CIS-Related Disputes: Key Developments

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PART 1: Commercial Litigation before the English Courts

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PART 1: Commercial Litigation before the English Courts

(1) *Kazakhstan Kagazy v Zhunus*

- The claimants pursued substantial fraud claims against former directors. The claims against D1 settled without trial. By judgments in December 2017 and February 2018, Picken J found D2 and D3 liable to pay c.US$298 million in respect of their fraud, and ordered an interim payment on account of costs of £8 million.

[2019] EWHC 878 (Comm) (4 April 2019)

- The proceedings had become subject to the Disclosure Pilot Scheme in the Business and Property Courts. The claimants applied for specific disclosure under CPR Part 31 (which technically no longer applied) on the basis that the court retained sufficient case management powers to make a proper and targeted order for specific disclosure.
- The Commercial Court (Andrew Baker J) partially granted the application:
  - The disclosure statement indicated that a proper, reasonable search for documents that might need to be disclosed under standard disclosure had not been carried out. The defendants to be targeted by the specific disclosure application had disclosed very few documents as compared to other parties, and were not able to adequately explain the basis on which they had selected those documents.
  - The parties were operating on an expedited timetable. It was appropriate to order the defendants to explain the basis of their document selection.

[2019] EWHC 2630 (Comm) (8 October 2019)

- No part of Picken J's judgment had been satisfied, and the claimants applied for non-party costs orders against D4 and D5 (D2's wife and mother-in-law).
- The Commercial Court (Jacobs J) held that, in the circumstances, it was just to make a non-party costs order under Section 51 SCA 1981 against D4 and D5, having funded D2 and D3's defences using monies transferred to them (and between them) by way of a seemingly planned family asset dissipating exercise.

PART 1: Commercial Litigation before the English Courts

(2) *Vneshprombank LLC v Bedzhamov* [2019] EWCA Civ 1992 (19 November 2019)

- The claimant accused D1 of participating in a fraudulent scheme which caused losses of £1.34 billion. The claimant obtained a freezing order (FO) against D1 for the whole £1.34 billion in March 2019. Under the FO, D1 was permitted to spend £35,000 per week on rent (subsequently reduced to £14,750) and £10,000 per week on other living expenses.
- Following several variations, D1 applied to increase his ordinary living expenses spending limit to over £165,000 plus an additional €165,000 per month. HHJ Harman QC allowed D1 only £80,000 per month. D1 appealed.
- The Court of Appeal (Sir Geoffrey Vos C; Newey LJ; Males LJ]) partially allowed D1's appeal:
  - HHJ Harman QC had erred in taking account of what would have happened to D1's lifestyle had the injunction not been made. The proper approach was to allow a figure for ordinary living expenses that enabled D1 to maintain his previous standard of living.
  - However, except in respect of rent, school fees, and the cost of private security, HHJ Harman QC had not erred in his broad approach to treat D1's evidence with considerable scepticism. There was little reliable evidence as to pre-injunction living expenses, and HHJ Harman QC had been entitled to do his best to select appropriate figures.
  - £40,000 per month would be permitted for general living expenses other than rent, school fees and private security. The FO would be varied to permit D1 to pay rent on a Monaco property and on a new London home.

PART 1: Commercial Litigation before the English Courts

(3) *Hajiyeva v National Crime Agency* [2020] EWCA Civ 108 (5 February 2020)

- D was the wife of a former chair of the International Bank of Azerbaijan (who was sentenced in 2016 to 15 years' imprisonment for, *inter alia*, embezzlement). Both D and her husband were considered to be PEPs. The NCA applied for a UWO against D in respect of a £11.5 million property on the basis it was beneficially owned by D, that D's husband was a PEP employed by a "state-owned enterprise" and his lawfully obtained income would have been insufficient to obtain the property.
- D unsuccessfully challenged the UWO. Permission to appeal was granted on the basis that this was the first UWO case to come before the courts and it would be beneficial to have guidance on the scope of the statutory UWO powers.
- The Court of Appeal (Lord Burnett LCJ; Davis LJ; Simon LJ) dismissed D's appeal against the refusal to discharge the UWO:
  - "*Politically exposed persons*": The statutory description focused on an 'entrusted person's' status, not how they had come to be entrusted with prominent public functions. If the International Bank of Azerbaijan was a "*state-owned enterprise*", then the husband (as its chairman) fell within the definition of a "*politically exposed person*" and was to be treated as "*entrusted with prominent public functions*". As his family member, D would also be a PEP under Section 362B(8)(b) POCA 2002.
  - "*State-owned enterprise*": the judge's broad approach was correct. The judge had found the State had ultimate control of the bank and had been entitled to reach that finding.
  - Income requirement for UWOs: the court had to be satisfied that there were reasonable grounds for suspecting that the known sources of the lawfully obtained income available to the PEP would have been insufficient to enable them to obtain the property. The husband's legitimate income as a state employee and any income resulting from his involvement with companies and property transactions would not have been sufficient to generate the funds needed to buy the property. The source of his wealth had been very vague.
  - The judge had been correct to rule that neither D1 nor her husband could invoke either the privilege against self-incrimination or spousal privilege as a result of Section 14 CEA 1968.
- On 21 December 2020, the Supreme Court dismissed D's application for permission to appeal.

PART 1: Commercial Litigation before the English Courts

(4) *Koldyreva v Motylev*

- D was the majority owner of Russian Credit Bank (RCB). He left Russia for the UK in 2015, shortly after which RCB collapsed. D was declared bankrupt in Russia in 2018 and the Russian equivalent of a trustee in bankruptcy was appointed in 2019. It was intended that English proceedings would be brought to recognise a Russian judgment declaring D bankrupt and appointing the trustee in bankruptcy, as well as concurrent English bankruptcy proceedings

[2020] EWHC 3083 (Ch) (11 September 2020)

- The Chancery Division (Meade J) granted the trustee in bankruptcy's WFO application:
  - A good arguable case had been established both as to the claim for recognition of the Russian bankruptcy and the intended English bankruptcy proceedings. D had been resident and domiciled in London for some years and had a substantial connection with the UK.
  - Real risk of dissipation: D had been in charge of a number of banks which collapsed with very large shortfalls in their balance sheets, having made loans to shell companies under his control. He unlawfully held two offices, had left Russia just before RCB's collapse, and the evidence showed a number of transactions were put into effect with speed just before RCB's banking licence was withdrawn.
  - Strong evidence D had not participated in the Russian bankruptcy process and his obligations there.
  - In the circumstances, it was also appropriate to make a passport-surrender order, as well as a *Norwich Pharmacal* order against four parties connected with D.

[2020] EWHC 3084 (Ch) (14 September 2020)

- D was observed visiting a company's premises with a frequency consistent with him using it as an office. The trustee in bankruptcy sought a search order on the basis that it was required to preserve any evidence found at the company's premises, as well as D's four-storey house.
- The Chancery Division (Meade J) granted the application for a search order:
  - There was a strong *prima facie* case for recognising the Russian bankruptcy under common law. Extensive documentary evidence had to exist and it would be critical to the asset tracing exercise. There was a real risk that D would destroy or remove evidence. Subject to certain restrictions on the search of D's home, the harm likely to be caused to D and his business affairs by the execution of the order was proportionate, and the requirement of overall proportionality was satisfied.

PART 1: Commercial Litigation before the English Courts

(5) *JSC VTB Bank v Skurikhin* [2020] EWCA Civ 1337 (21 October 2020)

- D1 was a judgment debtor, was subject to a WFO and was sentenced to contempt of court for breach of the WFO's disclosure obligations. D1 was the settler and potential beneficiary of a foundation, with power to transfer the foundation's assets in his own name or to other beneficiaries.
- The foundation applied to discharge C's receivership order over shares in D2 (an English LLP controlled by D1) which were held to be D1's assets in equity. The basis for the discharge application was a material change of circumstances – the foundation had passed a resolution to irrevocably exclude D1 from the class of beneficiaries on grounds of his bankruptcy. The judge refused the application and held it was an abuse of process.
- The Court of Appeal (Lewison LJ; Sir Keith Lindblom P; Phillips LJ) dismissed the foundation's appeal:
  - The delay in excluding D1 from the class of beneficiaries engaged the principles underlying abuse of process. The exclusion had not been a genuine attempt to divest D1 of his beneficial interest in the foundation's assets, but was merely a device to further disguise his ownership and frustrate enforcement.
  - The application was not a genuine attempt to discharge the receivers, but was made at D1's behest because he was in contempt of court and therefore unable to pursue the matter himself.
  - The whole process was redolent with illegitimate collateral purposes, subterfuge and manifest unfairness.
  - The foundation was in breach of the WFO and its application was an abuse of process.

PART 1: Commercial Litigation before the English Courts

(6) *Tatneft v Bogolyubov & ors* [2021] EWHC 411 (Comm) (24 February 2021)

- In 2007, T agreed to supply crude oil to UTN. The oil was sold via Tatneft's commission agent (S-K) and was supplied to UTN through a chain of intermediaries, with payments made back up the chain to S-K. After S-K entered bankruptcy in 2015, it purported to assign various causes of action to T, which brought a claim under Article 1064 of the Russian Civil Code (RCC) alleging that the defendants had participated in a scheme to siphon oil payments out through a series of sham transactions, thereby preventing S-K from receiving the monies owed to it from UTN.
- The Commercial Court (Moulder J) dismissed the claims:
  - Under the RCC, the claim would be time-barred if brought outside of the applicable 3-year time limit.
  - Adverse inferences were drawn by the court as a result of T's failure to call certain witnesses and to preserve relevant documentation.
  - Those adverse inferences, plus the evidence of the defendants' witnesses, established that T had had knowledge of the requisite elements of the tort claim more than 3 years before its claim form was issued.
  - As a matter of Russian law, it was not necessary that T knew or should have known the identity of the proper defendant. For these purposes, "knowledge" required a belief that a violation of rights had occurred.

PART 1: Commercial Litigation before the English Courts

(7) *Akhmedova v Akhmedov*

- In divorce litigation, the husband (a Russian/Azerbaijani national) was ordered to pay the wife £453 million, but the court held that he had resolutely frustrated attempts at enforcement.

[2019] EWHC 1705 (Fam) (3 July 2019)

- The husband owned a yacht worth approximately €250 million moored in Dubai. After the marriage ended, the husband arranged for ownership to be passed between various companies that he owned and ultimately, in breach of a freezing order, to D6. The wife applied for, inter alia, the extension of injunctive relief against D6 to prevent the yacht leaving Dubai.
- The Family Division (Gwynneth Knowles J) granted the wife's application:
  - D6 was a party to the proceedings and should not be able to avoid compliance with court orders by simply refusing to engage with the proceedings or obey the court's orders. In those circumstances, the court should take whatever steps it could to make its earlier orders effective.
  - It was just and convenient to make the order sought. The order would be enforceable in the UK against D6, which had submitted to the jurisdiction. Additionally, the order should provide a serious incentive to D6's corporate director to ensure that it complied.

PART 1: Commercial Litigation before the English Courts

(7) *Akhmedova v Akhmedov* (continued)

[2019] EWHC 3140 (Fam) (22 November 2019)

- The wife's Liechtenstein/Swiss lawyers came into possession of documents (from the husband's former "Lead Investment and Family Office Manager") which were relevant to the husband's strategy of evading enforcement. An independent barrister (appointed by the wife's English solicitors) concluded most of the documents were *prima facie* privileged, but the fraud/iniquity exception applied as there was a very strong *prima facie* case that the husband had instructed lawyers to take steps to defeat enforcement attempts. On that basis, 244 documents were identified as reviewable and provided to the wife's lawyers. Although the reviewable documents were *prima facie* confidential and privileged to the husband, the lawyers had not applied for directions from the court in accordance with the guidance in *UL v BK* before conducting the review. The wife then instructed new lawyers, who realised that the guidance in *UL v BK* had not been followed.
- The Family Division (Gwynneth Knowles J) granted the wife's application for directions in respect of certain documents confidential to her former husband:
  - The husband was in contempt of the court's orders, was engaged in a campaign to frustrate enforcement of the financial award, and had disengaged with the proceedings with the consequence that he could not be expected to give any proper disclosure. Those matters would have been reason enough to have granted a *UL v BK* application made at the time the documents were received.
  - Furthermore, the wife had not deliberately omitted to seek directions in the hope of obtaining some improper advantage, and had sought directions before making use of the documents in any legal proceedings. Her former lawyers had also instructed independent counsel who conducted a thorough and careful review to ensure that privileged documents were removed.
  - In those circumstances, any order that the wife must not use and/or must destroy the reviewable documents would be a disproportionate response to the failure to obtain directions at the relevant time since it would potentially deprive her of evidence which might assist in unravelling her husband's schemes to evade compliance with the court's orders.

PART 1: Commercial Litigation before the English Courts

(7) *Akhmedova v Akhmedov* (continued)

[2020] EWHC 3005 (Fam) (28 October 2020)

- The wife alleged her son had assisted the husband in dishonest schemes intended to prevent her from obtaining the judgment sum. The wife obtained a WFO and ancillary disclosure orders against her son, and an order was made requiring the son to deliver up and provide access to his electronic devices and cloud storage accounts for forensic examination.
- The son alleged that all his devices were lost in transit when he was seeking to comply with the order, and he failed to provide access to his cloud accounts. The wife applied for a search order against her son
- The Family Division (Gwynneth Knowles J) granted the search order application:
  - The court had jurisdiction to grant a search order under FPR 20.2(1)(h).
  - There was an extremely strong *prima facie* case against the son. The damage was very serious for the wife, and there was clear evidence that the son had incriminating documents in his possession with a real possibility that he might destroy such material before any *inter partes* application could be made.
  - The harm likely to be caused to the son by executing the search order was not going to be excessive or disproportionate to the order's legitimate object.
  - The son had not provided a single contemporaneous document since 2016 and his ongoing failure to disclose relevant documents was likely to damage the wife's ability to pursue her enforcement proceedings.

PART 1: Commercial Litigation before the English Courts

QUESTIONS

1. What is likely to be the practical effect of the changes taking place in terms of Disclosure and Document Production?

2. Are Unexplained Wealth Orders likely to become more frequent. Are there sufficient safeguards against abuse?

3. Should the English High Court have recourse to independent experts on foreign law issues?

PART 2: Arbitration-related matters before the English Courts

1) ***Stati v Kazakhstan*** [2019] EWHC 1715 (Comm) (2 July 2019)
2) ***PAO Tatneft v Ukraine*** [2019] EWHC 3740 (Ch) (20 December 2019) and [2020] EWHC 3161 (Comm) (23 November 2020)
3) ***Riverrock Securities Ltd v International Bank of St Petersburg*** [2020] EWHC 2483 (Comm) (23 September 2020)
4) ***Enka Insaat v OOO Chubb*** [2020] UKSC 38 (9 October 2020)
5) ***Premier Cruises Ltd v DLA Piper Rus Ltd*** [2021] EWHC 151 (Comm) (1 February 2021)

PART 2: Arbitration-related matters before the English Courts

(1) *Stati v Kazakhstan* [2019] EWHC 1715 (Comm) (2 July 2019)

- These were proceedings in which C obtained permission to enforce an award and Kazakhstan sought to have that permission set aside, *inter alia*, on grounds of fraud. After the Swedish court upheld the award, the Commercial Court held that there was a *prima facie* case that the award was obtained fraudulently and directions were given for a trial on the fraud issue. The claimants indicated they would not serve any witness statements and discontinued the proceedings. The discontinuance was upheld on appeal and the enforcement permission was set aside.
- Kazakhstan sought costs on the indemnity basis and for a payment on account of costs.
- The Commercial Court (Jacobs J) held partially allowed the indemnity costs application, and the payment on account of costs application:
  - In order for indemnity costs to be awarded, there had to be some conduct or circumstance which took the case outside the ordinary and reasonable conduct of proceedings. Where a party had unsuccessfully pursued fraud allegations to trial, indemnity costs would likely be awarded. However, the instant case could not be approached on the basis either that fraud had been established against the claimants, or that there was an overwhelming case of fraud: there was no more than a *prima facie* case which merited a trial.
  - No indemnity costs would be awarded for the period in which C had an award in their favour. In light of their success in Sweden and the USA, there was nothing out of the norm in C pursuing English enforcement proceedings. However, once C knew that the English court considered there was a real answer to their case for enforcement, they had incurred significant costs thereafter and their decision to discontinue should have been made earlier. Indemnity costs would be awarded in respect of that period only.
  - There was no good reason not to order C to pay a reasonable sum on account of costs. Prior to the notice of discontinuance, Kazakhstan had incurred costs equivalent to almost £5 million, which was extraordinarily high for a case which had involved only two hearings up to that stage. A figure of £1.3 million was reasonable as representing the likely level of recovery, allowing for an appropriate margin of error.

PART 2: Arbitration-related matters before the English Courts

(2) PAO Tatneft v Ukraine

- Multiple attempts to resist enforcement of awards rendered in UNCITRAL/BIT arbitration alleging, inter alia, expropriation of T's shareholding in Ukrtatnafta.

[2019] EWHC 3740 (Ch) (20 December 2019)

- In an UNCITRAL/BIT arbitration, T and Ukraine each appointed an arbitrator and they in turn appointed a presiding arbitrator (V). During the arbitration, V (following an approach from T's solicitors) was appointed as arbitrator by a port operator in an ICSID arbitration against Peru, and did not disclose the either the approach or the appointment to Ukraine. T obtained an award and permission to enforce. Ukraine applied for enforcement to be refused on the basis of justifiable doubts as to V's impartiality and independence.
- The Commercial Court (Cockerill J) rejected Ukraine's set aside application:
  - The French courts had already considered whether V's non-disclosure had caused the irregular composition of the tribunal, but not whether there had been a failure in the arbitral process. Accordingly, there was not the necessary identity of issues for an issue estoppel.
  - Article 9 of the UNCITRAL Rules required an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality and independence. But, it could not be said that V's appointment in the ICSID arbitration gave rise to a reasonable apprehension of lack of impartiality.

PART 2: Arbitration-related matters before the English Courts

(2) *PAO Tatneft v Ukraine* (continued)

[2020] EWHC 3161 (Comm) (23 November 2020)

- Ukraine applied under Section 103(4) AA1996 to set aside an element of a New York Convention award that related to a claim for US$81 million.
- Ukraine asserted that its agreement to arbitrate related only to investments that were made in accordance with Ukrainian legislation. Ukraine further asserted that the underlying shares that were the subject of the dispute had not been properly issued.
- The Commercial Court (Sir Andrew Smith) rejected Ukraine's set aside application:
  - Ukraine was attempting to raise new arguments that could reasonably have been raised on a previous challenge made by Ukraine.
  - In the circumstances, that amounted to a collateral attack on Ukraine's previous unsuccessful challenge. The set aside application was an abuse of process and was barred by issue estoppel.

PART 2: Arbitration-related matters before the English Courts

(3) *Riverrock Securities Ltd v International Bank of St Petersburg* [2020] EWHC 2483 (Comm) (23 September 2020)

- The parties had entered into nine similar contracts (English law/London arbitration/LCIA rules) under which C sold D securities in the form of credit-linked notes. Russian bankruptcy proceedings concerning D were commenced shortly before a default event was triggered under the contracts. In the context of the Russian bankruptcy proceedings, D commenced proceedings against C seeking the invalidation of the contracts on the basis that the relevant transactions were a scheme intended to siphon off D's assets. Consequential relief was sought in the form of repayment of all amounts paid to C. C sought anti-suit injunctive relief to restrain the Russian proceedings.
- The Commercial Court (Foxton J) granted C's application for an interim anti-suit injunction:
  - The substance of the Russian claims were contractual in nature and fell within the arbitration clause, regardless of whether as a matter of choice-of-law analysis they could be advanced in an LCIA arbitration. The claim was by one contractual party against its counterparty to invalidate contracts and recover amounts paid on the basis that the consideration under the contracts was at an undervalue and/or had the purpose of prejudicing D's creditors.
  - The claims brought in the Russian action under Article 61.2 of Russia's Bankruptcy Law were insolvency claims. In circumstances in which those claims sought relief which the arbitral tribunal was able to grant, and did not engage third party interests save to the extent that any creditor of an insolvent company would benefit from its success in arbitration, those claims were arbitrable.
  - There was no sufficient countervailing public policy at play arising from the fact that the claims were avoidance claims in a foreign bankruptcy to override the clear policy of English law of upholding arbitration agreements (whatever the position might be if they were English-law insolvency claims).
  - There was no strong reason why an interim anti-suit injunction should not be granted.

PART 2: Arbitration-related matters before the English Courts

(4) *Enka Insaat v OOO Chubb* [2020] UKSC 38 (9 October 2020)

- After a fire at a power plant, D (a Russian insurer) paid insurance claims and then commenced Russian proceedings against C (a subcontractor) seeking damages arising from construction defects. The relevant contract provided that certain of its provisions were governed by Russian law and that all disputes arising out of it were to be referred to London arbitration. C sought an anti-suit injunction.
- D argued Russian law applied to both the main contract and arbitration agreement. Under Russian law, there was a good arguable case that the Russian claim was outside the scope of the arbitration agreement. D was successful at first instance. C was successful at the Court of Appeal.
- The Supreme Court (Lord Hamblen/Lord Leggatt main judgment) dismissed D's appeal:
  - An arbitration agreement was governed by the law expressly or impliedly chosen by the parties or, in the absence of such choice, the law with which the agreement was most closely connected.
  - Where there was a choice of law to govern the main contract that should generally be construed as applying also to the arbitration agreement. Where there was no express choice of law governing the main contract, a choice of seat (even of a major arbitration jurisdiction) did not by itself justify an inference that the main contract or the arbitration agreement was intended to be governed by the law of the seat.
  - If there was no express or implied choice of governing law in the main contract, the law of the seat was generally to be regarded as the place most closely connected with the arbitration agreement. In the present case, there was no overall system of law intended to govern the main contract or the arbitration agreement so English law (the law of the seat) governed the validity and scope of the arbitration agreement.

PART 2: Arbitration-related matters before the English Courts

(5) *Premier Cruises Ltd v DLA Piper Rus Ltd* [2021] EWHC 151 (Comm) (1 February 2021)

- DLA Piper Russia (D1) and DLA Piper UK (D2) were sued in England for professional negligence arising out of their legal services concerning a dispute arising out of a shipbuilding contract. D1 had sent to C an engagement letter (Russian law/arbitration), which C signed. D1 sought a stay under Section 9 AA1996 on the basis that the arbitration agreement in the engagement letter applied retrospectively to work conducted before the engagement letter was signed. D2 (which was not party to the arbitration agreement) applied for a case management stay.
- The Commercial Court (David Edwards QC) rejected the stay applications:
  - Principles of Russian law contractual interpretation were applicable to the construction of arbitration clauses. The starting point was the literal meaning of the provision. If unclear, Russian law allowed consideration of the contractual context. If still unclear, it was permissible to consider a broader spread of evidence, including subjective evidence, to establish the actual intent of the parties. Absent a contrary provision, there was a presumption that an arbitration agreement would not apply retrospectively.
  - In the instant case, the there was nothing to rebut the presumption that the arbitration agreement was not intended to apply retrospectively. The words "*in connection with*" were sufficient to indicate that arbitrable disputes were not limited to disputes under the terms of the engagement letter, but the use of such wide words was not enough to justify a conclusion that the arbitration agreement was intended to apply retrospectively. There was also nothing in the engagement letter, which was entirely forward looking.
  - D2 was an English LLP. Pursuant to Article 4 of Regulation 1215/2012, the English court had mandatory jurisdiction over it. It was not open to an English court to stay a claim against an English domiciled defendant in favour of a court of a non-contracting state on *forum non conveniens* grounds. It was not open to an English court to stay proceedings against an English-domiciled defendant on discretionary case management grounds where it would undermine mandatory provisions of Regulation 1215/2012.

PART 2: Arbitration-related matters before the English Courts

QUESTIONS

1. Would a Russian Court applying Russian Law reach a different conclusion on arbitrability in the case of *Riverrock Securities Ltd v International Bank of St Petersburg* [2020] EWHC 2483 (Comm)?

2. Do you agree with the decision of Cockerill J in *PAO Tatneft v Ukraine* [2019] EWHC 3740 (Ch) rejecting the arbitrator challenge? Would it be different now in the light of the Supreme Court decision in *Halliburton v Chubb* [2020] UKSC 48?

3. Should the Arbitration Act 1996 be amended to include a permission requirement for a Section 68 challenge?

PART 3: Investment Treaty arbitral decisions

1) ***Stans Energy Corp and Kutisay Mining LLC v Kyrgyz Republic*** (PCA Case No.2015-32) (Award, 20 August 2019)
2) ***Herzig (as insolvency administrator over the assets of Unionmatex Industrieanlagen GmbH) v Turkmenistan*** (ICSID Case No.ARB/18/35) (Decision on Security for Costs, 27 January 2020)
3) ***Lotus Holding Anonim Sirketi v Turkmenistan*** (ICSID Case No.ARB/17/30) (Award, 6 April 2020)
4) ***Komaksavia Airport Invest Ltd v Moldova*** (SCC EA 2020/130) (Emergency Award on Interim Measures, 2 August 2020)
5) ***Hulley Enterprises Ltd & ors v Russian Federation*** (Dutch Supreme Court, 4 December 2020)

PART 3: Investment Treaty arbitral decisions

(1) *Stans Energy Corp and Kutisay Mining LLC v Kyrgyz Republic* (PCA Case No.2015-32) (Award, 20 August 2019)

- In 2009, the claimants obtained mining licences to develop the Kutessay II and Kalesay rare earth elements deposits in Kyrgyzstan. Those licences were cancelled by the Kyrgyz authorities on grounds of irregularities in the granting of the licences.
- In 2014, the claimants obtained a US$128 million default award from the Arbitration Court of the Moscow Chamber of Commerce and Industry, which assumed jurisdiction on the basis of the Moscow Convention on the Protection of Investor Rights. That default award was set aside by the Russian courts after the CIS Economic Court (an inter-state court with power to interpret the Moscow Convention) ruled that the Moscow Convention's dispute resolution provisions did not constitute a standing offer to investors to arbitrate disputes. The claimants' appeals through the Russian courts were dismissed.
- In 2014, the claimants also secured a freezing injunction over shares in a Canadian mining company belonging to Kyrgyzaltyn JSC (wholly owned by Kyrgyzstan). The freezing relief was set aside in the Canadian courts.
- In May 2015, the claimants commenced a second arbitration (under Kyrgyz foreign investment law) on substantially the same facts seeking US$304.23 million (divided US$128.23 million in damages and US$176 million in interest).
- The Tribunal (Karl-Heinz Bockstiegel, President; Colin Campbell QC; Stephen Jagusch QC) held that it had jurisdiction, and that the claimants' investment had been expropriated through the cancellation of the mining licences. However, the claimants were only awarded compensation of US$15 million in terms of sunk costs.

PART 3: Investment Treaty arbitral decisions

(2) *Herzig (as insolvency administrator over the assets of Unionmatex Industrieanlagen GmbH) v Turkmenistan* (ICSID Case No.ARB/18/35) (Decision on Security for Costs, 27 January 2020)

- Dr. Herzig was the insolvency administrator a bankrupt German LLC, which was in a dispute with Turkmenistan over alleged state interference in a project for the construction of flour mills and shopping centres. In an ICSID arbitration, damages of approximately EUR 37 million were sought.
- Dr. Herzig engaged a third party funder, La Française, to fund the arbitration. It was undisputed that the funding agreement did not cover any costs award in favour of Turkmenistan.
- Turkmenistan filed a Request for Security for Costs seeking an order that the claimant post security of US$3 million.
- The Tribunal (Lucy Reed, President; Philippe Sands QC; Nathalie Voser) granted (by majority) the request for security for costs:
  - The Tribunal had authority to order security for costs based on Article 47 of the ICSID Convention and Rule 39(1) of the ICSID Arbitration Rules. The main issue was whether Turkmenistan had proved "*circumstances to require such measures*".
  - Third party funding on its own was not sufficient to meet the exceptional circumstances standard, and neither was impecuniosity. The key question was whether the explicit non-liability of the funder for a costs award adverse to the funded party should lead to a security order.
  - In circumstances where there was an impecunious claimant, a third party funder, and a funding agreement that excluded liability for the funder for any adverse costs award amounted to exceptional circumstances that justified an order for security for costs.
- It is understood that the Tribunal subsequently set aside the security order in June 2020.

PART 3: Investment Treaty arbitral decisions

(3) *Lotus Holding Anonim Sirketi v Turkmenistan* (ICSID Case No.ARB/17/30) (Award, 6 April 2020)

- C's (bankrupt) subsidiary entered into various contracts with Turkmenistan state entities for industrial projects. C alleged Turkmenistan breached obligations owed to it under CIL, the Turkey-Turkmenistan BIT and the ECT, including breach of the FET standard and unlawful expropriation, by failing to make payments to its subsidiary under the contracts.
- Turkmenistan applied under Article 41(5) of the ICSID Arbitration Rules for C's claims to be summarily dismissed as manifestly without legal merit.
- The Tribunal (Vaughan Lowe QC, President; James Boykin; Brigitte Stern) summarily dismissed the claims:
  - An Article 41(5) application (which must be made within 30 days of the constitution of the Tribunal and in any event, before the first session of the Tribunal) must be decided on the basis of Request for Arbitration.
  - The claims were purely contractual. C had not explained why the contractual breaches amounted to international law breaches of either the BIT or ECT.
  - C itself was not party to any of the contracts in question. The rights protected under the BIT and ECT (monetary claims) belonged not to C, but to its subsidiary. The fact that C had re-characterised its claims as treaty claims through its Rejoinder was not sufficient to remedy the absence of such characterisation in the Request for Arbitration.
  - Even if the MFN clause in the BIT could be used to import umbrella clauses from other BITs entered into by Turkmenistan, that would not assist C, since C was not party to the relevant contracts.

PART 3: Investment Treaty arbitral decisions

(4) *Komaksavia Airport Invest Ltd v Moldova* (SCC EA 2020/130) (Emergency Award on Interim Measures, 2 August 2020)

- C acquired a 95% interest in a Moldovan company that was the sole legal operator of a concession to Chisinau International Airport. C invested at least €30 million in the airport.
- On 1 April 2020, Moldova imposed a new "special airport tax" on C's Moldovan subsidiary. Moldova took further action against C through criminal investigations, accusations of money laundering, alleged obstruction of C's efforts to obtain a performance guarantee, and formal issuance of notice to terminate the concession agreement.
- On 24 July 2020, C commenced emergency arbitration proceedings under SCC auspices. SCC served the application on Moldova, determined that Stockholm was the arbitral seat and appointed an Emergency Arbitrator – all on 27 July 2020. The Emergency Arbitrator set a tight procedural timetable to enable compliance with his duty to issue an emergency arbitral award within 5 days of the application. Notwithstanding that Moldova filed its response to the application a whole day late, the Emergency Arbitrator nevertheless took it into account.
- C sought provisional measures in respect of the special airport tax, the obstruction of the performance guarantee and the termination of the concession agreement.
- The Emergency Arbitrator (Bernardo Cremades) partially upheld the provisional measures application:
  - The Emergency Arbitrator noted that there was a high bar to an arbitral tribunal's interference with a State's fundamental sovereign right to exercise its taxation powers. The relief requested in respect of the special airport tax was rejected on the grounds of insufficient urgency to justify emergency remedies. Any financial harm caused was capable of being remedied at the substantive stage.
  - By contrast there was sufficient urgency in respect of the relief sought concerning the actions taken to terminate the concession agreement and the obstruction of the performance guarantee. The Emergency Arbitrator held that it was proportionate to restrain Moldova from terminating the concession agreement as "*the threat faced by Claimant far outweighs any harm that might be caused to the Respondent by the granting of the interim measures. In fact, the Respondent will suffer no harm at all*".

PART 3: Investment Treaty arbitral decisions

(5) *Hulley Enterprises Ltd & ors v Russia* (challenge proceedings in the Netherlands – update 4 December 2020)

- In 2014, an investment treaty tribunal awarded former majority shareholders in Yukos more than US$50 billion in damages in respect of violations of the Energy Charter Treaty.
- Russia challenged the awards through the Dutch courts (the seat of the arbitration). In 2016, the District Court in The Hague set aside the award, but that decision was overturned on appeal. Russia appealed to the Dutch Supreme Court. Meanwhile, the investors continue to seek enforcement of the award in multiple jurisdictions, including France, Belgium, USA, Switzerland and the UK.
- Publicly available information from English-language sources indicates that, on 4 December 2020, the Dutch Supreme Court refused to suspend enforcement of the awards:
  - Russia contended that there was no valid arbitration agreement because arbitration under Article 26 ECT violated Russian law. The Supreme Court held that this was not amenable to review.
  - Russia contended that there had been a violation of the tribunal's mandate because the tribunal failed to consult the Russian tax authorities pursuant to Article 21(5) ECT. The Supreme Court held that this did not justify the awards being set aside.
  - Russia contended that the tribunal had effectively abdicated responsibility to its assistant/secretary. The Supreme Court held that the fact that the assistant/secretary had made significant contributions to parts of the final award did not entail that the tribunal had improperly left decision-making to the assistant/secretary.
  - Russia contended that the award was deficient in terms of reasoning provided. The Supreme Court held that it was unlikely that there was a violation of due process that would result in the award being set aside.
  - Russia contended that there had been a violation of public policy. The Supreme Court held that there was insufficient grounds to rule (contrary to the Court of Appeal's findings) that Russia's arguments in this regard qualified as grounds to revoke the awards, and that those arguments could not be invoked in set aside proceedings.
  - Overall, Russia's request for suspension of enforcement, and its alternative request to require the investors to put up security, were rejected.
- It is understood that the final appeal decision from the Dutch Supreme Court is expected in late 2021.

PART 3: Investment Treaty arbitral decisions

QUESTIONS

1. Should Third Party funders always be made to "stand in the shoes" of a Claimant in terms of adverse costs orders? If so why? If not why not?

2. Are arbitral tribunals equipped to handle issues such as fraud and corruption? If not, what changes would you suggest?

3. Should any stay of enforcement of an arbitral award against a State always be subject to conditions – such as provision of a bank guarantee or should this be a matter of discretion for the Court/relevant decision making body?

For further information, see the following publications (Wildy, Simmonds and Hill (UK) publishers):

- *Conflicts of Interest in International Arbitration*
- *Bilateral Investment Treaties: The Essentials*
- *Public International Law Before the English Courts*
- *Advisory Opinions of the International Court of Justice*

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