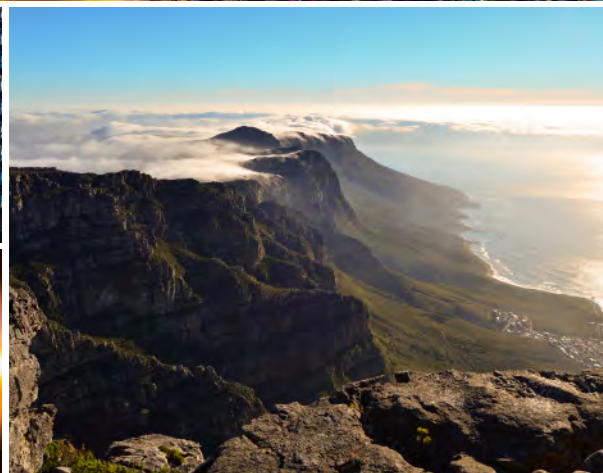
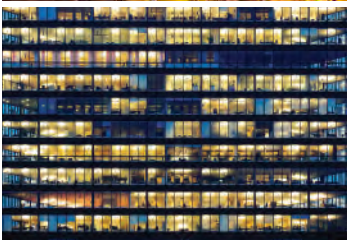




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INSIDE ARBITRATION

PERSPECTIVES ON CROSS-BORDER DISPUTES



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WELCOME

Welcome to the second issue of *Inside Arbitration*.

In this issue, we speak with Sarah Grimmer, incoming Secretary General of the Hong Kong International Arbitration Centre about her plans for growing and developing the HKIAC on the global stage.

Sarah also discusses the Equal Representation in Arbitration Pledge (the Pledge) which was launched since the publication of our last issue of *Inside Arbitration*. From my perspective as a practitioner and arbitrator, the Pledge is an important initiative aimed at tackling one of a number of diversity issues faced by the arbitration sector. As a firm, we hope that our clients will be encouraged by our commitment to gender diversity in international arbitration and will recognise the benefit of working towards gender parity. If you would like to hear more about the Pledge, how to sign it, and HSF's implementation of it in practice, please do not hesitate to get in touch.

This issue of *Inside Arbitration* also considers the use of arbitration in two key sectors: finance (in particular, for resolving disputes under the ISDA Master Agreement), and construction. With the ISDA Arbitration Guide having been available for over two years, Nick Peacock in London and Dr Mathias Wittinghofer in Frankfurt consider the suitability of arbitration for the resolution of the types of disputes which arise in derivative transactions and ask "what is next for the Guide?". In turn, a number of partners from across our global construction and infrastructure practice look at best practice in resolving construction disputes by arbitration, and offer practical guidance on how to ensure the process goes smoothly.

Continuing our focus on the individual characters and backgrounds of our partners, Beijing-based partner, Jessica Fei, shares with us her unique blend of legal and cultural attributes and gives her views on China's future as an arbitration venue. Andrew Cannon, a partner in our Paris office, discusses how his time spent as a legal advisor to the British Foreign and Commonwealth Office has given him a different perspective on disputes involving governments.

Following on from the article on protecting investments in a volatile world published in Issue 1, Dominic Roughton and Andrew Cannon consider the impact of territory and maritime boundary disputes on commercial parties and their investment decisions. Dominic and Andrew look at the ways in which both commercial actors and states can work to realise the economic benefits of resources in disputed areas and the legal, commercial and reputational factors to be considered.

Peter Leon and Ben Winks offer us a view of arbitration developments from Johannesburg, one of our firm's newest offices, and consider when South Africa may be an appropriate choice as a seat of arbitration.

Last but not least, in the wake of the outcome of the UK's referendum on membership of the European Union, Vanessa Naish and Hannah Ambrose consider whether there are any practical effects on the choice of dispute resolution provisions and governing law, both now and after the UK exits the EU.

I hope that you enjoy reading this second issue of *Inside Arbitration*. We would welcome your feedback.



Paula Hodges QC

Partner, head of global arbitration practice

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INTERVIEW WITH THE INCOMING SECRETARY GENERAL OF THE HKIAC **SARAH GRIMMER**

2016 is shaping up to be a year of change at the Asian arbitration institutions. SIAC recently appointed Delphine Ho as its new Registrar, and ICC Asia will undergo a change of leadership when Cheng Yee Khong steps down in August. HKIAC is also ringing the changes: Secretary General Chiann Bao will depart in September to return to private practice. She will be succeeded by **Sarah Grimmer**, a New Zealand-qualified lawyer who is currently Senior Legal Counsel at the Permanent Court of Arbitration in The Hague. Before she formally starts her new role, we invited Sarah to tell us something about herself, her career so far, and her ambitions for HKIAC.

Tell us about your career to date; how have you come to be where you are?

I trained and qualified in New Zealand, where I spent three years representing refugee clients in asylum claims. I then moved to Paris and joined the arbitration team of Shearman & Sterling LLP, before joining the ICC Court of Arbitration as Deputy Counsel for three years. From there, I went to the PCA, where I have spent the last ten years as Legal Counsel, then Senior Legal Counsel - apart from a sabbatical year at Cambridge to complete my masters in international law.

The PCA has a unique profile and caseload. How will a more commercially-focused institution compare?

My time at the PCA has coincided with a particularly exciting time in its history. In the last ten years, the Court's caseload has expanded exponentially - from approximately 11 cases in 2006 when I joined to 113 pending cases today. The PCA administers disputes between states, state-entities, inter-governmental organisations, private parties and combinations of these entities. A significant part of the PCA's work is dedicated to state-to-state arbitrations and investment treaty disputes, many of which are very high profile - for example, the pending Philippines/China South China Sea dispute, the Yukos cases, Philip Morris v Australia, Chevron v Ecuador, and a recent suite of investment treaty cases brought against Russia arising out of its

activities in the Crimea, to name a few. The 2009 Abyei Arbitration between the Government of Sudan and the Sudan People's Liberation Movement/Army was also a headline case administered by the PCA in the lead-up to South Sudan's secession from the North.

“Regardless of the difference in the kinds of arbitrations, what is common to both (and all) institutions is the need to provide highly-skilled support services”

At the PCA, my primary functions have been to act as tribunal secretary and to advise the PCA Secretary-General on appointing authority matters. I have worked on more than thirty investor-state arbitrations and as registrar in three inter-state arbitrations, including the Arctic Sunrise Arbitration, in which the Netherlands is suing Russia under the UN Law of the Sea Convention over its 2013 arrest of a Greenpeace protest vessel. In addition to treaty-based claims, I have also been involved in fifteen contract-based disputes involving a public entity of some kind. Through this work, I have encountered a plethora of procedural issues, many of which are common to all kinds of arbitrations. I have had the good fortune to work closely with many extremely distinguished arbitrators and as part of a stellar secretariat. It has been an absolute pleasure and privilege.

My role at the HKIAC obviously differs in many ways. After ten years, I look forward to the new challenge of leading an organisation. HKIAC's caseload is more commercially focused than the PCA. The work of its secretariat is more akin to the institutional administration that I was doing at the ICC in Paris and the appointing authority work of the PCA under the UNCITRAL Arbitration Rules. Regardless of the difference in the kinds of arbitrations, what is common to both (and all) institutions is the need to provide highly-skilled support services. No matter the kind of case, parties want their disputes to be resolved efficiently by independent and impartial tribunals. And tribunals need to be able to rely on institutions for prompt and steadfast administrative support.

What attracted you to the HKIAC?

Four main things appealed to me. First, I know HKIAC to be a sophisticated, dynamic and busy institution serving parties the world over. According to a recent survey, it is the most used institution outside Europe. Second, it benefits from world-class leadership, under Chair Teresa Cheng SC, and a superb Council and Executive Committee. Third, Hong Kong's wider arbitral community is vibrant, engaged and very supportive of the Centre. And finally, Hong Kong is an incredible city located in a fascinating and beautiful part of the world.



A number of leading arbitration institutions are now led by women, or have women in senior roles. Does this mean that arbitration's diversity issues are a thing of the past?

It is great to see so many women in leading roles at institutions. I believe that this will help drive change towards a fair representation of women in other key roles in arbitration. We are still a long way away from reaching that objective. But I am committed to taking the steps available to me in my new role at HKIAC to pursue fair representation. This is a continuation of the approach I have adopted throughout my career along with many of my colleagues. I was a member of the ICC secretariat team that recommended the appointment of a three-member tribunal all of whom, for the first time, happened to be women. And at the PCA, for example, my colleagues and I have always been mindful of ensuring that list procedures for arbitrator appointments include qualified women. The same applies to public speaking opportunities. In this respect, I am excited about the Pledge on Equal Representation in Arbitration, which was recently launched in London (www.arbitrationpledge.com). I believe that gender diversity is not a "women's issue" but an issue for everyone; it is essential that we tap into the pool of female talent that is currently under-exploited. If we succeed, it will only benefit all users of the process.

"Another project which is particularly close to my heart given my work at the PCA over the last ten years, is developing the tribunal secretary service HKIAC currently offers along with its accreditation program"

What are you excited about working on when you take up your new role?

There are a number of projects I am excited about working on when taking up my new role. One is looking at expanding the mediation space that HKIAC already occupies. Another project which is particularly close to my heart given my work at the PCA over the last ten years, is developing the tribunal secretary service HKIAC currently offers along with its accreditation program. The appointment of high quality tribunal secretaries relieves tribunals of significant administrative load and results in cost and time saving for parties. My experience at the PCA bears this out. It is true for *ad hoc* arbitrations as well as institutional arbitrations. In addition, acting as tribunal secretary prepares younger professionals for their first arbitral appointments. In this way, the program provides a means of training the upcoming generation as well as a further opportunity to ensure the involvement of women at important stages in their arbitral careers.

ABOUT SARAH

Sarah has an LLM from Cambridge University, and LLB and BA (Criminology) from Victoria University of Wellington.

Admitted to practice law in New Zealand.

Sarah spent three years in private practice in Auckland, specialising in proceedings brought under the 1951 UN Refugee Convention and the 1967 Protocol before various New Zealand courts and tribunals.

She was a member of the international arbitration group at Shearman & Sterling LLP (Paris).

Sarah spent three years as Deputy Counsel at the ICC International Court of Arbitration (Paris).

She spent ten years as Counsel and then Senior Legal Counsel at the Permanent Court of Arbitration (PCA).

WHAT'S THE DIFFERENCE?

ARBITRATING DISPUTES UNDER THE ISDA MASTER AGREEMENT

It is over two and a half years since the International Swaps and Derivatives Association (**ISDA**) published its Arbitration Guide, which provides both general guidance on arbitration, and a selection of model arbitration clauses that can be incorporated into an ISDA Master Agreement. ISDA decided to publish the Arbitration Guide following consultation with its members and other stakeholders, which confirmed the increasing interest in using arbitration as a means of resolving disputes arising from derivatives transactions documented under a Master Agreement. ISDA had previously (in 2010 and 2012) included an arbitration clause in its Islamic finance Tahawwut (Hedging) Master Agreement and its Mubadalatul Arbaah (Profit Rate Swap) Agreement, which were the first official ISDA documents to provide for arbitration. ISDA's decision to provide for arbitration in its documentation reflects a broader trend towards greater acceptance of arbitration in the financial markets - for example, the Loan Market Association (**LMA**) also incorporated an option for parties to agree to LCIA arbitration in some of its standard facility agreements at a similar time as the ISDA Arbitration Guide.

This article will consider some of the pros and cons of arbitrating (rather than litigating) derivatives disputes arising under an ISDA Master Agreement. It will then move on to consider the future of the ISDA Arbitration Guide and some areas for potential future development.

Is arbitration suitable for derivatives disputes?

Some of the key advantages and disadvantages of arbitrating derivatives disputes include the following.

Relative ease of enforcement:

The courts of London, New York, Paris, Frankfurt and other developed legal jurisdictions have historically been the preferred options for derivative disputes and for cross-border financial disputes in general, and remain popular forums. The English courts have recently sought to cement their position through the creation of a specialist Financial List that handles claims relating to the financial markets.

However, a major drawback in using any court to decide cross-border matters is that arrangements for cross-border enforcement of court judgments remain fragmented and piecemeal. This remains the case despite increasing uptake of the Hague Convention on Choice of Court Agreements, which provides for reciprocal enforcement of judgments rendered pursuant to an exclusive jurisdiction clause.

In contrast, arbitration awards benefit from the enforcement mechanisms available under the New York Convention, which has been signed by over 150 countries worldwide. Despite this, there remain practical difficulties in enforcing awards in some jurisdictions. In particular, the “public policy” defence to enforcement under the New York Convention is given a more expansive interpretation in some jurisdictions than in others. In the context of derivatives transactions, this may lend itself to an argument that the transaction violates *bonos mores*, such that enforcement of the resulting award would be contrary to public policy. Nonetheless, arbitration is typically the best available option in terms of ease of enforcement when operating in emerging markets.

This is particularly relevant given ISDA’s increasingly diverse membership, both in terms of types of counterparty (including multi-national corporates and state entities), and in terms of jurisdictions (as membership has developed in the Middle East, Africa, Russia and the former CIS).

Suitability of arbitration for resolving derivatives disputes:

A review of reported decisions of the English courts in recent years indicates that the most commonly occurring disputes under the ISDA Master Agreement include disputes as to a party’s capacity and authority to enter into transactions; mis-selling claims; disputes as to the suspension of payments; disputes as to close-out procedures and the calculation of early termination payments; and disputes in relation to notice provisions and the validity of termination and other notices.

These are issues that many commercial arbitrators are familiar with, and are equally capable of being addressed by commercial arbitrators as by judges.

In some respects arbitral tribunals can be better placed to decide these issues, given the scope for the parties to appoint arbitrators with particular qualifications or expertise. For example, disputes about a party’s capacity to contract often raise issues relating to the law of that party’s place of incorporation (which may be different to the governing law of the Master Agreement). Parties in arbitration may find it convenient to appoint an arbitrator qualified in the relevant law to assist in deciding such issues. Similarly, detailed issues of quantum may often arise in relation to netting and early termination payments, which may favour contributions from particularly numerate arbitrators or even non-lawyers on the tribunal.

The significance of this need for expertise has been recognised by the European Centre for Financial Dispute Resolution (“EuroArbitration”) and by the Panel of Recognised International Market Experts in Finance (“P.R.I.M.E. Finance”) (both specialist arbitration institutions targeting financial disputes), one of the key selling points of which is that the institutions maintain a list of arbitrators with specialist financial expertise.

Procedural flexibility:

Arbitration typically affords greater autonomy for the parties to determine what procedures will be adopted to resolve the dispute. For example, the approach to disclosure tends to be more flexible (and less onerous) in

arbitration. This can be a significant advantage for financial institutions that face the burden of extracting, reviewing and disclosing large volumes of documents.

The autonomy afforded by arbitration means that parties that are considering including an arbitration clause in their ISDA Master Agreement must be aware of the different options that are available when drafting the clause and the pros and cons of each. For example:

- Some arbitral institutions (such as the London Court of International Arbitration (**LCIA**)) provide for arbitrators to be remunerated based on hourly rates, while other institutions (such as the International Chamber of Commerce (**ICC**) or the Singapore International Arbitration Centre (**SIAC**)) tend to charge on an ad valorem basis (ie, based on the sum in dispute). Hourly rates can prove an advantage for disputes that are high value but do not raise particularly complex factual or legal issues (eg, a straightforward default scenario), although the ICC and other institutions that charge ad valorem fees are alive to the need to provide value for money in such circumstances.
- The model arbitration clauses in the Arbitration Guide require the parties to choose whether their disputes will be resolved by a tribunal of three arbitrators or by a sole arbitrator. Appointing a sole arbitrator can make the arbitration proceedings quicker, but on the other hand a three member tribunal may be preferable where complex issues arise, or where a blend of expertise or backgrounds is required on the tribunal (particularly given the limited scope for challenging/appealing an arbitration award – see further below).

Limited grounds of appeal/challenge:

In most jurisdictions, arbitration awards can only be challenged on very limited grounds, and appeals on the merits are typically not available. This promotes speed and finality. On the other hand, however, it means that a party that is aggrieved by the tribunal's decision is unlikely to have any avenues for redress. The potential significance of a lack of appeal is illustrated by the high profile case of *Lomas v JFB Firth Rixson* [2012] EWCA Civ 419, where

the English Court of Appeal was able to resolve uncertainty arising from conflicting first instance decisions, some of which were at odds with market expectations as to how the relevant provisions of the Master Agreement should work. This might not be possible in arbitration. However, one way of mitigating this potential drawback of arbitration is to provide for a three member tribunal, thereby lessening the risk of a “rogue” decision by an individual decision-maker.

Availability of summary and expedited procedures:

An often cited disadvantage of arbitration compared with some court procedures is that there are no summary and default judgment mechanisms available. In a summary procedure, the case is resolved without a full hearing on the merits on the basis that there is no credible claim or defence to the claim. Under a default procedure, judgment can be granted where the defendant to a claim does not appear to contest its validity. Such mechanisms can be useful ways of obtaining judgment more quickly against a defendant who does not participate in the proceedings or raises only very weak defences.

The recent English case of *Travis Coal Restructured Holdings v Essar Global Fund* [2014] EWHC 2510 (Comm) suggests that arbitral tribunals and supervisory courts may be more willing than in the past to support the use of summary procedures. In that case, an arbitral tribunal in New York dismissed certain fraud-based defences to a claim on a guarantee, adopting a summary procedure that fell short of a full hearing on the merits. In enforcement proceedings in England, the English court concluded that there was no realistic prospect of resisting enforcement of the award based on the summary procedure adopted by the tribunal. Further, the Singapore International Arbitration Centre (**SIAC**) has recently released its new rules, in force on 1 August 2016, which provide for an early dismissal procedure (at Article 29). The Arbitration Institute of the Stockholm Chamber of Commerce (**SCC**) is also considering including provision for summary procedures in its 2017 rules.

“Were a bifurcated dispute resolution clause to be included in future editions of the Arbitration Guide, this could provide for difficult technical questions to be resolved by an individual with relevant expertise, in some cases avoiding the cost and delay of presenting expert evidence”

This is, however, a somewhat controversial area and there remain concerns in some quarters about the use of summary procedures in arbitration, given arbitrators' obligations to observe due process and the scope for awards to be challenged on the basis that that duty has not been complied with. There is a tension between that duty and the need for arbitrators to be prepared to use robustly the procedural tools available to them to serve the needs of the parties for an efficient and effective dispute resolution process.

In the meantime, the use of expedited procedures in arbitration has gained greater acceptance. Some arbitration rules contain specific expedited procedures (eg, the SIAC arbitration rules). These can be a useful way of achieving a quick result, although unlike summary procedures it is still necessary to have a full hearing of the issues.

Lack of binding precedents:

Unlike litigation, arbitration does not give rise to binding precedents or even generally to publicly available decisions that can be relied upon as persuasive authority. This can be a significant issue for parties (eg, banks and other market participants) that enter into a large number of ISDA Master Agreements, and who could potentially have to arbitrate the same point multiple times against different counterparties. The ability to decide disputed provisions or scenarios for the benefit of the wider market has been one of the benefits of public court decisions in this area. P.R.I.M.E. Finance has sought to address this by making provision in its rules for publication of anonymised abstracts of awards. It will take some time for a substantial body of such decisions to be available, and such

an approach can only ever be mitigation for the absence of full public decisions and binding precedent in arbitration.

On the other hand, many commercial parties see the confidentiality of arbitration (where applicable) as a positive attribute and see no advantage in fighting their disputes in public, particularly where the dispute involves a counterparty default or otherwise raises sensitive issues.

Where next for the ISDA Arbitration Guide?

ISDA is well aware of the need for the Arbitration Guide to keep pace with developments in arbitration, and the evolving needs of ISDA's members both in terms of arbitral processes, and also the choice of institutions favoured by members.

Additional seats/institutions:

The selection of arbitral seats and institutions in the Arbitration Guide has been driven by ISDA members' preferences. It is therefore likely that further draft arbitration clauses will be included in the Guide in coming years, covering additional arbitral institutions and seats for which there is demand. Once the principle and practice of international arbitration for financial disputes is accepted, it can only be beneficial to ensure that users have standard-form drafting that they can use to opt for the process with which they are most comfortable. In the meantime, it is of course open to parties entering into a Master Agreement to opt for other arbitral institutions and seats that are not yet included in the ISDA Arbitration Guide, albeit that this will require bespoke drafting.

For example, further options that may appear in future editions of the Arbitration Guide include the **DIFC-LCIA** Arbitration Centre (an arbitration centre in the Dubai International Financial Centre that is affiliated with the London Court of International Arbitration) and the German Institution of Arbitration (**DIS**). Another option is the Arbitration Institute of the Stockholm Chamber of Commerce (**SCC**) – although the SCC has already issued its own "ISDA-fied" arbitration clause for use with the Master Agreement, at present there is no SCC clause in the ISDA Arbitration Guide.

Experts:

Disputes under the ISDA Master Agreement often raise difficult questions of quantum which require expert evidence to be decided by an arbitral tribunal, or a court. Even where a quantum expert might be appointed to an arbitral tribunal, it would remain the case that they would act as an arbitrator deciding cases based on submissions and evidence presented by the parties, rather than by applying their own expertise.

Query whether such disputes might be more suitable for resolution as an expert determination as an alternative to court or arbitration (albeit one of the two fall-back jurisdictions would still need to apply to disputes regarding, for example, the remit of the expert). In the recent case of *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm), Andrew Smith J in the English High Court recognised this and encouraged the parties to consider whether issues about the amount of an early termination payment could be more efficiently and satisfactorily resolved by an arbitrator or expert than by the court.

Were a bifurcated dispute resolution clause to be included in future editions of the Arbitration Guide, this could provide for difficult technical questions to be resolved by an individual with relevant expertise, in some cases avoiding the cost and delay of presenting expert evidence to an arbitral tribunal. Bifurcated clauses can however create their own complications in terms of delimiting the expert's and arbitral tribunal's respective jurisdictions. For this reason, such clauses must be carefully drafted and should only be used after careful consideration of the pros and cons.

Overall, the ISDA Arbitration Guide has been a notable success in meeting a need among ISDA members for market-standard drafting as international arbitration is increasingly used. The Guide has also sparked discussion around the choice of seat and arbitration institution in increasingly diverse cross-border deals which, in turn, has led to consideration of dispute resolution options beyond traditional court litigation, and even beyond standard arbitration options.

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SPOTLIGHT ON: JESSICA FEI

Jessica Fei, partner in our Beijing office, is a Chinese national, a New York lawyer, and one of China's most experienced international arbitration specialists. We asked her how she came by this unique blend of cultures and qualifications and how they add value to her practice, and about China's future as an arbitration venue.

You have a unique blend of experience: how does this affect your perspective as a practitioner?

I didn't start out as a lawyer; my major at Beijing Foreign Studies University was English and French. My first exposure to arbitration was as a case manager at CIETAC, the leading Chinese arbitral commission. CIETAC case managers were very hands-on; I was involved in every stage of the arbitration, from acceptance and tribunal appointment, to attending the hearing, to helping draft the award. Because I spoke English, I ended up working on anything with an international element - including CIETAC's interactions with international institutions, NGOs and international organisations.

"My experience at the institutions gave me excellent exposure to all aspects of arbitration. I learned what works well ... what is effective ... what a tribunal is likely to accept ..."

I went to law school on weekends while working full-time at CIETAC in the 1990s, qualified in China, then scraped together every last penny to do an LLM at Columbia in New York. From there, I moved to ICDR, the international wing of the American Arbitration

Association, to try to understand the different practice in the American arbitration institution. After a brief stint there, I joined a US-based international firm, opening its Beijing office in 2003, and have been in private practice ever since. Very few mainland Chinese practitioners have been focused on international arbitration for as long as I have.

My experience at the institutions gave me excellent exposure to all aspects of arbitration. I learned what works well and what doesn't; what is effective and what's not; what a tribunal is likely to accept or reject. I understand the rationales of both Chinese and international arbitrators and their different approaches. When I moved into private practice, I brought this understanding with me. I can help clients assess the merits of their claims, and how they will be received by a given tribunal, very objectively, and identify the best strategy for the dispute in question.

Are there significant differences between Chinese arbitrators and other international arbitrators?

It's difficult to generalise; most of the differences are down to individual personalities and preferences, rather than nationality. Having said that, Chinese arbitrators are inclined to focus on achieving a fair, or commercial, result, including by

helping to settle the dispute. It is not uncommon for an arbitrator in China to act as mediator, then resume the arbitrator role if the dispute can't be settled. Arbitrators from common law jurisdictions are more likely to focus on the strict legal position, rules of evidence, etc.

"The younger generation of Chinese lawyers is promising, and increasingly exposed to international cases"

Contrary to many people's expectations, Chinese arbitrators - particularly the older generation - take pride in being strictly objective, and not favouring the party that appointed them. In fact, I know at least one Chinese senior arbitrator who is actively biased against Chinese parties, and typically favours the international side in a dispute!

The real problem is that there is a limited pool of Chinese arbitrators with experience of international arbitration. Things are improving, but it will take time for China to have the strength-in-depth of other arbitral centres. The younger generation of Chinese lawyers is promising, and increasingly exposed to international cases. In 10 years' time I expect to see a lot more Chinese arbitrators and counsel practicing at an international level.



The PRC has made great strides in arbitration law and practice over the last 10 years. Will this continue? Will China ever be a “safe seat” for international arbitrations?

Mainland China is already a safe place to arbitrate. It is a New York Convention territory, with an excellent record of enforcing arbitral awards. The Supreme People’s Court is pro-arbitration, and has taken a number of steps to strengthen the arbitral landscape here. There are still some issues with local courts in smaller cities, but this is improving all the time. The main international institutions have begun to open offices in the Shanghai Free Trade Zone, with a view to eventually administering international cases here. This is still a way off, and until the position on international institutions administering arbitrations in mainland China is more certain, we advise international parties to arbitrate outside the mainland where possible. However, the fact that HKIAC, ICC and SIAC are willing to invest in a presence on the ground is a real vote of confidence for mainland Chinese arbitration.

What kind of disputes do you see most often?

We act for Chinese clients in international arbitrations, and international clients in Chinese arbitrations, so we see a huge variety. As well as construction and joint venture disputes, many of our cases are in the energy sector, where the last few years’ oil price crisis has prompted a marked increase in arbitrations. We do a lot of work for major energy clients, including Chinese SOEs. My background - and my team’s - means we are well-placed to understand the way these entities work and how to steer them successfully through major international disputes. Last year, for example, we won a multi-million dollar arbitration for a subsidiary of Sinopec, including enforcement proceedings, and defending a challenge in the Swedish courts. We also act for multinationals in dispute with Chinese counterparties. It’s great quality work in one of the most exciting jurisdictions in the world, and I feel privileged to be doing it.



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“Construction cases require an extensive unravelling of the facts and it is essential to have a dispute mechanism which allows the decision maker to properly understand what was happening at any given time in a project where hundreds of activities may be proceeding simultaneously over a period of years”



A GLOBAL PERSPECTIVE ON ARBITRATING CONSTRUCTION AND INFRASTRUCTURE DISPUTES: BEST PRACTICE AND CURRENT TRENDS

The construction industry is one of the major users of arbitration globally. The International Chamber of Commerce's most recent statistics show that the construction and engineering industry made up a quarter of its arbitration caseload last year. Arbitration clauses are common in the contracts used for the procurement of infrastructure, building of ships, erecting tower blocks and heavy engineering. They are the go-to mechanism for dispute resolution in privately financed projects from Rabat to Rio and Abu Dhabi to Abuja. Yet, in this multi-national, multi-cultural environment, the parties' expectations of arbitration are often very different. In this article, Mark Lloyd-Williams, Hamish Macpherson, Craig Shepher, Emma Kratochvilova and Thomas Weimann draw on their experiences to consider how arbitration is used in construction and infrastructure projects around the world.



The starting point for considering the nuances and different approaches is to look at the nature of the disputes which arise on a typical construction project. In construction and infrastructure, perhaps more than any other sector, it is often the scale and complexity of the factual matrix in the dispute which drives procedural questions as to its resolution.

Construction projects: dispute resolution in complex fact scenarios

Construction and infrastructure projects are inherently complex, involving a suite of intricate contracts and detailed requirements to address design, procurement, construction, installation, and commissioning, as well as the operation of the project. As a result, it is common for there to be thousands of different activities occurring at any one time while a project is built, and even on the best managed projects, problems arise and delays occur. For every day of delay, the contractor incurs additional overhead and running costs, while the employer sees the date on which it begins to earn a return on his investment deferred, and as each party's financial position deteriorates, the gap between them grows. The cliché that time is money is rarely truer than on a construction site. It is therefore not surprising that disputes arise and that complex questions of delay are often at their heart.

Broadly, time-related claims fall into 2 categories:

- (1) Employer's claims for liquidated or other damages – where the employer seeks to recover its additional costs or losses incurred as a result of the contractor's delay in completing the works, normally on the basis of a pre-agreed formula; and
- (2) Contractor's claims for extensions of time and prolongation costs – where the contractor wants to defer the contractual completion date and avoid (liquidated) damages, while generally also trying to recover the cost of staying on site for longer than anticipated.

Three other types of dispute are also commonplace:

- (1) Contractor's claims for loss and expense from disruption – where the contractor wants to recover the cost of working less efficiently (for example where additional resources have been needed to complete elements of the works);
- (2) Employer's claims for defects – where the employer wants to claim damages as a result of a fault in the works or where the works are not performing as they should; and
- (3) Contractor's claims for variations and final account valuations – where the contractor wants more than the employer thinks he is owed because of a change in the scope of the works.

Construction disputes are unusual because of their factual complexity. While many disputes in other sectors can be of extremely high value, they typically turn on a small number of discrete questions, such as whether a particular promise was made or a particular state of affairs amounted to a breach. Construction cases require an extensive unravelling of the facts and it is essential to have a dispute mechanism which allows the decision maker to properly understand what was happening at any given time in a project where hundreds of activities may be proceeding simultaneously over a period of years. Properly done, arbitration allows exactly that.

Construction arbitration: best practice and global trends

Very few – if any – clients want to take the arbitration process through to its ultimate conclusion, but the points addressed below apply as much to developing a party's position in order to secure the best commercial resolution as they do to achieving a successful arbitration award.

(i) Documentary evidence: getting your hands on the documents, dealing with the burden of disclosure

The availability of contemporaneous documentation, such as construction programmes, as well as correspondence is paramount. While some court systems allow a party to demand that the other provides relevant documents, many do not. If a dispute is heard in the courts of the UAE or Qatar, for example, it is very unlikely that either party will be ordered to provide any documents and each party will provide only those papers it wants the decision maker to see. This lack of a disclosure process in court pushes parties to use arbitration where a tribunal, even under the rules of most local institutions, will have the power to order the exchange of relevant documents. By way of example, Article 27.3 of the Dubai International Arbitration Centre Rules provides:

“At any time during the arbitration, the Tribunal may, at the request of a party or on its own motion, order a party to produce such documents or other evidence within such a period of time as the Tribunal considers necessary or appropriate and may order a party to make available to the Tribunal or to an expert appointed by it or to the other party any property in its possession or control for inspection or testing.”

The production of documents can, unfortunately, become a severe burden. Given the complexity of modern-day construction projects, millions of documents can be produced, and in order to prove a claim or establish a defence, it is often necessary to review thousands of documents and emails created during the construction period. This can be a particular problem in some common law jurisdictions such as Australia. Again, however, arbitration used wisely can prevent the weight of documents from overwhelming the process. It is now common in construction cases for the parties to agree to use, or be guided by, the IBA Rules on the Taking of Evidence in International Arbitration. The IBA Rules represent internationally recognised best practice, providing a compromise between common law and civil law concepts, and limiting the disclosure obligation to narrow and specific categories of documents that are

reasonably believed to exist, which are relevant and material to the outcome of the case and which are not already in the possession, custody or control of the requesting party. This middle ground allows an arbitral tribunal to ensure that it has access to the evidence it needs, without the parties being subjected to an overly onerous disclosure process. Further, good counsel can also advise on practical techniques to assist a client to comply with disclosure requirements in an efficient and cost-effective manner, advising on use of document management systems and technologies such as predictive coding. Whilst not all national courts will be familiar with, and accepting of, such tools, arbitral tribunals are often in favour of their use, provided that they do not undermine the parties' right to a fair hearing.

(ii) The thorny issue of evidentiary privileges and rules against admissibility

A related consideration in terms of important regional differences, concerns the lack of "privilege" or other evidentiary rules which protect documents from disclosure and/or admissibility. Again, using the Middle East as an example, in many of the key jurisdictions in the region the concept of making an offer on a "without prejudice" basis (meaning that the terms of the offer are not admissible before a court or tribunal) does not exist, and even legal advice may not be protected from disclosure in the same way it is in other jurisdictions. Therefore, unless the parties are careful, their expectations of which documents are discloseable and which are admissible, and what remains confidential, may not be met. Any such potential discrepancy between the client's expectations as to the privilege or protections which attaches to their documents, and the potential for those documents to be discloseable, should be identified at a very early stage. While this issue arises in all sectors, it is a real concern in construction cases where commercial correspondence is often drafted by a claims team with extensive construction knowledge, but no local law training, who will anticipate that marking a letter "without prejudice" will offer it a protection which that law does not recognise.

(iii) Difficulties surrounding witness testimony

Factual witnesses are also very important as they can provide an account of what was happening on site during critical periods of the project. Again, regional expectations differ and this can cause considerable difficulties in administering the process in some of the key markets for construction cases. In Saudi Arabian disputes there can even be contention over who can be a witness in the first place. Saudi court process requires witnesses to be independent and provides that the statements of a party or its employees or agents have no evidential value. Those court rules have no application in regional arbitration; but the fact that one party may strongly dispute the entitlement of a key witness to testify can lead to unnecessary procedural applications. A strong and experienced tribunal is needed to deal with such applications in a way that ensures that the arbitration proceeds without undue delay.

A further issue which is keenly felt in construction cases globally is the availability (or the lack of availability) of factual witnesses after a project completes. Many engineers, surveyors and others are engaged for a project, and when the project completes they move on to other work, in other countries, for other companies and may become reluctant to look back at events several years ago. Indeed, once the project team has been disbanded and access to the site has been terminated, it can become difficult to identify specific losses and their underlying causes. To tackle this it is important to prepare witness statements early, sometimes as soon as a dispute is contemplated, even if they are only in draft.

As with construction projects themselves, a construction dispute is also inherently complex. Often, a construction arbitration can turn on expert evidence from engineers, programming experts or quantum experts relating to the extent and causes of delay, how much additional cost the contractor is entitled to recover, whether the works comply with the specification or why the works are not performing as they should. Typically in construction arbitrations the parties will each appoint experts to assist counsel and to help the tribunal understand its claim or defence, and to assess the damages claimed, often resulting in a claim becoming a battle of the

experts. However in several civil law jurisdictions, in particular Germany and some neighbouring countries, it is well established practice for arbitral tribunals (as well as for state courts) to avoid such a battle and appoint a further expert independent from the parties to analyse the technical issues, to testify and to assist the arbitral tribunal. Such an approach can be a surprise where parties are used to each side appointing their own independent expert and moreover can be fundamental to a party's presentation of its case, and to what type of arbitrator is the right fit for the dispute.

(iv) Rules, seats, governing laws and language barriers

Given the complexities common to construction and infrastructure disputes, seasoned international players commonly opt for institutional arbitration rather than ad hoc proceedings. The choice of arbitral institution was historically linked to a handful of centres, such as London, Paris, New York, Stockholm and Hong Kong. However, more recently, with the increasing number and strength of reputable institutions boasting world-renowned construction arbitrators on their lists, there is now a wider choice, including institutions headquartered in the region of the project, eg, SIAC, HKIAC, BANI, KLRCA and CIETAC in Asia. Some institutions have had less success in growing a name for themselves on the international construction arbitration scene. For example, for their international construction projects, we see that Japanese corporates will commonly agree to the aforementioned Asian institutions over the JCAA in Tokyo.

English law is still widely accepted as the governing law of choice in construction projects featuring international companies. English law is favoured primarily for its clarity - the fact that it provides a predictable, user-friendly system that supports freedom of contract and will not generally subject those who use it to unwelcome surprises (for example, by introducing extraneous mandatory rules or implied good faith obligations). However, for government funded projects, it is common for the government to impose the law of its own

jurisdiction into the head contract. The contractor and subcontractors/suppliers continue to agree that English law should govern their contracts and this mismatch between the head contract and the other contracts can leave a significant risk of liability gaps for the main contractor. Careful analysis is required to understand how the contracts fit together when governed by two different legal systems.

English language has become the lingua franca of international construction contracts. This again is a driver for the use of arbitration as it allows the parties to appoint a tribunal which speaks the language of the contract, and to produce the contract in its original form. Courts in the Middle East require documents to be submitted in Arabic, and as many construction contracts run to thousands of highly technical pages, the cost and time implications of translation make litigation unattractive. Even in arbitration, one should never underestimate the time and cost associated with dealing with unavoidable language issues. In particular, the time and cost of translating documents and witness evidence, as well as finding a suitably qualified interpreter (both in terms of experience of interpreting at trial and familiarity with technical terms). These matters should be considered in the early stages so as to ensure that there will be sufficient translator resources to meet the procedural deadlines, as well as securing availability of the best interpreter candidates as they tend to be in high demand.

(v) Multiple party/multiple contract issue

One issue on construction projects which tends not to be addressed is the implications of the multi-contract environment. While the parties could ensure that the arbitration agreements in the different contracts are compatible and allow for such options as joinder or consolidation, this remains rare. Different contracts will frequently have different dispute clauses and the risk of tribunals coming to different decisions in related cases (such as claims between employer and contractor and between contractor and sub-contractor) is very real.

Concluding Thoughts

Arbitration is adopted in construction projects round the globe, and its ability to allow the parties and the tribunal to see documents, hear witnesses, and address the dispute in the most appropriate language means that it will long continue to be the default dispute resolution mechanism. However, the parties' expectations will not always be met where the sides have different cultural approaches. In these cases, it is vital that as the contract is drafted the parties are not only asked, "do you want to provide for arbitration", but are also asked, "what kind of arbitration do you want?"

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THE IMPACT OF SOVEREIGNTY AND BOUNDARY DISPUTES ON COMMERCIAL INVESTMENTS

As can be seen from the merest glance at the world's press, there remain a large number of unresolved sovereignty disputes around the world. According to the Maritime Boundaries Research Institute of the University of Dundee, as at June 2015, more than half of the 640 or so potential maritime boundaries were classified as unresolved or in dispute. This figure naturally excludes boundary disputes on land and internal secession disputes awaiting resolution. A number of boundary disputes are very high profile – for example, competing claims in the South China Sea, and the continuing dispute between the United Kingdom and Argentina over the Falklands/Malvinas, are significant sources of geopolitical tension.

Disputes over territory such as islands can be based on many different grounds, including geographical contiguity, claims to self-determination, historical claims (such as those based on the ethnic background of the indigenous people or disputed colonial treaties), or the disputed territory may be of political or strategic significance. Maritime delimitation disputes may themselves arise from disputes as to sovereignty over land, because as one international judge put it, “*the sea follows the land*”. Classic examples include disputes over sovereignty of islands, and indeed disputes concerning whether specific territory is properly classified under UNCLOS as an island at all (giving rise to full maritime zone entitlements), or is instead simply a “rock” with only a territorial sea. Equally, many maritime delimitation cases have relatively little origin in onshore sovereignty tussles and concern almost exclusively an interpretation and application of the provisions of the law of the sea.

Over recent times, many of the world's boundary disputes have arisen from, or have been exacerbated by, economic elements, in particular the discovery of hydrocarbons. Both land and maritime boundary disputes can have a significant impact on the international investment decisions of commercial actors and the political and economic development of a State. A feature of many, if not the majority of, boundary disputes is their longevity. A prime example is the dispute between Venezuela and Guyana over a mineral-rich area of land which began between the US and Britain in the nineteenth century and was revived last year following the discovery of oil off the coast of the disputed territory.

Why are sovereignty disputes relevant to commercial actors? A State exercises exclusive jurisdiction over its territory, and enjoys sovereign rights over associated natural resources. Investors who intend to explore and hopefully exploit natural resources need to know which State exercises sovereignty or sovereign rights over the relevant territory or maritime space and on what basis, and therefore which State has the exclusive sovereign right to grant concessions in relation to that territory. Unresolved competing maritime claims also have the potential to undermine an investment.

As well as the legal risks associated with commercial dealings with a State that does not have rights over the relevant area or resources, there are also important political, commercial and potentially reputational risks to consider.

From a State perspective, the satisfactory resolution of a boundary dispute can unlock the economic potential of natural resources. The existence or even spectre of a territorial or maritime boundary dispute can undermine the State's ability to exploit those resources.

In brief: types of dispute and methods of resolution

A dispute may exist in relation to the status of a territory itself (for example, as to sovereignty over the Falklands/Malvinas), or in relation to territorial areas where sovereignty is disputed between two or more neighbouring States (as

was the case on the border between Cameroon and Nigeria). Sovereignty disputes over territory on land can often lead to related maritime boundary disputes, including where claims to maritime rights cover the same maritime areas (as is the case between Thailand and Cambodia in the so-called Overlapping Claims Area).

In accordance with the UN Charter, disputes between States, including as to sovereignty over territory or maritime rights, must be resolved by peaceful means. UNCLOS specifies a number of peaceful means by which disputes are to be settled. Whilst classically, disputes between States have been referred to the International Court of Justice (the **ICJ**), the principal judicial organ of the United Nations, maritime boundary disputes may additionally be referred to an ad hoc tribunal established under Annex VII of UNCLOS, or to the International Tribunal for the Law of the Sea (the **ITLOS**), established under UNCLOS. Disputes may also be submitted to arbitration pursuant to a treaty (for example, the ongoing arbitration between Timor-Leste and Australia) or other special agreement. Of course, even once a dispute has been submitted for resolution to a dispute resolution body, the proceedings may take a number of years to complete and, as discussed further below, have the potential to disrupt ongoing exploration or other commercial activity in the region.

EXAMPLES OF FORMAL DISPUTE RESOLUTION:

ICJ: *Somalia v Kenya; Costa Rica v Nicaragua*

UNCLOS: *Barbados v Republic of Trinidad & Tobago, Guyana v Suriname*

ITLOS: *Bangladesh v Myanmar; Ghana /Ivory Coast*

Ad hoc: *Eritrea/Yemen*

States may reach a resolution of disputes without recourse to a decision-making body, with the outcome of their agreement enshrined in a boundary treaty. Indeed, the prospect of mutually beneficial economic co-operation may provide sufficient incentive to bring both sides to the negotiating table. However, the settlement process may be long and uncertain. For example, in 2015 India and Bangladesh finally implemented a land boundary agreement which had been signed in 1974. Further, interpretation or implementation of an agreement or treaty, or even a judgment of the ICJ or an international tribunal, may lead to further disputes.

Where a dispute concerns the exercise of the right to self-determination, the resolution may be achieved by constitutional means and within the framework of the territorial integrity of the relevant State (eg, the secession of the Republic of South Sudan which was achieved by referendum after years of conflict). However, in some cases such disputes may be resolved by non-constitutional means, as was the case of Eritrea's war of independence from Ethiopia. Any resolution may be temporary and will depend, in any case, upon international recognition of the new State.

"Provisional arrangements of a practical nature" – Joint Development Zones

Pending resolution of a dispute, States are encouraged by UNCLOS to make "every effort to enter into provisional arrangements of a practical nature". Accordingly, whilst a permanent agreement may take many years to accomplish, States may nonetheless be able to reach an agreement to establish a Joint Development Zone (or **JDZ**) which will enable them to explore and develop the natural resources within the disputed territory. Under JDZ agreements, the

States suspend their disputes over sovereignty, formalize the conditions for development and agree to the sharing of returns. The terms of JDZs vary, but the two States often co-operate to hold licensing rounds on a joint basis unless they have devolved their sovereign and regulatory rights and powers to a joint development authority (as is the case in the Nigeria/Sao Tome JDZ). The establishment of a JDZ can be a positive step which provides more security for commercial stakeholders, albeit that there may remain certain points of uncertainty. For example, the duration of the joint development agreement may be unclear or capable of variation. There may also be a lack of clarity as regards treatment of hydrocarbons which straddle the border of the JDZ into the recognized sovereign territory or maritime control of one of the States in the absence of an international unitization agreement.

Key issues for commercial stakeholders

The economic reality is that opportunities for activity in disputed territories cannot be ignored. However, the risks are complex.

The position under international law with respect to an opportunity offered to explore or develop a field is a primary consideration. For example, an IOC considering a licence or concession opportunity needs to assure itself regarding the extent to which the State in question is able to grant those rights. There may be competing claims to sovereignty over the territory in question. Further, the claim of a State in relation to a territory may be questionable in light of other claims. These claims may be those of another State, or the territory concerned may be non-self governing. A maritime boundary may not have been established and the area in question may be subject to competing entitlements and overlapping claims.

Some of these same considerations apply even if the rights are not derived directly from a State. For example, when looking at farm-in opportunities, it is important to make sure that the title to the original petroleum agreement is validly granted as a matter of international law, otherwise any further rights derived from it are potentially unenforceable.

The fact that an oil or gas concession has been granted by a particular State is not in itself determinative of the sovereignty of that State

over that territory or delimitation of a maritime boundary. Nor can it be relied upon to justify the adjustment or shifting of provisional lines of delimitation. The now consistent case law of international courts and tribunals is that the presence of such concessions is only relevant where it evidences or was based upon the existence of some express or tacit agreement between the States relating to the rights over the area in question.

The flipside of the encouragement in UNCLOS to enter into provisional arrangements is the existence of a similar exhortation to make every effort "not to jeopardize or hamper the reaching of the final agreement". This standard has been invoked where concessions have been granted by one State in disputed areas. In this context, a tribunal considering competing claims may interfere substantially with exploration or other commercial activity in disputed areas, if a risk of irreparable damage or prejudice to one of the party's rights can be established as resulting from that activity.

For example, in the Aegean Sea Continental Shelf case between Greece and Turkey, Greece sought an order from the ICJ which would have put a halt to exploration activity and related scientific research that had been granted by Turkey under a concession. In the event, the ICJ dismissed Greece's application on the basis that there was no irreparable prejudice. In a more recent example, a number of concessionaires were facing possible disruption last year when a special chamber of the ITLOS considered the request of Ivory Coast for provisional measures to stop drilling in the context of a territorial dispute with Ghana. The special chamber ordered Ghana to prevent any new drilling in the disputed area and to monitor strictly, and prevent the dissemination of, non-public information from past, ongoing or future exploration activities which could be used to the detriment of Ivory Coast.

Putting aside the fact that investment treaties may be of very limited value in protecting against such legal risks, investors also need to consider the risks of reputational damage attendant to investing where there exists a dispute as to sovereignty or maritime jurisdiction. In particular, commercial activity in, or associated with, an area in which the basis of a territorial claim is controversial can lead to considerable criticism and broader business

impacts. Shareholders can react in a high profile and negative way to activities in areas of dispute, with pension funds dropping investments. Oil companies have also been on the receiving end of civil claims in their home jurisdictions, based on allegations relating to activities in areas subject to historic and on-going disputes. Such claims often make unpalatable allegations, for example referring to corruption of government officials in connection with the investment and indirect funding, and thus facilitation of breaches of international law.

Further risk management issues for an investor include the potential for regular flare-ups in localised violent conflict. Indeed, possession of oil or gas fields and related installations can often become a focus in civil conflict, particularly in areas where sovereignty is disputed. Fighting or other military attention may lead to temporary cessation of production.

Therefore, for those invested in disputed territory or areas of overlapping maritime claims, the impact of escalating conflict and/or increasing political tensions at State to State level, is significant in many ways. In this context, it is difficult for a commercial party to avoid taking some sort of role in a State to State dispute in which private actors, of course, have no standing. However, as described below, a cautious approach is necessary.

Involvement of commercial actors in boundary disputes

In its award in the investor-State arbitration between RSM and Grenada the tribunal observed that it *"must highlight how uncommon it is to have a private commercial party ... directly involved in maritime boundary negotiations between sovereign states."* This observation is broadly accepted: sovereignty over territory is one of the basic characteristics of being a State. Boundary negotiations are usually highly confidential and diplomatically sensitive. Third parties have no standing in formalized resolution of boundary disputes and, as the same tribunal noted, *"[p]rivate, foreign oil companies are rarely involved in sensitive and delicate matters such as maritime boundary negotiations because of the high potential for conflicts of interest"*.

Private actors must therefore keep sight of whose boundary dispute it is. Undue or inappropriate influence in discussions between

States concerning their boundaries can have a deleterious effect and actually undermine efforts between those States to reach an amicable resolution. That said, where revenue-generating activity (for example, the exploitation of hydrocarbons or, indeed, even fishing) is hindered by ongoing boundary disputes, commercial actors can put further pressure on, and provide motivation from States to reach a resolution where possible. Commercial actors may therefore play a careful but legitimate role in trying to bring States together to put an end to developmental "chill" and achieve the positive benefits of resolution of a boundary dispute.

Key points for States in the realisation of economic benefits and the resolution of disputes

The need to exploit resources can provide the impetus to tackle sovereignty and maritime boundary issues head on. The key to establishing such claims is preparation. A State will need solid legal, technical and political advice on the merits and disadvantages of different courses of action and how to achieve a peaceful method of dispute resolution. The economic motivation of a State will of course be relevant - for example, a State's priority may be the short to medium term exploitation of resources, over and above a permanent determination of a boundary.

It will be important to consider the applicable law, including to investigate whether there have been any previous relevant agreements, their scope and their status. The expertise of a State's team should extend to geography and (for maritime claims) hydrography, and historical and anthropological investigation may also be imperative. Fundamental to creating a strong position, whether in negotiations or in the context of formal dispute resolution proceedings, will be preparation and the mastery of all this information together to create a coherent legal and technical argument as to the State's rights.

Particularly where there are promised riches of hydrocarbon discovery and exploitation, disputes as to sovereignty over territory and maritime boundaries are unlikely to decline. As we go to press, for example, the dispute between Ghana and Ivory Coast continues before the ICJ, and maritime boundary disputes continue to rumble on in

the Aegean Sea, involving Cyprus, Greece, Turkey and in some areas, Syria. Herbert Smith Freehills' Public International Law practice has considerable experience in advising both States and commercial clients on issues concerning disputed territory, delimitation of boundaries and the emergence of new States. For example, we were the first firm to commence an Annex VII arbitration under UNCLOS (Barbados v Trinidad and Tobago) and our specialists have been involved in a number of other disputes between States (including Eritrea/Yemen and Bangladesh's disputes with India and with Myanmar), and between States and oil companies.



For further information on investment protection, see

[INVESTMENT PROTECTION: PROTECTING INVESTMENTS IN A VOLATILE WORLD](#) in Issue 1 of *Inside Arbitration*.

<http://goo.gl/CGVmaO>

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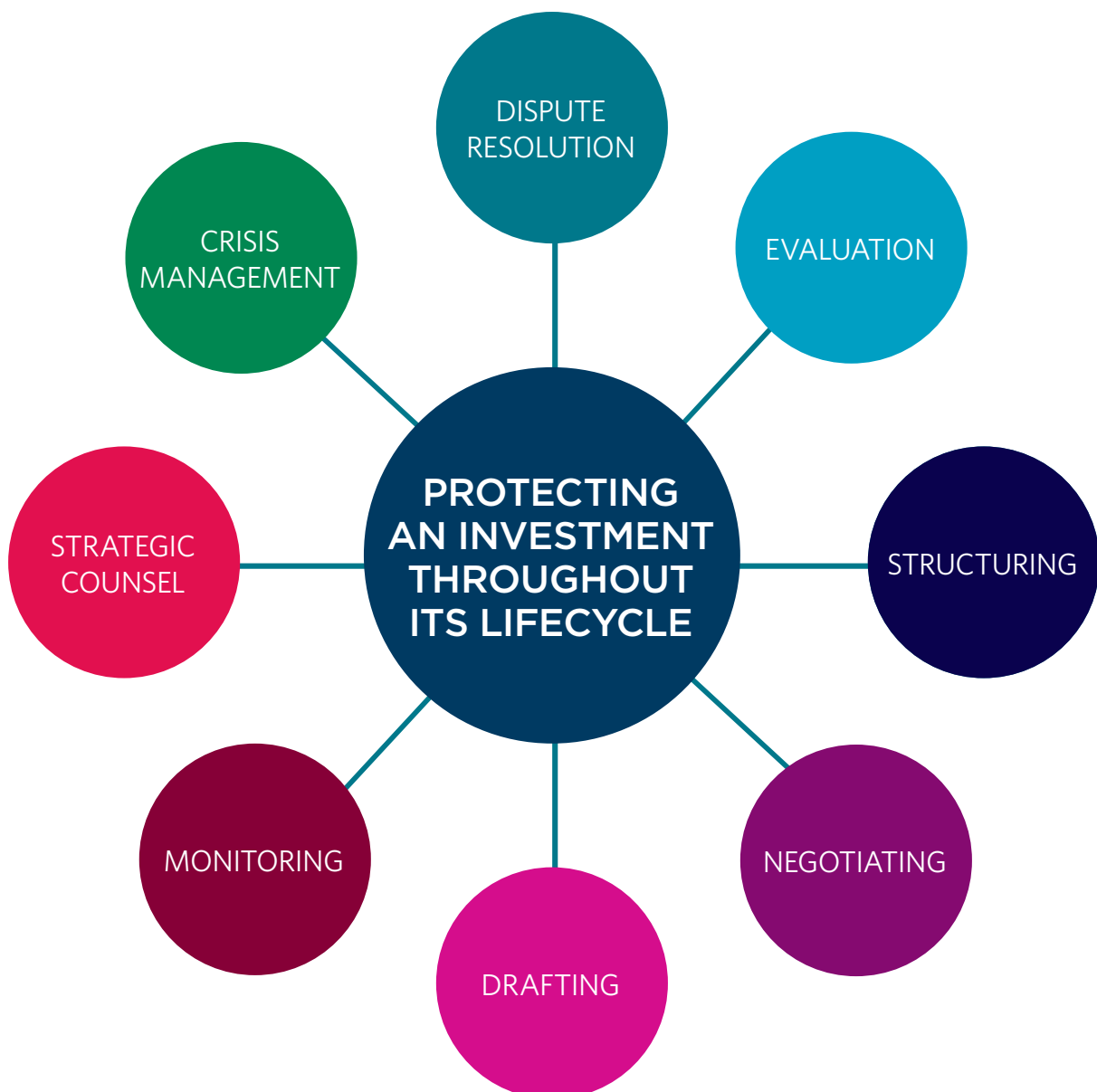
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OUR INVESTMENT PROTECTION PRACTICE: PROTECTING INVESTMENTS THROUGHOUT THEIR LIFE CYCLE

As we commented in Issue 1, in uncertain times investment protections offered by both contract and international law cannot be ignored. A savvy investor will pre-empt changes in the political landscape or investment climate when their investment plans are at an embryonic stage and keep the question on the agenda throughout the life of their investment. Such strategic consideration can help investors to both minimise the economic impact of change on their investments and manage the risk to their reputation.



DISPUTE RESOLUTION

- Representing states and investors in a number of investment treaty and other treaty-based claims, including advising:

Investors

- Chèque Déjeuner in a claim against Hungary
- BP and Rio Tinto in *Government of the Province of East Kalimantan v PT Kaltim Prima Coal and others*
- Telekom Malaysia Berhad in an arbitration against Ghana
- Vedanta Resources on a claim under the UK-India **BIT**
- ACP Axos in ICSID proceedings brought against the Republic of Kosovo
- United Utilities in a claim against Estonia

States

- Republic of Tunisia in respect of claims by ABCI Investments
- Kingdom of Spain in respect of claims under the Energy Charter Treaty
- Costa Rica in a DR-CAFTA claim

EVALUATION

- Representing a consortium of international oil companies on the implications of their investments in Sudan (currently estimated to be worth at least US\$11 billion and representing more than 95% of total Sudanese oil production) arising from the secession of South Sudan from the Republic of Sudan
- Advising BP on all contentious issues in contract and in tort, and in multiple jurisdictions, arising from the incident at the In Amenas gas facility in Algeria in January 2013

STRUCTURING

- Advising the world leader in natural gas in relation to protection and structuring of its investment in China through analysis of relevant treaties including bilateral investment treaties
- Advising Sierra Leone in relation to the development of the country's first independent power project
- Advising a Japanese trading company in relation to investment protection of its interests in a Bolivian mining project
- Advising a global power company in relation to the structuring of its US\$17 billion investment in the nuclear sector in a western European State. The advice included complex questions concerning available protections under applicable bilateral investment treaties and the Energy Charter Treaty, including in the context of contractual limitations and specific governmental assurances

NEGOTIATING

- Advising a G7 Government in relation to the drafting of its investment treaties
- Advising Kuwait Petroleum Corporation on the intergovernmental agreements (IGA), host government agreements and domestic regulatory structuring of proposed gas pipelines between Qatar, Bahrain, Saudi Arabia, Kuwait and Iran

DRAFTING

- Advising an energy and commodities company on stabilisation clauses in contracts with a West African State
- Advising an international energy company on the stabilisation provisions in an Umbrella Agreement/Heads of Terms for a Host Government Agreement

MONITORING

- Providing strategic advice regarding state succession issues on an on-going basis for international oil companies operating in Iraq/Kurdistan
- Advising a mining company concerning its exploration rights at the Eritrea-Ethiopia border, in view of the disagreement between those countries as to where the border lay

STRATEGIC COUNSEL

- Advising a Latin American state on the interpretation of, and its rights under, a multi-lateral treaty. Considering possible remedies, including a multi-party action involving a number of sovereign states where the consequence of the potential proceeding could be a seismic change in the management of international affairs in Latin America

CRISIS MANAGEMENT

- Acting for Santos Ltd and subsidiaries in relation to investigations, threatened claims and litigation (including by environmental and human rights interest groups), contractual issues between JV and drilling parties, as well as related insurance issues, arising out of an incident at the Banjar-Panji-1 well in East Java, Indonesia, which was alleged to have caused a mud volcano to erupt

To read more detailed analysis of these issues, look to "Protecting Investments in a Volatile World", by Larry Shore, Isabelle Michou, and Christian Leathley in Issue 1 of Inside Arbitration, available on <http://goo.gl/CGVmaO>.

A VIEW FROM JOHANNESBURG

In April 2016, the South African government gazetted a draft International Arbitration Bill, which will – at long last – domesticate the 1985 UNCITRAL Model Law on International Commercial Arbitration, alongside the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (which South Africa ratified in 1976 but only partially implemented).

The International Arbitration Bill (**the Bill**), will effectively replace the antiquated Arbitration Act of 1965, which was designed for domestic disputes and is thus, according to the Department of Justice, “deficient for an expanding international trade and investment regime”. That Act affords domestic courts wide discretion to interfere with the functioning of any arbitral tribunal seated in South Africa, which is inimical to the efficiency and consistency that modern international businesses seek when selecting a seat for arbitration.

“the government began to appreciate the risks of international investment arbitration: from 2001 to 2003, a Swiss national successfully claimed an undisclosed sum of damages from South Africa under the UNCITRAL Arbitration Rules”

While South African courts have exercised restraint in interpreting the 1965 Act and developed a strong culture of deference to arbitral tribunals, the lack of legislation based on the UNCITRAL Model Law has deprived business of the predictability it seeks. It also effectively confines the country’s highly-qualified practitioners and respected institutions such as the Arbitration Foundation of Southern Africa (founded in 1996) largely to domestic disputes.

The Bill will thus help to modernise South Africa’s dispute resolution regime and make the country a more hospitable hub for international commerce. As Cabinet explained when announcing the Bill, “the international arbitration process is an essential tool for doing business across the borders of the country”, and thus the Bill “will improve access to justice services for companies doing business outside the country and foreign companies in South Africa”. It is hoped that this will help South Africa to realise its long-held ambition to become the consummate “Gateway to Africa” for international investors.

While the Bill is a most welcome development, it is rather late in the day and too limited to bring about the fulfilment of this vision.

A little too late?

Regrettably, the Bill is being introduced almost two decades after it was first developed by the South African Law Commission, chaired by the late Chief Justice Ismail Mahomed. In July 1998, after two years of thorough consultative and comparative research, the Commission produced a comprehensive report recommending the adoption of a single statute which would domesticate not only the UNCITRAL Model Law and the New York Convention, but also the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**ICSID Convention**).



The latter proposal was motivated as follows:

“Although South Africa is a developing country, its relatively strong infrastructure and position as the major economic power in the region place South Africa in a somewhat unique position as a country which could get a dual benefit from ICSID membership. On the one hand, the country is anxious to attract more foreign investment and some of the potential projects could benefit from the availability of arbitration or conciliation under the Washington Convention.”

“On the other hand, South African companies are eagerly looking for investment opportunities in other African countries, virtually all of which are members of ICSID. Ratification of the Convention by South Africa would facilitate such investment and further the economic development of the region. Failure to ratify the Convention would leave South Africa as one of the very few African countries which have not done so and a continued failure to do so appears difficult to justify.”

Notwithstanding its obvious benefits, and despite being classified by Parliament in 2002 as one of the “urgent bills of a high priority”, the Law Commission’s first draft of the Bill fell victim to legislative languor and was never formally tabled. Meanwhile, the government began to appreciate the risks of international investment arbitration: from 2001 to 2003, a Swiss national successfully claimed an undisclosed sum of damages from South Africa under the UNCITRAL Arbitration Rules, for failing to protect his game farm from



vandalism following a land invasion, in breach of the guarantee of “full protection and security” under South Africa’s Bilateral Investment Treaty (BIT) with Switzerland.

The draft Bill (and with it the domestication of the UNCITRAL Model Law) fell hostage to Cabinet’s concerns about investor-state arbitration, which escalated further after South Africa received its second investment claim in 2007, as investors from Italy and Luxembourg argued that black empowerment quotas imposed on mining companies amounted to uncompensated expropriation, discrimination and derogation from fair and equitable treatment.¹ Cabinet responded with a “review” of South Africa’s BIT policy framework, completed in 2009, recommending the development of “a model BIT which is in line with its development needs”. A year later, Cabinet decided that this would be “the basis on which BITs could be evaluated and renegotiated”, mandating the Minister of Trade and Industry (**Minister**) “to draft legislation in this regard”.

Somewhat deviating from this mandate, the Minister decided against such renegotiation and instead unilaterally terminated all of South Africa’s BITs with EU and EFTA member states (giving the minimum of one year’s notice), commencing with Belgium-Luxembourg in 2011-2012, Switzerland in 2012-2013, followed by Austria, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Spain, Sweden and the United Kingdom in 2013-2014. South Africa has yet to terminate

any BITs with non-European states, including those with BRICS partners Russia and China, as well as several African states and Argentina and Cuba.

Alongside these targeted BIT terminations, the Minister developed the Promotion and Protection of Investment Bill, declaring that foreign investors will only be entitled to the same treatment as South African nationals, subject to domestic law and the jurisdiction of domestic courts. Signed into law in December 2015, the slightly retitled Protection of Investment Act proclaims that South Africa will no longer subject itself to investor-state arbitration, but may consent to state-state dispute settlement.

The passage of this legislation, ironically, cleared the path for the Bill to be reintroduced into Parliament this year, of course without the troublesome chapter domesticating the ICSID Convention. It is not known why that chapter could not simply have been separated from the Bill over a decade ago, so that South African law could at least have been aligned with the uncontroversial UNCITRAL Model Law and New York Convention in relatively good time.

This delay has retarded South Africa’s ambitions of becoming a leading dispute resolution destination, as well as the business gateway to Africa. Selected in 2007 to host the Permanent Court of Arbitration’s Regional Facility for Africa, South Africa later lost this title to Mauritius, which adopted the

UNCITRAL Model Law in 2008 and has since developed world-class arbitration facilities in collaboration with the London Court of International Arbitration. The increasingly busy Mauritius International Arbitration Centre won the Global Arbitration Review award for up-and-coming regional arbitral institution in 2015, and hosted the prestigious International Council for Commercial Arbitration Congress earlier this year.

¹ Peter Leon was co-counsel in the matter of *Foresti and Others v South Africa*, ICSID Case No. ARB(AF)/07/01.

Another African state to domesticate the UNCITRAL Model Law in 2008 was Rwanda – lately dubbed the Switzerland or Singapore of Africa. Rwanda is the closest challenger to Mauritius for the title of Africa’s arbitration hub, having set up the Kigali International Arbitration Centre in 2012.

South Africa has regrettably fallen behind. Having drafted a law domesticating the UNCITRAL Model Law ten years before Mauritius and Rwanda, it has given them an almost ten-year head start in implementing it. In that time, both Mauritius and Rwanda have overtaken South Africa in the World Bank’s Ease of Doing Business rankings, which consider the availability of arbitration as one of the factors that make it easier for investors to enforce contracts. (In 2016, Mauritius placed 32nd overall, Rwanda 62nd, and South Africa 73rd.)

Too limited

While the tabling of the Bill is an indispensable first step for South Africa to catch up to the continent’s leading international arbitration jurisdictions, it is insufficient, on its own and in its current form, to bridge the gap.

The Bill’s potential is affected by the same insularity that has delayed its enactment for so many years, and has driven the country to move from rules-based investor-state

arbitration back to the outdated and arbitrary regime of state-state diplomatic protection for foreign investments.

Provision for investor-state international arbitration has not only been removed from the Bill (with the deletion of the original chapter domesticating the ICSID Convention), but is in fact explicitly ruled out. The Bill’s application to state organs is made subject to the Protection of Investment Act, which provides that the South African government may consent to international investment arbitration only after exhaustion of domestic remedies and only if “[s]uch arbitration will be conducted between [South Africa] and the home state of the applicable investor”.

This significantly inhibits the Bill’s potential to modernise South Africa’s arbitration framework and to persuade international businesses to place their confidence in it. African economies are renowned for the prominent role played by state organs, not only as regulators but as commercial participants, and thus an effective and efficient system of international dispute settlement is inadequate if it does not afford investors access to arbitration outside the sovereign reach of the host state. This protection is essential not only for enterprises considering South Africa as an investment destination itself but also for those considering it as a regional base for investment into other African countries.

In disavowing investor-state international arbitration, South Africa not only forfeited the “dual benefit” of ICSID membership identified by the Law Commission in 1998, but also unilaterally repudiated the Southern African Development Community Protocol on Finance and Investment (**SADC Protocol**), a binding regional treaty which was signed in 2006, ratified by South Africa in 2008 and entered into force in 2010. The Protocol binds SADC members to honour the classic BIT protections (balanced with sustainable development imperatives and the host state’s right to regulate in the public interest), and records their consent to investor-state international arbitration after exhaustion of domestic remedies.

The SADC Protocol obliges member states to harmonise their legal regimes for foreign investment in accordance with international best practice, resulting in the development of a SADC Model BIT in June 2012. Rather than using this template to renegotiate BITs with European states, South Africa terminated them entirely and enacted the Protection of Investment Act in their place. This has created a dual disadvantage, discouraging new investments while giving pre-existing investments the very privileges the Act aimed to curtail (by triggering lengthy survival clauses in the terminated BITs).

“South Africa offers significant attractions as a prospective seat for commercial arbitration”

By contrast, fellow SADC member Mauritius has placed itself at the forefront of modern investment promotion. In 2011, the government announced a “*new economic diplomacy initiative to position Mauritius as the preferred gateway for investment into Africa*”, which included the development of a model BIT, an international arbitration centre and a one-stop shop for foreign investors. Five years later, this vision has clearly been realised, as the Mauritius International Arbitration Centre, a prodigious network of BITs and Double Taxation Agreements with African states, among many others (as well as membership of ICSID), have helped to make Mauritius the premier seat of regional management for countless foreign investors into Africa.

As South Africa deliberates over the Bill, it would be worthwhile to reflect on what opportunities were lost in the two decades’ delay since it was first drafted, and what more opportunities may be lost if the Bill remains limited by such a narrow approach.

South Africa still has the potential to become the Gateway to Africa. As the continent’s most industrialised, technologically advanced and financially sophisticated jurisdiction, boasting a robust and well respected judiciary, South Africa offers significant attractions as a prospective seat for commercial arbitration. In this uncertain and increasingly competitive global economy, however, South Africa simply cannot continue to do without a world-class arbitration framework.

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BREXIT: IMPLICATIONS FOR DISPUTE RESOLUTION AND GOVERNING LAW CLAUSES

As we go to press, there is considerable uncertainty as to the UK's future relationship with Europe. Commercial parties across the world are trying to understand the potential impact on their businesses. Times of commercial, economic and/or structural change are inclined to lead to disputes, as parties consider whether their contractual relationships continue to be financially viable or re-evaluate their business in the light of changing circumstances. Further, those entering into significant transactions in the coming days and months must consider whether their default choices of governing law and dispute resolution mechanism continue to be the best option. Vanessa Naish and Hannah Ambrose take a practical look at the effect on dispute resolution choices, both now and in the future.



The immediate impact of the Referendum on contracts

At this time, the outcome of the UK's referendum on membership of the European Union is known but no notice of the UK's intention to leave the EU has been given under Art. 50 of the Treaty on the European Union. Indeed, there is considerable debate about how such notice can be delivered, both in terms of UK constitutional law and under EU law. Delivery of the notice will formally start the process for negotiation of the UK's exit, and for determining the fundamental question of the nature of its on-going relationship with Europe. For more information on the process and potential alternative structures, please visit our Brexit hub, accessible through our website www.herbertsmithfreehills.com.

It is important to remember that, until the negotiation is finalised, nothing has changed. The UK remains a member of the EU with the same duties and responsibilities as all the other Member States. Significantly, the UK remains bound by directly applicable EU law (including the EU Treaties and EU Regulations). Unless and until they are repealed, the UK statutes that implement EU Directives will remain in force.

Whilst commercial parties will no doubt be assessing their business plans and structures,

neither the referendum outcome, nor the service by the UK of notice to leave the EU, are likely to impact on existing rights and obligations under most contracts. Until the terms of the UK's exit are finalised, the regulatory environment in which parties are performing contractual obligations will also not change.

Can I still choose English law to govern my contractual relationships?

(i) English contract law remains a sensible, commercial choice

English law has long been a popular choice of substantive law in international contracts – in many cases, English law is chosen despite there being no nexus between the parties or the place of contractual performance, and England.

“It is important to remember that, until the negotiation is finalised, nothing has changed”

During the period of negotiation between the UK and the rest of the EU Member States (rEU), the UK will need to determine the extent to which EU law will be incorporated into the law of the UK. It will be up to the UK to consider whether to retain parts of UK law which implement EU Directives. Further, the

UK will need to develop and pass domestic UK law to fill in any gaps left when directly applicable EU law no longer applies. Even if this takes the form of adopting many EU Regulations into national law without significant amendment, undoubtedly the task of disentangling the UK's legal fabric from that of the EU will be a complex one and it will take a number of years to be completed.

However, for many commercial parties, English law is chosen due to the stable application of a well-developed body of English contract law principles. These attributes are unlikely to be affected by Brexit. With the exception of consumer contracts, English contract law has developed largely independently of the UK's membership of the EU. It is predominantly unaffected by the EU *acquis communautaire*. The question of whether English law remains a sensible choice of substantive law will therefore be subject to the same considerations as it was before the referendum. For most parties, the answer to this will still be that English law is a sensible, commercial choice for international transactions.

(ii) A choice of English law should still be upheld across Europe

The ability of parties to choose a law to govern their obligations is determined by EU Member State Courts by reference to two directly





effective EU Regulations: Rome I (in respect of contractual obligations) and Rome II (in respect of non-contractual obligations) (together the Rome Regulations). Under the Rome Regulations, Member State Courts respect the express choice of the law of an EU Member State or a third country law in the overwhelming majority of circumstances.

As noted above, the UK remains a member of the EU and, as with all directly applicable EU law, the Rome Regulations will continue to be applied by the English courts until the UK has actually left the EU.

“...it is likely that English jurisdiction clauses and English court judgments would continue to be recognised and enforced across much, if not all, of Europe”

After this time, EU Member State Courts would continue to apply Rome I and Rome II, and so would continue to recognise and uphold the parties' express choice of law, including English law.

Where Rome I (or the Rome Convention) does not apply, the English courts apply English common law in relation to the parties' choice of governing law. This will also be the case after the UK exits the EU unless the UK decides to retain similar arrangements to the Rome Regulations, whether as a result of agreement with the rEU or of its own volition. The common law supports the concept of party autonomy in relation to choice of law, so that a choice of law governing contractual obligations will be valid

so long as it is reasonably certain. The approach of the English courts is untested as regards choice of law in relation to non-contractual obligations, but it is likely that the same approach would be followed.

Dispute resolution choices

(i) Arbitration seated in London or elsewhere

A choice to resolve a dispute by arbitration seated in London (or indeed, seated in any of the other EU Member States) is not affected by the outcome of the referendum and will not be affected by the UK exiting the EU. Arbitration is expressly excluded from the recast Brussels Regulation (which contains the EU regime for jurisdiction, recognition and enforcement).

The UK and all the other EU Member States are parties to the New York Convention 1958. The reciprocal obligations under the New York Convention (in short, to recognise arbitration agreements and to recognise and enforce foreign arbitral awards) are entirely independent of EU membership. Arbitral awards issued by London-seated tribunals are enforceable in any of the 156 states party to the New York Convention, and awards issued by a tribunal seated in any of the other EU Member States will still be enforceable in the UK.

As noted above, until the UK's exit negotiation is finalised, the UK remains bound by EU law, including the recast Brussels Regulation. Unless and until the recast Brussels Regulation is no longer binding on the UK, it remains questionable as to whether the English court can grant an anti-suit injunction in respect of

proceedings brought in another EU Member State Court to protect an arbitration agreement. Such relief may be available after the UK leaves the EU unless the UK adopts a law which restricts the use of anti-suit injunctions in relation to proceedings in EU Member State Courts, whether as a result of agreement with the rEU which has the effect of extending the recast Brussels Regulation to the UK, or of its own volition. It is perhaps unlikely that the UK would take the latter approach, given that, unrestricted by the recast Brussels Regulation, the English court has granted anti-suit relief to protect an arbitration agreement in respect of proceedings brought or threatened in a non-Member State Court.

(ii) English court jurisdiction and recognition and enforcement of judgments

Whilst the recast Brussels Regulation governs the relationship between the UK and the rEU with respect to jurisdiction agreements and reciprocal recognition and enforcement of judgments, the impact of a choice of English court jurisdiction will not change. In short, a choice of English court jurisdiction will be upheld throughout the EU, subject to a limited number of exceptions. Moreover, an English court judgment may be recognised and enforced throughout the EU.

After the UK exits the EU, recognition of a choice of English court jurisdiction and recognition and enforcement of English court judgments across the EU may be facilitated by an agreement between the UK and the rEU to replicate the existing rules on jurisdiction and reciprocal recognition and enforcement. There are a number of ways this could be achieved: there



could be amendment to the Brussels Regulation; a specific international agreement between the EU and the UK could be reached (as the EU entered into with Denmark, which has a general “opt-out” from EU law in this area); or the UK could join other conventions, such as the Lugano Convention, which allow for similar reciprocal enforcement. Alternatively, the same outcome could be achieved in part by the UK joining the Hague Convention on Choice of Court Agreements (to which the UK is currently bound by virtue of its EU membership), although the Hague Convention does not apply to unilateral jurisdiction clauses (clauses in which one party must bring proceedings in one jurisdiction but the other has a choice of jurisdictions in which to bring proceedings).

“A choice to resolve a dispute by arbitration seated in London (or indeed, seated in any of the other EU Member States) is not affected by the outcome of the referendum and will not be affected by the UK exiting the EU”

It is likely that any arrangement for exit will seek to ensure that there are provisions in place allowing for mutual recognition of jurisdiction agreements and judgments. In the unlikely absence of any such agreement, the recognition and enforcement of English jurisdiction clauses across the EU would be subject to the application by the courts of the rEU of those parts of the recast Brussels Regulation that apply to third states (ie, states outside the EU).

Further, the domestic law in many of the EU Member States makes provision for recognition of jurisdiction agreements and recognition and enforcement of foreign judgments. On this basis, it is likely that English jurisdiction clauses and English court judgments would continue to be recognised and enforced across much, if not all, of Europe.

Brexit-proofing and dispute resolution choices

While the end result of any negotiations will likely ensure that a choice of English court jurisdiction is upheld and English judgments are recognised and enforced across Europe, during this period of uncertainty with regard to arrangements for reciprocal recognition and enforcement of jurisdiction clauses and judgments, some commercial parties entering into medium to long term transactions are choosing to include “Brexit-proof” dispute resolution agreements.

Parties are including a “conditional” dispute resolution clause. Under such a clause, the parties agree that the English courts will have jurisdiction unless and until the UK leaves the EU or one of the parties is no longer domiciled within an EU Member State in which case disputes will be resolved by arbitration in London. Alternatively, the clause may provide that a different court will have jurisdiction where the enforcement of the primary choice of court or enforcement of a judgment issued by that court may be affected by any changes to EU membership. Indeed, such clauses are also seen as offering some reassurance in the event that any other country exits the EU.

Alternatively parties could choose to arbitrate their dispute with a London seat given the certainty of the position on arbitration.

For more analysis on the impact of Brexit, please visit our Brexit hub: <http://www.herbertsmithfreehills.com/insights/hubs/brexit>

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SPOTLIGHT ON: ANDREW CANNON

Andrew Cannon, partner in our Paris office, is an arbitration practitioner and public international law specialist. His time spent working at the Foreign and Commonwealth office, advising the British Government in Brussels and at the United Nations in New York, enables him to offer a unique perspective to his clients. Here he discusses how he came to specialise in public international law, what he has learnt from working as a government legal adviser, and how his insight into public sector imperatives and private sector implications assist clients.

What was it about public international law that drew you to specialise in this area?

I went to Cambridge University to read law and was particularly drawn to international law, which fitted with my love of history and modern languages. It was a time when people were hailing a new world order after the fall of the Berlin Wall, and seeing a renewed cooperation in the UN Security Council. I was fascinated by the principles and concepts of international law, derived from State behaviour and custom, and the way in which it was becoming more and more relevant, not just to States, but to individuals, and companies. And I was very fortunate to be able to learn from the very best: my lecturers included James Crawford and Christopher Greenwood, both now sitting at the International Court of Justice.

“I was ultimately swayed by the direct client contact that solicitors enjoy, and being part of a bigger organisation with like-minded individuals and energy, drive and diversity”

After I graduated, I was lucky enough to be awarded a scholarship to study at Princeton for a year. I opted to study international politics and international law, including at the Woodrow Wilson School. It was an

eye-opening experience, being confronted by the different world views and experiences of a wide range of international students, from pure multilateralists to West Point graduates focused on realpolitik.

I took advantage of my time in the States to intern at the UN, working on the preparatory committee for the establishment of the International Criminal Court, and on a range of topics for the International Law Commission (and my UN Secretariat office had a great view of the Chrysler building!). During that internship I met the legal advisers at the UK Mission to the UN, a memorable encounter that turned out to be an important factor in how my career later developed.

What led you to become a solicitor? Did you consider staying on as an academic?

At Princeton I was studying with others who were on the first year of a PhD. It was tempting, but I already had a training contract at Herbert Smith and was keen to get started. Like all English lawyers, I had that choice between barrister and solicitor, and it wasn't a straightforward decision. I was ultimately swayed by the direct client contact that solicitors enjoy, and being part of a bigger organisation with like-minded individuals and energy, drive and diversity (and an office football team).

That said, there aren't many law firms with the reputation and practice in public international law that would enable a solicitor to specialise in that area. I attended a lecture at university given by Lord Browne-Wilkinson and accosted him afterwards to ask which firm I should go to if I was interested in public international law. After only a brief pause, he said “Go and work with Lawrence Collins at Herbert Smith”. I started at Herbert Smith in 1997. During a fun-filled seat in Hong Kong in 1998, I was asked if I would like to return to London to work with Lawrence, and Campbell McLachlan, who had just been instructed by the Government of Chile to intervene in the Pinochet case before the House of Lords. It was an incredibly rewarding experience, and is still the seminal national law case on sovereign immunity. It was hard work, we had a small team, but uncovered novel arguments and I hope made a worthy contribution to an incredibly high level of debate and analysis, before a bench of seven law lords. The list of counsel involved read like a who's who of international law (including Christopher Greenwood and the late Ian Brownlie).

When I qualified, the specialist arbitration group at Herbert Smith was just being established and I was delighted to join. They were a wonderful first few years to my career.



Having started your career at HSF you made a move over to the UK Foreign and Commonwealth office. Why was that?

Yes, I left the firm to become an assistant legal adviser at the FCO in mid-2001. It was a difficult decision to leave, but I felt that working for the government would help give me a different insight into the practice of public international law, as I would become directly involved, from the State perspective, in the evolution of international law as it is applied to new and developing political situations.

“I was asked if I would like to return to London to work with Lawrence, and Campbell McLachlan, who had just been instructed by the Government of Chile to intervene in the Pinochet case before the House of Lords... [it] is still the seminal national law case on sovereign immunity”

I was lucky enough to be posted to the UK’s Mission to the UN in New York in 2002, and to the UK Permanent Representation to the EU in Brussels between 2004-2008, including during the last UK Presidency in 2005. I worked on the civil justice agenda and was

involved with negotiations on the Rome I and Rome II Regulations, and spent my last two years in the legal section, advising on all aspects of the UK’s relationship with the EU. This included a considerable amount of sanctions work, attending the relevant Council working groups, drafting and negotiating sanctions legislation, and working on UK Government interventions in sanctions cases before the European courts, for example OMPI and Kadi. It was at this time that the EU was facing a range of challenges from listed individuals and the Courts were engaged in ensuring that the fundamental rights of such individuals were being properly respected. I have retained a great interest in the EU and EU law since that time.

When you talk about your time at the Foreign and Commonwealth office it sounds pretty exciting and glamorous. What was it really like?

I wouldn’t use the word glamorous! But it was a privilege to be involved in so many of the most important foreign policy issues of the time. There was a very steep learning curve. The legal directorate is a small group compared to, say, the legal advisers at the State Department in the US, but it is a dedicated team of real international law experts whose job is to help the government implement UK foreign policy and promote essential UK interests such as the rule of law and international human rights,

dealing directly with Ministers; I worked with both Jack Straw and David Milliband during the last government.

You returned to HSF in 2010 to practice arbitration and public international law. How has your time working for the British Government helped or changed the way you advise your clients?

I had always thought that I would return to private practice at some point. I learned a huge amount at the FCO, working with great friends and colleagues. It gave me a sense of the bigger picture: an understanding of how States and governments function, and the difficulties in coordination of government policy even in a relatively efficient administration such as the UK.

“I wouldn’t use the word glamorous! But it was a privilege to be involved in so many of the most important foreign policy issues of the time. There was a very steep learning curve”



Those skills stand you in good stead in private practice. I wanted to return to HSF for all the reasons I had applied for a training contract there in the first place. As the market-leading disputes firm with a proud tradition of public international law work, returning was the obvious choice. My time at the FCO had shown me the relevance of public international law at a commercial level: it touches on many aspects of doing business, including sovereign immunity, the law of the sea, secession and sovereignty issues, and the growing field of business and human rights. The growth of international sanctions as the foreign policy tool of choice has impacted private enterprise more than ever before over the last few years, as international decision-makers target new industry sectors. I was also keen to do more investment treaty arbitration work – perhaps the clearest example of individual entities being able to bring claims directly against States for breaches of international law. I wanted to help clients, whether States, State-owned entities or corporations, navigate through these issues with the combined understanding of public sector imperatives and private sector implications. Joining the arbitration group was the logical choice – many disputes involving States are resolved through arbitration, but since returning I have also worked on international law cases before the English courts, and regularly advise corporate

and finance colleagues on related non-contentious matters, for example in relation to structuring investments to maximise treaty protection, the status of disputed territory, or general principles of contracting with or between States.

You are now a partner in our Paris office. What prompted the move?

It is something of a rite of passage for young international arbitration partners to spend time in an overseas office to participate in the development of the firm's international network. As a French speaker, Paris was an obvious choice for me and for the firm. Paris and London are both leading centres of international arbitration (famously vying for supremacy), and important hubs of public international law work. We have a strong common law practice out of Paris with an excellent team working on English law matters and English language arbitrations, and many cases where we work in tandem with a number of our other offices. Many influential arbitration practitioners are based in Paris, which also hosts the HQ of the ICC, and as a firm we are very committed to the French arbitration market and to our continuing development there.

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