HERBERT SMITH FREEHILLS

INSIDE ARBITRATION

PERSPECTIVES ON CROSS-BORDER DISPUTES

In this issue

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Welcome to the fifteenth issue of Inside Arbitration

Over the past decade, the legal landscape has shifted enormously and so have client expectations. We know that clients expect more certainty and efficiency in their legal services, whether through innovations in pricing, technology or the way in which legal services are provided. Arbitration has always been at the forefront of modernisation in the legal sector and that is why we decided to look at a number of developments in the provision of legal services in this issue, before turning our minds to other areas of modernisation affecting our clients more generally.

This issue starts by looking at exciting developments in the availability of third-party funding and alternative fee arrangements, particularly in the key arbitration venues of Singapore and Hong Kong. Contributors from around our global network consider what the different pricing and funding options are in those regions and beyond, and how they can help your business.

Continuing with the innovation theme, Alex Oddy, Tom Furlong, Charlie Morgan and Rutger Metsch showcase our Decision Analysis service and how it can quantify and model dispute risk. We are increasingly finding that clients want our support to gain a better understanding of the drivers of risks and uncertainty at key decision points in the lifecycle of their disputes and are keen to use Decision Analysis to help them.

Moving on to the modernisation of arbitration itself, there has been a concerted push among institutions, arbitrators and practitioners to address the efficiency and cost of the process. Yet there are still steps that can be taken to improve further. Jonathan Ripley-Evans and Liz Kantor look at what parties, arbitrators and institutions can do to improve the efficiency of the arbitration process, and offer practical insights in how to secure value.

Another recent trend has been the proliferation of new arbitration centres around the world. Since the UAE took steps to overhaul its arbitration regime, other countries in the region have sought to fill the perceived gap created. Craig Tevendale, Amal Bouchenaki, Stuart Paterson, Nick Oury and Janine Mallis consider recent developments in the Middle East and North Africa (MENA) and offer their thoughts on the proliferation of regional centres. They also look at the increasing focus on investor-state arbitration in the MENA region.

Turning to the broader theme of modernisation affecting our clients, a key development since our last issue has been the delays to proposed modernisation of the Energy Charter Treaty. Of particular note have been recent announcements by several European countries of their intention to withdraw from the treaty entirely. Guillermo Garcia-Perrote and Ella Wisniewski look at the latest developments in the modernisation process and the rationale behind them, including the likely impact on investments in both fossil fuels and renewable energy.

Meanwhile, the decarbonisation process has led to the global proliferation of hydrogen projects, a new and relatively untested technology that is expanding at an exponential rate. James Allsop, Chad Catterwell, Guillermo Garcia-Perrote and Jean Hamilton-Smith report on flashpoints for disputes relating to these new initiatives amid unprecedented attempts to forge a multi-billion-dollar energy market in a matter of years.

Moving to a different sector, private equity in Asia is facing an increasing number of disputes resulting from parties seeking specific performance of put options. Kathryn Sanger and Sophia Li report on this new trend in the context of international arbitration.

I am also delighted that this issue includes spotlight articles on Tom Furlong, a partner in our Singapore office, and Elaine Wong, a partner who hast just returned to our Tokyo office from Singapore. Tom talks about the impact of technology on legal services and the recent introduction of alternative funding arrangements in Singapore. Elaine discusses the impact of Covid on the disputes landscape in Japan and the role of arbitration for disputes involving corruption.

Finally, do take a look at our significant developments page, as well as our newly revamped infographic, which shows a recent snapshot of our arbitration practice. In the coming months, we shall be looking to use our new market-leading Genesis tool, based on over 1,000 historic arbitration matters across our global network to offer clients more certainty and support with pricing and case strategy – watch this space as there will be more on this in our next issue!

Simon Chapman KC
Deputy Head of Global Arbitration Practice, East

Hear from **Simon Chapman KC** here

Read our Arbitration and Public International Law blogs at

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

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

Significant developments

From the EU's proposed directive on third-party funding to Hong Kong's success fee shake-up, here's our summary of recent major developments in arbitration

- Seoul-based partner Mike McClure was appointed King's Counsel in England and Wales at the end of 2022. Mike will be the fourth KC currently practising at Herbert Smith Freehills (HSF), alongside Paula Hodges, Simon Chapman and Chris Parker. In September 2023, he will be relocating from Seoul to join the London team. Meanwhile, Hong Kong-based partner Kath Sanger has been granted Higher Rights of Audience in the Hong Kong courts.

- In October 2022, the EU published a proposed directive intended to regulate the use of third-party funding within the bloc. For more information, see our article on page 6 or contact Mathias Wittinghofer.

- Version 5 of the UNCITRAL & ICSID draft Code of Conduct for Adjudicators was published in late November 2022, alongside updated commentary in January 2023. It is expected the code will be finalised in 2023. For more information, contact Andrew Cannon or Christian Leathley.

- The SCC published new arbitration rules on 1 January 2023. For more information, contact Patricia Nacimiento and Stephanie Lam.

- In September 2022, the English Law Commission published its consultation paper on the English Arbitration Act. The deadline for comments was 15 December 2022. HSF is engaged in the consultation process. The Law Commission is expected to publish its final recommendations later this year. For more information, contact Liz Kantor or Vanessa Naish.

- There have also been noteworthy developments in the Middle East, including:
  - The Bahrain Chamber of Dispute Resolution (BCDR) launched the 2022 BCDR Rules of Arbitration. These apply to any arbitration commenced with BCDR on or after 1 October 2022.
  - In November 2022, the Saudi Center for Commercial Arbitration (SCCA) announced the creation of the SCCA court to oversee its arbitration cases and determine technical and administrative matters relating to its caseload. The SCCA also opened an office and hearing facilities in the Dubai International Finance Centre.

  For more information, see our article on page 26.

- Suriname and Timor-Leste became the 171st and 172nd signatories to the New York Convention. The Convention will enter into force for Suriname on 8 February 2023, and for Timor-Leste on 17 April 2023. For more information, contact Andrew Cannon, Christian Leathley or Chad Catterwell.

- In Hong Kong:
  - Changes to Hong Kong law that allow lawyers to charge success fees for arbitration came into force on 16 December 2022.
  - The Hong Kong International Arbitration Centre released its caseload statistics for 2022.

  For more information, contact Kath Sanger or Martin Wallace.

Beyond the hourly rate – **What are the options?**

With the number of ways to pay for legal services growing, we assess how third-party funding and alternative fee arrangements can help businesses

Our clients are used to paying lawyers on an hourly rate. While this is often the right option, there are many other practical alternatives. Over the past decade the legal landscape has shifted in many jurisdictions allowing for more innovative ways of providing legal services, particularly in arbitration. Historically, many of these options have been viewed as ways of allowing insolvent companies access to legal advice to bring a legitimate claim against a counterparty. But in practice, third-party funding and alternative fee arrangements (AFAs) can help a broad range of clients manage the costs associated with disputes. This includes solvent businesses who can use these novel structures to deploy their cash flow elsewhere and share risk and reward with their lawyers or a third party.

Watch the video **here**

What is third-party funding?

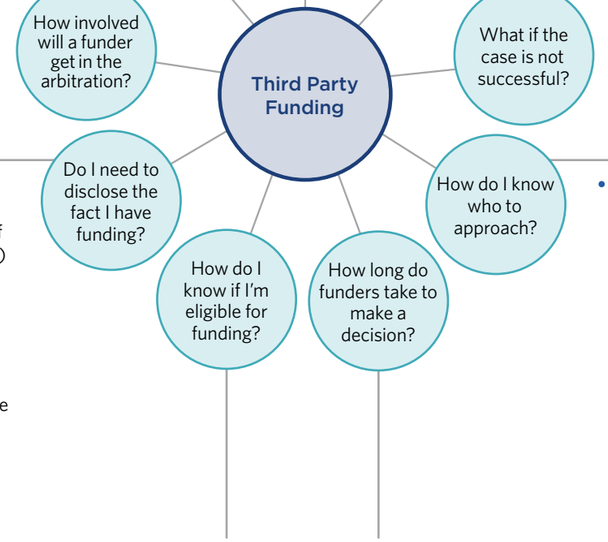
- Third Party Funding is when an independent funder provides the funds to pursue your case, usually in in return for a share of the damages

- Depending on (i) the estimated damages, and; (ii) likelihood of success of the case, Third Party Funding can cover:
  - Your legal fees and disbursements
  - Any potential exposure to adverse costs in the event of an unsuccessful award

- It really does vary based on how quickly the case progresses. Funding is typically based on either (i) a percentage of your damages recovered; (ii) a multiple return of the amount funded or (iii) a mixture of both.

- Reputable funders will respect the lawyer client relationship and have a very limited role in the running of any arbitration or the tactics in the arbitration itself. However, regular updates will be given to the funder, particularly on the progress of the arbitration, decisions that have been taken and any changes to the prospects of success. Given the funder's financial stake in the dispute, they will also need to be informed of any settlement offers and be given the opportunity to discuss any such offers.

- The funder loses their investment and in most circumstances, you would not be liable for **any** costs
- If the prospects of success alter during the arbitration the funding arrangement may also allow for the funder to stop the funding. We will explain this to you as part of the funding process.



- Once your arbitration has been funded, there may be a requirement (from the law of the seat or institutional rules) to disclose the fact the funding is in place.
- There are some common tactical steps that counterparties can take against funded parties. These are well-known to funders and to us. We will explain these to you and plan for them with you.

- **Leave that to us**, we have developed deep and meaningful relationships with leading funders in the global market over many years and have standing NDAs with many of them. This ensures that we are able to make every effort to find funding for your case and present you with the best options available to you in the global market

- If you have a strong case and want to offset the potential legal costs and risk, funding may be available to you. However, funders will usually want to see a quantum to cost ratio of around 10:1 (eg costs of $1 million against a claim value of $10 million). Funding is also usually a more obvious fit for a claimant than a respondent, although there can be exceptions to this.
- ***Please note: third party funding is not permissible in some jurisdictions, HSF can investigate what is possible based on each specific case and explore other options with you as needed.***

- This largely depends on how quickly we are able to receive the necessary documentation from you to enable us to review the dispute and do a merits assessment
- The funder's initial decision making process can take up to four weeks. If a funder agrees in principle to fund the case, there is typically a short exclusivity period in which they will run their own internal due diligence before submitting their initial funding terms

The legal market has seen increased liberalisation of third-party funding over the last 20 years. However, there are signs this may be challenged. On 3 October 2022, the European Parliament published a proposed directive to regulate commercial third-party funding within the EU. The directive would oblige Member States to regulate and authorise third-party funders. It would also empower courts to make adverse costs orders against funders and cap their recovery at 40% of the total award or judgment.

The European Commission will need to decide whether to move ahead with the initiative. Nonetheless, the draft does show concerns within Europe about the lack of consistent regulation of the funding market and the need for appropriate safeguards. The current draft appears intended to apply to arbitrations where the proceedings are seated in the EU, regardless of where the litigation funder is based. However, as is often the way with legislation designed to address both litigation and arbitration, the proposed directive does not explicitly address how funders will be made liable for adverse costs awards in an arbitration context – funders are not party to the arbitration and not subject to the tribunal's jurisdiction. The proposals such as the 40% cap on recovery may also be controversial in the funding community within international commercial arbitration where the users of third-party funding are becoming increasingly sophisticated.

MATHIAS WITTINGHOFER, PARTNER, FRANKFURT AND EMILY FOX, OF COUNSEL, PARIS

What are the options beyond third-party funding?

Funding may not be a viable option for you or may not be something you want to explore for your case. If so, other options may be available. These include:

- fixed fees;
- capped fees;
- phase-based fee arrangements with hourly rates and fixed or capped fees for different stages of an arbitration depending on the type of work;
- blended rates across all fee earners;
- volume discounts; and
- performance holdbacks.

The options are numerous, and we are open to discussing these arrangements with you.

The most common understanding of an alternative fee arrangement is based on performance, such as a successful outcome in the arbitration. These involve the firm taking a share of the risk with you. The three most common success-based arrangements are:

The availability of these three fee arrangements will depend on our assessment of the dispute and your attitude to risk and reward. However, these are not necessarily all-or-nothing arrangements. These are versatile structures that can be adapted to suit your needs. It may be possible to agree that a traditional fee structure will apply to one part of a case and an AFA will apply to another. The fee agreement may incorporate both fee structures from the outset or provide that one type of fee structure will be converted to the other if specified trigger events occur.

Conditional Fee Agreement (CFA): In a CFA, you will pay our fees at a discounted hourly rate throughout the arbitration whether we win or lose. If you are successful in the arbitration you will uplift our fees at a higher rate. Depending on the legal regime that applies to the CFA, we may also agree an additional success fee calculated as a percent of the legal fees incurred. This type of arrangement works for both claimant and respondent parties.

Damages Based Agreement (DBA) also known as a Contingent Fee Agreement or a "no win no fee": A DBA offers a very similar fee arrangement to a third-party funding agreement. We effectively fund the case in return for a percentage share of any damages awarded to you. If the case is unsuccessful, we won't receive any fees. This arrangement is suitable for claimants and occasionally for respondents where there is a significant counterclaim.

Hybrid DBA: A Hybrid DBA is an agreement where HSF recovers (i) fees during the life of the matter, usually on a discounted hourly rate; and (ii) a percentage of any damages awarded in the event of a successful outcome.

FN to the diagram: ***Please note, each jurisdiction will have specific rules surrounding CFAs and DBAs including, for example, the level of a success fee, the maximum share of damages under a DBA, whether a respondent can benefit from a DBA, and whether the law firm can recover their DBA payment on the award of damages or only on recovery by the client. Hybrid DBAs are not available in all jurisdictions.***

Case Study

We were working on arbitrations where we considered the client's case to be strong but the projected cost-to-damages ratio made the case less attractive to third-party funders. I worked with our pricing and analytics team to find a way for us to act for the client in a way that didn't leave HSF financially exposed.

We worked with a specialist insurance broker to design a policy for the firm that sat alongside a damages-based agreement. The policy enabled us to act for the client on a full no-win-no-fee basis but ensured that we would recoup some of our fees in the unlikely event that we lost the case. This innovative policy is now being used more widely across the legal market.

Amal Bouchenaki, partner, New York

Can you use AFAs and third-party funding for any arbitration?

The short answer is no. There is no single international framework for third-party funding or AFAs and every country has their own rules. But there have been exciting developments in the availability of third-party funding and AFAs in the last few years, particularly in the key arbitration venues of Singapore and Hong Kong. However, even here there are some significant differences in the rules that have been adopted and what is permissible. If we compare Singapore, Hong Kong and England & Wales, it is clear there are plenty of trip hazards for the unwary:

Singapore: third-party funding and contingency fees are now permissible

"In January 2022, Singapore passed a bill to permit CFAs. This bill came into effect on 4 May 2022, with the passing of the Legal Profession (Conditional Fee Agreement) Regulations. These amendments build on Singapore's 2021 reforms, which allowed third-party funding in arbitrations and related court and mediation proceedings, as well as SICC proceedings.

CFAs are now allowed in relation to:

- international and domestic arbitration proceedings in and outside Singapore;
- proceedings that are commenced in the SICC for so long as they remain in the SICC; and
- related court and mediation proceedings.

This includes work done for the purposes of, and before, the contemplated proceedings, such as preliminary advice, negotiations or the settlement of disputes. CFAs are permitted even if those proceedings are not eventually commenced, or if the dispute is settled.

DBAs remain prohibited. The uplift fee cannot be a percentage or proportion of the damages awarded.

This is an important step for Singapore, enabling HSF's Singapore-based arbitration team to offer success-based fee arrangements to our clients."

TOM FURLONG, PARTNER, SINGAPORE

Hong Kong: New legislation makes DBAs, CFAs and Hybrid DBAs available

"On 16 December 2022, lawyers in Hong Kong became able to offer success-based fee arrangements for work in Hong Kong on arbitrations and related proceedings.

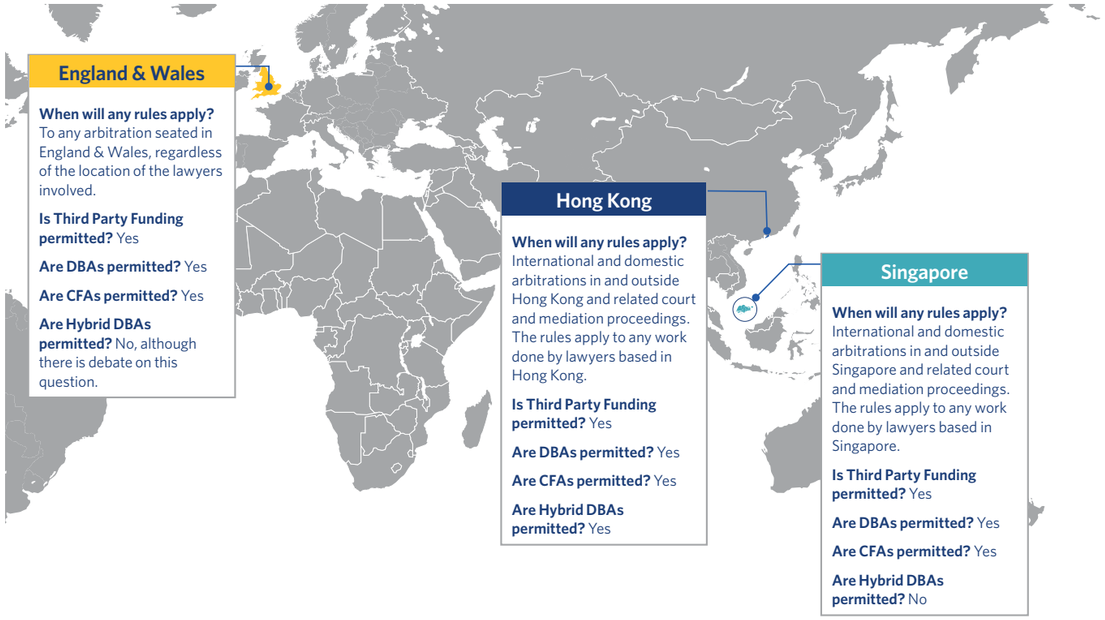
Hong Kong's new regime permits a broad range of fee options, including:

- CFAs;
- DBAs; and
- hybrid DBAs.

Hong Kong-based lawyers can agree to a success-based arrangement for arbitrations seated in Hong Kong or anywhere else in the world, as well as related court and mediation proceedings.

This means that Hong Kong now boasts one of the world's broadest legal success fee regimes for arbitration, giving parties the flexibility to cover legal costs while mitigating risk, aiding cash flow, and enhancing budget control."

KATH SANGER, PARTNER, HONG KONG



"Alternative fee arrangements offer real flexibility to clients. However, in international arbitration, it is very easy to get the rules wrong in different jurisdictions. We saw this last year when a boutique law firm was ordered to repay $1.6 million to a former client after its conditional fee agreement for an investment treaty arbitration was found to be unenforceable. Our pricing, litigation funding and insurance team keeps on top of changes in our key markets to ensure we can offer you market-leading fee arrangements whenever they become permissible. We have also been at the forefront of the DBA and CFA insurance market, working with insurers to cover our risk of taking on a success fee, reducing the risk for the firm and therefore the cost for you."

JOHN O'DONOGHUE, HEAD OF LEGAL OPERATIONS FOR UK, US & EMEA AND LITIGATION FUNDING AND INSURANCE TEAM HEAD

Would working with HSF on an AFA look different to working with us on an hourly rate?

"We always want to ensure we are working with you on a fee arrangement that meets your needs. If you approach HSF to act on your dispute we will:

- Ask you questions about the matter to get the best possible understanding of its complexity and the potential outcomes.
- Use our market-leading Genesis Arbitration tool to predict the time needed to undertake the work based on over 1000 historic arbitration matters from across our global network.
- Consider the widest range of permissible fee arrangements available to us, factoring in your needs and priorities, the risks undertaken by both parties, the lawyers working on your matter, the seat of arbitration and the place of enforcement.
- Consider any jurisdiction-specific requirements on how your fee arrangement is structured. For example, caps on the success fee, cooling-off periods, termination provisions, etc.

We can then propose appropriate fee arrangements to you and reach an agreement with you on how to proceed.

Once we start working together, you will notice little difference between how we operate on an hourly rate and an AFA arrangement. You will continue to receive the high-quality legal advice you would expect from HSF as we work to bring about the best possible outcome for you. HSF will keep track of the hours we spend working on your matter, even where we are working on a full DBA. This enables us to monitor our own performance, assess how accurate our price-predictions were, and also seek recovery of legal costs from the counterparty on success. We may also include a member of our legal project management team on the matter to help carry out that monitoring process.

What might be different? HSF may insure the risks of taking on an AFA and we may (with your agreement) need to share some information with the insurer. The insurance policy will not affect the day-to-day running of the case and you will not be a party to it."

MIKE MCCLURE, PARTNER, SEOUL

HSF is a market leader in disputes pricing. Our pricing and analytics team works with our lawyers and clients to achieve optimal pricing and commercial arrangements that work for everyone. Our litigation funding and risk transfer insurance practice for dispute resolution is a unique offering in the global market.

To find out more about the alternative fee arrangements we can offer around our network or about third-party funding, contact your usual Herbert Smith Freehills contact or to any of the authors.

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The ECT exodus – **Politics and unintended consequences**

With a host of states to leave the Energy Charter Treaty amid climate concerns, we explore what the flashpoint means for multilateralism and the energy transition

Watch the video **here**

Once a mainstay of international energy markets, the Energy Charter Treaty (ECT) has become mired in controversy, with Poland, Spain, the Netherlands, France, Belgium, Slovenia, Germany and Luxembourg having all recently announced their intention to withdraw from the agreement. At the centre of the controversy are arguments that the multilateral framework initially dominated by fossil fuels is restricting states' ability to robustly tackle climate change.

This article provides a refresher on the ECT, an outline of the debate surrounding the treaty, our take on the rationale of the exiting states and final thoughts on what this means for the energy transition.

What is the ECT?

The ECT is a multilateral investment treaty which came into force in 1998 with the aim of promoting international co-operation in the energy sector. The treaty, which was partly drawn up to help integrate the energy markets of the Soviet Union and Eastern Europe into the wider energy sector at the end of the Cold War, provides an investment protection regime for foreign investments similar to those in older generation bilateral investment treaties. The foreign investor may commence arbitration directly against the host state in respect of an alleged breach of the investment protection obligations set out in the treaty.

To fall within the scope of the ECT's regime, the foreign investment must be associated with an "economic activity in the energy sector". That term is broadly defined and includes the "construction and operation of power generation facilities, including those powered by wind and other renewable energy sources", while also encompassing investments in battery power and storage and energy efficiency.

Competing viewpoints

On one hand, commentators have pointed to the ECT's potential to protect new investments that are critical to the energy transition. By offering foreign investors a means of viable redress, the ECT protections may provide the confidence needed to support funding for new clean energy projects. This is particularly true where emerging technologies are involved, or the prospective investment is in a jurisdiction where sovereign risk poses a real concern. In the context of an energy transition heavily reliant on new or reallocated private capital, the availability of such protections may be a key factor in private investment decisions.

A review of recent investor claims shows the ECT has a track record of providing renewable energy investors with recourse where regulatory or political measures have adversely impacted their interests. The increase in cases brought by investors in the renewable energy sector has been remarkable. Available data suggests of all claims initiated under the ECT since its inception in 1994, approximately 60% are claims made by investors in the renewable energy sector (up to 1 June 2022). Of all claims commenced since 2012, claims relating to reforms affecting the renewable energy sector make up just under 70%.

However, critics have voiced concerns about its investment protections being 'energy-agnostic' as investors in fossil fuels may invoke them in response to measures to mitigate the effects of climate change, including the phasing out of the fossil fuel industry. These concerns are often articulated by reference to ECT cases such as *Rockhopper v Italy*, which involved a claim in relation to the reintroduction of a general ban on oil and gas exploration and production activity within the 12-mile limit of the Italian coastline. The tribunal found Italy had unlawfully expropriated Rockhopper's investment.

The outcome in *Rockhopper v Italy* turned on the fact that a 1994 Italian decree required production concessions to be granted within 15 days of environmental approval being awarded. Because of this decree, Rockhopper was entitled to be granted the relevant concessions as of August 2015, after Italy's Ministry of the Environment approved the project. This was the factual context for the subsequent conduct that was found to be expropriatory, when Rockhopper's application was rejected on the basis of the general ban reintroduced in late 2015.

It is worth noting the tribunal stressed that the arbitration was not concerned with whether Rockhopper's project should have proceeded to a production stage (ultimately, it did not). Likewise, the tribunal made clear that the decision to ban offshore production was Italy's sovereign choice to make, and the tribunal "should not be taken in any way to either criticize or deprecate that decision from either a political or environmental standpoint". The sole question before the tribunal was whether Italy's sovereign promise under the ECT had been broken by a subsequent sovereign act, to enliven Rockhopper's entitlement to compensation under international law. The tribunal emphasised that Rockhopper did not seek compensation on the basis that Italy's sovereign choice to regulate offshore production in its territorial waters was somehow wrong. Instead, it was because the specific prior interaction between Italy and Rockhopper gave rise to certain rights which were then negated without an offer of compensation.

The *Rockhopper* case provides a useful illustration of the fact-sensitive nature of ECT decisions. Such decisions do not – as a rule – rise and fall on the basis of value judgements about whether a state's exercise of sovereign power is morally just. As Swedish arbitration veteran Jan Paulsson puts it, investment protections under international law defy "resolution by abstraction". Rather, tribunals will determine claims with careful regard to the relevant economic, political and environmental factors at play, but with a focus on the specific interactions between the claimant investor and the respondent state in the case at hand. Accordingly, although the ECT does extend protections to foreign investors in a wide range of energy-related fields, these are not applied on a one-size-fits-all basis. They are elastic concepts which, as the recent wave of renewable cases demonstrates, are flexible enough to accommodate changing circumstances, including – insofar as the ECT is concerned – the commercial and technical complexities of a transitioning energy market. The recent report released by specialist think tank Climate Change Counsel, which reviewed dozens of awards rendered in respect of claims brought under the ECT, provides an insight into this body of jurisprudence, including in relation to cases concerning fossil fuel investments.

Rationale for withdrawal and unintended consequences

In the last year states such as Netherlands, Spain, France and Germany have announced plans to withdraw from the ECT, citing the incompatibility between the ECT and goals of the Paris Agreement climate accord. However, such comments can be contrasted with the fact that most claims in the past decade relate to state conduct that adversely impacted the renewable energy sector, not to mention recent efforts to modernise the ECT. In announcing that an agreement on modernised treaty text had been reached, the European Commission in 2022 proclaimed: "We have thereby aligned the ECT with the Paris Agreement and our environmental objectives".

The modernised ECT would include a "flexibility mechanism" allowing contracting parties to phase out protection for fossil fuel investments. The EU and the UK have already taken up this option, such that any new fossil fuel investments in their territories will lose protection under the ECT as of 15 August 2023. In addition, the modernised ECT would enable the EU to exclude protection for all existing investments in fossil fuels in the EU as of 10 years from the implementation of the modernised ECT. The effect of the amendments was recently summarised by the prominent investment law arbitrator Nikos Lavranos as follows: "...the revised ECT text contains the strongest language of any trade or investment agreement as regards the right to regulate and has strong language on the need to meet the Paris Agreement targets. This is coupled with the flexibility to go further than other ECT members, a gradual carve-out of fossil fuels from the treaty's coverage and protection, and the banning of intra-EU ISDS claims."

Although the withdrawing parties will be released from obligations under the ECT in relation to investments one year from formal notification, under the sunset provision of the current ECT, investments prior to that point may be covered by the protection regime for 20 years. In effect, this may mean the withdrawal will eliminate protection for all existing energy investments (including fossil fuel investments) at least 10 years later than the phase-out period for existing fossil fuel investments contemplated in the draft modernised ECT. Hence, it has been observed that "withdrawing from the ECT might have the paradoxical effect of prolonging protection under the old ECT regime".[1] It is difficult to reconcile this potential outcome with the rationale provided by the withdrawing states.

While the contracting parties were scheduled to finalise the draft modernised ECT on 22 November 2022, the vote has been postponed to a meeting in April 2023 instead. The prospects of these discussions are uncertain, particularly since the EU Parliament passed a resolution calling for the withdrawal from the treaty and the nullification of the sunset-clause between willing parties. It is unclear whether this strategy can succeed as, despite the European withdrawals, the ECT has still attracted states, particularly from Africa, willing to accede to the treaty.

1. "Withdrawing from the Energy Charter Treaty: The End is (not) Near", *Kluwer Arbitration blog* (4 November 2022) http://arbitrationblog.kluwerarbitration.com/2022/11/04/withdrawing-from-the-energy-charter-treaty-the-end-is-not-near/.

Implications

Some commentators have argued that, given the significant take-up of treaty protections by renewable energy investors in recent years, the withdrawal announcements will send a negative message to investors, and create legal uncertainty that may delay the energy transition. Ultimately, any adverse impact on investor certainty or decision-making in the renewable energy industry will be difficult to measure, particularly in view of the extensive framework of bilateral and multilateral investment treaties, including free trade agreements and regional partnerships.

It could also be argued the departure of European states from the ECT reflects a wider movement away from multilateralism in certain areas. Where states have experienced firsthand the significant costs associated with findings of liability against them under international treaties, they may be less inclined to continue to participate in efforts to reform those treaties in favour of a complete departure from the treaty-based system. This is particularly true where reform efforts are focused on procedural or cosmetic features of the system, rather than addressing the criticisms of its purpose. As academic, author and arbitrator Andrea Bjorklund has observed, the concern about international investment law infringing on national has sovereignty goes to the heart of the treaty-based system and is unlikely to be addressed by procedural reform within the existing model.

However, entry into international investment treaties like the ECT, and participation in reform of those treaties, are also calculated exercises of state sovereignty. As such, for states contemplating withdrawal this is not a choice between preserving or relinquishing sovereign power. Rather, it is a matter of how best to exercise it. Ultimately, this demands an assessment of whether the benefits of participation are outweighed by the benefits of withdrawal. Besides political statements underscoring commitments to the energy transition, it is not clear that departing states have coherent strategies in how their investment treaty frameworks will support the clean energy they claim to be prioritising.

For now, what is apparent is that this European exodus will undercut the planned conclusion of the ECT modernisation process. As noted above, the withdrawing parties may remain bound by the provisions of the old ECT due to the operation of the sunset clause, which is difficult to reconcile with their stated rationale for withdrawal. Putting to one side the direct implications for the departing states, if their exit undermines the modernisation process, it will be a lost opportunity to harness the considerable benefits of ECT membership and modernise its provisions to reflect the energy needs and priorities of the present day and beyond.

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Exits only – How investors can get put calls right

Despite a bullish year for private equity in the Asia-Pacific, exit disputes remain a risk. We assess the safest ways to exercise your put option

Despite major geopolitical and financial headwinds, Asia-Pacific investment in 2022 remained robust, with a particularly strong flow of private capital driving activity. According to data published by EY, during the first half of 2022 private equity (PE) activity surged in the region with a 47% increase ($47 billion) in M&A deal value against the pre-pandemic five-year average. Even though capital market conditions tightened, PE firms retained large amounts of cash that needed to be deployed. In July 2022, for example, dry powder in Asia-Pacific funds stood at $455.2 billion while across the year PE and venture capital investments in the Asia-Pacific region excluding Japan reached 208 transactions valued at $35.4 billion, according to S&P Global.

In simple terms private equity refers to investments in the shares of companies that are not publicly traded. PE investors and PE funds typically provide financing by purchasing a controlling stake or minority shareholding in a private company. Notwithstanding the recent surge in activity, however, the effect of a fragile global economy means that PE investments often underperform against expectations or become distressed. This can be exacerbated by the high levels of debt used to fund PE investments and limited timelines for generating returns. This, coupled with an increasingly competitive Asia-Pacific market where company valuations have been at all-time highs, has led to a steady increase in PE disputes and related arbitrations, which is the preferred method for resolving such disputes.

Although PE disputes can emerge at various points along an investment's life cycle, exit disputes – which arise when a PE house seeks to exit its investment by choice or compulsion – are among the most common. This article focuses on the first of these exit mechanisms, namely where the shareholders' agreements between the investor and controlling shareholder give the investor the right to exit by selling its shareholding at a stipulated price if certain conditions are not fulfilled, usually known as a put option.

Put options are found in almost every PE shareholders' agreement. They are important because they provide the investor with a contractual right to exit when certain pre-agreed triggers are met. Perhaps the most common trigger is when the target company does not achieve an initial public offering (IPO) within a certain period, usually five years after the investment. In those circumstances, the investor will usually want an alternative form of exit which matches its own internal investment timeframe. Other triggers include where the company does not achieve a certain level of financial performance, or where the controlling shareholder commits a material breach of the agreements.

Put disputes are common

What should on paper be a relatively straightforward contractual right to exit is often far from easy in practice, especially in a distressed market. Again, the position in Asia is often exacerbated. Company valuations remain artificially high, the investment is in an emerging market, and often the put requires

the co-operation of the founder shareholder, who did not anticipate returning the investment and is willing to do whatever it takes to avoid having to pay.

Disputes relating to put option mechanisms can arise for a variety of reasons. Here, we focus on three main types of disputes we have seen recently in Asia and explain how potential pitfalls might be avoided in the future.

Triggers and conditions:

A common battleground between the parties is whether the trigger for the exercise of the put has been met or not. While this might seem simple in some cases, it can have disastrous consequences for the investor if it gets it wrong. In one recent case where we acted for the controlling shareholder, the investor issued its put notice on the basis the company had not achieved an IPO within five years from closing. The investor, however, issued its notice on the fifth anniversary of the date of the shareholders' agreement, whereas the trigger required five years from closing to have elapsed. In other words, the notice was premature. By the time the investor realised its mistake, the company was in liquidation, which threw up a host of complicated issues about whether it was possible for the investor to re-issue its notice and rectify its earlier mistake. Moreover, the investor also failed to follow the formal requirements for the content and format of the notice.

Both mistakes could easily have been avoided. Nevertheless, by not strictly following the contractual requirements, the controlling shareholder had significant ammunition to argue the put was not valid in the first place, and that it was too late to remedy. Ultimately, this led to settlement on extremely favourable terms for the controlling shareholder, and the investor exited without achieving a return on its investment.

Lesson 1: Make sure the put option can be exercised and the exercise notice has been properly issued.

Valuation and mechanics:

Another common theme is what value should be ascribed to the put, and how this might be calculated. In some cases, the put is valued by reference to an internal rate of return on the amount of the investment made. Although this is more straightforward than assessing market value, disputes can arise in relation to the interest rate applied (and whether this might operate, or be construed, as a penalty), and how the value of the put should be calculated where a price rebate on the investment made is also due. In our experience, giving more thought to these questions, and the interplay between different remedies under the contract at the time of drafting, would always save significant cost and time in the event a dispute arises in the future.

Where the contract is silent on the valuation basis, questions also arise as to whether the price should be calculated by reference to market value and, if so, how this value should be ascertained. Even where the agreement contains sophisticated valuation mechanisms, involving both sides appointing valuation experts, the process can break down completely if one party does not co-operate, and the contract does not provide what should happen, and how the shares should be valued. Again, we have been involved in several disputes where significant time and cost would have been avoided if the agreements had been clearer on the valuation exercise and the role of experts in that process. In more extreme cases, tailoring the drafting to anticipate a recalcitrant shareholder can be the difference between success and failure.

Lesson 2: Ensure your valuation method and process for resolving valuation disputes are set out clearly in the shareholders' agreement.

Enforcement:

Unsurprisingly, the last area of contention we want to focus on relates to enforcement: what remedies should be sought, how such remedies can be enforced and on what terms.

A common debate is whether specific performance is available, and how this might be achieved practically. Some savvy PE clients have started attaching *pro forma* share transfer contracts to their agreements, to mitigate the risk that a tribunal finds that the terms of any share transfer are too uncertain to enforce. Another consideration is whether the governing law of the agreement permits specific enforcement of a put in the first place, and whether it is going to be possible to enforce an arbitration award in the place where the shares that are being transferred are registered, so that the transfer – and more importantly payment – can be achieved. Again, in circumstances where damages – repayment of the investment with interest – are likely to be the key goal, one way to address this upfront is to build contingency scenarios into the agreements, for example, a guarantee. We have seen this work to great effect and achieve quicker and simpler outcomes. Otherwise, it is important to think about how to structure the relief so a damages payment can be achieved, irrespective of what happens to the shares. Fortunately, tribunals and courts are increasingly willing not only to order specific performance, but also to find ways to assist investors who have a clear right to repayment of their investment, and to structure the relief granted accordingly. A good strategy is to engage the tribunal early about this issue and, of course, appoint an experienced tribunal in the first place.

Lesson 3: Consider how to enhance your chances of successful enforcement.

Conclusion

Although investment agreements invariably provide for put options, investors may not always be able to exercise their rights under the contracts successfully or quickly, particularly if the controlling shareholder is unwilling to, or cannot, repay the debt. Some challenges originate from questions of law or fact (eg, conditions that trigger the put option, the proper valuation), others come from practical considerations (eg, what remedies to seek). These all have important implications on the strategies that PE houses deploy in formulating their exit. While the recent trends from tribunals and courts are encouraging and indicative of a pro-enforcement approach, the exercise of put options – at both the drafting and enforcement stages – continues to require careful consideration. Getting dispute counsel involved at the deal stage, rather than only at the disputes stage, can itself pay dividends.

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Future Fuel – **How will hydrogen disputes be resolved?**

With a rapidly-emerging energy market set to fuel a rise in disputes, we explore how arbitration could offer the solution

A global transformation of the energy sector is underway. Markets appear to now accept that deployment of hydrogen at scale could be the next major energy source from around 2030. For that daunting goal to be realised, hydrogen must transition from emerging technology to mainstream commodity within a matter of years. In this article, we explain how quickly developing a fledgling energy market at scale while relying upon new technology will inevitably lead to an increase in disputes best resolved by international arbitration.

Clean hydrogen's promise

Clean hydrogen generally refers to hydrogen produced using either renewable energy or hydrocarbons with carbon capture and storage (CCS). Unlike coal or liquefied natural gas (LNG), hydrogen in its natural form is only found on earth in limited reserves. In the vast majority of cases, hydrogen must be produced. The three main ways of producing hydrogen are:

- **Electrolysis:** This is the process of extracting hydrogen from water using electricity. If the electricity is renewable, this produces no carbon emissions.
- **Gasification**: The process of using coal in a thermochemical reaction to extract hydrogen. The use of coal produces carbon emissions but when these emissions are captured and permanently stored, clean CCS hydrogen is produced.
- **Steam methane reforming**: The process of using LNG in a thermochemical reaction to extract hydrogen. The use of LNG also produces carbon emissions, but these can be captured and stored to produce clean CCS hydrogen.

Hydrogen's promise is undeniable, particularly for powering heavy industry and transport. It is flexible, transportable (unlike many forms of renewable energy), storable and, when used as a fuel, hydrogen's only emission is water. Hydrogen has the potential – depending upon the price – to permit many countries to reduce their dependence on oil and gas, including where it would otherwise be purchased from countries where geopolitical tensions are fraught. It also has the potential to reshape energy market dynamics. Countries which have not been major players in hydrocarbons but are rich in renewable energy – which is otherwise difficult to trade globally – have the potential to gain more prominence. Clean hydrogen has the potential to help deliver on lofty ambitions of achieving net zero commitments by 2050. Indeed, McKinsey estimates that hydrogen could abate seven gigatons of CO_2 emissions annually – about 20% of human-driven emissions if the world remains on its current global-warming trajectory – by 2050.

Australia as a case study

Australia, historically stable and resource-rich, might provide a useful litmus test for progress in hydrogen investment. It took Australia several decades of experience and setbacks to become competitive with Qatar as the world's largest LNG exporter, currently exporting £28 billion of LNG each year. But what took Australia several decades with LNG, it now plans to achieve in a matter of years with hydrogen.

The Australian Government states that about 11% of Australia's landmass (872,000 square kilometres) is highly suitable for renewable hydrogen production. Indeed, Australia's hydrogen sector has an investment pipeline of £75–103 billion, with a 43% increase in total hydrogen projects in 2021 alone, according to S&P Global. There is also significant international interest in Australia's potential as a hydrogen producer, and the interest is leading to mounting cross-border investment and collaboration.

But Australia has also started to experience some of the problems which come with rapid progress. In 2022, for example, a six-gigawatt hydrogen facility in South Australia had to be abandoned due to a lack of water, highlighting the scope for error in manufacturing hydrogen.

As initiatives and projects around hydrogen come to fruition, there will be a significant volume of complex, high-value new projects coming to market and a broad range of commercial agreements, including between parties in different jurisdictions. The projects will rely heavily on new and emerging technologies at a scale currently untested, generating the kinds of challenges, risks and disputes covered below.

The dispute flashpoints

1. **The bankability conundrum**

Despite some evidence that (at least in Europe) green hydrogen is now cheaper than LNG, considerable investment is still required to make hydrogen projects bankable. The International Energy Association's (IEA's) recent data puts the global cost of hydrogen at 3.2-7.7 US$/kg, which is higher than coal or natural gas by comparison. The IEA also estimates that global investment of US$1.2 trillion by 2030 on low carbon hydrogen is necessary to reach net zero by 2050. While such significant investment might be unachievable, governments are increasingly incentivised to contribute capital and subsidise the price of hydrogen to reduce hydrocarbon dependence. As with any project-financed or PPP arrangement, delays in financing can give rise to significant project delays, leading to inaccurate construction costs and offtake forecasting. Coupled with inflation, the bankability of projects could give rise to substantial cross-border disputes.

2. **The race to net zero**

It is no secret that goals and commitments around the energy transition are considerably off-track. Hydrogen production will need to jump to 614MT per year by 2050 to have any chance of reaching net zero. This is five times more than current total hydrogen production. With urgency and compressed deadlines, disputes will invariably follow. Pressure to finance, tender, bid and close projects at breakneck pace will provide significant scope for a variety of disputes.

3. **Certification and standards**

Regulatory uncertainty causes and exacerbates cross-border disputes. International regulations setting criteria for clean hydrogen do not yet exist. A number of different schemes are currently developing at national levels but there is currently no way for these schemes to interact with one another. Until such ambiguity is resolved, "change in law" and government action or inaction provisions may be triggered by even relatively minor updates to the framework.

To ensure hydrogen becomes a commodity capable of being traded reliably, and transparently, there should be a scheme for tracking and certifying the origin and quality of clean hydrogen. While such schemes have been proposed around the world, there is currently no consensus on which should apply – and the consequent lack of commercial and regulatory certainty represents a significant barrier to projects getting off the ground. Hydrogen certification and global standards require clarity to avoid situations where parties engage in offtake and supply arrangements failing to articulate the production and sustainability characteristics (greenhouse gas footprint and disruption to environment) of the hydrogen.

4. **Project-interface challenges**

Like LNG, a supply chain of projects, each significant in its own right, must function properly to produce hydrogen. An electrolyser for hydrogen production will be redundant without a source of water, energy (whether solar or wind), a way to store the hydrogen, and a means to transport it (rail and port infrastructure, as well as purpose-built tankers). Stakeholders in this lengthy supply chain must consider how these linked elements could expose it to more risk. This is particularly so given that stakeholders are likely to consist of government entities, established energy market players (including electricity network operators and shipping companies), and new market entrants (like tech companies) associated with innovative hydrogen technologies. Civil society groups may also be engaged around the physical sites from where the hydrogen is produced where it impacts upon water or land resources.

5. **New and largely untested technology**

The few pilot hydrogen projects which have reached the market are a study in technological advancement. In Australia, for example, Victoria's Latrobe Valley HESC project has begun gasifying coal with CCS to extract hydrogen. The hydrogen is then cooled to -253°C so that it changes from gas to liquid (reducing its volume to 1/800th of the size) and, in a global first, bespoke tankers then deliver the liquified hydrogen to Kobe, Japan. Until recently, much of this technology had barely been tested let alone deployed to the market.

Where there is new technology, teething problems often follow as the market learns safe ways to reliably produce and deliver clean hydrogen at scale.

A unique feature of energy disputes is their cross-border nature. International arbitration remains the preferred way of resolving global energy disputes in many parts of the world. Although a lucrative hydrogen market will bring many benefits, it will inevitably also result in an increase in international arbitrations in the years to come. Herbert Smith Freehills has played a key role in providing open-source guidance for governments setting up clean hydrogen legal frameworks through its pro bono support for the Green Hydrogen Organisation. This has included drafting a guidance paper on dispute resolution mechanisms to be included in contracts throughout the clean hydrogen value chain. This work will ultimately include drafting model form clauses that can be used as a transparent industry reference point to provide much needed commercial certainty. This would be similar to the Association of International Energy Negotiators' model form contracts which have been instrumental to the development of the oil and gas sector.

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Faster, cheaper, better – **A playbook for value-driven arbitration**

With companies under pressure to save time and money, we explore how parties, arbitrators and institutions can boost efficiency throughout a dispute

Watch the video **here**

A common complaint about international arbitration is it takes too long and costs too much. As a result, stakeholders are constantly asking how the process can be made more efficient. In this article, we look at the issue from the perspective of three different stakeholders and ask what can parties, arbitrators and institutions do to improve the efficiency of the process.

What works for one dispute may not for another. Appropriate case management must be considered on an individual basis, gauging factors such as complexity, value, resources and overall strategy. However, the techniques listed below are always worth considering.

What can parties and their counsel do?

- **Assess the case early:** Having a well-settled case theory and strategy can help ensure you adopt a procedure that allows you to present your case in the most persuasive way possible. Analysing the likely quantum outcomes at an early stage can also assist with settlement negotiations and streamlining the procedure. HSF's decision analysis tool is a useful way of conducting this exercise.
- **Improve arbitrator selection:** This can be done in several ways, but can include:
  - Agreeing to one arbitrator rather than three. The advantages are obvious — decision making is more efficient with one arbitrator, and it is also easier to lock down a hearing date.
  - Ensuring party-nominated or agreed arbitrators have good availability to actively manage the case and deliver the award as quickly as possible. This may require the selection of a lesser known or more junior arbitrator who has enough time to devote to the case. The more the arbitration community can do to broaden the pool of potential arbitrator candidates, the more we can reduce delay caused by unavailable arbitrators.
- **Pick up the phone:** Lack of communication between counsel can often lead to unnecessary rounds of correspondence and applications, particularly over issues such as time extensions and document production requests. It can be important to set out the client's position in writing but picking up the phone is far more efficient (and sometimes more effective) where the option is available. Establishing a good dialogue from the outset may also assist with a more collaborative approach later on.
- **Consider remote procedural conferences and hearings:** This will not only save time and expense, but may also mean securing an earlier hearing date. Although in many cases the parties will feel their case is best presented in person, the arguments in favour of remote hearings are obvious: they avoid the need to travel and the associated costs and enable hearings to be fitted into smaller slots. There are also environmental reasons for choosing not to travel for hearings.
- **Focus on your best points:** Spending time and money arguing weak points can be counter-productive – it undermines redibility with the tribunal and can also lead to adverse cost consequences. Particularly where page limits are imposed, less can be more.
- **Limit your evidence:** It can be easy to fall into the trap of assuming more evidence will help your case. However, submitting a small amount of focused evidence can be more effective. This will require working out which key witnesses are needed to prove your case and rebut your opponent's. It is also important to give careful thought to what expert evidence is truly necessary and have the confidence not to put expert evidence forward where it isn't.

What can arbitrators do?

- **Control the procedure:** Arbitrators who actively manage the procedural timetable from the beginning, including preparing a first draft of the timetable to circulate to the parties, can achieve a more efficient procedure. The provision of a timetable can often aid adoption, as it forces the parties to justify their departure from it.
- **Be braver in procedural decisions:** Tribunals have many tools at their disposal for improving the efficiency of proceedings, including bifurcation, rendering partial awards and summary dismissal in appropriate cases. While adoption of these tools is increasing, there is a general perception that tribunals could do more.
- **Control written submissions:** A key tool for controlling written submissions is imposing page limits. Being required to stick to a page limit promotes discipline and good advocacy and prevents parties from launching a war of attrition. By the time the parties come to submit their first round of submissions, the key issues should already be clear enough that agreeing page limits is achievable. In response to the Queen Mary Survey on Arbitration in 2021, arbitration users said they would be most willing to do without "unlimited length of written submissions".
- **Control the evidence:** Require parties to explain upfront what evidence they anticipate and justify why such evidence is needed. This will prevent unnecessary rounds of evidence and cross-examination.
- **Make immediate decisions on costs:** Unfortunately, there is a tendency for arbitrators to defer decisions on costs until the end of an arbitration and wrap it all up into one decision on costs rather than decide on a more ad hoc basis. However, where tribunals do rule on costs immediately, parties can feel the ramifications of obstructive conduct, meritless applications and failure to meet deadlines, which in turn could encourage better behaviours.
- **Promote settlement:** It is open to tribunals to promote mediation to parties and facilitate such mediation by ordering a stay. In some jurisdictions, it may also be possible for tribunals to facilitate the mediation itself. For the right case, proactively promoting settlement can be an effective tool that tribunals can use to reduce time and cost.

What can institutions do?

Institutions have already been proactive in this area. For example, the mainstream institutions now actively manage arbitrator availability to ensure chosen arbitrators have availability to manage the case and draft the award. Many institutional rules now also impose time limits on rendering the award and institutions have started to keep records of arbitrator case management: they will not appoint arbitrators who have underdelivered. Further steps institutions could take include:

- **Imposing cost sanctions on arbitrators for delay:** This is something the International Chamber of Commerce (ICC) has introduced in relation to awards that are delayed, and which other institutions could also consider adopting.
- **Encouraging adoption of expedited procedures:** These are essentially fast-track rules which either shorten time limits or attempt to limit other procedural steps in the process. Although arguably arbitrators have always been able to take these steps as part of their case management powers, their inclusion in institutional rules has generally encouraged tribunals to adopt them. They are proving popular, with the ICC administering 400 expedited arbitrations in five years, and the Singapore International Arbitration Centre receiving a total of 715 expedited procedure applications (and accepting 401) since the introduction of these provisions in 2010.
- **Encouraging tribunals to promote settlement:** Tribunals may be more willing to promote settlement if institutional rules empower them. For example, in Appendix IV to the ICC rules on case management techniques, it emphasises that the tribunal can inform the parties they are free to settle all or part of the dispute and, where agreed between the parties and tribunal, the tribunal may take steps to facilitate settlement. Although this issue is addressed in some other rules, it is not mainstream.
- **Striving for even greater efficiency:** Recognising that institutions have made great efforts to ensure their rules, processes and technology are cutting edge, there is always room for improvement. This is particularly the case where an institution has responsibility for a particular step (such as appointing an arbitrator or scrutinising an award).

Does anyone else have a role to play?

Of course, there is only so much that parties, arbitrators and institutions can do within the confines of an arbitral seat. Legislators have a key role to play in reviewing and ensuring that arbitration legislation remains up to date and empowers tribunals, institutions and parties to adopt efficient procedures. A recent example is the English Law Commission, which, among many of the proposed changes in its consultation paper, has proposed the English Act make explicit provision for the possibility of a summary procedure. The rationale is to remove any doubt as to its availability and reassure arbitrators about disposing of claims/defences where appropriate. Therefore, to the extent there is uncertainty among stakeholders or lack of take-up of procedural innovations, national legislation can step in to give arbitrators the comfort to properly control the proceedings.

There are lots of tools available. It's up to the parties, their counsel, arbitrators and institutions to use them.

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Decision Analysis – **Putting legal risk in the language of the boardroom**

With uncertainty inevitable in complex disputes, HSF's cutting-edge analysis aims to ensure clients can make informed decisions

Watch the video **here**

Making the right choice is hard, even when all the salient facts are at hand. So, when it comes to commercial disputes – events packed with high emotions, higher stakes and unknown variables – making the right call becomes a Herculean task. Whether choosing to launch proceedings, settle or pivot to a different strategy, most avenues in a contentious matter are beset by legal and commercial risk. It is this uncertainty that often frustrates companies striving to deliver predictable results more even than the costs involved.

It is here that Decision Analysis — a service combining data, software and legal know-how — steps in. "We assess litigation risk with tools more often used to model business risk, including decision trees," says Herbert Smith Freehills (HSF) disputes partner Alex Oddy, who established the firm's Decision Analysis service with colleague Donny Surtani. "Legal advice in the form of a long memo which concludes with subjective terms such as 'reasonable prospects' is not what commercial decision makers are looking for. With our offering, we aim to quantify the risk profile of decisions with the dispute and its resolution."

Break it down

At its core, Decision Analysis is a structured process that assesses the factors influencing a dispute and its outcome. This service helps clients to visualise uncertainties, values and commercial preferences and ultimately to make more informed decisions. The legal assessment is presented in a mode intelligible to boardrooms rather than in legal jargon.

Charlie Morgan, a senior lawyer in HSF's London arbitration team, notes: "We are using the same legal analysis and judgement that underpins a note of advice. However, we look to express our conclusions numerically and graphically to remove ambiguity. For example, we don't treat 'chances of success' as a single factor. One often sees success discussed by reference to a single 'win' scenario, but a win can take many forms, not all of which will be as valuable to the business. With Decision Analysis and decision tree modelling, we try to explain the weighted value of the claim based on legal risk that is quantified in relation to all relevant legal and factual issues."

Moreover, Decision Analysis enables our legal teams to assess how particular variables impact outcome in a granular way, illustrating the drivers of risk and uncertainty in a dispute, and where resources should be allocated in response. In all areas of a dispute where uncertainty resides, Decision Analysis looks to make the implicit explicit, whether in complex or routine matters.

The process is also one that can evolve with a dispute — models can be updated to reflect shifting outcome/probability assessments, changing costs and recovery rates. Rather than a one-size-fits-all approach, the service offers bespoke models sensitive to commercial considerations, such as the net present value of a future payment adjusted for factors like varying costs of capital, as well as partial enforcement.

Widening choice

Decision Analysis can be used to support strategic decision-making through the life of an arbitration or litigation. Where there is uncertainty, the process has something to offer.

Tom Furlong, an arbitration partner based in our Singapore office, outlines the kind of questions he has built models for clients in the past: "The modelling can quantify risks at each stage of a claim, such as questions about jurisdiction, liability and quantum. Will I be able to show causation? Which side's damages expert is likely to be relied on more heavily? How will X legal issue impact the ultimate damages number? Even what we might call a simple case might have multiple likely outcomes. We attribute probabilities to each of those and identify an overall value for the claim (or its defence)."

One of the more common use cases for Decision Analysis is around settlement. From sue-or-settle dilemmas to identifying a negotiation range, Decision Analysis offers a structured process that resonates with business professionals. For example, HSF has used the model to successfully settle complex claims by modelling clients' prospects of success on liability and numerous heads of loss (and the likely quantum that would be awarded, if so). The model helps to identify a negotiating range and the visuals and sensitivity analysis communicate the advice most clearly to commercial clients.

"On one of our cases, I presented the range of possible outcomes to a client's board in graphical form. This gave them a clear idea of the risks and opportunities," says Oddy, whose work developing Decision Analysis contributed to him winning most Innovative Practitioner at the 2022 Financial Times Innovative Lawyers Awards. "We also ran sensitivity tests to see the impact of changing probability inputs to more optimistic or pessimistic numbers. Clients can then consider their own risk appetite and decide how the relevant legal risks align with those."

A related use case has been settlement advocacy, where the model has been used to convince an opponent of their exposure and move them away from an entrenched position. Then there are more specialist applications, such as supporting external disputes funding, as third-party investors are more likely to back a case with credible risk analysis attached.

In short, Decision Analysis provides a market-leading means of modelling dispute risk, enabling clients to better calibrate decisions to their commercial objectives and budgets. "It's really rewarding to see the engagement the models generate in our discussions with clients, and how they can dramatically impact upon clients' strategies," says Rutger Metsch, a member of the Decision Analysis team and London arbitration associate.

"Through this service, we aim to speak the language of the boardroom and give the C-suite an edge in strategic decision-making," concludes Furlong. "It's about assessing legal risk quantitatively and shaping strategy through visual representations of risk to help clients make better decisions in disputes."

Knowledge is power — Use cases of Decision Analysis

HSF consultant Donny Surtani discusses practical applications of HSF's dispute analysis service

Illustrating the impact of fresh evidence on projected outcome "We modelled a misrepresentation claim by an Asian state-owned entity in the pre-action phase to put a strategic framework in place that could be updated and modified as the case developed. We used sensitivity analyses to demonstrate the impact of the strength of the evidence on the expected value of the claim, which helped the client understand the benefit of making witnesses available to strengthen key parts of the case."

Analysing a complex insurance claim: "In our largest decision tree to date, we modelled a $1.3 billion insurance claim with over 20,000 potential outcomes. The client's management boards found the model very helpful to support settlement strategy discussions and asked us to maintain it as the case developed."

Setting settlement parameters: "We worked with a major strategic client in connection with a novel tort claim arising out of the insolvency of a regulated financial services provider. The model informed the client's internal assessment of the case and was also used for agreeing settlement parameters with the client's liability insurers."

Click here for more information on HSF's decision analysis offering.

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Spotlight Interview **Tom Furlong**

Tom has spent much of his career with the firm in Asia, moving from Hong Kong to Singapore in 2019, where he was promoted to partner. Tom works on Asia-related disputes particularly for private capital, energy and tech/telco clients. From Singapore, his work regularly involves clients or counterparties in the People's Republic of China, India or the Philippines. Tom is an English barrister and Hong Kong solicitor.

Hear from **Tom Furlong** here

You started your career at the English Bar before joining Herbert Smith Freehills as an associate. How has your background as a barrister influenced you in arbitration?

Starting at the Bar set me down a path to international arbitration. I wanted to keep doing advocacy, see the world and build a team and business. I feel I get the best of both worlds.

The Bar was great training. Members of chambers were generous with their time and I saw that judges require clear thought and drafting. This was a great preview of what arbitrators expect. It helps me focus on whether a point is worth making and how to make it most effectively.

I always wanted to live overseas and travel for work. That led me to move across to law firm life. I joined Herbert Smith Freehills' Hong Kong arbitration team in 2014 and moved to the Singapore office almost five years later.

The most interesting parts of the job are our team and clients. That all takes on a different gloss working with clients and colleagues, or in front of arbitrators, from across the world. It takes a lot of different skills to win an arbitration in Asia, and I only have some of them, so it's a pleasure to see our colleagues in action and learn from them.

You are known as an innovator and a supporter of technology to improve legal services and reduce costs. How has tech changed the client experience? What developments are on the horizon?

We're on the cusp of radical changes to the legal market. Technology has disrupted our key clients and we're next. We have priceless data that we're just starting to exploit. We know our clients expect us to find better ways to meet their needs while earning a fair return for the value we add.

We're doing well on the basics, which shouldn't be taken for granted. We have better technology for everything from virtual meetings to sharing documents and collaborating. We're automating processes and looking at using AI to improve them. In the arbitration practice, we regularly conduct virtual hearings with ease. But we have only scratched the surface – we will look back and be shocked the old ways persisted for so long.

There is an old saying that before Henry Ford, too many people had been trying to build a faster horse. That difficulty in rethinking the problem really affects law firms but we're taking bold steps in investing and approaching innovation differently and we're aware it's something we haven't been good at historically.

And harnessing our data is crucial. As a world-class disputes practice, the potential of our data is market-leading. Historically, lawyers have relied on educated guesses about issues for which there is an answer with the right data. Our educated guesses are at the top of the market but data-driven answers are even better. We have recently developed a database known as Genesis that harnesses the data from thousands of our arbitrations across our global network. We can use that to inform our clients' approaches to their disputes. We're also getting much better at visualising our data and analysis to deliver actionable insights, for example, using our Decision Analysis tool and our CFO dashboards.

The future is bright. We have an opportunity to ask how we can really meet our clients' needs, as opposed to just continuing what law firms have historically done.

Hong Kong and Singapore have recently opened their markets to new ways of financing arbitrations, including third-party funding, conditional fees, and (in Hong Kong) damages-based agreements. What do you make of these changes?

These are exciting and we had new fee arrangements ready to sign the day the law changed.

We're all aware why clients don't like a pure hourly-rates model. Conditional fee arrangements, where part of the payment is conditional on the outcome of the dispute, allow us a blank canvas to design new fee structures that more closely reflect the value we add and our effort.

We can offer clients more clarity about cost in exchange for a conditional fee that reflects the risk that our effort will exceed the cost. This is fair for both lawyer and client. It aligns with client expectations that fee agreements should be predictable and reflect the value added. *At root, alternative fee arrangements offer the certainty that law firms have historically found it difficult to provide, particularly for disputes work.*

There is a learning curve for the legal profession in Asia Pacific now that these funding arrangements are available. Pricing the risk (ie, the effort involved in winning a complex dispute, and the likelihood of a successful outcome) is complex. We're lucky to be able to draw on an expert pricing team that has worked on similar arrangements in other jurisdictions, including the UK, for many years. It's another great puzzle to be working on and another chance to innovate to meet client need.

What advice would you give young lawyers hoping to have a career in international arbitration?

Go for it! This can be a fascinating and varied career.

First, internships and medium-term positions with law firms, arbitral institutions and even the UN or the international criminal tribunals can help graduates gain experience of arbitration, international law, and of navigating different cultures. They can be a great experience that demonstrates your commitment to pursuing a career in arbitration.

Second, get qualified as a lawyer as early as possible. Our trainees and junior lawyers learn a huge amount in their first few years. You will always benefit from time in a good law firm.

Third, take a risk on where you live and work. We see people move all over the region, enhancing their experience along the way. The beauty of this job is there are lots of different variations on what it can look like. Personally, I didn't want to spend my whole career in London.

In Asia, Hong Kong and Singapore are the leading arbitration hubs, and there are firms in mainland China, Seoul, Tokyo, Kuala Lumpur and other big cities in Asia that do great work and provide excellent training. Be willing to travel, explore and seize opportunities.

Your wife is also a lawyer with a successful career and you have two young children – finding time for family must be a challenge. How can law firms and other employers support working parents?

There are many ways employers can make their people feel supported when they have kids. Obviously, it's important to have strong policies in place, so people are treated consistently across an organisation.

Employers need to support their people to find the arrangements and balance between home and office that works for the individual. Different people have different priorities, whether it's taking kids to school, being home for bath time or working a condensed week. It is important to create an environment where people feel confident in expressing those preferences and trying to make them work.

When my children were born, I benefitted from the firm's policy of shared parental leave for male and female staff. I was the first male partner in Asia to take this leave, twice in my first three years of partnership. I timed my leave so I could be home when my wife was returning to work. I think that was helpful for her and allowed me time to learn from my own mistakes, get to know our children and form my own views about how to care for them. It also helped us set up our new normal of being working parents and relying on lots of help to care for our children. It was a memorable time that I was lucky to have.

Where is your happy place?

On the snow!

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MENA and arbitration in 2022 – **Change, development and uncertainty**

From shake-ups in Dubai to seats vying for position, 2022 proved a frenetic year for Middle East and North African disputes

2021 saw a seismic shake-up of the arbitration landscape in Dubai. Decree No 34 of 2021 (the Decree) was issued, which abolished the leading regional arbitration institution, the DIFC-LCIA Arbitration Centre, and transferred its future caseload to the Dubai International Arbitration Centre (DIAC). Shortly afterwards, DIAC issued new rules (see our July 2022 edition of Inside Arbitration for more information), which represented a total overhaul of its proceedings.

Nearly a year has now passed since the Decree was passed. In this article, we assess how Dubai has weathered the storm and review other key developments in the Middle East and North Africa (MENA) region.

DIAC – No visibility on the future as yet

After 15 years, the DIAC Arbitration Rules were updated in 2022, bringing them in line with international standards. Further evidence of DIAC's ambition for international growth was its announcement earlier this month that it has refreshed its arbitration court, which is now comprised of 10 prominent international arbitration practitioners from around the world in addition to 3 Emirati practitioners.

DIAC is yet to release its 2022 statistics but we suspect there to be growth in the number of cases registered with the body in 2022. The statistics are unlikely to indicate what percentage of this increase has come from existing DIFC-LCIA arbitration clauses which were transferred to DIAC as a result of the Decree but we expect it to be the majority. DIAC is certainly striving to position itself as the region's leading arbitration centre but it is too soon to tell whether it will emerge as the preferred successor to the DIFC-LCIA Arbitration Centre. As discussed below, a number of other regional institutions have secured an increasing amount of arbitration work in the region over the past five years and may also have benefited from the uncertainty resulting from the release of the Decree.

> The DIAC Arbitration Rules 2022 have been well-received, particularly by parties who had provided for DIFC-LCIA Arbitration in their contracts and who may otherwise have felt obliged to apply out-dated arbitration rules they did not consent to.
>
> **NICK OURY, HEAD OF MIDDLE EAST CONSTRUCTION DISPUTES**

Dubai Arbitration Week – Post-Covid rebirth

As part of DIAC's positioning as the leading centre for arbitration in the region, it hosted a successful Dubai Arbitration Week in November 2022. The week saw arbitration practitioners return to Dubai in person *en masse* in stark contrast to the subdued online events of the pandemic years. The week saw 80 events across the five days, with many events being over-subscribed. Panel discussions addressed topics such as arbitrating in the MENA region, recurring challenges in enforcing awards in the MENA region and crisis management in the Middle East.

> Dubai Arbitration Week 2022 was a tremendous success – it was refreshing to see so many lawyers, arbitrators, experts and funders attend in person, reflecting Dubai's established place in the arbitration world and its continuing regional importance, notwithstanding the significant changes arising out of the Decree.
>
> **CRAIG TEVENDALE, HEAD OF INTERNATIONAL ARBITRATION AND ENERGY UK**

Unexpected decisions from the Dubai Courts

The past year has also seen some surprising decisions from the Dubai courts. In October 2022, the Dubai Court of Cassation refused to enforce an award issued under the LCIA Arbitration Rules on the basis that, while the award debtor had assets within the jurisdiction (in the form of shares in two companies registered and domiciled in the UAE), the award debtor itself was not domiciled in the UAE. The Court held that, as the UAE companies were not party to the arbitration, and the award did not include a specific order against them, the award could not be enforced against the debtor. This is a surprising decision from the Dubai Courts and seems to contradict the New York Convention (to which the UAE is a party). While there is no system of binding precedent in the UAE, we wait to see any repercussions on enforcement of assets in onshore Dubai.

Clarifications from the DIFC Courts

In a recent blog post (which can be read here), we commented on the decision of the DIFC Courts in *Ledger v Leeor* [2022] DIFC ARB-016, which found that the power of the DIFC Courts to grant anti-suit injunctions is not a given where the seat of the arbitration is in contention. Rather, the DIFC Courts will only do so where there is a "high degree of probability" that there was an agreement that disputes would be determined by arbitration seated in the DIFC or, otherwise, it was an "exceptional case" such that the DIFC Courts could do so. The key takeaway is that clearly agreeing the seat of arbitration is the DIFC is essential, if parties want the option to apply for anti-suit injunctions before the DIFC Courts.

The English Courts comment on enforcement of English judgments in the UAE

In the recent application for a security for costs order in *Invest Bank PSC and Ahmad Mohammed El-Husseini and ors* [2022] EWHC 3008 (Comm), the English High Court rejected arguments that there was a real risk of substantial obstacles to enforcement of English Court judgments in the UAE. This was on the basis that:

- the UAE Ministry of Justice had issued a letter to Director General of the Dubai Court, recognising reciprocity with the English courts;
- enforcement proceedings were territorial and therefore it was inherently improbable the UAE Court would assume jurisdiction of the proceedings; and
- there was no reason to suggest the UAE Courts would decline to enforce an English Court judgment due to awarding legal costs being contrary to public policy.

Notably, the judgment follows the enforcement of a UAE Court judgment in England in *Lenkor Energy Trading DMCC v Puri* [2020] EWHC 1432 (QB). Parties seeking to enforce English Court judgments in the UAE should take comfort that the English Courts are increasingly acknowledging that reciprocity applies between them and the UAE Courts. For more information, see our blogpost on the judgment here.

Vying for position – The growth of MENA arbitral institutions

While the UAE has been taking steps to enhance its standing as an effective arbitration centre in the region, it is not the only country to do so. Other countries have also increasingly recognised the benefit of being seen as a stable arbitral seat with an effective arbitration institution. The release of the Decree has only led to a greater push from those other countries seeking to fill the potential gap in the region.

- **The Saudi Centre for Commercial Arbitration (SCCA)**: The SCCA has been a significant challenger in the region for some time. While its 2022 caseload statistics are not yet available, 2021 saw a 587% year-over-year increase in its number of cases. The SCCA has also recently upped the pressure with two new announcements:
  - In November 2022, the SCCA announced the opening of an office in the DIFC, its first branch outside of Saudi Arabia. The intention is for SCCA Dubai to provide a comprehensive suite of alternative dispute resolution services, including arbitration facilities. The SCCA Arbitration Rules do not specify a default seat of arbitration, so it will be possible for parties to agree that the seat of the arbitration will be the DIFC (and therefore that the DIFC Courts will have supervisory jurisdiction). Meanwhile, the SCCA Arbitration Rules will be applied and its infrastructure utilised – giving DIAC some healthy competition on its doorstep.
  - In November 2022, the SCCA announced the establishment of an independent SCCA court (akin to the courts of other arbitral bodies) to determine technical and administrative issues related to SCCA-administered cases. Fifteen internationally renowned arbitration practitioners, from 13 different countries, will sit on the SCCA Court. The role of the Court (which will replace the current SCCA Committee for Administrative Decisions) will include reviewing emergency applications, determining jurisdictional objections and deciding arbitrator challenges.
- **The Oman Commercial Arbitration Centre (OAC)**: Having introduced new arbitration rules at the beginning of 2021, in July 2022, the OAC and the Chartered

Institute of Arbitrators signed a Memorandum of Understanding to work together to enhance the Sultanate of Oman's reputation as an effective dispute resolution centre. With a focus on increasing understanding of the procedure and benefits of arbitration through the Chartered Institute of Arbitrators providing a training programme in Oman, the hope is that the alliance will benefit those doing business in Oman and the wider MENA region. Meanwhile, the OAC continued to grow its profile and caseload in 2022, having introduced new arbitration rules in 2021 and with ongoing initiatives underway to launch new codes of ethics for experts, mediators and arbitrators.

- **The Bahrain Chamber of Dispute Resolution (BCDR)**: The BCDR recently launched the 2022 BCDR Rules of Arbitration which will apply to any arbitration commenced with BCDR on or after 1 October 2022. In addition to a number of changes aimed at enhancing the efficiency of arbitration proceedings, there are two new key provisions under the 2022 Rules. Firstly, there is a requirement for parties to disclose the existence of any third-party funding agreement entered into at any time before or during the arbitration, and the identity of the third-party funder. The intention is it will enable arbitrators to assess whether any third-party funding arrangements result in conflicts of interest, and the impact (if any) on the costs of the arbitration. Secondly, while it was understood tribunals previously had the authority to order security for costs, the 2022 Rules now grant tribunals the express power to do so.

The Organisation of Islamic Cooperation – An increasing focus for investor-state arbitration in the MENA region

What is the Organisation of Islamic Cooperation?

The Organisation of Islamic Cooperation (OIC) was established in 1969 to enhance and consolidate the links between the Islamic member states and strengthen economic co-operation, with a view to achieving economic integration and establishing an Islamic Common Market. It is currently the second largest intergovernmental organisation, after the UN, and has 56 member states.

The OIC Agreement

The Agreement for the Protection, Promotion and Guarantee of Investments among member states of the OIC was signed in Iraq in 1981 (the OIC Agreement). Twenty-seven OIC member states have ratified the Agreement, including the UAE, Saudi Arabia, Oman, Turkey and Nigeria.

Article 17-1 of the OIC Agreement provides that "until an organ for the settlement of disputes arising under the Agreement is established, disputes that may arise shall be entitled through conciliation or arbitration". The OIC Agreement then provides detailed procedures for the settlement of claims via conciliation and arbitration.

The OIC Agreement makes clear that the decisions of the tribunal are final and binding, with the force of judicial decisions. Importantly, the contracting parties are obliged to implement the decisions of the tribunal in their territory as if they were a final and enforcement decision of its national courts, irrespective of whether it is a party to the dispute or the investor against whom the decision was passed is one of its nationals or residents.

Arbitrations brought under the OIC Agreement

To date, UNCTAD has reported 19 arbitrations under the OIC Investment Agreement. Importantly, 14 of these remain pending as of January 2023. As such, this is a developing area of investment treaty arbitration. Most recently, Primesouth International Offshore, a Lebanese power company, brought proceedings against the Republic of Iraq in relation to the Al-Doura thermal power plant project in Baghdad. Interestingly, Primesouth has initiated arbitration proceedings under the OIC Agreement, as well as a contract-based ICSID claim against Iraq.

Why is the OIC Agreement important?

Some OIC member states, such as Egypt, Libya and Iraq, continue to argue that the OIC Agreement precludes investor-state arbitration, but tribunals have consistently rejected this jurisdictional objection, finding that Article 17 of the OIC Agreement constitutes a valid offer to arbitrate investor-state disputes.

> Until an arbitration centre is created under the OIC Agreement, the Agreement has been found to provide for ad hoc arbitration, with the option to attempt investor-state conciliation. Given the geographical reach of the OIC Agreement, and the broad protections it offers investors, it can be a valuable instrument to add to the arsenal of investors in countries across East Asia, the Middle East and Africa.
>
> **AMAL BOUCHENAKI, PARTNER, NEW YORK.**

> 2022 has seen Middle East arbitration centres take crucial steps to align themselves with some of the leading international institutions and show they are worthy competitors. While the most appropriate centre will differ in any given case, parties can now take greater comfort that Middle East arbitration centres provide a sound option. If you are unsure as to which arbitration centre to include in your contract, please do reach out to us.
>
> **STUART PATERSON, MANAGING PARTNER MIDDLE EAST AND HEAD OF MIDDLE EAST DISPUTE RESOLUTION.**

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The era of reconciliation – **How arbitration will tackle climate and human rights disputes**

The HSF Singapore Management University Asian Arbitration Lecture outlined how new concerns have eroded the barriers between private and public law

The Herbert Smith Freehills (HSF) Singapore Management University Asian Arbitration Lecture 2022 was delivered by University of Notre Dame professor of law and global affairs Diane Desierto and focused on human rights, environmental and climate change laws in the substance and procedure of international arbitration. The lecture was followed by a panel discussion with Singapore's solicitor-general Daphne Hong, Gitta Satryani, Singapore arbitration partner and Antony Crockett, arbitration partner and global head of HSF's business and human rights practice. In this article, we provide a snapshot of the major themes and issues raised through the lecture and discussion.

Inter-state, investor-state and commercial arbitration have increasingly wrestled with the complexities of human rights, environmental and climate change law and their impact on the substance and procedure of international arbitration. These areas of public law are more frequently asserted by parties as part of the corpus of applicable law to a dispute. Moreover, they often recognise the role of human rights law, environmental law and climate change law as part of either existing or changing regulatory frameworks that ultimately bear upon the ability of a sovereign state or non-sovereign party to perform legal obligations under contract or treaty.

At the outset of the lecture, professor Desierto observed that human rights, environmental and climate change laws are not homogeneous or monolithic bodies of *lex specialis* (meaning where two laws collide in a situation, the law governing a specific matter overrides the more general counterpart). The uniqueness of treaty and customary norms in each of these fields injects complexities to the substance and procedure of disputes submitted to international arbitration, including inter-state disputes, investor-state disputes and international commercial disputes. There is no definitive set of international law rules that harmonise and provide secondary rules for reconciling lex specialis with lex generalia.

The absence of a harmonisation mechanism or set of conflicts rules mean arbitral tribunals may adopt different methodological approaches, while seeking to ensure an appropriate exercise of the arbitral function within the scope of the tribunal's jurisdiction and competence. Methodological approaches vary:

- Firstly, there are strategies of accommodation and effectiveness (eg, seeking to give effect both to the commercial, investment or treaty instrument that serves as the basis of arbitral consent, while accepting some relevance for human rights, environmental and climate change laws).
- Alternatively, there are more formal approaches as to whether human rights, environmental or climate change laws are applicable in the context of any particular dispute.

Regardless of the methodological approach taken by a tribunal in dealing with arguments based on human rights, environmental or climate change law, professor Desierto argued the arbitral tribunal will have to contend with substantive and procedural considerations when these bodies of law interact with commercial contracts, investor-state contracts, investment treaties and other inter-state agreements. For example, tribunals may need to decide how human rights, environmental or climate change laws bear on jurisdiction, the availability and nature of interim measures to be awarded, the merits and issues of damages and remedies. Procedural considerations will include:

- the composition of the tribunal (particularly the expertise of arbitrators);
- the design of arbitral procedures;
- the participation of non-disputing parties;
- the evidentiary/fact-finding approach;
- the probative value and assessment of evidence submitted; and
- the supervisory role of state courts as well as questions relating to recognition and enforcement of arbitral awards.

Tribunals will always have to bear in mind the arbitral function and the consent on which their jurisdiction is based. They will need to manage expectations regarding the limits of their jurisdiction while also allowing for flexibility in determining how human rights, environmental or climate change laws may impact the resolution of disputes. Arbitrators will need to gain expertise in these areas while the composition of tribunals may need to become more diverse or more expert participation may be needed to illuminate the interpretations of these dimensions of a dispute.

Reparative expectations in human rights, environmental and climate change laws are also unique. Unlike the more predictable parameters of compensation and damages in commercial contracts or investment contracts, the public law nature of human rights, the environment and climate change may not be readily compatible with traditional approaches to assessing damages. Arbitral tribunals will have to manage parties' expectations on what reparative measures they can realistically authorise in international arbitration disputes where human rights, environmental or climate change law are inevitably invoked.

Professor Desierto concluded by arguing we have passed the age of possibilities for separation between public law and private law given the nature of climate change-related disputes and the fact that human rights challenges and climate change action affect cross-border commerce, investment and international relations. International arbitration will remain an important dispute resolution mechanism to adapt to this new era.

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Spotlight Interview
Elaine Wong

Elaine is a partner whose career epitomises what it means to work in international arbitration. Qualified in England and Singapore, she has spent time in Paris and Tokyo, and worked for the last three years in Singapore. In January, she re-joined our team in Japan, where she continues to act as counsel in arbitrations under all the major institutional rules, as well as leading multi-jurisdictional investigations and advising clients on issues relating to bribery, corruption, fraud, corporate governance and compliance. Elaine also sits as arbitrator.

Hear from **Elaine Wong** here

You are returning to Tokyo after your time in Singapore. How has Japan weathered the pandemic commercially and what kind of disputes are you expecting on your return?

Japan was significantly impacted by Covid. Its border closures were extensive and lifted only late last year. While the borders were closed, it was impossible to obtain visas for foreigners to enter Japan; companies faced real difficulties renewing their workforces, travelling for meetings or getting foreign consultants into the country for site visits, etc.

Japan remains the third largest economy in the world, so there were high levels of activity domestically during the pandemic. Nevertheless, the economy remains highly dependent on international trade, which obviously slowed during Covid. Our work for Japanese clients involves supporting them at all stages of their international investments. On the disputes side, that may mean acting for a Japanese trading house in an arbitration arising out of a major infrastructure or natural resources project, for example.

Other world events have also had an impact on Japanese investors. We recently advised a Japanese client on a dispute involving a significant Russian energy project; many other clients' Russian investments have been impacted by sanctions as well as the pandemic. Covid also had a big impact on manufacturing, including as a result of the semiconductor shortage, so we anticipate numerous disputes in that sector too.

Now it has re-opened, we are seeing huge amounts of activity in Japan. I have been there a few times recently, including immediately after the border controls ended. There were lots of foreigners in Tokyo on business and much buzz around the city as activity levels returned to normal.

Your practice straddles international arbitration and investigations, including bribery, corruption and corporate governance. Is corruption on the rise and is arbitration effective for resolving disputes involving corruption?

Globally, the enforcement landscape has been very active in the last few years. We are seeing high levels of activity from national authorities, regulators and the multilateral banks.

Japanese corporates and trading houses do business across the globe, including in regions where corruption is endemic. The nature of these investments, for example in the energy and infrastructure sectors, also mean clients frequently face requests for bribes or encounter illegal activity. Japanese corporations often acquire shareholdings in companies based in difficult jurisdictions, where corruption is commonplace. Pre-acquisition, it can be difficult to obtain a full picture of the target's customs and practices. Post-acquisition, it can be difficult to ensure those companies are compliant with our clients' head office requirements on bribery and corruption.

If there is a real allegation of corruption, the first step is to conduct an investigation to find out what happened and who is involved. We can then advise the client on its rights and obligations, including self-reporting requirements and internal processes.

Where the investigation confirms there has been corrupt activity and the share purchase or shareholders agreement includes anti-bribery and corruption representations and warranties, our client can potentially sue the seller for breach. Most often, that will be in international arbitration. Breaches of this nature can cause clients significant damage, through the cost of running the investigation and – in some scenarios – where they have had to report to a regulator and pay a fine. Arbitration provides effective recourse that is enforceable virtually worldwide, thanks to the New York Convention.

Arbitration has always been a very international process, involving people from all over the world and extensive travel. Will the post-Covid world of virtual hearings and meetings mean an end to international arbitration as we know it?

Some of the travel is definitely gone for good, now that we know so much can be done remotely. I would expect most procedural hearings, for example, to be held virtually from now on.

It is less clear what will happen with evidentiary hearings. A lot depends on the size of the dispute, the length of the hearing, the administering institution, and – crucially – the preferences of the arbitrators, parties and counsel. Most likely, we will end up with a hybrid approach. For example, witnesses who are unwilling or unable to travel to a hearing can easily be examined virtually. This was already happening before the pandemic, but is now more widespread and easier, thanks to Covid-driven advances in technology. The ability to host meetings and hearings virtually also makes it easier to get all the various participants together. This, in turn, should reduce delay and help the arbitration process run more efficiently.

Overall, I don't think arbitration will become less international. The field is international by its nature, involving a mixture of laws, legal systems, and the legal backgrounds of the parties, their lawyers and the arbitrators. I can't see that going away.

Diversity remains a hot topic, but there are signs of progress – particularly as regards gender. As an Asian female practitioner who also sits as arbitrator, how do you encourage parties to consider a broad range of arbitrator candidates? And are parties really better off with younger, more diverse tribunals than a bench of older, experienced usual suspects?

As counsel, we have a big part to play in encouraging clients to consider a broad range of candidates when they select an arbitrator. Herbert Smith Freehills is very focused on diversity; we have systems to help clients (and ourselves) appoint diverse tribunals. The firm maintains a list of female arbitrators, for example, and we aim always to include qualified female arbitrators in our suggestions to clients. I definitely think it's important to have a diverse range of arbitrators, not just a mix of male and female, but diverse in all respects: culture, nationality, ethnicity and legal background, for example. It makes sense to tap into the minds of people with a range of backgrounds; it is healthier for the outcome of the case and the profession – it helps us regenerate.

Moreover, the usual suspect arbitrators are extremely busy; appointing younger or less well-known practitioners ensures our clients get a tribunal that can give their dispute the time and attention it deserves.

What would you have done if you hadn't become a lawyer?

I love writing, so maybe a journalist. I would love to be a travel writer.

Where would you like to retire, and why?

Italy. It has gorgeous nature and amazing food; I love the people and the fashion, the lifestyle, and just the whole feel of it. I'd totally embrace *la dolce vita*!

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Our global arbitration practice:
A snapshot of 2020 – 2022

Key stats

Current portfolio value is **$101.18 BILLION** with **4** cases with a claim value of over **$5 BILLION**

9 cases with a claim value of between **$1-5 BILLION** and **14** cases with a claim value of over **$250 MILLION**

52 arbitrator appointments for partners at HSF

HSF participated in **59** merits hearings and 9 jurisdiction hearings. 8 of these hearings were for cases with a claim value of over $500m and 46 were virtual or hybrid hearings

154 live arbitrations

7 active treaty based arbitrations

20 of 154 cases are ad hoc

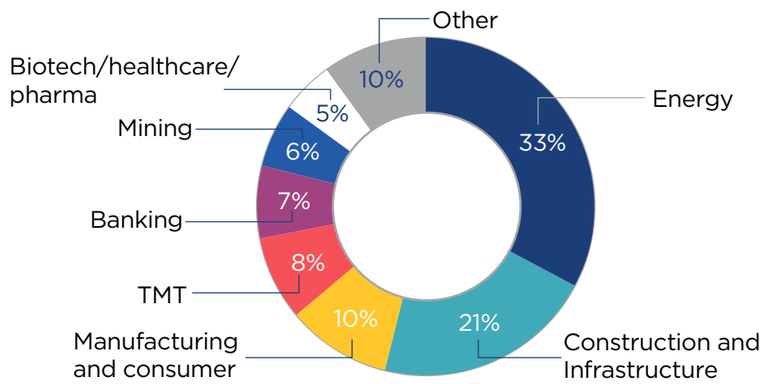
the rest are institutional

29 different arbitral institutions in our current caseload

34 different seats of arbitration in our current caseload

69 of our active cases involve teams from at least two different offices across our Global Arbitration Practice.

We offer a global team to suit your needs



Settled **37** cases, of which 5 were cases of over **$500 MILLION** in claim value

Read our International arbitration and Public International Law blogs:
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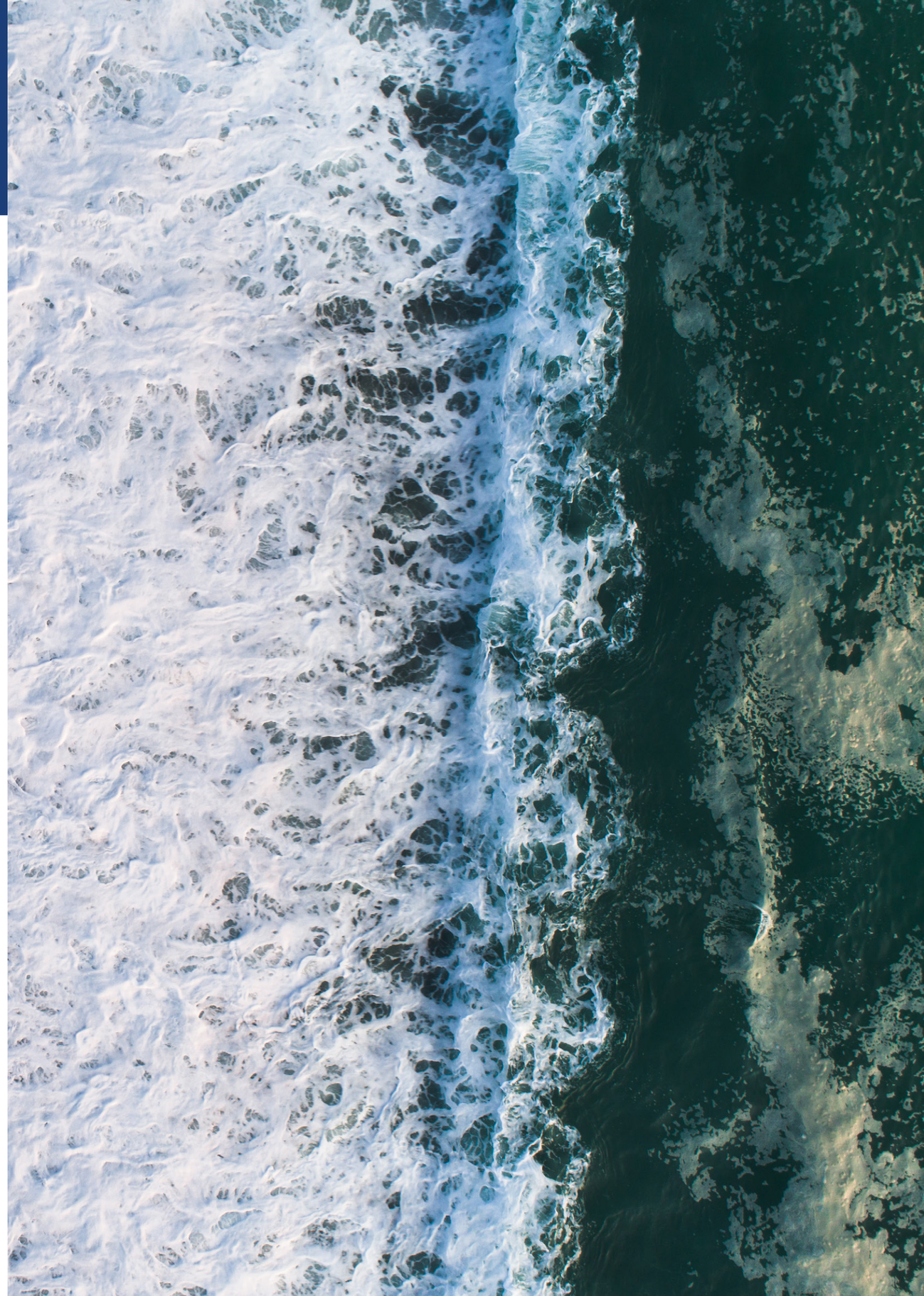

Notes

For a full list of our global offices visit **HERBERTSMITHFREEHILLS.COM**