HERBERT SMITH FREEHILLS

INSIDE ARBITRATION

PERSPECTIVES ON CROSS-BORDER DISPUTES

In this issue

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Welcome to the thirteenth issue of Inside Arbitration

2022 opened with continued uncertainty in the global fight against the Covid-19 pandemic. The closure of borders and various levels of lockdowns across the globe in response to the Omicron variant have tested all of us. However, I truly hope that this year will bring with it clearer skies and more positive prospects for us all. Indeed, there was a real lift in my own spirits when I was informed that London-based arbitration partner Chris Parker had been appointed Queen's Counsel (QC) in England and Wales. Chris is a great example of "home grown talent", having joined Herbert Smith's international arbitration group in London on qualification. He has also spent time in the firm's arbitration teams in Shanghai and New York, before returning to London from New York in 2015. Chris is an extremely talented advocate and this appointment is richly deserved. I am delighted for him.

Resilience has never been a more important quality than over the past few years. I'm very proud to share with you some statistics from our global arbitration practice from 2019-2021 which undeniably demonstrate that resilience. The overall portfolio value of the disputes handled by HSF in August 2021 stood at over $122 billion, an astounding figure showing the trust our clients place in us to manage their "bet the company" disputes. Our data also shows that 66% of the hearings in which we participated during 2020 and 2021 were fully virtual, demonstrating our adaptability in these unusual times. Do take a look at our infographic - it provides an inside view of the strength and breadth of our practice.

As trusted advisors to our clients we need to anticipate the challenges and opportunities appearing on the horizon. This issue has those themes front and centre, with a focus on adapting to and driving forward change from a sector perspective, regionally and within the arbitration market.

The firm continues to take a lead in guiding and helping our clients through their digital transformation and the use of new digital technologies. We have partnered with Global Arbitration Review in delivering a recent webinar on "Decentralised justice: the possible vs the practical of resolving digital disputes through arbitration". In this issue Simon Chapman QC and Charlie Morgan pick up on the themes discussed during that webinar and will look at whether the law, and dispute resolution, is keeping pace with digital technology.

Our clients value our global insight but also our regional specialism. With that in mind, three of our articles in this issue provide specialist insight into developments in arbitration in different regions and what they may mean to our clients. Weina Ye, Helen Tang, Briana Young and Sophia Li discuss the amendments that are being proposed to the PRC Arbitration Law, when they may come into force, and what they may mean for arbitrating China-related disputes in future. Meanwhile, Debby Sulaiman and Gitta Satryani discuss Indonesia's efforts to make it an attractive venue for arbitration and look at the new arbitration centres that have recently been launched there as potential alternatives to BANI (Badan Arbitrase Nasional Indonesia), including some sector-specific institutions. They also highlight some important considerations for parties entering into Indonesia related commercial contracts. Finally, Elizabeth Kantor and I look at the proposed review of the English Arbitration Act 1996 by the Law Commission of England and Wales and consider why the review is happening and where they may focus their attention.

We have also chosen to focus on partners in Herbert Smith Freehills Kewei for our Spotlights in this issue. Weina Ye and Cathy Lui are two very talented practitioners whose international experience is matched by their peerless knowledge of the PRC market. I hope you enjoy reading about their journeys to partnership, how the HSF Kewei Joint Operation benefits our clients and how the Chinese and international practice of arbitration may harmonise in future.

> **Resilience has never been a more important quality than over the past few years.**

Investor State Dispute Settlement has also been undergoing a period of transition over the last few years with an overhaul of the ICSID rules, and potentially the entire system, on the cards. With the draft revised ICSID Rules being tabled for a vote of approval by Member States in early 2022, now seemed like the right time to look at this subject in some more detail. In this issue, Christian Leathley, Chiara Cilento and Maria Lucila Marchini will be sharing their insight into the controversy surrounding ISDS over the past few years. In our next issue, they will provide an overview on where things currently stand, what the ICSID rule changes mean for investors and states and what further changes are likely over the coming years.

Read our Arbitration and Public International Law blogs at

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

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

ESG, Decarbonisation and Climate Change remain high on the agenda for our clients, for our arbitration practice and Herbert Smith Freehills more widely. As decarbonisation and climate change gains greater prominence for clients and their contracts, Craig Tevendale, Louise Barber and Arushie Mahwah give their insight into how these contractual arrangements are being challenged by the move towards decarbonisation and how contractual drafting may need to shift in future. We are committed to Diversity and Sustainability in what we deliver to our clients and are signatories of both the "Green Pledge" in arbitration and the "Equal Representation in Arbitration" Pledge. As a female head of a leading arbitration practice and President of the LCIA, diversity is a particular passion of mine. In this issue May Tai, Elizabeth Kantor and I explore why diversity in all its forms remains a challenge for arbitration, where success has been achieved and the steps that we, and you, can take to make a real difference.

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

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

Paula Hodges QC
Partner, Head of Global Arbitration Practice

Hear from **Paula Hodges QC** here

Arbitration news and developments

1. We have seen a spate of innovation and rule changes at several arbitral institutions, with more expected over the coming months.
   - The HKIAC has launched "HKIAC Case Connect", an online case management platform and repository for all documents on an arbitration. It is available free of charge until the end of 2022.
   - Prime Finance has approved new rules which came into force on 1 January 2022.
   - UNCITRAL's expedited arbitration provisions for the UNCITRAL Arbitration rules and explanatory note came into force on 1 October 2021. They will apply by agreement only and there is no threshold in terms of the value of the claim.
   - The ICC has published updated guidance for those appointed as experts under the ICC Expert Rules.
   - SIAC is expected to publish updated rules in 2022. These will be the 7th edition of the rules.
   - The Netherlands Arbitration Institute is expected to issue new rules in 2022.

   For more information, contact Vanessa Naish, Briana Young or Elizabeth Kantor.

2. On 9 December 2021, the Russian Supreme Court issued a judgment where it unequivocally held that if international sanctions are introduced against an entity, the Russian courts will have jurisdiction to hear disputes where such an entity is a party. That will be the case notwithstanding a dispute resolution clause providing for a different forum. It is not necessary for the sanctioned entity to provide any evidence that the agreed dispute resolution clause is unenforceable due to "obstacles to access to justice" caused by sanctions. The mere fact that sanctions have been imposed is deemed sufficient to create obstacles for a sanctioned entity to access to justice: therefore, the sanctioned entity can simply submit to the jurisdiction of the Russian courts. To discuss the implications for your business, please contact Ivan Teselkin or Maria Dolotova.

3. The English and Hong Kong Courts have confirmed that compliance with pre-conditions to arbitration is a question of admissibility, not jurisdiction, and that an arbitral tribunal's decision on admissibility is beyond the purview of the courts. Contact Briana Young for more information.

4. On 7 December 2021, the English Commercial Court refused a challenge to an arbitral award brought on the basis of the tribunal's award of the costs of third party funding to the successful party, finding that it did not constitute a serious irregularity under s68 of the 1996 Arbitration Act. In doing so, it followed the earlier case of *Essar*, but has left open the prospect of a s69 challenge for an error of law on this question in future. Contact Vanessa Naish for more information.

5. The ICSID Secretariat has published Working Paper 6, the latest iteration of its series of working papers on the revisions to the ICSID rules for ICSID Convention and ICSID Additional Facility arbitrations and conciliations. It has also published the complete set of amended ICSID rules in three official languages, English, French and Spanish. ICSID plans to table these rules for a vote of approval in early 2022. The impact of these changes will be discussed in our next issue of Inside Arbitration. Contact Andrew Cannon or Christian Leathley for more information.

6. On 20 September 2021, Decree 34 of 2021 Concerning the Dubai International Arbitration Centre (**DIAC**) was enacted in Dubai, by virtue of which the Arbitration Institute in the DIFC (**DAI**) was abolished. The DAI was the counterparty of the London Court of International Arbitration (**LCIA**) in an Operating Agreement that established the DIFC-LCIA.

   Amongst other things, the decree provided for the DAI's assets to be transferred to the DIAC, which will also see some restructuring under the decree).

   Under the decree, all agreements providing for DIFC-LCIA arbitration will remain valid. All ongoing arbitrations, mediations and other ADR proceedings commenced prior to the decree will be administered by the DIFC-LCIA Registrar and Secretariat for and on behalf of the LCIA until such proceedings are concluded. However, unless the parties agree otherwise, all arbitrations, mediations and other ADR proceedings arising out of agreements referencing the DIFC-LCIA and referred for resolution after the date of the enactment of the decree will be administered by the DIAC in accordance with the DIAC Rules.

   The LCIA is currently in discussion with the authorities in Dubai regarding transitional arrangements for cases where the parties have agreed to arbitration or mediation pursuant to the DIFC-LCIA Rules.

   For further information and guidance on the impact of this decree on your existing and future dispute resolution provisions relating to the Middle East, please contact Stuart Paterson, or Nick Oury.

7. Change is afoot in Singapore and Hong Kong regarding success fees in arbitration. On 12 January 2022, the Singapore Parliament passed the Legal Profession (Amendment) Bill, which legalises Conditional Fee Agreements for arbitration. The Bill will become law when it is officially gazetted. On 15 December the Law Reform Commission of Hong Kong published a report recommending that Hong Kong allow lawyers to use outcome related fee structures for arbitrations. These include Conditional Fee Arrangements, Damages Based Agreements and Hybrid Damages Based agreements. Legislative amendments are likely to take place during 2022. If you want to find out more about the proposed changes in Singapore please contact Alastair Henderson, Gitta Satryani, Elaine Wong, Tom Furlong or Dan Waldek. For the implications in Hong Kong, please contact Kathryn Sanger or Briana Young.

8. Herbert Smith Freehills is a proud supporter of the DELOS open access arbitrator database initiative, intended to promote diversity and share information about potential arbitrators across the world. The database will be available from 22 February 2022 and will be a valuable resource for practitioners and clients.

9. Justin D'Agostino, global Chief Executive Officer at Herbert Smith Freehills, has been appointed as the new co-chair of the Arbitration Pledge (**the Pledge**) Global Steering Committee. The Pledge seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve fair representation. Having been central to the establishment of the Pledge in Asia at its inception, Justin will now bring his wealth of leadership, experience and passion about diversity to the Pledge's ambitions and activities globally. Briana Young, Professional Support Consultant and practice manager in the Greater China arbitration practice at HSF, is also joining the Pledge's leadership team as Secretary of the Pledge Global Steering Committee while the current Secretary is on maternity leave. Contact Briana Young for more information.

Proposed Amendments to China's Arbitration Law: **a sign of internationalisation?**

The current Arbitration Law of the People's Republic of China (**Arbitration Law**) was promulgated in 1994. Except for cosmetic amendments made in 2009 and 2017, it has been in force for 26 years without substantial changes. With the rapid economic expansion over the past decades in China, the Arbitration Law has, in many respects, become disconnected from both economic reality and international practice.

Mainland Chinese courts, particularly the Supreme People's Court in Beijing and high courts and intermediate courts in the more developed regions, have long demonstrated their support for best practice in international arbitration. Mainland institutions have modernised their rules to reflect international best practice. The Arbitration Law, however, lacks many of the concepts and powers that are fundamental to modern arbitral legislation. These include the kompetenz-kompetenz doctrine, power for tribunals to grant interim relief, and the concept of a legal seat of arbitration. In addition, it is still unclear whether non-Chinese institutions can administer arbitrations in Mainland China. This has hindered the internationalisation process and the overall development of arbitration in China.

In light of these fundamental issues, the Ministry of Justice started a revision process in 2018, which led to the publication of the Revised Arbitration Law (Draft for Comment) (**Revised Draft**) on 30 July 2021 for public consultation. The proposed revisions are designed to improve the Arbitration Law by resolving existing problems and modernising China's arbitration regime.

The Revised Draft signals a range of ground-breaking changes to the existing arbitration regime in Mainland China. If enacted, the proposed revisions would address these lacunae and bring Mainland China more in line with other leading arbitral jurisdictions.

This article provides an overview of the key changes proposed in the Revised Draft.

1. General principles

Article 10 of the Revised Draft provides that PRC courts will "support and supervise" arbitration. Articles 4, 29 and 30 enshrine the following principles:

- parties to arbitration must be treated equally and provided with opportunities to fully present their cases (Article 29);
- undue delay and expense must be avoided in arbitral proceedings (Article 30); and
- arbitral proceedings must be conducted in good faith (Article 4).

The principle of conducting arbitration in good faith is further enshrined in Articles 21(2) and 33 of the Revised Draft. Akin to the principle of estoppel, Articles 21(2) and 33 prevent parties from raising jurisdictional or procedural objections at a later stage (eg in the enforcement stage or the set-aside proceedings) if they did not raise the objections in the course of the arbitration.

In addition, the Revised Draft seeks to adapt to the post-COVID-19 era, by allowing electronic methods of serving arbitration documents (Article 34) and conducting arbitration proceedings (Article 30).

Furthermore, Article 1 in the Revised Draft replaces "equal parties" with "natural persons, legal persons and other organizations", which may permit investor-state arbitration in China. However, there is no detailed information on what this means and so whether the courts would recognise and enforce an arbitration award made in investor-state disputes is still a matter of speculation.

2. Foreign arbitral institutions permitted to "conduct foreign-related arbitration business"

Article 12 of the Revised Draft provides that "foreign arbitral institutions" may set up offices in Mainland China to "conduct foreign-related arbitration business". Although the Revised Draft does not define "foreign-related arbitration business", it has been widely considered that this article would allow arbitral institutions based outside Mainland China to administer arbitration cases in Mainland China.

A number of foreign institutions such as ICC, HKIAC and SIAC have set up offices in Mainland China. However, those offices have so far only been permitted to conduct business development activities in Mainland China. Provision of case administration services by foreign institutions is currently not allowed except in certain designated areas such as Shanghai's Lin-gang free trade zone. The Revised Draft would allow foreign institutions to administer cases in Mainland China, although the scope of case administration services to be provided by foreign institutions will be limited to foreign-related arbitration cases and not include purely domestic Chinese cases.

In this connection, the Revised Draft also replaces the term "arbitration commission(s)" with the term "arbitral institution(s)". The Arbitration Law uses the term "arbitration commission(s)", a specific name for Mainland Chinese arbitral institutions, as the 1990s legislators originally intended the Law to apply only to domestic institutions, without envisaging that foreign institutions might also operate in Mainland China. In order to introduce the ground-breaking change of allowing foreign institutions to operate in Mainland China, the Revised Draft adopts the term "arbitral institution(s)" throughout, which refers to both domestic arbitration commissions and foreign arbitration institutions.

3. Seat of arbitration

While the PRC judiciary has already adopted this approach in practice, the concept of a "seat of arbitration" is not expressly recognised under the current Arbitration Law. The Revised Draft expressly recognises this concept and adopts the term "seat of arbitration".

According to the Revised Draft, if the parties fail to agree on the seat of the arbitration, the seat will be "the location of the arbitral institution" (Article 27). However, in case of a foreign-related arbitration, the seat may be determined by the arbitral tribunal having regard to the circumstances of the case (Article 91).

Based on the proposed text, there appear to be two possible interpretations:

i) Article 27 applies to domestic arbitration whereas Article 91 applies to foreign-related arbitration; or

ii) Article 91 applies to *ad hoc* foreign-related arbitration only, whereas Article 27 applies to both domestic arbitration and institutional foreign-related arbitration.

In our view, the first interpretation is more in line with international practice; hopefully this ambiguity will be clarified in later versions of the Revised Draft.

4. Arbitration agreements and kompetenz-kompetenz doctrine

The Revised Draft proposes a number of important changes with respect to the issue of validity of arbitration agreements.

First, under the current Arbitration Law, a valid arbitration agreement must contain three basic elements: (i) an intention to arbitrate; (ii) matters that are subject to arbitration; and (iii) a designated arbitration commission. An ambiguous arbitration agreement, from which it is not clear which arbitration commission the parties have selected, will be deemed invalid.

The Revised Draft significantly relaxes this requirement. According to Article 21 of the Revised Draft, the only necessary element for a valid arbitration agreement is an intention to arbitrate. Article 35 further provides that if the parties are unable to ascertain an arbitral institution pursuant to their agreement or the adopted arbitration rules, the first institution that accepts the case shall administer the arbitration.

Second, the Revised Draft recognises the kompetenz-kompetenz doctrine, which allows arbitrators to determine their own jurisdiction. Under the current Arbitration Law, an application to challenge the validity of the arbitration agreement may be made either to the arbitration commission or to a competent PRC court. If applications are made to both the arbitration commission and a PRC court, the court's decision shall prevail, unless the application to the court was made after the arbitration commission had already rendered a decision, in which case the court will defer to the arbitration commission's decision and not accept the application.

The Revised Draft abandons this mechanism and, in line with the international practice and UNCITRAL Model Law, provides that the tribunal has the power to decide on its own jurisdiction (Article 28). The draft further provides that the tribunal's decision may be reviewed by a competent PRC court and, if the court decides that the arbitration agreement is invalid or the tribunal does not have jurisdiction, either party may apply to a higher level court for a second-level review (Article 28).

Third, Article 90 of the Revised Draft clarifies that the law governing the validity of the arbitration agreement will be determined as follows: (i) the law agreed by parties to apply to the arbitration agreement will apply; (ii) in the absence of agreement on (i), it will be the law of the seat; (iii) in the absence of party agreement on the seat, it will be PRC law. This provides welcome clarity to an issue which is often contested in international arbitrations.

5. Appointment of Arbitrators

The Revised Draft proposes the following changes with respect to the appointment of arbitrators:

- parties to arbitration are permitted to select arbitrators off the panel of arbitrators of the institution (Article 50);
- where parties are unable jointly to appoint a presiding arbitrator, the presiding arbitrator will be jointly appointed by the co-arbitrators. Failing this, the institution will appoint (Article 51);
- arbitrators have a duty to disclose any circumstances that give rise to reasonable doubts as to their independence and impartiality (Article 52). On that note, the current Arbitration Law provides only that an arbitrator must recuse himself or herself under certain circumstances; it does not include disclosure obligations.

6. Tribunals empowered to grant interim relief

Under the Arbitration Law, the power to grant interim relief in aid of China-seated arbitration is exclusively reserved to the PRC courts. Arbitral tribunals do not have the power to grant interim relief. In practice, parties seeking interim relief may submit their applications to the administering institutions which will then forward the applications to the relevant PRC courts.

The Revised Draft fundamentally changes this mechanism by granting the power to arbitral tribunals and emergency arbitrators as well (Articles 43, 46 and 49). The PRC courts are required to enforce or provide assistance in the enforcement of the interim measures ordered by arbitral tribunals or emergency arbitrators (Articles 47 and 48).

The Revised Draft further provides that: –

- "interim measures" includes asset preservation, action preservation, evidence preservation and any other type of interim measures deemed necessary by the arbitral tribunal (Article 43);
- asset preservation and action preservation may be granted where behaviours of one party or parties, or any other reasons, may render it impossible or difficult to enforce the award or cause losses to the other party (Article 44);
- evidence preservation may be granted where the evidence may be destroyed or lost or become difficult to obtain in the future (Article 45); and
- the arbitral tribunal should require the applicant to provide security if it intends to grant an interim relief order (Article 47).

If an application is wrongfully made and thus causes damage to the other party, the applicant must be liable to compensate the loss suffered by the other party (Article 47). This article mirrors Article 105 of the PRC Civil Procedure Law, which applies to interim relief applications made to the PRC court. It remains to be seen how it would apply in practice to applications to arbitral tribunals or emergency arbitrators.

7. Arbitral awards

While Article 55 of the Arbitration Law already provides that arbitral tribunals may issue partial awards before issuing the final award, Article 74 of the Revised Draft further clarifies that:

i) tribunals may issue partial or interim awards;

ii) parties must comply with the order(s) granted in any partial or interim awards; and

iii) if a party fails to comply with the order(s) granted in a partial (but not interim) award, the other party may apply to a PRC court for enforcement.

This article addresses concerns under the current Arbitration Law regarding the finality of partial awards.

Interestingly, Articles 69 and 70 of the Revised Draft provide that, if parties reached a settlement agreement prior to the constitution of the tribunal or before commencing an arbitration, either party may apply to the arbitral institution to form an arbitral tribunal pursuant to the arbitration agreement and ask the tribunal to issue an award based on the contents of the settlement agreement. These articles aim to enhance the enforceability of settlement agreements and the use of other alternative dispute resolution mechanisms such as mediation.

8. Grounds for setting-aside and non-enforcement of arbitral awards

The Revised Draft proposes a number of changes to the mechanisms for set-aside and refusing enforcement of arbitral awards. Most significantly, it seeks to unify the grounds for setting aside domestic and foreign-related awards, and to prevent the enforcing court from reviewing issues relating to the merits of the arbitration with respect to both domestic and foreign-related awards.

Under the current Arbitration Law and the Civil Procedure Law, different grounds apply for setting aside domestic awards and foreign-related awards. While the grounds for setting aside foreign-related awards are more aligned with the UNCITRAL Model Law, domestic awards may be subject to a more substantive review and be set aside if (i) the award is rendered based upon any falsified evidence; or (ii) any material evidence which may have an impact on the decisions in the award was concealed by either party. The Revised Draft removes these two grounds and unifies the set-aside grounds for domestic and foreign-related awards (Article 77).

In addition, the Revised Draft introduces a new ground, providing that an award may be set aside if "the award was obtained through fraudulent conduct including malicious collusion and falsifying evidence" (Article 77). This ground also applies to both domestic and foreign-related awards. This addresses so-called "falsified arbitrations" in China, where arbitrations have been based on fraudulent legal relationships and falsified documents in order to damage third parties' interests and to unlawfully benefit the parties to the arbitration. Although this new ground does not exist under the Model Law, the circumstances it intends to tackle should, in our view, be also caught by the violation of due process ground or the violation of public policy ground under the Model Law and many other arbitration laws worldwide.

Second, the Revised Draft provides that the PRC courts may refuse to enforce a domestic or foreign-related arbitral award, only if the award is "against social public interest" (Article 82). While this appears to be inconsistent with the New York Convention, it arises from the legislators' concern of duplicative review of arbitral awards by the PRC courts in set-aside proceedings and non-enforcement proceedings and potentially conflicting results. This change will consolidate the power to the court hearing the set-aside applications and restrict the power of the enforcing court.

While currently a party wanting to challenge a China-seated award could do it by either bringing set-aside proceedings or resisting enforcement (or both), if this proposed amendment is adopted, that party would have to do it by bringing set-aside proceedings. The proposed amendment does not apply to foreign arbitral awards and Hong Kong, Macau and Taiwan awards, which would still be enforced under the New York Convention and the relevant arrangements.

Other important changes introduced by the Revised Draft regarding set-aside and enforcement procedures include:

- the time limit for applying to set aside an arbitral award has been shortened from six months to three months, from the date the parties receive the award (Article 78);
- the Revised Draft confirms that the PRC courts may partially set aside an arbitral award, which is the approach already followed by the courts in practice (Article 77);
- the Revised Draft stipulates the specific circumstances under which the courts may remit the case for re-consideration by the original arbitral tribunal or newly composed tribunal where the original one was not properly constituted or there is alleged misconduct (Article 80); and
- the Revised Draft confirms a third party's right to object to enforcement proceedings if the proceedings affect the third party's legitimate rights and interests (Article 84). This was already provided in the PRC Supreme Court's judicial interpretations and is now confirmed in the Revised Draft.

9. Ad hoc arbitration permitted for foreign-related commercial disputes

Ad hoc arbitration is not permitted under the current Arbitration Law for any arbitrations seated in Mainland China. Chapter 7 of the Revised Draft of the Arbitration Law contains special provisions for foreign-related arbitrations. A key change proposed is permitting *ad hoc* arbitration for "commercial disputes involving foreign-related elements" (Article 91).

The Revised Draft further provides that parties to *ad hoc* arbitrations may jointly appoint an arbitral institution as the appointing authority, failing which a competent PRC intermediate people's court may designate an arbitral institution as the appointing authority (Article 92). Furthermore, the arbitral tribunals appointed in *ad hoc* arbitrations are required to file the original award and the record of service of the award with the intermediate people's court of the seat of the arbitration (Article 93).

Comment

The Revised Draft will significantly enhance If adopted, the internationalisation of the PRC arbitration law. For example, the kompetenz-kompetenz principle, if implemented in practice, would be a significant move towards further empowering the tribunal and reducing the scope of judicial involvement in arbitral proceedings. The change to allowing foreign arbitration institutions to set up branch offices and the adoption of the "seat of arbitration" concept are very positive signals to show that legislators have a genuine intention to change the landscape of arbitration regime in Mainland China, and to develop an environment which is more friendly and open to international arbitrations.

Having said that, the Revised Draft may also create some new uncertainties. For example, it is still not entirely clear whether branches of foreign arbitration institutions will be granted any actual powers to administer cases in Mainland China. Hopefully, these issues will be resolved in the process of finalising the revisions and through implementation and judicial guidance.

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The proliferation of arbitral institutions in Indonesia: **navigating uncharted waters**

A. Background

Indonesia remains an attractive destination to invest and do business in notwithstanding the associated country risks. One risk mitigation tool used by parties in their Indonesia related commercial contracts is the adoption of offshore (foreign seated) arbitration using arbitral rules of established international institutions such as the International Chamber of Commerce (**ICC**) or the Singapore International Arbitration Centre (**SIAC**), to name a few. While this is the preferred option for many international commercial parties, there are an increasing number of Indonesian counterparties, as well as sector-specific rules and regulations, which demand the adoption of onshore or domestic (Indonesia-seated) arbitration.

In that scenario, parties often compromise and select an international institution's rules to apply to the onshore arbitration. However, what happens when the compromise solution is not available?

This short note explores whether BANI should continue to be the default option, whether there are other alternatives available in country, and other important considerations for Indonesia related commercial contracts.

B. The BANI controversy and its impact on the domestic arbitration scene

BANI (*Badan Arbitrase Nasional Indonesia*) was the established in 1977 by the Indonesia Chamber of Commerce and Industry and for the longest time was the sole national arbitral institution and the default choice for parties.

However, as previously reported, BANI has been dogged with controversies relating to its dispute with another similarly named institution, BANI Pembaharuan (Renewed BANI). The perceived weakening of BANI has resulted in the creation of new bodies who seek to position themselves as true alternatives to BANI, where users are – for various reasons – unable to select more established international institutions' rules for their onshore arbitrations.

Pusat Arbitrase dan Mediasi Indonesia (PAMI)

PAMI (Center for Arbitration and Mediation Indonesia) was established in September 2017 with the purpose of administering arbitrations involving disputes in the field of business, investment, and employment. In addition to administering arbitrations, PAMI also administers other forms of ADR, namely mediation, adjudication and expert determination.

PAMI has published its own set of rules of arbitration and a list of registered arbitrators which includes a few retired Indonesian Supreme Court judges. However, unlike BANI, the PAMI arbitration rules permit the appointment of a non-registered arbitrator subject to certain prescribed criteria and *ad hoc* registration process.

As of the date of publication, PAMI's list of registered arbitrations does not include any non-Indonesian arbitrators and its rules are only available in Indonesian language. This could be a reason why PAMI is not as widely known or used as BANI yet.

Indonesia International Arbitration Center (INIAC)

INIAC is the latest market entrant, having been established in April 2021. INIAC seeks to position itself as a domestic institution with an international outlook so as to attract international commercial parties needing to arbitrate in Indonesia and/or select a domestic institution. INIAC's list of arbitrators include not just Indonesians but established international arbitrators. In addition to its own rules of arbitration, INIAC also has mediation rules which parties may adopt.

It remains to be seen whether INIAC will be able to persuade potential users to adopt its rules.

Bali International Arbitration and Mediation Center (BIAMC)

BIAMC is another arbitration-related body that was established in the last few years. However, unlike PAMI or INIAC which seek to administer arbitrations and other forms of ADR using their own rules, BIAMC is not an institution which has its own rules or administers proceedings. Rather, BIAMC's focus is on the provision of hearing venues, and arbitration-related resources, although it has also indicated that it is able to "*facilitate ad hoc arbitrations and mediations*". Pending clarification as to the scope and extent of such facilitation, including the composition of BIAMC's case team and how fees are charged, users may not see BIAMC as a true alternative to BANI.

C. Sector-specific arbitral institutions – a new approach?

In parallel with the establishment of organisations such as PAMI, INIAC, or BIAMC, Indonesia has also seen a number of sector-specific institutions being established or consolidated, such as the following.

Sector	Institution/explanatory note
Financial services	**LAPS SJK** (*Lembaga Alternatif Penyelesaian Sengketa Sektor Jasa Keuangan*) • The Financial Services Sector Alternative Dispute Resolution Institution was established in September 2020 and replaces the roles and functions of six sub-sector arbitration institutions including BAPMI (capital markets) and BMAI (insurance). • In addition to administering arbitrations involving disputes in the financial services sector, LAPS SJK is also able to accept requests to issue binding opinions on referred matters (by agreement). • Disputes which fall within LAPS SJK's purview include disputes between (1) consumers and financial services business actors (**Commercial Parties**), (2) two or more Commercial Parties, involving agreements related to financial services. • LAPS SJK also administers disputes in the financial services sector involving Sharia/ Islamic law (eg Sharia insurance, banking, pension funds, etc.).
Construction	**BADAPSKI** (*Badan Arbitrase dan Alternatif Penyelesaian Sengketa Konstruksi Indonesia*) • The Indonesian Board of Construction Arbitration and Alternative Dispute Resolution is intended to deal with commercial disputes in the construction sector in Indonesia.

D. Important considerations for Indonesia-related commercial contracts

Notwithstanding the proliferation of institutions, to the best of our knowledge, take up or adoption by users of these alternatives are currently still low except for LAPS SJK where Commercial Parties have started to adopt them in domestic contracts with consumers.

It remains to be seen whether any of these institutions will be able to displace BANI e for Indonesia seated arbitrations.

In the meantime, the following points are worth noting when arbitrating onshore:

- Parties should specify which city in Indonesia should be the arbitral seat (eg arbitration seated in Jakarta, Indonesia).
- Parties could still select an international institution to administer an onshore arbitration. Alternatively, Parties could opt for *ad hoc* arbitration although care should be taken to select an appropriate appointing authority.
- Where Parties must choose a domestic institution, consider whether it is appropriate to select BANI or another domestic institution. Different institutions will have different rules, and different approach to selecting arbitrators, which may affect the conduct of the proceedings.
- Parties should take care to select the language of the arbitration (Indonesian language is the default under the applicable curial law), as this could inform Parties as to which institution will be more appropriate to administer the arbitration.

For other tips and considerations, please see our Guide to Dispute Resolution and Governing Law Clauses in Indonesia Related Contracts (2nd Ed, February 2020), which is due to be updated later this year.

Our legal services in Indonesia are provided through Herbert Smith Freehills LLP's association with Hiswara Bunjamin & Tandjung.

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Spotlight on the English Arbitration Act: **is change afoot?**

In late November last year, the Law Commission of England and Wales announced that it will conduct a review of the English Arbitration Act (Act), the principal legislation governing arbitrations in England, Wales and Northern Ireland. The Act first came into force in January 1997 and has not been revised or updated in over 25 years.

Consensus is that the Act continues to work very well and is not in need of a major overhaul. Indeed, London has consistently topped the polls as the most popular arbitration centre in the world, and many attribute London's popularity to the certainty and flexibility afforded by the Act, coupled with the support of the English judiciary. Against that background, the Law Commission has confirmed that it will not be proposing any wholesale revision of the Act. Instead, the review is intended to ensure that the UK remains at the forefront of international dispute resolution. The over-arching aim will be to "*maintain the attractiveness of England and Wales as a destination for dispute resolution and the pre-eminence of English law as the choice of law*".

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Where might changes be made?

The Law Commission has announced some possible areas of focus that may fall within the scope of its review. These include:

TOPIC	WHAT'S THE ISSUE?
Summary dismissal of claims and defences	There is no express power in the Act for an arbitral tribunal to dismiss a claim or defence summarily or early (even though this power is contained in some institutional rules). Some argue that this leads to uncertainty among arbitrators about whether or not they can summarily dismiss claims and concern that any awards issued as a result could be challenged on due process grounds. Because of this, the Law Commission may consider including an express power in the Act.
The Court's powers in support of arbitration proceedings	There is uncertainty as to whether the Court's powers set out in Section 44 of the Act (other than taking evidence from witnesses) extend to third parties. This contrasts with other arbitration legislation around the world and has not yet been resolved by the English courts. The Law Commission may consider clarifying the position in the Act.
Emergency arbitration	Emergency arbitrator procedures have been introduced into institutional rules since the Act was first drafted. As a result, emergency arbitration is not addressed in the Act and changes could be made to incorporate the concept into the drafting. In addition, and following the case of *Gerald Metals v Timis* [2016] EWHC 2327 (Ch), there is debate as to whether the availability of emergency arbitration may limit the English Court's powers to provide interim relief in support of arbitration.
Challenging jurisdictional awards	Under the Act, there are currently many routes for a party to challenge the jurisdiction of an arbitral tribunal. They may (i) object to the jurisdiction of the tribunal during the arbitral proceedings (ii) seek the Court's determination of a preliminary point of jurisdiction under Section 32 under certain circumstances (iii) not participate in the arbitration and seek the Court's determination under Section 72 and (iv) seek a re-hearing of the matter before the Court under Section 67 (if their jurisdictional challenge in the arbitration was unsuccessful). The Law Commission may consider whether or not all of these routes should be open to a party challenging jurisdiction, and whether a full rehearing by the court on the question of jurisdiction is necessary.
Appeals on points of law	Under the Act, a party can appeal an arbitration award on a point of law. This provision is fairly unique to England, even though the threshold for leave to appeal is very high, and this provision is often excluded by the parties either in their arbitration agreements or in the applicable institutional rules. Whilst some users of arbitration remain in favour of the provision (such as in the insurance industry), there is debate as to whether this provision should be removed in order to preserve the finality of arbitration, or to limit it to questions of public importance.
Confidentiality	The Act is deliberately silent on confidentiality, on the basis that an implied duty of confidentiality exists under the English common law, and that its evolution is best left to the courts. However, given that confidentiality is a key advantage of arbitration, the Law Commission may consider whether to put confidentiality on a legislative footing and if so, the best way of doing so.
Electronic service of documents, electronic awards and virtual hearings	The Law Commission may seek to ensure that the Act remains compatible with recent developments in technology, particularly in relation to service by email and virtual hearings.

Other topics which may be considered are the arbitrators' duties of independence and disclosure, discrimination and immunity of arbitrators. The Law Commission is also consulting with the arbitration community and users of arbitration on any other areas that should be considered.

While the Law Commission is considering some important and substantive topics in their review, these are all intended to improve and "future proof" the Act rather than fundamentally change it. Even if no changes are ultimately made, there is also value in the process of reflection and consultation in ensuring that the Act remains current and fit for purpose.

What's next?

The Law Commission has announced that it aims to produce a consultation paper by the end of 2022, and then it will produce its final recommendations to the English government after that. Herbert Smith Freehills is participating in the consultation process and looks forward to seeing how the review develops over the next year!

Decarbonisation and the energy transition: **impacts on existing and future commercial contracts**

Decarbonisation – meaning the reduction of carbon intensity in a particular area of activity – is the major industrial and commercial challenge of our time. It is an objective being pursued to varying degrees by states around the world, for example through the Paris Climate Agreement. It is also being pursued at the initiative of many private corporations and industry bodies, both for policy and commercial reasons, with a vast range of commercial entities seeking voluntarily to reduce the carbon emissions associated with their businesses. The rise of initiatives such as ESG (environmental, social, governance) investment has led wider stakeholders such as financial institutions, investors and lenders to take a closer interest in this as well, with decarbonisation-related policies and targets increasingly being incorporated into lending and investment behaviour.

There are therefore different drivers towards decarbonisation, which are likely to manifest differently in terms of the impact on commercial actors.

Regulatory thresholds or restrictions (for instance, set by state entities) may bind commercial entities – potentially even outside of their home jurisdiction.

Companies may themselves adopt corporate policy, with non-binding aspirational objectives at one end of the spectrum and self-imposed mandatory targets and commitments at the other, each with corresponding implications for reporting obligations and shareholder management. Lenders and investors may adopt their own policies which impose indirect – although no less significant – practical constraints on how businesses operate through the terms they set for loans and investments.

The result is that commercial actors across the world are left operating within a web of overlapping commitments, strategic objectives and in some cases, legal obligations driving towards decarbonisation. While this is relevant to almost all types of industrial activity, it naturally has direct and acute implications for the energy sector.

It is therefore inevitable that there will be large-scale and far-reaching changes over the coming decades, which will create a vast range of new opportunities and challenges for businesses. The question is, what does this mean for how those businesses plan for the future?

In previous issues of Inside Arbitration, we have considered the types of disputes which may arise from the energy transition and from climate change more generally (see Inside Arbitration: Issues 11 and 12). In this article, we consider some of the implications of the move towards decarbonisation for the way existing contractual forms are interpreted and applied. We also look to how future contracts may be designed with decarbonisation in mind. In short, what will the changes to the commercial and regulatory landscape over the coming decades mean for the management of commercial relationships, and in particular the structure of contractual frameworks?

Applying and interpreting existing contracts in a decarbonising world

The major challenge for commercial parties will be a lack of clarity in existing contracts on the allocation of the risks associated with decarbonisation. Friction may arise as companies navigate their own energy transition alongside the changing strategic objectives of their suppliers, joint venture partners, lenders, investors and customers, as well as regulators. These rapid changes in the regulatory and commercial landscape are likely to put many existing contracts under strain, as parties find that they may

no longer provide an adequate framework to help them resolve these frictions.

Which contracts could be affected?

- **Long-term contracts** may have been concluded many years or even decades ago, under different expectations about how the relevant industry would evolve. Decommissioning obligations, for example, have been a staple feature of oil and gas projects for decades. The contractual framework to allocate rights and responsibilities in respect of these obligations has been exhaustively developed in the industry. But the increasing emphasis on repurposing offshore infrastructure (for example, into offshore wind or carbon capture & storage facilities), rather than decommissioning it, may not fit neatly into a contractual framework drafted many decades ago, potentially creating contractual lacunae around the transfer of risk and cost burdens and the prospects of ongoing stewardship.
- **Model form contracts** which have been developed by certain industries may be poorly suited to the new challenges and risks arising from decarbonisation. Warranties and indemnities in current model or standard forms may not provide adequate protection or certainty in respect of the types of changes arising from decarbonisation initiatives. Contractual parties may try to stretch the language in those contracts to accommodate circumstances that were not anticipated when those provisions were developed – for example, attempting to retrofit standard form natural gas transmission contracts around the transport of hydrogen. Eventually, parties may be pushed into redrafting those model forms or opting to use entirely bespoke contracts, departing from the extensively tested and refined language developed by industry over time.

Specific challenges: voluntary commitments, lenders and limitations of liability

A major area where existing contracts are likely to be tested is around the relevance of decarbonisation commitments which come from sources other than regulation – namely, commitments which have been voluntarily assumed as part of corporate policy or which come from commercial third parties like lenders.

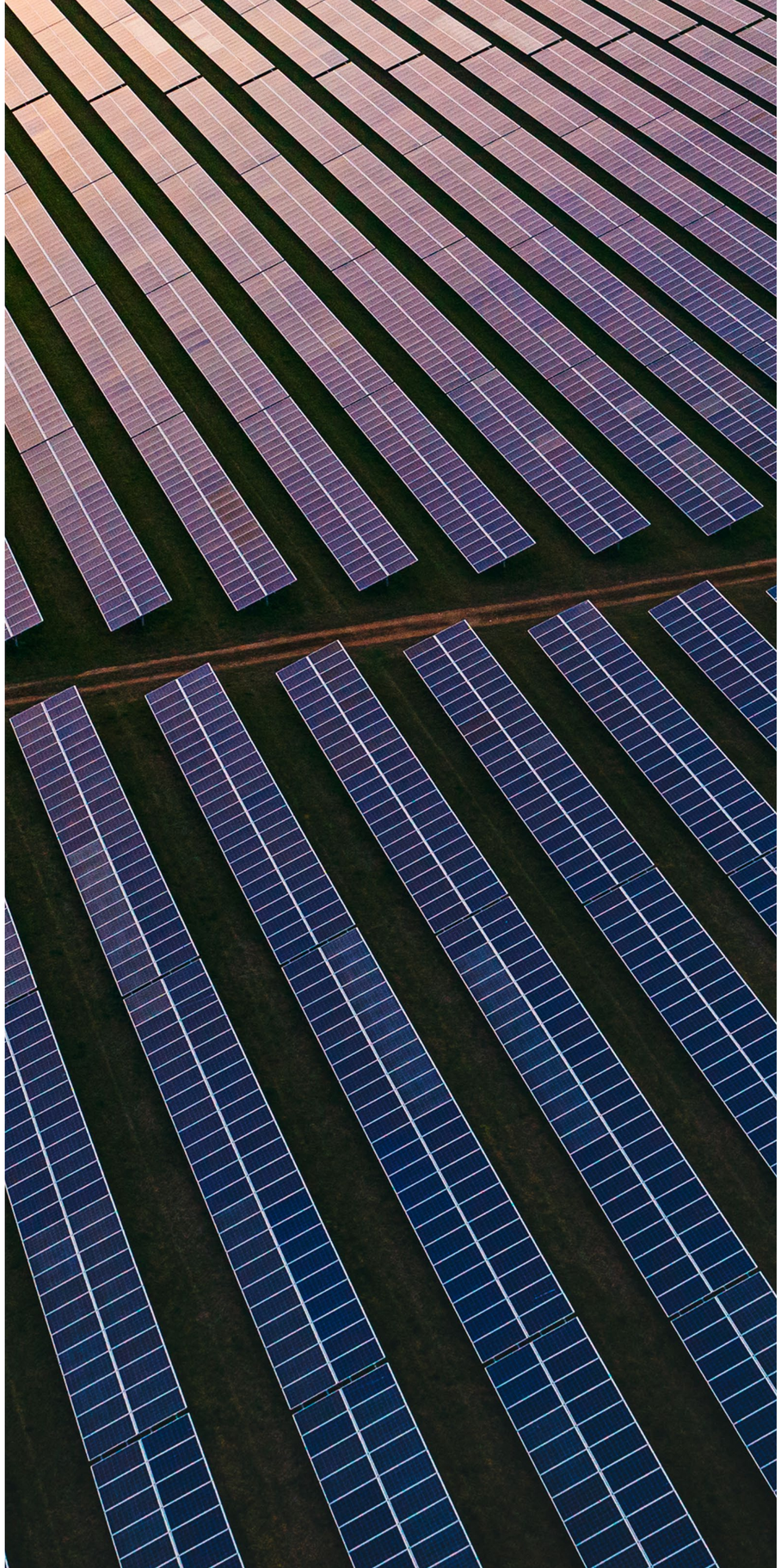
Many contracts contain some provision for how to allocate any increased costs and risks associated with changes imposed by state entities. They may even provide other contractual mechanisms like termination rights to allow the parties to adjust their relationship accordingly. However, these provisions may not assist where a contractual party has voluntarily committed itself to reduce the carbon intensity of its activities as part of its corporate policy.

What happens where a party within a joint venture has voluntarily adopted decarbonisation commitments which go beyond those required by regulation, but the other parties have not?

There is a wide spectrum among commercial actors as to the targets to which they have committed (if any), the timescales involved, and the way those targets are defined – for example, "net zero" means something different to "reducing carbon intensity" by a certain proportion, which is again different to "carbon neutral for Scope 1 & 2 emissions". A company's decarbonisation policy will be driven by a range of internal and external factors, including the appetite (or tolerance) of its stakeholders for change. It is striking to contrast the way in which political, societal and shareholder pressures can impact clients in this sector very differently, and lead to markedly different approaches across different jurisdictions. It follows that within a single joint venture or within one contractual relationship, there may be vast differences in the degrees of commitment to decarbonisation among the parties, each defined by different metrics and to be achieved at different paces.

This mismatch is likely to generate commercial differences as to what is an appropriate decarbonisation measure in any given project, testing the boundaries of any contractual discretion granted to particular parties. The scope of operators' duties and how a "reasonable and prudent operator" (RPO) is defined may therefore evolve substantially over the coming years against the backdrop of the changes anticipated from decarbonisation. What amounts to "reasonable" risk management under existing contracts – for example, in assessing good oilfield practice or a requisite level of diligence – may become a more contentious concept, as parties seek to define it by reference to factors which would not have been anticipated by the parties when the contracts were concluded many years ago.

Is it consistent with the RPO standard, for example, for an operator to install new technology for the measurement of emissions which impacts the efficiency of output, where such technology is not yet mandated by regulation but is likely to be so in three years' time? Such questions are likely to test the limits of contractual language around necessity, risk management and proportionality.



What happens where a contractual party's parent company has adopted a corporate policy on decarbonisation, but the contractual party has not done so?

For example, a commitment to phase out the use of certain carbon-intensive technology in manufacturing or a certain form of transport in the supply chain is likely to have cost implications and may even impact the ability to perform existing contracts. In some circumstances, the changes required by a decarbonisation policy may fundamentally alter the underlying economics of a project or a contract. Existing contracts may provide little guidance as to what relevance voluntary commitments – and particularly those made elsewhere within a corporate group – should have when the bill is presented for the changes required to comply with them.

What happens where third party commercial entities like investors or lenders seek to impose their own ESG-oriented decarbonisation goals through their terms?

Equally, existing contractual provisions may not assist where changes to the underlying financial support for a party or a project arise from the adoption of ESG-oriented decarbonisation goals by investors and lenders – for instance, where ongoing financial support or refinancing becomes contingent on a certain reduction in emissions. In those circumstances, a party may find itself compelled to insist on certain operational changes to a project within a joint venture, or to change its requirements under a supply contract, but may not have recourse to a contractual mechanism to allocate the costs of doing so.

In all of the above circumstances, parties may be forced to try to rely on force majeure provisions, hardship clauses (where available) or the doctrine of frustration to seek to excuse defects in performance. Where the economic prospects for a project become very different in the face of decarbonisation initiatives, one or more parties may look for ways to rebalance the underlying financial model. Parties may even seek to stretch the available grounds for termination to create opportunities to prematurely exit projects which no longer remain commercially viable for them under these changed conditions. The scope of these sorts of contractual mechanisms is likely to be tested in coming years as parties are confronted by the impact of decarbonisation.

Will existing contractual limitations of liability be effective for errors in emissions reporting obligations?

Finally, limitation of liability provisions in existing contracts may not be well-suited to the vast expansion in liability which may arise in response to emissions reporting regimes. With companies increasingly required to monitor and report on carbon emissions associated with their supply chains, many parties will find their existing supply contracts ill-equipped to protect them against errors in this reporting.

Looking to the future: how will new contracts be designed to accommodate the impacts of decarbonisation?

As companies transition to decarbonisation, there will undoubtedly be very substantial growth in investments, new collaborations, infrastructure projects and technological innovations. Against a background of ongoing regulatory change, these new commercial forms will bring significant opportunity. But they will also give rise to novel legal and commercial risks to which contractual drafting will need to respond.

Some of these changes will reflect changes in market participants, most notably in the energy sector. A steady increase in M&A activity and joint ventures is expected in the energy sector over the next few decades, driven significantly by traditional energy companies looking to diversify their portfolios in order to meet their decarbonisation targets. We will continue to see new entrants in the market, collaborations between competitors in the fossil-fuel industry, as well as 'non-traditional' partnerships between long-standing energy companies and technology and renewables counterparts.

Specific challenges

Complex JVs

For instance, the development of hydrogen production facilities is likely to be dominated by multi-party joint ventures, based on significantly more complex contractual arrangements than the traditional two or three party relationships typically seen in the oil and gas sector. These may well be built on new and untested contractual arrangements that sit outside the norms developed over decades by the oil and gas sector. Future contracts will therefore need to account for a potential mismatch in approach between market players that may come from divergent backgrounds. We expect the negotiation of indemnities, representations and warranties (particularly those relating to the green credentials of stakeholders), events of default

and termination rights to take centre-stage in how future decarbonisation-related contracts are drafted.

Renewables: contractual arrangements and allocation of risk

Many well-established energy companies with an upstream oil and gas focus are moving increasingly into renewables projects in order to meet their net-zero targets. Renewable projects, however, are exceptionally technical, requiring complex scientific and engineering expertise. Large-scale renewable projects also typically involve a suite of back-to-back interlocking contractual agreements with multiple parties for various works (for example, engineering, construction, supply and manufacturing, operation and maintenance, licencing and tariff, finance, insurance, etc.). Any disruption or delay in one aspect of the project (for example, construction delays or supply chain disruptions), is likely to affect contractual performance under other linked contracts with other parties. Stakeholders will therefore need to consider carefully the allocation of risk in contracts relating to renewable energy projects. Contractual frameworks may need to expressly regulate interface risk between different works contracts, specifying clearly each party's responsibilities, agreed construction and operational milestones, trigger events, as well as duties to cooperate.

New technologies

Contractual frameworks will also increasingly address the rights and obligations associated with the use and management of new technologies which are developed as companies decarbonise. Whether it is wholesale new energy technologies, such as hydrogen, or new types of electricity storage facilities or carbon measurement and verification facilities, technology is likely to be a key proprietary asset for many companies. Bespoke technology-sharing agreements and associated intellectual property (IP) licencing agreements are expected to become more common features of contractual suites underlying major projects.

A key part of this will be addressing the significant uncertainty and risk associated with relying on technology still in the process of development. Contractual provisions around representations and warranties will need to be carefully negotiated, as breach of contract and negligence claims relating to the performance of the technologies loom large. Market players will want to factor the risk of unforeseen technical issues into their contractual arrangements. There may also be risks over licencing of technologies, such as the scope of licences and royalties payable where one party owns the IP but licences it to another to develop in exchange for future royalties.

Investment finance

Given the significant investment required for the energy transition, we also expect to see a growth in complicated financing structures backed by ESG objectives in the energy finance sector. Investors (and shareholders) are increasingly taking account of sustainability-linked performance targets in their project financing decisions. Future commercial contracts, particularly financing agreements, are likely to include express requirements for companies to report on and reduce the environmental impacts associated with projects.

Specifications and industry standards

Contracts are likely to become more explicit as to the technical specifications and industry standards with which parties are required to comply, and may require the parties to make contractual representations as to the sustainability of their projects. Parties will increasingly be required to monitor and report on the environmental impacts of their operations across their supply chains (as well as their own Scope 1 emissions). Reporting requirements may increasingly be linked to events of defaults under financing agreements. Stakeholders may even insist on new kinds of contractual termination rights relating to a project's carbon footprint or environmental credentials, such that if carbon emissions associated with a project or a supply chain become too significant, the counterparty can exercise its right to terminate.

In parallel, the lack of robust and globally accepted frameworks for measuring, reporting, and verification of carbon emissions is likely to exacerbate uncertainty in future commercial contracts. The accurate measurement and reporting of carbon emissions is key in achieving any decarbonisation targets. We expect to see more emphasis on carbon measurement processes, verification and auditing mechanisms for carbon emissions data, related guarantees and consequences of misreporting (such as misrepresentation or breach of warranty claims) in future contractual obligations.

Anticipating regulatory change in contractual frameworks

Finally, commercial parties looking to the future will be alive to the likelihood of further regulatory change to come, particularly in sectors which remain in the relatively early stages of development. For instance, the regulatory architecture for carbon capture, use and storage projects, and the certification of hydrogen technologies is yet to be fully developed. It will therefore be critical for parties to consider ways in which they can incorporate protections for themselves in their contracts to account for the uncertainty of a rapidly evolving regulatory landscape. Contracting parties may also consider ways to allocate financial responsibility for the higher costs of compliance associated with regulatory changes (for example, the imposition of carbon taxes to minimise the carbon impact of projects) across supply chains and within joint ventures.

The challenges to come

Commercial parties are facing a time of rapid, far-reaching change in how they do business. One of the only certainties they face is that the coming decades will introduce uncertainty into almost every sector. The best protection against that uncertainty is for parties to anticipate the areas of friction which decarbonisation is likely to introduce into their business, whether with their suppliers, their customers, their joint venture partners or their investors, and consider the suitability of existing contractual mechanisms to help them work through those areas of friction. Contracts being concluded now are an opportunity for parties to build those mechanisms into their commercial frameworks, so that when these points of friction inevitably arise, they will be better placed to address them.

If you would like to discuss what decarbonisation is likely to mean for your business, please do not hesitate to get in contact with us.

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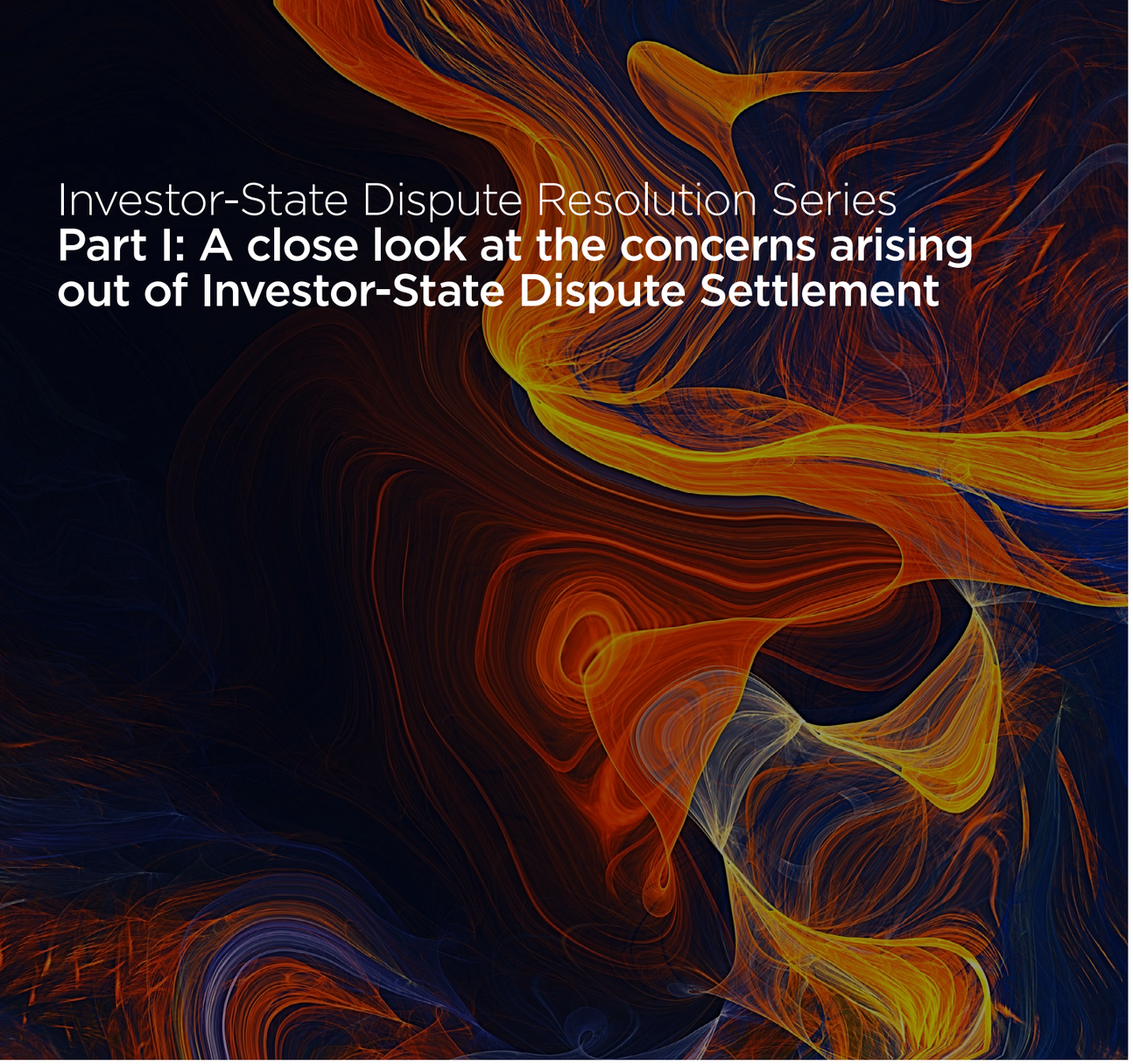
Hear **Craig Tevendale, Louise Barber, Arushie Marwah** talk about **Decarbonisation and the energy transition:** impacts on existing and future commercial contracts here



Investor-State Dispute Resolution Series
Part I: A close look at the concerns arising out of Investor-State Dispute Settlement

Introduction

Investor-state dispute settlement (**ISDS**) has historically been seen as a way of promoting foreign investment flows, depoliticizing disputes between investors and states, fostering the rule of law, and providing compensation for harm or damage suffered by investors.[1] However, the past two decades have witnessed stakeholders raising concerns about the legitimacy of the system as a whole and the decision-making process.

These concerns about ISDS have led to numerous parallel initiatives being instigated by the United Nations Commission on International Trade Law (**UNCITRAL**), the International Centre for Settlement of Investment Disputes (**ICSID**) and other arbitration groups in order to address some of the issues that have caused the so-called legitimacy crisis. These initiatives have their own scope, path, and time.

As debates continue regarding the pressing issues ISDS is facing and how the system should be reformed, investor-state tribunals have been as busy as ever. Recent data by the United Nations Conference on Trade and Development (**UNCTAD**) in its September 2021 report (**UNCTAD Report**) reveals that, consistent with the general trend for the past two decades, there was an increase in the number of investor-state cases initiated in 2020 compared with the previous year.[2]

In this two-part series, we examine what has caused the legitimacy crisis – recapping the concerns and challenges that the ISDS mechanism has triggered, including the path followed at ICSID. In the next issue, we will analyse what has been (or likely to be) the responses to the legitimacy crisis including possible reforms.

1 Lise Johnson, Brooke Skartvedt, Güven Jesse Coleman, "Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get us There?", Columbia Center on Sustainable Investment, 11 December 2017, available at https://ccsi.columbia.edu/news/investor-state-dispute-settlement-what-are-we-trying-achieve-does-isds-get-us-there.

2 UNCTAD, World Investment Report 2021, p. 129, available at https://unctad.org/system/files/official-document/wir2021_en.pdf.

ISDS trends: cases are on the up

Before delving into the alleged legitimacy crisis and its causes, it is important to make sense of where things stand with ISDS and where we are going.

The UNCTAD Report shows that 68 known ISDS cases were initiated in 2020, in line with a general growth trend since 1994.[3] Of the total of new cases in 2020, 58 were registered under ICSID.[4] However, it is important to bear in mind that the UNCTAD Report does not provide information about investor-state disputes arising from contracts or domestic investment legislation. In addition, some ISDS cases are conducted out of the public domain and may not have been picked up in the numbers recorded. As a result, the total figure reported is likely to be an underestimate.

The 68 new cases initiated in 2020 brought the total number of known ISDS cases to 1,104,[5] which is a remarkable amount considering that the first known ISDS case was only initiated in 1987. The 2020 ISDS cases were initiated against 43 countries, with Peru and Croatia being the most frequent respondent states. This is confirmed by ICSID, in which thirty-two percent of newly registered cases involved States in South America, followed by 20% in Eastern Europe and Central Asia.[6] While in 2020 four countries faced their first ISDS cases (Denmark, Norway, Papua New Guinea and Switzerland), the majority of new cases (approximately 75%) were brought against developing countries and transition economies. Similarly, in 2020 about 70% of investors from developed countries brought most of the cases (particularly investors from the United States, the Netherlands, and the United Kingdom).[7] However, the UNCTAD Report identifies 124 countries and the EU as respondents to one or more ISDS claims in the past 35 years.

The ICSID statistics report a similar trend for the year 2021. In line with the UNCTAD Report, the latest ICSID Annual Report reveals that 30% of newly registered cases at ICSID involved states in Eastern Europe & Central Asia, followed by 14% in South America and Sub-Saharan Africa respectively.[8] Comparable to previous years, from July 1, 2020, to June 30, 2021, the majority of new ICSID cases were brought under bilateral investment treaties (63%). 7% were brought under investment contracts between an investor and a host state, and 3% were commenced under the investment law of the host state. Cases brought under the Energy Charter Treaty (**ECT**) remain significant, making up 8% of ICSID's 2020 caseload.[9]

Lastly, in 2020, four known ICSID annulment proceedings were decided. With respect to these, applications for annulment were rejected in three instances, whereas only in one case the award was annulled in its entirety.[10]

Anyone who might expect the force of the detractors of the ISDS to have an impact on the number of ISDS cases, would be mistaken. At the same time, it could be argued that precisely because there is increased recourse to ISDS, this has stoked the flames of discontent.

What has triggered the so-called "legitimacy crisis" of ISDS?

Criticisms against the ISDS system began at least at the turn of the century, when external commentators started critiquing the lack of transparency of ISDS – in light of the confidential nature of the proceedings and decisions. In a 2001 article in the New York Times, arbitral tribunals constituted under the North American Free Trade Agreement (NAFTA) were described as follows:

> "[t]heir meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small number of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged."[11]

The concern with the lack of transparency and decisions taken "behind closed doors" was picked up by NGOs and academics in the subsequent years. By 2005, academics were already referring to the "Legitimacy Crisis in Investment Treaty Arbitration".[12] But in addition to transparency concerns, the issues now being raised included inconsistent decisions that could not be "appealed" except on very limited grounds.[13] According to commentators, the inconsistency of decisions was particularly problematic given that many ISDS decisions were deciding and interpreting substantive investment rights, such as fair and equitable treatment (FET), for the first time.[14]

Amidst the concerns raised on the ISDS system, governments such as Venezuela, Bolivia and Ecuador—who were on the receiving end of awards—sought to partially abandon the system. In 2007, Bolivia denounced the ICSID Convention, thus becoming the first country in history to withdraw from the ICSID Convention. After Bolivia's denunciation, Ecuador and Venezuela followed suit and denounced the ICSID Convention in 2009 and 2012 respectfully (although Ecuador has recently re-joined the ICSID Convention). At the time, the leaders of these countries heavily criticised the system, pointing not only to its

3 *Ibid.*
4 ICSID, "ICSID Releases 2020 Caseload Statistics", 28 January 2021, available at https://icsid.worldbank.org/news-and-events/news-releases/icsid-releases-2020-caseload-statistics#:~:text=In%202020%2C%20ICSID%20registered%2054,the%20ICSID%20Convention%20Conciliation%20Rules.
5 UNCTAD, World Investment Report 2021, p. 129.
6 ICSID, 2020 Annual Report, p. 20, available at https://icsid.worldbank.org/sites/default/files/publications/annual-report/en/ICSID_AR20_CRA_Web.pdf.
7 UNCTAD, World Investment Report 2021, p. 129.
8 ICSID, 2021 Annual Report, p. 25, available at https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR21_CRA_bl1_web.pdf.
9 *Id.*, p. 30.
10 UNCTAD, World Investment Report 2021, p. 130.
11. Anthony DePalma, "NAFTA's Powerful Little Secret: Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say," The New York Times, 11 March 2001.
12 *See* in general, Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions", 73 Fordham L. Rev. 1521 (2005).
13 *Id.* p. 1546.
14 *Id.* p. 1523.

secrecy, but also describing the system as protecting multinationals at the expense of foreign states. In effect, when Bolivia denounced ICSID, the Bolivian President Evo Morales called upon Latin American countries to also withdraw from ICSID,[15] and was quoted by the Washington Post stating: "*(we) emphatically reject the legal, media and diplomatic pressure of some multinationals that ... resist the sovereign rulings of countries, making threats and initiating suits in international arbitration*".[16] Venezuela took a similar stance when it denounced ICSID in 2012, and the Venezuelan Foreign Ministry's 2012 press release erroneously claimed that ICSID tribunals had *"ruled 232 times in favour of transnational interests out of the 234 cases filed throughout its history."*[17]

Another, albeit different, "legitimacy crisis" developed in Europe in around the same time. On 7 December 2012, the arbitral tribunal in the case *Achmea B.V. v. The Slovak Republic* issued its final award finding that the Slovak Republic had violated the Netherlands-Slovakia BIT[18] and ordered Slovakia to pay 22 million Euros in damages.[19] The claim was based on the reversal of the liberalization of Slovakia's health insurance sector, which Achmea claimed had constituted an unlawful indirect expropriation of its investment. Slovakia challenged both the merits of the claim and the jurisdiction of the arbitral tribunal, claiming that Slovakia's accession to the EU in May 2004 had terminated the Netherlands-Slovakia BIT, or in any event, rendered its arbitration clause inapplicable.[20] After the tribunal's rejection of Slovakia's arguments, Slovakia challenged the award before the German courts (the courts of the seat of the arbitration). While the Higher Regional Court of Frankfurt rejected Slovakia's arguments,[21] the German Federal Court of Justice on appeal referred the question of the compatibility with the EU to the Court of Justice of the European Union (**CJEU**).[22]

In March 2018, the CJEU ruled that the arbitration clause contained in the Netherlands-Slovakia BIT had an adverse effect on the autonomy of EU law, and was therefore incompatible with EU law.[23]

The CJEU's ruling was a landmark decision, not least because it established the first precedent with respect to the incompatibility between EU law and protections contained in intra-EU BITs. The issue of the compatibility between EU law and investor protections were not only relevant to the *Achmea* case but also applied to a number of other ISDS cases, including *Micula v Romania* [24](relating to the incompatibility of EU law with certain economic incentives introduced by Romania before acceding to the EU), as well as several cases brought against Spain and Italy. As a result of the CJEU judgment, in January 2019, several EU Member States declared their commitment to terminate their intra-EU BITs.[25] On 5 May 2020, 23 EU Member States signed the Agreement for Termination of all Intra-EU Bilateral Investment Treaties.[26]

The events in Europe and Latin America, coupled with the growing discontent of the ISDS among its stakeholders, raised further concerns: (i) perceived limited mechanisms (annulment and enforcement proceedings) against awards; (ii) third-party funding, which has come a long way in ISDS, raising questions of transparency given the potential for conflicts of interest arising from relationships between arbitrators and funders if not opportunely disclosed; (iii) the potential lack of independence and impartiality of arbitrators as "issue conflict" became a sub-topic in the realm of whether it was fair that an arbitrator candidate might have a certain predisposition to investor or state arguments; (iv) the lack of diversity in the appointment of arbitrators;
(v) interference with the state's right to regulate issues related to human rights, environment, national security issues, etc. – with some tribunals going so far as to decide that a state's right to regulate is limited by investor-state treaties; and (vi) the perceived expansion of the scope of the interpretation by tribunals of the standard of Fair and Equitable Treatment, among others.

At a macro-economic level, there has also been a curious convergence of concerns between capital importing countries and capital exporting countries. Previously, the latter would prefer to support ISDS as a means of supporting their national investors facing legal challenges abroad. However, as capital exporting countries themselves became the targets of multiple claims, often for changes those countries felt were normal regulatory advances, they too joined the calls for change.

Against this background, the stakeholders did not sit idly by. On the contrary, initiatives were generated to discuss these challenges and possible reforms to the system – which we will focus on in Part II of this series.

ICSID – own challenges, own path

The legitimacy crisis can best be described as split in two halves. One is substantive – how international law should be interpreted, in order to hold sovereign states accountable for their conduct before ad hoc tribunals. The other is procedural – how should any such disputes be resolved, bearing in mind the adage that justice must not only be done but be seen to be done.

When Bolivia, Venezuela and Ecuador denounced the ICSID Convention, the criticism was that they were shooting the messenger. The expressed purpose of the ICSID system has been, just like ISDS, to encourage, maintain, and expand private sector investment abroad by offering a procedure to resolve disputes that could arise in the course of the investment,

15 Damon Vis-Dunbar, Luke Eric Peterson, and Fernando Cabrera Diaz, "Bolivia notifies World Bank of withdrawal from ICSID, pursues BIT revisions", International Institute for Sustainable Development, Investment Treaty News, 9 May 2007.
16 *Ibid.*
17 Sergey Ripinsky, "Venezuela's Withdrawal From ICSID: What It Does and Does Not Achieve", International Institute for Sustainable Development Investment Treaty News, 13 April 2012.
18 1992 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic.
19 Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic), Final Award, 7 December 2012.
20 Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010.
21 Oberlandesgericht Frankfurt, decision of 18 December 2014 – Case 26 Sch 3/13.
22 Bundesgerichtshof, decision of 3 March 2016 – Case I ZB 2/15.
23 Slovak Republic v. Achmea B.V. (Case C-284/16).
24 Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20.
25 Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, available at https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en.
26 2020 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22020A0529%2801%29.

contributing to the "confidence" between the home States and foreign investors.[27] This is not an investor-only purpose, and was originally designed to offer legitimacy and depoliticize disputes for the benefit of sovereign states.

However, in recent years, this rationale has arguably been "obscured" due to the ongoing general debate on ISDS.[28] ICSID has not been a stranger to the discussions over concerns about ISDS. Nevertheless, while there are areas of overlap between the issues that are being addressed more globally and ICSID, they are distinct conversations with their own objectives and timeframes."[29] In effect, discussions about the challenges posed by ICSID are not new: over the years, debates and consultations over their application have led to amendments to the ICSID Regulations and Rules and the Additional Facility Rules since 1970.[30] This responds to the ICSID's willingness, as mentioned by its Secretary-General, "*to make sure that it remains fit for purpose*".[31]

The most comprehensive debate over concerns and challenges presented by the ICSID rules has been taking place since 2016. The formal discussions were triggered in October 2016 during the 50th Annual Meeting of the Administrative Council of ICSID. ICSID Member States were advised of ICSID's intention to launch consultations in 2017 on potential amendments to its sets of rules and regulations.[32] For such purpose, ICSID invited States and the public to suggest topics to be considered as part of a potential rule amendment process – and similar invitations were sent in the following years. Therefore, not only States have had the opportunity to express their views as to the challenges that the ICSID rules were posing, but also international organizations, academics, law firms, sole practitioners, among others. This turned out to be a very transparent process, with feedback encouraged from all interested stakeholders.[33]

The ICSID Secretariat received several detailed comments pointing out different topics of concern: the question of whether to disclose third-party funding; the perceived lack of transparency, especially considering that ICSID disputes touch upon issues that are relevant to the general public; the alleged lack of compliance with ICSID awards by states; the concern over the duration of the proceedings, including the procedural delays in rendering awards, among others.

After discussions with Member States and stakeholders, ICSID is very close to approving a reform – which we will analyse in the next edition of Inside Arbitration.

Concerns and challenges – and what's next?

In the next edition of Inside Arbitration we will look at what is being done to address these various concerns – and in particular, what is being proposed both at a substantive and procedural level by the various stakeholders.

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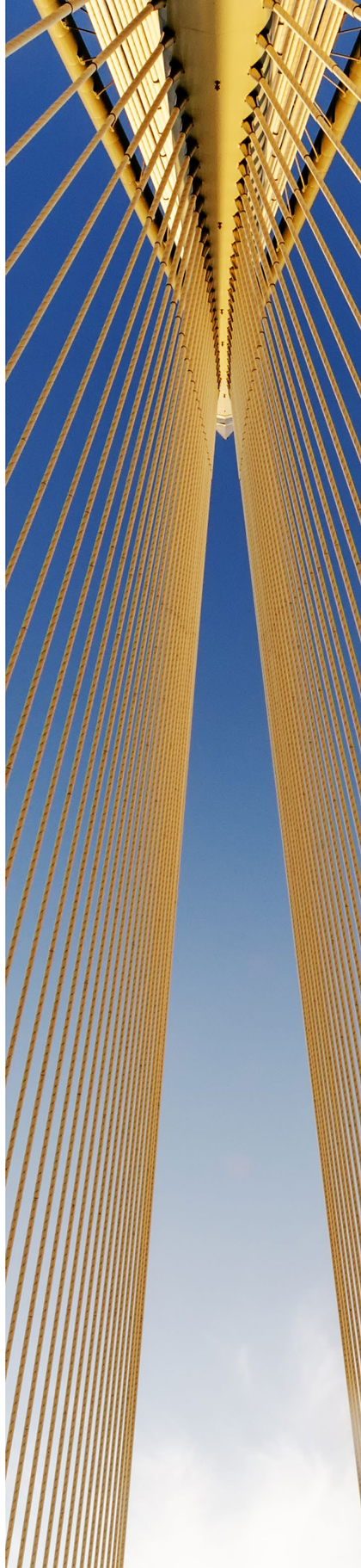
27 Meg Kinnear, "Continuity and Change of the ICSID System: Challenges and Opportunities in the Search for Consensus" McGill Journal of Dispute Resolution Vol 5 (2018-2019), p. 44.
28 *Ibid.*
29 *Id.*, p. 47.
30 ICSID, "A brief History of Amendment to the ICSID Rules and Regulations," 10 March 2020, available at https://icsid.worldbank.org/news-and-events/speeches-articles/brief-history-amendment-icsid-rules-and-regulations
31 Meg Kinnear, *op. cit.*, p. 48.
32 ICSID, "50th Annual Meeting of ICSID's Administrative Council," October 7, 2016, available at https://icsid.worldbank.org/news-and-events/news-releases/50th-annual-meeting-icsids-administrative-council?CID=196.
33 Meg Kinnear, *op. cit.*, p. 49.



Digital disputes: **anticipating and resolving disputes in the digital sphere**

The move to digital is accelerating. The digital transformation that companies underwent in 2020 continued in 2021 at a rapid pace with businesses across the globe continuing to be affected by the pandemic. There is no denying that digital is front and centre for the success of many businesses today. That trend is only likely to increase in the coming decade and beyond.

With industries doubling down on digital investment, major innovations and massive changes are afoot. The pandemic has fuelled a boom in the adoption of cloud services, the increase in SaaS offerings (software as a service) and essentially any technology that enabled commerce, communication, and productivity in a remote environment.

The step change in digitalisation in the last 24 months has also seen significantly more investment pour in to supporting longer term development of digital technologies and infrastructure that stand to change the way we all live and work more substantively. Subject to supply chains holding up in 2022, this trend is likely to continue this year and beyond.

In the context of B2B or B2C disputes, complex issues arise in the context of digital transactions both for the substance of the parties' legal rights and obligations but also in relation to the practical question of how to evidence and enforce them.

- Who is liable for the decisions of an algorithm?
- How to program morality and societal norms into a self-driving car? Who is responsible for the consequences of that programming: manufacturer, software developer, owner?
- Are transactions in a decentralised ecosystem outside the reach of the law/courts/tribunals?
- How to reconcile offline rights and obligations with self-executing online transactions?
- How can a party obtain the evidence it needs to prove its case about automated trading triggered by a third-party Internet of Things (IoT) device?
- Can blockchain help to facilitate amicable settlements and bring costs down in resolving disputes?
- What recourse is available if a non fungible token (NFT) is mis-sold, stolen or lost?
- Does arbitration advance or dilute the benefits afforded to B2B users of novel digital technologies?

Trends and predictions for 2022 and beyond

A bucket load of data to make sense of

Every day in 2020 we created over a 2.5 quintillion bytes of data per day (there are 18 zeros in a quintillion).[1] That number is growing at incredible speed and the data is increasingly being generated by machines rather than individuals. In the context of disputes, that data can be very helpful evidence. It can also mean a haystack within which to find relevant information.

Data is only as good as the systems we use to manage, regulate, and mine it for insights. Year on year, algorithms (under the umbrella of artificial intelligence) are becoming increasingly sophisticated. The best-known example may be Google's search engine and its ability to predict searches and offer up relevant results (there were expected to be around 2 trillion google searches in 2021 alone). But the impact of AI is so much broader, with algorithms feeding decision making within businesses across all sectors as demand for better data and improved digital experiences increases. The same applies in the context of dispute resolution, with supervised and unsupervised learning supporting document harvesting and review processes, among other things.

The work that many organisations continued in 2021 with new use cases for AI will continue to expand as organisations realise the power that AI can hold for solving problems better, faster, and at scale. With this in mind, AI stands to become more ubiquitous in the everyday lives of workers and consumers and it will also continue to be more useful. As AI moves from applied analytics and natural language processing to more robust and human-like functionality it opens up more radical ways in which machines may interact with humans in years to come.

Today, AI can generate super realistic images and 3D models of human faces, generate text for conversation, convert that text to human-sounding speech, and animate 3D characters to make it look like they are speaking. Eventually, AI may be able to generate complete virtual worlds in real time as we explore them and create fully immersive 3D environments that we can explore and interact with.

Broadening global access to the internet

Access to the internet stood at around 2.6 billion users in 2013 and increased dramatically to 4.66 billion users in January 2021, close to 60% of the world population.[2] We are also seeing the roll out of 5G which will continue to gather pace, greatly increasing network efficiency and capacity, while delivering faster speeds and lower latency. In turn, this opens up new ways in which people can interact online, as well as facilitating innovation in smart cars and infrastructure development in smart cities.

Are we all off to live in the Metaverse?

2021 was the year in which the Metaverse entered the mainstream lexicon and Facebook became Meta. This term means different things depending on who you ask, but the main ingredients are ubiquitous connectivity, crypto assets (cryptocurrencies, NFTs, smart contracts and crypto networks like Bitcoin and Ethereum) and eXtended Reality (XR) including VR and AR.

While we are unlikely to all be living our lives entirely in a matrix-style parallel universe just yet, there are obvious and wide-ranging applications arising from the ability to commoditise and trade information through NFTs in a digital environment. As well as creating entirely new markets segments (eg see Nike's acquisition of RTFKT in the 'virtual wearables' space or the Dogatars™ available from The Dematerialised) these technologies will enable process improvement within existing business processes.

One such use case widely discussed throughout 2021 was tokenisation and, particularly, CBDCs (Central Bank Digital Currencies) which central banks and regulators are considering as a means to anchor crypto transactions back to established and government-backed marketplaces. There are arguments for and against doing so, but these are major innovations for finance which could bridge a gap in existing financial markets (eg fractionalisation of ownership or hard/real assets, movement of wealth across marketplaces, access to currency for the 'unbanked'). These are innovations which extend into all segments of society and business.

Cryptoassets, coupled with IoT, AI and other new technologies can be used to enable new types of transactions (digital operations) to be automated and effected in a relatively frictionless environment, which can be pegged back to cryptocurrencies/stablecoins and eventually fiat currency. In short, businesses will ignore the opportunities afforded by new digital technologies at their peril.

How do these trends and predictions affect B2B or B2C dispute resolution in the digital sphere?

A key consideration for the adoption of these new technologies is to understand how the transactions within a particular online ecosystem will interface with the offline world. A fundamental aspect of that is to understand what legal rights and obligations will exist as a result of parties' online actions/transactions, what laws will apply and how those rights and obligations will be recognised and enforced if disagreements arise.

Parties also need to be clear about the drivers for adopting these technologies in order to assess whether existing dispute resolution mechanisms align with or undermine those objectives and whether digital 'alternatives' to these existing dispute resolution processes are required.

There is a growing number of online dispute resolution offerings that have the stated aim of digitising the traditional dispute resolution process. Some of these are centralised platforms which seek to digitise existing processes. Others are intended to be more disruptive and to deliver 'decentralised justice' within the online ecosystem outside the reach of conventional dispute resolution forums (ie traditionally domestic courts).

Many of the proponents of these decentralised dispute resolution tools argue that validity in the eyes of the law is not what matters in the online world, as long as the parties' codified agreement enables

1. Source: Raconteur.
2. Source: Statista.

enforcement as a matter of practice within the digital ecosystem. While this argument may perhaps hold in some instances (small value, high volume disputes and C2C transactions), it unlikely to be true for more complex and high value B2C or B2B relationships. In these relationships, digital transactions will need to interface and correlate to the offline world and comply with applicable regulatory regimes. This will also require a valid means of real world 'enforcement' of those digital obligations.

If a relationship exists within a digital ecosystem or relies upon decisions made by a machine, why do the parties' rights need to be enforceable 'offline'?

The short answer to this question is that it is neither desirable nor possible in practice for digital transactions in the B2B context to escape altogether the grasp of the mandatory laws that apply 'offline'. Parties can of course agree as a matter of contract what they will do within the digital ecosystem and how that agreement will be executed within the platform. But we all know that contracts do not provide for every eventuality, that protections are sometimes required outside the four corners of a contract (eg in instances of fraud) and that parties don't always comply with their contracts.

The practical inability (and undesirability) of escaping mandatory laws

Take smart contracts as an example (a term generally used in the context of blockchain ecosystems). This term refers to code that is intended to be executed automatically upon certain pre-determined trigger events that can be monitored digitally. This means that, the intended steps are programmed to run according to strict (and pre-defined) inputs. Digital assets can be transferred (be that cryptocurrency or data) between counterparties directly (without the need for further action between them). Smart contracts can be used to define and perform the obligations of a legally binding contract. The term "smart legal contract" is often used when the smart contract forms part of the binding contract itself.

Opportunities afforded by smart contracts are huge and of wide application. Examples, among many others, include supply chain management, identify authentication, HSE/operations management and transparency, regulatory/ESG monitoring and reporting.

However, it would be foolhardy to expect that the parties will have anticipated every eventuality upon the coding of their agreement or indeed that every term of their agreement is capable of codification.

Similarly, parties cannot proceed on the assumption that no error will ever need rectifying in these smart contracts (bugs are a feature of all coding) or that parties will always agree that the outcome of the smart contract reflected their agreement. When those issues arise, parties to the smart contract need to have some recourse to ensure their bargain is upheld. This cannot be achieved without recourse to the law. In order for smart contracts to give parties the necessary certainty to carry on business, they must be as legally robust as they are technologically sound.

If parties seek to treat their relationship as being shielded from the reach of the law, they run significant risks that, at any point, a party who is dissatisfied with an outcome may seek to obtain redress before traditional judicial authorities. In that instance, if the parties have failed to anticipate that possibility and, for example, failed to specify the applicable law of their agreement and the courts with supervisory authority over the dispute resolution process, very complex legal issues (eg conflicts of law) are likely to arise which could result in tactical satellite litigation around the world.

Where does arbitration come in?

Despite all the headlines, blockchain, NFTs and the metaverse remain on the fringes of business and society. In order for these technologies and the opportunities they present for B2B relationships to go mainstream, adoption needs to be 'legally robust by design'. This includes identifying mechanisms for resolving disputes that will enhance the digital offering, while being enforceable offline.

Arbitration can play that role in the short term, although greater digitalization of the arbitration process and the legislative frameworks within which arbitrations take place will continue to bolster the utility of arbitration in this context. Arbitration already benefits from several features that make it attractive as a dispute resolution process for digital transactions. Specifically:

- **Global ease of enforcement**: arbitration agreements are widely enforced under national laws and as a matter of treaty obligation pursuant to the New York Convention. When operating in a cross-border, a-national digital environment, this is a very valuable advantage of arbitration over court litigation or any form of consensual online mechanism which would require enforcement before a court/tribunal. That said, this still requires a counterparty to have an offline presence and assets that would be within the reach of a court within one of the NYC jurisdictions (c. 170 countries globally). In the same way that crypto will likely be pegged in due course to offline assets through stable coins or CBDCs, Decentralised Autonomous Organisations (DAOs) will likely require some offline nexus (see for instance Wyoming's codification of rules applicable to DAOs domiciled in that state).
- **Flexibility of process**: arbitration is a creature of contract. Parties can – within the framework of applicable mandatory laws – agree whatever process they deem appropriate for the resolution of their disputes through arbitration. For example, if parties wish to prioritise speed of outcome, they can agree abridged timeframes. Similarly they could agree upfront (depending on the relevant digital platform architecture) that certain evidence in relation to pre-defined types of dispute may be generated from the system and shared with the Tribunal for prompt determination 'on the papers' (ie without a hearing).
- **Expertise of decision makers**: arbitration offers parties the ability to select arbitrators with appropriate expertise (for example, arbitrators with an understanding of coding for a dispute about the working of a smart contract). This feature is sometimes downplayed, given that courts can rely on third party experts. However, an understanding of the technologies at hand and how they operate can be fundamental in this context in establishing a fair but robust procedure for the resolution of the dispute.

However, there are also challenges for arbitration to overcome in this sphere, including:

- **Third party orders and compelling a recalcitrant party**: Because arbitration is a creature of contract, the jurisdiction of a tribunal is defined by the parties' arbitration agreement. A tribunal cannot, without support from supervisory courts, make orders against third parties or require the production of evidence that is not controlled by the parties to the arbitration agreement. Similarly, the tribunal itself has limited recourse to compel a recalcitrant party to do something. However, tribunals are able to make awards against parties to an arbitration agreement who later refuse to participate in the process and that award can be enforced around the world wherever that party holds assets.
- **Speed**: current arbitration rules do not generally result in an award inside 9 months from the start of the dispute (and often much longer for complex disputes). In the context of digital transactions in a fast-moving environment, that could be seen as too slow. However, as mentioned above, it is open for parties to agree an abridged process. In addition, most recent institutional rules now provide for emergency arbitration and expedited appointment of tribunals by default, which greatly assists parties quickly to obtain an order to maintain the status quo.
- **Cost**: there is no doubt that in this context, especially while the value of transactions in the digital sphere remains comparatively low versus the offline B2B market, arbitration needs to get cheaper. However, this is readily achievable through tailored pricing and procedures for digital disputes, and the selection of counsel and arbitrators who understand the technologies at hand and can navigate the related issues effectively and efficiently.

What's next?

Parties adopting new processes in the digital sphere should be encouraged to include express terms in their contracts/smart contracts/smart legal contracts aimed at addressing the resolution of their disputes, the laws that will apply to their contractual relationships and the interface between their relationship in the digital and offline worlds. As the use of these technologies become more mainstream, the market will develop more tailored practices and model clauses that parties can make use of when negotiating and drafting their agreements.

Helpful guidance already exists in many jurisdictions, and some examples from England and Wales are set out below.

- Legal statement
- Law Commission: Smart legal contracts Advice to Government
- Blockchain: Legal and Regulatory Guidance
- Bank of England Discussion Paper on CBDCs
- HMRC Crypto promotions
- UKJT Dispute Rules

Diversity: what has been done so far and can the arbitration community do more?

These topics were discussed at a webinar on 8 February, co-hosted with GAR and Lexology. Charlie Morgan, Prof. Sarah Green (Law Commission), Sapfo Constantatos (SCB) and Sam Goodman (Twenty Essex) discussed: (i) why parties' rights and obligations need to be enforceable 'offline' even if the relationship is digital; (ii) whether arbitration if fit for purpose in determining digital disputes; (iii) what regulatory changes are needed to give certainty as to parties' rights and obligations in the digital realm; (iii) the drivers for 'end users' of arbitration in adopting these technologies and what changes this may require to existing DR processes. You can access the recording of the webinar here.

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Hear **Charlie Morgan** talk about anticipating and resolving disputes in the digital sphere here

Promoting gender diversity has become a key focus for the international arbitration community and beyond. In the Global North, it is generally acknowledged that the topic has gone from being a "*fringe, water cooler conversation*" to a key business priority.[1] Companies are facing greater internal and external pressure to increase the representation of women, particularly on boards and in senior leadership positions, and to provide equal opportunities and compensation at all levels.

Within the arbitration community, efforts have been focussed on ensuring the fair representation of women as arbitrators. The cross-institutional task force on gender diversity in arbitral appointments and proceedings conducted by the International Council for Commercial Arbitration (ICCA Taskforce) has also sought to identify and explore the underlying issues causing women to leave the legal profession. It recognises that addressing the lack of female arbitrator appointments is only the tip of the iceberg in seeking to achieve a more inclusive arbitration community and, indeed, legal profession.

The arbitration community has also started to acknowledge that in pursuing gender diversity, we must not ignore other forms of diversity – in particular ethnic, racial and cultural diversity- nor the intersectionality of gender with other forms of diversity, such as, sexual orientation. However, efforts in this sphere are at a much more fledgling stage.

Whilst the international arbitration community cannot single-handedly assume responsibility for fostering a more inclusive environment to practise arbitration, what more can we do to increase diversity in our profession?

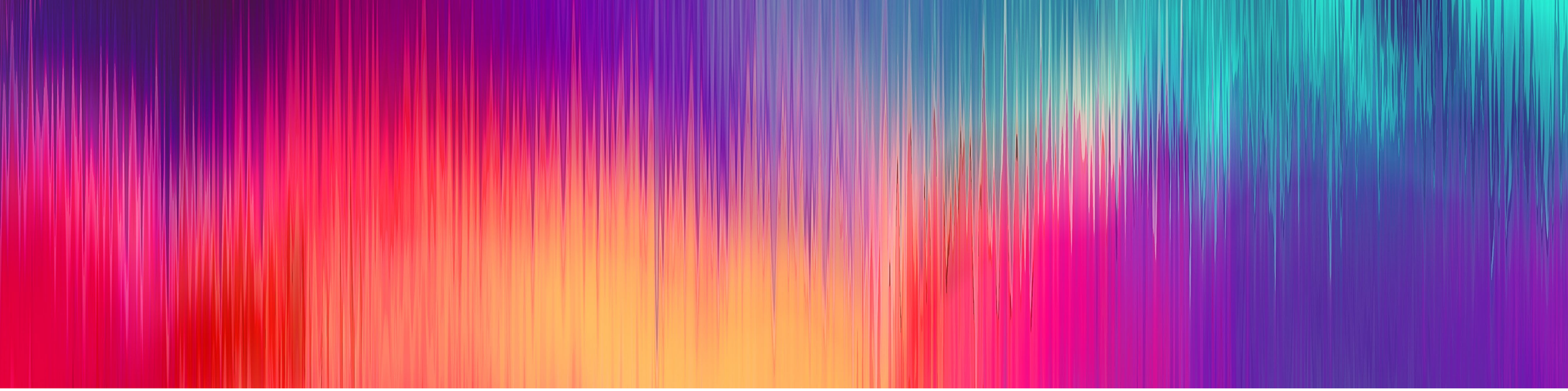
Why is diversity in arbitration important?

The case for diversity in arbitration is obvious, but bears repeating. For aspiring arbitration lawyers and arbitrators, increasing diversity – in all its forms – is about breaking down the barriers to entry that exist so that everyone can operate within a meritocratic system.

For users of arbitration, different perspectives from both arbitrators and counsel improve the quality of the decision-making process. Studies have also shown that cognitive biases such as "groupthink" (where a group of people who are theoretically capable of making excellent decisions nevertheless end up making poor ones as a result of flawed group process and strong conformity pressures)[2] are less likely to occur if there are diverse decision-makers. There has also been some new research that has shown that mixed gender teams tend to score more highly across a range of tasks due to the social sensitivity brought by women to the group.[3]

Diversity improves how arbitration is perceived across a broad spectrum of stakeholders and tribunal diversity adds legitimacy to the proceedings in the eyes of the users. A diverse pool of potential

1. See the Hampton Alexander Review which focuses on female representation on FTSE boards.
2. Is increasing gender and ethnic diversity in arbitral tribunals a valid concern and should arbitral institutions play a greater role in ensuring diversity? Dr. Ula Cartwright-Finch, August 2019. See also Won Kidane's book on the Culture of International Arbitration.
3. See Dr Ula Cartwright-Finch's article as above.



arbitrators allows users to access candidates who may bring a different perspective to the proceedings or be able to view the contracting parties and the contractual framework within a wider social, religious or cultural perspective. Importantly, actively pushing for diversity allows users to harness potentially untapped talent while also helping to avoid real or perceived conflicts as a result of repeat appointments of the same arbitrators by the same parties.

However, recognising the importance of diversity in the arbitration community does not require the de-legitimisation of more established arbitrators or counsel. There is little to be gained from the use of divisive and inflammatory terminology to highlight inequality. Indeed, experience should be respected and users will want to turn to experienced counsel and arbitrators when the stakes are high. Moreover, repeated use of the phrase "pale, male and stale" could serve to alienate those whose efforts are most likely to bring about change in terms of arbitrator appointments. An arbitrator tasked with recommending an alternative candidate or proposing a presiding arbitrator for their tribunal is more likely to recommend a diverse candidate if they feel included in the movement rather than ostracised from it.

What has been done so far?

The arbitral community has been making a conscious effort to improve gender diversity over the last decade. The first major move was in 2015, when, in recognition of the under-representation of women on international arbitral tribunals, arbitration practitioners, global representatives of corporate entities, states, arbitral institutions, and academics drew up the "Equal Representation in Arbitration" (ERA) pledge, whose objectives are to improve the profile and representation of women in arbitration and to appoint women as arbitrators on an equal opportunity basis. The pledge contains actionable steps to improve gender diversity, including the requirement for lists of potential arbitrators, committees, governing bodies and conference panels to include a fair representation of female candidates, and where possible, for a fair representation of female arbitrators to be selected. It also requires gender statistics for appointments to be collated and to be made publicly available.

As at May 2021, the ERA pledge had over 4,000 signatures, from parties, counsel, arbitrators and institutions who have all made efforts to ensure the fair representation of women as arbitrators. Arbitral institutions and law firms have also met their commitment to publishing statistics on gender diversity.

But have those efforts translated into results? The ICCA Taskforce reported in 2020 that women comprise just over 20% of all arbitrators, up from around 10% in 2015. To put this figure into context, the 2021 UK annual Diversity of the Judiciary report revealed that 33% of partners in UK law firms are women (although that statistic drops to 25% for equity partners). The proportion of female QCs is lower, with the Bar Standards Board reporting a 16.8% figure for 2020. Although there do not appear to be any statistics available regarding the proportion of women acting as counsel in international arbitration, it is likely that those statistics would mirror the proportion of women at various levels in law firms.

Outside of the UK, the statistics for law firms are similar in the USA, for example – with women comprising 30% of non-equity partners and 22% of equity partners.[4] For a frame of reference outside of the law, the Hampton-Alexander Review of FTSE women leaders reported that in the UK there are now over 34% of women on FTSE 350 boards, and women now occupy around 30% of all leadership roles. In OECD countries, 22.3% of board members are women.[5]

The proportion of female arbitrators is therefore approximately 10% worse than the proportion of female partners at law firms in the UK and US, but slightly better than the overall percentage of female QCs. However, the statistics published by leading arbitral institutions in 2021 (for the reporting year of 2020) do suggest that these percentages are gradually increasing (see table).

ARBITRAL INSTITUTION AND DATE	PROPORTION OF FEMALE APPOINTMENTS
SIAC (2020)	32.2%
HKIAC (2020)	22.8%
LCIA (2020)	33%
ICC (2020)	23.4%
ICSID (up to 30 June 2021)	31%
Average	**28.5%**

4. https://www.catalyst.org/research/women-in-law/
5. See the World Economic Forum's Global Gender Gap Report 2020.

Aside from gender, institutions (such as the ICC and LCIA) have also started to track and publish the regional origins of parties, and the nationality of arbitrators. These statistics indicate that the overwhelming majority of arbitrators are from the Global North. Nonetheless, it is clear that the home jurisdictions of many parties who are users of arbitration are either under-represented or not represented at all. The process of pulling these statistics together should help to promote awareness of this paucity of territorial and cultural diversity, and encourage institutions (in the first instance) to appoint arbitrators from a wider pool of candidates enabling them to gain experience and then promote themselves to parties and other arbitrators.

In addition, there are a variety of diversity initiatives in place, which will hopefully gain traction. These include the African Promise, which aims to tackle the under-representation of African arbitrators on tribunals, especially in arbitrations connected to Africa. The move to virtual conferences has also enabled a greater diversity of speakers to participate in conferences and increase their profiles by networking on a global scale.

What are some of the hurdles that are specific to arbitration?

Many barriers to entry are non-arbitration specific. For example, the most obvious barrier to the lack of gender diversity is the poor retention of women in the legal profession. Whilst there are now equal numbers of men and women choosing to go to law school and join the legal profession, the representation of women drops significantly among the more experienced and senior members of the profession – whether solicitors, barristers or judges. Fixing this retention issue is critical to diversifying the gender of counsel and arbitrators in arbitration, given that counsel and arbitrators are drawn from the senior members of the legal profession.

These barriers to entry are recognised to be even worse with respect to ethnic diversity – with barriers existing not only in relation to retention, but also at the recruitment stage.

> Nonetheless, as a truly international form of dispute resolution that prides itself on being separate from local court practice, the international arbitration community has a unique opportunity to provide a service that caters to the needs of its users worldwide.

This means providing a choice of arbitrators who have relevant social, cultural or religious perspectives irrespective of gender or nationality issues. This will not be possible if users of arbitration continue to come from all over the world, but arbitrators are predominantly from the Global North.

The party-appointment of arbitrators is a unique feature of arbitration, but parties have a propensity to appoint established arbitrators, particularly in high value, complex matters, which holds back the representation of diverse candidates on arbitral tribunals. For example, the ICCA Taskforce reported that in 2019, the percentage of female arbitrators appointed by parties (as opposed to arbitral institutions or co-arbitrators) was, on average, 13.9%. The ICCA Taskforce also confirmed that in general, institutions appoint a greater proportion of female arbitrators than parties or co-arbitrators.

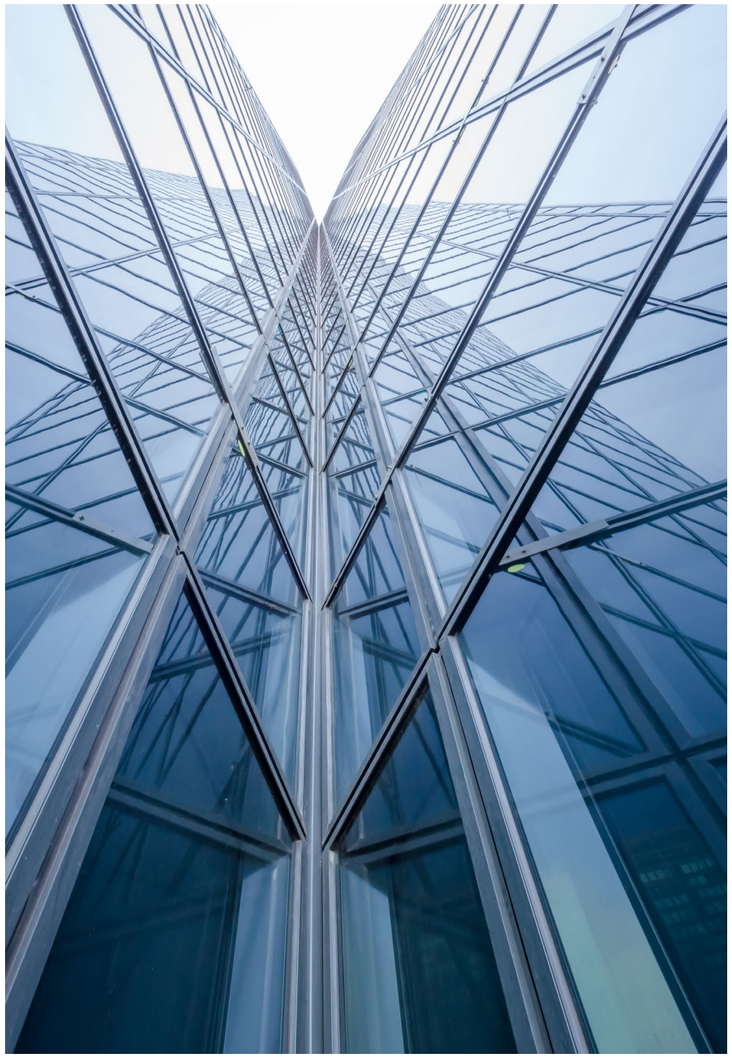
These statistics are to some extent unsurprising. The selection process is led by counsel and users of arbitration, who wish to make a decision that is in the best interests of the client/party. This militates against "first-timers" in favour of well-established arbitrators. Clients value the experience of their arbitration counsel and few are likely to recommend someone of whom they do not have first-hand experience. As a consequence, the more experienced practitioners from the senior ranks of the legal profession, many of whom are men from the Global North, are still likely to pick up the majority of appointments.

The future

> It is clear that there is a lot more we can do to achieve diverse representation in arbitration, even if we cannot single-handedly remove the barriers to entry that exist within the legal profession at large.

Whilst increased transparency and the publication of statistics are a good start, more active steps include co-counselling with local counsel to promote and improve regional expertise, continuing to train, champion and sponsor good candidates, and creating opportunities for more diverse candidates to promote themselves and shine. Facilitating and increasing access to information about potential arbitrator candidates is also crucial – the new Delos Arbitrator Database, an open access database, which allows any arbitrator or aspiring arbitrator to register and appear free of charge, is a great step in the right direction.

What can law firms do?	What can clients do?	What can would-be arbitrators do?
• When it comes to appointing arbitrators and engaging with the arbitration community, act in accordance with the objectives of the ERA pledge • Consider anonymising short-lists of arbitrator candidates • Train, sponsor, mentor and champion diverse candidates within organisations and ensure diversity of counsel teams • Use influence to boost profile of local practitioners in different jurisdictions and seek opportunities to invite them to speaking engagements and introduce co-counselling opportunities	• Actively engage in the arbitrator appointment process and challenge counsel to justify their short-lists and counsel teams • Consider level of experience required – eg for lower value claims or less complex disputes • Consider whether institutional appointment of arbitrators would be appropriate in some cases, and avoid co-arbitrator/party appointments • Be open to new names and be on the lookout for impressive potential candidates	• Consider applying for initiatives at institutions – eg the ICC's Africa program. The Canadian Institute of Chartered Arbitrators has also commenced a pilot shadowing programme • Submit your CV to an arbitral institution for inclusion on their arbitrator list • Raise your profile through speaking engagements, events and publications • Build your network • Act as tribunal secretary/spend time at an institution



- Justin D'Agostino, CEO of HSF, is currently Co-Chair of the ERA Pledge, of which HSF is a proud signatory. Briana Young, Professional Support Consultant and practice manager in the Greater China arbitration practice at HSF, is also joining the Pledge's leadership team as Secretary of the Pledge Global Steering Committee while the current Secretary is on maternity leave.
- HSF is proud to have supported Delos in the launch of the Delos Arbitrator Database.
- HSF was the proud host of the African Arbitration Academy in October 2021 and has been participating in the initiative since it was first conceived in 2019.

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Spotlight Interview **Cathy Liu**

Cathy is a partner at our Joint Operation firm Kewei in Shanghai. Her practice focuses on dispute resolution, regulatory investigations and white-collar crime. She has over 15 years' experience in representing clients before courts and arbitral institutions, dealing with disputes related to international trade, product liability, corporate control and unfair competition.

Meet **Cathy Liu** here

Passing the PRC Bar exam is notoriously challenging. What made you want to become a lawyer?

My aunt is a dramatist. When I was young she took me to see The Merchant of Venice. I was particularly impressed by Portia, because she is very intelligent, and takes on the role of judge and problem-solver. After seeing that, it became my dream to become a lawyer. And once I qualified, I discovered that what I love most about the job is the advocacy. It's a kind of art to present your own version of a story, and to observe the reactions of your counterparts and the adjudicator as you persuade them to accept your version of a case. Using the art of persuasion to help clients solve a problem is the reason I love this career. At the end of the day, it's about problem solving: that's the key function and value of a good lawyer. Solving a problem doesn't always mean you win a case outright; it's about knowing what your clients need, and fighting for it. Even where a client has a case that isn't very strong, we can find ways to help. Sometimes, just delaying a payment can be a victory for a client. There is always a way for a lawyer to figure out a way to meet the client's commercial needs.

You have a wide-ranging practice that covers litigation, arbitration, regulatory investigations and white collar crime. What originally interested you in these areas of law?

My original and lasting interest is in resolving disputes; everything else flows from that.

I think of all areas of my practice as contentious matters. Litigation and arbitration are obviously contentious procedures. In regulatory investigations, the relevant government authority is essentially my client's counterparty. Even internal investigations can require my clients to confront the targets of the investigation. Also, an investigation will often be followed by a contentious process like disciplinary action against the employee, or full-blown legal proceedings. Dispute resolution is at the core of everything I do.

How has Mainland Chinese dispute resolution changed since you started to practice?

I'd say the major change is increased sophistication. Not only Chinese lawyers, but also judges and clients have become more and more sophisticated in the way they deploy litigation and arbitration to resolve problems.

When I started practising 18 years ago, clients in Mainland China were very reluctant to commence litigation. The prevailing view was that fighting a counterparty in court was not a good thing, and would damage the client's reputation. Parties would delay starting proceedings, or avoid it altogether.

Things have changed quickly. Now, my clients will actively seek litigation or arbitration to resolve conflict with their business partners, or use proceedings as leverage in commercial negotiations.

Another major change has been in the quality of adjudication. 20 years ago, many judges in China – particularly in rural areas – were retired army members, not lawyers. Although they had their own ways of helping parties to settle disputes, these judges had no legal background and no formal judicial training. These days, most judges in Mainland China have postgraduate legal degrees; many have also spent time studying and working abroad. Although many Chinese judges still encourage parties to settle their disputes, and PRC litigation procedure is designed to encourage settlements, it's for a different reason. Parties' increasing use of litigation means there are many more cases than there used to be. Settling them both helps the parties, and reduces the burden on the courts.

These changes reflect the fact that China generally is much more international and globalised than at the start of my career. Improvements in China's economy have also played a part. As the country has grown more prosperous, more and more parents have been able to send their children overseas to study and gain experience in a cross-border context, before bringing that experience back home to China.

Tell us about the Kewei-HSF joint operation. How does it work to enhance the firm's offering to clients both in and outside Mainland China?

I joined Kewei three years ago, after the joint operation had been established. In that short time, I have seen many examples of how the joint platform can be very helpful for both Chinese and international clients. As Chinese lawyers, we have a deep knowledge of Chinese clients and the Chinese legal landscape. This knowledge enables us to act as a bridge between Chinese clients and the Herbert Smith Freehills teams outside China. That capability differentiates us from other international firms in China and from purely local Chinese firms.

> **I have seen many examples of how the joint platform can be very helpful for both Chinese and international clients.**

For example, we recently acted for a Chinese state-owned entity in a Singapore arbitration. Before instructing us, the client had been working with a local Singaporean firm, but the general counsel was finding it really difficult. He felt that the lawyers wouldn't interact with him, and that they just wanted to interview the client's senior management and to dig out every email and document that had anything to do with the case. The GC, who has a Chinese legal background, understandably felt that this was not in the SOE's favour. As someone with both Chinese and international background, I was able to explain that it is usual in international arbitration to interview witnesses and produce evidence that may or may not support your case. The Singapore lawyers had been doing their jobs, but it wasn't until Kewei came on board that the client fully understood the process and procedure he was involved in, and the reasons for it.

This same client is now involved in Australian court proceedings, working with Herbert Smith Freehills' Perth office. Our Australian team wasn't optimistic about the client's prospects, but the client wanted to litigate regardless. Kewei has acted as a bridge, explaining to the Perth lawyers that it was important for the SOE to initiate the litigation because PRC law obliges SOEs to protect state assets however it can, even outside China. We also explained to the client that our colleagues' assessment wasn't positive, and discussed whether to proceed. The client decided to go ahead, and we have helped develop a strategy that allows it to spend as little time and money as possible, while complying with its obligations under PRC law.

How do your clients use arbitration (both domestic and international)?

More and more Chinese clients are highly sophisticated, and routinely consider when entering a transaction whether to resolve disputes by litigation or arbitration. Their choices will depend on the circumstances of the transaction.

Mainland clients with foreign counterparts tend to opt for arbitration over litigation. Our clients know that arbitration gives them more flexibility, for example in choosing both arbitrators and shaping the procedure, compared to foreign court proceedings.

If the counterparty is a government authority, for example under a PPP agreement, my Chinese clients tend to feel that arbitrators provide a more impartial procedure than a judge in court.

Chinese clients are also aware of the enforcement advantages of arbitration over litigation. Clients are particularly keen on arbitrating in Hong Kong, because of the Interim Relief Arrangement that allows clients to apply for interim relief from the PRC courts to preserve the other side's assets at the beginning of the transaction. My clients see this as a major advantage.

If you hadn't been a lawyer, what would you like to have done as a career?

I would love to have been a primary school teacher. Being a lawyer, and the time and energy it involves, makes me feel that I owe a great deal to my family, and particularly to my two kids. I also love time spent with young children.

What have you done to pass the time during periods of Covid lockdown? Any new hobbies – or pets?!

I have spent a lot of time exercising. It's easier for me to exercise at home than when I'm working in the office, and it is important for my physical and mental health to keep exercising.

I have also made sure to keep in contact with my friends, family and clients during the pandemic. This could be by giving them a call, or posting on WeChat groups and other social media. Keeping in touch with people and checking in with them has helped me endure the lockdown, especially as it went on longer than we originally thought it would.

Get in touch

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Spotlight Interview **Weina Ye**

Weina is an international partner at Kewei. She started her career at Herbert Smith Freehills, where she was a member of the international arbitration teams in London, Hong Kong and Mainland China, before moving to Kewei in 2020. Weina's practice covers disputes in a broad range of sectors, including TMT, manufacturing, energy, infrastructure and leisure.

Hear from **Weina Ye** here

You are a Herbert Smith Freehills PRC Scholar, meaning that you trained in the London office and qualified as an English lawyer. You are also qualified in the PRC, and have practiced much of your career in China. How has that experience shaped your career and your approach as a lawyer?

I qualified as a non-practising lawyer in the PRC more than 15 years ago, but for regulatory reasons only obtained my practising certificate in 2021, after I moved to Kewei. I have been practising as an English solicitor for more than a decade, from London, Hong Kong and Mainland China. So I practise both English and Chinese law and advise both Chinese and multinational clients, on both Chinese and international arbitrations.

This is a fairly unusual background, which allows me to give advice from a comparative perspective, and offer insights from both the Western and PRC points of view. For example, there are differences in the way a Chinese tribunal and an international tribunal will approach certain issues. I can explain those to my clients, to help them assess the best options in each case.

The China market divides lawyers to "Chinese lawyers" and "international lawyers". With a hybrid background, I consider myself a "Chinese international lawyer" or an "international Chinese lawyer".

Tell us about the Kewei-HSF joint operation. How does it work to enhance the firm's offering to clients both in and outside Mainland China?

PRC regulation prohibits international firms like Herbert Smith Freehills from advising on PRC law. As a PRC law firm, Kewei can give Chinese law advice and represent clients in front of Chinese tribunals and courts.

The tie-up means, for my practice, that we can now provide a one-stop-shop for our multinational & Chinese clients for all types of disputes. This is a major advantage for all our clients, particularly in the resolution of cross-border disputes.

For example, in PRC-related international arbitration matters, the joint practice can not only run the international arbitration itself, but also the interim relief applications, related court proceedings and enforcement proceedings in Chinese courts, without having to engage co-counsel on a case-by-case basis. In global debt recovery matters, our HSF-Kewei joint team can work seamlessly in a number of jurisdictions including Mainland China, Hong Kong, Europe and the US. We also advise on disputes outside Mainland China that are governed by Chinese law or involve Chinese elements on a regular basis.

By providing a one-stop solution, the tie-up has enhanced our services in the resolution of cross-border disputes and addressed a real need for our clients. Kewei has become an important piece in the jigsaw of our very strong global disputes practice.

The PRC recently proposed a major revamp of its Arbitration Law. In your view, what are the most significant revisions, and why?

As a dual-qualified lawyer, I have paid much attention to the differences between Chinese arbitration practice and international arbitration practice. I often think about which is better, why, and how to harmonise the two systems.

There are many significant revisions in the consultation. For me, three stand out.

i) The proposals would allow arbitrations between non-equal parties, such as individuals and states. Essentially, this opens the door to investment arbitration in Mainland China, and is a very welcome development;

ii) The draft suggests that foreign institutions could administer foreign-related arbitrations in China (see article on page [ ] for further details). While the scope of the proposed permission isn't yet clear, this would be a truly significant change that would open

and internationalise the Chinese arbitration landscape;

iii) The amended law would allow ad hoc arbitrations in Mainland China. This proposal is limited to foreign-related disputes, but still represents a major shift in approach. Currently, all arbitrations in Mainland China must be administered by an arbitral institution.

Overall, the proposed revisions reflect two key things: Chinese legislators are willing to open the arbitration market to foreign practitioners, and there is a genuine drive to internationalise Chinese arbitration practice. I find this very encouraging.

What else is needed to internationalise arbitration practice in China and to harmonise Chinese and international practice?

There are two parts to this question: (1) internationalisation of practice in China; (2) international practice being more diverse to practitioners from various backgrounds and cultures.

We need to see continued internationalisation of arbitration in China. In some ways, Mainland arbitration practice is quite disconnected from international practice. There are several reasons for this, including overall differences between the Chinese/civil law litigation culture, which relies heavily on documentary evidence over witness testimony and encourages mediation, and international practice. Language is another obvious barrier, though this should improve gradually following arbitration reform in China, with more and more Chinese practitioners like me working in arbitration.

At the same time, it is important for international arbitration to be more diverse. While gender diversity has improved significantly, cultural diversity lags behind. For example, HKIAC and SIAC statistics include significant numbers of PRC law-governed and PRC-related cases, but appointment of PRC arbitrators remain relatively low. The same is true for arbitrators from other, less well-represented jurisdictions.

For international arbitration and Chinese arbitration to come closer together, we need to see more Chinese arbitrators sitting on international tribunals, then bringing that experience back to China for the benefit of Chinese and international parties alike.

China's Belt and Road Initiative was expected to generate a large number of disputes. Has that played out in practice? If so, what kinds of disputes are emerging, and in what fora are they being resolved?

"Belt and Road" is a loose "umbrella" label for all kinds of projects in the 70+ Belt and Road countries. I am not aware of any official statistics, but in the last few years I have definitely seen overseas Chinese projects, for example in the construction and mining sectors, encountering difficulties. The underlying reasons vary; the Covid pandemic is a factor, and a number of disputes arise for geopolitical reasons.

These disputes are referred to different fora, including arbitration. The choice of arbitral seat tends to depend on party nationality. Chinese deals with African counterparties often provide for arbitration in Paris. Central and Southeast Asian counterparties prefer Singapore and Hong Kong. Of course, most of these deals involve Mainland Chinese parties, and CIETAC arbitration is also used, for example, in Chinese financing agreements. There are also many "hidden" Belt and Road disputes being referred to CIETAC arbitration. These are disputes that arise out of a Belt and Road project, but between exclusively Chinese parties, eg a Chinese contractor and sub-contractor. Naturally, those parties may choose to arbitrate in China using a Chinese arbitral commission.

Historically, very few Chinese clients got involved in investment treaty arbitration. Has that changed?

Broadly, yes. In recent years, Chinese clients have developed a better understanding of investment treaty arbitration. This applies to both state-owned and private sector clients.

SOEs are still quite restrained in terms of bringing investment treaty arbitration, not least as a result of political and diplomatic concerns. However, we have seen a number of investment arbitration cases brought by Chinese private sector clients in the last few years. Overall, the Chinese market has an enhanced awareness of investor-state arbitration compared to a decade ago. As parties learn more about how treaty arbitration can be used for strategic and investment protection purposes, I certainly expect to see more cases in the years to come.

If you hadn't been a lawyer, what would you be doing now?

I have lots of thoughts on this! I want to run a farm, and to spend half of my time travelling. I'd also like to write a book about the generation born in the 1980s in China, based on my own experience and the experiences of those around me.

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Issue 1

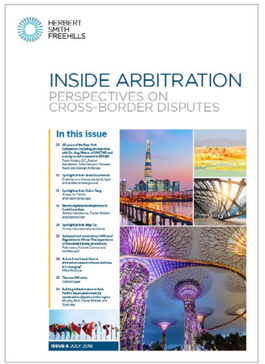
Issue 2

Issue 3

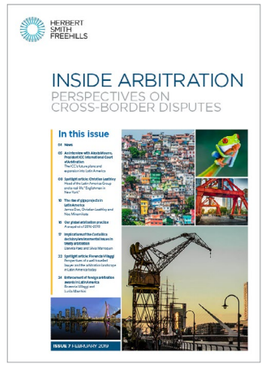
Issue 4

Issue 5

Issue 6



Issue 7



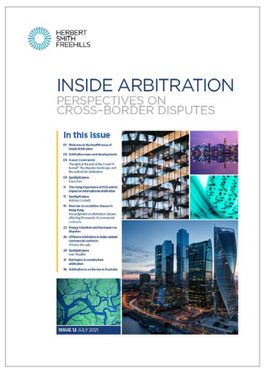
Issue 8

Issue 9

Issue 10

Issue 11

Issue 12



Our global arbitration practice: A snapshot of 2019 – 2021

US$122.4 BILLION

value of the claims and counterclaims in our portfolio

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

working on arbitration across **21 offices**

across **19 different seats***

29 members of the practice sitting as arbitrator on **66** cases

32 arbitrator appointments as presiding or sole arbitrator

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

settled **47** cases

65% of hearings were virtual in 2020 and 2021, showcasing our adaptability to COVID-19 restrictions

* of matters that went to hearing

Key stats

40+ Partners

200+ total qualified Lawyers working across the globe

129 live arbitrations and 14 active treaty based arbitrations

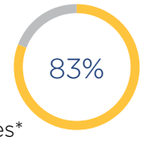
7 cases with a claim value

US$5 BILLION +

12 cases between **US$1-5 billion**

we have worked on arbitrations governed by **26** sets of rules

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



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