MCNAIR CHAMBERS

DEVELOPMENTS IN INTERNATIONAL ARBITRATION

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Seminar outline

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DEVELOPMENTS IN INTERNATIONAL ARBITRATION

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PART 1:

Key rule changes

Key rule changes – SIAC

Singapore International Arbitration Centre

- SIAC updated its rules on 1 August 2016
- Brand new provisions on:
  - Multiple parties – possible to "file a single Notice of Arbitration in respect of all the arbitration agreements invoked"
  - Joinder – if all parties (including additional party) agree or if additional party is prima facie bound by the arbitration agreement
  - Consolidation – if all parties agree or if all claims are made under same arbitration agreement or (if agreements are compatible) disputes arise out of same relationships or out of principal contract and ancillary contracts or out of the same transactions
  - Early dismissal of claims/defences that are "manifestly without" legal merit or jurisdiction

Key rule changes – SIAC

Singapore International Arbitration Centre

- Updated provisions on:
  - Interim/emergency relief – arbitral ruling within 14 days of appointment absent exceptional circumstances. Fixed fees
  - Expedited procedure – more efficient/streamlined, Expedited Procedure Rules will apply even in the face of contractual provisions to the contrary (see Article 5.3)
  - "Seat" – new rules remove the old provision providing for Singapore by default

Key rule changes – ICC

International Chamber of Commerce

- ICC brought new rules into force on 1 March 2017
- Brand new Expedited Procedure Rules ("EPR") (applicable if arbitration agreement concluded after 01/03/2017)
  - EPR applicable if the amount in dispute does not exceed US$ 2 million and if the parties have not expressly contracted out of EPR
  - Sole arbitrator (even in the face of contrary party agreement)
  - ToR not required
  - CMC within 15 days
  - Tribunal discretion to exclude production of documents
  - Reduced arbitrators' fees

Key rule changes – ICC

International Chamber of Commerce

- Updated provisions on:
  - Secretariat can provide parties with an arbitrator's signed statement of acceptance, availability, impartiality and independence
  - Terms of reference – within 30 days of transmission of file to arbitral tribunal (previously 60)
  - Tribunal shall only proceed with respect to claims in regard to which the whole of the advance on costs has been paid

Key rule changes – SCC

Stockholm Chamber of Commerce

- SCC brought new Expedited Procedure Rules into force on 1 January 2017
  - Request for Arbitration and Answer constitute main submissions/statements of claim (Arbitrator therefore receives a more developed case file upon appointment)
  - CMC/timetable within 7 days of referral of the case
- Also updates to summary procedure under standard SCC Arbitration Rules
  - Summary procedure for issues of fact/law/jurisdiction/admissibility/merits
  - Tribunal must have regard to "all relevant circumstances" including whether the summary procedure "contributes to a more efficient and expeditious resolution of the dispute"

Key rule changes – DIFC-LCIA

Dubai International Financial Centre-London Centre of International Arbitration

- DIFC-LCIA updated its rules on 1 October 2016
- Updated rules for:
  - Emergency arbitrators – appointment within 3 days of application, decision "as soon as possible"
  - Additional powers of tribunals – powers of consolidation where all parties agree or other arbitration is subject to DIFC-LCIA rules and between same parties
  - Formation of a tribunal – accelerated processes for appointment/replacement/challenges
  - Complaints against legal representatives – tribunal may reprimand counsel for breaches of conduct guidelines

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PART 2:

New arbitration centres

ISTAC

- Istanbul Arbitration Centre ("ISTAC")
  - General Assembly (25 members elected by business, legal and governmental institutions) elects the Board (8 leading domestic/international arbitration practitioners) to assist with the administration of disputes. Secretariat assists the Board
  - ISTAC's Arbitration Rules came into force on 26 October 2015. Largely influenced by ICC Rules. ISTAC Rules has fast track arbitration rules for small claims (under TRY300,000)

ISTAC

- Key provisions of the ISTAC Rules include:
  - Seat – Istanbul by default, unless the parties agree otherwise
  - ToR – drawn up by the tribunal and signed by parties at the outset of proceedings
  - Advance on Costs – based on the value of the dispute, paid at early stage to cover the fees/expenses of the tribunal /ISTAC
  - Time limit – Tribunal must render final award within 6 months, unless parties agree otherwise or Board grants an extension
  - Emergency Arbitrator rules – provisional appointment of emergency arbitrator to grant interim measures pre-constitution
  - Fast Track Arbitration rules – apply to claims below TRY300,000, sole arbitrator must render final award within 3 months from receipt of the file and within 1 month from the last statement or last hearing, whichever occurs later
  - Impact of regional political events – ISTAC has enormous potential and high quality rules. However, parties will also need to be convinced that the judiciary have the necessary freedom from political interference in their supervisory jurisdiction

Other new arbitration centres

- Mumbai Centre for International Arbitration (“MCIA”)
- Saudi Centre for Commercial Arbitration (“SCCA”)
- Lagos Chamber of Commerce International Arbitration Centre
- Nairobi Centre for International Arbitration (“NCIA”)
- Abu Dhabi Commercial Conciliation and Arbitration Centre (“ADCCAC”)

- Gurgaon (New Delhi) – new International Arbitration Centre approved in January 2017 as part of a new ‘Tower of Justice’ judicial complex. Not yet open

MCIA

Mumbai Centre for International Arbitration ("MCIA")

- Rules in force 15 January 2017
- Default seat is Mumbai (Rule 23)
- Time limit: final award within 12 months
- ToR: drawn up by Tribunal, communicated to parties (Rule 21)
- Advance on costs: 50/50, based on provisional estimates made by Registrar
- Expedited Procedure: Within 6 months. Available where either: (1) The amount in dispute at the time of application does not exceed the equivalent amount of INR 10 crore (INR 100,000,000), representing the aggregate of the claim, counterclaim and any set-off defence; or, (2) The parties so agree in writing. Rules provide a model clause.
- Emergency arbitrator rules: must submit statement explaining emergency/urgency. Arbitrator will be appointed in one day.

- Also note the substantial changes made to the Indian arbitration framework by the Arbitration and Conciliation (Amendment) Act 2015

SCCA

Saudi Centre for Commercial Arbitration ("SCCA")

- Rules in force: effective in May 2016
- Key provisions include:
  - Advance on Costs. Fees fixed by administrator, who allocates them among the parties. (Rule 36(2)
  - Time Limit: award made within 60 days of hearing
  - Emergency Arbitrator Rules: Party must give written notice. Administrator shall appoint Arbitrator within one business day.
  - No specific expedited procedural rules, but the Rules instruct the Arbitrator to conduct proceedings expeditiously.

LCCIAC

Lagos Chamber of Commerce International Arbitration Centre

- Rules in force: promulgated in 2015
- Key provisions include:
  - Seat: determined by parties or Tribunal. If determined by Tribunal, it shall be Lagos, subject to extenuating circumstances.
  - Advance on Costs: Tribunal may request that parties deposit an amount as advance on costs. Tribunal shall fix costs.
  - Emergency Arbitrator Rules: Annex VI. Shall be appointed "normally within two days" of receipt of application

NCIA

Nairobi Centre for International Arbitration ("NCIA")

- Rules in force: 24 December 2015
- Key provisions include:
  - Seat: Nairobi unless otherwise agreed
  - Advance on Costs: determined by Tribunal as it thinks appropriate
  - Time Limit: award within three months close of hearing.
  - Emergency Arbitrator Rules: Appointed within 2 days of application.

ADCCAC

Abu Dhabi Commercial Conciliation and Arbitration Centre ("ADCCAC")

- Rules in force: 1 October 2013
- Key provisions include:
  - Seat: Abu Dhabi unless otherwise agreed
  - Time Limit: within six months of receiving the file
  - No specific provisions on Emergency Arbitrators or Fast Track Arbitration Rules

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PART 3:

Key ICSID cases (last 12 months)

Key ICSID cases

- Jurisdiction/admissibility issues

  A. Meaning of “investor” – Case **(1)**

  B. Meaning of “Investment” – Cases **(1)-(3)**

  D. Corruption – Case **(1)**

  F. Document forgery/admissibility – Case **(6)**

  G. Limitation period – Cases **(7)-(8)**

Key ICSID cases

- Substantive law issues

  E. Disregard of contractual commitments as a violation of FET – Case **(18)**

  I. Scope of umbrella clause protection – Case **(18)**

- Annulment issues – Cases (19)-(20)

Jurisdiction/admissibility issues – A. meaning of "investor"

- **(1)** *Kim v Uzbekistan* (ICSID Case No.ARB/13/6) (Decision on Jurisdiction, 8 March 2017)
  - Uzbekistan argued that the claimants were not "investors" for the purposes of the Kazakhstan-Uzbekistan BIT because "investor" denoted "active" rather than "passive" investment
  - Tribunal (comprising Professor David D. Caron, President; L. Yves Fortier QC; Toby Landau QC) held:
    - The BIT did not contain any such distinction between "active" and "passive" investors as Uzbekistan contended
    - The tribunal rejected objections based on the claimants' status as "investors" (as well as related objections as to their nationality)

Jurisdiction/admissibility issues – B. meaning of "investment"

- **(3)** *Blue Bank v Venezuela* (ICSID Case No.ARB/12/20) (Award, 26 April 2017)
  - Issues arose as to whether Blue Bank had made an "investment"
  - Tribunal (comprising Christer Soderlund, President; George Bermann; Loretta Malintoppi) held:
    - Blue Bank brought its claim as a trustee on behalf of a Qatar Trust, and not on its own behalf
    - Blue Bank was not the owner of the purported investment
    - The Qatar Trust itself lacked personality and was not a company
    - Blue Bank could not be viewed as the beneficial owner and had not made an "investment" under the BIT
    - Further, Blue Bank did not even have effective control of the management of the Qatar Trust (which lay with the beneficiary)

Jurisdiction/admissibility issues – D. Corruption

- **(1)** *Kim v Uzbekistan* (ICSID Case No.ARB/13/6) (Decision on Jurisdiction, 8 March 2017)
  - Uzbekistan argued that the claimants had committed corruption, including through an US$8 million payment to the daughter of the then-President of Uzbekistan
  - Tribunal held:
    - On the available evidence, it had not been shown that the payments were violations of the Uzbek Criminal Code or international public policy
    - Jurisdictional objections relating to corruption were dismissed

Jurisdiction/admissibility issues – F. document forgery/admissibility

- **(6)** *Churchill Mining v Indonesia* (ICSID Case No.ARB/12/40 and 12/14) (Award, 6 December 2016)
  - Tribunal (comprising Gabrielle Kaufman-Kohler, President; Michael Hwang; Albert Jan van den Berg) concluded that 34 documents (30 of which were submitted by the claimants) were forged, including mining licences which were at the heart of the claim
  - (para. 502) “deliberate closing of eyes to evidence of serious misconduct or crime, or an unreasonable failure to perceive such evidence” by an investor could lead to their claim being inadmissible
  - In the circumstances, claimants had failed to act with reasonable diligence
  - Claims were rendered inadmissible by the fraud

Jurisdiction/admissibility issues – G. limitation period

- **(8)** *Ansung Housing Co Ltd v China* (ICSID Case No.ARB/14/25) (Award, 9 March 2017)
  - South Korean investor brought expropriation proceedings against China
  - China argued that the arbitration was commenced more than 3 years after the claimant had first acquired knowledge that it had incurred loss or damage
  - The claim was time-barred under the applicable BIT and thus was "manifestly without merit" for the purposes of Article 41(5) ICSID Convention (early dismissal of claims)
  - Tribunal (comprising Lucy Reed, President; Michael C. Pryles; Albert Jan van den Berg) upheld China's objections, dismissed the claim and awarded China its share of the direct costs of the arbitration proceedings plus 75% of its legal fees and expenses

Substantive law issues – E. Disregard of contractual commitments as a violation of FET

- **(18)** *Garanti Koza v Turkmenistan* (ICSID Case No.ARB/11/20) (Award, 19 December 2016)
  - Contract provided for specific requirements as regards invoicing
  - Multiple state agencies insisted that the claimant's invoices be re-submitted in conformity with alleged local invoicing requirements
  - Tribunal (comprising John Townsend, President; George Constantine Lambrou; Laurence Boisson de Chazournes) held:
    - There was an "inconsistency of behaviour" between different State organs as regards contractual obligations – this amounted to a FET violation
    - The insistence on a different invoicing requirement had put the investor in a position "so fundamentally unfair as to amount by itself to a denial of fair and equitable treatment" (para. 383)

Substantive law issues – I. Scope of umbrella clause protection

- **(18)** *Garanti Koza v Turkmenistan* (ICSID Case No.ARB/11/20) (Award, 19 December 2016)
  - Claimant contracted with a State-Owned Enterprise to construct highway bridges
  - Claimant, relying on umbrella clause, claimed failure to make payment against contractually-compliant invoices
  - Tribunal held:
    - To read the umbrella clause as raising a purely contractual breach to the level of an internationally wrongful act because the respondent was a State organ would be too broad
    - The correct interpretation was that the umbrella clause covered breaches of a contractual obligation "especially where the immediate cause of the breach is an action by an organ of the state other than the agency that is the party to the agreement" (para. 330)
    - Multiple state agencies other than the one that was a party to the contract had insisted invoices be resubmitted in conformity with local invoicing requirements
    - This amounted to a violation of obligations under the umbrella clause

Annulment Decisions

- **(19)** *Venezuela Holdings v Venezuela* (ICSID Case No.ARB/07/27) (Decision on Annulment, 9 March 2017)
  - Arbitral Tribunal held Venezuela liable to pay damages of US$1.6 billion in respect of the nationalisation of two oil projects, having increased applicable royalty rates and income tax
  - Annulment Committee (comprising Sir Frank Berman QC, President; Cecil Abraham; Rolf Knieper) held:
    - Parts of the Award dealing with compensation fell to be annulled
    - The Tribunal had wrongly disregarded a contractual limitation agreed between the parties governing compensation for expropriation (governmental approval was required for certain aspects – with consequent effect on the valuation of the assets)
    - Amount of damages payable was reduced by US$1.4 billion

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PART 4:

Key Arbitration Act 1996 cases (last 12 months)

Key issues considered

B. Stay (Section 9 AA1996) – Cases **(2)-(4)**

D. Abuse of process – Case **(6)**

F. Removal of an arbitrator (Section 24 AA1996) – Cases **(8)-(10)**

G. Orders under Section 44 AA1996 – Cases **(11)-(12)**

H. Registration/enforcement

- Stay of enforcement – Case **(13)**
- Security for costs – Cases **(14)-(16)**
- Public policy challenge – Cases **(17)-(18)**

I. Challenges to awards (Sections 67/68 AA1996) – Cases **(19)-(25)**

J. Impartiality – Cases **(26)-(27)**

K. Breach of confidentiality – Case **(28)**

B. Stay under Section 9 AA1996

- **(3)** *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd* [2017] EWHC 374 (Ch) (28/02/2017) (Marcus Smith J)
  - Allegations of anti-competitive behaviour gave rise to a claim in tort, defendants sought a stay of proceedings and relied on an arbitration clause
  - Court considered that the claim should be stayed under Section 9. It was not relevant that there had been no contractual claim pleaded as the tort claim arose from the same facts and the arbitration clause was sufficiently broad to encompass it

D. Abuse of process

- **(6)** *Michael Wilson & Partners v Sinclair* [2017] EWCA Civ 3 (13/01/2017) (Simon LJ main judgment)
  - Litigation proceedings were stuck out as an abuse of process where the claims had already been determined in an arbitration
  - Court of Appeal allowed an appeal against that decision
  - Although there was nothing to prevent the court from finding abuse of process in those circumstances, it should be cautious about doing so
  - In fact, in the instant case there was no identity of parties in both sets of proceedings (because the defendant to the court proceedings had not consented to be a party to the arbitration)
  - There could therefore be no claim of being vexed twice and therefore no justification for a finding of abuse of process

F. Removal of an arbitrator under Section 24 AA1996

- **(8)** *P v Q* [2017] EWHC 194 (Comm) (09/02/2017) (Popplewell J)
  - Challenge to two party-appointed arbitrators on the grounds that they had delegated their adjudicative functions to the tribunal secretary AND had failed to adequately supervise the Chairman's delegation of functions to the secretary
  - An email from the Chairman (intended for the Secretary but mistakenly sent to the claimant) asked for the Secretary's reaction to an email from the claimant
  - Court held that asking for the Secretary's view was not best practice BUT did not equal failure to properly conduct proceedings. Furthermore, there was no duty for the co-arbitrators to supervise the Chairman

- **(9)** *T v V* [2017] EWHC 565 (Comm) (07/02/2017) (Popplewell J)
  - Arbitrator refused to stay proceedings on the basis that the applicant was too unwell to participate
  - Arbitrator relied on a medical report from the applicant's treating clinician (stating he would be able to visit his solicitors in 1 month's time) in preference to an external report on the applicant's behalf stating he was too unwell to participate
  - Court held that this was insufficient to give rise to real doubts as to impartiality

G. Orders under Section 44 AA1996

- **(12)** *Gerald Metals SA v Timis* [2016] EWHC 2327 (Ch) (21/09/2016) (Leggatt J)
  - LCIA rejected an application for an emergency arbitrator
  - Court held that the test for an "emergency" was whether the relief was needed more urgently than the time that it would take for the expedited formation of a tribunal
  - It was only in cases where the powers of an arbitral tribunal were somehow inadequate that the court could act under Section 44

H. Registration and Enforcement – Security for costs

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- **(14)** *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2017] UKSC 16 (01/03/2017) (Lord Mance main judgment)
  - Ex parte enforcement order adjourned in 2005 (conditional on security) pending outcome of Nigerian challenge to the award
  - Further adjournment in 2008 (further security ordered)
  - Change of circumstances in 2009 = evidence of fraud
  - Consent order records further adjournment
  - Fresh application to enforce in 2012, dismissed BUT Court of Appeal allows appeal pursuant to Section 103(3) AA1996, orders fraud issue to be heard in England (not Nigeria) and further "adjourns" enforcement
  - Was security justified in a Section 103(3) order, rather than a Section 103(5) order?
  - Supreme Court held NO. Security is the price of the adjournment sought by the award debtor. No statutory wording to justify security on a Section 103(3) order

H. Registration and Enforcement – Security for costs

- **(16)** *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd* [2017] EWHC 797 (Comm) (11/04/2017) (Andrew Baker J)
  - Enforcement/set aside challenge adjourned pending resolution of award debtor's challenge to the underlying award at the seat
  - Intransigent defendant resisted an application for an "unless" order compelling compliance with a security order
  - Court ended the adjournment, discharged the security order and gave directions for expeditious prosecution of defendant's set aside challenge

H. Registration and Enforcement – Public policy challenges

- **(17)** *Stati v Kazakhstan* [2017] EWHC 1348 (Comm) (06/06/2017) (Knowles J)
  - Kazakhstan challenged enforcement on the basis that a Swedish award against it was obtained using fraudulent evidence (concerning valuation of an underlying asset)
  - Previous court decisions in Sweden/US had not conclusively determined the fraud challenge
  - It was in the interests of English public policy to examine the allegation before allowing the award to be enforced in the UK
  - Full trial of fraud allegations was ordered

I. “Serious irregularity” challenges under Section 68 AA1996

- **(22)** *Celtic Bioenergy Ltd v Knowles Ltd* [2017] EWHC 472 (TCC) (16/03/2017) (Jefford J)
  - Defendant failed to disclose to tribunal some correspondence on a significant issue as to whether there had been compliance with an arbitration agreement
  - Failure to disclose was deliberate and misleading and had caused substantial injustice (the wrong result)

J. Conflicts of interest / Impartiality

- **(26)** *Aldcroft v International Cotton Association* [2017] EWHC 642 (Comm) (30/03/2017) (David Foxton QC)
  - Was a rule that ICA arbitrators were limited to accepting 3 appointments for the same party each year and having no more than 8 active cases open at any time an unlawful restraint of trade?
  - Court held it was not. The rule served the legitimate objective of addressing concerns about impartiality in arbitration

K. Breach of confidentiality

- **(28)** *Teekay Tankers Ltd v STX Offshore & Shipbuilding Co* [2017] EWHC 253 (Comm) (15/02/2017) (Walker J)
  - Defendant counterclaimed, inter alia, that the claimant had breached arbitral confidentiality by disclosing the arbitral awards (and their reasoning) in the course of Korean and English litigation
  - Court held that there was no liability for breach of confidence – disclosure was in the interests of justice