DENTONS

International Arbitration Newsletter

Grow | **Protect** | Operate | Finance

Issue 6 • December 2023

Dentons' International Arbitration group comprises more than 500 lawyers, and is present in all major arbitration centres 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

Investor-State Arbitration

English court upholds Nigeria's challenge against $11 billion arbitral award

In a recent landmark decision, the English Commercial Court, presided over by Mr. Justice Robin Knowles, upheld Nigeria's challenge against a substantial $11 billion arbitral award in favour of Process and Industrial Developments Limited (P&ID). The case, which revolves around a Gas Supply and Processing Agreement (GSPA) signed in 2010, has brought to the forefront questions about the reliability of the arbitration process and its susceptibility to fraudulent practices.

The Gas Supply and Processing Agreement, between Nigeria and P&ID, laid out obligations for both parties. Nigeria was responsible for supplying "wet gas" to Gas Processing Facilities constructed by P&ID in Calabar, Cross River State, with P&ID accountable for processing the gas for power generation. However, the agreement became complicated as neither party fulfilled its contractual obligations.

The turning point came three years later when P&ID initiated arbitration proceedings against Nigeria, alleging a repudiatory breach of the GSPA. The arbitration tribunal not only found Nigeria liable but also awarded P&ID a staggering $6.6 billion, with an additional 7% interest – a sum equivalent to the size of Nigeria's Federal Budget.

In response to this significant arbitral award, Nigeria took the matter to the English Commercial Court in January 2019, seeking to set aside the award. The basis for the challenge was rooted in the assertion that the award was procured through fraudulent means and conduct contrary to public policy.

Mr. Justice Knowles, in his judgment, upheld Nigeria's challenge under section 68(2)(g) of the English Arbitration Act of 1996. The court found that P&ID had engaged in egregious misconduct, including bribery, perjury, and corrupt payments to Nigerian government officials. Furthermore, P&ID's improper retention of Nigeria's internal legal documents compromised the confidentiality of representation during the arbitration process, allowing P&ID to monitor Nigeria's position and awareness of corrupt practices.

This case has ignited vigorous debate on the reliability of the arbitration process and its vulnerability to fraud. In his reflections on the matter, Mr. Justice Knowles noted that even with a tribunal of great experience and expertise, the system can still be susceptible to manipulation. This raises critical questions about the safeguards in place within international arbitration to prevent fraudulent practices and ensure the integrity of the process.

The implications of this decision extend beyond the immediate parties involved. It calls into question the broader role of international arbitration in handling complex disputes and emphasizes the need for robust mechanisms to maintain transparency and integrity. The case serves as a stark reminder that, even in sophisticated legal frameworks, the risk of exploitation still exists, necessitating constant vigilance and scrutiny.

As the legal community grapples with the aftermath of this decision, the importance of revisiting and reinforcing the ethical standards and procedural safeguards within the arbitration process is underscored. Transparency, accountability, and the protection of confidentiality are paramount to ensuring the credibility of arbitration as a viable and trustworthy means of dispute resolution.

The English Court's decision highlights the complexities and potential challenges of international arbitration. Despite these intricacies, international arbitration remains a vital and indispensable tool for resolving cross border disputes, and its merits remain undiminished.

Contributed by Funke Agbor and Afolabi Caxton-Martins.

International Commercial Arbitration

English courts grant anti-suit injunctions in support of Paris-seated arbitration

Since 2020, the Russian Commercial Procedure (Arbitrazh) Code allows Russian courts to retain exclusive jurisdiction, under certain conditions, to hear certain disputes despite such disputes being otherwise subject to arbitration. The question of which legal effects, if any, a Russian court's decision to retain jurisdiction will produce outside of Russia remains subject to debate.

In two recent cases, the English courts have granted anti-suit injunctions ("ASIs") ordering applicants to discontinue court proceedings in Russia initiated in breach of the arbitration agreements providing for Paris-seated arbitration. The English court's power to issue ASIs in support of foreign arbitrations stems from s37(1) of the Senior Courts Act 1981, which enables the grant of an interlocutory or final injunction *"in all cases in which it appears to the court to be just and convenient to do so."*

On 31 August 2023, in *Commerzbank AG v RusChemAlliance LLC* [2023] EWHC 2510 (Comm), Mr Justice Bryan granted an application restraining RusChem from suing in a Russian court for EUR 94 million.

The judge was persuaded England was the proper place to apply for an ASI, including because (i) the arbitration agreement and the bond were governed by English law; and (ii) the French courts were unable to issue an anti-suit injunction. He was further content to exercise this jurisdiction based on French law evidence that the French courts would recognise the ASI.

This contrasts with the first instance decision of Mr Justice Bright declining an ASI in *Deutsche Bank AG v RusChemAlliance LLC* [2023] EWCA Civ 1144 (initially anonymised as *SQD v QYP*), then overturned on appeal. Mr Justice Bright heard only limited French law evidence with the prevailing message that the French courts had a "*philosophical objection*" to ASIs and therefore declined to grant relief which would not be enforceable. The Court of Appeal overturned his decision on 11 October 2023 on the basis of evidence that, whilst the French courts could not grant ASIs, they would recognise one granted by a court which had ASIs in its toolkit.

While French courts do not issue ASIs, they do enforce them if they are granted in support of arbitration. In *In Zone Brand*, the French *Cour de cassation* confirmed that an ASI is not contrary to the international public policy. On the other hand, French courts can refuse enforcement of an ASI adopted in breach of an arbitration clause. In *Mekatrade*, the Paris Court of Appeal ruled that "*the parties, who must perform an arbitration agreement in good faith, cannot themselves create an obstacle to the participation in the arbitration proceedings by seeking an anti-suit injunction from state courts*" (Paris CA, 4 October 2016, No. 15/03341).

Contributed by Anna Crevon, Catherine Gilfedder and Sophie Palmer.

International Commercial Arbitration

Fresh evidence admissible when court is deciding tribunal's jurisdiction

In *Russian Federation v. Luxtona Limited*, 2023 ONCA 393, the Court of Appeal for Ontario provided clarity around the ability of the court to "decide the matter" in applications under Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration.

Article 16(3) allows parties to request the court to decide on the tribunal's jurisdiction within thirty days of receiving notice of the tribunal's ruling on its own jurisdiction. The Court of Appeal clarified that in such proceedings the court does not owe deference to the tribunal's decision. Instead, it is to conduct a review *de novo* and in doing so parties may introduce new, or fresh, evidence without meeting the usual stringent common law criteria for new evidence that apply to appeals.

In line with the "uniformity principle" set out in Article 2A(1) of the Model Law, the Court of Appeal examined determinations on Article 16(3) from other jurisdictions including the United Kingdom, France and Singapore. The Court concluded that the principle of *competence-competence* does not restrict the court's fact-finding authority when assessing an arbitral tribunal's jurisdiction under Article 16(3). The Court must be "unfettered" in its fact-finding ability and not confined to the record that was before the tribunal.

The Court of Appeal's conclusion is significant in aligning jurisprudence from Canada with that of other jurisdictions regarding the court's standard of review under Article 16(3) of the Model Law. It also comes with a caution: while fresh evidence may be introduced on applications under Article 16(3) of the Model Law, such evidence may not carry the same weight as what was before the tribunal. As the Court of Appeal noted, citing the English case of *Electrosteel Castings Ltd v. Scan-Trans Shipping and Chartering Sdn Bhd*, [2003] 2 All E.R. (Comm) 1064, at para. 23 (Q.B.), as cited in the Singapore case *AQZ v. ARA*, [2015] SGHC 49: "[N]othing said here should encourage parties to seek two evidential bites of the cherry in disputes as to the jurisdiction of arbitrators, not least because (1) evidence introduced late in the day may well attract a degree of scepticism and (2) the court has ample power to address such matters when dealing with questions of costs."

Contributed by Rachel Howie, Mike Schafler, Chloe Snider and Janice Philteos.

International Commercial Arbitration

Irish High Court refuses injunction in rare application to restrain payment in aid of an intended arbitration

The Irish High Court has refused an injunction restraining payment under a letter of credit in aid of an intended arbitration in Nigeria against, inter alia, the second and third respondents, who were represented by Dentons and Citibank which was separately represented – *First Modular Gas Systems Ltd –V– Citibank Europe Plc & Ors*.

The dispute arose out of a project for a gas field in Nigeria and the connection to Ireland is Citibank, the confirming bank under a letter of credit, is based there. There is an arbitration agreement between the applicant and the second respondent but payment was due to the third respondent only under the letter of credit.

The second and third respondents challenged the application inter alia on jurisdictional grounds as the third respondent, the party to whom payment was to be made under the letter of credit, was not a party to the arbitration agreement.

The court found it did not have jurisdiction as the applicant failed to establish that the dispute was the subject of an arbitration agreement and it was not sufficient to show that a prima facie case that an arbitration agreement existed. Even if the latter were sufficient, the court found that no prima facie case had been made commenting that there was no Nigerian law evidence before the court in relation to the arbitration agreement.

The court found that, even if it were wrong on jurisdiction, the applicant failed to meet the high threshold for an injunction against a letter of credit, which required a *"seriously arguable case that the only inference to be drawn is one of fraud."*

This decision provides clarity that the test for an 'intended arbitration' under the Model law is that the dispute was subject to an arbitration agreement. The decision also emphasises that expert foreign law evidence may be required in any case where there is a dispute about the scope or validity of the arbitration agreement itself.

Contributed by Karyn Harty, Ciara FitzGerald and Aaron McCarthy.

Mining

Deep seabed mining regulations

The seabed floor is becoming increasingly commercialized in response to global demand increases for battery components. Regulations concerning mining the deep seabed have not kept up with this increased interest, and thus, investors do not currently have a clear guideline on how to structure potential deep sea investments or how to approach disputes when they arise over deep sea projects. However, this lack of clarity could be about to change.

As background, the deep sea is governed by the International Seabed Authority ("ISA"), which was created by the UN Convention on the Law of the Sea ("UNCLOS"). In 2021, unhappy with the fact that the ISA had not adopted regulations concerning exploitative investments, Nauru – a small island nation in Micronesia – triggered a provision in the ISA Implementation Agreement that gave the ISA two years to finalize regulations for exploitation. Despite this pressure, the ISA concluded its July 2023 meetings without finalizing a Mining Code for the seabed floor.

The consequences of not finalizing the Mining Code are not entirely clear yet. Under current law, the ISA has to begin considering mining applications based on provisional rules. However, provisional rules are provisional for a reason. Many aspects of the provisional rules are hotly contested. The lack of clarity leaves investors in the dark over the application process – and the potential dispute resolution mechanism the ISA will use.

The specific framework adopted is important because of the potential resources available. Cobalt, nickel, and magnesium are particularly essential in electric car batteries and are increasingly difficult to mine above the surface. As surface mines dry up, investors will look to the seabed floor. It is certain that where such valuable resources are being collected, disputes will follow. Investors with an interest in deep sea resources should thus stay informed of the way the ISA approaches the provisional rules to ensure they are positioned to vindicate their rights appropriately.

Contributed by Diora Ziyaeva and Cody Anthony.

Conflicts of Law

The Prestige – Clash of jurisdictions between England and Spain deepens

On 6 October 2023 the English High Court issued a judgment which has exacerbated tensions between the Spanish and English courts (The London Steam-Ship Owners' Mutual Insurance Association Limited v The Kingdom of Spain M/T 'Prestige' [2023] EWHC 2473 (Comm)).

The judgment is part of a long-running saga which began in November 2002 when the oil tanker *Prestige* sank off the coast of Spain causing significant environmental damage. The owner of the *Prestige* was insured with the London P&I Club (the "Club"), and the insurance policy included a London arbitration clause.

The Spanish Government brought a claim for compensation directly against the Club in the Spanish courts, as it was entitled to do under Spanish law. The Club objected to the jurisdiction of the Spanish courts and commenced arbitration proceedings in London against Spain, seeking declaratory relief to the effect that it was not liable. The Club was successful in the arbitration and sought an *exequatur* of the award in the English court. Spain contested those *exequatur* proceedings but lost, after a decision of the Court of Appeal in 2015.

Subsequently, the Spanish courts awarded Spain $1 billion in compensation against the Club, and Spain sought to have that judgment recognized in England under the Brussels Regulation 2001 (the "Regulation"). The main issue before the English court was whether the 2015 *exequatur* prevented enforcement of the Spanish judgment. Specifically, under article 34(3) of the Regulation, an EU judgment shall not be enforced in another EU country if it is irreconcilable with an existing judgment of the enforcing court. The English court referred to the Court of Justice of the European Union ("CJEU") the question of whether an *exequatur* qualifies as a "judgment" for the purposes of article 34(3).

The CJEU answered that it was; however, this was only if the enforcing court itself could have had jurisdiction over the dispute, absent the arbitration clause, without infringing the Regulation. In this case, a choice of English court clause in the insurance contract would not have been enforceable against Spain; therefore the *exequatur* was not a qualifying judgment.

The English court took the view that the CJEU had answered a question that was not put to it and disregarded the CJEU decision for that reason. It refused Spain's application for an order enforcing the Spanish judgment.

Contributed by Dominic Pellew.

What's happening at Dentons

IBA in Paris

We were proud to have our global Dentons team, represented by over 65 lawyers, participate in the esteemed International Bar Association (IBA) Annual Conference, which took place from October 29th to November 3rd, 2023, in Paris. This distinguished event attracted over 5,000 legal professionals from more than 130 jurisdictions, serving as a vital meeting point for lawyers, law firms, corporations, and regulators from around the globe.

Our representation, covering a wide range of practices and sectors, engaged in meaningful discussions, networked with clients, and forged new business relationships. A highlight of our involvement was the cocktail reception on October 30th, hosted by Dentons, Dentons Global Advisors, and the Nextlaw Referral Network, showcasing our dedication to fostering global connections and collaboration within the legal community.

Editors

Anna Crevon
Partner, Global Co-Head of Dentons' International Arbitration Group
anna.crevon@dentons.com

Lawrence Teh
Partner, Global Co-Head of Dentons' International Arbitration Group
lawrence.teh@dentons.com

Rachel Howie
Partner
Calgary, Canada
rachel.howie@dentons.com

Robert Rhoda
Partner
Hong Kong
robert.rhoda@dentons.com

For more information

Alexandra Joudon
International Arbitration MBD
alexandra.joudon@dentons.com

Check out our International Commercial Arbitration Toolkit, a free to use online toolkit that provides an overview of the laws of a contemplated place of arbitration (seat) and what enforcement laws look like – presented in highly structured format for a quick comparative analysis of jurisdictions of interest.