DENTONS

International Arbitration Newsletter

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International Commercial Arbitration

Current trends in the development of international arbitration in Central Asia

The ongoing geopolitical shifts and global processes in international economic relations have significantly influenced the development of international arbitration in Central Asia. As the region navigates these changes, several key trends have emerged.

1. "Nationalization" of international arbitration

In recent years, while global trade and investment activities have flourished, there has also been a rise in nationalistic movements across various countries, including those in Central Asia. This paradox highlights the resilience of international commerce and the necessity for effective dispute resolution mechanisms, even in nations where international arbitration has only gained prominence in the last two to three decades.

International arbitration was introduced to Central Asian countries by foreign investors shortly after their independence in 1991, following the collapse of the Soviet Union. Investors sought reliable means to protect their interests amidst the inexperience of local courts, perceived biases, and unpredictability in judicial decisions. Initially, contracts included arbitration agreements that directed disputes to recognized international institutions like the ICC Court of International Arbitration, the Stockholm Arbitration Institute, and the London Court of International Arbitration. Though local arbitration bodies began to emerge, they often struggled to earn the trust of foreign investors and were primarily used by local small and medium-sized businesses.

As experience in international arbitration grew, government entities and local businesses became more confident in this dispute resolution method. In response, some countries began to establish their own international arbitration centers to attract foreign investment, diversify arbitration options for global business, and further develop the rule of law. Additionally, these centers were seen as a means to alleviate local court congestion. For instance, in 2018, Kazakhstan established the International Arbitration Center (IAC) at the Astana International Financial Center, while Uzbekistan launched the Tashkent International Arbitration Center (TIAC) under the auspices of its Chamber of Commerce. Kyrgyzstan also boasts a functioning International Arbitration Court within its Chamber of Commerce. The levels of support from respective governments for these "national" international arbitration institutions vary, with Kazakhstan's IAC receiving notable backing, including financial aid and significant legislative privileges, such as enforcement of IAC awards through the AIFC Court and tax exemptions for arbitrator fees at TIAC.

2. Cooperation between arbitration institutions

A notable trend is the collaboration between arbitration institutions, exemplified by the adoption of joint rules by TIAC and the Hong Kong International Arbitration Center (HKIAC). This cooperation reflects a growing recognition of the need for harmonized practices and standards in arbitration, enhancing the overall efficiency and credibility of the arbitration process in the region.

3. "Cross-fertilization" of international commercial arbitration

The term "cross-fertilization" has gained traction in discussions about international commercial arbitration, referring to the exchange and integration of ideas, practices, and methodologies among different arbitration jurisdictions and practitioners. This process enriches the development of arbitration by enabling practitioners, arbitrators, and scholars to learn from each other's experiences and legal frameworks. Additionally, the phenomenon of utilizing precedents from various arbitration awards to inform decisions in other jurisdictions has become increasingly prevalent. While such references may not constitute formal sources of law, they provide valuable context regarding cultural differences, legal nuances, and business customs. As more local lawyers engage in international arbitration, whether as counsel or arbitrators, cross-fertilization is expected to gain even greater influence, fostering an adaptable and responsive arbitration environment.

4. Creation of international commercial courts

To complement the "national" international arbitration centers, several countries have established special commercial courts aimed at addressing the limitations of contemporary arbitration and attracting foreign investment. A prime example is the AIFC Court in Astana, which has expanded its jurisdiction to allow any parties, not just AIFC-registered companies, to select it for resolving disputes. This feature offers similar advantages to arbitration, including the freedom to choose the forum for dispute resolution, expedited proceedings, simplified procedural rules, low costs, and access to experienced judges. The AIFC Court plays a crucial role in supporting the IAC, as it handles the enforcement and challenges of IAC arbitral awards, thereby ensuring predictability and efficiency. Reports suggest that a similar commercial court is in development in Uzbekistan.

5. Growing demand for collaborative arbitration and mediation

Collaboration is essential in arbitration, emphasizing mutual understanding, creative problem-solving, and relationship maintenance. This collaborative approach not only resolves disputes but also fosters respect and cooperation, leading to more sustainable outcomes. An emerging trend in this context is the integration of mediation as an alternative dispute resolution method. Modern arbitration rules increasingly incorporate techniques like "arb-med" (arbitration followed by mediation) or "med-arb" (mediation followed by arbitration). Mediation, historically prevalent in Asia, is gaining traction in Central Asia, where the cultural inclination toward amicable dispute resolution is deeply rooted.

Conclusion

The landscape of international arbitration in Central Asia is evolving rapidly in response to both local and global dynamics. Nationalization trends, institutional cooperation, cross-fertilization of ideas, the establishment of commercial courts, and a growing focus on collaborative approaches are shaping the future of dispute resolution in the region. As Central Asian countries continue to develop their legal frameworks and enhance their arbitration practices, there is a significant opportunity for improved access to justice and more efficient resolution of commercial disputes.

Contributed by Aigoul Kenjebayeva.

Institutional News

Dubai Arbitration, where are we now?

A little more than three years have now passed since Decree No. 34 of 2021 came into effect, significantly altering the Dubai arbitration landscape. At the time, much was said in particular about the decision to have the Dubai International Arbitration Centre (DIAC) administer disputes arising out of legacy DIFC-LCIA arbitration agreements and what implications this could have in the context of protecting party autonomy. Whilst it is not unheard of for an arbitral institution to change its name, in this case the entity taking over (DIAC) was a completely different entity, with different rules, than the one agreed to by the parties (DIFC-LCIA).

Three years on and we now have several decisions considering the status and enforceability of DIFC-LCIA arbitration agreements. Unsurprisingly, the results have been mixed. In the US State of Louisiana, in the decision of *Baker Hughes Saudi Arabia Co. v Dynamic Industries*, the Court held that the DIFC-LCIA arbitration agreement in that case was unenforceable, finding that it could not *"...compel arbitration when the agreed upon arbitration [institution] is unavailable or no longer exists"*.

Similarly, the Singapore High Court in the case of *DFL v DFM* commented that the parties *"...cannot be compelled to submit to arbitration under a set of rules that they did not agree to"*. Although the Court ultimately granted enforcement of the provisional award in question, this was only on the basis of subsequent conduct submitting to the jurisdiction of DIAC. On the question of party autonomy, the Singapore High Court agreed with the analysis of the Louisiana Court.

In contrast, the Abu Dhabi Court of First Instance and Court of Appeal, having considered both the Louisiana and Singapore decisions, found a DIFC-LCIA arbitration agreement to be enforceable as a matter of UAE law. The Abu Dhabi courts found, amongst other things, that the parties had clearly intended to submit their disputes to arbitration, and that a change in procedural rules was not sufficient to allow a party to resile from an agreement to arbitrate.

This stance was mirrored by the DIFC Court in the recent case of *Narciso v Nash*. Justice Black KC expressed a *"strong (albeit necessarily provisional) view that [the Decree] has not rendered the Arbitration Agreement in the present case null and void, inoperative or incapable of being performed"*, a similar view to that taken by the Abu Dhabi courts. In comparison, Justice Black KC stated that the Louisiana Court *"did not appear to appreciate the difference between forum and the procedural rules"* and that the approach of the Abu Dhabi Courts was *"to uphold the twin principles of party autonomy and holding parties to their agreements to arbitrate in a way that resonates with the pro-arbitration policy of the DIFC Courts"*.

Where does this leave us? Whilst the answer is by no means certain, the DIFC Courts appear to have given the 'pro-arbitration' way forward. To avoid risk, however, we recommend all parties review their contracts and, where necessary, update their arbitration agreements.

Contributed by Faris Shehabi.

Enforcement and Set Aside

Hong Kong Court upholds arbitration agreement and sets aside default judgment

The Hong Kong Court once again reinforces its pro-arbitration stance and commitment to upholding party autonomy in arbitration. In *Tongcheng Travel Holdings Limited v OOO Securities (HK) Group Limited* [2024] HKCFI 2710, the court set aside a prior default judgment against the defendant in light of the parties' arbitration agreement contained in an investment management agreement (IMA).

Applying established legal principles, the Court first addressed whether a valid arbitration agreement existed. Despite the plaintiff's arguments, the Court found the arbitration clause valid and operable, interpreting it leniently to give effect to the parties' intention to arbitrate. The Court also reconciled the arbitration clause with an exclusive jurisdiction clause, ruling that they can coexist with the Court retaining supervisory jurisdiction over the arbitration in Hong Kong.

A key issue was whether the defendant had abandoned its right to arbitrate by initiating separate court proceedings against the plaintiff regarding the IMA's termination. The Court held that mere initiation of proceedings without effecting service or filing substantive defences did not constitute unequivocal abandonment.

While acknowledging the defendant's delay in applying for a stay, the Court considered mitigating factors like management changes and the merits of the defence. Notably, the Court briefly opined that the plaintiff's alleged termination of the IMA appeared to be wrongful, potentially foreshadowing difficulties for the plaintiff in the arbitration.

This case demonstrates the Hong Kong Court's willingness to uphold arbitration agreements and interpret them liberally to facilitate arbitration. Where appropriate, the Hong Kong Courts will set aside default judgments in order for parties to have their disputes resolved through arbitration. It also provides guidance on factors indicating abandonment of arbitration rights and stresses the importance of promptly seeking a stay of court proceedings. Overall, it reinforces Hong Kong's arbitration-friendly stance and commitment to party autonomy.

Contributed by Nigel Chan.

Enforcement and Set Aside

Canadian court clarifies the test for arbitrator challenges

In *Aroma Franchise Company, Inc. v Aroma Espresso Bar Canada Inc., 2024 ONCA 839*, the Ontario Court of Appeal reversed a decision of the Ontario Superior Court of Justice that had set aside an arbitral award on the basis of the arbitrator's failure to disclose that one of the law firms in the *Aroma* arbitration had, while that matter was still ongoing, appointed him as an arbitrator in a second, unrelated arbitration. That, according to the set aside judge, had given rise to a reasonable apprehension of bias.

The Court of Appeal determined that the chosen legal regime of an arbitration governs the standard to be followed when determining whether an arbitrator has discharged their disclosure obligations, or a "reasonable apprehension of bias" is established. In this case, the UNCITRAL Model Law on International Arbitration prescribes an objective standard. Accordingly, and contrary to the set aside judge's approach, the inquiry needed to be undertaken through the lens of an informed and fair-minded observer, and not the subjective concerns of a party. The Court of Appeal also held that the presumption of judicial impartiality applies to arbitrators.

The Court of Appeal followed the reasons of the Supreme Court of the United Kingdom in *Halliburton Company v Chubb Bermuda Insurance Ltd.*, [2020] UKSC 48, [2021] 2 All E.R. 1175, and of the England and Wales High Court (Commercial Court) in *Aiteo Eastern E & P Company Ltd. v Shell Western Supply and Trading Ltd. & Ors*, [2024] EWHC 1993 (Comm), but factually distinguished *Aroma* from them.

This decision follows after a nearly one year reserve, that was surrounded by significant discussion and debate in the arbitral community about what arbitral disclosure is required, at least in Ontario. The discussion will likely continue – first, the Ontario Court of Appeal has recently heard and reserved its decision in the matter of *Vento Motorcycles, Inc. v United Mexican States, 2024 ONCA 480,* dealing with the situation where one member of a three-member tribunal was subject to a reasonable apprehension of bias, but the award was not set aside because there was no evidence that the other two members had been tainted; second, the *Aroma* case may well proceed to the Supreme Court of Canada.

Contributed by Michael Schafler, Emily McMurtry, Radha Lamba, and Ramy Sarouf.

Investor-State Arbitration

ECT Contracting Parties approve a modernised text of the ECT

On 3 December 2024, the Energy Charter Conference, the governing and decision-making body established by the Energy Charter Treaty ("ECT"), adopted and approved several key provisions on the modernisation of the ECT.

According to the official communication, the decision represents the formal adoption by the Conference of the modernised text of the ECT negotiated and agreed by the ECT Contracting Parties in 2022 as the Agreement in Principle (see Energy Charter Secretariat, CCDEC 2022, 10 GEN, "Public Communication explaining the main changes contained in the agreement in principle").

Among the key amendments, the definition of "Economic Activity in the Energy Sector" will extend to cover the capture, utilisation and storage of carbon dioxide. The modernised text includes an explicit carve-out for intra-EU investment disputes. It also includes disclosure of third-party funding. Similarly to the ICSID Arbitration Rules, it provides a mechanism for summary dismissal of claims manifestly without legal merit.

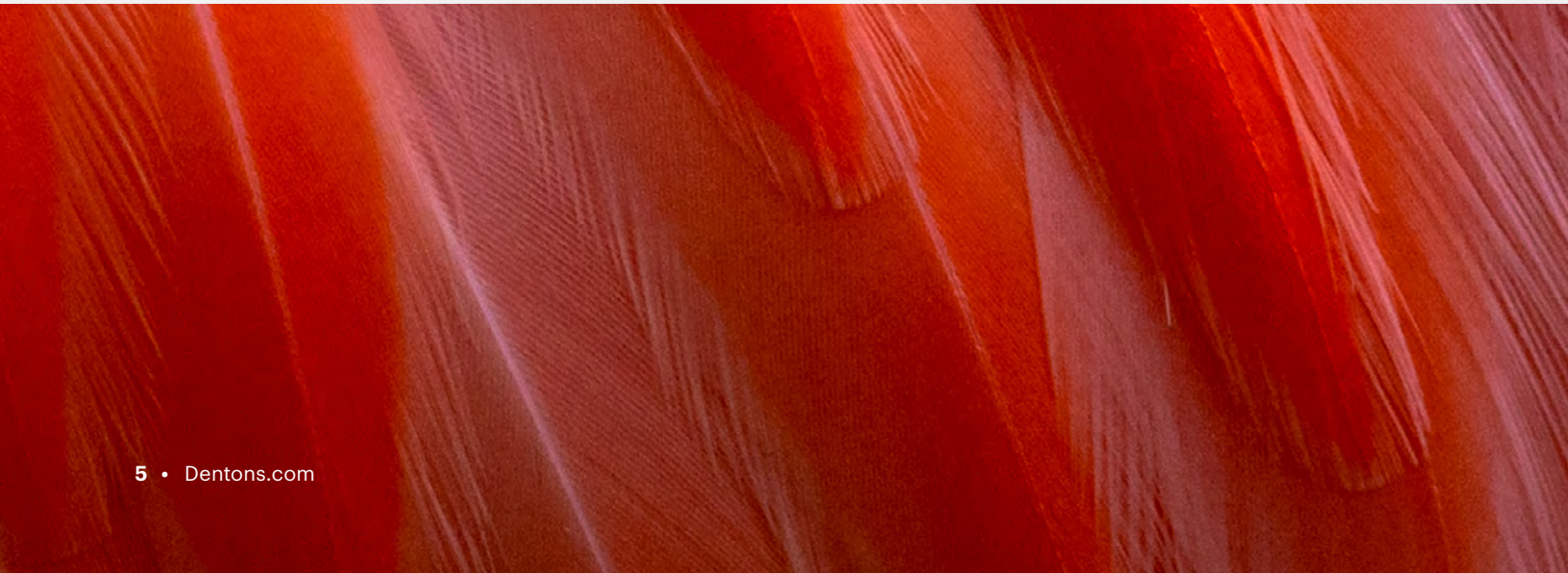
The amendments and modifications will enter into force on the 90th day after the deposit of the instruments of ratification, acceptance or approval by at least three-fourths of the Contracting Parties. The modifications shall not apply to on-going investor-State disputes brought under the existing text of the ECT.

The amendments and modifications will apply on a provisional basis from 3 September 2025, "to the extent that such provisional application is not inconsistent with [a Contracting Party's] constitution, laws or regulations" (Energy Charter Secretariat, CCDEC 2024, 15 GEN, "Entry into Force and Provisional Application of Amendments to the Energy Charter Treaty and Changes and Modifications to its Annexes"). A Contracting Party may choose to opt out of such provisional application before 3 March 2025.

Given the Portuguese Republic's withdrawal from the ECT, effective 2 February 2025, the Portuguese Government will no longer perform the functions of the Depository. The Energy Charter Secretariat will act as the Depository of the ECT instruments as of 2 February 2025 (Energy Charter Secretariat, CCDEC 2024, 16 GEN, "Designation of the Energy Charter Secretariat as a Depository of the Energy Charter Treaty").

Bearing in mind the withdrawal of the European Union and Euratom from the ECT, effective 28 June 2025, they were not present and did not vote on the modernised text of the ECT.

Contributed by Anna Crevon.



Enforcement and Set Aside

Mauritian courts enforce procedure to minimise their intervention

The endeavour of Mauritius to increase its profile as an arbitration-friendly jurisdiction has constantly found support from its judiciary which has staunchly enforced the highly non-interventionist approach prescribed under the International Arbitration Act 2008 ("'IAA"). Pursuant to her powers under the Courts Act, the Chief Justice of the Supreme Court of Mauritius has made rules for the adjudication of claims arising under the IAA by providing for a streamlined procedure and very tight deadlines. In a recent judgment in the case of *ECP Africa Fund IV A LLC v Galakha Enterprises Ltd and another* [2024 SCJ 278], a panel of three Designated Judges reiterated the mandatory nature of these rules when dealing with a claim for enforcement of an arbitration clause.

The applicants in this case were defendants in a substantive claim initiated by the respondents before the Commercial Division of the Supreme Court of Mauritius. The applicants raised a jurisdictional objection and applied for the case to be referred to arbitration. The applicants invoked an arbitration clause contained in a subscription agreement between the parties, whilst the respondent contended that it never gave its consent to the subscription agreement being signed on its behalf. The parties each filed one affidavit in support of their respective contentions. The respondent sought leave of the Court to file a further affidavit.

The Designated Judges refused to allow the motion for a further affidavit to be filed, highlighting that the IAA and the rules did not leave any room for doubt as to the fact that the rules were mandatory and stand alone. There was no residual discretion for the court to allow further evidence, the more so since, upon an application for referral to arbitration, the assessment made by the Court on the invalidity or inapplicability of the arbitration clause is on a *prima facie* basis only. In proving this invalidity or inapplicability, the respondent was held to a very high threshold of satisfying the Court that there was a very strong probability that the clause was manifestly null and void, inoperative or incapable of being performed. Such a threshold could not be met if the issues were so hotly contested as to require several rounds of exchange of affidavits. Moreover, the issue of validity or applicability of the arbitration clause may be raised again before the arbitral tribunal.

This decision follows the approach first propounded in the case of *Segatto Paolo Italo v Geosond Holding Ltd* wherein a motion for security for costs in an arbitration claim before the courts of Mauritius was rejected on the sole ground that the applicant had failed to comply with the procedure set out in the rules for such a motion.

Contributed by Natasha Behary Paray.

What's happening at Dentons

Dentons was a proud sponsor at the Hong Kong Charity Ball

Dentons was proud to sponsor and host a table at the Hong Kong Arbitration Charity Ball held at the Conrad Hotel on 23 October during Hong Kong Arbitration Week. The ball, attended by more than 500 guests, and for which **Robert Rhoda** (Hong Kong) is an organising committee member, was thoroughly enjoyable and a great success with proceeds donated to local charities, Equal Justice and the Splash Foundation.

Lexology Index: Arbitration 2025 recognizes Dentons lawyers among the world's leading arbitration practitioners

Dentons' global International Arbitration group has marked its strong position with 13 lawyers recognized in the Lexology Index (formerly WWL): Arbitration 2025 rankings of the world's leading arbitration practitioners.

Dentons' lawyers ranked in Lexology Index: Arbitration 2025 are: **Dan Bodle** (London), **Anna Crevon-Tarassova** (Paris), **Catherine Gildfedder** (London), **Rachel Howie** (Calgary), **Michal Jochemczak** (Warsaw), **Aigoul Kenjebayeva** (Almaty), **Roberto Lipari** (Rome), **Piotr Machnikowski** (Warsaw), **Robert Rhoda** (Hong Kong), **Tony Nguyen** (Hanoi), **Fernando Sanquírico Pittevil** (Caracas), **Lawrence Teh** (Singapore) and **Diora Ziyaeva** (New York).

These rankings are a testament to Dentons' excellence in international arbitration, rooted in consistently positive feedback from clients and peers. Comprising more than 500 lawyers, Dentons' International Arbitration group continues to deliver high-quality legal advice and guide clients through all stages of international arbitration disputes, whether under civil law, common law, international treaties or public international law. For more information about our rankings please find our press release here.

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.

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