



HERBERT
SMITH
FREEHILLS

INSIDE ARBITRATION

PERSPECTIVES ON CROSS-BORDER DISPUTES



IN THIS ISSUE

- 04 The Client Perspective:** an interview with Jo Cross, Assistant General Counsel for Dispute Resolution and Special Projects, BP
- 08 Spotlight on: Simon Chapman, Hong Kong**
A rising advocacy star
- 10 Arbitrating telecoms disputes: dispute resolution choices in a regulated sector**
Paula Hodges QC and May Tai
- 14 What do the Russian arbitration reforms mean for you?**
Alexei Panich, Nick Peacock, Alexander Gridasov, Hannah Ambrose and Vanessa Naish
- 18 Spotlight on: Dr Patricia Nacimiento, Frankfurt**
The growing relevance of public international law
- 20 Managing an arbitration: top tips for in-house counsel**
Vanessa Naish and Hannah Ambrose
- 22 A view from Sydney**
Brenda Horrigan, Leon Chung and Elizabeth Macknay
- 24 Arbitration in India: Dispute resolution in the world's largest democracy**
Nick Peacock, Donny Surtani and Kritika Venugopal



ISSUE 4 JULY 2017



Herbert Smith Freehills' Global Arbitration Practice

Step-by-Step Guides to Arbitration

Offering a practical overview of the arbitral process,
including under the ICC, LCIA, HKIAC and SIAC Rules.

To request a copy of one of the Step-by-Step Guides,
please contact arbitration.info@hsf.com



Read our Arbitration and Public International Law blogs at

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

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

WELCOME

Welcome to the fourth issue of Inside Arbitration.

We are delighted to feature in this issue an interview with Joanne Cross, Assistant General Counsel for Dispute Resolution and Special Projects at BP. Jo reflects on BP's use of arbitration to resolve disputes and how BP lawyers work in an integrated way with external counsel. Having been involved in a number of significant arbitrations at BP, Jo considers how in-house counsel can get the best out of the process. Jo also discusses a number of developments in arbitration, including criticisms of due process paranoia, increasing transparency about arbitrators and the Equal Representation in Arbitration pledge.

Also focussing on in-house counsel's important role in the arbitral process, professional support consultants Vanessa Naish and Hannah Ambrose provide some bite-size top tips on managing an arbitration for in-house counsel. For those who would like to explore this in more detail, a podcast is available by scanning the QR code in the article.

This issue covers developments and trends in a number of jurisdictions. Partners Alexei Panich and Nick Peacock, associate Alexander Gridasov and professional support consultants Hannah Ambrose and Vanessa Naish consider the practical impact of the recent Russian arbitration law reforms on those entering into Russia-related contracts. Whilst the reforms introduce a degree of clarity in relation to certain aspects of Russian arbitration practice, they also have an immediate impact on drafting arbitration clauses for Russia-related contracts.

As head of the Indian Arbitration practice, Nick, along with Partner Donny Surtani, and Senior Associate Kritika Venugopal, also consider the most efficient and practical options for resolution of India-related disputes. In particular, the article examines whether the reforms to both the Indian courts and the Indian arbitration law can provide more confidence for the resolution of disputes in India. The authors also comment on Mumbai's new international arbitration centre, the MCIA. This article also introduces the sixth edition of our Legal Guide on Dispute Resolution and Governing Law Clauses in India-related Commercial Contracts.

In a view from Australia, partners across our Sydney arbitration practice observe the trends in dispute resolution choices for Australian companies as they are increasingly involved in business across South East Asia and beyond. Brenda Horrigan and Leon Chung in Sydney, and Liz Macknay in Perth comment on the development of Australia as a seat of arbitration, looking at specific features such as the legal framework, the attitude of the courts and the institutional support from ACICA and, for energy and resources contracts, PCERA.

Drawing on experience from across our global practice, Partner May Tai and I consider disputes in the telecoms sector, looking at the various circumstances in which telecoms-related disputes arise and the suitability of arbitration to resolve them. We draw some conclusions as to the future of arbitration in an industry sector characterised by fast-paced change and consider how the arbitration process can be adapted to suit such disputes.

We continue our series of interviews with some of our partners from around the global practice. In the spotlight in this issue are Dr Patricia Nacimiento, Partner in Frankfurt and Simon Chapman, Partner in Hong Kong. Patricia comments on aspects of her commercial and investor-state arbitration practice and considers in particular the relevance of public international law to the firm's clients. Simon reflects on the characteristics of a good advocate and provides his perspective on the arbitral process from his role as an arbitrator.

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



Paula Hodges QC
Partner, Head of Global Arbitration Practice

Editors:

Vanessa Naish, Professional Support Consultant and Arbitration Practice Manager, London

Hannah Ambrose, Professional Support Consultant and Arbitration Practice Manager, London

Briana Young, Professional Support Consultant, Hong Kong

THE CLIENT PERSPECTIVE: AN INTERVIEW WITH BP'S JO CROSS

BP's Joanne Cross discusses issues in arbitration, the nature of in-house counsel's role in the arbitration process and how in-house counsel can get the best out of it.

Jo, perhaps you can tell us something about your current role at BP and what that role entails?

My present role is Assistant General Counsel for Dispute Resolution and Special Projects. Prior to this, I managed the Dispute Resolution team based in Canary Wharf, London. My work is hugely varied and very interesting. I provide advice on contentious issues to a range of different businesses and senior management. This advice covers, for example, issues arising from BP's operations and interests in India, Russia and Algeria, as well as some US cases arising from BP's businesses outside the US. In the course of my role, I also deal with reputational issues and I provide advice, for example, on modern slavery and other business and human rights issues. I am involved in strategic thinking regarding contentious risk mitigation but also retain a role in live cases. I am currently involved in around 20 different matters.

As a disputes lawyer at the heart of BP, I find that I am brought into many and varied conversations with different parts of the business, as well as with many of BP's global functions, such as government affairs, communications, group strategic planning, company secretariat, ethics and compliance, safety and operational risk, finance and audit. Looking at things from a disputes perspective really allows the business to think pro-actively about how we can do things differently and mitigate disputes risk.

What percentage of BP's disputes is resolved by arbitration?

It really varies from year to year. Currently I would estimate around 50% of BP's non-US disputes are being resolved through international arbitration. In previous years, there has been an even higher percentage (between 60 and 70%) of our work involving international arbitration. The ratio of litigation to arbitration arises very much by chance, depending on which disputes fight and which are resolved at an early stage. This obviously depends on an evaluation of the merits of the case at a relatively early stage as well as the commercial considerations which apply to any given dispute.

The reason that BP signs a lot of contracts containing arbitration clauses is the international nature of our work. We do not have a policy mandating arbitration clauses. However, clearly many of BP's businesses have formed a view that it is often preferable in the context of their contracts - we saw a significant increase in the use of arbitration clauses around 15 years ago. In international contracts, counter-parties often seek a neutral forum.

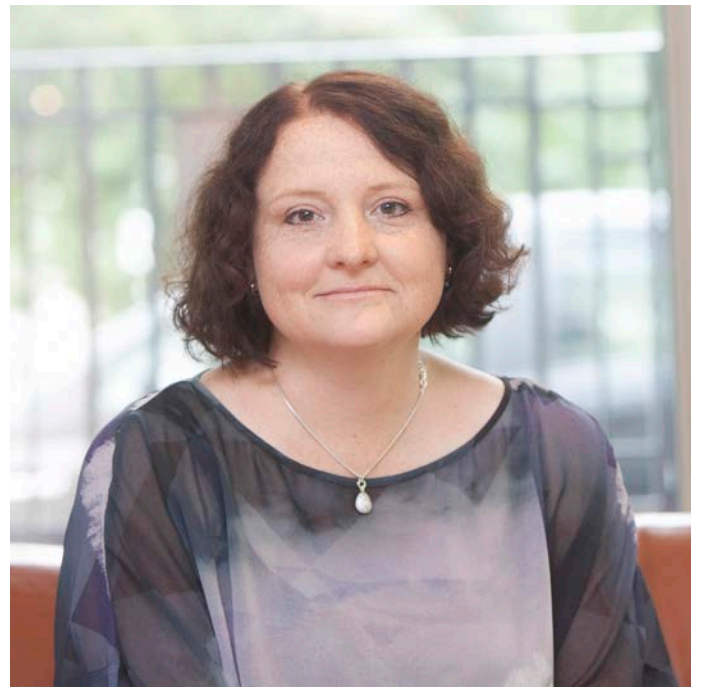
"Confidentiality is also a positive aspect but the perception of neutrality and independence is often the key driver"

Enforcement is a relevant consideration but BP has rarely had to take proceedings to enforce an award. Possibly this is because our arbitrations are often against companies in a similar position to BP in terms of their commercial position and reputation which means they tend to honour arbitral awards.

It is said that arbitration costs too much and takes too long. Does your experience suggest that the more recent focus of the institutions and practitioners on efficiency and cost-effectiveness is bearing fruit?

If you asked me about costs and delay 5-7 years ago, I would have given many examples of delay in the arbitration process. In one case we waited two years for an award! But the focus of institutions and practitioners on reducing delay really has had a practical impact on efficiency. In the past we have seen some unreasonable behaviour from arbitrators on costs - for example, a few years ago we experienced what we regarded as very high charges by the arbitrators even when a case settled very early on in the proceedings. However, recent experience has been much more positive in both these respects. There always needs to be focus on cost and efficiency because in comparison to using the courts, when you include arbitrators' fees, the final bill in an arbitration can often be greater.

We find external counsel costs are often much the same whether you are arbitrating or litigating, although using a law firm who can also do the advocacy at the hearing can be an effective way of keeping costs down. We have chosen to bring in barristers for some



arbitrations – we are open-minded and it depends on the circumstances of the case – but we had a great experience on a recent case with HSF in which the team did the oral advocacy.

In a 2015 survey respondents identified arbitrators' "due process paranoia" as leading to delays and an increase in costs. Would you agree with that assessment?

I would agree completely that this exacerbates time and costs. In one of our cases, a tribunal refused to deal with a key jurisdictional point up front when doing so could have substantially reduced costs. Other examples where the tribunal has not been procedurally strong include decisions on disclosure and procedural questions, as well as the handling of key potentially dispositive issues. I can also cite some good examples of procedural toughness so it really does depend on the arbitrator but, as a general rule, I believe users want arbitrators to be more procedurally robust.

SIAC has introduced a rule that permits the early dismissal of a claim or defence that is manifestly without legal merit, or manifestly outside the jurisdiction of the Tribunal. Do you regard this as a significant innovation which will be welcomed by users such as BP?

I am encouraged by these kinds of innovations as they help the process become more efficient. Most of the arbitration clauses which BP enters into are dealt with by the business and only a small percentage of clauses come via the dispute resolution team. Due to the size of BP, we do not and could not have oversight

of the drafting of all arbitration clauses and so it is very helpful to have these provisions come from the institutions in order for them to find their way into our arbitration clauses.

The 2010 QMUL Survey, ranked "Neutrality/Internationalism" and "Reputation/Recognition" as the top two factors for in-house counsel when choosing an institution. Against this backdrop, do you consider there is scope for local institutions to develop?

Those are the top two factors for BP's businesses when including arbitration clauses and this does mean that we are less likely to choose local institutions. However, whilst we may not propose a local institution or a different venue, we may nonetheless consider one in the right circumstances. We do often have to confront different choices of institution (as well as seat and governing law) where this is demanded by a counter-party, so there may well be a role for regional institutions in some circumstances.

"... we have had positive experiences of arbitrating in Stockholm and find the SCC is both practical and efficient"

On a general level, do you prioritise choice of substantive law or seat of arbitration?

If we could only get one and not the other we would probably go for English substantive law but obviously the seat is very important. Our preference is usually for a seat in London but we have done a number of arbitrations in other venues. For example, we have had positive experiences of arbitrating in Stockholm and find the SCC is both practical and efficient. We have not had many Singapore arbitrations recently, but Singapore is also considered to be a good choice of venue.

What was the most significant difference for you when you moved in-house?

How many different things you have to juggle in any one day! An in-house lawyer's role can be extremely intense and often requires very high levels of concentration. You can be asked any number of different questions, many of which are difficult to predict. The week ahead changes a lot from day to day and psychologically you need to be flexible to adapt to that level of uncertainty.

You have to be very nimble and think on your feet – you often do not have the luxury of being able to complete in-depth legal analysis before you give a view on what the position is. My clients are non-lawyers in BP's various businesses and, in this context, I am not likely to be thanked for giving a legally detailed view which is subject to a number of caveats. Clients are usually focussed on the end-game and do not want to take a meandering path to get there. You must be willing to give your first impression and try to be succinct and pragmatic.

Now you see dispute resolution from the in-house side, is there anything you would have done differently when you were in private practice?

Understanding how in-house lawyers work is important, as is appreciating the sheer number of different things that in-house counsel are dealing with at any one time. External counsel's advice needs to be very practical and pragmatic. I find using an external counsel who has done a secondment is a real plus. Take someone like Craig Tevendale, who has done two stints with BP in-house – Craig's knowledge about how an in-house team can be embedded with the external counsel team during an arbitration is very valuable indeed.

What is the role of in-house counsel in shaping the arbitral process?

Both arbitrators and counsel are beginning to realise that the clients want to have a louder voice in arbitrations. Six or seven years ago there were some examples of external counsel being dismissive of clients – it reflected a "closed-shop mentality". The client's voice is being listened to now far more than it was. With the external counsel who know how we work, we are engaged in far more discussion about how we can work together to make the process more efficient. If we use counsel who know us less well we may still have to push for this dialogue, and we do push for it.

So there has been a shift in dynamic in recent years. The working model I have described above, which reflects my perspective from BP arbitrations, has become more balanced between in-house and external counsel.

We have always done a certain amount of the labouring in-house when BP is involved in disputes. Ten years ago we did a couple of arbitrations purely in-house, with barristers used for hearings. The volume of disputes has increased so much that we cannot do that as much. We have the capability but not the capacity, but what we will do is take a share of the labour in-house in order to save costs. We also ensure we have a major input into strategy. We have such experience within the team that we can have an informed discussion with external counsel. We generally all come to the same conclusions. Ultimately, however, the business and in-house team will have the final say.

You have been involved in a number of arbitrations over the years. Do you have any top tips for in-house counsel in terms of getting the best out of the process?

The main advice is that you have to be embedded in the process. This is what we do in the arbitrations we do with HSF. In-house counsel must be part of the process at every

stage – not only the big strategic questions but also the detail. If we do not have a good grasp of the detail, we cannot be an effective bridge between external counsel and internal lay clients. The team structure should therefore include external and internal resources and there should be careful consideration as to the most efficient balance of resourcing from the outset.

It is also vital to get buy-in from the business stakeholders, for example, the senior person within the business who will have final say as to strategic decisions. You have to keep that person on-board and regularly updated throughout the process. If you make clear to your external counsel your internal reporting lines and the regularity with which you must report, this can make the process easier.

You are on the selection sub-committee of the ICC UK National Committee and Vice-President of the LCIA European Users Council. Do you think there is scope for a greater balance between private practitioners, barristers and arbitrators on the one hand and users of arbitration on the other hand, at institutional level?

In-house clients are increasingly having a voice and being asked to be involved in the process of arbitration. As well as the ICC and the LCIA, I am also involved in CEDR and the Global Pound Conference. I do not think in-house counsel would have been invited to take institutional roles 10 years ago. It remains a challenge for busy in-house counsel to be involved in the institutions as much as they would like but it is undoubtedly important if in-house counsel want their views reflected. I would encourage more in-house counsel to get involved and those of us who have been around longer are increasingly encouraging more junior members of our teams to participate. The institutions are making an effort to involve users, but part of the problem may be that there are not enough specialist disputes in-house counsel to fill these roles.

"In-house counsel must be part of the process at every stage..."

What are the most important characteristics in choosing an arbitrator? Does BP build up its own institutional knowledge about potential arbitrators?

We have our own institutional knowledge which we share within our team and we compare our views with our external counsel. Ultimately, the type of arbitrator you want

depends very much on the case. However, we may well seek to avoid those who over-sell themselves. We do not want to appoint someone who is too busy with many appointments. It makes it too difficult to schedule hearings. Also, if we see that an arbitrator is generally under-prepared, we will not appoint that arbitrator again.

We want strong arbitrators – particularly a strong presiding arbitrator – in terms of procedural robustness. They need a strong case management skill set which will deliver an efficient process. If an arbitrator delivered on our expectations in terms of case management, integrity, and due preparation and we felt that it was a fair process and a reasoned award, we may appoint that person again even if they had found against us in terms of substantive outcome.

Do you have any views on whether there should be some sort of equivalent to "trip advisor" for arbitrators?

Factual information is useful. For example, knowing how many tribunals an arbitrator is sitting on at any one time is valuable. Beyond this, there are a number of possible pitfalls. In terms of subjective feedback, you need to be able to trust the person who is giving the feedback and there are no safeguards against manipulation of this kind of tool. We will always speak to our own team and external counsel when selecting an arbitrator, rather than looking at a directory.

You were on the Steering Committee for the Equal Representation in Arbitration Pledge, which was launched last year and aims to increase the representation of women on arbitral tribunals. Was this kind of statement overdue?

I am really pleased to have been part of this initiative. For such a long time, the usual suspects for arbitrator appointments have been men and when you attended conferences, the vast majority of the senior attendees were men. Clients simply have not seen female arbitrators and that has to change. The Pledge has made BP reflect on our appointments and it seems that there has already been a noticeable improvement in the consideration of female arbitrators in lists of potential candidates. I hope and believe that this initiative will spark change. Certainly in my role on the ICC UK National Committee, we have been doing as much as we can to include female arbitrators.



"It remains a challenge for busy in-house counsel to be involved in the institutions as much as they would like but it is undoubtedly important if in-house counsel want their views reflected"

SPOTLIGHT ON: SIMON CHAPMAN PARTNER, HONG KONG

After Wadham College, Oxford and Nottingham Law School, Simon joined Herbert Smith's London office, where he was the first trainee in the firm's newly-established international arbitration group. He moved to Paris shortly after the London and Paris arbitration teams were formally integrated. And when the firm re-launched its China arbitration team, Simon was one of its founding members, relocating to Hong Kong in 2011, and joining the partnership in 2013. Since then, he has gained a reputation as one of arbitration's most talented practitioners and gifted advocates. He appears in Global Arbitration Review's list of "future leaders", where he is recognised as "a real up-and-comer". Last year, Simon was named Asia-Pacific Rising Star of the Year at the Asialaw APAC Dispute Resolution Awards.

Simon, you are an HSF "lifer", and were promoted to partnership as soon as you were eligible. What would you say has contributed to your success in the firm?

Mainly, it has been the opportunity to work with a group of talented lawyers and great mentors in all the offices where I have spent time. There is also an element of being in the right place at the right time. In particular, the Asian market presents huge opportunities for international arbitration; we have seen exponential growth in the time I've been here, and it is set to continue.

You have a reputation as one of the best advocates in your generation of arbitration lawyers. What makes a good advocate? Does an advocate in arbitration proceedings need different skills than one who appears before national courts?

Advocacy - written or oral - is all about persuasion. There isn't a "one size fits all" approach; the skill is in engaging with the tribunal and developing techniques to persuade each specific decision-maker. This is particularly essential in arbitration, where you have to persuade three different arbitrators,

who may come from entirely different legal and cultural backgrounds, and have widely varying expectations. It's not about bombastic, TV-style delivery. It's not even entirely about public speaking skills, although those are important. The best advocates are often the most softly-spoken and least "showy". They distinguish themselves by mastering every detail of their cases, understanding where they are most vulnerable, and addressing those vulnerabilities head on. This lets them package their arguments in the way that is most likely to appeal to the tribunal.

"Advocacy - written or oral - is all about persuasion. There isn't a 'one size fits all' approach"

Good advocates understand the importance of planning and thinking ahead, really getting under the skin of a case, so they are ready for anything in the hearing. Especially in arbitration, we can't assume that we know how the tribunal will approach an issue. It's vital to adapt on your feet, and you can do that only if you are thoroughly prepared. 90% of

your preparation may not even be apparent, but it is vital to delivering a polished product at the hearing.

Finally, never underestimate the importance of brevity. The more time you spend mastering the detail, the better you can explain it to the tribunal in a brief and compelling way. This is a truly powerful skill, particularly in complex cases with a lot of technical detail.

As well as acting as counsel, you have recently started taking arbitrator appointments. What have you learned from sitting on the other side of the table?

Sitting as arbitrator has definitely made me a better counsel. Like most people, my first few appointments have been as sole arbitrator in cases that are low value, but no less complex in terms of factual and legal detail. The parties in these cases generally don't have the benefit of experienced arbitration counsel - often they are not represented at all. More and more often, the respondent fails to participate in the case, or is deliberately unresponsive. In these situations, the arbitrator is left to weed through the papers and identify the issues him or herself. This really makes you appreciate the



value counsel can add, simply by helping the tribunal to understand the details of the case. Basic tools, like a chronology of key events, or a well drafted pleading, make a huge difference to an arbitrator.

Starting out as an arbitrator can be hard, particularly when sitting on your own, but I have been lucky to have peers I can ask for advice (without, of course, divulging confidential details of the case). Arbitral institutions play an equally important role, by supporting arbitrators on tricky procedural issues or questions of institutional practice. Support from both these sources has been invaluable.

Would you encourage younger practitioners, or even non-lawyers, to consider sitting as arbitrators?

Absolutely. It is well known that we need more diversity on arbitral tribunals. The focus has been on gender and cultural diversity, which I applaud; those are a big part of the problem. But all the stakeholders in international arbitration will benefit from an even broader pool of arbitrators, with an even wider range of backgrounds.

"It's not about bombastic, TV-style delivery"

For example, younger arbitrators are often less busy than their more established peers, so they can devote more time and attention to the case. They are also keen to build their reputations in the market, and generally go the extra mile in their work on the arbitration. Non-lawyers bring commercial, market or technical skills and experience to the process, which can be critical to understanding the dispute. I encourage them not to be put off if they don't have legal training. Institutions can appoint them as co-arbitrators together with legally trained tribunal members, or they can rely on counsel to explain the legal issues in cases where it is appropriate for non-lawyers to sit as sole arbitrator.

Diversity can only be an asset to any process. Arbitration is no exception.



GET IN TOUCH

T +852 2101 4217
simon.chapman@hsf.com

www.herbertsmithfreehills.com/people/simon-chapman



ARBITRATING TELECOMS DISPUTES: DISPUTE RESOLUTION CHOICES IN A REGULATED SECTOR

In this article, we take a high level look at the types of disputes which can arise in the telecoms sector and consider the circumstances in which arbitration may be the most appropriate method of dispute resolution. We will focus not on any particular market, but identify differences and particular challenges that arise for operators and regulators when resolving disputes which are of significant public interest and impact.

Law firms often categorise disputes by sector. It helps our clients to find the expert advice they need and it helps us, as lawyers, to identify and hone our in-depth industry experience. Some sectors, like telecommunications, are heavily regulated in many jurisdictions, and disputes in this sector may raise complex and highly technical issues. Yet some disputes are, at their core, defined not so much by sector as by aspects of the underlying transaction, such as a disagreement about contractual terms, pre-contractual negotiations or non-payment. Even many of the investor-state disputes brought by telecoms companies do not hinge on telecom-specific issues.

When can arbitration be used to resolve telecoms disputes?

Some disputes that arise in the telecoms sector are not suited to resolution by arbitration. There may already be a fixed method of dispute resolution by operation of law or regulation which cannot be bypassed by party agreement, for example, in some jurisdictions, network access, interconnection or consumer disputes.

Yet, there are some types of disputes which are ideally suited to it.

- **Arbitration of inter-operator disputes:** Operators may be able to seek resolution of their disputes between themselves without needing to use public finances (either in court, or through regulator involvement). From an operator's perspective, trying to resolve a dispute out of the public eye through arbitration may be beneficial and may enable the parties to reach an outcome which is commercially more acceptable to both. Yet that needs to be balanced against the need for the regulator to be appraised of the decision, and whether or not the regulator wants parties (and potentially then the regulator) to be bound by the tribunal's decision or to act on it.
- **Disputes between operator and regulator:** The process for resolving disputes between service providers and regulators may be laid out by statute and involve a process of judicial review. There may be public policy reasons for these types of dispute to be

resolved in the public domain. However, countries developing their telecoms infrastructure in emerging market jurisdictions and some more developed markets may be willing to permit the arbitration of disputes between operators and regulators, particularly where international investors may have concerns about the impartiality of the domestic judicial system.

- **Disputes between operator and commercial counterparties:** Contractual disputes with a telecoms "flavour" are very well suited to arbitration. When outside the reach of regulation, the parties can choose the method of dispute resolution which best suits them.
- **Disputes between foreign operator and regulator or the state more generally that cannot be resolved domestically:** Depending on the nature of the dispute there may well be the potential for investment arbitration: either on the basis of an investment contract between the service provider and the host state, an investment law which might be relevant, or an investment treaty. An investment treaty arbitration will derive from an alleged breach of treaty standards by the government acting through the regulators. The "information and communication" sector (of which telecoms forms a part) makes up 6% of the total cases brought at the International Centre for the Settlement of Investment Disputes according to the latest set of ICSID statistics. It may also be possible for a foreign operator to enlist the help of its home state in pursuing state-to-state avenues at the WTO.

Is arbitration being used to resolve telecoms disputes?

A recent study by Queen Mary University of London looked at the use of arbitration to resolve TMT disputes. The survey responses indicate that the telecoms sector stands alone amongst technology and media companies in preferring litigation and expert determination¹ for resolving their disputes over arbitration.¹ Indeed, the survey demonstrated reluctance amongst the telecoms sector to enter into any form of formal dispute resolution, preferring to attempt negotiation or mediation to resolve

disputes. Only 18% of those disputes which were not settled then went on to be pursued via arbitration, expert determination, adjudication or litigation.¹

Despite the small percentage of cases proceeding to formal dispute resolution, the survey also found that the telecoms industry was, by comparison to the rest of the TMT sector, very litigious. This suggests that the number of disputes that arise in the industry must be (comparatively) very large. 71% of respondents in the telecoms industry had experienced more than 20 disputes and 83% of those surveyed said their largest dispute was more than US\$100m. These high value telecoms disputes occur all over the world, particularly in Europe and North America.¹

Benefits of Commercial Arbitration

- A neutral forum
- Non-national dispute resolution
- The arbitrators are chosen by the parties and can be sector experts
- Party control over the design of the arbitral process
- Confidential or private process
- Enforceability of the Award in 157 countries around the world under the New York Convention

Yet the survey highlights that this institutional preference for litigation and expert determination seems to be at odds with the personal preferences of those in-house counsel responding. 92% of respondents said they thought that arbitration was well suited to resolving TMT (including telecoms) disputes and was the preferred method of dispute resolution for 42% of those surveyed.¹ Indeed, all of the benefits of arbitration highlighted above were also recognised as benefits for resolving disputes by arbitration in the telecoms sector, although notably, ease of enforcement, usually a key factor for many businesses choosing arbitration, was not considered so important in the telecoms sector.² So why then does institutional preference and personal preference amongst in-house counsel diverge?

1. QMUL Survey 2016, pp20 and 35.

2. QMUL Survey 2016, p23.

Companies often have a default position for their dispute resolution provisions. They may have model contracts from which those negotiating them are discouraged from deviating. Where regulation or national legislation requires a particular form of dispute resolution, it can often become the default across the entire business. Some concerns were also expressed about certain aspects of arbitration, such as costs, delay, arbitrator behaviour and the "over-judicialisation" of arbitration. Some commented that the same "tricks" used in litigation had found their way into arbitration.³ Others suggested that there was a need for more specialised arbitrators, and that increased sector specialism was likely to be needed in the next 10 years.

Making arbitration work for telecoms disputes

When in-house counsel were questioned about how arbitration could be improved, reducing costs was considered crucial, as was the availability of specialised arbitrators.⁴ Suggestions for improvement included better use of technology, more robust case management, limited cross-examination, disclosure and pleadings, and a schedule for the delivery of the award. Some felt that a neutral system for the accreditation of arbitrators specialising in TMT disputes, a specialised roster or the appointment of industry experts as arbitrators would help, with concerns that the "usual suspects" are often appointed.

These concerns are an important insight, but many can be overcome by drafting the right arbitration clause at the outset and then choosing the appropriate counsel and arbitrators once a dispute arises. Arbitration is, at its heart, an adaptable and flexible process. An arbitration based on a short form institutional arbitration clause can often proceed along a fairly standard timetable and procedure. However, it is entirely possible to draft an arbitration clause to stipulate a more pared-down process or the use of mandatory ADR. Indeed, this could then become the company "standard clause" in its Dispute Resolution policy when negotiating a

transaction. Clearly this has its risks; in the event that you are the claimant party and many millions are at stake, an expedited, procedurally limited process may be less appealing. Even if a pared down process is not prescribed in the contract, being clear with your counsel about your objectives for the arbitration is key. Good arbitration counsel will be able to advocate strategically for the process you want and will use their firm's knowledge of arbitrator candidates to help steer the arbitration towards a robust and efficient procedure.

Good arbitration counsel will also be able to find the right arbitrator to determine the relevant dispute. A dispute focused on the breakdown of a commercial relationship may need a good contract lawyer more than it needs a sector specialist, while a highly technical telecoms dispute may need someone with many years of practical industry knowledge and experience. However, proceeding on the basis that telecoms experience is crucial may limit the field too much. It may be that awareness of the region in which the dispute has arisen, or of largescale infrastructure projects, or, indeed, the underlying governing law, or, even, being an experienced arbitrator with a proven track record in pushing forward the resolution of the dispute may be more important. And it may be that limited arbitrator experience in telecoms can be compensated by good expert evidence. An investment treaty dispute involving a telecoms investor is likely to rest on allegations based on breaches of treaty obligations, potentially with telecoms as the underlying factual matrix, or even, with the sector of the party being somewhat irrelevant (eg issues relating to taxation of foreign companies rather than linked to its involvement in a sector). In those circumstances choosing a sector expert rather than a public international law expert would be a mistake.

Looking to the future?

The telecoms industry is typified by fast-paced change. The technology at the heart of future disputes is highly likely to change as innovation continues apace. The QMUL Survey

highlighted the expectation amongst the TMT industry that the next five years would witness more IP, data protection and privacy, licensing and data breach disputes.⁵ Many of these disputes stem from contractual relationships which will lend themselves to resolution by arbitration. Choosing to arbitrate these disputes (where permitted) is likely to be more efficient and to allow the involvement of experienced, industry expert arbitrators in comparison with national court systems.

Ultimately, it is for arbitration practitioners to demonstrate to their telecoms clients that we can overcome any concerns they may have and offer an arbitral process that can resolve these disputes of the future. Perhaps then the default will move away from litigation and expert determination towards a more tailored arbitral process.

AUTHORS



Paula Hodges QC

Partner, London
T +44 20 7466 2027
paula.hodges@hsf.com



May Tai

Partner, Hong Kong
T +852 2101 4031
may.tai@hsf.com

3. QMUL Survey 2016, p27.

4. QMUL Survey 2016, p28.

5. QMUL Survey 2016, p16.

TELECOMS DISPUTES

INTER-OPERATOR

- Between fixed network operators and mobile network operators relating to termination rates, interconnection disputes and roaming arrangements.
- True "telecoms" dispute: highly technical, operational and financial issues, often relating to complex, regulated areas.
- Failure to resolve these disputes quickly can affect national telecoms market, affect investment and ultimately limit competition.
- In the more developed and regulated of markets, where operators are of equal bargaining power, they may be allowed to resolve disputes and determine their own commercial relationship.
- If the dispute is not resolved, the regulator may step in. It may be required by national or supra-national legislation to adjudicate and resolve particular inter-operator disputes.
- Across the world, the approach is still quite varied, ranging from court resolution to enforced regulator-sponsored ADR and arbitration.

COMMERCIAL RELATIONSHIPS

- Not all commercial relationships or disputes that arise from them are focused on highly technical sector-specific or regulated issues.
- Telecoms companies enter into mergers and acquisitions and joint ventures (eg Alcatel dispute with Blackberry in relation to Saudi Arabia). They buy equipment, lease property, outsource and enter into finance agreements.
- Management and shareholders may disagree about the approach to be taken by the company (eg shareholder class action against BT).
- At their heart, these types of disputes raise questions of breach of contract, the interpretation of contractual terms and the breakdown of commercial relations. They are perhaps best described as disputes with a telecoms "flavour".

REGULATOR

- May result from resolution of inter-operator disputes, liberalization, compliance with regulatory standards, licensing fees, anti-trust or competition issues.
- Operator may seek to challenge action or inaction of regulator and it may be open to the service provider to challenge or appeal that decision. There may be some sort of judicial review process available within the national legal system (eg Globacom's legal action against the Nigerian Communications Commission and MTN Nigeria).
- Lengthy court battles and judicial decisions reviewing the decision of the regulator may ultimately undermine or limit the regulator's power. Yet, depending on national regulations and the agreement between regulator and service provider, arbitration could be an option and may serve the interests of both the operator and regulator.

CONSUMER V OPERATOR

- Disputes relating to service delivery, service costs, equipment failure.
- Dispute Resolution provisions are set out in the service contract or set by national regulator.
- Disputes are often resolved by a simple and inexpensive out-of-court dispute resolution scheme, overseen by a national body or watchdog.
- Depending on jurisdiction, potential for class actions (eg Telstra (Australia), or Talk Talk for breach of info security).

INVESTMENT DISPUTES

- Foreign investors into a national telecommunications market may bring investment disputes under bilateral or multilateral investment treaties.
- Disputes may relate to licencing issues or freeze in service tariff affecting the value of the investment (such as in Telekom Malaysia v Ghana or Telefonica v Argentina).
- May not relate to technical telecoms issues but on exercise of state authority and power over a particular investor. For example, the interpretation and application of taxation legislation (such as Vedanta Resources plc v. India or the Belize Telemedia dispute), or the process of privatisation (such as Axos v Kosovo). In each of these, the telecoms element is a factual element, but the public international law aspects are crucial in terms of the legal case.

STATE-TO-STATE

- In a truly global communications era, the ability of an operator to enter a national market, or connect to operators within the domestic sphere, is critical.
- WTO GATS commitments on the opening and regulation of telecommunications markets enable disputes which arise at a state-to-state level to be resolved before the Dispute Settlement Body (DSB) of the WTO. The dispute brought by the United States against Mexico in 2000 is a clear example of this kind of sector-specific dispute which was ultimately resolved in 2004 following receipt of a report by a DSB panel.

ARBITRATION CLAUSES IN RUSSIA-RELATED CONTRACTS: ARE YOUR DISPUTE RESOLUTION PROVISIONS FIT FOR PURPOSE?

In December 2015, Russia passed two laws¹ which introduced a number of changes to Russia's arbitration regulation in particular, to the Arbitrazh Procedure Code, the Civil Procedure Code and the Law on International Commercial Arbitration (collectively, the "Laws"). All three entered into force on 1 September 2016.

A number of Russian court decisions over the past few years had raised doubts about the arbitrability of certain types of disputes within Russia and questions were being asked about Russia's stance towards arbitration more generally. The changes brought about by the Laws are broadly recognised as an improvement. They primarily concern disputes relating to a direct investment into a Russian company (so, an indirect investment through foreign holding structures would remain untouched by the reform), and disputes which are subject to arbitration seated in the Russian Federation. However, even within this limited scope the Laws bring clarity on a number of issues, particularly on the question of arbitrability of certain types of disputes. At the same time, they increase the powers of the Russian courts to support arbitration and whilst also providing some limits to state courts' ability to intervene.

Some of the provisions also have serious implications for the choice of a dispute resolution mechanism for parties to transactions with a link to Russia. Therefore, since the changes were introduced, many businesses involved in Russia-related contracts have been considering whether they should make changes to standard policies or practices with regard to dispute resolution choices for future contracts.

"The revised framework for Russian arbitration is largely to be welcomed. However, clients will need to navigate the complexities of certain of the new provisions in the drafting of their arbitration agreements"

ALEXEI PANICH

What are "Corporate Disputes" for the purposes of the Laws?

Non-arbitrable corporate disputes, arbitrable corporate disputes and implications for choice of seat and institution

Corporate disputes are generally defined as those relating to the creation and management of, and participation in, a Russian company. The breadth of this definition led to some uncertainty as to the scope of the term "corporate dispute".

Non-arbitrable corporate disputes

The Laws have, to a degree, clarified the position and established a general presumption that corporate disputes are arbitrable. Simultaneously, the Laws provided a specific list of corporate disputes which are not covered by that presumption (ie are non-arbitrable). This list includes *inter alia* the following disputes:

- those relating to the convening of general shareholders meetings;
- those concerning tender offers;
- those arising out of acquisition and buy-back by a company of its own shares; and

- those connected with the expulsion of a legal entity's participants.

Specific attention was paid in the Laws to disputes relating to companies holding strategic status under the Federal Law No. 57-FZ "On Procedure for Making Foreign Investments into Entities having Strategic Importance for the State Defence and Security" dated 29 April 2008 (Strategic Law). Such disputes are generally non-arbitrable, unless related to ownership over shares or interests, the transaction of which did not require approval under Strategic Law.

Non-arbitrable corporate disputes shall be determined by the Russian arbitrazh (state) courts at the place of the Russian target company's business.

Arbitrable corporate disputes

Arbitrable corporate disputes can be divided into two sub-groups, discussed below. The different treatment of these two sub-groups has significant implications for the choice of arbitral institution and seat which should be considered at the stage of drafting agreements.

Group 1:

Examples include disputes arising out of: the incorporation, reorganisation and liquidation of legal entities; claims by shareholders to recover damages caused to a legal entity and for the invalidation of transactions made by a legal entity; and agreements relating to the management of a legal entity, such as Shareholders Agreements.

Group 1 corporate disputes must:

- be administered by a "permanent arbitration institution" (see further below);

1. The Federal Law On Arbitration (Arbitration Proceedings) in the Russian Federation and the Federal Law on Amendments to Certain Legislative Acts.



Key changes

1. Positive changes to the laws
Increased court powers:

- to appoint arbitrators and deal with challenges to arbitrators
- to assist in the taking of evidence

Arbitration agreements:

- clearer requirements as to electronic form arbitration agreements
- pro-arbitration bias: any doubts to be interpreted in favour of validity and enforceability
- arbitration agreements may be included in the charter of a legal entity provided that this is approved by all of the entity's shareholders. An arbitration agreement may not be included in the charter of a public joint company or a joint stock company with 1,000 voting shareholders or more.
- an arbitration agreement continues to be in effect in the event of assignment of the principal contract to a new creditor / debtor.

2. Arbitrability of disputes in Russia
As a rule, all disputes now are arbitrable, unless otherwise envisaged by law. The Laws set out a (non-exhaustive) list of disputes that are non-arbitrable, including:

- bankruptcy cases;
- administrative disputes;
- labour disputes;
- class actions;
- disputes relating to public procurement (until such time as a specific law governing arbitral procedure in relation to such type of disputes is introduced); and
- corporate disputes.



- have a seat in Russia;
- be heard in accordance with special rules of procedure for corporate disputes to be adopted by such institutions; and
- be subject to an arbitration agreement between the legal entity itself, all shareholders / participants and other parties who are to be claimants / defendants.

Group 2:

This category includes disputes regarding ownership over shares, interests in legal entities, the creation of encumbrances over such shares/interests or the exercise of rights arising therefrom (eg SPAs).

Group 2 corporate disputes must be administered by a permanent arbitration institution, but need not have a seat in Russia.

Entering into an arbitration agreement for an arbitrable corporate dispute

Arbitration agreements with scope to cover arbitrable corporate disputes may be validly concluded only after 1 February 2017. Those concluded before 1 February 2017 but after 1 September 2016 (the date when the Laws entered into force) are treated under the Laws as inoperable, with the result that the Russian arbitrazh (state) court may take jurisdiction over the substance of any dispute.

Further, the position is not straightforward with regards to arbitration agreements concluded before 1 September 2016. It is not sufficiently

clear now whether the above restriction has retrospective effect, and applies to arbitration agreements entered into before the Laws came into force (ie before 1 September 2016). However, in any event, reliance on any existing arbitration agreement which is inconsistent with the new Laws adds significant risks, particularly with regard to the enforceability of any award rendered under such agreement.

On this basis, it is advisable that all arbitration agreements in Russia-related contracts concluded before 1 September 2016 are reviewed and amended to ensure that all corporate disputes are referred to a permanent arbitration institution, and are seated in the Russian Federation where mandated by the Laws.

What is a "permanent arbitration institution" under the Laws?

As described above, arbitration of Russian corporate disputes (whether or not seated in Russia) and arbitration of all Russia-seated disputes (regardless of what the dispute relates to) may only be administered by a permanent arbitral institution (a PAI). To be a PAI, an arbitration institution requires a permit (or licence) from the Government of the Russian Federation. Whilst the approach may appear, on its face, protectionist, it has been introduced to try to avoid the conflicts of interest that have arisen when corporations set up their own "pocket" institutions to administer disputes to which they are party.

However, a consequence of this approach is that parties may not be able to choose their favoured international arbitral institution for resolution of Russian corporate or Russia-seated disputes. Many of the international arbitral institutions have not yet decided whether to apply to the Russian Government for a licence as a PAI. At a recent arbitration conference held by the Russian Arbitration Association in Moscow, it was confirmed that the Vienna International Arbitration Centre (VIAC) and the Kuala Lumpur Regional Arbitration Centre (KLRCA) have decided to register. At the same event, representatives from the ICC, SCC, HKIAC, SIAC and Swiss Chambers' Arbitration Institution indicated that those institutions were undecided or considering their approach. Anecdotal feedback suggests that the institutions are hesitant to risk being seen to compromise their independence by virtue of registration and are also considering the tax implications.

It should be noted that the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry (ICAC) is exempt from the licensing requirement and may administer Russian corporate disputes.

Planning ahead arbitration clauses which contemplate registration of institutions in the future

Many commercial parties are accommodating the uncertainty as to which institutions will be



a PAI into their arbitration agreements. For instance, the parties often agree on an arbitration clause which provides for dispute resolution by the ICAC (or another licensed institution at the signing date) by default, with another preferred institution to take the place of the ICAC for any disputes which arise after that institution becomes eligible to hear corporate disputes. To maximise the chances of an arbitration being administered by a preferred institution, the parties can provide for a certain priority ranking (eg LCIA – first priority, ICC – second priority, etc.) in the arbitration agreement.

Other important drafting points for Russian-related arbitration agreements

When drafting arbitration agreements which provide for a Russian seat, it is important to be aware that certain provisions may not be incorporated by reference (including certain of the chosen institutional arbitration rules). Rather, such provisions require express and direct agreement by the parties. For example such direct agreement may prohibit any assistance by the Russian courts in appointment of the tribunal in cases where the appointment mechanism fails.

Parties may also expressly exclude by direct agreement the right to apply to a Russian court to challenge the tribunal's jurisdiction and the

right to apply to set aside an award, including on the grounds of public policy. Many commercial parties are keen to exclude any potential for court challenges to the extent possible and it is important to note that this must be done expressly.

Make sure that reference is made to a particular arbitral institution, not only to the rules of that institution. This point arose from a decision of the Russian court.² Although this position was further overruled by the higher court,³ it is still recommended to mention the arbitration institution itself in arbitration clauses in order to avoid any risk of the arbitration agreement being found to be unenforceable.

A mixture of corporate and non-corporate disputes: dealing with consolidation of multiple arbitrations

The particular requirements as to corporate disputes lead to further drafting complexities when the transaction in question could lead to both corporate and non-corporate disputes and the parties wish to include the possibility to consolidate the arbitrations arising under different related agreements. Despite the modernisation of the legal framework in Russia, many parties remain reluctant to select Moscow as a seat of arbitration unless they are obliged to do so by Russian law. However, in certain circumstances consolidation provisions could fail, for example, when parties have agreed on a foreign seat but are required by the Laws to arbitrate part of their dispute in Russia. It may also lead to potential problems with conflicting decisions from different tribunals.

It will be important to consider the best solution in the circumstances of any particular transaction, considering whether corporate and non-corporate disputes will arise under the same factual matrix. This will depend on a number of factors, including the likelihood of inter-related corporate and non-corporate disputes arising, and the priority which the parties give to the seat of arbitration.

Many parties have historically been wary of selecting Moscow as a seat of arbitration, because (*inter alia*) of the risk of interference in the process from the Russian courts. Despite

the uncertainties and complexities as described above, the reforms constitute a well-intentioned, significant and positive step towards increasing confidence in the choice of arbitration in Russia. A consistent interpretation of the Laws by the Russian courts over the next few years, demonstrating judicial support for arbitration would further assist Moscow in attracting international parties to arbitrate there.

To discuss whether your dispute-resolution provisions in Russia-related agreements require amendment, please contact Alexei Panich or Nick Peacock, or your usual Herbert Smith Freehills contact.

AUTHORS



Alexei Panich
Partner, Moscow
T +7 495 36 36515
alexei.panich@hsf.com



Nicholas Peacock
Partner, London
T +44 20 7466 2803
nicholas.peacock@hsf.com



Alexander Gridasov
Associate, Moscow
T +7 495 36 36536
alexander.gridasov@hsf.com



Hannah Ambrose
Professional Support
Consultant, London
T +44 20 7466 7585
hannah.ambrose@hsf.com



Vanessa Naish
Professional Support
Consultant, London
T +44 20 7466 2112
vanessa.naish@hsf.com

2. Resolution of Moscow circuit Federal Arbitrazh Court dated 13 March 2012 in the case No. A40-29251/11-68-256, A40-21119/11-68-183.

3. Resolution of the Presidium of Russian Supreme Arbitrazh Court dated 16 July 2013 No. 2572/13.

SPOTLIGHT ON: DR PATRICIA NACIMIENTO PARTNER, FRANKFURT

Dr Patricia Nacimiento has a leading reputation in the world of both commercial and investment treaty arbitration. Here she reflects on her career to date, the increasing role of public international law in disputes and the global nature of her practice.

What attracted you to a career in international arbitration?

Cross border disputes are like the Tower of Babel. There are different laws and languages, legal backgrounds and traditions, practices and expectations that those involved in the dispute may simply fail to understand each other.

Navigating cultural difference is a familiar situation for me. I was born in Germany, but come from a family of seven with five different nationalities - parents from Paraguay and Argentina, originally from Italy, siblings born in Brazil and the US, I was raised at the French-German border, and married a Dane. Having lived, studied and worked in all of these countries, speaking these languages and understanding the culture, I was thrilled to learn about the existence of international arbitration. Interviewing for my first job with a US partner who was to become my mentor and who at the time was amongst the few dedicated arbitration practitioners in Germany, I was naturally attracted to the practice area and immediately hooked - this has not changed since then.

International arbitration is designed to create a level playing field in this situation. It requires counsel who can act as translator, making sure on the one hand that the voice of the client is heard, and who can contribute on the other hand to finding a common language. In today's world a profound understanding of diversity as well as cross cultural experiences are essential.

You act as counsel on commercial and investment treaty arbitrations - what are the similarities and differences in how you approach the work?

In terms of procedure, conducting a commercial or investment arbitration may not look very different. These similarities, however, are only on the surface. A sovereign State as party in an arbitration brings in fundamentally different issues to the proceedings. Political considerations as opposed to mere legal considerations need to be taken into account. Also the decision-making process within a State has an impact on the proceedings. The same applies to the choice of witnesses, the submission of documents and the selection of experts.

You have a degree in political science - do you find this helpful in your investment treaty work?

Absolutely. Handling the political dynamics is crucial when working for states. It is important to understand fully the position of the State and to ensure proper involvement of all relevant state bodies. At the same time, the decision-making process within a State must be respected and complied with, as well as a rather high degree of formality.

Can you comment on the relevance of public international law for the firm's clients?

Public International Law (PIL) nowadays more than ever, is of practical relevance for our clients. Investment protection is actually one

of the few but also the most important area of practical application of PIL. In this area, PIL not only provides the legal basis for investment protection but at the same time also offers a means for dispute resolution. It is quite unique that PIL treaties directly reach out to non-state parties.

In these political times, PIL and the protection that it provides is more important than ever. Cross-border trade and international relations need to be safeguarded. PIL is also a tool for peace keeping and the development of global values. It substitutes military aggression by, for example, sanctions or negotiations and solutions in state-to-state disputes. It is further one of the decisive factors for fostering human rights in business relationships.

Last not least, for our clients, PIL is a central element in their investment planning, because it provides them with a mechanism to enforce their foreign investor rights which would remain otherwise only a piece of paper. To give you an example, a client planning a major investment abroad will have easier access to financing or governmental investment guarantees if an effective law enforcement mechanism is in place.

But I believe that PIL and investor-state arbitration also help states. PIL can help to implement good governance, where State institutions would otherwise be unsuccessful. This is well reflected in the international efforts to ban corruption.

Could you comment on the role of PIL in successfully resolving investor-state disputes which may, in the past, have escalated to state to state level?

I would dare to say that before PIL was enforceable through investor-state arbitration, there was practically no effective means to resolve investor-state disputes. Diplomatic protection is not in a position to grant the same level of protection and is rather limited. And even if an individual managed to get the diplomatic machinery up and running, actual compensation cannot be guaranteed.

Since 2008 you have been appointed by Germany to the ICSID Panel of Arbitrators and Mediators, which must be a great honour. Germany is, however, one of the countries in which investor-state arbitration has been (and still is) a hotly debated topic, both in the context of the investment chapter in the CETA and more generally. Do you have any comment on the future of investor-state arbitration?

I consider the appointment by the German government both a great honour and responsibility. I have actively engaged in the ongoing debate on investment arbitration from the very beginning. I engaged with the aim of providing facts in a debate which was mostly emotionally fuelled. The debate started in Germany; while it has quietened down recently, the effects are still perceptible in a general criticism not just against investment arbitration but against arbitration generally. My view is that investment protection is here to stay. While it may not be a perfect system it is the best available and there are no alternatives in sight. The system of investment protection together with its dispute resolution mechanisms has evolved to be one of the globally most important tools for safeguarding the international economy, peace and human rights. At the same time, the debate has helped in not allowing us to be too complacent about the existing system. Criticisms and shortcomings of the system need to be addressed and the debate has certainly contributed to highlight this.

What is the most important thing for in-house counsel to anticipate at the start of arbitration proceedings?

In my view, the most important thing for an in-house counsel at the beginning of an arbitration is to properly brief all relevant staff members of the company about the arbitration, and ideally designate a team that assists the external counsel team on all issues. In-house counsel and external counsel need to work closely together to achieve the best result. This also ensures that a proper case strategy is devised early on and that each relevant decision in the case is jointly taken. Actually,



clients can save a lot of time and costs if their staff fully understands which documents are needed to advance a case or which person can provide the relevant witness testimony. Having a full understanding of the case, its strengths and its risks very early on and before starting formal proceedings, is crucial for the success of the working relationship between in-house and external counsel.

The German practice is thriving (see Issue 3 of Inside Arbitration) but in the last few years you have also worked on matters relating to many other countries including Russia, China, India, Saudi Arabia and most European countries. How does the German arbitration practice fit within the global International Arbitration practice?

I am a German qualified attorney, based in Germany but servicing clients all over the world. These can be German clients with disputes taking place outside of Germany, governed by laws other than German law or, vice versa, clients from outside of Germany with disputes relating to Germany or governed by German law. Many of the cases I handle have no connection to Germany and clients come from different parts of the world. The matters can be commercial arbitration, investment arbitration, arbitration-related court proceedings or asset tracing and recovery.

In any event, I will proceed with a team tailored to the specific matter - the right people in the right places and covering whatever is required in the case: applicable substantive and procedural law, sector or technical expertise, location, language and so on. This is usually a cross border team composed of members

from different offices or where necessary also other law firms or experts. Within HSF, we work seamlessly and appear before the client as one HSF team independent of where the individual members actually sit. For example, I recently represented a German client in a London seated arbitration governed by English law where my London colleagues advised on English law and were a natural part of the team. Global team work on many different levels is required for asset tracing and recovery. I am currently representing a client in asset tracing and investigation with a team working in various European States, in Central Asia and in off shore jurisdictions. We are able to handle most of this with our own resources working hand in hand, and we draw on external resources working closely with us, were required.

How would your team describe you?

Up in the air and down to earth....



GET IN TOUCH

T +49 69 2222 82530
patricia.nacimiento@hsf.com

www.herbertsmithfreehills.com/people/dr-patricia-nacimiento

MANAGING AN ARBITRATION: TOP TIPS FOR IN-HOUSE COUNSEL



1 MAKE USE OF RELEVANT GUIDANCE

- Various arbitral institutions have produced a guide for parties and/or their in house counsel.
- Check the websites for guides and notes. For example the [ICC in-house counsel guide](#) raises important tactical questions for in-house counsel to discuss with their internal and external teams at each stage of proceedings. It is useful even if your arbitration is proceeding under a different institution's arbitration rules.
- Ask for guidance on what to expect from external counsel. For example HSF has a number of step by step guides to arbitration under various institutional rules.



2 CHECK IF YOUR AWARD WILL BE ENFORCEABLE

- Where would you enforce your award? Are the courts of that jurisdiction or those jurisdictions likely to be "arbitration friendly"?
- What would be the costs of and how long will it take?
- Consider insuring enforcement risk?



3 GET THE RIGHT TEAM

- Think about possible additions to the internal team. If the case will feature a considerable administrative burden (eg collating documents or disseminating information), can legal costs or internal management costs be reduced by hiring a paralegal to manage aspects of the case?
- Do you need to add to your external team? Engage a PR firm to work with your legal team (eg in a case which is wholly or partially in the public domain)? Bring in external IT support to harvest documents?



7 BE VERY CLEAR WITH YOUR LEGAL TEAM: CLARITY FROM THE OUTSET AS TO YOUR EXPECTATIONS

- Who will approve pleadings, attend hearings etc. Plan for the right people internally to be available at the right time. Make the line of command clear, reduce costs by collating comments in-house.
- Discuss whether any balance is to be struck between winning, cost, quality and speed.
- Consider the frequency of, for example, WIP updates, summary emails, and reports for the board.



8 PREPARING STAFF FOR AN ARBITRATION HEARING

- Make witnesses available to external counsel for discussion of the process of giving evidence.
- Where your company's management or staff are giving evidence before an arbitration hearing, offer support. Addressing concerns head on is likely to ensure that the evidence they give is accurate and more confident which will ultimately assist the case.
- If organising the logistics for the attendance of yourself and witnesses, document the costs clearly to make them more readily recoverable.



9 WAITING FOR AND RECEIVING AN AWARD

- Manage expectations to the time it may take to get an award.
- External counsel are likely to receive the award before you. It may take some time to analyse the award (which may be lengthy) so that they can explain the reasoning for the tribunal's decision and its implications.



4

CONSIDER CASE MANAGEMENT: INTERNAL MANAGEMENT AND HOW YOU WILL WORK WITH EXTERNAL COUNSEL

- Focus on efficient and stream-lined internal management to help to reduce time and costs. Who will be the main contact for your external lawyers? How much authority do they have to make decisions in the case?
- How will you divide labour between in-house counsel and external counsel? Consider whether in-house counsel should be virtually embedded in the external legal team.



5

FAMILIARISE YOURSELF WITH THE LIKELY STEPS AND PEAK COSTS

- Anticipate periods in which your involvement is at its peak.
- Assist your financial management of the dispute and manage the expectations of any budget holders by asking external counsel to pinpoint periods of increased busyness.



6

PLAN AHEAD WITH DOCUMENTS AND WITNESSES

- Consider document retention and document creation at an early stage. Prevent creation of unnecessary but potentially discloseable documents – particularly informal emails.
- Discuss with external counsel how best to approach the document production process: where are documents held, in what form, and how can they be harvested?
- Who are the witnesses of fact? Is there a risk that an individual may be leaving the organisation or that the counter-party may want to rely on the testimony of the same witness, for example, a third party?



10

CONSIDERING CHALLENGE OF THE AWARD

- Engage with external counsel at short notice, and make quick decisions in order that the opportunity to challenge an award is not lost.
- Be prepared for a frank discussion as to the likely success of a challenge, the aims (whether to actually overturn the award or to seek a compromise on payment etc) and whether the costs of the process are too great for the likely return.



11

CONSIDERING CHALLENGE OR ENFORCEMENT OF THE AWARD

- Consider enforcement whether you win or lose.
- If you win, consider where you will enforce and instruct local counsel if necessary. If costs of enforcement are high, consider mitigating steps (eg a compromise with the losing party, insuring the risk of non-enforcement).
- If you lose, consider whether to pay. If not, consider grounds for resisting enforcement and the potentially substantial cost and time involvement in an enforcement challenge.



For more information on managing an arbitration, please scan the QR code above using the QR code reader on your device to listen to the podcast by Vanessa Naish and Hannah Ambrose on the HSF Arbitration Notes blog.

AUTHORS



Hannah Ambrose
Professional Support
Consultant, London
T +44 20 7466 7585
hannah.ambrose@hsf.com



Vanessa Naish
Professional Support
Consultant, London
T +44 20 7466 2112
vanessa.naish@hsf.com

A VIEW FROM SYDNEY

With the proliferation of Australian investment in South East Asia and further afield, effective means of resolution of cross-border disputes have become paramount. In this view from Sydney, partners Brenda Horrigan, Leon Chung and Elizabeth Macknay consider the growth of arbitration in Australia and Australia's efforts to promote itself as a seat for arbitration.

Introduction

Australia is one of Australasia's most politically and economically developed countries. After its colonisation in the 19th century, six Australian states formed the Commonwealth of Australia in 1901. Since then, Australia has had a stable liberal democratic political system. Similarly, Australia's economy has been strong over the decades. This is reflected in Australia's GDP, which in the year to March 2017 was at A\$1,684.2 billion (for a nation of ca 24 million citizens) (Source: Australian Bureau of Statistics).

In addition to having a well-developed political and economic system, Australia has a strong judicial and legal system. Its law at both federal and state level is largely based on and has developed alongside the English common law system and courts exist at both state and federal level and their decisions are independent and fair. As a result, Australian companies have for some time relied almost exclusively on the Australian court system to resolve their disputes.

However, Australian corporates are increasingly also looking at alternative dispute resolution mechanisms. "The main impetus for this change is the rapid development of Australia's modern economy and its increasing inter-connectedness with global markets," states Brenda Horrigan, Sydney partner and Head of International Arbitration (Australia). Already a significant part of Australia's economy today relates to foreign trade. For example, Australia has a significant direct investment presence abroad, with the stock of investment valued at A\$554.9 billion at the end of 2016 (Source: Australian Bureau of Statistics). It is expected that this trend will continue. One third of the top two thousand Australian companies on average hold investments in four to five jurisdictions outside

Australia, and it is estimated that a good 85% of those are looking to increase their geographic footprint (Source: Austrade).

Increase for demand for arbitration in Australia

Sydney partner and arbitration specialist, Leon Chung, observes: "As Australian companies engage in more trade and investment in the region, arbitration as the preferred choice of dispute resolution mechanism becomes more and more attractive. There is much more demand for arbitration clauses in contracts than, say, 10 years ago."

Australia is only at the beginning of this development. Australian parties are not as highly represented in the statistics of the international commercial arbitration institutions as some of their competitors based in other countries. However, the numbers are increasing. All of the major global arbitration institutions are reporting an increase of Australian- or Australian-related arbitrations. SIAC, for example, ranked Australia as the 15th most common nationality of a party in 2010, whereas it was ranked 5th in 2015. Similarly, the HKIAC ranked Australian parties at 6th place in 2015, when it did not even make the top 10 in 2014.

"Other regional hubs, such as Hong Kong or Singapore, are often the preferred choice of seat for arbitrations involving Australian parties"

There are good reasons for this development. Australian companies recognise in particular that in dealing with companies based in other

Australasian countries, Australian court judgments are generally not enforceable, whereas arbitration awards are. Hence, opting for arbitration significantly decreases their counterparty risk. Brenda Horrigan adds: "The presence of a workable dispute resolution clause – which for most cross-border disputes means an arbitration clause – is not only relevant when legal proceedings are inevitable. To the contrary, we assist many of our clients in early negotiations with respect to a budding dispute. The parties' bargaining position is significantly improved if the underlying threat of legal proceedings, which can actually be enforced against the counterparty, is not an empty one."

In addition, another draw card for arbitration which is often relied on by Australian companies is the private and confidential nature of the proceedings. Large multinationals based in Australia do not want to expose their business to competitors through a public court process.

Companies also refer to the finality of the proceedings as a factor in favour of arbitration. Court proceedings can invariably drag on, especially if an appeal process is included. Arbitration, on the other hand, provides finality and certainty, which is a factor in its favour.

Thus, with the trend of increasing cross-border investments and trade, Australian companies are looking to arbitration more and more as an effective dispute resolution mechanism. As Liz Macknay, a partner in Perth, observes: "Large multinationals have been using arbitration for a while now. Smaller companies, which are now branching out into the AsiaPacific region, are becoming increasingly aware of it and giving it serious consideration when choosing the appropriate dispute resolution mechanism."



Australia as the seat of arbitration

This does not mean that arbitrations necessarily take place in Australia. Other regional hubs, such as Hong Kong or Singapore, are often the preferred choice of seat for arbitrations involving Australian parties. This may be the case for a number of reasons. Location plays a role. Often, the Australian party initially suggests in the negotiations an Australian seat, but the counterparty pushes back with a request for a 'mid-point' jurisdiction such as Hong Kong or Singapore. In particular, Singapore and Hong Kong have strong reputations for being arbitration-friendly jurisdictions. Australian parties are generally accepting of those jurisdictions as they are also based on common law.

Having said that, Australia is working hard to increase its attractiveness as a seat. The government is very supportive of arbitration. In 1974, Australia enacted the International Arbitration Act 1974 (the IAA), which incorporated the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, later, the UNCITRAL Model Law on International Commercial Arbitration into Australian law. Since then, the IAA has been amended to keep pace with developments in international arbitral practice. In fact there are currently proposed reforms underway which are intended to deal with uncertainty created by some case law. Similarly, all six Australian states have adopted the Model Law in their state-level arbitration acts (the last one, the Australian Capital Territory, in March this year.)

In addition, Australian courts generally produce steady and reliable pro-arbitration decisions. The Chief Justice of the Federal Court, Allsop CJ, put it succinctly that "the bedrock of an "arbitration-friendly" jurisdiction, both domestically and

internationally, remains whether domestic courts are supportive or interventionist in their approach to arbitration" and that Australia delivers in that regard. In particular, through decisions such as the recent *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*, the judiciary has made it clear that it subscribes to the pro-enforcement principle of the New York Convention and the Model Law.

The same goes for the private sector.

In 1985, the Australian Centre for International Commercial Arbitration (ACICA) was established as a not-for-profit organisation. ACICA is the preeminent arbitration institution in Australia catering for cross-border dispute resolution.

"Australian courts generally produce steady and reliable pro-arbitration decisions"

ACICA has its headquarters at the Australian International Disputes Centre (AIDC) in Sydney, and also has registries in Melbourne and Perth. The number of international arbitration cases registered every year by ACICA varies greatly, but does not go beyond the double-digits. However, although ACICA might not (yet) have the case load of other recognised institutions in the region (such as the Singapore International Arbitration Centre (SIAC) or the Hong Kong International Arbitration Centre (HKIAC), ACICA has a good and up to date set of arbitration rules and an able and dedicated case administration team. It is a real alternative to other established institutions in the region.

Arbitration organisations that have been active in promoting the use of international arbitration by Australian parties also include the Australia branch of the Chartered Institute of Arbitrators and more specialist organisations such as the Australian Maritime and Transport Arbitration Commission (AMTAC) and the Perth Centre for Energy and Resources Arbitration (PCERA). AMTAC is a specialist commission of ACICA set up to provide services to the shipping and transport industry in the efficient resolution of disputes. AMTAC is widely used for shipping disputes.

PCERA is a relatively new institution set up in 2014 to assist with disputes in the energy and resources sector, Perth being home to a concentration of energy and resources companies. It maintains a panel of expert arbitrators with particular expertise in the energy and resources sector. PCERA publishes

a modified version of the UNCITRAL Arbitration Rules that, along with the accompanying PCERA Arbitration Principles, are particularly suited to the cost and time efficient resolution of energy and resources disputes. Whilst PCERA is still young, we are seeing an increasing number of companies operating in the energy and resources sector nominating PCERA in arbitration clauses.

As use of arbitration by Australian parties continues to increase, we expect to see growth in both the number of arbitrations seated in Australia and the number of cases heard by institutions in other seats, but involving Australian parties.

Conclusion

Whether the seat of the arbitration is in Australia or elsewhere, ultimately, makes little difference to Australian clients. "Other than the few days of the hearing, the proceedings can be, and are, conducted from Australia. This is often the easier solution for the Australian-based client, when witnesses, documents and instructing counsel are located in Australia" explains Brenda Horrigan.

Brenda has recently relocated from Shanghai, where she headed the HSF office, to Sydney in recognition of the growing demand for arbitration specialists in Australia. "It is an exciting move. All my career, I have worked in emerging markets, in particular, the countries of the Former Soviet Union and China. Australia is quite different in that it has a well-established economy and court system, but the use of international arbitration in Australia is nevertheless in an emerging phase, as many Australian companies are only recently beginning to appreciate the advantages of arbitration for their cross-border dealings."

AUTHORS



Brenda Horrigan
Partner, Sydney
T +61 2 9225 5536
brenda.horrigan@hsf.com



Leon Chung
Partner, Sydney
T +61 2 9225 5716
leon.chung@hsf.com



Elizabeth Macknay
Partner, Perth
T +61 8 3211 7806
elizabeth.macknay@hsf.com

ARBITRATION IN INDIA: DISPUTE RESOLUTION IN THE WORLD'S LARGEST DEMOCRACY

'Incredible India' (as the tourist marketing campaign describes it) has an economy growing at 7% a year, a population of 1.2 billion of whom some 65% are below the age of 35, and an outward-facing, English speaking business community boasting international players in steel, manufacturing, pharmaceuticals, telecoms, IT consultancy, to name but a few. No wonder India remains high on the list of cross-border traders and investors. But challenges go hand in hand with opportunities, especially when it comes to enforcing legal rights and resolving disputes. Where does international arbitration sit in this, and what is best practice for resolving India-related commercial disputes?

Nick Peacock, Donny Surtani and Kritika Venugopal of Herbert Smith Freehills' India Disputes group explain the options.

THE DISPUTE RESOLUTION AND ARBITRATION LANDSCAPE IN INDIA

Dispute resolution options for foreign companies in India

Indian litigation – patience required

The Indian judiciary is vast at some 17,000 judges, and while it boasts many professional and diligent judges, the system is under strain. With almost 24 million cases currently pending in the system,¹ the courts are understaffed, meaning bottlenecks and delays are endemic. Depending on the court, commercial cases may take in the region of 5, 10 or 15 years to reach judgment. In such an environment, commercial cases may even be abandoned as they eventually approach trial, as the pace of development, inflation, and the passage of time render the original dispute no longer relevant or economic to contest. Such distant trials render the question of 'interim' relief all important. Indian court litigants fight with aggression and creativity to achieve interim injunctions pending trial which can often effectively decide a dispute for all relevant commercial purposes.

The principles of Indian commercial law will be familiar to many common law practitioners, albeit that outside the main commercial hubs, the depth of experience of complex and strategic commercial or financial disputes can be limited. So too can familiarity with international arbitration and investment treaty arbitration.

Reform is underway although headline initiatives can sometimes be harder to see in practice on the ground. The government of Narendra Modi has embraced the long-debated concept of a 'Commercial Court' in India. The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act was passed in 2015 with the objective of creating Commercial Divisions with the High Court and Commercial Courts at a District level. However, while some judges have been designated to hear commercial cases, there is little sign of extra personnel or resources. The practicality is that rather than easing the burden of the courts, it is the same heavily-burdened courts which have been

1. As of May 2017: http://njdg.ecourts.gov.in/njdg_public/main.php





repackaged to hear commercial cases; which practitioners on the ground believe do not really help the base issue.

In the meantime, the Indian courts are widely watched and widely accessed including by public interest litigants who file suits to challenge the acts of government, individuals, and corporations, creating further obstacles to action in a country already replete with bureaucracy.

All of this means that Indian courts are ideally admired from a distance or with the curiosity of a disinterested observer. The objective of many international commercial parties will be to stay out of the Indian courts, meaning making use of arbitration whenever possible.

The arbitration landscape – an emerging independence

The arbitration landscape in India is defined by the Arbitration and Conciliation Act 1996⁴ (the Arbitration Act). The Arbitration Act is made up of two parts:

- **Part I** which applies to disputes with their seat of arbitration in India and gives the Indian courts significant powers to appoint or replace arbitrators, hear procedural appeals, grant interim measures, and set aside arbitral awards. This is often termed "onshore arbitration".
- **Part II** applies to disputes where the seat of arbitration is outside of India and incorporates the New York Convention and the Geneva Convention into Indian law. This is often termed "offshore arbitration".

Onshore arbitration

Historically, the great majority of arbitration cases seated in India have been ad hoc arbitrations; that is, arbitration conducted under the framework of the Arbitration Act, but with no supervision by an arbitral institution. A 2013 PwC study found that 47% of Indian companies that had chosen arbitration as their preferred method of dispute resolution chose *ad hoc* proceedings.⁵ The predominant choice of arbitrator in such cases has been, and remains, retired court judges. As a result, domestic arbitration has

developed the characteristic of 'after hours' litigation with advocates conducting short hearings after the court closes in front of retired judges who bring many of their past practices (such as pleadings and rules of evidence) from the courtroom into the arbitration chamber.

Importantly, the absence of a supervising institution also means that disputes between the parties on matters such as challenges to arbitrators and default selection of arbitrators need to be referred to the Indian court for resolution. Given the delays in obtaining such decisions, this often extends a commercial dispute far beyond the 1-2 years it may take under institutional arbitration (but see below regarding the new 12 month time limit for all onshore arbitrations).

This practice is gradually changing with the emergence of a body of full-time arbitration counsel who do not spend days in court, and so expect their arbitrators to hear cases during office hours in substantial hearings, rather than spread out in short sessions over a longer period. Doing so also means that no longer is the pool of arbitrators limited to retired High Court or Supreme Court judges and notable practitioners have begun hearing cases as arbitrators.

At the same time, institutional arbitration is also growing. Prime Minister Modi addressed the "Global Conference on Strengthening Arbitration and Enforcement in India" held in October 2016⁶ and declared that a "vibrant ecosystem for institutional arbitration" was one of his government's priorities.⁷

Foreign arbitral institutions such as the ICC and LCIA have long been used in India. More recently, SIAC has emerged as the number one choice for many parties arbitrating India-related disputes offshore. Foreign institutions within India have fared less well. LCIA India was set up in New Delhi with high hopes in 2009, but closed its doors only seven years later in 2016. SIAC has established a marketing office in Mumbai, but has not opened an Indian branch.

Judge/population ratio

India has a vast population and a vast judiciary, yet statistics showing the ratio of judges per million of population show the difference between the US and the UK.²



India

Population: 1,200,000,000
Judges: 18 per million



UK

Population: 65,000,000
Judges: 56 per million



US

Population: 320,000,000
Judges: 102 per million

The Law Commission of India in its 120th Report (1987) recommended a judge per capita ratio of 50 judges per million people.³ The Chief Justice of India in April 2017 said that some 70,000 more judges were needed.

2. India as at 2015. UK as at 2014, US as at 2011: <http://supremecourtindia.nic.in/Subordinate%20Court%20of%20India.pdf>

3. lawcommissionofindia.nic.in/101-169/report120.pdf

4. wipo.int/edocs/lexdocs/laws/en/in/in063en.pdf

5. pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf

6. niti.gov.in/arbitrationconference

7. globalarbitrationreview.com/article/1069841/modi-makes-institutional-arbitration-a-priority



Meanwhile, there are various domestic institutions such as the Indian Council of Arbitration (ICA), the Delhi International Arbitration Centre (DAC), the Indian Merchant Chamber (IMC) in Mumbai, and the Nani Palkhivala Arbitration Centre (NPAC) in Chennai. Most recently, these have been joined by the Mumbai Centre for International Arbitration (MCIA) (see below).

Offshore arbitration

Opting for arbitration with a seat outside India has the advantage of avoiding the delays associated with interaction with the Indian courts, at least until enforcement. Parties may still wish to approach the Indian courts for interim relief in support of arbitration (under section 9 of the Arbitration Act), or for assistance in collecting evidence (section 27), assuming they can be obtained in sufficient time to be useful to the ongoing arbitration.

There had historically been the risk that arbitrations taking place outside India may nevertheless be susceptible to Indian court action (including challenges to the award),

save where the jurisdiction of the Indian court under Part I of the Arbitration Act was explicitly or implicitly excluded. This led to a generation of arbitration agreements in cross-border contracts which contained exclusions of Part I of the Arbitration Act (save sometimes for sections 9 and 27). This risk was resolved by the Indian Supreme Court in its 2012 BALCO decision⁸ which held that the Indian courts had no supervisory jurisdiction over arbitrations held outside India.⁹ However this decision was stated to be prospective only, leaving a prior batch of arbitrations cases working their way through the Indian courts under the old law. The BALCO situation also confirmed the existence of a lacuna in that interim relief under section 9 (found in Part I of the Arbitration Act) was not available to parties with arbitrations seated outside India. The Supreme Court noted the lacuna but held that it was for the Indian legislature to resolve. This left parties with a difficult choice of whether to opt for offshore arbitration, but accept that they would have no ability to seek interim relief inside India, or choose onshore

arbitration with the additional issues of Indian court supervision and award challenge.

That lacuna has now been filled with the 2015 Arbitration Act amendments (see below), meaning parties once again have a straightforward choice of onshore and offshore arbitration, based on the needs, dynamics and bargaining positions of the parties to the transaction.

Thus, while onshore arbitration is growing, a number of offshore seats in particular Singapore and London, plus also Hong Kong, Kuala Lumpur, Dubai and Paris, remain common and sensible choices.

A DEVELOPING PICTURE

Arbitration Act reforms

Reform of the Arbitration Act had long been discussed in India, with various proposals and draft Bills having been produced over the last 10 years. The aftermath of the BALCO decision, the imperative to take further pressure off the Indian court system, and the

8. Bharat Aluminium Co & ors v Kaiser Aluminium Technical Service, Inc. (2012) 9 SCC 552

9. hsfnotes.com/arbitration/2012/11/06/supreme-court-of-india-delivers-landmark-arbitration-decision-in-bharat-aluminium-overruling-bhatia-international/

stated desire of the Modi government to encourage greater foreign investment into India, finally led to amendments to the Arbitration Act being passed in 2015, first as an Ordinance and then as the Arbitration and Conciliation (Amendment) Act, 2015¹⁰ (Arbitration Amendment Act) which came into force on 23 October 2015.^{11,12} Some of the key reforms made by the Arbitration Amendment Act were:

- Resolving the lacuna left by the BALCO decision by providing that sections 9 and 27 of the Arbitration Act would, subject to contrary agreement, apply to arbitrations with a seat outside India. Once more, parties arbitrating in Singapore, London or elsewhere are able to approach the Indian courts for interim relief in support of the arbitration.
- Addressing delays in the conduct of onshore arbitration, by providing that all Indian-seated arbitral tribunals must render their award within 12 months from the date of appointment. This period can be extended by a further six months by agreement of the parties, after which the mandate of the arbitrators will automatically terminate, unless an extension is allowed by the Indian court. The Arbitration Amendment Act having been passed only at the end of 2015, the question of whether the deadline will produce a flurry of extension applications to the courts will only now start to be answered, along with the attitude of the courts to such applications. This in turn, will indicate whether accepting an appointment to an onshore Indian arbitration will be more or less attractive for arbitrators in the future.
- Attempting to narrow the definition of "public policy" as an exceptional ground for setting aside arbitral awards in the Indian courts (in line with the New York Convention). Consistent with recent case law, the Arbitration Amendment Act now states that the exception will only apply where an award (i) has been obtained fraudulently, (ii) contravenes the fundamental policy of Indian law, or (iii)

conflicts with the most basic notions of morality or justice. While the scope for ambiguity to the public policy exception remains in India (as it does in most jurisdictions), the legislative intent to narrow the exception appears clear and, it is hoped, will be followed by Indian judges.

- Importantly, the amendments removed the automatic stay previously applied under section 36 of the Arbitration Act which prevents enforcement while an onshore award is subject to set-aside proceedings. This had produced an obvious incentive for any losing party to an onshore arbitral award to challenge in the Indian courts (which challenges could take upwards of 5 years to be decided) in order to frustrate enforcement. Now the Indian courts have a discretion to stay enforcement, but no obligation to do so. Moreover, the Arbitration Amendment Act now also fixes a one year time limit for the decision on a challenge application (under section 34 of the Arbitration Act). It is likely that a combination of these provisions will considerably reduce the number of awards being challenged in the Indian courts.

A trend towards institutional arbitration?

The current support for institutional arbitration from the Indian government may owe as much to the desire to take a load away from the Indian courts, as to improve the working of the onshore arbitration system. In any event, it is welcome. Despite the demise of LCIA India, the increased support for institutional arbitration in India is palpable.

One embodiment of this is in the creation and the promotion of the MCIA launched in Mumbai in 2016.¹³

The MCIA is supported by the Government of Maharashtra as part of its wider initiative to develop an international financial centre in Mumbai. Parallels may be drawn in this regard with the creation of financial centres, and associated arbitration institutions, in Middle

Eastern cities such as Dubai, Qatar and Bahrain. Taking its support one step further, the Maharashtra Government recently announced¹⁴ that all cases of a value of more than five crore INR (approx. US\$770,000) will have to compulsorily contain institutional arbitration clauses as the mode of dispute resolution.

The MCIA has emerged from a joint initiative between the State Government and the domestic and international business and legal communities. It now has a full set of institutional rules, a Council composed of Indian as well as overseas members, and a first class arbitration centre with hearing facilities in Mumbai. Herbert Smith Freehills Partner and Head of the India Disputes Practice Nicholas Peacock was part of the Rules Committee and in 2016 joined the founding MCIA Council.¹⁵

"It is an interesting time for arbitration in India and the MCIA is well-placed to take advantage of growth in the market"

**NEETI SACHDEVA,
MCIA REGISTRAR**

MIXED MESSAGES: CANCELLATION OF INVESTMENT TREATIES

While the past few years have seen encouraging trends for commercial arbitration in India, the Indian Government's treatment of its bilateral investment treaties (BITs) has created uncertainty for investors into and out of India.¹⁶

In 2016, the Government reported that it had sent notices to terminate BITs with 58 countries. While no definitive list of which BITs have been cancelled has been produced, it is known that the BIT between India and the Netherlands was terminated with effect from December 2016,¹⁷ while the BIT with the UK

10. indiacode.nic.in/acts-in-pdf/2016/201603.pdf

11. hsfnotes.com/arbitration/2015/11/05/amendments-to-the-indian-arbitration-act-now-effective/

12. sites.herbertysmithfreehills.vuturve.com/33/10790/compose-email/indian-international-arbitration-e-bulletin.asp

13. mcia.org.in/

14. indianexpress.com/article/business/economy/maharashtra-government-makes-institutional-arbitration-mandatory-for-contracts-above-rs-5-crore-4604321/

15. sites.herbertysmithfreehills.vuturve.com/33/12069/landing-pages/News-4_draft.asp

16. hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/

17. vno-ncw.nl/echo-berichten/echo-nr-51-opzegging-investeringsbeschermingsovereenkomst-ibo-door-india



was terminated from the end of March 2017.¹⁸ The BIT with Australia also terminated in March 2017.¹⁹ For its remaining 25 BITs which are still in their initial term and not yet capable of termination, the Indian Government has instead proposed 'Joint Interpretative Statements'²⁰ to the counterparties of these BITs seeking to restrict the scope of the protections under those ongoing BITs, in line with a recast Model BIT which India adopted in December 2015.

The terminations are an apparent reaction to the wave of recent BIT claims against India brought by investors. The first of these recent claims was the case brought by White Industries of Australia which concerned allegations of excessive judicial delays in enforcing a commercial arbitration award through the Indian courts.²¹ An award was made against India in 2011 (which it duly honoured), resulting in a notable backlash by India against the current mechanism of BIT

protections. In the meantime more claims were filed with the result that, by 2016, India was one of the most frequently named respondent states, with four claims brought against it by foreign investors that year. The current number of BIT claims against India is understood to be around 17.

The Government's first response was to re-issue its Model BIT which explicitly reduced the scope of protections available to foreign investors into India (and at the same time, to Indian investors into the counterparty state), including specially targeting matters such as the provision of non-commercial services by a state (ie court services) and the levying of (retrospective) tax which had formed the basis of prior or existing BIT claims.²²

While the Model BIT retained the use of arbitration for the settlement of investor claims, it included a new requirement for investors to exhaust local remedies (for a minimum five year

period from the date on which the investor first acquired knowledge of the state action in question) prior to initiating arbitration, unless the investor can demonstrate that there are no available local remedies reasonably capable of providing any relief.

"The institution's offering has been well-received by commercial parties and, although in its infancy, the MCI A has already been delegated the power of an appointment of an arbitrator by the Indian Supreme Court under s11 of the Act"

**NEETI SACHDEVA,
MCI A REGISTRAR**

18. ft.com/content/5fef7796-1914-11e7-a53d-df09f373be87

19. dfat.gov.au/trade/topics/investment/Pages/australias-bilateral-investment-treaties.aspx

20. indiainbusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf

21. hsfnotes.com/arbitration/2012/03/01/india-liable-under-bit-for-extensive-judicial-delays/

22. sites.herbertsmithfreehills.vuturvex.com/33/10790/landing-pages/key-features-of-the-model-bit.asp

It remains unclear which BIT terminations are pending and what protections will remain in place for investments already underway. For those BITs that are not yet terminated it remains to be seen if the relevant governments will agree with India's proposed joint interpretative statement and what impact the statement has on future investment and claims brought against India based on the ongoing BITs.

India having served notice to terminate its existing BITs with the seeming objective of adopting new BITs based on its Model BIT, investors into India are now faced with an absence of BIT protections for new investments, and no sense of when any new investment protection regime will be put in place. For example, the EU counterparties to terminated BITs are unable to negotiate new BITs with India, and must await the EU Commission to negotiate on behalf of all member states (including, for now, the UK).

While investments made before the termination of the BITs may be protected under the 'sunset' clauses in the relevant BIT, new investors into India, and Indian investors into counterparty states, will no longer benefit from treaty protections. This lack of previously available protections, together with the message sent by the Indian Government in removing these protections, must inevitably give prospective investors some degree of unease as they consider India as an investment destination.

Therefore, while there appear to be strides of development in the domestic arbitration landscape, when it comes to international arbitration, and in particular, investment treaty arbitration, there still appears to be a long road ahead before India can be touted as being a secure investor-friendly destination.

"MCIA is the first of its kind
arbitral institution in India
providing dedicated arbitration
hearing facilities and has
conducted over 100
arbitrations at its premises"

**NEETI SACHDEVA,
MCIA REGISTRAR**

We will be publishing the sixth edition of our well-regarded Guide on Dispute Resolution and Governing Law Clauses in India-related Commercial Contracts in August. The Guide is intended to assist in-house counsel who handle India-related commercial contracts on behalf of non-Indian companies and who need to have a practical understanding of the nuances of drafting dispute resolution and governing law clauses in the Indian context.

If you would like to request a copy please email asia.publications@hsf.com and we will send you an electronic copy as soon as it is available.

AUTHORS



Nicholas Peacock
Partner, London
T +44 20 7466 2803
nicholas.peacock@hsf.com



Donny Surtani
Partner, London
T +44 20 7466 2216
donny.surtani@hsf.com



Kritika Venugopal
Senior Associate, Singapore
T +65 68688017
kritika.venugopal@hsf.com



BANGKOK

Herbert Smith Freehills (Thailand) Ltd
T +66 2657 3888
F +66 2636 0657

BEIJING

Herbert Smith Freehills LLP Beijing
Representative Office (UK)
T +86 10 6535 5000
F +86 10 6535 5055

BELFAST

Herbert Smith Freehills LLP
T +44 28 9025 8200
F +44 28 9025 8201

BERLIN

Herbert Smith Freehills Germany LLP
T +49 30 2215 10400
F +49 30 2215 10499

BRISBANE

Herbert Smith Freehills
T +61 7 3258 6666
F +61 7 3258 6444

BRUSSELS

Herbert Smith Freehills LLP
T +32 2 511 7450
F +32 2 511 7772

DOHA

Herbert Smith Freehills Middle East LLP
T +974 4429 4000
F +974 4429 4001

DUBAI

Herbert Smith Freehills LLP
T +971 4 428 6300
F +971 4 365 3171

DÜSSELDORF

Herbert Smith Freehills Germany LLP
T +49 211 975 59000
F +49 211 975 59099

FRANKFURT

Herbert Smith Freehills Germany LLP
T +49 69 2222 82400
F +49 69 2222 82499

HONG KONG

Herbert Smith Freehills
T +852 2845 6639
F +852 2845 9099

JAKARTA

Hiswara Bunjamin and Tandjung
Herbert Smith Freehills LLP associated firm
T +62 21 574 4010
F +62 21 574 4670

JOHANNESBURG

Herbert Smith Freehills South Africa LLP
T +27 10 500 2600
F +27 11 327 6230

LONDON

Herbert Smith Freehills LLP
T +44 20 7374 8000
F +44 20 7374 0888

MADRID

Herbert Smith Freehills Spain LLP
T +34 91 423 4000
F +34 91 423 4001

MELBOURNE

Herbert Smith Freehills
T +61 3 9288 1234
F +61 3 9288 1567

MOSCOW

Herbert Smith Freehills CIS LLP
T +7 495 363 6500
F +7 495 363 6501

NEW YORK

Herbert Smith Freehills New York LLP
T +1 917 542 7600
F +1 917 542 7601

PARIS

Herbert Smith Freehills Paris LLP
T +33 1 53 57 70 70
F +33 1 53 57 70 80

PERTH

Herbert Smith Freehills
T +61 8 9211 7777
F +61 8 9211 7878

RIYADH

The Law Office of Nasser Al-Hamdan
Herbert Smith Freehills LLP associated firm
T +966 11 211 8120
F +966 11 211 8173

SEOUL

Herbert Smith Freehills LLP
Foreign Legal Consultant Office
T +82 2 6321 5600
F +82 2 6321 5601

SHANGHAI

Herbert Smith Freehills LLP Shanghai
Representative Office (UK)
T +86 21 2322 2000
F +86 21 2322 2322

SINGAPORE

Herbert Smith Freehills LLP
T +65 6868 8000
F +65 6868 8001

SYDNEY

Herbert Smith Freehills
T +61 2 9225 5000
F +61 2 9322 4000

TOKYO

Herbert Smith Freehills
T +81 3 5412 5412
F +81 3 5412 5413