NORTON ROSE FULBRIGHT

International arbitration report

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Norton Rose Fulbright

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International arbitration report
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Editorial

Welcome to issue 9 of Norton Rose Fulbright's *International arbitration report*.

In this issue, we feature the exciting topic of innovation and disruption in international arbitration. We review the procedural and technological advances that are, or soon will be, changing international arbitration and dispute resolution more generally. Our lawyers track the global trends, risks and opportunities in this changing landscape.

In our jargon-busting guide, we outline the most-hyped legal technologies such as Artificial Intelligence, Blockchain Technology and Smart Contracts. We argue that arbitration, as an inherently innovative process, is well-placed to utilize and benefit from new legal technologies, in particular online dispute resolution and Big Data.

We speak with Bill Slate, Chairman, CEO and co-founder of Dispute Resolution Data to get his insights on the growing availability and use of Big Data in arbitration and the tools available to parties to assess risk and decide case strategies. We also look at the dark side of the proliferation of smart technology and Big Data, discussing how parties and arbitrators can navigate the procedural and costs risks created by the virtual explosion of data. Our lawyers also anticipate other areas of future disruption to arbitration in this new world of Big Data.

Our technology disputes specialists consider opportunities for international arbitration in technology and intellectual property disputes. We also have an in-depth feature article on arbitrating Smart Contacts; what every lawyer needs to know about negotiating and drafting appropriate dispute resolution clauses for this growing area of law.

In our latest comparative guide, our global network of international arbitration specialists look at the different approaches to asymmetric arbitration agreements taken by the courts in various jurisdictions. We also review emerging approaches to regulation of third-party funding globally, and give an update on Canada's new Uniform International Arbitration law.

Mark Baker and Pierre Bienvenu Ad. E.
Co-heads, International arbitration
Norton Rose Fulbright

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About the cover

Our front cover for this issue features a sculpture of A. B. "Banjo" Paterson outside Rockend Cottage in Sydney. Banjo is an Australian poet and author, famed for "Waltzing Matilda", considered by many to be Australia's unofficial national anthem. Sydney is host to the IBA Annual Conference 2017.

Data insights

Q&A with Bill Slate, Chairman, CEO and co-founder of Dispute Resolution Data

Written by Mark Baker and Ayaz Ibrahimov

We speak with Bill Slate, Chairman, CEO and co-founder of Dispute Resolution Data (DRD), to get his insights on the growing availability and use of data in international arbitration, and the tools available to parties to assess risk and decide case strategies. In 2017, DRD was awarded the Global Arbitration Review (GAR) Award for Best Innovation in the Field of International Arbitration.

Please tell us a little bit about the history of Dispute Resolution Data and the gap you see it filling in today's market?

I spent almost 20 years at the head of the American Arbitration Association (AAA) and Debora Slate (who co-founded DRD with me) spent a similar time focused primarily on mediation and online dispute resolution (ODR).

The modern business world is increasingly reliant on data for its strategic planning and marketing, and we had both frequently heard from well-placed individuals in the corporate world that they would use arbitration, mediation and other forms of ADR with more confidence if relevant and accurate process data was available. This view was confirmed by many of the leaders of ADR institutions with whom we discussed this apparent shortcoming in the market.

After discussing this proposition further with transactional and contentious lawyers, corporate General Counsel, insurers and re-insurers worldwide, we became increasingly confident that a comprehensive database of reliable arbitration and mediation data would be of significant benefit to the business and legal communities. And so DRD was established in early 2015. Since that time, DRD has progressed in leaps and bounds and we were delighted to receive, this year, the Global Arbitration Review (GAR) Award for Innovation in Arbitration.

> DRD offers access to previously unavailable data on dispute resolution claims, duration and processes.

What information do you offer and how do you believe your data can best be used in formulating strategy?

DRD offers our subscribers access to previously unavailable data on dispute resolution claims, duration and processes. DRD generates geographic and case-type reports from aggregated data contributed by 17 arbitration and mediation institutions and representing data from 185 nations. This includes, for example, reports on average claim amounts by case type, average claim amount versus amount awarded, arbitration and/or settlement outcomes by case type, whether parties frequently file counterclaims and their success rates, and the average length of case. DRD's reports are dynamically updated with historic and current data contributions.

The best illustration I can offer of the value of DRD data in arbitration proceedings is to be found on the DRD website under "Use of DRD Data in the Steps of an International Arbitration" which shows in more detail how DRD data might profitably be used at 13 different points in an arbitral proceedings. DRD data has parallel value in mediation.

By way of a few brief examples, and as confirmed by a number of Counsel to whom we spoke at the last IBA Annual Meeting, DRD data would be especially useful in discussing with potential clients "global norms" in a given kind of dispute, and DRD data on case type, duration and cost would be useful in establishing a budget for a prospective arbitration or mediation.

Data on settlements, counterclaims, average success rates of arbitration and mediation, the frequency and type of discovery, local court involvement, the relationship between claims and sums awarded, are other examples of the areas in which DRD data should be of significant interest, whether in drafting clauses or in the conduct of proceedings.

Who are the data providers you work with?

There are 17 arbitration and mediation institutions that currently provide data to DRD (the full list is on the DRD website www.disputeresolutiondata.com). From those institutions, we receive regular data on the cases that they administer, with parties from 185 nations, and broken down into fields and sub-fields covering: geographical region, States and domicile; nationalities and languages; currencies; milestone dates; hearings; awards; stays and delays; interim applications and outcomes; post-award applications; joinder; consolidation; bifurcation; methods of tribunal selection; gender of arbitrators and mediators; challenges; State Court intervention; amounts claimed and counterclaimed; sums awarded; legal fees and costs; third-party funding; and more.

What steps are taken to validate and verify gathered data? Is there any independent verification of source data?

In short, the DRD validation process involves both technology and human review on the data contributing and data receiving ends.

Data received by DRD is owned and managed by the independent data contributing institutions, whose staff and leadership are highly principled and competent professionals, as concerned as DRD about the accuracy of the data that they provide. DRD has no authority to change any data it receives from its contributors. If any question or uncertainty arises about data provided, DRD staff communicate with the institution's staff and if any correction is required it is made by the institution.

In developing our data protocol, we received valuable input from Dr. Jonathan Katz, Head of the Statistics Department at California Polytechnic Institute, who is also the point person for the US Census Bureau. Dr Katz has observed that all arbitral institutions administer cases in broadly the same way, even though their rules may differ. As a consequence, even a small representative group of data providers can speak to a "global norm" on various process issues; perhaps as few as ten institutions. So, for example, while we remain in discussion with three Asian-based institutions, cases involving Asian parties are regularly filed by other institutions, including the ICC.

DRD software, developed by SPARC (now a division of Booz Allen Hamilton), addresses the 207 validation steps that appear in eight pages of the DRD Operating Manual. For example, there are specific validations set up in the application software during template intake to prevent "bad template data" from getting into the database. Data from a case which is a "statistical outlier" for its award size or any other extreme attribute, will not become a part of the active database until at least two other like cases are available for inclusion.

Given the confidentiality of arbitration, what are the challenges of the work that you do?

DRD and the contributing institutions fully understand that confidentiality is of fundamental value to commercial arbitration and mediation. Consequently, DRD never receives information regarding a case from any of its data contributors in a form that would in any way breach confidentiality; DRD receives no information as to the identity of the parties, the identity of the arbitrators or mediators, or the advocates representing the parties. Nor does DRD receive information as to the merits of any award. All data presented in DRD's reports is aggregated.

What are the biggest misconceptions that you'd like to dispel about the work you do?

On a general level, we would want our subscribers and potential subscribers in legal practice, whether transactional or contentious, to understand that DRD does not presume to substitute the accumulated knowledge and expertise of law firms dealing daily with arbitration and other forms of ADR. DRD's offering is intended to supplement and enhance that knowledge and expertise, and to provide reliable statistical reference

points to test assumptions and to point up significant developments and trends in a fast-moving field.

It is also worth clarifying that we are only collecting and processing information regarding international commercial arbitration and mediation. We do not collect information about investment treaty cases nor about purely domestic cases.

What has been your proudest achievement to date?

We are proud of the uniformly positive reception that our offering has enjoyed, but never complacent as to the challenge of keeping that offering relevant and up-to-date.

> We are enormously proud of the contributing institutions, without whose support this potentially transformative initiative would be impossible.

We are proud also to have been a pioneer in publically recognizing the importance of gender inclusion within the arbitral process. Two years before the Equal Representation in Arbitration Pledge went public, we had included the gender question in our draft template for data contributors.

We also take great delight in the honor of receiving the 2017 GAR Award for Best Innovation in the field of International Arbitration, which I mentioned in my opening remarks.

Last, but by no means least, we are enormously proud of the contributing institutions, without whose support this potentially transformative initiative would be impossible. They have prevailed upon their boards and their constituents to contribute never-before-available data about the arbitration and mediation process at a time when transparency is so important in all that we do. And for that, we are also very grateful.

What are your expansion plans for the future?

As to the future, we shall continually refine and enhance the quality of shared data, taking particular note of comments and recommendations from data users.

We plan in due course to include data from ad hoc cases.

We shall also be reaching out to make data available to assist some of the important entities which strive to advance arbitration and mediation, including ArbitralWomen, the UNCITRAL Arbitration Working Group and the International Mediation Institute (IMI).

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Online Dispute Resolution and electronic hearings

Arbitration in motion

Written by Matthew Croagh, Gemma Thomas and Rahul Thyagarajan

Online Dispute Resolution (ODR) has become a contemporary legal buzzword. In this article, we discuss how ODR presents a viable opportunity for international arbitration to live up to its early promise of being a cost-effective and efficient means of dispute resolution.

In recent years, arbitration has faced heavy criticism for allegedly failing to live up to its early promise of being a cheap and fast means of resolving disputes. In the face of such criticism, it is easy to forget that arbitration historically has been at the forefront of procedural and technological innovation. For example, arbitration embraced electronic filing and service of documents and implemented party-tailored procedures (including advocating a flexible, proportionate approach to disclosure) well before most courts contemplated such conveniences. However, with courts in many jurisdictions rapidly embracing technology and innovation, arbitration must take steps to ensure it stays ahead of the curve.

Arbitration is inherently an innovative and flexible process and is, as a result, perfectly positioned to lead the way in taking up other new technological and procedural innovations. Indeed, it is incumbent on arbitral institutions, tribunals and practitioners to do so – particularly where innovation drives cost and time efficiencies.

What is ODR (Online Dispute Resolution)?

Online Dispute Resolution is an umbrella term which describes dispute resolution processes that are assisted by the use of information technology (IT). Most of us have engaged in some form of ODR, be it by communicating with a tribunal via email or by utilizing electronic disclosure platforms to manage disclosure. However, the focus of this article is to explore a more holistic application of ODR; where IT is intrinsic to the dispute process itself, and where ODR is a stepping stone to virtual dispute resolution.

Many courts have introduced, or are looking at introducing, online court systems of some form or other. China is the latest to unveil a fully online "cyberspace court" based in Hangzhou, the Chinese capital of e-commerce. Proceedings are commenced, court fees are paid, and all documents are submitted via an online portal. Court notifications are delivered electronically. Mediation can be conducted by telephone or video conference. Hearings, including cross-examination of evidence, are conducted online via a live-stream with parties attending remotely and a judge "presiding" over computer monitors. There are no court clerks or transcribers – transcripts are generated electronically by voice identification software. The general public may observe proceedings via a video feed. One of the drivers behind introducing the online court is the significant increase in the number of cases and corresponding burden on the judicial system. This online court is seen as a potential model for other Chinese courts.

An online system could be easily implemented in the international arbitration context, though with arbitration allowing for more flexibility, it could be tailored to meet the parties and arbitrators specific needs.

I'm not a technology boffin: how can ODR benefit me?

More efficient pre-hearing preparation
Much of ODR's functionality can be quite basic but in practice the efficiencies offered for pre-hearing preparation can be significant. ODR's benefits should not be underestimated. An online document management system makes it much easier to manage documents, including when searching for, annotating and/or sharing materials between the client, counsel, experts and witnesses of fact. The convenience of having exhibits hyperlinked within pleadings or witness statements, for example, is an incredibly useful and time saving feature.

More efficient preparation of hearing materials
The cost of producing hard copy bundles can quickly become significant, particularly in document-heavy, multi-party and/or multi-arbitrator proceedings. Hours of intensive labour are often involved in pulling together the hardcopy master, making and then proofing multiple copies and manually updating each copy every time an amendment or addition is made. An ORB significantly reduces the work required to prepare and maintain the arbitration hearing bundle. If the ORB is set up early and documents are uploaded as and when they are served, the hearing bundle will be automatically constructed during the course of the proceedings. Where additions or amendments need to be made, these are done once centrally, avoiding the need to manually update numerous hardcopies. This can save significant time and cost (particularly in multi-party and multi-arbitrator proceedings) and eliminates the risk of inaccuracies between copies of bundles. An ORB also saves on additional transport costs (and avoids associated confidentiality risks) – providing someone access to the hearing bundle is as simple as giving them an access password to the ORB.

More efficient hearings
An electronic hearing can be up to 25 percent to 30 percent quicker than a traditional hearing. This is largely driven by the smoother and more efficient management of documents. Gone is the time-consuming and thumb-numbing process of everyone in the hearing room locating the correct document within volumes of lever-arches, or indeed waiting to locate additional copies of a document if one bundle has a copying error. There are also significant forensic advantages. During cross-examination for example, each document referred to by counsel appears on the screen in front of the witness almost instantaneously, enabling the cross-examiner to launch a peppering assault of questions, free from

ODR terminology guide

E-hearing (aka paperless hearing)
A hearing conducted electronically, using various digital technologies, to eliminate the need for hard copy materials. Commonly, the hearing room is set up with computer screens (content screens) to display electronic documents from an electronic hearing bundle. Each member of the tribunal, each witness and each party (and their legal representatives) has at least one screen in front of them. As a document is referred to by counsel or the tribunal, a central operator (present in the hearing room) locates that document on the ORB database and displays it simultaneously on all content screens. Additional content screens may be added, including in remote off-site locations, if required by parties. In conjunction, evidence or submissions may also be given by video-link.

Online review bundle (ORB) (aka electronic hearing bundle or electronic hearing book)
An electronic platform which allows a shared set of documents to be accessed online by the parties, their legal representatives and the arbitral tribunal. The ORB may be managed by a third-party proprietary service provider or by the tribunal itself (more often, an arbitral assistant), and can be organised by issue or category. Some ORB platforms offer in addition private online databases for each party, where documents can be sequestered confidentially from the other parties and the tribunal unless and until they are required to be released (e.g. for cross-examination).

Video-link
A live transmission of video and audio data between different locations, using computer and internet networks.

Real-time transcript
A live feed of the hearing transcript, accessible online. Commonly utilised at e-hearings where, in addition to the content screen, a second screen displaying the real time transcript may be set up. Again, additional screens may be added to suit the size of each party's representation and off-site, if required. Frequently, additional facilities are offered such as the ability for each party to confidentially annotate, highlight or share excerpts of the transcript in real time within their team.

the distraction, disruption and delay associated with the witness (and tribunal and opposing counsel) locating the document referred to in a hard copy bundle.

Another benefit is that everyone in the hearing room is presented with the same material simultaneously and the material on content screens cannot be "browsed" by an individual user. This focusses the attention of entire hearing room on the document or documents being discussed. Swifter resolution of disputes can not only benefit parties but also arbitrators who are often highly sought-after and time-poor individuals.

A more efficient hearing is not only faster, and often therefore less costly, but also affords parties greater opportunity to present their cases in the limited timeframe available. The same technology that allows ORBs can facilitate easier and novel ways of presenting evidence and submissions. It is far easier to navigate a large, complex spreadsheet electronically. Complex data can also be collated and presented electronically in clearer, even interactive, ways. Technologically-savvy counsel are already utilizing such methods.

Mobility and global reach

In an increasingly global market place, commercial disputes are frequently cross-border. As a result, parties, counsel, witnesses, experts and/or the tribunal could be located in multiple locations. E-hearings are an especially attractive solution in those situations, and can reduce or eliminate the additional cost and inconvenience of unnecessary travel. Documents on an ORB can be accessed remotely by any authorized user at any time, no matter their location. Factual or expert evidence can be taken from almost anywhere using video link in conjunction with an ORB – all that is required is for the witness to have access to a secure location where a content screen can be set up and some form of video-link technology (now widely and cheaply available). ORB's also eliminate the common complaint, made particularly by experts, counsel and arbitrators who often travel frequently for business, of having to carry arbitration bundles or risk not having to hand the right documents when needed. With an ORB, at most they would need to carry their laptop or iPad, alternatively, to have access to a secure computer.

Case Study: Recent ICC Mega-Arbitration

Norton Rose Fulbright recently acted in an ICC arbitration with the disputed quantum reaching ten figures. A decision was made by the parties shortly before the hearing that the hearing would be conducted electronically. The public ORB in that arbitration had over 110,000 documents. Those documents were at the instant disposal of the Tribunal and both parties. Over a six-week, stop-clock hearing, more than forty lay and expert witnesses presented evidence (several by video link), and over 22,000 exhibits (including witness statements and documents) were referred to. Despite the significant logistic and document management challenges that one might expect from a dispute of that complexity, each party fully presented its case within the allotted time.

If ODR is so great, why is it not more common?

ODR has the potential to streamline the dispute resolution process, saving time and costs and ultimately improving the quality of the process. Given international arbitration's promise of being a cost-effective and efficient means of dispute resolution and the mobility, accessibility and flexibility of ODR, it seems like the two are a perfect match. So why hasn't ODR been more popular in arbitration? There are always multiple, varying reasons for resistance to new technology. Perhaps the better question is what has changed such that ODR is now a viable alternative? Technological advances mean that fast, secure and effective internet and video facilities are now widely available, and correspondingly, the costs of ODR have decreased. ODR is no longer viewed as an expensive "Rolls Royce" process. Most modern arbitral institutions or venues offer technologically sophisticated hearing rooms. Technology is also more user-friendly. Add to that, lawyers and arbitrators are themselves increasingly technologically-savvy (whether by choice or necessity). There is less fear of the technology involved, or of lacking the technological aptitude to run an e-hearing well enough to extract forensic benefit. Where concerns remain, those can be addressed by engaging an experienced ODR service provider. Many will offer not only their product but also their (human) services, including guidance along the way and a central operator to locate documents during the hearing.

Critical success factors

- Engage an established service provider to run the system.
- Get buy-in from arbitrators.
- Set up chosen system early to maximize benefits and encourage familiarity pre-hearing.

I, Arbitrator: what does the future hold for ODR?

With greater exposure, familiarity and uptake, we expect to see ODR becoming a commonly chosen, if not the default option, in arbitration. Momentum for the use of ODR is growing in litigation too, and competition will naturally drive change. As long as this growth trend continues, ODR will revolutionize modern dispute resolution practices.

ODR is a possible gateway to entirely virtual arbitration. The obvious next step on from evidence being given by video-link is for counsel's submissions to be given by video-link. The tribunal panel need not be physically present in the same room as the witnesses, parties, nor indeed each other. Lawyers and clients could also participate actively in the hearing in real time by video link. This decentralization would arguably deepen the pool of experience and expertise of the arbitration community, and can accommodate the schedules of otherwise busy lawyers, arbitrators and experts. With the advances in virtual reality technology, it is foreseeable that in the near future participants could all come together in a virtual hearing room.

Conclusion

It is now generally accepted amongst the arbitration community that parties rarely choose arbitration because they perceive it as being the fastest or cheapest means of dispute resolution – the drivers are instead its global enforcement regime and confidentiality. Indeed, in most recent surveys, in-house counsel state that they choose arbitration despite the perception that arbitration can be as slow and costly as litigation. Most arbitral institutions are looking at ways to respond to the demand for greater cost and time efficiencies in arbitration. But the arbitration community also holds the tools for positive change. Parties, counsel and tribunals should be seeking out and embracing technological and procedural innovation. The tangible benefits of ODR, including its efficiency and mobility, go hand in glove with the innovative, flexible and international nature of arbitration. There is no "right way" to utilize ODR – it is a suite of tools from which arbitrators and the parties can jointly select the most suitable combination for their circumstances. With the rapid development of technology, ODR both now and in the future is exciting and should be embraced by the international arbitration community.

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Technology disputes

New opportunities for arbitration?

Written by Brian Gray

There are known difficulties with litigating intellectual property and technology disputes, particularly where the disputes are global and involve rights protected in different jurisdictions. This article explores whether arbitration could offer a solution.

Difficulties of intellectual property and technology disputes

Patent litigation is notoriously complicated, expensive and slow. At the end of the 19th Century, Master of the Rolls (the senior judge in the Court of Appeal in England and Wales) Lord Esher MR eloquently bemoaned the complexity of litigating patent disputes:

"Well, then, the moment there is a patent case one can see it before the case is opened, or called in the list. How can we see it? We can see it by a pile of books as high as this [holding up the papers] invariably, one set for each Counsel, one set for each Judge, of course, and by the voluminous shorthand notes: we know 'Here is a patent case.'
Now, what is the result of all this? Why, that a man had better have his patent infringed, or have anything happen to him in this world, short of losing all his family by influenza, than have a dispute about a patent. His patent is swallowed up, and he is ruined. Whose fault is it? It is really not the fault of the law; it is the fault of the mode of conducting the law in a patent case. That is what causes all this mischief." (*Ungar v Sugar* (1892) 9 RPC 113 at 116-117)

Since that time, not much has changed. The difficulty with patent litigation is multi-faceted. Patents (as with other intellectual property rights) are territorial in nature. The nature of the patent grant relates to an invention which will have been made in the past. This requires a consideration of the "state of the art" at some point in the past. The scope of patent rights can often be illusive and abstract. The scope of protection for inventions is determined by sometimes difficult to understand canons of claim construction, based on the understanding of a person of ordinary skill in the art at the relevant time.

But these difficulties are not unique to patent disputes alone. Software litigation can be just as complicated, expensive and slow, particularly where it concerns, for example, language structures and application program interfaces. The scope of protection for copyright for software, for example, can be no less illusive than patent rights, depending on the degree of originality of the work, considered after abstracting the non-original elements and set-pieces or scenes-à-faire. The tribunal must also take into account the degree to which the work is dictated by external functional requisites. Technology licenses frequently involve grants of rights to use patents, copyright or technical information and can involve the same issues of scope and validity both of the existing rights and the ownership of new developments or works arising from the original rights.

Pure intellectual property disputes (unlike contractual disputes) can arise between parties who have had no previous relationship. They can arise almost innocently seemingly out of nowhere or they can arise because of a calculated attempt to use another's inventions or ideas. They can be justified as a legitimate attempt to compete or be seen as a sordid theft of another's labour.

Further complicating the issue is the fact that intellectual property rights are generally national but, as most large companies trade and operate internationally, the dispute is usually international. The scope of the parties' rights can be interpreted differently in different countries, even when dealing with the same wording in a patent or the same software code.

Such disputes can be difficult to settle. Technology contracts and intellectual property infringement claims usually involve allegations of on-going continuous infringements or breaches which occurred in the past but are continuing up to the moment of trial or hearing. This can be distinguished from much commercial litigation that deals with an historical tortious event or contractual breach that occurred in the past and is not continuing. As a result, IP disputes are frequently as much about the present behaviour of the parties as an historical evaluation of past damages or past compensation. They are not about past monetary compensation alone.

There is also the matter of whether the judges and juries adjudicating the dispute will have the requisite skills. Few countries have specialist Intellectual Property courts and so there is a risk of getting a judge who knows nothing about the law in this area and almost certainly will not have the requisite technical expertise. In the US, all these cases, patent, copyright, software or contract disputes must be heard by a jury, who will decide technical issues of fact – and lawyers for one or the other party will typically remove from the jury the most educated and knowledgeable potential jurors.

Finally, the discovery and trial process in the US, in particular, results in the costs of the average patent case exceeding US$2 million dollars and sometimes much, much more, in some cases, into the tens or hundreds of millions.

Arbitration as a solution?

Is it any wonder, given the difficulties enumerated above, that a recent Queen Mary University of London Survey on Pre-empting and Resolving Technology, Media and Telecoms Disputes (November 2016) shows that at least 75 percent of the organizations surveyed had a dispute resolution policy and that of those policies mediation followed by arbitration were the most preferred dispute resolution mechanisms.

> Is it any wonder that ... mediation followed by arbitration were the most preferred dispute resolution mechanisms.

The survey also stated that 92 percent of respondents viewed international arbitration as well suited for Technology, Media and Telecoms (TMT) disputes, and in fact, when assessed at an all-respondents level (i.e. including private practitioners and other dispute resolution practitioners), arbitration is the most preferred dispute resolution mechanism for TMT disputes. Court litigation was the least desirable method.

However, there does not appear to be sectoral uniformity in these views. Information Technology (IT) and Telecoms suppliers were less in favour of arbitration, preferring litigation and expert determination respectively. By contrast, customers of these suppliers from the Energy, Construction and Manufacturing industries all rated arbitration as the most encouraged dispute resolution mechanism.

Despite the preferences of IT and Telecoms suppliers for other types of dispute resolution mechanisms, both indicated that TMT disputes are well suited to the use of international arbitration (73 percent and 80 percent respectively).

All respondents recognized the potential advantages of arbitration: the enforceability of awards across multiple jurisdictions under the New York Convention; the avoidance of litigation in a foreign court; confidentiality/privacy; the ability to select an expert arbitrator; neutrality of the forum; speed and finality (limited appeal/judicial review rights); flexibility of procedure; and, in many cases, cost. Confidentiality deserves a further mention given that trade secrets and knowhow are frequently at the heart of technology disputes. Arbitration can also be perceived as a less adversarial process, providing greater opportunity for settlement and potentially preserving an ongoing business relationship.

So why the reluctance of IT and Telecoms supplier companies? The QMUL survey does not provide ready answers.

The most common type of disputes in the Telecoms sector are intellectual property followed by competition disputes, but joint-venture/partnership collaboration and regulatory disputes were also relatively common. The QMUL study suggests that because Telecoms disputes tend to relate to the regulated market and business environment, rather than service, this may make suppliers less likely to deal with the matter by arbitration. For Telecoms sector respondents, expert determination/adjudication was the most encouraged method, which may be reflective of the highly regulated nature of the market in which matters crucial to the operation of the company are controlled by regulation and in which there is a need for specialized arbitrators familiar with the regulatory environment.

In the IT sector, the most common disputes are in IT systems development, implementation or integration, followed by intellectual property disputes, but licensing and outsourcing disputes, including contracting disputes concerning business process requirements, timing and change management were also common. These disputes are not regulatory and are normally contractual so that it is not clear why, given the sector's favourable view of arbitration, more are not arbitrated.

Arbitration in theory but not in practice?

The QMUL survey found that although survey respondents said that arbitration was their preferred mechanism, in practice the mechanism that was most often used over the last five years was litigation.

The survey offers some possible reasons. Firstly, many disputes today involve older long term contracts which may not have arbitration provisions.

Secondly, IT and Telecom suppliers are more pro-litigation and may be refusing to accept arbitration. However, this seems more a conclusion than a reason. Space does not permit extensive discussion about this, except that it is not immediately obvious why arbitration would not be preferred for the typical IT service contract which deals with an ongoing supply of services.

Thirdly, most patent infringement and other intellectual property infringement disputes do not arise between contracting parties and it may be difficult to obtain post-dispute agreement to arbitrate, notwithstanding the many advantages of arbitration, particularly where there are multiple related disputes in multiple jurisdictions.

Fourthly, it is still the case that when the terms and conditions are being negotiated, the parties may give little or no time to the dispute resolution provisions. Put simply, the pros and cons of litigation versus arbitration may not have been considered until too late.

> Put simply, the pros and cons of litigation versus arbitration may not have been considered until too late.

But the QMUL survey suggests that perhaps the real reason for the dominance of litigation is that parties require greater assurance of and confidence in the international arbitration process. This means ensuring that arbitration is seen as preferable to litigation in reality, not just in theory.

The survey touches on some suggestions for improvement, including the choice of arbitration institutions, use of knowledgeable specialist arbitrators (in particular with TMT expertise), and a need for greater confidence in the capabilities of arbitrators. Other suggestions include more efficient e-disclosure and document review and e-case management/resolution software. The survey also suggested a possible move to virtual arbitral hearings and an opportunity for innovation in arbitration to create more efficient procedures.

However, notwithstanding the criticisms of and opportunities for improvements in arbitration, 82 percent of survey respondents believe there will be an increase in the use of international arbitration.

Conclusion

Litigation will not always be the best method for resolving technology disputes. Given the benefits of arbitration, there is an opportunity for arbitration to play a greater role in resolving technology disputes.

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The future of arbitration in the world of Big Data

Disruptive innovation

Written by James Rogers and Matthew Buckle

Where once knowledge was power, data now rules. With huge processing capabilities (literally) in the palm of the hand, the internet and "smart" devices are changing ways of working and democratizing information. Set against this technological revolution, the legal sector has long been ripe for "disruptive innovation".

Artificial Intelligence and Big Data

From practice management software to e-discovery, IP management, document production and even qualitative contract review, start-ups offering tech-driven efficiencies have exploded. The artificial intelligence their algorithms create and exploit is increasingly capable of taking on the work of junior lawyers, presenting both a threat and an opportunity to the traditional legal powerhouses.

Technology now allows huge volumes of various data to be aggregated and processed rapidly with minimal margin of error. This is "big data": volume, variety, velocity and veracity – the "four Vs". For businesses it creates huge potential for database-driven relational decision-making based on analysis of hard facts.

In time it will lead to the automation of most human based tasks. AI is already capable of performing complex surgical operations or detecting disease with much more precision than the human margin for error. The change potential for all organizations (and for society at large) is enormous, and it is already happening in an arbitration-specific context.

Dispute Resolution Data is a US start-up that collates case data from a number of arbitral institutions (including the ICC, ICDR and CEDR) and claims to provide "insight through historic and current geographic and case-type reports on dispute resolution claims, durations and processes" for "users to formulate strategies that transform levels of service". For the time being, information covers industry type, claim amount, location, cost, duration and macro outcomes (settled, withdrawn, final award issued etc.). It provides a trend analysis tool for businesses to take decisions about whether, where, when and how to pursue arbitration effectively.

But the potential for big data to disrupt arbitration is potentially far larger when considered alongside the ongoing transparency debate.

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The democratization of arbitration data

At the same time that technology has been empowering the masses with information, arbitration has come in for criticism (fairly or not) as cliquey and shadowy; a private safe haven for commercial men to fight their battles out of the public eye. There has also been the fierce investor-state dispute (ISDS) debate, where the right of private investors to bring arbitration claims against foreign governments on the basis of policy decisions has been questioned.

Whilst public controversy has been at its highest in the investment context, it has also provoked inward reflection in commercial arbitration circles. "Transparency" remains a buzz-word on the conference circuit without consensus as to what it should mean or how much is too little, too much, or about right.

Lord Thomas, Lord Chief Justice of England and Wales, cast attention on an important issue in this context back in spring 2016 when he suggested that the success and popularity of arbitration, combined with a presumption of the confidentiality of arbitration proceedings in English law, had been "a serious impediment to the development of the common law by the courts in the UK".

The insight is an important one in support of the case for the democratization of arbitration data to go further. Lord Thomas' point was that there should exist a system of law that offers both clarity and predictability, at the same time as being capable of developing in a principled manner. Put simply, he argues that the development of the common law is hindered if too many important commercial decisions remain behind closed doors. Other members of the English judiciary have anecdotally recalled occasions where they have decided important principles of law whilst sitting as arbitrator, only to have to wait years for the same question to arise again in a public forum, when the answer can finally emerge into the light of day.

Others reasonably question whether the decisions of private arbitrators, appointed by parties with a wide freedom to choose whosoever they wish, and with little independent vetting of their experience and expertise, should influence the development of the law.

However, there is an arguable case for change. One elegant proposal for shifting the balance, rather than rocking the boat, is to switch the default position in English law from a presumption of confidentiality to a presumption against. This would at least ensure more arbitrable decisions are public and, while not binding precedent, available to assist parties and arbitrators in dealing with and deciding complex and novel legal issues.

Privacy versus democratization

What this would yield, indeed what the transparency debate is really about when the potential of big data is considered, is the democratization not merely of trend data but the potential for microscopic analysis of the substance of arbitration decisions and reasoning.

Such democratization might do to arbitration what Judge Analytics attempts to do to the US justice system. The platform of Ravel Law launched in 2015 to "judge the judges". By collating and processing the huge volume of data churned out by the US courts, the platform provides users with an at-a-glance insight into how a specific judge thinks, with information on what opinions that judge has rendered and what opinions and other judges they have cited.

The idea is to make the law more transparent. In part because nothing that is presented on the platform is information that wouldn't be ordinarily available to a litigation party with sufficient resources to pay sufficiently resourced lawyers. It is simply that technology has made the information more accessible.

Hidden perils?

However, whilst improving access to justice and advancing the commercial law might be publicly desirable outcomes in the interests of the common good they are both difficult to incentivise. For as long as there has been trade there have been disputes and there have been merchants wanting to resolve those disputes without resorting to the courts. There will always be business disputes that businessmen would prefer to keep confidential. This is a need that arbitration serves.

Further, might the democratization of substantive arbitration data bring about unintended perils? There are certainly several important cornerstones of arbitration that will be fundamentally disrupted by a big data revolution in arbitration.

One obvious area is arbitrator selection. Many have written on the sanctity of the right to nominate an arbitrator and arbitration awards have been challenged on the basis of alleged failures of party-nomination procedures. There are obvious parallels between what Judge Analytics does and the potential for big data to influence arbitrator selection but again, no wheel would be re-invented: already arbitrator due diligence is common practice (particularly in an investment arbitration context where past awards are public) and amounts to paying for research into whether a potential nominee has determined any issue or said anything publicly that might indicate a tendency towards a favorable position.

"Transparency" remains a buzz-word on the conference circuit without consensus as to what it should mean or how much is too little, too late, or about right.

But would the potential of big data to provide instant insight into every opinion that every potential arbitrator has ever publicly expressed on every issue truly improve arbitration, or does it risk prejudice, unbalanced tribunals and more dissenting opinions?

Would the pool of arbitrators (criticized as cliquey and homogenous) be encouraged to grow by such technology, or would parties instead look to appoint from within only a limited pool of those most known to support positions likely to help them to prevail?

All relevant information is already out there somewhere of course. The difference is that technology is making the information much more readily (and cheaply) available. Perhaps the real threat then is the pace of change, and the real question is whether the thinking and approach of arbitrators, practitioners and institutions can keep up with the inevitable advances and disruptions that technology will bring?

Longer-term (but potentially sooner than you think) might human arbitrators simply become irrelevant, as with the example of the surgeon? There will also be those who consider that human discretion will always be a necessary part of dispute resolution. But if arbitration exists to serve the interests of commercial business people, and when technology can or soon will offer solutions that are quicker, cheaper, data-driven and reduce margin for error, then perhaps it is inevitable.

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Managing disclosure in the face of the data explosion

A need for greater guidance?

Written by Matthew Croagh, Alison Fitzgerald, Cara Dowling, Cloudesley Long, Simone Pappas and Marc Robert

In this article, we discuss how to manage disclosure in international arbitration in light of the growing volume of electronic data. As the number of electronic devices, applications and other technologies increases, there has been a corresponding explosion in the volume of potentially disclosable data in a dispute. Whilst the disclosure obligations of parties are clearly defined in the context of litigation, international arbitration offers a more flexible approach to disclosure which will often be influenced by the legal jurisprudence of the tribunal.

An explosion of data

In addition to traditional information technology (IT) systems which capture and store large quantities of data, new applications and technologies are fuelling exponential growth in data. Mobile devices (from laptops to wearable technology) and other new technologies such as the Internet of Things are increasingly being used by companies and employees, generating significant levels of new data. Cisco Systems is behind an ongoing initiative to track levels of global mobile data. It reports that mobile data traffic has grown 18-fold over the past five years, and grew 63 percent in 2016 alone. In addition to the proliferation of physical devices, companies are increasingly using cloud-based technologies to manage and store data. Such technologies provide access to electronic resources via the internet and facilitate the flow of data between users. In the context of disputes, such data may be disclosable and therefore presents problems to participants of arbitration in terms of access and collection.

> The sheer volume of information can present issues in terms of the extent of data capture which may be required and the cost of managing the disclosure process.

The sheer volume of information which may be relevant to any given dispute can present issues for a party to an arbitration both in terms of the extent of data capture which may be required and the cost of managing the disclosure process. As things already stand, disclosure can frequently be the most expensive part of an arbitration, particularly where the process is disputed. Such costs risk further increasing in line with the amount of data. It is therefore important that parties, their counsel and arbitrators understand and consider – at a sufficiently early stage in arbitration proceedings – not only the parties' disclosure obligations but also processes that might simplify or reduce associated costs.

Arbitration and disclosure

Arbitration is inherently a more flexible process than litigation. Parties to an arbitration are generally at liberty to agree an approach to disclosure, overseen by the arbitral tribunal. In the absence of (and/or in addition to) the parties' agreement, arbitrators will be guided by the chosen arbitral rules and the procedural rules of the seat. However, most arbitral rules and arbitration laws afford arbitrators general powers to conduct the arbitration and the disclosure process in the way that they see fit, but without offering any real guidance. In the United Kingdom, for example, the Arbitration Act 1996 simply states that "it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter". Such matters include which documents or classes of documents (if any) should be disclosed and at what stage (if at all) in the proceedings.

> Most arbitral rules and arbitration laws afford arbitrators general powers to conduct the arbitration and the disclosure process in the way that they see fit, but without offering any real guidance.

The IBA Rules on Taking Evidence in International Arbitration (IBA Rules) do offer some non-binding guidance on disclosure and wider evidence issues. In the IBA Rules, "document" is defined very widely to include "data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means.". However, again much of the IBA Rules guidance on disclosure is either predicated on the parties reaching agreement or confers a wide discretion on the tribunal. The IBA Rules are also generally non-binding as few parties expressly incorporate the IBA Rules into their arbitration agreement.

Given the limited guidance around the disclosure process in arbitration, participants and arbitrators are oftentimes influenced (rightly or wrongly) by the approach to disclosure taken by the courts. As a result, the legal background of the tribunal, the parties and their counsel can heavily influence the scope and extent of disclosure. A commonly cited example of this, is the difference between arbitrators from a common law background and those from a civil law background. Disclosure in common law courts is generally more extensive than in civil law courts where little to no disclosure may be ordered. Approaches to disclosure will differ even within courts of similar legal jurisprudence – e.g. US style discovery is far more extensive than English disclosure. As a result, arbitrators from a civil law background can be perceived as more reluctant to order disclosure than arbitrators from a common law background, and as tending to only accept limited and specific disclosure requests, whereas arbitrators from a common law background may be more amenable to wider-ranging disclosure requests.

But not all arbitrators will be necessarily influenced by the approach of their home courts. In fact, many might consider that antithetical to the very nature of arbitration. So it can be risky to simply assume that an arbitrator's approach will be aligned with that or her or his home courts.

There have been various tools developed recently that aim to navigate this tricky issue of the uncertain approach of arbitrators to disclosure. GAR has launched GAR-ART, an arbitrator research tool which (for a subscription) offers profiles of arbitrators, including a section in which the arbitrators may state their procedural preferences. It also provides a list of tribunal chairs, co-arbitrators and counsel with whom each arbitrator has conducted cases whom parties can contact to obtain up to date feedback on the arbitrator's approach to conducting arbitration. This is an interesting development for a number of reasons. Firstly, it will be interesting to see how many arbitrators are willing to set out their stalls in this way – many, justifiably, question whether it would be appropriate to do so as their approach will be tailored on a case-by-case basis. Secondly, assuming a sufficient number are willing to disclose preferences, it will be interesting to see what trends develop and whether case management style in fact proves influential in the choice of arbitrator. It will also be interesting to see whether the (seemingly inevitable) feed-back loop occurs – i.e. parties end up influencing, via the selection process, arbitrators' approach to disclosure.

Taking inspiration from litigation

The difficulties of having limited guidance on disclosure in arbitration are compounded by the confidentiality of and lack of precedent in arbitration – arbitrators are navigating these tricky issues in isolation.

Various novel approaches to disclosure in litigation are being developed in a number of jurisdictions. In the English courts, judges are actively involved in scoping disclosure at an early stage in proceedings. Parties are obliged to consider and discuss the extent of searches to be made and parties will exchange an Electronic Documents Questionnaire detailing the proposed electronic search terms and date ranges as well as highlighting any potential issues with accessing electronic documents. Early intervention means that any difficulties or disputes over disclosure are aired well before the disclosure exercise commences, with the intention to save time and costs associated with challenges, satellite litigation and demands for multiple repeat disclosure exercises where prior exercises are allegedly inadequate. The English court's approach to disclosure is also heavily influenced by proportionality – the cost and burden of disclosure must be proportionate to the complexity and value of the dispute. Failure by parties (or indeed counsel) to engage in the process fully or responsibly will be sanctioned, including in costs.

Similarly useful e-disclosure court precedents are available in other jurisdictions. In Canada, some jurisdictions have adopted the Sedona Canada Principles Addressing Electronic Discovery which set out principles for the process of electronic discovery and, like the English approach, emphasize the importance of a proportionality. In Australia, court disclosure processes are increasingly being utilised in arbitration; where a large number of documents may need to be electronically exchanged, parties to arbitration will commonly agree a protocol for discovery of electronic documents, often based on the Federal Court of Australia's electronic discovery protocol (this is currently being updated) or one of the state Supreme Court protocols.

The influence is not exclusively one-way; Australian litigation is also being influenced by arbitration. The Federal Court's Commercial and Corporations Practice Note introduced in October 2016 suggests that parties consider using disclosure methods more common to arbitration such as the Redfern schedule and a "memorial"-style process for providing key documents and evidence.

It is important, however, that parties and arbitrators bear in mind that not all aspects of litigation disclosure protocols will be appropriate for arbitration. Arbitration has particular attributes that can present unique problems for the disclosure process. As an example, tribunals generally only have jurisdiction over the parties to the arbitration agreement and not third parties. Where data is held by third parties (such as in a distributed-host cloud system or by an internet service provider), a tribunal will generally not have the power to order disclosure against that third party. In this situation, a party to an arbitration will generally need to seek the assistance of the court, to obtain an order for non-party disclosure. Whether such remedies are available will depend on the procedural law and supervisory courts of the arbitration.

Another important development in litigation, is that many courts are actively embracing technology. "Predictive coding", a search technology which can be used to identify electronic documents relevant to the dispute, has been in use in US litigation for some time and more recently has been approved for use in the English courts. In *Pyrrho Investments Limited and another v MWB Property Limited and others* [2016] EWHC 256 (Ch), over 3.1 million electronic documents needed to be reviewed (prior to an automated process of de-duplication that number originally stood at 17.6 million). The judge stated that the cost benefits of technology-assisted review were significant and that, moreover, there was some evidence to suggest that this form of review was more accurate and consistent than a review carried out by humans.

As the volume of data increases, such technologies will become more crucial to reducing the time and cost burden of disclosure – thus, in addition to being the cause of the problem, new technologies might be part of the solution. Arbitrators, counsel and parties to arbitration must also continue to embrace new technology. Indeed, if technology-assisted review is in fact more accurate and efficient, foreseeably at some point it might be negligent not to do so.

Conclusion

It is clear that, in the context of both litigation and arbitration, the sheer volume of data which may be disclosable between parties and which therefore must be dealt with in some fashion will continue to grow exponentially. Arbitrators are in the somewhat unenviable position of having little guidance and almost a complete discretion in respect to dealing with this tricky issue. They have a heavy responsibility of ensuring that an effective but proportionate disclosure exercise is carried out, without incurring

unnecessary costs. The key seems to be engaging parties and their counsel at a sufficiently early stage in the arbitration, to agree not only the parties' disclosure obligations but also what processes or technology might simplify or reduce associated costs. Arbitrators are well-advised to keep abreast of innovations, including those being utilised in courts as well as new legal technologies.

> The flexibility of arbitration means that parties can (at least in theory) save significant time and costs as compared to litigation, but this relies on parties engaging properly to agree the process.

Of course, parties and their counsel must also take responsibility and seek, in the spirit of arbitration, to agree a proportionate approach to disclosure. The flexibility of arbitration means that parties can (at least in theory) save significant time and costs as compared to litigation, but this relies on parties engaging properly to agree the process. Sadly, in practice, disclosure is too often a fertile ground for satellite disputes; in the desire to beat their opponent at all costs, parties and their counsel seem to lose sight of the clear benefits of a consensual process. There might be an argument therefore that arbitrators should wield their case management powers in a stronger, more pro-active way and consider imposing appropriate sanctions where parties are obstructive. The introduction of new arbitrator profiling tools, such as GAR-ART, have the potential to track whether such active case management would prove popular amongst parties. However, obviously there will be an element of a feedback loop – the ability to track arbitrator conduct and what proves popular with parties, means that parties may influence arbitrator conduct in a way that parties cannot influence judges in litigation.

This leads us to perhaps the final piece of the puzzle – the solution may be greater guidance for arbitrators, whether that be binding guidance by arbitral rules or laws, or in the form of more detailed non-binding guidance in respect of e-disclosure protocols which parties can incorporate in their arbitration agreement or later opt into. Parties and counsel are already utilizing court-specific disclosure protocols in arbitration, which suggests that there is a place for greater formal guidance.

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Jargon buster: legal technology

Navigating the hype

Written by Paul Stothard, Matthew Plaistowe and Cara Dowling

In-house legal teams (and as a result, the external lawyers they instruct) are under ever increasing pressure to produce high quality results within less time and at less cost. Some are looking to lawtech –technology-enabled processes and software – to find ways to increase productivity whilst driving greater efficiencies within their teams. The hype around lawtech comes with a lot of jargon which can be bewildering for those unfamiliar with the subject. To add to the confusion, there is often no precise definition for some of the terminology and the exact meaning of certain terms may be debated or in flux. This article briefly explains some frequently used jargon to assist readers to navigate the fast changing world of legal technology.

Artificial intelligence (AI)

AI is a field of computer science that includes machine learning, natural language processing, speech processing, expert systems, robotics, and machine vision. Many people assume that AI means Artificial General Intelligence (AGI) – that is, intelligence of a machine which performs any intellectual task as well as, or better than, a human can perform it. Or to put it another way, AGI is AI that can meet the so-called "Turing Test": a machine's ability to exhibit intelligent behaviour equivalent to, or indistinguishable from, that of a human. In reality, we are some way off the emergence of AGI, although we already benefit from AI which is itself designed by AI. AI will impact most, if not all, industry sectors – including law – in significant and possibly highly disruptive ways. Further resources about AI, including analysis of ethical and legal risks, are available on our website http://www.aitech.law.

> The "Turing test", developed by Alan Turing in 1950, is a test of a machine's ability to exhibit intelligent behavior equivalent to, or indistinguishable from, that of a human.

Machine learning

A type of AI connoting automating decision-making using programming rules and, in some cases, training data sets. Human subject-matter experts can provide feedback on results as part of a training process. Machine learning can adapt its programming based on the training process and feedback, and the data can be represented by various graph and network structures. For example, an artificial neural network (ANN) or neural net is a system designed to process information in a way that is inspired by the framework of biological brains. Machine learning differs from automated decision-making based on conditional programming rules which follow pre-programmed "if-then" decision trees. Machine learning can now be seen in the context of contractual analysis (e.g. during a due diligence exercise), where lawyers teach the software to analyse contractual language and identify patterns or anomalies in contractual terms regardless of how they are phrased.

Natural language processing
An AI application which derives meaning, context, or sentiment in textual data or conversations with humans using grammars and graph structures.

Data mining
The process of sorting through and manipulating large, complex, unstructured data sets to identify patterns and establish relationships in order to extract useful inferences or solve problems through data analysis. Often a foundation for AI/machine learning and the basis of Big Data or predictive analytics.

Predictive analytics
A branch of advanced data analytics that uses techniques including statistics, predictive modelling, machine learning and data mining to analyse data in order to make predictions about the future. Some companies offer predictive analytics software as a tool for predicting the likelihood of certain legal arguments being successful in certain courts, and before certain judges, relative to the type of case.

Document automation
Rule-based software that automates the drafting of legal documents using rules and decision trees. At its simplest, document automation software combines a library of electronic templates with a pre-set question and answer and/or data-entry interface. Language is included or excluded based on the user's answers, resulting in a document that is customised for a particular purpose or transaction.

Robotic process automation (RPA)
A type of AI software programme that utilises machine learning to automate high-volume, repeatable processes or tasks that previously required a human to perform. RPA is different from standard automation as RPA software can be trained by demonstrating the steps in a process rather than by using code-based programming. RPA software interacts with the process in question (often another computer application) in the same way a human user would. This makes it more adaptable and more easily used by human end users. In a recent report on innovation in law, the Law Society highlighted various areas where RPA software could be used, including: Land Registry checks, populating Ministry of Justice forms, employment tribunal preparation, conveyancing processing and data room administration.

Technology assisted review
Encompasses many forms of electronic document review technology including predictive coding (which uses algorithms to identify relevant documents), visual analytics (communication mapping and topic grouping), and keyword and concept searching. This is an area of technology that has already been extensively adopted by the legal industry (e.g. in e-disclosure exercises), but which continues to develop in sophistication.

Blockchain technology
Software applications that deploy a blockchain. A blockchain is simply a digital record (ledger) of transactions that is distributed – i.e. identical copies of the ledger are maintained on multiple computer systems. Originally derived from the technology underpinning cryptocurrencies (such as Bitcoin). Further resources about blockchain technology and Smart Contracts are available on our website.

Smart contract
A set of contractually binding promises in digital form, and which also includes the protocols for automatically performing those promises. Smart Contracts typically rely on blockchain technologies. For further information about Smart Contracts see our article on Arbitrating Smart Contract disputes.

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Arbitrating Smart Contract disputes

Negotiation and drafting considerations

Written by James Rogers, Harriet Jones-Fenleigh and Adam Sanitt

Smart Contracts and the blockchain technology they use are hot topics in almost every industry sector. In this article, we explain what Smart Contracts are, the types of dispute that may arise when code and contract law intersect, and the role arbitration can play in resolving them.

What are Smart Contracts?

Despite the hype, there is a lack of understanding about what Smart Contracts are and how they work. The best description of a Smart Contract is: "a set of promises, specified in digital form, including protocols within which the parties perform on these promises" (Nick Szabo, Smart Contracts: Building Blocks for Digital Markets, 1996).

A drinks vending machine is a straightforward, early example embodying the characteristics of a Smart Contract. When money is paid, an irrevocable action is put in motion. Money is retained and a drink is vended. The transaction cannot be stopped in the middle of the process. The terms are, in a sense, embedded in the hardware and software that runs the machine.

A more recent example is a Smart Contract for a flood insurance policy, linked to a feed of precipitation data from the Met Office. When the data feed shows the threshold is met, the policy automatically pays out claims.

The key characteristics of the modern conception of a Smart Contract are

- Digital: it is in computer form – code, data and running programs.
- Embedded: contractual clauses (or equivalent functional outcomes) are embedded as computer code in software.
- Performance mediated by technological means: the release of payments and other actions are enabled by technology and rules-based operations.
- Irrevocable: once initiated, the outcomes for which a Smart Contract is encoded to perform cannot typically be stopped (unless an outcome depends on an unmet condition).

Corporates and financial institutions are developing a vast range of uses, from issuing and transferring securities, clearing derivatives, tracking the ownership of commodities for trade finance transactions, arbitraging energy consumption to passenger identity verification and ticketing.

Smart Contracts lie on a spectrum

- A contract may be written entirely in code.
- A contract in code with a separate natural language version.
- A hybrid or split model e.g. a contract in code incorporating by reference the terms of a natural language master agreement.
- A natural language contract with some encoded performance e.g. the payment mechanism.

Today's Smart Contracts are implemented in platforms that rely on what is referred to as distributed ledger technology (DLT) or often blockchain. DLT and blockchain enable parties (e.g. counterparties, banks, regulators and/or auditors) to come to a consensus over a shared set of facts.

In very simple terms, a blockchain operates as follows

- Identical copies of a ledger database are shared amongst a community of participating computers, called nodes.
- When a party wants to execute or record a new transaction, a request is sent to the network, where it is received for processing by the nodes.
- A consensus algorithm, administrator or sub-group of participants determines whether the request received is authentic.
- If so, the ledger is automatically updated with new "blocks" of data.

Some DLT platforms can also run programmes on each of the network nodes that use or add to the data on the ledger. Smart Contracts are implemented using these programmes. For example a blockchain may record ownership of a digital currency and a Smart Contract could include code that automatically transfers an amount of that digital currency to another account on the blockchain on the occurrence of a specific event.

Smart Contract disputes risks

Many technologists believe that Smart Contracts replace contract law and courts and tribunals with code. There is a misconception that, because they perform automatically and performance cannot be stopped, they remove the potential for disputes. At least for the moment, this is wishful thinking. Although Smart Contracts provide huge potential benefits in terms of reducing transaction costs and increasing security, disputes can and will arise. In fact, the intersection of contract law and code creates new areas of potential dispute.

For example

- Is the Smart Contract legally binding? In many common law jurisdictions, a contract can only be valid if it is entered into by a person (i.e. a human or legal person, such as a corporation) with legal capacity to do so. There is also common law authority (for example, in English law) that a contract cannot arise unless there is sufficient certainty over who the contracting parties are. Some civil law jurisdictions lay down other legal requirements for the formation of a legally binding contract.
- Coding errors may cause unexpected performance issues.
- There may be discrepancies between coding and natural language versions of a Smart Contract.
- Parties may want to terminate a Smart Contract for repudiatory breach or unwind it on the grounds of misrepresentation, mistake or duress.
- Subsequent changes of law or regulation (e.g. sanctions) may make performance of the Smart Contract illegal.
- Smart Contracts may perform on the basis of an inaccurate data feed.

Why include an arbitration clause?

Smart Contracts give rise to a number of dispute resolution challenges that make including a robust dispute resolution system key.

Difficulty identifying someone to sue
Smart Contracts can be executed pseudonymously. In those cases, it may be difficult to identify someone to bring a claim against. There may also be evidential difficulties in pinpointing who is responsible for loss that is caused by bugs in the operating system, corrupted messages or defective code.

Uncertainty over jurisdiction and governing law
As Smart Contracts operate via distributed nodes (computers) which may be based all over the world, it may be difficult to determine the applicable governing law and jurisdiction; it also increases the risk of satellite disputes over such issues.

Novel enforcement issues
One of the key characteristics of a Smart Contract, and what many see as an advantage, is that they are irrevocable and the transaction is indelibly recorded on the blockchain. However, this creates problems when a party is entitled to terminate or unwind a transaction and the record no long reflects the legal position.

> Arbitration is likely to emerge as the preferred means of resolving Smart Contract disputes and they will in turn drive innovation in the arbitration world.

Arbitration is likely to emerge as the preferred means of resolving Smart Contract disputes for a number of reasons, and Smart Contract disputes will, in turn, drive innovation within arbitration, as arbitral bodies and arbitration law and procedure adapt to meet the needs of new types of dispute.

Protecting proprietary information
Some Smart Contract disputes are likely to involve evidence about proprietary software and/or hardware. Where that is a risk and the source code and other proprietary information becoming public may have material commercial ramifications for one or both of the parties, it is preferable to agree that disputes will be resolved by confidential arbitration and to limit disclosure.

Tribunal with specialist technical knowledge
Some Smart Contract disputes will be fairly vanilla contract law disputes, but others will be of a highly technical nature, for example, where the code does not operate as expected. The courts in many jurisdictions are adept at getting up to speed with technical issues quickly, but the parties to a Smart Contract can agree an arbitration clause which enables them to appoint someone with, for example, an understanding of coding. The arbitral institutions are likely to develop specialist pools of arbitrators with relevant experience or published blockchain-tailored procedures over time.

Bespoke procedures and automated enforcement
Arbitration offers parties the potential to agree bespoke procedures that may help overcome the challenges presented by pseudonymity and the irrevocable nature of Smart Contracts. For example, the parties may agree to refer disputes below a certain threshold to a central blockchain administrator with the power to determine disputes and insert remedial transactions into the blockchain as necessary. Technologists are going a step further and looking at the idea of decentralised arbitration, whereby disputes in relation to Smart Contracts are referred to arbitrators selected at random, and their decision is then recorded on the blockchain.

A variation on this is where parties to a Smart Contract incorporate into the Smart Contract an agreement to refer disputes to arbitration and a mechanism to allow the arbitrator automatically to enforce any award without the intervention of a third party. For example, the "multisig" mechanism enables the parties collectively to nominate an arbitrator, which then triggers the power of that arbitrator to transfer assets or money on the blockchain.

Drafting arbitration clauses

Smart Contracts raise some interesting drafting considerations in respect of arbitration clauses.

Consent to arbitrate
Parties should ensure that they can establish consent to the arbitration agreement. This may be an issue in circumstances where the Smart Contract is entered into by a computer, is in code and/or and does not create legally binding contractual obligations under the applicable law.

Seat
Given the distributed nature of blockchain and the operation of Smart Contracts, it is important to agree a seat for the arbitration to avoid satellite disputes about the applicable seat and/or procedural law. Parties should check that the law of the chosen seat does not render a Smart Contract illegal or unenforceable, that the disputes likely to arise are arbitrable (in some jurisdictions for example, intellectual property disputes are not arbitrable), and that the codified arbitration agreement in question will be upheld and enforced by the supervisory courts.

Appointment of arbitrator(s)
Parties should weigh the importance of having a tribunal familiar with the technology against the importance of having the dispute decided by experienced contract lawyers. There is likely to be relatively little overlap between the two, so requiring both skill sets risks restricting the pool of potential arbitrators to such an extent that the arbitration agreement becomes unworkable in practice.

Formality requirements and enforceability of awards
Parties should ensure the arbitration agreement meets any formality requirements under the governing law of the arbitration agreement and Smart Contract, the law of the seat and wherever the award is likely to be enforced. For example, an arbitration agreement in code, or incorporated by code, may not meet the requirements for writing under the New York Convention 1958.

Confidentiality
A common mistake by parties is to assume that arbitration is by default confidential. That is not the case in all jurisdictions. If a desire for confidentiality is important, the parties should expressly agree in the arbitration agreement that they will keep the arbitration, together with all materials created and all documents produced in the proceedings confidential, except to the extent required for enforcement.

Further reading

For an in depth analysis of Smart Contracts and blockchain technology, see our publications:

- *Smart Contracts: Coding the fine print* (a legal and regulatory guide)
- *White paper: Can smart contracts be legally binding contracts?*
- *Unlocking the blockchain: A global legal and regulatory guide*

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Asymmetric arbitration agreements

A global perspective

Written by Sherina Petit, Katie Chung, Andrey Panov, Marc Robert, Benjamin Grant and Mina Morova
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This article examines the enforceability of asymmetric arbitration clauses agreed between sophisticated parties in a number of key jurisdictions.

One of the cornerstone principles of arbitration is that parties can agree how to resolve their disputes. Their agreement is often contained in the form of a contractually binding promise by each party to refer disputes to arbitration. Such an agreement is symmetrical – each party has the same right to invoke arbitration. However, it is not uncommon for parties to agree asymmetric, rather than symmetric, rights. The classic case is where only one party has the right to refer disputes to arbitration, but the other must litigate. Such asymmetric clauses are frequently used in financing transactions, where one party wishes to be sued only in its forum of choice (such as its home jurisdiction), but conversely wants the flexibility to enforce security and pursue assets against the other party wherever possible.

Enforcement of asymmetric clauses can be tricky. In some jurisdictions, there is a perception that they depart from the cornerstone principle of agreement between the parties. For example, in China, such clauses are prohibited. Users of asymmetric clauses must be aware of potential difficulties, to avoid being forced into litigation in an unfamiliar or unwanted forum.

Singapore

The Singapore Court of Appeal recently confirmed the validity of an asymmetric clause in *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] SGCA 32. The clause provided that at the election of one party (Dyna-Jet), a dispute may be referred to and settled by arbitration. Therefore, not only was the clause asymmetric and "lacking mutuality" but it was optional in that it depended on an election being made by Dyna-Jet. This is the first time that the Court of Appeal has ruled on the validity of an asymmetric and optional arbitration clause under Singapore law.

> Significantly, this is the first time that the Court of Appeal has ruled on the validity of an asymmetric and optional arbitration clause under Singapore law.

Upholding the High Court's decision, the Court of Appeal held that the dispute resolution clause was a valid arbitration agreement. The court held that, in establishing the validity of the arbitration agreement, it is "immaterial" that the arbitration clause is asymmetric and that arbitration of a future dispute entirely optional instead of imposing on parties an immediate obligation to arbitrate their disputes.

England and Wales

English courts have consistently found asymmetric clauses enforceable. The case of *NB Three Shipping v Harebell Shipping* [2004] EWHC 2001 (Comm) concerned an application to stay arbitration proceedings under an asymmetric clause. The shipowner was entitled to bring arbitration but the charterer was limited to High Court proceedings. Morison J noted the clause gave "'better' rights" to the shipowners but refused to stay the arbitration. However, in *Law Debenture Trust Corp v Elektrim Finance BV & Ors* [2005] EWHC 1412 (Ch), Mann J considered an asymmetric clause providing for arbitration but granting an option to one of the parties to litigate. In this case, the application to stay arbitration proceedings was granted as the right to seek arbitration was subject to the agreed option to litigate. These cases demonstrate that English courts will

give effect to the parties' chosen dispute resolution method irrespective of whether it is asymmetric.

This is reinforced in two recent cases on asymmetric court jurisdiction clauses. In *Barclays Bank plc v Ente Nazionale di Previdenza Ed Assistenza dei Medici e Degli Odontoiatri* [2015] EWHC 2857 (Comm), the High Court upheld a clause allowing one party to sue only in English courts but giving the other party a free choice, noting there were "good practical reasons" for the clause. Equally, in *Commerzbank AG v Pauline Shipping Limited Liquimar Tankers Management Inc* [2017] EWHC 161 (Comm) (still on appeal) the court held that asymmetric jurisdiction clauses are exclusive jurisdiction clauses for the purposes of Article 31(2) the Brussels 1 Recast Regulations. This is important as Article 31(2) provides that where there is an exclusive jurisdiction agreement, an EU Member State court is required to stay proceedings brought before it, until the court given jurisdiction under the parties' jurisdiction agreement declares that it has no jurisdiction over the dispute. The court noted that it would undermine the parties' agreement and foster abusive tactics if asymmetric jurisdiction clauses were treated as non-exclusive. These recent cases provide further comfort to those relying on asymmetric arbitration clauses. Even though they deal with a choice between courts rather than between arbitration and courts, the principle relied upon is the same – parties should be free to choose how to resolve their disputes and courts should respect that choice.

France

In *Sicaly*, Cass. 1st civ., 15 May 1974, the Cour de cassation upheld an asymmetric clause giving one party only the right to choose between a court or an arbitral tribunal.

However, since then, the Cour de cassation has issued some controversial decisions where it refused to enforce unilateral option clauses. Those cases arguably had no real bearing on asymmetric arbitration clauses since the option offered was between national courts. For instance, in the highly criticised *Rothschild* case (Cass. 1st civ., 26 September 2012, No. 11-26.022), the Cour de cassation held that an agreement providing an option to one party to choose between an indefinite choice of jurisdictions is void.

But in the recent *Apple* case (Cass. 1st civ. 7 October 2015, No. 14-16.898), the Cour de cassation clarified its position. The court gave effect to a clause that offered a rather limited choice to the beneficiary of the option, i.e. between the Irish courts, the court of the reseller's corporate seat (France), or "any jurisdiction where harm to [the reseller] is occurring". The court reached its conclusion on the basis that such a clause was foreseeable as the option permitted the identification of the jurisdictions before which the action could be brought.

Most scholars and practitioners are of the view that asymmetric clauses are valid under French law, provided that the choice offered to the beneficiary of the option is objectively limited and predictable.

In light of this latest decision, most scholars and practitioners are of the view that asymmetric clauses are valid under French law, provided that the choice offered to the beneficiary of the option is objectively limited and predictable.

Russia

The position under Russian law is complex and enforcement of asymmetric clauses can be problematic. In a widely reported case in 2012, the Presidium of the Supreme Arbitrazh Court (then the highest court for commercial matters) ruled that a clause which gave only one party an option to litigate in addition to the standard arbitration clause binding both parties, would be contrary to Russian law as it would give one party unfair advantage over the other and therefore contravene the equality of arms principle (see Resolution dated 19 June 2012 No. 1831/12 in case No. A40-49223/11-112-40). As a result, the court permitted both parties to bring claims before the Russian courts. In other words, the asymmetric clause was construed as a symmetrical one. Other courts, both before and since, have taken different approaches to this issue. In some, the court did not consider such asymmetric clauses to be problematic, whereas in others, the courts followed the view of the Presidium of the Supreme Arbtirazh Court.

Russian law does not appear, however, to require a simple symmetric arbitration agreement. Alternative dispute resolution agreements where both parties have a choice to refer a dispute to either a court or an arbitral tribunal appear to be valid and enforceable in Russian law. Likewise, a clause under which one of the parties can refer disputes only to arbitration, but the other is entitled only to litigate, has been held valid.

As enforcement of asymmetric clauses in Russia is complex, and much depends on the precise terms of the clause itself, careful drafting by an arbitration expert is required. Although Russian law permits some asymmetry in arbitration agreements, any outright attempt to give one party better rights than the other should be approached with caution.

India

The status of asymmetric clauses in India is unclear, in light of inconsistent decisions by Indian courts.

The starting point under Indian law is that there must be mutuality in an arbitration agreement. The Delhi High Court held that an asymmetric arbitration clause is not valid (nor indeed even an arbitration agreement) until the point at which the party exercises its option to arbitrate – prior to that, there is a lack of mutuality (*Union of India vs Bharat Engineering Corporation* ILR 1977 Delhi 57). However, the Calcutta High Court subsequently upheld the validity of an asymmetric arbitration clause (*New India Assurance Co Ltd v Central Bank of India & Ors AIR* 1985 Cal 76). The Calcutta High Court expressly declined to adopt the reasoning of the Delhi High Court and held that an asymmetric arbitration clause constitutes a valid arbitration agreement from the outset, albeit enforceable only by the party with an option to arbitrate. It is also likely that the Indian courts will take into account the balance of convenience, the interests of justice and similar considerations when deciding whether the Indian courts have jurisdiction under a contractual choice of forum or court clause. Indeed, such considerations may be "essential in the interests of international trade and commerce of the better relations between the countries and the people of the world" (see The Black Sea Steamship U.L. *Lastochkina ODESSA USSR v Union of India AIR* 1976 ANDH PRA 103).

Although not dealing with the point directly, more recent cases may indicate that the Indian courts are comfortable with some asymmetry between the parties' rights in arbitration clauses. Very recently, the Supreme Court of India in *TRF Ltd v Energy Engineering Projects Ltd* (July 3, 2017, Civil Appeal No. 5306 of 2017) reiterated that a clause entitling one party to appoint an arbitrator alone and without the input of the other is valid. The High Court of Judicature in Bombay also dealt with a clause whereby one party was solely entitled to appoint the arbitrator and did not consider it necessary to consider whether that aspect of the clause was valid (26 May 2017, Arbitration Application No. 65 of 2016).

> Although recent cases may suggest that Indian courts will permit some asymmetry in arbitration clauses, the position is far from settled.

Until the uncertainty caused by inconsistent decisions is resolved by the Supreme Court or the legislature, the position of asymmetric arbitration clauses under Indian law will remain unclear. Although recent cases may suggest that Indian courts will permit some asymmetry in arbitration clauses, the position is far from settled and parties should approach asymmetric clauses with caution.

Turkey

In recent years, Turkish courts have adopted an eclectic approach towards the interpretation of arbitration clauses.

A key prerequisite for the validity of arbitration clauses generally is that they are explicit and exclusive. The Court of Appeal favours a strict approach when analysing the parties' intent to arbitrate. Arbitration clauses that stipulate for both arbitration and state courts are deemed null and void generally. The choice of language is also important – the use of the word "may" instead of "must" or "shall" in an arbitration clause renders the clause invalid since it fails to establish an absolute intent to arbitrate (19th Civil Chamber, decision No. 2012/9080).

In a recent case, the Court of Appeal held that a clause which gave one party only a right to initiate both litigation and domestic arbitration while the other was restricted to litigation (11th Civil Chamber, decision No. 2009/3257) was invalid. The court cited reasons of due process and the right to be heard. (For example, the party with the right to go to arbitration could bar state court proceedings by invoking the arbitration clause, while the other party could not have recourse to arbitration at all.) The court also held that the intent to arbitrate was not clear and absolute since the agreement allowed one party to initiate both litigation and arbitration.

More recently, the Court of Appeal recognised the validity of an asymmetric court forum selection clause that gave one of the parties the right to bring proceedings before a foreign court as well as before the courts of the other party's country/place of business (11th Civil Chamber, decision No. 2016/4646).

Some view this as potentially indicating positive treatment of asymmetric international arbitration clauses by Turkish courts in the future. Whether this is correct remains to be seen. For now, the validity of asymmetric international arbitration clauses remains uncertain and such clauses should be approached with caution.

Conclusion

As can be seen, whether or not an asymmetric clause will be upheld depends upon which jurisdiction's courts will ultimately be called upon to rule upon its validity. Some courts, such as those in India and Russia, are uncomfortable with the proposition of a lack of mutuality between the parties or that one party may be at a disadvantage in choosing a dispute resolution forum. Others, such as those in England and Wales, Singapore and France, are comfortable giving parties more freedom in choosing how to resolve their disputes and are more willing to permit asymmetry between the parties' rights.

Parties wishing to include asymmetric arbitration clauses are well advised to consider carefully the approaches of the courts to such clauses in all relevant jurisdictions. It is essential to consider the commercial background to the transaction and identify which laws are likely to be relevant. Bearing in mind that an invalid arbitration agreement is a ground for resisting enforcement of an arbitral award, two critical considerations are the validity at the seat of arbitration as well as the governing law of the agreement. But parties should also consider validity in jurisdictions where an award might be enforced and any other jurisdictions where a party might seek to bring proceedings in breach of the arbitration agreement (for example, the parties' home courts). A careful analysis at the drafting stage can reduce the risk of only discovering that the arbitration clause is unenforceable at the point a dispute arises, and when it is most needed.

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Emerging approaches to the regulation of third-party funding

Recent global developments

Written by James Rogers, Alison FitzGerald and Cara Dowling

From recent global developments, three different approaches to the regulation of third-party funding in international arbitration can be seen to be emerging. In some jurisdictions, the legality of and rules around third party funding are legislated, whereas in other jurisdictions the legality of third-party funding is being developed on an ad hoc basis by case law. The third approach is essentially that of self-regulation, where in the absence of either legislative or judicial guidance, professional standards are being developed. In this article, we discuss recent examples of each approach.

The legislative approach

Hong Kong and Singapore

In June 2017, the Hong Kong legislature passed the Arbitration and Mediation (Third Party Funding) (Amendment) Bill into law. This new legislation expressly permits third-party funding agreements (TPFAs) and authorizes a body to issue a code of practice for third-party funders. The legislation requires parties to disclose to the arbitration body (which includes the arbitral tribunal) and opposing parties if a TPFA is in effect, along with the name of the third-party funder, either before arbitration commences or within fifteen days of the TPFA's adoption, whichever is earlier. While the legislation is in force, a specific code of practice has not yet been implemented.

Like Hong Kong, Singapore passed a Civil Law (Amendment) Bill in January 2017 to permit TFPAs for arbitration. Singapore considered that opening up to third-party funding of arbitration was necessary in order to remain a competitive international arbitration hub. The Singapore government also introduced the Civil Law (Third Party Funding) Regulations to set out eligibility requirements for third-party funders, including a requirement that third-party funders must have "paid-up share capital of not less than S$5 million". This recent legislation was accompanied by further amendments to Singapore's Legal Profession Act and Legal Profession Rules to promote counsels' duties to their clients and to require practitioners to disclose to other parties if a TPFA is in effect, along with the name of the third-party funder, on the commencement of arbitration or as early as practicable.

The Singapore International Arbitration Centre (SIAC) also issued its revised Investment Arbitration Rules in January 2017, which permit arbitral tribunals to order disclosure of the existence of TPFAs and names of third-party funders.

Ad hoc/juridical

England and Wales

In England and Wales, statutory amendments in the late 1960s abolished the torts and crimes of maintenance and champerty. Maintenance refers to an

unconnected third-party assisting to maintain litigation by providing, for example, financial assistance. Champerty is a form of maintenance where a third-party pays some or all of the litigation costs in return for a share of the proceeds. (We explored the history and development of these doctrines in issue 7 of our *International arbitration report*.)

Common law prohibitions on maintenance and champerty do still remain and such arrangements would be contrary to public policy and unenforceable as a result. The courts have, however, played a significant role in developing (i.e. relaxing) the rules on champerty and maintenance, particularly in respect of third-party funding.

In England and Wales, a third-party funding arrangement will generally only amount to maintenance or champerty where there is an element of impropriety such as disproportionate profit or excessive control of the proceedings on the part of the third-party funder. The English courts have gone further; actively promoting the important role third-party funding can play in providing access to justice and downplaying historic concerns over such funding, such as the risk of justice being corrupted and/or inappropriate third-party meddling in proceedings.

Australia and the United States
In other common law jurisdictions such as Australia and many states in the US, the approach of the courts to maintenance and champerty is similar to that in England and Wales and the judiciary tends to be supportive of third-party funding.

The courts in Australia (one of the most developed third-party funding markets) are more permissive than in England, finding that there is no public policy objection to a third-party funder not only financing but also controlling the proceedings with the aim of profiting from them.

In the US, where the third-party funding market is newer, the approach varies from state to state. In many states, in the absence of formal regulation, the courts have taken an active role assessing the validity and enforceability of third-party funding agreements. As in England, the common law doctrines of maintenance and champerty historically have formed the basis of challenges to such agreements. But there does seem to be a trend towards limiting the scope of those doctrines, with many states either abolishing them or dismissing them as not relevant to third-party funding agreements. There are a few states, however, where third-party funding agreements are considered to violate prohibitions on maintenance and champerty. In some of those jurisdictions, regulation (as opposed to prohibition) of third-party funders has been introduced.

Ireland
The Irish approach, however, is quite different. In Ireland, maintenance and champerty remain criminal offences. In May 2017, in *Persona Digital Telephony Limited & Sigma Wireless Networks Limited v The Minister for Public Enterprise, Ireland and the Attorney General*, [2017] IESC 27, the issue of whether third-party funding arrangements amount to maintenance and champerty came before the Supreme Court of Ireland. The court held that an agreement by a professional third-party funder to fund a plaintiff's case was champertous "as described in case law by the High Court and this Court over the last four decades" and therefore was not permitted. In coming to its decision, the court noted that "[c]hamperty remains the law in the State", however, it stated that modernizing Irish law on champerty and third-party funding was not for the courts but was instead better suited for a "full legislative analysis".

Legal commentators have since noted that this decision leaves Ireland lagging behind other common law jurisdictions. It remains to be seen whether Ireland will follow the example of Hong Kong and Singapore, to legislate to permit third-party funding.

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Self-regulation/professional standards

France
Third-party funding is not prohibited in France but it is not expressly permitted by any legislation. Case law on third-party funding is limited. In the absence of legislative or judicial guidance, on 21 February 2017, the Paris Bar Council adopted a resolution to provide guidance for counsel in respect of third party funding in France.

The resolution confirms that there is nothing in French law precluding parties from using the services of third-party funders to finance international arbitration. The resolution goes further to endorse the practice of third-party funding as being in the interests of both parties and counsel, particularly in the context of international arbitration. However, it reiterates that counsel must abide by their professional and ethical obligations and further mandates that: (i) counsel should not provide legal advice to third-party funders; (ii) counsel should only take instructions from their clients; and (iii) counsel should only meet with third-party funders in the presence of their clients. The resolution also recommends that counsel encourage their clients to disclose third-party funding arrangements to arbitral tribunals in order to avoid potential issues with enforcing arbitral awards.

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Procedural innovations in arbitration

Increasing efficiency and reducing costs

Written by Yaroslav Klimov and Andrey Panov

This article discusses various innovative procedural features introduced in recently adopted institutional arbitration rules, such as emergency arbitrators, expedited arbitration and summary procedures, which are designed to increase efficiency of arbitral proceedings. Most practitioners will be familiar with these concepts, but the following provides a useful summary for those less familiar with the arbitration rules of the major arbitral institutions.

The transformation of arbitration

Once touted as a cost effective and flexible procedure, arbitration is facing increased criticism for the substantial time and costs involved and increasingly for the standardization of procedures. In theory, significant savings in time and costs should be possible in arbitration, given that parties and arbitrators can agree to tailor proceedings to the specific case. For example, whilst extensive document production, numerous exchanges of lengthy pleadings and expert reports followed by prolonged evidentiary hearings may be appropriate and indeed necessary in certain complex cases, they are often not appropriate for smaller cases and lead to unnecessary and disproportionate delay and expense.

But in practice it can be difficult to obtain party agreement, even if only on procedural issues, once a dispute has arisen. There are various reasons for this. It is partly due to the fact that with increasingly large sums in dispute and greater transparency (and therefore scrutiny) of arbitral awards, counsel face increasing pressure to exploit every opportunity to advance their client's position, and in some instances that may mean delaying tactics or putting pressure on their opponent by driving up costs. Arbitrators can find it difficult to manage such conduct as they are under pressure to protect their awards from challenges, which means ensuring that parties are given every opportunity to present their case fully.

This is where arbitral institutions can play a useful role. Most major arbitral institutions now offer tools to assist parties and arbitrators to make appropriate case management decisions and most institutional rules contain provisions designed to ensure a proportionate arbitration procedure.

Customisable arbitration clauses

Parties can, of course, customize their arbitration agreements to provide for an arbitration procedure that is tailored to the parties and the types of dispute that might arise between them. For example, parties can limit certain procedural stages of an arbitration, most notably the document production phase. Providing for a sole arbitrator in appropriate cases could reduce time in various ways, including the time for formation of the tribunal and potentially for deliberation on and issue of the award.

The Swiss Chambers' Arbitration Institution (SCAI) recently introduced an interactive tool to help users customize their arbitration clauses. Users can select up to four additions to a model clause (from abridged time limits to documents-only arbitration) and the online system will generate a customized clause for inclusion in the contract. Even though

the options are limited, this tool is a useful starting point to encourage parties and counsel to think about what might be needed for a particular dispute in the future.

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) is another institution that offers a range of standard clauses with various options. The SCC's clauses are not presented in as technologically advanced format as the SCAI's tool, but they remain useful for adapting the dispute resolution provision to the needs of the parties to a particular contract.

> Prioritizing and investing time in the negotiation of a tailored arbitration clause could save parties significant cost, time and aggravation in the event that a dispute arises.

In practice, the option to tailor the arbitration clause is underutilised. Dispute resolution clauses are all too frequently included at the eleventh hour based on a standard form template and without adequate (if any) input from a dispute resolution specialist. This is regrettable as prioritizing and investing time in the negotiation of a tailored arbitration clause could save parties significant cost, time and aggravation in the event that a dispute arises. That said, care must be exercised when drafting bespoke arbitration clauses, as unclear drafting may lead to additional disputes over what the parties intended or even render the clause unenforceable.

Emergency arbitrator

The formation of the tribunal, particularly when a panel of three arbitrators is to be appointed, can take significant time. This may be particularly frustrating, or indeed damaging, when a party requires urgent relief to preserve the status quo between the parties.

To address this, most arbitral institutions have introduced so-called emergency arbitrator mechanisms into their rules. Parties may apply to the arbitral institution for appointment of an emergency arbitrator, prior to the formation of the tribunal, specifically to deal with urgent interim measure applications. In appropriate cases, a party can obtain relief relatively quickly, before formation of the tribunal and without having to resort to the courts. Any orders by an emergency arbitrator are temporary and may be varied or upheld by the substantive tribunal appointed in due course. This has consequences for enforcement, as not all jurisdictions will recognize a decision of an emergency arbitrator as an award for purposes of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. Nonetheless, emergency arbitrator applications are increasingly common and are seen as an important means of restraining or compelling the conduct of an adversary.

Expedited formation of the tribunal

Some arbitral rules also provide for expedited formation of the tribunal. For example, under the London Court of International Arbitration (LCIA) Rules, in cases of exceptional urgency, a party may apply for expedited formation and, if granted, the LCIA Court can abridge any period of time relevant for the tribunal formation. The parties can have a fully-functional tribunal in place much more quickly than in accordance with normal procedure – weeks instead of months.

Expedited proceedings

Perhaps the best way to reduce the time and cost of arbitration is to condense or eliminate certain stages of the process. Parties can agree, either in advance or with the tribunal, a condensed or fast track (expedited) procedure. The procedure can be bespoke or parties may choose to adopt institutional expedited procedural rules, such as the SCC Expedited Arbitration Rules.

The rules of other leading arbitral institutions provide that an expedited arbitration procedure will apply by default if a case meets certain criteria, with reference to the value in dispute and/or complexity. The International Chamber of Commerce (ICC) recently adopted amendments to the ICC Rules of Arbitration to introduce an expedited procedure which will apply to all cases in which the amount in dispute does not exceed US$2 million, if the arbitration agreement is entered into after 1 March 2017 (or if the parties agree to opt-in to the mechanism). The International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry (the ICAC) also provides for an expedited procedure in its recently updated rules. While proceedings at the ICAC are already relatively quick and awards are often rendered within 6 months of the formation of the tribunal, under the expedited procedure the case should be completed within 120 days of the tribunal's formation.

Although the specific rules differ, generally expedited arbitration rules include

- Preference for a sole arbitrator, where possible.
- Abridged periods of time for relevant procedural actions, in particular for delivery of the award.
- Right of the tribunal to limit written submissions and evidence, including document production.
- A presumption in favour of document-only arbitration, i.e. without an oral hearing.

Expedited procedures have proven popular: as of 2016, 28 percent of SCC cases were administered under the Expedited Arbitration Rules; around 40 percent of cases under the Swiss Rules were resolved by expedited procedure; and some 30 percent of both the ICC's and ICAC's caseload also fell under the rules for expedited procedure.

Summary procedure

An unmeritorious claim or hopeless defence can be particularly frustrating in arbitration, as traditionally arbitration has lacked a summary dismissal mechanism. Some institutions have moved to change that.

The first arbitral summary procedure was introduced by the Singapore International Arbitration Centre (SIAC) in 2016, but the SCC was quick to follow in 2017. Under the SIAC Rules, a party may apply for early dismissal of a claim or defence if: (i) a claim or defence is manifestly without legal merit; or (ii) a claim or defence is manifestly outside the jurisdiction of the tribunal. The SCC Rules appear to be somewhat broader, as the tribunal (upon the request of the party) may determine one or more issues of fact or law by way of summary procedure, i.e. without undertaking every procedural step that might otherwise be adopted. The issues to be determined by way of summary procedure may concern jurisdiction, admissibility or the merits of the case. Under both sets of rules, the application can only be determined after each party has had an opportunity to be heard.

It is not yet clear how extensively these provisions will be used. Nor is it clear how resulting decisions and orders will be recognised and enforced. However, the idea of granting tribunals powers to dispose of certain issues by way of summary procedure should be welcomed. It remains to be seen to what extent other institutions will follow suit.

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Reform of international arbitration law in Canada

Ontario paves the way

Written by Pierre Bienvenu and Jean-Christophe Martel

Under the impetus of the Uniform Law Conference of Canada (ULCC), Ontario recently became the first province to update its international commercial arbitration regime since the initial wave of arbitration legislation following Canada's accession in 1986 to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

The new Uniform Act

The ULCC, a century-old institute composed of provincial and federal government representatives and charged with promoting uniformity of the law across Canada, developed the first version of the Uniform International Commercial Arbitration Act (Uniform Act) in 1986. The Uniform Act was subsequently adopted by Ontario (in 1990) and many other Canadian provinces, occasionally with minor modifications.

Over the last decade, however, the need for modernizing this legislation became increasingly acute. Growing confusion regarding discrepancies between and among provincial and federal international commercial arbitration Acts along with the 2006 amendments to the UNCITRAL Model Law led to the development and adoption of a new Uniform Act in April 2014 (2014 Uniform Act). Until recently, the 2014 Uniform Act had not been implemented in any province.

> Ontario updates its international arbitration regime with the adoption of a new International Commercial Arbitration Act.

Ontario updates its international commercial arbitration regime

Building on the ULCC's 2014 Uniform Act, Ontario updated its international arbitration regime with the adoption of a new International Commercial Arbitration Act (Ontario ICA Act), in force from 22 March 2017. A key feature of the Ontario ICA Act – and one which may come as a surprise to many international arbitration practitioners – is that Ontario has only now formally incorporated the New York Convention into its legislation. The 2017 Ontario ICA Act also clarifies that the New York Convention applies equally to arbitral awards and agreements made before or after the entry into force of the Act. Doubts over the applicability of the New York Convention resulting from the repeal in 1990 of the Foreign Arbitral Awards Act have now been permanently dispelled.

Like the 2014 Uniform Act, the Ontario ICA Act also implements the 2006 amended version of the UNCITRAL Model Law. Key changes include the expansion of the notion of "writing" as a requirement for the validity of arbitration agreements and the clarification of the scope and availability of interim relief from an arbitral tribunal – the Ontario ICA Act now expressly recognizes an arbitral tribunal's power to order interim measures, including injunctive relief and security for costs, and provides for such orders to be recognized and enforced by the Superior Court of Justice.

Finally, the reform of Ontario's international arbitration regime also served as an opportunity for Ontario to

address the controversial 2010 Canadian Supreme Court ruling in *Yugraneft Corp. v Rexx Management*, 2010 SCC 19. In that case, the Supreme Court held that enforcement of foreign arbitral awards was subject to the standard two-year limitation period applicable to any cause of action in Alberta, rather than the ten-year limitation period for enforcing judgments. The Ontario ICA Act now imposes a ten-year limitation period for enforcing arbitral awards. This and the other changes implemented in the new Ontario ICA Act are meant to send an unequivocal signal that international arbitration is not a second-class form of dispute resolution and that it will be afforded utmost protection by courts of law in Ontario.

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Might foreign investors sue the UK for regulatory change post-Brexit?

Frequently asked questions about investment protection and Brexit

Written by Sherina Petit and Matthew Buckle

Might foreign investors be able to sue the UK for regulatory change that will follow Brexit?

That is a question which has triggered a lot of debate. Some of it is a little hysterical: there is no realistic prospect of suing simply "for Brexit", for example. But Brexit will almost certainly bring about significant regulatory change and it is likely that this will have some impact upon investments made in the UK before the referendum on leaving the European Union. This means that it is legitimate to ask whether such changes in the regulatory and investment climate following Brexit might give rise to sustainable claims against the UK Government. We know that the UK Government's view is that the short answer to this question is "no". But in reality the short answer is that "no-one can know yet". First of all, whilst there can be no doubt that Brexit will present enormous challenges, we don't know precisely the nature of the regulatory landscape post-Brexit and the negotiations have to play out. But that said, the question arises because we live in uncertain times. It's natural that foreign investors are looking again at the investments they have made in the UK, and at how those investments are protected under international law.

What mechanics exists for such claims?

The UK has made promises in various bilateral investment treaties (BITs) agreed with foreign states. Those BITs contain rights for qualifying foreign investors to bring claims against the UK in investor-state arbitration. So the basic mechanics are there for a suit against the UK, in the right circumstances.

The UK's BITs contain "Fair and Equitable Treatment" protections and this is a broad, adaptive standard (the FET standard). It is something of a "catch-all" for claims that don't fall into some of the more clearly defined aspects of BIT protection, such as direct expropriation. And critically in this context, we know that in arbitration, one tribunal can see things slightly differently to another tribunal.

How have arbitral tribunals considered the FET standard in the past?

What we see from the jurisprudence emerging on the FET standard, is that it will protect a foreign investor from host-state misconduct such as arbitrariness and bad faith, denial of justice and a lack of transparency. And then, broadly and dependent on the facts, it will also protect the investor's "legitimate expectations". Now that of course is again a broad concept. But there is at least some consensus that, given the right fact pattern and the wrong kind of Brexit, foreign investors might be able to show that the regulatory environment that existed when they made their investments in the UK will have changed significantly enough that their legitimate expectations have been impacted such to found claims.

Is there precedent for such claims? Will the floodgates open?

We have seen significant numbers of investment claims follow regulatory change before: in Argentina of course, and in Spain where the shift in renewable energy policy to remove or significantly reduce feed-in tariffs and other incentives triggered claims. Might there be a similar rush to file against the UK? We will have to wait and see.

What are the hurdles?

There will be hurdles to successful claims. As noted above, it would take a particular fact pattern, dependent on the precise deal that is ultimately struck with the EU and what that means for regulatory change and/or impact on investments in the UK. There is also

a real question over whether Brexit and its consequences could properly be attributed to a sovereign act of the UK. Whilst the triggering of Article 50 specifically was clearly an act of Government, the precise consequences in terms of regulatory, tariff and pass-porting changes will effectively be imposed from outside the UK. Also BITs protect investment measures rather than trade measures.

In addition, there is the fact that Brexit, whilst not widely forecast, was not a totally fanciful risk: the promise of a referendum was part of the Conservative party's manifesto in 2015, the referendum was in 2016 and the final outcome of Brexit is unlikely to be known until 2019. Even well before all that, the UK Independence Party (which campaigned for Brexit) had existed since 1993 and saw a significant share of the vote at the European elections in both 2004 (taking 15 percent vote share) and 2014 (when it took 26 percent, the largest share of the vote of any single party).

Finally, as we've seen in the *Phillip Morris* case and others, Tribunals are willing to accept an "acceptable margin of change". In other words, the FET standard is not a guarantee against novel state action, and Tribunal's accept that states must be free, within some acceptable tolerance, to judge what is in the public interest and to legislate in pursuance of that. How this concept might apply to Brexit remains to be seen. In particular, if Tribunals are willing to tolerate some legislative change in pursuit of a government's judgment as to what is in the public interest, there is arguably an even greater need for tolerance where (as with Brexit) the public interest in question is the directly democratic expression of the public itself.

What is certain however is that any claims against the UK government for Brexit would be highly controversial – legally and politically.

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