Baker McKenzie

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Welcome

Welcome to this issue of the Global DR Legal Update, our quarterly newsletter which aims to bring together the most important global developments in litigation and arbitration.

If you have any questions, or if we can assist further, please get in touch with Benjamin Roe or Steven Adams.
Alternatively you can speak to your local Baker McKenzie contact.

ASIA PACIFIC

EMEA

THE AMERICAS

GLOBAL

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Asia Pacific

Australia

Final report on third-party funding and class actions to be considered by Parliament

Australia's Attorney-General has released the final report by the Australian Law Reform Commission (ALRC) on third-party funding and class action proceedings. The ALRC report, which follows a two-year review and consultation period, advocates for stronger regulation of class actions and the litigation funding industry and makes 24 recommendations. These include how class actions are constituted, the treatment of competing class actions, settlement approval, the regulation of third-party litigation funders, and a review of legal costs, which includes the proposed introduction of a limited system of contingency fees. The Australian Government will now formulate a response to the report and has stated its intention to further engage with key stakeholders before doing so. Read more.

China/Hong Kong

New arrangement on reciprocal recognition and enforcement of judgments

Hong Kong and China have signed a new arrangement on reciprocal recognition and enforcement of judgments between the two jurisdictions. The arrangement applies to most civil and commercial matters under Hong Kong and Mainland law, including both monetary and non-monetary relief. Judgment creditors will not need to commence fresh proceedings in the enforcing jurisdiction. Parties seeking to enforce judgments covered by the Arrangement will not need to re-litigate their cases when seeking to recover assets in Hong Kong or the PRC, providing greater certainty and expediency. Read more.

Hong Kong

New HKIAC Administered Arbitration Rules further enhance efficiency of arbitrations

The Hong Kong International Arbitration Centre (HKIAC) has introduced a new version of its Administered Arbitration Rules which are now in effect. The 2018 Rules introduce a raft of important and useful amendments including rules relating to the use of technology (such as the use of online repositories), third-party funding, multi-party and multi-contract arbitrations, concurrent proceedings, early determination of disputes, alternative means of dispute resolution (e.g. arb-med-arb), shorter time limits under the emergency arbitrator proceedings, and time limits for the delivery of awards. The 2018 Rules are accompanied by a Practice Note on Appointment of Arbitrators. Read more.

Hong Kong

Code of practice for third-party funding of arbitration issued

A Code of Practice for Third-Party Funding of Arbitration in Hong Kong has been issued. The Code's objectives are to provide transparency and clarity for funded parties, by setting out the practices and standards expected of funders in areas such as disclosure and required provisions in the funding agreement, Hong Kong presence, capital requirements, complaint procedures, managing conflicts of interest, non-interference by the funder with the party's representatives, liability for adverse costs orders and termination of the funding. The provisions permitting third-party funding came into effect on 1 February 2019. Read more.

Japan

JCAA launch new and updated arbitration rules

The Japan Commercial Arbitration Association (JCAA) has updated both its Commercial Arbitration Rules and Administrative Rules for UNCITRAL Arbitration, in a bid to modernize the rules and make them more efficient. The changes include increasing the monetary jurisdiction of the expedited procedure, a ban on publishing dissenting opinions (in an apparent bid to reduce the number of challenges to awards), and changes to administration and arbitrator fees. In addition, JCAA has introduced a new set of rules for "interactive arbitrations", which require the Tribunal to take a more active role, including issuing a summary of the issues and a statement of the Tribunal's preliminary views. Read more.

Singapore

New infrastructure dispute protocol for Singapore

Singapore has launched a new dispute protocol which aims to help parties to large-scale infrastructure projects resolve disagreements before they escalate into disputes, and so minimize the risks of time and cost overruns. Under the new protocol, parties will appoint a Dispute Board of up to three neutral professionals who are experts in relevant fields such as engineering, quantity surveying and law. The Dispute Board will be attached to the project for its entire lifecycle, helping to manage issues that may arise, through a range of customized dispute avoidance and resolution processes. The move is seen as a key step in Singapore's aim to establish itself as the infrastructure hub of choice in Asia. Read more.

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EMEA

European Union

EU Member States agree to terminate intra-EU BITs

All 28 EU Member States have signed a joint declaration agreeing to terminate all intra-EU bilateral investment treaties by 6 December 2019. This follows the 2018 Achmea judgment in which the Court of Justice of the European Union declared investor-State arbitration clauses in BITs incompatible with EU law.

Twenty-two of the Member States also stated their belief that the Achmea judgment applies equally to the investor-State arbitration clause contained in the Energy Charter Treaty. The Declaration was welcomed by the European Commission, which has long held that intra-EU BITs are not compatible with EU law. Read more.

European Union

EU takes step towards collective redress mechanism

The European Parliament's Legal Affairs Committee has approved the first ever set of EU-wide rules on collective redress. At present, only 19 of the current 28 EU member states provide some form of legal remedy to so-called "mass harm", and there are no mechanisms for collective actions by consumers from different member states. In order to guard against abuse, the proposals only permit representative actions to be brought by eligible entities, such as consumer organizations and independent bodies. Additionally, legal costs will operate on a "loser pays" basis, and whilst the proposals seek to grant consumers full compensation for their loss, punitive damages will not be permitted. The proposals will now be scheduled for a first reading before the European Parliament. Read more.

Netherlands

Dutch Senate approves Netherlands Commercial Court

The Netherlands Commercial Court has officially launched, following approval by the Dutch Senate. The NCC seeks to offer a specialized forum for the hearing of complex, international commercial cases, which are conducted primarily in English before Dutch specialist commercial judges and based on Dutch law but with expedited procedures. It is one of a growing number of English language international courts that have been launched in the last 18 months, seeking to cater for the growing appetite for reliable, neutral dispute resolution venues for cross-border disputes. Read more.

South Africa

Commercial Court revived to speed up litigation process

A new Commercial Court Practice Directive, released by the Judge President of the Gauteng division of the High Court of South Africa, has created a specialized commercial court within the High Court. South Africa's first commercial court was created in 1996, but was never fully operational. The new court aims to increase efficiency and reduce the cost of commercial cases, through the use of specialized judges and strict case management. Allocation to the Commercial Court is upon application by a party and is restricted to substantial disputes which result out of a commercial transaction or relationship. Read more.

United Arab Emirates

UAE removes threat of criminal liability for arbitrators

Article 257 of the UAE's penal code, which, since 2016, threatened to impose criminal liability, including imprisonment, on arbitrators for failing to maintain "neutrality and integrity", has been amended. There were fears within the arbitration community that the wording was vague and so potentially open to abuse by parties seeking to obstruct or delay arbitral proceedings. The amended Article 257 no longer includes arbitrators within its scope, removing this threat, although other amendments to the penal code mean that arbitrators are now classed as "public servants" and so are subject to certain anti-bribery and anti-corruption rules. Read more.

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The Americas

Argentina

Argentine Supreme Court affirms limited grounds for review of arbitral awards

The Argentine National Supreme Court has reiterated its supportive view of arbitration by taking a restrictive approach in a recent challenge to an arbitral award. It noted that, in hearing a challenge to an arbitral award, the court is not permitted to review the merits of the dispute and must limit itself to assessing whether the award fell within the grounds for annulment set out in Argentina's National Procedural Code, namely that (i) the award contained procedural flaws, (ii) was rendered out of prescribed time limits or (iii) related to a matter not submitted to arbitration. In finding that none of these grounds applied and that a secondary challenge on public policy grounds had not been substantiated, the court dismissed the

appeal. Read more.

Brazil

Brazil approves creation of specialist cybercrime courts

The Constitution and Justice Commission (CCJ) of Brazil's Federal Senate has approved a bill which would create special courts to deal with cybercrime. The new courts have been proposed in response to the growing threat of cybercrime to individuals and companies, both in Brazil and worldwide. Staffed by experienced judges, and based on expedited and less bureaucratic procedures, it is hoped that the courts will allow cybercrime cases to be dealt with in a more expeditious manner than through the regular courts. The proposal will now be debated by the Plenary of the Federal Senate and, if passed, will be sent to Brazil's President for approval. Read more.

Canada

Canadian court refuses to certify "Dieselgate" securities class action

The Ontario Superior Court has dismissed a proposed class action involving the securities of a Germany car company that had been purchased on foreign exchanges. The relevant stocks were never sold in Canada, although some were purchased through Canadian brokers. The action related to the so-called "Dieselgate" scandal, in which the manufacturer admitted to fitting its “clean diesel” vehicles with “defeat devices” to fool emissions tests. These revelations caused a depreciation in the manufacturer’s share value. The court found that it lacked jurisdiction simpliciter or, alternatively, was forum non conveniens. This decision reinforces the principle that securities litigation should take place in the forum where the securities trading took place. Read more.

United States

US Supreme Court rejects “wholly groundless” exception to clauses delegating arbitrability

The US Supreme Court has unanimously rejected the “wholly groundless” exception to the general rule that courts must enforce contracts that delegate threshold arbitrability questions to an arbitrator, rather than a court. Several lower courts had ruled that a case need not be sent to an arbitrator if the claim of arbitrability is “wholly groundless.” However, the Supreme Court has rejected this as incompatible with the Federal Arbitration Act and Supreme Court precedent and thereby reaffirmed that courts are required to enforce arbitration agreements as written. The court also stated that, if parties intend for an arbitrator to decide the gateway arbitrability question, they must do so with “clear and unmistakable” language. Read more.

United States

California to permit non-Californian lawyers in International Arbitrations

California has amended its Code of Civil Procedure to allow foreign and out-of-state lawyers to represent clients in international arbitrations seated in California. The changes reflect the passage of a bill on the topic by the California State Senate, which was signed by Governor Jerry Brown back in July. This overturned a 1998 State Supreme Court ruling which barred non-Californian lawyers from action under threat of criminal penalty. The move is seen as a boost for the Californian legal market, which will now hope to attract international arbitrations to the State which might otherwise have been seated elsewhere to permit out-of-state or international parties to use their preferred lawyers. Read more.

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Global

New UNCITRAL convention on enforcement of mediation settlements published

UNCITRAL's new Convention on the Enforcement of Mediation Settlements and corresponding Model Law has officially been published. This follows approval of the draft text at the 51st session of UNCITRAL earlier this year. Known as the "Singapore Mediation Convention", it seeks to encourage confidence in mediation by creating an international mechanism for enforcement, similar to how the New York Convention acts as a framework for the enforcement of arbitral awards. The Convention is due to be signed in Singapore on 1 August 2019 and will come into effect six months after ratification by at least three United Nations states. Read more.

Prague Rules on taking of evidence in international arbitration launched

The "Prague Rules" on the taking of evidence in international arbitration have been launched. The new rules, a draft of which were published earlier this year, are now available for use in international arbitrations. They have been conceived as an alternative to the widely-used IBA rules on the same subject, which have been criticized in some quarters as unduly cumbersome and slow, increasing the time and cost of arbitration proceedings. The Prague Rules, which are more akin to the procedures used in civil law jurisdictions, give the arbitration panel a greater and more inquisitorial role. Read more.

JAMS and SCIA form new panel focusing on technology and media disputes

US-based alternative dispute resolution provider, JAMS, has announced a collaboration with the Shenzhen Court of International Arbitration (SCIA) to form a new Sino-American panel, consisting of dispute resolution professionals from China, the US, Europe and Hong Kong. The panel will initially focus on Sino-American disputes in the fields of technology,

media, entertainment, and sports. The tie-up aims to offer US and Chinese clients access to high-quality dispute resolution professionals, first-class case administration and market-leading facilities in both China and the US. The move follows a 2016 collaboration between JAMS and the Shanghai Commercial Mediation Center, which focused on assisting Chinese and foreign companies to settle disputes relating to real estate, trade, investment, intellectual property and insurance. Read more.

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