DENTONS

International Arbitration Newsletter

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Investor-State Arbitration

Honduras has denounced the ICSID Convention: how does this affect your investments in the country?

On 24 February 2024, Honduras officially denounced the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID). This decision by the Honduran government carries significant implications for the investment climate in the country and for those investors who relied on international treaties with a dispute resolution clause referring to ICSID to protect their investments.

Honduras denounced the ICSID Convention under its Article 71, so the denunciation will come into effect six months after its notification to ICSID. Therefore, Honduras' denunciation of the ICSID Convention will take effect on 25 August 2024. After that date, investors will not be able to submit their disputes with the country to ICSID jurisdiction and will have to seek alternatives for resolving disputes arising from investments made in Honduras.

Currently, Honduras has 10 pending cases before ICSID filed by investors of different nationalities for mostly infrastructure investments made in the country. Arbitration proceedings that are already underway will continue to be handled by ICSID, although Honduras may refuse to participate in them. Investors considering filing an investment arbitration and seeking to resolve their disputes before ICSID must necessarily inform Honduras of their intention to file an arbitration prior to 25 August 2024. This situation is particularly important for Chilean, Korean, and German investors, whose bilateral investment treaties with Honduras refer exclusively to the jurisdiction of ICSID for dispute resolution. Other treaties signed by the Central American country have alternative venues in addition to ICSID, so their investments are less affected in the event of a dispute.

Contributed by Aracelly López.

International Commercial Arbitration

Interface between arbitration and insolvency: implications from the Sian judgement

The recent Privy Council (PC) decision in the BVI case of *Sian Participation Corp (In liquidation) v Halimeda International Ltd* confirms the test to be applied on a winding-up petition where the petition debt is subject to an arbitration agreement.

Since the English Court of Appeal decision in *Altomart Ltd v Salford Estates (No 2) Ltd (No 2)*, the courts in England (and subsequently several other jurisdictions) had adopted the position that a winding up petition would generally be dismissed in favour of (or at the very least stayed pending) arbitration. The Court considered that it would be wrong for it *"to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration"*.

In the case of *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd*, however, the BVI Court of Appeal declined to follow Salford Estates and held that, where a disputed petition debt is subject to an arbitration agreement, the debtor would have to show that the debt was *"genuinely disputed on substantial grounds"* before a winding up petition would be dismissed or stayed pending arbitration.

In *Sian*, the PC held that the BVI approach was to be preferred and that the English Court of Appeal's decision in *Salford Estates* was wrongly decided on the issue of a discretionary stay for arbitration where the dispute was insubstantial.

Importantly, for the first time, the PC exercised its *Willers v Joyce* jurisdiction, altering the law of England and Wales on the issue before it. The PC gave a direction that, insofar as the PC found that *Salford Estates* was wrongly decided, it should not be followed in England and Wales.

The question now arises as to whether the PC's decision in *Sian* will alter the approach in other jurisdictions such as Malaysia and Singapore which have largely followed *Salford Estates*. The law on this point in England and BVI now diverges considerably from that applicable in Hong Kong: Since the Court of Final Appeal's decision in *Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP*, the Hong Kong courts will not only stay or dismiss a petition where the debt is subject to an arbitration agreement, but also where it is subject to a foreign exclusive jurisdiction clause, unless satisfied (without considering any detailed arguments or disputed evidence) that any dispute is frivolous or vexatious.

Contributed by Stuart Cullen and Nina Roheman.

Enforcement and Set Aside

Upholding party autonomy in arbitration: Hong Kong Court's continued reluctance to set aside

The Hong Kong Court has consistently adopted a pro-arbitration stance, demonstrating reluctance to interfere with arbitral awards. This approach is underpinned by section 81 of the Arbitration Ordinance (Cap. 609) (Ordinance) which provides limited grounds for setting aside an arbitral award. Recent case law demonstrates the Hong Kong Court's continuous commitment to upholding the party autonomy in arbitration.

In *CNG v G* [2024] HKCFI 575, the Hong Kong Court dismissed an application under section 81 of the Ordinance. In doing so, it emphasised the following principles:

- Arbitration is a consensual process of final dispute resolution to which parties voluntarily agree. There are only limited avenues for challenging the award.
- The limited recourse under the Ordinance is not intended to afford the parties with an opportunity to ask the Court to go through the award with a fine-tooth comb, to look for defects and imperfections under the guise that the tribunal had failed to act in accordance with its remit or agreed procedure.
- The Tribunal is best placed to manage the proceedings and procedures. The Court must respect the autonomy of the Tribunal and shall leave the Tribunal free to decide the dispute through the proper exercise of its case management powers.
- Matters which should have been raised with the Tribunal but were not raised, should not be brought before the Court as a matter of complaint to set aside the award.

Legal professionals are also reminded to play a more vigilant role in upholding Hong Kong's legal framework that is supportive of arbitration and respects the autonomy of the arbitral process, and to refrain from facilitating the pursuit of unmeritorious applications by "massaging" a case to fall within section 81 of the Ordinance.

In another case *G v X & Others* [2024] HKCFI 652, the Hong Kong Court remarked that a wasted costs order may be directed against the legal advisers should there be further unreasonable and unwarranted applications.

Despite the above, the Hong Kong Court will still set aside an arbitral award if the application is justified and of an exceptional nature. In *A v B* & Ors [2024] HKCFI 751, the Court set aside an arbitral award on the basis that the arbitrator provided absolutely no reasons in support of his ruling.

Contributed by Jean Lau and Nigel Chan.

International Commercial Arbitration

Vietnamese Supreme Court makes precedents for arbitration use

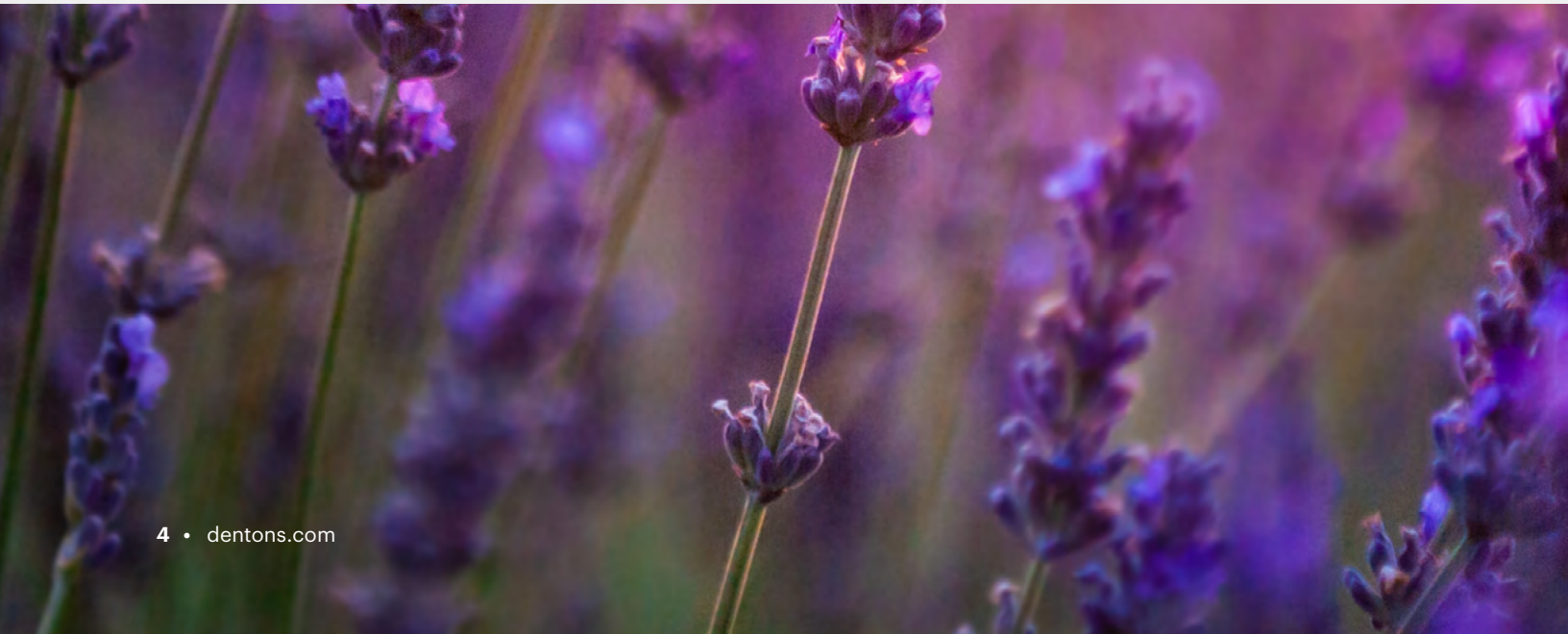
With a view to ensuring consistent application of law in trial in accordance with the 2013 Constitution, in 2015, the Vietnamese Supreme Court issued Resolution No. 03/2015/NQ-HDTP (later amended by Resolution No.04/2019/NQ-HDTP), which provides a specific process of making good judgments official precedents. The prospective precedents will be proposed by individuals, organisations or courts and subsequently be published for review by the public and assessed by the Precedent Advisory Board. They will then be considered and approved by the Supreme Court's Council of Justices.

As of today, seventy-two (including two arbitration-related) precedents have been enacted. Precedent No.42/2021 (consumer-contract arbitration) reconfirms the principle that a consumer may still go to court despite an arbitration clause in a consumer-trader contract. Precedent No.69/2023 (arbitrability of NCA) upholds jurisdiction of an arbitral tribunal over a non-compete and non-disclosure agreement despite that agreement being part of the employment contract. This precedent also reaffirms that a party will lose the right to object to the arbitral tribunal's jurisdiction if the party fails to raise the objection in the arbitration proceedings.

Legal scholars have recently proposed two draft precedents with substantial impact on arbitration practice. One affirms the Supreme Court's position that a construction contract is a civil law contract, and any issue not stipulated in construction law will be regulated by the Civil Code instead of commercial law. If adopted, the prospective precedent will put an end to the controversy on whether to apply the Civil Code or commercial law in ascertaining damages, penalty clauses and late payment interest.

The other draft precedent addresses a long-standing controversial issue on the rules of taking evidence. It affirms the position that the non-legalisation of documents presented in the arbitration proceedings is not a ground to annul an arbitral award. The basis for this ruling is the Supreme Court's interpretation of Article 9.4 of Decree 111/2011/ND-CP, according to which if an arbitration centre (as the receiving authority) does not require legalisation, then documents are exempt from legalisation for evidentiary purposes.

Contributed by Tony Nguyen.



Investor-State Arbitration

Greenhouse gas emission allowances found to not be an investment under NAFTA under specific regulatory scheme

The final award in *Koch Industries, Inc. and Koch Supply & Trading, LP v Canada* dismissed the claims brought by Koch Industries, a U.S. conglomerate, and its subsidiary, Koch Supply & Trading, LP (KS&T), against Canada for the cancellation of Ontario's Cap and Trade Program, which regulated greenhouse gas emissions. The Tribunal found that it had no jurisdiction over the dispute because the claimants did not have a protected investment under NAFTA Chapter 11.

The claimants had purchased emission allowances at an auction in 2017, which they intended to use or sell for profit. However, in 2018, the newly elected Ontario government repealed the legislation that established the Cap and Trade Program and cancelled the emission allowances without compensation. The claimants alleged that this amounted to an expropriation and a breach of fair and equitable treatment under NAFTA.

On the specific facts in this case, the Tribunal rejected the claimants' argument that the emission allowances qualified as property or an interest arising from the commitment of capital under NAFTA Article 1139(g) and (h).The Tribunal held that the emission allowances were not property because they were not capable of being owned, possessed, or transferred independently of the regulatory scheme that created them. The Tribunal also held that the emission allowances were not an interest arising from the commitment of capital because they did not entail any contribution to the economic development of the host state or any assumption of risk by the claimants.

The award is notable for its strict interpretation of the definition of investment under NAFTA and its emphasis on the link between the measure and the investment. The award also illustrates the challenges faced by investors who seek to rely on regulatory instruments that are subject to change by the host state.

Contributed by Ekin Cinar.

Enforcement and Set Aside

Ecuadorian Constitutional Court confirms that international arbitral awards do not require a recognition process to be enforced in Ecuador

Since the enactment of the Ecuadorian Arbitration and Mediation Law (LAM) in 1997, the recognition and enforcement of international awards has been controversial, leading to several contradictory decisions. LAM provided that all arbitral awards, including international or foreign shall be enforced directly, without a previous recognition procedure, in the same manner as a local award. This enforcement procedure was more favorable than the one under the New York Convention, to which Ecuador is a party.

After LAM was enacted, several courts refused to apply the direct enforcement procedure and required the holders of the awards to follow the recognition procedure. In 2015, the Organic Code of Procedure provided for a separate recognition procedure for international awards. These provisions were repealed in 2018, leaving in force the provisions of LAM on the direct enforcement of international awards. However, many judges still denied direct enforcement and required to follow a recognition procedure as a pre-condition to enforcement.

In *Cw Travel Holdings N.V. V Seitur Agencia De Viajes Y Turismo Cía. Ltda.*, the Ecuadorian Constitutional Court finally addressed this issue and confirmed that international awards must be enforced directly, as provided in LAM, without the need for a recognition procedure. In its decision of 9 May 2024, the Constitutional Court overturned the Appellate Court judgment which denied such direct enforcement.

This decision, welcomed by the arbitration community, clarifies the long-standing controversy in Ecuadorian law and upholds direct enforcement of international awards in Ecuador.

Contributed by Leyre Suarez.

What's happening at Dentons

Recent ICC Appointments

Dentons is proud to announce that several of our lawyers from around the globe have been appointed to influential positions within the ICC Commission on Arbitration and ADR and as ICC Court members for the 2024 – 2027 term. These prestigious appointments underscores our commitment to advancing the field of dispute resolution and promoting access to justice on a global scale. The ICC Commission on Arbitration and ADR rigorously examines the legal, procedural, and practical dimensions of arbitration and alternative dispute resolution, providing invaluable guidance and thought leadership in these critical areas.

ICC Court

- Juvenalis Ngowi (Tanzania) – Member
- Diora Ziyaeva (Uzbekistan) – Member

Arbitration and ADR Commission

- Rachel Howie (Canada) – Vice Chair
- Dogan Eymirlioglu – Delegate
- Herman Jeremiah – Delegate
- Roberto Lipari – Delegate

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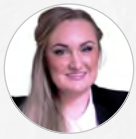

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Check out our International Commercial Arbitration Toolkit, a free to use online toolkit that provides an overview of the laws of a contemplated place of arbitration (seat) and what enforcement laws look like – presented in highly structured format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

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