Norton Rose Fulbright

International arbitration report

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Norton Rose Fulbright

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International arbitration report
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Editors – James Rogers, London; Cara Dowling, Vancouver

Editorial

Welcome to issue 16 of Norton Rose Fulbright's *International Arbitration Report*.

In this issue, we cover a broad spectrum of 'hot button issues' for boards and companies operating internationally.

With the COVID-19 pandemic continuing to shine a spotlight on supply chains, we look at how to avoid, mitigate and resolve supply chain disputes. We also offer practical "Top 10 tips" for drafting arbitration agreements and explain how a well-drafted clause will mitigate the risk of cross-border disputes.

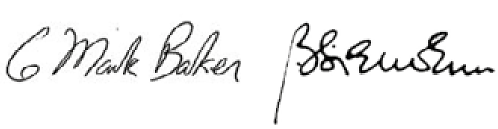
The Energy Transition remains a top priority for companies across all industries, presenting both opportunities and risks. We continue our series of articles exploring these issues, with a new analysis of renewable energy project disputes and a new article offering insights into the nature of climate change and sustainability disputes and examples of such disputes that have been referred to arbitration.

On a related topic, and continuing our series on Investor-State Dispute Settlement (ISDS), we look at joint venture disputes between investors and states and how to mitigate the risks when transacting with states and state-owned entities.

We also cover the hot topic of group, class and collective arbitration, exploring recent developments in the U.S. commercial arbitration and investor-state arbitration contexts.

In our practice section, we are delighted to be joined by by LCIA Registrar Eliana Tornese, who shares her insights on what it is like to work as a Registrar at a major arbitral institution in "*A day in the life of a Registrar*". We offer an opinion piece on arbitrator conduct in international arbitration, as well as succinct updates on recently revised rules of arbitration including the ICC, ICDR and ACICA Rules; all of which have revisions aimed at increasing the efficiency and effectiveness of arbitration and modernising the institutional response to new and developing issues being experienced by arbitral participants.

Last but not least, in our case law updates, we cover recent jurisprudence on how to recover costs of enforcement and interest when confirming arbitral awards in the U.S., and provide a succinct round-up of a number of other recent UK and U.S. arbitration-related court decisions.



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About the cover

The front cover for this issue features a statue of Mary Seacole on the grounds of St Thomas' Hospital, London. It is the UK's first statue in honour of a named black woman. Mary Seacole was a British-Jamaican nurse known for her work in the Crimean war. Mary was a contemporary of (and as well-known in Britain as) Florence Nightingale.

Q&A with LCIA Registrar, Eliana Tornese

"A day in the life of a Registrar"

Interview by James Rogers

James Rogers spoke with Eliana Tornese, newly appointed Registrar of the London Court of International Arbitration (LCIA), about her role.

Please tell us about the key elements of your role

As Registrar of the LCIA, I am head of the Secretariat and am responsible for the day-to-day administration of over 1,000 matters currently registered with the LCIA, allocated between all the members of the Secretariat, which is composed of counsel and casework administrators. The majority of these cases (more than 80%) are arbitrations under the LCIA Arbitration Rules, with the remaining caseload being divided between UNCITRAL arbitrations administered by the LCIA, mediations under the LCIA Mediation Rules, arbitrations where the LCIA is the appointing authority only and cases where the LCIA is acting as a fund-holder only.

Acting as Registrar is both a dynamic and exciting role. It involves, on the one hand, interfacing directly with users and arbitrators to help them navigate through the different stages of LCIA arbitral proceedings, and, on the other hand, supervising the Secretariat's members in order to ensure the LCIA standards are applied consistently across all cases.

What does your day look like?

No two days are identical. However, like for anyone else, especially in this time of remote working, the first item on my daily to-do-list is to review the inbox. The 2020 Rules provide for electronic communication with the LCIA in the arbitration. Accordingly, and in order to promote environmentally friendly best practice, the LCIA encourages users and arbitrators to send soft copies only of correspondence, submissions and other documents during the course of the arbitration.

As Registrar, I review all the new Requests for Arbitration. On busy days, we can receive over 20 new Requests for Arbitration, and usually fewer, on a regular day. My review involves checking that the Request complies with the requirements of Article 1 of the Rules in order to approve registration. Occasionally, I liaise with the President or a Vice President of the LCIA Court before registering new Requests for Arbitration to obtain the Court's input. For example, since the entering into force of the 2020 Rules, the LCIA has received a number of composite Requests for Arbitration pursuant to Article 1.2 of the Rules. Following consultation with the LCIA Court, we have clarified with claimants filing composite Requests for Arbitration that each arbitration requires a separate registration fee.

In the event the inbox only includes regular correspondence and once this has been addressed, the second item of my daily to do list is to have regular meetings with counsel and casework administrators, either in a team meeting or individually. Team meetings are an opportunity for counsel and casework administrators to share developments on their cases. The 2020 Rules introduced an explicit reference to the possibility of early determination; broadened the power of the LCIA Court and the Tribunal to order consolidation and concurrent conduct of arbitrations and included an explicit consideration of data protection. Each member of the Secretariat reports on these issues and other matters arising to the broader team in order that everyone is aware of the extent of application and interpretation of the LCIA Rules on these aspects and is able to guide users and arbitrators when similar issues arise on ongoing cases.

> ***Acting as Registrar is both a dynamic and exciting role***

In the daily individual meetings, counsel and casework administrators identify and raise with me any potentially problematic issues that arise on cases (including, for example, proposed procedure that is not in accordance with the Rules and challenges to arbitrators). However, more generally, in these meetings, I review with each counsel and casework administrator key draft correspondence and documents. This includes, for example, the first letter to parties which is sent after a Request for Arbitration is received, requests for advance payment for the costs of the arbitration, disclosures submitted by arbitrators prior and post appointment, the form of appointment officially appointing a tribunal and the notice of appointment informing the parties of such appointment, as well as awards. This allows me to supervise and monitor cases at key stages of the proceedings.

What role do you play in the arbitrator appointment process?

It should come as no surprise that one of the regular daily tasks of the Secretariat is to assist the LCIA Court with the appointment of the Tribunal, where we consider issues such as disclosures in parallel cases, repeat appointments and advance waivers.

As part of the appointment process where parties have agreed that the LCIA Court select arbitrators, I review shortlists of candidates prepared by Counsel, before they are submitted to the LCIA Court. Counsel's search starts with the LCIA's internal database and then other available resources, in order to identify lists of potential arbitrators suitable for the case, taking into account all relevant aspects. In practice, in recent years, more than 60% of all arbitrators appointed by the LCIA are selected by the parties or nominees, leaving 40% of arbitrators being selected by the LCIA Court. Reviewing and fine-tuning the lists of candidate arbitrators before they are sent to the President or Vice Presidents of the LCIA Court remains one of my favourite parts of the day. In particular, the LCIA strives to maintain diversity in experience, cultural/legal background, age and gender, which includes considering candidates who have not previously been appointed in LCIA proceedings.

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Supply chain disputes

Avoidance, mitigation and resolution

By C. Mark Baker, Cara Dowling and Carmel Proudfoot

Supply chains are increasingly complex. Globalisation of markets has led to supply chains which extend across multiple borders and consist of an ever growing number of links. As the pandemic has highlighted, businesses of all types need to take a cold, hard look at risks to their supply chain and to ensure that mechanisms are in place to initially assess and mitigate disputes risk, and then to later manage disputes that do arise. Careful management of supply chain disputes risk is critical given disruption can reverberate throughout the supply chain with significant time, cost, operational and liability implications for all involved.

Role of ADR and arbitration in resolving supply chain disputes

International arbitration is a tried and tested method for resolving supply chain disputes efficiently and effectively. It offers a neutral forum that can be adapted to the needs of the parties and results in a binding award enforceable in most jurisdictions.

Arbitration also works well as part of a tailored mechanism that incorporates other alternative dispute resolution procedures (**ADR**). Such bespoke options can be especially important where time is of the essence or the supply chains are essential. It can be very important that the supply chain continues to operate during the dispute to minimise loss.

Parties should also consider steps to preserve the supply chain if the other party refuses to cooperate

Many parties will initially seek to resolve disputes through negotiation, mediation or conciliation. These each provide an early opportunity to resolve the dispute, before it escalates and the parties become entrenched in their positions. Although ADR is sometimes seen as less hostile than traditional litigation, any dispute creates tension. Parties need to be realistic: disputes will arise and must be resolved practically. If the parties have sufficient personnel, it can be helpful to have separate staff dealing with the dispute to those responsible for the day-to-day management of the supply chain.

Parties should also consider steps to preserve the supply chain if the other party refuses to cooperate. This could range from seeking provisional measures to compel performance of the contract through to securing alternative supply to mitigate losses.

Disputes boards are another increasingly popular choice for supply chain disputes. A dispute board is a pre-established committee setup at the outset to help parties resolve disputes. The board may consider issues and provide guidance to the parties to prevent disputes from arising, or be limited to resolving formal disputes that are referred to it. The board can be directed to make binding decisions or to simply provide recommendations for the parties to consider and act upon. This can assist parties to avoid disputes or resolve them quickly in circumstances where a speedy resolution may be the most important outcome.

If the dispute cannot be resolved by ADR, then parties generally turn to either litigation or arbitration. The popularity of international arbitration in supply chain disputes is driven by several key factors, including:

- **Enforceability**: Unlike the enforcement of foreign court judgments, there is a near global and well-established regime for enforcing arbitral awards. Most countries have signed up to the New York Convention which provides straightforward rules for the enforcement of awards which, importantly, limit the scope for challenge. The ease and clarity of enforcement is a critical consideration in cross-border disputes, where disputing parties and assets may be spread across multiple jurisdictions.
- **Neutrality**: By choosing international arbitration, parties are choosing a neutral forum that is convenient to both parties to resolve the dispute, before independent, impartial arbitrators under transparent rules. In contrast, parties

can be reluctant to have disputes heard before local courts as it can be seen as giving one party a "home court" advantage (whether actual or perceived). In some jurisdictions, there may also be concerns over the neutrality, corruption, or skill set of domestic judiciaries.

- **Expertise**: Related to the neutrality point, parties to arbitration choose their arbitrators. They are able to agree in advance or after a dispute arises the particular skill set and expertise of their tribunal. There are no jury trials in arbitration. This can be extremely important when dealing with complex, technical disputes.
- **Confidentiality**: Arbitration is a private process that is generally also subject to confidentiality obligations. This can be particularly important for disputes that involve sensitive information or trade secrets, such as seen in the pharmaceutical industry. Confidentiality of process and outcome is easier to secure in arbitration than in proceedings before domestic courts where in general the starting principle is that proceedings and decisions are open to the public.
- **Flexibility of process**: Another great advantage of arbitration is that it offers significant flexibility. Unlike in litigation, parties have a large degree of control over the applicable rules, procedure and scope of the arbitration, including the rules over costs allocation.

Preparing for a supply chain dispute before it happens

Time and time again, where dispute resolution is an afterthought left for eleventh hour negotiation (or, worse, until a dispute has arisen), the outcome is invariably a costly, unnecessarily complex and protracted dispute. To be most effective, the groundwork for the dispute resolution procedure should be laid at the outset, when drafting the contract. In addition, companies that have undertaken a proper assessment of supply chain risk and implemented appropriate mechanisms, are better placed to prevent disputes from arising (by, for example, identifying key triggers), negotiate a resolution, or ultimately succeed in dispute resolution proceedings.

> ***Another key element of disputes-risk mitigation is a disputes-risk legal audit***

It is not possible to predict all the disputes that might arise during a complex long-term contract. Parties' should therefore focus on developing a robust and flexible procedure. In particular, parties to the contracts underpinning a supply chain should consider:

- **Consistency**: It is unlikely that the entire supply chain will be governed by a single contract. There are usually several contracts involving different parties and regions. The most appropriate option will need to be chosen taking into account all the circumstances. To minimise the risk of parallel proceedings and inconsistent decisions, parties will often benefit from a dispute resolution procedure that is consistent across the supply chain. Consideration should also be given to whether parties wish to be able to consolidate disputes and join key third parties to an arbitration.
- **Expedited relief**: Parties often need to obtain emergency relief quickly such as an injunction or declaration. Many arbitral rules provide for emergency relief or expedited arbitration that allow parties to seek rapid relief on an interim or final basis. Parties should consider the potential need for, and availability of, this type of relief when drafting their dispute resolution clause.
- **Pre-arbitral steps**: Given the long term relationships and cooperation needed for an effective supply chain, it may benefit parties to attempt amicable settlement before resorting to arbitration. This can be provided for in a multi-tiered dispute resolution clause, but it should be carefully developed to avoid imposing additional disruption or delay, or grounds for jurisdictional challenges.
- **Method of dispute resolution**: There are many ADR options and some will suit better than others. Parties should seek legal advice on the best options for their particular supply chain. Further tips on drafting an effective arbitration agreement are available here.
- **Disputes-Risk Legal Audits**: Another key element of disputes-risk mitigation is a disputes-risk legal audit. This audit involves both proactive and retrospective elements.
  - The proactive element is an audit to profile the range of disputes then develop, adapt and adopt internal protocols to support the dispute resolution policies put in place. It may also involve training for in-house personnel in dealing with each stage of the supply chain dispute under the internal protocols.
  - The retrospective element is an audit of where, how and why disputes are arising. It involves a strategic analysis of factual circumstances and contractual arrangements in which disputes have arisen. It can be holistic or focused, such as a particular suite of transactions, time period or region. Commonly, patterns can be observed which allow for identification of underlying issues and early commercial or

strategic intervention that may avoid similar disputes in the future. This retrospective analysis provides an important data-point for the proactive aspect of the audit.

— Such audits are critical because too often in the heat of battle or in the relief of the aftermath, the underlying issues that caused a major dispute are forgotten. Similarly, a spate of lower value or less commercially important disputes can slip individually beneath the radar despite amounting collectively to a significant drain on financial and management resources. The opportunity to identify a common cause underlying those disputes can be missed. In the case of smaller skirmishes, it can also mean missing a red flag that the conditions for a major dispute are forming.

- **Disputes protocols**: Related to this is the importance of having appropriate dispute resolution systems and protocols to record disputes and preserve evidence from the earliest stages of a dispute. Such systems lead to more efficient and effective dispute resolution proceedings. Importantly, they also allow earlier and more informed decisions as to the appropriate strategy for resolving the dispute and avoiding future disputes.

Investing in the assessment of disputes-risk and implementing both bespoke dispute resolution contractual mechanisms and company protocols for managing disputes can prove invaluable. In the long run it can save significant management time and money – and crucially, preserve important counterparty relationships. With operations and finance under pressure and disputes-risk on the rise in the face of global volatility, this is an important component of any risk management protocol.

Conclusion

Supply chain disputes are complex and often require fast cross-border solutions. International arbitration provides a flexible, efficient and effective framework to resolve these disputes, especially if combined with other ADR options. It is critical, however, that parties consider dispute resolution at the outset of a transaction, to develop an appropriate bespoke dispute resolution process that effectively manages their disputes. Conducting disputes risk audits of supply chains, particularly for companies operating in essential sectors or across multiple borders, and setting in place bespoke protocols for dealing with disputes are other important tools in a company's risk management tool-kit. If done well, these can save significant time, costs and commercial relationships.

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Navigating the dark side of the energy transition

Renewable energy project disputes

By Tamlyn Mills and Phoebe Miley-Dyer

The substantial growth forecast for renewable energy capacity, and therefore renewable energy projects, carries with it a significant risk of related disputes arising. This article explores the features of renewable energy projects, the types of disputes that may arise throughout a renewable energy project life-cycle, and the role of arbitration in resolving such disputes, particularly where projects have a cross-border dimension.

Forecast growth for renewable energy projects

Pressure on governments and businesses to pursue meaningful action on climate change continues to grow with global attention increasingly focussed on the threats posed by global warming. While the shift toward renewable energy is by no means new, with more governments committing to net-zero emission targets, these ambitious clean energy goals are accelerating the energy transition and increasing investment in renewable energy projects.

> ***This substantial growth carries with it a significant commensurate risk of disputes arising in relation to those projects***

In a report titled '*Renewables 2020 Analysis and forecast to 2025*' published by the International Energy Agency (**IEA**), renewable energy capacity was forecast to expand by almost 10% in 2021. In addition, the report forecast that 95% of the net increase in global power capacity in the period 2021 to 2025 would be generated by renewables. It also noted that 13 countries awarded almost 50 GW of new renewable capacity to become operational in the period 2021-24. The IEA forecast that 218 GW of renewable energy will become operational in 2021. This substantial growth in renewable capacity will necessitate substantial investment in new renewable energy projects and existing infrastructure, which carries with it a significant commensurate risk of disputes arising in relation to those projects.

Features of renewable energy projects

Renewable energy projects can take a variety of forms, from greenfield investment in new projects to hybrid projects which aim to integrate renewable energy technology into existing projects. Further, renewable energy encompasses a range of technologies such as solar, wind (offshore and onshore), hydropower, waste to energy, geothermal and hydrogen. However, renewable energy projects broadly share one or more characteristics which can impact on the disputes risk profile of renewable energy projects:

1. **Long term investments with high upfront capital costs** – renewable energy projects typically require significant up-front capital investment which is recouped as the project generates returns over its (generally long) operational life.
2. **A heightened degree of regulatory and political risk** – related to the above, renewable energy projects have a high exposure to regulatory and political risk. Consistent with clean energy policy objectives, many countries have introduced favourable regulatory frameworks designed to encourage investment in renewable energy. If these regulatory regimes are subsequently unwound or fundamentally altered, it can result in a significant diminution in the value of renewable energy projects. In some countries, the politics around climate change policy have increased regulatory uncertainty and instability.
3. **Adoption of new or developing technologies** – renewable energy projects, to varying degrees, seek to operationalise new or developing technologies sometimes on an untested scale. This increases the risk profile of such projects as unforeseen technical issues can arise during both the construction and operational phase of the project.
4. **Grid integration issues** – in some countries, the successful execution of renewable energy projects is hampered by issues associated with the integration of intermittent power supply into electricity systems designed

for traditional concentrated baseload dispatch. The requirement to upgrade or modify grid infrastructure to cope with the influx of renewable energy capacity can add cost and complexity to renewable energy projects and cause delay.

It is impossible to exhaustively catalogue the variety of disputes that might arise during the life-cycle of a renewable energy project

Types of disputes

Navigating the dark side of the energy transition requires an understanding of the particular features of renewable energy projects and how they might lead to disputes. It is impossible to exhaustively catalogue the variety of disputes that might arise during the life-cycle of a renewable energy project, particularly where projects are complex, high value and taking place across a multiplicity of jurisdictions. However, it is possible to identify some of the main areas where disputes may arise in connection with renewable energy projects. These include:

- Claims arising where new technologies fail to perform to expectations, such as misrepresentation, negligence or breach of contract (see, for example, *MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd and another* [2017] UKSC 59).
- Construction disputes, such as claims relating to delay, scope changes, breach of contract or defects.
- Investor-state claims under multilateral or bilateral investment treaties brought by foreign investors for breach of investment protections such as the fair and equitable treatment standard. The wave of investor claims against states such as Spain and Italy under the Energy Charter Treaty following changes to those states' renewable energy regulatory frameworks is an example of these types of disputes.
- Joint venture and other contractual disputes between stakeholders, where multiple parties are involved in the development and financing of large renewable energy projects.
- Claims arising out of delay in the commencement of supply from renewable energy projects, including where grid integration issues delay projects.
- Regulatory enforcement action where renewable energy is dispatched and sold in highly regulated markets.

Identification of the types of disputes that may arise in relation to renewable energy projects highlights the key areas of risk that stakeholders need to focus on in order to successfully navigate the dark side of the energy transition.

Use of arbitration to resolve renewable energy project disputes

Arbitration is already the dispute resolution mechanism of choice for many participants in the energy industry and it offers important advantages in the context of renewable energy project disputes.

Large scale renewable energy projects are likely to involve investors, contractors and sub-contractors from multiple jurisdictions. Given the cross-border nature of many renewable energy projects, arbitration offers an impartial forum for the resolution of disputes. The relative ease of enforcing arbitral awards globally under the New York Convention is also a key advantage of arbitration.

Another important advantage of arbitration is that it provides parties with the opportunity to have a say in the selection of arbitrators. In highly technical disputes, the ability to select arbitrators with specialised technical expertise or specific industry knowledge can be of great value to all parties.

Another attractive feature of arbitration is confidentiality. Arbitral proceedings and awards are private and generally confidential, unlike litigation. This can be very important where, for example, trade or commercial secrets in emerging technologies risk being exposed as part of a dispute. This privacy – along with the perception that arbitration can be less hostile – can also assist in preserving on-going commercial relationships, something that is important in renewable energy projects which involve long-term relationships.

Given the cross-border nature of many renewable energy projects, arbitration offers an impartial forum for the resolution of disputes

Finally, there is generally no right of appeal from an arbitral award and, save for limited recourse to have an award set aside or enforcement denied, the outcome is considered final. This finality can reduce the cost and time involved in resolving disputes.

Key takeaways

As the world moves toward a net zero emissions future, investment in renewable energy projects will continue to grow. The energy transition offers great opportunities and environmental benefits but also presents challenges and risks, including the risk of disputes.

In order to successfully navigate those risks, stakeholders in renewable energy projects are well advised to:

- carefully consider the allocation of risk in contracts relating to renewable energy projects, including warranties, exclusions and indemnities;
- if investing in a renewable energy project in another country, consider at an early stage whether the project could be covered by an investment treaty and how the project can be structured to take advantage of available treaty protections;
- apply best practice project management principals to the design and construction phase of a renewable energy project;
- consider how to price the risk of unforeseen technical issues where projects are based on new and emerging technologies;
- consider the benefits of an arbitration clause, particularly for cross-border renewable energy projects; and
- apply best practice dispute management and resolution protocols during the life of the project.

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Resolving joint venture disputes between investors and states

Important protections provided by investment treaties

By Matthew Buckle and Phillippa Hook

Since the first bilateral investment treaty was agreed over 60 years ago to support foreign direct investment, there are now over 2,500 similar treaties involving over 150 countries. Over that period, a significant body of investment law has emerged to provide qualifying investors with substantive extra-contractual protections over their qualifying investments. This includes, in the event of breach, the safety net for foreign investors of the availability of direct recourse to international arbitration against the host state. This article considers these advantages, particularly in the context of a joint venture.

Relevance of investment treaties to joint ventures

Joint ventures or investment agreements with host states (or state entities) are common in certain sectors, in particular natural resources and infrastructure projects. These agreements typically involve long-term commitments with significant investment from the foreign investor into the host country.

However, on occasion, the host state may later seek to re-open for negotiation the agreed terms once resources are committed by the investor, under the threat of expropriation or withdrawal of local licences or rights to operate, or threaten other measures having equivalent effect. This can particularly be the case where there has been a regime change in the host country or a shift in political priorities. Investment treaties can offer important protections against such conduct.

Investor protections can be found in many bilateral and multilateral investment treaties, as well as some other trade agreements. A bilateral investment treaty (**BIT**) is an international agreement made between two countries containing reciprocal undertakings for the promotion and protection of private investments made by investors from one of those states into the territory of the other state. A multilateral investment treaty (**MIT**), such as the Energy Charter Treaty, involves more than one state party.

An investor might then seek to structure its investment to benefit from treaty protections

The protections afforded under BITs and MITs will depend on the individual treaty, though many do contain similar protections. Those protections "have teeth" because the treaty often also includes Investor-State Dispute Settlement (**ISDS**) provisions, generally international arbitration.

The availability of substantive protections afforded under applicable treaties (if any) should be considered at the outset when making an investment into a foreign host state. An investor might then seek to structure its investment to benefit from treaty protections.

Investment treaty-based protections

Investment treaty-based protections operate in a different and distinct legal sphere from contracts or investment agreements, which means they can provide recourse to investors where there may be none under the contractual documents.

In order to benefit from treaty protection, the investor must be a qualifying "investor" making a qualifying "investment" as defined in the treaty. The definition of "Investor" usually includes nationals of and certain entities incorporated in the contracting states respectively. It can, but does not always, cover subsidiaries of those entities. As for investments, many treaties simply protect "any assets, directly or indirectly controlled by the investor", so specific advice should be taken in particular cases to ensure that a proposed investment has the necessary qualifying characteristics to be protected under the relevant treaty.

In industries focused around natural resources and infrastructure, host states increasingly require a joint venture company to be incorporated within their own jurisdiction. Shares typically qualify as an "investment" so it is sensible to consider the use of an appropriate investment vehicle incorporated in a jurisdiction that has a favourable treaty with the host state, even if the ultimate investment is a shareholding in the joint venture company. Attention will need to be paid to the whole corporate structure as some treaties do not cover indirect shareholdings.

BITs commonly provide the following substantive rights and protections:

- Prompt and adequate compensation for expropriation, sometimes including 'indirect' expropriation (i.e. where there has not been physical acquisition but there has been substantial deprivation of the investment's economic value).
- No less favourable treatment than local domestic competitors and investors under other BITs (known as national treatment and most favoured nation protections).
- Fair and equitable treatment.
- An "umbrella clause" recognising the host state will comply with private contractual obligations, elevating breach of contract claims to a BIT claim.
- Preferential investment terms, such as tax exemptions (although these are not always actionable claims under BITs).

Generally the remedy is monetary damages, though in some circumstances declaratory relief and restitution may be available. Interim relief to protect the status quo while proceedings are ongoing may also be available.

Investor-State Dispute Settlement (ISDS)

The key advantage of structuring an investment to fall under an investment treaty regime is that most contain ISDS provisions, which are an important procedural protection. These provide an aggrieved foreign investor with the right to commence international arbitration against the host state in the event that the state breaches its treaty obligations.

Claims will be governed by the terms of the relevant treaty and international law, and not necessarily by the law specified in any contracts related to the investment

This allows investors a private right of action against a host state that is outside local courts and allows them to seek an award of damages from an independent and international tribunal. If the state does not comply with an award, the award can be enforced against the state in most jurisdictions.

Most BITs provide that the investor has the option of the rules which will apply to the arbitration. This choice may significantly affect whether or not a prospective claimant has standing to bring claims under the particular BIT in question. In International Centre for the Settlement of Investment Disputes (ICSID) cases, for example, the rules provide that the investor must additionally demonstrate:

- A contribution or commitment by the investor;
- Performance of the investment / project for a certain duration;
- Existence of a risk for the investor; and
- A significant contribution to the economic development of the host state.

The application and interpretation of these features by tribunals in the context of different BITs is not uniform. There is no formal binding system of precedent in investment arbitration, but awards are typically published and in the public domain. This means that non-binding (and sometimes contradictory) jurisprudence exists in relation to many different jurisdictional and substantive issues.

As a result, it is common to see challenges to the tribunal's jurisdiction by the host state. This may be even more likely where the claimant is a party to a joint venture, or otherwise holds its interest in the "investment" indirectly.

Winners and losers

Generally the statistics show ISDS outcomes are largely even and do not tend to favour either states or investors. There are however some exceptions – the US has famously never lost one of the 17 claims brought under NAFTA, although four were settled.

Over the last two years there have been six concluded ISDS claims concerning joint ventures, of which one was decided in favour of the investor, and three in favour of the state. The other two were settled.

Notwithstanding the costs and risks of pursuing a claim, ISDS is a powerful tool in addition to any rights under the contracts with the host state. The ISDS provisions may be triggered alongside any contractual dispute resolution or subsequently if the contractual route is unsuccessful. Most importantly, treaty-based protections may fill a gap where there is no other available domestic recourse for host state conduct. The availability of remedies in investment arbitration can also serve to avoid disputes and facilitate negotiation, including for example where a local state joint venture partner seeks to later renegotiate the agreed terms.

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Top 10 tips for drafting arbitration agreements

A well-drafted clause will mitigate disputes risk

By Dylan McKimmie, Holly Stebbing, Katie McDougall, Carmel Proudfoot, Simon Goodall, India Furse, Nimoy Kher and Giulia Barbone

Arbitration agreements are often treated as "one-size-fits-all" precedents which are included in commercial contracts without much thought. This approach can be counterproductive and can result in increased time, cost and complexity to resolve disputes. A well-drafted arbitration agreement, taking into account the issues identified by this article, may serve to mitigate those risks.

Scope of the arbitration agreement

The scope sets out the types of disputes that can be referred to arbitration. A poorly drafted scope is a common source of disputes and may deprive the tribunal of jurisdiction over all or part of the dispute.

Three critical aspects to consider are:

- Language: Common phrases such as arising "out of", "under" or "in connection with" all have different meanings, some broader than others;
- Carve outs: Trying to carve out certain types of disputes often results in unforeseen consequences and should be avoided wherever possible; and
- Parties: The right parties need to be party to the arbitration agreement. This can be a problem where the contractual counterparty is a newly incorporated joint venture without assets or a state owned entity. The arbitration agreement should include the party against whom any award will be enforced.

Seat of the arbitration

The seat of arbitration determines the procedural law of the arbitration. Its importance cannot be overstated: amongst other things, it determines the availability of interim remedies and rights relating to the enforcement of the award. The seat of arbitration may be different to the venue of arbitration (where the arbitration will physically take place), and the governing law of the arbitration agreement.

Most parties opt for a 'neutral' jurisdiction as the seat but this should not be the only consideration. Arbitral laws differ between countries and have important consequences on the efficiency of the arbitration and enforceability of an award. Recognising this, CIArb has developed the London Principles, to assist parties in choosing a 'safe seat' for arbitrations.

Most parties opt for a 'neutral' jurisdiction as the seat but this should not be the only consideration

Governing law of the arbitration agreement

The arbitration agreement is a contract in its own right. Consequently, the law governing the arbitration agreement (which determines the validity and scope of the arbitration agreement) can differ from the governing law of the substantive contract.

In international contracts, performance may be in one jurisdiction while the parties are located in others; the governing law of the contract may be that of one jurisdiction while the seat of the arbitration may be another jurisdiction still. The absence of an express governing law for the arbitration agreement can lead to lengthy disputes.

Despite this, arbitration agreements often fail to specify the governing law of the arbitration agreement. We strongly recommend doing so.

Choice of rules

One of the most important decisions when drafting an arbitration agreement is whether to adopt the rules of an established arbitral institution, such as the ICC or LCIA, to govern the arbitration procedure. The main benefits of doing so is that the institution, in return for a fee, plays a key role in administering the dispute and their rules offer a well-established and predictable procedure.

If the parties wish to refer their disputes to ad hoc (un-administered) arbitration, they should consider either setting out a bespoke process, adopting existing ad hoc procedural rules (such as the UNCITRAL rules) or incorporating the rules of an institution but making clear that those provisions in which the institution plays an administrative role and receives fees for doing so will not apply. If this is not agreed prior to entry into the transaction between the parties, such options will need to be agreed between the parties. Parties should also consider using an institution as an appointing authority.

Language

The arbitration clause should identify the language of the arbitration, especially where parties are from countries with different first languages.

This is an important choice as all submissions and evidence will be presented in the agreed language during the proceedings. Selecting the language that the parties most commonly use in their communications could save significant translation and interpretation costs.

Number and appointment of arbitrators

As a general rule, where disputes are likely to be high value and complex, it is usually advisable to specify that the tribunal will consist of three arbitrators. Whereas if the dispute is likely to be low value and uncomplicated it may be more appropriate and cost effective to provide for a sole arbitrator.

In multi-party disputes, where it is unworkable for each party to select an arbitrator, parties should agree on an appointment procedure. For example, parties can agree that appointments will be made by an appointing authority.

Specifying arbitrator characteristics

Arbitration allows parties to agree upon the characteristics and experience that arbitrators are to have.

Generally, being non-specific gives parties the flexibility to nominate the most appropriate arbitrators at the time the dispute arises. But if parties wish to stipulate qualifying criteria (for instance, particular industry-sector experience or nationality), there are a few drafting tips:

- The class of potential arbitrators should not be unduly narrow, as it potentially might render the arbitration agreement inoperable (for the same reason, parties should avoid naming specific individuals); and
- The chosen criteria do not unintentionally include or exclude a class of potential arbitrators.

It is good practice for the selected arbitrator to obtain written confirmation upon appointment that the contractual criteria (where specified) are considered fulfilled, in order to avoid any later enforcement issues.

Consolidation and joinder

Parties bound by multi-contract arrangements face the risk that, when disputes arise, different tribunals may be appointed to deal with multiple arbitrations in relation to the same or similar set of facts. This can lead to conflicting decisions and add costs and delays.

The key to dealing with multi-contract disputes effectively is to ensure that the arbitration agreement in each interrelated contract is consistent and that it expressly allows for consolidation (i.e. the merger of separate arbitrations arising out of the same or interrelated contracts into a single set of proceedings) and joinder (i.e. the addition of a third party to an existing arbitration).

Parties should bear in mind that institutional rules may contain specific requirements in relation to consolidation and joinder.

Multi-tiered clauses

Multi-tiered clauses provide gateways for attempts at a negotiated resolution, allowing disputes to be gradually escalated from negotiation to mediation or conciliation and finally to arbitration.

Despite many commercial parties seeing great benefit in ADR, multi-tiered clauses should be drafted with a recalcitrant party in mind. Often by the time the dispute resolution process is invoked, the parties have already tried to informally resolve the dispute without success. The disaffected party, often the putative respondent, may seek to frustrate the process by various means. The clause should be drafted to ensure that there is a clear timetable and trigger points which can be progressed without the active participation of both parties.

> ***Arbitration allows parties to agree upon the characteristics and experience that arbitrators are to have***

Don't overcomplicate it!

With so much to consider, it can be tempting to set out a detailed clause covering every conceivable possibility, but this can be counterproductive. It is impossible to predict every dispute that might arise. A proscriptive clause may not suit the dispute that actually eventuates or be so complicated that the parties cannot sensibly comply with it.

Instead, parties should focus on completing a thorough risk assessment of the arbitration agreement and broader dispute resolution clause at an early stage. Based on this assessment, the parties can focus on drafting an arbitration agreement that is most suited to those risks, and that is effective for any dispute that might arise. A simpler approach to drafting helps mitigate the risk of the unexpected.

Key takeaways

Ultimately, every arbitration agreement is bespoke. Parties should seek legal advice to ensure that their arbitration agreement is effective and fit for purpose. However, the guidance set out above may help to ensure that your arbitration agreement does not create more disputes than it resolves.

With thanks to Giulia Barbone, London trainee, for her contribution to this article

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Insta-fail – waiving goodbye to arbitration

Lessons from a recent Australian court decision on an online arbitration clause

By Dylan McKimmie, Daniel Allman

As big tech comes under the microscope of Australian regulators, an Australian court has run the ruler over an arbitration clause agreed to by millions of social media users. The Federal Court of Australia's decision in *Dialogue Consulting Pty Ltd v Instagram, Inc* [2020] FCA 1846 (22 December 2020) provides a detailed study of the principles for enforcing foreign arbitration agreements in Australia. It also sets the table for some of the biggest arbitration battles to come, including whether an arbitration clause can constitute an unfair contract term. The implications will be felt far beyond the tech sector.

Background

Dialogue Consulting Pty Ltd (**Dialogue**) is an Australian company based in Melbourne. It offers a software-as-a-service product known as Sked Social, which helps companies to manage their marketing content on social media. Clients engage Dialogue to interact on their behalf with Facebook or Instagram (which is owned by Facebook), and in the process they hand over their login details for the relevant platform.

In February 2019, Sked Social's web domains were banned by Facebook and Instagram. This meant that Dialogue could no longer direct new clients to its product. According to the platforms, Dialogue's access license was revoked because the company had violated Instagram's terms of use by collecting user credentials and automating access without permission.

In April 2019, Dialogue commenced a proceeding against Facebook and Instagram in the Federal Court of Australia. Dialogue alleges breach of Instagram's terms of use as well as misleading and deceptive conduct, statutory unconscionable conduct, and anti-competitive conduct. For their part, the platforms maintain that Dialogue is the party that violated Instagram's terms of use.

In April 2020, Facebook and Instagram requested a stay of the proceeding on the basis that all of Dialogue's claims, other than the claims of anti-competitive conduct, should be referred to arbitration. For most of the time Dialogue had been in business, Instagram's terms of use included a clause requiring that disputes be resolved by arbitration under the American Arbitration Association's (**AAA**) consumer arbitration rules. That clause was expressed to be governed by the US Federal Arbitration Act, and the terms of use generally were to be governed by the laws of California. Any action relating to the arbitration clause was to be resolved in a Californian court.

International commercial arbitration is governed in Australia by the *International Arbitration Act 1974* (Cth) (**IAA**). Section 7 of the IAA provides for enforcement of foreign arbitration agreements, including in situations where the arbitration is seated in another New York Convention country (s 7(1)(a)) or where a party to the agreement was domiciled in a New York Convention country (s 7(1)(d)). Under s 7(2), Australian courts must stay court proceedings and refer the parties to arbitration in respect of a matter that can be settled by arbitration. However, under s 7(5), a court must not order a stay if it finds the arbitration agreement is null and void, inoperative, or incapable of being performed.

Dialogue challenged the stay application on various grounds, and succeeded on one of them.

> ***Applying Australian law to the question in Dialogue, the court found that an arbitration agreement had been formed***

Justice Jonathan Beach of the Federal Court addressed the following questions, which offer key insights into the enforcement of foreign arbitration agreements in Australia:

- First, what is the relevant choice of law applicable to the formation of an arbitration agreement by way of an internet-based contract?
- Secondly, assuming that an arbitration agreement was formed, should it be declared void for purposes of s 7(5) of the IAA on the basis that it is an unfair contract term?
- Thirdly, assuming again that an arbitration agreement was formed, should it be declared inoperative for purposes of s 7(5) on the basis that Facebook and Instagram waived their right to arbitrate?

Whose law is it anyway?

Before considering whether the arbitration clause should be enforced, Beach J asked whether there was an arbitration agreement in the first place. That, in itself, tells us something about the way Australian courts approach enforcement of arbitration agreements.

The principle of competence-competence is, in Beach J's words, "a tenet of faith amongst the arbitration set". It establishes that an arbitral tribunal has the power to determine its own jurisdiction, including the question of whether an arbitration agreement exists in the first place, and that a court should only ask whether prima facie there is a valid arbitration agreement that appears to cover the matter in dispute.

Although he recognised the competence-competence principle, Beach J did not apply it. This case, he said, involves tricky choice of law questions and matters of Australian consumer law, both of which the court is better placed to decide than an arbitrator. Rather than confining himself to deciding whether there was an arbitration agreement prima facie, which he said "would be a limp effort", Beach J made a final decision about whether an arbitration agreement existed on the balance of probabilities.

Next, it was necessary to identify the law applicable to the question of formation. As between the law of the forum, which was Australian law, and the law governing the arbitration agreement, which was US law, Beach J applied forum law. This was consistent with recent authority of the Full Federal Court in *Trina Solar (US) Inc v Jasmine Solar Pty Ltd* (2017) 247 FCR 1, which drew a distinction between, on the one hand, questions concerning whether parties have reached "consensus ad idem" and, on the other hand, questions of validity. Beach J also sat in that earlier case, and in the judgment he reasoned that it would be "counter-intuitive to suggest that the choice of law to assess consensus ad idem should be that set out in an agreement that an entity says it is not a party to because there was no consensus ad idem. That would be to assume what was to be proved."

Dialogue contended that having to arbitrate overseas would cause it detriment

Applying Australian law to the question in Dialogue, the court found that an arbitration agreement had been formed. Dialogue had reasonable notice at the time it opened an Instagram account that it would be subject to the platform's terms of use, and by continuing to access the platform Dialogue manifested its assent to those terms.

Take it or leave it: can an arbitration clause be unfair?

Having decided that an arbitration agreement was formed, the court considered whether that agreement should be declared void or unenforceable as an unfair contract term. If so, as Dialogue insisted, then the court was prevented from ordering a stay.

Australia's unfair contract terms regime was introduced in 2010. Although at first it applied only to standard form consumer contracts, since 2016 it has applied also to standard form small business contracts. The terms of use in force between Instagram and Dialogue constituted a small business contract under the regime.

Australia's consumer law is set out in the *Competition and Consumer Act 2010* (Cth), Schedule 2 (**ACL**). It provides that a term in a take-it-or-leave-it contract is "unfair", and therefore void, if (a) it would cause a significant imbalance in the parties' rights and obligations, (b) it is not necessary to protect the legitimate interests of one of the parties, and (c) it would cause detriment to the other party. Section 25 of the ACL lists examples of contract terms that would be unfair, including a term that limits one party's right to sue another party (s 25(k)).

Dialogue argued that the arbitration agreement in the terms of use would cause a significant imbalance and was not necessary to protect Instagram. According to Dialogue, it was illegitimate for Instagram to require disputes to be arbitrated on its home turf, rather than in the countries in which it operates, particularly because doing so might allow the American company to avoid local laws such as the ACL. Dialogue contended that having to arbitrate overseas would cause it detriment, and that the arbitration clause was not transparent because it did not appear on Instagram's sign-up page. Dialogue also argued that a user's right to opt out of the arbitration clause did not temper the significant imbalance between the parties.

Beach J disagreed with all of Dialogue's arguments. He explained that "a term does not cause a significant imbalance if there is a meaningful relationship between the term and the protection of a party, and that relationship is reasonably foreseeable at the time of contracting. And that is the case with the arbitration agreement here." Accordingly, the arbitration clause in Instagram's terms of use was not an unfair contract term under the ACL.

In the alternative, Dialogue invoked the statutory prohibition of unconscionable conduct. Section 21 of the ACL provides that a person must not, in trade or commerce, in connection with the supply or possible supply of services, engage in conduct that is unconscionable (s 21(1)(a)). Dialogue argued that by including the arbitration clause in its terms of use, and by seeking to enforce it, Instagram had contravened the ACL.

The court emphasised that the statutory concept of unconscionable conduct is not the same as the everyday notion of something not done in good conscience. The statutory norm is informed not by morality but by the text and purpose of the ACL, and industry practice is relevant. Here, Beach J found that Instagram's conduct went nowhere close to establishing statutory unconscionability. It is true that Facebook and Instagram are in a stronger bargaining position than Dialogue, that the arbitration clause was not displayed on the sign-up page, and that the clause was not negotiable, but none of that is enough. And it may be true that arbitrating overseas would involve additional cost for Dialogue, and that an arbitrator applying Californian law may not hear Dialogue's ACL claims. But again, that does not contravene the statutory norm.

> ***Where, as here, a challenge to the arbitration agreement is confined and does not extend to the substantive dispute, the court should resolve it***

Beach J addressed the Supreme Court of Canada's recent decision in *Uber v Heller* 2020 SCC 16, where a clause providing for foreign-seated arbitration in a standard form contract between Uber and a local driver was found to be unconscionable (also see our article on that case, The competence-competence principle under scrutiny in Canada). However, Uber's clause did not include an opt-out provision, and in any event the Canadian concept of unconscionability was said to be far more generous to those invoking it than the statutory concept of unconscionable conduct in Australia.

For all of these reasons, Beach J concluded that Instagram's arbitration clause did not trigger the relevant provisions of the ACL.

Use it or lose it: when is a right to arbitrate waived?

In circumstances where an arbitration agreement was formed, which is neither an unfair term nor void by reason of unconscionable conduct, an Australian court would normally stay the matter and refer it to arbitration under section 7(2) of the IAA. But here, according to Beach J, that ship had sailed. Facebook and Instagram had waived their right to arbitrate.

As a preliminary matter, it was necessary to revisit the principle of competence-competence. Facebook and Instagram insisted that the court had discretion either to decide the waiver question itself or to refer that question to an arbitrator. According to the platforms, waiver questions should be resolved by the arbitrator.

Beach J accepted that sometimes it is better for a court to refer to the arbitrator a challenge to the arbitration agreement under s 7(5), insofar as the challenge is intertwined with substantive matters in dispute. But where, as here, a challenge to the arbitration agreement is confined and does not extend to the substantive dispute, the court should resolve it.

Next, the court identified the law applicable to waiver. As described above in relation to the choice of law applicable to formation, the Full Federal Court's recent authority distinguished between questions of consensus ad idem and questions of validity. For validity questions, including waiver, the applicable law is the law chosen by the parties.

Here, Instagram's terms of use nominated the US Federal Arbitration Act as the law governing the arbitration agreement. Therefore, US law applied to the determination of waiver.

Applying US law, Beach J found that Facebook and Instagram had waived their right to arbitrate. This is because the platforms had participated in the Federal Court proceeding for 12 months before raising the arbitration question. Their delay in invoking arbitration had the effect of waiving their right to do so.

In an effort to decide the issue consistent with courts in California, Beach J embarked on a detailed examination of the approach taken by different US circuit courts. Although California falls within the appellate jurisdiction of the Ninth Circuit Court of Appeals, Californian courts have tended to adopt the Tenth Circuit approach to waiver rather than that of the Ninth Circuit. The Tenth Circuit approach calls for a showing that the delay in invoking arbitration affected, misled, or prejudiced the opposing party. Beach J concluded that the stay sought by Facebook and Instagram would prejudice Dialogue by causing unnecessary expense and inefficiency.

Given that Facebook and Instagram had waived their right to have matters referred to arbitration, the arbitration agreement was inoperative for purposes of s 7(5) of the IAA and the stay application was dismissed.

(As a postscript, in February 2021 Facebook and Instagram applied for leave to appeal the decision of Beach J. Dialogue has since filed a notice of cross-appeal.)

Key takeaways

Australian courts do not apply the competence-competence principle in all cases. Sometimes, particularly where a court considers it is better placed to do so than an arbitrator, the court will finally decide the arbitrator's jurisdiction.

Arbitration clauses in internet-based contracts are enforceable in Australia, at least insofar as a web user is put on notice of and offered access to the relevant terms.

Parties resisting arbitration might seek to challenge arbitration clauses under Australian consumer law, either as "unfair contract terms" or on the basis that efforts to enforce them constitute unconscionable conduct. Australian courts, however, will not lightly strike down an agreed arbitration clause even in cases of unequal bargaining power.

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Recovering costs of enforcement and interest

You won the arbitration, but can you also win interest and costs of confirming?

By C. Mark Baker and Denton Nichols

In any dispute resolution process, the war does not necessarily end upon receipt of an award or judgment. Where the losing party refuses to satisfy the award, the winning party will need to go through the legal process of recognition and enforcement of the award in all jurisdictions where the losing party has assets. In doing so, the award creditor can incur not-insignificant costs. An important question for parties seeking enforcement is whether a court will grant an award creditor their attorney's fees, interest on the award and costs of court. In the U.S., the answer may well be "yes" on all three counts as illustrated by a recent win for a Norton Rose Fulbright client in *Gulf Haulage Heavy Lift Co. v. Swanberg International*. In this article we cover how an award creditor can pull off this trifecta and obtain everything it is due.

Legal framework in the U.S.

In the U.S., confirmation of an arbitral award that was issued in another country is nearly always governed by either the New York Convention or its close cousin, the Panama Convention. These international conventions generally obligate a signatory country to enforce foreign arbitral awards issued within the territory of another signatory country, unless the party opposing confirmation proves any of the exceptions to enforcement specified in the relevant convention.

The New York and Panama Conventions do not address specifically whether an enforcing court should grant to a prevailing award creditor anything else, such as its costs in seeking confirmation or interest on the award. However, the conventions do not exclude the possibility. In fact, the New York Convention provides at Article III that signatory countries must generally enforce a foreign arbitral award "in accordance with the rules of procedure of the territory where the award is relied upon[.]" Similarly, the Panama Convention provides at Article 4 that execution on an award "may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed[.]" The conventions leave questions of ancillary compensation, such as costs and interest, up to the laws of the country where enforcement is sought.

The conventions leave questions of ancillary compensation, such as costs and interest, up to the laws of the country where enforcement is sought

In the U.S., the New York and Panama Conventions are implemented as federal law through the Federal Arbitrations Act. The Act does not expressly address whether and when courts confirming foreign arbitral awards can grant ancillary compensation. Given this legislative silence, it has fallen on the courts to decide these questions. As shown below, a growing judicial consensus recognizes that ancillary compensation for prevailing award creditors is often available.

Attorney's fees

U.S. courts usually decline requests for attorney's fees in confirmation actions, even when the award creditor successfully obtains confirmation of the foreign arbitral award. In doing so, courts frequently note the "American rule" whereby even prevailing parties must bear their own attorney's fees, absent express authority in a contract or statute.

That said, a growing body of U.S. case law holds that courts have the discretion to award attorney's fees to the prevailing award creditor, at least when the award debtor has opposed confirmation in bad faith, vexatiously, wantonly, or for oppressive reasons. For example, a federal district court in New York ordered an award debtor to pay attorney's fees after it failed to provide any briefing or evidence in support of its opposition. A district court in San Diego did the same, granting attorney's fees against a private company whose opposition it characterized as "weak" and "dilatory." Sovereign states are not immune to adverse fee awards, either. A court in the District of Columbia awarded attorney's fees against a sovereign state respondent that had, in the court's words, "refused to participate" in the court proceeding in a display of "inaction [that] is inherently unjustified and in bad faith."

Although somewhat rare, an award of attorney's fees is possible in a U.S. confirmation action

To this line of cases, one can now add *Gulf Haulage Heavy Lift Co. v. Swanberg International, Ltd.*, 4:18-CV-04392 (S.D. Tex. Nov. 12, 2020). The authors hereto acted in that case and argued on behalf of our client that the award creditor was entitled to its attorney's fees in seeking confirmation of a Saudi arbitral award. We construed the award debtor's case against confirmation as being not only in bad faith, but also largely irrelevant to the recognized exceptions to confirmation under the New York Convention. The court agreed. Thus, in an apparent first for a federal court sitting in Texas, the court granted attorney's fees to an award creditor that successfully obtained confirmation of its foreign award pursuant to the New York Convention.

What is the takeaway? Although somewhat rare, an award of attorney's fees is possible in a U.S. confirmation action, particularly if the court concludes that the award debtor's opposition to confirmation is legally groundless or in bad faith.

Interest on the award

An award creditor may also wish to recover interest on the unpaid arbitral award. Such a recovery may not always be possible (for example, if the question of post-award interest was specifically considered but denied by the arbitral tribunal). But if post-award interest was not decided in the award, then a U.S. court may well have the power to decide the issue.

Assuming the court has the requisite power, there are two types of post-award interest that a U.S. court can award, with different rules for determining the available interest rate to be applied.

Post-award, pre-judgment interest—that is, interest accruing between the date of the arbitral award and the date of the court judgment confirming the award—is considered an equitable remedy. Federal courts sometimes determine the equitable rate of interest by reference to the pre-judgment rate that would ordinarily apply under the laws of the particular U.S. state where the court sits. This is not a hard and fast rule, however, and the court may determine that a higher or lower rate of interest—or even no interest at all—should be awarded in a given case.

In contrast, the availability and amount of post-judgment interest are determined in accordance with a federal statute that governs money judgments (i.e., 28 U.S.C. § 1961). This statute essentially mandates the award of post-judgment interest, with the interest rate to be determined based on the going rate for the U.S. one-year treasury bond.

Although both types of post-award interest are usually available, a surprising number of award creditors fail to request either when seeking confirmation of an arbitral award.

In the *Gulf Haulage* example, we invited the court to award both types of post-award interest. The court agreed, granting in the final judgment nearly one million U.S. dollars in additional compensation to our client.

Costs of court

While often overlooked, an award creditor should also not forget the possibility of recovering costs of court. In many cases, these costs can be comparatively minor, possibly no more than a few hundred dollars for the case filing fee. In confirming a foreign arbitral award, however, the costs of court may well be higher. For instance, interpreters may be needed, and the costs of engaging them may be recoverable costs. Copying and printing costs can also be voluminous and, if properly documented, they too may be recoverable.

Whether such costs are large or small, the client is out of pocket. Therefore, when preparing a bill of costs, it can be well worth the small effort to consult the list of potentially recoverable costs found in 28 U.S.C. § 1920.

Conclusion

Obtaining an award is often not the end of the process. The end game – getting the client paid – is always top of mind for experienced arbitration counsel. As in any legal process, there are tactics to achieving the best enforcement outcome for a client and part of that is the costs position. In seeking enforcement of a foreign arbitral award in the U.S. (and elsewhere), award creditors should consider seeking ancillary compensation beyond that granted on the face of the award to cover the costs of enforcement and the time lost in receiving payment on the award.

In law, as in life, it really pays to ask.

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Arbitrator conduct in international arbitration

Lessons learned from the Sun Yang case

By Mathew Buckle

The setting aside by the Swiss Federal Supreme Court of a high-profile Court of Arbitration for Sport (CAS) award involving the decorated Chinese swimmer, Sun Yang, has shone a light on arbitrator conduct and the issue of arbitrator bias. Avoiding arbitrator bias is of course not only at the heart of ensuring a fair outcome in the interests of justice on a case-by-case basis, but of course also a vitally important pervasive issue in order for there to be faith in the sanctity of the process and the propriety of proceedings. These are emotive issues, and the Sun Yang case demonstrates not only the importance of avoiding bias but also avoiding perceptions of bias.

Background

In February 2020, CAS upheld an eight-year ban imposed on Sun Yang by the international governing body of swimming (the Fédération Internationale de Natation (**FIN**)). The ban followed an incident in September 2018 when Sun Yang, who had a previous doping violation, was visited by testing agents and required to provide a sample of blood. Sun Yang provided a sample, however, after a stand-off with respect to anomalies in the credentials of the testing agents, it is alleged that the blood sample was destroyed by Sun's entourage and the testers left without a sample.

An initial decision ruled that the International Standard for Testing and Investigations used by the World Anti-Doping Agency (**WADA**) had not been followed by testers and that Sun Yang had not breached the rules. An appeal was later lodged by WADA at CAS. The ensuing arbitration resulted with an award in favour of WADA, finding that Sun Yang had violated the doping rules by tampering with the testing samples. An eight-year ban was upheld.

Challenging behaviour

A challenge to the Award was brought, focusing on a series of tweets by the President of the Tribunal, which were made after his appointment and before the Award. In these tweets, the President of the Tribunal had commented on animal welfare issues in China, including in language that the SFSC described as "*problematic*" and "*violent*" language.

> ***An important benefit of arbitration is the relative finality of awards***

The SFSC balanced the arbitrator's rights in principle to defend their convictions on social networks with the requirement that they "*must do so with the restraint of judges*". The arbitrator's choice of words and repeated use of violent expressions in the tweets allowed the court to objectively justify the doubts of impartiality and annulled the award.

The court also found that the timing was not an issue despite grounds of impartiality needing to be raised immediately upon becoming known or risk being forfeited. As Sun Yang was found to have sufficiently investigated for any potential indications of impartiality from the tribunal, there was no issue on raising the point after the award had been issued.

The CAS will have to render a new award under a new panel and, in the meantime, Sun Yang is free to swim again.

Commentary

An important benefit of arbitration is the relative finality of awards and that the ability to overturn them is rightfully limited, with successful challenges rare. Arbitrator bias is a proper ground for successful challenge in the natural interests of justice.

But this case shines a light on the sometimes difficult balance to be struck between the rights of individual arbitrators freely to expressly themselves on political issues, and the need for decisions to be impartial in the interests of justice and for there to be confidence in the impartiality of those decisions. This applies to private commercial arbitrations as well as arbitration awards that are more likely to be in the public domain (as with sports and investment arbitration, for example). As the SFSC put it, there is a need for arbitrators to act "*with the restraint of judges*".

But arbitrators are not judges. They are, of course, important actors in the administering and rendering of justice, particularly in the examples of both CAS arbitration and also investment arbitration, where decisions are far more likely to be in the public domain. However, unlike judges, arbitrators are not retained by the public purse in order to be able to serve a public function as a judicial wing of government. They typically have private careers outside of the specific arbitration in which they are appointed to perform the function of reaching an unbiased decision. Further, the freedom to choose an arbitrator (of any specific qualification) is an important fundamental tenet of arbitration.

It is therefore perhaps arguably not appropriate that they be expected to act with the restraint of the judiciary. However, the Sun Yang decision highlights that they must nevertheless expect to have their public words and actions scrutinised and on occasion used as the basis for a challenge to their decisions.

All arbitrators do well to remember that justice must be done and must also be seen to be done.

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Revised ICDR and ACICA Rules

Increasing the efficiency and effectiveness of international arbitration and modernising the institutional response

By Kevin O'Gorman, Tamlyn Mills, Daniel Allman

The International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association (AAA), and the Australian Centre for International Commercial Arbitration (ACICA) have each recently released updated rules of arbitration. The updated rules are aimed at increasing the efficiency and effectiveness of international arbitration and modernising the institutional response to issues faced by parties in arbitration, including those highlighted by the COVID-19 pandemic. This article is a practical discussion about the key changes in the amended rules and what practitioners need to be aware of when drafting ICDR or ACICA arbitration agreements or participating in arbitrations administered by these institutions.

ICDR Rules

The new ICDR International Dispute Resolution Procedures (*including Mediation and Arbitration Rules*) came into effect on March 1, 2021 (**2021 ICDR Rules**). For parties that have agreed to arbitrate disputes under the ICDR rules, or that have provided for arbitration of an international dispute by either the ICDR or the **AAA** without designating particular rules, the 2021 ICDR Rules apply to any arbitration commenced on or after March 1, 2021 (Article 1(1)).

Multi-party arbitration

Under the 2021 ICDR Rules, the rule on joinder has been expanded so that an additional party can now be joined not only in circumstances where all parties agree but also where, after constitution of the arbitral tribunal, (a) the tribunal determines that joinder is appropriate, and (b) the additional party consents (Article 8(1)). The previous version of the rules (effective June 1, 2014) permitted joinder only where all parties agree.

The power to consolidate arbitrations also has been expanded so that it includes not only situations where arbitrations under more than one arbitration agreement involve the "same parties" but also where they involve "related parties" (Article 9(1)). Additionally, consolidation under the 2021 ICDR Rules is available not only at the request of a party but also on the ICDR's own initiative.

> ***These changes provide increased flexibility for tribunals to deal with the joinder of third parties and to efficiently manage multiple related arbitrations***

These changes provide increased flexibility for tribunals to deal with the joinder of third parties and for the ICDR to efficiently manage multiple related arbitrations commenced under separate arbitration agreements.

Third-party funding

Whereas the previous ICDR rules were silent on the issue of third-party funding, the 2021 ICDR Rules empower a tribunal to require parties to identify any third party that has agreed to pay or contribute to the cost of a party's participation in the arbitration and the nature of that undertaking (Article 14(7)(a)). Likewise, a tribunal will have the power to require parties to identify any third party that has an economic interest in the outcome and the nature of that interest (Article 14(7)(b)). These new rules are intended to protect the integrity of arbitration proceedings by safeguarding the impartiality and independence of arbitrators where insurance or third-party funding arrangements apply.

Arbitrator challenges

The 2021 ICDR Rules clarify how decisions are made on challenges to the appointment or continuing service of an arbitrator, as well as other administrative determinations such as deciding disputes regarding the number of arbitrators and making an initial determination as to the place of arbitration (Article 5). This new article codifies the ICDR's existing practice of involving the International Administrative Review Council, which is comprised of current and former ICDR executives, in such determinations but provides transparency around the Council's role in decision-making.

Use of technology

In the wake of recent and ongoing restrictions imposed during the COVID-19 pandemic, the 2021 ICDR Rules specifically address the use of video, audio, and other electronic means for conducting preliminary matters and final hearings (Articles 22, 26). Tribunals are given broad discretion to conduct arbitration proceedings in whatever manner is appropriate, subject to the guiding principle that the parties are treated equally and each party has the right to be heard and is given a fair opportunity to present its case (Article 22(1)). Significantly, tribunals can decide, after allowing the parties to comment (but without requiring the parties' agreement), that a hearing should be held virtually where doing so would be appropriate and would not compromise the rights of any party to a fair process (Article 26(2)). These provisions will empower tribunals and parties to continue to take advantage of the efficiencies afforded by video and audio hearings in appropriate circumstances, even after pandemic restrictions ease.

Tribunals are also now required to discuss with parties at the procedural hearing issues of cybersecurity, privacy, and data protection

Tribunals are also now required to discuss with parties at the procedural hearing issues of cybersecurity, privacy, and data protection in order to ensure an appropriate level of security and compliance (Article 22(3)).

Arbitrability

There has been some uncertainty recently regarding whether, as a matter of U.S. law, the reference in a contract to a set of arbitration rules constitutes a delegation to the tribunal of the issue of arbitrability. In particular, the American Law Institute's most recent restatement of U.S. law on international arbitration raises questions about whether such a reference satisfies the test of "clear and unmistakable evidence" of an intention to delegate as set down by the U.S. Supreme Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

While the ICDR views the Restatement's position as contrary to the weight of U.S. case law, the 2021 ICDR Rules address this issue by providing expressly that a tribunal has the power to rule on any objections with respect to arbitrability "without any need to refer such matters first to a court" (Article 21(1)). Although the former ICDR Rules included the competence-competence principle, there was no explicit mention that court involvement is unnecessary.

Non-paying parties

Although failure by a party to pay fees or deposits still results in the withdrawal of that party's claim (or counterclaim), the 2021 ICDR Rules clarify that in no event shall a non-paying party be precluded from defending itself against another party's claim (or counterclaim) (Article 39(3)). Additionally, a party that pays the deposit for a non-paying party will be able to request that the tribunal render a separate award for recovery of the deposit plus interest (Article 39(4)).

ACICA Rules

The new ACICA Arbitration Rules incorporating Emergency Arbitrator Provisions came into effect on April 1, 2021 (**2021 ACICA Rules**). Where parties have agreed in writing to refer disputes to arbitration under the ACICA rules, the new rules apply to any arbitration commenced from April 1, 2021 unless the parties have specifically agreed to apply a prior version of the rules (Article 2.4).

However, unless otherwise agreed by the parties, the amended provisions dealing with consolidation and joinder (Articles 16, 17) and the new provisions dealing with single arbitration under multiple contracts (Article 18) will only apply if the arbitration agreement was concluded after April 1, 2021. This means existing ACICA arbitration agreements do not automatically incorporate the new provisions relating to these issues (Article 2.5).

For the first time, the 2021 ACICA Rules expressly permit claims arising out of multiple contracts to be made in a single arbitration

Multi-party arbitration

The rule on joinder in the 2021 ACICA Rules has been expanded so that an additional party can now be joined by the tribunal in circumstances where all parties, including the additional party, expressly agree even if the additional party is not bound by the same arbitration agreement (Article 17.1(b)). However, if a request for joinder is made before the tribunal is constituted, there is no change to the rule that ACICA may only join an additional party that is prima facie bound by the same arbitration agreement as the existing parties (Article 17.8). The 2021 ACICA Rules expressly require both the tribunal and ACICA to give all parties, including the additional party, an opportunity to be heard before exercising the power of joinder (Articles 17.1, 17.8).

The rule on consolidation also has been expanded to remove the requirement, in the case of arbitrations under more than one arbitration agreement, that the arbitrations are between the "same parties" (Article 16.1). In other words, where arbitrations arise under multiple arbitration agreements, ACICA can consolidate if (a) a common question of law or fact arises, (b) the rights to relief are in respect of the same transaction, and (c) the arbitration agreements are compatible – regardless of whether the arbitrations are between the same parties. However, ACICA can only exercise its power of consolidation after it has consulted with the parties and with any confirmed or appointed arbitrators (Article 16.1). The 2021 ACICA Rules provide also that a party wishing to consolidate must submit a request for consolidation including a number of specified matters (Articles 16.2, 16.3).

Multi-contract arbitration

For the first time, the 2021 ACICA Rules expressly permit claims arising out of multiple contracts to be made in a single arbitration (Article 18). Claimants can file a single notice of arbitration for claims arising out of multiple contracts, which will be deemed to commence multiple arbitrations alongside an application to consolidate (Article 18.2). A single arbitration will be permitted to proceed where ACICA decides that any one of the grounds for consolidation is met (Article 18.1). Where ACICA rejects an application to consolidate, the claimant must file separate notices of arbitration in respect of all proceedings that have not been consolidated (Article 18.3).

The 2021 ACICA Rules also allow a tribunal, after consulting with the parties, to conduct two or more arbitrations at the same time, or one immediately after another, or suspend any of those arbitrations until after the determination of any other of them where the same tribunal is constituted in each arbitration and a common question of law or fact arises in all the arbitrations (Article 19). This new provision empowers a tribunal to effectively case manage multiple related arbitrations even where those arbitrations are not formally consolidated or do not meet the criteria for consolidation.

Third-party funding

The 2021 ACICA Rules introduce new provisions dealing with the disclosure of third-party funding arrangements (Article 54). The Rules require parties to disclose the existence of third-party funding and the identity of the funder at the time of submitting a Notice of Arbitration or Answer or as soon as practicable after third-party funding is provided or a third-party funding arrangement is entered into (Article 54.2). Further, there is a continuing obligation to disclose any changes to the arrangements. Additionally, a tribunal now has the power to order that a party disclose the existence and identity of any funder (Article 54.3).

Early determination

The 2021 ACICA Rules clarify that the powers of a tribunal include the power to make an award granting early dismissal or termination of any claim, defence, or counterclaim (Article 25.7). This amendment is made in the context of recent debate about the extent to which different arbitral institutions' rules permit the early dismissal of claims or defences that are clearly unmeritorious. For example, whereas the Singapore International Arbitration Centre rules effective August 1, 2016 (**SIAC Rules**) include a dedicated procedure for early dismissal of claims or defences (SIAC Rule 39), the International Chamber of Commerce rules effective January 1, 2021 (**ICC Rules**) provide more generally that a tribunal must make every effort to conduct the arbitration in an "expeditious" manner (ICC Article 22(1)).

This amendment is made in the context of recent debate about the extent to which different arbitral institutions' rules permit the early dismissal of claims or defences that are clearly unmeritorious

Arbitrator nomination and appointment

The 2021 ACICA Rules are amended to stipulate that, in the case of both sole arbitrators and co-arbitrators on a three-member panel, the parties' preferred candidates are nominated for confirmation by ACICA rather than appointed directly to the tribunal (Articles 12, 13). ACICA's Secretary-General has the power to confirm a nomination, including the nomination of a Chairperson by two arbitrators, if either (a) the nominee has not disclosed circumstances likely to give rise to justifiable doubts as to availability, independence, or impartiality, or (b) the nominee has disclosed such circumstances but no party has raised an objection (Article 14.1). Alternatively, if the Secretary-General declines to exercise the power to confirm, the nomination will be submitted to ACICA itself (Article 14.3).

Use of technology

In light of COVID-19 disruptions, virtual hearings, both preliminary and final, are expressly permitted under the 2021 ACICA Rules (Articles 25.3, 25.4, 25.5, 35.5). Hearings attended virtually are deemed to have been held at the seat, unless otherwise agreed by the parties or directed by the tribunal (Article 27.2). The tribunal is afforded full discretion to establish the conduct of a hearing, including its form, in consultation with the parties (but without requiring their agreement) (Article 35.5).

The 2021 ACICA Rules also introduce an express power for the tribunal, in consultation with the parties and where appropriate ACICA, to adopt any measure to protect information shared in the arbitration and to ensure that any personal data is processed and/or stored in light of any applicable law (Article 26.6).

Time limit for award

The 2021 ACICIA Rules introduce a time limit for the tribunal to render a final award. Unless a shorter period is specified by law or the parties otherwise agree, the final award must be made no later than **9 months** from the date the file was transmitted to the tribunal or no later than **3 months** from the date the proceedings close, whichever is earlier (Article 39.3). ACICA may extend this time upon a reasoned request from the tribunal or if it otherwise deems it necessary.

No arb-med provisions

The 2021 ACICA Rules do not include specific provisions for the conduct of "arb-med", which is a hybrid process whereby an arbitrator assumes the role of mediator during the course of arbitration. This is despite specific arb-med provisions appearing in the consultation draft rules published last year. Instead, new provisions in the 2021 ACICA Rules require the tribunal to raise for discussion with the parties the possibility of using mediation (or other ADR) (Article 55.1), and empower the tribunal to suspend the tribunal to allow for mediation (or other ADR) (Article 55.2).

Conclusion

Recent amendments to the rules of both the ICDR and ACICA grapple with the challenges posed by multi-party disputes, management of related disputes arising under separate arbitration agreements, potential risks to arbitrator impartiality and independence raised by undisclosed third-party funding arrangements, and the increasing use of technology in arbitration in circumstances of increased data regulation and cybersecurity risk. The amendments are aimed at providing users with modern rules that facilitate increasing efficiency and transparency in the arbitration process, and offer more effective mechanisms for resolving complex disputes.

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Revised ICC Arbitration Rules

What changed when the revised ICC Rules came into force on January 1, 2021?

By Philippe Hameau, Janice Feigher and Marc Robert

The International Chamber of Commerce (ICC) has undertaken another revision of its arbitration rules. The 2021 version of the rules (2021 Rules) will apply to arbitration proceedings initiated as of January 1, 2021, irrespective of the date of conclusion of the contract in which the arbitration agreement is included or of the date of conclusion of the special agreement to submit a dispute to arbitration (subject to the specific provisions pertaining to the applicability of the emergency arbitrator and expedited procedure provisions).

The 2021 Rules codify certain practices of the Court of Arbitration of the ICC (**the Court**) and also introduce new measures aimed at improving the flexibility, efficiency and transparency of ICC arbitration proceedings.

This new version of the Rules consolidates the major developments achieved by the Court in these fields under the presidency of Alexis Mourre.

Thus since 2016, the ICC publishes the names of arbitrators designated in ICC arbitration proceedings (unless the parties object), with a view to increasing transparency but also to promoting new generations of arbitrators and to fostering diversity and inclusion in the constitution of arbitral tribunals.

Since 2016, the Court also has the faculty of reducing the fees of arbitrators who render their award unjustifiably late.

An important innovation, the expedited arbitration procedure (which initially applied mainly to disputes which financial value did not exceed USD 2 million), was introduced with the revision of the Rules of 2017.

Finally in 2019, the ICC announced that arbitral awards would henceforth be published (in an anonymised format) two years after they are rendered, bearing in mind that the parties can object to such publication or provide for some carve-outs in this context.

The 2021 Rules build on the progress already made and place emphasis more specifically on multiparty arbitration, on measures aimed at guaranteeing the independence and impartiality of the arbitral tribunal and on the extension of the scope of the expedited arbitration procedure. The Rules also feature an upgrade on the technical ground by enabling the parties to complete certain formalities exclusively by electronic means and by encouraging the holding of hearings remotely.

Multiparty arbitration

Joinder of additional parties

The 2017 Rules (Article 7.1) allow for the joinder of an additional party after the confirmation or appointment of any arbitrator only if all parties, including the additional party, agree to it. In the framework of the 2021 Rules, it will be possible for the tribunal to authorize the joinder of an additional party without the consent of all parties, on the sole condition that the additional party accept the constitution of the arbitral tribunal and the Terms of Reference (Article 7.5). When making its decision, the arbitral tribunal shall take into account the relevant circumstances of the dispute including (i) its prima facie jurisdiction, (ii) the timing of the request for joinder, (iii) possible conflicts of interests and (iv) the impact of the joinder on the arbitral procedure.

Consolidation of arbitrations

Whereas Article 10 of 2017 ICC Rules contemplates the consolidation of arbitrations when "*all of the claims in the arbitrations are made under the same arbitration agreement*", the new Article 10 of the 2021 Rules refers to "*the same arbitration **or agreements***". This addition is both important and welcome as it allows for the consolidation of arbitrations based on separate contracts and between different parties when the arbitration agreements are the same. This is a usual situation in complex transactions such as in construction or project finance transactions involving multiple related parties and contracts.

Constitution of the arbitral tribunal

The 2021 Rules include a new article 12.9 which gives the Court the faculty of designating all tribunal members, irrespective of the method of constitution provided for in the arbitration agreement. This faculty must be used in "*exceptional* *circumstances*" and to avoid a significant risk of unequal or unfair treatment that could affect the validity of the award.

This new faculty granted to Court is undoubtedly aimed, amongst others, at enabling to overcome difficulties in the constitution of the arbitral tribunal that arise in cases falling under the Dutco case law. By way of reminder, in the so-called Dutco case, the French supreme court ruled that the parties' right to be on an equal footing in the constitution of the arbitral tribunal is a principle of international public order. The Supreme Court specified that the parties cannot waive this right before any dispute arises.

Independence and impartiality of the tribunal

Measures enabling to exclude party representatives designated after the constitution of the arbitral tribunal

In order to avoid supervening conflicts of interest during the proceedings, the new article 17.2 gives the arbitral tribunal the power to exclude from all or part of the proceedings counsel designated by one or more parties after the constitution of the arbitral tribunal. Under article 17.1, parties are also under an obligation to promptly inform the ICC of any change in their representation.

Intervention of third party funders

Under article 11.7 of the 2021 Rules, parties will also be under an obligation to disclose the intervention of third party funders in the framework of ICC arbitration proceedings. This provision concludes the debate on the need for parties to make such disclosure, with a view to avoiding that arbitrators become unwittingly conflicted with a funded party. This new provision is in line with a more global tendency to promote transparency in international arbitration. Thus, in February 2017, the Paris Bar Board had adopted a resolution according to which Paris Bar lawyers "*should recommend to their client to disclose the existence of the funding scheme to the arbitrators and should explain the potential adverse consequences of not doing so (in particular with regard to the validity and enforcement of the award)*".

Investment arbitration

Finally, in investment arbitration proceedings based on a treaty, the new article 13.6 provides that no arbitrator shall have the nationality of any party to the arbitration, in order to offer more guarantees of neutrality of the arbitral tribunal.

Expedited procedure

The introduction of an expedited arbitration procedure was one of the main innovations of the 2017 Rules. As a reminder, the expedited procedure is generally conducted by a sole arbitrator and aims at obtaining an award within 6 months. It provides for a reduced scale of administrative expenses and arbitrator's fees compared to a standard ICC arbitration and invites the parties and arbitrator to limit among others the requests for document production, the length and scope of written submissions, the examination of witnesses and experts and the holding of a hearing. The expedited procedure is already a success even though it only became applicable to arbitration agreements concluded as from 1st March 2017 (146 cases between March 2017 and end of 2019). The expedited procedure was so far applicable to all arbitrations up to an amount in dispute of USD 2 million - except when excluded (opt-out) - which already accounts for 36.3 per cent of the cases recorded by the ICC in 2019. The 2021 Rules extend the scope of application of the expedited procedure to arbitrations with an amount in dispute of up to USD 3 million and based on arbitration agreements concluded as from 1st January 2021. Unless the Court determines otherwise, the expedited procedure also remains open to cases involving a higher amount in dispute when the parties agree to apply it (the parties have made this choice in 21 cases in 2019). This change clearly reflects the will to further increase the efficiency and lower the costs of ICC arbitration with regard to disputes involving small amounts.

Additional award

The 2021 Rules introduce a new Article 36.3 allowing the parties, within 30 days from receipt of the award, to apply for an additional award to address claims which the arbitral tribunal has omitted to decide. As for the correction and interpretation of awards, the other party/parties will have a short time limit, normally not exceeding 30 days, to submit any comments thereon and the arbitral tribunal will itself have a time limit not exceeding 30 days to submit to the Court the additional award in draft form.

Modernization – Electronic communications

As soon as on April 9, 2020, the ICC had reacted to the challenge posed by the Covid-19 global health crisis by publishing a Guidance note on possible measures aimed at mitigating the effects of the Covid-19 pandemic on arbitrations and inviting the arbitrators and the parties, wherever applicable, to envisage the holding of virtual hearings.

This is also the approach adopted in the 2021 Rules which provide that "*the arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication*" (Article 26(1)).

This addition had been called for as it enables to reduce the costs and length of the proceedings and reflects an existing and increasingly common practice. It also grants to the arbitrators the authority to resolve situations in which in person hearings are impossible or very difficult to hold or to put an end to dilatory tactics. Time will tell if this change of setting will become standard. The benefits of holding hearings remotely shall, however, not overshadow the various challenges involved and in particular the difficulty to assess the credibility of a witness or to efficiently cross-examine such witness remotely.

Finally, with a view to modernizing arbitration and preserving the environment, the 2021 Rules favor communication by electronic means over paper filings by providing, among others, that the requests for arbitration and answers will no longer be communicated in hard copies unless it is expressly requested by a party (Articles 3(1), 4(4), and 5(3)).

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Recent key U.S. decisions

Update on international arbitration law in the U.S.

By Matthew H. Kirtland, Katie Connolly, Esha Kamboj, Ernesto Hernández, and Eddie Skolnick

This past year, most in-house counsel have wrestled with significant disruption, distractions and lack of time. It has proved difficult for many to stay on top of legal developments. This article offers summaries of the most significant recent international arbitration law developments in the United States.

Recent key decisions

Impact of corruption on enforceability of awards

In *Vantage Deepwater Company v. Petrobras America Inc.*, the Supreme Court denied Petrobras's petition for certiorari concerning a Fifth Circuit decision confirming Vantage's arbitral award over Petrobras's objection that the award was procured by bribery and contrary to U.S. public policy. Petrobras had asked the Supreme Court to clarify whether U.S. courts should "*review de novo an arbitrator's conclusions on issues of law or mixed questions of law and fact bearing on the ultimate question of whether United States public policy should prevent enforcement of an arbitral award[.]*" In the now-final decision, the Fifth Circuit deferred to the arbitral tribunal's conclusion that Petrobras "ratified" the parties' allegedly corrupt contract because it had notice of alleged bribery and nonetheless performed. 966 F.3d 361 (5th Cir. July 16, 2020), *cert. denied*, No. 20-1032, 2021 WL 666498 (Feb. 22, 2021).

Foreign sovereign immunity

In *Bolivarian Republic of Venezuela v. Crystallex International Corp.*, Venezuela, PDVSA, CITGO Petroleum, and PDV Holding have appealed to the Third Circuit a January 14, 2021 Delaware district court order denying their respective post-judgment motions challenging the court's grant of Crystallex's writ of attachment *fieri facias* and directing the sale of the CITGO shares to proceed. Nos. 21-1276, 21-1277, and 21-1289 (3d Cir. Feb. 12, 2021). The January order followed the Supreme Court's May 2020 denial of Venezuela's and PDVSA's joint petition for certiorari in which they sought review of a now-final Third Circuit decision holding inter alia, that (a) jurisdiction under the Foreign Sovereign Immunities Act ("FSIA") from a recognition proceeding carried over to post-judgment enforcement and did not require an independent basis for subject matter jurisdiction, and (b) the *Bancec* alter ego extensive control analysis did not require proof that PDVSA was extensively controlled by Venezuela and that its control was connected to Crystallex's injury. 932 F.3d 126 (3d Cir. July 29, 2019), *cert denied*, 140 S. Ct. 2762 (May 18, 2020).

In *Process & Industrial Developments Ltd. v. Federal Republic of Nigeria*, Nigeria has appealed to the D.C. Circuit a district court decision holding that signatories to the New York Convention relinquish their ability to claim sovereign immunity in other convention signatories' courts. No. 21-7003 (D.C. Cir. Dec. 31, 2020) (appealing No. 18-CV-594 (CRC), 2020 WL 7122896 (D.D.C. Dec. 4, 2020)). In June 2020, the D.C. Circuit reversed a different district court decision in the same case, holding that Nigeria's immunity defense – that a confirmable "award" under the FSIA arbitration exception cannot include an award set aside by a court with supervisory jurisdiction – was colorable and that it could not be forced to brief the merits before resolution of this immunity defense because the FSIA provides immunity from litigation as well as from entry of adverse judgments. 962 F.3d 576, 580 (D.C. Cir. June 19, 2020).

Service on foreign parties

In *Compania de Inversiones Mercantiles ("CIMSA") v. Grupo Cementos de Chihuahua ("GCC")*, GCC has filed a petition for certiorari to the Supreme Court seeking review of two questions: (1) "Does service by email on the U.S. counsel of a foreign party pursuant to Federal Rule of Civil Procedure [("FRCP")] 4(f)(3) violate the Hague Service Convention?" and (2) "Does a case satisfy the 'arising out of' test for personal jurisdiction merely because meetings in the United States were part of the 'narrative' of the case, notwithstanding that the governing contract was formed and the alleged breach occurred outside the United States?" No. 20-1033 (Jan. 29, 2021). The Tenth Circuit order being appealed had affirmed a Colorado district court's decision that (a) alternative service of process on a foreign party is appropriate under FRCP 4(f)(3) where the alternative method is not "prohibited" by the Hague Service Convention and (b) the court has personal jurisdiction over GCC. 970 F.3d 1269 (10th Cir. Aug. 17, 2020).

Contracting out to retain the right to seek court interim injunctive relief

In *Henry Schein, Inc. v. Archer & White*

Sales, Inc., the Supreme Court reversed itself and dismissed Schein's petition for certiorari, leaving as final a Fifth Circuit decision that a carve-out of injunctive relief disputes from an arbitration clause meant that such actions do not first have to go to an arbitrator to determine whether the carve-out applies to the dispute. 935 F.3d 274 (5th Cir. Aug. 14, 2019), *cert. granted*, 141 S. Ct. 107 (June 15, 2020), and *cert. denied*, 141 S. Ct. 113 (June 15, 2020), and *cert. dismissed as improvidently granted sub nom. Henry Schein, Inc. v. Archer & White Sales, Inc*., 141 S. Ct. 656 (Jan. 25, 2021). In 2019, on a prior appeal in this same case, the Supreme Court held that when a contract delegates the question of arbitrability to an arbitrator, a court may not override the delegation, even if it thinks that the argument that the arbitration clause applies to a dispute is "wholly groundless." 139 S. Ct. 524, 529 (Jan. 8, 2019).

Evidence for use in private commercial arbitrations

In *Servotronics, Inc. v. Rolls-Royce PLC*, the Supreme Court has granted Servotronics' petition for certiorari seeking a decision on whether "the discretion granted to district courts in 28 U.S.C. § 1782(a) to render assistance in gathering evidence for use in 'a foreign or international tribunal' encompasses private commercial arbitral tribunals, as the Fourth and Sixth Circuits have held, or excludes such tribunals without expressing an exclusionary intent, as the Second, Fifth, and, in the case below, the Seventh Circuit, have held." No. 20-794 (Mar 22, 2021). The Seventh Circuit ruled that private commercial arbitrations cannot be "proceedings before foreign or international tribunals" under 28 U.S.C. § 1782 and denied Servotronics's petition for discovery in support of an anticipated commercial rules arbitration in England. 975 F.3d 689 (7th Cir. Sept. 22, 2020).

Challenge to arbitrator

In *Monster Energy Co. v. City Beverages, LLC*, the Supreme Court denied Monster Energy's petition for certiorari leaving as final a Ninth Circuit decision vacating an arbitral award because of evidence that the arbitrator failed to disclose certain facts, including that the arbitrator had an ownership interest in the arbitral institution, creating a reasonable impression of partiality. There continues to be a circuit split on the standard, with the Eleventh Circuit endorsing the "evident partiality" standard adopted by the Ninth Circuit, while the First, Second, Third, Fourth, Fifth, and Sixth Circuits require a showing that "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." 940 F.3d 1130 (9th Cir. Oct. 22, 2019), *cert. denied*, 141 S. Ct. 164 (June 29, 2020).

Non-signatories to arbitration

In *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, the Supreme Court analyzed the New York Convention's text, its negotiation and drafting history, and the post-ratification conduct of its signatories to hold that the New York Convention does not prohibit U.S. courts from applying the equitable estoppel doctrine to determine whether an international arbitration clause can be enforced by a non-signatory to compel arbitration. The Supreme Court reversed and remanded the Eleventh Circuit's decision for consideration of whether GE Energy, on the facts of this case, could enforce the arbitration clauses and compel arbitration. 140 S. Ct. 1637 (June 1, 2020). A more detailed review of the Outokumpu decision can be found here.

Impact of 'Achmea' on enforcement

In *Micula v. Romania*, the D.C. Circuit affirmed the district court's decision that *Slovak Republic v. Achmea BV* (Case C-284/16) ("Achmea"), in which the ECJ ruled that an investor-State arbitration clause in a bilateral investment treaty between two E.U. member States was incompatible with E.U. law, did not apply to invalidate an arbitral award against Romania because the key events leading to the award occurred before Romania's accession to the E.U., and because the dispute did not relate to the application of E.U. law. There are nine other enforcement actions pending in D.C. against Spain and Italy in which the states have argued that the courts lack jurisdiction because of *Achmea*. 404 F. Supp. 3d 265 (D.D.C. Sept. 11, 2019), *aff'd*, 805 F. App'x 1 (D.C. Cir. May 19, 2020).

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Recent key UK decisions

Update on international arbitration law in the UK

By Sherina Petit, Cara Dowling, Ben Mellett and Joshua Coates

The English courts have recently brought welcome clarity to several aspects of English arbitration law. We set out below a few key cases addressing arbitration issues decided by English courts in the past year. (Please also see the UK Supreme Court's seminal decision in Enka v Chubb (covered in issue 15 of the International Arbitration Report)

Arbitrator conflicts and apparent bias

The UK Supreme Court delivered its long awaited judgment in *Halliburton Company* (**Halliburton**) *v Chubb Bermuda Insurance Ltd* (**Chubb**) [2020] UKSC 48 on arbitrator conflicts and apparent bias. The judgment clarifies two important English law questions:

(a) Does an arbitrator have a duty to disclose information to parties in circumstances where there have been multiple appointments in related arbitrations?

(b) What test should be applied to issues of apparent bias once that information has been disclosed or, as in *Halliburton v Chubb*, where that information has not been disclosed?

The dispute arose following the explosion of the BP-operated offshore oil drilling rig, Deepwater Horizon, in 2010. Halliburton was a sub-contractor to BP on Deepwater Horizon, providing cementing and well-monitoring services. Numerous claims were brought against Halliburton and Transocean LLC (**Transocean**), the lessee of the Deepwater Horizon rig. This led to liability and settlements on the part of Halliburton and Transocean. Both Halliburton and Transocean were insured by Chubb so to cover the settlements, they initiated claims under their respective liability policies against Chubb. Chubb disputed the claims, contending that the settlements were not reasonable.

Halliburton invoked arbitration against Chubb, and after a protracted litigation Mr Kenneth Rokison QC was appointed as the presiding arbitrator by the High Court. Unbeknownst to Halliburton, Mr Rokison had also accepted appointments in two arbitrations in which Transocean was a party: as Chubb's nominee in one arbitration (the **Second Arbitration**), and another involving Transocean and another insurer (the **Third Arbitration**). Halliburton challenged Mr Rokison's impartiality and called for his resignation under section 24 of the Arbitration Act 1996 (the **Act**).

> ***Disclosure is a legal duty under English law unless waived by the parties***

Is disclosure a legal duty?

The Supreme Court confirmed that disclosure is a legal duty under English law unless waived by the parties. On the issue of multiple arbitral appointments, the Supreme Court held that acceptance of arbitral appointments concerning the same or overlapping subject matter with only one common party may give rise to an appearance of bias, as inequality of knowledge between the common party and the other party or parties may confer an unfair advantage. On the facts, the Supreme Court determined that Mr Rokison had breached his obligation to the parties to make disclosure.

What is the test for judging apparent bias

The Supreme Court confirmed that the test is whether a "*fair-minded and informed observer*" would conclude that there was a real possibility that the arbitrator was biased. A fair and informed observer is someone who will apprise themselves of all of the facts before forming a judgment. The Supreme Court held that the fair-minded and informed observer must have regard to the facts and circumstances "at and from the date when the duty arose and during the period in which the duty subsisted".

What does the arbitrator need to disclose?

An arbitrator should disclose facts or matters which would or might reasonably lead to an apprehension of bias.

What happens where there are competing duties of privacy and confidentiality?

The Supreme Court observed that an arbitrator is capable of disclosing enough information to the parties so that they can test whether there is a concern about bias, without actually breaching its duty of privacy and confidentiality. Further, the

Supreme Court held that in the absence of a contract to the contrary or rules restricting / prohibiting disclosure, certain disclosures may be made without obtaining the express consent.

When should the arbitrator make the disclosure?

The arbitrator should make disclosure as soon as facts or matters arise that lead to the disclosure. In *Halliburton v Chubb*, this was as soon as Mr Rokison was appointed in the Second and Third Arbitrations.

When will an arbitrator be removed?

The English courts will determine whether or not to remove an arbitrator by reference to matters known "*at the date of the hearing to remove the arbitrator*", and not by reference to the facts and matters known at the time disclosure should have been made.

Is the failure to disclose a factor?

Although it is not determinative, a fair-minded and informed observer may decide that the arbitrator's failure to disclose could itself be evidence of bias, or an appearance of bias.

Takeaways

Halliburton v Chubb has clarified that an arbitrator has a duty to disclose an apparent bias. Further, an arbitrator's failure to disclose in similar circumstances may nullify an arbitral appointment because one can no longer plead lack of certainty in English law.

Importantly, the Supreme Court also confirmed that the tests for disclosure and bias should be determined by reference to the relevant arbitral institution's rules, where applicable. It was only because the insurance policy provided for ad-hoc arbitration in *Halliburton v Chubb* that the Supreme Court opined on the relevant tests as a matter of English law. This is another reason why incorporation of institutional rules of a major institution can be preferable, as institutional rules are generally clear and user friendly. Challenges to arbitral appointees within arbitral institution procedures also generally remain confidential, rather than playing out before English courts.

Orders against a non-party to an arbitration

The Court of Appeal confirmed in *A and B v C, D and E* [2020] EWCA Civ 409 that the English courts have the power to compel a non-party to an arbitration to provide witness evidence in an arbitration seated in another jurisdiction.

The court noted parallels that the English courts could, in support of foreign court proceedings, order evidence to be taken from a non-party witness by way of deposition pursuant to CPR 34.8

The claimants appealed against the High Court's first instance decision to dismiss their application for the compulsory taking of evidence of the third defendant, who was resident in England but a non-party to the arbitration, under section 44(2)(a) of the Arbitration Act. The third defendant argued, inter alia, that the English courts had no jurisdiction to make such an order.

The Court of Appeal held that, unless otherwise agreed by the parties, section 44(2)(a) of the Arbitration Act grants the English courts the power to compel a non-party to provide evidence in arbitral proceedings, regardless of the seat of arbitration. The decision turned, inter alia, on the wording of the Act which provides that the English courts have the power to order the taking of evidence from "witnesses", a word which is not synonymous with "parties" or with those who were in the control of a party. The court noted parallels that the English courts could, in support of foreign court proceedings, order evidence to be taken from a non-party witness by way of deposition pursuant to CPR 34.8. The court held that the third defendant was therefore required to provide evidence in support of the New York seated arbitration.

The Court of Appeal's judgment brings clarity to whether the English courts have the power to order the taking of evidence of a non-party to the arbitral proceedings. It is not yet clear whether the English courts' other powers under section 44 of the Act can be exercised against non-parties, for example an order regarding the preservation of evidence (section 42(2)(b) of the Act). However, the decision in *A and B v C, D and E* paves the way for a broad interpretation.

Multi-tier clauses – does a failure to comply with a negotiation stage lead to jurisdictional issues?

In February 2021, judgment was handed down by the High Court in *Sierra Leone v SL Mining* Ltd [2021] EWHC 286 (Comm). This case concerned a challenge under section 67 of the Arbitration Act to an arbitration award dealing with jurisdictional issues, on grounds that the tribunal's conclusions on jurisdiction were wrong and they lacked substantive jurisdiction to hear the claim.

Central to the challenge was the construction of a multi-tiered arbitration clause which provided for alternative dispute resolution (**ADR**), namely good faith endeavors to reach amicable settlement, prior to submitting the dispute to arbitration. The applicant alleged that the parties had failed to comply with the amicable settlement provision and therefore the arbitral tribunal lacked jurisdiction to hear the dispute and the award was of no effect and unenforceable.

This case was preceded in 2014 by *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2015] 1 WLR 1145, which was also a challenge to an award under section 67 of the Act and similarly turned on the construction of a multi-tiered arbitration clause which contained ADR provisions, namely, to seek to resolve the dispute or claim by friendly discussions. In the *Emirates Trading* case, the court held that a dispute resolution clause in an existing and enforceable contract which requires the parties to seek to resolve a dispute by friendly discussions in good faith and within a limited period of time is enforceable as a matter of English law. The court went on to conclude that the condition precedent to arbitration, although enforceable, was satisfied. Therefore the court held inter alia that the tribunal did have jurisdiction to hear the dispute and dismissed the challenge.

The court in *Sierra Leone* was, however, invited by the parties' counsel to take a different approach to the issues and to consider first if the question of whether or not negotiation preconditions to arbitration are satisfied, is a matter that goes to the tribunal's jurisdiction at all or whether it is merely a question of admissibility. This point was not argued in *Emirates Trading*. Prior to 2019, there had been no decision nor even debate in a judicial context in an English court as to whether some matters thought to be jurisdictional are in fact not issues of jurisdiction at all and are more properly to be treated as issues of admissibility. This is a new line of argument that was seen for the first time in cases in 2020.

This is an important question because only if it is a jurisdictional matter does it falls within the court's powers under section 67 of the Arbitration Act. It was common ground between the parties that if it is instead a question of admissibility, then parties have no right to challenge the award under section 67, and indeed interference by a court in the issue is expressly curtailed and discouraged by section 1(c) of the Arbitration Act.

The court in *Sierra Leone* (Burton J) concluded that the question as to compliance with a multi-tier dispute resolution clause is indeed a question of admissibility. The court held that the question was not whether the claim is arbitrable or whether there is another forum in which it should be decided (which would be jurisdictional matters), but whether the arbitration has been presented too early. Burton J agreed with the tribunal's reasoning in its jurisdiction award that if reaching the end of the settlement period provided in the arbitration agreement is to be treated as a condition precedent at all, it could only be a matter of procedure (i.e. admissibility of the claim) and not a matter of jurisdiction. Pre-arbitration procedural issues are capable of being resolved by the tribunal and indeed required to be submitted to the tribunal for determination.

This case will have significant ramifications for how multi-tiered arbitration agreements are construed, and how challenges to such agreements and to subsequently rendered awards are dealt with by courts and tribunals. It is worth noting that the court also cited academic commentary on this point which noted that presumptively this would be the case in most legal systems, and concluded that the international authorities submitted by counsel for the respondent are "plainly overwhelmingly in support of a case that a challenge such as the present does not go to jurisdiction". Therefore, this decision is likely to echo in courts around the world.

Key takeaways

There are a few key takeaways from this judgment. Firstly, should parties wish for ADR to amount to a precondition to arbitration and for the tribunal to lack jurisdiction if those steps are not completed, then parties are wise to provide for that expressly and clearly in the dispute resolution clause. This case is also a reminder of the potential risks of drafting multi-tiered dispute resolution clauses where the final mechanism is arbitration. In light of those risks, drafters may wish to consider whether or not such provisions are in fact necessary or desirable. ADR can be commenced by parties voluntarily at any stage, both prior to and during proceedings – there is no need to provide for ADR in addition to arbitration (and experience shows that ADR can in fact perform better at a later point in proceedings than at the preliminary stage provided for in most contracts). There is also a related practical point, where faced with such a clause, if parties wish to avoid costly and time consuming satellite litigation, it is always worth endeavoring to comply with all stages of a multi-tiered dispute resolution clause prior to commencing arbitration. There often will be time or business constraints that require the parties to commence proceedings sooner, but as a general rule, satisfying the prior stages of a multi-tier dispute resolution clause should always be considered where arbitration is the final mechanism.

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Group, class and collective arbitration

Recent developments in the U.S. commercial arbitration and investor-state arbitration contexts

By Martin Valasek and Ernesto M. Hernández

Group arbitration can offer certain advantages over class litigation (not least, the ability to enforce awards across multiple jurisdictions). However the consent-based nature of arbitration can lead to jurisdictional obstacles for such claims. This article explores the U.S. line of authorities dealing with group arbitration of commercial disputes, one of the most developed globally. It also compares the approach taken in investor-state arbitration – an increasingly hot topic particularly given the more permissive approach to group arbitration taken by tribunals in the reported cases to date.

Group arbitration – 'class' versus 'collective' and other foundational aspects

It is important to distinguish between two types of group arbitration. Collective arbitration (by which term we refer to any joint, consolidated or mass arbitration) is a procedure allowing a group of similarly-situated claimants to pursue identical or related claims in a single action. By contrast, class arbitration is an arbitration brought by a class representative asserting claims on its own behalf and on behalf of similarly-situated (absent) class members. Whereas collective arbitrations bind absent parties only if they opt in, class arbitrations bind absent parties unless they opt out.

Group arbitration stems from the same economic imperative that drives class actions in the litigation context. When a party bound by an arbitration agreement has a claim of relatively low value that does not justify the cost or burden of commencing an individual arbitration, that party may benefit from joining others with similar claims to advance those claims in a single arbitration, thereby splitting the cost of the proceeding among all claimants instead of each claimant having to commence and pay for its own arbitration.

Assuming that some of the individual claimants would have proceeded on an individual basis notwithstanding the costs, proceeding on a group basis may have additional benefits stemming from the avoidance of multiple parallel proceedings against the same defendant (such as avoiding duplicative discovery and briefing and inconsistent awards). Further, group arbitration may have advantages over class litigation, notably in respect of selecting a specialist neutral, tailoring procedure to the particularities of the case and enforcing the award across multiple jurisdictions. Group arbitration may therefore represent real and effective access to justice versus a theoretical or notional right to commence arbitration that cannot be exercised in any practical or realistic way.

Even so, the putative efficiencies of group arbitration often come up against a roadblock embedded in the very foundation of arbitration: the notion of consent. The issue of a collective or class arbitration is straightforward where parties have expressly consented to proceed as such: there can be no objection by a respondent to a claimant bringing such a proceeding. More typically, however, claimants have attempted to bring a collective or class arbitration based on a standard arbitration clause, which is silent on the issue.

Under the legal framework for arbitration, strictly speaking, the only parties who can take part in an arbitration are the parties who are bound by the same arbitration clause in the same agreement. Thus, in these circumstances, there is a tension between any efficiency rationale favoring group arbitrations and the consent-based framework governing arbitration.

In the commercial context, the United States has grappled with this tension the most and has adopted a relatively strict approach. By comparison, group arbitrations in the investor-state context have generally adopted a more permissive approach. Recent developments in each of these contexts are described below.

Commercial class arbitration in the United States

U.S. courts have recognized that by consenting to arbitrate their disputes, parties to an arbitration agreement select the benefits of private dispute resolution by foregoing comprehensive judicial procedures and substantive appellate review. Under the U.S. Federal Arbitration Act (**FAA**), the United States' primary arbitration statute, U.S. courts place arbitration agreements on an equal footing with other contracts and enforce them according to their terms. The contractual requirements for class arbitration, however, have been subject to additional scrutiny.

Group arbitration may have advantages over class litigation, notably in respect of selecting a specialist neutral, tailoring procedure and enforcing the award across multiple jurisdictions

Historically, U.S. courts generally maintained a strict approach to interpreting arbitration clauses and rejected attempts by claimants to bring collective or class arbitrations unless the parties' arbitration agreement expressly provided for it. In the early 1980s, some courts began to favor class arbitrations, reasoning that economic efficiency and effective access to justice justified avoiding the unfair result of forcing numerous individual parties to litigate individually in separate arbitral fora.

The pro-class arbitration trend arguably reached its pinnacle in 2003. In *Green Tree Financial Corp. v. Bazzle* 539 U.S. 444 (2003), the U.S. Supreme Court was asked to determine whether the FAA permitted class arbitrations when arbitration agreements were "silent" on the issue. In a plurality opinion, the court held that absent express language to the contrary, whether an arbitration agreement authorizes class arbitration is an issue for an arbitrator to decide. On the underlying facts of the case, the court vacated the state Supreme Court's judgment and remanded the case so that the arbitrator could determine whether the parties' arbitration agreement was actually "silent" on the availability of class arbitrations.

The *Bazzle* decision led to a substantial increase in class arbitrations in the U.S. By remanding cases for further proceedings, courts were signaling that class arbitrations were not necessarily inconsistent with the FAA and that the availability of class arbitration depended on the terms of the parties' arbitration agreement. Subsequent decisions from the U.S. Supreme Court, however, clarified and curtailed the availability of class arbitration.

In *Stolt–Nielsen S.A. v. AnimalFeeds International Corp*. 559 U.S. 662 (2010), the U.S. Supreme Court addressed the question it had not reached in *Bazzle* and held that a party may not be compelled to submit to class arbitration if the parties' agreement is "silent" on the issue. The court reasoned that a shift from bilateral arbitration to class arbitration is a fundamental change to the "nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." Thus, consent to arbitrate a dispute, without more, is not consent to arbitrate a dispute on a class basis, and the parties' arbitration agreement must explicitly authorize class arbitration or class procedures.

More recently, the U.S. Supreme Court has restricted access to class arbitration even further. In *Lamps Plus, Inc. v. Varela* 139 S. Ct. 1407 (2019), the court held that "ambiguous" arbitration agreements do not provide the necessary contractual basis to compel class arbitration. Relying on *Stolt-Nielsen*, the Court found that "[l]ike silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[ ] the principal advantage of arbitration'" by agreeing to class arbitration.

Recent cases point to at least one way in which parties might access class arbitration: incorporation into their arbitration agreement of arbitration rules that give judges a basis to determine that it is up to the arbitrator to decide, in what seems like a throwback to the approach adopted in *Bazzle*. In *Blanton v. Domino's Pizza Franchising LLC*, the Sixth Circuit held that incorporation of the AAA National Rules for the Resolution of Employment Disputes (AAA Employment Rules), which provide that an arbitrator shall have the power to rule on his or her own jurisdiction, "clearly and unmistakably" demonstrated that the parties agreed to arbitrate "arbitrability." (962 F.3d 842 (6th Cir. June 17, 2020), *cert. denied sub nom. Piersing v. Domino's Pizza*, No. 20-695, 2021 WL 231566 (U.S. Jan. 25, 2021). To the same effect, see also *Sun Coast Resources, Inc. v. Conrad*, 956 F.3d 335 (5th Cir. April 16, 2020)). The Sixth Circuit also found that the AAA Employment Rules, by extension, empowered the arbitrator to decide whether the arbitration would proceed as a class arbitration, which the Court ruled was an issue of arbitrability.

Subsequent decisions from the U.S. Supreme Court clarified and curtailed the availability of class arbitration

Group arbitration in Investor-State Dispute Settlement

In the investor-state context, four group arbitrations have been initiated under the ICSID Rules: the three "Argentine Bondholder Cases" (*Abaclat v. Argentina*, *Ambiente Ufficio S.p.A. v. Argentina*, and *Alemanni v. Argentina*) and the more recent *Adamakopoulos v. Cyprus*.

The Argentine Bondholder Cases arose from Argentina's default on its foreign sovereign debt during its 2001 financial crisis and involved claims brought by Italian nationals under the Argentina-Italy BIT. In each arbitration, Argentina raised preliminary objections to the tribunal's jurisdiction and admissibility of mass claims. It argued that its consent to arbitrate under the Argentina-Italy BIT did not encompass mass claims and that each tribunal lacked the power under the ICSID Convention and Rules (**ICSID Framework**) to adopt procedural measures addressing the mass nature of the proceedings while preserving the parties' due process rights.

With respect to jurisdiction, the *Abaclat* and *Ambiente* tribunals concluded (each by majority) that Argentina's specific consent to mass claims was unnecessary because the ICSID Framework contemplated multi-party claims, a respondent's specific consent was not necessary in multi-party proceedings and a tribunal's jurisdiction over multi-party claims was not lost when the number of claimants surpassed a certain threshold. Diverging in its reasoning from the *Abaclat* and *Ambiente* majorities, the *Alemanni* tribunal held that a single "dispute" must be found to exist for the mass claims to proceed.

With respect to admissibility, the *Abaclat* majority found that under the ICSID Framework, a tribunal possesses the necessary powers to adapt existing procedures to ensure that mass claims proceed efficiently and preserve the parties' due process rights. It held that a mass claim was acceptable where the claims raised by multiple claimants were identical or sufficiently "homogeneous." The *Ambiente* majority, as well as the *Alemanni* tribunal, agreed that the ICSID Framework allowed them to devise a procedure to accommodate the mass claims but deferred finding whether the underlying claims were "homogenous" or "sufficiently comparable" until a later stage in their respective proceedings. Before having an opportunity to determine the admissibility of the claims, both the *Ambiente* and *Alemanni* arbitrations were discontinued.

More recently, in *Adamakopoulos v. Cyprus*, a majority of the ICSID tribunal held that it had jurisdiction to hear a mass claim by 956 Claimants against Cyprus. The Claimants, holders of financial assets in Cypriot banks, alleged that they incurred losses from their exposure to the Greek economic downturn and that Cyprus's measures in response to the downturn violated its obligations under applicable BITs. In response, Cyprus argued, in relevant part, that proceeding as a mass arbitration was (i) outside the Tribunal's jurisdiction, (ii) inadmissible and (iii) unsupported by party consent.

Regarding jurisdiction, the Tribunal found that that the large number of claimants did not preclude jurisdiction because it had jurisdiction over "a dispute" under the ICSID Convention and BITs. Following *Alemanni*, the Tribunal found that the core issue was whether the individual claims constituted a "single dispute." It found that there was "substantial unity" in the claims and harms alleged. It reasoned that the BITs under which the claims were brought invoked almost identical broad expressions of consent, the claims were based on the same substantive allegations of illegality, the relief requested was a common declaration of liability, and the factual background among the claims was "identical or essentially the same."

Regarding admissibility, the Tribunal concluded that the case was manageable under the ICSID Rules, that the parties' due process rights would be preserved, and that the mass claims were admissible. After considering certain procedural issues, the Tribunal concluded that the claims were admissible as a mass claim, subject to certain conditions being implemented to preserve the parties' due process rights, such as potentially fixing the claimant pool, bifurcating the proceedings, and awarding security for costs to Cyprus.

Regarding consent, again following *Alemanni*, the Tribunal found that Cyprus's consent to the consolidation of claims was unnecessary for the mass claim to proceed. It noted that there was no consolidation of claims in this case because a plurality of claimants agreed to proceed jointly as a single claimant party and that neither BIT contained language requiring additional party consent for the consolidation of claims.

In short, while there exist substantial barriers to group arbitration in both the commercial and investor-state contexts, the mechanism may be available in the right circumstances.

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What are climate change and sustainability disputes?

Key arbitration examples (Part 1 contractual disputes)

By C. Mark Baker, Cara Dowling, Dylan McKimmie, Tamlyn Mills, Kevin O'Gorman, Holly Stebbing, Martin Valasek

It is impossible to ignore that climate change and sustainability issues are scorching hot topics (pardon the pun). On a daily basis, these issues are debated in the news, at industry roundtables and dinner tables, as well as on the floor of parliaments around the globe. Inevitably, these issues have also become part of the legal landscape and are being argued before courts and tribunals. The range of climate change and sustainability legal disputes to date is vast. It is a global phenomenon, where legal issues traverse multiple fields of law and various causes of action, and involve a wide range of claimants and defendants from multiple sectors. The disputes risk profile for companies is not only complex but in a state of flux as claimants and defendants present ever novel arguments, and as legislators, regulators, courts and tribunals grapple with how to address these complex issues and who should bear the significant legal and fiscal burdens. For many in-house counsel, the sheer breadth of these issues is nightmare-inducing and makes it difficult to assess the likely legal and regulatory risks and to formulate strategies to mitigate those risks. In this two part series, using examples from recent cases referred to arbitration, we seek to offer a simple introduction to the types of climate change and sustainability disputes that are being brought in international arbitration and to explore related trends. This first article explores climate change and sustainability related arbitrations arising out of contracts.

What are climate change and sustainability disputes?

There is no single definition of what constitutes a climate change related dispute. One helpful description was offered in the recent ICC Commission Report '*Resolving Climate Change Related Disputes through Arbitration and ADR*' (**ICC Taskforce Report**) which took a broad view of such disputes as including "*any dispute arising out of or in relation to the effect of climate change and climate change policy, the United Nations Framework Convention on Climate Change ("UNFCCC") and the Paris Agreement*".

We largely adopt that broad approach, save to add 'sustainability' to our definition. This is in recognition of the fact that these disputes often encompass other distinct issues which fall within the broader sustainability sphere. For example, human rights and other fundamental rights have traditionally been viewed as a distinct category but these are inherently related to and impacted by climate change. Commentators tracking climate change dispute trends have for years been predicting (accurately) that there will be an increase in claims that are essentially climate change related disputes but formulated as fundamental rights arguments. This is a trend that will increase in coming years, not least because such arguments have already enjoyed some success. Other examples are biodiversity and land degradation issues which are impacted by climate change (and in turn compound the impacts of climate change) but which are also impacted by many other factors. Put simply, the term "climate change" on its own is now unhelpfully narrow.

Admittedly, even this definition is flawed. 'Sustainability' also notoriously suffers from being too subjective and lacking in clearly defined parameters. However, rather than getting wrapped up in linguistic niceties and wrestling with a strict definition, it is perhaps easiest to follow the approach famously taken by U.S. Supreme Court Justice Potter Stewart to describe his threshold test for obscenity: "you know it when you see it". To that end, this two part series offers a number case examples to bring to life the variety of climate change and sustainability related disputes ending up in arbitration.

At the risk of re-complicating matters, it can also be useful to roughly divide climate change and sustainability disputes by certain practical identifying features. For example, it can be helpful to use the following categories (again somewhat similar to the approach taken by the ICC Taskforce) when talking about such disputes:

1. cases brought to either mandate or change climate-related policy or conduct;
2. cases brought to seek financial redress for damages associated with the effects of climate change;
3. contractual disputes arising out of the industry transitions which the energy sector and all major industries are currently undergoing;
4. contractual disputes resulting from climate-related weather events;
5. related disputes between foreign investors and host states; and
6. related disputes between states, and between other transnational actors.

A key reason for selecting these categories is that the potential role for arbitration varies significantly depending on the category of dispute, with arbitration having a greater role (in practice and in potential) in categories 3 to 6. This is largely because claims that fall within categories 1 and 2 tend to be based on statute or constitutional or administrative law rather than contract. Those disputes necessarily tend to end up before national courts (if not deferred to political fora). More fundamentally, as arbitration is a contractual process, public interest groups often will not have legal standing in arbitration (though it is important to note that it is not so cut and dry as, in some instances, non-parties to the arbitration agreement may be able to participate such as by applying to intervene as amicus curiae in investment arbitration, or with joinder of third parties the consent of the parties in commercial arbitration). There can also be problems with arbitrability of certain disputes falling within these first two categories.

As such this two part series focuses on categories 3 to 6, presenting a selection of cross-industry examples of each. Categories 3 and 4 – contractual disputes – will be covered in this first article. Disputes between investors and states, and disputes between states, will be covered in part two.

Disputes arising out of contracts relating to transition, adaptation or mitigation, or resilience activities

The IPCC Special Report on the impacts of global warming of 1.5°C predicted the need for "rapid, far-reaching and unprecedented changes in all aspects of society", which includes in particular "rapid and far-reaching transitions in land, energy, industry, buildings, transport and cities". Transitions in these key sectors, individually and collectively, will impact every private, commercial and public endeavour. One hundred years ago, transitions in energy, industry and transport led to fundamental societal change. The advent of the automobile, for example, enabled speedier and safer travel over larger distances, transformed industry and trade, and reshaped our cities as well as our private lives. Modern transitions to limit and adapt to the changing climate (not least, the energy transition) call for an equally radical reorganisation of the way our societies, cities, industries and lives are configured and run. The difference is that these transitions are occurring at a pace that has never been attempted nor achieved in the history of humanity.

> ***These transitions are occurring at a pace that has never been attempted nor achieved in the history of humanity***

It is trite to say that significant financial investment will be required to fund these transitions. According to a recent report by the IEA, to reach net zero emissions by 2050, the cost of annual clean energy investment worldwide will need to more than triple by 2030 to approximately USD $4 trillion. It also requires massive deployment of all available clean energy technologies (such as renewables, electric vehicles, and energy efficient building retrofits) and huge investment in research and development for new technologies between now and 2030. That is just the cost of the energy transition – the transitions occurring in other major industries will also require significant levels of investment. In addition, according to the 2020 UNEP Adaptation Gap Report, the costs of adaptation (i.e. measures to reduce countries' and communities' vulnerability to climate change by increasing their ability to absorb or withstand the impacts) are estimated at USD $70 billion annually in developing countries. This figure is expected to reach USD $140-300 billion in 2030 and USD $280-500 billion in 2050.

This presents enormous opportunities for industry and businesses. It will, however, also result in an increased risk of disputes. This is in part due to a simple increase in the number of transactions, a percentage of which will invariably result in some form of dispute. In addition, there is also an increased risk of disputes given the particular characteristics of these transactions. Many investments and projects will be peppered with novel aspects, such as new innovations (technologies, products or processes), new infrastructure and systems, new collaborations (including between non-traditional partners such as energy and technology companies), new suppliers and manufacturers, new markets and customers, and new competitors. These are also occurring in the context of a rapidly changing regulatory environment as new regulatory regimes are introduced or old regimes adapted to be fit for purpose. As is the case with clean energy technology, project partners will find themselves navigating a heavily regulated industry, perhaps for the first time. Last, but certainly not least, the pace at which these transitions are occurring will have a significant impact on the risk profile – mistakes are bound to happen in the course of rapid, large scale disruption.

International arbitration is frequently the dispute resolution mechanism of choice for many of the sectors undergoing these transitions, in particular, energy, natural resources, infrastructure, and transport. Statistics provided by the major arbitral institutions evidence that consistently a high proportion of disputes administered by those institutions involve these sectors. It is also the mechanism of choice for cross-border transactions, particularly where a party is a state or state-owned entity or an emerging market is involved (as is often the case in the energy, natural resources and infrastructure sectors). Parties also favour arbitration where confidentiality and privacy is important to disputant parties (as is often the case with contracts involving technology and innovation). Many climate change and sustainability disputes are also technical in nature, and therefore arbitration again offers an edge over litigation because parties can select arbitrators with relevant expertise to adjudicate the dispute. This is borne out by a recent 2019 SCC Report on '*Green Technology Disputes in Stockholm*' (**SCC Report**) which concluded that more green technology companies are resorting to arbitration to resolve their disputes. Therefore, a significant number of the disputes arising out of industry transitions and other adaptation and resilience activities have, and will continue to, end up in international arbitration proceedings.

Arbitration examples

The SCC Report cited a number of cases involving renewable energy facilities (from wind farm to biogas installations) noting that over 60% of its green technology disputes involved renewables. It stated that typical issues raised involved whether the facility satisfied the contractual standards, for example production of the agreed amount of power, or preventing environmental risks. (Read also our article in this issue on Renewable Energy Project disputes).

A significant number of the disputes arising out of industry transitions and other adaptation and resilience activities have, and will continue to, end up in international arbitration proceedings

Construction issues always prove fertile ground for disputes, with usual disputes relating to quality, liability for additional costs, work and delay (including liquidated damages claims). A high profile example is that of the disputes brought in the wake of a disaster during the construction of the multibillion Hidroituango hydroelectric dam in Colombia which collapsed causing a major flood. A Colombian public utility is seeking USD $1.6 billion from a Spanish insurer following the collapse, and another billion dollar dispute with the consortiums behind the project has also been referred to arbitration. A less extreme example, cited in the SCC Report, is a dispute concerning construction of a biogas facility in which it was alleged that the work performed suffered errors so significant that the facility could not be used. There are many other examples of construction disputes related to renewable energy or resilience and adaptation projects or infrastructure being referred to arbitration.

In addition to these common issues, recent upheavals at both global and regional levels have led in some instances to companies struggling to find financing for projects which has led to delays at best, termination of contracts at worst, and ultimately arbitration.

There will also be disputes related to financing, whether that be financing of climate change or sustainability-related projects, failure to meet technical specifications to achieve green or sustainability-linked financing, or the appropriate use of sustainable finance or climate-related funding. Similarly, disputes will arise under carbon credits or emissions trading schemes. As an example, a Danish engineering company won a USD $150 million SCC award against two Russian state-owned entities in an arbitration arising from a contract to undertake works to reduce carbon emissions at gas pipelines. Under that contract, the engineering company was to receive carbon credits for its work which it could trade on international markets under the Kyoto Protocol. However, the Russian entities failed to get the project registered by a certain time. In response, the claimant sought to enforce a contractual mechanism to claw back its investment and an agreed rate of return. In turn, the defendants (unsuccessfully) alleged in the arbitration that the contract was procured by corruption and related criminal complaints in Russia were also instigated.

Supply and delivery disputes related to climate change or sustainability-related contacts are also commonplace, involving performance, delivery, quality and quantity issues. Commodities are an important area to watch – on the one hand fluctuations in commodity prices will impact climate change and sustainability-related contracts, and on the other hand, commodity prices and contracts (whether related to or unrelated to climate change and transition activities) will be impacted by the effects of climate change and the transitions. For example, commodities may be harder to source or transport due to more extreme weather conditions, and there will be fluctuations in demand and prices, for example, due to technological advances, or changes in policy, law or consumer sentiment, and in some instances certain commodities may no longer commercially viable as a result. Given the fluctuations to commodity prices that have been seen in recent years, and the further anticipated fluctuations in global markets, price review disputes, as well as disputes over performance and termination, with some connection to climate change and sustainability are predicted to rise. Gas price review arbitrations of course spring immediately to mind when thinking about price review disputes, and these cases offer real insight to what could come given most were driven largely by external events such as changes to markets and economic crises, and as a group they resulted in some of the highest-value disputes in the world. But to offer another example, a dispute between a German manufacturer and supplier and a Taiwanese photovoltaic (PV) company related to performance of a long-term supply agreement for silicon wafers (an essential component of cells used to generate solar electricity) was referred to arbitration after the PV company refused to continue to perform the contract following a rapid plunge in the cost of silicon and wafers.

The SCC Report also cited contract-based arbitrations involving unpaid delivery of wind energy converters, claims for payment for consultancy services in connection with share issuance for an organic food producer, and disputes arising from distribution agreements (such as where breach of an exclusive distribution agreement in respect of bioenergy products was alleged). Other commercial disputes such as under licencing, joint venture and partnership agreements related to climate change and sustainability projects should also be expected.

it is inevitable that contractual disputes involving states and state owned entities will arise

As governments invest in new projects and infrastructure related to the energy and other industries' transitions or to mitigate the effects of climate change, it is inevitable that contractual disputes involving states and state owned entities will arise. As an example, a German renewables company successfully pursued ad hoc arbitration against the African state of Lesotho after the state refused to perform on a contract to purchase solar energy equipment. Subsequent court proceedings to enforce the €50 million award have also been pursued in the US, UK, South Africa and Mauritius. Nigeria is also reportedly facing an ICC claim worth USD $400 million after allegedly breaching a settlement intended to resolve a prior arbitration over the construction and operation of a major hydropower project. The underlying dispute involved allegations that the main contractor had been excluded from the project. Similarly, a dispute has been reported to have arisen in relation to a wind energy complex in a remote area of the Dominican Republic. The claimant company alleged that it had completed a comprehensive, multi-year study of the wind patterns in the contracted area, leased the property for the complex and obtained all the required licences – only for the state-owned energy company to refuse to formalise a power purchase agreement (PPA) and awarded the PPAs to other companies.

Disputes involving infrastructure arrangements are also likely to increase given that in many instances infrastructure for transition-related projects may be limited or need to be introduced specifically for these projects. As an example, a dispute under a partnership agreement to build a wind farm was referred to arbitration after the claimant alleged that, because the grid connection was no longer available for the wind farm, an event of default under the agreement had occurred and it therefore had the right to transfer its shares in the project back to the respondent. In a similar vein, a Chinese-owned entity has reportedly threatened a Pakistani state entity with arbitration over a USD $2.2 billion electricity transmission project that is part of China's Belt and Road Initiative over alleged delays in commissioning work which also involved counter-allegations over the impact on the local grid.

Contracts affected by climate change and sustainability issues

The effects of climate change are already impacting commercial enterprises. A quick review of reports by insurance companies shows significant increases in losses due to extreme weather-related events – the increasingly frequency and severity of which many attribute to climate change. These impacts are predicted to further worsen in the coming years. Its worth noting that the effects could go beyond the physical; they could also be transitional (such as loss of an existing market or new competitors), or legal or regulatory (such as inability to renew permits or greater restrictions on doing business that impact profitability).

There is a myriad of ways that weather-related issues might negatively affect contracts and result in commercial disputes. Obvious examples are claims of force majeure, frustration or termination due to the impact of weather-related events. Disputes relating to insurance arrangements will also arise. The recent COVID-19 pandemic offered insight into the potential scale of global disruption that climate change could have, and highlighted in particular the vulnerability of supply chains. (Also read our article in this issue on Supply Chain disputes)

There is a myriad of ways that weather-related issues might negatively affect contracts and result in commercial disputes.

More broadly, however, changes in policy, technology and physical risks could prompt a reassessment of the value of a large range of assets as costs and opportunities become apparent, leading to contractual defaults or distressed or stranded assets.

In addition, where new risks manifest, parties will invariably seek to mitigate and allocate such risks as between them contractually. Unsurprisingly, many contracts now include obligations to comply with and/or warrant compliance with environmental, human rights or sustainability obligations, and commitments to put in place back-to back arrangements with counterparties further down the line. Disputes over these provisions will invariably arise.

Again, commercial arbitration will be the dispute resolution mechanism of choice for many of these contracts, and there will be an accordant increase in disputes being brought in arbitration as the effects of climate change continue to manifest around the globe.

Arbitration examples

A number of disputes have arisen out of the recent severe storms in Texas in early 2021 which caused widespread power blackouts across Texas, shut down oil and gas wells, froze pipelines, and led to the price of natural gas skyrocketing. Other countries that are reliant on natural gas imports from the US were also impacted, including Mexico which also suffered widespread blackouts. Reportedly, a US investment bank commenced international arbitration against Mexico's state electric utility to recover USD $400 million in debt that allegedly arose under a gas purchase agreement as a result in massive surges in the daily price rate as compared to the monthly rate. The utility has refused to pay the increase which it said was caused by an unforeseen event (as well as now alleging other discrepancies in the deal).

Disputes have also been referred to arbitration and litigation in relation to important infrastructure such as ports and railway lines which suffered devastating damage from flooding, after which the impacted transport companies and the state were unable to agree who should be liable for the costs of repairs and whether the flooding constituted an event of force majeure.

Conclusion

Climate change is leading to new economic realities and legal frameworks to which all state and corporate entities must adapt. Climate change and sustainability disputes are the new corporate reality. There is no cause for alarm – no transaction is without risk. However, parties are well advised to consider dispute resolution mitigation and resolution strategies at the outset of every transaction. A well-drafted arbitration agreement is a key contractual risk allocation mechanism. As a neutral forum, offering access to expert adjudicators, arbitration is arguably well placed to play a leading role as an arena for resolving many climate change and sustainability disputes arising out of contractual relationships. Other important mechanisms include conducting climate change and sustainability disputes risk audits of the company's global and regional operations, and establishing protocols for dealing with disputes immediately as they arise. If done well, these can save significant time, costs, reputation and preserve relationships with counterparties. The latter is a critical point in climate change and sustainability contractual disputes given many such contracts will be long-term arrangements involving significant levels of investment both at the outset and ongoing. Considering disputes risk at the outset of such transactions is the best way to avoid a climate change disputes disaster.

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