



RCIL ARBITRATION NEWSLETTER

October 2023

INVESTMENT ARBITRATION AND CLAIMS

Investor files trio of claims against EU, Denmark and Germany

27th October 2023

A US-owned investment group has launched the first ever ICSID claim against the European Union, as well as separate claims against Germany and Denmark over an oil and gas enterprise. ICSID yesterday registered the claims brought under the Energy Charter Treaty by various members of the Geneva-headquartered Klesch Group, which is chaired and owned by US businessman and reported billionaire Gary Klesch.

Klesch operates two oil refineries that it says collectively turn over around €4.5 billion annually – the Heide in north Germany and Kalundborg on the Danish island of Zealand. Entities linked to those refineries are among the claimants in the ICSID cases. Moreover, The EU is not a party to the ICSID Convention and has never previously faced a claim at the centre. The ECT provides that disputes brought against parties not subject to the Convention are to be heard under ICSID's additional facility rules.

Germany and Denmark are among several states to have announced their intention to withdraw from the ECT, while the European Commission called for the EU and its member states to withdraw from the treaty earlier this year.

India fails to overturn satellite award in the Netherlands

26th October 2023

A Dutch court has refused to set aside an investment treaty award that ordered India to pay US\$111 million over a cancelled satellite deal, dismissing the state's allegations of fraud.

On 25 October, the Hague District Court found that there were no grounds to set aside the final award in favour of three Mauritian shareholders in Indian telecoms company Devas Multimedia. The Dutch court rejected India's argument that Devas and its shareholders were guilty of fraud, finding the Hague Court of Appeal had already dismissed those allegations in proceedings the state filed to set aside a partial award from the case.

The shareholders were represented by Linklaters in Amsterdam. The state used Windt Le Grand Leeuwenburgh in Rotterdam. The long-running dispute arises out of cancelled deal Devas signed to lease two satellites from Antrix, the commercial arm of India's space agency. Antrix terminated the contract in 2011, saying that national security policy had changed. The shareholders filed for arbitration under the Mauritius-India bilateral investment treaty in 2012.

In 2016, the Hague-seated tribunal – chaired by the late Marc Lalonde of Canada – issued a partial award upholding jurisdiction and finding the state liable. Lalonde was joined by David Haigh KC and Indian retired justice Anil Dev Singh. A final award followed four years later, requiring India to pay US\$111 million plus interest



Australian court rejects India's sovereign immunity defence

24th October 2023

The Federal Court of Australia has ruled that India cannot rely on state immunity as a defence to enforcement of a US\$111 million investment treaty award arising from a cancelled satellite deal.

On 24 October, Justice Ian Jackman gave his reasons for dismissing India's bid to set aside an application to enforce the award. He said India had submitted to the jurisdiction of the court "by agreement" within the meaning of Australia's Foreign State Immunities Act 1985 (FSI Act) by signing the New York Convention in circumstances where the applicants had tendered a copy of the UNCITRAL award and a prima facie arbitration agreement.

Three Mauritian shareholders in Indian telecoms company Devas Multimedia won the award in 2020 and brought the Australian action the following year. After the winding-up of Devas in India, its US affiliates have been assigned rights to the award and were substituted as parties by the Australian court earlier this year.

German solar investors win damages over Spanish reforms

23rd October 2023

An ICSID tribunal has ordered Spain to pay €15 million plus interest to a group of German solar investors over reforms to the state's renewable energy subsidy regime.

In an award issued on 6 October, a tribunal chaired by the UK's Vaughan Lowe KC of Essex Court Chambers and including Australians Michael Pryles AO and Zachary Douglas KC ordered Spain to pay the damages to businessman Mathias Kruck and seven other German nationals. The claimants were also awarded around €3 million in costs.

The tribunal already found Spain liable under the Energy Charter Treaty in a decision last year.

"The most severe abuses of the arbitral process": UK court overturns mega-award on grounds of fraud

23rd October 2023

A UK judge has raised serious concerns about the supervision of large arbitrations involving states after finding that an US\$11 billion award against Nigeria was procured through false evidence, corrupt payments and improper retention of leaked documents.

In a highly anticipated decision, Mr Justice Robin Knowles in the Commercial Court in London said that while he had not accepted all of Nigeria's allegations, he was satisfied that British Virgin Islands company Process & Industrial Development (P&ID) had procured the award through fraud and in a manner contrary to public policy. He said that P&ID had obtained the award "only by practising the most severe abuses of the arbitral process" and therefore upheld Nigeria's challenge under section 68 of the English Arbitration Act 1996.

India's top court upholds annulment of billion-dollar award

16th October 2023

The Indian Supreme Court has upheld a decision to annul a US\$1.3 billion ICC award against a state entity on grounds of fraud.

On 6 October, the Supreme Court rejected a petition for special leave to appeal the annulment of the award in favour of defunct Indian telecoms company Devas Multimedia against Antrix, the commercial arm of India's space agency. It said a Delhi High Court decision from March confirming the annulment "does not call for interference".

A US subsidiary of Devas brought the latest petition after Indian authorities put its parent entity into liquidation based on allegations of fraud

Tanzania pays out to settle mining claim

16th October 2023

A Canadian gold mining company says it has received US\$30 million from Tanzania to settle their ICSID dispute over the revocation of a project licence.

In a statement, Vancouver-based Winshear Gold said it will retain a net amount of US\$18.5 million after deductions for legal costs and funding. Winshear asserted it has agreed to terminate the arbitration and that a conditional settlement announced last month is now concluded. Winshear is represented by Lalive and its former partner Timothy Foden, who joined Boies

Schiller Flexner last year. Third-party funder Delta Capital Partners Management financed the case.

The miner filed for arbitration in 2020 under the Canada-Tanzania bilateral investment treaty over the SMP gold project in south-west Tanzania. It sought compensation after the state adopted legislation that abolished its retention licence for the project and transferred rights to the government. The ICSID case went before a tribunal chaired by Gabrielle Kaufmann-Kohler of Switzerland and including retired Covington & Burling partner Thomas Johnson of the US and Botswana's Edward Fashole Luke II.

Electricity investor reports win against Peru

04th October 2023

A Singaporean company linked to an Israeli billionaire has won US\$116 million in a third-party funded ICSID claim against Peru over its investments in the state's electricity sector.

Kenon Holdings, which is indirectly majority owned by London-based businessman Idan Ofer, announced that a tribunal issued a final award in favour of the company and its wholly-owned Singaporean subsidiary IC Power – finding Peru liable under its free trade agreement (FTA) with Singapore.

The dispute concerns Kallpa Generación, Cerro del Águila and Samay I, three Peruvian electricity generation companies that the claimants controlled through a Bermudan company before Kenon sold its entire Latin American and Caribbean energy portfolio to private equity firm I Squared Capital for US\$1.2 billion in 2017.

Yukos investors urge UK court to reject Russia's immunity defence

04th October 2023

The former majority shareholders of Yukos Oil Company have urged a UK court to reject Russia's sovereign immunity defence to the enforcement of awards worth nearly US\$60 billion, arguing the Dutch courts have already decided the underlying issue.

In a case before the Commercial Court in London, shareholders argued that Russia cannot claim state immunity because of the doctrine of issue estoppel, which prohibits re-litigating a matter already decided on its merits. The shareholders contended that Dutch courts had previously determined that Russia was obligated to arbitrate investment disputes under the Energy Charter Treaty (ECT). According to section 9 of the UK's State Immunity Act, states can be subject to legal proceedings if they have agreed in writing to arbitration. Although Russia never formally ratified the ECT, the treaty signatories had provisionally applied its provisions while awaiting its formal entry into force.

Moldovan investor threatens Spain over snow crabs

04th October 2023

A Moldovan investor has notified Spain of a potential investment treaty claim worth at least €31.5 million over the suspension of permits to fish for snow crabs in Arctic waters – an industry that is already the subject of three ICSID claims against Norway.

The notice invokes the Moldova-Spain bilateral investment treaty, which provides for ICSID or ad hoc UNCITRAL arbitration. It triggers a six-month cooling-off period before an arbitration can be filed.

Visnea, a company, owns a 50% stake in Mariscos Polar, which possesses a fishing vessel called the Adexe Primero. This vessel originally had permits from Spain to fish for snow crabs in a specific area called "the Loophole," located in international waters between Norway and Russia in the Barents Sea, as well as in the waters surrounding the Norwegian archipelago of Svalbard. However, in 2015, Spain suspended the Loophole permit, later withdrawing it due to a recommendation from the EU. This decision followed a joint declaration by Russia and Norway, asserting that snow crabs are a sedentary species within the jurisdiction of the two coastal states. Spain briefly reinstated the permit in 2016 but subsequently stopped issuing it altogether according to Visnea.

INSTITUTIONS, PEOPLE AND GROUPS

“A miasma of dishonesty”: Hoffmann's comments on Nigeria case

27th October 2023

Following the set-aside of a US\$11 billion award against Nigeria, Lord Hoffmann – who chaired the tribunal – has stood by comments he made earlier this year, reflecting on the “great miasma of dishonesty” that can exist in the background of a case of which arbitrators are “unaware”.

South African arbitrator and former UK law lord Lord Hoffmann was chair of the tribunal of arbitrators that in 2017 issued a final award upholding a claim



by Irish-owned BVI company Process & Industrial Development (P&ID) against Nigeria over a contract for the construction of a gas processing plant.

The award was set aside this week by Mr Justice Robin Knowles in the UK Commercial Court, who found P&ID had procured the award through fraud and in a manner contrary to public policy. Lord Hoffmann said that “long afterwards”, in applying to set-aside the award, Nigeria had raised arguments that the award had been obtained by corruption and that “the people running the case on behalf of the Nigerians were corrupted to lose”.

Lord Hoffmann continued that, as an arbitrator, “you feel never really know the full story” and there may be things going on in the background of a case “which you don’t know about.” He cautions that if tribunals are not vigilant in this way, as Justice Knowles warned in his judgment, “a case such as the present could happen again and not reach court”.

Gowling poaches arbitration team from Parisian boutique

25th October 2023

Former head of disputes at French multinational Areva, Marie-Aude Ziadé, has left CBR & Associés to launch a Paris-based arbitration group at Gowling WLG.

Ziadé and associates Sophia Allouache and Hadrien Torron moved to Gowling last month from CBR & Associés, a corporate boutique firm that the trio joined last year to establish an international arbitration practice. Gowling intends to double its partner and associate count in the Paris office in the next two years, as part of a plan to grow its arbitration and other practices across Europe, Dubai and Singapore.

HKIAC seeks new secretary general

11th October 2023

The Hong Kong International Arbitration Centre is seeking a new secretary general after it confirmed that Mariel Dimsey is stepping down from the role she took on less than 18 months ago. In a statement, the HKIAC confirmed that Dimsey is retiring from the position and said it was accepting applications for her replacement.

Dimsey says that “for personal reasons based on needing more flexibility”. She will continue in the role until a new secretary general is found, including supporting the HKIAC until the ICCA Congress in Hong Kong in May 2024. She says she will stay in Hong Kong after her replacement is appointed.

The announcement comes at a time when the centre is preparing for Hong Kong Arbitration Week, which takes place next week. In a LinkedIn post, Dimsey said the HKIAC is expecting “literally hundreds of overseas guests” over the course of the week that will “showcase how wonderful Hong Kong arbitration and HKIAC are”.

Russian centre opens in Dubai International Financial Centre

10th October 2023

The Russian Arbitration Center of the Institute of Modern Arbitration has opened an office in Dubai’s financial freezone – its first office outside Russia. The centre held an event on 26 September to celebrate the launch of its new office in the Dubai International Financial Centre (DIFC), where it obtained permission to operate in July.



In an announcement from July confirming the launch of its first overseas office, the Russian Arbitration Center (RAC) said that opening in the DIFC is “in line with our goal to make arbitration convenient for the parties” and that parties to arbitrations administered by the RAC can now choose the freezone as a seat.

The RAC also says it intends to conduct dispute resolution events in the MENA region and “further promote alternative dispute resolution”.

CONFERENCES AND EVENTS

Roebuck Lecture by Kabir Duggal – Can arbitration solve the problems of the world?

03rd October 2023

In the latest Roebuck Lecture held by the Chartered Institute of Arbitrators, Kabir Duggal considered the potential of international arbitration to safeguard human rights, mitigate armed conflict and address the threats posed by climate change. Duggal, a US arbitrator, lecturer-in-law at Columbia Law School and senior adviser at Arnold & Porter in New York, delivered the annual lecture to a global audience of more than 500 in June. Duggal’s lecture acknowledged the primacy of arbitration, and particularly investor-state arbitration, as a global dispute resolution mechanism.

Encouraging the arbitral community to take steps to better integrate other areas of international law into the arbitration ecosystem, Duggal cautioned that a failure to address such “tension” may lead to “trouble”. Although focus to date has been on the legitimacy of investment arbitration, Duggal said it is “a

question of time” before similar concerns reach the commercial arbitration space.

It remains to be seen whether the arbitral community will answer Duggal’s call to find a better balance between the tradeoffs inherent in protecting investment and human rights issues. It is, after all, a call to protect the legitimacy and survival of our system..

Recording of the lecture can be [found here](#).

GLOBAL ARBITRATION TRENDS & REPORTS

Report urges new approach to arbitrator selection

19th October 2023

A report launched during Hong Kong Arbitration Week has found that most lawyers take an informal, ad hoc approach to selecting arbitrators – and recommends they adopt a more systematic process to limit bias in their choices.

The report is the result of year-long research project conducted by Cortex Capital, a consultancy that applies psychology and neuroscience to business and law. The report highlighted “rolodex thinking” as the first step when conducting the initial search – an approach of simply listing all names that immediately come to mind. This approach, which almost all respondents said they used, is particularly susceptible to cognitive biases. The report also indicates that although some more sophisticated clients are involved in the



selection process, the vast majority of clients are “entirely led” by the firms advising them.

Although the project is focused on Hong Kong, she says that preliminary indications suggest that these practices are materially similar across jurisdictions.

The full report can be found [here](#)

TREATIES, CHARTERS AND CONVENTIONS

Updates not available

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