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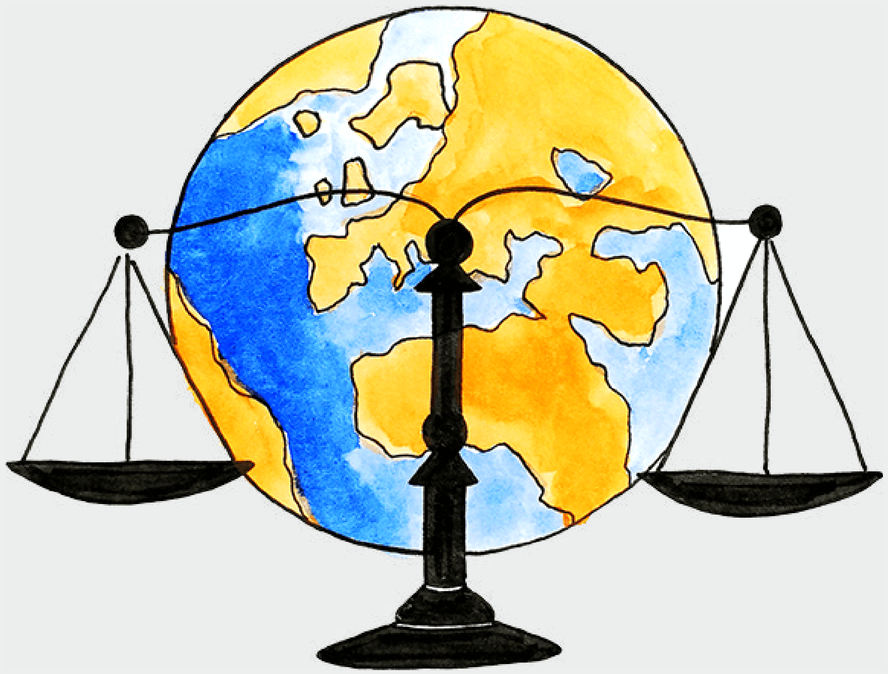

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2021 UNCITRAL EXPEDITED ARBITRATION RULES ENTERED INTO FORCE

Written by Shannen Trout, Aiden Lerch & Charlie Gonzalez (Work Experience visitng student from the University of Wollongong)

BACKGROUND

After more than two years of collaboration, the United Nations Commission on International Trade Law ('**UNCITRAL**') Working Group II (Dispute Resolution) developed their Expedited Arbitration Rules ('**EARs**'). The EARs were drafted with the expertise of dozens of State members, intergovernmental organisations and non-governmental organisations. It is therefore the 'brainchild' of many pre-eminent trade law bodies that have carefully considered the implications of its implementation on ad hoc arbitration. The EARs were adopted by the broader UNCITRAL in July 2021 and entered into force on 19 September 2021.

In light of the introduction of the EARs, this note aims to provide guidance to parties considering the most efficient and effective arbitration clause for their dealings and will briefly compare some of the core provisions to their equivalents in the ACICA Expedited Arbitration Rules ('**ACICA Rules**') and the ICC Rules.

An advanced copy of the UNCITRAL Explanatory Note can be found here, the advanced copy of the recent UNCITRAL Working Group II Report here, and the final text of the EARs here. The Explanatory Note provides a particularly helpful in-depth clarification of each provision under the EARs.

WHAT IS AN EXPEDITED ARBITRATION?

The Explanatory Note describes expedited arbitration as a 'streamlined and simplified procedure with a shortened time frame, which makes it possible for the parties to reach a final resolution of the dispute in a cost- and time-effective manner.'

IMPORTANT PROVISIONS:

Article 1 – Scope of the EARs

The EARs are attached as an appendix to the UNICITRAL Arbitration Rules ('UARs') and are authorised by the newly inserted Article 1(5) of the UARs. Article 1(5) provides that the EARs will apply to an arbitration where the parties agree and parties may agree to apply the EARs at any time, even after the dispute has arisen. However, the EARs do not act retrospectively without the express consent of the parties involved.

It is common for arbitration rules to automatically trigger an expedited arbitration procedure, especially for claims of a lower value (see, e.g., Article 30(2) of the ICC Rules). This is not the case in the EARs. As such, there is no monetary limit set in the EARs and, like the ICC Rules, parties can opt-in to an expedited arbitration procedure without regard to any monetary limit.

Article 2 – Withdrawing from the EARs

Parties may withdraw from the expedited arbitration at any point by consent and where a party wishes to unilaterally withdraw from the expedited arbitration, they must apply to the arbitral tribunal to prove 'exceptional circumstances'. While exceptional circumstances are not defined in the EARs, the Explanatory Note advises that the party applying should 'provide convincing and justified reasons' to the tribunal and provides a high threshold for a unilateral withdrawal.

Article 3 – Conduct of the parties and the arbitral tribunal

Both parties and the arbitral tribunal are required to conduct the proceedings expeditiously and the tribunal may utilise any appropriate technology to facilitate the proceedings. Similar provisions are found in Article 26 of the ICC Rules and throughout the ACICA rules; these clauses are of obvious benefit in the current era of remote conferencing.

Article 6 – PCA as the appointing authority

Should the parties fail to agree on the choice of an appointing authority 15 days after a proposal for the designation of an appointing authority has been received by all other parties, a party may request the Secretary-General of the Permanent Court of Arbitration to designate the appointing authority or serve as appointing authority.

Articles 7 & 8 – Sole arbitrator

Unlike Article 8 of the ACICA Rules where only a sole arbitrator is permitted in all circumstances, or Article 2 in appendix VI of the ICC Rules, where the Court is likely to appoint a sole arbitrator, the EARs set a sole arbitrator as default, but the parties may elect more than one arbitrator.

If the parties cannot agree on the appointment of a sole arbitrator following 15 days after a proposal of arbitration has been received by all other parties, a sole arbitrator shall

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be appointed by the appointing authority at the request of a party as per Article 8(2) of the UARs.

Article 10 – Arbitral tribunal to have discretion regarding periods of time

Other than as outlined under Article 16, the arbitral tribunal may, provided the parties have been invited to express their views, extend or abridge any period of time otherwise prescribed by the UARs and EARs. Shorter timeframes are common among most expedited arbitration rules.

Article 11 – Optional hearings

The sole arbitrator, in the absence of a request to hold hearings, can determine that hearings shall not be heard, provided the parties have been invited to express their views, as in both the ICC and ACICA Rules.

Article 13 – Prohibition on claim amendments and supplements

Article 13 acts as an inversion of Article 20 of the UARs. Under the EARs, parties cannot amend or supplement a claim or defence during proceedings unless the arbitral tribunal 'considers it appropriate.'

Article 16 – Period of time for making the award

The starting position is that an award shall be made within six months from the date of the constitution of the arbitral tribunal, however if there are exceptional circumstances and the parties have been invited to express their views, this can be extended to nine months. Failing this, the parties may agree to a final time or change to arbitration under the UARs.

INSIGHT

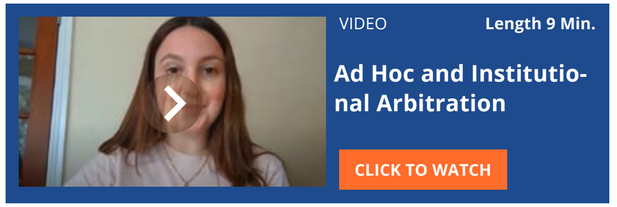
While expedited arbitrations are unlikely to suit complex arbitral proceedings, they can assist parties seeking a fast-tracked resolution where the circumstances are not particularly contentious or multi-faceted. Moreover, the EARs have been well-integrated into the UNCITRAL framework.

The EARs were drafted as a careful balancing act between the 'efficiency of arbitral proceedings' and the need to preserve 'due process and fair treatment'. The adoption of the EARs modernises the UARs, aligning the UARs with similar provisions found, inter alia, in the LCIA Rules (art 9A), ICC Rules (art 30), the ACICA Expedited Arbitration Rules and Sections E-1 – E-10 of the AAA.

Such a development is welcome, as the global fora have seamlessly integrated an alternative arbitral process under existing tried-and-tested rules; flexibility that will prove invaluable for ad hoc arbitration proceedings where time and cost are of the essence.

For additional information and queries, please contact shannen.trout@zeilerfloydzad.com or aiden.lerch@zeilerfloydzad.com.

Additional content on this topic:



KOUT FOOD: THE UK SUPREME COURT WEIGHS IN ON WHO IS A PARTY TO AN ARBITRATION AGREEMENT (AND WHICH LAW APPLIES)

Written by Philip Vagin

In its recent judgment in *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48, the highest court in the UK decided what law determines whether a corporate parent is bound by the subsidiary's arbitration agreement.

FACTS

Kabab-Ji entered into a series of franchise agreements with Al Homaizi to operate Lebanese restaurants in Kuwait. All agreements provided for ICC arbitration in Paris and were governed by English law. Interestingly, they also required the arbitrators to apply the UNIDROIT Principles, unless they contradicted the wording of the agreements.

Al Homaizi then underwent a corporate restructuring and became a subsidiary of the holding company called Kout Food. After a dispute arose under the franchises, Kabab-Ji commenced arbitration – but only against Kout Food, not Al Homaizi. The defendant took part in the arbitration under protest, maintaining that it was not a party to the franchise or arbitration agreements.

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THE AWARD AND THE FRENCH SET-ASIDE PROCEEDINGS

The tribunal found for the claimant, Kabab-Ji. The majority of the arbitrators found that the arbitration agreement was governed by French law as the law of the seat. Under French law, Kout Food became party to its subsidiary's arbitration agreements. The tribunal concluded that, under English law (which applied to the merits), Kout Food also became liable under the franchise agreements due to "novation by substitution".

Kout Food applied to set aside the award in Paris, arguing that the tribunal lacked jurisdiction over it as Kout Food never became party to the agreements. The appeal was denied by the Paris Court of Appeal and went up to the Court of Cassation.

THE ENGLISH ENFORCEMENT PROCEEDINGS

In the meantime, Kabab-Ji applied to enforce the award in England. Kout Food opposed enforcement on the grounds that English law applied to the arbitration agreements (as the law of the substantive contract). Kout Food further argued that English law must determine whether it became a party to the agreements. If this is correct, then several entire agreement and no-oral modification clauses in the franchise agreements would prevent Kout Food from becoming a party.

Under Art. V(1)(a) of the New York Convention, which governs enforcement of foreign arbitral awards, an English court may refuse enforcement if the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".

The Commercial Court and the English Court of Appeal both found that the arbitration agreements were governed by English law as the law of the contract and that, due to several no-oral modification clauses, Kout Food could not be bound by these agreements. The central issue on appeal to the UK Supreme Court was which law applied to determining parties to an arbitration agreement.

THE UKSC JUDGMENT

It was common ground between the parties that the term "validity" of the arbitration agreement in Art. V(1)(a) of the New York Convention also covered whether a third party is bound by that agreement. Therefore, the law governing the arbitration agreement would determine if Kout Food was a party to it. This is consistent with older High Court and Court of Appeal authority.

If so, then which law applies to the arbitration agreements here? Relying on its seminal judgment in *Enka v Chubb* on choice of law for arbitration agreements, the Court analysed Art. V(1)(a) and concluded that it contains two uniform choice of law rules: (1) the law to which the parties have subjected the agreement applies, or (2) *in absence of any indication of this*, the law of the place where the award was made.

Ideally, when an English court interprets the New York Convention, it should give it single and uniform meaning and apply it in a uniform way. However, the Supreme Court held that there was no international consensus about how Art. V(1)(a) should be applied, which meant that the English court would form its own view – in this case, based on rules developed last year in *Enka v Chubb.*

To recall, *Enka* determined which law governed the arbitration agreement during "enforcement" of *the agreement itself* (through an anti-suit injunction). This is colloquially known as "Stage 1" – followed by Stage 2 (challenges to the agreement before the tribunal) and Stage 3 (challenges during enforcement of the award). The New York Convention did not apply in *Enka*, because anti-suit injunctions are mostly governed by common law.

In *Kout Food*, however, the challenge to the validity of the agreement arose at Stage 3 and the Convention applied. Despite these differences, the Supreme Court stated that the same choice of law principles should apply at all stages and that it would be illogical if the law governing the arbitration agreement were different before and after the award. In effect, the rules laid down in *Enka* now apply in both Stage 1 and Stage 3 challenges.

On the exact facts in *Kout Food*, the Court held that English law applied as the law governing the substantive franchise agreements. The mere fact that the parties chose to arbitrate in Paris was not sufficient to displace the implicit choice of English law for the arbitration agreement.

Even though the franchise agreements required the arbitrators to apply the UNIDROIT Principles in addition to English law, this did not mean that the parties failed to choose *one single law of one country* to govern the arbitration agreement (so that French law as the law of the seat would apply under Art. V(1)(a)). First, only *the arbitrators* were required to apply the Principles – not the courts. Second, it would be absurd if the parties' choice to "supplement" English law with the UNIDROIT Principles meant that the parties chose *no law* at all for the arbitration agreement. Applying French law as the law of the seat would in this situation be inconsistent with the parties' intentions.

The claimant lastly argued that the arbitration agreements

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should be governed by French law, "so as to give effect to, and not defeat or undermine, the presumed intention that an arbitration agreement will be valid and effective". This is known as the "validation principle". However, as the Court noted, the validation principle only applies where an agreement between Parties A and B is made and is now at risk of becoming invalid if a law of country X applies, instead of law Y. This principle does not apply where Party B disputes it concluded an agreement with Party A in the first place.

COMMENTS

The judgment in *Kout Food* represents a logical and principled extension of the choice of law rules from *Enka* into new territory (enforcement of foreign awards). Given the broad brushes in which the *Enka* court had already set the scene, it appears hardly surprising that the same result was reached in *Kout Food* – albeit at a Stage 3 inquiry.

It remains to be seen whether the approach in *Kout Food* will be followed elsewhere. Interestingly enough, US courts appear to take a different approach to choice of law determining whether a person became a party to the arbitration agreement.

In *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657 (2d Cir. 2005), which was in many respects a replay of *Kout Food*, the Egyptian plaintiff had a contract with a Cypriot subsidiary fully owned by a Delaware parent. The contract was expressly governed by Egyptian law and provided for CRCICA arbitration. Despite the tribunal's finding under Egyptian law that the parent was bound by the subsidiary's arbitration agreement, the US Second Circuit refused to enforce the award. The *Sarhank* court held despite the choice of Egyptian law in the contract, US federal arbitration law determines whether a party has consented to arbitrate. Unless US law allows to bind the parent to the arbitration agreement (e.g. based on estoppel, assumption, veil piercing, agency, etc.), holding the parent liable without its consent would be contrary to public policy and to the intentions of the parent to be insulated from liability overseas.

Although the decision in *Sarhank* has been heavily criticized academically, it was approved by subsequent federal decisions as a mere articulation of a longstanding principles of US law. Given that the decision in *Kout Food* puts the US and English approaches in direct conflict, it will be interesting to see if US courts change tack in response.

Read more on *Enka v Chubb* in our ZFZ Spring Arbitration Bulletin 2021.
Read the full *Kout Food* decision here.
Read the full *Sarhank* decision here.

For additional information and queries, please contact philip.vagin@zeilerfloydzad.com

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UPDATE: 28 U.S.C. §1782 – U.S. DISCOVERY IN AID OF INTERNATIONAL COMMERCIAL ARBITRATION IN AND OUT AT U.S. SUPREME COURT?

Written by Jonas Patzwall

The past half-year has seen a handful of developments with regard to discovery applications pursuant to Section 1782 of the U.S. Code and it is high tide for an update tracking what has happened. For now, the 3-2 U.S. Circuit Court split over whether the statute extends to private commercial arbitrations abroad remains undecided, but a new case pending certiorari at SCOTUS might soon yield a decision.

Section 1782 allows for U.S. (federal) courts to assist foreign tribunals in gathering evidence. Importantly, this assistance can be requested not only by the tribunals but a variety of persons. In fact, "any interested person" may apply to a federal district court to gather evidence under Section 1782. The product of such discovery may be used in the foreign tribunal, at least from the U.S. perspective. This allows access to U.S. – style discovery for foreign litigants and, generally, extends to a time when such proceeding is merely "closely contemplated" (ie, is not limited to pendency of the proceeding). Section 1782 is often cast as "the product of congressional efforts [over the span of 150 years] to provide federal-court assistance in gathering evidence for use in foreign tribunals."

Section 1782 discovery can be a powerful tool for parties in international litigation and arbitration. This is where current developments come in. A split in the U.S. circuit courts (federal courts of appeal) started developing in the late 90s and has taken firm shape in recent years. The issue: whether the discretion granted to district courts in 28 U.S.C. § 1782(a) to render assistance in gathering evidence for use in "a foreign or international tribunal" encompasses private commercial arbitral tribunals. The analysis (and rationale of the courts coming down on either side of the issue) often revolves around the question whether the congressional intent was to provide federal-court assistance to private arbitral tribunals abroad.

The U.S. Courts of Appeal for the Fourth and Sixth Circuits have found in favor of encompassing private commercial arbitration. In *Abdul Latif Jameel Transportation Co. v. FedEx.*, 939 F.3d 710, 726 (6th Cir. 2019), the Sixth Circuit took the view that changes in the language of the statute make clear Congress's intent to expand § 1782(a)'s applicability. In the Fourth Circuit, the decision in *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020) set equally permissive precedent arguing that "arbitration in the United States is a congressionally endorsed and regulated process that is judicially supervised. And it was developed as a favored alternative to the judicial process for the resolution of disputes [...]" thereby making it a "government-conferred authority" under U.S. law and thus a tribunal. The court made similar observations about the panel charged with arbitrating the matter in *Servotronics*, an arbitration panel in the UK governed by the Arbitration Act of 1996. Id. at 215. Among other points, the court states:

> *In serving the role given under § 1782(a), a district court functions effectively as a surrogate for a foreign tribunal by taking testimony and statements for use in the foreign proceeding. When viewed in this light, the district court functions no differently than does the foreign arbitral panel or, indeed, an American arbitral panel. The UK Arbitration Act of 1996 authorizes arbitrators to have the benefit of subpoenaed testimony and documents, with court enforcement, if necessary. See UK Act § 43. Similarly, under the FAA, American arbitrators have the benefit of subpoenaed testimony and documents through the enforcement of the courts. See 9 U.S.C. § 7; see also Fed. R. Civ. P. 45.*

The Second, Fifth and, most recently, the Seventh Circuit courts of appeal do not come to the same conclusion. In early July of 2020, the Second Circuit handed down its decision in the matter *In Re Guo*, No. 19-781, 2020 WL 3816098 (2d Cir. July 8, 2020). The Second Circuit found itself bound to its prior ruling in *Nat'l Broad. Co. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d Cir. 1998) and affirmed the lower court's ruling which had concluded that CIETAC arbitration is a private international commercial arbitration outside the scope of § 1782(a)'s "proceeding in a foreign or international tribunal" requirement.

In particular, the Second Circuit analyzed factors which it deemed to distinguish purely private arbitration from arbitrations which might be considered government sponsored: the extent to which the arbitral body is internally directed and governed by a foreign state or intergovernmental body; the degree to which a state possesses the authority to intervene in arbitration after the panel has rendered a decision; the nature of the jurisdiction possessed by the panel and whether it relied entirely on parties' consent or possessed government-backed jurisdiction; and the ability of the parties to select their own arbitrators.

Most recently, *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020), a Seventh Circuit decision arising from

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the same underlying UK arbitration that spawned the Fourth Circuit's *Servotronics v. Boeing* decision (a pro-private arbitration ruling) found that the Second and Fifth Circuit had gotten it right and excepted private international arbitration from the scope of Section 1782. And, thus, the stage for U.S. Supreme Court intervention was set in the most pronounced clarity, a split arising from the "same" case.

The Court granted certiorari in early 2021. Then, in September of this year, Servotronics (the petitioner seeking the discovery in the Seventh Circuit) notified the Court of its intent to dismiss the case. The Court dismissed the matter pursuant to Rule 46 of the Rules of the Court following a joint stipulation. The matter came and went, the circuit split remains unresolved.

Now, in September 2021, thanks to a petition for certiorari by ZF Automotive US, Inc., a subsidiary of the German car parts manufacturer, ZF Friedrichshafen, the issue might come before the Court once again. In this case, ZF Automotive (the party who discovery was asked from) was on the receiving end of a Section 1782 petition in the U.S. District Court for the Eastern District of Michigan (in the Sixth Circuit). There, the court compelled production of documents to a Hong Kong electronics company, Luxshare, Ltd., for use in a closely contemplated arbitration in Germany. The Sixth Circuit denied a request to stay the proceeding pending the appeal. The Supreme Court would still need to grant certiorari.

In summary, this issue has come and gone from the Court's docket. The circuit split remains. It looks likely that there will be another chance for resolution in the near future. We are monitoring developments carefully. In the absence of guidance at the moment, a circuit-to-circuit approach and analysis is necessary in the Section 1782 context.

Parties in international arbitration might also consider some of the alternatives to Section 1782 actions, some of which we have reported on and laid out in a past "Primer" on Section 1782 discovery.

For additional information and queries, please contact jonas.patzwall@zeilerfloydzad.com

Additional content on this topic:

COMPARATIVE VIEWS: ARBITRABILITY AND COMPETENCE-COMPETENCE

Part 1: Arbitrability

Written by Alexander Zojer

Arbitrability and competence-competence are two cornerstone principles of international arbitration. The understanding of these principles, however, varies significantly in the U.S. and in Austria. In a two-part series, we will take a comparative look at the differences and similarities of arbitrability and competence-competence.

This first part will provide a cursory overview of the US and Austrian concepts of arbitrability.

ARBITRABILITY: AN AUSTRIAN PERSPECTIVE

In Austria, (as in the U.S.) parties are free to submit certain kinds of disputes to arbitration instead of state courts. To do so, they must conclude an arbitration agreement which, according to Section 581(1) of the Austrian Civil Procedural Code ("ZPO"), is an agreement to submit to arbitration all or certain disputes which have arisen or may arise between the parties in respect of a specific legal relationship. However, not all kinds of disputes can be referred to an arbitral tribunal.

Arbitrability establishes which claims can be subject to an arbitration agreement and which cannot. Pursuant to Sec-

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tion 582(1) ZPO, two kinds of claims are arbitrable:

- First, pecuniary claims, i.e. claims involving an economic interest, can be submitted to arbitration. While the Austrian Civil Procedural Code does not provide a definition of the term "claim involving economic interest" it is undisputed that it is to be interpreted broadly. Claims already involve an economic interest if they are closely connected to a proprietary relationship, even if the claims have no monetary value. Consequently, claims for performance can be arbitrable just like declaratory claims and claims for the amendment of a legal status.

- Second, also claims that do not involve an economic interest are arbitrable if the parties are entitled to conclude a settlement regarding the matter in dispute. Given the broad scope of the first category (pecuniary claims), the second category is hardly ever applied and has its roots in the old arbitration law in force before 2006.

A prerequisite for the arbitrability of both kinds of claims claim is that they lie within the "jurisdiction of the general courts". Thus, parties are free to refer disputes involving economic interests that would otherwise be decided by a general court to an arbitral tribunal. The type of procedural rules applicable to the respective dispute in general court proceedings does not directly affect the arbitrability of a claim. Therefore, contentious and non-contentious matters can be arbitrable.

Section 582(2) ZPO expressly lists non-arbitrable matters which essentially include matters of family law, assisted housing, tenancy, and cooperative apartment ownership law. Importantly, such claims are not arbitrable even if they involve an economic interest or if the parties can settle them. In these specific matters, the state retained a monopoly on dispute resolution in these areas due to socio-political considerations.

ARBITRABILITY: A U.S. PERSPECTIVE

In comparison to the Austrian understanding of arbitrability, arbitrability has a much broader meaning in the U.S. The U.S. Supreme Court uses the term "arbitrability" to refer to a variety of threshold issues dealing with the existence, enforceability, and scope of an arbitration clause.

On the one hand, arbitrability encompasses the issue of whether a subject matter is capable of being subject to arbitration proceedings instead of state court proceedings. This essentially corresponds to the Austrian / European understanding of arbitrability. On the other hand, arbitrability from a U.S. perspective also comprises issues regarding contractual flaws of the arbitration agreement.

Therefore, arbitrability essentially encompasses two groups of jurisdictional issues that could render a dispute inarbitrable: First, the so-called "subject matter inarbitrability" means that a dispute cannot be submitted to arbitration as a matter of law because of its relation to matters of public interest. Second, there is also contract-based inarbitrability, which does not involve the public interest but sets a focus on challenges to the existence, validity, and scope of the arbitration agreement.

We will first look at "subject matter arbitrability", since it can be best compared with the Austrian understanding of arbitrability:

Subject-matter arbitrability is regulated in the FAA. Therefore, in practice, courts have the final word: In U.S. courts, certain types of claims, such as claims arising under federal securities law, RICO claims and antitrust claims were traditionally treated as non-arbitrable. However, this position has changed quite dramatically over the years.

In *Scherk v. Alberto-Culver Co.,* for example, the U.S. Supreme Court held that claims under federal securities laws were arbitrable if they arose from an international commercial transaction.

In *Mitsubishi Motors Corp. v. Soter Chrysler-Plymouth, Inc.* the U.S. Supreme Court held that claims under federal antitrust laws are arbitrable in international cases.

And in *Shearson/Am. Express, Inc. v. McMahon*, the U.S. Supreme Court held that also claims under federal securities law and the RICO statute are arbitrable.

Hence, many types of claims which were traditionally deemed non-arbitrable in the U.S. have become arbitrable over the years thanks to federal policy in favor of arbitration and a broad interpretation of such policy by the U.S Supreme Court.

However, some U.S. states, including New York, have recently adopted legislation which nullifies agreements to arbitrate claims related to sexual harassment or discrimination. In 2018 in New York, for example, adopted legislation that prohibits the mandatory arbitration of sexual harassment claims.

The U.S. analysis of arbitrability does not stop with subject matter arbitrability but also comprises matters of contract-based inarbitrability i.e. other flaws of the arbitration agreement, under the scope of the term arbitrability. This includes issues relating to the scope, validity, binding effect, and enforceability of an arbitration agreement.

Such issues are not considered matters of arbitrability un-

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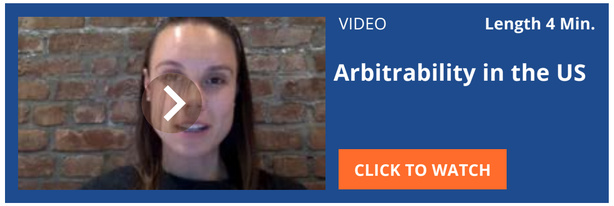
der Austrian law, even though the old Austrian arbitration law, which was in force until mid-2006, dealt with the issues of arbitrability in the narrow sense and issues concerning the formation of the arbitration agreement collectively in one single provision. In the revised arbitration act, these issues are now split up into different sections.

WHO DECIDES ON THE ARBITRABILITY OF A DISPUTE?

Be it in a broad or narrow sense, issues of arbitrability, in essence, deal with the question of whether a dispute can be transferred to an arbitral tribunal. The – arguably even more interesting – question is: who decides on the tribunal's competence to decide an individual dispute? Unsurprisingly, the answer is not the same for the U.S. and Austria. More on this in the next ZFZ Bulletin.

For additional information and queries, please contact alexander.zojer@zeilerfloydzad.com.

Additional content on this topic:



ENFORCEMENT AND STATE COUNTERPARTIES

General Dynamics United Kingdom Ltd v State of Libya [2021] UKSC 22

Written by Lucy Noble

When seeking to enforce a foreign arbitral award against assets in England, the Arbitration Act 1996 stipulates that an application is made without notice to the opposing party. If the court proceeds to grant the enforcement order, this is served on the opposing party who is allowed the opportunity to try and have the order set aside.

As was confirmed in the June 2021 Supreme Court majority decision of *General Dynamics United Kingdom Ltd v State of Libya* [2021] UKSC 22 however, this procedural aspect of the English arbitration enforcement regime does not apply straightforwardly when the opposing party is a State.

PROCEDURAL BACKGROUND

In 2016 an ICC arbitral tribunal in Geneva handed down a GBP16 million award in favour of General Dynamics. Libya's failure to remit payment in satisfaction of this award prompted 2018 enforcement proceedings in the English High Court - without notice to Libya.

In the first instance, the Court granted the enforcement order, dispensing with the formal service requirement set out in Section 12(1) of the State Immunity Act 1978. Section 12(1) requires (our emphasis):

> *'any writ of other* ***document required to be served for instituting proceedings against a State*** *shall be* ***served by being transmitted through the Foreign and Commonwealth Office to the Ministry of the Foreign Affairs of the State'*** *("Diplomatic Service")*

In finding that the exceptional circumstances existing in Libya at the time of the decision allowed the Court to dispense with the Diplomatic Service requirement, valid service was effected by courier to three addresses connected with Libya. The evidence in respect of the exceptional circumstances established that Diplomatic Service was too dangerous and, assuming it was possible at all, likely to take over a year.

In the second instance, Libya successfully applied to have the enforcement order set aside on the basis that the High Court could not dispense with the Diplomatic Service requirement.

COURT OF APPEAL

On appeal, the Court considered that both General Dynamic's arbitration claim and the enforcement order were outside the scope of the Diplomatic Service requirement. On the basis of the Arbitration Act, the arbitration claim was not a '*document required to be served*' and the enforcement order was not a document '*instituting proceedings*'.

SUPREME COURT

On Libya's appeal, the Supreme Court decision turned on three questions:

1. Whether the enforcement order was within the

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scope of the Diplomatic Service requirement.

2. If yes, could the Court dispense with the Diplomatic Service requirement in exceptional circumstances; and

3. Should the Court interpret the Diplomatic Service requirement in exceptional circumstances where the commencing party's right to a fair trial would otherwise be subverted?

In answer of these questions, a broad interpretation of the Diplomatic Service requirement was favoured by the majority of Justices. They found that the enforcement order was within scope and therefore applied on a mandatory basis. The Court did not have the discretion to dispense with this requirement in exceptional circumstances and a fair trial would not be subverted through mandatory application.

The majority considered that the Diplomatic Service requirement was appropriate on consideration of matters of international law – an area of considerable sensitivity. The Diplomatic Service requirement was considered a well-established procedure for service on States and a workable and proportionate avenue for service. In this context, the wording of Section 12(1) was wide enough to apply to the enforcement order obtained by General Dynamics.

Importantly, the Court unanimously held, in addition to the above, that Diplomatic Service requirement imposes an obligation on the Foreign and Commonwealth Office to use its best endeavours to effect service in accordance with Section 12(1).

Diplomatic Service was therefore a procedural privilege afforded to States which could not be dispensed with in the English law arbitration enforcement regime.

COMMENT

While this Supreme Court decision brings clarity to the service requirement concerning a State counterparty in enforcement proceedings, it is difficult not to feel that this decision represents a further hurdle in seeking to enforce an arbitral award against English assets, albeit, in rare circumstances. This is difficult to justify where, as in this case, Libya (or any State against which enforcement is sought) actively participates in the arbitration process and the consequent enforcement proceedings.

In the minority decision, Lord Stephens highlighted that a broad interpretation offers States the ability to obtain "*de-facto immunity*" by deliberately obstructing Diplomatic Service so as to protect against enforcement. It is clear that even without such an intention, Diplomatic Service is often far from simple, potentially undermining the arbitral process for counterparties that are not in a position to pursue it.

Despite this decision, parties entering into commercial interactions with States can still seek to protect themselves by negotiating a mutually accepted method of service. This is a valid exception to the otherwise mandatory Diplomatic Service, which was confirmed by the Supreme Court. If such negotiation is not workable or commercially realistic, counterparties may need to look outside of the English jurisdiction to seek enforcement against a State.

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Additional content on this topic:

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ENERGY ARBITRATION IN THE CEE REGION

Written by Ondrej Cech

On 7 October 2021, two of our colleagues took part in a panel discussion focused on Energy Arbitration in the CEE Region. The event was jointly organized by Young Czech Arbitration Professionals (YCAP), Young Austrian Arbitration Practitioners and DIS40 (Below 40 group of the German Arbitration Institute). Ondrej Cech, senior associate from the ZFZ Vienna office, was in charge of the organizational aspect as one of the YCAP's co-founders, and Lisa Beisteiner, our Viennese partner, appeared as one of the speakers. Other panelists included Evgenia Peiffer from Germany, Jan Panacek from Czechia and Yaroslav Petrov from Ukraine. Olga Kuchmiienko acted as the panel's moderator. The panel was construed as an introduction to the field of energy arbitration to younger practitioners and a presentation of the current trends in the field.

After a brief introduction by Ondrej and Olga, the opening presentation was performed by Lisa whose task was to define the field of energy arbitration and present her expertise in contract adjustment disputes. Lisa spoke about the diverse nature of energy disputes, which are seemingly connected only by the fact that they relate to the energy sector. Lisa continued by providing an overview of types of disputes which may be regarded as energy arbitration. The first item covered in the overview were contract adjustment disputes which concern primarily long-term contracts for supply or storage of gas. These disputes revolve around change of market circumstances rendering the contracts disadvantageous to one of the parties, which then seeks adjustment of price or other contractual provisions. The second type of typical energy disputes are energy construction disputes, which are similar to the standard construction disputes but also involve the particularities of the energy sector. Other types of disputes are various commercial disputes, out of which, Lisa pointed out disputes concerning shipping of LNG and disputes concerning production. Another major group are investments disputes in the energy sector, which in Europe most prominently concern subsidy schemes for solar powerplants.

Following this overview, Lisa zoomed in on the contract adjustment disputes in gas supply and storage, which is her specialization. She explained that the field is defined by a scheme of long-term commercial relationships among only several key players which reflects the high entry-costs in the field. The starting point for the contracts in this field is that, typically, the buyer assumes the volume risk, while the seller assumes the price risk. The contracts include price revision clauses, which can significantly differ from one another as regards triggers, adjustment criteria and the adjustment process. Most frequent disputes concern these clauses and situations where the parties were unable to reach a compromise. According to Lisa, the most interesting aspect of these disputes is the manner in which they combine procedural and substantive law issues. The disputes do not concern a legal wrong or a breach of contract but instead are trying to find the best solution to restore the balance of the contract.

Evgenia followed Lisa as the second speaker and focused on the disputes in the field of renewable energy. She started by introducing and describing the interplay between the project companies, investors, state entities and contractors in the context of a renewable project. Evgenia explained the various relationships which are entered between the individual players and particularities of disputes which may arise along the way. This was followed by two case studies concerning the construction of wind turbines. The first dispute arose between the contractor and the subcontractor due to an excessive delay in delivery by the sub-contractor, which forced the contractor to incur additional expenses. Evgenia explained that the most interesting aspect of this case was the impact of the relationship between contractor and the project company on the relationship between the contractor and the sub-contractor. The second case concerned damage to wind turbines caused by defective components delivered by the sub-contractors. The dispute arose between the contractor and the subcontractors, but this time concerned multiple jurisdictions and multiple proceedings, which influenced one another. Evgenia concluded by explaining that such international schemes are typical in renewable disputes.

Jan continued as the third speaker introducing his perspective of an in-house counsel who is also educated in nuclear physics. He started by presenting his understanding that, in principle, the common features of all disputes in the energy field are regulation and scarcity. Jan then continued by re-visiting upon the discussed types of energy disputes and pointed out how these features play role in all of them. Regulation is present because energy is not only a commodity but, more importantly, it is the primary resource thanks to which all other industries can function and as such is of the highest importance to the states. Scarcity is present in the limited nature of all current energy sources, at least until we learn to store electricity from renewable sources effectively. Following this introduction, Jan proceeded by discussing energy investment arbitration, which is his field of professional focus. In this regard, Jan illustrated the particularities of this field using the example of disputes concerning solar power plants in the Czech Republic. He explained the clash of interests of the investors and the state, which resulted in the arbitration. Jan concluded by offering a balancing ap-

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proach, suggesting to find a reasonable economic solution for all parties involved.

The final speaker was Yaroslav. His presentation concerned the connection between politics and law in energy disputes, which was illustrated in the example of Ukraine and Russia. Yaroslav started by introducing the key players in the Ukraine-Russia disputes and their relationship concerning supply and transit of gas. The dispute in question arose over the alleged breaches of the supply and transit agreements concerning non-payment and insufficient offtake. The Ukrainian party was successful in the first arbitration and was awarded a significant amount, however, the award was challenged, and further disputes continued. In the end, the parties settled all outstanding claims in 2019. The settlement significantly influenced further negotiations and the relations between Ukraine and Russia in general. Yaroslav then concluded his presentation by discussing the current trends in energy arbitration.

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BEG S.P.A. V. ITALY (ECHR 160(2021)) - JUSTICE MUST ALSO BE SEEN TO BE DONE

Written by Christian Weisgram

In its decision of 20 May 2021, the European Court of Human Rights ("ECHR") once again highlighted the importance of Art 6 §1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (right to a fair trial). The ECHR addressed the alleged lack of impartiality of an arbitrator who was affiliated with Respondent's parent company.

THE FACTS

In February 2000, Beg S.p.a. ("applicant") and ENELPOWER signed a cooperation agreement regarding the construction of a power plant by Beg S.p.a. and Beg S.p.a.'s obligation to sell the energy to ENEL (the parent entity of ENELPOWER). In the cooperation agreement the parties undertook to refer any future disputes to the Arbitration Chamber of the Rome Chamber of Commerce ("ACR").

Subsequently, the applicant lodged a request with the ACR to commence arbitration proceedings against ENELPOWER. In December 2000, ENELPOWER filed its reply and appointed as its arbitrator Mr N.I. In his acceptance statement, N.I. did not disclose any conflict of interest.

On 6 December 2002, the arbitral award was deposited at the ACR. On the same day, the applicant lodged a request for withdrawal of N.I. as arbitrator to the ACR and to the Rome District Court. Beg S.p.a. had become aware of the fact that N.I. had been Vice-Chairman and member of the Board of Directors of ENEL from June 1995 to June 1996, in a time when Beg S.p.a. started to negotiate the corporation agreement in dispute with ENEL. Furthermore, N.I had represented ENEL as lawyer in civil disputes while acting as an arbitrator.

Since the ACR and the Rome District Court dismissed the request for withdrawal, the applicant filed an appeal before the Rome Court of Appeal. The applicant argued that the appointment of N.I. as arbitrator had lacked any lawfulness, because he did not disclose his lack of impartiality, due to his ties to the ENEL group, in the independence declaration. Therefore, the applicant requested the court to annul the arbitral award.

Following the dismissal of the appeal by the Rome Court of Appeals, the applicant referred the matter to the Court of Cassation. The latter also dismissed the appeal, arguing that the existence of a link between the arbitrator and ENELPOWER, resulting in an alignment of interests in a specific outcome of that very dispute had not been demonstrated.

The applicant subsequently submitted an introductory letter to the ECHR and argued that because of the professional links between N.I. and the parent entity of ENELPOWER, the arbitrator N.I. had lacked independence and objective impartiality.

THE DECISION

In its decision, the ECHR first reviewed its jurisdiction *ratione personae* in the issue of State responsibility for the arbitral proceeding. According to Article 35 §3 of the Convention, the ECHR only has jurisdiction if the violation has been com-

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mitted by a state or in some way attributable to a state. Since the ACR is not a domestic court, but rather a special agency to further the interests of business, the ECHR has no jurisdiction over the ACR. But, since the Italian domestic courts validated the acts and omissions of the ACR, the Italian State was capable to engage its responsibility under the Convention. Therefore, the Court had jurisdiction *ratione personae* over the Italian state and was able to examine the applicant's complaint.

The ECHR reiterated that Article 6 of the Convention secures to everyone the right to have any claim relating to his civil rights brought before a court or tribunal. This access to a court is not necessarily to be understood as access to a court of law and therefore Article 6 does not preclude the establishment of arbitral tribunals. Furthermore, the Court held that by signing an arbitration clause to a voluntary arbitration the parties voluntarily waive certain rights secured by the Convention. Such a waiver is not incompatible with the Convention provided it is established in a free, lawful and unequivocal manner. However, such a waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate to its importance.

The ECHR held that a waiver of the guarantee of impartiality of the tribunal would have been possible in this case, since the party joined a voluntary arbitral proceeding under the scheme provided by the ACR. But such waiver was not granted by the applicant by not challenging the lack of an explicit negative by N.I.: Just because the applicant had not objected to N.I.'s lack of a declaration of independence did not mean that it had waived its rights.

Moreover, the ECHR held that Article 6 of the Rules of the ACR compelled the arbitrators to indicate any relationship with the parties or their counsel. The ECHR concluded that in the absence of an explicit negative disclosure a party could legitimately presume that such relationships did not exist. Therefore, the Court found that the applicant could not be considered to have unequivocally waived the guarantee of impartiality of the arbitrators.

The Court reiterated that a tribunal or a tribunal's member must be independent and impartial towards both parties. Impartiality denotes the absence of prejudice and bias. According to the Court's settled case-law, the impartiality is tested twofold, by a subjective and by an objective test. The subjective test determines, based on the personal convictions and conduct of a judge, whether he or she showed any personal prejudice or partiality in a given case. In contrast the objective test examines if the tribunal offered, through its composition, guarantees sufficient to exclude any legitimate doubt about its impartiality. Professional or personal links between an arbitrator and a party may raise doubts to the impartiality of the arbitrator. The decision on the impartiality is therefore always a gradual question whether the connection in question is of such a nature that the tribunal lacks impartiality.

In connection with the objective test the ECHR indicated that also the appearance of independence and impartiality of a tribunal member is important to ascertain if the arbitrator is objectively impartial: *"justice must not only be done, it must also be seen to be done"*. Therefore, in the objective test of impartiality, it must be considered if certain circumstances, like professional or personal links, could legitimately give rise to doubts as to the arbitrator's impartiality, from the point of view of an external observer.

As to the subjective aspect of impartiality, the ECHR found that there was no evidence in the present case to suggest any personal prejudice or bias on the part of N.I. With regard to the objective test, the Court concluded that there were ascertainable facts which rose doubts as to N.I. impartiality. Under the importance and the economic stakes of the business project in dispute, N.I.'s senior role in the parent entity in the first negotiations of the project and his role in civil proceedings for ENEL during the arbitration proceedings, is capable or at least appear open doubts as to his impartiality. Therefore, the applicant's fears to the lack of impartiality were reasonable and objectively justified. Accordingly, the ECHR determined that there has been a violation of Article 6 of the Convention.

COMMENT

With this decision, the ECHR once more confirmed its jurisdiction *ratione personae* over member states of the Convention in case of interactions between arbitration proceedings and domestic courts. Consequently, Member states and therefore domestic courts are indirectly responsible to ensure the application of the provisions of the Convention also in arbitration proceedings. This broad responsibility likely means a stricter review of arbitral awards by state courts and therefore also a stronger involvement of the ECHR in arbitration proceedings.

One way for parties to arbitration proceedings to avoid the application of the rules of the Convention is to waive their application. However, in this particular case, the ECHR concluded that a lack of objection cannot be seen as a waiver of rights guaranteed by the Convention. According to the ECHR such a waiver must be voluntary and unequivocal. Therefore, it remains questionable whether parties can waive Convention rights at all by remaining silent.

The ECHR also held that for a lack of impartiality of an arbitrator no actual subjective bias is necessary. Mere legitimate doubts are enough to determine the independence or impartiality of an arbitrator. This high standard of inde-

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pendence and impartiality for arbitrators has already been applied in Austrian case law. In this context, the reasons for challenging a state court judge were applied as guidelines for arbitrators, while respecting the particularities of arbitration proceedings.

For additional information and queries, please contact christian.weisgram@zeilerfloydzad.com.

Additional content on this topic:

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Constitution of Tribunal

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VIDEO **Length 3 Min.**

Role of the Courts

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NEWS & EVENTS

TEAM

| VIENNA

In October our arbitration team welcomed a new member, Christian Weisgram. After spending the last two years of his studies interning with ZFZ, now a University of Linz graduate, Christian has joined the Vienna team full time as a junior associate specializing in dispute resolution, with an emphasis on international arbitration.

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Disputes for Tea | Litigation
"US Class Action and European Representative Action compared"
With Edward Floyd and Alfred Siwy.
Thursday, 9 December 2021

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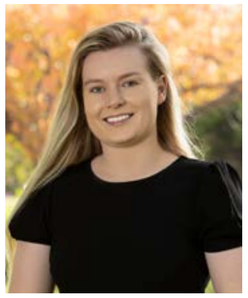

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