HERBERT SMITH FREEHILLS

CROSS-BORDER LITIGATION

INTERNATIONAL PERSPECTIVES

In this issue

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Welcome

Welcome to the third issue of Cross-Border Litigation, a periodic publication spotlighting legal and practical issues specific to litigation with an international aspect.

We tap into the vast expertise of the firm's leading commercial litigators across the globe to give readers the benefit of their hands-on experience in conducting cross-border litigation and to flag key developments that should be on commercial parties' radars.

Why the focus on cross-border litigation? The increasing globalisation of business has inevitably resulted in a dramatic increase in the number of litigated disputes where the parties are based in different jurisdictions or there is some other international aspect (such as the location of evidence or assets).

Such disputes of course raise particular legal issues, many of which fall within what is traditionally known as 'private international law' - such as jurisdiction, choice of law and enforcement of foreign judgments. Those areas of law are continuing to evolve apace, both within national legal systems and through multi-jurisdictional arrangements. For commercial parties dealing internationally, an awareness of developments in those areas of law is important as a key part of dispute risk management - not only when a dispute arises but also at the deal-making and contract drafting stages.

Further, beyond matters of substantive law, cross-border litigation typically gives rise to practical challenges that do not arise to the same extent in domestic disputes. Relatively straightforward procedures can become complicated where they span borders, and it is important to be aware of these additional hurdles and how best to navigate them.

We hope that you enjoy reading this issue and welcome your feedback.

To read previous issues, visit hsf.com/cbl2.

To discuss any of the topics covered or other cross-border litigation issues, do not hesitate to get in touch with one of our regional key contacts listed at the end of this publication, or your usual Herbert Smith Freehills contact.

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In brief

New HSF Guide published: **Dispute resolution clauses - putting yourself in the best position**

It is an all too common feature of cross-border commercial disputes that great amounts of time and costs can be spent on the preliminary question of how the dispute will be resolved – by what process, in what jurisdiction and under what law. In some cases, the answers to those questions can may make all the difference to whether or not you will be able to enforce your rights under the contract.

So it is important to think about these matters at the outset and ensure that the dispute resolution clauses in your contract are tailored for the deal in question. All too often, such clauses may be treated as part of the boilerplate: the usual wording thrown in, with perhaps little thought for the particular circumstances.

As part of Herbert Smith Freehills' series of contract disputes practical guides, Adam Johnson QC, Alexander Oddy and Nick Peacock have produced a short guide to dispute resolution clauses, considering choice of law and jurisdiction/arbitration clauses, as well as clauses providing for ADR, and providing some practical tips on their use. You can download the PDF guide by clicking here or by visiting hsf.com/cdg10

Clients and contacts of the firm can also access the archived version of our hour-long webinar exploring these issues by contacting Jane Webber at jane.webber@hsf.com. Or if you would prefer a shorter version focusing on key practical tips, Nick has also presented a 15 minute podcast which can be accessed at hsf.com/drcpodcast

US Supreme Court confirms that non-US corporations cannot be sued under the Alien Tort Statute

In a judgment in April 2018, the US Supreme Court ruled that the Alien Tort Statute (**ATS**) can only be relied on to bring claims against natural persons and not corporate entities (*Jesner v. Arab Bank*).

The ATS is a controversial US statute dating back to 1789 which gives the US Federal courts jurisdiction to hear actions by "aliens" (ie. non-US citizens) for torts committed "in violation of the law of nations or a treaty of the United States". Having gone mostly unused until the 1980s, the statute has since then primarily been sought to be used by non-US citizens to pursue actions alleging human rights violations that occurred overseas – with claims not only against foreign government officials but also multinational corporations for alleged participation in violations.

The trend in the US courts' approach to the statute has been to interpret it narrowly, in a way that severely limits its application. In particular, in *Kiobel v. Royal Dutch Shell* (2013), the Supreme Court confirmed that it does not apply to conduct that took place wholly outside US territory.

However, a separate unsettled question remained as to whether the ATS could be used to bring actions alleging corporate liability. The recent decision confirms that it does not – albeit by the slimmest of majorities and on the basis of varying reasoning. The key majority reasoning appears to be that, given the foreign policy considerations of the ATS, any 'extension' of liability under the statute to foreign corporations was a matter for Congress rather than the judiciary.

The decision will be welcomed by non-US corporations considering their potential exposure to actions in the US based on a presence there.

English Commercial Court clarifies when a worldwide freezing order can be enforced abroad without court's permission

Akcine Bendrove Bankas Snoras v Antonov [2018] EWHC 887 (Comm)

The Commercial Court recently considered the scope of the standard undertaking provided in connection with worldwide freezing orders, which requires the applicant to seek the court's permission before seeking to enforce the order outside England and Wales, or seeking an order of a "similar nature":

The court held that the claimant bank was not in breach of its undertaking by obtaining orders in Lithuania and Switzerland seizing certain of the respondent's assets, as the foreign courts had independent jurisdiction to make the orders which did not derive from the making of the worldwide freezing order in England.

This decision provides welcome clarification as to the scope of the standard undertaking, and should provide some comfort to those seeking to secure assets abroad based on a separate and independent right or jurisdiction, where they have also obtained an English freezing order.

The decision also suggests that, where there has been a breach of the undertaking, the court may be inclined to grant retrospective permission and continue the freezing order unless the respondent can present clear evidence that the foreign order has had an oppressive or prejudicial impact.

New international commercial courts

The past year or so has seen a surge in the number of jurisdictions announcing proposals to establish specialist courts designed to deal with international commercial disputes in a more business-friendly manner, spurred on in some instances by the Brexit referendum.

A key feature of these courts is the use of the English language (albeit only partial in Paris' case) – in recognition of the overwhelming popularity of English as the language of international trade.

Belgium

The Belgian Parliament currently has before it a bill for the creation of a Brussels International Business Court, with English as the working language and including judges from foreign jurisdictions. Interesting features of the proposed court include that its rules of procedure will be based on the UNCITRAL Model Law on International Commercial Arbitration; that there will only be limited scope for appeal; and that it will be staffed by both professional judges and other "legal experts". It is scheduled to commence operation from 1 January 2020.

China

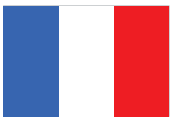
As highlighted in the update from our China practice on page 19, the Supreme People's Court of the People's Republic of China has recently indicated an intention to establish a specialist international court (potentially modelled in part on the Singapore International Commercial Court). This is specifically in anticipation of the expected surge in transnational disputes in coming years arising from China's One Belt One Road investment initiative. No substantive details of the proposal have yet been released.

The Netherlands

The Netherlands Commercial Court will be based in Amsterdam and will operate under Dutch procedural law, with English as its working language. It will operate at both first instance and appellate level, as a distinct chamber of the Amsterdam District Court and Amsterdam Court of Appeal. Judges will be selected from within the Netherlands. The court is scheduled to open in mid 2018 although we understand that there are doubts as to whether this timing will be met.

Germany

Since January 2018, the Frankfurt High Court has operated a specialised chamber for the hearing of international commercial disputes. The structure is broadly similar to that of the Netherlands Commercial Court, including provision for proceedings to be conducted in English. However, the international chamber currently only operates at the first instance level, with no corresponding chamber within the Frankfurt Court of Appeal



France

Two new "International Chambers" of the Paris Commercial Court and the Paris Court of Appeal were inaugurated on 12 February and are expected to commence operation imminently. (In the case of the first instance court, the new chamber involves a renaming and a new set of procedural rules for the pre-existing internationally-focused court at that level).

The most novel aspect of the new chambers is that the procedural rules include many features more commonly found in adversarial common law jurisdictions and not frequently employed in the more inquisitorial French system – including some provision for case management by procedural judges, mandatory disclosure of documents and witness evidence and cross-examination. Judges will be drawn from within the French judiciary, with no apparent provision for judges from foreign jurisdictions.

The aspect of the new Paris offering that received the most attention when first announced was the report that the new court would operate in the English language – regarded as a dramatic departure for the French court system. However, it is now clear that it would be more accurate to describe the new chambers as allowing for some flexibility regarding the use of English, at least to some greater extent than the purely domestic French courts. The proceedings will be oral and conducted in French as the default, with simultaneous translation for non-Francophone parties where necessary. However, foreign parties and their witnesses, experts and counsel may elect to speak in English (or another language) – although if this necessitates translation services for other participants it will be at the non-Francophone party's expense. All procedural documents (including applications, submissions and orders) must be drafted in French and decisions will be delivered in French (with an English translation). It will however be possible to submit exhibits in English without translation.

It remains to be seen how such partial use of English within an otherwise French language proceeding will work in practice.

Litigation funding on the rise internationally

Commercial funding is an increasingly common feature of cross-border dispute resolution. Key players in the funding market are building global capacity and diversifying the range of jurisdictions in which they invest, and it is increasingly common for funded actions relating to the same subject matter to be commenced in multiple jurisdictions.

Australia has long been on the frontline of legal and commercial developments in litigation funding. Here, **Damian Grave** and **Helen Mould** of our Melbourne office provide a snapshot of the current global funding landscape and identify some key trends.

UK

The litigation funding market in the UK has grown rapidly and deeply in recent years, as courts have increasingly accepted funding arrangements as promoting access to justice, and following the endorsement given by Lord Justice Jackson in his 2009 review of civil litigation costs.

Early last year, it was reported that funders' investments in UK litigation had risen more than 25% in 2016, from £575 million to £723 million.

Most major funders active in the UK have significant involvement in also funding offshore claims, as well as funding international arbitration cases, including investor state dispute settlement claims.

Several recent or current large group actions in the English courts have been financed, at least in part, by funders (for example, the shareholder claims against RBS, Lloyds and Tesco, litigation regarding automotive emissions testing and claims against Mastercard in relation to fees).

Australia

A key reason for the substantial growth of the litigation funding industry in Australia in the last decade has been its development in parallel with the Australian class action regime.

In a pivotal 2006 decision, the Australian High Court ruled that commercial funding arrangements were not contrary to public policy. Subsequently, funders' returns have been enhanced by the acceptance by Australian courts of "closed class" proceedings (where class membership is restricted to signed-up claimants) and, more recently, the approval of the "common fund" doctrine (permitting funders to recover a commission across the "open class").

Empirical research confirms that class actions have been commenced in Australia with much greater frequency in recent years. Data published in 2016 indicated that approximately 40% of the total number of actions filed since commencement of the regime in 1992 had been commenced in the 6 years to 2016. In the period 2010-2016, 49.5% of Australian class actions were funded by commercial litigation funders, up from 23.4% in the 6 years prior.

As to the future, we are seeing an increasing number of Australian class actions backed by off-shore funders, while Australian based funders are increasingly pursuing opportunities in overseas markets.

Hong Kong

In June 2017, the Hong Kong Legislative Council enacted legislation expressly approving use of third party funding in arbitration. The legislation implemented recommendations of the Hong Kong Law Reform Commission. The Commission's report concluded that the reforms were necessary to enhance Hong Kong's competitive position as an international arbitration centre and to avoid the loss of arbitrations to other seats where funding was permitted.

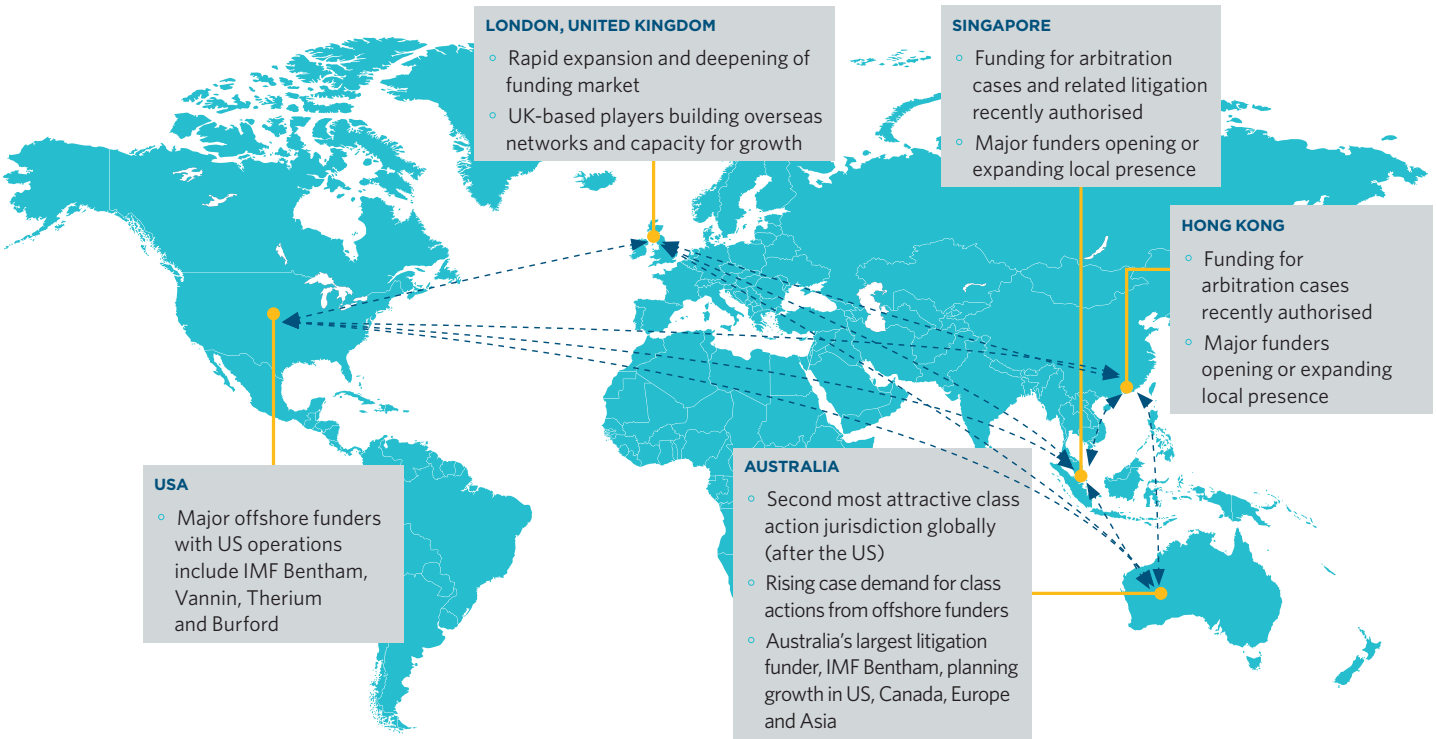
Singapore

A similar rationale was advanced for Singapore's introduction, also in 2017, of legislation permitting third party funding for international arbitration cases and related court and mediation proceedings, including those for, or in connection with, the enforcement of arbitral awards.

Funders going global

The internationalisation of commercial litigation funding is also apparent from the footprint of some of the major players in the area.

- **IMF Bentham Limited** is an Australian funder which listed in 2001 and badges itself as "a pioneer of the global litigation funding industry". IMF has offices in Australia, Asia, North America and Europe. IMF has recently stated that its funded cases under management have a total value in excess of $3.7 billion. In addition to litigation in Australia, the United States, Canada and Singapore, IMF is funding (or has funded), cases in New Zealand, Hong Kong, the UK, Netherlands and South Africa.



- **Harbour Litigation Funding** is based in the UK and operates globally with offices in London, Hong Kong and Singapore. It states that it has funded cases in 13 jurisdictions and under 4 sets of arbitral rules, and has raised capital of £760 million.
- **Burford Capital Limited** is an LSE-listed funder, with offices in New York, London, Chicago and Singapore. Burford has stated that its volume of new business in FY17 ($1.34 billion) was more than triple the level in FY16 and more than 30 times the level in FY13.
- **International Litigation Funding Partners** is a Singaporean based funder that has funded several large Australian securities class actions.
- **Vannin Capital** is a UK based funder, with offices in Europe, Australia and the United States.
- **Therium** is a UK based funder with offices in Europe and New York, established in 2009, which states that it has funded $36 billion in claims.
- **Augusta Ventures Limited**, is a UK based funder, which badges itself as the largest litigation funder in the UK by volume of claims financed. In 2017, Augusta opened a Sydney office.

"‥ funders' investments in UK litigation (rose) more than 25% in 2016"

Trends

- Litigation funding is becoming accepted and used in an increasing number of jurisdictions
- Funders are increasingly building global capacity and diversifying the range of jurisdictions in which they invest, as a growth strategy and in order to mitigate risk
- Competition for new investment opportunities within the global litigation funding market is intensifying
- Funders are supporting a broader range of disputes than previously
- It is increasingly common for funded actions relating to the same subject matter to be commenced in multiple jurisdictions, giving rise to the challenges of parallel litigation

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Judicial turf wars in Dubai
Is this the end of the 'conduit' jurisdiction?

The past 18 months have seen significant developments in Dubai's legal landscape, which have had a substantial impact on the operation and reputation, particularly internationally, of the Dubai International Financial Centre (DIFC). As a result, the DIFC's much-touted status as a so-called 'conduit' jurisdiction, allowing enforcement of foreign court orders and arbitral awards against assets located in the UAE and the Middle East more widely, has been thrown into doubt.

From our Dubai office, Stuart Paterson, partner, and Joseph Bentley, associate, bring us up to date on the current position and assess the regional impact.

Of the numerous financial free zones established within the United Arab Emirates (**UAE**), and the Emirate of Dubai, the most widely known is the Dubai International Financial Centre (**DIFC**). The DIFC is virtually[1] unique – it operates as an autonomous, 'offshore' jurisdiction, carved out from, but situated within, the Emirate of Dubai. Notably, the DIFC also operates with its own independent judiciary – the DIFC Courts – which, as distinct from the civil law applied in onshore UAE and the Emirate of Dubai, apply the DIFC's own civil and commercial laws based on principles of common law (defaulting to English law where silent) and overseen by an experienced common law judiciary.

Although separate jurisdictions, the DIFC and onshore Dubai enjoy a close, reciprocal relationship.[2] Importantly, under the relevant legislative framework, a judgment handed down in one of either the DIFC or Dubai Courts may be ratified and executed in the other without consideration of its merits.

Enforcement in the UAE

Academically interesting as the relationship between the DIFC and Dubai courts may be, why is this important? The answer lies in the impact it has on the ability to enforce judgments and awards against assets in the Middle East. However, before explaining the significance of the 'conduit' jurisdiction, we must first describe the issues encountered by parties when seeking to enforce arbitral awards and overseas orders against debtors and assets in Dubai.

Historically, award and judgment creditors have struggled to enforce in the UAE in the face of what has been perceived as heavy-handed judicial interventionism, obstruction and delay. In particular, despite the UAE being a signatory to international treaties such as the New York Convention, the Courts of the UAE and Dubai have tended to make the enforcement of international awards and judgments subject to the UAE's domestic provisions which, among other things, provide that the UAE Courts should first satisfy themselves that they do not have 'original' jurisdiction over the dispute. This had led in some instances to the Courts of Dubai in effect assuming jurisdiction over the underlying claims, thereby re-opening and re-examining the merits of disputes.

Despite more recent decisions having demonstrated a new, more amenable approach, there remains a widely held perception among clients and practitioners alike that enforcing overseas awards and judgments in the Dubai Courts is fraught with risk. Added to this, proceedings in the Dubai Courts are held in Arabic, do not allow for procedures familiar to common law lawyers (such as summary judgment, disclosure, examination of witnesses and oral hearings) and are subject to an automatic right to appeal, resulting in an often lengthy and bureaucratic process in which even straightforward claims typically take several years before a conclusive outcome.

[1] The Emirate of Abu Dhabi has recently established a free zone similar in concept to the DIFC, the Abu Dhabi Global Market, which also operates as a distinct common law jurisdiction with an independent judiciary (but instead directly incorporates English law).

[2] The legislative framework is governed in large part by Dubai Law No. 12 of 2004 (as amended) (the **Judicial Authority Law**) and two protocols propagated in 2009: the Protocol of Jurisdiction Between Dubai Courts and DIFC Courts (the **Protocol of Jurisdiction**) and the Protocol of Enforcement between Dubai Courts and DIFC Courts (the **Protocol of Enforcement**).

In light of the perceived risks, the relationship of reciprocity between the DIFC and Dubai Courts, established under the Judicial Authority Law, had led practitioners to speculate whether the DIFC Courts may be used as a means through which to obtain enforcement against assets in Dubai without recourse to the local Dubai Courts. Under the provisions of the Judicial Authority Law, parties seeking enforcement would not necessarily require any nexus to the DIFC (for example, assets situated there) to have an award or judgment order enforced by the DIFC Courts, which could, in theory, then be enforced in the Dubai Courts without risk of further review.

The advantages of doing so are not limited simply to circumventing the risks associated with the Dubai Courts. As a common law judicial system, the DIFC Courts are not only familiar to common law practitioners, but are also able to grant interim and equitable remedies of their own to assist with enforcement, for example, freezing and search orders and, particularly useful, orders compelling a director of the award or judgment debtor to provide evidence on oath about the value and location of the debtor's assets.

'Judgment laundering': The conduit jurisdiction

There swiftly followed a number of highly significant DIFC Court decisions, in which the DIFC Court examined and expanded its own jurisdiction in the context of enforcing arbitral awards and overseas judgments, resulting in nothing short of a total redefinition of the jurisdictional relationship between the Courts of Dubai and the DIFC.

As a result of these cases, a party seeking to enforce its arbitral award (including, somewhat controversially, awards seated in onshore Dubai) against assets located in onshore Dubai could first enforce the award in the DIFC Courts. Then, once enforced by the DIFC courts, the reciprocity provided for under the Judicial Authority Law would in effect bind the Dubai Courts to accepting the enforced award without risk of review of the merits of the underlying dispute. In practice, therefore, an award creditor would employ a relatively simple, two-step procedure to 'passport' awards, whether issued in onshore Dubai or elsewhere, for enforcement in onshore Dubai, using the DIFC as a stepping stone to bypass the risks associated (fairly or otherwise) with the Dubai Courts. This is the foundation of the so called 'conduit jurisdiction'.

Eventually, the position as regards enforcing a judgment of an overseas court developed into broadly similar position, albeit on different grounds. Under the common law doctrine of obligations and international principles of comity, the DIFC court held that a court judgment represented a legal obligation, similar in nature to a debt, which could form the basis of a new claim in the DIFC courts. Therefore, a party seeking 'enforcement' of a foreign order in the DIFC Courts would not necessarily seek enforcement of the order, but rather a fresh judgment of the DIFC courts, which could then be enforced in onshore Dubai under the Judicial Authority Law (in a process colourfully termed as 'judgment laundering').

Perhaps the most significant implication of these DIFC Court decisions did not relate to the domestic issues as between the DIFC and Dubai Courts or even to enforcement against recalcitrant local defendants, but rather to assets across the Middle Eastern region. The UAE has entered into certain international multilateral treaties,[3] which between them provide for reciprocity between the decisions of the courts of signatory states. As the DIFC Court is now firmly established as a constituent Court of the UAE and its judgments rank as that of a UAE Court, a judgment or award creditor could use the conduit character of the DIFC to enforce an international award or judgment and then passport the resulting DIFC Court order – a UAE Court judgment – for enforcement in one of the signatory states to the Riyadh and GCC Conventions, again, at least in theory, without (or with very limited) review of the merits.[4]

Given a number of signatory states to the Riyadh and GCC Conventions have previously demonstrated a capacity to make enforcement difficult, this is potentially highly significant. Moreover, certain states such as Yemen and Iraq are not Contracting States to the New York Convention but have signed up to the Riyadh Convention.

Turf wars: The Judicial Tribunal

That was the positon at the end of 2016. Each successive DIFC Court decision had tested and redefined the remit of the DIFC's 'conduit' jurisdiction. As succinctly summarised by the DIFC Court at the time, "*it is not wrong to use the DIFC Courts as a conduit jurisdiction to enforce a foreign judgment and then use reciprocal mechanisms to execute against assets in another jurisdiction.*"

However, the conduit jurisdiction inevitably raised a number of questions. Although certain commentators viewed it as a perfectly proper exercise of the DIFC Court's powers as a court of Dubai and a means by which the UAE could adhere to its obligations under the New York Convention, others considered the rapid expansion of the limits of the DIFC Court as a form of 'jurisdiction creep', inappropriately encroaching on the 'natural' jurisdiction of the Dubai Courts.

In what now appears a response to such concerns, the Ruler of Dubai issued Decree No. 19 of 2016 establishing a new tribunal – the 'Judicial Tribunal for the Dubai Courts and the DIFC Courts' – formed with the stated intention of ruling on (i) conflicts of jurisdiction; and (ii) conflicts of judgments, as between the Dubai and DIFC Courts. Briefly, the Judicial Tribunal comprises seven members: three judges from the Dubai Courts (including the President of the Court of Cassation who, as Chairman, holds the casting vote) and three representatives from the DIFC Courts, with the seventh member being the Secretary-General of Dubai's Judicial Council.

The Judicial Tribunal was initially met with cautious optimism by Dubai's legal market. It was hoped (and it seems intended) that the Judicial Tribunal would provide a decisive 30 day procedure to resolve conflicts, giving

[3] The GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications in 1996 (the **GCC Convention**) and the Riyadh Arab Agreement for Judicial Cooperation in 1983 (the **Riyadh Convention**).

[4] Article 25 of the Riyadh Convention.

Three remarkable decisions...

1. In December 2016, the Judicial Tribunal issued its first landmark decision – Cassation No. 1 of 2016. To understand its significance, the background is important. In August 2015, the award creditor filed an application in the DIFC Court of First Instance for recognition and enforcement of an onshore Dubai seated DIAC award against the award debtor, a DIFC entity. The DIFC Court not only enforced the award, but also granted a freezing order (on *Congentra* principles) and, for the first time, handed down a winding up petition against the debtor under the DIFC Insolvency Law. In parallel, typical of the type of frustrating tactics often employed in Dubai, the award debtor repeatedly and unsuccessfully applied to the Dubai Courts seeking annulment of the award. Following dismissal of the application at the Dubai Court of Appeal stage, the debtor referred the matter to the (at that point, unconstituted) Judicial Tribunal for resolution of an apparent conflict.

   In its decision, the Judicial Tribunal held that, as proceedings were pending before both the Dubai and the DIFC Courts, there was indeed a conflict of jurisdiction and "*only one of the two courts should determine to annul or recognize the...arbitral award*". Despite a formal dissenting opinion from all three of the DIFC Court judges sitting (outvoted using the Chairman's casting vote), the Judicial Tribunal ordered that the case be remitted entirely to the Dubai Courts and that the DIFC Courts should "*cease from entertaining the case*".

   The Judicial Tribunal's decision was extraordinary, particularly in circumstances where (i) the underlying dispute concerned DIFC property and enforcement would have been limited to the DIFC; (ii) the DIFC Courts had already enforced the award and handed down several interim orders; and (iii) the Dubai Courts had twice rejected applications for annulment on the grounds that it did not have jurisdiction. Further, as noted in the DIFC Court's dissenting opinion, while the courts with competence to set aside or annul an award rendered in onshore Dubai are the Dubai Courts, it is the DIFC Courts which (under the Judicial Authority Law) have exclusive jurisdiction to hear applications to enforce arbitral awards within the DIFC. There is, in practice, no conflict – as stated in a recent DIFC Court decision,[5] "[n]*ot only are the jurisdiction of the DIFC Courts and the jurisdiction of the Dubai Courts in relation to the recognition and enforcement of an arbitral award mutually exclusive, they are also complementary*".

2. Subsequently, in Cassation No. 1 of 2017 the Judicial Tribunal applied virtually identical reasoning to the enforcement of a foreign-seated arbitral award in the DIFC under the New York Convention. The Judicial Tribunal held that, notwithstanding that the award was "*issued by arbitrators in London*" and therefore enforced in the DIFC under the New York Convention, there was a conflict and "[a]*ccording to the general principles of laws embodied in the procedural laws and* ***since Dubai Courts have the general jurisdiction****, and then they are the competent courts to entertain this case*"(emphasis added).

3. More recently, with respect to foreign court orders, in Cassation No. 4 of 2017 the Judicial Tribunal ruled in favour of the Dubai Courts in relation to an attempted enforcement of an English court order in the DIFC Courts. The judgment debtor commenced proceedings in the Dubai Courts (it is not clear on what basis) long after the DIFC Court granted enforcement of the English court's order. The Judicial Tribunal explicitly stated that "[t]*he time at which the cases were registered in the two courts is not a factor in determining the competent court to entertain the case since their registration occurred prior to delivery of the judgment of the JT*". Also, notably, although the judgment debtor had defended the claim in the DIFC Court on its merits, the Judicial Tribunal determined that this did not constitute submission to the DIFC's jurisdiction, which it stated needs to be express and in writing.

'Regrettably, such decisions have paved the way for parties seeking to frustrate enforcement in Dubai...'

commercial parties confidence as to which court to approach. However, since its institution in June 2016, the Judicial Tribunal has only prompted further uncertainty, triggering what some respected commentators have described as a 'turf war' between the jurisdictions of Dubai and DIFC.

Three decisions by the Judicial Tribunal in particular have curtailed the application of the conduit jurisdiction and potentially impaired the viability of the DIFC Courts themselves (see boxed text).

Where does this leave us?

The general principle to emerge from the recent Judicial Tribunal decisions, to the extent that one can be discerned, is that the Dubai Courts are deemed the 'natural' courts of jurisdiction. So, where there is a perceived conflict between the DIFC and Dubai Courts, the DIFC Courts will only have jurisdiction subject to certain conditions, for example, the award or judgment debtor's express written submission to the DIFC or the absence of Dubai Court proceedings. We note, however, that interim relief ordered by the DIFC Court appears to survive unaffected, provided it is aimed at "*maintaining and restoring the status quo pending determination of the dispute*".[6]

Accordingly, if the DIFC Courts were only to grant interim relief in favour of the enforcing party, it is arguable that there is no conflict. However, it remains to be seen whether this decision will be followed where parties are seeking to passport overseas awards and judgments through the DIFC, or where an injunction would, in effect, dispose of a claim.

Regrettably, such decisions have paved the way for parties seeking to frustrate enforcement in Dubai to contrive a Dubai Court connection, whether spurious or not, in order to commence parallel proceedings and then apply to the Judicial Tribunal. If there are parallel proceedings, the Judicial Tribunal will

[5] ARB 006/2017 Isai v Isabelle.

[6] Cassation No. 8 of 2017 (JT).

inevitably rule in favour of the Dubai Courts. Now, following Cassation No. 4 of 2017, in ruling that debtors can construct a conflict even long after a DIFC Court judgment is issued, it is difficult to see how the conduit jurisdiction can survive.

> "... it is not only the existence of the conduit jurisdiction that is in doubt, but also the continued successful operation of the DIFC Courts"

Practitioners in the region had often speculated as to how the Dubai Courts were likely to respond to having their hands tied in a way most likely not contemplated with the DIFC court appeal, and to the expansion of the DIFC's jurisdiction. In light of the recent developments, if businesses can no longer initiate DIFC court proceedings and be confident that they will not be frustrated by conflicting proceedings in the Dubai courts (whether legitimate or contrived), it is not only the existence of the conduit jurisdiction that is in doubt, but also the continued successful operation of the DIFC Courts, if their business is to be limited to matters that have no possible onshore connection.

Where to from here?

There is no doubt that the uncertainty has had an adverse impact on the reputation of the DIFC and investor confidence more broadly in the UAE. As a firm and a representative member of the DIFC Court Users' Committee, we are involved in initiatives to ameliorate the position. In the past, the DIFC Court has proven itself adept at maintaining its position as one the most accommodating fora for dispute resolution worldwide; however, it remains to be seen both how the DIFC Court will respond to this setback and how the jurisdictional tensions between the two courts systems will evolve.

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Multi-jurisdictional litigation: Lessons from cross-border intellectual property enforcement

Handling litigation across multiple jurisdictions involves numerous legal and procedural complexities not generally encountered in purely domestic litigation.

One area where this is clearly illustrated, and from which lessons in multi-jurisdictional litigation can be learned, is the enforcement of intellectual property (IP) rights. Such enforcement action commonly needs to be undertaken on a country-by country basis and requires a highly coordinated and strategic approach that takes account of those complexities.

Rebekah Gay, Jonathan Turnbull and **Julian Gauld** of our London IP team provide a brief guide to navigating the challenges of cross-border litigation in this context.

While IP rights protect global markets, they are generally national rights that are enforced on a country-by-country basis. Even across Europe where there is central coordination of the granting of IP rights (eg. patents through the European Patent Office and trade marks through the European IP Office), currently enforcement must be pursued nationally. This will, in part, change for patents following the introduction of the Unified Patent Court (see inset box) but much of the strategy currently required to coordinate successful pan-European litigation will remain relevant.

For IP owners, the optimal strategy requires national enforcement to be consistent and coordinated across all jurisdictions whilst navigating the different national court's practices and procedures: arguments advanced in one jurisdiction may be unsuitable in others; courts have different approaches to evidence; the ability to obtain urgent interim relief varies significantly, and decisions in one jurisdiction can influence another. As a consequence, multi-jurisdictional enforcement is complex and benefits considerably from the appointment of a "coordinating counsel".

To illustrate this, we highlight below a handful of the complexities and considerations that can arise in multi-jurisdictional IP enforcement and provide some examples that are encountered in pharmaceutical patent enforcement in particular.

What is the aim of enforcement?

In many instances the overriding objective is to obtain injunctions to protect the market exclusivity conferred by the relevant IP rights. However, the adequacy of damages or the potential liabilities involved in seeking interim injunctions may dictate a different strategy. In addition, other less tangible factors, such as the company's attitude to litigation or risk and potential public relations implications, must be taken into account when formulating strategy.

It is therefore essential to understand all the options at a very early stage so that the optimal strategy can be agreed and implemented. Failure to act quickly can result in the irreversible loss of market exclusivity and result in some strategies or options becoming unavailable due to delay, which can have significant commercial ramifications.

Who owns what and where?

What are the relevant IP rights?

It is essential to have a good understanding of all relevant IP rights. For example, for a given pharmaceutical product, IP rights may include product patents, formulation patents, utility models, trade marks in the brand name and design rights in the delivery system. In addition, other non-IP rights may need to be considered, such as regulatory exclusivity (market and data exclusivity), which can influence whether and when to enforce the available IP rights.

The picture is also rarely uniform across all jurisdictions: an IP owner may not have any IP rights (or a limited sub-set) in certain jurisdictions and even if the "same" rights exist in different jurisdictions, the protection they offer may not be the same. This can arise either because local laws and procedures mean that these rights are treated differently by the national courts, or that differences arise from how the relevant office has assessed these rights (eg. differences between the examination procedure before the European Patent Office and the US Patents and Trademark Office).

Ownership, licenses, commercial arrangements and standing

It is essential to correctly identify the owner of all relevant IP rights at the outset. Within a group of companies, a variety of entities may hold the relevant IP rights (eg. as a consequence of acquisitions). This can affect where and when to enforce. In some jurisdictions only the patentee and/or exclusive licensee can sue for infringement, and non-exclusive licensees do not have standing. Assignments or licences may therefore need to be executed before enforcement. For registered rights, the public registers may not reflect the current ownership of rights and this can affect whether a party

has standing to bring proceedings and to claim relief (including the right to damages). If this is an issue, then the registers should be updated, which can be a time consuming process.

If a relevant licensee is not in the same corporate group as the patent owner, any applicable license will need to be reviewed as to who has control of the litigation and who bears the costs and liabilities of litigation. Any inadequacies in the terms of the licence (assuming one exists) will need to be addressed and practical arrangements put in to place to ensure effective communication within the agreed litigation framework.

Where compensation is being sought for infringement, the entities who actually suffer the losses must be identified to verify whether these are all licensed entities. This is important as in most jurisdictions, an entity can only claim its own losses – it cannot claim losses booked by other members of its corporate group. If licensing arrangements need to be changed or formalised to reflect the prevailing commercial position, then this must be done promptly and will likely require input from a number of internal teams (legal, commercial and tax). If it is not possible or practicable to enter in to new arrangements, then bringing a claim for alternative forms of compensation could be considered, such as an account of profits or damages based on a reasonable royalty.

It is also important to bear in mind that in some jurisdictions it is difficult or impossible to ensure that any intra-group commercial arrangements relied upon during litigation remain confidential. Where it is possible to put confidentiality arrangements in place, this should be done so at an early stage.

Formalities

In addition to registering licences, there are other time consuming steps that will need to be taken in some jurisdictions before enforcement begins. These include ensuring you have instructed local counsel and that they are conflict free, and providing Powers of Attorney covering all relevant rights and work. When executing Powers of Attorney, some jurisdictions require additional formalities (notarising and apostilling) and evidence of the signatory's authority (delegated powers or board minutes).

Understanding the market

Market size

The value of the particular market for the relevant product must be understood in each jurisdiction. This will inform whether the costs of enforcement outweigh the benefits, and whether interim injunctions should be sought.

Market access

The ability to launch an infringing product to enter a market, and the speed of doing so, can be influenced by market access issues. For example, in the pharmaceutical sector these market access considerations include:

- Regulatory data exclusivity – most regulatory regimes for pharmaceutical products apply exclusivity for clinical trials data. In the EU, this period is 8 years, with a further 2 years of marketing exclusivity, meaning a total period of 10 years from market entry of the branded product before a generic can come to market. In Australia, the period of data exclusivity is 5 years.
- Marketing authorisation, pricing and reimbursement – in some jurisdictions the timing of these procedures can impact on the timing of launch. In Italy, for example, although in principle a marketing authorisation could be granted for a generic product pending the price and reimbursement negotiation, it is extremely disadvantageous for a generic to launch its product on the Italian market without the price and reimbursement status established by the Italian Medicines Agency (AIFA), in particular by the Pricing and Reimbursement Committee. Therefore, in practice, a generic company may wish to wait for the completion of pricing and reimbursement by AIFA before launching on the Italian market. In contrast, in the UK it is possible for a generic product to launch without formal pricing and reimbursement steps. These two framework impacts the speed at which a product can become available in Italy and in the UK.
- Substitutability – national practices may also affect the substitutability of the infringing product for the originator product. Mandatory substitution and generic prescriptions can have a very significant impact on the rate at which an infringing generic product acquires market share.

Similar hurdles may exist in other sectors, whether those are regulatory in nature (eg. bringing a new financial or insurance product to market), practical (eg. public procurement requirements), or technological (eg. compliance with standards or interoperability requirements).

By understanding national market access issues, it is possible to develop a better insight into the timing and impact of the launch of an infringing product. It may also provide you with mechanisms in which a market can be monitored for potential launch (eg. for medicinal products, monitoring the databases maintained by the relevant authorities on regulatory approvals) and mean that you can engage in correspondence with the potential infringer, and prepare for enforcement action, in an orderly fashion.

Should I engage in correspondence with the alleged infringer?

In many jurisdictions, it is desirable to engage in correspondence with the alleged infringer before applying for an interim injunction and may be required if this is being sought on an *ex-parte* basis. However, by engaging in correspondence you may effectively commit yourself to litigation: careful consideration must be given as to whether and when to engage.

If the strategy is to send warning letters, their content must be carefully considered as many jurisdictions allow for proceedings to be brought by an alleged infringer if a rights-holder makes unjustified threats of infringement. The potential for action for unjustified threats differs from country to country and therefore local advice must be received to avoid any unintended and damaging consequences.

Can i get a preliminary injunction?

Infringement proceedings on the merits can take several years to determine, with appeals adding several more years. A rights-holder may therefore seek relief from infringing acts pending final resolution of the case in order to protect its position. Most commonly, this is in the form of an interim injunction – that is, a court order to restrain the infringing conduct until the court has considered the case on its merits.

Legal requirements

The national implementation or judicial interpretation of relevant IP law can introduce a disparity in the legal standards applied when enforcing rights nationally, which can have a significant impact on the ability to obtain interim relief. The availability of interim relief can also be influenced by the whether the national procedure:

- requires you to demonstrate (i) urgency, or diligence following alleged infringement; and/or (ii) that the infringement will cause irreparable harm if it is not prevented
- undertakes a "mini trial" to assess validity of the allegedly infringed right (as is the case in France and Spain) as well as the likelihood of infringement, or whether the court mainly considers the "balance of convenience" (as is the case in England & Wales, Ireland and Australia)
- favours the preservation of the *status quo*, such that if an allegedly infringing product has already launched, it may be more difficult to obtain an interim injunction.

How quickly do I need to act?

In many jurisdictions, there will be a requirement to act with reasonable urgency or diligence in seeking an interim injunction. What this means in practice differs substantially: it can be as long as 6 months (eg. Denmark), but as little as a few days or weeks (eg. the UK and Australia). Where *status quo* arguments may arise, it will be even more important to try to prevent further infringement or to act upon the threat of infringement as quickly as possible.

In order to act quickly, you need to be in a position to file the relevant documents commencing interim proceedings. In some jurisdictions (eg. Spain) detailed pleadings covering not only the requested interim injunction, but also the substantive main action must be filed, along with expert reports and factual evidence (eg. evidence of licences). This can impose significant practical limitations on the ability to act quickly in the absence of advance preparations. You must consider at an early stage in which jurisdictions you need to be pro-active in your preparations and do so well in advance of any anticipated infringement.

A New Patent System for Europe

The Unified Patent Court Agreement is nearing full ratification. Once Germany has ratified, a new patent system can come into force for participating members states (currently the UK, and all EU member states other than Spain, Poland and Croatia) which will provide a European patent with unitary effect across these states (the "unitary patent" or "UP") and a new court system to enforce it, the Unified Patent Court ("UPC").

The UPC will have local divisions in most participating member states as well as a central division split between Paris, Munich and London (the London arm of which will deal with pharmaceutical patents in particular). In addition, the UPC will provide a forum for litigating current and future European patents which are designated to individual participating countries in the same "one-stop-shop" court proceedings as for the UP. This means that European patent disputes can be resolved across all the participating states in one court, the UPC, which will also be able to provide injunctions and damages in a pan-participating state fashion.

There will be an option to opt-out nationally designated European patents from the new system, whereby such opted-out European patents will continue to be litigated on a country by country basis. Patentees should be considering now whether opting out is a better strategy for their current and future European patents. Following a transitional period the option of opting-out will be withdrawn but this period will last for at least 7 years from the new system coming into operation.

Although this new system suggests that a whole new set of strategies will need to be employed for European patent litigation, the fact that the UPC will have dual jurisdiction with the national courts over major elements of patent disputes during the transitional period, as well as the impact of opting-out European patents from the new system, will mean that experience gained in the current multinational European litigation system will continue to be significant.

More information on the considerations for opt-out and the structure and functioning of the UPC and UP system can be found on our dedicated UPC/UP Hub here: www.hsf.com/upc

Time to obtain an interim injunction

The time to obtain an interim injunction varies considerably from country to country. For example, in England & Wales and Germany an interim injunction can be obtained within days (or hours if very urgent). In other jurisdictions it can take several months unless a temporary restraining order is obtained, which itself may be difficult to obtain. Therefore the timing of the granting of interim injunctions needs to be carefully considered to see whether an injunction will in fact provide any effective relief.

Enforcing an interim injunction

In most jurisdictions, the price of obtaining an interim injunction is to accept liability for any loss caused by the injunction should the court subsequently find it was wrong to have awarded it (eg. because the IP right is found to be invalid in the proceedings on the merits). In many cases, it is also necessary to provide the court with security against this liability. Where a bank guarantee or bond is required as security, it may be necessary to have made suitable arrangements with a bank in advance of the award of the interim injunction to ensure that the security can be provided quickly and so that the injunction can be enforced.

In some jurisdictions (mainly common law jurisdictions) the court requires you to undertake to the Court that you accept such liability (a so-called "cross-undertaking" in damages). In England & Wales, as well as in Australia, the standard form of cross-undertaking as set out in the Patents Court Guide is given not only for the benefit of the party against which the interim injunction was sought but also third parties on notice of the injunction who may have suffered loss as a result of the injunction. This can mean a significantly increased exposure, which should be considered carefully.

Occasionally, the potential exposure to third party liabilities creates too great a risk, meaning that alternative strategies should be considered. If a local approach differs to the global approach, the consequences of this should be considered very carefully to determine whether there are any competition law issues, and whether practical difficulties may arise for example in relation to parallel trade.

Evidence and discovery

Discovery (or disclosure) obligations also vary significantly across jurisdictions. For example, in many continental European jurisdictions there is no formal discovery during proceedings, although it may be possible to obtain information by way of "saisie" measures (eg. in Belgium and France). Even where disclosure is possible, courts may be reluctant to order broad disclosure. The English Patent Courts (and also the Australian courts) have become increasingly reluctant to make discovery orders without a clear justification for its necessity. Any limitations on the ability to the use documents disclosed in one jurisdiction in another, and the cost versus likely benefit of any discovery, must also be taken into account.

The amount and type of evidence required by each national court also needs to be considered. In particular, the weight given to a party's own expert evidence varies significantly, with it being key to proceedings in some jurisdictions, and of less importance in others due to the court's own expertise or that of court appointed experts who guide the court on technical matters.

How long will the main action proceeding take and how long will it take to get relief?

To reach a first instance decision on the merits can take between six months to two years, depending on the jurisdiction and whether it has been possible to accelerate proceedings. Even at that stage, a final injunction may not be awarded or damages not payable if an appeal is filed, as the relevant national law may require these to be determined prior to awarding such relief. In the absence of interim relief, this delay could limit the practical benefit of a final injunction if the relevant IP right is nearing expiry. It is therefore important to have a clear understanding of the likely timing and availability of relief when determining strategy.

Settlement

As proceedings develop, settlement may be considered, whether in relation to a specific jurisdiction or across a number of jurisdictions. When considering settlement with one party, it is necessary to consider the impact of this on other alleged infringers – settlement with that party may dictate the terms of subsequent settlements with the other parties (eg. under a Most Favoured Nation clause). In any event, it is crucial that any settlement agreement is considered from commercial and competition law perspectives.

Conclusion

A successful multi-jurisdictional IP enforcement strategy requires co-ordinated and early assessment of the differing national legal and procedural requirements. Such an assessment will provide a clear understanding of the speed at which proceedings can be brought and their cost, the level of advance preparation required and the potential liabilities or limitations of any enforcement strategy.

The most effective strategy will be determined by a holistic assessment of all this information from both a legal and commercial perspective, such that the risks and benefits of all available strategies are methodically considered before deciding on a strategy. Ensuring that all relevant commercial and legal input is received early gives the strategy flexibility to evolve over time as the specific threats become known and to account for any changes in the commercial or legal position. This is best achieved by instructing a co-ordinating counsel who, by understanding the relevant business and commercial drivers, can work closely with you to create and implement a tailored strategy for each jurisdiction based on advice from local teams.

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Introducing... our new Milan office and Laura Orlando

Herbert Smith Freehills has further strengthened its European offering with the opening of a new office in Milan and the hire of leading Italian intellectual property specialist, Laura Orlando.

Europe is the second largest market for pharmaceutical companies, after the US, and Milan has a strong and growing biotech and pharmaceuticals industry. Most high value European patent disputes lead to litigation in Italy.

Laura specialises in contentious and non-contentious IP, with a focus on patent and regulatory law in the life sciences sector.

In this field she has acted in some of the highest profile multi-jurisdictional patent cases and has assisted major pharmaceutical companies in connection with patent issues concerning their biggest-selling drugs. She also advises on regulatory matters, particularly at the interface with patent law.

Regularly lauded by directories and legal publications, Managing Intellectual Property has listed Laura in the IP Stars Handbook, calling her "formidable". Chambers 2017 describes her as playing an "important role in the IP sector in Italy". Chambers 2016 describe her as "intelligent," "proactive" and "an excellent professional."

Laura has also been joined in the Milan office by Herbert Smith Freehills Partner **Sebastian Moore**, who was raised in Italy and is recognised by the legal directories as a leading patent litigator. He regularly acts for top clients in UK litigation, EPO oppositions and in co-ordinating actions on a pan-European basis.

Laura Orlando 2018 awards

- **Best in Intellectual Property – Patents** ILO Client Choice Award
- **Biomedical Lawyer of the Year** TopLegal Awards
- **Life Sciences Lawyer of the Year** Legal Community Awards

GET IN TOUCH

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The growing 'internationalisation' of China's courts

Over the past 18 months, the judicial system of the People's Republic of China (PRC) has begun to demonstrate what is being seen as an increased openness internationally, including with respect to the enforcement of foreign judgments. With the One Belt One Road investment initiative continuing to grow and the increasing proliferation of international disputes involving Mainland Chinese parties, such positive development is expected to continue.

Dominic Geiser and **Rachel Yu**, partner and senior associate in our Hong Kong office, and **Helen Tang**, partner in our Shanghai office, highlight the various recent developments.

Enforcement of judgments

Under the PRC Civil Procedure law, a foreign civil court judgment can only be recognised and enforced by a PRC court in accordance with either:

(a) an international treaty concluded or acceded to by the PRC; or

(b) the reciprocity principle,

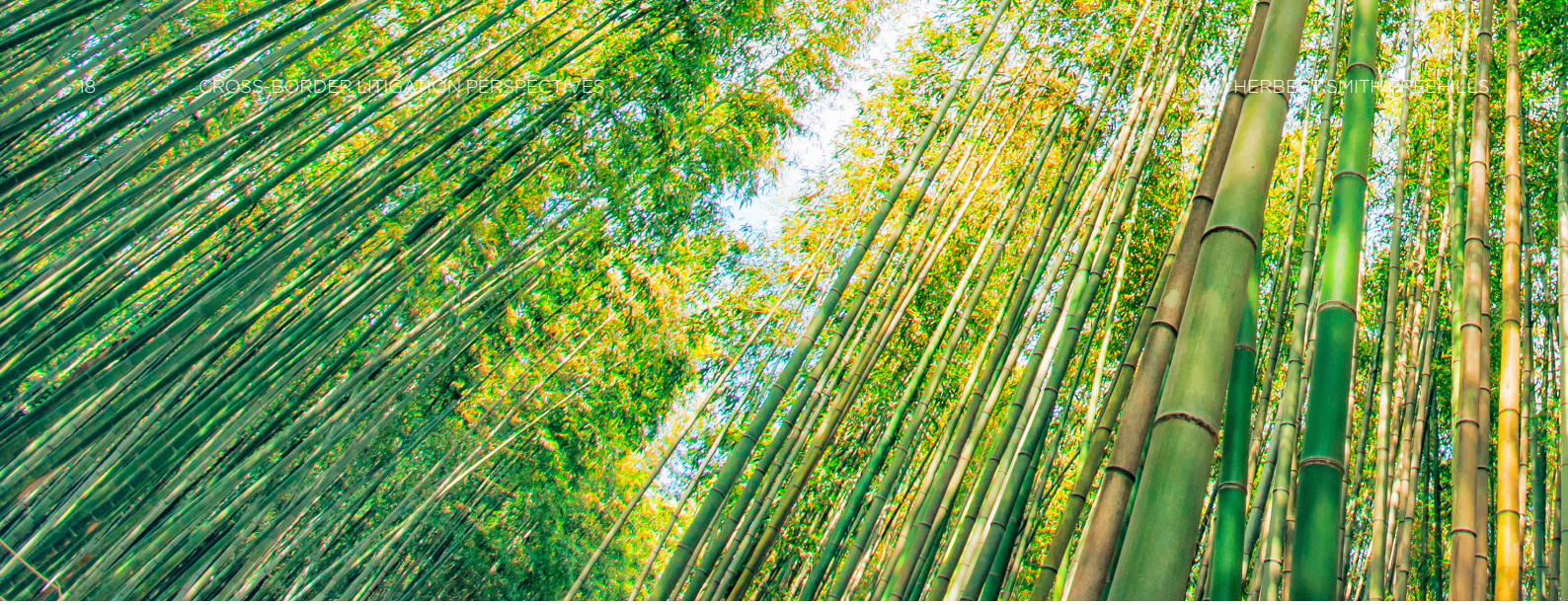
and where it is not in violation of the basic principles of the law, sovereignty, security or public interest of the PRC.

International enforcement treaties

While the PRC is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it has up until recently not concluded many mutual assistance treaties in relation to the enforcement of foreign court judgments.

It was therefore widely welcomed when the PRC announced in September 2017 that it had signed the Hague Convention on Choice of Court Agreements 2005 **(Choice of Court Convention**).

The Choice of Court Convention provides a regime for the mutual enforcement of exclusive jurisdiction agreements in international commercial transactions, as well as for the enforcement of judgments resulting from proceedings based on such agreements. The presumption is that a case meets the



requirement of being "international" for the purposes of jurisdiction unless the parties are resident in the same member state and the relationship of the parties and all other elements relevant to the dispute (apart from the location of the chosen court) are connected only with that jurisdiction. For the purposes of enforcement, a case is international whenever recognition or enforcement of a foreign judgment is sought.

The PRC still needs to ratify the Choice of Court Convention before it becomes a member state and is bound by its terms. (Notably, although the United States signed the Convention in 2009, it is yet to ratify it). However, the signs appear promising that the PRC will do so in a timely manner: at the time of signature, the Chinese Ministry of Foreign Affairs stated that it would "study the approval of the Convention as a matter of priority so that the Convention can become effective for the PRC as soon as possible".

If and when it does, there will certainly be increased opportunity for the recognition of foreign court judgments in China (and vice versa). However, in assessing the extent of that increase, it is important to note the limitations on the scope of the Choice of Court Convention. In particular, it only gives effect to *exclusive* jurisdiction clauses. That is, it only applies where there was an exclusive jurisdiction clause in favour of the foreign court in the relevant agreement that gave rise to the dispute and the foreign judgment.

Also, at the time of writing, the Choice of Court Convention has yet to attract widespread signing and ratification amongst other jurisdictions (currently, only Singapore, Mexico and the EU member states – minus Denmark – are members, although the Ukraine and Montenegro have signed, along with the US).

Separately, the PRC is also recently reported to be participating in the drafting of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (**Hague Recognition and Enforcement Convention**), which is a broad equivalent to the New York Convention for civil court judgments. It is likely, however, to be some time before that Convention is in final form.

Reciprocity principle

Reciprocity is the principle by which a court enforces the judgments of foreign courts on the basis that the foreign court in question reciprocally enforces judgments from the first court.

Despite reciprocity officially being a basis upon which PRC courts could enforce a foreign judgment, there had until recently been no reported instances of the principle actually being applied.

However, in December 2016 and June 2017, two notable enforcement decisions were handed down in Nanjing and Wuhan, recognising and enforcing a Singapore and a California court judgment respectively, on the basis of reciprocity (**see inset box**).

As reported by the Supreme People's Court (**SPC**) Monitor in October 2017, the SPC is apparently drafting a "judicial interpretation" which will address the meaning of "reciprocity" and standards for applying it. (Although the PRC's courts do not follow a system of precedent as found in common law jurisdictions, the SPC has frequently provided what is effectively guidance to lower courts

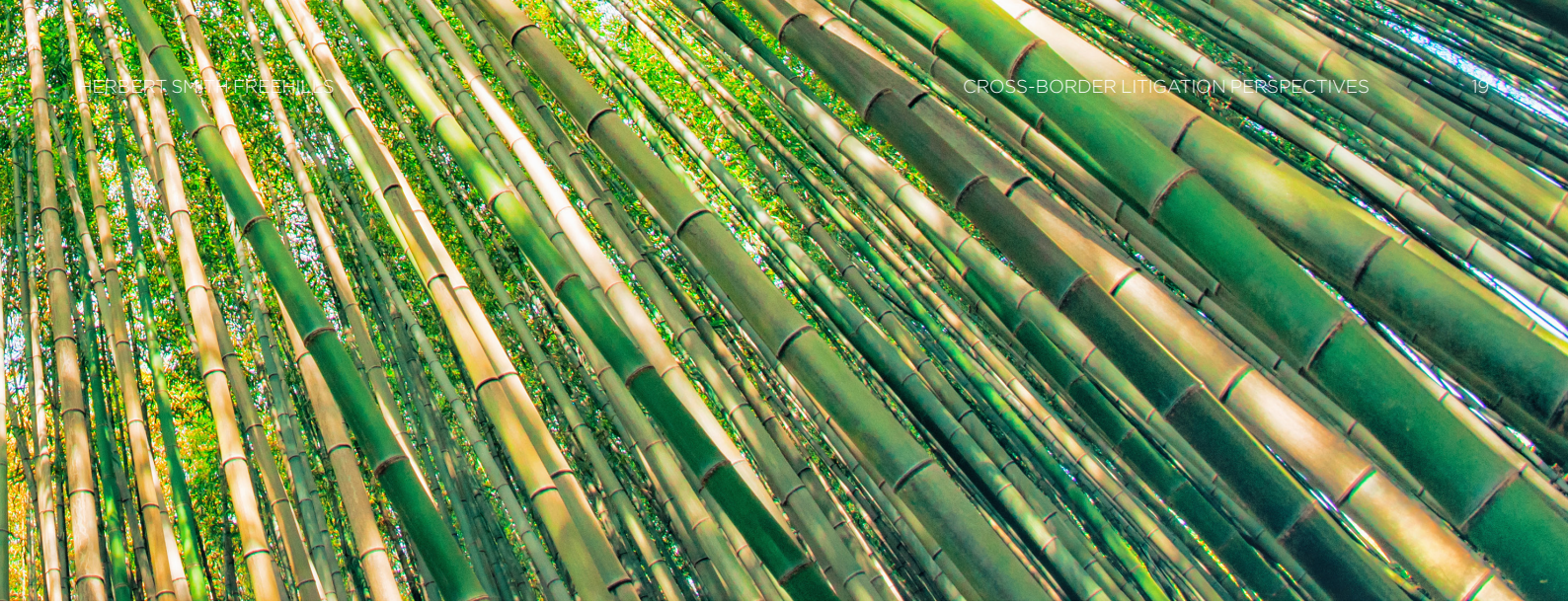
First PRC enforcement decisions based on reciprocity

In December 2016, the Nanjing Intermediate People's Court recognised and enforced a default judgment rendered by the High Court of Singapore, specifically on the basis of reciprocity under the Civil Procedure Law. The judge referred to a 2014 decision of the Singapore High Court in *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] SGHC 16, in which it recognized and enforced a civil judgment rendered by the Suzhou Intermediate People's Court in Jiangsu Province (the same province as that of the Nanjing Intermediate People's Court).

Jiangsu Province in *Kolmar Group A.G. v Jiangsu Textile Industry(Group) Import & Export Co., Ltd.*
(2016) Su01 Xie Wai Ren No.3

In June 2017, the Wuhan Intermediate People's Court recognised and enforced a civil judgment of the Los Angeles Superior Court in California. Similar to Nanjing, this involved a default judgment rendered by a foreign court and the Wuhan court found reciprocity on the basis that the District Court of the Central District of California had previously recognized and enforced a judgment rendered by the Higher People's Court of Hubei Province (of which Wuhan is the capital) in *Hubei Gezhouba Sanlian Industrial Co., Ltd et Al. v Robinson Helicopter Co., Inc.* (C.D. Cal 2009).

Liu Li v Tao Li and Tong Wu (2015)
Yue Wuhan Zhong Min Shang Wai Chu Zi No.26



through its decisions or such published "judicial interpretations").

It therefore appears that the two decisions made by the Nanjing and Wuhan courts were not a matter of coincidence, and are indicators of the PRC courts' intention and plan to formalise its approach to enforcement of foreign civil judgments.

Understandably, both decisions have attracted a lot of commentary about the PRC courts' application of the reciprocity principle. Although both judgments are indeed encouraging in terms of enforcement of foreign civil judgments in the PRC, a closer reading of particularly the Nanjing ruling suggests that the application of the reciprocity principle was not entirely clear.

It appears that the PRC courts will accept that there is reciprocity so long as the foreign court has previously enforced a judgment rendered by a court in its province. However, there is clearly a call for clarity as to what exactly is required in terms of reciprocity before the PRC courts would recognise and enforce a civil judgment made by a foreign court, such as geographical limits and level of court. It is hoped that the forthcoming SPC judicial interpretation will shed more light on this.

One Belt One Road – a new Chinese International Commercial Court?

The One Belt One Road Initiative ("**OBOR**") is China's ambitious international development strategy involving large-scale cross-border infrastructure investment linking Asia to Africa and Europe.

The size and nature of OBOR clearly lends itself to potential cross-border disputes and attention has increasingly been turned to considering what dispute resolution processes should be available to facilitate the fast and efficient resolution of such conflicts so that projects are not sidelined by protracted litigation.

Among the various proposals, which include the promotion of mediation and other forms of ADR, the SPC is considering establishing a Belt & Road International Commercial Court. The SPC is understood to be looking to Singapore's International Commercial Court and Dubai's International Financial Centre as models for any such court. For instance, a memorandum of understanding was concluded between the SPC and the Singapore Supreme Court in August 2017, regarding mutual recognition and enforcement of monetary judgments, and also provision of judicial training, within the broader context of OBOR.

However, the details of what such a Chinese international court might look like remain unclear. In particular, it is not clear whether it could replicate what is one of the most valuable features of the existing international courts – the familiarity and credibility brought by the presence of international judges sitting on the court. That would not be permitted under current Chinese legislation.

Separately, depending on the timing of the progress toward the Hague Recognition and Enforcement Convention, and how widely it is ultimately embraced (noting that the Hague Choice of Court has not yet been widely ratified), it is possible that the PRC will consider entering into bilateral/multilateral treaties with its OBOR partners in relation to mutual recognition and enforcement of civil judgments with a view to promote and facilitate the implementation of OBOR.

Finally, the PRC's promotion of mediation as an alternative dispute resolution mechanism for OBOR projects also offers opportunities to jurisdictions that have been actively promoting and developing mediation. Hong Kong and Singapore, both well-established common law jurisdictions with a deep pool of legal practitioners can lend expertise and credibility to the OBOR mediation dispute resolution mechanism and will no doubt have a role to play.

Conclusion

The recent developments give us much cause for optimism in terms of the PRC's growing jurisdictional openness, including a willingness to recognise and enforce foreign judgments. In particular, its signing of the Choice of Court Convention opens the door to increased opportunities for the recognition of Chinese court judgments internationally and vice versa. That said, it remains to be seen how the SPC will guide the lower courts in handling enforcement of foreign judgments, and the extent to which the PRC will conclude international treaties regarding mutual recognition and enforcement. It can be expected that OBOR will continue to be a key driver in this regard.

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Indonesia-related commercial contracts
Dispute resolution and governing law clauses

Herbert Smith Freehills has published its essential guide to "Dispute Resolution and Governing Law Clauses in Indonesia-Related Contracts."

Known as the 'Keris book', the guide is aimed primarily at multinational companies who handle contracts with a nexus to Indonesia (eg. where one of the contracting parties is Indonesian, where the subject matter or performance under the contract is in Indonesia, or where Indonesian law is the governing law).

It is intended to provide guidance on:

- whether there are legal or other restrictions on a party's ability to select a governing law and/or dispute resolution clause and when these restrictions apply
- what issues should be considered when selecting a governing law and dispute resolution mechanism for your Indonesia-related contracts
- practical drafting solutions

To preview the guide click here or visit hsf.com/drindonesia

To request a copy of the guide, please email SEAPublications@hsf.com

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