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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

Repatriation of artefacts

Several States recently confirmed their commitment to return certain cultural objects seized during the colonial era.

Under the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, requests for recovery of cultural objects are addressed through diplomatic offices. The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects allows for individual claims to be brought before a court of the State where the cultural object is located; the parties may also agree to submit the dispute to any other court or arbitration. However, these Conventions do not apply retroactively.

In the absence of an applicable international convention, States address the repatriation requests on a case-by-case basis and introduce ad hoc mechanisms in their domestic legislation. A recent example is the repatriation by France to the Republic of Benin of 26 Benin bronzes. To return these artefacts, on 24 December 2020, the French Parliament adopted a law after three years of consultations which applied specifically to the artefacts listed in its annex and provided for a derogation from the general principle of non-alienability of public art collections. By order of the French Ministry of Culture these artefacts were removed from the inventory of the Museum Quai Branly where they were previously exhibited. The transfer of property was recorded in a bilateral agreement between France and Benin signed on 9 November 2021. Since February 2022, the 26 artefacts are exhibited in Cotonou. Numerous other objects remain in Europe.

Dentons successfully assisted another State to return an object of that State's cultural heritage.

Contributed by David Syed and Anna Crevon.

International Commercial Arbitration

Outcome related fee structures – 'no win no fee' in Hong Kong and Singapore

Conditional fee arrangements (CFAs) and damages based agreements (DBAs) are widely used tools in some jurisdictions for high value international arbitration and litigation. A CFA is where a lawyer agrees with their client to be paid a success fee (sometimes called 'no win no fee' or 'no win low fee') only in the event of a successful outcome. A DBA (also known as a contingency fee) is where the lawyer receives payment only if the client makes a recovery (usually damages) and where the payment is calculated as a percentage of that recovery.

CFAs and DBAs are widely adopted in jurisdictions such as the US, England and China and are used, together with third party funding, to share the financial risk of litigation and arbitration and to take legal spend off the company's balance sheet.

Despite the recent introduction of third party funding in Hong Kong and Singapore (having previously been prohibited), lawyers in these jurisdictions have, however, still been prevented by law and regulation from offering CFAs or DBAs.

This is set to change with both jurisdictions passing legislation, which means Singapore now allowing CFAs for arbitration and Hong Kong allowing both DBAs and CFAs.

Contributed by Robert Rhoda and Lawrence Teh.

Shipping

New BIMCO ADR clause

BIMCO is one of the largest international shipping associations, one of whose main functions is to produce standard form maritime contracts for industry use. Within these standard contracts are standard clauses on dispute resolution that users can select when they adapt contractual forms for use in transactions. BIMCO's new standard Mediation/Alternative Dispute Resolution Clause 2021 is an all-encompassing ADR clause that makes reference not only to traditional mediation but also other forms of ADR such as early intervention and early neutral evaluation. Further, either party may invite the other to participate in the selected ADR procedure prior to or after the commencement of any arbitration or litigation proceedings. This is in contrast to the Mediation Clause 2020 where commencement of proceedings was a pre-condition to requesting ADR. These amendments seek to facilitate the amicable resolution of disputes between commercial parties at an early stage and save valuable time and costs by avoiding arbitration and court proceedings.

Contributed by Jenwei Loh and Kavitha Ganesan.

Investor-State Dispute Settlement

ICSID approves amendment of its Rules and Regulations

After 5 years of consultation, on 21 March 2022, ICSID Member States approved the fourth amendment to the ICSID set of rules governing investment disputes. The amended rules will enter into force on 1 July 2022.

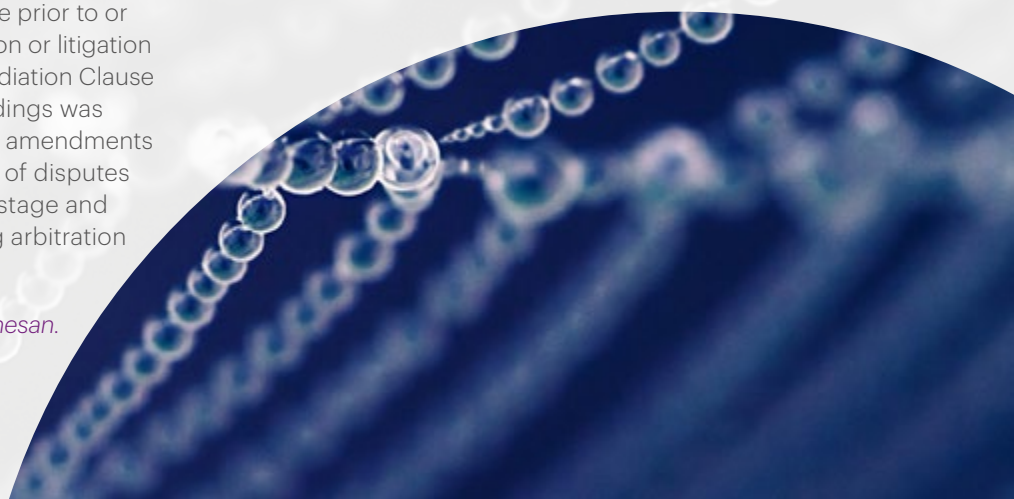
Among the enhancements, the updated ICSID Institution Rules address Member States' difficulty to assess the relationship between the investment and the investor. To preempt jurisdictional objections on this basis, the new rules provide that the description of the investment in the Request of Arbitration must include a statement on its ownership and control (IR 2(2)(a)).

The revised ICSID Arbitration Rules aim to render ICSID arbitration more expeditious and efficient. For instance, to avoid the disrupting effect of disqualification challenges to arbitrators, the revised rules provide a tight schedule during this phase and give the parties the possibility not to suspend the arbitration (AR 22-23). At last, all filing of documents is now officially electronic (AR 4).

Another goal of the revised ICSID Arbitration Rules is to strengthen transparency. The new rules require to disclose third-party funding and to identify the persons or entities controlling the funder (AR 14(1)). The rule institutionalizes the participation in the dispute of third parties, who under the terms of the funding agreement may have a significant influence over one of the parties and may, ultimately, become the sole beneficiaries of the award. The security for costs rule was also amended to cover third-party funding: while it is still at the discretion of the tribunal to order security for costs, the tribunal must now consider the existence of third-party funding (AR 53(4)).

Similarly, to follow the current trend in many Member States where domestic legislation compels public access to State records, the amended Arbitration Rules facilitate the publication of ICSID awards and decisions. Albeit consent of both parties is still required, such consent is now presumed if there is no written objection within 60 days of the dispatch of the award (AR 62).

Contributed by Francisco Garcia-Elorrio.



Institutional News

New DIAC rules

The Dubai International Arbitration Centre (DIAC) has issued a new set of Rules for arbitral proceedings, which came into force on 21 March 2022 (the 2022 Rules) and will replace the DIAC Rules 2007.

DIAC will now be the only arbitration centre in Dubai and is replacing the DIFC-LCIA Arbitration Centre and the less-used Emirates Maritime Arbitration Centre. The LCIA will administer all existing DIFC-LCIA cases commenced and registered before 20 March 2022 from London, while all disputes commenced after 21 March 2022 which arise under an agreement with a DIFC-LCIA arbitration clause will now be administered by DIAC under the 2022 Rules. The default seat has been changed from Dubai to the DIFC.

Among the key additions to the 2022 rules are provisions for consolidation and joinder, an expedited procedure for disputes under AED1million (USD272,250), express provisions for the granting of interim relief and the appointment of an emergency arbitrator. The 2022 Rules clarify that tribunals have the power to award legal costs, and expressly recognize the use of third-party funding subject to requirements to disclose details of the funding and whether this extends to adverse costs liability.

The 2022 Rules also anticipate the possibility that the Arbitration Court may, at the request of the Tribunal, notify relevant professional bodies of any actions considered to be misconduct or an attempt to unfairly obstruct the arbitration process.

Contributed by Dean Ryburn and Patrick Hassan.

Energy and Mining

Two Disputes Arise from The Cancellation of the Keystone XL Pipeline

In November of 2021, Canadian pipeline operator TC Energy Corp. ("TCE") submitted a Notice of Intent to commence arbitration against the United States as a legacy claim under the North American Free Trade Agreement 1994 ("NAFTA"), as permitted by the Agreement between the United States, the United Mexican States, and Canada ("USMCA"), which replaced NAFTA. TCE seeks in excess of $15 billion for damages resulting from the US revocation of the cross-border permit for the Keystone XL Pipeline. On July 2, 2021, TCE submitted its Request for Arbitration, formally initiating its claim.

The case is still at its early stages. TCE has appointed Henri Alvarez as its arbitrator, and the US appointed John R. Crook. Notably, the US has never lost a NAFTA claim.

The Keystone XL Pipeline was first proposed in 2008. The project envisioned carrying 830,000 barrels per day of crude oil from Alberta, Canada to the US. TCE (formerly TransCanada Corporation) had previously launched a Keystone XL related investment claim when the Obama Administration rejected the project. That claim was withdrawn when the Trump Administration approved a cross-border permit in 2017.

More recently, in February 2022, the Alberta government, through the Alberta Petroleum Marketing Commission, filed a Notice of Intent to Submit a Claim to Arbitration against the US, based on the termination of the Keystone XL Project. Alberta's Notice of Intent references a potential NAFTA legacy claim for $1.3 billion.

Contributed by John Hay and Mandy Guo.

What's happening at Dentons

Dentons recognized as one of the world's top 20 arbitration firms

Global Arbitration Review has once again ranked Dentons among the top 20 international arbitration law firms in the world in its annual GAR30 ranking. Dentons has gained significant ground this year moving up 16 places from last year. GAR selects the top firms using criteria that measure the size and importance of matters handled by firms and the standing of the firm's lawyers among the world´s leading international arbitration practitioners.

Please click here to access the full press release.

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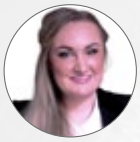

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