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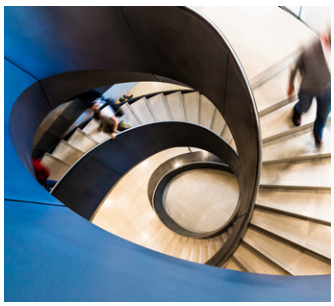
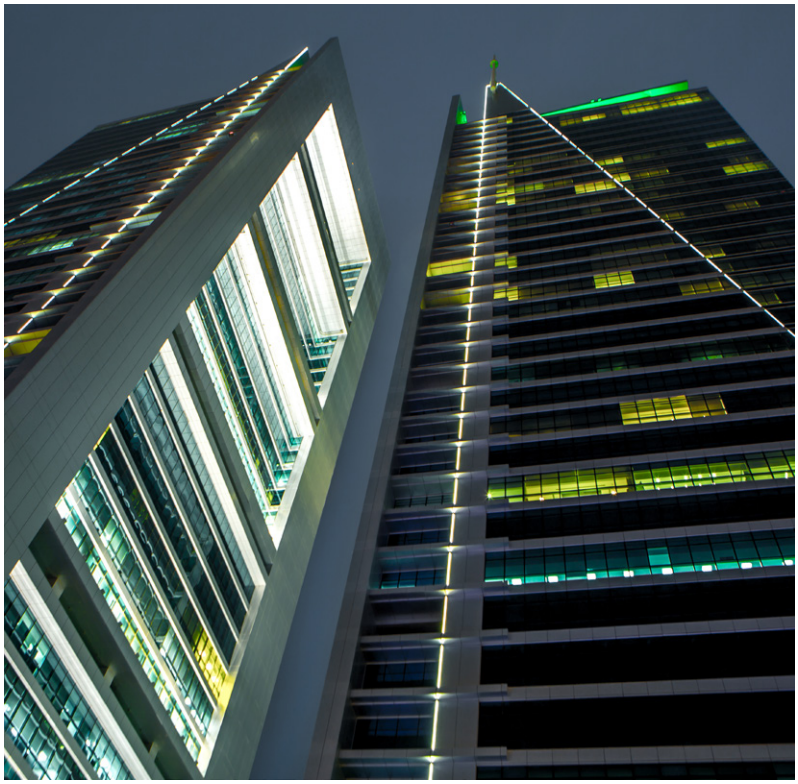
INSIDE ARBITRATION

PERSPECTIVES ON CROSS-BORDER DISPUTES

In this issue





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Welcome to the 16th issue of Inside Arbitration

Introduction

Welcome to the 16th issue of Inside Arbitration. This edition highlights the vast global and industry span of arbitration as we explore the big-picture trends and regional developments defining the world of high-stakes dispute resolution.

There's probably no global trend attracting more attention currently than the AI revolution, but how will this impact arbitration? Simon Chapman KC and Charlie Morgan delve into its application to look beyond the hype at the existing adoption of AI in the legal industry, focusing on the many exciting opportunities in arbitration, and providing some practical guidance for lawyers on potential implications for their everyday work.

Recent months have also seen significant developments in the enforcement of awards against states and state entities. Antony Crockett, Guillermo Garcia-Perrote and Imogen Kenny assess the challenges that award creditors may face in enforcing against states – including annulment applications, state immunity arguments and domestic actions – and how to anticipate and mitigate those challenges.

We then move onto the construction sector. First, Joza AlRasheed, Nick Oury, Sean Whitham, Jean Hamilton-Smith and Jason Han consider the rise of arbitration in Saudi Arabia, and how the combination of the Kingdom's giga-projects and regulatory changes are forging a new destination for international disputes. Next, Mike McClure KC, Daniel Waldek, Noe Minamikata and Tse Wei Lim explore calls on bonds in the context of emergency arbitration.

Turning to local developments, looking first at England, we have previously explored the efforts of the arbitration community in tackling gender diversity, particularly among arbitrators. This year, the Law Commission asked in its review of the English Arbitration Act whether discrimination should be prohibited in the context of arbitration. Although the Commission has decided not to proceed with this proposal, Hannah Ambrose, Vanessa Naish, Liz Kantor and Peter Frost explore some of the practical challenges that would need to be addressed before any such prohibition would be effective.

We then move east, first to explore some recent decisions of the Hong Kong and Singapore courts regarding challenges to arbitral awards. Simon Chapman KC, Kathryn Sanger, Daniel Chia, Yanguang Ker and Martin Wallace compare the approach in the two jurisdictions and report on some recent experiences in each set of courts. We also look at choices of arbitral seat for India-related arbitrations. Tom Furlong, Anu Agnihotri, Christine Sim, Divyanshu Agrawal, Arushie Marwah and I compare the key features of India, London and Singapore as seats of arbitration.

We round off with a practical exploration of the question of whether the costs of in-house counsel can be recovered in arbitration – read the article by Craig Tevendale, Louise Barber and Divyanshu Agarwal to find out more!

I am also delighted that this issue includes spotlight articles on Hannah Ambrose, Catrice Gayer and Charlie Morgan, all of whom were promoted to the partnership on 1 May 2023. Do check out their videos to find out more about them!

Andrew Cannon
Partner, Co-Head of Public International Law and Deputy Head of Global Arbitration, London

Hear from **Andrew Cannon** here

Read our Arbitration and Public International Law blogs at

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

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

Significant developments

From politics to case law, here is our summary of recent major developments in arbitration

- The European Commission has formally called for the EU and its Member States to withdraw from the Energy Charter Treaty on the basis that the unmodernised treaty is not in line with EU principles and objectives – see our blog post here. The Energy Charter Secretariat published an updated edition of statistics on investment arbitration cases brought under the Energy Charter Treaty in May – see here. For more information, contact Andrew Cannon.

- The English Supreme Court confirmed in *Paccar Inc v Road Haulage Association Ltd* [2023] UKSC 28 that litigation funding arrangements based on a share of recovery are damages-based arrangements (DBAs) for the purposes of s.58AA of the Courts and Legal Services Act 1990. The court held that such agreements fall within the scope of the provision because litigation funders provide "claims management services" as defined for these purposes. Such litigation funding arrangements must therefore comply with the statutory requirements for DBAs. For funders of English arbitration matters, the lack of clarity in the application of the wider regime may raise questions about the application of *Paccar* to such funding arrangements. For more information, see our blog post here or contact Hannah Ambrose or Vanessa Naish.

- On 7 July 2023, UNCITRAL adopted "in principle" the Code of Conduct for Arbitrators and UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution. For more information, contact Christian Leathley or Andrew Cannon.

- The Saudi Center for Commercial Arbitration published revised arbitration rules in May this year – see our blog post here and our longer article on Saudi Arabia's reformulation of its arbitration framework on page 15 of this issue. For more information, contact Joza AlRasheed or Nick Oury.

- The English Law Commission has published its final report on the English Arbitration Act. For a summary of the key recommendations, read our blog post here. We have also published an article about the Law Commission's proposal to prohibit discrimination on page 11 of this issue. For more information, contact Hannah Ambrose, Vanessa Naish and Liz Kantor.

- A number of cases in the Russian courts have shown increased willingness to apply Russian legislation which enables a Russian party to seek court jurisdiction over a dispute which would otherwise be governed by an arbitration agreement. For more information, contact Andrew Cannon.

- The English Commercial Court recently refused to enforce an arbitration award on public policy grounds. While stressing mandatory business-to-consumer arbitration is not in itself unfair, the English Court concluded that in the circumstances of the case, enforcement of the Judicial Arbitration and Mediation Service Rules arbitration award would be contrary to public policy. This was because the specific public policy embodied in UK consumer legislation and the Financial Services and Markets Act 2000 required the issues in this case to be governed by English law and not to be decided overseas. See our blog post here. Since then, the English court has also rejected a further public policy challenge – see our blog post here. For more information, contact Charlie Morgan or Liz Kantor.

- In *C v D* [2023] HKCFA 16, the Hong Kong Court of Final Appeal confirmed that arbitrators, not the courts, should have the final say on whether a party has complied with an escalation clause. See our blog post here. For more information, contact Simon Chapman KC.

Legally speaking – Are large language models friends or foe?

With the rise of generative AI raising fundamental questions about the future of disputes, clients and lawyers alike must weigh the risks and rewards of using the transformative technology

There's a widening dichotomy in discussions on artificial intelligence (AI). Increasingly, arguments over the benefits and risks of the technology go something like this: "AI is accelerating digital transformation in every sector. Get ready for a revolution in the legal sector!" vs "we can't trust computers; AI development must be stopped!"

Figuring out what's hype and what's real can be hard, especially when it comes to unfamiliar technologies. It's important to approach these developments with a critical eye and to do your research before jumping on the bandwagon. While AI has the potential to revolutionise many industries (including law), it's not a panacea to all our problems.

Although the legal profession is often seen as conservative and slow to adopt new technologies, it has actually been implementing AI systems since the 1980s. And now, with the latest iterations of machine learning models and generative systems, is the legal sector poised for a major revolution?

Bill Gates recently argued the new wave of AI development was "as fundamental as the creation of the microprocessor, the personal computer, the Internet, and the mobile phone". This applies as much to the legal sector as anywhere else.

This article will explore the existing use cases of AI for arbitration and highlight the opportunities generative AI offers. For now, it is clear the arbitration process cannot lose the human touch – the most exciting possibilities lie not in replacing humans and lawyers with machines, but in using AI to improve client results.

Status quo in arbitration

AI is already used in the legal sector for a variety of tasks, including due diligence, research and data analytics. In commercial arbitration specifically, the adoption of AI-based technologies has been widespread. This was partly accelerated by the Covid-19 pandemic, which forced stakeholders to be more tech-forward in their processes. Examples of applications of AI to arbitration include:

- **Document review:** E-disclosure software can harness continuous active learning systems or predictive coding to assess which documents of a set are more likely to be relevant to an underlying dispute. This is particularly useful in data heavy sectors such as construction, where the number of relevant documents can be vast. The document review platforms we use at Herbert Smith Freehills involve supervised and unsupervised machine learning to predict and promote documents most likely to be relevant to reviewers. This significantly increases the speed and reduces the cost of review time.
- **Legal research:** Legal research sites use AI and machine learning to help legal professionals conduct research and compose legal documents more quickly, directing them to relevant case law and citations and identifying key passages in documents. For example, we have a number of different tools to identify and analyse case law. Many of those tools use AI to predict relevance and propose alternative lines of investigation. We are also looking to use large language models to help our lawyers find relevant precedents and know-how.
- **Cost/case outcome prediction:** AI services that predict costs and outcomes of legal cases[1] use machine learning algorithms and predictive analytics to analyse historical data and provide insights into potential costs and outcomes of proceedings. For example, we use AI algorithms to help us interrogate our data about historic disputes in order to better price and scope the work required on current and future cases.
- **Automatic transcription:** During arbitration proceedings, AI transcription systems use speech recognition algorithms to capture and transcribe exchanges between parties, witnesses and arbitrators, eliminating the need for manual note taking and enhancing the accuracy of the record.
- **Arbitrator selection:** The process of selecting an arbitrator is highly important, and yet largely remains based on subjective techniques such as basic web searches, reputation and word of mouth. AI-driven solutions such as Arbitrator Intelligence[2] and Billy Bot[3] collect information and feedback about arbitrators worldwide and provide recommendations to parties while promoting diversity and objectivity.
- **Chatbot lawyers:** Start-ups such as "DoNotPay" leverage chatbots and AI to provide automated services for common consumer and legal needs. Apps such as these aim to make legal information and self-help accessible to everyone.

1. See for example ArbiLex, a predictive data analytics tool, which leverages machine learning to predict litigation outcomes https://www.arbilex.co/).

Introducing generative AI

Generative AI (GenAI) is a branch of AI that takes data and uses it to create new and original content that retains a likeness to the originals without repeating them. GenAI exploded into the public focus with the launch of OpenAI's chatbot ChatGPT in late November 2022, becoming officially the fastest growing consumer service in history. Unlike traditional AI systems that are designed for specific tasks, GenAI models have the ability to generate novel and creative outputs based on patterns and information they have learned from vast amounts of data.

GenAI is already being successfully applied in a number of innovative ways. Natural language generation models such as ChatGPT, Bard and Bing are producing text that replicates the human voice to such a degree that it looks set to irreversibly change content generation forever. Image synthesis via AI is generating realistic artwork and design. Video generation technologies are creating realistic video sequences, deepfakes and lifelike animations. The remarkably creative capabilities of GenAI are blurring the line between the artificial and the real.

Why is generative AI different?

Whereas traditional AI systems can appear unintuitive, the human-like outputs of GenAI are instinctively attractive to even the most techno-phobic lawyers. The number of posts and articles on the subject has skyrocketed versus the discussion of technology assisted review/continuous active learning, which has saved many more millions of lawyer hours than GenAI will for some time to come. The new era of GenAI appears to offer the possibility of an easy, human-like assistant who can do big swathes of your job for you.

While AI and machine learning has been available to assist practitioners with legal research for years, by scanning resources and identifying relevant cases and citations, the human-like output of GenAI makes it instantly intuitive. But with this comes risks: when it looks too good to be true, it sometimes is. While the opportunities around GenAI are huge, they need to be explored, tested and implemented with caution.

The opportunities

- **Data review and categorising:** GenAI's ability to rapidly analyse and interpret vast amounts of legal data will facilitate faster access to relevant information, expediting routine tasks at a rate incomparable to the human effort. Automating tasks such as research and document review will enable firms to take on larger and more complex cases, liberating human resource to focus on more complex and nuanced aspects of the arbitration process that cannot be undertaken by AI systems. Some examples of use-cases for GenAI in arbitration which will save costs are tools which can proof-read, check citations, prepare minutes of meetings, generate executive summaries and visuals for complex advice and produce matter debrief sheets.

2. Accessible here: https://www.wolterskluwer.com/en/solutions/kluwerarbitration/practical-tools
3. Accessible here: http://www.billybot.co.uk/index.html

Dos and Don'ts of using generative AI chatbots

Dos

1. **Summarise, interrogate and critique existing content**: chatbots are great for manipulating information (eg, creating lists and chronologies) and proof-reading or sense-checking existing content.
2. **Increase efficiency**: chatbots can be used to streamline repetitive or time-intensive admin based tasks. They are also highly effective in rapidly providing summaries of documents or concepts.
3. **Verify and fact check all information**: language models are predicting strings of words, not providing facts. They are also strictly limited by the dataset they have been trained on – ChatGPT, for example, was trained on data only up to September 2021, meaning its responses often include out of date or inaccurate information, or even entirely hallucinated facts.
4. **Use simple prompts**: keeping your communication on a chatbot clear, direct and simple will enhance its ability to generate the most relevant and appropriate responses.
5. **Use it to inspire or create a preliminary draft**: chatbots are a great tool for kickstarting the creative process by brainstorming ideas and approaches, which can then be tailored by the user to create original content. However, they should not be used to create content, due to the risks associated with its output such as plagiarism, inaccuracy and bias.

Don'ts

1. **Rely on it for facts or to give legal advice**: recognise the technology's limitations and use this resource responsibly, alongside other sources of information and with careful human oversight.
2. **Share confidential or personal information**: public chatbots do not ensure the privacy or security of any information you input, and as such inputting data into it risks breaching confidentiality obligations and data protection laws.
3. **Use generated content without considering copyright**: chatbot output may infringe copyright, if it reproduces or plagiarises an existing work. Consider copyright issues and attribution before using any outputs.
4. **Ignore likely biases in outputs**: always consider the potential biases of any content generated by language model before using it.
5. **Get left behind**: while using chatbots is not without legal risk, safe and effective use of this technology will promote efficiency and drive growth.

- **Document analysis, review and drafting:** GenAI has the potential to enhance and improve AI technology already in use, such as for populating templates for legal documents and generating contracts. In due course, it may also be able to do more sophisticated tasks such as generating cross-examination scripts.
- **Reduced costs:** Costs will be reduced across the board, as manpower hours are replaced by minutes of AI processing time. GenAI can also assist with the billing process by generating draft narratives and categorising lawyer time entries by phase code.
- **Access to justice:** Professional advice is too expensive for many individuals. GenAI bots offer the promise of expanded access to legal expertise for little to no cost. This will be particularly beneficial in cases of domestic arbitrations (such as employment arbitration in the UK) where not all parties are able to source legal representation.

The challenges

- **Unreliable content:** GenAI systems can produce content without providing a clear source, making it challenging to attribute responsibility or accountability for its work. GenAI also suffers from hallucinations, arguing facts that don't exist. This became evident after the New York District Court issued a first of its kind sanction in June of this year – a joint $5,000 fine to two lawyers for presenting a case brief filled with bogus case citations entirely fabricated by the generative AI model ChatGPT. Although ChatGPT assured one of the lawyers that the "cases I provided are real and can be found in reputable legal databases", ChatGPT had in fact generated fake legal documents which the lawyer presented to the court as fact. Ultimately, this case says less about the AI technology than the conduct of the lawyers. However, if GenAI content is relied upon in proceedings, it will create an additional burden of researching and verifying submissions on the arbitrator/opposing counsel, slowing down the process and increasing costs.
- **Lack of transparency:** GenAI is often described as "black-box" technology on account of the lack of visibility over its inputs or operations. In the context of arbitration, this may make it difficult for parties to understand the reasoning behind the decisions, resulting in reduced transparency and trust in the process.
- **Bias:** One of the principal concerns with relying on GenAI content is that AI systems can replicate the biases of the data they have been trained on, including gender, racial and ideological biases. Where GenAI systems are legal sector specific, they will have been trained on decades of case law that may not reflect the position of society today.
- **Ethics:** GenAI has no code of ethics unless one is embedded in the systems. OpenAI has even provided an example where ChatGPT lied in order to advance its agenda. Arbitration is a discipline which requires the observance of ethics in order to be effective as ignoring ethical norms cannot lead to fair outcomes.

Careful consideration is essential to address these challenges and ensure responsible and ethical usage of generative AI in arbitration. Regulatory bodies worldwide are racing to draft rules to govern ChatGPT and future GenAI systems. Governance and regulation will play a significant role; but law firms should themselves also implement comprehensive trainings systems and develop strategies for monitoring and reviewing the use of GenAI across the firm.

Could AI be the future of arbitration?

A lot of the discussion in law around GenAI has been around the impact of this technology for lawyers. How many jobs will be lost, what does it mean for the hourly billing model, who will pay for the use of the technology, etc?

But there are more fundamental and exciting questions about how this technology could be deployed for the benefits of the end-users of arbitration. While we are still some way off entirely AI-powered arbitrations, as the technology advances, the prospect of shaking up the arbitration process to enable a radical reduction in the time and cost that it takes businesses to resolve a dispute can only be a good thing.

Until then, arbitration lawyers and clients alike need to get as familiar and comfortable as possible with the technology. Stakeholders need to test the capabilities of these tools in a safe, private and secure environment to distinguish hype from opportunity and to make the most of the latter.

There are lots of questions to work through like whether justice delivered by machine is still justice and whether any of this is even desirable. However, unless we participate in the debate and position ourselves to make a meaningful contribution to the discussion, we won't be at the table when those important questions are answered.

Conclusion

While GenAI is still in its early stages of development, it is likely to disrupt the legal sector without replacing lawyers altogether. Lawyers will have more information at their fingertips and be able to generate first drafts of documents quickly, to which they can add their strategic value add. But it is important to recognise the limitations of GenAI and preserve the human touch in arbitration. The most exciting possibilities lie in leveraging AI to revolutionise client outcomes and make arbitration an even better way for businesses to resolve their disputes.

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Risks and awards – Challenges of enforcement against states

While countries have a larger playbook for frustrating proceedings, there are ways of anticipating their moves

Watch the video **here**

Disputes involving state entities (be they a state itself, or entities owned or controlled by a state) present unique challenges, both from a legal and commercial perspective. These issues are particularly acute in cross border disputes and even more so when pursuing enforcement of arbitral awards (or court judgments for that matter).

When pursuing enforcement of arbitral awards against state entities, it is common for state parties to deploy both procedural and substantive arguments to resist enforcement. As further discussed below, some of the tactics often exploited by state entities include: re-litigating issues in applications to set-aside the award and related enforcement proceedings; raising sovereign immunity arguments; and deploying domestic measures which may have the effect of frustrating or hindering enforcement of an award (eg, domestic court proceedings, legislative or regulatory measures, criminal investigations, etc.). It is therefore critical for award creditors to devise enforcement strategies that anticipate the tactics which states may use.

How things stand

Arbitral institutions dealing mainly with commercial arbitrations have reported that between 15% to 20% of recent cases involve state parties.[1] If we also consider investor-state arbitrations which concern claims by private parties against states pursuant to treaties or trade agreements administered by arbitral institutions such as the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration, it becomes apparent that there are many arbitrations involving state entities.

In our experience, state entities are less likely to comply with arbitral awards (therefore more likely to resist enforcement) than typical commercial parties. Data shows states have a low voluntary compliance rate with arbitral awards of around 30% in investor-state cases,[2] whereas the average rate of voluntary compliance in commercial arbitrations is around 75%.[3]

1. 2022 LCIA Annual Casework Report, p. 14; 2020 ICC Dispute Resolution Statistics Report, p. 11.
2. Academic Forum on ISDS, 'Compliance with ISDS Awards: Empirical Perspectives and Reform Implications' (11 November 2022), para 25.
3. Queen Mary University of London, 'International Arbitration: Corporate attitudes and practices' (2008), p. 8.

It is useful to examine the challenges of pursuing enforcement against state entities, which arise both from legal issues applying specifically to state entities (such as the doctrine of sovereign immunity) and commercial issues (such as the increased leverage state parties may have compared to private parties).

Non-compliance with awards

Although favourable awards against state entities can often prompt settlements, as a rule of thumb state entities do not comply with awards on a voluntary basis.

It is therefore frequently necessary for parties prevailing in an arbitration to apply for enforcement of the award before domestic courts. Crucially, the question of where to enforce the award will be informed by two key factors.

1. **The location, nature and extent of the state party's assets**. This is where asset tracing investigations become relevant and often shape the enforcement strategy.
2. **The likelihood of the courts enforcing the award**. This requires regard to the courts' track record, pro-arbitration stance and local law nuances.

Against this backdrop, we now discuss the tactics often deployed by states when resisting enforcement of awards, starting with challenges to unfavourable awards. How that challenge takes place depends on whether the award is enforceable under the New York Convention (signed up to by 178 state parties and requires states to recognise and enforce arbitration agreements and awards rendered in other contracting states); the ICSID Convention (signed up to by 158 contracting states and provides that the states are bound by arbitration awards settling disputes with private parties under the Convention); or some other instrument.

With this in mind it is useful to consider whether insurance for the award should be sought at the outset or once a successful award has been rendered. There are a number of potential insurance options to cover the risks of an award being set-aside or annulled, or a party defaulting on the award.

Set-aside and resisting enforcement under the New York Convention

Generally speaking, under the New York Convention, parties may apply to the courts at the seat (or legal place) of the arbitration to set-aside an award, and to any courts of enforcement to refuse enforcement of the award, based on certain limited grounds. Since these grounds are narrow, state parties often seek to re-litigate issues in set-aside and enforcement proceedings, with the outcome depending on the track record of the relevant domestic courts, their pro-arbitration stance and local law nuances.

To mitigate the risk of challenges and duplicative proceedings, award creditors can deploy a two-step strategy on enforcement.

1. **Seeking enforcement in a court that is known to adopt a pro-arbitration stance** and is likely to reject spurious challenges.
2. **Deploying this first judgment in subsequent enforcement proceedings** before other courts to defend any further challenges.

The effect of the first judgment on other courts is a question of local law and practice. However, most courts will either find the judgment persuasive or preclusive. By way of example, a Singaporean court recently found that a state was precluded from raising arguments that the arbitral tribunal had exceeded its jurisdiction to support an application that an award be refused enforcement. This was because these arguments had already been rejected by a Swiss court in set-aside proceedings and the judgment resulted in an issue estoppel with negative *res judicata* effect as the grounds for challenging the award and parties were identical.[4]

This strategy is likely to be less effective where the grounds of challenge require application of domestic law, such as whether the award is contrary to the public policy of a particular country. For example, a Dutch court has recently refused to enforce an award against a state on the grounds of public policy in the Netherlands. This was despite a Swedish court rejecting an application to set-aside the same award on the basis that it was contrary to public policy in Sweden.[5]

Where there are concerns regarding potential dissipation or movement of assets by a state entity, another avenue to explore is seeking interim relief from the courts in the form of security for the award, asset freezing orders or orders to disclose the location of assets.

Annulment under the ICSID Convention

States may apply to ICSID for an award to be annulled under the ICSID Convention based on certain limited grounds. Even though annulment applications are rarely successful (because of how narrow the grounds are for annulment) states regularly seek to annul unfavourable awards. This causes significant delay as the annulment process typically takes up to two years.

In addition, notwithstanding the fact the ICSID Convention does not provide for any other avenue of challenge outside of annulment, states frequently seek to re-litigate arguments from annulment proceedings at the enforcement stage. Whether this strategy is successful will turn on the approach taken by domestic courts. Pro-arbitration courts generally give such tactics short shrift. A US court recently rejected a state's challenge to enforcement of an ICSID award (following an unsuccessful annulment application) on the grounds of due process finding that all the enforcement court could (and should) do was assess whether the award was authentic and binding.[6]

To mitigate the risk associated with this delay, award creditors may seek to resist applications by the state to stay enforcement proceedings in local courts pending determination of the annulment application (although, success in this regard is not guaranteed). They may also seek orders that the state provide security for the award (plus interest and costs) if a stay of enforcement is granted by the enforcement courts,[7] or the ad-hoc committee charged with determining any ICSID annulment application.[8]

4. *Deutsche Telekom AG v The Republic of India* [2023] SGHC(I) 7, [150]-[153].
5. *Stati and others v The Republic of Kazakhstan* (Amsterdam District Court, 9 January 2023). C.f. *Stati and others v The Republic of Kazakhstan* (Svea Court of Appeal, 9 December 2016).
6. *Valores Mundiales, S.L. and another v Bolivarian Republic of Venezuela* (United States District Court for the District of Columbia, 15 May 2023).
7. See, for example, *Micula v Romania* [2018] EWCA Civ 1801, [245]-[248].
8. See, for example, *Joseph C. Lemire v Ukraine* ICSID Case No. ARB/06/18 (Decision on Ukraine's Application for Annulment of the Award), [51].

State immunity

States (and sometimes state entities) often seek to rely on sovereign immunity to shield themselves from foreign enforcement proceedings and their assets from execution, to varying degrees of success.

Recent decisions by the courts in Australia and England and Wales have determined that sovereign immunity had been waived in respect of proceedings involving recognition and enforcement of ICSID awards by states that had ratified the ICSID Convention (although the waiver does not extend to execution against state property).[9] Generally, "recognition" refers to a domestic court recognising an award as binding; "enforcement" refers to a court enforcing the pecuniary obligations in the award as if it were a judgment of the domestic court; and "execution" refers to the court process by which actual enforcement is carried out to obtain satisfaction of the pecuniary obligations through seizure of assets. Similarly, a US court found that a state had waived its rights to sovereign immunity in respect of award enforcement proceedings in other contracting parties to the New York Convention, by acceding to the Convention.[10]

While the scope of sovereign immunity is a question of local law, assets that are often presumed to be protected by sovereign immunity include property which is used for:

- diplomatic functions;
- military functions; and
- the central bank or other monetary authority of the state, or part of the cultural heritage of the state.[11]

However, these presumptions are not absolute and may be rebutted, for example if it can be proven that the disputed assets are not entitled to the state immunity protection due to the asset's use or intended use in commercial activities.[12]

Domestic actions

State entities often deploy various tactics domestically in a bid to avoid payment of an award in substance or in effect. We discuss some of these tactics below.

Domestic courts refusing to enforce arbitral awards

The New York Convention and the ICSID Convention are powerful instruments for the enforcement of arbitral awards worldwide, and courts in key pro-arbitration jurisdictions continue to be reliable when it comes to ensuring effective enforcement of awards under these treaties.

However, this is not the case in every jurisdiction and it is therefore essential to map out enforcement strategies accordingly. For example, the European Court of Human Rights recently held that an EU state had wrongfully refused to enforce an award against a state agency in contravention of the New York Convention and in doing so had breached the EU citizen's right to peacefully enjoy its possessions.[13]

For recourse outside of the EU, the best hedge against the risk that the 'home' courts of the state or state entity will refuse to enforce an arbitral award is to seek enforcement in other jurisdictions where the state might hold assets. As noted above, asset tracing is often critical to inform the enforcement strategy. Importantly, even if an award has been set-aside at the seat, it may still be enforced in other jurisdictions. So, if the home courts of an award debtor have refused to enforce an award on a questionable basis, it may still be possible to enforce that award in another pro-arbitration country.

Criminal investigations

State entities have also sought to utilise criminal investigations against award creditors or their affiliates to delay the enforcement of arbitral awards or call into question the validity of the arbitral process.

The best defence against these tactics at the enforcement stage is to put the state to strict proof to establish these issues were raised as soon as possible after the state became aware of the criminal investigations, and that the criminal investigations directly concern the rights and parties subject of the proceedings. By way of example, a state's arguments concerning the illegality of an investment the subject of arbitral proceedings were rejected by the arbitral tribunal on the basis that the arguments were untimely and the evidence tendered was unpersuasive. This decision was affirmed by the Swiss courts in subsequent set-aside proceedings.[14]

Legislative and regulatory measures

States have also implemented domestic legislative and regulatory measures designed to frustrate the arbitration process.

For instance, an investor has recently commenced investment arbitration proceedings claiming that a company in which the investor was a shareholder (which was the award creditor in an earlier ICSID arbitration) was placed into liquidation by a state to evade its payment obligations under the award.[15]

In another example, a state, following a recent string of successful arbitrations brought by one individual and related companies under an agreement with a minister of the government of that state, implemented legislation designed to deprive the agreement and the related arbitral awards of legal effect.[16] This legislation was upheld by the highest courts of that state,

9. *Kingdom of Spain v Infrastructure Services Luxemborg S.A.R.L & Anor* [2023] HCA 11, [75]; *Infrastructure Services Luxembourg SARL & Anor v Kingdom of Spain (Rev1)* [2023] EWHC 1226 (Comm) [112]-[115].
10. *Pao Tatneft v Ukraine* (United States Court of Appeals, 28 May 2019), p. 2.
11. *United Nations Convention on Jurisdictional Immunities of States and Their Property* (2 December 2004), Art. 21. Although this Convention is not yet in force, it can shed light on the content of customary international law: *Jurisdictional Immunities of the State (Allemaigne v. Italie),* Judgment, [2012] ICJ Reports 99, 128, [54], [66].
12. See for example, *Ascom and others v The Republic of Kazakhstan and the National Bank of Kazakhstan* (Supreme Court of Sweden, 18 November 2021) (at [40]-[41], [47]-[48]).
13. *BTS Holding, A.S. v Slovakia* (European Court of Human Rights, 30 June 2022), [71]-[72].
14. *Deutsche Telekom AG v The Republic of India* PCA Case No. 2014-10 (Interim Award, 13 December 2017), [115]-[119]; *The Republic of India v Deutsche Telekom AG* (First Civil Law Court of Switzerland, 11 December 2018).
15. *CC/Devas (Mauritius) Ltd and others v The Republic of India*, Notice of Arbitration (2 February 2022).
16. *Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2020* (WA).

and the individual concerned is reported to have commenced an investor-state arbitration on the basis that these actions breached the terms of an investment treaty.

The best response to these types of domestic measures will turn on the nature of the measure and the potential avenues for recourse. It may be that the most appropriate way forward is to seek to put diplomatic pressure on the state, test the validity of the measure in the courts, commence arbitration under an investment treaty, or a combination of those approaches. Another potential way to respond might involve assigning the award to a third party (such as an affiliate), to insulate the award from measures taken by a state against the award creditor.

Key takeaways

Award creditors should plan for the worst when it comes to enforcing arbitral awards against state entities and do so from the outset. While a state entity may be more likely to resist enforcement of arbitral awards than the average party to an arbitration and have more cards up their sleeves when it comes to doing so, it is possible to anticipate these plays and to mitigate the risks they present.

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Can we end discrimination in arbitration?

The English Law Commission proposed a strong stance on diversity, but a workable strategy proved elusive

In Issue 13 of Inside Arbitration we explored the efforts of the international arbitration community and beyond to improve gender diversity, particularly among arbitrators. The arbitration community has also acknowledged the need to focus on other forms of diversity – in particular ethnic, racial and cultural diversity. Institutions have begun to monitor the nationality and place of qualification of arbitrators, but efforts in this sphere are at a much more fledgling stage. Despite these efforts, change is slow. The statistics for party and co-arbitrator appointments of female arbitrators remain stubbornly low.

The LCIA's Casework Report for 2022, which was published in June of this year, showed a decrease in the percentage of women selected by the parties (19%, albeit up from 16% in 2021) and co-arbitrators (23%, down from 33% in 2021). These low percentages of female arbitrators selected for party appointment are replicated across other main arbitral institutions including HKIAC (18.9% in 2022) and the ICC (16% in 2021). For many, this lack of diversity is seen as evidence of gender discrimination in the field of arbitration.

In September 2022 the Law Commission of England & Wales (the Law Commission) made a bold intervention into the discrimination debate in the context of its review of the English Arbitration Act 1996 (the Act). In its first consultation paper the Law Commission asked whether the Act should prohibit discrimination in the appointment of arbitrators (specifically looking at arbitration agreements which specify the characteristics of potential arbitrators). However, in its second consultation paper in March 2023 it identified new topics of potential reform. Rather than focusing on the question of arbitrator appointments and gendered language, the Law Commission opened up the scope of review to consider whether "discrimination should be generally prohibited in the context of arbitration".

This novel proposal was superficially attractive. A legislative stance would send a strong message that discrimination in the arbitral process is not to be tolerated, supporting diversity and access to a broad pool of talent. However, the Law Commission set out no detail in its paper about how discrimination (including in the appointment of arbitrators) would be prohibited, what a "general" prohibition on discrimination would look like, or the legislative changes required.

While the proposal has not made its way into the Law Commission's final paper on proposed changes to the Act, it raised an interesting question: is legislating to prohibit discrimination realistic? In this article we explore some of the practical challenges and questions that need to be answered before any such prohibition would be effective.

How would a prohibition work in the context of arbitrator appointments?

When a company hires a new employee, they will usually follow a strict recruitment process with a detailed job specification, an application process, a degendered review of applications, a shortlist of candidates, and a carefully structured interview to test candidates' aptitudes, competencies and suitability for the role.

However, the appointment process for arbitrators follows a very different pattern. Arbitrators are either appointed by arbitral institutions, or nominated by co-arbitrators or by parties, usually with the advice of their legal counsel.

Appointment by parties

When choosing who to appoint, parties are highly unlikely to write any sort of public job specification, rather they may simply identify in their own minds the key characteristics needed such as someone qualified in a particular jurisdiction, with experience in a particular sector or with strong case management skills. Subjective criteria might also be applied to the appointment. For example, whether or not the party's legal counsel has experience of the arbitrators being considered. In an institutional arbitration, the institutions do not generally question the basis for the party's nomination, or how they arrived at their choice, before making an appointment (although perhaps this is starting to change, with new diversity provisions in the Scottish Arbitration Centre which apply to both the parties and the institution itself). Generally though, any arbitrators being considered for appointment are very unlikely to know this. In most cases, only the final few potential candidates may be approached to provide information about conflicts or availability. Even were a potential arbitrator to know they were being considered, for example by making a data subject access request, any such correspondence between clients and their counsel may be covered by privilege or professional secrecy laws (except for limited exceptions).

Appointment by arbitral institutions

Arbitral institutions retain databases of potential arbitrators which are added to and curated by the institutions' secretariats. The process by which a potential arbitrator is added to the database is often not transparent. Each institution will have their own system for choosing appropriate arbitrators, usually in discussion with their Court or board who will consider the necessary experience and expertise. Candidates will not know they are under consideration until they are approached for their availability and any conflicts of interest. The parties will also be asked to identify any potential conflicts or issues with the proposed candidates. Some arbitral institutions may propose a list system which requires each party to rank their preferred arbitrators from a list. The institutions do not set out the basis on which the list has been prepared, nor are the parties required to justify the rankings they give for those candidates.

Unlike appointments by parties, an arbitral institution's appointment process would be unlikely to be covered by privilege or professional secrecy. Arbitral institutions currently have immunity under s74 the Act, save for acts or omissions shown to have been made in bad faith. In order for the prohibition of discrimination to be effective, there would need to be clarity around whether or not immunity applied or whether "bad faith" would be made out if discrimination were proven.

Appointment by co-arbitrators

Many arbitration clauses provide that the two party-appointed co-arbitrators choose a suitable presiding arbitrator of the arbitral tribunal. Some co-arbitrators will seek the views of the parties before making their choice. Others will simply propose a name and seek confirmation from the parties that there are no conflicts of interest. The appointment process here is not transparent and different co-arbitrators may adopt different processes.

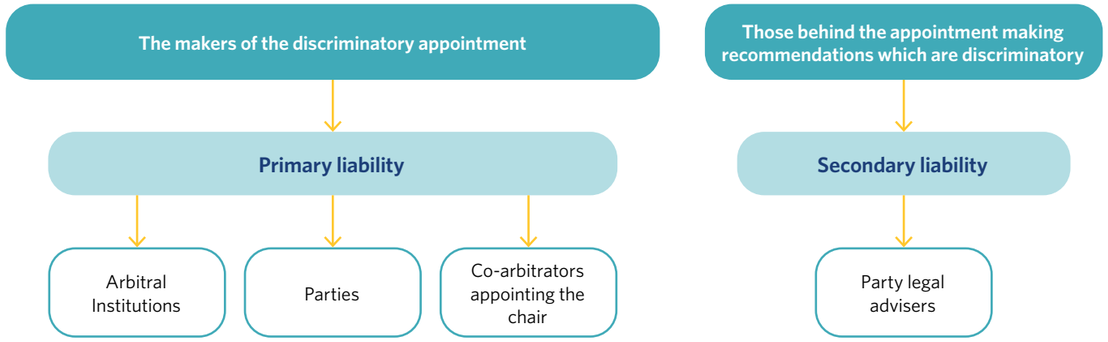
As with arbitral institutions, the appointment process would be unlikely to be covered by privilege. Similarly, arbitrators currently have immunity under s29 of the Act, save for acts or omissions shown to have been made in bad faith. Again, in order for the prohibition of discrimination to be effective, there would need to be clarity around whether or not immunity applied or whether "bad faith" would be made out if discrimination were proven.

Realistically, the effective prohibition of discrimination in arbitration would require creating processes for the appointment of arbitrators that are sufficiently transparent for the necessary evidence of discrimination to be available. This could include adopting similar steps to a recruitment process for anyone involved, whether parties, institutions or co-arbitrators. This will be seen as unworkable by many in the context of arbitration for reasons of efficiency and practicality. Few parties would want to publicise their disputes in order to ask arbitrators to apply for the role. Any interview of a potential arbitrator candidate must necessarily be limited and carefully carried out so as to minimise the risk of challenge to the arbitrator's independence and impartiality.

Who would face discrimination claims?

Assuming that a discrimination claim could be made out by a potential arbitrator, who would the claim be directed at? As we have already explored, arbitrator appointments can be made by arbitral institutions, co-arbitrators and parties. In the latter case, parties are advised by their legal counsel in deciding who to select. While the client may make the final decision, they will often be guided by the recommendations of their counsel and any bias inherent in their counsel's shortlisting process.

Critically, the Law Commission did not address whether or not liability for discrimination in the arbitrator appointment process would be restricted to primary liability or whether secondary liability would also apply as described in the diagram on the next page.



Resolving a discrimination claim: remedies and wider impact

Assuming a potential arbitrator was to bring a claim, in which forum would they do so and what remedies would they be seeking?

The Equality Act 2010 allows claims to be brought before the Employment Tribunal, the County Courts or the High Court in certain circumstances. In the context of arbitration, the only realistic option would be for such claims to be determined by the High Court. The current backlog before the Employment Tribunal stands at approximately one year and there is no availability for expedited hearings, which would limit the availability and impact of non-monetary remedies described below. Resolution of discrimination claims by the High Court would ensure that the decision-maker had experience and understanding of arbitration and the arbitrator appointment process. Consideration would also need to be given to whether such claims would be public.

Under the Equality Act, the remedies for discrimination claims are a declaration of rights (which includes a declaration of unenforceability, which can in turn include a declaration as to the unenforceability of a term of a contract (s142)); compensation for loss of earnings and injury to feelings; or a "recommendation" to take certain steps to undo the discriminatory action. However, some of these remedies within the existing employment law framework are unlikely to be appropriate for arbitration.

- Arbitrator characteristics or requirements which are discriminatory will rarely be included as contractual terms (of the arbitration agreement or of the arbitrator appointment) meaning there would be no terms to declare unenforceable.
- Recommendations, particularly a recommendation that the arbitrator appointment process be re-run, would require the discrimination claim to be brought and heard on an expedited timescale to avoid derailing the arbitration. Recommendations also cannot be enforced. Given that arbitration is a party-led, contractual process, it would seem very unlikely that parties would accept the replacement of an arbitrator who is already in place, even if such a step were "recommended". This is particularly the case if giving effect to the recommendation would result in an impact on the wider arbitration.

It would be important to ensure any decision-maker determining a discrimination claim could exercise discretion in favour of ensuring an effective and efficient arbitration process when considering appropriate remedies, avoiding a protracted parallel discrimination claim running alongside the arbitration proceedings. Practically, this is likely to mean that most remedies would be financial in nature (s124(7) of the Equality Act), compensating the potential arbitrator for their loss of earnings (if applicable) and the injury to their feelings.

Could a general prohibition work?

Discrimination in the arbitration process is plainly harmful, not only undermining the right of each individual to be treated equally regardless of characteristics such as race, ethnicity and gender, but also narrowing the pool of arbitrators to the detriment of the parties. The impact of multiple efforts to encourage diversity within arbitration appears to be slow. However, there are considerable challenges in legislating against discrimination in the appointment of arbitrators. These challenges are writ large when we consider the Law Commission's broader suggestion of a "general" prohibition on discrimination in arbitration.

- **Whose conduct should be regulated?** Would a general prohibition on discrimination only cover discrimination by arbitrators within the process (once appointed), institutions and parties? Or would it also cover discriminatory acts by other participants like legal counsel, witnesses and experts, or between arbitrators in arbitrator deliberations? The Act does not currently contain any duties on these other participants. This would be a significant change in approach with potentially wider consequences than just discrimination.
- **Should the prohibition only cover direct discrimination?** Direct discrimination involves treating someone with a protected characteristic less favourably than others – for example, where an arbitrator dismisses or denigrates the contribution of a female advocate. Indirect discrimination involves putting rules or arrangements in place that apply to everyone, but that put someone with a protected characteristic at an unfair disadvantage. The Law Commission's consultation appeared to envisage covering only direct discrimination. However, most discrimination in an arbitration context may well be indirect. Would legislating against direct discrimination alone achieve enough to merit legislative intervention?
- **What protection is already on offer?** There are already many protections offered by the Act that could potentially cover discriminatory conduct. An arbitrator could be challenged and removed by the parties under s24 on the basis that they are not fulfilling their duty to the parties (s33) by acting in a discriminatory manner. Similarly, discriminatory behaviour in the arbitral process could lead to a challenge to an arbitral award under s68. For English-qualified barristers and solicitors, discrimination is prohibited as part of

their professional conduct obligations and under s44 to 47 of the Equality Act. Consideration would need to be given to the gaps within the existing framework. As already discussed, the existing provisions on immunity for arbitrators and institutions may need to be revisited.

- **Is legislation the most effective solution?** If gaps do exist, we must ask whether the Arbitration Act is the right tool through which to introduce new legislation, or whether this should be done through amendments to the Equality Act or by way of guidance.
- **What could be the wider implications?** The Law Commission would also need to consider how amending the Arbitration Act may have implications for how London is regarded as a seat of arbitration internationally. For example, parties may be concerned about the risk of satellite litigation. They may also fear a potentially discriminatory appointment or discrimination within the arbitration itself could lead to a challenge for procedural irregularity. Moreover, parties may worry that an award rendered by a tribunal which has not been constituted in accordance with party agreement (because such agreement was considered discriminatory at the seat) could make the award unenforceable elsewhere.

Conclusion – More to be done

In this article we have given some thought to the challenges of implementing workable and effective legislation against discrimination in arbitration. Many of these challenges result from the unique position of arbitration as a contractual, party-driven process yet one that is regulated by domestic legislation and the judicial oversight and support of national courts. It also cannot be viewed purely through a domestic lens. The Act forms part of a wider international system backed by treaty which requires the appreciation of other viewpoints and approaches from across the globe, balancing domestic agendas with the application of those agendas on a perhaps less receptive international user-base. Given these complexities, it is unsurprising discrimination has not been addressed in arbitration legislation to date.

In early September the Law Commission concluded, with some reluctance, that a prohibition on discrimination would be unlikely to be effective and could well give rise to satellite litigation and disingenuous challenges. Many participants in the arbitral process will find themselves simultaneously disappointed and relieved that the Law Commission has not progressed this proposal and discrimination has not made its way into the draft bill to be placed before Parliament. However, the fact that this topic was raised should give all participants in the process pause for thought and a renewed focus on improving diversity in arbitration. The warning bell has been sounded for participants in the arbitration process: if we don't solve the problem ourselves, governments across the world will do it for us.

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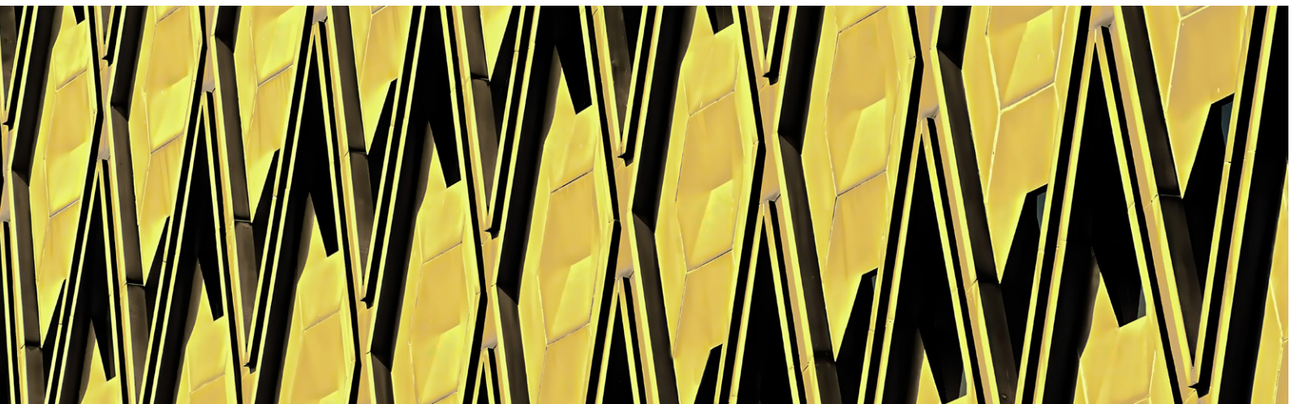


The undeniable rise of arbitration in Saudi Arabia

A combination of the Kingdom's giga-projects and regulatory reforms are creating an new destination for international disputes

Watch the video **here**

The Kingdom of Saudi Arabia is pursuing high-paced redevelopment. Aiming to reduce its dependence on oil reserves (an industry accounting for 20-40% of GDP), Saudi Arabia's plan entitled "Vision 2030" is an ambitious strategy involving enormous developments in public infrastructure, reclaimed heritage sites and tourism with the target of attracting 100 million visitors per year by the end of the decade.

Vision 2030 is built upon the pillars of a vibrant society, a thriving economy and an ambitious nation. These strategic goals have resulted in two of the largest projects in the world's history:

- **NEOM:** A project site the size of Albania, which will consist of 10 different regions. These include Sindalah, a 1,100,000 cubic yards luxury island resort overlooking the Red Sea; OXAGON, a 200 square kilometre industrial hub and the world's largest floating structure; The Line, a 170 kilometre linear city flanked by mirrored skyscrapers; and Trojena, a 60 square kilometre ski resort in the Sarwat Mountains offering year-round skiing. The project is estimated to cost $500 billion, dwarfing other giga-projects around the world.
- **The Red Sea:** A vast 28,000 square kilometre tourism destination along the Kingdom's west coast, which aims to run entirely from renewable energy. Tourists will be invited to visit the Red Sea's 90 islands and snorkel in waters largely untouched in human history.

Saudi Arabia has also initiated transport and mobility schemes (such as the Riyadh Metro) and introduced social infrastructure developments, such as the Ministry of Housing's Sakani (سكني) Program. The volume of engineering, procurement and construction being rolled out to implement Vision 2030 is astounding. There are currently estimated to be 5,200 construction projects underway in Saudi Arabia, with a combined value of $819 billion. This represents 35% of all projects in the Gulf Cooperation Council States. However, this increase in construction projects has presented a few challenges.

Construction disputes in Saudi Arabia

Saudi law is based on *shari'ah* (Islamic law), which is derived from the *Holy Qur'an* and Sunna (the words, practices and traditions) of the Prophet Muhammad. Essentially, the rights and obligations of parties to a dispute must be viewed through the lens of compliance with *shari'ah*. For foreign investors, the overlay of Saudi law can create complexities and risks in construction disputes. Below are three examples:

- The prohibition against uncertainties (*gharar*) prohibits contractual clauses that are excessively uncertain. This can impact standard form clauses, such as consequential loss provisions, which entitle a party to waive its claims before knowing the value of the right that is waived.
- The prohibition against claiming interest (*riba*) can significantly reduce entitlement under a construction contract after there is an incident of non-payment.
- Time bars tend to be upheld provided they will not offend on *shar'iah* principles. But where a party's right to claim relief would be permanently lost because of the breach of the time bar, the position is less clear.

Common concepts in construction contracts such as extensions of time, variations and delay liquidated damages can all exist and function within the rubric of Saudi law. However, the overlay of *shari'ah* adds uncertainty and therefore risk, which has historically driven international investors to have their contracts governed by laws more in line with international standards.

New Civil transactions law

One important way in which Saudi Arabia has sought to neutralise this perceived risk is by codifying for the first time the laws governing contracts and torts. The Civil Transactions Law, which was enacted on 19 June 2023 by Royal Decree M/191, will come into force on 16 December 2023. It brings the country's legal framework in alignment with global best practice. The landmark legislation is widely expected to provide investors with more certainty with regards to the application of the law by the Saudi courts which was historically inconsistent in comparison with other jurisdictions.

The Civil Transactions Law regulates the formation and interpretation of contracts in a similar manner to the civil codes of most other jurisdictions. Notably, it will have retroactive application on pre-existing contracts or relationships that existed prior to 16 December 2023, except in the following limited scenarios: (i) if any statutory provision or judicial principle, relating to an incident, contradicts the provisions of this law, and one of the parties invoked it; or (ii) in case of where a judgement rendered related to a cause of action that has a statutory limitation period which started prior to the law coming into effect. To the extent that the codified provisions do not regulate a relevant term of a contract, the 41 *shari'ah* maxims enunciated in the final chapters of the Civil Transaction Law will operate to fill any gaps in the law, failing which the most suitable *shari'ah* principle will apply.

While the Civil Transaction Law is yet to be tested before the Saudi courts, and its retroactive application will need to be carefully considered (and possibly incorporated) by parties with existing contracts or relationships, those doing business in Saudi Arabia should take comfort. These latest reforms denote a major commitment to modernising the country's legal framework and will ultimately make it easier to do business in the Kingdom.

Commercial transactions law

Saudi Arabia will also be issuing the Commercial Transactions Law, which is expected to be approved and published soon. This is another example of how the Kingdom is aiming to bring its laws more in line with international best practice. The Commercial Transactions Law shall govern all commercial contracts and relationships. Both the Civil and Commercial Transaction Laws are meant to be complimentary. The Civil Transactions Law provides that it shall apply without prejudice to any other legal provisions that are specific to the underlying matter, which means in practice that the Civil Transactions Law will apply to commercial contracts or relationships only when the Commercial Transactions Law is silent on these matters. We anticipate that this will be further confirmed once the Commercial Transactions Law is issued.

New rules of the Saudi centre for commercial arbitration

Another way in which Saudi Arabia is seeking to enhance investor comfort is by swiftly bringing its legal and regulatory framework into alignment with global arbitration best practice. The Saudi Centre for Commercial Arbitration (SCCA) was established in 2014 and has until recently remained a relatively nascent institution through which to resolve international arbitrations, in comparison to its commercial counterparts such as the LCIA, ICC, HKIAC or SIAC.

But given the inflow of international investment into Saudi Arabia necessary to facilitate Vision 2023, on 1 May 2023, the SCCA published its revised SCCA Arbitration Rules, which aim to strengthen the governance and efficiency of SCCA arbitration. The key changes include:

- **Wider discretionary powers for the arbitral tribunal:** The SCCA Arbitration Rules now vest in a tribunal the power to determine the appropriateness of holding a hearing and the format of any hearing. The Rules also empower the tribunal to encourage parties to resolve their dispute by negotiation or mediation. The tribunal may also now limit the length of any written submissions, or testimony of witnesses. In the spirit of promoting cost-efficient and expeditious resolution of disputes, these discretionary powers of a tribunal accord with best practice in international arbitration.
- **Use of technology:** The SCCA Arbitration Rules now allow the parties to engage in the use of technology in a manner which mirrors the progress we have seen with other recognised institutional rules. By way of example, the 2023 Rules provide for the electronic filing of documents and hearings may be conducted, in whole or in part, by videoconference or through other appropriate means of communication.
- **Establishment of the SCCA Court:** The SCCA Court is a new creation under the new SCCA Arbitration Rules that is comprised of 15 members independent of the SCCA, including international arbitrators, retired appellate judges, former leaders of arbitral institutions and renowned practitioners and academics. It is empowered to perform supervisory functions related to the administrative aspects of SCCA-administered arbitrations, such as appointing arbitrators, determining arbitrator challenges, reviewing emergency applications and the fixing of advance on costs. The separation of administrative workload from the responsibilities of arbitral tribunals is a welcome approach to the management of the SCCA's capacity for caseload, at a time when SCCA is expecting a significant increase in demand for its services.

Current progress

> These latest reforms are a few of the many steps that Saudi Arabia has taken to position itself as an arbitration-friendly jurisdiction. The result is that arbitration is making strides to become the preferred choice of dispute resolution in Saudi Arabia.
>
> **JOZA ALRASHEED, MANAGING PARTNER RIYADH, MIDDLE EAST**

One of the key challenges for any emerging arbitration landscape is the supervision of process and treatment of arbitration awards by the courts. However, this is not a concern when it comes to Saudi Arabia as it has a proven track record of enforcing awards (whether international or domestic) as further set out below.

In 2021, courts in Saudi Arabia enforced 204 domestic and foreign awards representing an aggregate value of $2.1 billion, with enforcement proceedings being resolved on average within two weeks. In addition, between January and September 2022, the Saudi Courts enforced a further 522 arbitral awards. Since the Saudi Arbitration Law in 2012 there have been approximately 35,000 applications for enforcement with an aggregate value of enforced arbitral awards coming in at just over $6.16 billion.

Meanwhile, of the 131 motions to annul received by the Saudi Courts between 2017 and 2021, 92% were denied, only 5% were granted in full, with the remaining 3% granted in part. Moreover, of the arbitral awards that were partially or fully annulled, only 3.8% were annulled because of a violation of *shari'ah* or public policy. Additionally, we understand that between January and September 2022, there were no annulments based on a violation of public policy.

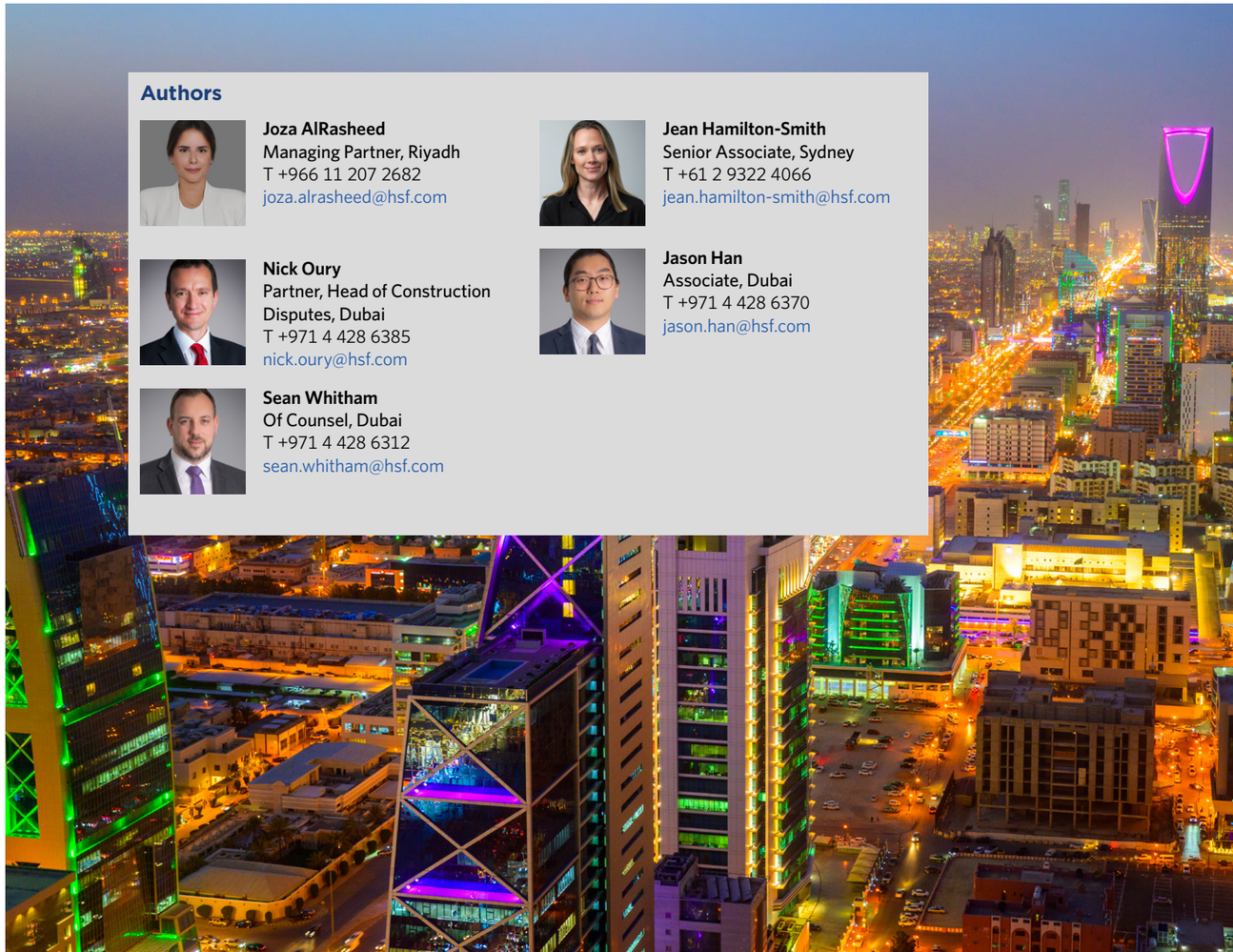
In 2019, Royal Order No. 28004 of 28 January 2019 also opened the doors to government agencies and state-owned entities settling disputes with foreign investors by way of SCCA-administered arbitrations. This was followed by amendments to the Government Tenders and Procurement Law and its implementing regulations, which permitted government agencies to enter into arbitration agreements with the approval of the Minister of Finance. Most recently, on 6 June 2023, the Minister of Finance issued a resolution approving a model general arbitration agreement and a model SCCA arbitration agreement. These new changes mean more disputes will be resolved by arbitration, and more arbitrations will be governed by the SCCA Arbitration Rules.

New regulations and the regional headquarters program

In parallel, new regulations governing professional services in Saudi Arabia have for the first time granted some foreign law firms a licence to set up a direct presence, rather than relying on partnerships with existing groups in the Kingdom. The new regulations were designed by Crown Prince Mohammed bin Salman's administration to "enhance the Kingdom's competitiveness", "develop the legal profession by training Saudi lawyers and staff members" and "attract wider foreign investments". The introduction of the licensing laws, which come into force this summer, is aligned with the Regional Headquarters Program that was launched in 2020, which is also aimed at encouraging international entities to establish their headquarters in the Kingdom.

What next?

The future in Saudi Arabia is promising to be more international and more connected with the wider international market. Through a series of carefully curated reforms, Saudi Arabia has demonstrated a genuine commitment to becoming an arbitration-friendly jurisdiction. There is no doubt that the ambition behind Vision 2030 is continuing to solidify Saudi Arabia's position as an attractive destination for arbitration.



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Spotlight interview
Hannah Ambrose

Hannah Ambrose is a partner in our global arbitration and public international law teams, based in London. She has experience in both commercial and investment treaty arbitration in a number of sectors and advises on a range of public international law matters including state immunity and immunity of international organisations. She was promoted to the partnership on 1 May 2023.

Hear from **Hannah Ambrose** here

What has your path to partnership looked like?

I qualified into the international arbitration group in London at another firm. I was intent on being a disputes lawyer – I couldn't see myself doing anything else. I was particularly drawn to the international aspects of arbitration and the opportunity to do the advocacy. And I can't say that I was sad that the White Book would not be a regular feature of my practice! I was also attracted to the idea of working on commercial disputes; but I was really interested in the public international law work too, in particular the confluence of law, policy and public interest often found at the heart of investment treaty arbitration. I have deliberately kept a mixed commercial/international law practice throughout my career.

I worked in a busy arbitration practice for a number of years before I had my first daughter. I had a bit of a non-traditional route from there, job-sharing as a senior associate with Vanessa Naish. Although it was a pretty novel arrangement at the time, we had the support of colleagues and clients and continued to enjoy a mixture of interesting commercial and investor-state work.

Then, after daughter number two, looking for a new opportunity but wanting to keep hold of a solid and productive working relationship, Vanessa and I joined Herbert Smith Freehills together as professional support lawyers and practice managers for the global arbitration practice, still job-sharing. We didn't know whether we could move firms together but we thought, if you don't ask, then you don't get! It was very forward-thinking of Herbert Smith – as it then was – to take on the pair of us, and still we have not come across any other lateral hire of a job-share.

It was the perfect role to build my internal network, as well as to focus on the financial management, people management and business development side of a successful practice, while keeping my technical knowledge sharp. All of these aspects of the role have served me in really good stead as my career has developed. Although it was an enjoyable and challenging period, I missed focusing on client work and building client relationships, so I moved back to fee-earning in late 2018. I immediately got stuck into some very interesting cases and have really enjoyed moving back to managing matters and delivering strategic advice. Since I returned to fee earning, I have done a lot of oil and gas-related work, but also focused on pharma and life sciences and banks and financial institutions.

You have a broad practice, with a particular focus on public international law. What attracted you to public international law and what are the current trends you are seeing?

I would love to say that my interest started back in university but in reality I missed that opportunity completely and gravitated towards public international law work once I had qualified. It is a really intellectually interesting area of practice with real-world consequences for both commercial and state clients. Investment arbitration is a significant limb of our work and that is where my interest in international law grew from.

In terms of trends, the international law and "soft law" commitments towards addressing climate change and the pursuit of net zero demand a shift in domestic energy policy for many countries, and the consequent legal changes are likely to continue to lead to investor-state disputes as well as climate-change related human rights-based litigation. This impacts both our commercial and state clients. Of course, international law is fundamental to address significant geopolitical events such as Russia's invasion of Ukraine and many commercial clients are looking to international law protections, under investment treaties and other international law instruments, to address the impact on their businesses. International law commitments continue to be relevant beyond the energy sector – resource nationalism affects our mining clients in particular, but a broad range of state action may give rise to an investment treaty claim. We are seeing, for example, increased state control of data flows; sector-based antitrust legislation; opportunistic demands for capital gains tax on high-profile transactions; imposition of "windfall" taxes, reassessment of taxation models (eg for gig economy), refusal to handover VAT rebates, and/or withdrawal of exemptions. Clients across all sectors are vulnerable to significant, or even existential, impacts of state actions which is where investment treaties come in.

You also work with many financial institutions, who historically referred their disputes to court rather than to arbitration. Why has this started to change?

I don't think financial institutions are turning away from the courts, particularly the English courts, which are often the preferred forum for efficient and cost-effective resolution of many of their disputes. But most of our clients in this sector have always operated nuanced dispute resolution policies which point to international arbitration in particular when there is no clear path to enforcement of an English court judgment against the counterparty. Given there is no international treaty for reciprocal enforcement of judgments to rival the New York Convention 1958, arbitration has its place in many different types of transaction, particularly in the loan and derivatives markets. While favouring court litigation, clients in the sector tend to include more arbitration clauses than they expect and are increasingly curious as to how they can turn the procedural flexibility and party autonomy inherent in the arbitral process to their advantage. The ability to choose an arbitrator with practical sector experience, and more limited production of documents can also be valuable in the right circumstances. The moves among the institutions to make their rules more sector-friendly have helped, such as empowering the tribunal to dismiss unmeritorious claims and defences on a summary basis. The fear factor has certainly been reduced.

You have done a lot of pro bono work in your practice, including for the Government of Sierra Leone. What is the impact of this work, and what do you see as the professional benefits?

I have been really proud to be involved with Fair Deal Sierra Leone. The broad aim is to help to build capacity and to support development outcomes, in circumstances where Sierra Leone does not have sufficient financial, legal and/or human resources. Our work since 2010 has been varied and has included supporting deal negotiation with international investors, building capacity to redress the balance when negotiating with large well advised international investors, training and provision of other resources in support of capacity building, in London as well as Freetown, and work on the development of new legislation and promotion of the rule of law. I have been lucky to work on both the accession to the New York Convention and the development of new arbitration legislation, among other things.

There are many professional benefits: interesting work which contributes to an international development agenda and sustainable change, the opportunity to build long lasting client relationships and friendships, personal development outside my usual working environment, and exposure to Ministers, civil servants, governmental advisors, and the diplomatic and international development communities. It really is a unique experience and one I can highly recommend.

Independently of the Fair Deal work, I was also fortunate enough to be part of the team supporting Bridges Outcomes Limited on their participation in the Sierra Leone Education Innovation Challenge – a pay-by-results contract where the upfront investor is repaid based on the educational outcomes achieved. This is just the tip of the iceberg in terms of the pro bono opportunities available at the firm.

What is your career highlight so far?

There have been so many! If I'm going to pick then perhaps my first hearing in the Peace Palace in the Hague and being on the right side of a Court of Appeal judgment upholding an anti-suit injunction to prevent threatened proceedings challenging an arbitral award in our client's favour. It was a very hard-fought arbitration for one of the loveliest clients.

What do you like to do to relax?

Running, eating, and shopping – online or in person. At least half of it goes back, honest!

Bond calls in emergency arbitrations – what you need to know

With the construction industry facing continued uncertainty, we explore how contractors can navigate emergency proceedings to retrain bond calls

Watch the video **here**

Contractors on complex projects are often required to provide on-demand bonds, usually from banks, as security for their contractual obligations including timely completion and performance. Employers favour these bonds as they require the issuing bank to pay the employer where it makes a compliant demand irrespective of whether the contractor's default is disputed. This ensures an employer is "paid now", although the contractor is free to dispute the employer's entitlement later. Bond calls are therefore often highly disputed. The stakes are high for both parties, but particularly for the contractor who will normally be liable to reimburse the issuing bank under a counterindemnity.

Given the nature of on-demand bonds, a contractor's options to resist a call are limited. The contractor can apply for an injunction to prevent the employer from calling the bond or the bank from making payment after a call has been made. In practice, both options are often pursued. Importantly, any injunction must be obtained within a short timeframe as banks are generally obliged to make payment within a matter of days (and sometimes even on the day of the demand).

This type of injunctive relief was historically obtained from domestic courts (eg, in the jurisdiction where the bank and/or employer are based). However, recent statistics from the International Chamber of Commerce show contractors are increasingly turning to emergency arbitration to obtain this injunctive relief.

Emergency arbitration is designed specifically to provide urgent interim relief. Traditionally, a party was required to wait for the arbitral tribunal that would determine the main dispute to be fully constituted – which can take several weeks – before filing a request for interim relief. Emergency arbitration avoids this delay by allowing an institution-appointed sole arbitrator to issue provisional measures pending the main tribunal's formation. The procedure is fast paced with an interim order (to hold the status quo) sometimes being given almost immediately and a formal decision being issued generally within a few days or at most two weeks. It is now available under many arbitration rules, including: The International Chamber of Commerce (ICC); The Singapore International Arbitration Centre (SIAC); The Hong Kong International Arbitration Centre (HKIAC); The London Court of International Arbitration (LCIA); The Australian Centre for International Commercial Arbitration (ACICA); and the latest Stockholm Chamber of Commerce (SCC) Arbitration Rules.[1]

Emergency arbitration also gives parties greater freedom to choose the most appropriate legal system for seeking interim relief. This can be useful in international projects where the employer, contractor and bond issuer are commonly based in different jurisdictions, which can raise complex questions as to the appropriate domestic court for interim relief and risks of one party being perceived as having a "home advantage".

However, despite its advantages, emergency arbitration introduces additional dimensions that should be assessed carefully. Notably, as with any arbitration proceedings, it is a consent-based process which requires an arbitration agreement binding on the relevant parties and is therefore not free from jurisdictional challenges and enforcement issues. The other side is also always on notice of the proceedings because there is no mechanism in arbitration for a party to make an *ex parte* application like in many court systems, which some contractors in particular may prefer if trying to stop (or at least delay) an imminent bond call. This article examines the factors that parties to construction contracts should consider when using emergency arbitration.

1. Our Global Arbitration Team has produced an interactive PDF table which compares the rules of key arbitral institutions and the UNCITRAL Rules, including those in relation to emergency arbitrations. To receive an electronic copy of this table, please contact arbitration@hsf.com.

A shift in substantive principles?

Applications for injunctive relief to restrain bond calls are commonly determined based on an application of the law governing the relevant bond and/or construction contract pursuant to which the bond was provided, or the law of the forum where relief is being sought. The applicable law may itself be disputed, so thought should be given to this when considering whether to seek injunctive relief.

Under most common law systems, injunctions to restrain a bond call are difficult to obtain, especially against banks which would otherwise be in breach of their bond obligations if they refuse payment. English law, for instance, will only grant injunctions in exceptional circumstances.

Under English law, the contractor will typically need to establish either that:

- the employer's call was clearly not permitted by the construction contract; or
- the employer's bond call was fraudulent, such that the "only realistic inferences" are that the employer could not honestly have believed that it was entitled to make the demand and that the bank was aware that the demand was fraudulent.[2] This is an exacting standard that contractors rarely succeed in establishing.

Establishing either ground is also not determinative, and the English courts will ultimately consider whether the balance of convenience favours the injunction being granted, which usually requires "extraordinary facts", such as the contractor's insolvency.[3]

Other common law jurisdictions apply similar principles albeit with some important differences. For example, both Singapore and Malaysian law recognise "unconscionability" as a further ground to restrain bond calls. Unconscionability arises where the employer's call was unfair or constitutes "reprehensible" conduct.[4] It is a fluid concept allowing contractors to rely on grounds which extend beyond the strict fraud exception under English law, including the proportionality of the sums called, bad faith by the employer and the employer's contribution to the event underlying the call. Nevertheless, unconscionability remains a high threshold that is highly fact specific and difficult for contractors to establish.[5]

2. *Shapoorji Pallonji & Co Private Ltd v Yumn Ltd and another* [2022] 1 All ER (Comm) 1202
3. *Tetronics (International) Ltd v HSBC Bank Plc and Blueoak Arkansas LLC (Intervener)* [2018] EWHC 201 (TCC)
4. *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia and another* [2010] SGHC 2; *Raymond Construction Pte Ltd v Low Yang Tong* [1996] SGHC 136
5. *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia and another* [2010] SGHC 2; *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR 657

Injunctive relief is also available in civil law jurisdictions, although the ease of a contractor obtaining such relief can vary significantly between countries. In our experience, among the civil law jurisdictions in Asia, the courts of Thailand and Korea appear more inclined to grant injunctions to restrain bond calls when compared to certain regional counterparts, such as Indonesia.

A move towards international standards?

Given the complexities arising from differences in the standards to be applied for issuing an injunction depending on the applicable law and forum, emergency arbitration has created an opportunity for emergency arbitrators to sidestep those complexities and choose to apply more general standards. There have been several known occasions of emergency arbitrators determining interim relief applications based on "international standards" rather than established domestic law.[6]

In our experience, the types of international standards which emergency arbitrators are known to have considered include where a contractor shows that:

- the bond call has a risk of serious or irreparable harm to the contractor;
- the injunction is urgently required relief; and
- granting the injunction will not prejudge the merits of the dispute.

Some tribunals have also required contractors to establish that the balance of hardships weighs in its favour. A contractor's insolvency, for example, may be a compelling factor.

The application of such international standards is significant. This could allow a party to avoid otherwise high evidentiary thresholds, leading some contractors to argue that international standards should be applied because an emergency arbitrator is not bound by the applicable substantive law governing the dispute "since the grant of provisional relief is not by nature a matter of substantive law".[7] This view has not been widely accepted, and the prevailing view remains that domestic law should take priority, with international standards serving as supplemental principles to the extent necessary. However, the correctness of either position remains unsettled and, in our experience, can add further complexities to emergency arbitrations.

That said, there is a clear takeaway. The consideration of international standards tends to place an emphasis on the parties' conduct and circumstances prior to the emergency arbitration. Parties should therefore carefully manage their conduct and correspondences leading up to a bond call, in particular setting out cogent explanations for their actions.

Further considerations

Several other factors could also affect the effectiveness of emergency arbitration as a forum for interim relief.

First, the emergency arbitrator is generally appointed by the relevant arbitral institution rather than the parties. The lack of party input may mean that the emergency arbitrator may not be someone a party would have nominated otherwise.

Second, if the injunction sought is against the bank that issued the bond, an emergency arbitration will only be possible if the bond includes an arbitration clause. If not, an emergency arbitrator would lack jurisdiction over the issuing bank. The domestic courts would be the appropriate forum in such a case.

Third, contractors often initiate parallel injunction applications across various fora. Major international arbitration rules, including the ICC, LCIA, HKIAC and SIAC, allow parties to approach domestic courts for interim relief notwithstanding an emergency arbitration having been initiated. Thus, a contractor may try to hedge its bets by commencing emergency arbitration proceedings concurrently with an injunction application in the domestic courts. However, the arbitration laws of certain jurisdictions may not allow this. For example, Section 12A(6) of the Singapore International Arbitration Act restricts the Singapore courts' ability to grant interim injunctive relief to occasions where an emergency arbitrator is unable to do so effectively. Further, where courts are aware of a party bringing parallel injunction applications in multiple jurisdictions, they may reserve their decision until the emergency arbitrator has decided the application.

Fourth, the determinations of emergency arbitrators are generally issued as orders or decisions, rather than awards. The enforceability of emergency arbitration decisions is unsettled in most jurisdictions. Certain jurisdictions, such as Singapore, Hong Kong and Malaysia, have introduced legislation requiring domestic courts to recognise and enforce the orders and decisions of emergency arbitrators in a manner similar to an award of any arbitral tribunal. Many jurisdictions, however, have not enacted similar legislation including countries where global construction companies are headquartered such as the UK, Japan and South Korea. While this may have limited practical impact as parties often voluntarily comply with emergency arbitration decisions to avoid any negative impression of their conduct in the main arbitral proceedings, this may give rise to uncertainty if enforcement becomes an issue.

A consideration that may count against emergency arbitration, particularly for contractors, is that arbitration must always be on notice, in that the other side will be aware about the proceedings from the start. This contrasts to many court systems (both common law and civil) where parties usually have the right to approach the court *ex parte* (ie, without notice to the other side) in certain emergency situations (although if a successful order is obtained *ex parte*, it must then be notified to the other side who is then entitled to make submissions to the court usually in relatively short order). *Ex parte* procedures can sometimes be used by contractors to delay impending bond calls. Indeed, even if the contractor is only able to delay the bond call for a short period of time, this may have some commercial or tactical advantage for the contractor, such as allowing the contractor some short-term breathing space to negotiate with the employer and possibly also the bank. If this is a factor, then emergency arbitration may not be the right move for contractors in such a situation.

6. ICC Report on Emergency Arbitrator Proceedings (2019), paras 138-141; Gary Born, International Commercial Arbitration (3rd Ed, 2021), Chapter 17; Steven Lim, Interim Relief in International Arbitration (originally delivered at SIAC Conference 2014); Alvin Yeo SC, Interim reliefs in international arbitration: the appropriate standard for tribunals, 1 April 2015
7. ICC Report on Emergency Arbitrator Proceedings (2019), para 138

Conclusion

Although construction activity has been on the rise globally, the industry continues to be impacted by instability and it is likely that we will see more distressed projects and bond calls. This is a timely reminder that parties involved in construction projects should familiarise themselves with the grounds for bond calls under their construction contracts. If these are being drafted, contracts should specify in clear and obvious terms the situations in which bonds can be encashed and any formal preconditions for a call, including whether the employer must first raise and determine a timely claim. Disputes often arise from disagreements on the interpretation of such contractual restrictions.

Given the advantages of emergency arbitration, parties may also consider including arbitration agreements in both their construction contracts and bonds, although banks may resist this. If included, these should be coupled with provisions allowing proceedings under both contracts to be consolidated. As disputed bond calls often raise multiple proceedings, a consolidation agreement would allow these to be settled in a single forum which minimises costs and avoids inconsistent decisions.

With emergency arbitration gaining popularity with contractors, the rising number of emergency arbitrations worldwide is likely to continue. Parties to construction contracts should therefore carefully consider the legal and practical implications of emergency arbitrations and how best to navigate the process.

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Spotlight interview **Catrice Gayer**

Catrice Gayer is an international dispute resolution specialist and partner based in our Düsseldorf office, Germany. Catrice has broad experience as counsel in national and international arbitration proceedings and her particular fields of specialisation are construction/infrastructure, manufacturing/engineering, energy, TMT, commercial (agency, distribution, international sale) and corporate including post-M&A disputes. She also sits as an arbitrator. She was promoted to the partnership on 1 May 2023.

Hear from **Catrice Gayer** here

You joined HSF in 2016. What attracted you to the firm?

Before I joined HSF, I was working at a German law firm. A lot of the work I was doing was international arbitration, and the cases were truly international: in the nearly 8 years I worked there, not a single international arbitration case I worked on was in German. I was drawn to HSF due to its reputation as a global arbitration powerhouse. It was also a great opportunity to build the German disputes practice at HSF. At the time I joined, the Frankfurt office had been open for a couple of years but I was one of the first disputes lawyers in the Düsseldorf office, which was very exciting and a great opportunity for me.

You have a broad practice, spanning cross-border litigation and arbitration, with a focus on construction/infrastructure and manufacturing/engineering. What kind of disputes are you seeing?

As I work in the construction, manufacturing and engineering sectors, I tend to deal with high-value projects that have gone wrong – whether that is a significant delay, unmet specifications, one or often hundreds of defects or a dispute about the cost of the project. Over the years, the projects I have worked on have become increasingly sophisticated and innovative: they are often the first of their kind, particularly in the renewable energy, manufacturing, and transport sectors, which are constantly evolving at a rapid pace. As these projects are often high value, this means that the stakes are high when things go wrong.

In construction/infrastructure cases, I tend to work for the employer, contractor, subcontractors and other players involved; so I'm used to seeing every side of the story. As the disputes I work on often revolve around sophisticated technical questions, they involve experienced experts, be it on technical, delay or quantum issues. Their input and working efficiently and closely with them is vital to informing the case strategy.

Arbitration has already played an important role in Germany, and there is an ongoing project to modernise the country's arbitration law. What changes do you expect to see in future?

Germany's arbitration law, the current "German Arbitration Act" is based on the UNCITRAL Model Law and so it provides a very robust framework. Germany is also a very pro-arbitration jurisdiction – there are very few cases where the courts have set aside or refused enforcement of an award in commercial arbitrations (and if they have, it will have been for very good reasons).

I think that Germany has previously undersold itself as an arbitral seat and should be up there with London, Paris and Geneva as a popular choice of seat. We have lots of excellent arbitrators, counsel and technical expertise. The German Arbitration Institute (DIS) also revised its rules in 2018 with the aim of reducing time and costs for users. It is a modern set of rules which include provisions aimed at streamlining proceedings, such as giving a preliminary assessment of the case at an early stage (if both parties agree). I would expect Germany to grow as an arbitration hub in the coming years and would hope that it could start to rival some of the other major arbitration hubs.

Do you notice any difference in approach between German lawyers who are civil-law trained and your colleagues from other jurisdictions?

One great thing about working at a global law firm is that I get to work with colleagues from lots of different backgrounds. I really admire the advocacy skills of my English-qualified colleagues – whether in their written submissions or cross-examination. This is something that I learn from and try to mirror in my practice.

In international arbitration cases, the difference is less about whether you are civil or common-law trained. Often, the different practices and the "best of all possible worlds" have merged. But an approach that is very important to me in my daily practice is – for the right cases – that we focus on adopting an early case strategy and front-loading the evidence, rather than "keeping our power dry". For example, we tend to instruct experts at a very early stage in order to identify the difficult technical questions and weaknesses in the case. Further, we plead our case in as much detail as possible in the first round of submissions. There have been many cases where we have successfully achieved a settlement by adopting this strategy.

What do you enjoy most about the work you do?

I love learning new things and drilling down into the detail – whether that's how a power plant or a steel mill works, how to produce energy in the most emission-free way or how trains, airplanes and e-buses move. But also, I enjoy identifying the overall case strategy and working as a team. And finally (and possibly unusually for a lawyer!), I am also a big fan of numbers, so I enjoy analysing the figures to find holes in the other side's case.

What do you do when you are not helping clients resolve their disputes?

I love visiting new places, spending time with family and friends, and a range of different sports. I sometimes also like sleeping!

Having your cake and eating it: **Award challenges in Hong Kong and Singapore**

While parties choosing arbitration generally want finality, they also expect the opportunity to challenge flaws in the process. Striking the right balance requires supervising courts with sophistication and expertise

Watch the video **here**

Challenges to arbitral awards increasingly feature as a standard part of the post-award playbook for disappointed parties. Most of these challenges are rejected in leading seats, reflecting the high legal bar for awards to be set aside or refused enforcement, and consistent with parties' general expectations of finality. Limited rights to challenge awards on due process or jurisdictional grounds nevertheless provide an important safeguard to protect the fundamental rights of parties, who expect to have a remedy when things go wrong with the arbitral process.

Striking this balance requires sophisticated courts staffed by judges with specialist arbitration expertise. Recent decisions in Hong Kong and Singapore illustrate the approach of the courts in Asia's most popular seats.

> Herbert Smith Freehills has acted in some of the most high-profile and significant award challenges to have come before the Hong Kong courts in recent years. Arguing the landmark case of *C v. D* before the Court of Final Appeal was a personal career highlight. The court's ruling that non-compliance with escalation clauses generally will not affect the tribunal's jurisdiction has far-reaching practical and commercial significance for parties. The case also underscores our ability to conduct arbitration-related cases before every level of the Hong Kong courts.
>
> **SIMON CHAPMAN KC, DEPUTY HEAD OF GLOBAL ARBITRATION PRACTICE, EAST**

High bar for success

Arbitration judges in both jurisdictions enforce a high threshold for successful challenges. In Hong Kong, a Herbert Smith Freehills (HSF) team led by current CEO Justin D'Agostino acted in the leading case in this area, *Grand Pacific v. Pacific China* (2012), in which the Court of Appeal held that breaches of due process must be "serious" or even "egregious" before they will justify the court in setting aside an award. In Singapore, the Court of Appeal emphasised in *SBT v. Fairmount* (2007) that the complaining party must show they suffered actual or real prejudice. The successful party was represented by Daniel Chia (who has since joined HSF's formal law alliance partner in Singapore, Prolegis, as head of litigation).

Back door appeals

One of the most common tactics of dissatisfied award debtors is to allege due process breaches in order to attack merits findings by the back door. The robust approach to such challenges in both Hong Kong and Singapore is exemplified in the ruling of the Singapore Court of Appeal in *SBT v. Fairmount* (mentioned above), which emphasised that challenge proceedings are not an opportunity for a dissatisfied party to have a "second bite of the cherry" on the merits. The recent Hong Kong case of *AI v. LG II* (2023), in which HSF appeared for the successful award creditor, underlines the same point. The team was led in court by solicitor advocates Simon Chapman KC and Kathryn Sanger, and details of the case are available on our blog.

Ambush!

While adopting a robust approach to challenges in general, the courts in Hong Kong and Singapore will not uphold awards where there has been a serious breach of due process which gives rise to injustice. A classic example is where the tribunal has decided the case on the basis of an argument or finding which the losing party had no opportunity to address.

This was the position in the Singapore case of *Convexity v. Phoenixfin* (2022), in which the successful party was represented by Daniel Chia and Yanguang Ker (who joined Prolegis as a director as a member of Daniel's market-leading team). The respondent attempted less than a month before the hearing to amend its case to include a new argument that certain contractual provisions were unenforceable penalty clauses. Despite denying the respondent's formal application to amend its case to include this issue, the tribunal went on to dismiss the claimant's arguments, relying exclusively on the penalty issue.

> Upholding a challenge to an award can be the pro-arbitration decision where something has gone badly wrong with the process of the arbitration and a party has been genuinely prejudiced. In the unlikely event that they are on the receiving end of such a result, clients want to have confidence that the courts at the seat or the place of enforcement will provide redress. The courts in both Hong Kong and Singapore have consistently demonstrated a willingness to provide a remedy in these rare cases, while adopting a robust stance in rejecting *de facto* appeals on law and fact as well as other unmeritorious challenges.
>
> **KATHRYN SANGER, PARTNER, HONG KONG**

The Singapore Court of Appeal (in a decision which Daniel Chia and Yanguang Ker have written about in detail here) held that there had been a breach of natural justice prejudicing the claimant and set aside the relevant parts of the award. Recent Hong Kong caselaw is consistent with this decision.

Jurisdiction

Where an issue has clearly been placed before the tribunal for determination and the parties have had an opportunity to be heard, in contrast, claims of ambush by disappointed parties will be rejected. The recent Singapore case of *CDM v. CDP* (2021), in which Daniel Chia and Yanguang Ker represented the successful party, provides a good example. The award debtor challenged parts of the award dealing with an issue which had not been submitted for arbitration in the notice of arbitration or the statement of claim, arguing (among other things) the tribunal had therefore exceeded its jurisdiction. The Singapore Court of Appeal reviewed the record of the proceedings as a whole and found that the relevant issue was not only squarely before the tribunal but had been introduced by the award debtor itself in its own pleadings. The challenge was therefore rejected.

Escalation clauses

Turning back to Hong Kong, the recent landmark judgment of the Court of Final Appeal in *C v. D* (2023) has significantly narrowed the scope for jurisdictional challenges to awards based on alleged non-compliance with escalation clauses. Accepting the arguments put forward by Simon Chapman KC, who appeared for the successful party, the court adopted a presumption that disputes in relation to escalation clauses go to "admissibility" rather than jurisdiction and are therefore matters on which the tribunal's decision is final and cannot be reopened by the courts. The highly-anticipated decision provides welcome certainty for parties and brings the position in Hong Kong into line with that in Singapore and many other jurisdictions. Further details are available on our blog.

The devil is in the detail

While there are many similarities between the approach to challenge of awards in Hong Kong and Singapore, there are some differences which parties may wish to bear in mind when selecting a seat and considering post-award options.

The costs consequences of a failed challenge by the award debtor are likely to be more severe in Hong Kong, where the normal practice (which was established by the Court of Appeal in *Grand Pacific v. Pacific China*, mentioned above) is to order indemnity costs for unsuccessful challenges unless there are exceptional circumstances. In contrast, the Singapore Court of Appeal rejected the adoption of a default rule in favour of indemnity costs in *CDM v. CDP* (also mentioned above).

Hong Kong also features a statutory regime of limited appeal rights, which requires that the first instance court hearing a challenge

to an award must give leave before its decision can be appealed. The constitutionality of this regime as it applies to the setting aside of awards was upheld by the Hong Kong Court of Appeal in *CIF v. Dennis Lau* (2015), in which HSF acted for the successful party. In Singapore, meanwhile, there is an automatic right to appeal without a requirement for leave.

Whether these differences represent advantages or disadvantages for a particular party will vary depending on the circumstances of each case. In both jurisdictions, however, parties can be confident of a fair hearing from expert judges who are robust in rejecting unmeritorious challenges but are ready to act when needed to safeguard the integrity of the arbitral process.

> Award challenges are highly fact-specific and require a legal team which is completely on top of the details of the case. Having the challenge proceedings conducted by the same team which acted on the underlying arbitration (which will be best placed to understand the background and context of the procedure adopted) can be a huge advantage.
>
> Through its formal law alliance firm Prolegis LLC, Herbert Smith Freehills is one of few firms with the capability to provide an end-to-end service for arbitrations seated in both Hong Kong and Singapore. Our market-leading teams in both jurisdictions include lawyers and solicitor advocates who can guide our clients through both the underlying arbitration and any related court proceedings (including challenges to awards).
>
> **DANIEL CHIA, HEAD OF LITIGATION, HERBERT SMITH FREEHILLS PROLEGIS, SINGAPORE**

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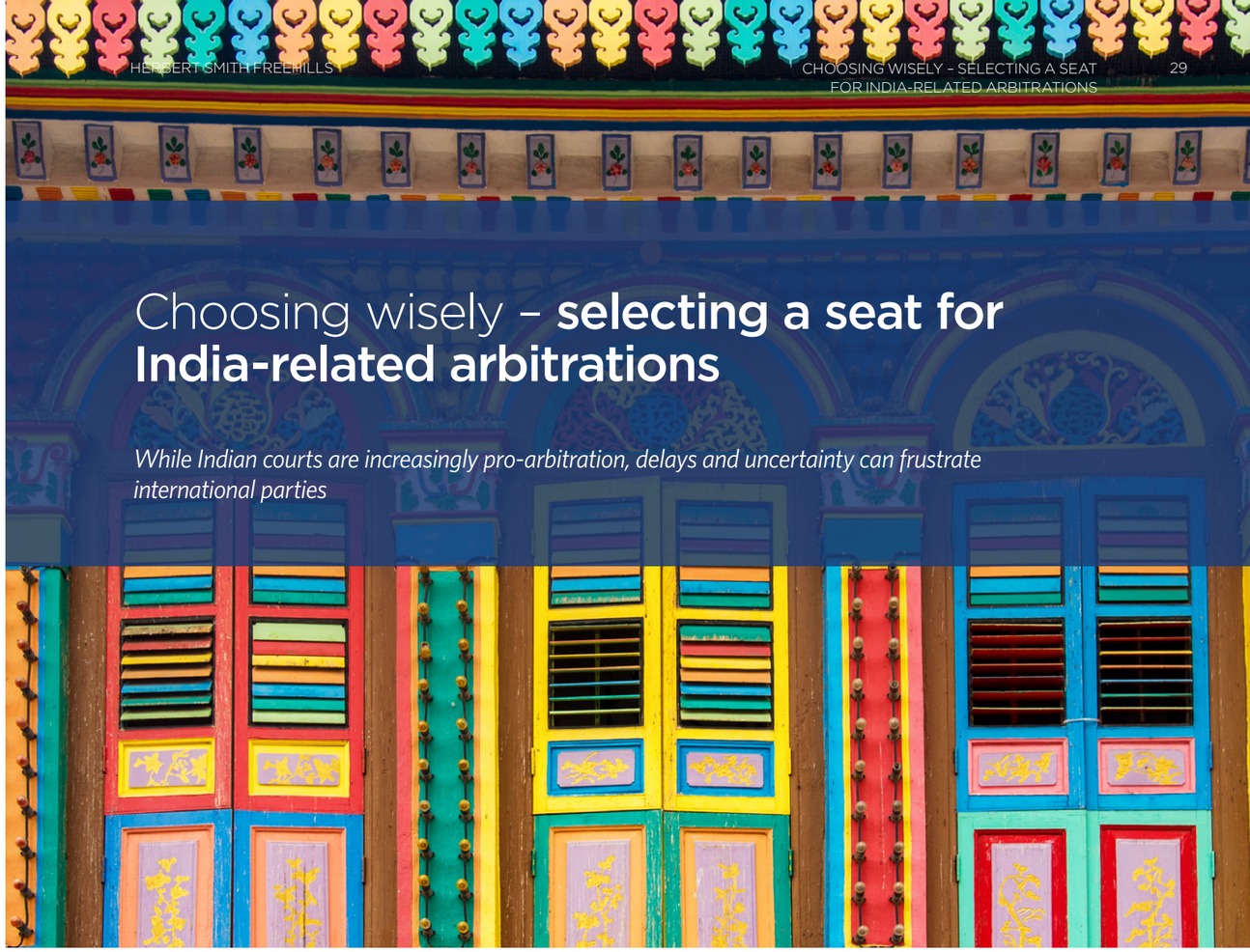
Choosing wisely – **selecting a seat for India-related arbitrations**

While Indian courts are increasingly pro-arbitration, delays and uncertainty can frustrate international parties



The Indian Supreme Court has put beyond doubt the freedom of parties to India-related contracts to choose arbitration outside of India (see *PASL Wind Solutions v GE Power Conversion India*, covered here). Market practices suggests that when such parties arbitrate offshore, they are likely to do so in Singapore or London – and both are suitable. Often, parties also prefer arbitration in India.

This article addresses the key differences between these choices of seat to assist with this important choice in commercial contracts. Carefully considering these at the outset and choosing the right seat (and the right dispute resolution mechanism) can help make the process efficient and effective.

As we note below, parties' experience of institutional arbitration in India, the UK and Singapore is increasingly similar, although ad-hoc arbitration in India is likely to be subject to delay due to the heightened role of the Indian courts. These areas of convergence are considered in more detail at the end of this article.

In our experience the key factors parties consider when choosing an arbitral seat are:

(i) Whether they are willing to submit to the Indian courts as the supervisory courts, with the risks of relative delay and uncertainty which that may bring compared to the English or Singapore courts.

(ii) Whether interim relief will be required against people or assets in India, in which case arbitration in India may be preferred.

(iii) Where arbitrability is a grey-area in India (for example for some kinds of shareholder disputes), whether the parties prefer to increase the likelihood that the arbitration nonetheless proceed, by choosing London or Singapore arbitration.

Each of these issues and more are considered in more detail below.

Where to choose? – The key considerations

Enforcement of Tribunal and Emergency Arbitrator (interim relief) orders

If the ability to obtain enforceable interim relief against assets in India is a key consideration, this may be a decisive factor in favour of choosing a seat in India, because there is no mechanism under Indian law to directly enforce an order of a foreign-seated tribunal. However, this limitation is somewhat mitigated by the option to use an order of a foreign tribunal to ask the Indian courts to grant interim relief in similar terms under section 9 of the Indian Arbitration and Conciliation Act (for example, see *HSBC v Avitel* here, where the Bombay High Court granted relief in similar terms to two SIAC emergency arbitrator orders).

	India	London	Singapore
Foreign orders	Not directly enforceable, but may be indirectly enforceable	Not directly enforceable	Yes
Domestic orders	Yes	Yes (in relation to interim orders) Untested (in relation to emergency arbitrator orders)	Yes

In India (for India-seated arbitrations) and Singapore (for Singapore-seated or offshore arbitrations), an interim order is enforceable as if it were an order of court. An English court will not act unless satisfied the applicant has exhausted any available arbitral process in respect of a failure to comply with the tribunal's order.

Choice of seat and arbitrability

All three seats recognise that certain disputes are not suitable for arbitration as a matter of public policy. These include family disputes, criminal or tax matters or insolvency proceedings affecting the rights of third parties (eg, schemes of arrangement, judicial management, and winding up). However, parties should consider their choice of seat carefully where disputes may arise in relation to minority oppression, mismanagement or unfair prejudice claims, intellectual property, or allegations of fraud.

Note that the non-arbitrability of a dispute under Indian law is a ground to resist enforcement in India, so when dealing with counterparties that only have assets in India, care must be taken before arbitrating offshore a dispute that is potentially non-arbitrable under Indian law.

Arbitrability Issue	India	London	Singapore
Minority oppression or company mismanagement or unfair prejudice claims	Unclear whether oppression and mismanagement are arbitrable, though purely contractual disputes arising out of shareholder agreements can be arbitrated.	Oppression (or unfair prejudice) disputes are arbitrable, but an arbitral tribunal does not have the power to grant all of the relief available in unfair prejudice disputes under the English Companies Act.	Minority oppression or unfair prejudice disputes are generally arbitrable, unless the subject-matter of the dispute is such that it would be contrary to public policy.
Intellectual properly	commercial disputes involving IP rights (eg, licensing agreements) are probably arbitrable. mixed authorities on whether awards determining infringement and validity of IP rights are enforceable as between the parties to the arbitration.	Contractual IP disputes (eg, licensing agreements) are arbitrable.	Commercial IP disputes (eg, licensing agreements) are arbitrable Awards determining infringement and validity of IP rights are enforceable as between the parties to the arbitration (but third parties will not be bound).
Allegations of fraud	Allegations of fraud can be arbitrated except where: the arbitration agreement is alleged to have been vitiated by fraud, or where the fraud allegations are against the State.	Allegations of fraud are generally arbitrable.	Allegations of fraud are generally arbitrable.

Note that under Singapore law, arbitrability is determined by looking at the law of the seat and the law of the arbitration agreement, so the agreement should also be governed by Singapore or English law in a Singapore seated arbitration, to maximise the likelihood that disputes are arbitrable (see *Anupam Mittal v Westbridge Ventures II* [2023] SGCA 1).

Impact of arbitral seat on choice of governing law

Parties to India-related contracts should consider whether Indian law imposes any restrictions on the parties' choice of governing law. This depends on: (i) whether all parties are incorporated in India (or in the case of an individual, are Indian nationals and/or residents); (ii) whether the contract has a "foreign element"; and (iii) the parties' choice of seat.

Indian courts are increasingly adopting a more flexible approach in allowing Indian parties the freedom to choose the governing law and seat of arbitration applicable to India-related contracts. For instance, in *PASL Wind Solutions v GE Power Conversion India*, the Supreme Court allowed two Indian parties the freedom to choose a foreign seat of arbitration (see our blog here). Meanwhile, in the case of *Sasan Power Limited v North America Coal Corporation India Private Limited* (see decision here), the Supreme Court allowed two Indian parties also to choose a foreign governing law since the dispute contained a "foreign element". However, there may still be some restrictions on the parties' freedom of choice in this respect, such as Section 28(1)(a) of the Indian Arbitration Act 1996, which provides that in an arbitration other than an international commercial arbitration (ie, an arbitration where at least one party is not incorporated, resident or national of India), Indian law shall be mandatory. We recommend parties seek specific advice on these issues before selecting the governing law and seat of arbitration applicable to their contracts.

Note: Consider whether you want to allow appeals on issues of law. If so, parties must choose London seat and English governing law and make sure that any waiver of such right to appeal in applicable arbitration rules (ie, LCIA Rules and ICC Rules do contain a waiver of appeal; whereas the LMAA Rules do not) is excluded.

> Choice of seat is an important consideration for arbitration users. The arbitral seat or legal place of arbitration determines which country's arbitral procedural law applies and which courts have supervisory jurisdiction over the arbitration. Choosing the right seat can make a meaningful difference to the effectiveness of remedies and have a significant bearing on the outcome of a dispute.

Increasing convergence between India, the UK and Singapore

Parties have found increasing similarities in their experience of institutional arbitration, whether the seat is in India, London or Singapore. Institutions are often able to deal with issues that, in ad hoc arbitrations, might ordinarily be referred to the court, for example regarding the appointment of arbitrators or first review of arbitrator challenges.

Whether the seat of arbitration is India, London, or Singapore, many of the substantive principles will be similar. Examples of convergence of the national arbitration laws across all three seats include:

- Arbitration is confidential under the laws of India, England and Singapore subject only to exceptions, such as disclosures required by law.
- Third-party funding is available for arbitration at all three seats. Third-party funding is clearly regulated and prevalent in England and Singapore and has been recognised judicially as essential to ensuring access to justice in India (see our blog here).
- The courts at all three seats can appoint arbitrators in ad-hoc arbitrations (the arbitral institution is capable of appointing arbitrators under most institutional rules such as the ICC, LCIA, SIAC and MCIA rules). The appointment of arbitrators has historically been a source of delay in India, although the Indian Supreme Court has recently asked courts to attempt to decide such applications within six months (see our blog here).
- Attempts to commence insolvency proceedings at all three seats will be stayed where a disputed debt is subject to an arbitration agreement (see *Indus Biotech Private Limited v. Kotak India Venture Fund* from the Indian Supreme Court and recent decisions in England and Singapore here and here)
- At all three seats, arbitrators are subject to duties of independence and impartiality and must disclose circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. Indian statute defines the content of this duty in detail (see the Fifth Schedule and the Seventh Schedule of the Indian Arbitration and Conciliation Act 1996) and the duty has been developed through case law in England and Singapore (for example, in *Halliburton v Chubb*, discussed here).
- In all three jurisdictions, domestic awards can be set-aside, and awards refused enforcement, on similar grounds as found in Article V of the New York Convention (such as lack of jurisdiction, a serious failure of due process, non-arbitrability of the dispute, or that the award is contrary to the public policy of the place of enforcement). There is important local nuance as to how these principles have developed in each jurisdiction; but it would be difficult to predict at the contract drafting stage how these differences play out.

While many substantive principles are similar across the three jurisdictions, parties' experience in practice can be quite different given the unpredictable nature of litigation in India (especially delays and timelines) and the ease with which parties approach Indian courts during various stages in an arbitration. While Indian courts are gradually and consistently taking a more pro-arbitration view, relative delays and uncertainty in the Indian court system can come as a surprise to international parties.

> India-related businesses are no strangers to London as a trusted seat of arbitration. London offers a forum that understands the needs and unique circumstances of clients with an India nexus. The well-established legal framework under English law, the multitude of experienced arbitrators, and strong track record of upholding and enforcing arbitral awards contributes to London's status as the go-to destination for the resolution of complex cross-border disputes. With the recent developments in the Indian arbitration landscape, London will no doubt remain a preferred seat of arbitration for Indian clients in their commercial contracts.
>
> **ANDREW CANNON**

> The arbitration scene in India is undergoing an exciting transformation. Indian and international clients alike are very discerning and do not hesitate to demand effective and efficient solutions for their disputes. The need of the hour for all India-related disputes is for lawyers to use their experience to simplify the complex, global dispute resolution scene and deliver practical, tailor-made solutions that help clients achieve their goals.
>
> **ANURADHA AGNIHOTRI**

> Indian parties have been the top users of SIAC arbitration for many years, and many of the leading Singapore authorities concern India-related disputes, creating helpful precedent for parties to understand how India-specific issues (like the jurisdiction of the NCLT, or the impact of Indian insolvency laws) may impact a Singapore seated arbitration.
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> Together with its familiar common law legal system, geographic and cultural proximity and well-established arbitration infrastructure, we expect the number of Indian parties arbitrating in Singapore to continue to increase.
>
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Can in-house teams recover their own arbitration costs?

Despite being the preferred mechanism for resolving cross-border disputes, many still consider arbitration too costly. We assess what parties can do to recoup the costs

According to the 2021 Queen Mary University of London International Arbitration survey, arbitration remains the preferred dispute resolution mechanism for cross-border disputes. However, the biggest concerns for arbitration users are that it takes too long and it costs too much. As a result, one common question is whether and to what extent parties can recover costs incurred in connection with an arbitration. The answer can be an important factor in deciding whether a party should incur (or continue to incur) these costs or seek settlement.

When recovery of costs is discussed, the focus is usually on costs of external counsel and experts. This is understandable given these are typically the most significant costs incurred by parties. What is discussed less is whether the costs of in-house counsel and other party employees are recoverable. An arbitration requires significant attention of in-house teams. It is unlikely to form part of business as usual for many companies and running an arbitration invariably redirects substantial time from other projects.

Until recently, except for out-of-pocket expenses, in-house costs were not considered recoverable as a matter of principle. This position is changing. In the appropriate circumstances, tribunals are more inclined than before to award these costs: in one recent case, we successfully recovered a large percentage of our clients' in-house costs. In this article, we look at general principles regarding the recovery of in-house costs and a few points for parties to consider at different stages of the arbitration process.

Arbitrators usually have wide discretion to award and allocate costs. National arbitration legislations and arbitral rules recognise a tribunal's authority to make cost decisions and may provide some general guidance on allocation of costs. However, there is limited or no guidance on categories of recoverable costs. The prevailing approach of tribunals (particularly in commercial arbitrations) is that 'costs follow the event' or 'loser pays'; however, there may be other factors which qualify this approach.

In-house costs of managing the dispute are typically irrecoverable. Traditionally, in-house costs were considered irrecoverable on the basis that such costs fall within the general operational expenses of the party. For the same reason, tribunals still typically consider that costs incurred by

in-house counsel or other employees in instructing external counsel and/or in the general management of a dispute are not recoverable.

In-house costs might be recoverable if the work done internally reduced the work carried out by external counsel and experts. The Chartered Institute of Arbitrators' Guide on Drafting Arbitral Awards notes that arbitrators may award in-house costs "if they are satisfied that the work done internally obviated the need for outside counsel or experts to do it and hence led to an overall saving of costs". This makes sense as a matter of fairness – a party should not be disadvantaged because the counterparty allocated all work to outside counsel and experts. This is also implicit recognition of the evolving role played by in-house counsel who often provide strategic input and make important contributions throughout the arbitration, with the result that running an arbitration is more collaborative than before. It is usually easier to persuade a tribunal this was the case in a particular arbitration if there was a detailed record of what the internal teams did.

Moreover, dividing the work appropriately between the internal and external teams may reduce the overall costs incurred by the party. In this regard, a tribunal might look at whether the number of hours and the fees billed by external counsel instructed by the party claiming its in-house costs are lower than that billed by the other party's external counsel.

To be recoverable, in-house costs must also be substantiated. In contrast to external counsel who provide detailed invoices, a significant practical hurdle in claiming in-house costs is such costs are often difficult to accurately substantiate with supporting evidence. Ideally, in-house teams would provide a record of the time spent working on the particular arbitration along with an explanation as to how that time translates into costs, and whether and how those costs are recorded in the party's systems.

Such evidence might conceivably be available in a situation where in-house counsel is specifically hired for the purposes of a dispute, or where internal work is carried out by a group company which is not party to the arbitration and there is an intra-group agreement to govern how the party shall bear the costs (pursuant to which invoices are issued for that internal work). However, such clear evidence is unlikely to be available in most other circumstances. Parties can consider providing an approximate figure for the time spent by internal teams and calculating the costs by reference to a proxy rate. However, the less evidence there is for substantiating in-house costs, the less likely it would be for a tribunal to award such costs.

What should parties consider?

In-house counsel and other internal teams often dedicate substantial time to an arbitration and their contributions are indispensable to its outcome. Therefore, it makes sense to consider whether internal costs can be recovered in the event of a successful outcome. While it is not possible to predict how a tribunal will approach these costs, it is worth considering the following points.

- **At the stage of drafting the arbitration agreement – should in-house costs be expressly addressed?** Given the uncertainties in how a tribunal will approach decisions on costs, you may wish to address costs in the arbitration agreement and expressly provide that in-house costs are (or are not) recoverable. In practice, however, this level of detail is unlikely to be front of mind at the drafting stage.
- **At the commencement of the arbitration – should you put systems in place to record the time spent, work done, and costs incurred by in-house teams?** If there is a possibility that you may wish to claim in-house costs, it would be sensible to discuss with external counsel and put these systems in place. As noted above, it would likely make it more straightforward to substantiate these costs and explain how the work carried out by the external teams was reduced by the in-house team's contributions. It might also be helpful to flag the involvement of in-house counsel to the tribunal by, for example, including them in the first procedural order as part of the legal team to be copied on procedural correspondence.
- **At the stage of cost submissions – should you claim in-house costs?** As costs submissions are typically exchanged simultaneously and before the substantive outcome of the arbitration is known, different factors might be relevant to this decision. If you claim in-house costs, you would likely be seen as accepting as a matter of principle that such costs are recoverable. This might give credence to the other party's claim for in-house costs (if any). If the total costs claimed (internal plus external costs) are significantly higher than the total costs claimed by the other party, it might make your costs appear unreasonable or disproportionate. On the other hand, if it appears during the course of an arbitration that the other party's legal fees would likely be higher (for example, given a significant disparity in the number of attorneys on record), you might feel more comfortable claiming in-house costs.

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Spotlight interview **Charlie Morgan**

Charlie Morgan is a partner in our global arbitration team, based in London. He specialises in energy and technology disputes, and his recent experience includes advising energy majors, global tech companies and start-up/scale-up companies in high-value and complex disputes. Charlie was promoted to the partnership on 1 May 2023.

Hear from **Charlie Morgan** here

You joined the firm as a trainee – can you tell us a bit about your path to partnership?

My first seat as a trainee in 2012 was in the London arbitration team working with Paula Hodges KC and Chris Parker KC. I attended a hearing where I saw both of them up on their feet doing all of the advocacy and it was at that point that I got the arbitration bug!

My early career was driven largely by my interest in the energy sector – as a trainee I spent six months on secondment at BG Group (now Shell) and I also went to Paris to sit with our infrastructure and projects team. Since then, I have worked on disputes in the energy sector across many jurisdictions and emerging markets.

It was then I noticed shifts in our clients' businesses and in how heavily they were relying on digital technologies. I spent a lot of time upskilling on existing and emerging technologies and how they are being used. This led to me develop a tech disputes specialism, acting on a number of disputes for both tech and non-tech clients, from joint ventures for tech infrastructure (eg, fibre cables) to governance disputes, data migration disputes, outsourcing going wrong, cloud-computing and crypto and digital asset disputes. This is a huge growth area with fantastic opportunities for our clients; but it also comes with risks and unavoidable disputes.

My path to partnership would not be complete without mentioning my two boys, who are now aged four and two. I took advantage of the firm's generous shared parental leave policy to spend time with them in the early days. They've certainly helped to hone my problem solving and multi-tasking skills!

Your practice focuses on energy disputes and technology. What trends do you see at the moment and why are these disputes going to arbitration?

A lot of recent macro trends arise from global events like Covid-19, the Ukraine war, decarbonisation or digital transformation, and they apply (though in different ways) to energy and tech. Our clients' businesses and the world in which they operate continue to be increasingly complex and international. The disputes they throw up involve different parties, jurisdictions and legal systems. They are also often commercially sensitive and strategic in nature. It is no wonder that arbitration as an international, flexible and neutral forum is in high demand.

In the energy sector, we have seen a lot of price disputes arising from the volatility of commodity prices, supply-chain disruptions and their operational impacts. We've also seen energy transition and decarbonisation disputes and investor-state disputes arising – in part at least – due to governments seeking to make up treasury shortfalls arising from the pandemic response.

In tech, one prominent trend is the surge in disputes concerning private capital investments in technology and digital transformation, from outsourcing disputes, data migration issues, misrepresentation claims or disputes arising from the operational impacts of regulatory change. Commercial disagreements related to software development, licensing, and technology service agreements are also on the rise, reflecting the complexities of negotiating and executing these types of projects.

You have been involved in a number of internal digital transformation initiatives for the firm. Why is it important for lawyers to be tech-savvy?

Digital tech has been changing all our lives (both personal and professional) for many years. Our clients' businesses are changing, and the legal sector is not immune to change either. It is important that we keep pace with that change to remain trusted and valued advisors to our clients. We can only do that if we invest and adopt tools which keep us delivering the most efficient and effective legal advice.

When I started out, we didn't have things like technology-assisted review or generative AI, and ultimately these are all tools that enhance our ability to deliver the best service for clients. Lawyers need to provide input on things like the functionality, usability and user experience of tech in order to ensure that the products they are using actually deliver value for clients.

How is Herbert Smith Freehills using tech to better serve its clients?

At HSF, we have a large portfolio of technology at our lawyers' disposal – varying from the full Microsoft 365 suite through to document automation tools, cutting edge e-discovery software with built in AI and machine-learning and predictive analytics tools. We also have proprietary software we've developed ourselves, including tools to robustly predict the effort and time involved in an arbitration and to take data-driven decisions on pricing and return on investment for clients pursuing particular strategies in the dispute. This allows us to be innovative with pricing and solutions for clients.

We also use specialist software to deliver our Decision Analysis service, whereby we build decision-tree models which quantify and visualise legal risk. The visuals we create demonstrate the risk profile of disputes in an intuitive way to better support client decision-making.

But tech doesn't stand still, and we constantly work to identify and test new things. I have recently been testing an in-house tool we developed using generative AI (the best-known public example of which is ChatGPT) to interrogate our data and generate information more quickly. This is a hugely exciting area, but it requires cutting through the hype and ensuring adequate controls are in place to protect ours and our clients' data, as well as ensuring the limitations of the software are well-understood to its users.

What is your favourite thing about being an arbitration lawyer?

Through advising our clients on high-stakes disputes, we are privileged to witness a captivating interplay between commercial, economic and political drivers. This is something that has always been of great interest to me – I did a degree in politics, philosophy and economics at university, and I like understanding how the work we do for our clients sits within the broader landscape.

As arbitration lawyers, we also have the joy of presenting the evidence and arguments to the decision-makers ourselves! We are particularly lucky at HSF to have four KCs in our practice, which also allows us to maintain the strong culture of doing our own advocacy.

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

I would have fulfilled my **lifelong** dream of becoming a professional taste-tester for ice cream.

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