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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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German Federal Court of Justice rejects India's extra-EU BIT objection

The German Federal Court of Justice held that arbitration clauses in bilateral investment treaties (BITs) between EU Member States and non-members do not violate EU law (I ZB 12/23 – 12 October 2023). According to the court, the principle of loyalty that is key among EU Member States does not extend to third countries.

Deutsche Telekom AG's Indian subsidiary contracted with an Indian state-owned company. After the Indian company terminated the contract, Deutsche Telekom AG successfully brought damages claims against the Republic of India under the German-Indian BIT. The Higher Regional Court of Berlin held the award enforceable. The Federal Court upheld the decision on appeal.

The Federal Court held that the judgment of the Court of Justice of the European Union (ECJ) in *Slovak Republic v Achmea* does not apply to BITs between EU Member States and third countries. In *Achmea*, the ECJ established that arbitration clauses for intra-EU investment disputes violate EU law. According to the ECJ, such arbitration clauses impair the autonomy of the EU's legal system and the principle of loyal cooperation among EU Member States.

According to the German Federal Court of Justice, the *Achmea* judgment, however, does not apply to disputes between EU Member States and non-EU members. The ECJ's decision in *Komstroy* shows that arbitration clauses in BITs between EU Member States and third countries do not contradict EU law. The European Court held that EU Members States could not validly agree on the Energy Charter Treaty (ECT) to the extent of its application between EU Members States, citing the autonomous nature of EU law. However, EU law remains unaffected by an arbitration clause between an EU Member State and third countries. The German Federal Court of Justice concludes that the principle of mutual trust does not apply to arbitration agreements vis-à-vis non-EU members.

The German Federal Court also commented on the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada and the ECJ's opinion that CETA differs significantly from BITs between EU Member States and third countries. According to the ECJ, CETA is a treaty of the European Union as a whole and not of a single Member State, making it structurally different from other BITs. Once again, the German Federal Court of Justice took this as confirmation that the principle of loyal cooperation only applies between EU Member States.

The German Federal Court's conclusion leaves little doubt that arbitration clauses in BITs between EU Member States and third countries remain valid despite *Achmea*.

Contributed by Heiko Heppner and Kristina Bittner.

Enforcement

English Court finds that state immunity has no relevance to the registration of ICSID awards: *Border Timbers v Zimbabwe*

In a recent Commercial Court decision, Mrs Justice Dias DBE departed from previous case law, finding that state immunity had no relevance to an application to register an ICSID award, only coming into play later at the point of execution.

Following arbitration proceedings concerning the expropriation of land during Zimbabwe's controversial land reform programme, the Claimants were awarded over USD 125 million in 2015. An order was made registering the award pursuant to s.2 Arbitration (International Investment Disputes) Act 1966. Refusing the set aside application, Dias J came to the following conclusions in her novel judgment:

1. Although Zimbabwe had given a general waiver of immunity through Article 54 of the ICSID Convention, this did not constitute a specific submission to proceedings before the English courts. Therefore, this was no exception to the protection of state immunity.
2. Despite the "*hermetically sealed nature*" of ICSID proceedings, the court is obliged, when considering the "arbitration exception" to state immunity, to consider the validity of the arbitration agreement and its application to the dispute.
3. The court does not exercise an adjudicative jurisdiction when registering an ICSID award. State immunity arguments are therefore not engaged at this stage. A state could, however, later raise state immunity as a bar to the award's execution.

This decision runs counter to the recent judgment of the then-Mr Justice Fraser in *Infrastructure Services v Spain* [2023] EWHC 1226 (Comm), which similarly considered an application to set aside registration of an ICSID award. In contradiction to this case, Fraser J found that state immunity was relevant at the point of registration, but that exceptions to state immunity under the English statutory regime applied because of the existence of an ICSID arbitration agreement.

Permission to appeal to the Court of Appeal has been granted in both of these cases, with some commentators suggesting they could sensibly be heard together.

Contributed by Alice Culkin-Tamayo, Catherine Gilfedder and James Langley.

Investor-State Arbitration

***EEPL Holdings v Republic of Congo* (ICSID Case No. ARB/21/53): Another failure by a state to bring a successful counterclaim under a BIT**

It is well known that bilateral investment treaties (BITs) create the possibility for private investors to bring arbitration claims against sovereign states. What is less clear is whether BITs permit sovereign states to bring claims against investors. In a decision of 12 January 2024, the tribunal in *EEPL Holdings v Republic of Congo* denied jurisdiction over counterclaims Congo had advanced against a Mauritian investor. Although the tribunal's reasons have not yet been published, the decision suggests that states will continue to encounter difficulties in bringing such claims.

There are two main problems for states. First, the arbitration provisions of many BITs directly exclude claims by states – for example, they cover only "claims by investors". Secondly, BITs only rarely impose substantive obligations on investors, which means host states generally have to look to other sources, including their own domestic laws, to bring claims for breaches of such obligations. That, in turn, may mean (depending on how the particular BIT is worded) that tribunals lack jurisdiction over such claims. In *EEPL Holdings* it appears that Congo's counterclaims were based on obligations of the investor contained elsewhere than in the Mauritius – Congo BIT. That, in turn, may have meant the counterclaims fell foul of the requirement in the arbitration clause of the BIT that disputes "relate to matters governed by the present Agreement".

The difficulty faced by states wishing to bring counterclaims under BITs has contributed to the present wave of criticism against investor-state dispute settlement (ISDS), particularly as many counterclaims, or attempted counterclaims, relate to alleged environmental abuses carried out by investors. Indeed, one of the counterclaims in *EEPL Holdings* was for the costs of remedial environmental works carried out by Congo. However, it should not be forgotten that in such situations host states can always bring environmental claims in whichever other forum would normally be competent (for example, their own courts).

There has been speculation that international arbitral tribunals will increasingly interpret BITs creatively so as to permit counterclaims. *EEPL Holdings* suggests this is not happening.

Contributed by Dominic Pellew.

International Commercial Arbitration

Remitting the matter to arbitrator to reconsider public policy in Hong Kong

The recent Hong Kong decision in *G v N* ([2023] HKCFI 3366) affirms the Hong Kong courts' stance of not encroaching the autonomy of arbitrators and reinforces the policy of minimal curial intervention.

Just a few days before issuing a first award in which the arbitrator applied the case of *Tinsley* (Tinsley v Milligan [1994]) in making findings of illegality, the Hong Kong Court of Appeal handed down its decision in *Monat* (CACV 448/2020 [2023] HKCA 479), which held that *Patel* (Patel v Mirza [2017] AC 467) rather than *Tinsley* represented Hong Kong law on illegality. The former provides for a more flexible approach to illegality that considers a "range of factors" including proportionality. The applicant argued that the relevant awards should be set aside as they would be contrary to the public policy of Hong Kong in light of the decision in *Monat*.

Madam Justice Mimmie Chan held that, when it is contended that an award is contrary to public policy, the court is bound to consider public policy "as of today" and that this is not against the spirit or principles of the New York Convention. She held that the arbitrator's consideration of public policy was not made in accordance with what is now recognised by Hong Kong law and the difference in approach may result in a different conclusion. Accordingly, she ordered the matter to be remitted to the arbitrator to "take such action as in his opinion will eliminate the grounds for setting aside" and suspended the setting aside proceedings. In the meantime, leave has been granted to appeal the decision.

Contributed by Grace Lee.

International Commercial Arbitration

Singapore International Commercial Court ("SICC") rejects allegations of forgery of arbitration agreement after permitting cross-examination

In a significant decision, the SICC dismissed a setting aside application made by Reliance Infrastructure Limited over an arbitral award in favour of Shanghai Electric Co Ltd ("SEC"). Reliance relied on various grounds to challenge the award adverse to it, including an argument that the agreement to arbitrate was contained in a forged document, i.e. a guarantee letter. Specifically, Reliance argued that its then-officer, Mr Agrawal, did not sign the guarantee letter and suggested that someone from SEC forged his signature.

The SICC found that Reliance had waived its right to raise the forgery challenge because it knew of the facts underlying its forgery challenge and even claimed that the guarantee letter was a "*false instrument*", but failed to specifically raise a jurisdictional objection before the tribunal. In any event, the SICC found that Reliance failed to prove forgery on the evidence before it, including finding that the evidence of Reliance's handwriting expert was insufficiently compelling.

As regards Reliance's claim of want of authority, the SICC similarly found that this precise objection had been waived because Reliance failed to put into issue Mr Agrawal's want of authority to execute the arbitration agreement. In short, Reliance's argument on this point in the arbitration was too general as it was directed at the guarantee letter rather than at the arbitration agreement, and it did not argue that the tribunal lacked jurisdiction.

As this case illustrates, advancing a case of forgery requires an intense focus on factual and forensic evidence in addition to an awareness of strategic decisions from the start of the arbitration to ancillary court proceedings, including being clear what the falsity in a forged or false document precisely is.

Contributed by Alexander Kamsany Lee, Kia Jeng Koh and Wen Jin Lau.

International Commercial Arbitration

7-judge bench of Indian Supreme Court upholds validity of arbitration clauses in unstamped agreements

In a landmark ruling, a 7-judge bench of the Indian Supreme Court has held that unstamped or insufficiently stamped agreements do not affect the existence of the underlying arbitration clause. While the agreements are inadmissible as evidence, they are not considered void or void *ab initio* so as to impact the arbitration clause.

By virtue of this ruling, respondents will be prevented from objecting to applications for reference of disputes to arbitration under Section 8 of the Indian Arbitration & Conciliation Act, 1996 (and equivalent provision under the UNCITRAL Model Law), and under Section 11 for appointment of arbitrator by Indian courts. The ruling also empowers arbitral tribunals to examine and decide objections regarding insufficient stamping of agreements. Going forward, Claimants will only need to prove *prima facie* existence of arbitration clauses, irrespective of their embodiment in unstamped agreements.

The ruling makes non-stamping, or inadequate stamping, of an agreement a curable defect. In doing so, it upholds the cornerstones of arbitration – separability of the arbitration agreement and *kompetenz kompetenz*.

Contributed by Kshama A. Loya and Nusrat Hassan.

Institutional News

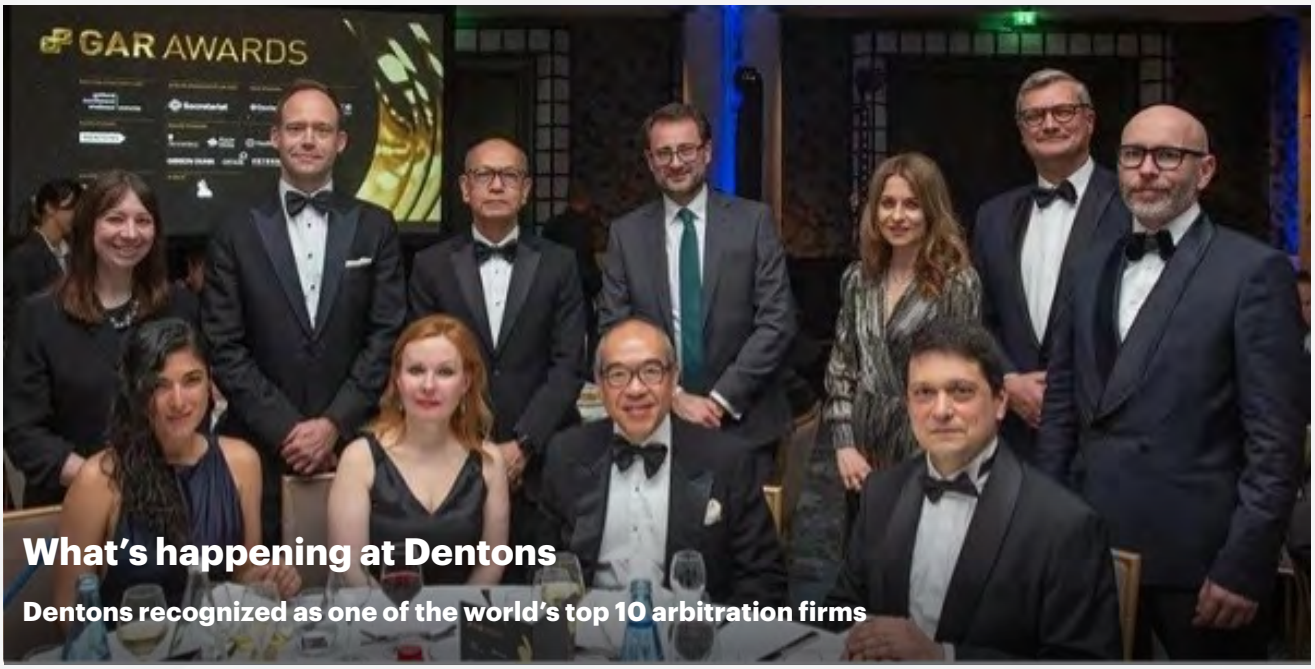
ArbitrateAD, Abu Dhabi's new institution for international arbitration

ArbitrateAD, Abu Dhabi's new institution for international arbitration, was officially launched on 1 February 2024, as a successor to the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC). The new centre aims to administer a significant portion of construction disputes and other commercial disputes in the region to position Abu Dhabi as a leading global arbitration hub.

ArbitrateAD's improvements over the previous ADCCAC rules are designed to align with international best practices, enhancing procedural efficiency and embracing technological advancements. Notable provisions allow for expedited proceedings for claims under AED 9 million, a nine-month deadline for issuing awards from the case management conference, and for the Court's scrutiny of awards to ensure quality and consistency. Further improvements include use of electronic filing as opposed to submitting "hard" copies, language flexibility, mechanisms to deal with parties failing to advance their share of the costs, and provisions for early dismissal of cases without legal merit. The rules also include provisions for joinder and consolidation and emergency arbitration.

The details of how ArbitrateAD will work in practice are limited. However, it is expected that the establishment of ArbitrateAD, with its modernised rules and enhanced case management facilities will mark a significant evolution in Abu Dhabi's arbitration offerings. It is poised to increase confidence in the UAE's arbitration framework and attract parties internationally seeking a sophisticated, efficient, and transparent dispute resolution mechanism.

Contributed by Dean Ryburn and Uzmah Shah.



What's happening at Dentons

Dentons recognized as one of the world's top 10 arbitration firms

Dentons, the world's largest global law firm, has ascended into the top 10 of the *Global Arbitration Review's* GAR30 ranking of international arbitration law firms globally for 2024. Dentons' elevation to 9th place represents a remarkable advancement from its 11th place ranking in 2023, showcasing an impressive leap of two positions, following an earlier unprecedented climb of 23 places from 2021. This continuous upward trajectory reflects Dentons' unwavering commitment to delivering innovative legal solutions and its dedication to exceeding client expectations on a global scale.

Click here to access the full press release.

Editors

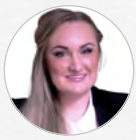
Anna Crevon
Partner, Global Co-Head of Dentons' International Arbitration Group
anna.crevon@dentons.com

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.