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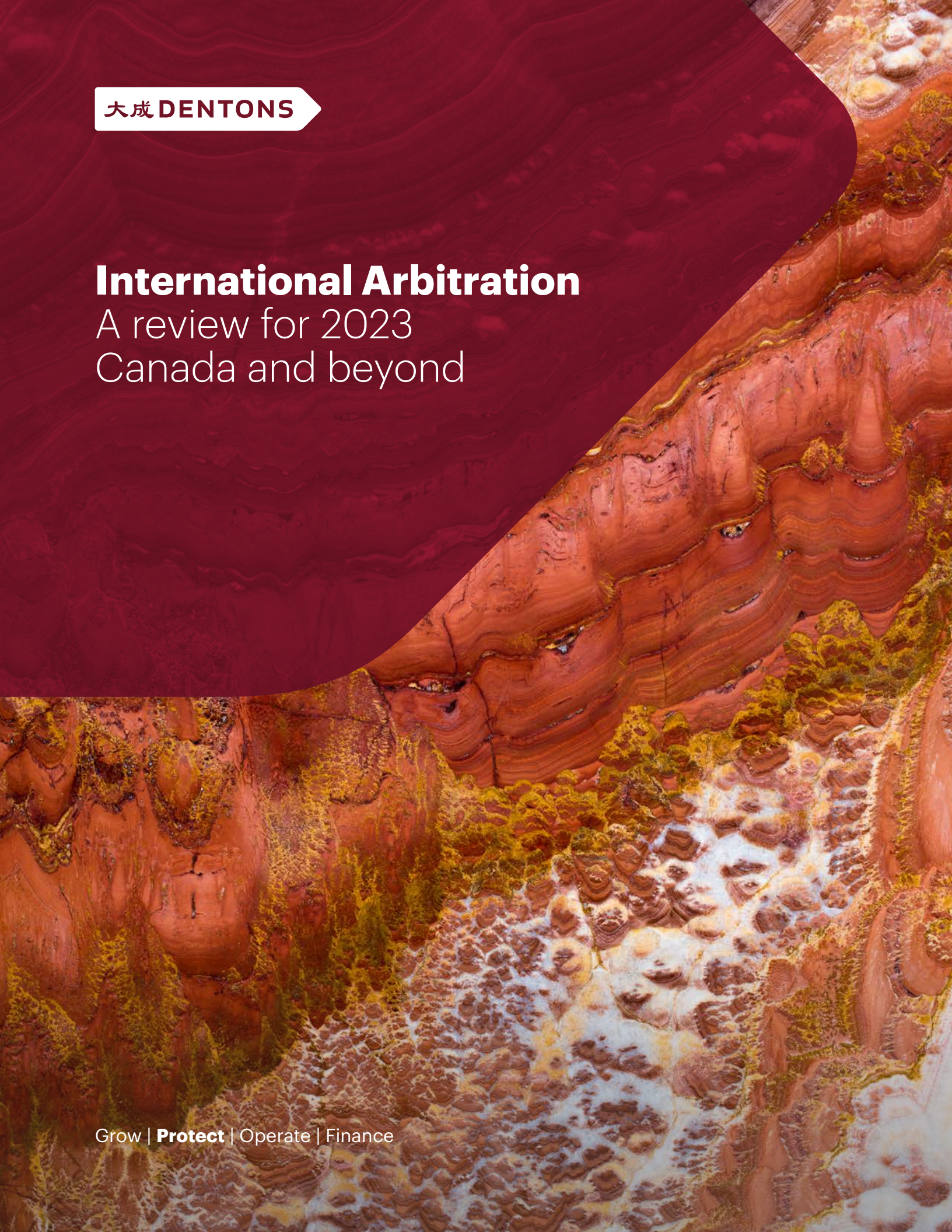
International Arbitration

A review for 2023
Canada and beyond



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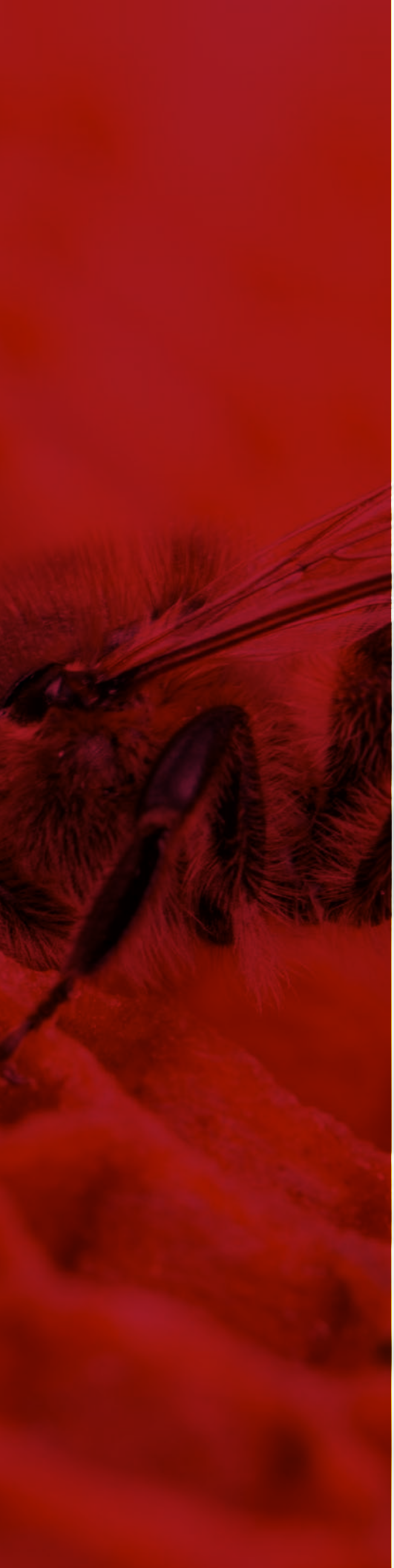

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Dentons is pleased to bring you our review of international arbitration for 2023 in Canada and beyond. The following compiles the legal trends and developments that we have seen in the last year that are likely to impact international arbitration going forward. Please feel free to contact us if you would like any further information on how these developments might impact your interests with respect to dispute resolution clause drafting, investment structuring, international commercial or investor-state arbitration, related court proceedings in Canadian courts and enforcement of awards.

Institution and rules updates

The Vancouver International Arbitration Centre announces new International Arbitration Rules

On May 4, 2022, the Vancouver International Arbitration Centre (VanIAC) announced the adoption of its new International Commercial Arbitration Rules (Rules) which were last amended on January 1, 2000. The Rules are set to become effective July 1, 2022.

Progressive changes

The new Rules adopt several measures that we have seen in recent updates to other international arbitration rules that aim to increase efficiency and optionality in proceedings. These include the following substantial changes that bring the rules to the forefront of offering parties flexibility in their process.

- An early disposition procedure providing an express option for early summary determination of one or more issues of fact or law (Rule 21). This does not exist as of right; a party to an arbitration seeking early disposition (at any stage in the proceedings) must apply to the tribunal for leave to bring an application for early disposition. As a part of this gatekeeping feature, the parties have an opportunity to present positions on both the suitability of the matter for early disposition and the procedure that ought to apply to that application for the tribunal to consider.
- The ability for a party to apply for an ex parte preliminary order simultaneously with an application for an interim measure (Rule 27). If seeking this relief, the applying party must set out its reasons for why "prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the interim measure." There are also strict disclosure requirements on the applying party and the Rules recognize that such relief may be prohibited by law or prohibited by the parties by agreement.
- An emergency arbitrator procedure to hear applications for interim measures or preliminary orders before the arbitral tribunal is constituted (Rule 29).
- A new international expedited procedure (Appendix A) that applies if no claim or counterclaim exceeds CA$500 000, or the parties otherwise agree. The expedited procedure does not apply if the parties have agreed to more than one arbitrator hearing their dispute, and parties may nonetheless opt-out of any expedited procedures. This structure sets several thresholds for when there could be an expedited procedure, making it prudent for those wanting to incorporate the Rules in their arbitration agreements to fully consider how those agreements are drafted, and what disputes may result in light of the thresholds. There may also be rare situations where it is unclear at the outset of a dispute whether the expedited procedures apply (for example, where the parties have not expressly opted out, have a dispute under the monetary threshold, but then after the dispute arises agree to a sole arbitrator altering what was previously in the arbitration agreement).

There are several additional smaller updates in the Rules which are worth noting, including:

- A sole arbitrator is the new default number of arbitrators unless the parties agree otherwise (Rule 11(a)).
- In line with international trends, a party is required to advise the other parties, the tribunal and VanIAC if a funding agreement exists in relation to a claim and of the identity of the third-party funder regardless of whether that agreement was made before or after commencement of the arbitration (Rule 6).
- A tribunal can direct matters to proceed by way of a virtual hearing (Rule 23(a)).
- When VanIAC is to appoint an arbitrator, the Rules set out a list method for VanIAC to follow, but this now starts with provision of at least five names instead of at least three (Rules 11(e) and (f)).

Key takeaways

These changes to the Rules will align VanIAC international arbitration procedure with certain aspects of typical Canadian court procedure with respect to potential injunctive, or ex parte interim interim relief, and with developments in arbitration procedure generally, such as the express ability to seek early disposition. Unlike VanIAC's new domestic arbitration rules, the new international Rules refrain from implementing an appeal process. Consistent with the current iteration, there is also no addition of any provisions that expressly refer to either joinder or consolidation.

While adding to the range of options available to parties looking for sophisticated international arbitration rules, the developments in the new Rules underscore the need for users to carefully consider which rules they want to adopt. The nuances between rules, and even within rules with respect to the ability to opt-in or out of certain provisions, provide parties with increased choice and an ability to uniquely tailor an arbitration procedure to suit their needs – but doing so requires careful advance consideration.

The Hague Court of Arbitration for Aviation

A new specialized institution for dispute resolution for the global aviation industry launched in The Hague in July 2022. With a roster of arbitrators experienced in the aviation industry, and tailored dispute resolution procedures, this development is significant for the industry. Click here for more information.

New 2023 Stockholm Chamber of Commerce Arbitration Rules

On January 1, 2023, the *Stockholm Chamber of Commerce* (SCC) released a revised version of its Arbitration Rules and Expedited Arbitration Rules, along with other dispute resolution rules. Some of the changes in the Arbitration Rules are their availability in various languages and allowing a case to be terminated for failure to pay an advance on costs after a case is referred to the arbitration tribunal. Click here for more information.

New ICSID Rules

Check out our comment on the new *International Centre for Settlement of Investment Disputes* (ICSID) Rules later in this review.

Select cases of note

The enforceability of arbitration agreements and insolvency

In *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. The 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 minimize 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 emphasized 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 principle any questions about enforceability are to be decided by the tribunal.

Read the full details of this case in a post by Michael Schafler, Rachel Howie and Ekin Cinar, here.

An arbitration clause is a dispute resolution clause, not a forum selection clause

In *General Entertainment and Music Inc. v Gold Line Telemanagement Inc.*, 2022 FC 418, the Federal Court overturned a decision of a Prothonotary dismissing a motion to stay the court proceedings in favour of arbitration in Bermuda. The agreement between the parties called for all disputes to be settled by arbitration in Bermuda. After the Plaintiff initiated the Federal Court proceedings, the defendant delivered its defence and counterclaim pleading that the Court was not the proper form for resolving the dispute because of the parties' agreement to arbitrate. The Court held that where there is an arbitration clause, because of the principle of competence-competence, established by the Supreme Court of Canada, "any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator." It follows that "Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator's jurisdiction concerns a question of law alone." In particular, to clarify an issue in terminology, the Court noted that while "parties have tended to use the terms 'choice of law clause,' 'forum selection clause' and 'arbitration clause' indiscriminately, resulting in much confusion", "a choice of law clause specifies the law of the contract; a forum selection clause ousts the jurisdiction of otherwise competent local courts in favour of a foreign jurisdiction; and an arbitration clause binds the parties to a dispute resolution mechanism crafted through consensual agreement."

The standard of review for jurisdictional decisions in international commercial arbitration

Recent court decisions in Ontario, *The Russian Federation v. Luxtona Limited*, 2021 ONSC 4604, and British Columbia, *lululemon athletica Canada inc. v. Industrial Color Productions Inc.*, 2021 BCCA 428, have addressed the standard of review for jurisdiction decisions under the United Nations Commission on International Trade Law (UNCITRAL) Model Law (the Model Law), which is incorporated into both provinces' international commercial arbitration legislation.

The cases provide important guidance on the options for a court to review decisions on arbitral jurisdiction and the interplay between the different avenues of review set out in the Model Law. Specifically, in a "set aside' application under Article 34, courts will look to review the decision on a correctness standard (with the possibility of a de novo hearing perhaps remaining in British Columbia). For applications under Article 16, there is consensus that the language, "to decide the matter", invites an adjudication of jurisdiction on a de novo basis.

The remaining inconsistencies discussed in the cases, namely the de novo approach to Article 34 and the ability to pursue a review on the basis of both Articles 16 and 34, will await further clarity from the courts. With Luxtona being granted leave to appeal earlier this year, there may be some answers soon.

Read the full discussion in an article by Chloe Snider and Karin Kazakevich for the Ontario Bar Association's Alternative Dispute Resolution section here.

Class actions and international arbitration

In *Petty v Niantic Inc.*, 2022 BCSC 1077, the defendant successfully obtained an order to stay the class proceedings brought by the representative plaintiffs under the International Commercial Arbitration Act because the contractual terms of service at issue included a mandatory arbitration agreement. The Court found, on the basis of the language of the arbitration clause, there was no improvident bargain in the agreement to arbitrate that unduly disadvantaged the plaintiffs or operated to the advantage of the defendants, nor was the agreement contrary to public policy. The decision is still under appeal.

Global M&A and cross-border acquisitions are more focused than ever on mitigating risk. Dentons, together with research provider Mergermarket, recently surveyed 150 senior executives involved in cross-border and global M&A to see how these executives view the market. The key findings of our report, "The shifting tides of cross-border M&A", are covered in a **webinar** and **video series**. The full report is available for download **here**.

The research found that some of the most common types of disputes faced post-closing involve disputes over the dispute resolution procedure itself and governing law. This, combined with the popularity of arbitration, dispute resolution boards and expert determination as means to resolve disputes, highlights the importance of dispute resolution clauses in transaction documents. Understanding the differences between jurisdictions and applicable laws is critical. Dentons' global international arbitration team is uniquely positioned to address these issues for clients around the world.

Understanding key differences in international arbitration in the US and Canada

Presentation materials for these webinars are available **here** and **here**.

"Do you know what your neighbour is doing?" Understanding key differences in international arbitration in the US and Canada

In a series of webinars, Dentons lawyers John Hay, Kristen Weil and Diora Ziyaeva set out key points of International Arbitration in the US, and Rachel Howie, Chloe Snider and Michael Schafler discussed key points of international arbitration in Canada. A summary of this discussion follows.

As cross-border transactions and the potential for parties to be considering international arbitration in Canada and the US increases, there are certain considerations to keep in mind. What are the practical differences between international arbitration in the US and Canada?

Arbitration legislation

In the US, international arbitration is governed by the *Federal Arbitration Act* (FAA). However, state law can also be relevant and in the case of a conflict the parties' choice of law will not override the FAA. (*Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)). This is in contrast to Canada, where there is legislation in every province and territory governing international arbitration; with the exception of Québec, where international arbitrations are governed by the Code of Civil Procedure. Federal legislation, the Commercial Arbitration Act, governs international arbitrations that involve the Crown or any Crown corporation, along with admiralty and maritime matters. While all legislation is generally based on the UNCITRAL Model Law, there are nuances and differences between jurisdictions.

Arbitral jurisdiction

In Canada, under the principle of competence-competence, the arbitrator generally has the power to rule on questions of their jurisdiction. As a result, arbitrators are usually the ones to determine both their own jurisdiction and whether a matter before them is arbitrable, as Dentons has discussed in the past. To the contrary, there is no such default rule in the US. The court will decide whether questions on arbitrability have been delegated to the arbitrators. This is because the FAA provides that a presumption of arbitrability applies when assessing whether a matter falls within the scope of the arbitration clause. Thus in the US, unless there is clear and unmistakable evidence that the parties agreed to have the issue decided by the arbitrator, the courts will determine arbitrability.

Discovery

Another procedural difference that can influence an international arbitration is the process around discovery. The discovery process in US litigation is usually long and tedious. To the contrary, in Canada it is less common to incorporate any oral discovery procedures in international arbitration cases. The significance of this difference is that businesses can avoid time-consuming discovery in the US by ensuring that the institutional rules agreed to by the parties are those that limit the discovery processes. As pointed out by Kristen Weil, "careful drafting of [a] dispute resolution clause can avoid very costly problems in the future."

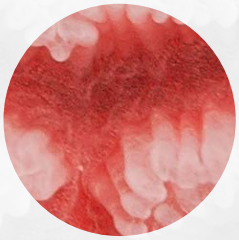
Costs

In Canada, costs for legal fees generally follow the event and are awarded to the successful party. Notwithstanding this principle parties may still want to address costs in their dispute resolution provision to be clear if they want costs to follow the event. This is not the case in the US, where the general legal principle is that parties bear their own costs unless their agreement stipulates otherwise. For parties to obtain an award on costs in the US, they must carefully consider and elect to use arbitration rules that provide for the successful party to be entitled to fees.

See the full summary of the webinar discussion in a post by Rachel Howie and Diora Ziyaeva for Kluwer Arbitration Blog here.

Class arbitration in Canada

Another key difference in arbitration between the US and Canada lies in approaches to class arbitration. While case law in Canada has left open the notion of class arbitration in some contexts, this has not been tested. See our full review of the topic in a post by **Michael Schafler** and **Camila Maldi** **here.**



Investor-State disputes and Canada

NAFTA deadline looming

Investors hoping to bring claims under the North American Free Trade Agreement (NAFTA) have been filing their claims in recent months before the agreement's "sunset period" comes to an end on June 30, 2023. The US-Mexico-Canada Agreement (USMCA), which replaces NAFTA, updates many of its provisions, but also removes from investor-state dispute settlement (ISDS) protections investments of Canadians and Canadian businesses. After the end of the sunset period, there will no longer be a specific ISDS mechanism for these investors.

For more details see the discussion in CDR Magazine featuring Sean Stephenson here.

New ICSID Rules

As mentioned in our last report, the International Centre for Settlement of Investment Disputes (ICSID) was in the process of amending its Rules and Regulations. These amendments were approved in March 2022, and came into force on July 1, 2022. These changes aim to increase efficiency, modernize and streamline the rules. Some of the main changes include:

- Implementing an ongoing obligation to disclose any third-party funding, with information such as the name and address of the funder, so as to avoid conflicts of interest (Rule 12);
- Addressing the procedure around requests for bifurcation (Rule 42);
- Permitting a tribunal to award security for costs with respect to both claims and counterclaims (Rule 53);
- Setting timelines around objections to claims on grounds they are manifestly without legal merit (Rule 41); and
- Providing direction around the tribunal's exercise of discretion with respect to costs (Rule 52).

Perhaps most significantly, the amendments change the jurisdictional requirements under ICSID's Additional Facility, with the effect that even if neither disputing party is an ICSID Contracting State investors may access Additional Facility arbitration.

Investment structuring

In light of the changes in for Canadians under the USMCA, and other changes in investment treaties globally, it is increasingly important for Canadian companies to consider investment structuring. Political, social and environmental risks in many industries are quickly evolving, and a change in a government, after an election or otherwise, could result in a dramatic impact for an investor. While political risk insurance can offer some assurances, investment structuring at the outset of an international investment and alongside any corporate reorganizations, takeovers, or other changes, should regularly be assessed so that investors can arm themselves with options to address potentially negative impacts.

A full discussion on the matter was recently written by Rachel Howie for Canadian Mining Magazine here.

Tennant Energy, LLC v Government of Canada

Tennant Energy, LLC, a US corporation, filed a claim against the *Government of Canada* under Chapter 11 of NAFTA regarding a proposed wind farm project in Ontario. Tennant Energy alleged that the administration of the Feed-In-Tariff (FIT) in Ontario was non-transparent and that it was treated unfairly regarding their project. They also claimed that government records related to the alleged unfair regulatory measures were intentionally destroyed.

The recent award dismissed all claims on the grounds that the claimant became an investor a few months after the last alleged breach had taken place. The arbitrators decided that the evidence was insufficient to establish that the claimant had been the beneficiary of a trust or that the claimant's principal had controlled the investment. The arbitrators also found that there was no evidence that the claimant had suffered any loss or damage to its investment.

Dismissal of claims against Canada upheld

Global Telecom Holding's request for annulment of its unsuccessful claim for 1.8 billion in damages against Canada was **dismissed**. The Claimant, which invested in Canadian company Globalive Wireless Management Corporation in 2008, claimed that Canada failed to create a fair, competitive and favourable regulatory environment for new investors in the telecommunications sector, and that Canada had breached its obligations under the Canada-Egypt Foreign Investment Promotion and Protection Agreement. However, the majority of the Tribunal ruled that Canada did not breach its fair and equitable treatment, full protection and security, national treatment or transfer of investments and returns obligations. Both the Claimant and Canada had sought partial annulment of the award, but their requests were dismissed by the Annulment Committee.

ABOUT DENTONS

Dentons is designed to be different. As the world's largest global law firm with 21,000 professionals in over 200 locations in more than 80 countries, we can help you grow, protect, operate and finance your business. Our polycentric and purpose-driven approach, together with our commitment to inclusion, diversity, equity and ESG, ensures we challenge the status quo to stay focused on what matters most to you.

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