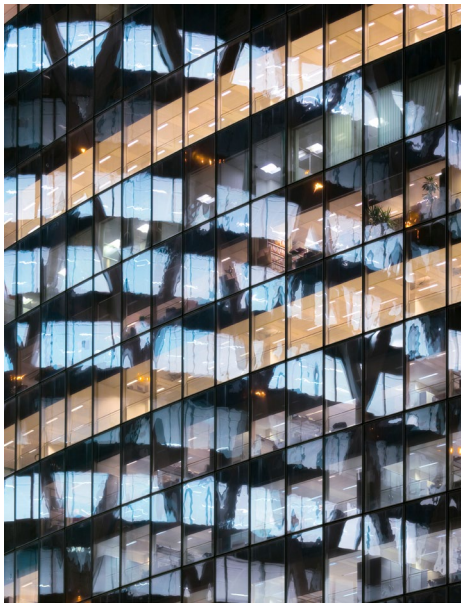
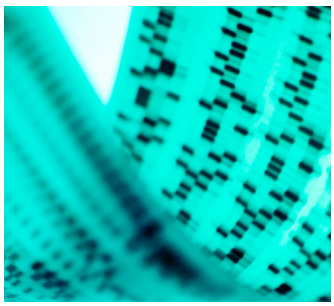
HERBERT SMITH FREEHILLS

INSIDE ARBITRATION

PERSPECTIVES ON CROSS-BORDER DISPUTES

In this issue





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Welcome to the twelfth issue of Inside Arbitration

As we move through 2021, the impact of the Covid-19 pandemic continues to be felt by many of us both in our work and personal lives. While the light at the end of the tunnel is now beginning to shine more brightly, many questions remain about the virus and our global response to it. With that in mind, in this edition Andrew Cannon, Simon Chapman QC, Vanessa Naish and I have explored whether it is possible to predict how the post-pandemic disputes landscape may look and how arbitration practice may be impacted longer term.

The pandemic is not the only significant force for change and development facing the world at present. Over the last few years governments, investors, businesses and communities have become increasingly focused on environmental, social and governance issues, while regulation has intensified globally. In this issue Antony Crockett, Dr. Patricia Nacimiento and Dr. Alessandro Covi have looked at what "ESG" means for businesses, how ESG issues are being introduced into commercial contracts, and the potential impact of these trends on international arbitration. Meanwhile, Craig Tevendale, Chris Parker and Charlie Morgan have focused on energy transition, the increased use of renewable sources of energy, and decarbonisation. In the context of the proliferation of new infrastructure projects, they look at the challenges on the horizon and the potential legal disputes that may arise.

Change has also occured within the Herbert Smith Freehills' arbitration practice, with three of our talented arbitration practitioners, Dana Kim (in Seoul), Antony Crockett (in Hong Kong) and Ivan Teselkin (in Moscow), being promoted to the partnership. Our Spotlight articles in this issue are focused on their differing areas of practice and their views on the outlook for arbitration in their regions.

The recognition of the talent of our practitioners and the growth of our global practice is exciting, but so too are the successes we achieve for our clients, particularly those cases that can be reported publicly! Led by Simon Chapman QC (who appeared as the advocate), we have achieved a recent success in a landmark case in Hong Kong. This case has confirmed that failure to comply with escalation requirements in a dispute resolution clause will not affect an arbitration tribunal's jurisdiction over the dispute. This is a decision with real international significance, given that Hong Kong is a Model Law country, and means that alleged failures to comply with requirements to negotiate or mediate before beginning an arbitration will not prevent the arbitration agreement being upheld by the courts. Simon and Charlotte Benton discuss the case and its wider significance in this issue.

In our remaining articles, we look at wider developments across the globe. April 2021 saw an important new judgment from the Supreme Court of India, which decided that two Indian parties may validly agree to resolve their disputes in arbitration seated outside India. Andrew Cannon and Nihal Joseph explore the significance of this for Indian companies and Indian subsidiaries of international corporates, given the availability of international dispute resolution options in India-related transactions going forward.

We also look at the rise of arbitration in Australia, with Chad Catterwell and Guillermo Garcia-Perrote covering the release of the ACICA Arbitration Rules 2021, which have further strengthened ACICA's status as the pre-eminent arbitral institution in Australia.

Finally, in our sector-focused piece, we take a look at the current hot topics in construction arbitration, with Hew Kian Heong, James Doe and Noe Minamikata covering the impact of recent materials shortages, a possible rise in construction insolvencies and the continuing effects of the Covid-19 pandemic on construction projects.

I hope that you enjoy reading this issue of Inside Arbitration and that you find the articles interesting. Finally, don't forget to take a quick glance at our "watch this space" feature, where we briefly cover the latest issues and developments in international arbitration.

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

Paula Hodges QC
Partner, Head of Global Arbitration Practice

Hear from **Paula Hodges QC** here

Arbitration news and developments

The revised Arbitration Foundation of Southern Africa (AFSA) International Arbitration Rules came into force on 1 June 2021, applying to all arbitrations commenced on or after that date. Like the recent revisions to other institutional rules, the rules provide for electronic filing and virtual hearings. The new rules also notably introduce a Secretariat and the AFSA Court, consisting of senior international and African practitioners, including HSF's Jonathan Ripley-Evans. For more information, please contact Director, Jonathan Ripley-Evans.

In May, the Russian Ministry of Justice granted "Permanent Arbitration Institution" (**PAI**) status to the ICC and the SIAC. Following HKIAC's PAI status in 2019, this will now give users of international arbitration in Russia access to three of the "top-five most preferred arbitral institutions" in the world according to the Queen Mary University of London Arbitration Survey 2021. PAI status will allow the ICC and the SIAC to administer institutional arbitrations with a seat of arbitration in Russia and arising out of certain "corporate disputes" (such as disputes arising out of share purchase agreements). For more information, please contact Partners Alexei Panich and Ivan Teselkin or Associates Alexander Gridasov and Olga Dementyeva.

The revised ICDR-AAA Arbitration and Mediation Rules (**ICDR-AAA Rules**) came into force on 1 March 2021, applying to any arbitration or mediation under the ICDR-AAA Rules commencing from that date unless agreed otherwise. The ICDR-AAA Rules were last revised in 2014, while the Mediation Rules were last revised in 2008. Similar to recent changes implemented by other institutions in the revisions to their rules, the ICDR-AAA Rules 2021 include changes relating to third-party funding, joinder & consolidation, data protection, and the effects of Covid-19 on the use of technology. For more information, please contact Partner Amal Bouchenaki, Counsel Florencia Villaggi or Associate Lucila Marchini.

Hong Kong has now enacted the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between Mainland China and the Hong Kong Special Administrative Region in full. The Supplemental Arrangement was concluded in November 2020 and serves to clarify and remove restrictions in the mutual enforcement regime between Hong Kong and Mainland China. Following amendments to the Arbitration Ordinance, all Mainland arbitration awards (as long as they were rendered pursuant to the PRC Arbitration Law) are now enforceable in Hong Kong, and the Arbitration Ordinance now also provides for simultaneous enforcement of arbitral awards in Hong Kong and the Mainland. For more information, please contact Partner Simon Chapman QC or Professional Support Consultant Briana Young.

On 23 June the European Commission presented a "note verbale" to the Swiss Federal Council as Depositary of the Lugano Convention confirming it is "not in a position" to consent to the UK's application to join the Lugano Convention. It remains our understanding that this is ultimately a decision for the Council to take, by qualified majority voting. The non-EU signatories to the Convention have all consented to the UK's application. If the UK does not join the Convention, clients may wish to carry out an audit of their contracts and consider the appropriate choice of jurisdiction clauses going forward. Importantly, arbitration is unaffected, and clients can continue to use arbitration clauses as normal. For more information, please contact Partner Andrew Cannon.

The reforms on the taking of witness evidence in litigation matters in the English Business and Property Courts came into effect in April 2021. Those involved in English-seated arbitrations will need to be aware of the changes as the new rules apply to most arbitration-related applications in the English courts (although not for interim relief). Within the arbitration community there has been a similar focus on how witness evidence is prepared and presented, with guidance published by the ICC in this area. There are many similarities between the new English regime and this "best practice" guidance. For more information, please contact Professional Support Consultant Vanessa Naish.

In April, the UK Jurisdiction Taskforce published the Digital Dispute Resolution Rules which aim to enable the rapid resolution of blockchain and crypto legal disputes. Under the Rules, users are offered a choice of arbitration (under the English Arbitration Act 1996) or expert determination. The rules may be incorporated into a contract, digital asset, or digital asset system, and provide for the tribunal to use its best endeavours (unless otherwise agreed by the parties) to resolve the dispute within 30 days from its appointment. For more information on these rules or alternatives for resolving digital disputes through arbitration (including by reference to institutional rules), please contact Partners Craig Tevendale and Chris Parker, Consultant Dorothy Livingston, Professional Support Consultant Vanessa Naish or Senior Associate Charlie Morgan.

The English Supreme Court has delivered its decision in the General Dynamics case concerning the enforcement of arbitral awards against states. The Court was tasked with deciding the appropriate mode of service under the State Immunity Act 1979 for certain documents and whether in exceptional circumstances English courts can dispense with the service requirements under the English rules of civil procedure. Departing from the Court of Appeal's decision, the Supreme Court found that s12(1) State Immunity Act 1978 created a "*mandatory and exclusive*" regime for serving documents instituting proceedings on a state which could not be dispensed with or altered, even in exceptional circumstances. For more information, contact Partner Andrew Cannon and Senior Associate Hannah Ambrose.

Iraq has become the 168th signatory to the New York Convention, having previously announced its decision to accede in 2018. In the past, foreign arbitral awards were only enforceable in Iraq if they were issued in a signatory state to the Riyadh-Arab Agreement for Judicial Co-operation 1983, or if they were issued in a country with a specific treaty on judicial cooperation with Iraq, such as Egypt. Accession to the New York Convention forms part of Iraq's plans for economic recovery. For more information, please contact Partner Amal Bouchenaki or Senior Associates Anna Wren and Rob Dawes.

There have also been developments at ICSID. Following a change in government, Ecuador signed instruments of accession on 21st June 2021 to re-accede to the ICSID Convention. This marks a significant change in policy for the country, notable for its denunciation of the ICSID Convention in 2009 and programme of BIT termination. The Convention will come into force following ratification. Meanwhile, ICSID has published Working Paper 5, the latest iteration in its series of working papers on the revisions to the ICSID rules for ICSID Convention and ICSID Additional Facility arbitrations and conciliations and also published materials related to mediation. For more information, please contact Partner Andrew Cannon.

A post-Covid world

The light at the end of the Covid-19 tunnel?: The disputes landscape and the outlook for arbitration

The approval and rollout of mass Covid-19 vaccinations across many parts of the world has prompted many to look ahead to a "post-Covid" world. For clients and practitioners of arbitration who have witnessed the almost overnight shift of arbitral practice into the virtual arena, that quest for a sense of when, and how, we may return to "normal" is just as powerful.

But are we really there yet? There remain many questions about the virus and our global response to it. While the direction of travel may appear to be a positive one, there are likely to be a number of twists and turns before "normality" will return. And, importantly, for an international practice area such as arbitration, the speed and trajectory of that journey will differ from country to country.

With that in mind, are we really ready to predict what will happen next in terms of disputes and arbitral practice?

The disputes landscape: Is the 2008 Global Financial Crisis an helpful indicator?

The Covid-19 pandemic has led to unprecedented disruption to economic activity on a global scale. Many have drawn on the experience of the 2008 Global Financial Crisis in their efforts to predict the consequences of this current crisis, particularly as regards the type and number of disputes that may arise. There are, however, a number of noteworthy differences in the implications for disputes between the two situations, understandably given their markedly different nature.

THE 2008 GLOBAL FINANCIAL CRISIS	THE COVID-19 PANDEMIC
The financial crisis stemmed from particular actions of individuals and entities and was initially felt first in one jurisdiction.	The Covid-19 pandemic is a natural phenomenon, and spread extremely quickly on a global scale.
Immediately after the events of 2007 - 2009 we saw an initial spate of corporate and securities-related disputes, many of which were focused on the allocation of blame and the resulting financial consequences. Governments began civil and criminal investigations into the events that led up to the crisis and focused on allocating responsibility and managing the considerable fallout.	While there have been efforts in certain jurisdictions to allocate blame in relation to the cause of the pandemic, notably in a series of lawsuits brought in the US against China, this has not been replicated in the vast majority of countries.
The first wave of civil disputes was felt within the financial and mortgage sectors. As the crisis spread to other sectors, it resulted in a global recession and seismic financial shock to international markets, causing a large wave of civil litigation and insolvency-related disputes. The long tail of these later disputes is still being fought.	A far higher number of industries and sectors have been affected by the pandemic more quickly and directly than was witnessed in the first stages of the financial crisis. The almost overnight contraction of global mobility and the imposition of national restrictions have impacted aviation, shipping, commodities, travel, leisure, hospitality, consumer products, energy and the insurance industry, to name but a few. Each of these industries has already seen a significant number of disputes, many of which are focused on the allocation of financial risk with the aim of preserving valuable and necessary cash resources. In some cases, this has resulted in boilerplate Force Majeure and Material Adverse Change clauses being triggered. The contraction of the industries most severely affected has also resulted in a spate of M&A disputes where buyers have sought to avoid completing deals struck before the crisis hit, particularly in the retail and hospitality sectors. Industries hit by the restrictions have also faced a number of consumer actions and employment claims.
Quick move towards formal dispute resolution to allocate risk and responsibility.	Perhaps as a consequence of the scale of the pandemic and its human impact, the way some disputes have been resolved has differed from the financial crisis. At the start of the pandemic, many businesses found themselves unable to meet their contractual obligations or were faced with their counterparties being unable or unwilling to perform. There does appear to have been a significant effort made by many parties to adopt a collaborative rather than combative attitude in light of the global nature of the pandemic. Some parties have sought to reach negotiated settlements and to share risks and costs with a "we are all in this together" approach.

What can we expect from the next wave of pandemic-related disputes?

Given that the first wave of disputes looked rather different, does that mean that the 2008 Global Financial Crisis is not a good indicator for predicting future disputes? Right now, it remains hard to tell. While some may have declared the worst of the pandemic behind them in more highly vaccinated countries, this is not the case worldwide, and the course the pandemic takes could significantly impact the shape of the disputes landscape. Many governments have borrowed large sums to introduce public support schemes and have also changed insolvency regimes during the pandemic, making it difficult for creditors to pursue companies in difficulty. Nevertheless, the longer the pandemic lasts and the global economy remains in stasis, the greater the underlying economic distress we are likely to see in all markets, even if that distress is deferred by those public support systems. Fast-paced vaccination programmes in some jurisdictions may enable a swifter bounce back and economic recovery. Indeed, some predict a post-pandemic "boom". Fast-growing domestic economic growth and the return of consumer confidence in those jurisdictions may help to limit the number of domestic disputes. However, the disparity in vaccination rates and emergence of variants is likely to mean that the pandemic will continue in many parts of the world throughout 2021 and into 2022, having a significant impact on domestic trade in those countries and international trade globally. If so, the number of disputes that arose out of the 2008 Global Financial Crisis may pale by comparison to disputes generated by the pandemic. While the scale may be in question, there will certainly be disputes. And just as there was in the financial crisis, there is likely to be a long tail of disputes.

> The gradual retreat of the pandemic may well lead to a new wave of disputes. As "crisis mode" starts to abate and the economic impact of the pandemic is felt more keenly, parties may have no choice but to consider their dispute resolution options as they decide how they want to allocate risk and responsibility for the past year and a half. As businesses regroup and the global economy rebounds, we are likely to see a move away from ADR to more adversarial options. We may also see new disputes emerge as businesses seek to consolidate, "de-globalise" and build resilience going forward.
>
> **Paula Hodges QC**

The disruption has caused losses that are not unique to an individual or business, but are common to many, which provides a fertile environment for class actions or group claims. Regulators showed leniency during the pandemic, but are likely to resume investigations and aggressive enforcement action, also giving rise to increased litigation and arbitration. Employee, insurance, securities and competition claims have already been commenced across the world and in numbers that suggest more may follow. As public support schemes and insolvency restrictions come to an end, businesses will be expected to return to more normal operations, albeit potentially with increased costs and reduced turnover. Creditors will pursue unpaid debts and landlords will evict for non-payment. As a consequence, there is a much higher risk of restructurings and insolvency filings, which in turn increase the risk of disputes.

> The restrictions we have seen over the past year and a half may prompt parties to consider any claims they may have against governments or states under investment treaties. Whether or not a specific state's actions in response to Covid-19 could result in a breach of treaty protections, and whether an actionable claim arises for a specific investor as a consequence, will be heavily fact- and treaty-specific. It may well be a 2-4 year lead time for the majority of these claims to materialise, but the first few are starting to be made. For example, a notice of dispute has reportedly been submitted by two French investors against Chile under the France-Chile BIT regarding the concession for the operation of Santiago's airport and the impact of the pandemic, while potential claims have also apparently been threatened against both Peru and Mexico.
>
> **Andrew Cannon**

The outlook for arbitration

Are pandemic disputes being arbitrated?

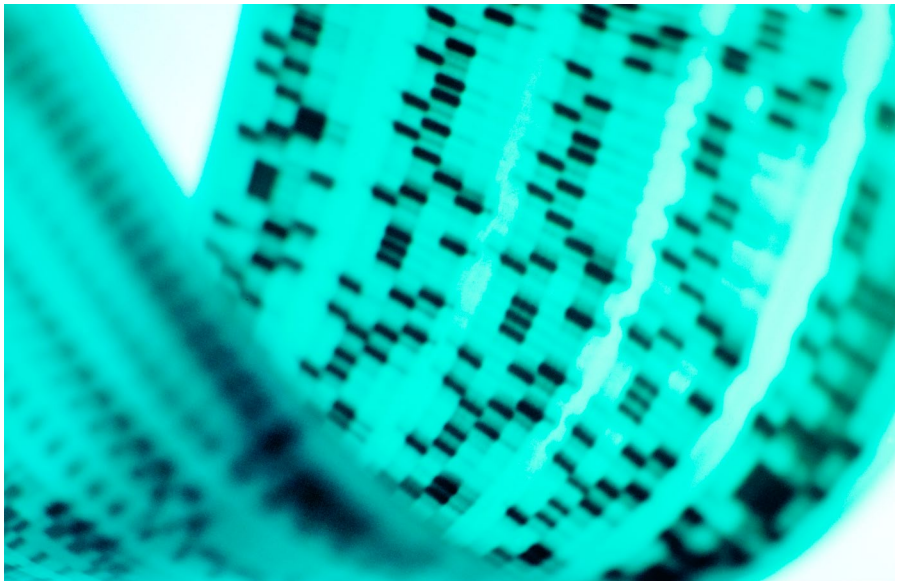
Of particular interest to arbitration practitioners will be whether these different waves of disputes will be arbitrated, litigated, or pursued through other dispute resolution mechanisms. Unlike the 2008 Global Financial Crisis, the pandemic has had a seismic impact on the entire system, forcing all forms of dispute resolution onto some form of virtual or hybrid platform. In the early stages of the pandemic, when the long term implications were still unclear, it appeared that only the most critical cases would progress, with many parties choosing to postpone hearings and to defer initiating disputes.

Nevertheless, despite an initial short, sharp shock for all forms of dispute resolution including arbitration, there has been a palpable sense of activity increasing over time. In the English courts, case numbers stayed low until August 2020, before rising to baseline levels in October and November 2020. Similarly, the number of arbitration cases since the summer of 2020 appears to have been particularly strong, with the first wave of 2020 statistics from the arbitral institutions matching anecdotal evidence that there has been an upswing in arbitrations across the board.

An increase in arbitrations due to the pandemic?

All the main arbitral institutions have seen an increase in their annual caseload, with many registering their highest number of cases for many years or, in the case of the LCIA and SIAC, an all-time high.

INSTITUTION	2019	2020
International Chamber of Commerce (ICC)	869	946
Hong Kong International Arbitration Centre (HKIAC)	308	318
Singapore International Arbitration Centre (SIAC)	479	1080
Stockholm Chamber of Commerce (SCC)	175	213
London Court of International Arbitration (LCIA)	395	444



It remains hard to conclusively "prove" that this rise is due to the pandemic given that most arbitral institutions had been on a trajectory of growth over the last 3-4 years in any event. Indeed, the recent LCIA 2020 report identifies that "*it is not always apparent on the basis of the documents received by the LCIA as the administrating institution whether the pandemic was the stated and/or ultimate trigger for a dispute. In addition, the ripple effect of this pandemic has reached every sector of the world economy and society making it difficult to assess whether "but for" the pandemic a dispute would have arisen*". However, the LCIA has identified a considerable contraction in the time lag between the date agreements were entered into and when actual disputes arise, with almost half of all disputes filed in 2020 arising out of agreements executed in the previous two years, much higher than the percentage of disputes arising between 2018-2019. This may suggest an increase in disputes arising out of recently concluded agreements as a result of the pandemic. If correct, it would appear that many of the disputes from the first wave, at least, are being arbitrated, and that these arbitrations may have been initiated more quickly than during the 2008 Global Financial Crisis.

Assuming a similar pattern of disputes emerges to that flowing from the 2008 Global Financial Crisis, we should expect a further rise in arbitrations during the remainder of the pandemic, with a long tail of disputes over the following 3-5 years.

The arbitration world: changes in practice and process?

There has been much discussion about the impact of the pandemic on working practices and the move away from office-based working to a more flexible working style. Those practicing arbitration have had to adapt extremely swiftly to the virtual world and, as we discussed in Issue 10 of Inside Arbitration, the move to virtual hearings has been extremely effective and successful. But will this move to the virtual world be a more permanent one?

The biennial QMUL Survey provides helpful insight into arbitration sector attitudes across the globe. In the latest survey from 2021, participants were asked about their experience of virtual hearings and use of technology during the pandemic. The results recognise that virtual hearings may produce "greater procedural and logistical flexibility" and offer a chance for "greater efficiency through use of technology".

Interestingly, 70% of respondents would choose "to proceed at the scheduled time as a virtual hearing" and only 16% would "postpone the hearing until it could be held in person". Some negatives were identified, including the difficulty of accommodating time zones, the fallibility of technology, "screen fatigue" and challenges for counsel teams to confer effectively.

Nevertheless, if the experience has been largely positive, what does this mean for the future? Well, for many of us during the course of 2021, and into 2022, there may be little choice and it remains hard to predict whether a preference for holding an in-person hearing will re-emerge. As in all areas of life, the return to "normal" will be dependent on the availability and supply of vaccine doses, the speed and ease of distribution and the protection offered by those vaccines. While there are positive signs so far, data is still being gathered about the extent to which the vaccines will work to prevent infection, limit serious illness and

reduce the ability of the vaccinated person to transmit the virus, particularly in light of new variants. The answers to each of these questions will have a significant impact on when, and how, we can return to normal. Moreover, countries will face different trajectories to "normality" based on how these issues play out on the global stage. The speed with which international trade and travel opens up will require considerable negotiation and planning by each government, balancing the protection of public health against the recovery of domestic economies. Few can yet predict with any real certainty whether and when people will be able to travel freely across international borders and the extent to which they will need to prove immunity, immunisation or a negative test prior to doing so.

International arbitration often involves parties from multiple jurisdictions. While so much uncertainty remains, it would seem overly optimistic at this stage to assume that many in-person international hearings will be possible during 2021. What we may see is an increasing number of "hybrid" hearings over the latter half of 2021 where those who are able to travel will do so, or those in the same jurisdiction meet in person, with those from other jurisdictions attending virtually. These hybrid hearings will require careful handling to ensure equal treatment and procedural fairness, particularly if not all of the parties are able to appear in person before the arbitrators.

As a consequence, those planning hearings during 2021 and 2022 would be well advised to be flexible, working on the assumption that virtual hearing arrangements of some form may be required. Awareness of Covid restrictions, variants and vaccination schedules within the jurisdiction in which an in-person hearing is scheduled to take place is likely to become an increasingly relevant factor, with the picture potentially shifting month to month. For the medium term at least, virtual hearing technology in some format looks likely to remain prevalent.

But what about the truly post-Covid world? Will the shift towards virtual or hybrid hearings be permanent? The QMUL Survey would suggest a narrow preference for procedural hearings to be wholly virtual (48%), a preference for substantive hearings to be a mixed model (some attending virtually and some in person) (48%) but with in-person hearings a very close second (45%). Only 8% of respondents indicated a preference for retaining fully virtual substantive hearings if given the option. This split between the mixed and in-person model seems to be the most likely outcome. We may find a two-tier approach to hearings based on the amounts in dispute, with lower value disputes erring towards the hybrid option finding the cost savings and environmental benefits attractive even when in-person hearings become feasible. For those involved in truly "bet the company" cases, in-person hearings are likely to remain the preferred option, allowing both sides to see the whites of each other's eyes, particularly where witnesses from different time zones are involved.

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An increase in third party funding and innovative fee arrangements for disputes?

Over the past eighteen months clients' needs and behaviours have changed. The challenging economic conditions have led to an increase in disputes, but have also placed legal budgets under increased scrutiny. Clients want to receive quality legal advice, but also want to explore ways to limit up front costs and maximise value. As a consequence, law firms have had to show commercial agility in adapting to and supporting their clients' changing needs and behaviours. As law firms recognise the need to "do things differently", innovative pricing, risk sharing and alternative funding solutions have become more important than ever.

These financial constraints and uncertainties also mean that clients are increasingly alive to other ways to finance their disputes. Our experience at Herbert Smith Freehills is that clients are more aware than ever of third party funding as a potential financing option. Even those who are unaware of the concept of third party funding are attracted by the opportunity to move the legal cost of a claim from their balance sheet to a third party funder. As interest has grown in this area, so too have opportunities to offer such arrangements, as third party funding has become accessible across more jurisdictions, including Singapore and Hong Kong. Perhaps unsurprisingly, as a consequence, the pandemic has led to rapid growth in the third party funding market, particularly in arbitration.

Herbert Smith Freehills's Disputes Team: leading the market

A recent UK legal landscape study by Acritas (Thomson Reuters) showed Herbert Smith Freehills leading the market for the use of our value based pricing and Alternative Fee Arrangements, with 21% of those surveyed highlighting this as relative strength for HSF (compared to our peer market average of 4%). Herbert Smith Freehills continues to demonstrate its commitment to be recognised globally as established thought-leaders in the area of third party funding, success fees and legal expense insurance within international disputes.

We also keep on top of the fast moving regulatory landscape across our global network to ensure we can offer the right products to our clients at the right time. To assist our lawyers (and subsequently clients), we have created HSF Clarify, an internal compliance tool, developed by our Legal Operations team, setting out what is permissible in terms of third party funding, success fees and insurance within the jurisdictions we operate in.

What does this mean for our clients?

Our experience in the ever-growing funding and insurance markets ensures that no stone is left unturned in delivering a suite of options for our clients. We ensure that we are engaged and aligned to our clients' needs in thinking creatively about how our pricing proposals can be structured to maximise transparency, efficiency and cost control. As a consequence, we can work with our clients to identify the right pricing option, enabling them to meet the financial and business challenges of the pandemic and beyond.

> "Legal is changing. Our Legal Operations team has been created to help us and our clients achieve better aligned commercial and business outcomes."
>
> **JOHN O'DONOGHUE**

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Spotlight piece **Dana Kim**

Following her promotion this year, Dana is the first "home-grown" partner in our Seoul office, having joined the firm as an associate in 2013. A Korean national, Dana is qualified in New York and England and Wales. She has worked on arbitrations across Asia, including China, Hong Kong, Singapore, Australia and South Korea, and also sits as arbitrator.

Dana is a prominent member of the South Korean arbitration community, and speaks regularly at arbitration events. She was recently appointed co-chair of KCAB-NEXT, a platform for the next generation of arbitrators and advocates in Korea.

Meet **Dana Kim** here

Congratulations on your promotion to partnership. Can you tell us how you got to this point?

My first job was with an international law firm in Hong Kong. As I majored in Chinese language and literature at college, I wanted to work where I could continue to learn the language. In 2008, I joined the shipping disputes team at Holman Fenwick Willan. It was during the Global Financial Crisis and clients were embroiled in contract disputes. In my first week at work we started around ten arbitrations! I was the lead associate on many of those cases, some of which lasted two or three years. Market conditions were terrible, and these disputes were "make-or-break" for my clients – they would often tell me that their company's future was in my hands. It was a big responsibility, but when we got an award in our client's favour, it was a really rewarding feeling.

> "I focus on helping my client to manage the case as much as on managing the case within the Herbert Smith Freehills team"

Most of my clients in those cases were Korean. A few years later, South Korea opened its legal market to foreign firms, and Herbert Smith Freehills decided to open an office in Seoul. I interviewed with Justin D'Agostino, who was looking for a Korean-speaking lawyer, and joined the new office in 2013.

Arbitration has given me a chance to work with, and learn from, people from all over the world; including clients, arbitrators, counsel and experts. I have enjoyed it all, and look forward to more of the same in the next stage of my career as a partner.

You have a reputation for being "responsive and client-oriented". What does that mean in practice? What do you think the ideal lawyer-client relationship should look like?

In my experience, the lawyer-client relationship in an arbitration is different than in a corporate or finance matter. My clients are usually new to the arbitration process and unfamiliar with arbitration procedure. Often, the dispute is the single most important issue for their organisation at that time, and as the in-house lawyers they are under pressure to get it resolved as quickly and favourably as possible. During the life of the matter, they have extensive reporting requirements; both internally and to shareholders.

My priority is to help my clients understand the arbitration process and report effectively to their stakeholders. I explain the procedure in as much detail as possible, as well as the strategy and next steps. I focus on helping my client to manage the case as much as on managing the case within the Herbert Smith Freehills team. To do this, it is important for me to understand the client's internal structures and exactly what their management and shareholders want to know. This requires close communication and a detailed understanding of each client's needs. For me, that is the ideal lawyer/client relationship.

Your career has spanned a period where arbitration has really taken off in Korea. Why is that, in your view? What do the next ten years hold for Korean arbitration?

When I started practising, Korean shipping companies were very familiar with arbitration, which is widely used in maritime disputes. Other Korean clients were much less familiar; arbitration just was not used so widely in other sectors. In fact, at that time Korean clients were often reluctant to take any claim to arbitration

for fear of damaging their business relationships. This has changed over the course of my career. Korean clients have grown to realise that they may need to engage in formal dispute resolution to recover a loss. These days, I see more and more Korean parties who are willing to commence arbitration to protect their commercial interests, or for strategic reasons. This is particularly true in the construction sector and also in tech.

Korean tech companies, especially semiconductor and battery manufacturers, are active internationally and have come to understand arbitration well; some actively prefer it to litigation. Some of these clients have significant bargaining power when it comes to negotiating their contracts and try to push for disputes to be arbitrated in Seoul.

The Korean Commercial Arbitration Board (**KCAB**) has become a major arbitration centre, and a few years ago launched KCAB INTERNATIONAL to meet the growing demand for cross-border commercial dispute resolution. It has an excellent reputation and its caseload is growing as arbitration booms in Asia. I think that trend will continue, and KCAB will increasingly sit alongside ICC, SIAC and HKIAC as a preferred institution for Asia-related disputes.

> "Overall, I am confident that arbitration has a bright future in South Korea."

We hear a lot about the need to improve diversity in arbitration. From what you see in your practice, are we making progress?

Yes, definitely; I see a lot of progress.

Four years ago, together with other firms and KCAB, our office established an annual "Women in Arbitration" event during the Seoul ADR Festival. That was the first event of its kind in Korea. We invited female leaders of the international arbitration community to speak, and the session provided a forum for people to consider and discuss diversity in arbitration, including the appointment of female arbitrators. It has become one of the most popular events of the Festival: before Covid, there was always a long waiting list to attend the physical session. Last year, KCAB used the online event to announce the launch of its Diversity & Inclusion Committee, another sign that the Korean community is actively thinking about these issues.

KCAB NEXT is trying hard to make sure its events include equal numbers of male and female speakers, and we are making good progress. Korean law firms have some very senior female arbitration lawyers leading arbitration teams, and Korean clients are generally happy to appoint women as well as men to tribunals. The next step is to encourage more Korean women to put themselves forward as arbitrators and to be active in the global arbitration community.

What do you do to relax?

I like visiting the galleries near our office, in Seoul's old capital area. We are lucky that there are lots of great museums and old palaces offering traditional fine art just nearby.

I am also a big fan of K-drama, which is becoming more and more popular internationally, as part of the "Korean wave" cultural boom. There are lots available on Netflix now (with subtitles), on a wide range of themes including historical and, of course, legal. This is definitely one of my favourite ways to relax, and it seems I am not alone; I have found myself discussing these shows with colleagues from Paris to Jakarta who are also fans!

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The rising importance of ESG and its impact on international arbitration

Debates around corporate purpose dominated headlines in the months leading up to the Covid-19 outbreak. Intensified scrutiny of corporate conduct, governance and investment behaviours during the pandemic only served to accelerate the conversation around environmental, social and governance (**ESG**) issues.

In 2021, ESG issues have remained at the top of the agenda for many governments, investors and businesses. A wave of new ESG regulation around the globe calls for more extensive and detailed corporate disclosures. In parts of Europe, mandatory ESG due diligence rules have been introduced to force a more active approach to ESG risk management.

In response to investor demand and increased regulatory and litigation risk, many corporates have significantly upgraded their own policies and risk management approaches, including to ensure that ESG risks are appropriately managed by third parties, in supply chains and in the context of other business relationships.

In this article we consider the impact of these developments on international arbitration and the potential for ESG-related disputes to become an increasingly prominent feature of the arbitration landscape.

What is ESG?

ESG as an acronym has been in use for more than a decade as a label for a range of factors that are relevant in assessing whether an economic activity is sustainable for the purposes of investment decision making. These factors were used, for example, by large investors and asset managers to decide on allocation of capital, with a view to ensuring sustainability and financial performance over the long term. Recently, the label has been applied more broadly to an ever-expanding universe of regulations, standards and expectations regarding the responsible management of a wide range of issues.

Environmental

- Climate change and greenhouse gas (GHG) emissions
- Energy efficiency
- Resource depletion, including water
- Hazardous waste
- Air and water pollution
- Deforestation

Social

- Human rights
- Working conditions, including slavery and child labour
- Local and indigenous communities
- Conflict
- Health and safety
- Employee relations and diversity

Governance

- Executive pay
- Bribery and corruption
- Data protection
- Board independence, diversity and structure
- Tax strategy
- Transparency
- Shareholder rights

Source: 2018 Thomson Reuters

While ESG factors have not traditionally been seen as financial performance indicators, there is increasing acceptance of their potential to pose material financial risks. For this reason, governments and regulators are focusing on the need to promote effective ESG risk management, both to achieve sustainability goals and also to manage risks to investors, capital markets and the financial system more broadly.

In practice, effective ESG risk management involves:

- assessing and understanding ESG risks in business operations, relationships and supply chains;
- taking steps to avoid or mitigate those risks;
- complying with reporting and disclosure requirements;
- engaging effectively with stakeholders including regulators, investors, employees, consumers and communities; and
- ensuring robust governance and accountability at board level and integration of material ESG factors into strategic decision making.

How might ESG-related disputes come before arbitral tribunals?

Disputes arising out of commercial contracts

One of the ways in which companies are managing ESG risks is by the use of ESG conditions in commercial contracts. In 2018, the American Bar Association (**ABA**) launched the first version of model contract clauses (**MCCs**) aimed at the protection of human rights of workers involved in international supply chains, mainly through imposing representations and warranties to suppliers. An updated version of the MCCs were released in 2021, expanding the scope of ESG obligations to require buyers to engage themselves more proactively in the protection of human rights.

Examples of ESG issues that may be covered by contractual provisions include:

ESG PROVISION	MCCS[1]
Human rights due diligence	Section 1.1 obliges both Buyer and Supplier to have a human rights due diligence process in place. This should enable them to identify, prevent, mitigate and account for how each of them addresses the impacts of their activities on the human rights of individuals affected by the supply chain. It may also encompass the implementation and monitoring of remediation plans aimed at addressing issues identified in the course of the due diligence. Parties are required to disclose information relevant to the due diligence process.
Mutual obligation with respect to combatting abusive practices in supply chains	Section 1.3 establishes Buyer's commitment to support Supplier's compliance with human rights regulations. For instance, Buyer must have responsible purchasing and pricing practices, provide reasonable assistance to Supplier, and consider the impacts of any requests for modification or termination of the agreement.
Remediation of adverse human rights impacts	Section 2 sets out how any identified human right impacts linked to contractual activity should be remediated. For instance, it regulates how and when the Supplier is to notify the Buyer about potential or actual violations and establishes the Parties' duty to fully cooperate in the investigation thereof. It also defines how a Remediation Plan should be structured and how its implementation should be monitored.

1. Full text available at: https://www.americanbar.org/content/dam/aba/administrative/human_rights/contractual-clauses-project/mccs-full-report.pdf.

The use of such terms in supply chain contracts is not an isolated phenomenon. Similar clauses are also increasingly common in loan facilities, joint-venture agreements and in M&A transactions. The inclusion of such conditions reflects the rising importance of ESG factors to companies. Equally, because these factors have become commercially important, they are more likely to be source of disputes if the relevant conditions are not complied with, or if ESG-related representations or warranties turn out to be false.

ESG-related conditions are also becoming more common in long-term investment contracts, including in the energy, mining and infrastructure sectors. These can include, for example, obligations on the investor to adhere to specified ESG standards. These contracts may also incorporate carve-outs to stabilisation clauses, allowing governments to introduce new regulations concerned with ESG issues (usually with a provision that any new regulations must be proportionate, non-discriminatory and consistent with relevant international standards).
A well-known example is Paragraph 2(d) of the BTC Human Rights Undertaking from 2003, which provides that the Baku-Tbilisi-Ceyhan Pipeline Company's shall "*not seek compensation under the 'economic equilibrium clause' or other similar provisions* [...] *in such a manner as to preclude any action or inaction by the relevant Host Government that is reasonably required to fulfil the obligations of that Host Government under any international treaty or human rights* [...], *labour or HSE in force in the relevant Project State from time to time to which such Project State is then a party*"[2].

Many such contracts will provide for international arbitration. Accordingly, where disputes arise in relation to these ESG provisions, arbitral tribunals will be called upon to settle those disputes.

Arguably, certain ESG-related contractual provisions may be intended to benefit third parties. For example, undertakings by a supplier to adhere to certain internationally recognised labour standards could be argued to be intended to benefit the supplier's employees, who will not be party to the contract. This raises the interesting question of whether a third party may be able to enforce these provisions and to invoke an arbitration agreement in order to do so. The answer to that will depend, among other things, on the terms of the contract itself and also the law(s) applicable to the contract and to the arbitration agreement.

Following the Rana Plaza tragedy, global fashion brands and trade unions entered into the 2013 Accord on Fire and Building Safety in Bangladesh which, among other things, involved agreement on fire and building safety standards necessary to protect workers in the local textile industry. The Bangladesh Accord contains an arbitration clause and there have been at least two cases initiated by trade unions (who are parties to the Accord) alleging breaches of the agreement by a number of fashion retailers.

Disputes arising under Investment Treaties

The renewable energy sector and other sectors targeted by ESG investors, such as technology, can be vulnerable to heightened levels of political and regulatory risk. Where an applicable investment treaty is in place between the home state of the investor and the host state and that political or regulatory risk materialises, this can result in investment treaty disputes. For example, the elimination or modification of subsidies in the renewables sector in various countries has generated dozens of investment treaty disputes over the last decade.

ESG themes and issues such as human rights, environmental protection, conflicts with indigenous or local communities, bribery and corruption and tax issues are also arising more frequently in investment treaty disputes.

Some examples of these themes include:

CASE	ESG-RELATED THEMES
Series of claims against the Kingdom of Spain, Italy, and the Czech Republic regarding renewable energy incentives	After these three states' withdrawal of investment incentives related to renewable energy, a number of foreign investors have initiated proceedings against these governments through international arbitration under the European Energy Charter Treaty. The investors have argued a violation of the fair and equitable treatment standard due to a frustration of their legitimate expectations. The outcomes of these cases have varied and some are ongoing. For example, PV Investors v Spain PCA Case No. 2012-14, involved a claim for compensation of over €2bn. Herbert Smith Freehills successfully represented Spain in those proceedings, which resulted in an award for compensation of only 5% of the quantum sought by the claimants.
ICSID Case No. UNCT/15/3 David Aven and others vs. Republic of Costa Rica	The proceedings concerned an investment in a tourism project in Costa Rica's Central Pacific Coast (the "Las Olas Project"). The project was shut down when wetlands and forest were discovered on the land, in compliance with local law on protection of the environment. The claimants claimed that Costa Rica breached its obligations under the DR-CAFTA and requested damages in the amount of close to US$ 100 million. In September 2018, the arbitral tribunal issued unanimously an award dismissing all the claimants' claims and ordered the claimants to bear all the costs of the arbitration. Herbert Smith Freehills represented the Republic of Costa Rica in this case.
ICSID Case No. ARB/14/21 Bear Creek Mining Corporation vs. Republic of Perú	The proceedings arose after Peru's revocation of a decree that authorized the acquisition of a mining concession by the claimant, due to protests of local communities against the mining activities. In November 2017, the tribunal acknowledged that Peru had unlawfully expropriated the claimant's investment. However, damages were limited to the amount actually invested in the project, as the tribunal understood that the lack of a "social license" to the project impaired the likelihood of successful operation or profitability in the future, thus making the project too speculative for damages to be quantified by reference to its potential profitability using the DCF method.

2. Full text available at https://subsites.bp.com/caspian/Human%20Rights%20Undertaking.pdf.

CASE	ESG-RELATED THEMES
ICSID Case No. ARB/07/26 Urbaser SA and Consorcio de Aguas Bilbao Bizkaia vs. The Argentine Republic	The proceedings arose in connection to the termination of a concession for water and sewerage services granted to the claimants' subsidiary. Argentina brought forth a counterclaim alleging that the claimants' administration of the concession had breached international human rights obligations (namely, the human right to water). In December 2016, the tribunal accepted jurisdiction over Argentina's counterclaim, and acknowledged expressly that the treaty's reference to general principles of international law encompassed international human rights obligations. On the particular case, however, the counterclaim was dismissed on the merits, on the grounds that there were no applicable human rights obligations which the claimants had breached.
ICSID Case No. ARB/10/3 Metal Tech Ltd. vs The Republic of Uzbekistan	The proceedings related to a joint-venture agreement between the claimant and two state-owned companies from Uzbekistan. The claimant alleged that the Uzbek government adopted measures that led to the cancellation of their right to export materials, secured by the agreement. Uzbekistan denied liability and objected to the tribunal's jurisdiction, on the grounds that the agreement was obtained by means of corruption. In October 2013, the tribunal acknowledged the corrupt nature of the relationship between the parties and thereby decided that it lacked jurisdiction over the case, as the claimant's investments had not been made in accordance with host State Law.

Model treaties and some recent investment treaties have also begun to incorporate provisions relating to sustainability objectives or investor conduct. How these provisions should be interpreted and applied may also give rise to disputes in future. These include:

TREATY	ESG-RELATED PROVISION
South African Development Community Model Bilateral Investment Treaty Template (2012)	**Article 15.1** Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not under-take or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife. **Article 15.3** Investors and their investments shall not [establish,] manage or operate Investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher.
Dutch Model Investment Agreement (2019)	**Art. 7.1** Investors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labor laws. **Art. 7.4** Investors shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state. **Art. 7.5** The Contracting Parties express their commitment to the international framework on Business and Human Rights, such as the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, and commit to strengthen this framework.

Is arbitration well-suited to resolving ESG-related disputes?

International arbitration has many features that make it well-suited for the resolution of ESG-related disputes. Arbitration offers a neutral forum and flexible procedure. It also offers the parties the chance to appoint arbitrators with specialist expertise (for example in relation to human rights, climate change or other environmental matters). International arbitrators have also proved adept at resolving disputes involving a range of applicable laws and, in some cases, 'soft law' standards. The ability to enforce worldwide under the New York Convention may also offer considerable advantages. In 2019 a group of arbitration and human rights practitioners launched the Hague Rules on Business and Human Rights Arbitration aiming to retain these beneficial features, but also provide a set of rules with modifications needed to address issues likely to arise in the context of business and human rights disputes. These include a Code of Conduct, fostering good faith and collaboration, stressing the benefits of a diverse tribunal and encouraging the adoption of processes which are based on inclusion, participation, empowerment and transparency.

There has, however, been some criticism of the use of arbitration as a dispute resolution process in an ESG context. Some see it as inappropriate for the resolution of disputes between corporations and individuals due to the potential imbalance in resources between the parties and the likelihood that corporations will have an inherent advantage as "repeat players". Concerns such as these have led certain organisations to abandon

the use of arbitration in certain contexts, including consumer or employment disputes, or allegations of sexual harassment or discrimination. Criticism has also been raised against some investment treaty tribunals for failing to take adequate account of environmental or human rights standards and also complaints about inadequate transparency in relation to proceedings which often implicate important public interest matters, including for example, tax, corruption and public health.

Conclusion

The rising importance of ESG in a commercial context is likely to lead to an increasing number and variety of ESG-related disputes. Given that arbitration remains the preferred dispute resolution mechanism of most major corporations in relation to cross-border commercial activity, it is likely that a significant number of these disputes will fall to be resolved through international arbitration. Rising community concern with ESG and related regulatory change may also mean that ESG issues arise more frequently in investment treaty arbitration. To date, some have questioned whether arbitration is the appropriate forum to resolve such disputes. Significant efforts have been, and are being made to meet those concerns head on. However, it remains essential that arbitrators and arbitration counsel become more familiar with ESG regulation and standards and respond proactively to adopt appropriate arbitration procedures for ESG-related disputes. This will help to ensure that arbitration remains an effective forum for resolving disputes in this fast-growing area.

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Spotlight piece **Antony Crockett**

Antony is a disputes lawyer, specialising in public international law. He leads our global Business and Human Rights practice and is a member of the firm's Environmental, Social and Governance (ESG) leadership group. Originally from Australia, Antony has lived and worked abroad for most of his career. He is now based in Hong Kong, and was promoted to the partnership on 1 May 2021.

Hear from **Antony Crockett** here

Public international law (PIL) is often considered an academic discipline, but you apply it every day in your practice. How does PIL help your clients in their business activities?

Public international law underpins so many aspects of investment and trade; it is hugely important to facilitating international business. PIL also influences international regulation of everything from employment, to environmental protection, to human rights. All of that affects our clients and the way they run their businesses. So, even though most clients and lawyers do not engage directly with it on a day-to-day basis, public international law is really foundational to international commercial activity.

In the last few years, "ESG" has gone from a buzzword to what our CEO, Justin D'Agostino, describes as "critical to everyone's future". What has brought about this change, and why now?

The adverse social and environmental impacts of business activity – particularly transnational economic activity – have been a concern since at least the 1960s. It is true that ESG has become a huge buzzword over the last year, but this is really the culmination of a movement that has built up over several decades. People have become increasingly aware of these adverse impacts and of the consequential economic, financial and social outcomes. The materiality of social and environmental performance for companies has long been debated, but there is increasing evidence that companies that manage their ESG risks responsibly will outperform financially. Alongside increased awareness of the need to avoid adverse impacts, there is also rising awareness that ESG creates new opportunities for business. Decarbonisation, the growth of renewable energy and focus on sustainable supply chains are just a few examples.

Even for an international lawyer, you are very well travelled. You have lived and worked in Australia, Singapore, London, Jakarta, Vienna, and now Hong Kong, and travelled far and wide on cases. Can you name a high point of your international lifestyle, and a low point?

It has been tremendously exciting to work in all those different places, with so many different people and in different cultures. Building friendships all over the world with a diverse group of colleagues and clients is an added bonus. Once upon a time, I could maintain these friendships by seeing people regularly on my work travels, but the pandemic has made that impossible for more than a year now. That has certainly been a low point.

The global nature of international arbitration is part of what originally attracted me to this area of practice. As well as enjoying meeting so many people from a human point of view, I think these interactions have made me a better disputes lawyer.

> "There is no better way to get to know the business culture of a country and the types of disputes that arise in that culture and political context than being able to go there, meet and talk to people, and get a first-hand understanding."

One of the reasons international arbitration is so effective and widely used is that the international community has developed a consensus around the best ways to resolve international disputes. That consensus, and the community that created it, was built in

part by practitioners being able to travel, meet in person, develop deep relationships and work together effectively. As Winnie the Pooh once said: "You can't stay in your corner of the forest waiting for others to come to you; you have to go to them sometimes."

> "There is increasing evidence that companies that manage their ESG risks responsibly will outperform financially"

Business & Human Rights is a key pillar of your practice. Why are clients seeking our help in this area? Are there regional or sector trends?

This year is the tenth anniversary of the UN Guiding Principles on Business and Human Rights, which were endorsed by a unanimous resolution of the UN Human Rights Council in 2011. The Guiding Principles establish a universal expectation that business enterprises should respect human rights. This means that businesses must act with due diligence, to avoid adverse human rights impacts that might be caused by their activities.

By now, the majority of our clients have adopted policies reflecting that expectation. At the same time, governments have begun to legislate requiring companies to do human rights due diligence or to report on the steps they take to avoid human rights risks. Clients seek our advice on how to carry out the due diligence, how to avoid or mitigate adverse human rights impact, and how to resolve grievances and disputes.

In terms of trends, multinational corporations started to adopt human rights policies in the late 1990s/early 2000s. We saw this first in the extractive industries, for the obvious reason that this sector involves projects with significant environmental and social footprints, and resulting risks of adverse human rights impacts. It was only a decade or so later that some of the large technology companies started to adopt human rights policies. As they reached a point where their businesses were so large and geographically diverse, these tech giants also started to develop an awareness of the adverse social impacts which may arise in relation to their operations and the use of their services. When the firm's Business and Human Practice was first established, we were working almost exclusively for oil & gas or mining companies. That experience and the approaches we developed in those early years are now being applied in new sectors; we have been particularly busy in the tech sector over the last couple of years.

Another important global trend which is very relevant in the Asia Pacific relates to concern about modern slavery and human rights abuses in supply chains. Almost twenty years ago, the large fashion retailers were amongst the first to be under significant scrutiny in this area. More recently, other companies have realised that similar risks exist in the supply chains for a huge range of commodities as well as services. The introduction of modern slavery legislation in the UK, Australia and parts of Europe has contributed to this and it has become increasingly important for clients to carry out due diligence on those risks in this region.

What do you enjoy most about the work you do?

Working with interesting people, solving interesting problems and learning about different businesses, sectors and economies. In the context of an investment treaty arbitration, not only the legal system in the host state, but also its political and social situation will often be a very important part of the background to the dispute. To resolve these disputes, you have to learn about all of that, which I find fascinating.

You have two young children. What advice will you give them about choosing a career, when the time comes?

In order of importance:

Do something that energises you.

Do something you find interesting.

Do something that lets you work with people you enjoy working with.

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New law on escalation clauses in Hong Kong

Key judgment on arbitration clauses affecting thousands of commercial contracts

Many commercial contracts contain "escalation clauses" requiring parties to take certain steps before formal arbitration begins – such as a requirement to "negotiate in good faith" before starting arbitration.

Previously, failure to comply with the escalation mechanism in a contract left the arbitrators' decisions vulnerable to challenge in domestic courts.

In a new judgment, the Hong Kong High Court confirmed that this approach is wrong, and that questions around compliance with the escalation mechanism are matters of admissibility for arbitrators to resolve, not matters of jurisdiction subject to review by local courts.

As Hong Kong is a Model Law jurisdiction, this judgment has real international significance. The case will be of relevance in the 118 jurisdictions which have legislation based on the Model Law, and follows a wider international trend. Those in contractual disputes can now have certainty that arbitration agreements will be upheld, even where there are questions around pre-conditions to arbitration. It also provides welcome confirmation of the pro-arbitration stance of the Hong Kong courts, particularly in cases where, as the judge observed: "the parties' commitment to arbitrate is not in doubt".

Herbert Smith Freehills acted for the successful Defendant, with Partner Simon Chapman QC appearing as advocate.

C v D [2021] HKCFI 1474

Background
The contract in issue stipulated that, if a dispute arose between the parties, they should "*attempt in good faith promptly to resolve such dispute by negotiation.*" The contract went on to say that "*Either Party may, by written notice to the other, have such dispute referred to the Chief Executive Officers of the Parties for resolution*" and that, if the parties could not resolve the dispute amicably within 60 business days"*of the date of the Party's request in writing for such negotiation*", they could refer the matter to arbitration.

A dispute arose between the parties which the Defendant raised with the Board of Directors of the Plaintiff "*in a final effort to resolve this issue and avoid further legal proceedings*". The relevant correspondence indicated that it was "*clear... that a relevant dispute now exists for the purpose of* [the contract]", but ultimately the matter was not resolved. The Defendant therefore commenced arbitration, with the Plaintiff challenging the jurisdiction of the tribunal on the basis that the Defendant had not properly complied with the escalation mechanism in the contract, because the dispute had not been referred to the parties' respective Chief Executive Officers.

Issues in dispute
The tribunal in the arbitral proceedings rejected the Plaintiff's complaint, finding that the Defendant had complied with the clause, such that no issue of jurisdiction arose. The Plaintiff then applied to set aside the tribunal's decision under section 81 of the Arbitration Ordinance (Cap 609), which incorporates Article 34 of the Model Law.

Section 81(2)(a)(iii) provides that an arbitral award may be set aside if: "*the award deals with a dispute not contemplated by or falling within the terms of the submission to arbitration*". Section 81(2)(a)(iv) provides that an award can be set aside where: "*the arbitral procedural was not in accordance with the agreement of the parties*".

It was common ground between the parties that the contract contained a mandatory condition precedent to arbitration, and that, at a minimum, this required a request in writing for negotiation. There was a dispute, however, as to the precise requirements of the contract, and whether those requirements had been fulfilled. The Plaintiff's case was that they had not, such that the tribunal lacked jurisdiction. The Defendant argued that the contract had been complied with in full, but in any event this was a question of admissibility, rather than jurisdiction, such that section 81 of the Ordinance was not engaged.

Decision
The court found that the "*generally held view of international tribunals and national courts*" is that non-compliance with a pre-condition to arbitration is a question of admissibility, not jurisdiction.

The court relied on a number of academic authorities which recognise the distinction, as well as previous authorities from the United States Supreme Court and the Singapore Court of Appeal. The court also cited, with approval, the recent English High Court decision in *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm). In that case, the contract in question required the parties to negotiate in good faith for three months before commencing arbitration. The Defendant allowed less than three months to elapse, but the court nonetheless declined to set aside the award on the basis that this was ultimately a question of admissibility, not jurisdiction.

In reaching this conclusion, the court distinguished previous authorities from England and Wales and Hong Kong in which it had been found that compliance with escalation clauses did give rise to questions of jurisdiction. The Plaintiff had sought to rely, for example, on *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2015] 1 WLR 1145, where the English High Court held that a contractual requirement for friendly discussions in good faith before the arbitration was a matter going to jurisdiction. A similar point was argued in *HZ Capital International Ltd v China Vocational Education Co Ltd* [2019] HKCFI 2705, albeit where the condition precedent was found to have been waived. The court noted, however, that in both of these cases the distinction between admissibility and jurisdiction was never

argued, such that neither decision provided any real support for the Plaintiff's case.

Limited exception to the rule

The court recognised that there may be a limited exception to the general rule that pre-conditions to arbitration do not go to the jurisdiction of the tribunal, namely where the parties have explicitly provided that failure to comply with pre-arbitral requirements will exclude the tribunal's jurisdiction.

In this case, however, there was no indication that the parties intended compliance with the relevant provisions to be a matter of jurisdiction. Moreover, it seemed "*unlikely to be the parties' intention that despite a full hearing before and a decision by a tribunal of their choice the same issue should be re-opened in litigation in the courts.*"

Constitutional objection rejected

The Plaintiff had also argued that it would be unconstitutional for the court not to intervene in these circumstances, on the basis that this would curtail the Plaintiff's fundamental right of access to the courts under Article 35 of the Basic Law. The judge rejected this argument on the basis that one of the underlying principles of the Ordinance is to restrict the court's interference in arbitration to circumstances expressly provided for under section 3(2)(b) of the Ordinance. The restrictions set out in section 81 were, furthermore, proportionate to the aim of section 3(1) of the Ordinance to "*facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense*".

Comment

This important decision provides welcome certainty that arbitration agreements will be upheld, even where there are questions regarding compliance with pre-conditions to arbitration, such as mandated cooling off or negotiation periods.

This does not mean that these provisions are not enforceable. As the court made clear: "*The fact that a condition is regarded as going to admissibility rather than jurisdiction does not mean it is unimportant. What it does mean is that the arbitral tribunal has jurisdiction and may deal with the question as it sees fit.*" The tribunal may, for example, choose to stay the proceedings to allow time for compliance with the clause, order some form of cost sanction to account for the breach of contract, or even dismiss the claim outright as inadmissible. As the court observed, this approach has: "*considerable advantages*" because the tribunal chosen by the parties is likely to be well-placed to "*consider and determine what needs to be done having regard to the commercial realities and the practicalities including whether it would be futile to compel the parties to go through the motions*".

Importantly, and having surveyed all of the international authorities on this issue, the judge concluded that this approach was: "*entirely consistent with the policy in Hong Kong law which respects the parties' autonomy in choosing arbitration as the means to resolve their disputes with its incident of speed and finality as well as privacy*". The decision therefore further underlines the pro-arbitration stance of the Hong Kong courts, particularly in cases such as the present where "*the parties' commitment to arbitrate is not in doubt*". Reflecting the usual practice in Hong Kong, the Defendant was awarded costs on the indemnity basis.

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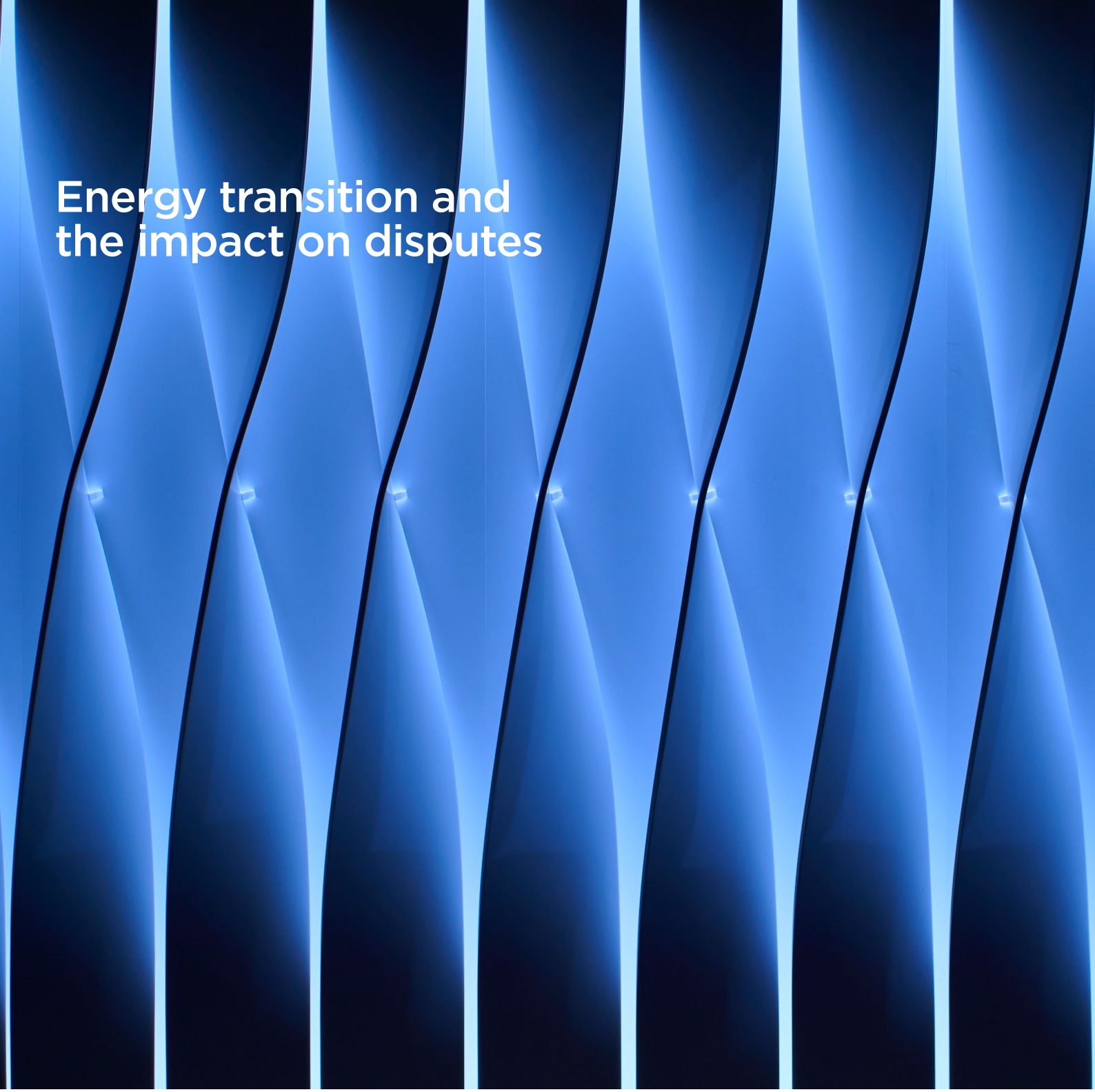


Energy transition and the impact on disputes

A hindrance or a catalyst? Arbitration and the energy transition

There have been a number of 'energy transitions' throughout human history, but none more complex than the one currently underway. To give the world a chance of keeping global warming, measured against pre-industrialisation temperatures (ie pre-coal), below 2°C will require an energy transition far quicker and larger than ever before. This transition will involve: (i) a global move to reduce reliance on fossil fuels for energy production and consumption in favour of renewable sources of energy; and (ii) decarbonisation of (reduction in scope 1, 2 and 3 emissions arising from) continuing fossil fuel production, transportation and consumption.

Energy transition has been a tenet of global policy for over three decades already, and in particular since the United Nations Framework Convention on Climate Change was signed in 1992.

However, the past decade has seen a sharp increase in state co-operation on the international plane, most significantly in the form of the Paris Climate Agreement in 2015, driven by a significant shift in societal attitudes towards climate change and the emissions generated from hydrocarbon production and consumption.

The commercial drivers within the private sector are also shifting rapidly. Reflecting societal changes, investors are increasingly looking to deploy capital in accordance with Environmental, Social, and Governance principles (**ESG**). This has seen, for example, financial institutions take a more active role in monitoring and influencing the environmental impact of their investments. As discussed in the article authored by Antony Crockett, Patricia Nacimiento and Alessandro Covi, ihat trend will continue.

The growing appetite for renewable energy and decarbonisation of the current energy supply chain will continue to spawn exciting new infrastructure projects, many public-private partnerships and new collaborations between competitors in the fossil-fuel industry as well as between 'traditional' energy producers and new technology and renewables counterparts.

The challenges associated with the energy transition cannot be overstated, and it is inevitable that some projects and acquisitions will see significant friction between stakeholders. As such, dispute resolution will play a key role in keeping positive change 'on track' and ensuring that the investment climate exists to enable the colossal levels of public and private investment required to enable a successful 'transition' to be made.

Strakeholder friction will often manifest itself in "*business as usual*" disputes which are very familiar in the energy sector, but we will also see many disputes (both treaty and commercial) that are new to energy sector participants. This article will touch on some of those flashpoints for disputes. The energy transition will inevitably lead to a large number of complex construction and planning disputes, but those disputes are not considered here in any detail.

Investor-State disputes

Two 2019 reports on climate change and green technology disputes respectively by the International Chamber of Commerce (**ICC**)[1] and the Stockholm Chamber of Commerce (**SCC**)[2] suggest that energy and natural resources companies are increasingly relying on investment treaties (**BITs**) in respect of regulatory changes affecting fossil-fuel projects, including the outright phasing out of the relevant fossil fuel, as well regarding changes affecting the conditions of investment in renewable energy projects

BITs are agreements between two or more states which commonly contain reciprocal undertakings for the protection of investments made by nationals of the respective states in each other's territories. Such investor protections usually guarantee a minimum level of protection, including a guarantee of fair and equitable treatment, and protection against discrimination and expropriation of the investment. Investment agreements generally recognise that private foreign investors should be adequately compensated when states wrongfully breach the legitimate expectations they created and in reliance upon which an investment was made.

Crucially, such treaties give investors a right to bring proceedings directly against a host state by way of international arbitration before an independent tribunal (rather than the host state's domestic courts) to seek compensation for breach of these protections. For example, over 136 cases have been brought since 1991 pursuant to the Energy Charter Treaty (**ECT**), which has 47 signatory states.[3] However, the ability of foreign investors to bring claims for damages against states under BITs has drawn criticism, including concerns that it may hamper states' ability to implement domestic regulation in response to legitimate social change, including in relation to the energy transition.

Disputes over the entitlement to and calculation of incentives for investments in 'green' segments of the energy market are becoming increasingly common in this context. For instance, a number of European states withdrew clean energy subsidies in the wake of the 2008 global financial crisis, and subsequently faced investment arbitration claims. Spain alone has seen more than 40 claims brought against it over its withdrawal of subsidies relating to the photovoltaic sector. One such case, *PV Investors v Spain* PCA Case No. 2012-14, involved a claim for compensation of over €2bn. Herbert Smith Freehills successfully represented Spain in those proceedings, which resulted in an award for compensation of only 5% of the quantum sought by the claimants. Many countries have also implemented significant new incentives and subsidies to boost investment in the green energy sector as the world rebuilds after the pandemic.

Where a host state has made environmental commitments enshrined in domestic or international law, its non-compliance with those commitments may be detrimental to investments made in reliance on them. In such circumstances, the investor may have legal recourse against the state. In *Peter A. Allard v Barbados* (2016) PCA Case No. 2012-06, the tribunal held that investors could bring claims where a host state failed to comply with environmental obligations imposed by its own domestic law and such failure caused damage to a protected investment, although this claim failed on the facts. A further illustration of this is *Zelena N.V. and Energo-Zelena d.o.o Inđija v. Republic of Serbia*, ICSID Case No. ARB/14/27, where Belgian investors in a waste management company complained that Serbia's non-enforcement of its environmental and veterinary laws allowed its competitors to dispose of animal waste more cheaply, thus giving them a competitive edge. The tribunal held that Serbia had denied fair and equitable treatment to the investors. Moreover, the tribunal in the *Allard* case also suggested that a State's international environmental obligations "*may well be relevant*" in the application of investment treaty protections to particular circumstances. When considering the relevant regulatory framework and protections afforded to their investments, investors should be mindful of the international environmental obligations a host state has committed to, as well as its domestic regulatory regime.

Investor-state cases are also being seen as States withdraw from fossil-fuel projects in favour of cleaner energy sources. For instance, the Netherlands recently implemented legislation providing for the phase-out of coal by 2030, which did not contain provisions for the compensation of coal plant operators. German energy company RWE, which had built a coal plant in 2015, subsequently brought a claim against the Netherlands under the ECT seeking compensation of €2bn. Several companies including Vattenfall, the Swedish state-owned power company, brought similar claims over Germany's 2011 decision to phase out nuclear energy by 2022, with the parties agreeing to a settlement in excess of €2.4bn earlier this year. Disputes are also likely to arise as states review their contract portfolios seeking to amend or terminate longer-term fossil-fuel contracts, or in relation to the decommissioning of assets and the costs of the associated continuing environmental liability.

Tribunals have also recently appeared increasingly willing to hear counterclaims by states against investors for breach of domestic environmental regulations and international human rights law. Various arbitral tribunals, including in the case of

1. https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf.
2. https://sccinstitute.com/media/1059447/green-technology-disputes-in-stockholm.pdf.
3. https://www.energychartertreaty.org/cases/statistics/.

David Aven v. Costa Rica (2018) ICSID Case No. UNCT/15/3, have accepted that they had jurisdiction to determine such counterclaims. Further, in twin arbitrations arising out of the same investment, *Burlington Resources Inc v. Republic of Ecuador* (2017) ICSID Case No. ARB/08/5 and *Perenco Ecuador Ltd. v. Republic of Ecuador* (2019) ICSID Case No. ARB/08/6, Ecuador successfully argued its counterclaim based on a breach of a statutory environmental regulation regime (albeit, in these cases, the investors expressly agreed to arbitrate the counterclaims in an international forum).

The interventionist stance taken by some national courts towards the enforcement of states' compliance with international environmental obligations adds further complexity. For example, in its 2019 decision in *Urgenda Foundation v. State of the Netherlands*, the Dutch Supreme Court upheld a decision of the District Court in the Hague ordering a 25% reduction in CO_2 emissions relative to 1990 levels. Earlier this year, the German Constitutional Court similarly ruled that Germany must bring forward its climate change legislative agenda to reduce CO_2 emissions more quickly than the Government had planned. Most recently, in May 2021, the District Court in the Hague also ruled that Royal Dutch Shell must cut its net carbon emissions by 45% by 2030 compared with 2019 levels. These decisions highlight the fact that the executive branch of a State is not always the sole and final arbiter of the scope and content of regulatory change, and therefore add to the uncertainty as to the stability of existing regulatory frameworks.

The accelerating pace of regulatory change intended to promote the energy transition will continue to generate investor-state disputes, both under BITs and host-state agreements, as a delicate balance is sought between the legitimate expectations of investors in the stability of the investment framework, and the increasing urgency with which states are responding to climate change.

Commercial Disputes

The SCC and ICC reports mentioned above forecast an exponential increase in climate-related commercial disputes. There are three key factors driving this trend: (i) the prospect of regulatory change, (ii) the increased significance of background factors not linked to a particular project, such as shareholder commitments and ESG concerns, and (iii) the evolution of market norms, such as partnerships between different kinds of market players.

When a technical regulation is implemented which affects a particular project, this may have a direct or indirect adverse effect on the contractual relationships which underlie the development, financing and operation of the project. Strain may also be put on commercial relationships by background factors such as broader shareholder reporting obligations or voluntary shareholder commitments – for example, some international oil companies have adopted ambitious targets for emissions reductions, whereas others have made no public commitments. The contrast may be even more stark where ESG funds are involved as investors. This will lead in some projects to tensions between partners, for example as to the increased costs involved in reducing emissions. Similar issues may arise as a result of representations made in financing agreements with environment-conscious lenders. Examples may include regulations requiring the use of less carbon intensive fuels when shipping products from projects within the host state for sale on the global market, or the use of green steel in the construction of new energy projects. These increased tensions will likely to give rise to disputes between commercial parties.

In parallel, increased M&A activity in the energy sector is likely to continue, as established energy companies diversify their offering away from traditional upstream oil and gas assets to align their portfolio with mandatory and voluntary net-zero targets. Joint venture (**JV**) activity is also on the rise as new entrants to the renewables market look to partner with traditional fossil fuel producers. In both the M&A and JV context, disputes are likely to arise in relation to indemnities and breaches of representations and warranties relating to the environment, as well as as a result in clashes in approach between market participants who may come from divergent backgrounds.

We expect to see a growing number of disputes also arise from contractual requirements to report on and reduce the environmental impact of projects. For example, as companies start to monitor the environmental impacts across entire supply chains (as well as their own sope 1 emissions), disputes are likely to arise from breaches of obligations relating to the monitoring, reporting, and verification (**MRV**) of emissions. These disputes are likely to be exacerbated and their resolution made more complex by the lack of robust and globally accepted frameworks on emissions MRV. As a result, disputes may arise in relation to the effectiveness of monitoring processes, the reliability and veracity of emissions data, and the integrity of the verification and auditing mechanisms.

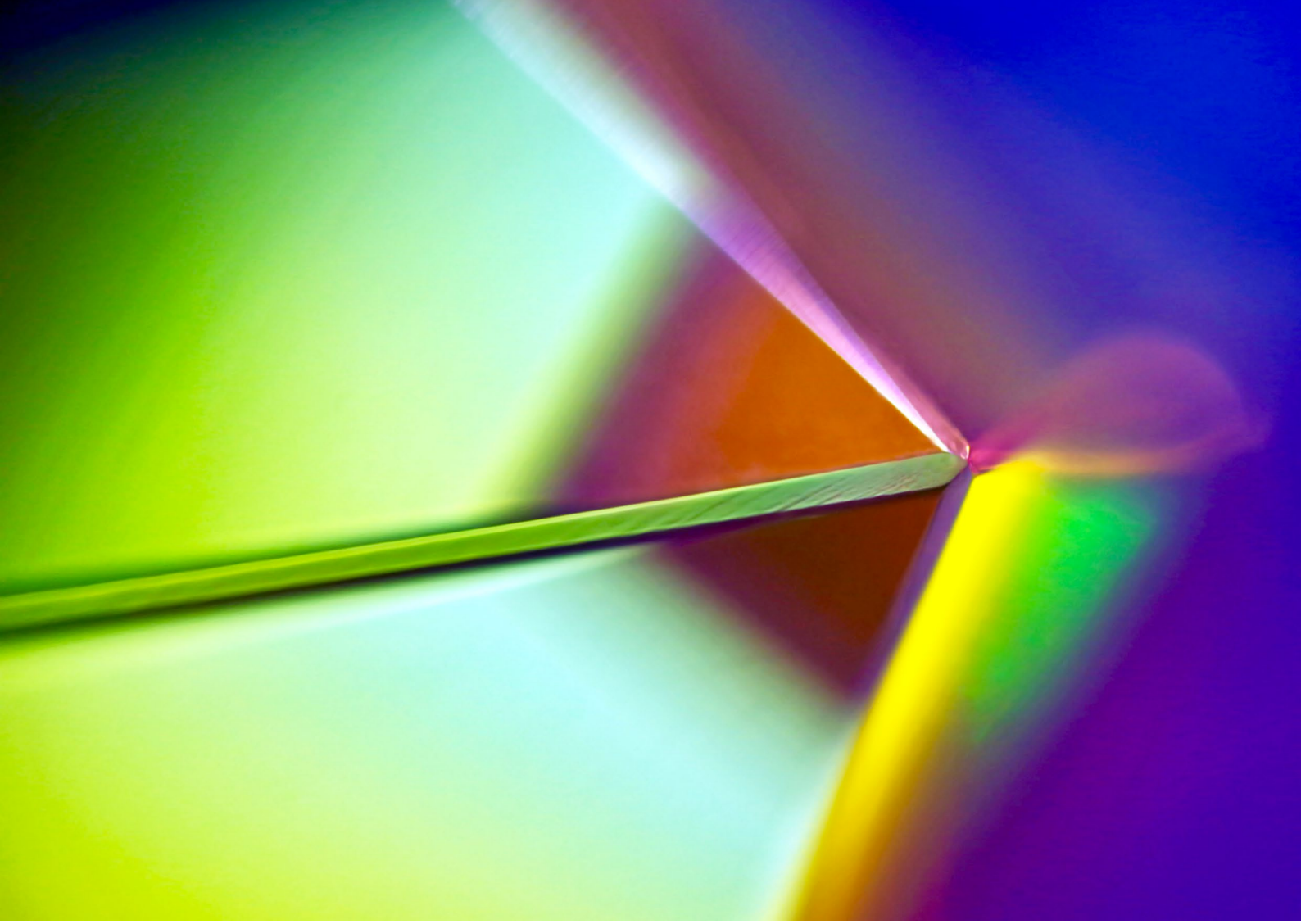
These reflect only a few examples of potential disputes. In short, greater scrutiny of environmental credentials by all stakeholders in a project will lead to a broad array of disputes, from operators' duties to financing obligations (we are seeing the more regular inclusion in financing agreements of representations regarding emissions and other environment-related targets), reporting and information rights, access to discussions with counterparties (particularly with state entities), budgeting, approvals and distributions.

We also expect to see an increasing number of disputes arising from activist shareholders. By way of example, in 2019, a shareholder class action was brought against ExxonMobil, wherein the claimants argued inter alia that the board of directors did not adequately evaluate the potential impact of climate change-related risks on the value of the company's assets and its long-term business prospects. In May 2021, activist shareholders succeeded in nominating two new members to ExxonMobil's board.

The proliferation of new technologies, relating for example to storage and grid connectivity to support renewables or carbon measurement and verification, also creates fertile ground for dispute. As the key asset of many renewable companies is their proprietary technology, technology-sharing agreements are likely to become more common. These contracts and arrangements will be bespoke and – given the technology is so new – involve significant risk and uncertainty as to the efficacy and development of the technology. This raises the prospect of disputes as to IP, the scope of obligations to develop or warrant technology and the allocation of risk and reward based on the success or failure of the technology and the collaboration.

The role of Arbitration in the energy transition

A ubiquitous feature of energy disputes is their international dimension. Existing energy projects often have a cross-border element. They may involve a number of parties incorporated and based in different jurisdictions. The jurisdiction of the host state may be foreign to some or all of them. This will hold true for many new projects arising out of the energy transition, for similar reasons and because some projects (such as the construction of subsea electricity cables



to connect electricity grids) will cross borders. Arbitration in a neutral seat is the natural choice for international contracts, given the advantages of enforcement pursuant to the New York Convention. Further, the ability to ensure an arbitration is confidential and to choose arbitrators from with the requisite legal and technical expertise will remain important advantages of arbitration. International arbitration is therefore likely to remain the prime forum for resolving these disputes.

Conclusion

To meet globally agreed climate change targets, radical changes to energy markets are required in the coming 20-50 years. A large majority of the energy currently being produced from fossil fuels will need to be provided by renewable-energy sources, nuclear power or fossil-fuels that can be produced and consumed as carbon neutral, for example through carbon capture utilisation and storace. Governments and the private sector alike are committed to achieve the necessary changes. However, this will be a gargantuan task with many operational, financial, technical and cultural challenges.

Associated with each of those challenges is a risk of legal disputes. While some of those challenges will be exacerbations of 'business as usual' issues, others are entirely novel. This is an exciting time for incumbent energy produces and new market participants alike. Parties are well-advised to closely assess their dispute resolution mechanisms at the outset of new investments and in the light of ongoing market shifts. Given the nature of likely disputes in this area, international arbitration remains the primary dispute resolution mechanism to enable parties effectively and efficiently to enforce their legal rights, while ensuring that the energy transition maintains its positive course.

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Offshore arbitration in India-related commercial contracts: **Wind in the sails**

Keeping up with arbitration developments in India can be challenging. Since 2015, the arbitration law has been amended three times, two major arbitration institutions have been established and the government has proposed a quasi-regulator for arbitrators and arbitral institutions. Yet one development that stands out is a judgment from the Supreme Court of India in April 2021 in *PASL Wind Solutions v. GE Power Conversion India* that allows two Indian parties to resolve disputes by arbitration outside of India.

The judgment is significant to Indian subsidiaries of international businesses who now have greater freedom in their choice of dispute resolution options for commercial contracts. Equally, Indian companies doing business internationally will likely welcome the flexibility to resolve their disputes in popular jurisdictions like Singapore, London and New York (to name but a few). In either case, the judgment is an opportunity for businesses to refresh their approach to dispute resolution clauses in India-related commercial contracts. This article explains the background to the judgment, what it means for arbitration clauses and the challenges that remain.

Background

Arbitration in India is governed by the Arbitration and Conciliation Act, 1996 (**Arbitration Act**). The Arbitration Act differentiates between arbitrations with their 'seat' or 'legal place' in India and those with their seat outside India. The choice of seat often determines which country's arbitration law applies and which courts have supervisory jurisdiction over the arbitration. Under Indian law: (i) two non-Indian parties or (ii) an Indian party and a non-Indian party can choose to arbitrate their dispute offshore, that is, to choose a seat other than India. However, there were conflicting judgments on whether Indian parties to a contract could choose an offshore seat. Some High Courts had held that an award arising out of such an arbitration could not be enforced, while others reached the opposite conclusion.

In *PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited* (**PASL Wind**), the Supreme Court of India, the highest appellate court, finally resolved the debate. In this case, two companies incorporated in India (one a subsidiary of a French company) entered into a settlement agreement. The agreement provided for arbitration seated in Zurich under the ICC arbitration rules and was governed by Indian substantive law. The tribunal issued an award and GE Power applied to enforce it in Gujarat. The Gujarat High Court held that the award was enforceable notwithstanding that the two Indian parties had chosen a foreign seat, but also held that parties to such an arbitration would not be entitled to interim relief in the Indian courts. PASL Wind Solutions appealed to the Supreme Court.

The Judgment

The issue before the Supreme Court was whether a foreign award (being an award issued by a tribunal seated outside India) included an award arising out of a dispute between two Indian parties. The appellant argued that the participation of two Indian parties meant that the award did not satisfy the definition of a foreign award. The court rejected this argument and held that there were four criteria for an award to be considered a foreign award:

- the dispute must be considered to be a commercial dispute under the law in force in India,
- it must be made pursuant to a written arbitration agreement,
- the dispute must arise between "persons" (without regard to their nationality, residence, or domicile), and
- the arbitration must be conducted in a New York Convention country.

The court held that these criteria were met by the award in question. It did not matter that the parties were companies incorporated in India.

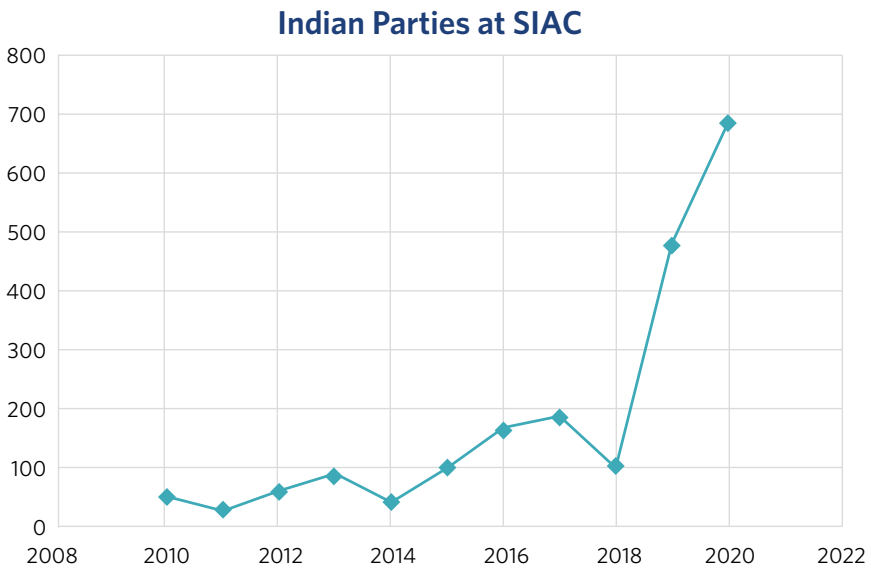
Another issue before the court was whether an agreement between two Indian parties to arbitrate in a foreign seat was against the provisions of the Indian Contract Act 1872. In particular it was argued that the agreement was against public policy and in restraint of legal proceedings and was therefore void.

On public policy, the court found that, on balance, there was no harm to the public in allowing two Indian parties to resolve their disputes offshore: "*The balancing act between freedom of contract and clear and undeniable harm to the public must be resolved in favour of freedom of contract as there is no clear and undeniable harm caused to the public...*". The Court also reaffirmed previous judgments in which it held that party autonomy was "*the brooding and guiding spirit of arbitration*" and that there were no grounds on which to restrict this autonomy by preventing Indian parties from arbitrating abroad.

Finally, the court also held that the parties could seek interim relief under the Arbitration Act from courts in India.

Impact of the judgment

The *PASL Wind* judgment will be a welcome clarification on an issue that has divided many High Courts in India including those in Delhi, Bombay and Gujarat. The greater freedom and flexibility gives parties more choice when it comes to dispute resolution clauses. As noted above, this is likely to be significant to Indian subsidiaries of international groups, allowing them to more closely align the arbitration clause in their India-related contracts with their standard arbitration clause. At the same time, Indian companies with international businesses are also likely to welcome the freedom of choice. They are after all no strangers to offshore arbitration. Over the last decade, Indian parties topped the list of foreign (non-Singaporean) users of the Singapore International Arbitration Centre (**SIAC**) in seven out of ten years. The number of Indian parties using the SIAC to resolve their disputes is rising fast. PASL Wind is likely only to accelerate this trend.



Source: SIAC Annual Reports 2010 to 2020

Important considerations for India-related commercial contracts

Substantive Indian law

The choice of seat decides the law that applies to procedural matters but not substantive matters. Can two Indian parties also choose to apply a non-Indian substantive law to their dispute? The Supreme Court considered the issue only briefly in *PASL Wind* and did not provide a full answer. It observed that even if parties choose a foreign law, conflict of law rules would usually have regard to Indian law where it "*prohibits a certain act*". It also commented that where a foreign award was contrary to the fundamental public policy of India, it would be a ground to refuse enforcement of an award under the Arbitration Act. Accordingly, it will remain important for parties to consider carefully whether and to what extent Indian law and public policy might affect their contract and the enforcement of their award.

Applications to Indian courts

The Arbitration Act provides that even where the seat of arbitration is outside India, the parties are entitled to seek interim relief from courts in India, unless the parties agree otherwise. *PASL Wind* confirmed that this provision would apply also where two Indian parties agreed to offshore arbitration. When drafting an arbitration clause, it will be important to consider whether (and to what extent) to exclude recourse to the Indian courts.

Enforcement

The New York Convention sets out the process that signatory countries must follow to enforce a foreign award and the grounds on which they may refuse enforcement. However, an application to enforce an award is still subject to the procedural rules of the country in which enforcement is sought. Therefore, even if a dispute is arbitrated offshore, if enforcement in India is necessary the complexities of litigation in the Indian courts (and the delays involved) will still need to be navigated.

Another unfortunate quirk of Arbitration Act is that the courts may only enforce a New York Convention award where the government has issued a notification in the Official Gazette, declaring that the country is a New York Convention country. Therefore, even if the award is issued in a New York Convention state, it is possible that the Indian courts will not enforce it unless the country has also been recognised as a New York Convention country in the Official Gazette.

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Spotlight piece
Ivan Teselkin

You joined Herbert Smith Freehill's Moscow office in 2012. What drew you to the firm at that time, and what draws you to it now?

I started my career in 2009, as a trainee at Clifford Chance in Moscow. I did two seats in the corporate department, and was fully expecting to qualify as a corporate lawyer. Then I joined the dispute resolution group for my last seat – and the rest is history. At that time, there were a lot of disputes arising out of foreign investment into Russia in the 2000s. Our clients were foreign banks and investors, and many of the disputes went to international arbitration. We worked closely with other offices in the network, particularly London, and I really enjoyed the international nature of the work.

Meet **Ivan Teselkin** here

A few years later, a friend mentioned that Herbert Smith Freehills was looking for a disputes associate in Moscow. What led me to apply was the quality of the firm's disputes brand, both internationally and in the Russian market. I did a number of interviews for the role, including one with a disputes partner who was rumoured to be leaving the firm. At the end of the interview, he asked if I had any questions and I asked him if the rumours were true! To his credit, he gave me the honest answer, which was "yes". Luckily, I was applying to the firm because of its reputation across the board, not just to work with this one partner. When the offer came in, I was delighted to accept, and I have been with the firm since then.

What draws me to the firm nearly 10 years later? If you permit me a football analogy, I would say that it is the same thing that makes me a lifelong supporter of Spartak Moscow. In Russian football, there are other good teams, but I do not really care about any of them; just my team. It becomes like your family and I feel exactly the same about the firm. The people I work with are just like family to me; they have a place in my heart. I speak to peers at other firms, which are great firms, but I still think this firm is the best place for me.

"I love the fact that our international focus is so strong and that inter-office collaboration is one of the firm's top priorities. I honestly think this differentiates us from other firms."

You spent some time seconded to our London office. Tell us about your time in London; what were the biggest takeaways from your point of view, both professionally and personally?

My secondment was a remarkable time for me. I was in a new team, working on new projects, and it gave me a new, fresh view on how to run complex, difficult matters.

I was originally meant to stay in London for six months, but early on I got involved in a big arbitration relating to Kazakhstan, which ended up keeping me in London for around a year and a half. Within a week of arriving, I found myself at an LPG plant in the middle of the Kazakh desert, absolutely in the middle of nowhere. I was reviewing documents with a team of people from all over the firm. It was a fully international team of great people.

We are indeed a very international firm, with particularly strong links to England through legacy Herbert Smith. The London office is the core of the firm and I really valued the first-hand experience of how this very large operation is managed and functions. I was fascinated to see everything from how partners structure their matters to how the lawyers did their work day to day. Spending time at the heart of the firm was very important to me. The more people I work with, the more I feel enriched in terms of professional abilities and cultural experience. It was unforgettable and very exciting.

On a personal level, I cannot forget the lovely Indian and Chinese food I discovered in London! My favourites were Chutney Mary for Indian and Royal China for Chinese – as recommended by my office mate. I still have not found anything comparable in Moscow.

"The more people I work with, the more I feel enriched in terms of professional abilities and cultural experience."

I also loved to visit the museums in London, especially the British Museum. I got it down to a science of visiting the same museum many times, for an hour or two only, which stopped me getting too exhausted!

In our down time, my wife and I got to visit the Lake District, as well as Edinburgh in February, which was dark and misty with lots of great atmosphere. These were great experiences that I would love to repeat one day.

You practice both litigation in the Russian courts and international arbitration. What trends are you seeing in Russian dispute resolution?

My partners and I were observing recently that Covid has not changed the litigation landscape in Russia as much as elsewhere. We think this is because the Russian courts were largely digitised before the pandemic, so there has not been the need to adapt so much as in other court systems. For example, we already had a good system for filing court documents online and a system for holding hearings remotely. It is not always perfect: a few weeks ago one of our associates was trying to dial into our hearing and ended up connecting to a completely different one! But generally, it works well and Russian parties were used to it well before the pandemic.

Another notable trend is the increase in bankruptcy cases. Specifically, Russian litigants are relying more and more on the concept of "subsidiary liability", which allows a creditor to claim against individuals who are considered to control the insolvent company. These claims can be for large amounts – up to the total amount owed by the company. In one case, a couple who controlled a family-owned company had transferred assets to their children before the company went bankrupt. The children were later held liable for the company's debts, even though one was still a minor at the time. This is a significant pattern which has been widely discussed in Russian disputes circles. In my view, this has changed the way Russian companies are managed and this trend is likely to continue.

"We are seeing a real trendency for Russian parties to select seats in Asia"

On the arbitration side, we are seeing a real tendency for Russian parties to select seats in Asia. This is partly because Asia is perceived as neutral compared to Europe and the US which have imposed sanctions on Russian parties. The other driver is recent changes that enable Russian courts to take jurisdiction over any dispute that involves a Russian party that is subject to sanctions, even if the relevant contract provides for disputes to be resolved in another forum. In a recent example, a Russian media company owned by a sanctioned individual recently sued Google in Russia. The claimant convinced the Russian courts to accept jurisdiction by submitting proof that it had been unable to instruct US lawyers because of the owner's sanctioned status, even though the dispute would usually have been resolved by a US court. In general, there is less risk of this happening where the agreed forum is arbitration in Asia.

HKIAC, VIAC, ICC and SIAC are now accredited as Permanent Arbitral Institutions (PAIs) under Russia's Arbitration Law. This status enables foreign arbitral institutions to administer certain Russia-related corporate disputes, as well as international disputes seated in Russia. Are your clients taking advantage of this by putting these institutions into their arbitration clauses?

Yes, absolutely. Many of my clients are providing for arbitration under the rules of a foreign PAI; this has been happening since HKIAC and VIAC first obtained the status a few years ago.

Clients have also been including "waterfall clauses", which provide for arbitration administered by a Russian arbitration institution, unless a specified foreign institution (eg LCIA) gains PAI status and becomes eligible to hear the dispute instead. These clauses have become quite common in our practice recently, though I expect they will be used less often now that many of the main international institutions have PAI status. The exception is the LCIA, which is still very popular with Russian parties. I am hopeful that LCIA will apply for PAI status in the near future and join the group of foreign PAIs – the Russian market would welcome that.

How do you spend your downtime?

I do not have as much downtime as I would like, but when I do have time off I spend it with my wife, my family and my friends. This past weekend we went to Karaoke and I also take singing classes.

I also try to exercise regularly. With such an all-consuming job, I think it is critical for me to keep doing sport to maintain my health and wellbeing.

I am finalising editing this text in my country house over the weekend and looking forward to having a barbeque for a dinner. Reading a book near a fire in the nature – probably the best way to recharge before a new week!

Get in touch

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Hot topics in construction arbitration

Listen to our Co-Global Heads of Construction & Infrastructure Disputes, James Doe and Hew Kian Heong, discuss the impact of virtual hearings on construction arbitrations, and the COVID-19-related challenges that remain for the construction industry by clicking on their pictures.

Overview

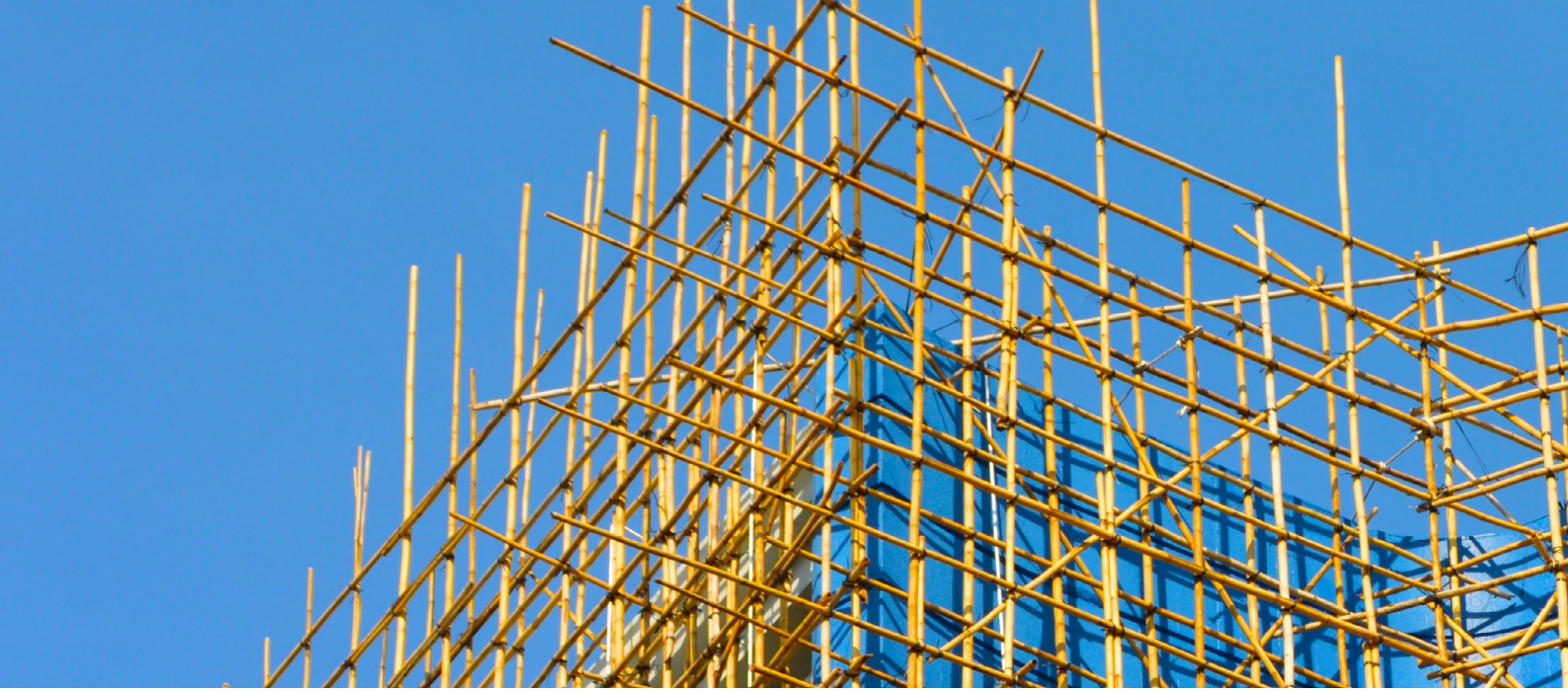
The past year has been a turbulent time for the global construction industry, with many construction projects around the world having been affected in some form or another by delays, disruption and cost overruns arising directly or indirectly from the Covid-19 pandemic. Whilst there have been indications of a recent uptick in the global construction industry, many Covid-19 related disputes have yet to be resolved, and it is likely that the knock-on effect of such disputes, compounded by other pressing problems such as the global shortage in materials and workers, will increasingly be felt going forward. As government support schemes gradually come to an end, insolvencies in the construction sector are also expected to become a feature of the landscape.

That being said, there have been some positives to emerge from the last year. As with other types of disputes, parties and practitioners involved in construction arbitrations have been required to embrace remote working conditions, in particular virtual hearings, which have contributed significantly to furthering the greener and more sustainable arbitration agenda. Modular methods of construction, which have facilitated socially distanced working, have also continued to be in the spotlight.

In this article, Herbert Smith Freehills' Global Co-Heads of Construction Disputes, **James Doe** and **Hew Kian Heong**, examine further how these global issues have impacted and/or are expected to continue impacting construction arbitrations going forward.

1. Continuing effects of the Covid-19 pandemic

In the wake of the Covid-19 pandemic, many international construction projects were impacted, albeit to varying degrees and at different times, by a range of Covid-19 related matters, such as government-imposed lockdowns, workforce shortages including a reduction in migrant workers, travel restrictions, pandemic related health and safety requirements, border closures and export restrictions.



In 2020, the initial focus of the construction industry was on whether or not force majeure provisions and change in law provisions in construction contracts would apply to these unprecedented circumstances and/or the doctrine of frustration (or equivalent principle in the relevant jurisdiction) could be invoked to relieve the parties from the adverse effects of the pandemic. At the time, the general trend was for parties to agree on short term fixes in the form of, for example, contractual variations and standstill agreements, rather than immediately to resort to formal dispute resolution.

This trend has also been seen in certain Asian jurisdictions, although with a key difference being that the short term fixes have been primarily government led. The Singapore government, for example, encouraged parties to negotiate and compromise, whilst providing extensive temporary legislative relief.[1] The Malaysian government also introduced a temporary legislative freeze on the ability of parties to exercise their rights in relation to their counterparties' inability to perform their contractual obligations, and established a specialised mediation centre to resolve disputes arising from government-imposed lockdowns.[2]

This government-led approach to mitigating the adverse impacts on construction projects and potential disputes has also been seen in China, with province specific guidelines being issued across the country, including on how parties should administer the increased cost of labour, materials, plants, and equipment arising from Covid-19. These have ranged from the employer bearing extra costs if the increase in material prices exceeds 5% (Guangzhou) to specifying the quantum for pandemic prevention costs, ie testing, quarantine, per worker (Shanxi).[3]

However, these short term fixes have also meant that the final resolution of many Covid-19 claims remains pending and important questions unanswered, for example, in relation to the assessment of the time impact of various social distancing and other Covid-19 related measures on the overall progress of the project. These issues have the potential to evolve into complex disputes with significant financial consequences, the resolution of which will be complicated in light of the unprecedented nature of the pandemic, but also given that reduced productivity claims are generally difficult to establish and depend heavily on the availability of good records of what was planned and what actually happened. Further, the longer such claims are left to fester, the harder they become to prove and likewise to rebut.

What is more, the economic impact of the pandemic is expected to make non-Covid-19 related claims more likely as projects become financially distressed which, in turn, increases the likelihood of parties resorting to arbitration. Even where all Covid-19 related claims on a project have been resolved, it is probable that these will have had a significant economic impact on the project, for example, by eroding margins and contingencies, so that the project is less equipped financially to deal with future challenges. Where a project is economically distressed, claims and disputes are invariably likely and parties may have no other option but to commence formal arbitral proceedings.

2. Construction insolvency

In the UK, much to the surprise of many insolvency practitioners, there were apparently fewer insolvencies in 2020 than would have been expected in a pandemic free year such that, whereas between 2015 and 2019, construction insolvencies in England and Wales rose steadily reaching 3,228 in 2019, in 2020, the number of insolvencies dropped dramatically to just 2,042, which was the lowest number for at least a decade.[4]

This may, in part, be due to the fact that, in the UK, construction was one of the few sectors that was permitted to continue operating, albeit in a less efficient way due to restrictions such as those relating to construction site activity.[5] The general view, however, is that these unusually low insolvency figures are attributable to the billions of pounds pumped into the industry by the UK government in the form of the furlough scheme, government-backed loans

1. See https://www.mnd.gov.sg/newsroom/press-releases/view/further-extension-of-relief-periods-under-the-covid-19-(temporary-measures)-act-for-specified-categories-of-contracts-in-the-built-environment-sector
2. See http://www.pmc19.gov.my/en-index.html
3. See https://www.fticonsulting.com/-/media/files/apac-files/insights/articles/2020/aug/impact-covid-19-construction-industry-china.pdf?rev=c2e43c26950e405697af9a3d7dafd968&hash=5932990BEDB46A2E5F4116FBEAA14513
4. See https://www.constructionnews.co.uk/financial/there-is-going-to-be-a-massive-bang-the-coming-rise-in-insolvencies-18-02-2021/
5. See for example the Site Operating Procedures (at the time of this article, version 7 dated 7 January 2021) published by the Construction Leadership Council which reflect the UK government's guidance on 'Working safely during Coronavirus (Covid-19) – Construction and other outdoor work' in England.

and the deferral of tax payments such as VAT. According to the British Business Bank, the UK construction sector received the highest proportion of total Coronavirus Business Interruption Loans and Bounce Back Loans (17%), with £2.5 billion and £7 billion of loans offered respectively.[6]

Given the UK construction sector's dependence on government intervention, it is likely that insolvencies will begin to materialise soon after the UK government withdraws support, and loan and deferred tax payments begin to fall due.

Similarly, in Japan, corporate bankruptcies in 2020 fell to the fourth lowest number in 50 years, due to a range of pandemic response government cash flow assistance measures, with only 1,247 bankruptcies reported in the construction industry – a 13.6% decrease from the previous year.[7] According to the Research and Technologies arm of Mizuho Financial Group, government support prevented 397 bankruptcies in the construction industry in 2020.[8] As with the situation in the UK, however, it is likely that the number of bankruptcies will rise once government support gradually comes to an end. In this regard, it has already been reported that large scale bankruptcies have seen an increase in 2021, including in the construction industry.[9]

Where contractor insolvencies (or the risk of contractor insolvencies) begin to emerge, this typically leads to related disputes surrounding bond calls (which can, in turn, often lead to emergency arbitrations to resist the same) as well as termination claims.

3. Global shortages in materials and workers

Given the myriad obstacles that global trade has faced over the past 12 months (eg Covid-19 lockdowns which have caused understaffing and high shipping costs, uneven global trade, the Suez canal blockage, and lower plastics production following floods in Texas) the global shortage of construction materials such as timber, steel and plastics, and consequent increase in the cost of such materials, is hardly a surprise.

In the UK, the Office of National Statistics has predicted price rises of 7-8% across the board, but some industry bodies are reporting that prices for timber have gone up by 50% and cement by 30%.[10] The Dow Jones Steel Index has also increased by over 100% between June 2020 and June 2021. To date, in the UK, the brunt of these price increases has been felt by SMEs, as larger players have been able to stockpile and plan ahead. However, it is predicted that the effect of shortages will eventually be felt further up the supply chain, ultimately affecting major projects.

Region-specific problems have also played a part, such as in the UK, where the effects of Brexit have contributed, or are expected to contribute, to materials shortages. The impact of Brexit on the construction workforce is also starting to bite, with the UK construction sector losing a quarter of its EU workforce in 2020.[11] Further delays and price rises are expected to result from the introduction of post-Brexit certification rules, which will replace the European 'CE' trade markings with UKCA certification, and have been heavily criticised by industry leaders who say that the system does not have sufficient testing capacity and will disincentivise European suppliers from exporting to the UK.[12]

In Singapore, the impact of Covid-19 on the construction workforce has also been significant. Due to large outbreaks amongst migrant worker communities, most of which live in communal dormitories, construction came to a virtual standstill for at least two months in 2020, and more recently, due to tighter border measures which reduced the inflow of migrant workers, it has been reported that many Build-to-Order housing projects are expected to be delayed by a year or more.[13]

6. See https://www.british-business-bank.co.uk/coronavirus-loan-schemes-continue-to-support-businesses-evenly-across-the-uk-new-analysis-shows/
7. See https://www.tsr-net.co.jp/en/bankruptcy/2020.html
8. See https://www.mizuhogroup.com/binaries/content/assets/pdf/information-and-research/insights/mhri/en-eo210506.pdf
9. See https://www.nippon.com/en/news/yjj2021051001022/
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11. See https://www.constructionnews.co.uk/brexit/uk-construction-loses-a-quarter-of-its-eu-born-workforce-22-01-2021/
12. See https://www.ft.com/content/11e49a14-5b89-4f23-ba47-2cde24dcd1ef
13. See https://www.channelnewsasia.com/news/singapore/lawrence-wong-impact-of-border-measures-construction-bto-hdb-14786454

Further, materials shortages will likely be exacerbated as countries try to build their way out of the economic downturn following the Covid-19 pandemic. For example, whilst the final shape of the US Infrastructure Bill remains to be seen, the US government is expected to inject potentially up to US$1 trillion[14] into the construction of roads, bridges and other public works. Similarly, the UK Government has already committed £600 billion to infrastructure investment over the next five years as part of its 'Build Back Better' programme. China has also launched a 'New Infrastructure' campaign to drive its economic recovery, with state media reporting that the investment in new infrastructure, which refers to digital facilities such as 5G base stations, vehicle charging stations, big data centres, artificial intelligence and industrial internet, could reach 17.5 trillion yuan, or about US$2.47 trillion.[15] Although these ambitious measures will no doubt help the recovery of economies, they are also likely to place significant pressure on the demand and cost of raw materials.

Questions are bound to arise as to who bears the risk of shortages in materials and workers, and consequent price hikes under contract or at law. Some civil law systems may offer relief for undue economic hardship, although this is not always the case in other systems of law (for example, such relief is not generally available as a matter of English law). Therefore, assessing how the relevant construction contract addresses the risk of unavailability of materials (and/or increase in material costs) as well as workers will likely be a key focus of many parties going forward. However, similarly to the impact of Covid-19 (as described above), an increase in costs is, in any event, likely to place projects under greater economic stress which, in turn, may lead to a greater likelihood of claims and formal disputes arising.

4. Virtual hearings

The global arbitration community in general was quick to adopt remote working practices, in particular virtual hearings, following the outbreak of the Covid-19 pandemic, with many arbitral institutions issuing guidance on how to mitigate the effects of the Covid-19 pandemic on arbitral proceedings[16] or updated rules[17] to reflect the 'new normal'. Similarly, construction arbitration players have embraced virtual hearings, which have had the added benefit of shifting the sector's dispute resolution practices towards a greener and more sustainable direction.

Now that virtual hearings have been tried and tested, parties to and practitioners of construction arbitration are likely to be increasingly conscious of the costs of in-person hearings (and meetings) when budgeting for disputes and may be more inclined to opt for virtual hearings going forward regardless of the lifting of Covid-19 related travel restrictions. The potential cost savings offered by virtual hearings, in particular as all parties concerned get more familiar and comfortable with them, will no doubt be a material consideration especially in the case of large and complex international construction disputes, which typically involve significant travel and accommodation costs to enable the tribunal, witnesses and legal teams to convene in the same place on multiple occasions.

However, the shortcomings of virtual hearings have also become apparent. Some professional bodies have been overtly critical of the experience offered by virtual hearings, with the Bar of Ireland, Bar Council of England and Wales, Bar Council of Northern Ireland and the Faculty of Advocates of Scotland jointly describing remote hearings as a '*markedly inferior experience*'.[18] The Korean Commercial Arbitration Board's Secretary General has also expressed that it is difficult to argue that virtual hearings can '*fully replicate the nuanced and instantaneous interaction between tribunal, counsel and witnesses which physical hearings can offer*'.[19]

Therefore, whilst virtual hearings are clearly here to stay, parties to construction arbitrations will need to consider very carefully how they are to achieve an appropriate balance between cost savings and the specific needs of the case. This may mean a more discerning way in which virtual hearings are used, for example, by reserving them for lower value or less complex matters and/or primarily for procedural hearings.

5. Modular methods of construction

Modular construction methods continue to be a hot topic in the construction industry, and have increasingly been a hallmark of the most innovative construction projects. For example, the UK government has expressed an interest in investing in a Rolls-Royce-led consortium which plans to produce small nuclear reactors created from modules produced off-site.[20] Recently, Exyte, a German engineering group, created modular Covid-19 vaccine manufacturing facilities with a six month delivery time (whereas new permanent facilities can take years). Modular construction is also being recognised as providing the solution to the UK housing crisis. Elsewhere, in Hong Kong, a city record was achieved when factory assembled free-standing modules were installed on site to design and build 99 temporary Covid-19 quarantine units in just 77 days.[21] As recent modular projects

14. At the time of writing, President Biden was seeking US$1 trillion in new spending, although this was being opposed by the Republican party who were offering just over US$300 billion (see https://www.reuters.com/world/us/us-house-will-start-infrastructure-bill-wednesday-energy-secretary-granholm-2021-06-06/)
15. See http://www.xinhuanet.com/english/2020-05/21/c_139074719.htm; see also HSF's e-bulletin on the New Infrastructure campaign: https://sites-herbertsmithfreehills.vuturevx.com/95/22666/june-2020/-new-infrastructure---china-s-massive-stimulus-measures-after-covid-19-outbreak--part-1--internet-data-centres(1).asp
16. See ICC guidance dated 9 April 2020
17. See 2020 Update to the LCIA Rules which took effect from 1 October 2020
18. See https://www.lawsociety.ie/gazette/top-stories/remote-hearings-have-multiple-and-multi-faceted-drawbacks--four-bar-councils/
19. See http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/
20. See https://www.rolls-royce.com/innovation/small-modular-reactors.aspx#/; https://www.ft.com/content/d7016b80-e0c4-4444-a059-2daf32b9a4ab
21. See https://www.lwkp.com/project/sai-kung-outdoor-recreation-centre-temporary-quarantine-facilities/

demonstrate, the Covid-19 pandemic has propelled innovation and has brought about the shift to modular construction much quicker than might otherwise have been the case.

There is, of course, a long list of benefits to modular construction. An advantage that has been especially highlighted during pandemic times is that it facilitates socially distanced working by reducing the presence of workers on site and controlling social distancing in the factory setting where the module is being built. Proponents also advocate that it provides greater schedule certainty, less material waste and fewer delays.

However, as with all new technologies, modular construction is not without its risks. For example, the modular construction start-up Katerra, which was backed by SoftBank, filed for bankruptcy on 7 June 2021. It is understood that the bankruptcy was caused by spiralling costs and delays on several large projects.[22] In this regard, it is easy to see how delays and cost overruns can occur on a project involving modular construction: on complex projects with numerous interfaces, a module which does not work or fit could cause serious delays, especially if multiple versions of the same module are to be used across the site and extensive rework is required. In these circumstances, the programme will rarely be able to accommodate the resulting delays, especially if it is already under significant pressure (eg due to the continuing impact of the Covid-19 pandemic).

Whilst the industry's view remains that modular construction is the future, such disputes arising from projects involving modular construction can probably be expected as the technology finds its feet.

Concluding remarks

As we enter the second half of 2021, it is clear that challenging times are likely to continue, not only for the construction sector, but for the world as a whole. Although a sense of normality is gradually returning in some jurisdictions where governments have implemented national vaccine programmes, the global construction sector will likely be dealing with Covid-19 related claims for some time yet. Such claims may be further compounded by issues such as contractor insolvencies and materials and skills shortages. Despite these difficulties, however, it is also true that over the last year construction arbitration in the international context has taken a significant evolutionary step in embracing virtual hearings and normalising more sustainable practices. Whilst a balance will need to be struck, it will be incumbent on construction arbitration practitioners to sustain these positive changes.

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22. See https://www.ft.com/content/a70b6130-b062-4850-8759-4a10a5a26f3d

Arbitration is on the rise in Australia

Arbitration is on the rise in Australia

The arbitration industry is booming in Australia. Between 2017 and 2019, the total amount in dispute in arbitrations with an Australian connection exceeded A$35 billion. Like any successful industry, success does not happen in a vacuum.

In the car industry, the location of a factory in a particular country is a multifaceted decision involving a range of financial and commercial considerations. It is a very competitive process in which factors such as the strength of domestic car sales, a business-friendly legal framework, the productivity and competitiveness of the labour force, and the technological know-how of supply-chains all play a role. In a similar way, the rise of the arbitration industry in Australia arises out of a confluence of factors. In this article we cover the following three:

- First, corporates increasingly see arbitration as their go-to-method of dispute resolution, particularly when there is a cross-border component to the dispute. On this, the numbers are telling. As shown in the inaugural Australian Arbitration Report by the Australian Centre for International Commercial Arbitration (**ACICA**) and FTI Consulting (the **Report**), the use of arbitration is booming in Australia because of increased domestic and cross-border investment and trade in sectors and industries such as construction, engineering, mining, infrastructure and renewables.
- Second, Australia's arbitration-friendly legal framework continues to be reinforced by the support of the Australian courts and by their sophisticated consideration of international arbitration issues. Over the past decade, the Australian courts have increasingly provided users with certainty and confidence around the judiciary's support for a robust international arbitration framework.
- Third, the preeminent arbitral institution in Australia is at the fore-front of arbitral best-practice and innovation. The recently unveiled ACICA 2021 Rules modernise the rules by codifying recent practices in relation to technology, virtual and hybrid hearings, and anticipating the needs of the arbitration community in key areas such as consolidation and multi-contract arbitrations, effective case management and costs.

Report confirms that arbitration is thriving in Australia

223 active arbitrations

The Report identified 223 unique arbitrations with an Australian 'connection' between 2017 and 2019, meaning: one or more of the parties involved in the arbitration was an Australian entity; the seat of the arbitration was in Australia; or Australian-based were involved in the conduct of the arbitration.

over **$35** billion

The total amount in dispute for these 223 arbitrations exceeded A$35 billion. While the Report found a roughly equal case load of 'domestic' and 'international' arbitrations, the amount in dispute in international arbitrations (approx. A$26 billion) far exceeded that in domestic arbitrations (approx. A$9 billion).

For international arbitrations, the Report indicated that the most favoured arbitration rules were those of the Singapore International Arbitration Centre (**SIAC**) and the International Chamber of Commerce (**ICC**), and Singapore was the most popular arbitration seat. There was indication of a growing inclusion of ACICA arbitration clauses (now almost equal to the use of SIAC/ICC rules) in cross-border contracts, which we would expect to translate into a greater proportion of Australian-seated ACICA arbitrations in the future.

Broad industry use

The Report highlights that arbitration is experiencing significant growth in sectors other than the traditional core sectors for arbitration in Australia, ie construction, infrastructure, mining and resources.

Although the bulk of the 223 arbitrations referenced occurred in relation to construction, engineering and infrastructure (about 43%), oil and gas (about 20%), mining and resources (about 13%), and transport (about 4%), there was also a significant use by 'other' industries (about 20%), including property, banking, agriculture and others.

We expect to see an increase in arbitration use by the technology, consumer products, banking and finance sectors as these sectors benefit from key features of the arbitral process such as confidentiality and cross-border enforceability.

Chasing efficiency

While 80% of respondents indicated that they were satisfied with arbitration, for some respondents costs and time were two key perceived weaknesses of the arbitration process.

Further, users remarked that, particularly in the domestic arbitration context, there was a "tendency for arbitration to resemble litigation" and "not always follow international best practice" which can prevent arbitration users from maximising the time and cost efficiencies of the process. However our experience suggests, and the Report's data seems to confirm, that the Australian market is making significant steps forward in consolidating international best practices to maximise the benefits of arbitration for its users.

Judicial support

61% increase

While the volume of arbitration-related judgments in Australia has remained stable over the last decade, there has been a 61% increase in the proportion of these judgments that concern *international* arbitration as opposed to domestic arbitration. This shows the increase in cross-border disputes being heard in Australia.

Some decades ago, a number of arbitration-related decisions were issued by the Australian courts that were perceived as parochial in international arbitration circles. Indeed, it was only in 2006 that the Full Court of the Federal Court of Australia resolved diverging lines of authorities on whether statutory claims for misleading and deceptive conduct were arbitrable.[1]

The situation is very different now. In harmony with international best practice, Australian courts consider it essential to pay due regard to international jurisprudence when construing international instruments such as the New York Convention and the UNCITRAL Model Law,[2] and give consideration to international principles when dealing with the construction of international arbitration agreements and the relationship between national courts and arbitral tribunals.[3] The Australian judiciary is now unabashedly "pro-enforcement".[4]

More recently, Australian courts have demonstrated their ability to adeptly tackle complex arbitration-related questions in a nuanced and thoughtful way. In two recent examples, the Federal Court of Australia:

- ordered a stay of litigation proceedings concerning non-arbitrable matters relating to arbitral proceedings on the basis that the non-arbitrable matters were ancillary to and dependent on the outcome of the arbitral proceedings. To allow litigation proceedings to continue would be contrary to the resolution of disputes in a cost-efficient manner and create a real risk of inconsistent findings;[5] and
- has engaged on nuanced issues regarding the applicable law for determining whether an arbitration agreement was formed (deciding to apply the law of the forum), and the applicable law to determine whether a party has waived its rights to enforce an arbitration agreement (deciding to apply the law governing validity, ie the law governing the arbitration agreement or where no choice has been made, the laws that have the closest and most real connection).

1. *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45.
2. *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 at [75].
3. *Cape Lambert Resources Ltd v Mcc Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [55].
4. *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 at [50]; *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303 at [128].
5. *First Solar (Australia) Pty Ltd, in the matter of Lyon Infrastructure Investments Pty Ltd v Lyon Infrastructure Investments Pty Ltd* [2018] FCA 1666 at [58]-[73].

Best practice – ACICA 2021 Arbitration Rules

The ACICA 2021 Arbitration Rules (the **2021 Rules**) further strengthen ACICA's status as the preeminent arbitral institution in Australia. We set out below a selection of salient features of the updated rules.

New provisions embracing the digitalisation of arbitration: Virtual hearings and paperless filing

The 2021 Rules expressly permit Tribunals to hold conferences and hearings virtually or in a combined (or 'hybrid') form. Under the new rules, if a hearing is held virtually it will be deemed to be held at the seat.

ACICA has also moved to default electronic filing by requiring both the Notice of Arbitration and Answer to be filed by email or through its dedicated online portal.

Unless the parties agree otherwise, or the Tribunal or ACICA directs otherwise, any award may be signed electronically and/or in counterparts and assembled into a single instrument.

Extended scope for consolidation and multi-contract arbitrations

The 2021 Rules adopt a more liberal approach to consolidation, broadly consistent with the SIAC and HKIAC rules.

ACICA may consolidate two or more arbitrations into a single arbitration, if:

- the parties have agreed to the consolidation;
- all the claims in the arbitrations are made under the same arbitration agreement; or
- the claims in the arbitrations are made under more than one arbitration agreement, **a common question of law or fact** arises in both or all of the arbitrations; the rights to relief claimed are in respect of, or arise out of, the **same transaction or series of transactions**; and ACICA finds the arbitration agreements to be **compatible**. (emphasis added).

The 2021 Rules also present a streamlined approach for multi-contract arbitration. In a multi-contract setting, the Notice of Arbitration should include an application to ACICA addressing the threshold issues for consolidation.

Early dismissal procedure

The 2021 Rules expressly empower the Tribunal to make an award granting early dismissal or determination of any claim, defence or counterclaim. Consistent with other developments, this provision enhances the Tribunal's powers under the ACICA Rules, now expressly including summary dismissal and early determination.

Time limit for rendering awards

The Tribunal is required, unless a shorter period being required by law or by parties' agreement, to render an award no later than the earlier of 9 months from the date the file is transmitted to the Tribunal, or 3 months from the date the Tribunal declares the proceedings closed.

ACICA may extend these time frames following a reasoned request from the Tribunal, or if ACICA otherwise deems it necessary.

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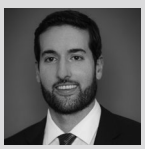

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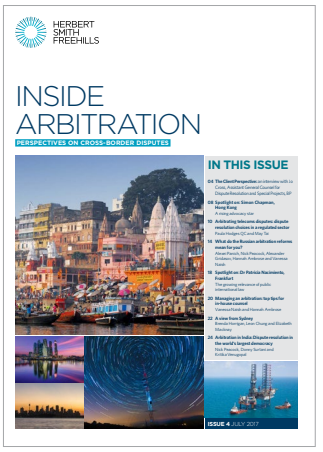

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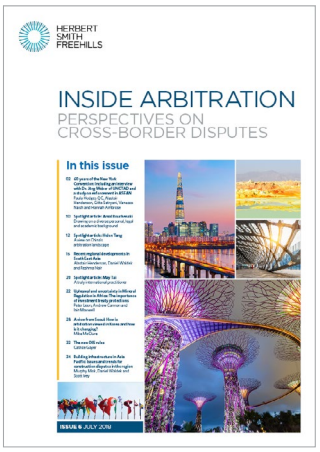

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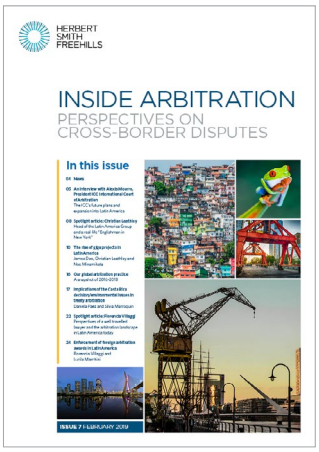

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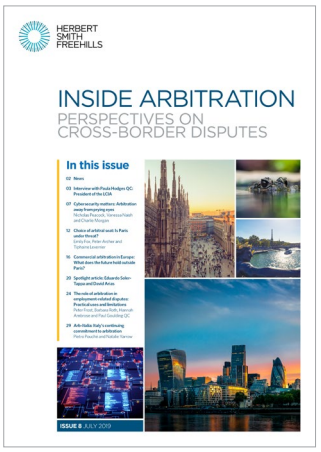

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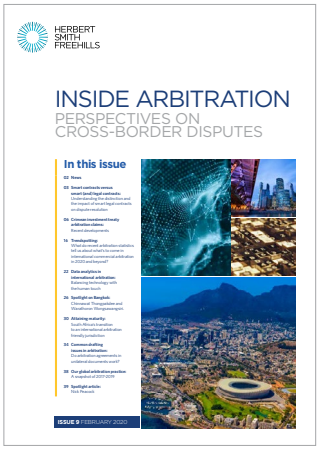

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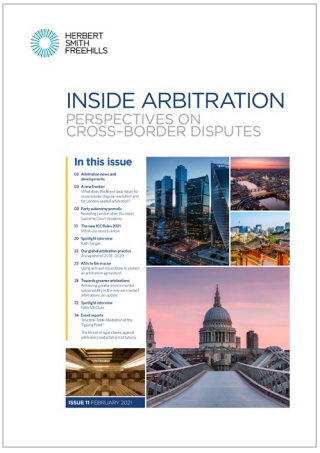

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