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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 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.

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Indian Court holds third party funders not responsible for adverse costs

In a first of its kind, a Division Bench of the Delhi High Court ('Appeal Court') gave its decision in *Tomorrow Sales Agency Private Limited* ("TSA") v. *SBS Holdings, Inc. & Others* on 29 May 2023, in an appeal that arose against the 7 March 2023, order of a Single Judge of the Delhi High Court ('Single Judge') on the issue of the liability of third-party funders to pay costs awarded by an arbitral tribunal. The Appeal Court allowed the appeal, overruling the finding of the Single Judge that third-party funders are liable to pay the costs awarded. The Appeal Court held that third-party funders cannot be made liable to pay costs when they are not a party in the arbitration, disagreeing with the finding of the Single Judge.

The Division Bench observed that third-party funding is essential to ensuring access to justice, which makes it important that third-party funders are fully aware of their liability as any uncertainty would dissuade third-party funders from funding litigation.

The Division Bench held that *Arkin v. Borchard Line Ltd. & Ors. and Excalibur Ventures LLC v. Texas Keystone Inc. and Ors.* are authorities that are inapplicable as TSA (the third-party funder) was not a party to the arbitration and given that *Arkin and Excalibur* were decisions of the English Court of Appeal based on the unique powers granted to courts in England and Wales under the Senior Courts Act 1981.

Examining Section 46 of the A&C Act, the Division Bench found that the decision of the Supreme Court of India in *Gemini Bay* is not applicable in the case of third-party funders who are not a party to the arbitral proceedings and have not been imposed with any liability in terms of the award.

This decision is a welcome development as it has brought clarity to the liability of third-party funders in India.

The key takeaway for defendants in arbitrations involving Indian parties is to ensure that security of costs is obtained in order to recover costs, or alternatively, where permissible as per law, that third-party funders are made parties to the arbitration.

Contributed by Atul Sharma and Shravan Yammanur.

Third Party Funding

Third Party Funding in Mainland China

Third-party funding has gained familiarity in mainland China and judicial precedents on the subject have typically been favourable, particularly in connection with arbitration cases where strict limitations provide few obstacles for the enforcement of arbitral awards. In two recent cases, award debtors challenged two CIETAC awards before the Wuxi Intermediate Court and Beijing No.4 Intermediate Court on the grounds of substantive and procedural issues in relation to third party funding. These issues included confidentiality and conflict of interest. The Wuxi Court rejected the challenge holding that using third party funding did not violate confidentiality and the Beijing No. 4 Court held that third party funding is neither prohibited by the PRC law nor involves conflict of interest.

However, it is worth noting that some courts have denied third-party funding in the name of public policy, signaling some level of caution among judicial authorities. For example, Shanghai No. 2 Intermediate Court has found that third party funding in litigation is invalid and violates public policy.

However, judicial precedents are not binding except those punished by the Supreme People's Court as Guiding Cases.

Initially, there was much interest surrounding third-party funding in mainland China. However, the low demand for such funding in the state-owned enterprise-dominant environment has led to a decrease in interest. For instance, for an SOE to pay a high proportion of a contingency fee will expose it to significant compliance risks. Additionally, concerns over default among companies that use such funding arrangements have made investors more cautious. The rules and regulations related to third-party funding need to be clarified, such as those relating to conflicts of interest and information disclosure for example. Bar associations, judicial agencies, or arbitration institutions are expected to introduce corresponding rules.

Contributed by Yongrui (Raymond) Zhou.

International Commercial Arbitration

ICC Rules presumed to align with Agreement to Arbitrate

The recent Ontario Court of Appeal decision of *Baffinland Iron Mines LP v. Tower-EBC G.P., S.E.N.C* derived from a domestic arbitration held pursuant to the International Chamber of Commerce (the "ICC") Rules. The Court of Appeal upheld the lower court's finding that the arbitration agreement between the parties (the "Agreement") precluded appeal of the arbitral award.

Baffinland Iron Mines ("Baffinland") had sought leave to appeal the arbitral award from the Ontario Superior Court. One focus of the appeal was contractual interpretation based on the "presumption of consistent language". While the term "finally settled" was used directly in the arbitration clause, the term "final and binding" had been used elsewhere in the Agreement. Baffinland argued that this differing use of language should be understood as intending to convey differing meanings. The application judge at the Ontario Superior Court rejected this argument, finding that there was no substantive difference between the two terms. The Court stated that the clear meaning of ICC Rule 35(6) is that there is no further recourse from an arbitral award pursuant to the ICC Rules. The Court concluded that ICC Rule 35(6) was not inconsistent with the Agreement, and that the Agreement therefore precluded appeals.

On appeal, Baffinland argued that the application judge had failed to correctly apply the presumption of consistent language. The Ontario Court of Appeal rejected this argument, emphasising that a common sense approach should be used in contractual interpretation, rather than technical rules. The Court of Appeal found that, in context, the two terms had the same meaning. The Court of Appeal further dismissed as irrelevant Baffinland's argument that the Agreement has priority over the ICC Rules where the two are inconsistent; there had been no error in the application judge's finding that the Agreement and ICC Rule 35(6) were consistent. This decision supports the finality of arbitration under the ICC Rules, even when used in a domestic arbitration from which there might be potential statutory routes for appeal.

Contributed by Marina Sampson and Nicole Tzannidakis.

International Commercial Arbitration

Hong Kong's Court of Final Appeal rules on tiered arbitration agreements

The CFA has dismissed an appeal from the Court of Appeal in C v D ([2023] HKCFA 16) (see our earlier article here) and found that both the main underlying contractual dispute and any dispute as to the fulfilment of pre-arbitration conditions under the agreement in question fell within the parties' contemplation and intended submission to arbitration. The CFA also adopted the distinction between "jurisdiction" and "admissibility" as an aid for determining whether judicial intervention was permissible and held that a dispute over pre-arbitration conditions goes to admissibility and not jurisdiction and, accordingly, does not deny consent to the arbitration. The appellant could not rely on section 81 of the Arbitration Ordinance (incorporating Article 34 of the Model Law) to set aside the arbitral award for want of jurisdiction and the appeal was unanimously dismissed.

This is an important decision that reaffirms the pro-arbitration stance of the Hong Kong courts. It is also the highest authority from a Model Law jurisdiction confirming that the tribunal has power to decide whether the pre-arbitration requirements have been complied with, which will not be subject to judicial intervention. As we noted in our earlier article, it remains 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 Grace Lee.

International Commercial Arbitration

Directly applicable provisions of the Turkish Code of Commerce: A new way to circumvent arbitration agreements?

Attempts by local parties to override choice of law or jurisdictional clauses is not a new phenomenon.

In a recent case, a Turkish distributor has argued that Article 105 of the Turkish Code of Commerce is a directly applicable public policy provision of Turkish law that authorises a Turkish distributor to initiate proceedings before Turkish courts against its foreign principal in disregard of the arbitration clause provided in the distribution agreement.

Pursuant to Article 105, agents are entitled to initiate legal proceedings on behalf of their principal and/or be named as a defending a party in a case filed against their principal regarding disputes arising from the contracts that they have brokered or concluded. Any agreement to the contrary is null and void. However, Article 105 regulates only those court proceedings that may be brought by the customers of the agents or principals, or by the agents or principals against the customers. This provision is not intended to, nor does it invalidate the arbitration clause in the distribution agreement.

It is designed to prevent customers/ultimate users from being forced to litigate in a foreign forum and consequently risk being denied access to justice on pure litigation cost concerns.

This construction of Article 105 is confirmed by the Turkish Court Appeals (see, e.g., 11th Civil Chamber of the Court of Appeals, Case no. 2019/4747, Decision no. 2021/5341, dated 23.06.2021; 11th Civil Chamber of the Court of Appeals, Case no. 2016/14407, Decision no. 2018/7712, dated 06.12.2018; 11th Civil Chamber of the Court of Appeals, Case no. 2016/1582, Decision no. 2017/4287, dated 13.09.2017).

However, a Court of Appeals decision does create binding precedent under Turkish law. Thus, the risk of similar attempts to override the applicable arbitration clause being successful on a given occasion remains possible. To reduce this risk, foreign principals may consider local arbitration as their dispute resolution forum, which may also provide time, cost and enforcement advantages.

Contributed by Dogan Eymirlioglu.

Energy

Energy Charter Treaty – Postponement of modernisation vote extends uncertainty for investors

The Energy Charter Treaty (ECT) is a multilateral investment treaty for the energy sector. With 53 signatory States predominantly in Europe and Central Asia, in recent years it has been relied upon by numerous investors to obtain high-value compensation for measures such as unlawful expropriation, nationalisation and failure to provide fair and equitable treatment. Of particular note has been EU investors suing EU States (such as Spain and Italy) for reducing subsidies for renewable energy investments. The effect of this and certain large awards to fossil fuel investors has been a backlash within the EU against the ECT and allegations that the ECT prevents EU States from tackling climate change.

This has led to a "modernisation" process aiming to bring the treaty in line with current priorities, by making amendments both allowing for protection for fossil fuel investments to be removed and making clear that new products such as green hydrogen are covered. In parallel, we have seen successive announcements of withdrawals by States from the ECT and calls for others to do so, including for a coordinated withdrawal by the EU itself.

Votes on the modernised ECT have been scheduled, most recently in April 2023, but postponed indefinitely reportedly due to EU Member States not reaching an agreed position. The future of the treaty thus remains uncertain, and (notwithstanding the ECT's 20-year sunset clause) many investors are exploring additional means to protect their investments, including through re-structuring via States that have not announced an intention to withdraw or exclude fossil fuel investments, and shoring up contractual protections e.g. in host government agreements. Considering also the difficulties investors now face in enforcing intra-EU arbitration awards, we expect to see increased interest in the use of alternative instruments for claims against States, such as (for investments in Europe) Article 1 of Protocol 1 of the ECHR, which has been successfully invoked on many occasions in cases of expropriation and controls on use by States of private property, both in domestic courts and eventually at the ECtHR in Strasbourg.

Dentons recently held a webinar discussing the future of the ECT and what steps investors can take to protect their positions now – a recording of that session is available here.

Contributed by Catherine Gilfedder.

Institutional News

2022 round-up

Major arbitration institutions, including HKIAC, LCIA and SIAC, have released their 2022 caseload reports offering an in-depth view into the global arbitration landscape. However, somewhat unusually, the ICC has not released casework statistics for 2021 and 2022 (although we did report last year on the ICC's preliminary figures for 2021).

Comparing similar case statistics from 2021, the number of new cases handled by LCIA and SIAC in 2022 decreased while the number of new cases handled by HKIAC increased slightly. Arbitrations filed in 2022 continued to be overwhelmingly international in nature featuring parties from a wide range of jurisdictions. The decrease in the number of new cases may be due to the challenges posed by the pandemic and rising geopolitical uncertainties. Given that the pandemic is effectively over, it is likely that international arbitration caseloads will continue to rise in 2023. For more details, please click here.

Contributed by Nigel Chan.

What's happening at Dentons

International Commercial Arbitration Toolkit

Celebrating its recent presentation at the workshop "Procedural Innovations in Arbitrations: Techniques, Use, and Trends" hosted by AIA-ArbIt-40 and ICC YAAF in Italy, the team introduced the International Commercial Arbitration Toolkit. Whether selecting an arbitral seat or navigating a dispute, the Toolkit enables you to explore jurisdictions of interest, providing insights into laws, practices, and comparative approaches. Authored by Dentons lawyers from relevant jurisdictions, the Toolkit currently features 30 entries, with more to be added later this year.

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