International Arbitration
Newsletter

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Dentons' International Arbitration group comprises more than 500 lawyers, and is present in all major arbitration centers around the world. Dentons is listed among the top international arbitration groups globally, according to Global Arbitration Review (GAR) and Who's Who Legal. Please visit **Dentons Arbitration** page for more information.

In this issue

Law on Treaties

Angola concludes the process of ratification of the ICSID Convention

Following the signature of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) in July 2022, Angola has proceeded to the deposit of its Instrument of Ratification of the ICSID Convention on 21 September 2022. The Convention entered into force on 21 October this year, in what is considered a relatively quick process of signature and ratification.

Angola has become the 158th Contracting State to the ICSID Convention.

This is much awaited news to foreign investors who consider the ratification of the ICSID Convention, following the earlier ratification of the New York Convention in March 2017, as a sign that Angola is an investment and arbitration friendly country.

While being part of the New York Convention facilitates and promotes the process of recognition of foreign arbitral awards, the ratification of the ICSID Convention is another significant step for the country, which shows that it adheres to the legal framework for the settlement of investment disputes, beyond what is already established in several investment treaties signed by Angola, having now an institutional system for dispute resolution.

As a contracting State to the ICSID Convention, Angola will also assume its responsibilities on the Administrative Council and designate up to four individuals to be part of the Panel of Arbitrators.

This is another important commitment by Angola to improve the position of the country in attracting foreign investment.

Contributed by Itweva Nogueira.

Investor-State Arbitration

United States District Court denies Section 1782 discovery in ICSID proceeding

A U.S. court issued an order holding that discovery under 28 U.S.C. §1782(a) ("Section 1782") does not extend to ICSID arbitrations, answering a question left unaddressed by the United States Supreme Court decision *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (13 June 2022). In *ZF Automotive*, the Supreme Court held that Section 1782 does not apply to private commercial international arbitration or ad hoc tribunals in investor-state arbitration because only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under Section 1782. *ZF Automotive* did not address whether ICSID arbitration panels meet that definition.

On 27 October 2022, New York Eastern District Court Magistrate Judge Robert Levy vacated his prior order permitting Section 1782 discovery, holding that an ICSID tribunal lacked the requisite "governmental authority." *In Re: Alpene Ltd.*, No. 1:21-mc-02547 (E.D.N.Y.). Alpene Ltd. sought discovery from Elizabeth McCaul, a member of the European Central Bank's supervisory board, in connection with Alpene's claim under the China-Malta bilateral investment treaty. McCaul moved to vacate the order.

Magistrate Judge Levy concluded there was "insufficient support for the argument that Malta and China intended to imbue the ICSID arbitration panel with governmental authority" after evaluating five factors that the Supreme Court considered in *ZF Automotive*: whether (1) the applicable treaty reflected governmental intent that an ad hoc arbitration panel exercise governmental authority, (2) the ad hoc panel "function[ed] independently" of and was not affiliated with either state, (3) the panel consisted of individuals chosen by the parties who were unaffiliated with a state government, (4) the panel received any government funding or if parties were responsible for paying fees and costs, and (5) the proceedings were confidential. Judge Levy also found that granting discovery for an ICSID proceeding would not further purposes of comity.

Contributed by Kristen Weil.

International Commercial Arbitration

Whether the amendment of the Arbitration Act will remodel the arbitration landscape of mainland China?

In the last decade, China has strived to become more and more arbitration-friendly. This can be seen from the judicial practice that only in rare cases can an international arbitral award be denied recognition and enforcement or a foreign-related domestic arbitral award be set aside. In contrast, the Arbitration Act is quite outdated. It was enacted in 1994 when arbitration was viewed as a quasi-judicial mechanism of dispute resolution in China. The Act has remained almost unchanged in nearly three decades. In July 2021, the draft amendment of the Arbitration Act was published to solicit public opinion.

The draft has 19 new articles. If these amendments are adopted, the Arbitration Act will become more aligned with prevailing arbitration legislation worldwide.

The suggested amendments include the following: no mandatory panel of arbitrators; the choice of the presiding arbitrator firstly being that of the party-appointed arbitrators; broader application of the doctrine of separability of the arbitration agreement; explicit provision for the parties' autonomy in selecting arbitral procedures; adoption of emergency arbitrators; and ad hoc arbitration being allowed for foreign-related domestic disputes.

If these revisions are adopted, it is likely that the landscape of arbitration practice in mainland China will be more open. International arbitration professionals will also enjoy more opportunities to be involved in arbitration in China.

Contributed by Raymond Zhu and Allison Zhao.

Law on Treaties

European Union countries indicate their exodus from the Energy Charter Treaty

France, Spain, The Netherlands, Slovenia, Germany, Poland and Luxembourg have all recently announced their intention to withdraw from the Energy Charter Treaty ("ECT"), citing insufficient alignment with the Paris Climate Accords.

To withdraw from the ECT, a State must notify the treaty depositary Portugal (ECT Art. 47(1)). Once Portugal receives the notification, the withdrawal will become effective within one year. To date, none of the seven States has given its notice of withdrawal.

Under the ECT, the consequences of withdrawal are straightforward. ECT Art. 47(3) grants a 20-year sunset period for any investment made in the withdrawing State prior to the effective withdrawal date. For example, if a State notifies its withdrawal on 1 January 2023, any investment made before 1 January 2024 will still receive treaty protection until 1 January 2044.

However, proposed reforms to the ECT may reduce the time horizon for protection of certain investments. Some States are currently discussing several modifications to the ECT. On 24 June 2022, all parties to the ECT adopted an agreement in principle on its modernisation. The agreement so far has not been made public but was due to be discussed among the States at the Energy Charter Conference in Mongolia on 22 November. The ECT Secretariat has recently published a comparative chart indicating the agreement would reduce treaty protections for non-renewable investments made in the EU before 15 August 2023. Instead of a 20-year sunset period, such investments would merely be protected until 15 August 2033, *i.e.*, for 10 years. The outcome of the modification proposals of the ECT remains to be seen. Any modification would have to be ratified by States parties under ECT Art. 42(4). Complex legal issues will likely arise, in particular, if the amendment proposal should not be ratified by all States parties.

Contributed by Heiko Heppner, Daniel Wisehart, and Thomas Davis.

Third-party Funding

The European Parliament proposes to regulate third-party funding

On 13 September 2022, the EU Parliament proposed a directive to regulate the landscape of so-called "third-party litigation and arbitration funding" ("TPLF"). Such funding concerns the mechanism through which a third party unrelated to the dispute commits to financing a party's procedural costs of the proceedings, in return for a percentage of any damages eventually received from the counterparty.

The EU Parliament's proposal addresses two primary concerns that have not yet been dealt with at the European level: (i) improving access to justice by making it more affordable; and (ii) establishing common EU standards in order for Member States to exercise effective supervision and to adequately ensure that the parties' interests are protected.

With this aim in mind, the proposal plans to address the following key issues: (i) prohibit funders from influencing the course of the arbitration or litigation; (ii) oblige the parties to disclose funding agreements to courts and arbitral tribunals; (iii) prescribe a minimum content of the financing agreements, especially for compensation, so as to protect the funded parties; and (iv) provide for Member States a system of authorisation of the funders' activities and control over the funders' activity and liquidity.

The proposal could represent a turning point in the European litigation and arbitration landscape.

Cross-border litigation and arbitration proceedings, which are increasingly common in commercial practice, tend to be burdensome. At times, the financial burden connected to such proceedings may limit access to a justice. Clear regulation of the TPLF at a European level could remove obstacles to access to justice and put to rest certain concerns raised in respect to this growing industry.

A point that requires particular attention is recognising and protecting the parties' right to select their arbitration counsel. The proposal considers that if the third-party funders were allowed to influence the selection of the legal counsel, not only would this potentially limit competition in the legal market, but it may also reduce the independence that lawyers must retain at all times.

Contributed by Roberto Lipari.

Investor-State Arbitration

Case report: ICSID Award, BBVA v. Bolivia

On 12 July 2022, an ICSID tribunal rendered its award in the *Banco Bilbao Vizcaya Argentaria S.A. (BBVA) v. Bolivia* case.

This case was based on the "unjustified delay" in the nationalisation process of the pension fund system in Bolivia. Before 2009, this pension fund system was partially administered by BBVA. In 2009, Bolivia enacted a new Constitution whereby the pension fund system should be administered by a State entity (Gestora Pública).

Unlike most disputes brought before international investment tribunals, this case is not based on Bolivia's decision to nationalise the pension fund; it is based on the process and measures undertaken by the Bolivian government to make effective said nationalisation, as well as the extent to which they were contrary to the provisions of Art. 3 (1)-(2) of the bilateral investment treaty between Bolivia and Spain ("BIT").

In the award, the arbitral tribunal considered that, in delaying the implementation of the nationalisation process, Bolivia has breached its obligation to grant BBVA a fair and equitable treatment (Art. 3(1) of the BIT), as well as its obligation to not adopt arbitration measures against the investor (Art. 3(2) of the BIT). The same conclusion was reached regarding Bolivia´s decision to make BBVA responsible for the amounts owed to the pension fund by employers.

In addition, the arbitral tribunal concluded that Bolivia has breached Art. 3(1) of the BIT during the migration of information from BBVA to the State entity. According to the award, Bolivia submitted BBVA to a roller coaster effect by constantly changing the rules that governed this migration process.

Based on these conclusions, the award orders Bolivia to compensate BBVA for damages in the amount of USD 105 million. However, Bolivia has announced its intention to request annulment of the award.

Contributed by Zoya Galarza and Nina Leguizamón.

International Commercial Arbitration

The Supreme Court of Canada affirms primacy of parties' arbitration agreement, creates narrow exception for insolvencies

In a recent decision, *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, the Supreme Court of Canada ("SCC") found that an otherwise valid arbitration agreement may, in limited circumstances, be inoperative or incapable of being performed because it would compromise the integrity of court-ordered receivership proceedings as in the case at bar.

The case garnered national attention as it grappled with whether an arbitration agreement may effectively be overridden in insolvency proceedings. While the SCC ultimately held that the receiver could not disclaim a valid arbitration agreement, it upheld the trial decision that the receiver could nonetheless prosecute its claims in court. SCC's analysis focused on the meaning of "inoperative" under the Model Law. It will be recalled that a stay in favour of arbitration will generally be ordered in the face of a valid arbitration agreement unless, among certain other exceptions, it is "inoperative".

According to the SCC, an arbitration agreement may be inoperative when enforcing it would compromise the insolvency proceedings. The SCC further held that when considering the issue, the court should consider factors such as the effect of arbitration on the insolvency proceedings, which are intended to minimise economic prejudice to creditors; the relative prejudice to the parties and the debtor's stakeholders; the urgency of the dispute; the effect of a stay of proceedings arising from the insolvency proceedings; and any other factors the court considers material in the circumstances. On the facts of this case, the SCC concluded that the arbitration process consisting of multiple overlapping arbitrations would have compromised the orderly and efficient resolution of the court-ordered receivership. The arbitration clause was therefore inoperative.

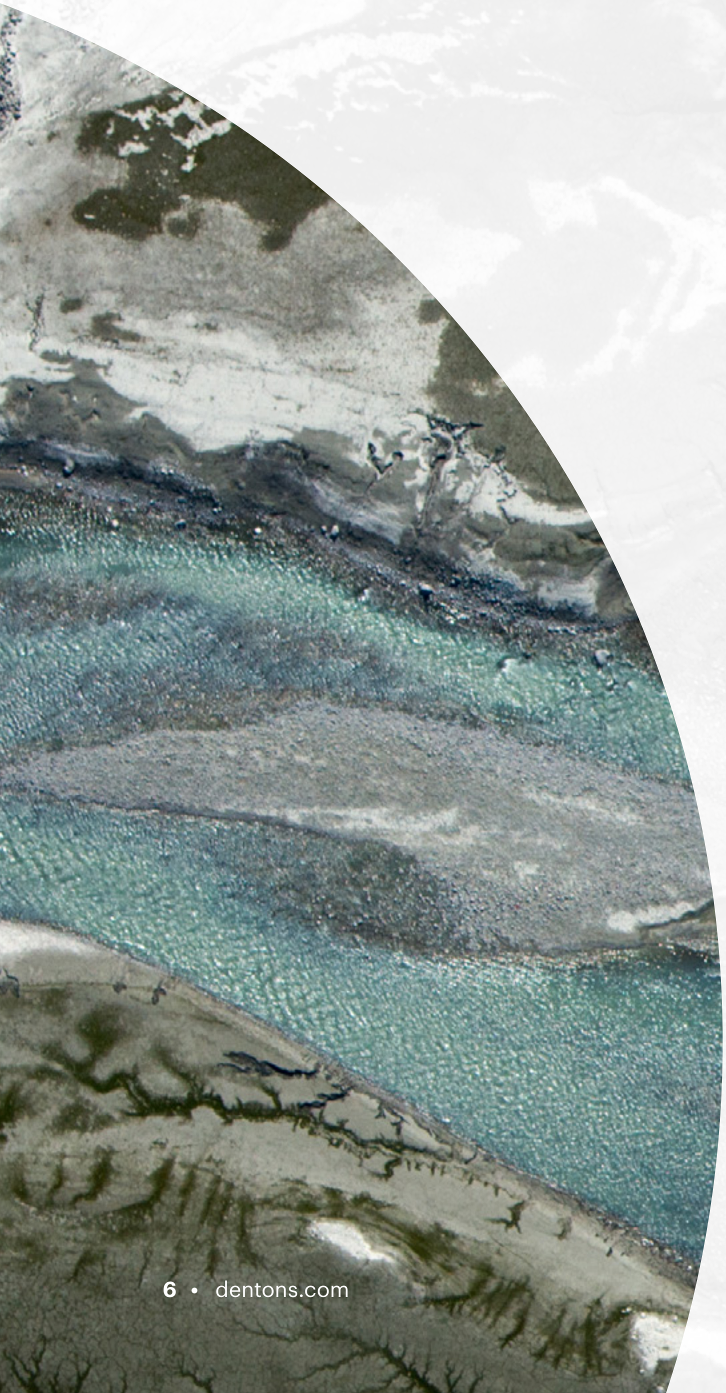
The SCC emphasised that the result was highly context-specific and only the unique facts of the case justified departing from the general rule that in Canada arbitration agreements are to be enforced and that, typically, under the competence-competence principle any questions about enforceability are to be decided by the tribunal.

Contributed by Mike Schafler and Ekin Cinar.

Energy

Stabilisation clauses: seeking stability in unstable times

Stabilisation clauses are frequently included in long-term energy contracts between investors and States (or State-owned entities), particularly those that involve large upfront capital expenditure such as production sharing and concession agreements. They are designed to stabilise the legal and economic framework in which an investment is made, so that it is not adversely impacted by new laws and regulations.



However, there is an obvious tension between this stabilisation for the investor and the State's sovereign right to legislate. To address this, the most common stabilisation clauses do not prevent the State from passing new laws. Instead, they provide that those laws will not adversely affect the investor's economic return and, if they do, that such impact will be remedied.

Although stabilisation clauses can be short and often drafted in seemingly straightforward terms, their application may be more complicated. For example, how to determine if a given law does in fact adversely affect an investor (consider a new law which both increases tax but also incentivises investment). And, if there is found to be an adverse effect, how to remedy this in the contract; often such clauses require the parties to agree the relevant modifications, but this is likely to result in disputes. Usually those disputes are referred to arbitration or, occasionally (and perhaps controversially), expert determination.

Case law suggests that stabilisation clauses are generally upheld by courts and tribunals (see for example *Société d'Exploitation des Mines d'Or de Sadiola S.A. v. Republic of Mali*, ICSID Case No. ARB/01/5). However, parties are advised to ensure their drafting is clear and that there is a well-defined process to resolve any disputes. Further, to minimise the disruption that disputes may cause, parties should consider carefully their scope. Although investors will want them to be widely drawn, our experience is that Governments are increasingly reluctant to provide blanket stabilisation, particularly as they face the challenges of legislating to address climate change.

Contributed by James Langley.

What’s happening at Dentons

A round up of this year’s GAR Live events

This year Dentons participated in 5 GAR Live events in Beijing, Hong Kong, London, New York, and Singapore. GAR LIVE hosts thought leaders from the world of arbitration including, lawyers, in-house counsel, and arbitrators, to discuss, debate and analyse the latest major developments in arbitration across the world. Many of our members joined in and led the conversation on topics such as “the drive for greater efficiency and the impact of third party funding” by Rachel Howie, “US, UK and EU Sanctions” by Raymond Zhu, “M&A and private equity disputes: case studies and key developments” by Herman Jeremiah , and ”Sanctions and their impact on the rule of law” by Robert Rhoda.

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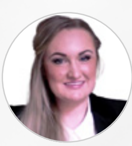

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