



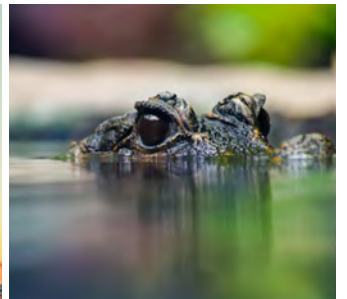
HERBERT  
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# INSIDE ARBITRATION

## PERSPECTIVES ON CROSS-BORDER DISPUTES

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Public International Law blogs at

Arbitration Notes: <http://hsfnotes.com/arbitration/>

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# Welcome to the eighth issue of Inside Arbitration

In our last issue we took an in-depth look at arbitration in Latin America and we have decided to once again take a regional focus, turning to Europe in this issue.

The firm has long had a sizeable European footprint starting in Paris in 1964, with highly experienced arbitration lawyers working together across our offices in Düsseldorf, Frankfurt, London, Madrid, Milan, Moscow and Paris. We have been delighted to further strengthen our existing European offering in the last few months with the promotion of Laurence Franc-Menget to partner in our Paris office and the arrival of our new Madrid partner David Arias, together with Of Counsel Luis Capiel and the rest of David's team.

This has also been an exciting time for me in my capacity as the new President of the LCIA. I am extremely honoured to have been chosen for this role. One of our spotlight articles covers my thoughts on the future development of the LCIA and the imminent update to the LCIA Rules. I also explore how my role at the LCIA has enriched the advice I can offer clients and how we can improve diversity in arbitration.

Joining me in the spotlight are Eduardo Soler-Tappa, who leads our dispute resolution practice in Madrid, and our latest partner recruit, David Arias. Eduardo and David reflect together on the success of the Madrid office over the last ten years, including a recent Spanish arbitration before an all-female tribunal, and also take a look at the future of Madrid as an arbitration seat.

We continue our European tour with views from France and Italy. Of Counsel, Emily Fox covers the reasons behind Paris's popularity as a seat and why Paris is well-placed to participate in the increasing volume of Africa-related arbitration. She also provides insight into the likely impact of Brexit and increased competition from other arbitral seats. Milan-based Of Counsel, Pietro Pouché and London Associate, Natalie Yarrow consider the potential for the growth of arbitration in Italy, where litigation has historically held sway, but a more arbitration-friendly environment is now being promoted.

Partners from a number of our European offices have joined together to look at key arbitration developments in the region, offering their predictions for what lies ahead. We begin in Germany, with thoughts from Patricia Nacimiento, Mathias Wittinghofer and Thomas Weimann. Highlights from Russia are contributed by Alexei Panich, followed by comments from Eduardo Soler-Tappa and David Arias in Madrid. I have then provided my views on developments in the UK, together with London partners, Craig Tevendale, Nick Peacock, Chris Parker and Andrew Cannon. This piece gives a flavour of the fascinating changes taking place across Europe, as arbitration continues to grow and develop.

Taking a look at cybersecurity and data privacy issues in arbitration, London partner Nicholas Peacock, Professional Support Consultant Vanessa Naish and Senior Associate Charlie Morgan discuss how to protect an arbitration from "prying eyes". We also explore the role of arbitration in employment-related disputes, discussed by partners Peter Frost and Barbara Roth and Senior Associate Hannah Ambrose along with guest author Paul Goulding QC of Blackstone Chambers.

We once again include our "Watch this space" page, where we highlight some key developments in global arbitration and how you can find out more about them.

I hope that you enjoy reading this edition's focus on Europe. We welcome any feedback you may have on the content of this issue and we should be delighted to hear from you to discuss your thoughts on the topics covered.



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# Watch this space...

## Arbitration news and developments to keep an eye on

Paula Hodges QC has now started her Presidency of the LCIA. Paula will continue in practice as Head of Herbert Smith Freehills Global Arbitration Practice alongside her new role at the LCIA, which began in May 2019. Paula has been a Vice President of the LCIA Court for several years and has also spent ten years on the LCIA Board, as well as being on the arbitrator panels of many of the leading institutions and the Energy Arbitrators List.

The UK Supreme Court will hear the appeal in the important case of *Halliburton Company v Chubb Bermuda Insurance Limited* [2018] EWCA Civ 817 on 12-13 November 2019. The Court of Appeal decision was widely criticised for having set an unduly high bar for a finding of arbitrator apparent bias. We will be covering the decision on our arbitration blog: [www.hsfnotes.com/arbitration](http://www.hsfnotes.com/arbitration).

The HKIAC has become the first foreign arbitration institution accredited to hear certain Russian corporate disputes. The HKIAC was approved as a 'Permanent Arbitration Institution' (PAI) in April 2019. The Vienna International Arbitration Centre (VIAC) followed and will attain PAI status on or before 8 July 2019. It will be interesting to see whether other foreign arbitral institutions also become recognised. For more information please contact [briana.young@hsf.com](mailto:briana.young@hsf.com).

A joint task force on data protection in international arbitration has been launched by the International Council for Commercial Arbitration (ICCA) and the International Bar Association (IBA). The task force is producing practical guidance for the arbitration community on the impact of data protection issues and a draft of their guide is expected to be circulated shortly for public comment. For more information please contact Charlie Morgan, a member of the task force: [charlie.morgan@hsf.com](mailto:charlie.morgan@hsf.com).

For contracts with a Russian link, welcome clarification on enforceability of standard institutional arbitration clauses has recently been issued by the Russian Supreme Court. In our last issue we reported on a Russian court decision which had found that an arbitration clause based on the ICC recommended wording was unenforceable. The Russian Supreme Court has now issued guidance in relation to this and has confirmed that standard clauses recommended by arbitral institutions are valid.

Singapore announced in April 2019 that it is considering amending its arbitration legislation, the International Arbitration Act (IAA), in order to allow appeals on a point of law, where parties opt in. This would promote party autonomy and give businesses wishing to choose a Singapore seat the option to allow their arbitral awards to be appealable for an error of law. A public consultation on the proposed change has been launched.

Parties to Hong-Kong seated institutional arbitration will in future be able to seek interim relief from mainland Chinese courts. This new arrangement was agreed in April 2019 when the Hong Kong SAR government entered a mutual assistance pact with the PRC's Supreme People's Court. The mutual assistance deal will come into force at a future date to be specified and will make Hong Kong the only seat to benefit from mainland interim relief. While this arrangement does not extend to ad hoc arbitration, this development has been widely welcomed given Hong Kong's likely role as a leading seat for Belt and Road disputes.

The LCIA will shortly release an update to its Rules. The current LCIA Rules issued in 2014 contained significant changes and are widely perceived to be working well. The LCIA is now therefore embarking on an update rather than a major rule change. The updated LCIA Rules, which will include express powers for arbitrators to order expedition and early determination are expected to be welcomed by the arbitration community as a further step towards enhanced efficiency.





## Interview with Paula Hodges QC: President of the LCIA

Paula Hodges QC's career is pretty remarkable. Head of Herbert Smith Freehills' Global Arbitration Practice, she is ranked as one of the leading arbitration practitioners in the world. During her career to date she has had no shortage of interesting cases, involving clients from across the world, concerning disputes centred on the North Sea, Dubai, the Caspian Sea, Nigeria, Korea, Kenya and Indonesia to name but a few. Her outstanding skills as an advocate were recognised when she was awarded Queen's Counsel in 2014. In May 2019, Paula took over as President of the London Court of International Arbitration (LCIA), one of the main international arbitral institutions, chosen by parties across the globe as the institution to administer and supervise the resolution of their complex international disputes.

We asked Paula about her career choices, the glass ceiling, her new role at the LCIA and continuing full-time private practice at Herbert Smith Freehills.

**Paula, could you start off by telling us a little about yourself and your background. How did you come to be a lawyer and why did you choose to specialise in arbitration?**

I first thought about becoming a lawyer when I was about 15, when I started to do quite a lot of debating and public speaking and one of my teachers asked whether I had thought of becoming a barrister. That rather piqued my interest and I started to look into being a barrister or a solicitor. Both appealed and I ended up reading law at Cambridge. While I was studying, I decided the bar was not for me; I liked the idea of being the person with the client connection and interaction. That said, I still really wanted to do advocacy and disputes work. Looking around at the law firms in London, Herbert Smith (as was) had a market-leading reputation in this area and felt like the ideal fit for me.

I was lucky to qualify in 1989 just before the introduction of the Courts and Legal Services Act in 1990. This piece of legislation offered solicitors the opportunity to get higher rights of audience and enabled me to become an advocate and do as much advocacy as I could on cases. My early

**The aim is that we work seamlessly to achieve the strategy that the Board has set for the LCIA**

years as a litigation associate were focussed on high court trials where I was encouraged to do the advocacy on procedural applications. After three or four years, I started to do some arbitration work and by the end of the 1990s, I had built up a base of clients, particularly in the Energy and Natural Resources sector. They were either exploring for or extracting new resources all over the world, going to ever more exotic locations and wanted to use arbitration to resolve their disputes rather than litigate in local courts. I had a big decision to make around the year 2000 as to whether I would follow my clients into the world of arbitration or remain as a litigator doing some arbitration – and it was a big decision, to be honest, particularly given Herbert Smith's reputation for litigation prowess! Nevertheless, I followed my instincts and

opted for arbitration. I am absolutely delighted that I did because I managed to ride the wave of arbitration to other sectors, different clients and into new regions. Being made a QC in 2014 was the icing on the cake and a huge honour. And at a personal level it felt like a real vindication of all the career decisions I'd made from my student days onward.

**Huge congratulations on the news of your appointment as President of the London Court of International Arbitration. Can you tell us what the role entails? And how does it differ from the role as Vice President that you've held for four years?**

The President of the LCIA is the figurehead of the institution. The President works alongside the Director General, Jackie van Haersolte-van Hof, the Secretariat team and works closely with the members of the Court and Board. The aim is that we work seamlessly to achieve the strategy that the Board has set for the LCIA; which is for the LCIA to continue to internationalise itself and to ensure that the LCIA keeps ahead of trends within commercial arbitration. The President is the leader of the Court, which has 42 members who are highly accomplished and recognised arbitration figures in different regions around the world. We try and ensure there's broad global coverage and representation to cater for parties worldwide.

The President is also the steward of the organisation and the guardian of how the rules are applied, seeking to ensure and retain the high standing of the LCIA as an arbitral institution. The President oversees the administration of LCIA arbitrations, including appointments and challenges of arbitrators. The Secretariat carries out the day to day administration, together with the Vice Presidents, who deal with most of the appointments of Arbitrators; because under the LCIA Rules the LCIA appoints all Arbitrators whether they're nominated by the parties or chosen by the LCIA. The Vice Presidents also deal with applications for expedited proceedings, emergency arbitrations, they set the rates and costs the Arbitrators can charge and they deal with other procedural issues that arise before the Tribunal is in place. The President oversees any challenges to Arbitrators during the course of the Arbitral proceedings, choosing a Vice President or a team of Vice Presidents to consider the challenge application depending on the complexity. Given that I am a partner in private practice, I will not be involved in any issues relating to a case in which Herbert Smith Freehills has a role or a client of the firm that has an

interest. That will be dealt with by the Vice Presidents and we can also call on our vastly experienced honorary Vice Presidents of the Court.

**It may seem obvious, but institutions can't include every detail of how the rules will be applied in the rules themselves**

**Your role at the LCIA is in addition to your position as head of HSF's global arbitration practice. How do clients of a firm benefit from having their lawyers involved in arbitral institutions like the LCIA?**

Being involved in the Institution as an officer or a member of the board, enables you to have a very detailed understanding of how the relevant institution administer its cases and how the rules are applied in practice. It may seem obvious, but institutions can't include every detail of how the rules will be applied in the rules themselves. By seeing the administration of the cases from the inside, you gain an understanding of how the institution deals with knotty procedural issues, and monitors the progress of the arbitration. You also have advance notice of emerging trends in arbitration and stay in close contact with other institutions and practitioners around the world. You're also invited to participate in events all around the world, which enables you to stay ahead of the game in terms of the issues that are being faced in arbitration proceedings, whether that's in Africa, in Asia or in the US. As a consequence, when you're advising clients you can give a richness to your advice and will have had experience that is very relevant to the issues they're facing. Another very important factor is that you meet a high number of arbitrators from around the world so when your clients are choosing an arbitrator, you have extensive knowledge and experience of arbitrators which is very helpful in identifying the most appropriate arbitrators for particular cases. It also enables you to try and diversify the pool of arbitrators you suggest to clients because you're meeting both male and female arbitrators from different nationalities and of different ages around the world.

**With the closure of LCIA India and LCIA-MIAC, it appears that the LCIA has undergone a period of geographical contraction at a time when its competitors (like the ICC) have done the opposite. Has the LCIA decided to revert to being a London-based institution?**

Absolutely not!! You are right in saying we have drawn back from our operations on the ground in India and Mauritius. I think it's fair to say at the outset that the LCIA took a different route to the ICC in that the LCIA produced specific rules for the countries in which it established a presence in India, Mauritius and of course Dubai, which continues. In contrast, the ICC has opened branch offices around the world to aid administration of its cases and hasn't produced bespoke rules for those different countries. I sincerely believe that by establishing a formal presence overseas, the LCIA was able to internationalise its image and I think the LCIA will continue to benefit from that. Unfortunately there were particular issues experienced in India and Mauritius which meant that continuing operations on the ground was not viable. We also found that parties preferred to use the principal LCIA rules as opposed to using the Indian or Mauritian version. This has been less so for Dubai and so we continue with our cooperation with the DIFC using specific LCIA-DIFC rules, albeit very much based on the principal LCIA rules. The LCIA will have to make the decision going forward about the extent to which it needs to have operations overseas, or whether it should continue to operate from its London base, maintaining its international presence through events around the world. The number of arbitrations received by the LCIA is still on the rise, we reached over 300 in 2018, so certainly the business continues to expand. We have also seen that the absence of a physical presence has not been an impediment in various markets where the LCIA is strong, such as Russia. It's just a matter of how we decide to continue that growth going forward.

**The LCIA has indicated it will be releasing an update to its 2014 rules. Why an "update" at this stage rather than a wholesale revision?**

The LCIA issued new rules in 2014 which had some quite significant differences from the previous set of rules which were introduced in 1998. These changes included the annex to the Rules which sets out guidelines to party representatives in order to promote good and equal conduct within the arbitration. The introduction of that annex is still very different to the approach taken by other Institutions. It's therefore



only five years since we made some fairly significant changes. Now, some may say that five years in the world of arbitration is a long time. Arbitration is increasing in popularity all over the world, there are more and more users using arbitration and they come with different ideas of how they want the institutions to provide arbitration services. The arbitration institutions have grown in number too, and it's become quite a competitive environment so everybody is obviously watching what the others are doing and ensuring their rules evolve to keep pace with the changes and trends around the world.

As an institution the LCIA is always horizon scanning and looks at changes that other institutions make. But it is absolutely critical that we don't lose the USP of the institution. We're very proud of the LCIA's heritage and

**I sincerely believe that by establishing a formal presence overseas, the LCIA was able to internationalise its image and I think the LCIA will continue to benefit from that**

some of the core provisions that it has, not least the confidentiality of proceedings. The Board and the Court have looked at the changes we made in 2014 alongside recent innovations and developments and decided it wasn't necessary to have a wholesale rule change. We are of the view that the LCIA Rules as they stand are sufficiently flexible to deal with issues such as

expedition of proceedings, early determination of issues and multi-party arbitrations. However, we appreciate that it is helpful to users and arbitrators to have express provisions to refer to when considering ordering expedition and early determination for example. We have therefore tried to expressly describe the powers that arbitrators already have under the LCIA Rules in a little bit more granular detail in certain respects. By making these powers more overt, we hope to encourage arbitrators to be brave and to run proceedings more expeditiously where appropriate in the circumstances.

**The LCIA Statistics over the past few years have shown an interesting trend in the use of arbitration for financial institutions and banks. What do you think is behind this trend and do you see it continuing?**

It's a trend that those in private practice who are involved in drafting clauses for transactional departments will have seen coming for about five years. However, there was a considerable delay in banks and financial institutions adopting arbitration compared to other sectors. I think banks still favour using court proceedings where their headquarters are in a mature economy with an experienced and established commercial judiciary. Traditionally, banks and financial institutions have had the bargaining power to dictate to the borrower what the dispute resolution provisions would be, so they would always choose the courts in their home patch, whether that be London, Europe, the US or in Asia. However, as business has globalised, companies have sourced financing for projects all over the world and increasingly in less developed countries. The banks have, quite rightly,

realised that if they are lending to entities that are based in those jurisdictions, or the project is based there, that arbitration is a much safer route in order to have more certainty about enforcing the collateral over the financing or whatever other security they have sought. I'm obviously delighted that banks have recognised the benefits of arbitration and I do see the trend continuing, not least because I can't see globalisation reversing – in fact, as more less developed countries try to attract foreign direct investment, I think it's only likely to grow. I think the LCIA has benefitted from this trend in particular because it is a London-based institution and there is such a strong financial market in London. I don't see that changing even if the UK exits from Europe. I firmly believe that London will remain a strong financial centre interacting both with Europe, but also with the rest of the world as well.

**You have achieved a high profile position in the world of arbitration. You are the President of the LCIA, head one of the world's leading arbitration teams and are ranked as one of the leading arbitration practitioners in the world. To what extent do you think that there is still a "glass ceiling" for women in arbitration today?**

I am delighted by the focus on gender diversity that has really gathered pace over the last five years or so, particularly with the Equal Representation in Arbitration Pledge. Arbitral institutions and practitioners

involved in arbitration have realised that there is much to be done to move from the more traditional silver haired, white male arbitrators dominating the arbitration scene. While no one would wish to lose the experience of those long standing arbitrators, it's obviously critical that we diversify the pool to include women and indeed arbitrators from a more varied national background as well. I think what has been achieved by the community has been more than simply empty words – we've only got to look at the statistics published by the institutions in particular to see that more women are being appointed. I'm delighted by the progress the LCIA has made, in particular, when it has an opportunity to select and appoint arbitrators. That said, parties are still lagging behind and there's a long way to go in improving the gender balance in party appointments. From my experience, multi-nationals with experienced in-house legal teams are very welcoming of a diverse shortlist of arbitrators which includes women; indeed some require that there is at least one woman on that shortlist. What we're not seeing though is the conversion of female arbitrator candidates on the shortlist into them being chosen as the arbitrator in the case. I fully accept that companies will often want an experienced arbitrator, particularly if it's a high-value complex case, but not all cases are like that. Often an arbitrator that has not been selected before will have the time, enthusiasm and

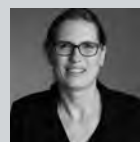
commitment to do an excellent job on the case and it's incumbent on the institution and law firms to persuade clients of that possibility going forward.

So at the moment the glass ceiling is still there for women in arbitration as of today, albeit that the glass is starting to crack. The historic appointment of more men than women means that there are not as many women with extensive experience of sitting as an arbitrator as there are men. Clearly, that's going to take time to change. But I'm very optimistic about the future. Everyone across the arbitration sector realises that diversity is one of the inherent characteristics of arbitration. It brings people together from different jurisdictions to resolve their disputes and the people presenting those cases and determining those cases should be from a diverse pool that reflects the diversity of its users.

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# Cybersecurity matters: Arbitration away from prying eyes

One of the many reasons that companies choose to resolve disputes through arbitration over court litigation is the ability to keep their disputes and the outcome of their disputes private. Arbitration is often chosen to resolve highly sensitive disputes, and being a truly international dispute resolution process, a single arbitration can involve participants from across the world.

Within the arbitral process those participants are likely to exchange information that is not in the public domain. That information may have the potential to cause commercial damage, influence share prices, corporate strategies or even government policy. The outcome of an arbitration could have significant repercussions in the financial markets, particularly for a listed company.

While arbitration is not on many client's radar as a potential source of cybersecurity risk, in reality the arbitral process is an obvious and attractive target for cyberattacks, particularly if hackers can identify a weak link in the chain of custody.

## How can my data be targeted?

With so much information stored or transferred electronically, almost anyone and any organisation is susceptible to a cyber-attack.

The primary targets in international arbitration include:

- law firms acting as legal advisers, advocates or local counsel;
- past, present and prospective arbitrators whether in sole practice, in chambers or as a partner in a law firm;
- arbitral institutions;
- parties to disputes; and
- third parties holding information on any of the above, including experts, witnesses and service providers (the Participants).

Legal advisers and their clients generally share information and discuss drafting points and strategy by email. Pleadings, evidence, expert reports and witness statements are also often exchanged electronically with arbitrators, the other side's legal advisers, experts, witnesses, arbitral institutions and third party service providers. Document review and production regularly takes place on electronic data hosting platforms, usually owned by third party service providers. An award will be drafted, discussed and exchanged between the different members of an arbitral tribunal and may also be sent to the arbitral institution administering the arbitration, before being sent to counsel and the parties.

Each custodian represents a fresh target for cyber attackers and a potential point of weakness in relation to the security of arbitration data. Once data has been sent electronically in the course of an arbitration, the sender can no longer monitor or ensure its security. Law firms, particularly larger international law firms, have high levels of cybersecurity to protect their clients' data. Yet they can still be the target of cyberattacks. In 2016, three men were charged with making over US\$4 million from insider trading with information stolen from the M&A teams of New York law firms. The perpetrators stole emails from partners who worked on the deals, bought shares in the target companies and then sold those shares after the deal was announced to the market. Accessing information that is otherwise held privately in the context of an arbitration may present similar appeal for hackers.

Arbitral institutions have access to a flow of data between a large number of parties and access to a steady stream of awards before they are issued, making them another obvious target for cybercriminals. There is precedent for successful attacks on arbitral institutions too: in 2015, the Permanent Court of Arbitration's website was hacked on the third day of a hearing involving a territorial dispute between the Philippines and China over the South China Sea.

Other participants, particularly those who are less likely to have implemented advanced cybersecurity measures, may also be seen as attractive targets for attack. While some arbitrators operate from within law firms or chambers, others are sole traders who may have in place more limited cybersecurity protections. The same could be said of expert witnesses and some fact witnesses who receive and store data on their personal devices. Careful consideration needs to be given by all stakeholders in an arbitration to avoid such participants being a weak link in the chain of custody.

### Who might want your arbitration data?

- Hacktivists are individuals or groups seeking to further a social or political cause. Depending on the subject matter of your arbitration, they might try to encourage environmental, economic, social or political reform and search for information they can use to advance their goals.
- State Actors pursue information to advance their own political agenda. In *Libananco Holdings Co Ltd v Republic of Turkey* the respondent state intercepted a number of the claimant's privileged emails through a money laundering investigation separate to the relevant arbitration proceedings.
- Cybercriminals generally perpetrate cyberattacks for monetary gain, either holding information for ransom or stealing information and selling it on to interested third parties. In 2016, a Russian cybercriminal was believed to have targeted 48 elite law firms in the United States to steal mergers & acquisitions information for the purposes of insider trading. Obtaining a draft form of an arbitral award before release to the parties themselves could be very lucrative for cybercriminals.
- Another potential source of cybersecurity threats are opponents in international arbitration proceedings. It is possible that commercial or individual parties to arbitration might attempt to obtain information unlawfully against their opponents to gain an advantage in the dispute resolution process.

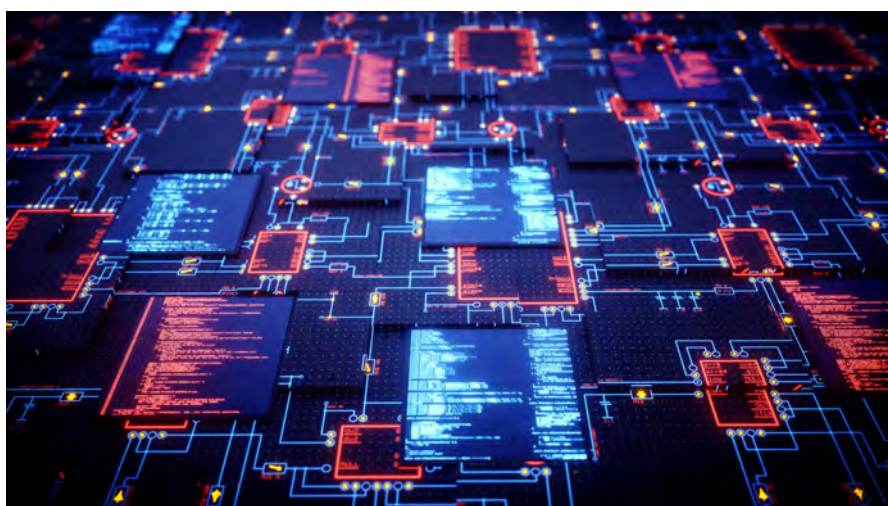
### What might be the consequences of a cyberattack for a party to arbitral proceedings?

Cyberattacks may have severe legal, financial and reputational consequences for any party in relation to which (or whom) data is exchanged in arbitral proceedings.

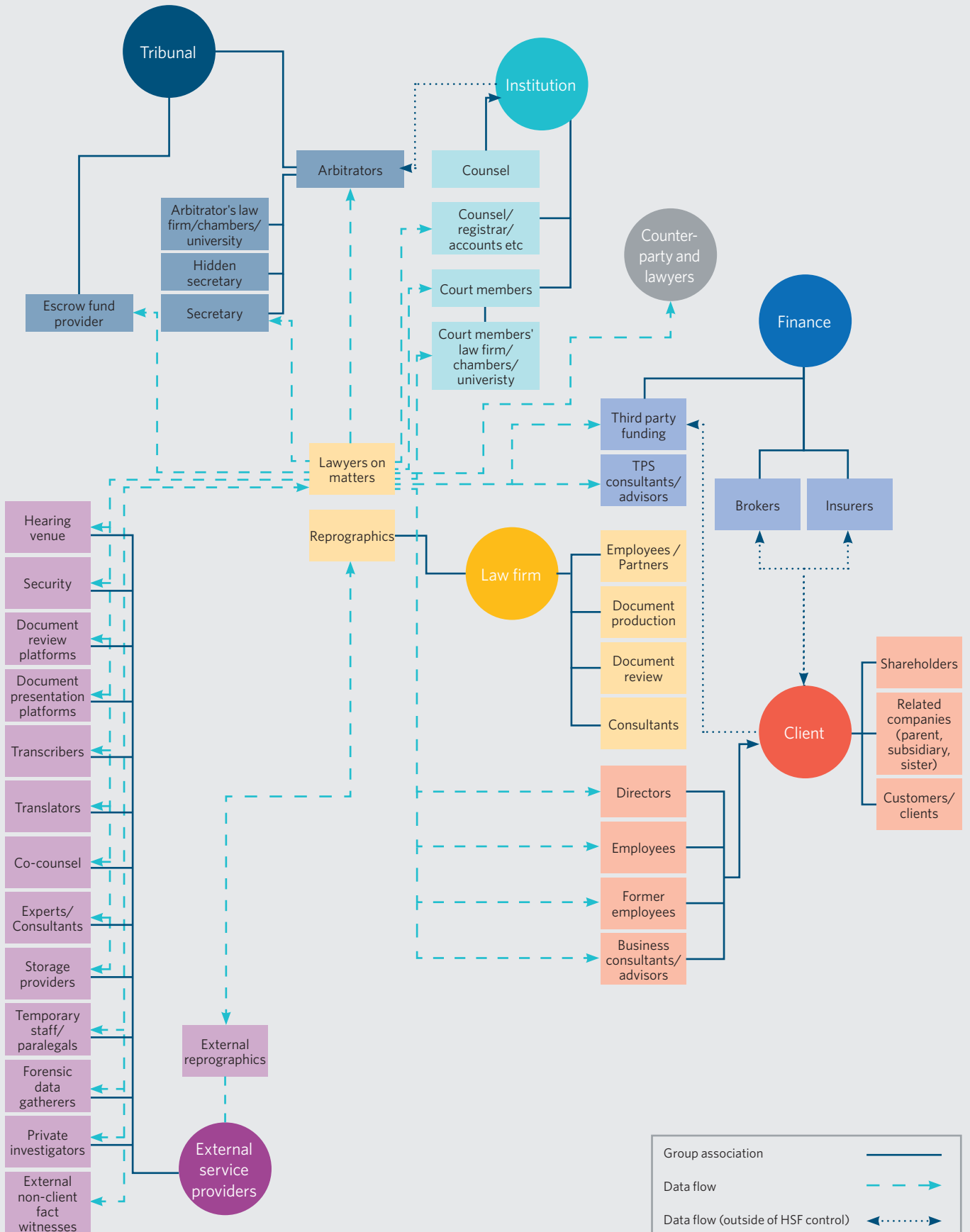
Research published in 2018<sup>1</sup> analysed the long and short term share price effects of data breaches. The research found that the share prices of companies that had been hacked suffered in the short term following a data breach, hitting a low point after 14 days of trading (dropping -2.89% on average and underperforming the market by -4.6% over that period). In the long term, such a company's share price underperformed in the market by -3.7% (1 year), -11.35% (2 years), and -15.58% (3 years).

Damage caused by cyberattacks is not limited to share value. The breached data is likely to relate to one or more of the parties involved. It may be confidential or commercially sensitive information that was not intended to be shared with the wider market. It may be politically sensitive material which may show the party in a less favourable light and may cause considerable reputational damage to that party if leaked. The party whose data has been breached may also find themselves facing claims from other parties or individuals who are not involved in the arbitration but who were mentioned or discussed in the breached material.

1. Paul Bischoff, 'Analysis: How data breaches affect stock market share prices (2018 update)', Comparitech, 6 September 2018



# Data flows in arbitration for one side



## Who controls data flows in an arbitration?

Arbitration is a party-driven process. The parties have significant input in shaping procedure and the mechanisms by which data is exchanged between all the participants in the arbitration. Where parties agree on the procedure to be adopted in the arbitration, an arbitral tribunal will rarely challenge that agreement. Where the parties do not agree on the processes that will apply to data management in arbitration, the arbitral tribunal may be called upon to make directions.

### Pre-arbitration or on receipt of Request

#### 1. Initial cybersecurity risk assessment

Before commencing an arbitration (claimant) or immediately upon notification of commencement (respondent), the party in question and their legal advisors should consider carrying out a risk assessment into whether any commercially sensitive data is likely to be relevant to the dispute and what approach should be taken to the collation, storage and review of that data. A discussion should be had about whether access to that data, any particular pieces of information, the fact of the arbitration or its outcome could have a significant impact on the party's business.

Depending on the outcome of that risk assessment, a number of further steps may be necessary at the outset of the arbitration. The party and its legal advisers will need to discuss the retention of documents and the gathering and review of potentially relevant material with specific regard to any cybersecurity issues identified. At this stage, there is unlikely to be any agreement with the other side on appropriate cybersecurity measures, nor will an arbitral tribunal necessarily have been appointed. Where the content of initial pleadings or documentary evidence appended to it contains particularly sensitive information, legal advisors should send those submissions to, where relevant, arbitral institutions by the institution's electronic system (where secure) or via encrypted file transfer sites.

At this early stage, a party will also discuss with their legal advisors who to nominate as an arbitrator and may analyse the appointment made by the other side, an appointing authority or arbitral institution. Where cybersecurity is critical, it may be sensible to send a checklist of cybersecurity related questions to arbitrators before or immediately after nomination or appointment. The answers to such a checklist (or a failure to answer) might lead to security concerns that need to be addressed before the arbitrator's appointment is confirmed.

### Before first procedural conference

#### 2. Assessing cybersecurity risks in sharing data with other arbitration participants

Once the arbitration has commenced and the parties, legal advisers, institution and arbitrators are in place, it is helpful for each party to carry out a wider assessment of the cybersecurity risks posed by the sharing of data with the other participants in the proceedings. It may be helpful to map out a list of all the participants that will or may in future hold data related to the arbitration and identify what types of data each one will receive. The list can be added to when additional participants become involved.

In assessing those cybersecurity risks, the Draft ICCA Cybersecurity Protocol may give guidance in assessing whether the arbitration has a "low", "medium" or "high risk" profile. Parties may wish to consider:

- The participants, their status and location. Their technical resources and capability to comply with cybersecurity measures. For example:
  - Who are the parties?
  - Other law firms: large or small? Domestic or international? What security measures are they likely to have?
  - Experts: are they sole traders, academics, large professional services firms? What security measures are they likely to have?
  - Witnesses: will you be sending information to their work or personal email address?
  - Third party suppliers: what contractual arrangements will you have? Where will liability rest for cyber breach?
  - Arbitral institutions: any awareness of their security profile? Is there an online filing system?
  - Arbitrators: partner in large law firm, QC from chambers, academic or sole trader? Technical competence and experience?
- The dispute, its value and sector.

- What types of information will be shared in the arbitration.
- Who will hold the different types of data.
- How and where information will be stored.
- Consequences of breach and severity.
- Other regulatory requirements (such as the GDPR and other regulatory regimes related to personal data).

This analysis may enable a party to identify (and therefore seek to address) concerns about the suitability of cybersecurity measures put in place by other participants in the arbitration. That party may wish to take the initiative prior to the first procedural conference to seek agreement from the other party or directions from the tribunal (once appointed) about what cybersecurity measures should be put in place. This could include ensuring that data is encrypted in transit and at rest, setting up a secure online repository/data room to minimise email exchange/storage or the use of encrypted hardware to transfer data.

### At the first procedural conference

#### 3. Tribunal mandated cybersecurity measures or cybersecurity agreement

Under its procedural powers and discretion, an arbitral tribunal should be able to determine what security measures, if any, are reasonable in the circumstances of the case. Although it is not yet commonplace for tribunals to make directions or orders on cybersecurity without it being requested by one of the parties, this is likely to change, particularly as cybersecurity issues are being addressed by many arbitral institutions in their latest rule changes. The tribunal will usually wish to reach its determination in consultation with the parties and this may include prior submissions on cybersecurity risk. The tribunal may also wish to use the Draft ICCA Cybersecurity Protocol to guide its analysis.

Based on this analysis, the tribunal may wish to consider adopting or ordering reasonable cybersecurity measures such as:

- Specifying how communications will take place between the parties and the tribunal, between the tribunal members and with other participants; through password protected email or by secure file transfer systems.
- Using a secure platform for the transmission of large volumes of documents relating to the case or sensitive documents.
- Reducing the use of paper documents (which represent a confidentiality risk) and/or a protocol for their storage.
- Redaction of certain categories of data or particularly sensitive information unrelated to the dispute.
- Reducing access to certain categories of data.
- Reducing unnecessary disclosure.
- Breach detection, notification and mitigation.
- Allocation of liability and penalties that will apply in the event of a breach (although this may be hard to negotiate in practice).
- Insurance against breach.
- Document retention and destruction.

The tribunal will need to weigh up the costs associated with any proposed measures against the anticipated risks, whilst also factoring in the need for efficiency and effectiveness in the arbitral proceedings.

Alternatively, the parties, their legal advisors and the tribunal may wish to formalise these cybersecurity measures in a cybersecurity protocol or agreement. A document of this kind could be signed by the parties, legal advisors and tribunal (and potentially the arbitral institution) and other participants involved at that stage in the process.

### Throughout the arbitration

#### 4. Ongoing considerations: new participants and monitoring compliance

If an agreement is entered into or measures are ordered or adopted, it is critical that the parties linked to or instructing witnesses,

experts or third-party service providers later on in the process clarify the importance of cybersecurity and obtain those participants' agreement (or at least compliance) to the cybersecurity measures that have been instituted. This may include signature of a cybersecurity agreement. If they are unable to comply, consideration should be given to how the risks associated with their non-compliance can be managed and whether notification is required to the other participants involved in the arbitration.

A party (directly or acting through its legal advisors) will also need to be alert to failures in compliance from other participants. If there is a formal agreement on certain steps that must be taken, then failure of a participant to comply may be obvious. Similarly, if a participant has given responses to a cybersecurity questionnaire that appear not to be accurate on the basis of their performance, this may need to be flagged. The party and their legal advisers will then need to consider how to respond to this failure to comply.

#### 5. What to do in the event of a breach

Data breaches can be difficult to detect, especially where data has been accessed for the purpose of committing a financial crime such as insider trading. Herbert Smith Freehills has developed its own software to help clients respond to data leaks quickly and reduce the financial impact of a cyber-attack. The parties and their legal advisers should be alert to any suspicious activity, as should all participants in the arbitration.

Every party to the arbitration should have a plan in place in the event of a breach. Many companies will have a designated cybersecurity breach action plan based on specialist IT advice, although the action plan may be directed at an "in house" breach, rather than necessarily a breach of data held externally. Where the cybersecurity risk presented by an arbitration is high, it is advisable for the participants' IT teams to be involved at the outset to ensure that the right strategy is in place.

If a breach occurs, necessary steps may include:

- Identifying the breach – what type of breach has occurred and how far has it spread?
- Disconnecting any devices that have been affected by a breach.
- Informing the other participants in the arbitration, including the arbitrators, parties, institution, and third parties.
- Following a designated cybersecurity breach action plan.
- Seeking specialist IT advice.
- Informing insurers.
- Hiring crisis management professionals to manage any reputational fallout.
- Notifying the data breach to relevant regulators

Some arbitrations deal with issues that may put certain individuals at risk of harm. In cases where this kind of personal data has been breached, extra care should be taken to ensure the safety of those individuals.

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# Choice of arbitral seat: **Is Paris under threat?**





Choice of arbitral seat is one of the crucial decisions in any contractual negotiation and can have a direct impact on the ease with which parties are able to resolve their disputes. Indeed, many arbitration users and practitioners consider that, in some circumstances, the choice of seat is more important than the choice of substantive law. Although Paris, like London, has long been considered the "obvious" choice for many parties, the market for arbitral seats is changing. There is greater choice, more competition and an increased willingness to consider alternatives. This is likely to be part of a long-term trend. But for many parties, Paris remains the obvious choice – and is likely to remain so for the foreseeable future, and for good reason.

### Paris' enduring popularity

Paris' enduring popularity as an arbitral seat is well-established. In last year's Queen Mary University of London (QMUL) International Arbitration Survey,<sup>1</sup> it was second only to London as the participants' "most preferred" seat. The same had been true in the 2015 survey, and this popularity is global. Paris came second to London in all but one of the regions covered by the survey.<sup>2</sup>

There are a number of reasons for Paris' popularity:<sup>3</sup>

- French arbitration law is sophisticated, reliable and arbitration-friendly. The reforms introduced in 2011 placed it at the forefront of international arbitration law globally, and subsequent case law has helped to maintain this position. In addition, many arbitration-related decisions are widely published and commented upon, further increasing its transparency and reliability.
- Arbitral awards made in France may only be set aside on the limited grounds specified in the French Code of Civil Procedure. Furthermore, the courts are not permitted to review the merits of an award – even where it is (allegedly) tainted by a substantive error of law.
- France is party to the New York Convention, with its attendant advantages in respect of the recognition and enforcement of awards. In practice, the Convention is rarely applied by the French courts themselves because French law is more favourable in respect of the recognition of foreign awards. Thus, as a striking example of the French courts' pro-arbitration approach, the fact that a foreign award has been set aside at its seat does not, in and of itself, prevent its recognition and enforcement in France.

- The French judiciary is neutral, independent, efficient and experienced, with expertise in both arbitration and the conduct of complex international proceedings.
- Paris' (well-deserved) reputation as a pro-arbitration seat means that it is considered a "safe" choice – a factor identified as a key element in a seat's popularity in the QMUL survey.
- London's reputation as a costly venue for legal proceedings means that Paris is often seen as a more economic option.
- The procedural law of many civil law countries was originally modelled on French law. Lawyers from these jurisdictions tend to follow developments in French arbitral law, and our experience indicates that familiarity is often a factor in the choice of Paris as an arbitral seat.
- Besides being a cultural and economic centre, Paris has long been associated with arbitration – not least because it is home to the ICC Court. As a result, it boasts a world-class legal market, with counsel specialised in international arbitration, as well as the services and infrastructure needed to sustain an arbitration community and to meet the practical requirements of parties seeking a hearing venue.

These attributes are not, of course, unique to Paris. London (like New York, Singapore or Geneva, to name a few "traditional" arbitral seats) shares many of them. But, for francophone parties in particular, they mean that Paris is often an "obvious" choice when seeking an arbitral seat.

1. Available at: [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF).

2. The exception was Asia-Pacific, where Paris was ranked behind London, Singapore and Hong Kong. The survey included data on preferences for participants from five other regions: Europe, Latin America, North America, Africa and the Middle East.

3. On top of the QMUL Survey, See the CI Arb Seat Index: <https://globalarbitrationreview.com/benchmarking/gar-ci-arb-seat-index/1176966/paris>; see also: <http://parisarbitration.com/en/why-paris/>

## The challenge(s)

However, like other established seats, Paris faces new challenges.

The most obvious is the rise of "newer" seats<sup>4</sup> such as Sao Paolo, Mexico, Malta, Mauritius, Nigeria, Kigali or Lebanon, which have the potential to become increasingly attractive in their respective regions. Developments of this sort are not new. Miami has long attracted Latin American and US parties. But the increasing popularity of such seats – illustrated by the fact that Sao Paolo was the fourth "most preferred" seat among Latin American respondents in the QMUL survey – suggests that this is part of a broader trend towards greater regionalism.

### Paris is a natural (and in many cases perfect) seat for high-value international arbitrations

The same trend is consistent with a push, in Africa and Latin America especially, to promote local institutions, seats, and arbitrators, as a way to foster more diversity and to close potential cultural gaps.<sup>5</sup> This has been reflected in the creation, or increased prominence, of various arbitration centres over the past decade. The growth of the OHADA Common Court of Justice and Arbitration (CCJA) is one example of this. Likewise, the creation of new arbitration centres such as the New Delhi International Arbitration Centre, the Egyptian Arbitration and Mediation Centre and the Tashkent International Arbitration Centre are further examples of the increased appetite for "local" arbitration. Given the tendency of some parties to allow the choice of institution to influence the choice of seat, this may also impact on Paris' popularity.

These developments are also being felt in other ways. ICC arbitration was once

synonymous with Paris. But the ICC now also administers cases from offices in New York, Hong Kong, Sao Paolo and Singapore.

Active State support for arbitration is another factor in the emergence of new seats. As they become aware of the financial benefits of a thriving legal market, States are increasingly willing to promote specific locations as arbitral seats or hearing venues. In Mauritius, the government's support for the Mauritius International Arbitration Centre (MIAC) is part of a policy of developing the island as a dispute settlement hub and arbitral seat. Similarly, Rwandan government support has been essential to the successful establishment of the fast-growing Kigali International Arbitration Centre (KIAC).<sup>6</sup> Government support has also contributed to the development of seats such as Singapore or Dubai in the past.

The impact of State action may also be more subtle. Paris is a natural (and in many cases perfect) seat for high-value international arbitrations. However, as was noted in a previous issue,<sup>7</sup> Hong Kong, Singapore, Kuala Lumpur and Seoul – rather than Paris – are the obvious seats for Belt and Road arbitrations. This does not mean that Paris will suffer as a result. The increase in investment associated with the shift in the globe's economic centre is likely to boost the use of arbitration overall, benefitting Paris (and other "traditional" seats). Some Belt and Road arbitrations are likely to be seated in Paris. The biggest benefits, however, are likely to be felt by Asian, rather than European, seats.

A further challenge, of course, is cost. As more and more seats come to be viewed as "safe", there is a risk that the fact (or perception) that certain "newer" seats may be cheaper than Paris will be a further factor in their favour.

Finally (and perhaps surprisingly), the most immediate challenge to Paris as a seat of arbitration may well be Brexit. Whether it

will materially affect London's popularity is (like Brexit itself) impossible to predict. Just over half of the respondents to the QMUL survey thought that it was unlikely to have an impact, while others have suggested that Paris will benefit. Indeed, the French authorities are aware of the potential opportunities, and in 2018 a specialist international chamber in the Paris Court of Appeal – which will hear evidence in English and issue decisions in French and English – was created in an attempt to help attract part of the London litigation market.

However, an alternative view, which was articulated extra-judicially by a Court of Appeal judge last year,<sup>8</sup> is that Brexit may increase London's attractiveness as a seat. Unlike its European counterparts, London will not be bound by the Achmea finding that investor-state arbitration under an intra-EU investment treaty is incompatible with EU law – a decision which some commentators have suggested may ultimately have consequences for commercial, as well as investment treaty, arbitration within the EU. This may encourage investors to structure their investments through the UK. Brexit may also mean that anti-suit injunctions are more readily available. For some parties, these factors may increase London's attraction as a seat – potentially to Paris' detriment.

### Paris' future

These challenges should not, however, be overstated. Paris continues to boast enormous strengths. It is still one of the world's most arbitration-friendly jurisdictions, and it continues to be a preferred seat for parties in every region of the world.

Crucially, Paris is also particularly well-placed to respond to the growing number of Africa-related arbitrations. This is reflected in both the ICC's figures – which showed a 40% increase in parties from sub-Saharan Africa (many of whom are likely to be francophone) in 2017 – and in our own

4. See Delos Guide to arbitration places (<https://delosdr.org/index.php/gap/>) and especially the "traffic lights for all jurisdictions": <https://delosdr.org/wp-content/uploads/2018/05/Delos-GAP-1st-edn-Traffic-Lights-for-All-Jurisdictions.pdf?pdf=GAP1-TLs>.

5. CI Arb Features, recognising the development of "Arbitration consciousness" in Africa, 1st October 2018: <https://www.ciarb.org/resources/features/recognising-the-development-of-arbitration-consciousness-in-africa/>; SOAS Arbitration in Africa Survey: <https://eprints.soas.ac.uk/25741/1/SOAS%20Arbitration%20in%20Africa%20Report%202018.pdf>.

6. The development of the KIAC, and Kigali's growth as an arbitral seat, was discussed in a previous edition of Inside Arbitration. [Issue 3 (February 2017), pp. 11-13].

7. [Inside Arbitration, Issue 5 (February 2018), p.4].

8. <https://www.judiciary.uk/wp-content/uploads/2018/05/speech-by-lj-gross-hirst-lecture-distribution-may-2018.pdf>



experience. The Paris office of Herbert Smith Freehills has seen a significant rise in the number of French-language arbitrations in recent years, and disputes increasingly extend beyond the traditional sectors of energy and mining to other areas such as corporate governance and services.

A further consideration is the importance of local intervention, customarily in conjunction with local counsel, in respect of litigation commenced in parallel with ongoing (or imminent) arbitration proceedings. Here, too, a shared language and legal culture is an invaluable asset with the result that Paris – both as an arbitral seat and the home to a polyglot arbitration community – remains the natural choice for such disputes.

## Paris continues to boast enormous strengths

Notwithstanding the challenges outlined above, therefore, nothing suggests that Paris' position is likely to change in the near future. Its long and distinguished past as an arbitral seat is likely to be matched by an equally long (and equally distinguished) future.

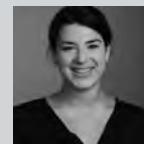
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# Commercial arbitration in Europe: What does the future hold outside Paris?

In a period of change, transition and reflection across Europe, and following our article on Paris, our arbitration partners in our European offices share their thoughts on what the future holds for arbitration in their jurisdiction and more widely.



## Germany

Many formerly London-based financial institutions have set up in Germany in the wake of the UK's Brexit referendum, with a number of banks, asset managers, traders and insurers making the move. There is the potential for this to impact on choice of governing law and arbitration, with an increasing number of financial institutions looking to Germany as a preferred seat. In the last few years more German businesses in the finance and insurance sectors have already been turning to arbitration and we expect this trend to continue, particularly in the light of moves in the financial sector as a result of Brexit.

The revised DIS rules entered into force last year and have also increased the appeal of German arbitration, enhancing the position of Germany as a seat. The Rules call on arbitrators to conduct proceedings in a manner tailored to the case in question, while continuing to encourage arbitrators to be pro-active in managing arbitrations, so as to reach a swift resolution of the dispute.

The Federal Ministry of Justice and Consumer Protection has formed a task force to further enhance the effectiveness of German arbitration law. Patricia Nacimiento of Herbert Smith Freehills is a member of the task force, which lists the declaration of enforceability of foreign awards among its key priorities. The final report is expected within 2019 and will be an important development in German arbitration. However, given the current political landscape in Germany, it is not expected that there will be any major change to German arbitral legislation in the short term.

Civil law is currently having an increased impact on international arbitration procedure more generally, with the arrival of the Prague Rules late last year. While not all civil law lawyers are in favour of every provision in the Rules, many German

lawyers would agree there is some truth in the drafters' position that standard international arbitration procedure has become too stagnant and fixed. Over the next 10 years we expect to see this change as civil law approaches become more regularly adopted.

Another important development is the establishment of an English-language German commercial court in Frankfurt, which reflects Germany's intention to attract non-German speakers to Germany as a jurisdiction. While we do not expect the new court to overtake arbitration in the short term, the English-speaking court may in future offer an alternative to international arbitration. It will be interesting to see how the court's caseload develops over the next ten years.

German businesses in a number of sectors which have traditionally litigated disputes have increasingly been turning to arbitration over the last few years. We expect to see this trend continue, particularly in the finance, insurance, pharma and tech sectors.

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## England and Wales

London has an excellent reputation and strong recognition in arbitration globally and is one of, if not the, most popular seats of arbitration in the world. The UK is a signatory to the New York Convention, has a well-drafted and clear piece of modern arbitration legislation, an impartial and well regarded judiciary, a strong track record in supporting arbitration and enforcing arbitral awards and high quality arbitrators, experts and counsel.

All of these factors are reasons that parties currently choose a London seat and will remain valid after Brexit. However, Brexit is bringing with it uncertainty, and while that uncertainty does not directly impact on arbitration itself, it may lead to some parties looking to other seats, particularly where other countries actively seek to promote their own offering as a response.

We have seen a considerable rise in the number of financial transactions that have included arbitration clauses over the past decade. London is currently leading in the arbitration of complex financial disputes, with the LCIA reporting increased use of London-seated arbitration by financial institutions in 2018. Almost a third of arbitrations filed with the LCIA in 2018 related to banking or finance. We expect this growth to continue in the short to medium term at least despite Brexit, given the ongoing strength of London as an arbitral seat and the fact that many contracts already concluded in the sector will have a London-seated arbitration clause.

London remains a strong centre for ad hoc arbitration, seeing for example over 1,500 ad hoc arbitrations taking place in LMAA arbitration alone in 2018.

Post-Brexit, we anticipate a period of reflection and an increased awareness that London cannot be complacent about its position in the arbitration universe. The recent success of events like London International Disputes Week demonstrate that understanding and London's willingness to grow and develop as an arbitral centre. In the short to medium term there is the potential for revision and updating of the Arbitration Act 1996, which is currently on hold due to the Brexit legislative timetable.

The English approach to disclosure in the courts is changing and this is likely to make the difference between English court litigation and arbitration less pronounced. This may in turn lead English lawyers to become more flexible and imaginative in their approach to document production, so that they may come to have more in common with the approach of their civil law colleagues. Also, while the IBA Rules are likely to continue to be used in the majority of London-seated arbitrations, there is interest in the Prague Rules among London-based lawyers, which may also increase civil law influence.

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## Spain

Spain is working to establish itself further as a desirable seat for international arbitration involving Spanish, Portuguese and Latin American interests, particularly with the increase in LatAm arbitration. As part of this initiative, a new unified arbitration institution, the Centro Internacional de Arbitraje de Madrid, is expected to launch soon. The new arbitral institution is being formed by the three main current Spanish arbitral institutions, with the aim of promoting Madrid as a leading international seat.

The underlying legislative framework supports these efforts, as Spain is an arbitration-friendly jurisdiction, with a modern Arbitration Act based on the Model Law. Spain is also a signatory to the New York Convention.

There is a very healthy and growing domestic arbitration market, as demonstrated by the First Survey on Arbitration in Spain, published in 2018. The survey reported that 45% of Spanish companies surveyed have been involved in at least one arbitration in the previous 5 years and 47% of companies surveyed prefer arbitration to court litigation.

Spain's arbitral institutions are quick to adapt and change, as seen with the introduction of emergency arbitrator provisions in 2014. New rules are expected for the Centro Internacional de Arbitraje de Madrid, which may encourage other Spanish arbitral institutions to revise their rules.

The Spanish national courts are still seeking to strike a balance between supporting and supervising arbitral proceedings and there have been some surprising recent decisions. In 2018, for example, an award was annulled due to an unreasonable assessment of evidence, as certain evidence was not analysed in the award. In another case an award was annulled despite the parties' joint request to withdraw the annulment proceedings. This year has seen the annulment of an award on costs due to the failure to provide reasons for disregarding the rule on allocation of costs established by the Spanish Civil Procedure Act. These decisions are restricted to the Madrid High Court and more consistency is generally seen in decisions from the higher courts.

The third party funding sector is growing in Spain, particularly in certain niche areas such as private antitrust claims. Third party funding is not currently regulated and we do not expect legislation on third party funding to be introduced in the short term. However, Spanish arbitral institutions may potentially in future decide to implement rules to regulate third party funding.

The creation of a single international arbitration centre is expected to increase the prominence of Spain in the international arbitration sphere. In the last few years, Spain has seen the emergence of fast-track procedures for lower value arbitrations. New tools to deal with these lower value arbitrations are expected to continue to be developed and technology will probably play a major role in this.

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## Russia

The past few years have been a time of real change and development in Russian arbitration and there is likely to be more change to come. On 29 March 2019 a series of amendments to Federal Law No. 382-FZ “On Arbitration (Arbitration Proceedings) in the Russian Federation” came into force. The amendments attempt to address various issues arising from the 2016 Russian Arbitration Reform, including the arbitrability of corporate disputes and the Russian Permanent Arbitration Institutions (PAI) regime.

In April 2019 the HKIAC became the first foreign arbitral institution to achieve PAI status and the Vienna International Arbitration Centre (VIAC) will gain PAI status on or before 8 July 2019. It is likely that some other international institutions will also apply. We have recently seen a trend of increasing interest in Asian seats and expect more movement of Russian disputes from European seats to Asia, particularly given the imposition of sanctions and the registration of the HKIAC as a PAI.

Past concern about the enforceability of the ICC standard clause in Russia has now been laid to rest, with the Supreme Court issuing an “Overview” in December 2018

confirming that standard institutional arbitration clauses should be enforceable. The Supreme Court Overview also introduced increased predictability on the enforceability of unilateral option clauses. This type of option as used under many other systems of law (including English law where such clauses, if clearly drafted, are enforceable) will not be effective as a matter of Russian law. This clarification should end the sometimes contradictory approach to such clauses by Russian courts, but may in future limit both the attractiveness of Russia as a seat and of Russian governing law for sectors such as finance, where unilateral options are common.

The last year has also brought broadly positive news about enforcement of arbitral awards in Russia, with the publication in November of the Russian Arbitration Association’s study. Between 2009 and 2017, the overall success rate of recognition and enforcement applications in the Russian commercial courts fluctuated between 80% and 97%. The success rate for ICC awards was only 61% and only 47% for LCIA awards, demonstrating differences in enforceability depending on the seat/institution, but this remains a positive development given the perception that enforcement in Russia may be challenging.

The recent Russian arbitration reform introduced significant changes and the arbitration market is still in a transition phase. Reaction to the reform has divided opinion in the Russian arbitration community, with commentators taking opposing views on whether the reform has enhanced Russia’s appeal as an arbitral seat. The number of arbitral institutions (and accordingly also caseload) has dramatically decreased since the reform, mainly due to regulatory requirements for arbitral institutions. In the short to medium term we expect the Russian arbitration market to recover to pre-reform volumes, but anticipate that complex and high-level commercial transactions will largely continue to be handled by international arbitral institutions with a seat outside Russia.

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## Spotlight article: Eduardo Soler-Tappa, Partner, and David Arias, Partner

**Eduardo, can you give us some background on the Madrid disputes practice? What growth have you witnessed since you joined us in 2010? Where did we start, and where are we now? What kind of work are you doing, and for what kind of clients?**

The Madrid office opened 10 years ago. During that time, the disputes practice has grown to become one of the pillars of our office, especially in the last few years. In 2010, our team had four lawyers and the practice accounted for around 16% of the office's turnover. In 2019, our team has 28 people (including 19 fee earners) and the practice accounts for 31% of the office's turnover.

We advise clients on pre-trial issues and represent them in both judicial proceedings before Spanish courts and in arbitration proceedings. Our track record includes representing the Kingdom of Spain in an UNCITRAL investment arbitration filed under the Energy Charter Treaty by 14 investment funds from Luxembourg, the Netherlands, Germany and Spain, and representing Iberdrola in an LCIA arbitration against Kenya Electricity Transmission Company Limited. Our team is also involved in arbitrations under Algerian, Brazilian, Colombian and Nepalese law, seated in London, Paris and Singapore.

As for the clients, I have already mentioned the Kingdom of Spain and Iberdrola. We also advise other IBEX35 companies, including Banco Santander, Bankia and Red Eléctrica, as well as international companies such as Acerinox, Deutsche Bank and Oaktree Capital.

...the disputes practice has grown to become one of the pillars of our office...

**David, it is so exciting for the firm that you have joined us. You are a well-known figure in the Spanish arbitration world, and it's fabulous to have someone of your experience join the team.**

**In recent years, you've been doing mainly arbitrator work. What made you decide to come back to counsel work?**

**David:** Let me first say that the excitement is all mine. Dispute resolution forms part of the DNA of Herbert Smith Freehills; joining a firm like this is a thrilling opportunity for someone like me, who has been doing disputes for more than 27 years.

Getting to your question, I've been doing a lot of arbitrator work in recent years and I simply missed having the counsel hat on more often. But don't get me wrong. It has been fantastic to sit as arbitrator in cases across the globe and to share tribunals with the most respected arbitrators. It's just that I wanted to experience more regularly the excitement that is brought about by being on the other side, building a case from scratch, being the one who has to persuade instead of being persuaded, handling clients, etc. My age still lets me enjoy that excitement (and I hope it will for a few more years), so it seemed about time to return to the counsel side.

**What attracted you to Herbert Smith Freehills?**

Dispute resolution is a core practice at Herbert Smith Freehills and the firm is consistently considered one of the best in the world when it comes to arbitration. Further, the firm's strength in Asia is remarkable and this may be of great help in developing the arbitration practice in Latin America, considering that investment by Asian parties in that region is on the rise. All this, together with my eagerness to act more often as counsel, could only lead to me accepting to join Herbert Smith Freehills after the firm knocked at my door.

It has not been long since I joined, so I am not fully acquainted with all of the firm's capabilities yet. However, I can say that I'm

It has been fantastic to sit as arbitrator in cases across the globe and to share tribunals with the most respected arbitrators

amazed by the specialised resources that the firm offers. They have already been of great help. With the support of the specialised construction team in London, for example, I was able to get ready in the blink of an eye for a conference on construction arbitration given at King's College London in June. Without that help, it would have taken me weeks to prepare for it.

Another interesting resource is Alternative Legal Services (ALT), a division of the firm that can help to process massive quantities of documents or information in a cost-efficient manner. I haven't worked with the ALT team yet, but it will surely be extremely helpful in many cases.

**Spain is working to position itself as a leading arbitral seat. There is a newly-created arbitral institution, and moves to create a harmonised set of rules for Spanish-seated arbitrations. Is there room for another "leading seat" in Europe? Can Madrid offer anything that Paris and Geneva can't?**

**Eduardo:** Spain has taken various steps since the beginning of the 21st century to position itself as an attractive arbitral seat. A very important step was, of course, the passing of the Spanish Arbitration Act in 2003, which implemented a modern legislative framework, based on the Model Law, for arbitrations seated in Spain.



**David:** Another important step was the creation of the Spanish Arbitration Club in 2005. The Club is an association aimed at promoting arbitration, of which I had the honour to be president from 2013 to 2017. Over the years, the Spanish Arbitration Club has expanded its remit to become one of the most relevant associations for the Iberian and Ibero-American arbitration community, and beyond. This is evidenced by its more than 1,000 members from 43 different countries.

**Eduardo:** Among other things, the Club has published soft law instruments such as the Code of Good Practice, an updated version of which has been published recently. Every year since its creation, the Club has organised an international arbitration congress, which puts the spotlight of the arbitration community on Madrid, where it takes place. This year the congress brought to Madrid around 400 attendees from approximately 30 countries.

This, together with a judiciary that for the most part understands and supports arbitration, has contributed to positioning Spain as an attractive arbitral seat. It is evident, however, that Madrid is still far from the leading seats, such as London, Paris, Singapore, Hong Kong, Geneva, New York or Stockholm.

**David:** One thing that may have discouraged parties from seating their arbitrations in Spain is the existence of various Madrid-based arbitration institutions with different rules; specifically the Court of Arbitration of the Madrid

**I believe that there is room for another leading seat, and Spain is a perfect fit for that**

Chamber of Commerce (CAM), the Civil and Mercantile Court of Arbitration (CIMA) and the Court of Arbitration of the Spanish Chamber of Commerce (CEA).

Parties or attorneys who were not familiar with the Spanish arbitration scene, when considering an arbitration seated in Spain under the rules of any of those institutions, may have decided against it because they were not entirely clear about the institution and rules in question.

Fortunately, these three institutions have been negotiating to create a unified arbitration centre for international arbitrations, which is expected to be up and running in the next few months.

**Eduardo:** The unified centre will eliminate the lack of clarity, and increase the likelihood of parties and lawyers choosing to submit disputes to its rules. This, in turn, should lead to more arbitrations being seated in Spain. Further, the rules are expected to contain modern provisions that incorporate the latest developments in arbitration. This may have a beneficial effect on domestic arbitration as well, by encouraging Spanish institutions to modify their domestic arbitration rules to mirror those of the unified centre.

**David:** Finally, I believe that there is room for another leading seat, and Spain is a perfect fit for that. Arbitrations involving Latin American parties are on the rise and none of the leading seats have particular ties with that region. Spain and Latin American countries not only share a language, they also have a common cultural and legal tradition. This makes Spain a perfect candidate to become the leading seat for arbitrations with a Latin American element.

**David, you have a very strong Latin America practice. Can you tell us more about that?**

Yes, during the last few years, I have been fortunate enough to be involved in a lot of

cases with a Latin American element, mainly as arbitrator, but also as counsel.

A great number of those cases concerned major infrastructure and energy projects. I recall as a particularly enjoyable experience an ICC case seated in Santiago de Chile, concerning the construction of a power plant, in which my team and I represented an Italian group. The amount in dispute exceeded US\$ 1 billion and there were six parties involved. It was very rewarding, because the case was remarkably complex and the level of professionalism of the lawyers, arbitrators and experts was exceptional. This case ended a few years back; perhaps the reason why I have this good recollection of it is that it ended with a very positive settlement agreement for our client.

Currently, I am sitting as arbitrator in cases involving parties from Ecuador, Colombia, Peru, Brazil or Mexico, seated in cities such as Quito, Lima, Santiago de Chile, São Paulo or Miami. Further, my team in Madrid and I are representing a company from a Latin American country in an ICC arbitration relating to the construction of a highway in the same country and subject to its law.

I certainly hope that the number of cases involving Latin America increases during the following years and that our Madrid office gets to work with other offices in many cases of that kind.

**The Madrid office has just won a case with a three-woman arbitral tribunal. Is this usual in Spanish arbitration? If not, what is the Spanish arbitration community doing to improve gender (and other) diversity on tribunals?**

**Eduardo:** First, our partner Paulino Fajardo and his team of Miguel García-Casas and Cecilia Tilve must be congratulated for the victory and also for enhancing women's visibility in arbitration panels by taking part in a case like this.

**David:** Turning to your question, it is not usual at all to find a three-woman arbitral tribunal in a Spanish arbitration. However, I am hopeful that this is changing with initiatives, such as the Equal Representation in Arbitration Pledge, that are gaining traction in Spain. The Pledge has been

signed by Herbert Smith Freehills and I had the honour of co-organising with Juan Fernández-Armesto the event where the Pledge was introduced to the Spanish arbitration community.

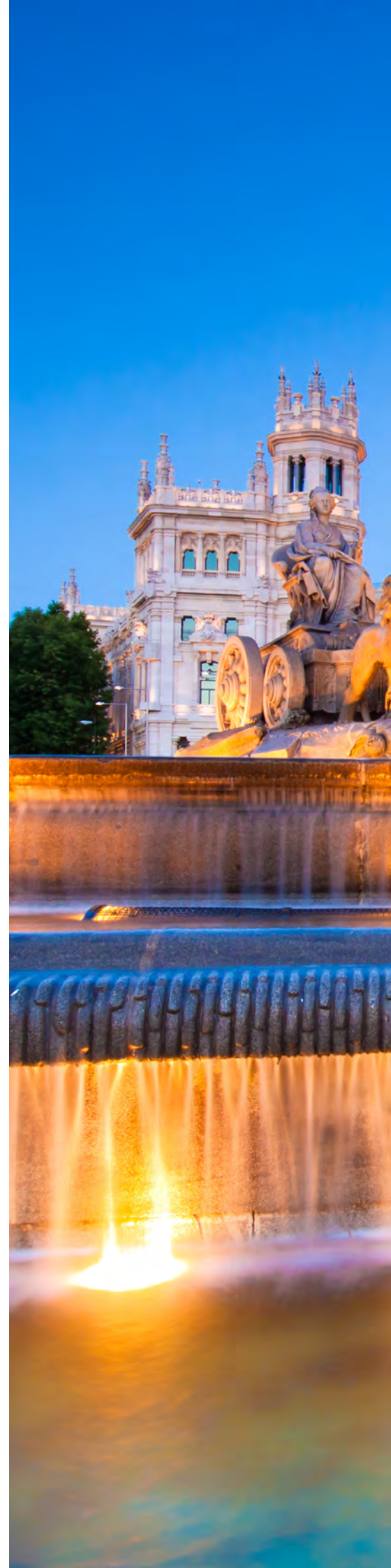
**Eduardo:** The main Spanish arbitral institutions (CAM, CIMA, and CEA) have taken the Pledge and we haven't had to wait long to see the results. For instance, data from CAM released in September 2018 revealed that, in the previous half year, 48% of the arbitrators appointed by the CAM were women and, where the CAM was required to submit a list of potential arbitrators to be considered by the parties, at least 50% of the names were of female candidates.

**David:** To tell you briefly about my own experience, I have acted as counsel for Fomento de Construcciones y Contratas (FCC) in an ICC arbitration against a Qatari company that was decided in April 2019, in which the two party-appointed arbitrators, the chair and the lead counsel of the counterparty were all women. I believe this was one of the first ICC panels with a three-woman arbitral tribunal. The point I want to make is that improving the representation of women in international arbitration greatly depends on us. If we keep taking steps in that direction, a three-woman panel will soon be unsurprising.

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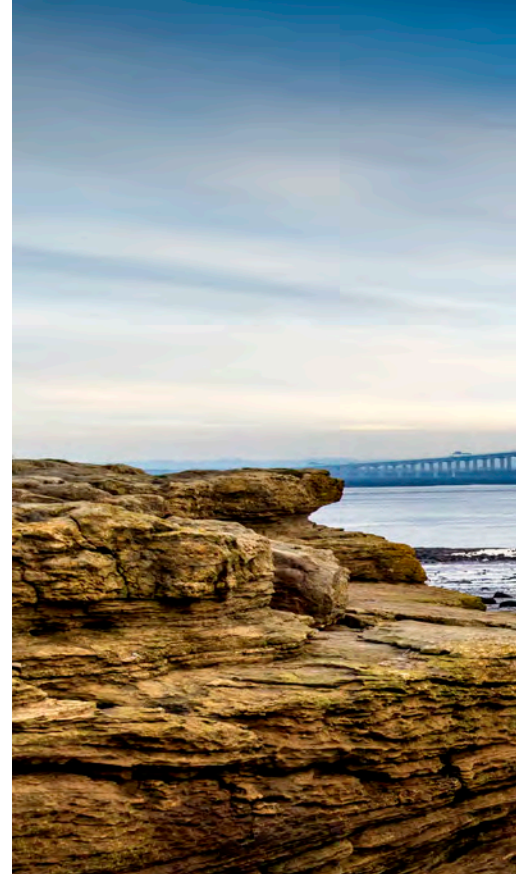






# The role of arbitration in employment-related disputes: Practical uses and limitations

In this article, Paul Goulding QC of Blackstone Chambers, Peter Frost, London and Barbara Roth, New York, Partners in Herbert Smith Freehills' contentious Employment practice, and Hannah Ambrose, Senior Associate in the Global Arbitration practice, explore the growing appetite to resolve employment-related disputes by arbitration, focusing on some recent examples. They also focus on the policy considerations which mean that arbitration may not be suitable in circumstances where there is no true consent between the parties.



The UK Employment Lawyers Association (the **UK ELA**) published its Report on Arbitration and Employment Disputes in November 2017, following over two years of research considering use of arbitration in the context of employment across the globe, conducted by ELA's Arbitration and ADR Group. The Report concluded that arbitration clauses are increasingly found in partnership and LLP agreements, deferred remuneration scheme rules and contracts of employment. As identified in the Report, there are a number of key reasons why arbitration may be particularly suited to resolution of employment-related disputes. However, in certain circumstances arbitration may not be desirable, particularly when used as part of a mandatory process.

## Private dispute resolution in employment-context

One of the features of arbitration is that the process is usually private and often confidential. Whilst there are circumstances in which the details of an arbitration may become public (for example, if the arbitral award is challenged or enforced before national courts), arbitration hearings are held in private and there is no public access to the file.

In some circumstances, the confidential nature of arbitration raises legitimate concerns about its suitability as an alternative to litigation for resolution of employment-related disputes. In particular, public policy considerations may arise when employees are compelled to enter into

employment contracts, non-disclosure agreements and settlement agreements which purport to bind them to confidential settlement of disputes. This issue has been the subject of much discussion in the US in particular. Mandatory arbitration clauses are prima facie enforceable under the Federal Arbitration Act (**FAA**), with the US Supreme Court finding in *Gilmer v Interstate/Johnson Lane Corp.* in 1991 that the Age Discrimination in Employment Act did not preclude arbitration of age discrimination claims and confirming in *Circuit City Stores, Inc. v. Adams* in 2001 that the FAA covers all contracts of employment. More recently in May 2018, by a 5-4 majority, the US Supreme Court decided in *Epiq Systems Corp. v Lewis* that arbitration agreements containing class and collective action waivers of wage and hour disputes were enforceable under the FAA. It is possible that the reasoning of the court would also apply to other types of claim.

## ... the confidential nature of arbitration raises legitimate concerns about its suitability as an alternative to litigation ...

Recognising, however, that the effective "silencing" of claims for, for example, discrimination and harassment, may contribute to a negative workplace culture and potentially enable the perpetuation of such conduct, many US states are

introducing laws to restrict the use of mandatory employment arbitration, unless agreed after a dispute has arisen. Similar laws exist across Europe and these restrictions are discussed further below. Many companies are also reflecting on their employment policies and considering whether mandatory arbitration clauses should be removed, or their scope limited. Google, Microsoft and Uber are amongst the companies which have reconsidered their policies in recent years.

However, there are employment-related disputes in which confidentiality may be in the interest of both parties. For example, it may be damaging to enforce a restrictive covenant concerning the use of confidential information in a public forum - the litigation may increase the risk of losing the confidentiality in the information, raise questions as to whether the business or the ex-employee can be trusted by customers or business partners with confidential information, or advertise the fact that the business and ex-employee have parted company on bad terms. More specifically, some contracts of employment are high-profile and resolution of any dispute would attract significant media interest, which may be unwanted by one or both sides. An obvious example is contracts involving sports personalities, particularly players and managers on the one hand and sports clubs on the other (with many of these disputes being referred to arbitration under the auspices of the Court of Arbitration for Sport, or other specialist tribunals). High-profile employment-related disputes clearly exist beyond the world of



celebrity and sport. In particular, financial institutions and corporates may find that disputes concerning the exit of senior executives, intra-board conflicts, and disagreements between the directors and shareholders are matters of interest to the business and mainstream media, even though the parties (or some of them) consider their dispute is best resolved without public scrutiny. Employees, particularly those working in the regulated sector, and other senior executives or partners in firms, may not want to litigate in public, particularly where allegations of misconduct or incompetence form part of the employer's case. Indeed, resolution of a matter in a private hearing may serve to protect both individual and corporate reputations.

### ... a key principle of arbitration is party autonomy

The private nature of hearings and largely confidential nature of arbitral awards might even, in many cases, positively influence the substantive outcome. For instance, witnesses may be more comfortable in private proceedings than they would be in open court proceedings and may therefore give evidence with a greater degree of clarity.

However, one key issue for parties wishing to use arbitration to ensure that the nature and purpose of their relationship and any related information passing between them

remains confidential, is ensuring that a threatened breach of confidentiality can be quickly and effectively prevented. Whilst an arbitral tribunal usually has the power to grant urgent interim relief, including to prevent the use or disclosure of confidential information, the coercive powers of the tribunal in relation to any interim order may be limited. The most effective remedy may therefore be granted by a court. The court of the seat of arbitration is usually the first port of call in respect of interim relief and therefore the speed with which a party may be able to get an effective remedy and the scope and any restrictions on the court's powers to grant interim relief are relevant. Potential restrictions on access to the court for the purpose of seeking interim injunctive relief may be found in international institutional arbitration rules – if so, this should be addressed when the arbitration clause or agreement is drafted. It is not unusual for an agreement to explicitly specify that the parties agree that a particular court has the authority to issue injunctive relief.

### Party autonomy and getting the right dispute resolution process

Other features of the arbitral process can be an advantage in employment claims – for example, a key principle of arbitration is party autonomy. The parties can thus influence the procedure to craft an efficient and effective way of resolving their specific dispute, without being bound by the often rigid civil procedure rules of national courts. They can, in many cases, also appoint

arbitrators with industry knowledge or experience, which makes them better suited to understand and decide the case.

As employment-related contracts are regularly entered into with individuals, the potential to craft a suitable process can lead to the dispute resolution provisions being more heavily negotiated, particularly as the potential claims on each side are often different in scale. Unlike a state court system, parties to arbitration must pay for all expenses (eg hearing of their dispute and the tribunal's remuneration). In many jurisdictions, an arbitral tribunal allocates these costs between the parties after it determines the dispute, generally following the principle that costs follow the event (ie, the loser pays the winner's costs) except where it appears that this is not appropriate. Nevertheless, the costs involved are undoubtedly a consideration for parties, particularly individuals, and cost drivers can influence the type of dispute resolution process that the parties are willing to accept. For example, take a situation in which an employee leaves employment subject to restrictive covenants, and for the purposes of continuity of service delivery by the employer to third parties, enters into short-term consultancy agreement under which he or she continues to perform tasks related to the previous employment. In this scenario, if the restrictive covenants are breached, the ex-employer may have a substantial claim for damages and may consider that the expense of an arbitration before a three-member tribunal is justified. The ex-employee, however, anticipates that

### Case study 1: Confidential consultancy agreement

Consultancy agreements may be relevant in a myriad of different scenarios. In a recent example, a client engaged a consultant in the highly confidential context of exploring business prospects in a new market in order to achieve certain due diligence objectives on potential business partners. Arbitration was used in the consultancy agreement and accompanying non-disclosure agreement (**NDA**) in part to ensure that any disputes between the consultant and the client could be resolved in as confidential a manner as possible, consistent with the need to keep the purpose of the consultancy agreement confidential.

A secondary objective was to ensure that the consultancy agreement and NDA could be effectively enforced against the company through which the individual consultant supplied his services. Consultancy agreements are regularly made with a company established by the individual consultant, often in a tax-advantageous jurisdiction. Whilst the party engaging the consultant may be familiar with a certain court system in the broader context of their business (for example, the English court or New York court), there may not be a clear and certain route to enforcement of a judgment of that court in the jurisdiction in which the consultant is based or their company is incorporated. It is likely, however, that an arbitral award could be enforced using the New York Convention 1958.

Additional considerations in these kinds of scenarios are: (i) the appropriate seat of arbitration (and any restrictions on the choice of seat which may affect enforcement of the arbitration agreement or any award); and (ii) the powers of the tribunal and the court of the seat to grant interim relief, in particular to preserve confidentiality during the arbitration proceedings or to provide injunctive relief to maintain the status quo and prevent irreparable harm prior to the arbitration proceeding.

he or she will need to enforce the payment obligations under the consultancy agreement quickly and cost-effectively. The arbitration process proposed may not be acceptable. Careful drafting will be needed to marry these two imperatives, potentially with certain types of disputes carved out of the arbitration clause but taking into account how different claims and counter-claims may be interrelated. Alternatively, the parties can agree other ways to reduce the potential costs of an arbitration (for example, by using a sole arbitrator or by increased use of technology to minimise in-person hearing time).

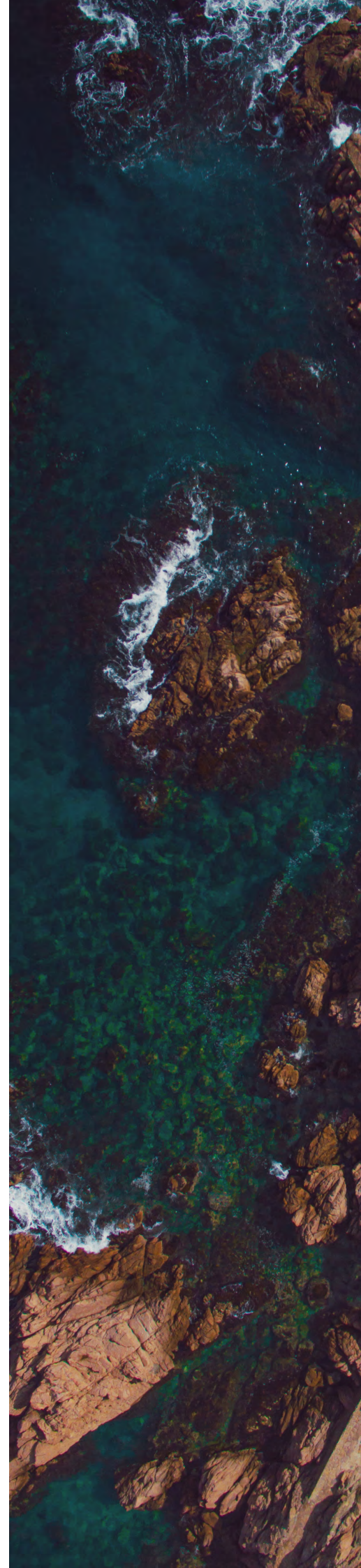
### Institutional arbitration

There are a number of general domestic and international institutions which may be suitable to administer employment-related disputes. Arbitral institutions can assist with communications between the parties and the arbitrator(s), selection and/or appointment of the tribunal, fundholding, and scrutiny of the award.

Some arbitration institutions offer specific rules for employment disputes. The American Arbitration Association which has developed the Employment Arbitration Rules and Mediation Procedures and the International Institute for Conflict Prevention and Resolution has an Employment Dispute Arbitration Procedure. The UK ELA's Report of November 2017 notes that a similar rise in

the interest in, and use of, arbitration to resolve employment-related disputes across Europe led to the development of the European Employment Lawyers Association (**EELA**) arbitration scheme, including EELA's bespoke arbitration rules, a model arbitration clause and a submission agreement under which existing disputes can be resolved by arbitration. Further, sector-specific arbitral bodies also offer services in the context of employment-related arbitration. In the US securities industry, for example, the majority of all employment disputes between broker-dealers and their employees are resolved through arbitration administered by the Financial Industry Regulatory Authority (**FINRA**); however, discrimination cases are heard by FINRA only where both parties expressly agree. Because of limitations on discovery available to parties before FINRA as well as the absence of a meaningful appeal from an arbitral decision, many parties do not file, or agree to, proceed with, discrimination disputes before FINRA.

Bespoke employment arbitration rules may offer an appropriate process, including addressing the concerns discussed above. However, this should not be assumed. Employers and employees alike need to scrutinise the rules of an institution to ensure that they are suitable for the disputes in contemplation. The rules should provide a fair and cost-efficient process and both parties should be wary of rules unduly limiting scope



## Case study 2: Global enforcement of a settlement agreement

In a recent example, a client entered into a settlement agreement on termination of an employment contract. Given the international nature of the client's business, the ex-employee was likely to move on to engagements across the world and there was therefore a potential for breach of the restrictive covenants in the settlement agreement in a number of jurisdictions.

Arbitration was a suitable method of dispute resolution as it would enable the client to take advantage of the New York Convention and enable the client to enforce an award against the ex-employee in whatever jurisdiction he settled. However, it was also important to preserve the ability of the client to seek interim relief in both the court of the seat and the courts in which the ex-employee was engaging in breach of the restrictive covenants. This factor was relevant to the choice of both the seat and institutional arbitration rules which would apply to arbitration of any dispute under the settlement agreement. As injunctive relief is often a more desirable remedy for breach of covenant than damages, it was also important that the tribunal had the power to grant a permanent injunction in its final award if required, which award could then be enforced under the New York Convention. The English Arbitration Act 1996 provides that, unless otherwise agreed, the tribunal has the same power as the English court to order a party to do or refrain from doing anything. In other jurisdictions, the powers of the tribunal with regard to remedies are less clear but injunctive relief is generally accepted as being available.

Additional considerations in these kinds of scenarios may include: the ability to serve proceedings in support of an arbitration (including proceedings for interim relief) in different jurisdictions; consolidation of disputes under related agreements.

of disclosure, restricting a party's ability to insist on an oral hearing, or providing procedures which may not give the parties an opportunity to test the evidence. Further, if an institution will appoint an arbitrator, it is important that the pool from which it chooses contains individuals who are independent and impartial, appropriately qualified, and culturally diverse. If the institution's appointments do not satisfy these criteria, questions about the quality of justice are inevitable. Such questions attain particular significance if arbitration is mandatory.

While some FINRA arbitrators are highly qualified, a significant number of the randomly proposed panels of arbitrator candidates have limited or no experience with either the law or with the securities industry and therefore are unlikely to provide the level of expertise parties should want when reaching conclusions about their claims. In addition, FINRA procedure requires only limited disclosure between the parties and does not generally permit the filing of dispositive motions – something that, in court, can eliminate the need for trial of a party's claims.

### Enforcement

An arbitration award also offers significant benefits in terms of enforcement of the outcome of a dispute. Whilst there is no global system for reciprocal enforcement of

judgments, 159 countries are party to the New York Convention on Recognition and Enforcement of Arbitral Awards 1958 (the **New York Convention**), under which state courts are obliged to recognise and enforce arbitral awards on a reciprocal basis as if the award was a judgment of the enforcing court. Enforcement considerations may be particularly relevant in employment-related contracts of an international nature.

### Limitations on how arbitration may be used in an employment context

It is clear that parties that seek to have their disputes resolved by arbitration must be aware that, unlike standard commercial contracts, employment-related issues may be subject to additional requirements and therefore not all disputes arising out of an employment relationship are arbitrable. In the U.S. however, some types of disputes must be arbitrated – including claims arising out of interpretation of a collective bargaining agreement in a unionized workforce. In some other types of claims, the parties will seldom choose to arbitrate because of the limitations on discovery and the unavailability of motion practice or appeals. In addition, though arbitration originally was believed to be less costly than litigation in court, participants have found that arbitration can be as expensive as any other method of dispute resolution. In a number of jurisdictions,

certain types of employment dispute are considered non-arbitrable as a matter of public policy and statutory restrictions apply to claims for, for example, harassment or discrimination.

The pitfalls of ignoring the interrelation of different types of claim are demonstrated in a recent case in the Swiss court relating to the dismissal of a football coach. The club was not able to insist on arbitration of the dispute as it included a statutory claim for wrongful dismissal which, under Swiss law, could be referred to arbitration only by separate arbitration agreement entered into after the termination of the employment contract. The Swiss approach to arbitration agreements that extend to future statutory employment claims is not unique. In the UK, whilst contractual and tortious claims arising from an employment relationship are largely arbitrable without restriction, there are constraints on contracting out of future statutory employment claims.

Inconsistency between the dispute resolution provisions in an employment contract and statutory requirements as to those dispute resolution provisions can lead to undue delay, costs and has the potential for increasing publicity regarding the claim. A court is unlikely to stay proceedings and refer a dispute to arbitration in circumstances where the arbitration clause violates mandatory statutory provisions or covers the types of employment claim which it regards as non-arbitrable.

Depending on the jurisdiction, the most practical and effective way of making sure that all claims arising from a single dispute /

set of disputes – whatever their legal basis – can be resolved in the same forum and minimise the risk of parallel proceedings may be to agree to arbitration after a dispute has arisen. For example, to use arbitration effectively and ensure compliance with statutory restrictions in the UK, parties may agree to arbitrate after the dispute has arisen by entering into a settlement agreement. Providing that such settlement agreement is compliant with the statutory requirements, the arbitration clause therein (known as a submission agreement), will be enforceable in relation to all the claims that have arisen. In a situation where an employee has brought a number of claims based in both contract and statute, this can be an appealing solution for both parties who wish to resolve all their claims (sometimes in more than one jurisdiction) in a single forum. They can take advantage of the benefits of arbitrating, rather than litigating, and avoid the risk of inconsistent outcomes, inherent in cases of multiple related proceedings.

### **A valuable option for resolution of disputes in employment-related transactions**

Whilst arbitration will not be suitable for all employment-related transactions and may raise considerations as to whether there is true consent, bringing together expertise in both employment law and arbitration law and practice can help parties identify where alternative dispute resolution methods can be used. Arbitration can bring advantages in a wide variety of employment disputes from those concerning bonuses and deferred remuneration, to disputes about restrictive

covenants and team moves, although there can also be serious limitations to consider, particularly where mandatory arbitration procedures are engaged. Parties are encouraged to consider the pros and cons of including an arbitration clause in employment-related contracts and the opportunity to submit their dispute to arbitration after it has arisen.

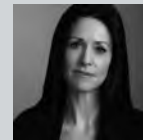
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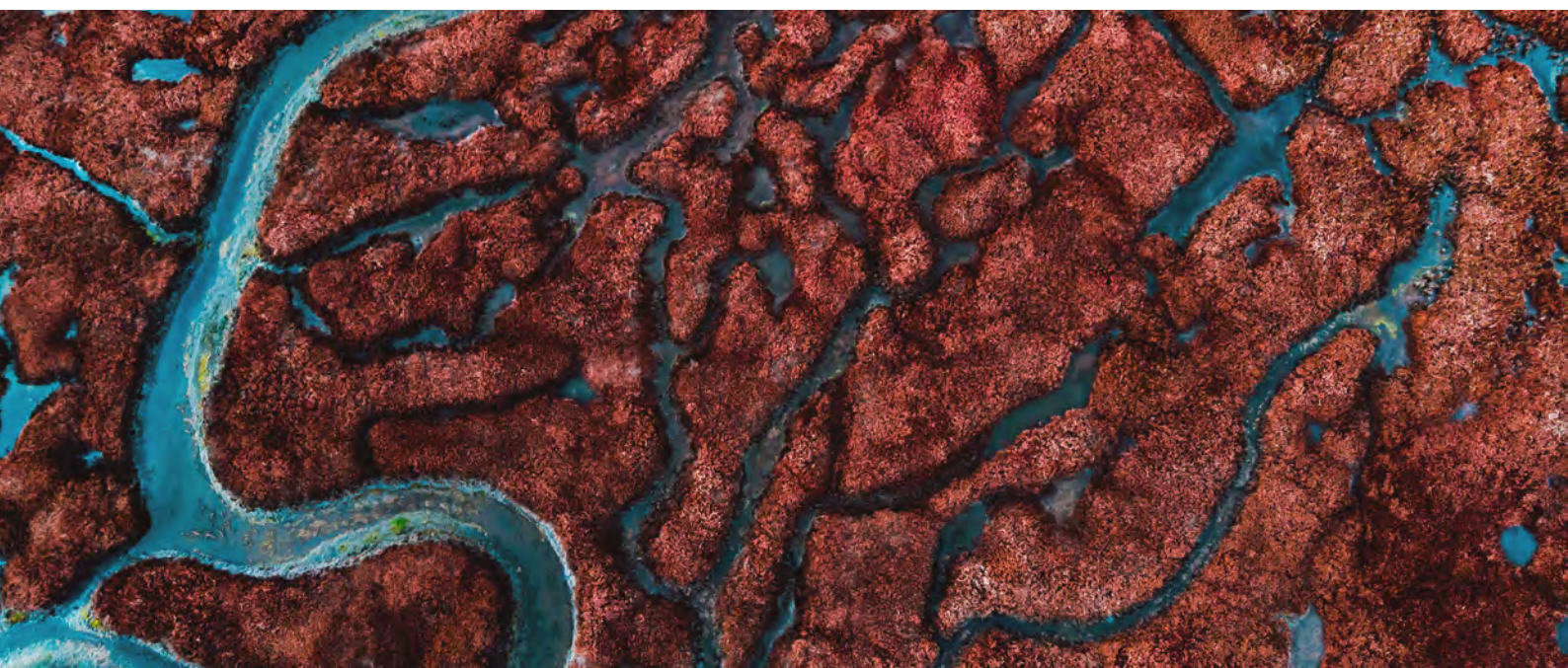
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## Arb-Italia: Italy's continuing commitment to arbitration

In litigation-saturated Italy, arbitration has often been cited as an attractive alternative form of dispute resolution. However, its uptake has been somewhat slower than anticipated. Legislators and arbitral practitioners have taken various steps in the past years to promote an arbitration-friendly culture at both a domestic and international level in Italy. Arbitration is indeed entirely possible, effective and available for solving both domestic and international disputes in Italy, and statistics show that slowly but surely arbitration is gaining increased importance. Significantly, on 8 June 2019 the Milan Chamber of Arbitration ("**CAM**") published its new arbitration rules which have been brought in line with other leading institutions. As such, it is hoped that Italy's arbitral caseload may soon pick up the pace.

## Moving away from litigation

Italy's preferred form of dispute resolution to resolve commercial disputes has traditionally been and remains domestic litigation. This is notwithstanding the Italian justice system's reputation for being slow with a considerable backlog of cases, with an average duration of judicial proceedings (both first and second instance proceedings) lasting for more than seven years.<sup>1</sup> At an international level in cross-border disputes, parties have been known to leverage the Italian court's inefficiency to their advantage to defeat a jurisdiction agreement, dubbed the 'Italian torpedo'. By bringing an action in Italy, the court of the member state in whose favour the jurisdiction clause is drafted must then wait until the Italian court, as the first court seized, has dealt with the jurisdictional dispute. In many cases, the resulting delay and expense leaves the 'torpedoed' party with little option but to settle. While EU Regulation no. 1215/2012 (Bruxelles / Bis) (the Recast Brussels Regulation) has succeeded in reducing the frequency of such actions,<sup>2</sup> the Italian court nevertheless remains clogged with cases.

Arbitration is an obvious alternative route to the oversubscribed and inefficient Italian court. Consequently, arbitration is of particular growing importance and interest in Italy, and is becoming more widely used than in previous decades.

### Italy's arbitration law

Arbitration is practised in Italy at both a domestic and international level. While the Italian arbitration legislation is not expressly based on the UNCITRAL Model Law, its principles are nevertheless incorporated.<sup>3</sup>

The law governing Italian arbitration is found in Book IV, Section VIII of the Italian Code of Civil Procedure ("**CPC**"). Articles 806 to 840 of the CCP apply to all arbitral proceedings which are seated in Italy. An arbitration will be deemed to be "international" where the parties to the proceedings have different nationalities or

are domiciled in different countries, provided that the arbitral seat is within Italy. All other arbitrations with their seat in Italy will be deemed "domestic". Italian parties are free to choose a seat of arbitration other than in Italy.

The CPC provides for two 'types' of arbitration in Italy: *arbitrato rituale* ('formal arbitration') and *arbitrato irrituale* ('informal arbitration'). *Arbitrato rituale* is by far the most common and ordinary type of arbitration in Italy. These proceedings are governed by the CPC and, as with any normal arbitral procedure, the aim of *arbitrato rituale* is to produce an enforceable award at the end of the proceedings. *Arbitrato irrituale*, on the other hand, is a unique and alternative procedure which results in a contractually binding, but not enforceable, award. If a party does not comply with the *arbitrato irrituale* award, the other party can start legal proceedings before the competent court of first instance for breach of contract against the breaching party.<sup>4</sup>

All provisions in the CPC governing arbitration are mandatory for Italian-seated arbitrations. However, parties are free to determine the rules of the arbitration and also the language, provided that they comply with the due process requirement, namely the equal right of the parties to be heard and to defend themselves.

Various Italian bodies/institutions now offer sophisticated sets of procedural rules aimed at attracting domestic and international parties. The most prominent example of this is the CAM which can conduct arbitrations entirely in English. The Piedmont Arbitration Chamber is also gaining recognition, although we understand that this is currently an Italian-language only institution. International arbitrations seated in Italy are usually administered by the CAM or the ICC. "Ad-hoc" arbitrations, where the arbitration has no additional procedural rules and is run purely according to the provisions contained in the CPC, are relatively common in Italy.

Arbitrators are mostly prevented by the CPC from granting interim relief, but preliminary relief and interim measures in support of arbitration can be requested from the Italian courts.

The key difference in which the CPC rules apply to domestic and international arbitrations is found in the way domestic and international arbitral awards are recognised and enforced. Enforcement of domestic awards requires the filing of a request with the court of the relevant Italian seat. Having conducted a formal review of the award, the relevant Italian court declares enforceability by decree. In the case of an award rendered outside of Italy, the request for enforcement must be filed with the President of the Court of Appeal. The President will order the recognition and enforcement of the award if it is satisfied that the award is in line with formal requirements, does not infringe public policy grounds, and that the dispute is arbitrable under Italian law. In relation to recognition and enforcement of foreign awards rendered in commercial arbitrations (including UK and US awards), the provisions of the CPC reflect the rules of the New York Convention on the Recognition and Enforcement of Arbitral Awards (1958) ("New York Convention"), to which Italy is a signatory. Italy is also a party to the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, the 1961 European Convention on International Commercial Arbitration and the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

**The key difference in which the CPC rules apply to domestic and international arbitrations is found in the way domestic and international arbitral awards are recognised and enforced.**

1. <http://arbitrationblog.kluwerarbitration.com/2015/12/18/the-strange-case-of-italy-and-its-distrust-of-international-arbitration/>
2. Article 31 of the Brussels Recast Regulation provides that, where the court upon which jurisdiction is conferred by an exclusive jurisdiction clause is seized, a court in any other Member State must refuse to hear the matter until the "chosen" court declines jurisdiction. This 'anti-torpedo' provision thus acts to get around strategic attempts by parties to bring cases in the Italian courts, in circumstances in which the court of another Member State has prima facie exclusive jurisdiction. This is in contrast to the original Brussels Regulation, which gave priority to the Member State court first seized of a dispute.
3. As of 2016, CAM has introduced a procedure which regulates services for arbitrations conducted in accordance with UNCITRAL. The arbitral institutions provide assistance to follow the UNCITRAL Model Law at the parties' request.
4. [https://eguides.cmslegal.com/pdf/arbitration\\_volume\\_i/cms%20gta\\_vol%20i\\_italy.pdf](https://eguides.cmslegal.com/pdf/arbitration_volume_i/cms%20gta_vol%20i_italy.pdf), pp. 464-465.



## Recent case statistics

Data provided by CAM, the main institution for arbitration in Italy, suggests that the reforms have been successful in encouraging Italian parties to engage in arbitration.

In 2007, immediately after a reform of the arbitration provisions of the CPC, the number of new cases at CAM was 99.<sup>5</sup> In 2008 and 2009, this grew to 118 and 153 respectively.<sup>6</sup> In 2015,<sup>7</sup> 2016<sup>8</sup> and 2017<sup>9</sup> the number of new cases was just over 130 per year. In 2009 the average value in dispute was around €6.7 million.<sup>10</sup> While this number dropped to €2.4 million in 2014,<sup>11</sup> it recovered in 2017 with an average value of €4.8 million.<sup>12</sup> In addition, at the upper end of the scale, 2017 saw several disputes with a value of €100,000,000 and over.

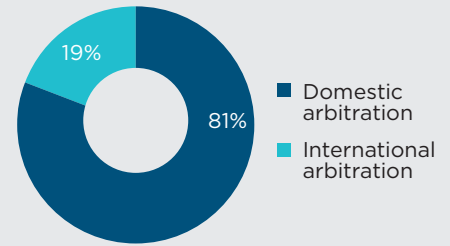
Looking specifically at CAM'S 2017 statistics, there were 131 new requests for arbitration that year. 81% were deemed

domestic arbitration and the remaining 19% international arbitration. The seat of these cases was overwhelmingly Milan, with the remaining 11.5% choosing another Italian city. 97% of cases were classed as *rituale* and the remainder as *irrituale*. 35% of cases related to corporate matters, 14.5% to construction, 9.2% to the rent, sale and concession of a business.

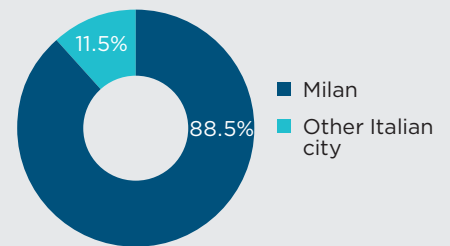
Of the 345 parties to the proceedings in 2017, over 90.4% of them were of Italian nationality (having their registered offices in Italy). 17 parties were from the European Union, and 16 were from non-EU countries.

The average duration of cases which closed in 2017 with the rendering of an award was 19 months. 64 awards were rendered, of which 59 were final, four were partial, and one was interim.

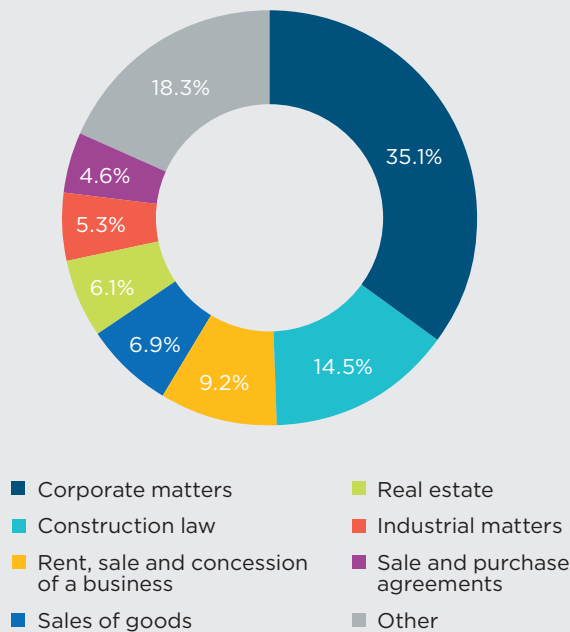
### International or domestic?



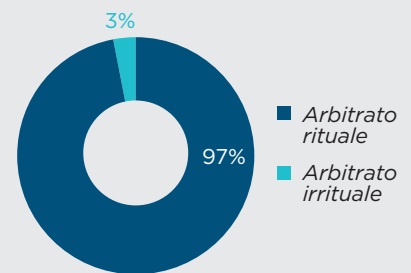
### Seat of arbitration



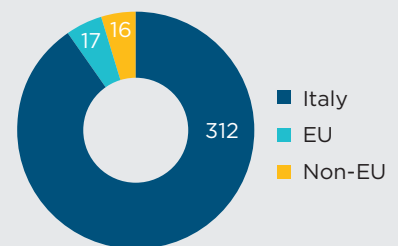
### Subject matter of arbitration



### Rituale or Irrituale?



### Nationality (registered office) of parties



5. [www.camera-arbitrale.it/upload/documenti/statistiche/2007-2012-cam-arbitration\\_facts-figures.pdf](http://www.camera-arbitrale.it/upload/documenti/statistiche/2007-2012-cam-arbitration_facts-figures.pdf)

6. Ibid.

7. [www.camera-arbitrale.it/upload/documenti/statistiche/2015-cam-arbitration-facts-figures.pdf](http://www.camera-arbitrale.it/upload/documenti/statistiche/2015-cam-arbitration-facts-figures.pdf)

8. [www.camera-arbitrale.it/upload/documenti/statistiche/2016-cam-arbitration-facts-figures.pdf](http://www.camera-arbitrale.it/upload/documenti/statistiche/2016-cam-arbitration-facts-figures.pdf)

9. [www.camera-arbitrale.it/upload/documenti/statistiche/2017-cam-arbitration-facts-figures.pdf](http://www.camera-arbitrale.it/upload/documenti/statistiche/2017-cam-arbitration-facts-figures.pdf)

10. [www.camera-arbitrale.it/upload/documenti/statistiche/2007-2012-cam-arbitration\\_facts-figures.pdf](http://www.camera-arbitrale.it/upload/documenti/statistiche/2007-2012-cam-arbitration_facts-figures.pdf)

11. [www.camera-arbitrale.it/upload/documenti/statistiche/2014-cam-arbitration-facts-figures.pdf](http://www.camera-arbitrale.it/upload/documenti/statistiche/2014-cam-arbitration-facts-figures.pdf)

12. [www.camera-arbitrale.it/upload/documenti/statistiche/2017-cam-arbitration-facts-figures.pdf](http://www.camera-arbitrale.it/upload/documenti/statistiche/2017-cam-arbitration-facts-figures.pdf)



The Italian legislators have demonstrated a firm commitment to promoting arbitration as a favourable means of dispute resolution, having reformed the arbitration provisions in the CPC in 1983, 1994, and most recently in 2006. Further, the introduction of procedural provisions applicable specifically to company disputes via Legislative Decree no. 5/2003 is thought to be an attempt to encourage the resolution of company law matters by arbitral tribunals, thus helping to lighten the case load of the Italian justice system.

The ICC's 2018 dispute resolution statistics demonstrate that ICC administered arbitration is a popular choice among Italian parties. Italian was the fifth most frequent nationality in new cases. There were 87 Italian parties in total, 38 of which were claimants and 49 were respondents.

While the recent number and value of cases reported by CAM suggests that arbitration practice may have plateaued slightly and that fewer large-scale disputes are being arbitrated within Italy itself at present, CAM's statistics nevertheless demonstrate that parties are waking up to the possibility of international arbitration in Italy. With an increased quantity of disputes to be resolved, Italy's 'arbitration machine' could be up and running at full speed. This would, of course, also assist in relieving the burden on the saturated Italian courts.

### 2019 CAM rules reform

The increase in arbitration caseload in Italy may not be far away. CAM's new arbitration rules, which were published in June 2019 and entered into force as of 1 March 2019, provide for an even more efficient system of administration of arbitral proceedings. They apply to arbitration proceedings commenced after 1st March 2019, unless the parties have agreed under Article 832 of the CPC that the arbitration proceedings shall be subject to the arbitration rules in force at the time of the stipulation of the arbitration clause (in which case, CAM may refuse to manage the proceedings). The 2010 Rules remain in force for all proceedings initiated up to 28 February 2019.

Crucially, it appears that the new rules attempt to align CAM with those of the leading institutions in international arbitration and their best practices. The main new features involve the arbitral tribunal having the power to adopt interim and provisional measures of protection with binding contractual effect on the parties (Article 26). Another key introduction is the concept of an emergency arbitrator (Article 44), who also has the power to issue provisional measures.

The rules also strengthen the standard of transparency and impartiality of the entire procedure, and include a special provision

addressing these issues in connection with third-party funding. Further, the rules cater for scenarios such as the replacement of the arbitral tribunal (Article 23). They also include a duty to act in good faith during any phase of the proceedings (Article 9).

These revisions can only help to enhance and promote Italy as a worthy venue of international arbitration proceedings.

### Comment

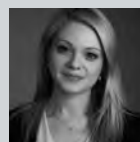
Although Italy cannot yet be considered a major arbitral hub, its practice is slowly but surely solidifying, both on the domestic and international front. The tradition of litigating commercial disputes in the domestic courts is deeply rooted in Italian legal culture and shifting away from the status quo has proven more difficult than perhaps expected. Nonetheless, legislators and arbitration practitioners continue to make great efforts to promote a new arbitration-friendly culture for parties seeking to resolve their commercial disputes. CAM's issuance of its revised set of arbitration rules last month demonstrates Italy's continued determination and commitment to this cause.

In particular, by bringing the CAM Arbitration Rules in line with rules of major international organisations such as the ICC and the LCIA, arbitral practitioners are aiming not only at increasing the practice of arbitration itself in Italy, but also promoting Italy as a potential seat of arbitration for foreign parties. This can be deemed as a welcome development, as bringing big international cases within the sphere of Italy-seated tribunals is likely to also encourage domestic parties to consider arbitration as a plausible alternative to the traditional litigation waitlist. It is hoped that the arbitration players of Italy will soon see the fruits of their labours with increased numbers of disputes trickling before arbitral tribunals, rather than stagnating in front of the already overstretched Italian judicial system.

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## Issue 2



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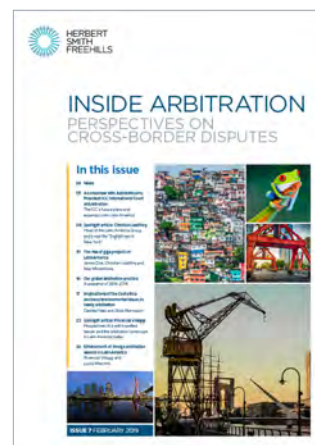
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