INSIDE ARBITRATION

PERSPECTIVES ON CROSS-BORDER DISPUTES

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Welcome to the fourteenth issue of Inside Arbitration

In our previous issue I hoped for "clearer skies and more positive prospects for us all". Those hopes were dashed only a few weeks later as the Russian invasion of Ukraine unfolded. The invasion continues to have appalling consequences for the people of Ukraine. In response to these actions Herbert Smith Freehills (HSF) has closed our Moscow office and ended all work associated with the Russian State, while supporting our Ukrainian and Russian colleagues who have been directly impacted by the conflict.

The images from Ukraine continue to shock us all. Moreover, the invasion has had global ramifications, adding to the pressures of the post-Covid recovery and exacerbating the already challenging cost-of-living crisis, with soaring inflation as energy, food and consumer product prices have spiked. The invasion has also reignited concerns about national interests and energy security and prompted political re-alignments. Many of our corporate clients have been faced with closing their Ukrainian operations and supporting staff through enormously challenging circumstances. Others have grappled with the same decisions as HSF in terms of their Russian presence. Some are struggling with the inflationary pressures, while the situation in Ukraine has added to an already fractious disputes landscape for many of our energy clients.

As a consequence, we felt the war and its impacts should be front and centre of this issue. In our lead article Andrew Cannon, Hannah Ambrose, Jake Savile-Tucker and Olga Dementyeva assess the war's impact on contractual relationships, the effects of the ongoing sanctions regimes and the scope for investment treaty claims against Russia. It is clear that international firms pulling out of Russia have no easy options, but being forewarned is crucial. In our second article, Craig Tevendale, Louise Barber and Divyanshu Agrawal analyse the conflict in the context of wider trends and pressures in the oil & gas sector and assess the energy disputes outlook for 2022 and beyond.

Unsurprisingly, such political instability has jolted financial markets, including cryptocurrencies, which have been mauled as investors flock to safer assets. Simon Chapman QC and Troy Song look at the types of disputes that can arise out of cryptocurrency transactions, spotlighting a recent case that demonstrates how the courts are wrestling with thorny issues of jurisdiction in this inherently borderless market.

While the war in Ukraine has dominated our screens and thoughts, events elsewhere have had significant personal and international implications.

Unprecedented April temperatures in India and Pakistan and devastating floods in Australia have sharpened focus on climate change. Our article by Amal Bouchenaki, Craig Tevendale, Maguelonne de Brugière and Olga Dementyeva measures the carbon consequences of our arbitration work. Crucially, we compare the carbon footprint and costs of in-person and virtual hearings to help arm clients with the tools and facts to achieve their own climate goals.

In our last issue Christian Leathley, Chiara Cilento and Maria Lucila Marchini shared their insight into the sustained controversy surrounding investor-state dispute resolution. In this issue, Andrew Cannon and Vanessa Naish assess the reform process that has emerged in response, considering the new ICSID rules and what they mean for investors and states. They also explore likely further changes over the coming years.

With more of a regional focus, Stuart Paterson, Nick Oury and Patrick O'Grady consider recent Middle East developments and the impact on arbitration of the dissolution of the DIFC-LCIA by Dubai government decree. Chad Catterwell and Guillermo Garcia-Perrote, meanwhile, provide insight into the private equity scene in Asia-Pacific post-pandemic and the implications of recent developments for disputes.

On 1 May we saw the promotion of three new partners in our Global Arbitration Practice: James Allsop in Tokyo, Jonathan Ripley-Evans in Johannesburg and Daniel Waldek in Singapore. We also had three promotions to counsel: Vincent Bouvard in Paris, Guillermo García-Perrote in Sydney and Yosuke Homma in Tokyo. These promotions span our global practice and demonstrate the firm's investment in arbitration talent across our network. As usual at this time of year, the Spotlights in this issue profile our three new partners. I hope you enjoy getting to know them, professionally and personally.

Finally, don't forget our Arbitration news and developments feature, where we highlight the latest issues and developments in international arbitration.

Feedback on this publication is, as always, welcome.

Paula Hodges QC
Partner, Head of Global Arbitration Practice

Read our Arbitration and Public International Law blogs at

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

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

Arbitration news and developments

From Hong Kong paving the way for outcome-based fees to updates to the Commercial Court Guide, here are the major recent developments in global arbitration.

1. In one of the first English decisions relating to non-fungible tokens, in *Soleymani v Nifty Gateway* the English High Court halted a consumer's claim for a declaration that an arbitration agreement in an auction platform's terms of use was unfair. While the court held it had jurisdiction to hear the non-arbitration aspects of the claim, proceedings were stayed under section 9 of the English Arbitration Act in favour of New York arbitration, which would determine the validity and enforceability of the arbitration agreement. For more information, contact Simon Chapman QC and Olga Dementyeva.

2. The Hong Kong Court of Appeal made a landmark ruling in a case concerning escalation clauses, in which Herbert Smith Freehills represented the successful party. The Court decided disputes concerning pre-conditions to arbitration are matters of admissibility rather than jurisdiction and should therefore be decided by arbitral tribunals. This is an important case of international significance as it is the highest authority on this point in any model law jurisdiction. For more information, contact Simon Chapman QC.

3. Hong Kong has officially published a bill that would allow lawyers to agree outcome-based fees for arbitration work in the territory. Under the proposed reforms, parties would benefit from a broad range of fee options, including conditional fee agreements (CFAs), damages-based agreements (DBAs) and hybrid DBAs. For more information, contact Kathryn Sanger and Briana Young.

4. The updated Commercial Court Guide was released in February 2022. Further revisions have been made to deter spurious challenges to arbitral awards and confirm the court's powers to dismiss such claims and sanction parties who bring them. For more information, contact Craig Tevendale or Vanessa Naish.

5. On 4 May 2022, Singapore's bill to permit CFAs came into effect. Lawyers in Singapore can now enter into CFAs in selected proceedings, including arbitration and certain Singapore International Commercial Court proceedings. For more information, contact Alastair Henderson, Tomas Furlong, Gitta Satryani or Daniel Waldek.

6. The Judiciary of England and Wales has published the Commercial Court Report 2020-2021. This year's report continues to show the English courts' non-interventionist approach to arbitration and the high threshold for a successful challenge within the jurisdiction. For more information, contact Craig Tevendale or Vanessa Naish.

7. Paula Hodges QC has been re-appointed for a second term as the London Court of International Arbitration (LCIA) President. The LCIA also released its annual Casework Report for 2021, showing an increased number of cases from North America and the Middle East and continued improvement in arbitrator diversity in appointments by the LCIA Court. For more information, contact Andrew Cannon or Louise Barber.

8. On 21 March 2022, the member states of the International Centre for the Settlement of Investment Disputes (ICSID) approved wide-ranging amendments to ICSID regulations and rules, which came into effect on 1 July 2022. For more information, see our article below.

9. In September 2021, the Dubai International Financial Centre Arbitration Institute (DAI) was dissolved. The DAI was the counterparty of the London Court of International Arbitration (LCIA) in an operating agreement that established the DIFC-LCIA. On 28 March 2022, it was announced the LCIA would administer all existing cases as of 20 March 2022 under the DIFC-LCIA rules. All arbitrations referring to the respective rules of the DIFC-LCIA commenced on or after 21 March 2022 shall be registered by DIAC unless otherwise agreed by the parties. For more information, contact Paula Hodges QC, Stuart Paterson or Nick Oury.

10. The South China International Arbitration Center (Hong Kong), or SCIAHK, recently approved the SCIAHK rules, which came into force on 1 May 2022. For more information, contact Briana Young.

11. Turkmenistan has become the 170th state party to the New York Convention, having acceded on 4 May 2022. The convention will come into force for Turkmenistan on 2 August 2022. For more information, contact Andrew Cannon.

The war in Ukraine – **implications for investments and contracts**

In the light of Russia's invasion of Ukraine, companies worldwide have announced that they are withdrawing from Russia. Unwinding years of legal relationships is complex and may involve risks of liability as well as potential claims. This article explores some of the principal considerations in relation to terminating Russia-related commercial contracts. It also highlights how investment treaties may offer an avenue for recourse if investments in Ukraine or Russia are affected by Russian state action.

Russia's invasion of Ukraine: Part 1: implications for commercial contracts

When Russia invaded Ukraine in February 2022, the international reaction against Russia was swift and significant. At the governmental level, many countries moved very quickly to impose sanctions packages aiming to cut the flow of foreign capital into Russia. Russia responded by passing a range of new laws, often referred to as 'counter-sanctions'.

Practically all international companies with operations in the region have been affected. Primary concerns have included ensuring the safety and well-being of employees on the ground and/or directly impacted by the invasion, ensuring compliance with the new international sanctions and monitoring the evolving Russian legislation. And many companies have taken decisions to bring their Russian operations to an end, or are still considering their position.

Any decision to end or to scale back operations in Russia will of course require careful consideration of the contractual rights and obligations of the parties. If a party gives notice that it intends to terminate a contract in the absence of a clear contractual right, it risks a complex and expensive legal dispute and potentially significant liability. Many commercial contracts do not contain rights to terminate contracts at will, and therefore a party wishing to bring a Russia-related contract to an end may need to invoke other provisions in the contract such as a force majeure or material adverse change ("**MAC**") clause, or to have resort to other legal doctrines such as the doctrine of frustration.

We consider these points further below.

Force majeure clauses: "prevent" and "hinder" are not the same thing

The legal systems of many countries with a civil code, including Russia, recognise a doctrine of force majeure which operates in circumstances where performance of the contract is prevented, delayed or hindered by circumstances outside the reasonable control of the parties.

However, under English law, the availability of force majeure depends on whether it is expressly included in the relevant contract, and upon the precise terms of the relevant clause.

Force majeure clauses commonly refer to a list of circumstances or events, including an outbreak of war or the passing of new legislation, not foreseen by the parties at the time of entering into the contract, which have rendered performance of obligations under the contract impossible (or significantly more difficult).

The precise wording of such a clause is very important. For example, some force majeure clauses are worded as the unforeseen event having to "prevent" performance of the contract, whereas others use the language of "hinder" or "delay". If a clause requires the force majeure event to prevent performance, this generally means that the clause can only be invoked if it is physically or legally impossible for the party invoking the clause to perform its obligations. This is a high standard to meet. On the other hand, when the words "hinder" or "delay" are used, contractual performance would generally need to be substantially more difficult (even if not impossible). There is a large body of English case law on this distinction.

Many force majeure clauses contain an express mitigation requirement, and in any case the English courts have implied into force majeure clauses that the party seeking to rely on it has to take reasonable steps to mitigate against the effects of the relevant circumstances or event. For example, where a party seeks to rely on sanctions as the force majeure event, it should first explore whether a licence is available or other manner of lawfully complying with the contract.

Some contracts may contain a stated right of termination where circumstances constituting force majeure persist for a specified period of time. This right may only be exercisable by the party that has not declared the force majeure, or by either party. Where there is no such provision, there is no automatic termination right.

Clearly the value of a force majeure clause depends on its terms and the circumstances in which it can be applied. It may not assist where a company makes a policy decision that it no longer wishes to continue a Russia-related contract. However, for companies directly impacted by the war in Ukraine, sanctions against Russia, or new Russian legislation, the scope of any force majeure clause should be closely considered.

> The application of force majeure clauses to any particular circumstances is rarely clear-cut and disputes can often arise. For example, a significant number of cases arising from the Covid-19 pandemic are currently being litigated or arbitrated.
>
> **ANDREW CANNON**

MAC clauses

Material Adverse Change (MAC) clauses are typically found in finance agreements and M&A transactions, but may also be used in other contracts as a risk allocation tool. They often permit a party to terminate a contract but, if triggered, may have other consequences, such as acceleration of contractual obligations. The relevance of a MAC clause in the context of the invasion, the sanctions or Russia's reaction to the international response, will be determined by its terms. The English court has generally required a high threshold to be reached before finding that a material change has occurred.

Doctrine of frustration

The doctrine of frustration may also be relevant. The doctrine may apply if it can be shown that performance has become impossible or illegal in unforeseen circumstances, or when the performance has become radically different from that which was agreed, and where there is no contractual provision (such as force majeure) which provides for such an event.

It follows that in circumstances where a Russian counterparty is sanctioned, a terminating party may be able to avail itself of the doctrine of frustration to bring the contract to an end and discharge any further obligations under it.

HERBERT SMITH FREEHILLS

The courts apply the doctrine strictly, considering whether there is anything the party claiming frustration could have done to avoid the frustrating event (such as seeking a licence), as well as whether that event affects the whole of the contract or only certain obligations and the degree of permanence of those circumstances.

Difficulties in performance that arise from consequences of the invasion – rather than the sanctions themselves – depending on their severity may not be regarded as of sufficient permanence to establish the contract is frustrated. An example would be the impact on supply chains.

In all of these situations, the law under which any claimed illegality arises should also be carefully considered. As a matter of English law, performance may only be excused where it is illegal under the governing law of the contract or in the place of performance.

Some practical considerations

- **Compile a list** of all relevant commercial contracts potentially affected.
- **Review the terms of each contract** to evaluate your options, including the wording of any force majeure or MAC clauses, any sanctions-related representations and warranties, and the scope of any express termination rights.
- **Collate evidence** of the impact of the Russian invasion on operations and any steps taken to avoid or mitigate the impact.
- Seek to **maximise privilege protection** in respect of discussions of termination rights and avoid creating unhelpful documents which may be disclosable in subsequent legal proceedings.
- Assess options for **negotiating a commercial solution** with counterparties, mindful of any constraints imposed by sanctions.
- Ensure **a clear right exists to terminate** any contract before doing so, to minimise the risk of a repudiatory breach.
- Check the dispute resolution options and be ready to **arbitrate or litigate any dispute** arising out of termination.
- Check for relevant **developments of Russian law**, for example, under a recent decision, Russian courts may take jurisdiction to hear disputes involving Russian-sanctioned individuals and entities as well as entities controlled by them.
- Throughout the process, **keep sanctions developments under review**, as these change rapidly. Consider not only the sanctions regime of the country where you are based, but also other key regimes given the risk of secondary sanctions. You can subscribe to HSF's Sanctions Tracker for reports on key developments.

Investment treaty protections and potential claims against Russia

Companies whose operations in Ukraine, Russia or elsewhere have been adversely affected by Russia's conduct will be considering whether there are ways to either recover or mitigate their losses. Bilateral investment treaties (BITs) may present an opportunity for recourse.

BITs are agreements between two or more countries (**states**) containing reciprocal undertakings for the promotion and protection of private investments made by nationals of the state signatories in each other's territories. Such agreements have historically been agreed to provide confidence to foreign investors that their investment will not be negatively affected by irregular action by the state hosting the investment and, if it is, to enable the investor to claim damages through an independent arbitral process rather than only in the host state's own courts.

Each treaty must be considered on its terms, but BITs commonly include: protection against unlawful expropriation of an investment without adequate compensation; a guarantee of fair and equitable treatment; a guarantee of full protection and security for the investment and investor; and the right to repatriate profit and capital. BITs may also include war clauses guaranteeing compensation for losses owing to an armed conflict.

As well as Ukraine, Russia has entered into BITs with major economies including the UK, UAE and Japan. Many of Russia's BITs seek to place limits on an investor's ability to pursue a dispute through arbitration but some tribunals have nevertheless considered themselves able to take jurisdiction.

A number of claims were initiated against Russia under the Ukraine-Russia BIT following Russia's invasion and annexation of Crimea. Tribunals found that investments in Crimea prior to its annexation were protected under the Ukraine-Russia BIT by virtue of the fact that Russia was in *de facto* control of the territory in Ukraine in which the investments had been made.

There are also a number of jurisdictional requirements that must be satisfied in order to successfully bring a claim, and these will depend upon a careful review of the nature of the investment and investor in light of the wording of the BIT.

Oschadbank v Russia

This case was brought against Russia by a Ukrainian state-owned bank following Russia's invasion of Crimea. Oschadbank operated a number of branches in Crimea and claimed that the banking regulations imposed by Russia in Crimea after its invasion resulted in an unlawful expropriation of its investment in violation of the Ukraine-Russia BIT. Oschadbank won a US$1.1 billion award in the arbitration, with the tribunal upholding its jurisdiction, although the Paris Court of Appeal (the court of the seat of the arbitration where a challenge to the award was brought) later ruled that the BIT in question did not protect investments made prior to 1992.

Companies with operations or investments in Russia may be concerned at the prospect of retaliatory measures by Russia, such as counter-sanctions, seizure of shares or immovable property or the blocking of access to funds. Accordingly, they should consider their corporate structures and potential protections offered by any relevant Russian BITs against such measures.

Russia has generally chosen not to participate in treaty arbitrations arising from its invasions of Crimea and Georgia and, when it has, it has participated only by sending a letter challenging jurisdiction or at the quantum stage. However, Russia has typically become highly active in challenging the awards of the tribunals in the local courts of the seat and resisting enforcement. As the sanctions regime is broad and complex, enforcement strategy should be considered at the outset of any claim.

Conclusion

Businesses with operations in Russia or Ukraine are facing difficult decisions. Terminating contracts with Russian counterparties for operational or reputational reasons or pursuing relief for lost or damaged investments carry significant risks and require careful consideration. Ultimately, these risks can be managed but there are few easy answers.

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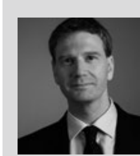
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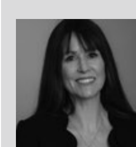
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The future of energy disputes: **shocks to the system**

Battered supply chains and turbulent geopolitics mean the energy sector should brace for a surge in disputes

When it comes to disputes, the energy sector is facing as complex a time as it ever has. Some of the challenges, such as climate change, have been on the agenda for a long time. Some are perennial hazards, like state interference. But the industry also finds itself faced with a range of immediate challenges that it would have been hard to anticipate five or ten years ago. These include fallout from a global pandemic and severe supply chain interruptions; an oil and gas supply crunch due to the Ukraine-Russia conflict; and intense national debt and cost-of-living pressures leading to windfall taxes on oil and gas companies being mooted or introduced in many jurisdictions.

In short, there has been a confluence of forces driving soaring oil prices in 2022, only two years after the industry was forced to confront the implications of unusually low prices. The full impact of this volatility on the long-term energy transition is unclear. But in the short-term, we can reasonably forecast a rise in resource nationalism in response to energy security concerns, price reviews as parties seek to rebalance their contracts and turmoil in investment markets.

While high oil prices have historically led to fewer disputes – there being less need to chase every dollar when returns are high – the supply crisis and political instability accompanying this price spike promises to stoke a significant increase in disputes. This article considers a range of areas we expect to be key battlegrounds in energy disputes in the years ahead.

Decarbonisation and climate change

The largest and most diverse area for disputes remains the energy transition, as the sector grapples with the brutal realities of decarbonisation. Corporate decarbonisation policies are fertile ground for a mismatch between commercial counterparties, with companies' objectives being defined in different terms and on different timetables. Where parties in a joint venture have contrasting approaches to decarbonisation, they may have different attitudes to what is an appropriate operational adjustment to make to reduce the emissions of a project, particularly as corporate commitments often go beyond regulatory requirements. In many cases, there will be a lack of clarity in existing contracts about how to manage this. Warranties, indemnities, force majeure clauses and other contractual provisions are unlikely to be well-suited to allocate risk and responsibility for the consequences of such fundamental changes within supply chains and joint ventures.

The pace of change required by the energy transition will likewise inevitably give rise to further disputes. The growing appetite for renewable energy and decarbonisation of the current energy supply chain will continue to spawn new infrastructure projects, many public-private partnerships, and new collaborations between competitors as well as between traditional energy producers and new technology and renewables counterparts. Disputes will arise as new partnerships are implemented and M&A transactions are completed at speed, generated by mismatches in expectations between partners, technology and designs not fit for purpose, construction projects built on overly-ambitious timetables and transactional warranties (including as to carbon impact) not being met.

Governments may also become key players in climate-change related disputes, whether from a regulatory perspective or as respondents in investment treaty claims as states seek to amend or terminate longer-term hydrocarbon contracts, or in relation to the decommissioning of assets and continuing environmental liabilities.

Disputes arising from the Russian conflict

Of course, much of the current oil price volatility, along with a range of supply chain constraints, stems from Russia's invasion of the Ukraine and the global response. Sanctions against Russia are unprecedented and far-reaching, particularly addressing its oil and gas sectors, while a Russian decree requiring European importers to pay in roubles (by way of 'counter-sanctions') has further threatened access to gas.

On one hand, this has exacerbated pressures on existing contracts and supply chains, with parties seeking to rely on force majeure/material adverse change clauses or negotiate exits from affected projects and contracts. Companies may also be considering how to make use of investment treaty protections to recover lost value, against a background of uncertain dispute resolution mechanisms and enforcement options under contracts with Russian entities. On the other, such pressures have stoked Western calls for accelerated clean energy transition and can be expected to drive more frenetic M&A activity in the medium term.

State action and potential for disputes

Against this turbulent setting, there are many reasons for increased state involvement in the energy sector, with the Ukraine conflict prompting a renewed focus on energy security. At the same time, governments are evaluating the impact of increased public spending to combat Covid-19, together with the current inflationary crisis and ongoing pressure to act on commitments to address climate change.

We are seeing and expect to see increased state involvement in the following four areas:

1. **Windfall profit taxes and retrospective tax liabilities** – increased risk that windfall taxes will be imposed in a high oil price environment, with Spain and the UK among those to have already announced a windfall tax.
2. **Cost audits and cost recovery disputes** – increased government involvement in cost audits and national oil companies (NOCs) challenging investment decisions and expenses incurred by operators.
3. **Indirect government pressure on existing projects** – significant state pressure where revenues under existing projects are due to NOCs or where the oil or gas being produced and supplied is a critical source of energy supply for the state.
4. **Decommissioning and other environmental liabilities** – changing regulatory frameworks for decommissioning, and increased risks around abandonment and allegations of environmental damage.

Price reviews

The volatility in gas demand over the past few years has already given rise to price reviews in liquefied natural gas (LNG) share purchase agreements (SPAs) and is continuing to do so. The current high oil price is likely to contribute to that trend, as contract price in many such agreements is linked to oil or oil product prices.

Even before Covid-19, many buyers viewed the LNG market as oversupplied as more projects commenced production in Australia and the US. This consensus contributed to low LNG spot prices even as oil prices stayed comparatively high, prompting some buyers to initiate price reviews under oil-linked SPAs. This was exacerbated during lockdowns when buyers were looking to defer cargoes and considering force majeure claims.

More recently, there has been a significant shift towards energy price increases as economies have reopened, exacerbated by the Ukraine crisis. In this market, we expect many sellers to push for contract price increases under LNG SPAs.

Given these shifting market dynamics, two issues will be a key focus in any price review dispute, including arbitration where such a mechanism is available:

1. **Review period** – whether the review period for the price review ends before the recent price increases. If so, a buyer might try arguing for a decrease on grounds it was an oversupplied market during the relevant period and any recent price increases should be taken into account in a future price review.
2. **Factors to be considered by parties** – whether the price is to be benchmarked against other long-term contracts only, or whether new medium and short-term LNG contracts can also be considered. It may take some time before high oil and gas prices are reflected in long-term contracts. Depending on the wording of the price review clause, sellers may not be able to rely solely on increased short-term LNG prices to push for an increase in prices.

Transnational tort claims

Following the UK Supreme Court decisions in *Vedanta* and *Shell*, we expect to see further growth in attempts by claimants to 'pierce the corporate veil' and pursue transnational parent companies for actions of their overseas subsidiaries. With these cases having opened the door to establishing such parent company liability (at least as a matter of jurisdiction), similar trends are emerging in other common law jurisdictions, particularly in Canada and Australia.

In these cases, the key question was the extent to which the parent company assumed or shared with the subsidiary the management of the relevant operations or activities. This included through management activities, providing defective advice or policies to a subsidiary, promoting and implementing group-wide safety and environmental policies, or holding out that the parent company exercises a particular degree of supervision and control over the subsidiary.

We expect to see future attempts at such claims, scrutinising connections between parent companies and their subsidiaries – particularly via governance procedures and policies, especially in connection with environmental and/or climate change issues. Given current uncertainty as to when parent company liability will arise, there is also the possibility of speculative claims geared towards attempting to extract early settlements.

Hemmed in on all sides, wrestling with intense structural and short-term pressures – it is hard to remember a time when the energy industry has faced risk on so many fronts. Casualties and collateral damage look inevitable.

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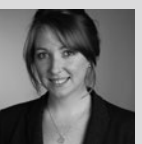

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Cyber disputes – **are there borders in the blockchain?**

With the cyber economy fast emerging, courts are struggling with drawing borders in a decentralised world. One recent case hints at the path ahead

In the 1997 book *Sovereign Individual*, the authors envisioned a global cyber economy where individuals base themselves wherever they desired. Over two decades later, a blockchain economy is emerging, partially realising that vision. In this new world, transactions and services are conducted in a borderless, decentralised manner. This poses fundamental questions for legal systems designed for conventional businesses with connections to physical locations.

One recent case gives some indication on how the English courts are responding in a dispute about trading blockchain-based non-fungible tokens (NFTs) between a trading platform and its user (*Soleymani v Nifty Gateway LLC [2022] EWHC 773 (Comm)*). In essence, the court attempted to draw jurisdictional markers in this borderless dispute.

100 winners of one NFT auction

Mr S, an art collector in Liverpool, was an active user of US-based NFT trading platform Nifty. In April and May 2021, Mr S participated in an auction of digital art held by Nifty, placing a bid for an NFT associated with an artwork by Beeple titled "Abundance". His US$650,000 bid was the third highest. Nifty informed Mr S he was a winner in the auction and had to pay the amount of his bid. According to Nifty's rules, the highest 100 bidders were winners of a numbered edition of the artwork corresponding to the position of their respective bids. Accordingly, Nifty claimed that Mr S was obliged to pay for the third edition of Abundance. Upon learning of Nifty's rules, Mr S refused to pay.

Arbitration in New York

Nifty commenced arbitration in New York against Mr S, relying on its terms and conditions, which it alleged Mr S agreed to after opening his account in February 2021. The terms require the parties to submit their disputes to JAMS, an arbitration service provider in New York. Under the JAMS policy, in a consumer arbitration, additional standards of fairness are applied to the proceedings. The arbitrator determined Mr S met the definition of a consumer. Mr S applied to dismiss the arbitration, arguing Nifty's terms had not been properly brought to his attention. The arbitrator ordered an evidentiary hearing in September 2022.

English court proceedings

While contesting Nifty's claims in the New York arbitration, Mr S launched proceedings in the English courts, arguing the New York governing law clause and the arbitration clause in Nifty's terms were unfair and should not be binding on him. Mr S relied on the Civil Jurisdiction and Judgments Act 1982 (CJJA), which states consumers are entitled to resolve disputes in their domestic courts. This mirrors the Recast Brussels Regulation (EU) No. 1215/2012 (Brussels Regulation), which regulates the recognition and enforcement of civil and commercial judgments in the European Union.

Nifty contested the English court's jurisdiction and applied for a stay of the court proceedings. Nifty argued the CJJA does not apply to arbitration-related claims. Despite acknowledging its business had global reach, Nifty also alleged it did not direct any marketing activity toward the UK. Thus, Mr S could not establish jurisdiction under the CJJA.

In light of the New York arbitration, the court had to decide on two issues:

1. Did the English court have jurisdiction under the CJJA?
2. Could Nifty stay the English court proceedings under the English Arbitration Act 1996?

Jurisdiction under the CJJA

The court considered that the CJJA provisions did not apply to Mr S's claim that the arbitration clause was unfair, because those provisions do not apply to arbitration. However, the arbitration exception did not apply to Mr S's other claims. Accordingly, the court needed to decide whether there was a consumer contract for the purposes of the CJJA. In particular, it had to rule on whether Nifty directed commercial activities in the UK.

Considering the parties' arguments, the court discussed the following factors in finding for Mr S:

1. The court disagreed with Nifty's argument that its business was "New York-centric" as some of its activities were directed at the UK. Applying the approach in *Bitar v Banque Libano-Francaise [2021] EWHC 2787* (QB), this also shows gaining business in the UK was not entirely incidental or unimportant to Nifty's marketing strategy.
2. Other activities were specifically directed at the UK. For example, Nifty had promoted an NFT-related webinar hosted by a group based in London. Nifty's founders had also featured in an interview published in the UK newspaper, *The Times*.
3. In light of the features of the NFT market (which was accepted by Nifty as borderless and global), some US-related factors were of limited weight. The evidence did not suggest Nifty's business activities were directed to US customers, as opposed to customers elsewhere.
4. The relevant case law (*Pammer v Reederei Karl Schluter GmbH & Co KG [2011] 2 All ER (Comm) 888*) related to businesses that provided services relating to a specific location. The factors explored in *Pammer* were not directed at businesses that are borderless and decentralised by nature. Accordingly, *Pammer* does not mean the CJJA must be construed as providing no protection to consumers of a global borderless business.

In these circumstances, the court found Mr S supplied plausible evidence to establish a jurisdictional gateway under the CJJA for his claims on the governing law clause and the English Gambling Act.

Stay in favour of arbitration

Under the Arbitration Act, the English courts must stay their proceedings where the dispute is subject to an arbitration clause, "unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed". Mr S accepted he was a party to the arbitration clause but disputed its enforceability. Nevertheless, the court concluded that Mr S's claims should be stayed:

1. The arbitration clause covered validity and enforceability issues, even if the issues raised were ones of consumer protection based on English law.
2. A number of factual issues were raised. Mr S acknowledged the blockchain technology underlying the transaction gave rise to several novel points which required a careful factual investigation. Mr S did not have a strong case on these questions of fact or arbitrability which justified summary determination by the court.

3. Ultimately, the matters in dispute concerned points of fairness, rather than technical questions of English law. In the context of decentralised and borderless transactions, an English judge was not significantly better placed than a US judge or arbitrator to decide fairness.
4. There was no evidence to suggest any legitimate concern as to the tribunal's quality, the arbitral process, the supervision of the New York courts, the ability of New York law to protect consumers, or its ability to address English law questions.

> In the context of transactions that were acknowledged to be 'fundamentally de-centralised and borderless' an English judge could not be said to be significantly better placed than a US judge or arbitrator to decide the questions of fairness raised.
>
> **MS CLARE AMBROSE QC, THE DEPUTY HIGH COURT JUDGE**

Significance

Despite being fact-specific, this case sheds light on the English courts' position on issues arising from blockchain-related transactions. For internet companies, especially those providing blockchain-related services (sometimes called Web3 companies), the following questions are worth considering:

Where is the business directed?

Although many Web3 companies offer services globally, the English courts may consider their commercial activities to be directed in one particular jurisdiction. Relevant factors include the service provider's statement on its geographical coverage, accessibility of the services, and any business campaign that has close connections with a certain jurisdiction, such as the NFT London webinar and *The Times* article in this case.

Who are your users?

Internet companies are often less clear about this. This is particularly the case for blockchain enterprises, where parties are often interacting with each other on a pseudo-anonymous basis. Such transactions are pseudo-anonymous because a public blockchain address may be traced back to a personal identity. Accordingly, many businesses set out eligibility requirements for users in their standard terms. If users are considered consumers, relevant domestic law may afford them additional protections.

Who has jurisdiction?

The questions above are relevant to considering jurisdiction.

While many Web3 institutions put arbitration clauses in their terms, users may still bring actions in their home courts. This is not the first time that the user has relied upon consumer protection laws to seek a more favourable forum. In *Ang v Reliantco Investments Ltd [2019] EWHC 879 (Comm)*, a user of a cryptocurrency platform relied on the Brussels Regulation, asking the English court to disregard the platform's standard terms that gave Cypriot courts exclusive jurisdiction. The court in that case concluded the user was a consumer under the Brussels Regulation and entitled to bring her claim in England.

Ultimately, we anticipate seeing more conflicts between the dispute resolution clause in Web3 companies' contracts and the local laws of their users' domiciles.

What do blockchain and cryptocurrency mean for arbitration?

The court in this case recognised the distinctive features of blockchain transactions and agreed that many existing authorities on conventional contracts are not wholly helpful. Accordingly, legal professionals and arbitrators should be prepared to deal with novel issues arising from this area. Examples include:

- Determining the governing law of on-chain activities where there is no express agreement.
- Deciding the relationship between an NFT (being an on-chain token) and its associated artwork. In Nifty's auction, one piece of artwork was linked to 100 NFTs.
- Considering whether a crypto-platform or blockchain protocol is centralised or decentralised. This leads to questions about whether liability can be attributed to certain individuals or entities.

New issues bring new opportunities. Many institutions in the cyber sector have adopted arbitration as their dispute resolution mechanism of choice. The usual advantages of arbitration, including ease of enforcement, neutrality, and participating in choosing the tribunal, apply equally to the blockchain economy as to the traditional economy. Arbitration looks likely to become the most popular gateway to justice in this borderless world.

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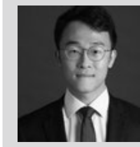

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Spotlight Interview **Jonathan Ripley-Evans**

Jonathan is head of Herbert Smith Freehills' South Africa disputes practice. Based in our Johannesburg office since February 2018, he has established a market-leading reputation and is a key figure in South Africa's developing international arbitration community. He is also an experienced litigator, an accredited mediator and arbitrator. Jonathan was promoted to the partnership on 1 May 2022.

Your practice covers the full range of dispute resolution processes, including litigation, arbitration and mediation. What does your litigation and mediation experience bring to your arbitration work?

Working as a litigator has taught me the real benefits of arbitration. Many of the things that frustrate me – and my clients – about litigating in South African courts can be addressed by referring the dispute to arbitration. One of the biggest frustrations with litigating in Africa is inefficiency; it can be years before a client gets effective justice through the court process. There is also the 'straitjacket effect' in litigation: parties are constrained by the need to follow the procedures dictated by the court, and the courts themselves focus on process over outcome. Finally, there are significant concerns about political interference with the courts in much of Africa.

Most of these issues can be overcome or mitigated by referring the dispute to arbitration in accordance with international best practice. For example, parties. Parties to arbitration have a high degree of flexibility to adapt the procedure to their case. Arbitrators typically deliver an award in a shorter timeframe than the courts and parties are free to select arbitrators who are independent and impartial. It is easier to get to the heart of a dispute using arbitration.

I'm also a big advocate of mediation. I was exposed to the process early in my career, which encouraged me to qualify as a mediator. Many commercial disputes are appropriate for mediation, even more so with African disputes. In many African cultures, disputes are resolved informally through forms of conciliation. Parties can be uncomfortable with the adversarial approach of a court case or arbitration. Often, those more formal processes break down because they involve procedures developed in the West that are not suited to the prevailing cultures on the African continent. This often leads to results an African party perceives as unjust. Mediation can play an important role in bridging that gap between delivering justice and the perception created by the outcome of the process. Mediation has a bright future in Africa.

What types of disputes are you seeing?

There are a lot of disputes stemming from cash flow constraints on businesses, mostly because of Covid. Economies are under pressure, and that has led to an increase in disputes appearing to be manufactured by the opponent to bring about delay or avoid payments because of their own cash flow problems. In the public/administrative space, there is a lot of judicial review activity, mostly stemming from irregularities in the procurement process.

Renewable energy disputes are also on the rise, mainly relating to the construction side of the projects. Many of these disputes also appear to be linked, in some way, to the consequences of Covid.

Africa, with the exception of Nigeria and Kenya, is generally considered a less developed arbitration market than Europe and Asia. Is that the case? How does South Africa compare?

Both Kenya and Nigeria have active arbitration markets and have produced several high-profile practitioners and arbitrators. However, many of those arbitrations are domestic, rather than international. There is often a marked difference in the two procedures. Domestic arbitration procedures tend to mimic domestic court procedure, which is not as effective as international arbitration in resolving the underlying disputes.

South African arbitration is similar. The market is active, but still relies heavily on domestic procedure, and we often see the

appointment of retired judges as arbitrators. International arbitration still has some catching up to do, but there are encouraging signs. South Africa has taken a few important steps toward ensuring it is regarded as a safe seat, where parties are confident in the arbitral law and the supervisory courts, as well as the quality of the arbitrators.

You are a member of the Arbitration Foundation of Southern Africa (AFSA) International Court and were instrumental in drafting the new AFSA International Arbitration Rules. What have the reforms brought to the table?

We were fortunate to have put together a drafting committee comprising first-class international arbitration lawyers. The committee was chaired by Professor Dr. Maxi Scherer, and included Ms. Chiann Bao, Prof. Lise Bosman, Dr. Remy Gerbay, Ms. Ndanga Kamau, and Ms. Jennifer Kirby.

The committee assumed the huge task of redrafting the AFSA Commercial Arbitration Rules to ensure alignment with South Africa's new arbitral law, which is based on the Model Law, and international best practice.

The new rules established the AFSA Court, which is unique from a South African perspective and plays an important role in overseeing the arbitral process. The procedure under the new rules is more flexible, giving arbitrators more autonomy than the previous regime. We also introduced a number of procedural aspects found in the leading international rules, including emergency arbitration and an expedited procedure.

There is evidence diverse tribunals produce better quality decisions. While there are high-profile African practitioners in the international arbitration sphere, we are a long way from equal representation. What are your thoughts on how to achieve better representation, and what would it mean for the parties you represent?

Where parties come from different countries, cultures or legal systems, it is important their disputes are decided by arbitrators from diverse backgrounds. Diverse panels are less likely to be constrained by a particular legal background or cultural viewpoint; they can stress test each others' inherent biases. That should improve the quality of the award.

Those of us who practise arbitration in Africa must actively promote African arbitration. We can start by encouraging our clients to arbitrate locally, rather than defaulting to better-known seats like London or Paris. It is also incumbent on us to appoint more African arbitrators. There are so many excellent arbitration lawyers all over Africa, who would make excellent arbitrators. But they are trapped in a vicious circle: without experience, parties won't appoint them, and they can't get experience unless parties appoint them.

African practitioners need to support each other, reinforce the message and bolster the local arbitration community. If we, as Africans, aren't appointing our fellow Africans, how can we convince parties from the rest of the world to appoint them? We need to lead the way on this.

One practical step would be to focus on developing young arbitrators. Over time, initiatives that help younger practitioners to secure their first few appointments will go a long way to increasing the number of Africans sitting as arbitrators. It is also important for parties and their lawyers to push beyond the comfort zone of appointing the 'usual suspects'. We need to appoint newer arbitrators who may have had fewer appointments, but still have strong arbitration experience as counsel. This isn't just the case in Africa but applies to international arbitration all over the world.

Can you name a highlight of your career?

Representing Lonmin in the three-year-long judicial commission of inquiry set up by the then President of South Africa, Jacob Zuma, following the shooting of 34 miners by police officers at the Marikana mine. Close behind is the instruction to represent one of the accused in a high-profile corruption trial involving the same ex-President. Another highlight was my involvement in drafting the new AFSA Rules. That was a huge process and a great development for African arbitration!

What's your hobby?

I have been an enthusiastic photographer for about ten years now. This became a challenge under the lockdown regulations as I was confined to my house for extended periods. That, together with my five-year-old son's recently acquired interest in the cosmos, provided the perfect excuse to try my hand at astrophotography. It's a steep learning curve but it's the ideal hobby for someone with a busy job and young family as I can only do it late at night when everyone else is asleep and I finally get some free time!

Arbitration in Dubai: **wa hala' la wein (where do we go from here?)**

Following a busy year, the consolidation of two leading Dubai arbitration centres has radically changed the UAE disputes landscape

The past year has been eventful in the United Arab Emirates (UAE), with the country commemorating 50 years since its formation and hosting over 24 million visitors at the delayed Expo2020. This year saw the largest legislative overhaul in the country's history, in addition to the adoption of a new working week to align with other key financial and legal centres. The arbitration community was not left out, with the consolidation of the two leading Dubai arbitration centres and the publication of much-anticipated new DIAC Rules. We cover these and other major developments below.

Consolidation of key arbitral institutions in Dubai

What happened to the DIFC-LCIA?

In September 2021, Decree No. 34 of 2021 concerning the Dubai International Arbitration Centre (DIAC) was issued, taking many in the UAE arbitration community by surprise. The decree dissolved the Dubai International Financial Centre Arbitration Institute (DAI), the entity that operated the DIFC-LCIA Arbitration Centre and the Emirates Maritime Arbitration Centre in a joint venture with the London Court of International Arbitration (LCIA). This resulted in a transfer of the assets, rights and obligations of the DAI to DIAC.

All the arbitration centres and other relevant authorities were granted six months from the entry into force of the decree to comply with its terms.

What does this mean?

In March 2022, the DIAC and the LCIA agreed the LCIA will administer all cases commenced and registered by the DIFC-LCIA under a case number on or before 20 March 2022. In order for administration to be transferred to the LCIA, parties had to file a Request for Arbitration and pay the registration fee, and the DIFC-LCIA would need to have registered the case and assigned a case number before the deadline.

The decree states that DIFC-LCIA arbitration agreements entered into before the effective date are still deemed valid. However, as of 21 March 2022, where a party wishes to commence new proceedings under a DIFC-LCIA agreement, such proceedings must (unless the parties agree otherwise) be commenced with DIAC, and DIAC will administer them under the new DIAC Rules.

If case commenced and	Outcome
If case commenced and registered by DIFC-LCIA on or before 20 March 2022 ...	LCIA will administer case
If case commenced and registered from 21 March 2022 onwards ...	Proceedings must be commenced with DIAC (unless parties agree otherwise) and 2022 DIAC Rules apply

What do I need to know about the new DIAC Rules?

The decree presented an opportunity for DIAC, now Dubai's sole arbitral institution, to issue new rules enacting changes envisaged by draft rules issued in 2017. DIAC has also announced the appointment of an Arbitration Court, which replaces the Executive Committee of DIAC and will supervise the management of all cases administered by DIAC.

The updated DIAC Arbitration Rules 2022, which entered into force on 21 March 2022, are a total overhaul of DIAC proceedings. The changes represent a long-awaited departure from the DIAC Rules that have been in force since 2007 and align more closely with international standards of other leading institutions such as the ICC and LCIA. They also address a number of hot topics in arbitration, notably in relation to third-party funding, virtual hearings and expedited and emergency proceedings.

The 2022 Rules are an important step in securing Dubai's reputation as the leading hub for commercial arbitration in the region, following a period of uncertainty since the abolition of the DIFC-LCIA Arbitration Centre.

At a glance

- DIFC-LCIA arbitration agreements in existing contracts entered into before the effective date of the decree are deemed valid
- Parties should ensure future contracts do not refer to the DIFC-LCIA
- The LCIA will administer all cases commenced and registered by the DIFC-LCIA on or before 20 March 2022. Cases commenced on or after 21 March 2022 must be registered by DIAC and the 2022 DIAC Rules will apply (unless the parties agree otherwise)
- The DIFC as a seat of arbitration (including its arbitration law and court system) is not affected by the decree and parties remain free to select the DIFC as the seat, alongside the rules of an outside arbitral institution (eg, LCIA, ICC or DIAC)
- The 2022 DIAC Rules represent a total overhaul of DIAC proceedings and address a number of important changes in practice

DIFC court takes robust approach to arbitration agreements

The DIFC court continues to demonstrate its willingness to support DIFC-seated arbitrations and to enforce awards.

Importantly, the DIFC courts have, for the first time, issued an anti-suit injunction in favour of a party to pending DIFC-LCIA arbitration proceedings. The injunction was issued to prevent the defendant from taking further steps in the Dubai courts but *also* required the discontinuance of existing onshore proceedings.

The decision sends a robust message that parties with contracts that provide for arbitration with a DIFC seat must respect this choice of forum. It is hoped this decision will curtail a disruptive tactic common in Dubai whereby a party commences litigation in the local courts contrary to an agreed dispute resolution clause providing for a different forum.

Procedural irregularities in the UAE courts

The onshore UAE courts continue to frame arbitration as an "exceptional arrangement" and a form of waiver of the right to access courts. As a result, failure to comply with procedural formalities may have significant consequences both during proceedings and at the enforcement stage. In summary:

- The courts of the UAE, including most recently the Abu Dhabi Court of Cassation, still consider an individual's lack of authority to sign an arbitration agreement as a ground on which it may be held to be invalid.
- The Dubai Court of Cassation has held that the Dubai courts had jurisdiction:
  - where disputes arising out of multiple contracts relating to the same transaction (only one of which contained an arbitration agreement) were so closely connected that it was in the interests of justice, and necessary to avoid inconsistent judgments, that the disputes should be determined in one forum; and
  - where the parties incorporated by reference the FIDIC Red Book General Conditions (which contains an arbitration agreement) but failed to refer expressly to the arbitration agreement - the court held explicit reference is needed as evidence of consent to arbitration.
- The Dubai Court of Appeal recently issued a judgment which held, where the parties to an arbitration fail to pay their shares of the advances on arbitration costs and the arbitral centre in turn decides not to proceed with the arbitration, the court has jurisdiction over the dispute.

Where do we go from here?

The sweeping changes over the last year represent a significant overhaul of the UAE's arbitration landscape. Following a period of uncertainty since the abolition of the DIFC-LCIA Arbitration Centre, the disputes community has witnessed a number of positive steps aimed at securing Dubai's reputation as the region's leading hub for commercial arbitration. Combined with other major legislative changes in recent years, including the implementation of a new federal arbitration law in 2018, the UAE offers an increasingly modern and sophisticated legal framework both onshore and within its financial free-zones.

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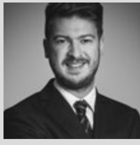

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> **The key take-away is for parties to ensure particular care is paid to drafting arbitration clauses – particularly for multi-party and multi-contract projects common in construction and financial services contexts – given that a party's intention to arbitrate must be explicit and unequivocal.**
>
> **NICK OURY**

> **Parties should also keep in mind the consequences of not complying with procedural matters, which may appear at first glance to be minor idiosyncrasies of the region, can be severe.**
>
> **STUART PATERSON**

Whether virtual or physical, we can do more to make arbitration hearings sustainable

Our study comparing the carbon impact and expense of virtual hearings with in-person equivalents reveals in person hearings have on average 19 times the carbon footprint of virtual hearings, and are 6% more expensive.

At a stroke, the Covid-19 pandemic normalised virtual arbitration hearings. The disputes community made use of arbitration's procedural flexibility to quickly adapt processes to ensure ongoing proceedings were not halted by the global travel restrictions as the pandemic raged. With the world now reopening, many users of international arbitration are at a crossroads: return to old habits and hold hearings in-person or keep certain pandemic practices and make use of virtual hearings?

To get to the bottom of whether virtual hearings are less carbon intensive and expensive than in-person alternatives and to identify the most environmentally unfriendly aspects of each, Herbert Smith Freehills recently conducted a case study. This culminated in a comparison of medium-sized international arbitration seated in London, using metrics from our database of cases.

This research followed on from our previous study into the carbon footprint of legal counsel in proceedings (throughout the duration of an arbitration from start to finish).

Following the results of these studies, our London arbitration team has launched an environmental sustainability initiative aimed at helping our clients reduce the carbon footprint of their arbitrations by introducing changes to the way our cases are run. As part of our relationship with clients, throughout their arbitrations, we can explore ways of working that will directly impact on the carbon footprint of the proceedings, and help clients meet their own sustainability goals. Get in touch if you would like to hear more.

In-person hearings – A far greater carbon footprint and higher costs

Our case study comparing in-person hearings with procedurally similar virtual hearings identified the in-person hearing in our case study as giving rise to 111 tonnes of carbon dioxide equivalent (CO2e). This is **19 times** that of the carbon footprint of an identical hearing taking place virtually (estimated to give rise to 6 tonnes CO2e). This CO2e difference is the equivalent of the average amount of CO2 generated by 15 people in the EU during an entire year. The comparative analysis also found in-person hearings around **6% more expensive** than virtual hearings – a difference translating into tens of thousands of pounds sterling.

Striving for sustainability in the way we work

At HSF, we have stringent sustainability targets, as do many of our clients. As a business, we strive to find fresh ways to ensure we work in a more environmentally sound fashion, and assist clients in meeting their targets.

We can partner with you to run your arbitrations in a greener way. This can help:

- minimise your carbon footprint and reduce that of your arbitrations;
- assist in meeting your own sustainability targets and goals;
- align the way we work with your sustainable business model;
- protect and strengthen your brand value and reputation.

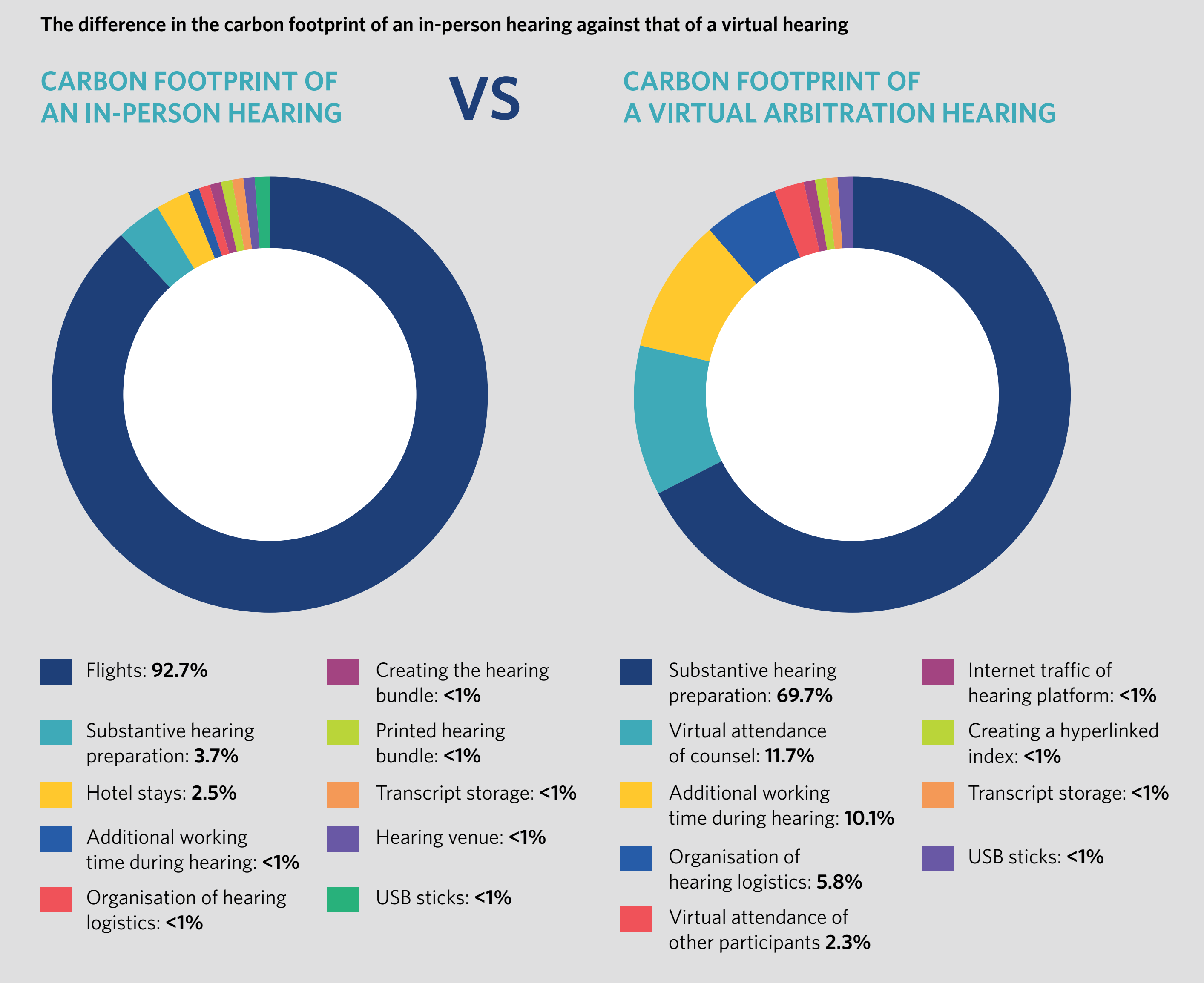
Sources and methodology

The case study analyses the carbon footprint and costs of two notional arbitration hearings (one virtual and one in-person) in a medium-sized international commercial arbitration seated in London.

The study is based on data collated from our matters; our experience of preparing for and attending hearings of both formats over the past two and a half years; and data from external sources.[1]

The case study assumed a five-day hearing, comprising eight sitting hours every day including breaks. It assumed any in-person hearing would take place in London, with a number of participants being required to travel for the hearing as set out below, and any virtual hearing would be hosted on Zoom.

The review accounted for the emissions and costs associated with the preparation for the hearing by the parties' counsel teams, as well as attendance at the hearing by the parties, their counsel, witnesses (both factual and experts) and the tribunal. It also accounted for the carbon footprint and costs associated with the hearing venue and provider of the virtual hearing platform (for in-person and virtual hearings respectively).[2]



1. This includes data from a leading London hearing centre (for in-person hearings) and data relating to the energy consumption of attending Zoom calls (for virtual hearings). Owing to a lack of available data from third party suppliers, we did not consider the emissions of third-party transcribers, but included their costs.
2. This article is based on an article that was first published in GAR on 12 April 2022

Case study insights

Carbon footprint of in-person hearings against virtual hearings

In the case of in-person hearings, the top three contributors to carbon emissions were identified as:

- **Travel**: Flights (coming in at around 103 tonnes CO2e) accounted for **92.7%** of the total carbon emissions of the hearing;
- **Substantive hearing preparation**: The time spent by the counsel teams in preparing for the hearing (including, for example, drafting submissions and cross-examinations, but excluding time spent regarding the logistical preparations for the hearing) accounted for **3.7%** of the emissions;
- **Accommodation**: The third largest contributor of emissions were the **hotel stays,** for those participants who are assumed to have travelled to London for the hearing, which amounted to **2.5%** of the emissions identified.

Even though the remaining carbon contributors identified in the charts above amount to less than 1% each of the total carbon emissions, they should not be written off as insignificant. The cumulative carbon footprint of these remaining categories remains greater than the carbon footprint of a virtual hearing in its entirety.

Two of these three top emissions contributors fall away when looking at virtual hearings (travel and accommodation) – unsurprisingly the carbon footprint of virtual hearings therefore looks vastly different.

For virtual hearings:

- **Substantive hearing preparation** accounts for almost **70%** of the carbon emissions associated with a virtual hearing, despite being the same in terms of hours as for an in-person hearing;
- **Virtual attendance of counsel**, assumed to have joined from their respective offices, amounts to just under **12%** of the total emissions; and
- **Virtual attendance of other participants**, such as witnesses and arbitrators (who are presumed to have joined from a home office) accounts for just over **2%** of the virtual hearing emissions.

Other categories of emissions, such as those relating to the hyperlinked bundle, USB sticks and internet traffic from the hearing platform, amount to less than 1% of the total emissions each.

Costs of in-person hearings against that of virtual hearings

COST OF AN IN-PERSON ARBITRATION HEARING VS **COST OF A VIRTUAL ARBITRATION HEARING**

Cost of an in-person arbitration hearing	
Substantive hearing preparation	**71.1%**
Flights	**3.1%**
Hotels	**1.8%**
Creating and printing copy bundles	**1.8%**
Organisation of hearing logistics	**1.6%**
Additional trainee assistance during hearing	**<1%**
Hearing attendance and additional working time during hearing	**<1%**
Transcription services	**<1%**
Hearing Venue	**<1%**
USB sticks	**<1%**

Cost of a virtual arbitration hearing	
Substantive hearing preparation	**76%**
Hearing attendance and additional working time during hearing	**19.8%**
Organisation of hearing logistics	**2.6%**
Electronic presentation of evidence	**<1%**
Virtual hearing platform and hearing manager	**<1%**
Transcription services	**<1%**
USB sticks	**<1%**

A cost comparison of different aspects of the hearing conducted identified significant costs savings associated with virtual hearings (up to 6%), despite the additional time required to co-ordinate, and host a virtual hearing.

While substantive hearing preparation makes up the majority of costs for both hearing types, the **lack of flights, hotels and hard copy bundle costs** (which collectively represent around 7% of the total in-person hearing costs) all translate into savings for the parties. Although organising the logistics of a virtual hearing was found to be more expensive than organising an in-person hearing, the overall cost was relatively low.

In any event, this is a cost that can be expected to decrease over time, as hearing providers and practitioners become more familiar with organising virtual hearings and the process becomes more efficient.

Conclusion: which format to go for?

The short answer is: it depends. Deciding whether to hold a hearing virtually or in-person involves a range of practical and strategic considerations. The environmental impact and cost of the hearing are just two such factors to take into account. They compete with others such as the location and availability of participants, the amount of witness evidence, the number of languages used in the hearing, the availability of reliable technology and considerations regarding the format that would be most conducive to effective advocacy in a given case.

Rather than being understood as a blanket endorsement of virtual hearings, the true value of the HSF case study lies in identifying the most carbon-intensive aspects of hearings. This enables parties to reduce their environmental impact and reduce their carbon footprint where possible, even if a virtual hearing is not the best choice for the case at hand.

At HSF, we are committed to reaching net zero by 2030

Our recent achievements:

- In FY 20/21, we reduced our overall emissions by 76%.
- 100% of our energy in the London, Belfast, Brussels and Madrid offices comes from renewable sources.
- We are one of 13 of the world's leading companies that form the Global Alliance to support and help scale the innovative and ground-breaking solutions developed by the finalists of The Earthshot Prize.
- Working with the Science Based Targets Initiative, we have set a number of ambitious targets, including:
  - transitioning to 100% renewable energy where possible;
  - offsetting part of the carbon emissions we produce from 2020 to 2026; and
  - removing any emissions produced to achieve net zero by 2030.
- We are signatories of the Green Pledge (Arbitration) and the Green Litigation Pledge and our team members sit on the steering committees for both.

Our carbon offsetting project: The Sichuan Household Biogas Programme

- In support of our goal to reduce our global carbon footprint, we offset the CO2 emissions associated with the travel to Hong Kong and Sydney for our most recent global partners conferences.
- Through this carbon offsetting project, we have supported over 2,800 impoverished families in rural China so far by helping fund an initiative that gives low-income people access to clean, convenient and free biogas for cooking, heating and lighting.
- We intend to grow this initiative and support 5,000 families by 2026.

For more information, or to request a copy of our brochure "Towards Greener Arbitrations: Achieving greater environmental sustainability in the way we work", contact partners Craig Tevendale and Amal Bouchenaki, senior associate Maguelonne de Brugiere, associate Olga Dementyeva, or your usual Herbert Smith Freehills representative.

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Spotlight Interview **Daniel Waldek**

Dan is an arbitration lawyer, based in our Singapore office for over a decade. He specialises in construction and engineering disputes in the infrastructure and energy sectors. Dan has a reputation as an up-and-coming advocate and also accepts arbitrator appointments, which gives him a great opportunity to see other advocates in action.

Dan, congratulations on your promotion to the partnership. You qualified in 2009. How has the practice of law changed since you started?

There have been two big changes. First, the influence of technology. The pace of change has been incredible. I was part of the first generation of lawyers to have BlackBerries, which were revolutionary at the time. Now we're all using smartphones, not only for calls and emails, but for hearings. This also means lawyers and clients can access each other round the world and round the clock. Technology has impacted almost every aspect of commercial law, from contract automation to document production. Whatever the pros and cons, we are in an entirely different world.

The second change is cultural. At the beginning of my career, before the financial crisis of 2008, the professional world accepted a wide range of behaviours that are not remotely acceptable now. These days all big law firms, and HSF in particular, put a huge emphasis on how we look after our people. That simply wasn't on the radar when I started. We can – and must – do more, but the profession has made great strides.

You have two young children. If they become lawyers, how will the practice of law have changed?

I have twin boys, Rafi and Asher, who are three and a half. By the time they join the working world, I suspect there will be fewer lawyers in private practice. Those working in law firms will be ever more specialised in niche fields or different ways of lawyering. We are already seeing the beginnings of this, with the likes of HSF's Alternative Legal Services and other areas of legal operations. Managing data and technology will be a bigger part of the practice; pure lawyering as we think of it may be required less.

Also, more lawyers will work in-house. Increasingly, large companies will continue to develop extremely specialised, sector-specific, legal teams. This will lead to a greater reliance by in-house lawyers on technology-based solutions for business-as-usual lawyering. Things like standard supply contracts, employment agreements and terms and conditions are already being produced using artificial intelligence. By the time my kids start work, I think it will be the exception for that kind of work to be done from scratch by humans as opposed to machines.

Your time in Singapore has coincided with its evolution from a competitive regional seat to global arbitration powerhouse. What makes Singapore such an attractive place to arbitrate?

The Singapore success story reflects foresight by its government over many years. It is the result of a clear policy goal backed up by effective legislation which is regularly reviewed to keep pace with global best practice. The last decade has seen Singapore's International Arbitration Act amended a number of times to ensure it reflects all the latest developments that facilitate the arbitral process. The law is backed by a world-class judiciary, which applies it with regard to the ultimate goal of keeping Singapore one of the world's leading seats. A lot of this comes down to minimal intervention by the courts and deference to the arbitral tribunal wherever possible.

Set against all of this is Singapore's development as a hub for business and legal services in Asia more generally. Again, that is the result of a considered government strategy, supported by business-friendly regulation. These are all factors making it a powerhouse on a global level.

You have a focus on construction, energy, and infrastructure. What kind of disputes are you seeing? And what do you expect in the next few years given the aftermath of the pandemic and the current situation in Ukraine?

We will continue seeing large and complicated construction disputes arising out of projects. The commercial, legal, and political environment in which these projects are designed, procured, and built is increasingly complex. Overlaid on that is the global transition to cleaner energy. How you design renewable energy projects, where you locate them, and ensuring they are built sustainably are all challenges for the sector. There is a greater degree of uncertainty at the design stage, which can ultimately lead to disputes.

A contractor designing a large liquified natural gas plant in a coastal area may need to make complex predictions about the climate and sea levels over next 25 years to factor into the design basis. If the contractor gets that materially wrong, it could have catastrophic effects on the life of the project and the surrounding community and lead to culpability on a major scale.

Covid will also have an impact. In the next two-to-three years, we will see projects that have been heavily impacted by Covid delays reach the final stages of completion and closeout. Deals made on a 'less-than-official' basis because of Covid may be challenged in proceedings. Some may be unwound. Everyone recognises Covid had an impact on industry, in terms of delay, cancellation, and other unforeseen consequences. However, assessing the exact nature of that on a specific project may lead to a dispute. This will be a widespread issue for everyone involved in major projects over the last few years.

How do you think it benefits clients to have their advisers doing the advocacy as well?

I think it adds value in two ways. First, the advocate is steeped in the detail of the matter from the outset. He or she can bring a viewpoint to the entire way you manage the case, bearing in mind how he or she will ultimately present that case at the hearing. It also achieves cost and productivity efficiency because we are a single service provider. Clients of our arbitration practice get a cradle-to-grave service from lawyers who are accountable for the whole dispute. The arguments I make, and the way I make them, reflect on the firm and its values, which I see as no-nonsense and down-to-earth.

It's a very rewarding part of the job to help my client from the earliest stages of a case, building the strategy and understanding all the details, right to the culmination of presenting that case to a tribunal. There is nothing like the adrenalin rush.

Having said that, I once had a different kind of adrenalin rush while acting as advocate. An expert witness almost collapsed on the stand – I thought he was in cardiac arrest as a result of my cross-examination. I was afraid I might have killed him! Thankfully, it turned out he recently had back surgery and experienced a spasm. He made a full recovery.

Singapore recently allowed lawyers to charge success fees for arbitration work, after legalising third-party funding in 2017. How will these developments impact your clients?

The new rules make it possible for clients to share risk with their lawyers or a third-party funder in an appropriate and regulated way. Conditional-fee agreements and litigation funding are highly sophisticated tools for managing cost risk. They allow clients greater flexibility in how to deploy their capital. This is something clients have been able to do in other jurisdictions for many years, and it's something they actively want.

There's also an important access-to-justice element. This is relevant in the construction sector where contractors with good claims might be experiencing cash flow issues preventing them bringing claims because they can't pay the legal fees.

Construction disputes are notoriously long and complex. What techniques are available to help parties resolve them with less expense?

Construction disputes benefit greatly from arbitrators who are active, engaged, and fully read-in from the beginning of the case. Parties often plead very generally at the beginning, deferring their more detailed cases to later when they present expert evidence. Tribunals who challenge the parties to articulate their cases clearly and effectively at an early stage can help narrow the dispute and test the case, saving time and money. Questioning parties at an early stage helps narrow the issues and test the case. Arbitrators who adopt a more inquisitorial approach really force the parties to make cases in a tight way. This benefits the parties on both sides.

What do you do to relax?

Before Covid, skiing. I skied from a young age and years ago I also did a ski season in Whistler, Canada working with their on-mountain racing events team. The endless days of powder were unforgettable.

Obviously, being stuck in Singapore during Covid didn't provide much opportunity to ski! But I started running a lot more, both to stay fit and to find some mental space to relax. The other thing I love and never get enough time to do is cooking. I love food and everything that goes with it – hence the need to run.

At the end of the day, my family comes above everything. I couldn't do my job without my incredibly supportive wife, Lisa, and my amazing kids. They are what I get out of bed for. They put everything else into context.

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Investor-state dispute resolution series part II: **Reform or rebirth?**

With concerns from stakeholders growing, we consider how ongoing reforms could rebalance the ISDS process

In the first part of our two-part series, Christian Leathley, Chiara Cilento and Lucila Marchini examined the concerns of stakeholders about investor-state dispute settlement (ISDS). The concerns identified in our first article were divided into two key areas: first, whether the rights and obligations of states and investors were correctly balanced; and, secondly, whether the process itself needed structural reform. In this article, we turn to the future of ISDS. We look at what has been done to address the so-called legitimacy crisis and the reforms which may still be in the pipeline, focusing first on efforts to rebalance substantive rights and obligations, before evaluating efforts to overhaul the ISDS process itself.

In the first part of our two-part series, Christian Leathley, Chiara Cilento and Lucila Marchini examined the growing concerns of stakeholders about investor-state dispute settlement (ISDS). The concerns identified in our first article were divided into two key areas: first, whether the rights and obligations of states and investors were correctly balanced; and, secondly, whether the process itself needed structural reform. In this article, we turn to the future of ISDS. We look at what has been done to address the perceived legitimacy crisis and the reforms which may still be in the pipeline, focusing first on efforts to rebalance substantive rights and obligations, before evaluating efforts to overhaul the ISDS process itself.

Rebalancing rights and obligations

As ISDS jurisprudence has grown and developed, there has been a perceived expansion of the scope of the interpretation by tribunals of the standard of Fair and Equitable Treatment (FET), among others. Some stakeholders have also expressed concerns that older treaties limit the rights of states to regulate for human rights or the environment, failing to keep pace with the fast-developing ESG agenda. These concerns have led to diverse and disparate efforts from individual countries and regional groupings to rebalance these rights and obligations. To this end, we have seen treaties terminated, interpretative statements issued, domestic legislation released, and new treaties concluded.

What does this rebalancing look like? Some examples of ongoing reforms and changes include:

International Guidance: In 2015, the United Nations Conference on Trade and Development launched guidance for policymakers in the evolution towards a new generation of investment policies. The guidance sought to help countries negotiate investment agreements and promote sustainable development within those agreements.

Individual countries and treaties:

- India has sought to terminate 57 of its older bilateral investment treaties (BITs) and issue interpretative statements in relation to others, while aiming to enter into new BITs under India's new model BIT language. This provides for more limited protections and more restricted access to ISDS[1].
- South Africa has been terminating BITs with plans to replace them with a domestic investment protection law without an FET provision or right of recourse to international arbitration.[2]
- Indonesia announced it would terminate all of its 67 BITs and has been actively renegotiating new BITs with new provisions on corporate social responsibility, anti-corruption and the right to regulate.[3]
- The 2016 Nigeria-Morocco BIT includes a dedicated right for the host state to regulate. It also promotes sustainable development.[4]

Regional and sectoral approaches:

- Wider African investment treaty templates exclude FET altogether or allow for it in a heavily restricted form, while some also provide expressly for counterclaims by states.[5]
- The United States-Mexico-Canada Agreement (which replaced the earlier NAFTA) contains updated and more restrictive investment protections, more room to regulate for states, and restrictions on access to investor-state arbitration.[6]
- The sector-focused multilateral Energy Charter Treaty (ECT) is also undergoing reform. In November 2017 the Energy Charter Conference launched a discussion on potential modernisation of the ECT and 15 rounds of negotiations have since taken place. On 24 June 2022 Agreement in Principle was reached.[7] The agreed changes cover rights and obligations and also structural and procedural reform. In the first camp, definitions of key terms such as "investment" and "investor" and FET are being changed, while the right of states to regulate is being strengthened. There is also agreement to promote sustainable development and corporate social responsibility. In the latter, transparency, security for costs, and third-party funding are all being addressed. The draft text will be sent to Contracting Parties in August for adoption on 22 November.

1. https://hsfnotes.com/publicinternationallaw/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/
2. https://hsfnotes.com/publicinternationallaw/2017/02/16/new-dispute-resolution-rules-for-foreign-investors-in-south-africa/
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4. https://hsfnotes.com/publicinternationallaw/2017/05/23/is-the-recently-signed-morocco-nigeria-bit-a-step-towards-a-more-balanced-form-of-intra-african-investor-protection/
5. African Union's 2016 Pan-African Investment Code, the ECOWAS 2018 Common Investment, COMESA's Revised Investment Agreement, The SADC Model BIT.
6. https://hsfnotes.com/publicinternationallaw/2020/07/02/the-usmca-or-nafta-2-0-came-into-force-on-1-july-2020/
7. https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf

Procedural and structural reform

Substantive and procedural reform go hand-in-hand. The examples above show that the rebalancing of rights and obligations is not being tackled in isolation. These new generation BITs and multilateral treaties have also introduced procedural changes, introducing restrictions on when ISDS can be accessed or requiring greater transparency in ISDS procedure.

That does not mean, however, that there are no initiatives focused purely on procedural reform. The 2014 United Nations Commission on International Trade Law (**UNCITRAL**) Rules on Transparency in Treaty-based Investor-State Arbitration and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration have introduced greater accessibility of ISDS to the public within the existing ISDS system of investment treaty arbitration. However, there are also several initiatives which are focused on the structural overhaul of the entire ISDS process. These have the potential to bring about a seismic shift in the way disputes between investors and states are resolved.

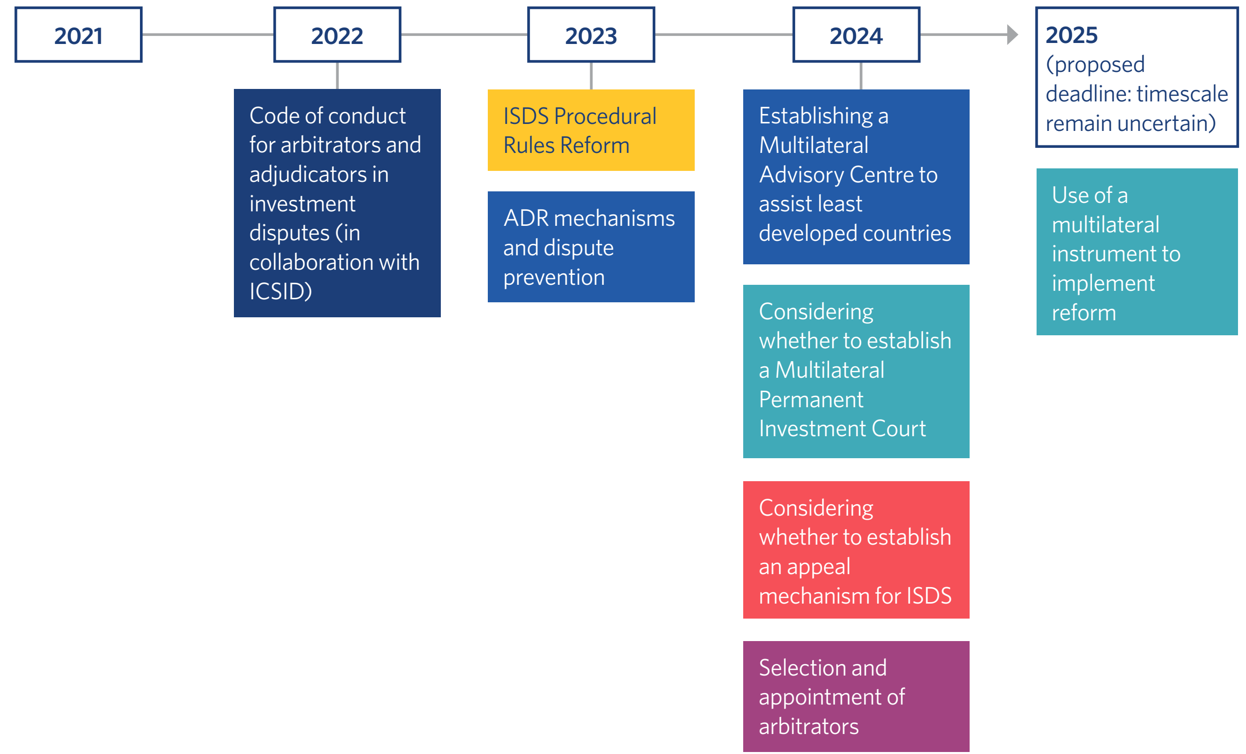
The European Union: An investment court system

The European Union has been at the forefront of this structural overhaul. Following protests against the inclusion of ISDS provisions in proposed trade agreements with both Canada and the US, the European Commission began a period of consultation about reforming the whole ISDS process and infrastructure.[1] This resulted in a concept paper which envisaged a very different future for the resolution of investor-state disputes.[2] The proposal was for an investment court system in each treaty with a standing roster of adjudicators and an appeal mechanism, to replace the current ad hoc arbitral procedure. Bilateral agreements between the EU and Canada, Singapore, Vietnam and Mexico each adopted this new system. The European Commission has also proposed that this system be established internationally through a permanent multilateral investment court and is currently seeking to attract international support for this proposal through the work of UNCITRAL.[3]

UNCITRAL Working Group III: Broader review and overhaul

In July 2017, UNCITRAL gave a working group (called Working Group III) a broad mandate to work on possible reform of ISDS.[4] The group sought input from a wide range of stakeholders, including governments, NGOs, practitioners and investors. It was then asked to consider the concerns raised, decide whether reform was necessary and develop solutions.

There has been considerable disagreement among delegates and observers about the project's scope and ambition and whether systemic reform, or more modest change, was required. After many meetings and discussions about the focus of reform, in April 2021 the Secretariat published a draft workplan.[5] The draft proposed working on eight distinct reforms as separate, parallel workstreams, with different delivery dates:



1. http://hsfnotes.com/publicinternationallaw/2015/01/14/investment-protection-and-isds-in-the-ttip-the-discussion-continues-with-another-public-consultation-around-the-corner/
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3. https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf
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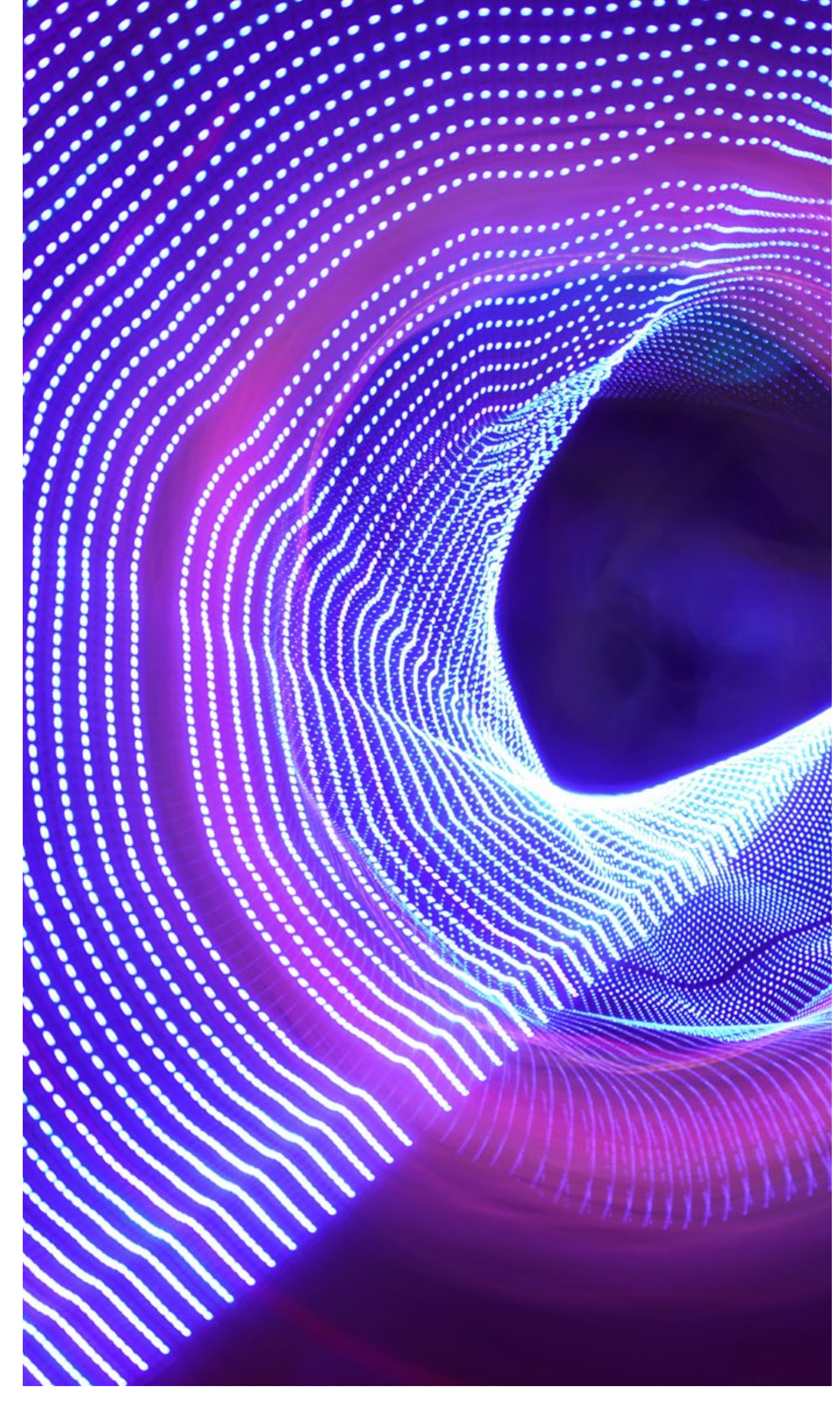
5. https://uncitral.un.org/sites/uncitral.un.org/files/wg_iii_wp_206_adavace_copy.pdf

At present, the most advanced project is the Code of Conduct for arbitrators and adjudicators which is being worked on in collaboration with the secretariat of ICSID. Currently in its third draft and still a work in progress, the outcome of this project has the potential to bring about significant change to the eligibility of arbitrators in investment treaty cases.[6] Other notes or initial draft reports have also been published. These include notes on the regulation of third-party funding;[7] the feasibility of an appellate mechanism;[8] an advisory centre;[9] a standing multilateral mechanism;[10] and a potential multilateral instrument to introduce these changes.[11]

ICSID – Own path, new rules

In the first part of this series, we discussed the unique position of ICSID in this debate and the consultation underway to revise the ICSID rules. On 21 March 2022, the Member States approved wide-ranging amendments to the ICSID Regulations and Rules, which came into effect on 1 July 2022. This marks the end of a consultation spanning over five years. These changes form part of a wider project which has also introduced a new ICSID mediation process. The new rules incorporate and codify experience gained through administration of hundreds of cases, with the aim of modernising the efficiency of ICSID arbitrations. The wide-ranging and substantive amendments are a welcome development for parties and their counsel.



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8. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_wp_-_appeal_14_december_.pdf
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So, what do these changes look like?

Some key changes

Provisional measures: The new ICSID Rules introduce greater clarity around when parties can seek measures from a Tribunal preventing action that causes harm or prejudice to a party or the process, preserve evidence, or maintain or restore the status quo. Rule 47(3) of the new regime sets out the circumstances and factors a tribunal can consider. While the language in the rule is new, this is generally understood as simply codifying what ICSID tribunals have already been doing in practice.

Transparency: Greater transparency has been provided in the new rules, particularly regarding access to documents in proceedings:

- **Awards**: Under Rule 62(3) parties are deemed to consent to the publication of an award if no written objection is made within 60 days after dispatch of the award. If an objection is made, the Secretariat will publish excerpts of the legal reasoning (following party review).
- **Tribunal orders and decisions**: Rule 63 states that the ICSID Secretariat "*shall*" publish Tribunal orders and decisions. However, to balance the interests of the parties, they are asked to agree redactions, and any disagreement is to be resolved by the Tribunal. The Tribunal also needs to avoid publishing confidential information.
- **Party submissions**: Under Rule 64 publication is dependent on the parties' consent and subject to redactions agreed by the parties.

Third-party funding: the new rules introduce a requirement for parties to provide written notice of third-party funding when registering a request for arbitration or as soon as the funding arrangement is agreed. This was a much-debated issue throughout the consultation but the end result in Rule 14 is to adopt a very broad definition of funder. This new disclosure requirement is intended to provide greater transparency regarding the identity of the funder and allow arbitrators to identify any conflict of interest.

Costs and security for costs: Rule 52 now gives guidance to a tribunal on the factors they can consider when allocating costs between parties. This includes the outcome of the proceedings, conduct of the parties, complexity of the issues and the reasonableness of costs claimed. New Rule 53 is dedicated to the issue of security for costs and sets out guidance to the tribunal when considering whether to order a party to provide security. Interestingly, the existence of third-party funding is included as a relevant factor.

Special Procedures: At the start of a case, a party may wish to make preliminary objections, apply for bifurcation or argue that a claim is manifestly without legal merit. These three processes have been separated into individual rules with different procedural requirements and time limits for each. This has been done to improve clarity and brings the ICSID rules themselves in line with current practice.

You can find out more detail about these changes in our blog post.

The future

ISDS is evolving. The so-called legitimacy crisis has sparked challenging discussions and led to significant reform efforts at the regional, national, and international level. Some of these reforms have reached an end point, at least for now. The new ICSID Rules are now in place, likely to be left unchanged for many years, and provide a more robust and transparent model for resolving future investor-state disputes. In contrast, Working Group III's mandate is still some considerable way from completion. In particular, it remains unclear from the drafts and notes to date whether the ultimate recommendations will be for seismic overhaul or evolutionary improvement.

Even once those recommendations are made, it is still uncertain whether there is the international will to implement them. Substantive reform of rights and obligations is similarly in a period of transition. New generation treaties are emerging which introduce a different balance into the relationship between investors and their host states. It remains in the balance whether this new generation of treaties will meet the aims and expectations of their drafters while still encouraging foreign direct investment. Reform certainly, but rebirth? The case remains unproven.

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Spotlight Interview **James Allsop**

James started as a Herbert Smith trainee in 2006 and qualified in England & Wales in 2008. Despite his English background, he always wanted to work in Asia, and did a secondment to our Tokyo office from 2012-15. After a few years back in London, litigating in the English courts, James returned to Tokyo in 2018, where he has built a practice combining international arbitration with corporate crime and investigations work. Acting for many of the firm's largest Japanese and multinational clients across sectors including manufacturing, energy, TMT, pharma and consumer products, he was promoted to of counsel in 2020 before joining the partnership on 1 May 2022.

Japan has a reputation for being slow to pursue disputes, preferring to resolve conflict by negotiation. Is that your experience? What disputes do go to arbitration in Japan, and why?

That is a long-standing reputation and, in general, it still holds true. Japanese corporates generally favour arbitration clauses for international deals, typically Singapore International Arbitration Centre (SIAC) or Hong Kong International Arbitration Centre (HKIAC) rules. When a dispute arises, they are often reluctant to arbitrate, and prefer to reach an amicable settlement wherever they can.

However, over recent years Japanese companies are increasingly willing to utilise formal dispute resolution procedures, including arbitration, to try to reach an amicable settlement. I recently acted for a client in an M&A dispute where the other side refused to proceed to completion, citing an inability to satisfy certain conditions precedent. When negotiation failed, we suggested the client commence HKIAC proceedings, and utilise the document production process to put pressure on the other side to complete. We adopted the same approach in another recent case, by commencing SIAC arbitration. In both those cases, the parties ended up settling at an early stage.

Where it is not possible to reach a settlement, my experience is once our clients decide to fight in formal proceedings, they are very committed to that course and will pursue the arbitration actively to the end. Generally, it's the big, business-critical deals where clients feel they have no choice but to take it to arbitration.

You also advise on fraud and corruption investigations, corporate governance and crisis management. How did that occur and do the two sides of your practice ever meet?

Investigations and white-collar crime have always been interesting to me, due to their subject matter and because they involve a different, albeit complimentary, skillset to arbitration. This an increasingly important issue globally, and a real focus area in Japan in particular. Japanese companies frequently invest in risky jurisdictions and, following several high-profile incidents involving Japanese companies, ensuring compliance with international best practice has taken on even greater significance.

The two sides of my practice don't often cross over, but I have had cases where an investigation turns up evidence of wrongdoing that ultimately leads to an arbitration. I acted for a major Japanese technology company that had acquired a subsidiary in Southeast Asia. The subsidiary's original management team was retained after the sale, to continue day-to-day running of the company as part of an earn-out structure under the share purchase agreement (SPA). Our client discovered this team was implicated in various wrongdoings, including embezzlement and corrupt payments to public officials. This led first to an internal investigation and then to an enquiry by the US Department of Justice for potential breaches of the Foreign and Corrupt Practices Act. That investigation revealed there had been breaches of the sellers' representations and warranties under the SPA, and we commenced a successful arbitration claiming damages for those breaches.

Diversity is a focus for the arbitration community. From practising outside your home jurisdiction, what have you learned about bringing different perspectives to the table when running a case? And what changes you have noticed during your time in Japan?

As an English-qualified lawyer, I'm probably too inclined to think the common-law approach is always the right one. Practising overseas in arbitration has taught me that is not the case. Working with international parties and co-counselling with civil

lawyers, I have learned how valuable it can be to apply different perspectives and approaches to achieve a successful outcome – particularly where the stakeholders are from different backgrounds themselves.

Japan is still traditional in working practices compared to many jurisdictions but I have noticed several changes in gender diversity. The trading houses and big corporates are increasingly aware of the importance of gender balance, and are rolling out some good initiatives. There is also an increasing confidence and desire to pursue corporate careers, on the part of Japanese women, that is bound to result in continued change over time. This is true in many sectors, including the law – there are undoubtedly more women now in the legal profession, especially in senior roles.

Working conditions are changing too. Japan has jumped forward ten years in terms of its approach to agile working because of the pandemic, with many companies now rolling out formal agile work policies, permitting employees to work from home up to two days a week.

We're also seeing Japanese clients move away from traditional business dinners, which are hard to juggle with family commitments, to breakfasts and lunches, which are more family-friendly.

Japan was largely closed to the world throughout the pandemic. What is one thing you have done in Japan you might not have if you'd been able to travel?

My youngest child, Samuel, was born in March 2020, just before the world started shutting down. In some ways, I was glad of the excuse not to have to travel with three children under six!

Not being able to leave Japan encouraged me and my wife, Elizabeth, to explore new parts of Japan and its culture. A highlight was taking part in a *shichi-go-san*, a coming-of-age ceremony, last year with our two older children, Olivia and Felix. This traditional rite of passage ceremony celebrates the growth and well-being of young children. The whole family wore traditional Japanese dress. Both kids really enjoyed it – Felix enjoyed it even more when someone gave him a toy sword during the ceremony!

What did you do on 1 May to celebrate your promotion to the partnership?

The timing was fortunate, as it was the Golden Week holiday in Japan. I was away with the family at Fujikawaguchiko, one of the "Fuji-five" lakes. It was ten days of great family time after the hectic period that precedes partnership promotion. I indulged in a few bottles of champagne too!

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Asia-Pacific private equity disputes to rise as deal volumes grow

Following a period of pandemic-enforced turbulence, private equity deals have rebounded strongly, with disputes likely to grow as a result

The private equity (PE) scene in Asia-Pacific is thriving again after pandemic-fuelled turbulence. We consider the implications of recent developments for disputes in this sector, including: private equity trends in the region; the nature of PE disputes we have seen; and the key features of arbitration that make it suitable for resolving PE disputes.

Trends in Asia-Pacific

What have we seen?

Before the Covid-19 pandemic, the PE industry enjoyed sustained growth in APAC. Between 2015 and 2019.[1]

- the average size of PE funds in APAC grew from $210 million to $630 million;
- assets under management for APAC-focused funds grew 31% (compared to a 12% increase for funds focused on North America and Europe); and
- the region's share of the global PE industry increased from 17% to 28%.

Different trends can be seen in pockets across the APAC region. For example:

- In Australia and New Zealand, pension and super funds have begun transitioning towards a more active role with direct PE investments. This trend is reflected in Australian Super and BGH Capital's $1.5 billion takeover of education group Navitas in 2019.
- In comparison, corporate venture capital funds have been more active across Asia (eg China and Japan), with a focus on investment into start-ups and high-growth companies. In mainland China, this has been spurred by a new Foreign Investment Law, which harmonises previous legislation and signals renewed commitment to inbound investment.

Navigating Covid-19

Despite turbulent macroeconomic conditions resulting from pandemic-related disruptions, PE returns in APAC continued to perform strongly, rising to a decade high 14.2% median net internal rate of return in 2021.[2] This growth reflects the abundant investment opportunities that have arisen after the Covid-19 pandemic. The acceleration of social trends including e-commerce and demand for remote working, health services and digital platforms has provided new opportunities for PE funds.

The emergence of increasingly sophisticated markets in places like Singapore, Malaysia and Thailand, and early-stage opportunities in markets such as Cambodia and Laos, have spurred this regional progress.

What is to come?

PE transactional activity rebounded strongly from pandemic-fuelled turbulence in 2020-2021. There are some indications this will continue, with high deal volume, increasing industry competition, and strong returns driven by PE firms creating value, delivering top-line growth and reducing cost bases to increase margins.

However, despite the industry in APAC having overcome the worst of pandemic-induced volatility, there are headwinds in the short-to-medium term:

- The ongoing conflict in Ukraine (including the volley of sanctions against Russia, and Russia cutting gas supply to some European countries), the consequential threat to commodity flows and price pressures;
- China's response to the spread of new Covid-19 strains; and
- widespread inflationary pressures.

Where is arbitration in APAC region?

Arbitration is on the rise in APAC across a range of sectors, including private equity. Data published by the major arbitral institutions reveals that parties consistently prefer to resolve disputes by arbitration:

- According to preliminary statistics, 13.6% of ICC filings in 2021 came from South/East Asia, and another 12.5% from Central/West Asia.
- Singapore remained Asia's most popular arbitral seat in 2021, followed by Hong Kong (Queen Mary University White & Case Survey 2021)
- Arbitration is on the rise elsewhere in the region including in Australia, China, South Korea, Japan, Indonesia, Malaysia, and Thailand.

1. Boston Consulting Group, *The Promise for Private Equity in Asia-Pacific* (August 2020)

What kind of disputes does PE generate?

While no two PE disputes are alike, there are common categories:

	Pre-closing disputes	Disagreements over purchase price, where the price is tied to completion accounts, performance milestones, leakage in relation to the locked box regime or exercise of termination rights.
	Post-closing disputes	Post-closing disputes most often arise in the context of a contractual warranties regime, where breaches of a warranty are discovered after closing. Examples include warranties relating to financial information, undisclosed liabilities and the condition of material assets. Disputes also arise in relation to earn-out arrangements.
	Exit disputes	A variety of exit disputes arise, depending on the transaction structure and the exit options available to investors. Parties disagree about the exercise of put/call options, including the enforceability of the mechanism; whether conditions have been met; and the buyout price (or how it should be calculated). Disputes also arise where a minority investor is squeezed out.
	Other Disputes	These include confidentiality and conflict of interest issues, and myriad disputes concerning the valuation of the underlying investment (eg calculation of fair value and the application of minority discounts). We also see disputes over governance, indemnification or enforcement of non-competition agreements.

Why arbitration for PE disputes?

PE transactions are often international and fast paced, with investors facing increased competition in bidding for high-quality deals. Arbitration has a few key features which give it an edge on other forms of dispute resolution for PE cases.

Feature		Benefit for APAC PE disputes
	Worldwide enforcement regime	Given the typical cross-border nature of PE transactions involving multiple international parties, the ability to enforce arbitral awards in 170 jurisdictions under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is a key advantage. In contrast, enforcing court judgements across borders in the region is challenging. Arbitration, therefore, offers an element of convenience and finality for parties in the PE space, and also allows them to resolve disputes in a single forum – preventing conflicting court decisions.
	Ability to select arbitrators	The complexity of international PE transactions makes disputes arising in relation to PE contractual instruments particularly amenable to resolution by tribunals with relevant expertise (as judges or juries are likely to be less familiar with PE disputes). In arbitration, parties can help select the individuals who will decide their dispute. This enables them to appoint people who have heard PE disputes before and are familiar with the sector and its issues.
	Privacy and confidentiality	The relative confidentiality and privacy of arbitration is especially appealing to players in the PE space, who typically wish to avoid public court proceedings.

Although there are perceived limitations or pitfalls to arbitration, these can be mitigated with various tailored solutions, as outlined below:

Limitation	Impediment	Mitigation/Solution
Speed	It can take 18-24 months from the commencement of the dispute to the final hearing, and months more for the delivery of an award. In the context of PE disputes, this timeframe may be too long, with fundraising, deployment, and realisation stages typically taking place in short time frames. If a dispute arises, the parties want to resolve it and move on.	Under most rules, parties can agree on a fast-track or expedited arbitration process. Most arbitral rules also include an "emergency arbitration" procedure for parties who need urgent interim relief before the tribunal has been formed.
Scope for remedies	Remedies in arbitration are predominantly monetary. In certain scenarios, PE players may need more urgent relief in the form of freezing orders or injunctions. Arbitrators can make such orders but have limited powers to sanction non-compliance.	Most courts in APAC can order interim relief in support of arbitration and have extensive power to punish parties who do not comply.

Outlook

The fundamentals of the PE industry look strong despite the emergence of new risks in 2022. As the volume of deals remains robust, we anticipate a commensurate growth in PE disputes. Statistics indicate most of these disputes will go to arbitration.

In particular, we expect the trend of growth in offshore investment to continue. In recent times, large funds based in the US, Europe and Asia have shown increased interest in assets across APAC, including in Australia. Australia remains a relatively stable and attractive investment market compared to more unsettled markets in Europe and elsewhere. The cross-border component of these offshore investments suggests arbitration of PE disputes will continue to thrive in the region.

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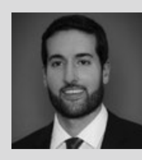

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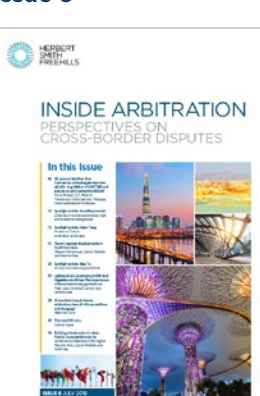

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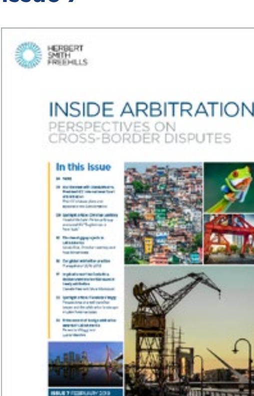

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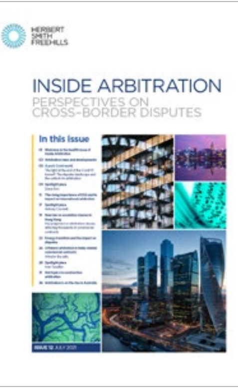

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HERBERT SMITH FREEHILLS

DISPUTE RESOLUTION IN AFRICA

A MULTIJURISDICTIONAL GUIDE

Covering the full span of the continent's courts and arbitral hubs, our authoritative guide breaks down the dynamics of a fast-evolving market.

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