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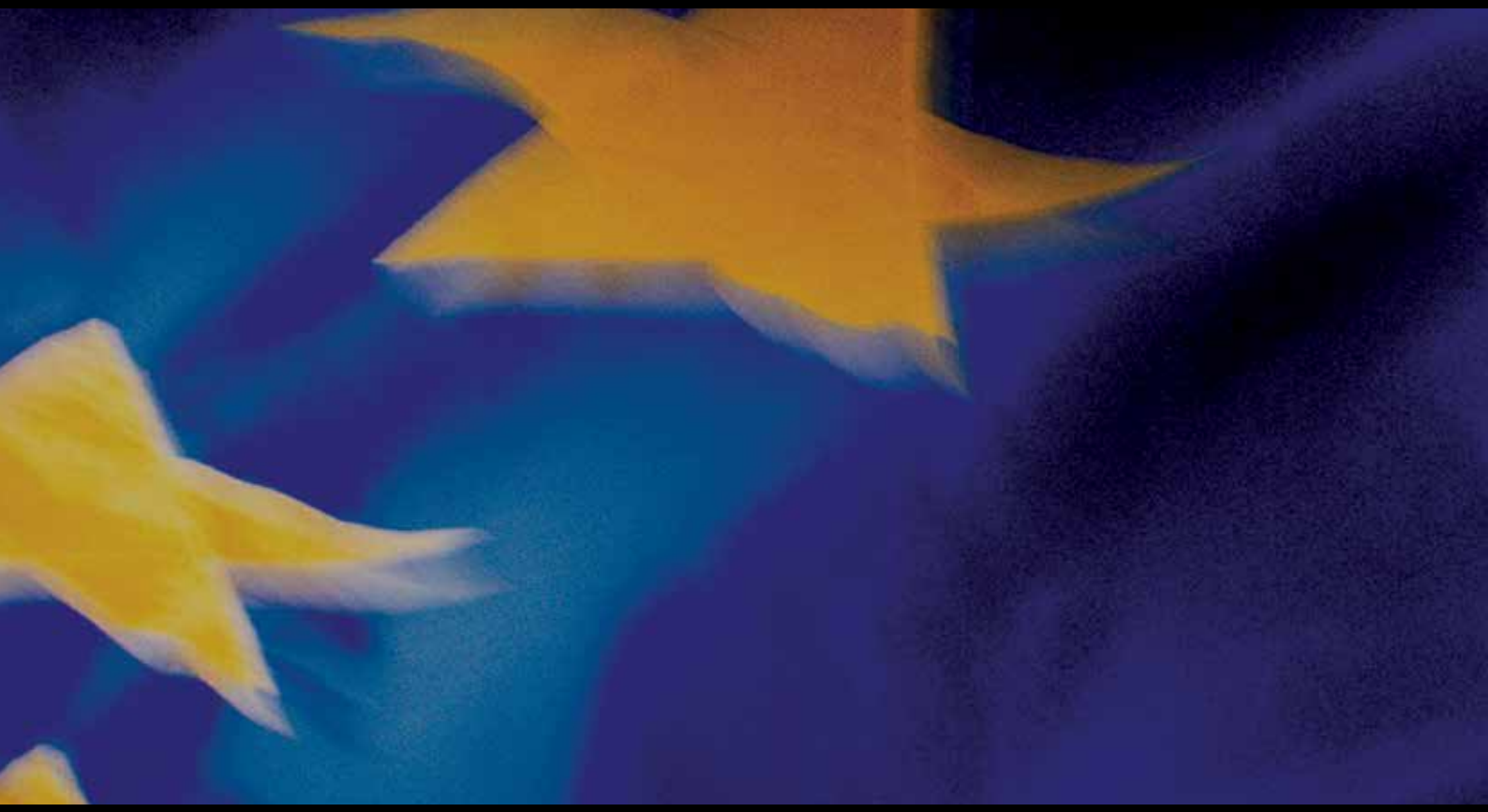

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Summary of Arbitration in England 2014

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As of 1 August 2014, a search of the Lawtel database of reported decisions of the English courts using the keyword 'arbitration' returns a list of 100 decisions, compared with the 107 decisions that were made over the first eight months of 2013. Save for the Supreme Court, all echelons of the English judiciary have heard arbitration-related cases this year, including the Judicial Committee of the Privy Council. In keeping with previous years, the English courts have maintained an arbitration-friendly approach. There have been a number of decisions from the Commercial Court relating to the recognition and enforcement of foreign awards under the New York Convention 1958 (the New York Convention) in England. In other decisions, the court has underlined that clear agreements to arbitrate will be upheld. One of the major international arbitration institutions, the London Court of International Arbitration (LCIA) has revised its arbitration rules. In other developments, the EU and the United States have been negotiating the Transatlantic Trade and Investment Partnership (TTIP). A key issue is whether or not the TTIP will include a investor–state dispute resolution (ISDS) mechanism. The greatest number of contributors in an recent public consultation hailed from the United Kingdom, demonstrating that this issue is of significant interest in England.[1]

Enforcement of foreign arbitral awards

The English courts have been kept particularly busy with regards to enforcement of arbitration awards this year. The decisions have been favourable to arbitration and have provided useful guidance on the interpretation of the relevant provisions of the Act. It is worth noting the comparative approach taken by English courts when examining provisions of the New York Convention.

Certification not a prerequisite to enforcement under the New York Convention

In *Lombard Knight v Rainstorm Pictures*,[2] the Court of Appeal refused to allow formalities to thwart the enforcement of an award. In so doing, it upheld a pragmatic interpretation of the requirement in section 102(1)(b) of the Act (which reproduces the wording of article IV of the New York Convention) that the original arbitration agreement or a 'duly certified copy' of it is required for the enforcement of an award under this section.

By way of background, a sole arbitrator sitting in California rendered an award in favour of Rainstorm, awarding it US$13 million in damages. Rainstorm sought enforcement of the award in London and Eder J granted permission under section 101 of the Act to enter judgment against Lombard in the same terms as the award. Lombard made an application to set aside Eder J's enforcement order on grounds that enforcement would be against public policy within the meaning of section 103(3) of the Act. Lombard further submitted five additional grounds upon which enforcement of the award should be refused and on the morning of the hearing contended that the enforcement order was irregular because Rainstorm had failed to comply with section 102(1)(b) of the Act since only photocopies of the arbitration agreements had been attached to the claim form requesting recognition and enforcement of the arbitration award. At first instance, Cooke J rejected all the grounds pleaded for refusing enforcement of the award, but then held that it was not sufficient for Rainstorm to merely produce a copy of the arbitration agreements. There had to be some independent certification of the copy of the arbitration agreements. Cooke J held that Eder's enforcement order was indeed 'irregular' and set aside the order for leave to enforce the award. Rainstorm appealed.

Tomlinson LJ in the Court of Appeal (with whom Ryder LJ and Christopher Clarke LJ agreed) held that the fact that the claim form attaching the copies of the arbitration agreement was signed with a statement of truth was sufficient to comply with the formalities in section 102(1)(b) of the Act. It was 'inherent' in signing a statement of truth that the claimant considered the copies to be true copies of the originals and this was sufficient. There is no requirement in the Act for independent certification of arbitration agreements by an independent person. That said, the court went on to make clear that best practice is to expressly refer to the accuracy of the copies of the arbitration agreements in the claim form and supporting witness statement to put this issue beyond doubt. In reaching his decision, Tomlinson LJ observed that Cooke J was wrong to introduce the concept of authenticity of the arbitration agreement as this was not a requirement under section 102(1)(b) of the Act. After reviewing a number of authorities that stress the pro-enforcement bias of the New York Convention, in particular Mance LJ's (as he then was) decision in *Dardana v Yukos*, the judge held that the Convention did not intend to put 'meaningless and purposeless hurdles' in the way of enforcement. The judgment sends a strong message to parties that English courts will, in principle, enforce awards unless serious grounds affecting the validity of the award, those stipulated in section 103(2) of the Act, are established.

Diag turned away from English shores – controversial application of issue estoppel

Diag Human SE v Czech Republic[3] is the longest running arbitration to which the Czech Republic is party. The dispute dates back to 1996, when the then Czech Minister of Health wrote a letter to Diag's major supplier raising doubts as to the latter's credibility. As a result, the supplier cancelled its contract with Diag (one of the world's largest blood plasma suppliers). Diag sought compensation from the Czech Republic and both parties agreed to submit their dispute to ad hoc arbitration. The arbitration agreement included, at article V, a mechanism to allow the parties to invoke a review of the first award by a second arbitral tribunal; Czech arbitration law expressly permits the parties to agree to such review. It was common ground that if such an appeal mechanism was invoked within the specified time, the award would not become binding until the review process had been completed.

In 2008, the arbitral tribunal issued its final award, ordering the Czech Republic to pay Diag approximately £135 million in damages and £140 million in interest (which continues to accrue). The state sought to invoke the review process (as did Diag, although this application was later withdrawn). Though the tribunal in the review process had been appointed, its constitution was the subject of protracted Czech court litigation that included allegations that the Czech courts were biased in their decisions towards the state's position. The Czech municipal court ultimately determined that the constitution of the tribunal was valid, but at the time of the judgment, the review tribunal had not issued an award (and as such the review process was not yet complete). Diag has not sought enforcement of the final award in the Czech Republic, but it has taken it elsewhere in the hope of enforcement. Neither the Cour de Cassation in France nor the Court of First Instance in Geneva were prepared to recognise or enforce the award. Similarly, the Supreme Court of Austria found that the first arbitral tribunal's award was not 'binding' on the parties. As a result, the court refused to recognise and enforce the award pursuant to its discretion to refuse enforcement of an award that 'has not yet become binding on the parties' (as per article V(1)(e) of the New York Convention). At the time that the judgment was made, enforcement proceedings in other jurisdictions were still pending.

Seeking enforcement on English shores, on 21 July 2011, Burton J gave leave to Diag to enforce the award against the Czech Republic. The Czech Republic sought to set aside Burton J's order. Its primary submission was that the Austrian Supreme Court's determination created an issue estoppel as between the parties. Its secondary submission was that the award was not binding for the purposes of section 103(2)(f) of the Act, which mirrors article V(1)(e) of the New York Convention.

Eder J conducted a thorough review of domestic and international case law on the New York Convention, emphasising the pro-enforcement bias that is recognised in England (ie, the prima facie right that an award creditor has for the enforcement of an award). However, Eder J held that the decision of the Austrian Supreme Court (that the award was not binding on the parties) created an issue estoppel that was determinative of this issue between these two parties. In line with the accepted criteria for identifying issue estoppel, the judgment was issue by a court recognised under English law as a court of competent jurisdiction, its decision was final and conclusive, and the decision was 'on the merits' of the case, the English court was prevented from ruling on the same issue between the same parties. As to the last of these criteria, Eder J recalled previous case law to the effect that 'on the merits' in this context means that the decision should not be wholly procedural and should establish certain facts and express a conclusion based on these facts. Eder was J was satisfied that the Austrian court's decision as to whether the award was binding or not fulfilled these criteria. Importantly, it is not material that the judgment related to enforcement proceedings under the New York Convention and there is no reason why such decisions cannot give rise to an issue estoppel. Rightly or wrongly, the decision of the Austrian Supreme Court related to the same issue between the same parties that was before the English courts in this case. Issue estoppel applied.

Even if he was wrong on the point of issue estoppel, and Eder J had to consider the issue anew, Eder J held that Diag's request to recognise and enforce the award should fail, since the review process had been validly initiated and had not yet been completed. The award was not yet binding on the parties for the purposes of section 103(2)(f) of the Act.

This decision is only the fourth reported case in England and Wales to deny recognition and enforcement of a New York Convention award and the first under English law to deny recognition and enforcement of such an award on grounds of issue estoppel.

Issue estoppel is a common law doctrine. It is not a defence for refusing recognition and enforcement of a foreign arbitral award under sections 101 to 104 of the Act (which incorporate the relevant provisions of the New York Convention) and some would criticise this case as running counter to the spirit of the New York Convention which requires state parties to recognise and enforce arbitration awards on a prima facie basis. However, Eder J was of the view that where the estoppel related to the question of whether or not the award was binding (which is a potential ground for challenge under the New York Convention), there was no reason why estoppel could not arise.

Few arbitration agreements contain provisions permitting the review of awards by another arbitral tribunal before they become binding. Nonetheless, the judgment demonstrates the difficulties that can arise with enforcement of awards – especially where enforcement has already been sought (and rejected) in other jurisdictions.

Yukos' interest in the English courts pays off – setting aside in Russia ignored

In *Yukos Capital Sarl v OJSC Rosneft*,[4] the English courts had to consider whether interest on sums awarded in four awards made in Russia in 2006 could be recovered. The background of the case relates to the well-known expropriation of the Yukos oil company by Russia through a series of illegal tax assessments. The principal amounts due under the awards were paid in 2010 following successful enforcement actions in the Dutch courts, even though the Russian Arbitrazh Court had set aside each of the awards in 2007. In other words, the Dutch courts refused to recognise the Russian court's set-aside decisions. None of the awards included interest and the claimant sought to recover this element in the English courts under English or, alternatively, Russian statutory provisions. The court had to grapple with two issues: first, does the principle of ex nihilo nil fit (nothing comes of nothing) prevent the enforcement of the awards in England, and second, if not, can the English court award interest on the awards?

The defendant argued that no interest could accrue on the awards since the awards failed to exist once they had been annulled by the Russian courts. It emphasised that English law considers arbitral awards to be rooted in the laws of a particular jurisdiction and since no award existed at the law of the seat, the principle of ex nihilo nil fit applied. Simon J rejected the defendant's submission. He held that the proper starting point is that an award is enforceable at common law on a prima facie basis. Simon J highlighted that the question of whether or not an award annulled at the seat should be recognised in the courts of another country is a question that is not conclusively answered by legal philosophy. Rather, the following test should be applied: can the court treat an award as having legal effect notwithstanding a later order of a court annulling the award? Applying ordinary principles governing the recognition of judgments by foreign courts, he held that it would be unsatisfactory and contrary to principle if the court was bound to recognise a decision of a foreign court that offended against basic principles of honesty, natural justice and domestic (ie, English) concepts of public policy. This would have been the natural consequence of respecting the Russian set-aside decisions in this case and therefore recognition should not be permitted.

The reasoning of the court's decision focused on the question of the enforcement of a foreign award at common law in the face of a conflicting foreign court judgment and thus made no reference to provisions of the New York Convention or its enacting sections under the Act. Nevertheless, it sends a positive message regarding the courts' attitude to the enforcement of the awards in England. The case also emphasises how, at least where public policy is at stake, each sovereign state is entitled to make its own independent findings as to the validity of an arbitral award (and the validity of any court judgment seeking to set aside that award).

Errors of fact or law cannot prevent enforcement

Finally, the Judicial Committee of the Privy Council in *Cukorova Holdings v Sonera Holdings*,[5] rejected an appeal to a decision from the BVI Court of Appeal that granted enforcement of an ICC award made in Geneva. Lord Clarke, giving the decision of the Board, held that an enforcing court has no jurisdiction to set aside an award on the basis of an error of fact or law under the New York Convention and that there was no breach of natural justice in the instant case as the appellant has every opportunity to present its case to the arbitral tribunal.

Arbitration agreements

Sufficiently precise preconditions to arbitration must be complied with

The two decisions below shed light on the importance of drafting precisely worded tiered dispute resolution clauses. In *Emirates Trading v Prime Minerals Exports*,[6] the court was called on to construe and interpret whether an agreement to engage in negotiations was enforceable under English law. The claimant challenged the jurisdiction of the arbitral tribunal under section 67 of the Act on grounds that a condition precedent to the arbitration, requiring the parties to seek to resolve their dispute by 'friendly discussion', had not been satisfied. It is worth reproducing the wording of the clause below:

> *11.1 In case of any dispute or claim arising out of or in connection with or under this LTC including on account of a breaches/defaults mentioned* [...] *above, the Parties shall first seek to resolve the dispute or claim by friendly discussion. Any party may notify the other Party of its desire to enter into consuLTCtion* [sic] *to resolve a dispute or claim. If no solution can be arrived at in between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause and refer the disputes to arbitration.*

The claimant submitted that this clause should be construed as a valid time-limited condition precedent whilst the defendant, relying on the authority of *Walford v Miles*, argued that the clause merely amounted to an agreement to negotiate and was therefore unenforceable. Teare J reviewed a number of English authorities touching upon this issue as well as case law from Australia, Singapore and awards of tribunals acting under the auspices of the International Centre for Settlement of Investment Disputes before concluding that the clause was enforceable. The judge reasoned that the agreement was not incomplete, that no term was missing, nor was there any uncertainty in upholding the bargain to be met. On the contrary, Teare J noted that an obligation to seek to resolve a dispute by friendly discussions has an identifiable standard: namely that of fair, honest and genuine discussions aimed at resolving the dispute. Moreover, the obligation was time-limited. Read in context, this clause did not require the parties to reach an agreement through discussions, but instead it required that four weeks elapse from notification of the dispute before arbitration proceedings were commenced. The judge highlighted the public interest in enforcing such clauses as commercial men expect the court to enforce obligations that they have freely undertaken and as such, this clause should be upheld.

The decision emphasises the importance of certainty when drafting preconditions to arbitration. In analysing relevant cases, Teare J carefully distinguished clauses that are uncertain and vague in and of themselves from those clauses that clearly require parties to perform an obligation but that might lead to an uncertain outcome. Parties, therefore, need to ensure that their tiered dispute resolution clauses are carefully drafted and that the obligation to pursue settlement discussions is worded in unequivocal language. By contrast, as the next case illustrates, vague wording results in unenforceable clauses.

In *Kruppa v Benedetti*,[7] the claimants applied for a stay of proceedings under section 9 of the Act in favour of a hybrid agreement to submit disputes to arbitration before submitting them to litigation. The clause was worded as follows:

> *In the event of any dispute between the parties pursuant to this Agreement, the parties will endeavour to first resolve the matter through Swiss arbitration. Should a resolution not be forthcoming the courts of England shall have non-exclusive jurisdiction.*

Cooke J in construing the clause identified a number of factors that led him to conclude that the parties' reference to arbitration was unenforceable. The judge observed that the clause imposed no binding obligation on the parties to refer the dispute to arbitration but merely envisaged that the parties attempt to agree to arbitration. Additional factors that indicated the uncertain and unenforceable character of the clause include the absence of any provision relating to the identity or the number of arbitrators or the lack of any designated court that could appoint an arbitrator.

LCIA Arbitration Rules 2014

A number of the key international arbitration institutions have recently revised their arbitration rules including the Hong Kong International Arbitration Centre, the Singapore International Arbitration Centre and the International Chamber of Commerce. All these revisions deal with practical issues facing arbitral procedure, such as the issue of multiparty and multi-contract proceedings and the availability of interim relief. The LCIA has also released a revised set of arbitration rules that come into effect on 1 October 2014 (the Rules). The latest version not only deals with these two important issues, but also tackles other issues of current importance. The conduct of legal representatives has, uniquely, received special focus. Since the Rules were last revised in 1998, amendments also focus on updating and clarifying the Rules as well as streamlining the process of arbitration under the auspices of the LCIA in line with current LCIA practice.

The LCIA Rules already allowed parties to request the LCIA Court to form the arbitral tribunal on an expedited basis. From 1 October 2014, under article 9(B) of the Rules, parties can also apply for relief on an interim basis to be granted by an emergency arbitrator. The emergency arbitrator will be appointed within three days (or as soon as possible thereafter) and all the requirements regarding independence and impartiality will apply to the emergency arbitrator as they do to the full arbitral tribunal. The emergency arbitrator has 14 days to render a reasoned decision on the application and the emergency arbitrator can order or award anything that the full arbitral tribunal would be permitted to do

(except for orders in relation to costs that will be determined by the arbitral tribunal). The decision of the emergency arbitrator can be confirmed, varied, discharged or revoked by the arbitral tribunal (either in whole or in part). The Rules make clear that the availability of interim relief from the emergency arbitrator does not prejudice any rights the parties have to seek such relief from the courts. The emergency arbitrator mechanism is available in relation to all arbitral proceedings commencing on or after 1 October 2014, or if the parties expressly 'opt-in' to this mechanism by agreement and not where the parties have expressly 'opted out'.

There have been other amendments aimed at increasing procedural efficiency. These include the ability to file the request and response electronically and also expressly empower the arbitral tribunal to award costs sanctions against parties for uncooperative behaviour that causes delay. There are also provisions encouraging the parties to make contact with the tribunal as soon as possible and no later than 21 days from the notification of the formation of the arbitral tribunal (article 14.1). An express provision that the tribunal 'seek to make its final award as soon as reasonably possible following the last submission from the parties' (article 15.10) will also apply from 1 October 2014.

The arbitral tribunal will have express powers (if requested by the parties) to order consolidation in certain cases (where the LCIA Court approves and where the parties have had an opportunity to put forward their views). Consolidation can be ordered where the parties agree in writing or where there is the same or a 'compatible' arbitration agreement, the same parties and (if more than one tribunal has already been appointed) the same tribunals. If no tribunal is yet in place, the LCIA Court may order consolidation of arbitrations between the same parties and under the same agreements (as long as the LCIA Court permits the parties to set out their views on the matter). The Rules contain General Guidelines for the Parties' Legal Representatives that are contained in an annex to the Rules. These apply to all legal representatives who appear by name before the tribunal. The Guidelines set out a standard of conduct of these legal representatives during the course of the arbitration and require that representatives:

- do not obstruct proceedings with repeated challenges of jurisdiction and authority of the tribunal;
- do not make false statements to the tribunal or to the LCIA Court;
- do not knowingly procure or rely on false evidence;
- do not conceal or assist in the concealment of documents that have been ordered by the tribunal for production; and
- do not initiate or entertain unilateral contact with the tribunal or the LCIA Court without disclosing this contact to all parties.

The tribunal have explicit sanctions to deal with any breaches of the General Guidelines and may issue a written reprimand, or a caution, or any other measure it thinks necessary.

Other developments

The LCIA registered a record number of 290 arbitral requests last year, making 2013 the busiest year in the institution's history. The LCIA also bid farewell to Adrian Winstanley OBE, who headed the institution for the past 14 years, and welcomed Dr Jacomijn van Haersolte-van Hof as the new director general.

The TTIP is currently under negotiation between the EU and the United States. One of the issues under discussion is whether or not the TTIP should include ISDS mechanisms. The UK government is generally favourable towards investment treaty arbitration, evidenced by the approximately 100 bilateral investment treaties and the Energy Charter Treaty entered into by the United Kingdom. The UK government has signalled that it prefers to have an ISDS provision in the TTIP.[8]

Arbitration Act 1996, fifth edition, by Robert Merkin and Louis Flannery, was published this year.

Queen Mary, University of London, held the inaugural conference of its new Institute for Regulation and Ethics in September 2014, on the topic of 'The Arguments For and Against Further Regulation of Arbitration Counsel'. The Institute is headed by professors Catherine Rogers and Stavros Brekoulakis.

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Notes

1 Online Public Consultation on Investment Protection and Investor-to-State Dispute Resolution in the TTIP, European Commission (July 2014).
2 [2014] EWCA Civ 356 (Tomlinson L.J., Ryder L.J. ,Christopher Clarke L.J.).
3 [2014] EWHC 1639 (Eder J).
4 [2014] EWHC 2188 (Comm) (Simon J).
5 [2014] UKPC 15.
6 [2014] EWHC 2104 (Comm).
7 [2014] EWHC 1887 (Comm).
8 See House of Lords European Union Committee, 14th Report of Session 2013-2014, para. 160.

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