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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.

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International Commercial Arbitration

Arbitration in sport: a big deal

Of all the sports played globally, football (or soccer depending on where you are) remains the biggest business in sport. The revenue it attracts from global television rights and sponsorship compare to most business sectors. Transactions, both for players and for clubs, are high value in any market. The recent sale of Chelsea FC to Todd Boehly and Clearlake Capital was valued at £4.25 billion.

Sport has long used arbitration to resolve its disputes. It provides a specialist tribunal and a flexible process. Football is no different. The English Premier League Rules have a bespoke arbitration process which commits all member clubs to arbitration. With the increasing value in the market, these disputes are often high value and extremely complex. The cases are also contributing to the jurisprudence of arbitration. One recent example is the challenge by Manchester City FC to an arbitration commenced by the English Premier League on grounds of jurisdiction and apparent bias.

The arguments regarding apparent bias were especially interesting in the context of standing panels: Manchester City argued that the panel of arbitrators from which the Tribunal was chosen was selected by the Premier League, was reliant on the Premier League to reconfirm the arbitrators' re-appointments at the end of their terms, and who were well remunerated for their appointments. The English court rejected these arguments and concluded that the fair minded and impartial observer would not consider that there was any real possibility of bias.

Dentons acted for Newcastle United in its arbitration against the English Premier League in relation to the sale of the club to a consortium including the Public Investment Fund of Saudi Arabia.

Contributed by Dan Bodle.

Investor-State Arbitration

SCC tribunal rules that intra-EU claims under the Energy Charter Treaty (ECT) may not be arbitrated

The ECT provides a useful basis on which investors may claim protection, and enforce that protection through arbitration, for investments in the energy sector. It has been signed by the EU and its member states and over 20 other countries. Famously, it was the basis of the claim by the former shareholders of Yukos against Russia which led to the largest arbitration award in history.

Over the years, a number of ECT arbitration claims have been made against EU member states, for example against Spain and the Czech Republic in relation to changes in the regulatory regime relating to solar energy. Some of the investors bringing those claims have been from other EU countries.

Recent decisions of the Court of Justice of the European Union (CJEU), in particular in Moldova v Komstroy (2 September 2021), have made clear that, as a matter of EU law, such claims by EU-based claimants against other EU countries (i.e. intra-EU claims) may no longer be brought, since they impair the uniform application of EU law.

Despite these decisions, international tribunals have continued to accept jurisdiction over such intra-EU claims, taking the view that they are subject to international law and not EU law. However, on 16 June 2022, in the case of Green Power Partners K/S and another v Kingdom of Spain, a tribunal hearing an intra-EU claim under the ECT held for the first time that it lacked jurisdiction because of the position under EU law.

At first sight this would appear to be bad news for EU investors thinking of bringing such claims. However, the decision in Green Power depended on the tribunal being constituted under Stockholm Chamber of Commerce rules and hearing the dispute in Stockholm (the tribunal therefore felt bound to apply EU law, which is part of Swedish law). Claimants in ECT arbitrations generally have the option of bringing a claim under the rules of the International Centre for the Settlement of Investment Disputes (ICSID). ICSID arbitrations exist outside the framework any domestic law, so the Green Power reasoning would not apply to them.

Contributed by Dominic Pellew. Dominic was the chair of the tribunal in the arbitration which was the subject matter of the Komstroy decision.

International Commercial Arbitration

Tiered arbitration agreements escalated to HK Court of Appeal

Conditions precedent, typically 'escalation clauses' requiring parties to negotiate before commencing proceedings, feature often in arbitration agreements. There has been debate as to whether failure to comply with a condition precedent means the tribunal lacks jurisdiction to determine the dispute or the question of compliance goes to the admissibility of the claim.

In the recent case of C v D (HKCA 729), the Court of Appeal in Hong Kong drew a distinction between jurisdiction and admissibility under Hong Kong's Arbitration Ordinance and the Model Law and held that the question of whether a pre-arbitration procedural requirement has been fulfilled is one of admissibility and gives the tribunal freedom to deal with the issue as it sees fit.

C v D is consistent with other first instance decisions from England and Singapore but is the highest authority on the subject from a Model Law jurisdiction. It is likely therefore to be persuasive in many jurisdictions.

The decision makes it clear that, unless conditions precedent contain a clear provision otherwise, the tribunal will retain jurisdiction to determine the dispute despite non-compliance. It does, however, remain important to have regard to conditions precedent in arbitration clauses because the tribunal may still decide to stay or dismiss proceedings when faced with failure to follow them.

Contributed by Jean Lau.

International Commercial Arbitration

United States Supreme Court ends debate on discovery in aid of foreign international arbitration proceedings

The United States Supreme Court answered, in a pair of consolidated cases, the question of whether 28 U.S.C. §1782(a) (commonly referred to as "Section 1782") makes discovery available in support of foreign private international arbitration proceedings. In ZF Automotive US, Inc. v Luxshare, Ltd., 142 S. Ct. 2078, 2022 WL 2111355 (13 June 2022), the Supreme Court unanimously held that Section 1782 does not apply to private commercial international arbitration or ad hoc tribunals in investor-state arbitration, clarifying that only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under Section 1782.

The Supreme Court explained that a "'foreign tribunal' is one that exercises governmental authority conferred by a single nation, and an 'international tribunal' is one that exercises governmental authority conferred by two or more nations. Private adjudicatory bodies do not fall within § 1782." Id. at 2089. In the case of ad hoc investment treaty tribunals, even though a sovereign state is present and a treaty exists, the contracting nations do not intend to imbue the tribunal with governmental authority. (While the Supreme Court did not expressly address arbitration arising under ICSID, it seems likely that such tribunals would likewise be excluded unless they exercise "governmental authority.") In other words, where an arbitration involves private parties acting without governmental involvement in the constitution of an arbitral tribunal, Section 1782 will not apply. The Supreme Court found that principles of comity encourage federal courts to assist foreign governmental bodies, but do not apply to help private parties decide their private disputes internationally, and that making discovery available in private international arbitration proceedings would be in significant tension with the Federal Arbitration Act ("FAA"), which permits much more limited discovery than Section 1782.

Contributed by Kristen Weil.

Enforcement

French Supreme Court applies significant CJEU ruling on EU sanctions against Iran

On 29 April 2022, the full chamber of the French Supreme Court (Court), applying a recent ruling of the Court of Justice of the European Union (CJEU), upheld that the freezing of assets under EU economic sanctions precluded preventive attachment of those assets without prior authorisation from the competent national authority (Cass. ass. plén. 29 April 2022, 18-18.542 18-21.814). Since the judgement-creditors, two U.S. companies, could not have obtained conservatory measures such as preventive attachments on the Iranian entity's assets in France, the Court held the limitation period on claims to interest was suspended when the sanctions were in force.

The CJEU ruling responded to a query from the same Court regarding sanctions against Iran implemented by Regulation (EC) No 423/2007 of 19 April 2007 and subsequent regulations ('Regulations') that froze the assets of several Iranian entities.

The question was whether the Regulations – which prevented any enforcement measures that transferred ownership of the frozen assets – also applied to conservatory measures such as preventive attachments that did not transfer property but established the right to be paid on a priority basis.

In its judgment of 11 November 2021 (Case C-340/20, Bank Sepah v Overseas Financial Limited and Oaktree Finance Limited), the CJEU clarified that the Regulations also precluded the implementation of conservatory measures in respect of the frozen assets without prior authorisation from the competent national authority in each EU jurisdiction as indicated in Annex III of Regulation 423/2007 (in France, the Direction Générale du Trésor).

The French decision is the first application of the CJEU's ruling. However, it will likely impact other creditors seeking recourse against debtors subject to sanctions under these Regulations holding assets in EU Member States.

Contributed by Asha Rajan.

Institutional News

ICCA's Right to a Physical Hearing Project

The Covid-19 pandemic prompted a reconsideration of the necessity of an in-person/physical hearing, particularly due to the ubiquity and improvement in remote hearing technology and the option of resolving disputes on a 'documents-only' basis. ICCA's Right to a Physical Hearing Project aims to gather global feedback on the issue, through a survey of 78 New York Convention jurisdictions. Its General Report was issued on 12 May 2022.

The General Report noted that:

a. None of the surveyed jurisdictions had an express right to a physical hearing in their arbitration law, and most regarded such a right to be excluded. However, a handful of jurisdictions believed there was a right to a physical hearing.

b. Most jurisdictions agreed that if the parties decided to hold or not hold a physical hearing, this decision would be binding on the tribunal. However, there were divergent views as to whether a tribunal could override one or both parties' requests for a physical hearing, and whether this may render the award unenforceable.

Parties should therefore be careful not to rush into foregoing a physical hearing in the interests of expedience. It is prudent to obtain and consider legal advice from all relevant jurisdictions in order to ensure that the arbitral award remains enforceable.

The General Report can be accessed on the ICCA website page "Right to a Physical Hearing Project: Release of the General Report". The topic has also been explored by the Global Co-Head of Dentons' International Arbitration Group, Lawrence Teh: see Maxwell Conversations, July 2021; ICCA Webinar, December 2021.

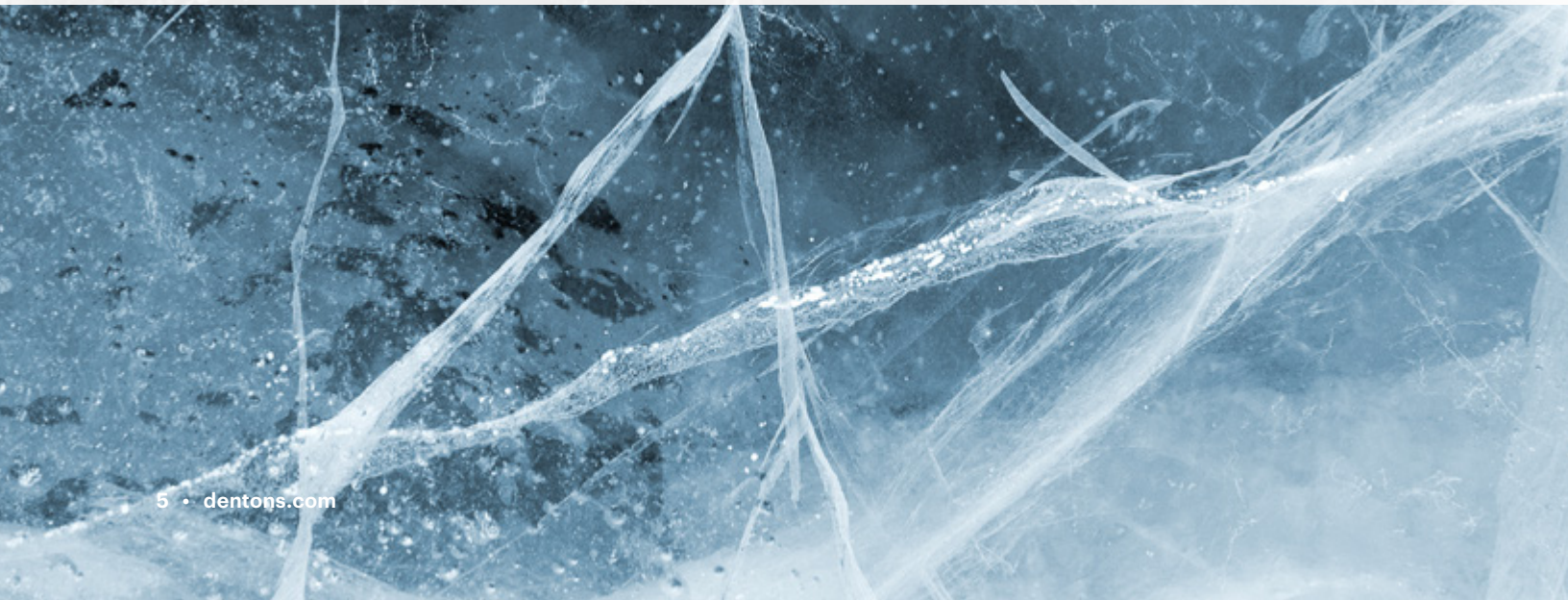
Contributed by Melissa Thng.

Institutional News

2021 round-up

The major arbitration institutions have now released their statistics for 2021, offering an in-depth view into the global arbitration landscape. As a general trend, the **HKIAC**, **ICC**, **LCIA** and **SIAC** continued to enjoy a robust inflow of cases with the monetary value in dispute remaining steady, although the ICC, LCIA and SIAC experienced a decline in new cases as compared to their 2021 peak. Arbitrations administered are mostly international in nature, accounting for over 80% of the total cases, with the top sectors being trade, corporate, banking and financial services and energy and resources. The data disclosed illustrates the institutions' ability to manage complex disputes amid challenging circumstances, in particular, those brought by COVID-19 and is a testament to the unique position of arbitration as the preferred method of international dispute resolution across multiple sectors globally. For more details please click here.

Contributed by Paul Lin.



What's happening at Dentons

Meet the Dentons Team during ICCA Congress in Edinburgh

Our team, representing the 500+ Dentons International Arbitration lawyers serving 80+ countries across the globe, will be in Edinburgh throughout the ICCA Congress. Lawyers from Angola, France, Germany, Hong Kong, Qatar, Singapore, UK and the US will be in attendance.

If you are interested in meeting the team at ICCA please contact Alexandra Joudon (alexandra.joudon@dentons.com).

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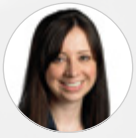

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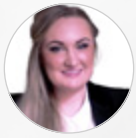

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