



HERBERT
SMITH
FREEHILLS

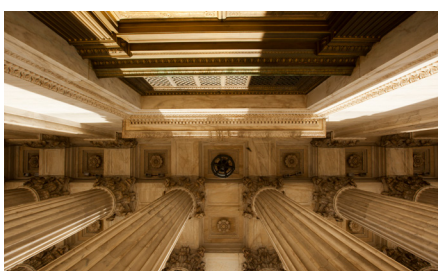
INSIDE ARBITRATION

PERSPECTIVES ON CROSS-BORDER DISPUTES

In this issue

- 02 Arbitration news and developments**
- 03 A new frontier**
What does the Brexit deal mean for cross-border dispute resolution and for London-seated arbitration?
- 08 Party autonomy prevails**
Revisiting London after the latest Supreme Court decisions
- 13 The new ICC Rules 2021**
What you need to know
- 20 Spotlight interview**
Kath Sanger
- 22 Our global arbitration practice**
A snapshot of 2018 - 2020
- 23 ASIs to the rescue**
Using anti-suit injunctions to protect an arbitration agreement
- 28 Towards greener arbitrations**
Achieving greater environmental sustainability in the way we conduct arbitrations: an update
- 32 Spotlight interview**
Mike McClure
- 34 Event reports**
‘Investor-State Mediation at the Tipping Point’

The threat of legal claims against arbitrators and arbitral institutions



ISSUE 11 FEBRUARY 2021



Read our Arbitration and
Public International Law blogs at

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

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

Welcome to the eleventh issue of Inside Arbitration

2021 has started with a challenging mix of hope and uncertainty. As the Covid-19 pandemic continues to impact our lives, many of us will find ourselves working at home with considerable restrictions on our everyday activities. Some of us have been directly impacted by illness or loss. To all of you, I send my heartfelt regards and best wishes.

With Covid-19 still dominating our personal and working lives, we have intentionally chosen not to focus on the pandemic as a major topic in issue 11 of Inside Arbitration. I hope very much that by the time of the next issue of Inside Arbitration, the light at the end of the tunnel will be shining much more brightly. As we turn that corner, I hope that the time will then be right to look at the impact of Covid-19 on the future of arbitration and disputes more widely. Even now, there are measurable signs of that impact, with record numbers of arbitrations recorded at the ICC, LCIA, HKIAC and SCC in 2020.

Moreover, we have not been short of developments and topics to cover this time round. One topic we could not avoid was Brexit. Many of our clients remain somewhat perplexed by the impact of Brexit on their dispute resolution clause choices. Andrew Cannon, Hannah Ambrose and Vanessa Naish have sought to simplify the issues for you and to provide some answers to the myriad questions we have received on this issue in the past weeks and months. I would particularly draw your attention to the charts which simplify the advice admirably.

In terms of institutional developments, 2020 saw the release of both the new LCIA Rules 2020 (covered in our last edition) and also the draft ICC Rules 2021 which came into force on 1 January this year. In this issue Craig Tevendale, Simon Chapman QC, Thierry Tomasi and Vanessa Naish look at the changes to the ICC Rules and the accompanying "Note to Parties". They also give their perspective on the ICC as a global institution and its truly international reach.

2020 also heralded the long-awaited and high-profile judgments in two English Supreme Court cases, namely, *Halliburton v Chubb* and *Enka v Chubb*. While the cases cover questions of English law, they have been awaited with interest by the global arbitration community because of the areas they address – arbitrator independence and conflicts of interest, and the governing law of arbitration agreements. The two judgments have caused a degree of controversy, and this has been ably explored from an international perspective by Chris Parker, Alastair Henderson, David Arias and Rebecca Warder.

Continuing the theme of international perspectives, and drawing together some of the issues raised by both Brexit and *Enka v Chubb*, we explore the current status of anti-suit injunctions, their availability and their use across the world. Simon Chapman QC and Briana Young look at the law and practice on anti-suit injunctions, including examples of how our clients are deploying them.

I am delighted that this issue also includes spotlight articles on Kath Sanger, a partner in our Hong Kong office, and Mike McClure, a partner in our Seoul office. Mike looks at the disputes landscape in Korea, including its potential to become the next big Asian seat of arbitration, and discusses his involvement in the first case under the US-Korea Free Trade Agreement. Kath describes her journey from Yorkshire to Hong Kong, and considers some of the disputes trends we are seeing in the region.

In these difficult times, I particularly enjoy "good news" stories that highlight how developments continue apace despite, or sometimes, because of, the current challenges. In the last issue we mentioned very briefly our efforts to increase the sustainability of arbitration within Herbert Smith Freehills. We are proud of those efforts and the wider efforts of our team members to truly work towards the prospect of "Greener Arbitration" and have returned to the topic in more detail in this issue. We hope you enjoy finding out more from Chad Catterwell, Maguelonne de Brugiere and Helin Laufer. Finally, as another positive example of the resilience and strength of the global arbitration community, we hope you enjoy reading the two short reports of virtual events held by Herbert Smith Freehills in Singapore and Hong Kong that drew together participants from across the world.

Do take a quick look at our "watch this space" page, where we briefly mention trending issues and developments. I also invite you to take a look at our infographic, a snapshot of our arbitration practice from August 2018 to August 2020, which offers us a chance to share with you some statistics about our global arbitration practice and our case load.

I trust that this issue of Inside Arbitration provides some useful insights and that you enjoy reading it.

Feedback on the content is, as always, welcome and we should be delighted to hear your thoughts on any of the topics covered.



Paula Hodges QC
Partner, Head of Global
Arbitration Practice

Hear from **Paula Hodges QC** here

Arbitration news and developments

A number of the leading arbitral institutions have released caseload statistics for 2020, with the LCIA and ICC both reporting record numbers of new cases in 2020. There were 444 arbitrations referred to the LCIA in 2020, with 407 conducted under the LCIA Arbitration Rules. The ICC saw 929 cases registered under the ICC Rules of Arbitration. HKIAC and SCC have also reported their highest number of new cases since 2010 and 2009 respectively, with HKIAC reporting 318 new arbitrations in 2020 and SCC reporting 213.

The revised ICC 2021 Arbitration Rules have come into force, applying to ICC cases commenced on or after 1 January 2021. Key changes concern the provisions on consolidation and joinder; virtual hearings; powers for the tribunal to limit changes to party representation; a duty to disclose certain third party funding arrangements; and discretion for the ICC Court to appoint the entire tribunal. The revised Rules were accompanied by an updated Note to Parties and Arbitral Tribunals. We look in detail at the new Rules on [page 23](#).

In November 2020 the English Supreme Court handed down its decision in the high-profile *Halliburton v Chubb* arbitrator conflicts case. The Court confirmed that all arbitrators have a duty of disclosure relating to facts and circumstances which would or might reasonably give rise to an appearance of bias, including overlapping appointments in accordance with the usual practice in the relevant type of arbitration. A failure to disclose overlapping appointments will be one factor taken into account in deciding whether there was a real possibility the arbitrator was biased. We discuss this decision on [page 18](#).

The start of 2021 saw the updated DIFC-LCIA Rules 2021 come into force. The Rules apply to DIFC-LCIA arbitrations commenced on or after 1 January 2021 and provide that the award can be signed electronically and in counterparts, and that parties must submit a Request for Arbitration and Response in electronic form unless prior approval has been granted for delivery by other means. Other innovations include broader powers of consolidation and joinder and the ability to amend Requests and Responses. We discuss the new Rules on our [blog](#). To discuss, please contact Partners [Nick Oury](#) and [Stuart Paterson](#).

The English Supreme Court is expected to deliver its decision this year in the *General Dynamics* case concerning the enforcement of arbitral awards against states. The Court has been asked to decide the appropriate mode of service under the State Immunity Act 1987 in respect of an arbitration claim form. For more information, contact Partner [Andrew Cannon](#) and Senior Associate [Hannah Ambrose](#).

The UK and the EU have concluded the EU-UK Trade and Cooperation Agreement, setting out the terms of trade and cooperation on certain other matters between the UK and EU from the end of the Brexit transition period. Among other things, the agreement prohibits tariffs and quotas on the movement of goods produced between the UK and the EU. Rather than being resolved by the Court of Justice of the European Union, disputes between the UK and the EU are to be resolved by arbitration following a consultation process. For more information, contact Partner [Andrew Cannon](#).

In October 2020, the English Supreme Court decided *Enka v Chubb* on determining the governing law of an arbitration agreement and the availability of anti-suit injunctions in support of arbitration. The majority held that the arbitration agreement will usually be governed by the same law chosen for the main contract and that this choice will not usually be displaced by the choice of a different seat of arbitration. For the purposes of granting anti-suit relief, the Court held that it is irrelevant whether the arbitration agreement is governed by English or foreign law. This decision is explored in our article on [page 20](#).

In November 2020, the Chinese Supreme People's Court and the Hong Kong Department of Justice signed the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong. The Supplemental Arrangement modifies and supplements the existing Arrangement. It is expected to further facilitate mutual enforcement of arbitral awards between Hong Kong and the Mainland, provide enhanced judicial support for arbitration proceedings, and better protect parties' interests in cross-border commercial dealings. For more information, see our [blog](#) or contact Partner [Helen Tang](#).

The International Bar Association (IBA) is expected to release revised Rules on the Taking of Evidence in International Arbitration early this year. Notable revisions are expected to include provisions on remote hearings, powers for the tribunal to exclude evidence obtained illegally, and provision for the tribunal to deal with cybersecurity and data protection issues at the initial consultation with the parties.

In December 2020 the EU and China concluded in principle the negotiations on the Comprehensive Agreement on Investments that will replace 25 bilateral investment treaties between individual EU member states and China. Among other things, the CAI will prohibit forced technology transfers and state interference with the technology licensing. The CAI also contains a commitment for the EU and China to complete negotiations on investment protection and investment dispute settlement. For more information, contact Partners [Andrew Cannon](#) and [Patricia Nacimienta](#).





A new frontier What does the Brexit deal mean for cross-border dispute resolution and for London-seated arbitration?

The transition period under the Withdrawal Agreement has now come to an end and, following the last minute announcement of a deal between the UK and EU on 30 December 2020, businesses across the world are assessing the practical implications of Brexit for doing business in the UK and the EU going forward.

But what does the Brexit deal mean for cross-border dispute resolution? What is the impact on English court jurisdiction clauses and on London-seated arbitration clauses? Below we give some answers to the questions that our clients have been asking over the past days and weeks.

What does the UK-EU Brexit deal say on civil judicial co-operation?

In contrast to the Withdrawal Agreement, the Agreement reached between the UK and the EU does not cover civil judicial co-operation between the UK and the EU

member states. This particular issue was always going to be resolved outside the formal trade agreement, but has not yet been so resolved. Significant issues remain as set out in this article. The hope is that the fact that agreement was reached will pave the way for a further agreement on judicial cooperation shortly.

Key Terms and Agreements

Applicable law: Applicable law (also called the governing law or substantive law) is the law that governs parties' rights and obligations under contracts or for tortious acts. Most of our clients will expressly provide for a law to govern their contracts or non-contractual obligations, but in the event that they do not do so, most countries have rules to work out what law should apply. In the EU, these rules are set out in the Rome I and Rome II Regulations.

Civil judicial co-operation: Co-operation between countries to clarify which national courts have jurisdiction to resolve cross-border civil and commercial disputes and to ensure that judgments given in those disputes can be enforced in different countries.

The Hague Convention: The 2005 Hague Convention on Choice of Court Agreements is an international treaty. Parties to the convention recognise and uphold the jurisdiction of a court which has been chosen in a contractual exclusive jurisdiction clause and will recognise and

enforce the resulting judgment. States party are currently the EU, Mexico, Montenegro, the UK and Singapore.

The Lugano Convention: The 2007 Lugano Convention is an international treaty between the EU and three European Free Trade Association (EFTA) states, Iceland, Norway and Switzerland. It covers civil judicial co-operation between the EU member states and those three states. The Lugano Convention is substantially the same as the Brussels Regulation before it was "recast".

The New York Convention: This is the name commonly used for the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This treaty requires the courts of contracting states to uphold agreements to arbitrate and recognise and enforce arbitral awards made in the territory of other contracting states (subject to very limited exceptions). There are over 160 contracting states, including all EU member states and the UK.

The Recast Brussels Regulation: The Brussels Regulation 2001 provided a set of rules regulating which courts within the EU will have jurisdiction to hear civil or commercial disputes and providing for mutual recognition and enforcement of foreign judgments. The Brussels Regulation was revised ("recast") with effect from 2015 with various improvements and the abolition of some formalities.

The UK-EU Trade and Co-operation Agreement (the Agreement): a trade agreement signed on 30 December 2020, between the European Union and the United Kingdom. It has been applied provisionally since 1 January 2021, when the transition period ended.

The Withdrawal Agreement: Signed on 24 January 2020, this treaty set the terms of withdrawal of the UK from the EU on 31 January 2020 and also contained a transition period (to 31 December 2020), together with an outline of the future relationship.

What was the position before 1 January 2021 in terms of civil judicial cooperation?

The UK officially left the EU on 31 January 2020. However, during the transition period established by the Withdrawal Agreement, EU law continued to apply to, and in, the UK, and the UK continued to be treated by the EU as an EU member state for the purposes of international agreements to which the EU is a party. This meant that the Recast Brussels Regulation continued to apply between the EU member states and the UK. It also meant that the UK continued to be treated by the EU member states (and EFTA states where applicable) as a party to the Lugano Convention and the Hague Convention. Each of these instruments has slightly different provisions, but the important takeaway was that where any of these instruments applied, the UK and EU member states would enforce each other's judgments and would uphold a contractual exclusive jurisdiction clause in favour of each other's courts, subject to only very limited exceptions.

The Withdrawal Agreement also allowed for the application of other internal EU rules

on choice of applicable law and the service of proceedings, maintaining the status quo.

Under the Withdrawal Agreement, the provisions of the recast Brussels Regulation will still apply to claims that were commenced prior to 31 December 2020. However, the position is different for claims commenced in the UK or an EU member state after this date.

What is the situation now in terms of civil judicial cooperation between the UK and the EU and could it change in future?

The Recast Brussels Regulation no longer applies between the EU member states and the UK, and the UK is no longer treated by the EU as an EU member state for the purpose of its international agreements.

The UK re-acceded to the Hague Convention in its own right, having previously been party to it via EU membership, with such accession taking effect on 1 January 2021. The Hague Convention therefore remains in force between the UK (now as a separate party)

and the EU member states. There is, however, some uncertainty as to whether the EU member states will treat the Convention as having been in force for the UK since 1 October 2015 (when it came into force for the EU member states, at that time including the UK) or from 1 January 2021 (when the UK re-acceded in its own right). The European Commission has so far indicated that it takes the latter view, while the UK the former. This means that where an exclusive jurisdiction clause was agreed before 1 January 2021 (and on or after 1 October 2015), there is some uncertainty as to whether EU member states will treat the clause as falling within the Hague Convention. This is often referred to as the "change of status" risk.

Last year, the UK applied to re-accede to the Lugano Convention with effect from 1 January 2021. However, this requires the unanimous agreement of all the contracting parties. While Iceland, Norway and Switzerland have indicated their support for the UK's accession, the EU's position is not yet clear. We expect to have some clarity on this by April 2021.¹

1. Under Article 72(3) of the Lugano Convention the Contracting Parties shall endeavour to give their consent at the latest within one year. The UK applied to re-accede to the Lugano Convention in April 2020.

- **If the UK does not re-accede to the Lugano Convention, what is the impact?**

For exclusive English jurisdiction clauses agreed on or after 1 January 2021, the position should be straightforward. EU member state courts will generally respect exclusive English jurisdiction clauses and enforce the resulting judgments under the Hague Convention (as will the other contracting states to the Hague Convention). Where the Hague Convention does not apply (either because of the change of status risk, or because there is a jurisdiction clause which is non-exclusive or unilateral, or which was agreed before 1 October 2015, or simply because there is no jurisdiction clause), the UK and EU member state courts will apply their own rules to questions of jurisdiction and enforcement of judgments.²

limited and the procedures may be more cumbersome and more expensive.

There will also be a number of other changes: for example, the English court's permission will be needed to serve out of the jurisdiction in more cases. However, the English court would also be able to issue anti-suit injunctions in respect of proceedings in EU member state courts in appropriate circumstances, such as where an action has been brought in breach of an exclusive English jurisdiction clause.

- **If the UK does re-accede to the Lugano Convention, what changes?**

The Lugano Convention will then apply as between the UK and the EU member states and the three EFTA states while the Hague

claimants should be aware that Lugano will only apply to proceedings commenced once the UK has re-acceded,³ when considering the timing of new claims.

Does Brexit have any implications for arbitration clauses?

In short, no. Arbitration has very intentionally been kept outside the reach of EU law, and because it sits outside EU law, it also means that the whole system of arbitration is unaffected by Brexit.

The agreement to arbitrate is a contractual one, and the interpretation and recognition of that agreement will be a question of each country's national law (of which there is quite a degree of consistency based on the UNCITRAL Model law) and the New York Convention (to which all EU member states are party). The arbitral process will be governed by the law of the seat of arbitration, alongside party agreement (including institutional arbitral rules where the parties have agreed to apply them), and the discretion of the tribunal. Challenging an arbitral award will be a matter of national law and is usually possible only on very limited grounds. The enforcement of the arbitral award that results from the arbitral process will be governed by national law and the provisions of the New York Convention. Again, there are very limited grounds to refuse enforcement of that award.

So, while Brexit may have a significant impact on many areas of business, it does not have an impact on arbitration as a form of dispute resolution. This makes arbitration a good choice to ensure that the parties' agreement as to forum is upheld and the outcome of a dispute resolution process can be enforced. Regardless of Brexit, arbitration can have advantages in a cross-border context over litigation, including ease of enforcement, party autonomy and flexibility, limited grounds to challenge or appeal, neutrality and privacy in the arbitral process.

Should I still be using English law to govern my contracts?

Yes. English law remains a sensible, commercial choice. English law has long been a popular choice of substantive law in international contracts, many of which have no nexus with England, the parties or the place of contractual performance. English



Where an EU member state court has jurisdiction under the Recast Brussels Regulation, there is some uncertainty as to the circumstances in which it can stay proceedings or decline jurisdiction in favour of non-EU courts (now including the UK) except where those proceedings are commenced first. Where the non-EU proceedings are first in time, there is an express power to stay proceedings under Articles 33/34 of the Recast Brussels Regulation, but otherwise the Regulation is silent as to any power to stay.

Most EU member states are likely to enforce foreign judgments even without a specific reciprocal regime, although the type of judgment enforced may be more

Convention applies between the UK and the other Hague Convention contracting states. This would mean that very little would change from the pre-Brexit regime in relation to jurisdiction and enforcement of judgments (albeit that the Lugano Convention does not include some of the improvements made when the Brussels Regulation was "recast"). English court judgments would continue to be readily enforceable throughout the EU and in EFTA countries, and English jurisdiction clauses would largely continue to be respected by those countries, and vice versa. Importantly, the Lugano Convention is not limited to exclusive jurisdiction clauses, so there is more scope for parties confidently to use other types of dispute resolution clause without increasing risk. However, potential

2. It is worth noting that the UK and Norway reached an agreement to continue to apply an old mutual enforcement treaty between the two countries to cover the question mark over Lugano re-accession. Judgments will therefore continue to be enforceable between the UK and Norway.
3. There is also a 2/3 month delay once the UK has deposited its instrument of accession before it enters into force for the UK.

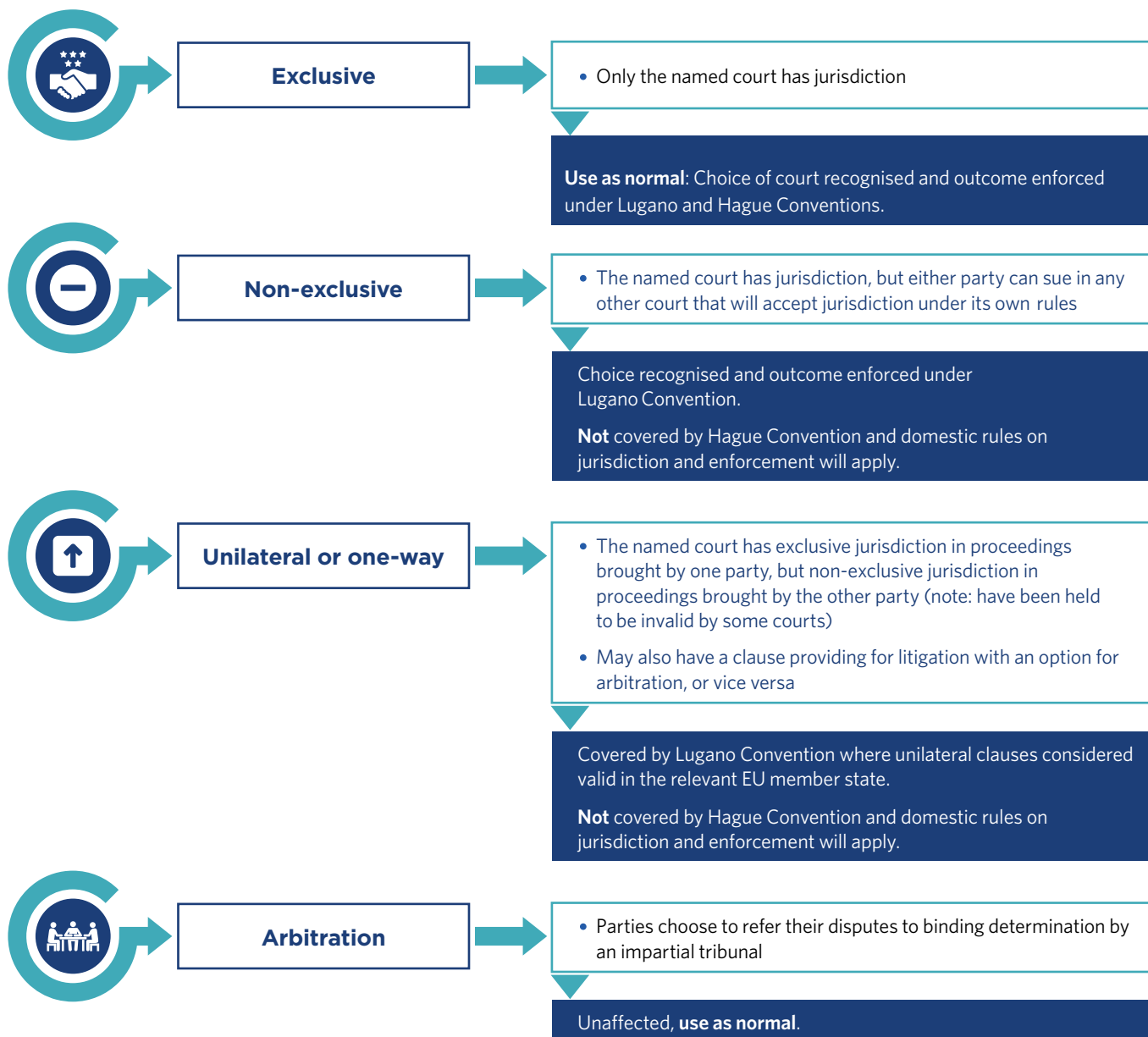
law is chosen due to the well-developed body of English contract law principles. With only a small number of exceptions (such as consumer and employment contracts), English contract law has developed largely independently of the UK's membership of the EU and is predominantly unaffected by the body of EU law. The question of whether English law remains the right choice of substantive law will therefore be subject to the same considerations as it was before Brexit occurred.

The obvious next question is whether a contractual choice of English law would be

upheld by EU member state courts. The answer again, is yes. EU courts will continue to apply the Rome I and Rome II Regulations, and these respect the express choice of the law of an EU member state or a third country law (now including the UK) in the majority of circumstances. As a result, EU member state courts should continue to give effect to a contractual choice of English law. It is also worth noting that the UK has adopted the provisions of Rome I and Rome II into its own legislation and will therefore follow the same approach when it comes to a choice of governing law of an EU member state (or any other country).

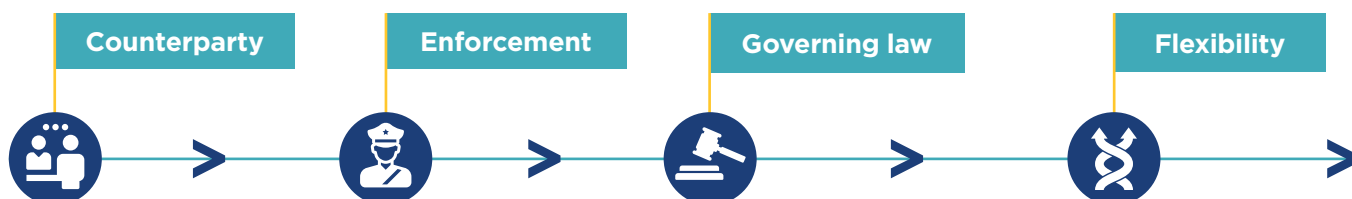
What does this mean for me practically? What dispute resolution clauses should I include in my contracts going forward?

Understanding the practical implications of the legal framework can be challenging. The chart below summarises the application of the Hague Convention and re-accession to the Lugano Convention to the standard dispute resolution clauses used in most contracts.





However, the uncertainty around the UK's re-accession to the Lugano Convention does not mean you should immediately be changing your approach to your dispute resolution clauses. It is important to consider four elements before reaching a conclusion on which dispute resolution clause will be best for you.



First of all, it is really important to remember that this is an EU/EFTA/UK issue and that the position hasn't changed for the rest of the world. So if you are a UK company and are contracting with a counterparty in the US with assets in the UK and the US, the position remains as it was before and Brexit doesn't affect your choices.

Similarly, if you may have to enforce a judgment outside the EU, choosing a dispute resolution clause that would be enforced in the EU but would not produce a judgment that can be enforced elsewhere isn't advisable. For example, choosing an exclusive English court jurisdiction clause because it definitely fits within the Hague Convention is not a sensible choice if you need to enforce the resulting judgment in a jurisdiction where English court judgments are not enforceable. If you are going to need to enforce in multiple jurisdictions across the world (including within the EU) then the balance shifts towards arbitration being the preferred choice.

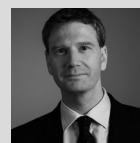
The governing law of your contract is also an important factor. Generally (but not always) parties will try to ensure that their

jurisdiction clause matches the governing law to make sure that the courts are applying their own domestic law (eg English law, English courts). Where that isn't possible, they may choose arbitration. Finally, some contracting parties may not be able to identify where disputes may arise or where they may need to enforce a judgment or arbitral award. In those circumstances, flexibility may trump all other factors and including a unilateral option involving arbitration (either as the default or as the option) may be a sensible choice.

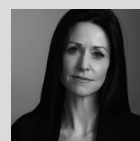
Where that analysis leads you to conclude that the right choice is an English court jurisdiction clause and enforcement is likely to be needed in the EU, an exclusive English court jurisdiction clause is likely to be your best choice, at least for the moment. Where other factors come into play, particularly if there are multi-jurisdictional enforcement options or the counter-party is not prepared to agree to exclusive English court jurisdiction, arbitration (English-seated or otherwise) is likely to remain the best option.

While the legal framework for jurisdiction and enforcement of judgments has changed, its significance is undiminished: the choice of dispute resolution mechanism remains a fundamental part of any contract in order to ensure the enforceability of the parties' obligations.

Authors



Andrew Cannon
Partner, Deputy Head
of Global Arbitration
(West), London
T +44 20 7466 2852
andrew.cannon@hsf.com



Hannah Ambrose
Senior Associate,
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

Party autonomy prevails Revisiting London after the latest Supreme Court decisions

Against the backdrop of Brexit, there has been an increased interest in London as an arbitral seat, intensifying with the UK's exit from the EU in January 2020 and over the few months leading up to the end of the transitional arrangements on 31 December 2020. This greater focus on London has coincided with several high profile Supreme Court cases which have addressed key aspects of arbitration law. In this regard, Q4 of 2020 saw the most significant English arbitration decisions since 2011 and the judgments in question have placed both arbitrator impartiality and the governing law of the arbitration agreement under the lens. In this article, we consider the recent Supreme Court decisions and where these leave London as a seat of arbitration.

What happened in Halliburton?¹

The underlying arbitration between Halliburton and Chubb related to the Deepwater Horizon incident and Halliburton's claim under an insurance policy. As the presiding arbitrator could not be agreed, the English High Court appointed Kenneth Rokison QC in June 2015. Mr Rokison was subsequently appointed by Chubb in a further arbitration in relation to Transocean's separate claim against Chubb under the same insurance cover (December 2015). Transocean then

appointed him in relation to Transocean's claim against a different insurer under the same layer of insurance (August 2016). Halliburton became aware of these arbitrations in November 2016 and then applied to the English Court for Mr Rokison's removal under s24 of the English Arbitration Act 1996. Both this application and a subsequent appeal to the Court of Appeal, were rejected.

Halliburton appealed to the Supreme Court, arguing that there was apparent bias on Mr Rokison's part. This was because Chubb could communicate with the arbitrator by way of submissions and evidence submitted in the later

1. *Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd* [2020] UKSC 48.

The Supreme Court was asked to decide two issues:

1. Whether overlapping appointments could be accepted without this resulting in the appearance of bias on the part of the arbitrator?
2. Could such appointments be accepted without giving disclosure?

Supreme Court decision

The Supreme Court made it clear that impartiality was vital in international arbitration. There was no suggestion of actual bias, so the Supreme Court was required to decide whether there was an appearance of bias, applying the well-established test of “*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*” The Supreme Court decided that when the apparent bias test is applied to arbitrators, the unique features of arbitration must be considered, including the private nature of arbitration, the limited rights of appeal, the appointment process and the potential “*financial interest in obtaining further appointments as arbitrator*”. The Court emphasised that in English law, party-appointed and presiding arbitrators must meet exactly the same high standards of fairness and impartiality.

The decision confirmed that all arbitrators have a duty of disclosure concerning facts and circumstances which would or might reasonably give rise to the appearance of bias. In considering compliance with this duty, the Court will assess the circumstances at the time the disclosure fell to be made. The Court emphasised that the duty aligned with best practice set out in the International Bar Association (“IBA”) Guidelines on Conflicts of Interest in International Arbitration 2014 and the approach of arbitration institutions such as the LCIA and ICC.

The Supreme Court determined that acceptance of multiple overlapping appointments of this kind may have to be disclosed, in accordance with usual practice in the relevant type of arbitration. Failure to disclose appointment in overlapping arbitrations may amount to apparent bias and will be one factor taken into account in deciding whether there was a real possibility of bias. Apparent bias is assessed in light of the circumstances at the time that the challenge to the arbitrator is heard.

The Supreme Court decided that Mr Rokison had been under a legal duty to disclose the multiple appointments, because disclosure of this kind was the norm in Bermuda Form arbitration and because at the time of that appointment it “*might reasonably give rise to the real possibility of bias*”.²

However, the Supreme Court found that there was no appearance of bias in this case, for the following five reasons:

1. At the relevant time the English law on arbitrator disclosure was unclear.
2. The time sequence of the three arbitrations in question may explain why Mr Rokison disclosed the arbitration between Halliburton and Chubb to Transocean, but did not identify the need to tell Halliburton about the arbitration between Chubb and Transocean.
3. Both the later arbitrations were to be decided by way of preliminary issue, so there would be no overlap in evidence or submissions. Mr Rokison had offered to resign from the later arbitrations should this prove not to be the case.
4. There was no secret financial benefit.
5. Mr Rokison had dealt with the challenge fairly and there was no evidence that he “*bore any animus towards Halliburton as a result*”.

proceedings on questions potentially relevant to the arbitration between Halliburton and Chubb. Halliburton contended that this gave Chubb an unfair advantage. Halliburton also took the position that Mr Rokison’s non-disclosure amounted to apparent bias.

As the case raised questions of general importance in the law of international arbitration, the Supreme Court permitted interventions from multiple arbitral institutions and organisations, notably the LCIA, ICC, CI Arb, LMAA and GAFTA.

“

In my view as former chair of both the IBA Arbitration Committee and also of its Subcommittee on Conflicts of Interest, which published the 2014 IBA Guidelines on Conflicts of Interest, the *Halliburton* judgment is a clear demonstration of the value of the IBA Guidelines as the international arbitration community’s gold standard in difficult terrain. The Guidelines strike a careful balance between common law and civil law practice and have provided a very well utilised guide to the international arbitration community.

David Arias
Partner, International Arbitration, Madrid

”

2. Emphasis is from the original judgment.

What was decided in *Enka v Chubb*?³

The English Supreme Court case was an appeal from the decision of the Court of Appeal, which had granted an anti-suit injunction preventing Chubb Russia⁴ from continuing a subrogation claim in the Russian courts. This was on the basis that the Russian claim was brought in breach of the arbitration agreement in question, which the Court of Appeal decided was governed by English law.

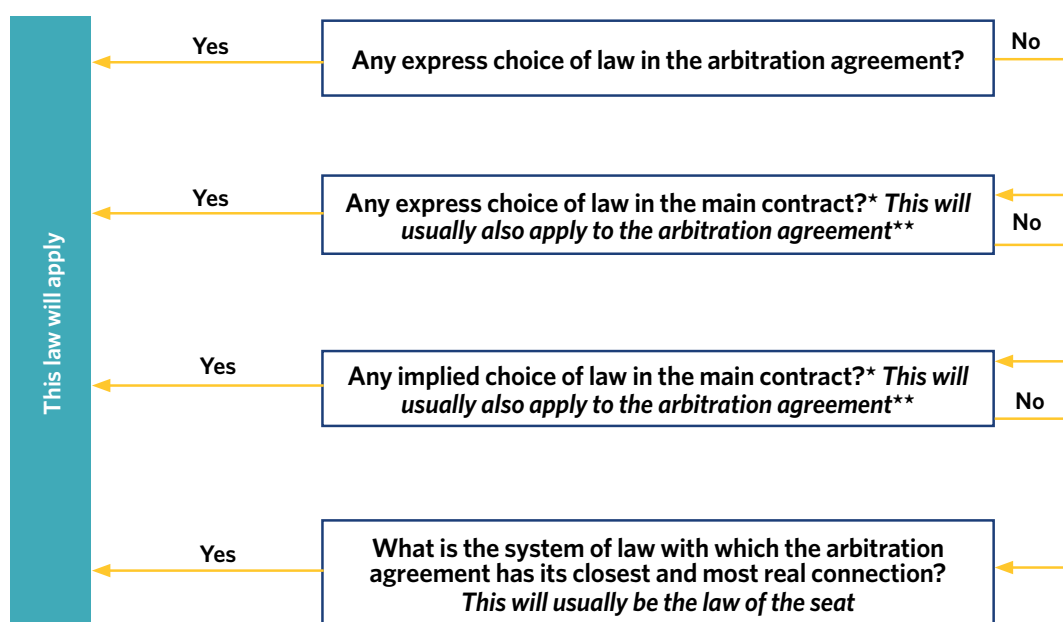
In the Supreme Court appeal, Chubb Russia took the position that the arbitration agreement constituted an integral part of the contract and was therefore governed by the law governing the main contract. Chubb Russia argued that the parties had made an implied choice of Russian governing law for the main contract.

Supreme Court decision

The majority of the Supreme Court decided that an arbitration agreement will usually

be governed by the same law that has been chosen to govern the main contract and this choice of law will not be displaced by the selection of a different seat of arbitration. Additional factors may be relevant in some circumstances, including where there is a serious risk that the arbitration agreement would be rendered ineffective if it were to be governed by the main contractual governing law.

The Supreme Court set out the following general rules for determining the governing law of the arbitration agreement:



* Choice of law for the main contract is to be ascertained by applying the Rome I Regulation.

** Subject to any reasons to negate this, such as where the arbitration agreement would be invalid under the law of the main contract.

The majority decided that there had been no express or implied choice of Russian governing law for the main contract. Under Article 4(3) of the Rome I Regulation, the contract was governed by Russian law, on the basis that this was the country with which the contract was most closely connected. This meant that it was necessary to consider the system of law with which the arbitration agreement had its closest and most real connection, which was determined to be English law, being the law of the seat.

In relation to the anti-suit injunction, the Supreme Court decided that it was irrelevant whether an arbitration agreement was governed by English or foreign law, confirming the availability of anti-suit relief.

“

Enka v Chubb has set out a clear principle of English law that parties' choice of governing law for their underlying contract will generally be respected as a choice of governing law for their arbitration agreement, even if the parties have chosen a different seat. The judgment wisely recognises that this rule should not prevail where there is a serious risk that the contractual law would render the arbitration agreement invalid.

Alastair Henderson

Partner, International Arbitration, Singapore

”

3. *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38.

4. While Chubb entities were parties to both the *Halliburton* case and the *Enka v Chubb* case, the two cases were not related.



Both these judgments have generated a significant volume of comment in the international arbitration community. There has been a particularly mixed reaction internationally to the *Halliburton* decision, with a number of criticisms made of the judgment, including whether the application of the principles outlined in the judgment to the facts in question met the expectations of the international arbitration community. There have been criticisms of the long-standing objective nature of the apparent bias test in English law and some commentators have also raised concerns around the differing timings set by the Supreme Court for assessing compliance with arbitrator duties of disclosure and impartiality.

In relation to the *Enka v Chubb* case, there are certainly differing approaches internationally to the question of determining governing law

of an arbitration clause. The French courts, for example, will review the scope of an arbitration clause in a Paris-seated arbitration with regard to mandatory French law/public policy, the parties' intentions and the case background, but without reference to any domestic law. These different approaches to governing law can put national courts on something of a collision course, as in the recent *Kabab-Ji SAL* saga. In that case, the Paris Court of Appeal refused to set aside an arbitral award handed down by an ICC Tribunal seated in Paris, despite the same award having been denied enforcement by the English Court of Appeal, on the basis that English law governed the arbitration agreement and that the award was made against a non-party.⁵

While there are clearly a range of standpoints on both decisions, these definitive judgments have brought a

welcome clarity to two important areas of English arbitration law, with the courts taking a pro-arbitration stance and reinforcing the centrality of party autonomy. After these decisions there is greater certainty on how governing law of an arbitration agreement will be determined by the English courts and how the courts will assess arbitrator conflicts. While these decisions have not won entirely unanimous support, importantly they are both pro-arbitration, in that *Enka v Chubb* has confirmed the ability to use anti-suit injunctions in support of arbitration and the *Halliburton* decision has underlined that the English courts will judge any allegations of apparent bias carefully in the context of the specific circumstances of each particular case.

“

The decisions by the Supreme Court in *Halliburton* and *Enka v Chubb* have dealt with the confusion that had previously surrounded the approach to arbitrator conflicts and the governing law of the arbitration agreement. While the decision on the facts in *Halliburton* has elicited a mixed response from the arbitration community and the approach in *Enka v Chubb* will diverge from that taken by some other legal systems, both decisions provide welcome clarity and reflect the continued pro-arbitration approach of the English courts. The judgments have highlighted the importance of careful drafting of arbitration clauses, including the need for a considered choice between institutional and ad hoc arbitration and the wisdom of expressly stating the governing law of the arbitration clause itself.

Chris Parker
Partner, International Arbitration, London

”

5. See the French proceedings in *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [CA Paris, 23 June 2020, n°17/22943] and the English Court of Appeal judgment, *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6.



Party autonomy could be said to lie at the heart of both these decisions, with the approach to governing law in *Enka v Chubb* leaving the parties free to expressly state their preferred governing law for the arbitration agreement itself. In contracts where no express choice of governing law has been referred to in the arbitration clause, the English courts will recognise the parties' choice of governing law for the underlying contract as a clear choice of governing law for the arbitration clause. The *Halliburton* decision leaves parties free to ensure what the *Halliburton* judgment referred to as a "best practice" approach, by opting for institutional arbitration, such as LCIA or ICC arbitration, where decisions on conflicts are generally informed by the IBA Guidelines. Parties also continue to have the choice to opt for the different approach to conflicts taken in specialist types of arbitration, including for example, LMAA and GAFTA maritime and commodities arbitration, which is expressly recognised by the IBA Guidelines.⁶

Where does this leave London?

The finding in *Halliburton* of no apparent bias may have been criticised by some, but that decision was founded on the narrow facts of the particular ad hoc arbitration in issue and the reasoning is pro-arbitration. Further, selecting London-seated institutional arbitration provides a measure of certainty that conflicts will be dealt with in the manner expected by the international arbitration

community. This is because challenge applications are first made to the relevant institution, so that challenges are considered by specialists in international arbitration, who are well aware of the standards of arbitrator ethics expected internationally. In relation to governing law, some parties from jurisdictions with a different approach to interpreting arbitration agreements might not be inclined to agree with the English law principles set out in *Enka v Chubb*. That said, the decision ensures certainty and this issue can in any event effectively be side-stepped by expressly referring to the chosen governing law in the arbitration clause itself.⁷

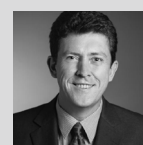
London is not only a leading institutional seat, but also continues to be a popular seat for ad hoc arbitration, with over 1,000 London-seated ad hoc arbitrations commenced in 2019.⁸ Some users of ad hoc arbitration may well move to institutional arbitration in the wake of the *Halliburton* case, in recognition of the strong institutional approach to conflicts. However, in a number of the sectors prominent in London-seated ad hoc arbitration, such as maritime and commodities, there is a small pool of specialised arbitrators and the relevant market accepts that multiple and overlapping appointments are an inevitable feature. Given the lack of consolidation provisions in these types of arbitration, it is accepted that parties will often wish to appoint the same tribunal and deal with the arbitrations concurrently.

Ultimately, the key factors behind London's leading position as a seat for both institutional and ad hoc arbitration remain unaltered by the latest judgments and parties are likely to continue to be attracted by the arbitration-friendly legislative framework and supportive courts, along with the existence of a thriving arbitration hub.

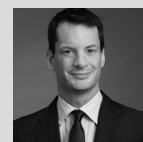
Authors



David Arias
Partner, Madrid
T +34 91 423 4003
david.arias@hsf.com



Alastair Henderson
Partner, Singapore
T +65 68 688 058
alastair.henderson@hsf.com



Chris Parker
Partner, London
T +44 20 7466 2767
chris.parker@hsf.com

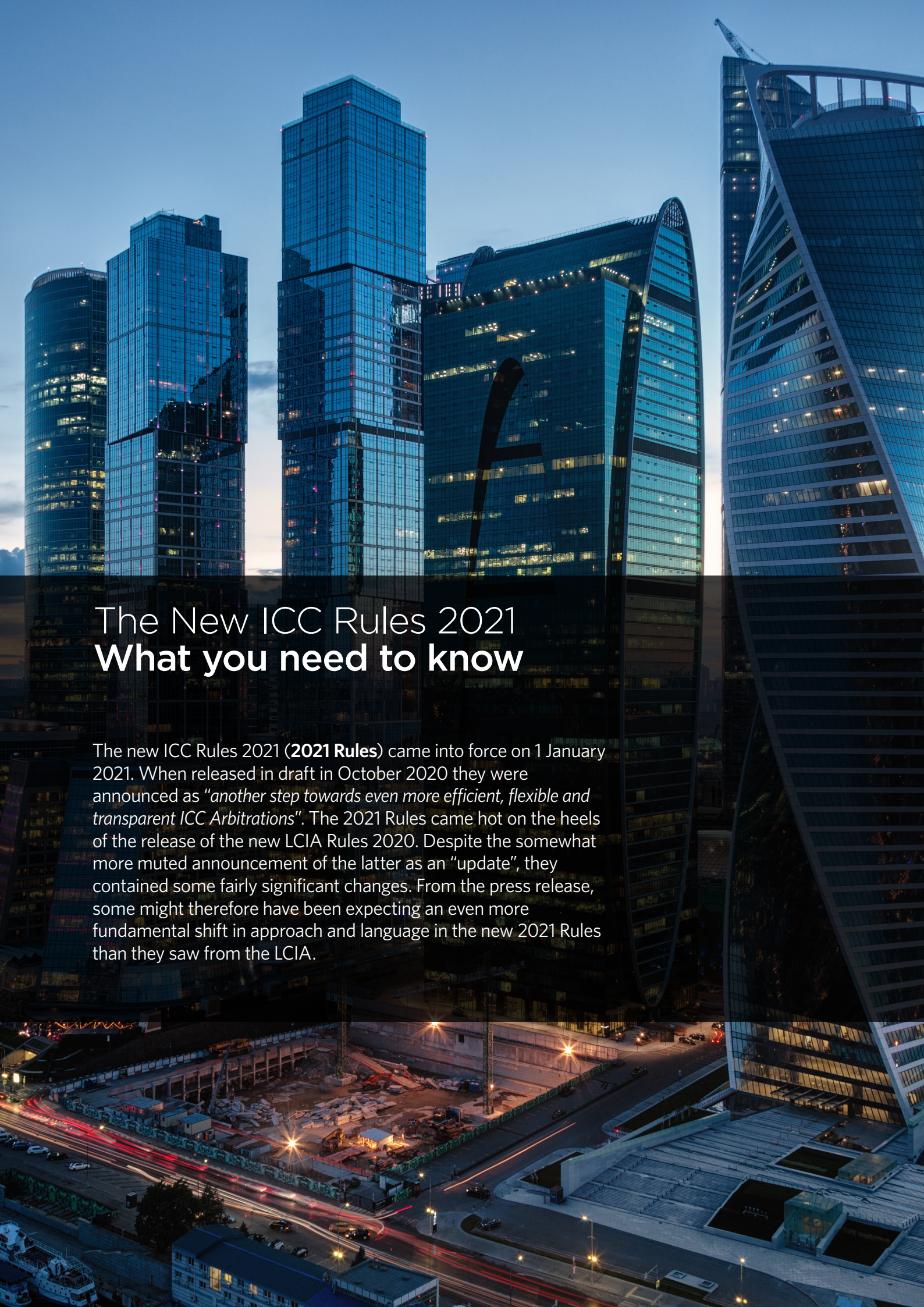


Rebecca Warder
Professional Support
Lawyer, London
T +44 20 7466 3418
rebecca.warder@hsf.com

6. See Footnote 5 to 3.1.3 IBA Guidelines on Conflicts of Interest in International Arbitration 2014, which recognises that no disclosure of multiple appointments is required in types of arbitration such as maritime, sports and commodities, with a smaller/specialised pool of arbitrators, where parties frequently appoint the same arbitrator to different cases and where all parties should be familiar with this.

7. For users of LCIA arbitration, the issue is dealt with by Article 16.4 of the LCIA Rules, which provides that the law governing the arbitration agreement will be the law of the seat, unless the parties have agreed otherwise.

8. For the latest published statistics on ad hoc arbitration, see our blog post: [Ad hoc arbitration alive and well in London: the latest statistics](#).



The New ICC Rules 2021 What you need to know

The new ICC Rules 2021 (**2021 Rules**) came into force on 1 January 2021. When released in draft in October 2020 they were announced as *"another step towards even more efficient, flexible and transparent ICC Arbitrations"*. The 2021 Rules came hot on the heels of the release of the new LCIA Rules 2020. Despite the somewhat more muted announcement of the latter as an "update", they contained some fairly significant changes. From the press release, some might therefore have been expecting an even more fundamental shift in approach and language in the new 2021 Rules than they saw from the LCIA.

At a glance

The top changes in the 2021 Rules and ICC guidance are:

- Provision for **virtual hearings and a shift away from paper filings**;
- Amendments to the **consolidation provision**, and to the joinder provision to allow for **joinder after the confirmation or appointment of a tribunal** in certain limited circumstances;
- Allowing for the tribunal to **limit changes to party representation** where it causes conflicts of interest;
- A requirement that parties disclose certain **third party funding** agreements;
- ICC Court discretion in “exceptional circumstances” to **deviate from party agreement** on the method of constitution of the arbitral tribunal and **appoint the entire tribunal to avoid unequal treatment**; and
- Greater scope for **transparency and publication of documents** by the ICC, but greater **clarity on how parties can ensure confidentiality**.

Anyone expecting that level of change might be disappointed. Many of the changes are to be found not in the main body of the rules, but in Appendix I and Appendix II and relate to the internal running of the ICC Court. These include the appointment of the President of the ICC and the formation of committees and special committees to carry out the work of the ICC Court and to streamline process. There are

also provisions about the constitution and decision-making processes of those committees. For many, particularly users of the ICC, the internal workings of the institution will be of passing interest, but of relatively little practical significance.

Where we have seen considerable change, however, is in the “Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration” (**Note to Parties**) which accompanies the ICC Rules. This latest version has been significantly expanded, revised and updated to reflect the changes to the 2021 Rules, but also to provide more extensive guidance on the application and interpretation of the ICC Rules more generally.

So where have the 2021 Rules and guidance taken a step further towards efficiency, flexibility and transparency? In this article we focus on the most important substantive changes, discussing why the changes have been made, and why these changes are of interest and importance to both practitioners and users.

The practical: the COVID-19 response

An obvious and expected change has been to include amendments that are necessary or helpful to smooth the administration of ICC arbitrations through the COVID-19 pandemic, and to provide more clearly for the practice of virtual or remote hearings. Article 26.1 (Hearings) now provides that *“the arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference,*

telephone or other appropriate means of communication.” This provision gives a tribunal the discretion to order a virtual or remote hearing if appropriate, and, like the 2020 LCIA Rules, “future-proofs” the drafting with the phrase “other appropriate means of communication” to allow for remote hearing technology to continue to evolve over time. The Note to Parties includes a fairly lengthy new section VII C entitled “Virtual Hearings” which provides guidance to arbitrators and parties on when a virtual hearing may be appropriate and the procedural and logistical steps that may be necessary.

The 2021 Rules no longer presume that pleadings and written communications will be submitted in hard copy in multiple sets for each party, arbitrator and the ICC Secretariat. Article 3.1 (Written Notifications) now merely provides for pleadings and written communications to be “sent” to each party, arbitrator and the Secretariat, and that the Secretariat be copied into communication from the tribunal. Article 4 (Request for Arbitration), Article 5 (Answer to the Request) and Article 1 of the Emergency Arbitrator Rules have all seen an amendment as a result. The onus is now placed on the claimant and respondent to decide whether they request transmission of the Request, Answer or Emergency Arbitrator Application by *“delivery against receipt, registered post or courier”* and if so, they are required to submit a sufficient number of paper copies. This shift has been confirmed in the Note to Parties, which states in paragraphs 10 and 11 that *“as a general rule”* pleadings and correspondence will be sent by email and that the Secretariat will similarly communicate by email.



The clarificatory: changes resolving issues surrounding the ICC's consolidation and joinder provisions and clarifying the ICC's move towards greater transparency

Consolidation and joinder

The 2021 Rules introduced innovative and wide-ranging changes regarding consolidation and joinder. The 2021 Rules have sought to clarify some of the language in the consolidation provisions and have also provided for joinder after the formation of the arbitral tribunal.

In Article 10 (Consolidation), the 2021 Rules have tidied up the language in Article 10(b). It had been an open question under the previous drafting whether consolidation was only possible where all the claims in the arbitration were made under "the same arbitration agreement" (ie the same contract), or also allowed for consolidation under multiple agreements with mirror arbitration clauses. The 2021 Rules now confirm that consolidation may happen where *"all of the claims in the arbitrations are made under the same arbitration agreement or agreements"*. Article 10(c) now confirms that it relates to claims that are *"not made under the same arbitration agreement or agreements"*. These changes are helpful, and should be welcomed, as should the new guidance in Section II of the Note to Parties which provides significantly more detailed guidance on how the ICC will decide on issues related to consolidation.

Article 7 (Joinder) has also seen an interesting change. Under the framework of the 2012/2017 Rules, no additional party could be joined after the confirmation or appointment of the tribunal unless all parties, including the additional party, agreed. The 2021 Rules include new

Article 7(5) which allows for a Request for Joinder to be made after the confirmation or appointment of any arbitrator. The tribunal, once constituted, may now decide on that Request, taking into account all relevant circumstances, including whether the tribunal has jurisdiction over the additional party, the timing of the Request, possible conflicts of interest and the impact of the joinder on the arbitral procedure. The additional party must also accept the constitution of the arbitral tribunal and agree to the Terms of Reference.

Practically speaking, the impact of this change may be minor. What new Article 7(5) will now allow is for a respondent to join a willing co-respondent without the express agreement of the claimant party (providing the tribunal considers it appropriate in the circumstances). Where the party to be joined is unwilling to participate and refuses to accept the constitution of the arbitral tribunal or the Terms of Reference, clearly, the prior hurdles remain.

Transparency

The 2019 Note to Parties contained significant changes focused on transparency and the publication of ICC Awards to aid transparency in commercial arbitration. There are further changes to the 2021 Note to Parties to clarify the earlier provisions, but also to broaden their scope. Section IV B now confirms that the Court will publish (from 1 January 2020) the law firms (where previously it was "counsel") representing parties in the case and (from 1 July 2021 for arbitrations registered as of 1 January 2021) the names of administrative secretaries. Section IV C also expands the material that the ICC may publish from an ICC Arbitration to cover *"ICC Awards and/or orders, as well as any dissenting and/or concurring opinions made as of 1 January*

Getting to grips with the changes: resources to help you

The new ICC Rules may not have changed substantially in tone or approach. However, if you are a user of ICC arbitration, you will still want to get to grips with what the changes mean for you and how the ICC Rules compare with those from similar international institutions.

Herbert Smith Freehills' Global Arbitration Team has produced an updated Step by Step Guide to Arbitration under the ICC Rules and an interactive PDF table which compares the rules of key arbitral institutions and the UNCITRAL Rules. To receive an electronic copy of these documents, please contact arbitration.info@hsf.com

2019". However, this section also sets out greater clarity regarding when confidentiality will prevent such material from being published. Importantly, this also includes the ability of any individual or entity to tell the Secretariat in advance that it does not wish, as a general policy, for any ICC award and related documents to which it is a party to be published. Clients who are frequent users of ICC arbitration may find this of particular interest.

The bold: trying to answer long-standing issues in arbitral practice

Changes to party representation

Back in 2014 the new LCIA Rules introduced a novel provision, providing for a tribunal to be able to withhold the approval of any intended change or addition to a party's



legal representatives where such change or addition could compromise the composition of the arbitral tribunal or the finality of any award (on the grounds of possible conflict of interest or other like impediment). At the time this provision caused considerable interest and some controversy. Some hailed it as an answer to situations similar to that which arose in the investment treaty case of *Hrvatska Elektroprivreda vs Slovenia* (ICSID Case No ARB/05/24), where the addition of new legal counsel (a barrister from the same chambers as one of the arbitrators) shortly before the final evidentiary hearing raised an issue as to the independence or impartiality of the arbitral tribunal. Other commentators viewed the new provision in the LCIA Rules as a limit on the parties' freedom to choose their legal representatives and as an excess of power for the tribunal.

Some 6 years have passed since the 2014 LCIA Rules. In that intervening period, we've seen a requirement in the SIAC and HKIAC Rules that parties immediately inform the tribunal of any change in their representation, but not a wider adoption of the LCIA's approach (which has been retained in the recent update to the LCIA Rules). However, the fast pace of change in the arbitration community is evident in the ICC's decision to adopt a very similar provision to that of the LCIA in its new Article 17.2. This article allows the tribunal to *"take any measure necessary to avoid a conflict of interest of an arbitrator arising from a change in party representation, including the exclusion of new party representatives from participating in whole or in part in the arbitral proceedings"*.

The intention behind new Article 17.2 is extremely sound, designed to prevent parties from making "tactical" appointments to derail an arbitration by creating a conflict of interest. However, a provision of this nature does expressly empower a tribunal to limit a party's ability to appoint legal representatives of its choice. It is to be hoped that the inclusion of the provision will act as a warning and deterrent to parties considering this sort of tactical game playing, rather than to limit party freedom to change representation where that is genuinely necessary.

Restrictions on unequal tribunal appointments

A further long-running question in arbitration has been whether parties may agree contractually to an unequal method of forming an arbitral tribunal, particularly in a multi-party situation. The issue became live in 1992 when the Supreme Court of France, the Cour de Cassation, gave judgment in the case of *Siemens v. BKMI and Dutco*. The decision focused on the potential conflict between the right to appoint an arbitrator against the right to an equal treatment of the parties in the appointment process and party autonomy. As was standard practice at the time, the two respondents in the ICC arbitration were asked to agree on a joint arbitrator, while the claimant appointed the other. The two respondents challenged the proper composition of the tribunal on the basis that their interests were not aligned, a position which was rejected by the Paris Court of Appeal. However, the Cour de Cassation disagreed, finding that the appointment process was contrary to public policy. The court held that each party must have equality in the appointment of arbitrators, and that this right could only be waived after the disputes in question had arisen. This threw into doubt any purported waiver of the right of appointment at the contractual stage (whether that was by incorporation of institutional rules into the parties' arbitration agreement, or by express waiver drafting in the arbitration clause itself).

The decision of the Court de Cassation in *Dutco* led to a series of changes to the rules of many arbitral institutions, including the ICC. The 1998 ICC Rules provided for the formation of claimant and respondent "sides" for the purposes of appointment in multi-party arbitrations, and, where the parties could not agree to those "sides", for the arbitral institution to appoint the entire tribunal, thus ensuring equal treatment. This approach was retained in the 2012, 2017 and 2021 amendments. However, the new 2021 Rules also include a new Article 12.9 which can be viewed as a further extension of that principle. Under this article the ICC Court now has a fall-back discretion *"in exceptional circumstances"* to deviate from any agreement by the parties on the method of constitution of the arbitral tribunal, and for the ICC Court to appoint the entire tribunal. The new provision states that this power may be invoked *"to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award"*.





This provision may well raise some eyebrows, particularly amongst users who view their ability to nominate their preferred arbitrator as a fundamental right, a major advantage of using arbitration and a cornerstone of arbitral practice. Many may question where the limits of that party autonomy and choice lie, particularly in an arm's length contractual negotiation between experienced commercial parties. Fault lines on this issue could arise between common and civil law practitioners, particularly on whether any general public policy principle of equality in this area even exists. The ICC has a strict approach to the adoption of the full ICC Rules, and it will be interesting to see whether efforts to draft express provisions to limit or disapply these powers under the ICC Rules, or to confirm the parties' agreement to potential inequality in certain circumstances will be successful. Other users may be concerned by the fairly open and discretionary nature of the provision, how the ICC will interpret the requirement of "exceptional circumstances" in the future and how frequently it will be applied. In practice, these concerns may only be resolved with time and a clearer understanding of how the ICC intends to exercise its powers going forward.

Third party funding

Whether or not a party should be required to disclose its funding arrangements to its counterparty and any arbitral tribunal is a much debated issue that we also see addressed within the revisions to the ICC Rules. There is currently no general rule requiring parties to disclose a third-party funding agreement. In 2014 the IBA Guidelines on Conflicts of Interest in International Arbitration addressed the disclosure of third-party funding agreements (where funders and insurers have a "direct economic interest in the award") in the context of arbitrators' impartiality and independence. Arbitral institutions have adopted different approaches to this issue. The AAA, SIAC and LCIA do not include specific provisions within their rules requiring the disclosure of funding arrangements, while the HKIAC's Article 44 sets out an express requirement for the disclosure of funding agreements.

The ICC's 2019 Note to Parties and Arbitral Tribunals gave a steer on what was coming in future changes to the ICC Rules. Paragraphs 24 and 28 of the Note confirmed that

arbitrators needed to identify in their disclosures of conflicts of interest any relationships with "*any entity having a direct economic interest in the dispute*". As with the IBA Guidelines, the obligation was placed firmly on the arbitrators themselves, and fulfilment of that obligation rested on the parties to supply the necessary information. New Article 11.7 of the 2021 Rules now requires that each party promptly notifies the Secretariat, tribunal and the other parties "*of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration*" in order to assist prospective and appointed arbitrators in complying with their duties of disclosure. This is a shift in approach, moving the requirement out of ICC guidance and into the Rules themselves. It has also placed a new express obligation and burden of disclosure on the parties, who must now disclose their funding arrangements throughout the life of their arbitration.

The decision to include this provision in the 2021 Rules is important and can be viewed as part of a broader acceptance at institutional level of the potential relevance of relationships between arbitrators and non-parties to questions of independence and impartiality. The drafting in the new provision of the Rules is quite narrow and does not appear to encompass all forms of funding that may be available to parties and their legal advisors (such as law firm insurance for damages based agreements). Based on the Note to Parties, this appears to have been intentional, as paragraph 21 confirms that, "*Article 11(7) would not normally capture (i) inter-company funding within a group of companies, (ii) fee arrangements between a party and its counsel....*". As with the HKIAC Rules, however, the 2021 Rules have not sought to go any further in addressing issues it has been suggested by some commentators that third party funding may raise in respect of the arbitral procedure and decision-making. There is currently no consensus in commercial or investment arbitration on the question of whether third-party funding arrangements should be relevant to issues such as security for costs, and this change to the ICC Rules certainly does not purport to answer that question.

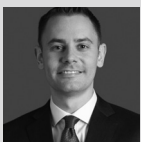
Smaller changes

- Ability of the tribunal to make “additional awards” where they omit to address claims in the main Award (Article 36.3)
- Slight changes to clarify how the Rules work for investment treaty disputes (eg Article 13.6 on arbitrator nationality and 29.6(c) disapplying the Emergency Arbitrator provisions)
- The value in dispute in order for the Expedited Procedure Rules to apply (under Appendix VI and Article 30(2)) has risen from \$2m to \$3m where the arbitration agreement was concluded on or after 1 January 2021
- New Article 43 confirms that any claims arising out of or in connection with the ICC Court’s administration of an arbitration shall be governed by French law and resolved by the Tribunal Judiciaire de Paris

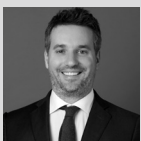
Authors



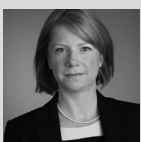
Craig Tevendale
Partner, UK Head of International Arbitration and UK Head of Energy, London
T +44 20 7466 2445
craig.tevendale@hsf.com



Simon Chapman QC
Partner, Deputy Head of Global Arbitration (East), Hong Kong
T +852 210 142 17
simon.chapman@hsf.com



Thierry Tomasi
Partner, Paris
T +33 1 53 57 70 92
thierry.tomasi@hsf.com



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

Partners Craig Tevendale, Simon Chapman QC and Thierry Tomasi discuss the 2021 Rules and the ICC’s global reach

Craig:

The changes to the 2021 Rules aren’t earth-shattering, and we wouldn’t expect them to be. The ICC carried out a substantial revision and change in approach back in 2012. Those 2012 rules were extremely innovative and changed the landscape for arbitral institutions globally. It isn’t surprising that the 2021 Rules leave the fundamental framework introduced in 2012, and then updated in 2017, largely unchanged.

Thierry:

Some of the changes that have been introduced are ones we expected or hoped for – the “practical” and “clarificatory” changes we’ve mentioned above. But the “bold” changes we’ve identified are perhaps the most interesting.

Simon:

Absolutely. The three changes we’ve discussed above do seem to be an attempt to draw a line under certain issues that have been troubling the arbitration community for some time. I’m not sure that the changes have necessarily done that – indeed, the provisions on unequal tribunal formation and third party funding in particular may have added to the debate rather than ended it!

Craig:

In 2019 the ICC celebrated its centenary and the ICC Court registered its 25,000th case. The 2019 case numbers reflect growing global popularity, with 869 new cases registered by the ICC Court, the second highest number ever. This may be a direct result of the success of steps taken by the ICC over the last decade to extend its global reach and cement its position as a truly global arbitral institution. There has been a move away from a Paris-centralised Secretariat, opening regional case management teams in key arbitral hubs across the world, each of these administering arbitrations and offering more localised support. As an Arabic speaker with a MENA disputes focus, I have watched the ICC’s efforts to attract parties within the MENA region with interest. The ICC opened an office in Abu Dhabi to serve the Middle East and North Africa in 2018. Given that UAE, Saudi Arabian and Qatari parties feature among the top nationalities for parties to ICC Arbitrations (167 in total in 2019), it certainly seems to be working.

Thierry:

Likewise, as a practitioner with a substantial Latin American practice, that decentralisation has also been worth watching. Arbitration is becoming increasingly popular across the region, and approximately 15% of parties to ICC arbitrations come from Latin America. Unsurprisingly, the region is a focus for growth for the ICC, as it is for many other institutions. The ICC’s New York office was opened in 2013 to administer arbitrations across the Americas, and in October 2017 the ICC opened a case management team in São Paulo in Brazil. The ICC’s 2019 statistics show that since it was established in October 2017, it has administered over 83 cases. The ICC’s São Paulo office has been classified by the State of São Paulo as a registered institution, allowing it to administer arbitral proceedings involving that state. This presents opportunities for foreign investors in Brazil, particularly those contracting with state entities.

Simon:

There is a similar picture across Asia. Approximately 30% of parties in ICC arbitration come from across Asia and the Pacific. The ICC’s Hong Kong “Asia” office was its first branch outside Paris and has been very successful. In September 2019 the Supreme People’s Court of China and the Hong Kong Department of Justice confirmed that the Mainland Chinese courts would be able to order interim measures in support of Hong Kong-seated arbitrations administered by certain qualifying arbitral institutions. These include ICC Hong Kong, along with the HKIAC and other Hong Kong based institutions. This has real potential to increase the attractiveness of Hong Kong seated arbitrations to Chinese parties, and may benefit the ICC. The ICC also opened a case management office in Singapore in April 2018, its fourth overseas office, and the 2019 statistics show similar success there, with 130 cases being administered from Singapore. The ICC also administers India-related arbitrations from Singapore and appears to be witnessing real growth across India, with the number of Indian parties tripling to 147 in 2019. I’m sure the ICC is hoping that growth will continue and that it can tap into the potential for India-related arbitrations in the future.



This podcast discusses the key takeaways and changes following the release of the ICC's 2021 Arbitration Rules. Listen to the podcast [here](#).



HERBERT
SMITH
FREEHILLS



ICC RULES 2021

The top 5 changes

Craig Tevendale, Partner, UK Head of International Arbitration
Thierry Tomasi, Partner, International Arbitration
Vanessa Naish, Professional Support Consultant



Spotlight interview Kath Sanger

Born and bred in Yorkshire, UK, Kath has lived and worked in Mainland China and Hong Kong since 2002. She joined our Hong Kong Arbitration Team as a Partner in October 2016, after many years in the Disputes team of Clifford Chance. Kath is a commercial arbitration specialist with a broad practice that includes M&A, financial services, energy, pharmaceutical and China-related disputes. She is qualified in Hong Kong and England & Wales.

Hear from **Kath Sanger** here [▶](#)

Unusually for a Yorkshire lass, you speak and write Mandarin Chinese. How did that come about?

I was always interested in learning languages. My grandmother was German and my mum kept trying to get my dad to speak German to me when I was younger. That never quite succeeded, but it did inspire an interest in languages at an early age. When I was 15, I went into a Chinese restaurant in Leeds with my dad. As soon as I looked at the menu, I decided I had to learn to write those characters. I realised pretty quickly that I couldn't learn them on my own and that doing a degree was going to be the best way to achieve it. I ended up reading Chinese at Wadham College, Oxford and never looked back.

You trained in London but have spent virtually your whole career in Hong Kong. What originally drew you to the region, and what has kept you here for almost 20 years?

After reading Chinese, I converted to law. The uncle of my good friend at Wadham was a partner at Freshfields and my friend's mum was a careers advisor. Between them, they convinced me that speaking Chinese would be a great advantage for a lawyer. I applied to Clyde & Co and was interviewed in Chinese by a lawyer who was visiting from Hong Kong; they pretty much offered me a job on the spot. That was great, because the firm would sponsor me to go to law school, but by this time it was almost too late to apply. Thankfully, I managed to get my application in on the last day, having

had to courier it all the way to Oxford for my old tutor to sign it!

I loved studying law, but was determined not to lose my Chinese. I pushed Clyde & Co to give me a six month trainee seat in Hong Kong. At the time they had just cancelled their Hong Kong programme, but one day they found me entertaining a group of Chinese clients in one of the London meeting rooms – in Chinese. The next day I was offered a six month placement in Hong Kong. The moment I arrived it felt like home, and I knew fairly quickly that this was the place where I wanted to develop my career. It also helped that I met Laurence, my now husband and then a trainee with Slaughter and May, in the first week!

Why am I still here 20 years later? It's a place of great opportunity generally, and a fabulous place to practise arbitration. I have been able to develop my practice in both languages, and to build a niche in the arbitration community through my work with HKIAC. Laurence also made partner at Slaughter and May, before becoming GC at Li & Fung, a world-leading supply chain manager.

"Why am I still here 20 years later? It's a place of great opportunity generally, and a fabulous place to practise arbitration."

Hong Kong is a dynamic city that attracts people with great energy. Laurence and I have made some very deep and long - lasting friendships, and it has been a great place to raise our two boys in a diverse and multicultural environment. They have learned Chinese from an early age, which is important to me.

Your recent portfolio includes several private equity disputes. What trends are you seeing in that sector, and how is it being affected by the global economic situation?

Private equity deals have always been relatively competitive in this region. The pandemic has intensified scrutiny on these deals, but it has also created opportunity. This means there is a lot of M&A activity, which generates disputes on both sides of the transaction.

Pre-closing, we've seen cases where the private equity sponsor has either refused to close the deal, or has used aggressive tactics to negotiate a large discount at the last minute. We have helped clients on both sides of that line, including by giving strategic advice to assist in pre-closing negotiations.

Unsurprisingly, we are also seeing disputes that arise from one party exiting the investment. We have a number of disputes around the exercise of put options in different Asian markets. I am also defending my first ever case where the claimant has alleged frustration of a series of investment contracts.

What other sectors are trending in Asia right now?

I am seeing increasing numbers of pharmaceutical, healthcare and TMT disputes.

Mainland China is a particularly active market because of the opportunities it offers international health and pharmaceutical companies to access an extremely large and lucrative market. However, given the difficulties of penetrating that market, foreign investors generally need to enter joint venture or collaboration agreements with their Chinese counterparts. Frequently, these arrangements generate disputes further down the line.

TMT disputes are just starting to trend in this part of the world, not least as a result of the US-China rift and moves against companies like Huawei and ByteDance. It will be interesting to see how this trend develops once the new US administration takes office.

You are a respected member of Hong Kong's arbitration community, having spent more than a decade as a member of HKIAC's Council and five years as Chair of its Appointments Committee. From that position, how do you view Hong Kong as an arbitral seat?

I'm obviously biased, but Hong Kong remains an excellent place to arbitrate. It has done a superb job of building and maintaining a reputation as one of the world's top seats, supported by a fabulous and innovative institution in HKIAC. Both the institution and the Hong Kong Government have been very agile in changing rules and law to keep up with trends in international arbitration. The Arbitration Ordinance has been amended several times in the less than ten years since it was introduced, including to make emergency arbitral relief enforceable, and giving access to interim relief via the Mainland courts. The courts are knowledgeable and supportive of arbitration, and the current Secretary for Justice was formerly Chair of HKIAC, so fully understands arbitration and what it needs to flourish. Despite recent press, none of that has changed.

As a lead advocate, you have been at the coal face of the "pivot" to virtual hearings this year. What have been the best and worst things to come out of conducting hearings by Zoom?

On the positive side, it is incredibly efficient to be able to conduct a whole hearing from a meeting room in your offices. My experience with the technology has been very good; it has worked very smoothly, including during simultaneous Chinese/English interpretation while cross-examining witnesses via Zoom. In a recent hearing, I questioned Chinese witnesses in English, got the answer in Chinese, and had an interpreter in my earpiece to help with any words I hadn't caught. Surprisingly, I found doing this remotely was actually smoother and easier than having all of us together in one room.

The other upside is the reduced impact on the environment, particularly because no one is flying and we are using a lot less paper. Across the board, this should make a significant impact on arbitration's carbon footprint over the years.

"The arbitration community as a whole has adapted remarkably well to the virtual environment"

On the less positive side, it's a shame not to have my team together in person during the hearing. Where we would usually get together during breaks and at the end of the day to de-brief, we now have to do it virtually, which is less satisfactory. I also found it harder to build rapport with witnesses when we weren't in the same place. Obviously too, when the technology does fail that can be a real frustration. Having said all that, I feel the arbitration community as a whole has adapted remarkably well to the virtual environment and that the pros generally outweigh the cons.

Diversity is a hot topic in arbitration, particularly the general lack of diversity on arbitral tribunals. As a lawyer who also sits as arbitrator, what is your take on this? What can be done to encourage more gender and ethnic diversity on tribunals in Asia?

The arbitral institutions have done a good job in ensuring that their lists of arbitrators are generally diverse across the board.

We as lawyers could do better. We need to take more responsibility for both, producing diverse lists of candidates for our clients, and encouraging them to feel comfortable nominating some less familiar names. We also need to encourage a more diverse range of people to apply to the HKIAC List of Arbitrators, SIAC list and other institutions' panels of arbitrators.

Finally, what is your favourite thing about being an arbitration lawyer?

Cheesy as it sounds, I love being in the Herbert Smith Freehills Arbitration team. It is a hugely talented and fun crowd of people to work with, and it has become my family.

I like the fact that we do our own advocacy, and I like the way a case unfolds at the hearing from a bare legal submission to a real-life story involving real people. That process is always fascinating to me.

"I like the fact that we do our own advocacy"

Finally, arbitration lawyers get to become mini-experts in the sectors and industries that give rise to our disputes. For example, I recently did a case about a logistics business and finally understood why, when you order something tiny from Amazon it comes in a massive box...!

Get in touch

Kath Sanger
Partner, Hong Kong
T: +852 21014029
kathryn.sanger@hsf.com

<https://www.herbertsmithfreehills.com/our-people/kathryn-sanger>

Our global arbitration practice:

A snapshot of 2018 – 2020

US\$98.64 BILLION

value of the claims and counterclaims in our portfolio



Our recent arbitration experience covers over **100 Countries**

working on arbitration across **21 offices**

across **19 different seats***

22 members of the practice sitting as arbitrator on **44** cases

32 arbitrator appointments as presiding or sole arbitrator

175+ appointments and roles at arbitral boards, bodies and working groups

settled **59** cases

Facts and figures



40+ Partners



200+ total qualified Lawyers working across the globe



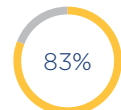
147 live arbitrations and **7** active treaty based arbitrations



12 cases over **US\$1bn** including 6 over **US\$5bn**



we have worked on arbitrations governed by **32** sets of rules



we have conducted the advocacy in **83%** of our cases*

Our sectors



Energy



Financial



Mining



Construction



Infrastructure



Insurance



IT / TMT



Trading



Travel and leisure



Manufacturing



Pharmaceuticals



Real Estate

Read our International arbitration and Public International Law blogs:

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

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

* of matters that went to hearing

ASIs to the rescue using anti-suit injunctions to protect an arbitration agreement

International, commercial parties overwhelmingly elect to arbitrate their cross-border disputes, rather than taking them to court. As a matter of law, an arbitration agreement ousts the jurisdiction of any national court to decide the substance of the dispute. Despite this, our clients increasingly find themselves served with foreign court proceedings, in contravention of their agreements to arbitrate. Fortunately, there are ways to oppose such tactical moves and return the dispute to arbitration. One of the key tools in the arsenal is the anti-suit injunction (ASI).

Asia Head of Disputes **Simon Chapman QC** and Professional Support Consultant **Briana Young** examine how these injunctions work, some of the key cases, and how to deploy anti-suit injunctions to enforce your agreement to arbitrate.

What is an anti-suit injunction?

An anti-suit injunction is an order of a court or tribunal that prevents a party from commencing or continuing proceedings in a jurisdiction or forum other than the contractually agreed forum. Failing to comply with the order can amount to contempt of court, with serious legal consequences for the offending party. These can include fines, seizure of assets and even imprisonment.

Anti-suit injunctions can be used to restrain court proceedings brought in contravention of an exclusive jurisdiction clause. For example, where a contract provides for litigation in the courts of New York and one party sues in the English courts instead, the counterparty can ask the New York courts to enjoin the English proceedings.

They can also be used where one party brings a claim in court instead of arbitrating it in accordance with the contract. In this article, we focus on anti-suit injunctions in the context of arbitration.

What is the legal basis?

Bringing proceedings in a forum other than the contractually agreed forum is a breach of contract. On this basis, courts in common law jurisdictions have historically been willing to restrain foreign court proceedings commenced in breach of a court jurisdiction or arbitration clause. In contrast, civil jurisdictions generally do not recognise this form of relief and civil courts will not typically restrain foreign proceedings in the same way.

Who can grant anti-suit injunctions?

A party facing court proceedings in a dispute that is subject to an arbitration agreement has two principal options.

It may ask the arbitral tribunal (once constituted) to order the counterparty to withdraw the court proceedings, or to stay them pending the outcome of the arbitration. An arbitral tribunal can make such an order only if the law of the seat, and any relevant institutional rules, allow it to do so. Tribunals have this power in most major seats and under most key institutional rules, including ICC, SIAC, HKIAC, SCC and LCIA. However there are exceptions, eg Mainland China, so it is important to check the law and rules.

Alternatively, the party can apply to the courts of the arbitral seat for a similar order. If granted, the order will bind the counterparty, not the foreign court. However, the order will usually be sent to the foreign court, so that it is aware the order exists. A recent decision of the English court, *Enka v Chubb*, confirmed that the court of the seat is the appropriate court to grant anti-suit relief; *forum non conveniens* considerations do not apply (see the article "Party autonomy prevails: revisiting London after the latest Supreme Court decisions" for more on this case).

A third option, where no tribunal is yet in place, is to appoint an emergency arbitrator and apply for an order directing the counterparty to stay or withdraw the court proceedings. The relevant arbitral rules, and the law of the seat, must both permit emergency arbitration. By definition, orders of an emergency arbitrator are made on an interim basis and are subject to review by the full tribunal, once constituted.

Therefore, emergency arbitration is typically considered only where the need for anti-suit relief is urgent.

Should you apply to the court or the arbitral tribunal?

The circumstances of your case will determine the best approach. As well as checking whether the law of the seat and the applicable rules allow courts and arbitrators to issue injunctive relief in support of arbitration, there will be a number of other considerations.

For example, your counterparty may file court proceedings before an arbitration is commenced, or before the tribunal is constituted. In such circumstances, you could seek an injunction from the court at the arbitral seat. In addition, courts have more robust powers than arbitral tribunals to enforce their own orders. Understandably, even once the tribunal is constituted, many parties prefer to seek anti-suit relief from a body that can fine, or even imprison, non-compliers. Arbitral tribunals are limited to drawing adverse inferences or penalising the offender in costs, and many are reluctant to impose cost consequences until the end of the case.

However, there will be times when parties need, or prefer, to apply to the arbitral tribunal. This may be for a number of reasons, including a desire to preserve confidentiality, or to avoid the time and expense of instructing local lawyers to file a court application. The tribunal will likely already be familiar with the parties and the facts of the case, and therefore able to issue a decision quickly. In a recent case, our client's counterparty started proceedings in the domestic courts of its home jurisdiction, in breach of an arbitration clause. In that



case, we obtained anti-suit relief from the arbitral tribunal, and in parallel lodged an objection to the jurisdiction of the domestic court.

Even if the relevant court has power to order anti-suit relief, there may be concerns about local influence, corruption, or other considerations that mitigate against applying to the court. It is important to take advice on your specific circumstances to establish the best way forward.

What must you show?

The exact requirements will vary depending on the forum in which you apply. It is important to check carefully, and make sure your application meets all the necessary criteria.

In England and other common law jurisdictions, you must satisfy the court:

- that there is a valid arbitration agreement;
- that it binds the party bringing the foreign court proceedings; and
- that the judicial proceedings amount to a breach of the arbitration agreement.

The court must be satisfied that the arbitration clause is not null and void under the law which governs it. You must also demonstrate that the clause binds your counterparty, either as an original party or as a third party (as a result of novation or assignment, applicable third party rights legislation, or otherwise).

In English law, there is no general requirement to show that the judicial proceedings are vexatious or oppressive. Rather, the burden is on the respondent to establish that there is a “strong reason” why the injunction should be refused.

The final point requires the applicant to demonstrate that the claim before the court falls within the scope of the arbitration clause. This involves demonstrating that the substance of the claim is covered by the wording of the arbitration clause. In the majority of commercial arbitration cases, this should not be unduly difficult. Most modern arbitration agreements are drafted broadly to cover disputes “arising out of or relating to” the relevant contract, or similar. Well-drafted clauses also expressly include both contractual and non-contractual claims. Moreover, in keeping with the principle established in *Fiona Trust & Holding Corp v Privalov* [2007] Bus LR 1719, the English courts (and the courts of many other leading seats) will assume that commercial parties intended any dispute arising from their relationship to be resolved in a single forum. As a result, your counterparty would have to show that the substance of the court claim is either clearly outside the contractual relationship, or not arbitrable.

It is important to apply for anti-suit relief promptly, and before the court proceedings are too far advanced. Any delay is likely to discourage the court or tribunal from granting the relief.

It is also essential that you do not voluntarily participate in the proceedings you seek to injunct. Doing so will reduce – often significantly – your chances of obtaining an injunction. However, you may take steps in the court proceedings if there will be adverse consequences for failing to do so. For example, certain courts require the defendant to acknowledge service, or to take some other step to recognise that the proceedings have been filed. Alternatively, you may need to file an objection to the court’s jurisdiction to avoid the court

concluding that you accept it. Always check carefully and seek local law advice.

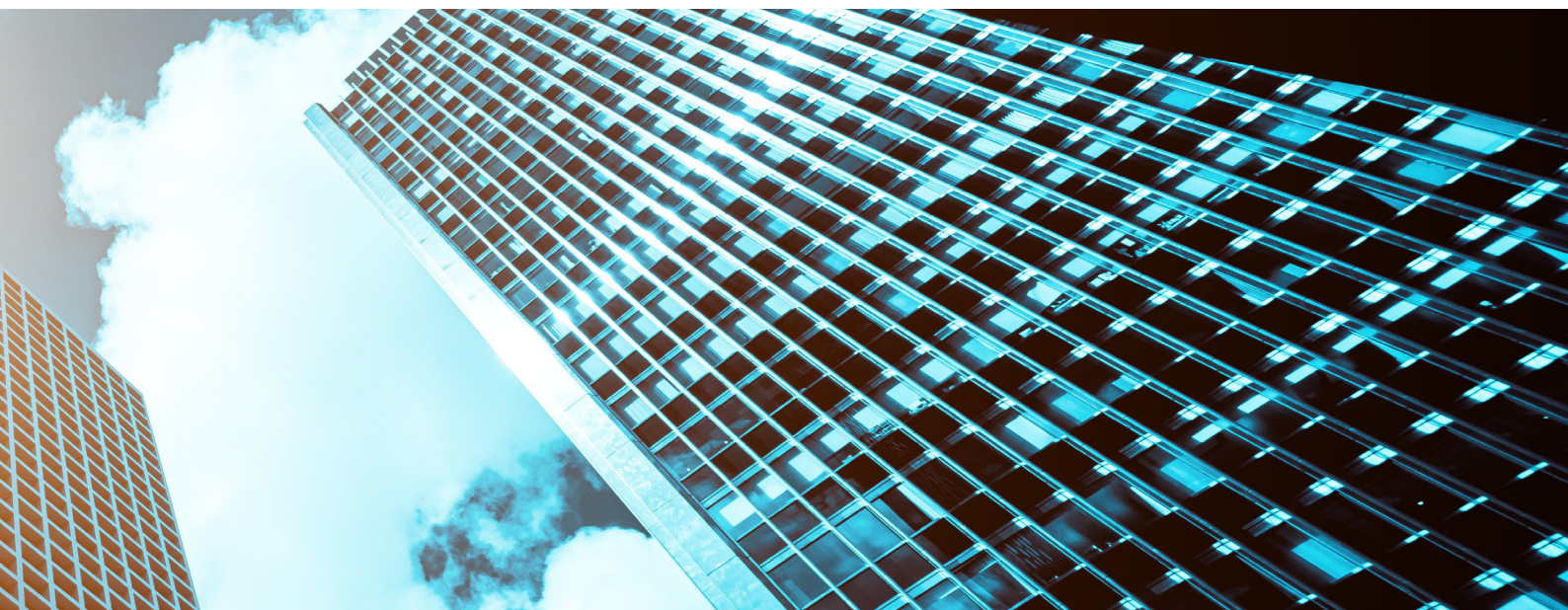
What form does the injunction take?

The exact form is dictated by the procedures of the relevant court. Broadly, though, an anti-suit injunction will be in the form of an order that the respondent cease and desist from pursuing the court proceedings, and take all steps necessary to stay the court proceedings, pending final resolution of the arbitration. It may impose a time limit for taking those steps, and require the respondent to notify the claimant when they are complete. Finally, the injunction will usually order the respondent not to bring any additional proceedings in respect of disputes that are subject to the arbitration agreement.

An anti-suit injunction binds the respondent, ie the party that commenced foreign court proceedings. It cannot legally bind the foreign court. However, if the respondent fails to suspend the proceedings, you may consider applying to the court directly, using the injunction to support your application. Again, the exact procedure will be determined by the rules of the relevant court.

When are anti-suit injunctions not available?

We increasingly see counterparties engaging in tactical litigation to avoid or delay arbitration. Often, this takes the form of bringing parallel civil proceedings against a contractual party, or one of its affiliates, in a foreign court. In these cases the anti-suit injunction can usually provide a quick and effective remedy, depending on the scope of the underlying agreement to arbitrate.





There may, however, be instances where anti-suit proceedings are not appropriate, or are unlikely to be effective. In some jurisdictions, for example, it is common for parties to lodge criminal proceedings in parallel to any civil suit as a way of increasing pressure on a counterparty to settle. Even if the criminal complaints are groundless, they are founded in a separate cause of action to the arbitration and, in any event, are unlikely to be arbitrable. Consequently, an anti-suit injunction will not generally be appropriate, although the existence of such proceedings may still be brought to the attention of the arbitral tribunal, and may be a factor considered in the final assessment of costs.

We are also aware of cases where a counterparty has launched regulatory proceedings as a tactic to delay or divert resources from an arbitration. Although such complaints may be baseless, they cannot be referred to arbitration and must instead be dealt with by the relevant regulator. Therefore, they do not fall within the scope of the arbitration clause and cannot support an application for anti-suit relief. The same applies where a counterparty brings a claim based on a cause of action that only a court can determine, such as breach of statutory duty.

What is the position in the EU?

The availability of anti-suit injunctions in the European Union is a complex topic. As noted above, anti-suit injunctions are overwhelmingly a common law remedy. As a result, European courts will not generally restrain proceedings in a foreign court.

In addition, EU law (including the Recast Brussels Regulation and the European Court of Justice decision in *Allianz SpA v West Tankers Inc* (Case C-185/07)) effectively prohibits a court in one member state from restraining the pursuit of court proceedings in another member state. There is an “arbitration exception”, but the *West Tankers* decision held that it does not permit member state courts to grant anti-suit injunctions to protect arbitration agreements, and subsequent decisions have left the position uncertain.

However, following Britain’s exit from the EU, UK courts should be able to issue anti-suit relief in respect of court proceedings in an EU member state, including to protect an arbitration agreement.

Damages may be available for breach of an arbitration agreement, even where anti-suit relief is not available.

What if the court proceedings involve third parties?

It is not uncommon for our clients to find themselves sued in a foreign court alongside an affiliate that is not party to the arbitration agreement. Alternatively, claims which clearly fall within the scope of the arbitration clause may be brought only against an affiliate in an effort to avoid the agreement to arbitrate. Fortunately, the courts of most key seats have taken a robust approach to the non-party issue.

Recent anti-suit cases in Hong Kong, England and Singapore confirm that the courts are generally willing to injunct

proceedings brought outside the agreed forum if their substance is covered by a valid arbitration clause. The addition of extra parties is typically not a bar to granting such relief.

In England, *Donohue v Armco* [2002] 1 All ER 749 established that a party sued in a forum other than the agreed forum is entitled to an injunction restraining the foreign proceedings. This is the case even if the claim is made against more than one defendant, only one of whom is party to the jurisdiction agreement. The judge in that case stated:

“In my opinion, an exclusive jurisdiction clause in the wide terms of that with which this case is concerned is broken if any proceedings within the scope of the clause are commenced in a foreign jurisdiction, whether or not the person entitled to the protection of the clause is joined as defendant to the proceedings” (emphasis added).

More recent decisions adopt the same approach. For example, in *GM1 and GM2 v KC* [2019] HKCFI 2793, the Hong Kong Court of First Instance held that anti-suit



relief may be granted against a third party if the arbitration agreement can be construed to cover claims against the non-contracting affiliates or associates of the contracting party (citing *Giorgio Armani SpA v Elan Clothes Co Ltd* [2019] HKCFI 530). The Singapore Supreme Court confirmed that “[i]n cases involving an arbitration agreement or an exclusive jurisdiction clause, it would suffice to show that there was a breach of such an agreement, and anti-suit relief would ordinarily be granted unless there are strong reasons not to” (*Sun Travels & Tours v. Hilton International Manage* [2019] SGCA 10).

In other words, the courts will look to the substance of the dispute. If it falls within a valid arbitration clause and one party is entitled to rely on the clause, that may be sufficient grounds for restraining the foreign court proceedings. Put another way, the party to the arbitration clause has a contractual right to have any claims arising out of or relating to the contract determined in arbitration. The launch of court proceedings is a breach of that contract, for which anti-suit injunction is an available remedy. The party may also be entitled to damages.

The courts will also consider whether the third party is asserting a right under a contract that contains an arbitration clause. If so, they will generally hold that the party is bound by the arbitration clause. In *Dickson Valora Group (Holdings) Co Ltd v Fan Ji Qian* [2019] HKCFI 482, the Hong Kong Court issued an injunction against a non-party who had commenced court proceedings in Mainland China, holding that since the non-party was asserting his right to a success fee, the conditions integral to this

right (ie the arbitration clause) also bound him. *AIG Insurance Hong Kong Ltd v Lynn McCullough and William McCullough* [2019] HKCFI 1649 adopted a similar approach. Where a non-party to an insurance agreement was claiming rights under that agreement, she was bound by the arbitration clause in the agreement. The court therefore issued an injunction restraining proceedings that the non-party had commenced in the USA (this case is on appeal).

What if you are sued in the courts of the arbitral seat?

Anti-suit injunctions are an appropriate remedy for a party sued in a foreign court, ie a court outside the seat of arbitration. If you are sued in the courts of the seat, you may apply to the court to stay its proceedings in favour of arbitration. The courts of most major arbitral seats must stay their proceedings if the applicant demonstrates that the dispute is covered by a valid arbitration agreement. This obligation is set out in Article 8 UNCITRAL Model Law, s.9 English Arbitration Act, s.20 Hong Kong Arbitration Ordinance, and other modern arbitral statutes.

Is it possible to injunct an arbitration?

This is a question of the applicable law. In England and other common law jurisdiction, it is possible but unusual.

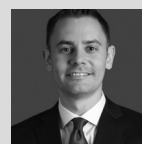
In 2019, the English Court of Appeal provided guidance in *Sabbagh v Khoury and others* [2019] EWCA Civ 1219. It held that an anti-arbitration injunction may be granted where it is “just and convenient” to do so.

Where it is clear that the dispute is within the scope of the arbitration agreement, no injunction should be granted. Where it is clear that the dispute falls outside the arbitration agreement, the court may grant an injunction but only if the circumstances of the case require it (eg when the arbitration proceedings are considered oppressive and vexatious). However, the Court emphasised that the grant of an anti-arbitration injunction remains an exceptional step.

Conclusion

The anti-suit injunction is an equitable remedy rooted in the common law. Where such injunctions are available, the court will exercise its discretion when deciding whether to grant the relief in any specific case. However, our own experience and recent case law both demonstrate an encouraging trend among courts in key jurisdictions, which have repeatedly shown themselves willing to protect commercial parties and their contractual rights to arbitrate.

Authors



Simon Chapman QC
Partner, Deputy Head of
Global Arbitration (East),
Hong Kong
T +852 210 142 17
simon.chapman@hsf.com



Briana Young
Professional Support
Consultant, Hong Kong
T: +852 210 142 14
briana.young@hsf.com

Towards greener arbitrations
**Achieving greater environmental
sustainability in the way we
conduct arbitrations: an update**



Background

Around the globe, tackling climate change has now undisputedly become a political priority and an environmental necessity. This priority is reflected in the corporate world, where environmental sustainability now regularly features as a pillar for strategic growth for most multinational corporations, who are facing unprecedented pressure to react to calls for increased climate change mitigation action. As a result, a common response has been to set stringent environmental sustainability targets, with many major corporations having recently pledged to become carbon-neutral.¹

The arbitration world has not been immune to this trend. Naturally, law firms have been setting their own sustainability targets, with Herbert Smith Freehills recently pledging to reach net-zero by 2030.² Collaborative legal initiatives, such as the Chancery Lane Project,³ have sprung up from the ground to create practical legal solutions to help businesses and communities transition to net zero. In parallel, the arbitration community itself has formed its own task forces to tackle the reduction of carbon emissions arising from the work we do, from proceedings to the conferences we attend. In particular, the independent arbitrator Lucy Greenwood's Green Pledge has piqued the interest of the international arbitration community, prompting practitioners and arbitrators to consider the wider impact of their case management on the environment.⁴

The Covid-19 pandemic has also acted as an accelerator for an increased digitalisation of proceedings, introducing opportunities for practical ways to mitigate the carbon footprint of arbitrations, as the arbitration community has turned to virtual hearings, which are now a common occurrence, and forging a path for sustainable change in the way we work.

Striving for environmental sustainability

Hear from Helin Laufer, an Associate in our International Arbitration team in London.



In 2020, the Campaign for Greener Arbitrations, spearheaded by Lucy Greenwood, was formally launched to raise awareness of, and mitigate, the significant carbon footprint of international arbitrations.⁵ The Campaign is based on Lucy Greenwood's Green Pledge which encourages commitment to creating a work space with a reduced environmental impact, corresponding electronically where possible, using videoconferencing as an alternative to travel, and avoiding printing, among other suggestions.

The Campaign for Greener Arbitrations' research sparked even more interest in sustainability in arbitration, as it revealed that just under 20,000 trees would be required to offset the carbon emissions resulting from a medium-sized arbitration.⁶ This is the surprising equivalent of four times the number of trees in Hyde Park or all of the trees in Central Park.

At Herbert Smith Freehills, the London-based international arbitration team also conducted related research, and analysed the carbon footprint of one party's counsel in a medium-sized London-based arbitration. Herbert Smith Freehills' study

identified two major carbon emitting sources in such arbitrations: the energy usage of the fee earners working on the matter and air travel.⁷ Our firm's study also identified and reviewed the use of materials comprising paper for printing and photocopying, and USB drives, as another carbon emitter.

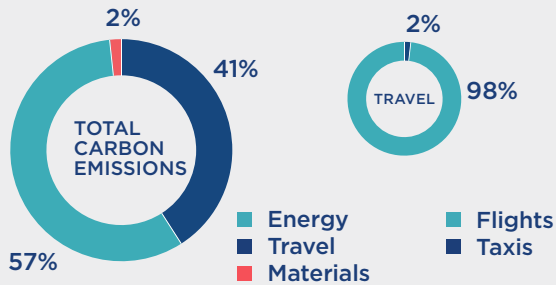
The use of cleaner energy sources to combat the carbon emissions arising from energy usage, exploring effective alternatives to travel where possible, as well reducing any unnecessary material or electronic waste, are clear priorities for those looking to reduce the footprint of proceedings.

Such concerns appear to have arisen in parallel in the wider international arbitration community too, as the new LCIA and ICC Arbitration Rules reflect the special attention paid to environmental sustainability-related procedural aspects. For instance, Article 4.1 of the LCIA Arbitration Rules 2020 now provide for electronic means as the default for submitting a request for arbitration and the response thereto. Article 4.2 further provides that any written communication in relation to the arbitration shall be delivered electronically. The new ICC Rules have also shifted to electronic filing. In addition, Article 26(1) of the draft ICC 2021 Arbitration Rules also contain a new environment-friendly provision which enables arbitral tribunals to decide, after consulting the parties, and on the basis of the relevant circumstances of the case, that hearings may be conducted remotely by video-conference and there are equivalent provisions in the LCIA Rules 2020. These new kinds of provisions in arbitral rules may reflect the Covid-19 pandemic, but also highlight the potential for the reduction of travel and waste in international arbitration proceedings, as well as the crucial role which arbitral institutions and tribunals may play in managing cases in a sustainable manner.

1. For instance, in January 2020, Microsoft pledged that, by 2030, it will become carbon negative and, by 2050, it will remove from the environment all the carbon which it has emitted either directly or by electrical consumption since its establishment in 1975 – read more [here](#). In February 2020, BP announced its intention to go carbon-neutral by 2050 – read more [here](#).
2. Herbert Smith Freehills "'Carbonneutral' and 'Net Zero Carbon': What's the Difference – and why does it matter?", 2 December 2020, available [here](#).
3. Read more [here](#).
4. Campaign for Greener Arbitrations, "The Green Pledge", available [here](#).
5. Campaign for Greener Arbitrations, "The campaign" – read more [here](#).
6. Campaign for Greener Arbitrations, "A significant impact" – read more [here](#).
7. Inside Arbitration – Issue 10, "Towards greener arbitrations: achieving greater environmental sustainability in the way we work" – read more [here](#).

Herbert Smith Freehills arbitration case study: the carbon footprint of a medium-sized arbitration

We have mapped out the carbon footprint of one of our previous London-seated arbitrations on which London-based fee earners have worked.¹



1. Details of these data calculations are available separately on demand.
2. Data published by Lucy Greenwood, founder of the Pledge for Greener Arbitration.

A medium-sized arbitration on average requires just under **20,000 trees** to offset the carbon emissions created by that one arbitration – a number equivalent to four times the number of trees in Hyde Park or all the trees in Central Park.²

- The figure relating to **energy** is based on the number of fee earner hours recorded on the matter. It has been assumed that these hours were recorded in the London office.
- The figure relating to **travel** represents the CO2 emissions (kg) resulting from flights and taxis fares.
- The figure relating to **materials** represents the CO2 emissions (kg) resulting from the production of the materials used in the arbitration.
- The **materials** considered comprise paper used for printing and photocopying and USB drives.

Covid-19 as a driver for sustainable behaviour

Hear from Chad Catterwell, a Partner in our International Arbitration team in Melbourne.



In 2020, Earth's "Overshoot Day", which marks the date that humanity's resource consumption surpasses the amount of resources that the Earth can produce in 12 months, took place one month later than in 2019.⁸ This change has been attributed in large part to the current Covid-19 pandemic, and the associated reduction in international and domestic travel amongst other things.

The reduction in travel and the restrictions on in-person gatherings that have been implemented globally have forced the arbitration community to adapt – leading to a widespread shift to virtual meetings, interviews, hearings, networking events and conferences. As such, Covid-19 has forced the international arbitration community to adopt state-of-the-art technology and employ video-conferencing and electronic document sharing means almost exclusively. We have had the opportunity to take stock of what works, and what does not, and already we are seeing useful guidance being published on key topics such as the use of online case management platforms,⁹ virtual hearings and advocacy¹⁰.

Many of these virtual alternatives, in principle, will remain suitable following the pandemic and will assist in the reduction of the carbon emissions associated with arbitration proceedings and conferences in the longer run. They can also represent opportunities to help address other challenges in arbitration, such as diversity in representation (where physical and financial boundaries shift with a move to digital

proceedings) and accessibility. These longer term changes do however require investment and access to the necessary technology and a reliable internet connection, which can also present its own challenges. Following the pandemic, it is to be expected that travelling and in-person hearings will resume to an extent. However, given the widespread and irreversible shifts in working patterns which will follow and, given the potency and success of the available technology to conduct virtual meetings and put together e-bundles, it is likely that the conduct of virtual proceedings will remain common, and that the use of paper and other single-use materials will be further reduced.

8. In 2019, Overshoot Day occurred on 29 July, compared to 22 August in 2020 – read more [here](#) and [here](#).

9. See the Protocol for Online Case Management in International Arbitration, available [here](#).

10. See for example the HKIAC Guidelines for Virtual Hearings, the Delos Checklist of Holding Arbitration and Mediation Hearings in Times of COVID-19, the African Arbitration Academy Protocol on Virtual Hearings in Africa, the Seoul Protocol on Video Conferencing in International Arbitration and the CI Arb Guidance Note on Remote Dispute Resolution Proceedings.

Herbert Smith Freehills' campaign on environmental sustainability in arbitration

Hear from Maguelonne de Brugiere, a Senior Associate in our International Arbitration team in London.



In spring 2020, after many years of driving internal sustainability initiatives within the firm, Herbert Smith Freehills expanded these efforts externally, offering arbitration clients the possibility to conduct greener arbitrations to fit their own internal environmental sustainability targets and the circumstances of each case.

The London-based arbitration team of Herbert Smith Freehills has put together a menu of case management options which clients can adopt in the conduct of their arbitrations, as well as propose to their counterparties and arbitral tribunals at the first procedural conference in a case. Some of the considerations on which Herbert Smith Freehills has focused for the purpose of conducting greener proceedings throughout the duration of a case include, unsurprisingly, the reduction of air travel, the use of electronic correspondence, the offsetting of carbon emissions, the avoidance of e-waste and the increased use of our internal e-discovery capabilities as a carbon reduction tool.

Where appropriate, the firm also encourages arbitration clients to make a number of sustainable suggestions at the first procedural conference, including running a paperless arbitration and enabling witnesses to give evidence through video-conferencing where appropriate. Herbert Smith Freehills also proposes a set of environmentally-friendly measures at hearings too. These include using technology to view relevant documents and avoiding printed bundles, as well as

encouraging arbitrators to use video-conferencing when deliberating following the hearing, instead of meeting with their co-arbitrators in person.

The London-based arbitration team has benefitted from substantial support from the firm as whole in setting up its initiative on environmental sustainability in arbitration. This close and successful collaboration reflects Herbert Smith Freehills' long-standing commitment to working sustainably and promoting environmental sustainability globally.

Environmental sustainability at Herbert Smith Freehills

At Herbert Smith Freehills, we too have placed environmental sustainability at the forefront of our agenda. We are one of the few international law firms to have pledged to become a net-zero carbon firm by 2030.¹¹ Our net-zero goal is supported by the Science Based Target Initiative to limit temperature rise to 1.5C, and will be achieved by using cleaner energy across our offices, working with suppliers committed to reducing emissions and supporting initiatives that remove carbon dioxide that the firm produces from the atmosphere.

Some of Herbert Smith Freehills' recent global achievements in changing the way in which we work to reduce our carbon emissions in the longer term include:

- The achievement of our 2020 sustainability targets by reducing our carbon footprint by over 15%, energy use by over 10%, and paper consumption by over 30%;
- 100% of our energy in the London, Belfast, Brussels and Madrid offices comes from renewable sources;
- 80% of our entire global network is single-use plastic-free;
- The entire firm encourages recycling. Almost 50% of our global offices have swapped personal bins for centralised disposal to improve recycling rates; and
- The offsetting of all flights associated with the annual Global Partners Conference. In addition, many of our Practice Leaders and Partners have taken the initiative to offset all of their flights.

Given our deep-seated commitment to environmental sustainability and established efforts in this space, we are confident that we are well-placed to continue our progress to longer term more sustainable practices and to reaching our net zero target. Please get in touch if you would like to hear more about our sustainability in arbitration campaign and our sustainability and climate change-related training offering.

Contacts



Paula Hodges QC
Partner, Head of Global Arbitration, London
T +44 20 7466 2027
paula.hodges@hsf.com



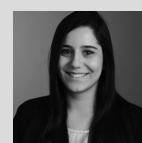
Craig Tevendale
Partner, UK Head of International Arbitration, London
T +44 20 7466 2445
craig.tevendale@hsf.com



Chad Catterwell
Partner, Melbourne
T +61 3 9288 1498
chad.catterwell@hsf.com



Maguelonne de Brugiere
Senior Associate, London
T +44 20 7466 7488
maguelonne.debrugiere@hsf.com



Helin Laufer
Associate, London
T +44 20 7466 6425
helin.laufer@hsf.com

11. Read more [here](#).

Spotlight interview

Mike McClure

Mike is a Herbert Smith Freehills world traveller, having spent time in our London, Dubai, Hong Kong and Moscow offices. Now based in Seoul, he heads the office and leads a thriving international arbitration practice in one of Asia's most up-and-coming arbitral seats. Mike's practice covers commercial and investment treaty disputes.

Even for a lawyer in an international firm, you are very well travelled! What have been the best and worst things about moving around so much? Do you have a favourite country?

The best thing professionally has been practising in all these different jurisdictions and learning how different clients and cultures work. Outside work, I have had so many fantastic experiences I would never have had if I hadn't moved around so much. Everything from snowmobiling in the Arctic Circle, to desert camping in Dubai, to exploring remote parts of Korea that you wouldn't usually visit as a tourist.

"The best thing professionally has been practising in all these different jurisdictions and learning how different clients and cultures work."

The worst thing is missing friends and family back home. Also, my children are being brought up without the close family nearby that I had as a child. These are definitely things that play on your mind as a long-term expat parent.

Do I have a favourite country? They've all been great. I loved my time in Russia; it was perfect for me at that age and stage. There were lots of English law, foreign-related disputes in Russia at the time, and lots of international arbitrations. I was married but without children, which meant my wife and I



Hear from **Mike McClure** here [▶](#)

could travel widely, and we actually found the long winters fun and novel.

Now that I have children and am at a different stage of life, it's been good to move on. I love Korea: the food, the culture, the entertainment have all been great to experience and be involved in. I feel very much like a foreigner in Korea, but that brings with it a sense of adventure and excitement that I really enjoy. Every day I feel that I am living completely differently to the way I would be living back home – and that gives me a real buzz.

Seoul is viewed as a rising star of Asian arbitration, with ambitions to compete with Hong Kong and Singapore. In your view, can it achieve those ambitions?

Seoul is extremely well placed to become a major arbitration centre in Asia. Like Singapore and Hong Kong, it enjoys a good level of government support for arbitration and a very pro-arbitration judiciary, which are key to any seat's success.

"Seoul is extremely well placed to become a major arbitration centre in Asia."

A significant milestone in recent years was the merger of the Seoul International Dispute Resolution Centre and Korea Commercial Arbitration Board (KCAB), plus the formation of KCAB International. That has been a real driver in developing Seoul as a seat. From the outset, KCAB International has benefited from superb leadership from Professor Hi-Taek Shin and Ms Sue Hyun Lim. It is staffed by people from all over the world, who bring to the centre a genuinely international perspective and approach. This makes KCAB International a truly international arbitration centre that happens to be based in Korea, rather than a Korea-centric arbitral centre. It has evolved into a first-class institution that acts as a focal point for the Korean arbitral community, and attracts cases from in and outside Korea. It also has excellent hearing facilities.



Also, the arbitration talent in Korean law firms is very good. These firms have lawyers who are knowledgeable about international arbitration, with experience representing clients in difficult and complex cases. These same lawyers also sit as arbitrators and are rendering high quality decisions, which all adds to the attractiveness of Seoul as a seat for arbitration.

On this basis, I see Seoul as well positioned to compete on an even playing field not only with Hong Kong and Singapore, but also other leading seats.

What kind of disputes are you seeing in Korea and the wider region? Has this changed during the time you have been in Seoul?

It's a real mix. We see a lot of disputes in the construction sector; many Korean EPC contractors are doing big and difficult projects all over the world, which inevitably generate disputes. There are also lots of intellectual property and licensing disputes, which is to be expected given Korea's prominence in the technology sector.

In recent months, we're starting to see more post M&A disputes, including a number of breach of warranty claims. This looks like it will be a real growth area for arbitration work in the coming months and years.

You acted for the Government of Korea in the first investment treaty arbitration under the US-Korea Free Trade Agreement. Will we be seeing more Asian investor-state cases in coming years?

Yes, I think so. We successfully defended Korea in the first case under the US-Korea

FTA to come to hearing, which of course is a real source of pride for me and the whole Herbert Smith Freehills team.

"Investors are increasingly savvy about their rights under bilateral investment treaties."

More generally, investors are increasingly savvy about their rights under bilateral investment treaties and their access to investor-state dispute settlement, and more confident in pursuing these remedies. The scale of the projects – and of the potential losses – may be prompting investors to pursue these avenues. Also, as investors see more of their fellow investors calling on ISDS mechanisms, the process is de-mystified and clients start to see it as a viable option. This is playing out in practice; there has been a spate of cases against Korea in the last couple of years, and I expect to see more.

What has been the biggest impact on your practice as a result of this year's pandemic?

We've been relatively lucky in Korea. There hasn't been such a major impact on our practices or our lives as in other countries where Herbert Smith Freehills has offices, and we have never been fully locked down. Our office has been open the entire time, albeit with more flexibility around home working, and of course social distancing measures in place.

The biggest impact has probably been not flying to hearings. As a result, we've now done four virtual hearings this year. They've all worked smoothly and well, to the extent that I wonder whether we will ever go back to fully in-person hearings even after the pandemic.

How do you see the future of Herbert Smith Freehills' disputes practice in Korea?

It is very positive. There is a great community here, and more and more arbitration practitioners and clients are being attracted to Korea. In particular, we have a really strong next generation of arbitration lawyers in Seoul, including Dana Kim and Philip Kim in my own team, who both have excellent reputations both in Korea and internationally as true arbitration specialists. Seoul is in great hands for the future.

"Seoul is in great hands for the future."

Get in touch

Mike McClure
Partner, Seoul
T +82 2 6321 5701
mike.mcclure@hsf.com

<https://www.herbertsmithfreehills.com/our-people/mike-mcclure>



Event report Investor-state mediation at the tipping point

The pandemic this year may have held a lot of us back from physical gatherings, but it certainly did not diminish our interest in gathering (virtually) for this year's Hong Kong Mediation Lecture. The lecture, organised by the Department of Justice and proudly sponsored by Herbert Smith Freehills, was well attended, with attendees coming from a diverse spread of countries, including the United Kingdom, Canada, Turkey, Serbia, Saudi Arabia and Singapore.

Following opening remarks by the Secretary for Justice, Teresa Cheng SC, and Simon Chapman QC, Partner of Herbert Smith Freehills, Mark Appel, an Independent International Mediator and Arbitrator, delivered a presentation on 'Investor-State Mediation at the Tipping Point'. His speech looked at a number of points including how Investor-State mediation seems to be at the tipping point of change, what accumulation of events have led us to this place and what was required for real change to occur?

Mark set the scene by explaining the meaning behind his use of the phrase 'tipping point': Investor-State mediation has previously rarely been used due to a number of reasons, many of which come down to the lack of trust. However, this seems to be on the brink of change, thanks to the concerted effort of the ISDS community over the past few years.

Mark then demonstrated what has been done in recent years by various stakeholders to provide much needed education and address the legitimate concerns with the Investor-State mediation process. Mark highlighted the innovative set of Investor-State Mediation Rules published by the International Bar Association in 2012, which recommended novel best practice (such as the possibility of appointing co-mediators) and hence helped normalise and legitimise practice. There were also efforts

to upskill mediators, including the Competency Criteria for Investor-State Mediators developed by the IMI Investor-State Mediation Taskforce, as well as training programmes run by the Centre for Effective Dispute Resolution (CEDR) and other institutions.

However, Mark noted that rules and mediator quality were just part of the story. Nagging perceptions and doubts still existed. In Mark's view, these have also now fortunately been addressed. A survey revealed that States find mediation problematic due to, among other things, the fear of being criticised or even prosecuted for corruption. Through dialogues in a series of workshops and seminars with different stakeholders, the Energy Charter Organisation was able to get to the bottom of these perceptions. It found that a major cause is that many States lack structural and policy support for mediated negotiation. In light of the finding, the Energy Charter Secretariat drafted the Energy Charter Model Instrument on Management of Investment Disputes, providing guidance on the practical and legal issues that should be considered by States in developing a conflict management plan for investment disputes.

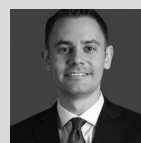
Mark also highlighted other recent efforts to address concerns, such as the Draft ICSID Mediation Rules, the Draft UNCITRAL Mediation Rules and the Draft UNCITRAL

Notes on Mediation. Finally, Mark covered the Singapore Convention, which he considered to be the single greatest contributor to increased confidence in international mediation.

In his concluding remarks, Mark noted that we are starting to see the results of these efforts: mediators are growing in competence and model instruments are receiving more and more attention. Mark reiterated his view that Investor-State Mediation really has come to the 'tipping point'.

As a thought leader in the legal community, Herbert Smith Freehills will be proudly sponsoring the Hong Kong Mediation Lecture for five years and looks forward to being part of a lecture series which will continue to contribute to the latest discussions on and development of mediation.

Author



Simon Chapman QC
Partner, Co-Deputy Head
of Global Arbitration
(East), Hong Kong
T +85 2 2101 4217
simon.chapman@hsf.com



Event report

The threat of legal claims against arbitrators and arbitral institutions

This year marked the tenth edition of the Herbert Smith Freehills – SMU Asian Arbitration Lecture Series. We were privileged to have Ms Loretta Malintoppi from 39 Essex Chambers deliver that lecture, focusing on an often overlooked but growing threat of potential civil liability of arbitrators and arbitral institutions.

There is no question that arbitrators and arbitral institutions should be held liable if they commit gross negligence or act in bad faith. Where they fail, they find themselves open to challenge. Indeed, there is a growing trend of claims being brought by parties who are dissatisfied with awards rendered and raise allegations of bad faith or violations of public policy by arbitrators as tools to invalidate those awards.

In that context, the question is whether arbitrators should also be subject to civil claims – and if so, on what basis and to what extent.

The issue is approached differently by different arbitral rules and different national laws. For example, the system of the International Centre for Settlement of Investment Disputes (“ICSID”) has espoused full immunity from legal process for ICSID arbitrators and conciliators and members of the ICSID Secretariat for acts carried out in the exercise of their functions. Most other rules contain provisions limiting the liability of arbitrators and the institutions themselves for acts or omissions carried out in the conduct of arbitral. Typically, these limitations do not apply in cases of intentional wrongdoing or dishonesty – providing further grounds for debate.

That said, most arbitral rules do not accord more protection than what is already afforded under the relevant national laws. The obvious consequence is that State courts can always ignore or dismiss the provisions of arbitral rules when applying national laws.

To that end, there is no uniform approach across national laws. Singapore and Australia, for example, set out a broad immunity regime from civil claims. Other jurisdictions accord immunity to arbitrators in the exercise of their functions, but not to actions or omissions done in bad faith – see for example, the UK Arbitration Act.

All this to say that arbitrators and arbitral institutions are facing an increasingly aggressive environment, with arbitrators in particular becoming collateral damage as they face expensive and lengthy proceedings over their alleged liability. The threat of such legal claims against arbitrators has fed due process paranoia and that continues to be one of the issues that users believe is preventing arbitral proceedings from being more efficient.

Both arbitral institutions and national laws must therefore be more robust in managing the issue. As that effort moves forward, a practical way to manage risk is for arbitrators to take out professional indemnity insurance. Another solution is for arbitral institutions to obtain insurance coverage for the arbitrators conducting arbitrations under their rules and for the institutions themselves. But most importantly – the risk must be mitigated by addressing the issue at its root: national courts must take a strong stance against frivolous cases brought with vindictive purposes against arbitrators, and dismiss them at an early stage.

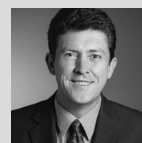
The consensus in our panel discussion was that the risk that arbitrators may be defeated in legal proceedings brought by disappointed

parties, sometimes in bad faith persists in various jurisdictions. That they occur at all – even such proceedings end in favour of the arbitrator – the result likely comes after years of judicial battles with inevitable financial aggravation and emotional suffering for the arbitrators, and at a cost to arbitration in general. More must be done now by counsel, arbitrators, institutions, national courts and legislature to cull this trend. As Ms Malintoppi ended,

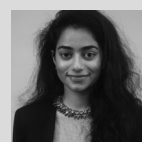
“The house is not burning yet but this fire will not be unexpected when it comes and we should intervene when we can still prevent it”

The annual Herbert Smith Freehills-SMU Asian Arbitration Lecture Series was established in 2010 through funding from Herbert Smith Freehills, and promotes collaborative forms of dispute resolution and access to justice. It also aims to promote Singapore as a leading centre for dispute resolution in Asia, particularly in arbitration and mediation.

Authors



Alastair Henderson
Partner, Singapore
T +65 686 88058
alastair.henderson@hsf.com



Reshma Nair
Associate, Singapore
T +65 6868 8002
reshma.nair@hsf.com

Previous issues of Inside Arbitration

We hope that you have enjoyed reading this issue of Inside Arbitration.

Previous issues can be accessed below or on our website at www.herbertsmithfreehills.com/latest-thinking/inside-arbitration. If you would like to receive a hard copy of a previous issue please contact paul.mckeating@hsf.com or louise.fuller@hsf.com.

Issue 1



Issue 2



Issue 3



Issue 4



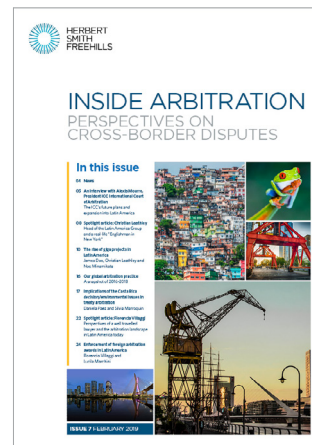
Issue 5



Issue 6



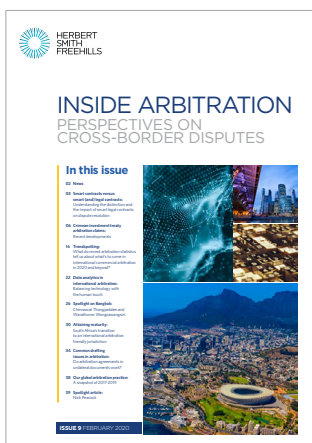
Issue 7



Issue 8



Issue 9



Issue 10



For a full list of our global offices visit [HERBERTSMITHFREEHILLS.COM](https://www.herbertsmithfreehills.com)