HERBERT SMITH FREEHILLS

INSIDE ARBITRATION

PERSPECTIVES ON CROSS-BORDER DISPUTES

In this issue

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Welcome to the fifth issue of Inside Arbitration

A new year is a time of change and transition. It is also a chance to look ahead to the future, and this issue of Inside Arbitration is no exception to that rule. Partners and associates from across our global practice have taken the opportunity to look ahead to the future of their region, jurisdiction, sector or practice area focus to ask: "What does 2018 hold for arbitration?"

In this issue, Global Head of Disputes Justin D'Agostino and Professional Support Consultant Briana Young look at China's "Belt and Road" initiative, including the numerous proposals for resolving related disputes. Will arbitration be the method of choice, or is there an emerging preference for a less adversarial approach to safeguard the commercial relationships on which these billion-dollar transactions rely?

In a "View from Dubai", Partner Caroline Kehoe and Senior Associate Anna Wren look at the future of dispute resolution in the UAE and give insight on future-proofing the dispute resolution provisions of your MENA-related contracts.

Our sector-focused piece in this issue looks to the pharmaceutical industry and the growth of arbitration to resolve pharma disputes. Partner Chris Parker and Associate Elizabeth Reeves provide guidance on planning ahead and drafting effective arbitration clauses for this important industry.

Disruptive technologies have been front and centre of the news over the last few months with Bitcoin and other cryptocurrencies sparking the public's interest. But the technology behind Bitcoin has the potential to change the way we do business in the future in many other ways. Partner Craig Tevendale and Associate Charlie Morgan explain what blockchain technology is, its potential uses and how it will influence the resolution of disputes.

Change is also afoot for investment arbitration. There is a widely reported view that some degree of reform is needed to rehabilitate, or reframe, the investment arbitration system and to restore faith in its legitimacy. Partners Christian Leathley and Andrew Cannon, and Of Counsel Iain Maxwell, highlight the key ongoing developments in investment treaty arbitration and what this means for our clients. We have also seen change and innovation in commercial arbitration in recent years as arbitral institutions seek to offer alternative ways to obtain interim relief. Partner Nick Peacock and Professional Support Consultants Vanessa Naish and Hannah Ambrose question whether in innovating, those institutions may have created some "traps for the unwary" and whether further change is needed in future.

Legal services are not immune to change. "Big data" and analytics are front and centre for any industry and law firms are no different. In this issue, our Global Head of Pricing for Disputes, John O'Donoghue, provides insight into how we use our data to price and deliver your arbitration matters efficiently and effectively.

We continue our series of interviews with some of our partners from around the global practice. In the spotlight in this issue are Thierry Tomasi, Partner in our Paris office and Alastair Henderson, Managing Partner of South East Asia. Thierry comments on his mastery of multiple languages, his Portuguese language caseload and the importance of diversity in arbitration. Thierry, along with Senior Associate Greg Travaini, also reflects on the enforcement in France of arbitral awards set aside by the courts of the seat and the practical consequences of this approach for commercial parties. Alastair reflects on building a career in arbitration in South East Asia, looks ahead to Singapore's continuing rise as a seat of arbitration and considers the impact of Artificial Intelligence on arbitral procedure in future.

We are proud of what Herbert Smith Freehills' Global Arbitration Practice achieves for our clients. While the nature of what we do means we cannot shout our successes from the rooftops, sometimes the numbers can speak for themselves. We provide an infographic focussed on many aspects of our practice that aims to do just that.

I hope this issue of Inside Arbitration provides some useful insight and that you enjoy reading it. Feedback on content is, as always, welcome and we would be delighted to hear from you to discuss your thoughts on the topics considered.

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Negotiating roadblocks? **Resolving disputes on the Belt and Road**

The Belt and Road Initiative, China's ambitious international development strategy, is already increasing trade and stimulating economic growth across Asia and beyond.

Comprising two main components – the land-based "Silk Road Economic Belt" and the oceangoing "Maritime Silk Road" – the US$900 billion Belt and Road Initiative spans more than 60 countries and regions, stretching from Asia to Europe via Southeast Asia, South Asia, Central Asia, West Asia and the Middle East. Investment on this scale, particularly when focused on complex cross-border infrastructure , is bound to generate disputes. The question now, as Belt and Road construction and investment gathers momentum, is how dispute resolution linked to this initiative will be balanced between the different methods and providers available, and the extent to which a new model, of "dispute resolution with Chinese characteristics", will be utilised.

A US$900 billion initiative

Launched in 2013, Belt and Road celebrates its fifth birthday this year. It is generating investment in roads, railways, ports and other facilities, on a scale not seen since the US Marshall Plan re-built Europe after World War II.

Belt and Road looks certain to be the single largest driver of global trade and investment over the next decade. China Development Bank alone has announced allocations of US$890 billion to fund almost a thousand projects.

Chinese government sources indicate that Chinese firms' M&A activity increased 47% in Belt and Road countries during 2017, contrasting sharply with a 13% decline in deals outside the region.[1] Recently agreed deals include the US$13 billion Malaysian East Coast Rail Link and a US$105 million Thai rail contract. The initiative has also created, and will continue to create valuable opportunities for Chinese investors, as well as non-Chinese contractors, financiers and government authorities.

Inevitably, a construction and infrastructure initiative on this scale will generate disputes. Although most Belt and Road projects are still in their early stages, there is evidence that a number have already encountered roadblocks.

1. http://english.gov.cn/news/top_news/2018/01/30/content_281476030661728.htm

Plans for a Chinese-built refinery in Myanmar were shelved in late 2017, after the US$3 billion project failed to obtain financing. A U$14 billion dam project in Pakistan was suspended, after the Chinese government allegedly requested an ownership stake and the host refused on grounds of national interest. A proposed China-Laos railway link has suffered a number of setbacks, and Tanzania is reportedly renegotiating a billion-dollar port project with its Chinese and Omani investors.

Complex projects generate complex disagreements. Claims arising from major projects are generally expensive and time-consuming, diverting attention and resource from the projects themselves. More importantly, disputes threaten commercial relationships, often jeopardising the project itself. It is critical that these disputes be resolved quickly, efficiently, and effectively, from both the legal and commercial standpoints.

So far, so obvious. The question occupying dealmakers, policymakers and lawyers is: how to achieve it?

It seems that everyone along the Belt and Road has a view. Given the likely number and quantum of Belt and Road disputes, providers of dispute resolution services have been quick to throw their hats into the ring, emphasising their experience of complex commercial and investment cases alike. Will one achieve dominance, or is there space for a range of courts and institutions to help disputing parties get back on track?

Over, under or through? The pros and cons of an adversarial process

Most Belt and Road disputes will be cross-border. Many will involve at least one Chinese party. Counterparties' legal systems will range from highly sophisticated to largely undeveloped, with varying degrees of political influence. Quantum could be calculated in billions, and there will be inherent political sensitivities. It is essential to find an effective way of resolving differences as they arise. But for disputes so complicated and varied, is there a "one size fits all" method of resolution?

Arbitration

For cross-border disputes, international arbitration is the mechanism of choice. Alongside confidentiality and flexibility, it is the ease of enforcement that drives commercial parties to arbitrate. More than 150 states are party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.[2] The Convention establishes a regime for quick and easy enforcement, without re-litigating the dispute on its merits. Enforcing a foreign arbitral award under the Convention is significantly easier than enforcing a court judgment abroad. Arbitral awards are also much more difficult to appeal or overturn.

Arbitration is well-known and widely-used throughout the international business community. This is particularly the case in China-related transactions, where foreign parties are reluctant to submit to the Chinese courts, and vice versa. By contrast, both Chinese and non-Chinese parties are usually comfortable with the arbitral process. As a result, most cross-border deals provide for disputes to be arbitrated. This is especially true in the construction, infrastructure and maritime sectors, which are the principal focus of Belt and Road.

Arbitration institutions, including the Court of Arbitration of the International Chamber of Commerce (**ICC**), Singapore International Arbitration Centre (**SIAC**), Hong Kong

For disputes so complicated and varied, is there a "one size fits all" solution?

2. A number of Belt and Road jurisdictions, including Timor-Leste, Yemen, Turkmenistan, Iran, and the Maldives, are not party to the New York Convention. Enforcing arbitration awards in these jurisdictions will depend on local laws and court procedures, and may be less straightforward. Parties to transactions involving any non-New York Convention territory should take specialist advice to ensure their dispute resolution provisions are suitable. It remains an option to enforce against assets in any New York Convention jurisdiction, to the extent they can be located.

International Arbitration Centre (**HKIAC**), and many more are encouraging Belt and Road deals to adopt their rules. As world-class dispute resolution providers, all are well-placed to resolve these disputes between commercial parties. Regional institutions, including Malaysia's KLRCA and Seoul's KCAB, are similarly positioning themselves to attract Belt and Road disputes.

Recognising the potential for Belt and Road disputes between investors and states, including claims under bilateral investment treaties, these institutions are also boosting their investment arbitration credentials. Both SIAC and the China International Economic and Trade Arbitration Centre (**CIETAC**) released investment arbitration rules in 2017, for example, with CIETAC also establishing a dedicated Investment Dispute Resolution Center in Beijing, although it has not yet heard an investment dispute.

Hong Kong, Singapore, Kuala Lumpur and Seoul are all attractive seats for Belt and Road arbitrations, though by no means the only choices.

Yet arbitration has its drawbacks. Arbitrating complex disputes can be time-consuming and expensive. It is also adversarial, which can make it difficult - or impossible - to maintain the commercial relationships on which the project's success relies. Many Asian cultures, in particular, prefer less confrontational methods of resolving disagreements.

Mediation

An increasingly popular alternative is mediation. China has a longstanding culture of mediating disputes, as do other Asian countries. Beyond Asia, users of dispute resolution services are also demonstrating a preference for alternatives to litigation and arbitration, which are perceived as expensive and detrimental to commercial relations.

A non-adversarial process, mediation facilitates negotiated settlements and focuses on preserving business relationships. It is faster than arbitration, confidential, and less costly.

Key players have been quick to emphasise mediation's advantages. In September 2017, the Singapore International Mediation Centre (**SIMC**), and the China Council for the Promotion of International Trade China Chamber of International Commerce Mediation Center (**CCOIC**) agreed to cooperate in assisting businesses to resolve cross-border Belt and Road disputes using mediation.

Ms Ng Chai Ngee, SIMC Board Member, noted "As the Belt and Road takes off and cross-border commercial transactions grow, there will also be a corresponding increase in disputes. Mediation provides an avenue for these disputes to be resolved quickly, cost efficiently and amicably, in a way that preserves relationships and is consistent with Asian values that both Singapore and China share."[3]

Hong Kong has also signaled its support for mediating Belt and Road disputes. The Department of Justice is developing eBRAM.hk, a secure online arbitration and mediation tool, tailored to large infrastructure projects under the Belt and Road. At a Hong Kong government Belt and Road Summit in October 2017, delegates discussed a bespoke Belt and Road arbitral and mediation centre, as well as a model Belt and Road dispute resolution clause providing for mediation, then arbitration.

SIAC, HKIAC, CIETAC, ICC and more have long offered mediation in addition to, or instead of, arbitration. They have tried and tested rules and processes, long track records, and panels of experienced mediators. All are well placed to offer these services to Belt and Road parties.

Overall, we anticipate that mediation will play a growing role in resolving Belt and Road disputes over the life of the initiative.

Dispute resolution "with Chinese characteristics"

As the driving force behind Belt and Road, China will surely influence dealmakers' decisions on dispute resolution. Mainland officials have repeatedly indicated their support for a "hybrid" method, combining mediation and arbitration, with the courts playing a role as well.

Last summer, the Hong-Kong based think-tank International Academy of the Belt and Road published a proposed "*Dispute Resolution Mechanism for the Belt and Road Initiative*"; the so-called "*Blue Book*".

In it, the Academy proposes a unified dispute resolution clause, procedure and "Belt and Road Dispute Resolution Center" for commercial, trade and investment disputes. The proposed mechanism would require negotiation, then mediation, and finally arbitration if no negotiated settlement were reached.

3. https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/singapore-and-china-mediation-centres-work-together-to-help-busi.html

In September 2017, China's Supreme People's Court (**SPC**) released proposals for a Belt and Road International Commercial Court,[4] to provide parties in Belt and Road countries with "fair, efficient and low-cost one-stop legal services". It was thought at the time that China might have modelled its proposed tribunal on Singapore's International Commercial Court or the Dubai International Finance Centre Court, but no further detail was revealed.

On 23 January 2018, at a meeting chaired by President Xi Jinping, the Chinese Communist Party formally adopted the "Opinions on Establishing Belt and Road Dispute Resolution Mechanisms and Institutions". At the time of writing, the Opinions have not been published, but they reportedly contain plans for China to establish a system to resolve commercial, trade and investment disputes that arise under the Belt and Road.

The Party's stated goal is to protect the lawful rights and interests of Chinese and foreign individuals equally, and to create a stable, fair and transparent business environment. China has also said it will seek to work with existing international dispute resolution resources and services.

Following this announcement, Chinese media reported that China intends to establish three international commercial courts to handle Belt and Road disputes. The three courts will be located in Shenzhen, Xi'an and Beijing. The Shenzhen court will be responsible for handling cases relating to the Maritime Silk Road countries and the Xi'an court will handle cases relating to the Continental Silk Road countries. The court in Beijing will serve as "headquarters", although there is no indication what this means in practice.

Further reports suggest that the SPC is working with Silk Road countries to establish a Belt and Road International Disputes Management Center in Xi'an, to provide negotiation, mediation and arbitration services and maintain close cooperation with the Chinese courts.

In addition, it is reported that the China Council for the Promotion of International Trade (**CCPIT**) is working with foreign industrial and commercial associations to establish a new dispute prevention and resolution institution. The new institution will operate as a non-governmental international organisation and will provide dispute prevention, mediation and arbitration services tailored to the needs of Belt and Road countries.

Until the Opinions are published, it is difficult to be sure how these plans will play out in practice. In the meantime, China's international approach and focus on collaboration with existing dispute services providers are encouraging.

It is too early to say how much traction China's proposals will gain, versus the offerings of established international institutions.

It is also unclear whether, and to what extent, Chinese parties will be encouraged to adopt the proposed mechanism. Given their likely negotiating power, however, it is likely that this form of "dispute resolution with Chinese characteristics" will at least be on the table when discussing Belt and Road deals.

Belt and Road or not?

There is no official method of designating a Belt and Road project, nor published list of the Initiative's projects.

Belt and Road is an umbrella term to describe inbound and outbound investments across a nominated region. Even the list of Belt and Road countries is the subject of debate.

Whatever the strict parameters of the Belt and Road, it looks certain to result in a surge of investment into and out of China, and a consequent surge in disputes. It seems that, for the time being at least, there will be almost as many ways to resolve Belt and Road disputes as there are Belt and Road jurisdictions.

The market may eventually produce a preferred method, or even two, although in our opinion it is unlikely that a single forum will dominate.

In the meantime, parties and their advisors must keep abreast of the options, so they can select the most appropriate method for their particular transaction. A road block isn't always insurmountable.

4. Literally, "tribunal"

Belt and Road Projects

https://www.herbertsmithfreehills.com/latest-thinking/chinas-belt-and-road-initiative-projects-pave-the-way

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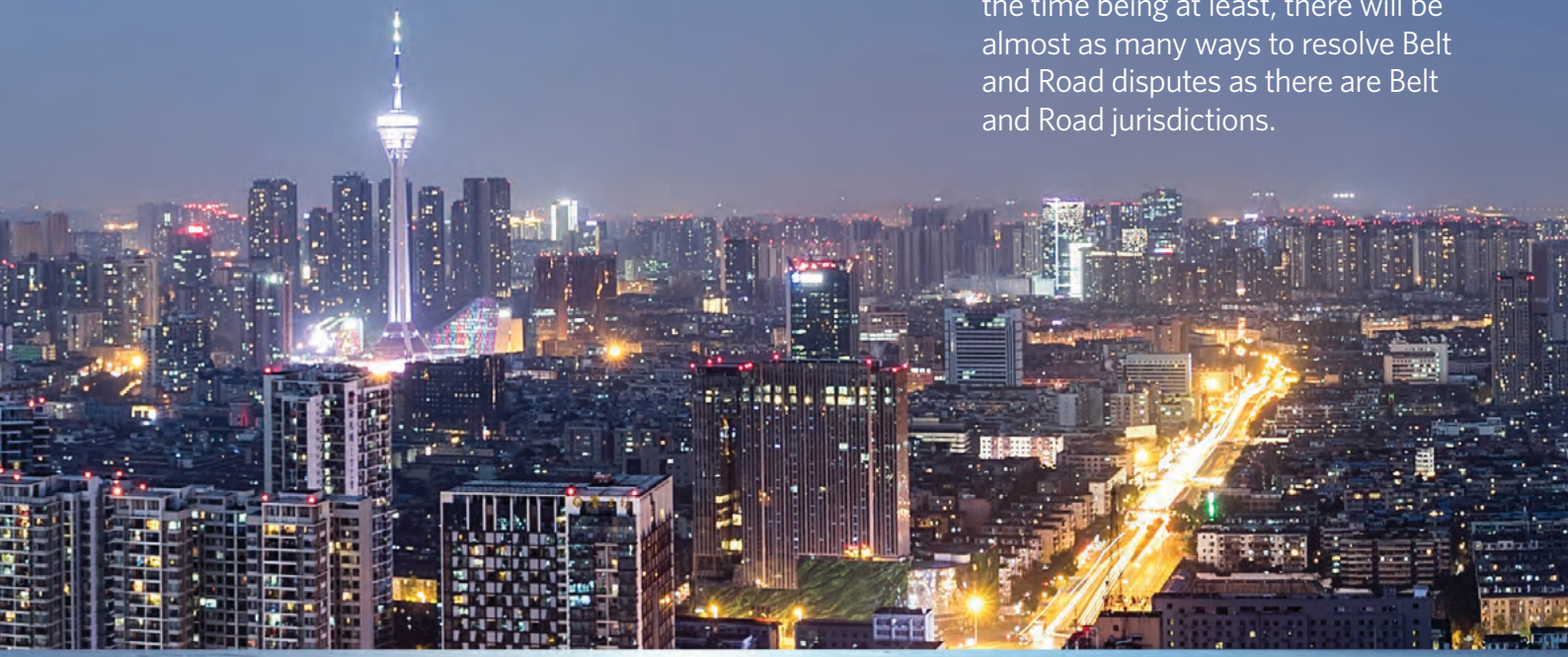

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Spotlight article: **Thierry Tomasi**

Partner, Thierry Tomasi, joined our Paris arbitration practice in October 2017. Here he discusses his move to HSF, working in four different languages across multiple continents and his predictions for future trends in arbitration.

Thierry, you joined HSF last year from a Boutique law firm. What is different about working in a firm like HSF?

A firm like HSF is a global business, and the whole environment is different: the scale of everything is different, the sheer number of people working for the firm and strength of the network is astonishing. A particularly important and noticeable difference for me though has been diversity. I am relishing the diversity of background and cultures in the people that I work with day-to-day in Paris but also across the global practice. It is so important to have that breadth in a practice like international arbitration. Diversity in background, culture and experience translates into diversity in hard and soft skills. It is great to be able to harness all these different skills from across the global arbitration practice and channel them into work for my clients.

> "A particularly important and noticeable difference for me though has been diversity"

What isn't different between my old firm and HSF is the level of dedication that I see being put into the work we do for our clients. From that perspective, it feels very familiar and comfortable.

One of the things that is instantly apparent on talking to you is that you speak English like a native. How have you come to speak English so well, and what other languages do you speak?

I was raised bilingual in French and Italian. I also went to an international school from the age of 6 to 18 and I spoke English there. All the children at my school came from different backgrounds and myriad nationalities. You learn to get along with all of these children, find out about their lives and their homes and that makes you curious about the world. It made me want to travel and experience different cultures, learn different languages and live life with an international mindset. My English was probably rounded off in terms of fluency when I spent time studying a Masters in private international law and arbitration in London after I did my Masters degrees in Paris.

In addition to French, Italian and English you also speak Spanish and Portuguese. Did you learn Portuguese at school? Do you work on Portuguese language cases for your clients within your international caseload?

Portuguese has been a more recent acquisition as a language. I have been working for Brazilian clients for about 10 years now, travelling out to Brazil to work with them and to arbitrate Brazil-related disputes. I'm a member of the Brazilian arbitration committee and go out to Brazil to attend and speak at conferences there. I've picked up Portuguese language skills during that time and am now fluent.

In terms of my cases, yes, I work on a number of Portuguese language cases, mostly related to Brazil in one way or another. Brazil is by far the largest Portugese language market for arbitration and it is growing incredibly quickly. But the lusophone African market is also growing. Angola became the 157th contracting state to the New York Convention last year, and I was recently invited to speak at an ICC conference there. I sensed a genuine interest from the Ministry of Justice in making Angola an arbitration-friendly jurisdiction, and in drawing on the experience of lusophone arbitration specialists.

I've been really pleased with how quickly I've been able to draw on the resources available to me at HSF and form a team who have the necessary Portuguese language skills and background for these cases. The future looks exciting for HSF's lusophone arbitration practice.

Does arbitrating in Brazil look and feel like it would anywhere else in the world, or are there differences?

I would say that arbitrating in Brazil can be very different to your standard international arbitration. Arbitration has grown very quickly in Brazil to resolve domestic disputes first and foremost, so the procedure is still influenced by the country's litigation culture and perhaps less by the international models. Knowledge of the Brazilian way of doing things is definitely a plus for arbitrating in Brazil or with Brazilian parties.

That said, a fair number of Brazilian practitioners have a solid experience of international cases and are well known as arbitrators, and they bring more international practice home with them.

You obviously have a number of regional focuses in your practice. Some arbitration practitioners have particular sector focuses. What about you, are there particular sectors you are most interested in?

I really enjoy having a varied caseload across a variety of different sectors. I've got very broad commercial experience, having worked on cases in aerospace, defence, rail equipment and infrastructure, energy, and mergers & acquisitions disputes. The type of dispute you get is very different between sectors and I enjoy mastering the different issues that arise. Obviously, you develop a client base and with that client base you develop additional skills in particular fields and sectors. In my case, I have particular expertise in civil and military aerospace and rail. I also teach Investment Treaty arbitration at Université Catholique de Louvain in Belgium and given my academic interest in this area, I'd be keen to grow my practice here too.

Which trends do you see affecting commercial arbitration in near future?

The biggest trend for me must be the further globalisation of the arbitration community and a move towards diversity in every respect: in gender, geography and culture. We've already seen the growth of Asia as an arbitration centre and that looks set to continue. Arbitration in Latin America is already thriving- Brazil is one of the largest countries as origin of parties in ICC and the ICC has opened office there- but I think it will also gain more of an international presence. All the efforts of some African jurisdictions to position themselves as centres of arbitration excellence may gather speed. In terms of gender diversity of arbitration practitioners and arbitrators, while we in no way have gender parity at the moment, I'm extremely positive about the up-and-coming generation of abitrators. I hope very much to see a far more representative set of arbitrators on every tribunal in a few years' time. Diversity can only be a good thing.

I am also noticing an increasing interconnection between arbitration and criminal laws, as well as issues of compliance. Commercial disputes can sometimes be accompanied by difficult discussions with regulators or a financial prosecutor and their investigations can, in turn, have strong repercussions on commercial disputes. I also see this increasing link at the post award stage where parties seeking to have the award annulled or avoid enforcement raise issued related to criminal law, in the form of fraud or breach of public policy allegations, or make criminal complaints to hinder the enforcement. This can be challenging for a commercial lawyer but is fertile ground for us to focus our minds on new solutions.

Talking of enforcement, you recently discussed the French approach to enforcement of awards annulled at the seat at a "GAR Live Inquisition" in Paris. Do you think ease of enforcement remains the main concern of clients choosing arbitration?

The French approach to the enforcement of awards annulled at the seat of arbitration has been a hot topic in arbitration for some time now. French courts have taken a liberal approach to this issue, which consists in allowing, as a matter of principle, the enforcement of an award annulled by the courts of the seat of the arbitration, provided that the award otherwise satisfies the basic requirements set by French law for recognition and enforcement. This approach remains isolated from a comparative standpoint, and often comes as a surprise to clients.

In terms of client concerns regarding enforcement, unless there is a regional system of mutual recognition of judgments exists (such as within the EU), an arbitral award remains, by and large, easier to enforce than a judgment. But while it is "easier" that doesn't mean it is always easy. While the New York Convention certainly makes enforcement possible around the world, there are still hoops to jump through and domestic procedures to follow. We sometimes need to set more reasonable expectations for our clients about the time it may take to enforce, and the prospects of success of enforcement against certain types of counterparties. For example, state-owned entities in transitioning economies or against state owned assets in other jurisdictions (including France, after the recent enactment of a law regulating enforcement on sovereign assets).

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Enforcing in France a foreign award that has been set aside at the seat of arbitration: **is it possible and what are the practical consequences for the parties?**

As a matter of principle, French courts hold that the setting aside of an international arbitral award by the courts of the seat of the arbitration is irrelevant and does not prevent, per se, its recognition and enforcement in France (*Hilmarton v. OTV, Cass. Civ 1st, 23 March 1994, n° 92-15137; Putrabali v. Rena Holding, Cass. Civ 1st, 29 June 2007, n° 05-18053*).

The rationale behind this position is twofold. First, Article VII of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (**NY Convention**)[1] allows signatory countries to adopt rules that are more favourable to the recognition and enforcement of foreign awards that the NY Convention itself. Article 1520 of the Code of Civil Procedure (**CPC**)[2], which lists the grounds under which recognition and enforcement of an award may be refused, does not include the setting aside of an award at the seat of arbitration. Second, from a more theoretical standpoint, French courts consider that an international award is an international judicial decision, detached from any particular domestic legal system. Therefore, the decision of the courts of the seat setting aside an international award does not carry any particular weight or authority (*Cass. 1st Civ., 9 October 1984, Pabalk Ticaret Sirketi v. Norsolor, n° 83-11355*).

Conflicting awards rendered abroad relating to the same dispute between the same parties cannot coexist within the French legal order. Accordingly, when an award has been recognised in France, any other international award rendered between the same parties and on the same subject matter cannot be recognised in France, irrespective of whether the second award was issued after the annulment or setting aside of the first award at the seat (*Cass. Civ 1st, 29 June 2007 N° 06-13.293*).

The position of French courts therefore carries important practical consequences when some of the parties' assets are located in France, or when recognition of the award in France may be relevant:

The party in favour of whom an international award is made may consider, irrespective of whether proceedings for the setting aside of the award are pending at the seat of the arbitration, or of whether the award has been annulled or set aside:

- Requesting without delay recognition of the award, through an enforcement order (*ordonnance d'exequatur*). Applications are filed with the Paris Court of First Instance (Article 1516 CPC), and the order of enforcement is issued on an ex parte basis within an average of four weeks, on the basis of an original copy of the award and of the arbitration agreement (or certified copies thereof), duly translated into French (Article 1515 CPC). The issuance of the *ordonnance d'exequatur* of the first award would prevent any attempt to have any subsequent award, issued further to its annulment or setting aside, recognised and enforced in France.
- Attaching, on a provisional basis, assets belonging to the award debtor (or held by third parties on behalf or to the benefit of the award debtor) located in France, if any, on the basis of the award, which is considered as having res judicata effect (Article 1484 CPC). Provisional attachments may then be converted once the ordonnance d'exequatur has been obtained.

The party against whom an award is made may consider, in cases where this award is being challenged before the courts of the seat, and it is subsequently annulled or set aside:

- Appealing without delay the *ordonnance exequatur* for the first award[3], in order to make it possible for the award issued subsequently to the annulment or setting aside of the first award to be recognized and enforced in France. The grounds for appeal are, however, limited: (i) the arbitral tribunal wrongly upheld or declined jurisdiction, (ii) the arbitral tribunal was irregularly constituted, (iii) the arbitral tribunal ruled without complying with the mandate conferred upon it, (iv) due process was violated, or (v) recognition or enforcement of the award would violate French international public policy (Articles 1520 and 1525 CPC).
- Requesting that the Court of Appeal seized of the appeal against the *ordonnance d'exequatur* stay or adapt the enforcement of the first award, as the appeal itself does not have this effect (Article 1526 CPC). This is possible, by way of exception, where enforcement of the award pending the appeal "could severely prejudice the rights of one of the parties" (Article 1526(2) CPC), for instance where the debtor would become insolvent or bankrupt due to enforcement, or there is a significant risk that the award creditor may not repay the amounts to the debtor in case of reversal of the *ordonnance d'exequatur* (because it is insolvent, etc.).
- Moving without delay to have any subsequent award issued in its favour recognized in France, subject to the reversal of the *ordonnance d'exequatur* of the first award.

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1. France is a party to the New York Convention, which came into force on 24 September 1959
2. Pursuant to the 2011 French Arbitration Act (Decree No. 2011-48 of 13 January 2011)
3. Once the award debtor is notified of the exequatur order, it can lodge an appeal against the order within 30 days from the date of notification, with an additional two months if the award debtor is domiciled outside of France (Articles 1525 and 643 CPC)

Arbitrating pharma disputes is on the rise – **why it makes sense and how to plan ahead**

Pharmaceutical companies risk coming up against complex and high value disputes in their everyday dealings and operations, and we are increasingly seeing arbitration being used to resolve those disputes. Here we discuss the kinds of disputes pharmaceutical companies face and why international arbitration is well-suited to resolving those disputes.

What kinds of disputes do pharmaceutical companies face?

Leaving typical IP disputes to one side, pharmaceutical disputes do not necessarily fit within the same bucket. However, they commonly arise out of contractual relationships, whether "one-off", such as acquisitions, or ongoing, such as collaborations for drug development or co-promotion agreements.

Contractual disputes are increasingly common in the sector, including from R&D collaborations and co-promotions.

As in other sectors, M&A can give rise to a variety of disputes, relating, for example, to inherited liabilities and warranty claims.

Pharmaceutical companies also enter into a vast range of ongoing commercial arrangements, including R&D agreements, licenses, co-promotion contracts and supply or distribution agreements. While most of these contracts are performed amicably, they can be ripe for dispute if the parties' commercial interests fall out of alignment.

For example, co-promotion, co-marketing, joint development or license agreements in relation to a particular drug can bring together companies of significantly different size, with expertise in different segments of the market and different geographical reach. The idea, of course, is that the parties share an interest in successful commercialisation of the product. Their interests may not, however, always align – particularly if the agreement (as is often the case) places primary responsibility for the costs of development or promotion of the product on one party or the performance of the product is not in line with expectations.

These collaborative agreements commonly include some form of endeavours or efforts obligation, such as a requirement for one party to exercise commercially reasonable efforts to develop a particular product. In our experience, these kinds of obligations provide fertile ground for dispute if the parties' commercial relationship deteriorates. In particular, what a particular endeavours or efforts obligation requires is often a complex question, from a legal perspective and in terms of industry practice and the product and markets in question. We also find that these obligations can be vague and ill-defined – for example, in the absence of key performance indicators, what should be the reference point to determine whether a company is doing enough to satisfy its obligations to work towards a certain objective? In a co-promotion agreement, should the focus be on the investment committed, the number of details performed, reflection rates or something else entirely? There are often good reasons for drafting an endeavours obligation in broad terms – for example, because the development pathway for an early stage drug is uncertain. However, the vaguer the drafting, the more scope there will be for conflicting interpretations and disputes further down the line.

Further, when these disputes do arise, they can be very high value (hundreds of millions of dollars), with the claiming party alleging significant lost revenues in the form of lost royalties or lost sales, covering many years. Needless to say, this can result in the agreement in question receiving a much higher level of scrutiny – by lawyers and tribunals, but also internally – than was ever anticipated when it was signed. It also

In a 2013 survey on dispute resolution in technology-related disputes produced by the WIPO Arbitration and Mediation Center (the "**2013 WIPO Survey**", available here), one respondent from an R&D institution in Germany estimated that in two years the institution had concluded approximately 2,000 non-disclosure agreements, 6,000 R&D agreements, 900 licenses, cross-licenses and pool licenses and 10 agreements on settlement of litigation.

brings into focus clauses often considered as boilerplate – including, in particular, limitation of liability provisions and arbitration clauses. A well-crafted and enforceable limitation clause will preclude a high-value, speculative claim, and could be critical in enabling a commercial resolution to any dispute.

The 2013 WIPO Survey suggests that disputes arise more commonly from license agreements as compared to other contractual relationships: respondents from the pharmaceutical / biotechnology sector identified license agreements as most commonly giving rise to disputes, at 26%, followed by R&D agreements at 20%.

In the 2013 WIPO Survey respondents from the pharmaceuticals / biotechnology sector were asked to identify their preferred dispute resolution clause for use in commercial contracts – the results placed arbitration in second place (at 24%), not far behind court litigation (at 33%). Respondents were also asked about their key considerations when negotiating dispute resolution clauses – those who used arbitration more frequently in international agreements identified time, enforceability, quality of outcome and forum neutrality as more important considerations compared to respondents using litigation most frequently. Respondents also indicated that they spent more time and incurred significantly higher costs in litigation than in arbitration and mediation.

Arbitration of pharmaceutical disputes is on the rise and set to grow

We are seeing increasing use of international arbitration to resolve pharmaceutical disputes, primarily in the context of cross-border commercial arrangements, where a deal or relationship spans multiple countries. This increasing move towards arbitration is likely down to the fact that, as we explain below, arbitration has a number of advantages over national court litigation in the context of cross-border agreements in this sector. With the pharmaceutical industry continuing to grow and increasing awareness of the benefits of arbitration for the resolution of pharmaceutical disputes, we expect the use of international arbitration in this sector to continue to rise.

Arbitral institution caseloads also indicate that the use of arbitration for pharmaceutical disputes is on the rise. For example, the number of pharmaceutical disputes before the American Arbitration Association (the "AAA") steadily grew year-on-year from 2009 to 2013, increasing from 26 to 47 cases, and in 2016, pharmaceutical and healthcare disputes were the joint sixth largest industry contributor to the LCIA's caseload.

Why and when to choose arbitration for pharmaceutical disputes

A neutral forum for resolving multi-jurisdictional disputes

Commercial arrangements in pharma increasingly span many countries and involve parties of different nationalities. Recent years have also seen increasing expansion of global pharmaceutical companies into emerging markets. By 2015, emerging markets had overtaken the "EU5" economies (Germany, France, Italy, the UK and Spain) in pharmaceutical spending (see McKinsey, "*Pharma's next challenge*", July 2015, available here). The activities of a number of the global pharma companies also demonstrate significant investment in emerging markets: Bernstein analysts have estimated Pfizer's 2017 emerging markets growth as the fastest, at +7.8%, and average emerging markets exposure for big pharma at 22% (as reported here).

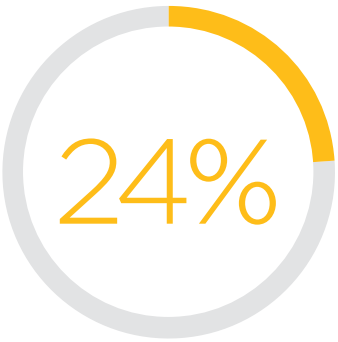
Although there has been significant growth in emerging markets and growth prospects remain attractive, growth has been less

PREFERRED DISPUTE RESOLUTION CLAUSE

Pharmaceuticals / biotechnology sector were asked to identify their preferred dispute resolution clause for use in commercial contracts

COURT LITIGATION

ARBITRATION



explosive than previously forecast (as highlighted by Deloitte in "*Pharma and emerging markets: Unlocking the potential of emerging economies*", available here). This stall in growth is owed in part to economic conditions, but it is likely to also be attributable to a number of other factors, such as pricing pressures, lack of IP protections and regulatory challenges. Nonetheless, the long-term potential for pharmaceutical companies in emerging markets remains, particularly with the shifting epidemiological profile in developing countries and the upward trend in chronic diseases (as reported by PWC in "*Pharma 2020: The vision*", available here).

Arbitration is an attractive option for resolving any disputes that arise from these cross-border arrangements. Arbitration provides a neutral forum: for example, an English party and Japanese party may agree on arbitration in Paris or Singapore as a neutral forum in which to resolve any disputes, without submitting to the jurisdiction of courts with which they may not be familiar. It also provides an alternative to the local courts of the country where the activity is taking place – a key consideration in emerging markets, where the rule of law may be less rigorously applied and national courts may not have the necessary expertise or resources to deal with complex, high-value disputes.

Enforceability

In the cross-border context, enforceability of arbitration awards or court judgments is a critical consideration – a favourable judgment that cannot be enforced against the counterparty's assets will often represent a pyrrhic victory. Here, arbitration awards have a significant advantage over court judgments, with the New York Convention providing a regime for the enforcement and recognition of arbitral awards within its 157 contracting states. While enforcement may be refused on limited grounds, this means that in the vast majority of jurisdictions, a successful party will have better (and often much better) prospects of enforcing a foreign arbitration award than a foreign court judgment.

It is, however, important to note that some jurisdictions impose limitations on the arbitrability of patent disputes, which may impact enforceability. For example, the French courts will not enforce an award on the validity of a French patent, but will recognise a decision on civil action for infringement.

Preserving confidentiality

In our experience, pharmaceutical disputes frequently concern IP issues and sensitive technical and commercial information. Confidentiality is therefore often a critical concern. While arbitration is not always confidential, it can be. Parties who choose to arbitrate can opt for an arbitral seat or institutional rules (for example, London or the LCIA Rules) which impose a duty of confidentiality on the parties in relation to documents, submissions and evidence provided in the arbitration, or they can include an express confidentiality obligation in the arbitration agreement.

The collaborative nature of many commercial relationships in this sector also means that it is often to the benefit of all parties to preserve an ongoing relationship, and to continue working towards the aim of the collaboration, pending resolution of a dispute. The possibility of maintaining confidentiality in arbitral proceedings may mean this is more achievable, mitigating the risk of publication and external comment exacerbating the dispute.

Selecting a procedure that is suited to the dispute

Our clients value the greater flexibility that arbitration generally offers to parties to tailor a dispute resolution procedure to suit a specific dispute. Arbitrators have greater discretion than judges in civil litigation to adopt a procedure that is best suited to the dispute in question, as they are not bound by detailed procedural rules. Further, parties are also able to choose their own arbitrators, and can choose candidates with experience in pharmaceutical disputes, a scientific background and a degree of familiarity with the sector. Some arbitral institutions (such as the International Centre for Dispute Resolution) offer panels of arbitrators with specific life sciences experience to assist parties in selecting the most appropriate candidates.

Arbitration may also offer the parties to a dispute the opportunity to resolve it more quickly by way of expedited or emergency procedures. This may be of particular benefit where resolution of a dispute is time-sensitive, for example, where it is important that a dispute causes minimal disruption to the development of a specific drug.

2013 WIPO Survey

The results of the 2013 WIPO Survey highlight the cross-jurisdictional nature of commercial arrangements in technology-driven sectors such as the pharmaceutical industry. The survey revealed that:

- 90% of respondents concluded agreements with parties from other jurisdictions;
- 80% of respondents concluded patent-related agreements with parties from other jurisdictions on technology patented in at least two countries;
- 71% of WIPO mediation and arbitration cases have been international in scope; and
- 92% of patent-related WIPO arbitrations and mediations have been international in scope.

Finality of the arbitral award

Arbitration awards are final and subject to appeal only on very limited grounds (which do not typically include alleged errors of fact or law). In turn, this increases the possibility of the dispute being brought to a timely conclusion and reduces the risk of the parties incurring further costs. Of course, the counter-argument is that everything then turns on the decision of the arbitral tribunal.

Drafting effective and enforceable arbitration clauses

When parties do opt for arbitration, it is critical to get the arbitration clause right: a badly drafted clause can (at best) cause delay and increase costs if there is a dispute or (at worse) be ineffective.

To keep things simple and minimise the risk of challenge, **we suggest using the relevant institution's model arbitration clause as a starting point and tailoring it (if appropriate and with care)** to suit the agreement in question.

The arbitration clause should contain a mandatory reference to arbitration and set out the parties' agreement on the seat, language of the arbitration, the applicable institutional rules, the governing law of the arbitration agreement (typically either the governing law of the contract or the law of the seat) and the number of arbitrators.

Parties should **take care in selecting the arbitral seat**, which determines the national law that will underlie the arbitration and the national courts to which the parties will turn if they require court intervention in support of the arbitration or wish to challenge the tribunal's award. Certain places are commonly considered "safe" seats because they benefit from a legal framework that limits the scope for court intervention and from strong, "pro-arbitration" local courts. Seating an arbitration in a less arbitration-friendly jurisdiction can have significant consequences; for example, there may be increased risk of local court intervention, either during the arbitration or in lengthy challenges to the tribunal's award. There can also be negative practical consequences: for example, certain jurisdictions prohibit international counsel from appearing as advocates.

It is important to **bear in mind how the agreement to arbitrate will work in practice**. For example, including in the arbitration clause strict qualification requirements for the arbitrators can cause delay, lead to the challenge of arbitrators (on grounds that they do not meet the criteria) and limit the pool of potential arbitrators.

Parties should also **consider whether multi-contract or multi-party scenarios should be taken into account** in the choice of arbitral institution and in the drafting of the arbitration clause. For example, where there are multiple interrelated contracts, it is often advisable to include a consolidation mechanism and consent to disputes arising under the different agreements to be resolved together.

Finally, **tiered dispute resolution mechanisms are increasingly common**, requiring negotiation or mediation before an arbitration is commenced. The attractions are obvious, but a tiered clause like this arguably precludes either party starting arbitration until the tiered clause has been complied with. The drafting should therefore be clear that either party may commence arbitration after a certain number of days (whatever has happened or not happened) – and parties should only include this sort of mechanism if they are prepared to let it play out if a dispute does arise.

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Blockchain and Smart Contracts: **novel opportunities for improving efficiency in contract execution and dispute resolution**

Blockchain is seen by many as the most significant technological breakthrough since the advent of the internet. Digital currencies based on blockchain technology have monopolised many of the headlines, notably with the huge price volatility of Bitcoin in recent months. However, blockchain has far wider-reaching potential and new applications are capable of fundamentally disrupting business practices across many sectors.

Indeed, blockchain could have a similarly disruptive and revolutionary effect as did the internet on the way that business is conducted across the globe, having the potential to radically improve efficiency and eliminate centralised trust dependency models.

Some blockchain advocates have suggested that blockchain enables its users to eliminate disputes altogether or, at least, to significantly disrupt conventional methods for dispute resolution. However, this risks overstating what blockchain can achieve in the context of dispute resolution, at least in the short to medium term. This is particularly true of smart contracts and, chiefly, their purported ability to eliminate disputes through wholesale self-enforcement. Blockchain protocols and their smart contract applications need to be developed methodically and in the recognition that this technology will not be a panacea for dispute-free self-enforcement of all contractual obligations.

Craig Tevendale and Charlie Morgan explain blockchain technology in more detail below and consider at a high-level some of its potential applications. They then briefly address the 'real world' limitations of smart contracts. Finally, they consider how partially self-executing agreements can prosper as an effective tool to improve efficiency of contract execution, in a manner compatible with existing methods of dispute resolution.

What is blockchain?

In simple terms, blockchain is a way of recording data. It is a decentralised public ledger of transactions that is maintained by its users, rather than by a trusted third party. Each blockchain 'protocol' operates on cryptographic technology and acts as a dynamic registry for the exchange of digital assets and verification of digital information.

Transactions on the blockchain are divided into encrypted, irreversible and time-stamped 'blocks' which are shared and corroborated by the users of the blockchain (or a selection of such users). Users of the blockchain can see the block (and, in some cases, approve it), but nobody can unilaterally modify any block that has been approved. Each 'block' is then chained to the next block, using cryptographic signatures to ensure validity and prevent tampering.

Smart contracts

Blockchain technology supports applications that go beyond virtual currencies. In short, the blockchain enables complex transactions of digital assets to take place in a decentralised manner. Various blockchain protocols have been developed, and the characteristics of each one impacts upon its ability to support any given cryptographic application. The best known blockchain protocols are perhaps Bitcoin and Ethereum. These platforms are used by others (individuals and businesses) to develop applications customised to their own purposes.

A 'smart contract' is not a contract in the traditional sense. Instead, a smart contract is a software programme built on the blockchain. Smart contracts can be used for allocating digital assets (in their simplest form, digital currencies) between two parties, when specific conditions or requirements established in the programme are met. In short, a smart contract is the translation into software code of an agreement reached between two or more parties.

A smart contract can include the contractual arrangement itself, the preconditions necessary for the parties' respective obligations to take effect and the mechanics for the actual execution of the obligation in question (once those preconditions are met). In a purely digital world, and assuming a perfect one in which software bugs could be eliminated, smart contracts could avoid the need for further input from the parties to the agreement or any trusted third party, such that the contract, or certain parts of it, become self-fulfilling.

Smart agreements and smart clauses

Given that a smart contract is not a contract in the traditional sense, this term can cause confusion. Therefore, it is worth coining two additional terms. The first is a 'smart clause', being a traditional legal clause, the content of which is (in addition to forming part of a traditional contract) executed digitally as a smart contract on a blockchain. Similarly, 'smart agreement' can be used to refer to a written agreement

(entered into in compliance with traditional principles of contract formation), which contains one or more smart clauses. In this sense, a smart agreement is essentially the incorporation into a traditional legal agreement of smart contract mechanics, which will enable the parties' agreement to evolve over time and, in relation to those clauses for which this is practicable and efficient, to self-enforce on the blockchain.

Blockchain and smart contracts will not eliminate disputes altogether

Some technologists have been heard to proclaim that the advent of blockchain and smart contracts will avoid disputes altogether on the basis that the parties' bargain is automatically implemented in a decentralised manner, when the conditions agreed between the parties are fulfilled. However, that view disregards the way in which disputes generally arise.

There is no doubt that blockchain technologies have the ability to change the way in which business is done in the future. For example (and there are far too many such examples to mention), at the end of last year, a consortium including energy supermajors BP and Royal Dutch Shell announced the development of a blockchain-based digital platform for energy commodities trading which is expected to start by end-2018. The Australian Securities Exchange (ASX) was then the first global exchange to announce that it would replace its settlement and clearing system with blockchain technology. The trend continues in 2018, with the French government opening the way for the trading of unlisted securities using blockchain.

However, the performance of actions on the blockchain is limited to the digital world, whilst much of the performance required under commercial contracts takes place in the physical world. As a result, while self-executing smart contracts and blockchain applications have the potential to increase the efficiency of dispute resolution dramatically, disputes will not disappear altogether. On the contrary, **the irreversible nature of the blockchain makes it crucial that any self-enforcing aspects of parties' agreement are anchored within a valid legal framework and that the parties identify at the outset the applicable dispute resolution mechanism**.

By way of simple example, a smart contract has no means by which to verify whether external data is correct; the programme simply retrieves digital data when the function calls for it, and applies that data to determine the next 'transaction' (or step) in the software's application. If the data received by the smart contract is incorrect, the software may execute in a manner that is contrary to the parties' bargain. Furthermore, 'bugs' are frequently identified in software programmes and coding. For these and many other reasons, disputes will arise in relation to self-executing smart contracts and, when they do, it will be essential for parties to be able to determine their rights and obligations under relevant laws and through an agreed dispute resolution mechanism.

> ... a smart contract has no means by which to verify whether external data is correct

Smart agreements offer a pragmatic solution, therefore, for those parties seeking to reap the benefits of blockchain technology, while retaining robust dispute resolution mechanics anchored in the real world. Smart agreements can ensure that parties preserve their ability to resolve both blockchain and real-world disputes in a single chosen dispute resolution forum (or tailored mechanisms for different types of disputes, if the parties so elect). They also ensure that all of the parties' rights and obligations pertaining to a legal relationship (or a particular aspect thereof) can be identified readily in a single document.

No legal vacuum: real world issues of governing law and jurisdiction

Indeed, if a smart contract is to be legally binding (as well as being immutable following publication to the blockchain as a matter of practice), it needs to be subject to the contract law of a given jurisdiction. Further, insofar as it is intended to effect obligations agreed between the parties, those obligations must also be capable of enforcement even if there is a bug in the software programme and the obligation of one party is not automatically performed. As such, the parties must be able to determine which decision-maker has jurisdiction to hear and decide upon any dispute.

Therefore, if parties do not anchor their smart contracts into a smart agreement (or otherwise enter into a standalone legal agreement which governs disputes arising from the smart contract) and agree the applicable law and decision-maker expressly between them, the decentralised nature of the blockchain (with its users and servers located in many different

jurisdictions across the globe) will cause very complex conflict of laws questions regarding the applicable laws and the courts that have jurisdiction to determine 'blockchain disputes'. The ability of its users to operate on some blockchain protocols through pseudonyms, with near-anonymity, represents another obstacle to the resolution of such disputes through arbitration (eg by consent of the parties once the dispute has arisen).

In light of this, it would be advisable for each blockchain protocol to specify that disputes arising in relation to transactions published on the blockchain shall, unless otherwise expressly agreed between parties to a contract on the blockchain, be referred to a neutral, binding dispute resolution mechanism. This would not replace the need for smart agreements, but might help to provide some form of safety net in the event that parties overestimate the attributes and capabilities of smart contracts. The obvious candidate for resolving such disputes is international arbitration. Arbitration offers parties the ability to select individuals with the necessary experience to resolve their disputes effectively (whether sector-specific, legal or technology-related). The enforceability of arbitration awards across the globe under the New York Convention is also of considerable benefit in this context (ie where users of the blockchain – and their assets – are spread across the world and may be difficult to trace given the pseudonymity of the blockchain).

Coding programmes are also being developed to allow for arbitration to take place 'on the blockchain', which can be then built in to parties' smart contracts. One of these protocols was tested through mock arbitration proceedings last year, as a means of suspending the operation of a smart contract pending resolution of the parties' dispute. Those exciting initiatives are beyond the scope of this article, but we continue to consider their relevance for our clients. However, given the continuing regulatory uncertainties surrounding the use of blockchain and the inescapable risk of software bugs, it remains advisable to incorporate any such dispute resolution mechanism within a smart agreement. This will enable parties to harness the benefits of blockchain, while mitigating the risks of unforeseen challenges.

Conclusion

Cryptographic technologies which support blockchain and its applications such as smart contracts are capable of creating significant efficiencies in many industries around the world, including through the effective implementation of contracts.

For contractual obligations which are based on or are implemented through blockchain technology, we may well see changes in how disputes arise and how they are resolved. For example, the scope of disputes may become narrower, focused on a particular failed step in the blockchain, and disputes may be resolved through virtual platforms. However, these technologies are still untested in mainstream commercial application, and many questions remain about how their use will be regulated. **For now at least, users would be well advised to treat smart contracts as a software translation of standalone 'traditional' contractual obligations, which operate under a given law and which are subject to the jurisdiction of a particular decision-maker who can hear and decide upon any disputes.** Parties who disregard these questions due to the so-called self-executing nature of these digital 'contracts' will increase their legal risk, and likely encounter the very real world problems of increased uncertainty and exacerbated cost in determining how and by whom disputes will be resolved. This in turn could delay the global adoption of blockchain applications more widely.

> Parties should treat blockchain applications as an effective tool for improving efficiency in contractual implantation, while ensuring that the entirety of their agreement is anchored within a valid legal framework governed by robust means of dispute resolution.

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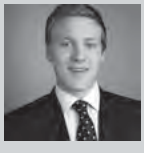

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Protecting party rights by use of interim measures: **traps for the unwary in obtaining court-ordered interim relief**

In this article, partner Nick Peacock and professional support consultants Vanessa Naish and Hannah Ambrose explore the availability of court-ordered interim relief in support of arbitration and how it interacts with the relief available within the arbitration process. They draw on recent developments and consider whether changes to institutional arbitration rules on emergency relief may have had unintended consequences for parties seeking to obtain interim relief from the courts.

Interim measures of protection (also known as interim relief or conservatory measures) are orders granted on a temporary basis in order to safeguard the rights of a party until there has been a final determination of a dispute.

In an increasingly globalised trading environment in which evidence and assets can often easily be transferred across borders, interim or conservatory relief is a significant aspect of effective dispute resolution. Interim relief may take many forms. A party may want to preserve the status quo (for example by restricting the transfer of shares, or the exercise of contractual rights in a permanent way), prevent the destruction of evidence, or ensure that any confidentiality obligations are observed. Most often, interim relief is aimed at preventing the dissipation of assets which are either the subject matter of the dispute or may be relevant to the satisfaction of an anticipated judgment or award.

The use of interim relief in litigation is well recognised. Yet interim relief is no less significant in international arbitration. The importance of timely and effective interim relief is recognised by the leading arbitration institutions including the ICC, LCIA, SIAC, SCC, Swiss Chambers, AAA-ICDR and HKIAC. A number of these institutions will constitute an arbitral tribunal on an expedited basis to assist in cases of urgency. More recently, many institutions have introduced an emergency arbitrator (EA) facility: where an arbitrator is appointed for the sole purpose of determining urgent interim applications in a short timescale before the main tribunal is constituted.

Options for interim relief before an arbitral tribunal are therefore available. However, for many commercial parties, court-ordered interim relief may still be preferable. Court-ordered relief has a number of potential benefits, including the ability to seek ex parte relief, and to ensure that the relief binds third parties when that is needed to make it effective (for example, a freezing injunction against accounts held at third party banks).

The first port of call for court-ordered interim relief: the courts of the seat?

The most natural forum for the grant of court-ordered interim relief in support of an arbitration is often the court of the seat of arbitration. In most jurisdictions which are regarded as supportive of international arbitration, the scope of the court's power to grant interim relief is set out in the arbitration law of that jurisdiction, and the extent of this power is one important factor for parties to consider when choosing their seat of arbitration.

A further relevant consideration when choosing a seat is the type of interim relief available to ensure that, if a dispute arises, relief will be both effective and efficient. For example, where assets are spread across multiple jurisdictions, it may be time-consuming and inefficient to make

Foreign court proceedings threatened?

It may be possible to seek anti-suit relief in anticipation of foreign court proceedings in breach of an arbitration agreement, even if no arbitration has been started. The English Supreme Court has been prepared to grant such relief (See *Ust-Kamenogorsk Hydropower Plant JSC (Appellant) v AES Ust-Kamenogorsk Hydropower Plant LLP (Respondent)* [2013] UKSC 35, where proceedings in Kazakhstan were threatened in breach of an agreement providing for arbitration in London).

Where should you make an interim relief application: arbitration or court? Key considerations

Is interim relief in support of arbitration available in the courts which have jurisdiction over the counterparty and/or assets in question? Are there any restrictions on seeking court relief in the law of the seat?

Does the application need to be made "ex parte" (ie without the other side being notified of the application in advance) in order for the measure to be effective?

Is the relief sought urgent? If so, how urgent?

Has the arbitral tribunal been constituted? If not, can you seek expedited constitution, or relief from an EA? Can a tribunal (or EA) act effectively in granting the relief sought (for example, does the relief sought need to bind third parties)?

Would the counter-party be likely to comply with an order for interim relief from the tribunal? Would it comply with an order from the available court?

Are there any restrictions in the arbitration agreement or the institutional arbitration rules on seeking interim relief?

multiple separate applications for relief in the courts of different jurisdictions, even assuming those courts would entertain such applications. A number of courts are empowered to grant a freezing order that extends to assets located outside of its jurisdiction. Worldwide freezing orders are available from the English court (and others) in support of arbitration and, indeed, have even been granted in circumstances where the seat was London but there were no assets within the jurisdiction (*U&M Mining Zambia Ltd v Konkola Copper Mines Plc* [2014] EWHC 3250 (Comm)).

Other options for court-ordered interim relief: where will relief be most effective?

The courts of the seat will often be the most obvious forum in which to seek interim relief. However, in some cases, a party may be able to get effective relief from courts in another jurisdiction – for example, where the types of relief available are more advantageous, if the relief would be more effective if granted by the court of the respondent's domicile or where the relief is to protect assets which are located in another jurisdiction.

> The courts of the seat will often be the most obvious forum in which to seek interim relief.

The statutory framework governing arbitration in a number of jurisdictions includes a power of the court to grant relief in support of arbitration proceedings wherever they are seated. The English court is able to grant interim relief where the seat of arbitration is outside England. Many other jurisdictions take the same approach, for instance, the Cypriot courts – a jurisdiction which is often used as a financial hub – also have this power. Commercial parties have used similar proceedings to good effect to obtain relief from the courts of the situs (for example, in the jurisdiction where physical assets are targeted by the interim relief application, or the jurisdiction where a debt is due to the respondent which the applicant wishes to attach).

However, the possibility of "forum shopping" for interim relief outside the court of the seat should not be exaggerated. Even though a court may have the power to grant relief, it may not consider it appropriate to exercise that power. The English court recently dismissed an application for interim relief where there was already litigation in the BVI and arbitration proceedings seated in Switzerland (see *Company 1 v Company 2 and another* [2017] EWHC 2319 (QB)). Its reasons for doing so included the tenuous link which the dispute had to England and the guiding principle that the natural court for granting interim injunctive relief is the court of the country of the seat of arbitration.

A further consideration is whether there are any restrictions in the parties' arbitration agreement which would preclude an application for interim relief to the courts other than the courts of the seat. These restrictions may be express. However, restrictions may also have taken effect by virtue of the parties' choice of institutional arbitration rules, as discussed further below.

Restrictions on access to court-ordered interim relief: the impact of institutional arbitration rules

Emergency arbitrator provisions or the scope for the expedited constitution of a tribunal may affect the court's power to order interim relief

The inclusion of EA provisions in all major institutional arbitration rules was heralded as the answer to the need for easy access to emergency relief within the arbitration process. EA provisions are useful where the available courts do not have procedures for granting interim or conservatory measures in support of an arbitration; or where parties prefer to make such an application within the arbitration. In promoting its emergency procedures, the LCIA explains that the EA provisions do not prejudice "a party's right to seek interim relief from any available court" (see the LCIA Notes on Emergency Procedures). Similar statements have been made by other arbitration institutions in respect of their own EA provisions. Institutions have also included or expanded the availability of expedited arbitrations or the expedited formation of tribunals, which can ensure quicker access to interim relief from the tribunal.

Whilst it may not have been the intention in taking these initiatives to prejudice applications to the court for interim relief, a case last year in the English courts demonstrated that the availability of emergency relief within the arbitral process (including the possibility of expedited constitution of a tribunal) could indeed impact not only the court's balancing of the relevant circumstances concerning an application, but the court's powers to grant relief.

In *Gerald Metals SA v Timis* [2016] EWHC 2327 (Ch), the English court considered its power to order urgent relief under the English Arbitration Act in circumstances where the LCIA had already considered, and refused, an application to appoint an emergency arbitrator. The court found that the test of "urgency" under s44(3) of the English Arbitration Act 1996 would not be satisfied unless:

- the matter was so urgent that there was insufficient time to form an expedited tribunal or appoint an emergency arbitrator; or
- an expedited tribunal or emergency arbitrator could not exercise the necessary powers.

In this case, the court considered that, because the application for appointment of an emergency arbitrator had already been considered and dismissed by the LCIA Court, the test of urgency was not satisfied and therefore the court had no power to grant urgent relief under s44(3). The case is discussed in more detail on our arbitration blog here.

This case concerned the LCIA Rules and how they interact with the requirements of the English Arbitration Act 1996. **However, the case has far broader application. As noted above, most institutional arbitration rules contain provisions dealing with emergency proceedings – either EA provisions or the ability to seek expedited constitution of a tribunal. Furthermore, many courts will require an applicant for interim relief to establish that the relief sought is urgent before they are empowered to grant it.** As in the case of *Gerald Metals*, the combination of emergency provisions in the arbitration rules and carefully circumscribed powers of the court could prove fatal to an application for interim relief.

> The inclusion of EA provisions in all major institutional arbitration rules was heralded as the answer to the need for easy access to emergency relief within the arbitration process.

So, can parties have it both ways – keep the EA provisions but without undermining the prospects of an application for interim relief from the courts? It is untested, but the most practical solution may be to include express drafting in the arbitration agreement which

seeks to deal with the possibility that a party chooses to bypass the EA procedure, or is not successful in having an EA appointed. Suggested language could record that: neither (i) the potential availability of relief from an EA or the possibility of the expedited constitution of an arbitral tribunal; nor (ii) the failure to make an application for the appointment of an EA or expedited constitution, shall prejudice an application to a state court for interim relief. A further step could be to agree that the decision of the institution on whether to appoint an EA or to expedite constitution of the tribunal, or the decision of an EA on the question of whether the relief should be granted, shall not bind the court or limit its powers, thereby encouraging any court to reach its own conclusion on the facts of the application presented to it. Another option, of course, would be for the parties to exclude the emergency provisions of the institutional rules altogether. Arguably this would be the only effective approach where it is the existence of the mechanisms (rather than any evidence of whether or how they have been invoked) which would go to the jurisdiction of a court to hear an application for interim or emergency relief. Either kind of agreement should be considered carefully. It will be relevant to consider both the specific provisions of the law of the seat and the institutional rules, as well as the potential importance of access to EA relief or expedited constitution of the tribunal if disputes should arise.

Relief from the court after the tribunal is constituted: is there a two-stage test under the LCIA Rules and how to avoid it?

In 2014 the LCIA launched its revised Arbitration Rules which introduced changes to the text of Article 25.3, which deals with the parties' right to apply to a state court for interim measures. This provision follows Article 25.1 which sets out the arbitral tribunal's own powers to grant interim or conservatory relief. An application to a state court after formation of the tribunal was permitted by the 2008 Rules "in exceptional cases". The changes to Article 25.3 in the 2014 Rules now explicitly focus on interim and conservatory measures "to similar effect" to those available under Article 25.1, but introduced an additional requirement that applications to a state court after formation of the tribunal may only be made "in exceptional cases **and with the tribunal's authorisation**".

Whilst there is an inherent appeal in seeking to ensure that the tribunal (once constituted) becomes the gatekeeper for the parties' applications for relief related to the proceedings (as is expressly envisaged by some arbitration legislation, for example, s44(3) of the English Arbitration Act 1996, and section 12(A)(6) of the Singapore International Arbitration Act Cap. 143A and more obliquely referred to in others, for example, Article 17J of the UNCITRAL Model Law), problems emerge where a need for such relief arises which is both urgent and involves seeking relief that – while "to similar effect" to that which may be granted under Article 25.1 - is beyond the ability of the tribunal to grant. A sensible reading of Article 25.3 is that it does not require the tribunal to authorise an application to the court for relief that the tribunal itself could not grant (ie relief which is not "to similar effect" to relief which the tribunal is empowered to grant under Article 25.1). A worldwide freezing injunction, for example, is arguably not "to similar effect" as the types of relief which the tribunal is empowered to grant under Article 25.1. However, on its face, Article 25.3 has the potential to cause difficulties for parties seeking urgent, and in particular without notice (ex parte), relief from a state court where that relief may fall within the scope of Article 25.1 or could be regarded as relief "to similar effect".

Moreover, tribunals have interpreted Article 25.3 as introducing a gateway whereby a party is required to establish that the case is "exceptional" (a subjective term which may or may not be equated with urgency) **and** then address the tribunal as to whether it should authorise it. If the tribunal declines to do so, a party who proceeds with an application to the court would be in breach of the LCIA Rules, would risk its reputation with the tribunal, and would also potentially face the prospect of the court refusing the application influenced by the tribunal's decision, rather than the court conducting its own analysis consistent with the precise requirements of the law of the seat. In any event, a party seeking an urgent without notice freezing injunction against the respondent will find such an application completely undermined by any prior application it may be said it needs to make to the tribunal, on notice, for permission under Article 25.3 to apply to the court for such relief.

> ...the most pragmatic solution for parties concerned about this requirement is to include drafting in their arbitration agreement to dis-apply certain of the requirements of Article 23.2

Whilst anecdotal evidence from the LCIA suggests that a party may make a retrospective application for the tribunal's authorisation **after** it has sought the relief it needs from the court, the risk remains that a court could refuse to grant the relief on the basis that the arbitration agreement had not been complied with. Any suggestion of unilateral communications with the tribunal to obtain authorisation for an ex parte application would constitute a clear breach of the LCIA Rules and would risk prompting a challenge to the tribunal.

Until the LCIA issues guidance or revises its rules in the light of these considerations, the most pragmatic solution for parties concerned about this requirement is to include drafting in their arbitration agreement to dis-apply certain of the requirements of Article 25.3. For example, parties may choose to dis-apply the requirement for tribunal authorisation under Article 25.3, or they may also consider it prudent to dis-apply the requirement for the case to be "exceptional" in order to avoid any court having to contend with arguments that Article 25.3 imposes a higher or additional threshold of "exceptionalness" on top of any criteria, such as "urgency", imposed by the law of the seat.

Nor is this simply an LCIA Rules issue. Notably, a similar requirement for there to be "exceptional circumstances" is found in the SIAC Rules 2016. Other sets of institutional rules, such as the SCC Rules 2017, HKIAC Administered Arbitration Rules 2013, and ICDR Rules 2010 do not impose any additional hurdles, simply recognising that an application to a court is not inconsistent with an agreement to arbitrate. The ICC Rules 2017 specify that a party may apply to a court for interim relief after the file has been transmitted to the tribunal "in appropriate circumstances".

Given the significance of interim relief to the effective resolution of disputes through arbitration, and the ability to enforce arbitral awards, this is an area which merits attention from the parties at the transaction stage. As well as considering the powers of the potentially relevant courts to grant relief should the need arise, it is important to consider the requirements of the chosen institutional arbitration rules and how these two aspects of the dispute resolution process may need to work together. As ever, time spent reflecting on the scope of the dispute resolution provisions, and their suitability to the sorts of disputes that may later appear, can help the parties lay the groundwork to obtain effective interim relief in support of arbitration proceedings if it is ever needed.

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Our global arbitration practice

A snapshot of 2015-2017

US$48.63 BILLION

value of the claims and counterclaims in our portfolio

Our locations

Our recent arbitration experience covers over 100 Countries

working on arbitration across **21 offices**

involving **77 laws**

across **43 seats**

Our sectors

- Energy
- Construction
- Financial
- Infrastructure
- Mining
- Insurance
- IT / TMT
- Manufacturing
- Trading
- Pharmaceuticals
- Travel and leisure

Facts and figures

40+ Partners

100+ qualified Lawyers

129 live arbitrations and **14** active treaty based arbitrations

14 cases worth more than **US$1 billion**

we have worked on arbitrations governed by **37** sets of rules

86%

we have conducted the advocacy in **86%** of our cases

Read our International arbitration and Public International Law blogs:

Arbitration notes: http://hsfnotes.com/arbitration/

PIL Notes: http://hsfnotes.com/publicinternationallaw/

Spotlight article: **Alastair Henderson**

The Head of our Southeast Asia Disputes practice reflects on a career shaped by geography, serendipity, and conversations in college bars...

Alastair, how did you get into the law?

I had never thought about studying law. I did sciences at school and went to university to read zoology. But then I got interested in law through chatting with law student friends in the bar; so much so that eventually I changed my degree course.

I trained in London at Ashurst Morris Crisp (as it then was). I had never thought much about working outside the UK, until I visited a university friend in Hong Kong. I found it so different and vibrant and fun that I decided straight away to spend some time there. As luck – or serendipity - would have it, Herbert Smith was advertising for a litigation associate in Hong Kong, and I jumped at the chance. Hong Kong in the mid-90s was an extraordinary, wonderful experience, with great work too.

A few years later my girlfriend (now my wife) gave me an ultimatum: return to London or go our separate ways. We went back and I re-joined Ashurst. But we didn't love being back in the UK and when Herbert Smith called on a dark and rainy winter day, to ask if I'd join its new Singapore office, it took about four seconds to say yes. We moved to Singapore in the summer of 1999.

Why have you chosen to build your career in Southeast Asia?

I've never had a long-term plan; it just turned out this way.

After a few years in Singapore, I moved to the firm's Bangkok office in 2002, at a time when Thailand's boom years and major projects of the 1990s were giving rise to a stream of disputes in the early 2000s. Thai Government contracts mostly provided for ICC arbitration in Bangkok, yet few firms in Thailand at that time had the resources and experience to handle complex international arbitrations. I was lucky enough to work on a string of large, interesting cases involving toll roads, power projects, joint venture disputes and the new Bangkok airport, and many others. It was superb experience in a fantastic cross-cultural environment, and of course we also loved living in one of the world's greatest cities.

I moved back to Singapore in 2011 and now I head the firm's Southeast Asia Disputes practice. The ASEAN region is so diverse in its legal systems, cultures, languages, geographies, politics and development, from the heights of Singapore to the still-developing economies of Laos and Myanmar. We work on cases all across this region and in every country, often complex and always fascinating. I'm lucky to do this with an amazingly talented team. When you combine that with the landscapes, the beaches, the history and the people – well, I challenge anyone working anywhere in international arbitration to say they have a more rewarding job than mine!

Singapore enjoys significant government and judicial support that has helped it become one of the world's leading arbitral seats. What could other aspiring seats learn from Singapore's approach?

Singapore benefits from geography and history, and from the vision and drive of its leadership since 1965 who turned this island into one of the world's great centres of international commerce. Its legal system and infrastructure play key roles in sustaining this. These factors have certainly helped it develop as a hub for arbitration. But this is also attributable to the Government which decided years ago to promote Singapore's growth as a hub for legal services and specifically arbitration. Once that decision was made, it was pursued with relentless determination. Just as examples, arbitration law is continually updated to reflect best practice; immigration and legal practice rules were changed to allow international lawyers and arbitrators to conduct cases with minimal red tape; tax laws were changed to exempt visiting arbitrators; universities and institutions promote thought leadership and scholarship in this field. Meanwhile, steps were taken to develop the SIAC's international standing, and Maxwell Chambers was created as a first-of-a-kind facility for the business of arbitration. It's not an exaggeration to say that the holistic promotion of Singapore as a world-class arbitration centre is a matter of national policy.

> "But Singapore is still in a class of its own – at least for now"

It is difficult for other jurisdictions to emulate that. Other SE Asian seats are viable and effective, for example Kuala Lumpur, Bangkok and Jakarta. We conduct arbitrations in all of them successfully. But none of them enjoys the degree of

single-minded government support that we see in Singapore. Kuala Lumpur is closest; it has excellent new facilities, updated laws and dynamic leadership that has done a lot in recent years to lift its standing and caseload. But Singapore is still in a class of its own – at least for now.

You are known as a leading arbitration advocate. What advice would you give younger arbitration lawyers who want to develop their advocacy skills? In particular, how can they convince partners (and clients) to let them have a go at pleading before a tribunal?

The key to good advocacy is thorough preparation. Once you have mastered the detail and know the case inside out, you have the confidence to present clearly, to cross-examine effectively and deal with anything unexpected that might (or will!) be thrown at you during the hearing.

It's also essential to be attuned and sensitive to the tribunal. This is particularly the case here, where tribunals can – and should – be very diverse in their cultural and legal backgrounds, their languages and the extent of their arbitration experience. Arbitrators have different expectations and preconceptions of what makes effective communication and what conduct is appropriate. I have watched a US lawyer tearing into a witness in front of a Thai tribunal, oblivious to the arbitrators' extreme discomfort at an approach they considered culturally unacceptable. Similarly, some English barristers speak exactly as they would before an English judge, the same arcane expressions and vocabulary although the arbitrators don't speak English as a first language and are clearly struggling to understand the jargon. It is as important to think about who you are speaking to, as about what you are saying. It's my experience that businesslike, straightforward advocacy is more effective and appealing than courtroom dramatics on most occasions.

> "Partners need to trust and guide their juniors to get advocacy experience whenever they can"

Finally, you need to preserve your credibility with the tribunal at all costs. You want a tribunal to trust you and to believe the case you're presenting. If you lose that credibility by running hopeless arguments or misrepresenting the evidence or droning on unnecessarily and without a point, you will lose the tribunal and probably the case too.

Partners need to trust and guide their juniors to get advocacy experience whenever they can. You can start small with a minor witness or a peripheral issue, then build from there. In my experience, clients don't oppose associates taking on some of the advocacy as long as it's clear that the associate has the trust of the partner and has mastered the issues. Sometimes the hardest challenge for an associate is simply mustering the confidence to take that first step.

We hear a lot about artificial intelligence and online dispute resolution transforming the legal landscape in coming years. How do you think this will affect international arbitration?

There is already a large technology component in dispute resolution, including arbitration. Many big cases now involve electronic document review platforms, video displays of evidence, computer modelling, video conferencing and such like. But mostly these are simply ways of using technology to help us do our existing jobs better, faster or more efficiently; they haven't yet changed the game fundamentally. I think AI is on the cusp of driving much more profound change, in ways I haven't imagined and probably faster than we think. For example, AI-based decision making is bound to have an impact. When parties can enter the facts of the case into a computer that uses its stored knowledge and learned experience to spit out a ruling with – say – a 90% level of confidence in the conclusion, will there still be a place for the cost, time and disruption of traditional arbitration? Probably not, at least for disputes of a certain type and value, although I suspect that in higher-value disputes there is generally too much money and emotion at stake to rely exclusively on AI – in my lifetime, at least. More generally, there is still an important role for a human element in order for parties to feel that they have been through a fair process and can live with the result.

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Smarter Legal Service Delivery with Herbert Smith Freehills: **Planning, pricing and managing an arbitration throughout its lifecycle**

We strive to find innovative ways to provide value whilst containing legal costs for our clients. By actively planning, pricing and managing matters with our pricing and legal project management teams we increase cost-effectiveness and efficiency, whilst developing and maintaining long-lasting client relationships.

1

Matter planning

- Identifying the key commercial objectives of the client.
- Assessing potential matter scope for the arbitration.
- Identifying internal experts across our global business to maximise performance and cost efficiency.
- Discussing client preference and appetite for innovative fee arrangements.
- Assessing potential requirement/eligibility for funding or insurance.
- Evaluating the possibility for utilising our ALT services offering.

1a

What is ALT?

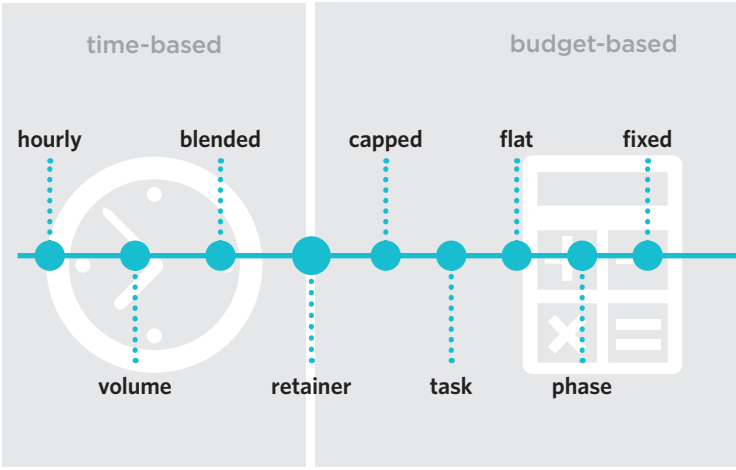
Our global Alternative Legal Services team can carry out reputationally-sensitive and complex work, whilst delivering time and cost savings. We are a market-leader in the use of e-disclosure and predictive coding for large-scale document production exercises. ALT can also assist in scoping matters; provide advisory services on document preservation and collection; help manage client-side data processing; carry out early case assessments and provide evidence management services for the life of an arbitration.

2

Pricing efficiently based on experience

We are the only law firm in the industry with a designated team of Disputes pricing experts

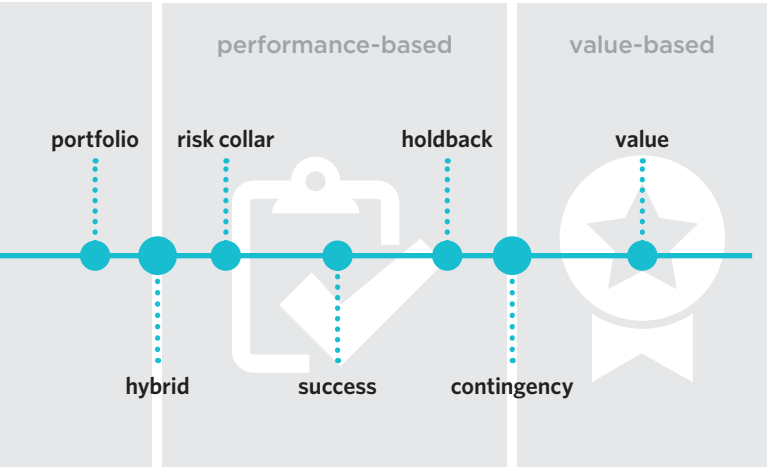
- Identify key parameters from scope of arbitration which may have implications for pricing (for example, commercial or treaty arbitration, number of arbitrators, amount in dispute, number of witnesses or experts, seat of arbitration, arbitral rules).
- Cross-reference these parameters against our matter profiling system to produce comparative matters.
- Use comparative matters to produce an efficient and experience-based price for the arbitration.
- Produce fee proposal to client based on their preference and appetite for fee arrangements and suitability of the case.
- Responsibly propose and implement complex and innovative AFAs that will maximise cost-efficiency.



3

Process mapping

- Ensuring the foundations for strong matter management are in place before commencing with any arbitration.
- Allocating time by arbitration-specific phases managed consistently by the matter team in a consistent way.
- Ensuring phase codes are implemented from matter opening.
- Identifying matter milestones and aligning these with the process map.



4

Project management

Managing a project is critical to deliver it on budget. To achieve this the firm provides:

- internal/external dashboards and portfolios;
- trend charts and matter analysis;
- client/matter level lawyer utilisation support;
- real time matter updates; and
- projections and forecasting.

Some matters may also benefit from legal project management from outside the arbitration team.

4a

Our Legal Project Management team

Our LPM experts comprise experienced lawyers, seasoned project managers, consultants and data analysts, all of whom work closely with our clients and multidisciplinary teams to support the design and delivery of outstanding legal services in an efficient, transparent and predictable manner.

5

Post matter review

All businesses can learn from what they have done and work to improve, and a law firm is no different. At the end of an engagement, our matter teams will carry out a Post Matter Review in the shape of Diagnostic and Prescriptive analytics. This will encompass analysis overall and by phase, identifying trends across the matter.

We also compare the matter against our original comparator matters to identify differences and interrogate the reasons for those differences.

Our Post Matter Review will feed into client relationship management meetings with the client.

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Dubai: The heart of arbitration in the Middle East

Arbitration is growing in use in contracts with a nexus to the Middle East, with parties increasingly willing to consider arbitral institutions and seats in the region. Over the past few years, there have been a number of notable developments in arbitration in the Middle East: institutional rules, legislative changes and significant decisions of the courts, including in relation to enforcement of arbitral awards. These developments have the potential to influence the choice of dispute resolution mechanism in Middle East-related contracts. Partner Caroline Kehoe and Senior Associate Anna Wren comment on these developments and predicted trends – focussing, in particular, on Dubai - and reflect on a number of key considerations for commercial parties.

Growth of Dubai's economy

Dubai is popularly known for its long sandy beaches, year-round sunshine and its wealth of 5-star hotels. But Dubai is much more – from its early beginnings as a pearl export centre, Dubai has grown into a world-class centre for international trade and business. And not just for oil companies – although Dubai's early growth was fuelled by the discovery of oil in the late 1960s, contrary to popular belief, less than 5% of Dubai's GDP is oil-based.

Indeed, Dubai's success is derived not from a wealth of oil, but the lack thereof, as compared to its neighbouring Emirate, Abu Dhabi. This led the Dubai government to diversify its economy, in particular in the construction, tourism, aviation, finance and trade sectors. Dubai is now home to more than 20,000 international companies, including offices from 124 of the Fortune 500, and has a GDP of over US$108 billion.[1] Dubai's liberal economic regulation and business friendly policies have caused Dubai's total international trade to grow on average by over 11% per year since 1988.[2]

> The trend in the Middle East is definitely pro-arbitration, ...

Part of Dubai's success is due to the establishment of economic "Free Zones", which group businesses from the same sector in the same geographical location. Free zones invite foreign investment into Dubai as they offer investors full ownership rights (as compared with the 51% local ownership requirement for establishment onshore Dubai) along with significant tax incentives, minimal regulation and government intervention, and full repatriation rights for capital and profit. Dubai's free zones span a variety of sectors and activities from IT and media, to healthcare, commodities (the Dubai Multi Commodities Centre (DMCC) is the world's fastest-growing free zone), and, of course, finance (the Dubai International Financial Centre (DIFC)).

Growth of arbitration in the Middle East

The growth in the economy and international trade in Dubai, and more generally in the region, has brought with it an increase in dispute resolution offerings. Parties are becoming increasingly willing to have their disputes resolved in the region rather than relying on seats in Paris, London, Geneva or elsewhere.

This is reflected in the establishment of various different seats of arbitration in the region. For example, the UAE alone hosts the following arbitration centres located onshore and offshore (ie in the freezones):

Onshore UAE

- Dubai International Arbitration Centre (DIAC);
- Abu Dhabi Conciliation and Arbitration Centre (ADCCAC);
- Sharjah International Commercial Arbitration Centre;
- Ras Al-Khaimah Commercial and Arbitration Centre;

Offshore UAE

- DIFC-LCIA Arbitration and Mediation Centre (DIFC-LCIA), a joint venture with the LCIA (located offshore Dubai in the DIFC);
- the Emirates Maritime Arbitration Centre (EMAC) (located offshore in the DIFC); and
- the Abu Dhabi Global Markets Arbitration Centre (located offshore in Abu Dhabi Global Markets, which will also soon be home to an ICC representative office to be opened this year).

Other regional arbitration centres include the Bahrain Chamber for Dispute Resolution (BCDR-AAA) (partnered with the American Arbitration Association); the Commercial Arbitration Centre of the Kuwait Chamber of Commerce and Industry (KCAC); the Qatar International Center for Conciliation and Arbitration (QICCA); and the Saudi Center for Commercial Arbitration (SCCA).

The trend in the Middle East is definitely pro-arbitration, with several jurisdictions enacting, or moving to enact, arbitration-friendly procedural laws, in many instances based on the 1986 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006) (the "Model Law"). For example, Qatar recently enacted Law No. 2 of 2017 promulgating the Law of Arbitration in Civil and Commercial Matters.

It is also anticipated that the UAE will enact a Federal Arbitration Law this year, also based on the Model Law. The Federal Arbitration Law will replace and supersede Articles 203 to 218 of the Federal Civil Procedure Code which currently govern arbitrations seated onshore UAE, and has been eagerly awaited since the UAE acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "New York Convention") over a decade ago. The draft law has been circulated to the UAE's National Assembly and Cabinet of

1. GDP 2016 AED 397,225m, https://www.dsc.gov.ae/Report/Gross%20Domestic%20Product%20at%20Currents%20Prices%202016.pdf
2. http://www.dubai.ae/en/aboutdubai/Pages/DubaiEconomy.aspx

Ministers and is understood to be in the final stages of approval. It is anticipated that the new law will provide a properly structured procedural framework for domestic and international arbitrations seated in the UAE, with clear rules on when an award may be challenged, as well as easing the route to enforcement of awards by giving arbitration awards the status of court judgment which can be ratified in the UAE Courts (thereby avoiding lengthy enforcement proceedings).

Arbitration in the UAE

In circumstances where many Middle Eastern counterparties require that the parties choose a regional seat for their arbitration clause, Dubai offers perhaps the safest and most practical seats for arbitration.

- It is a peculiarity that certain countries in the Middle East, despite having signed the New York Convention, may be more favourable to enforcement of arbitral awards if that award is rendered in a fellow Islamic country. A UAE-seated Award, recognised by the Dubai Courts, may in principle therefore be more enforceable than an award from a Western country.
- There are also numerous practical reasons why Dubai is a good choice of seat in the region. Regional unrest makes Dubai more attractive for local and foreign investors into the region – it offers a safe and stable environment for dispute resolution. Dubai is also incredibly well-connected. Situated in the "middle" of the world map, Dubai is an airline hub, offering direct flights to over 200 destinations around the world, including most capital cities and business centres, making it easily accessible for all parties.
- Although there have been some recent unhelpful developments in UAE legislation which have impacted on arbitration, it is clear that there is an intention to address these and to continue the pro-arbitration trend. For example, it is understood that the recent amendment to Article 257 of the UAE Penal Code (which had the effect of extending the law such that arbitrators that fail to maintain the requirements of integrity and impartiality may be found guilty of a criminal offence and sentenced to imprisonment) will be amended or repealed this year, although the scope or nature of the any forthcoming amendment is as yet unknown.
- One significant drawback of a choosing a Dubai seat, however, is the enforcement process. Until the new UAE Federal Arbitration Law is enacted, enforcing an onshore Dubai-seated arbitration award through the Dubai courts will continue to be fraught with difficulties, including uncertainty (there is no system of binding precedent in the UAE), significant delay (enforcement proceedings can take up to three years), and costs (legal costs are not recoverable in the Dubai Courts).

It is for this reason that many international parties choose to seat their arbitration in the Dubai International Financial Centre (DIFC), which has seen particular growth in recent years.

> ... Dubai offers perhaps the safest and most practical seats for arbitration.

Arbitration in the DIFC

The DIFC was established in 2004 and is now home to more than 1750 companies as well as NASDAQ Dubai. More importantly, however, the DIFC also boasts its own

judicial system and legal framework based on English common law, which is separate and distinct from the onshore UAE legal system and courts. It also has its own internationally recognised regulator, the Dubai Financial Services Authority (the DFSA). This means that regulations, judgments or awards issued in the DIFC are issued in English, rather than Arabic, and are not subject to Shari'a law.

The DIFC is also home to the DIFC-LCIA Arbitration and Mediation Centre. A joint venture with the LCIA, the DIFC-LCIA was launched in February 2008 at the same time as enactment of the DIFC Arbitration Law[3], which is based largely on the provisions of the Model Law. The DIFC-LCIA rules of arbitration are substantially based on the LCIA Rules. The DIFC-LCIA was relaunched in November 2015 to operate in parallel to and independently from the DIFC Courts, which provide supervisory jurisdiction over arbitrations seated in the DIFC.

The upward trend in arbitration is evidenced by the DIFC-LCIA's growing caseload – the first full 12 months following the relaunch in November 2015[4] saw a 20% increase in cases registered on the previous year and, in 2017, the caseload was more than three times the caseload of 2016, with 51 arbitrations and six mediations registered.

Choosing the DIFC as a seat for arbitration has several advantages.

- Opting for a DIFC seat means the parties have access to the supervision and support of the DIFC Courts, not only for the purposes of enforcement, but also for the purposes of obtaining interim remedies, like temporary freezing or attachment orders, which can be important if there is a risk of dissipation of assets.
- The DIFC Courts are established, English-language, common law courts which are experienced in arbitral disputes and consistent in their treatment of arbitral awards. Cases related to arbitration before the DIFC Courts are typically private, providing parties with assurance that their matter will be kept as confidential as it would be in a more established seat, like London or Singapore.
- A DIFC award, which is recognised and enforced by the DIFC Courts, can be enforced directly throughout the MENA region through various regional treaties and conventions, in the same way as a Dubai-seated award. Constitutionally, the DIFC Court is considered part of Dubai's judicial system and, for the purposes of international treaties to which the UAE is a signatory state, are considered a court of Dubai and the UAE. The UAE is party to the New York Convention, but it is also party to the regional conventions, the Agreement of Execution of Judgments, Delegations and Judicial Notifications in the Arab Gulf Cooperation Council Countries (1996) (the "GCC Convention")[5] and the Riyadh Arab Agreement for Judicial Cooperation (1983) (the "Riyadh Convention") [6], the latter of which includes signatories that are not party to the New York Convention (for example, Iraq).
- A DIFC Award which has been recognised by the DIFC Court will also be recognised by the Dubai Courts. Under Dubai Law No. 12 of 2004 (as amended) and the Protocol of Enforcement between Dubai Courts and DIFC Courts, the Dubai Courts are bound to enforce a DIFC Court judgment without review of the merits. This can make it easier for parties to obtain enforcement over assets located in onshore UAE or in Riyadh or GCC Convention member states.

Arbitration in the Middle East is clearly on the rise and Dubai is at the forefront with its pro-arbitration legal framework and the DIFC's established independent court system coupled with world-class arbitration centres. This must surely make them preferred seats for arbitration in the Middle East.

Our Middle East Practice

We have one of the largest disputes practices in the Middle East with three partners, eight associates and one trainee based in Dubai. We have a proven track record of successfully resolving disputes for many high profile local and international clients, advising on a wide range of commercial disputes in the MENA region. We advise local and international clients with disputes arising in the Middle East and have successfully assisted clients in arbitrations seated in the DIFC, Dubai, Abu Dhabi, Saudi Arabia, Bahrain, Syria and Qatar. Our local knowledge ensures that we are ideally placed to advise on arbitrations under local rules such as DIAC, DIFC-LCIA and the Abu Dhabi Chamber of Commerce and international rules where the arbitration is seated in the region.

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3. DIFC Law No. 1 of 2008, as amended by DIFC Law Amendment Law No. 1 of 2013
4. From 1 January 2016 to 31 December 2016
5. Other parties to the GCC Convention are Jordan, Bahrain, Tunisia, Algeria, Djibouti, Saudi Arabia, Sudan, Syria, Somalia, Iraq, Oman, Palestine, Qatar, Kuwait, Lebanon, Libya, Morocco, Mauritania and Yemen
6. Other parties to the Riyadh Convention are Bahrain, Saudi Arabia, Oman, Qatar and Kuwait

Arbitration in the Middle East is clearly on the rise and Dubai is at the forefront.

A shake-up of the system of investment treaty arbitration: **What does the future hold?**

Over the past few years, investment arbitration (also known as "Investor State Dispute Settlement", or "ISDS"), has captured the public's attention like never before.

The ongoing debate came to greater prominence during the negotiation of the proposed Transatlantic Trade and Investment Partnership (TTIP) between the EU and US, through a public consultation launched by the EU Commission in 2014. Although the consultation focused on the EU's proposed new approach to investment protection and investor-state dispute resolution in the TTIP, it shed a light on investment arbitration more generally, encouraging public engagement with the topic and a far greater scrutiny of its key components than had previously been seen. Moreover, it provided an opportunity for critics of the system to organise and air their concerns publicly and in a forum where they would resonate. The impact of the consultation was considerable and led to global discourse as to the future of ISDS. There is a widely reported view that some degree of reform is needed to rehabilitate, or reframe, the investment arbitration system and to restore faith in its legitimacy. In this brief article we highlight the key ongoing developments in the shake-up of the system of investment treaty arbitration and pose the question as to what the future holds.

The EU's response: A Multilateral Investment Court

Since the EU first launched its consultation on the TTIP in 2014, the EU's plans for the resolution of investor-state disputes in its own future investment agreements with third countries have developed. The EU now appears determined to pursue wholesale change to the previous system of "ad hoc" arbitration, where tribunals are appointed in a manner similar to that used in commercial arbitration. Instead, the EU is seeking to build consensus with other states to develop a permanent Multilateral Investment Court (**MIC**), aiming to create what it describes as a "coherent, unified and effective" approach to investment dispute resolution for all investment treaties.

What is this Multilateral Investment Court and what is it intended to achieve?

Many of the criticisms raised against the existing system of investment arbitration focus on the "ad hoc" nature of the tribunals chosen to decide disputes, and the perceived potential for arbitrators to have conflicts of interest. Concerns have also been raised about the absence of a system of binding precedent, inconsistencies in decision-making, the cost and time involved in investment arbitration, lack of transparency and the very narrow grounds on which arbitral awards can be challenged.

The MIC proposed by the EU would be a permanent international court empowered to hear disputes about investments between investors and states that have accepted its jurisdiction to decide whether there has been a breach of the obligations guaranteed in investment treaties. By seeking procedural consistency through introducing both a standing court, with an appointed body of decision-makers overseeing the investor-state dispute process, as well as an appeal mechanism, the Commission aims to establish a system which is predictable in delivering consistent case-law. The EU's intention is that states would agree to replace the method of dispute settlement in their existing investment treaties with the MIC in future.

Is it going to happen?

As a first step to the envisaged establishment of the MIC, the EU has been seeking the establishment of an individual standing investment court under each of its recent investment agreements with third countries, to replace the previous "ad hoc" arbitration model. This court would only be appointed to adjudicate, however, on disputes arising under that specific agreement. Two agreements have been concluded to date containing such provisions: with Vietnam and Canada, although none has yet entered into force. While the Canada agreement (known as the Comprehensive Economic and Trade Agreement, or **CETA**) has been provisionally applied, that provisional application has excluded the investment chapter and investment dispute resolution provisions. In a July 2017 factsheet concerning the negotiation of the EU-Japan FTA, the Commission noted that "[f]or the EU ISDS is dead", and that such an investment court system is now being pursued in all of its trade agreements.

In the longer term, the obvious problem of a proliferation of individual, treaty-specific investment courts is sought to be overcome by the establishment of the MIC referred to above, which would have jurisdiction over disputes arising under any number of investment treaties. This intention is clear, for example, from the commitment which the EU and Canada made in the CETA to "pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes". Moreover, the EU has asked the UN Commission on International Trade Law (**UNCITRAL**) to consider its suggestion of an MIC in UNCITRAL's work on wider ISDS reform (see further below).

It remains to be seen for how long the EU continues to introduce the individual investment courts under each agreement whilst pursuing the ambition of the overarching MIC, or whether it will seek to set up a plurilateral court under one EU agreement, but then use this same court for the resolution of disputes under other agreements. The main obstacle of course will be securing the agreement of the third states involved, even if all of the EU's own member states are fully supportive.

There is also a legal question mark which remains over the EU's plans. On

What is an investment treaty or international investment agreement (IIA)?

An investment treaty is an agreement reached between two or more countries containing reciprocal undertakings for the promotion and protection of private investments made by nationals of the state parties in each other's jurisdictions. These undertakings can form party of a standalone treaty or part of a wider agreement, for example, a free trade agreement or an agreement focused on sectoral co-operation (such as the Energy Charter Treaty).

What is investment treaty arbitration?

Investment treaties are unique in international law. If a host state fails to deliver on its undertakings to protect or promote investment, an investor of the other state party may bring an arbitration against the host state for breach of its obligations. These arbitrations will take place as set out in the treaty, often under the rules of the International Centre for the Settlement of Investment Disputes (ICSID) or through "ad hoc" arbitration under the UNCITRAL Rules.

6 September 2017, Belgium submitted a request to the Court of Justice of the European Union for an opinion on the compatibility of the investment court system set up under the CETA with the European Treaties. Depending on the court's opinion, even the two investment courts already negotiated and agreed may be called into question.

UNCITRAL: reform of ISDS?

In July 2017, UNCITRAL gave one of its working groups, Working Group III, a broad mandate to work on the possible reform of ISDS. The working group was asked to identify concerns regarding ISDS, consider whether reform was desirable and, if so, to develop recommendations.

The first session of Working Group III was held in late November 2017 and was attended by more than 300 participants representing 80 States and 35 observers, including the EU and various interested parties. Working Group III discussed certain procedural aspects of ISDS, including duration and cost of proceedings, allocation of costs, security for costs, third party funding, transparency, and early dismissal mechanisms. Working Group III also exchanged views on the overall consistency and coherence of the ISDS system and its outcomes. The working group is scheduled to continue its discussion at its next session in New York from 23 to 27 April 2018.

If UNCITRAL Working Group III recommends solutions, what impact will these have?

It is likely to be at least 2019 before the working group makes any recommendations. It is important to be aware that UNCITRAL itself is not a signatory to any investment agreements. However, steps taken by UNCITRAL can have significant practical consequences. In late 2014 UNCITRAL was responsible for developing a Convention on Transparency in Treaty-based Investor-State arbitration (known as the Mauritius Convention). This Convention supplements existing investment treaties by applying detailed transparency-related obligations in the context of resolution of investor-state disputes under existing BITs where both parties to the BIT are also parties to the Mauritius Convention.

Whilst it has only been ratified by three states to date, the Convention has received 22 signatures, and has attracted significant international attention. If it continues to grow and more states accede, some are suggesting that the Convention could serve as a template for a further treaty introducing a multilateral investment court system for resolution of investor-state disputes under existing investment treaties.

Changes at ICSID: a revision to the ICSID Arbitration Rules?

The International Centre for the Settlement of Investment Disputes (**ICSID**) was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. It is an independent dispute-settlement institution which can be chosen by member States as a forum for resolution of investor-State disputes in their investment treaties, investment laws and investment contracts, with disputes resolved under the Convention and the ICSID Arbitration Rules. Investor-State disputes involving a non-member State can be resolved using ICSID's additional facility rules.

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In October 2016, ICSID launched a consultation on the amendment of the ICSID Arbitration Rules and invited Member States to make proposals. A similar invitation was issued to the general public in January 2017. The ICSID Secretariat has collected these comments and is preparing background papers on 16 topics that have been identified for potential rule amendment. The papers are expected to be published in early 2018.

Are these amendments being considered in response to criticisms of ISDS?

ICSID has carried out four amendments to its rules in the past, some of which have been more detailed than others. ICSID has not indicated that the current amendment process is a response to particular criticisms, stressing more generally that the changes are intended to modernize the rules based on case experience. However, given that over 60% of all known investor-State disputes have been filed at ICSID, such "case experience" will no doubt encompass many of the issues that have been raised elsewhere.

What are the expected areas of change?

The Secretariat has highlighted 16 areas where amendments could be considered. These include: appointment of arbitrators, including the possible introduction of a code of conduct; challenges to arbitrators; third party funding; consolidation; preliminary objections and first session; witnesses; experts and other evidence; discontinuance of a case; awards and dissenting opinions; security for costs and security for stay of enforcement of awards ordered by the ad hoc committee; allocation of costs; annulment; publication of decisions and orders (compared to the current provisions referring to awards); as well as the modernization of the means of communication (apparently with a view to making the procedure 'less paper-intensive and more environmentally friendly').

However, it is important to remember that consideration of an amendment may not necessarily result in a specific rule change.

Why the ICSID Rules and not the Convention itself?

Amendments to the ICSID Rules require approval of two-thirds of the member States (ICSID Convention Article 6). Amendment of the ICSID Convention requires unanimous ratification of the member States. It is therefore easier to bring about changes in the system through the Rules rather than the Convention. However, ICSID has noted that it will highlight areas where change would have to be effected through a Convention amendment and see if consensus exists for such a change.

What is the relevance of ICSID Arbitration in an investment court system?

The EU Commission, presently at least, sees a continuing role for arbitration under (i) the ICSID Convention and ICSID Arbitration Rules, and (ii) the ICSID Additional Facility Rules, albeit within an investment court system. A claim under the investment chapters of the CETA and the EU-Vietnam FTA may be submitted to ICSID arbitration or, where not applicable, arbitration under ICSID's additional facility. However, the compatibility of the ICSID system and the new investment courts (whether they operate at a bilateral or multilateral level) is yet to be fully explored.

Alternative National and Regional approaches: the US and Africa

While there are steps being taken at international and EU level to bring about reform to investment arbitration, it is important to remember that other states and blocs are also forging their own paths for reform. Some countries, such as South Africa, India, Indonesia, Venezuela, Bolivia and Ecuador , have sought to terminate or not renew their BITs. Others are seeking to renegotiate or reframe their BITs and regional agreements. This may occur whilst those existing agreements remain in force or following termination. Indeed, there are some indications that Ecuador may be considering entering into some new bilateral arrangements following its programme of terminations.

In the US the debate about ISDS continues. In October 2017, a group of US academics in the fields of law, economics and public policy wrote a letter to President Trump urging the abandonment of ISDS in the renegotiated North American Free Trade Agreement (NAFTA). This letter repeated many of the criticisms raised by stakeholders in the EU's earlier consultation on inclusion of ISDS in the TTIP. However, there remains considerable support for ISDS among other US stakeholders. The NAFTA negotiating objectives released by the US Government in November 2017 are ambiguous on the issue, recording US support for "meaningful procedures for resolving investment disputes," which will "ensur[e] the protection of US sovereignty and the maintenance of strong US domestic industries."

Meanwhile, the South African Development Community has recently introduced amendments to Annex 1 (Cooperation on Investment) of the SADC Finance and Investment Protocol. The preamble to the amendment agreement notes that some of the existing provisions "fail to adequately balance investor protection and development policy space for host States". Not only do the amendments limit the scope of protection to investors from SADC states and remove the guarantee of fair and equitable treatment, the international arbitration provisions were replaced with an obligation to resolve disputes through the domestic courts of the host state. This is undoubtedly a significant statement by a bloc of 15 African states. However, it should not be understood as being indicative of a general rejection of ISDS on the continent. African states have signed 25 bilateral investment treaties with countries from Europe, Eurasia, the Middle East, Asia, North America and South America since the beginning of 2015. Many of these recent agreements include dispute resolution provisions which continue to provide for "ad hoc" arbitration, albeit with clauses which are more sophisticated than the standard short form articles found in the bulk of the BITs negotiated in the global surge in the mid-1990s.

What does the future hold?

The future quite clearly holds reform. It is the extent and speed of that reform that is, as yet, unknown. We can expect that some substantial changes will be proposed to the ICSID Rules and that the necessary two-thirds majority will vote in favour of at least some of those changes. The eventual outcome of the EU's efforts to establish an MIC is more uncertain. Whilst the deliberation of reform at multilateral level

has been passed to UNCITRAL, it is one of a number of considerations being reviewed by the working group, concerning both the substantive protections afforded to investors and the mechanism by which disputes are resolved. It is possible that the idea of a standing multilateral investment court may become subsumed in other more or less wide-ranging suggestions for reform. Even were the Working Group to propose a significant shift in approach, it would then require at least some international consensus for those recommendations to translate into action. Similar uncertainty rests over NAFTA, with ISDS forming only one aspect of any potential renegotiation.

A limited number of countries have already decided to move away from investment arbitration, requiring investor-state disputes to be resolved before domestic courts. Nevertheless, the movement towards reform, however fragmented and piecemeal, is likely to uphold the retention of a form of non-national, treaty-based investor-state dispute resolution. Whether a common global system is adopted, or a number of different reformed dispute resolution systems develop, remains to be seen.

What does this mean for investors?

For investors who have structured their investments to benefit from the protections of specific existing investment treaties, it is important to be aware that the focus is largely on the dispute resolution procedures in these treaties, rather than the substantive protections available under them. While we are witnessing a shift in the way certain protections are worded in the newer generation of model BITs, many of which also expressly protect a state's right to regulate, these changes do not impact on existing treaties under which investments have already been made.

A practical impact will likely be felt most quickly in relation to the changes to the ICSID Arbitration Rules. If changes to the Arbitration Rules are proposed and accepted, they could come into force within a year or two, affecting any arbitrations for which the parties have given consent after that date.

As for the EU's proposals, the EU is currently only introducing its investment court proposal into the investment chapters of its new free trade agreements with States with whom the EU previously had no agreement. However, these new EU agreements are designed to replace existing bilateral arrangements between EU Member States and these third party states. For example, if the investment protection and investment court provisions of the CETA enter into force, these will replace the bilateral investment treaties between Canada and individual EU member states, including any dispute resolution provisions that they may contain. In such circumstances, the introduction of the investment court will be a significant change in the way an existing EU investor in Canada, or vice versa, can enforce its rights against a state. Indeed, the nature of the substantive investment protections will also change in most cases, with the CETA including more modern and sophisticated drafting than will have existed under many of the BITs. Conversely, where no bilateral arrangements already exist, treaties entered into by the EU under which an investment court is established will introduce new substantive investment protections and offer a new and additional method of dispute resolution for European investors into jurisdictions where no prior international law system existed. In either case, the practical ramifications of the new court remain as yet unclear, since none has yet been established.

The debate will continue to evolve over the coming months and years. In particular, it is the wider, wholesale changes to the system being considered by UNCITRAL that are worth investors keeping a watchful eye on over the next few years. An international consensus on broad changes to ISDS implemented by an international convention could result in changes to the dispute resolution system for many existing investment treaties. Ultimately, however, it is likely that investors will still be able to protect their investments under international law and before an independent and impartial international body.

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