CROSSING BORDERS
International Arbitration Insights

10th Edition
Welcome to the 10th edition of Crossing Borders, in which we are using our anniversary to look 10 years in to the future and ask: What will arbitrations be like going into 2028? Where will disputes be decided? How will they be decided, by whom, and what disputes will be in front of them?

First, however, Daniel Xu, Wilson Antoon and Edmund Northcott look back 10 years to 2008, and identify the key developments we have seen in the last decade. They find, that whilst there has been discontent with the system of investor-state dispute resolution (ISDS), commercial arbitration has seen positive developments in terms of growth, diversity and transparency, and the future for arbitration looks bright.

We then travel forward to 2028. Daisy Mallet, Guan Feng and Holly Blackwell examine the resurgence of the courts in resolving international disputes, and Dorothy Murray and James McKenzie foresee a risen East in terms of arbitral centres and practice, especially given the dominance of Belt and Road Initiative (BRI) project disputes in the global landscape of 2028. Meg Utterback examines the way Digital Ledger Technology (DLT) is changing the way business is done and foresees a future of smart contracts and digital currency executing BRI projects. Paul Starr, Nicholas Lee and Felicity Ng then review key findings from the Queen Mary Survey and, gazing into their crystal ball, predict that Hong Kong will eclipse other venues as the dispute resolution centre for years to come.

In keeping with our “10” theme, we also bring you:
- 10 predictions about international arbitration in 2028 in a post-Brexit UK;
- 10 issues to bear in mind in relation to arbitral confidentiality;
- 10 arbitration centres you may not have heard of, but should consider; and
- 10 things you need to know about the new draft amended ICSID rules.

Finally, we have the latest arbitral news and developments from key regions: the EU, Mainland China, Hong Kong SAR and Dubai.

Your key international arbitration contacts

Meg Utterback
Global International Arbitration Coordinator, Partner
London
T +44 20 7550 1524
meg.utterback@eu.kwm.com

Paul Starr
Global International Arbitration Coordinator, Partner
Hong Kong
T +852 3443 1118
paul.starr@hk.kwm.com

Dorothy Murray
Partner
London
T +44 20 7550 1521
Dorothy.Murray@eu.kwm.com

Huang Tao
Managing Partner, Dispute Resolution & Litigation
Beijing
T +86 10 5878 5029
huangtao@cn.kwm.com

Peter Pether
Managing Partner, Dispute Resolution & Tax
Sydney
T +61 2 9296 2416
peter.pether@au.kwm.com

Tim Taylor QC
Partner
Dubai
T +9 71 4 313 1702
Tim.Taylor@me.kwm.com

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The last ten years have been a tumultuous time for the world at large, let alone arbitration. The shockwaves emanating from the Global Financial Crisis (the “GFC”) fuelled a rise in nationalist politics and the resulting reactions against globalisation led to some key milestones in modern history: the election of President Trump of the United States and the United Kingdom’s decision to exit the European Union have been coupled with the rise of China as a superpower, a new low in Western relations with Russia and North Korea’s nuclear brinkmanship. Could we have predicted these? Unlikely! Yet what is interesting is that this decade has mirrored a similar discontent surrounding arbitration and especially investor-state dispute settlement (“ISDS”). On the commercial side of arbitration, the previous decade has seen a continued growth in caseload (despite challenges from new international commercial courts), improvements in diversity, a wider variety of nationalities involved as parties and a continuing debate between confidentiality and transparency. This article will look at what has happened over the past ten years; the good, the bad and the ugly, and try to set the scene for the future-looking articles elsewhere in this special 10th edition of Crossing Borders.

The rise (and fall?) of ISDS

ISDS saw a huge rise in the number of cases filed in the period 1993-2012, with a cumulative total of 514 cases and a record 58 cases (at least) filed in 2012.1 This sudden rise can be largely attributed to the number of claims arising out of Argentina’s debt crises in 2001 and the GFC. Nevertheless, with the rise in the number of ISDS claims, came the ensuing rise in awards issued against defending host states. Such states were typically developing nations, rich in natural resources, fraught with economic and political turmoil, which had concluded a batch of bilateral investment treaties (“BIT”) in the early 1990s (before this rise of ISDS, which would herald a more cautious approach by host states). For example, Argentina, Ecuador and Venezuela were all on the receiving end of substantial damages awards in the mid-2000s which they struggled to afford, and this became a running theme. Host states began to wise up to the fact that whilst ISDS provided a predictable and stable arrangement for investors, it offered fewer benefits for the states themselves.

A paradox developed whereby the foreign direct investment flowing into these developing nations was negated by the outflow of damages awards. By the end of 2012 the average damages award was USD 81.4 million,2 and the defendant countries were all developing nations. Developing nations could neither afford to pay the damages award nor put in place measures to prevent investors bringing claims. States began terminating their BITs and withdrawing from the International Centre for Settlement of Investment Disputes (“ICSID”). Venezuela, Ecuador and Bolivia withdrew from the ICSID Convention between 2007 to 2012, Venezuela terminated its BIT with the Netherlands in 2008 and in 2013 Ecuador signalled its intention to terminate all of its BITs (and had withdrawn from 13 by 2014).

The host-states’ concerns and criticisms of ISDS also led to an ever-increasing number of refusals to pay damages awards. By 2012, Argentina had refused to pay USD 300 million to US investors alone, as a result of claims arising from its debt crisis. This resulted in a Presidential Proclamation by the US in the same year, suspending Argentina’s benefits under the US Generalized System of Preferences.3 However, even more developed countries, such as South Korea, have also refused to enforce damages awards, showing this behaviour is not isolated to South American nations with less stable economies. This attitude towards ISDS is likely to nurture a shift towards host states preferring disputes to be settled in their national courts. This trend would discourage foreign direct investment into these developing nations. An investor cannot guarantee the safeguarding of its investments, resulting in a vicious cycle whereby the countries in need of investment cannot attract investors who want the protection ISDS offers.

By Daniel Xu (Dubai), Wilson Antoon (London) and Edmund Northcott (London)

Notes:


Furthermore, there has been a steady increase in the number of annulment applications against ICSID-rendered awards. Between 2001 and 2010 there were twenty-six annulment applications in total, compared to 2017 alone, where there were 82 annulment cases, 30% of which ended in a full or partial annulment.4

**How ISDS could survive the next ten years**

It appears that host-states' main gripe with ISDS boil down to its lack of accountability and the inability to appeal arbitral awards. A return by some nations to the Calvo Doctrine, whereby states exclude arbitration clauses in favour of having disputes settled in the national courts, is looking likely. The rise of nationalistic politics has also led to President Trump's desire to re-negotiate the North America Free Trade Agreement (the investment treaty with the second highest total number of claims filed under it to date), and is likely to result in isolationist, anti-ISDS policies.5

All is not lost. To appease the host states and mitigate these negative trends, there are a number of methods ISDS can employ:

**An investment arbitration court:** A centralised arbitration court is likely to be popular amongst host states seeking to revert to judicial review in their national courts. Permanent arbitrators, a codified appeals system and possibly a binding system of precedent would offer states the accountability, transparency and enablement they are craving. One current example has already been included in the latest draft of the Canada-EU treaty ("CETA") and it includes a permanent roster of arbitrators and an appellate tribunal.

There has also been a recent rise in jurisdictions attempting to capture market share of the cross-border disputes or regain ground on arbitral centres. The Singapore International Commercial Court (the "SICC") is one such example. Established in 2015, it aims to offer international parties the best parts of arbitration and litigation. The SICC has experienced a steady growth in its caseload since its inception, with 17 cases on its books in 2017.6 Such international courts might appeal to those host-states disillusioned with ISDS, but not capable of offering reliable judicial review in their own national courts, when they come to negotiating a dispute resolution clause in their next BIT. It would not be surprising for more courts to start positioning themselves in a similar way following the SICC's initial success.

**Compulsory conciliation:** At present, attempts to settle arbitrations in the pre-action phase are often fruitless. An alternative is to include a compulsory conciliation or direct negotiation provision in arbitration agreements, forcing the parties to attempt an amicable settlement. Japan has used negotiated settlements, mediation and conciliation to profound effect, Japanese investors only ever initiating three known ISDS claims.7 A pioneering initiative is the establishment of the Singapore Mediation Convention ("SMC"), which aims at facilitating the enforcement of settlement agreements by allowing the enforcing party to go directly to a court in a country where enforcement is sought. The SMC has been approved by UNCITRAL and is expected to be signed in August 2019. These endeavours directly address an issue that continues to pervade ISDS, namely cost. Arbitrations are becoming more expensive and drawn out, therefore nipping the claim in the proverbial bud at the conciliation stage, would benefit everyone.

**Update the arbitration rulebook:** ICSID is undergoing a review of its rules in order to update them (a first draft of which were published on 2 August 2018). Similarly, the latest UNCTAD report shows that new BITs and international investment agreements include more progressive clauses, which again, should assuage some of the criticism levelled at ISDS.8 For example, Canada and Chile updated their Free Trade Agreement most recently in 2017 to include a provision on corporate social responsibility and enjoining the parties to adopt a permanent multilateral tribunal.9 Similarly, in October 2017, Bangladesh and India signed the Joint Interpretative Notes for their BIT. The Notes clarify BIT provisions, such as the definitions of ‘investor’ and ‘investment’ – critical in determining any ISDS claim.10 The problem is that it takes time and ISDS needs to be nimble enough to react in this fast-changing geo-political environment.

**Staying commercial: variety, diversity, transparency**

Despite this article’s focus on ISDS, it must not be forgotten that most arbitrations are commercial rather than investment-based. In terms of which sectors dominate commercial arbitration, commodity disputes made up the bulk of the claims decided by the London Court of International Arbitration ("LCIA") in 2008 (around 30%),11 whereas energy and resources and banking and financial services disputes each made up a quarter of LCIA claims in 2017. It appears that the financial sector is gradually putting arbitration to use in the manner many predicted following the GFC.

Another relatively untapped market for arbitration is also showing signs of growth: sub-Saharan Africa. According to the ICC's statistics, 2017 saw a 40% increase in cases involving parties from sub-Saharan Africa, 153 in total of which 64 involved claimants from the region.12 We believe this trend will continue with China’s BRI Initiative, which has already had a significant impact on Africa’s infrastructure.

Commercial arbitration has experienced similar challenges to ISDS from the likes of new international courts,13 but where commercial arbitration has been blazing a trail is in diversity. A good example is the Arbitration Pledge. Started in 2015, this is an award-winning movement aimed at improving female representation on arbitral tribunals. To show how significant this movement has been, in 2008 the LCIA did not even publish their gender diversity statistics for tribunals, whereas in 2017 34% of LCIA arbitrators were female and parties proposed a female arbitrator 17% of the time (a four-fold increase on 2016 figures).14 Even more impressive, and a long time coming, is the ICC’s achievement in securing gender equality on the ICC Court during its 2018-2021 term, with female court members rising from 23% to 50%.15

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8 ICSID's proposed amended rules are addressed in our article ‘10 Things you need to know about the New ICSID Rules’ and can be viewed at https://icsid.worldbank.org/en/Documents/Amendments_Vol-One.pdf.
10 Ibid.
11 Ibid.
14 Guan Feng and Daisy Mallet examine this trend in their article ‘The Rise of the Courts’.
Finally, transparency. In-house counsel contributing to the 2015 and 2018 Queen Mary Surveys noted that confidentiality and privacy was one of the top three characteristics of why they chose arbitration, yet in order to modernise and stay relevant arbitration needed to increase its transparency. There have been some examples of improved transparency which do not encroach on the parties’ confidentiality: (i) the amended Article 11(4) of the ICC Rules allows the ICC Court to provide reasons for its decisions in certain matters (e.g. appointment, removal, challenge or replacement of an arbitrator) as the strict wording, and the reasons for such decisions shall not be communicated” was removed from the 2012 ICC Rules; and (ii) the new opt-out provision of Article 41 of the 2018 Rules of Arbitration and Conciliation of the Vienna International Arbitral Centre (“VIAC”) which permits the VIAC to publish anonymised summaries or extracts of awards (a practice the ICC also conducts). Since the introduction of the provision this year, VIAC has published a selection of 60 awards.

Arbitration on the move, or not

Despite the rise in the number of new arbitration centres, the ‘elite seats’ of London, Paris, Singapore, Hong Kong, Geneva, New York and Stockholm remain dominant, with London continuing its supremacy at the top of the league table in terms of popularity. The rise in popularity of Hong Kong and particularly Singapore reflects the increased case load coming out of Asia. The Singapore International Arbitration Centre (“SIAC”) had 86 cases filed with it in 2007, compared with 343 filings in 2016 (which was a 27% rise on 2015’s total). This growth even outstripped the LCIA, which experienced a small downturn in growth during the same period.

From the latest Queen Mary Survey, it appears that Brexit will not have as detrimental effect on London’s position as the preferred arbitral seat. There is a chance, albeit a small one, that it may even bolster London’s attractiveness by increasing its independence from Europe and could revolve the anti-suit injunction, but it is likely that if there is any impact it will likely be negative and could result in the other elite seats receiving a few extra ‘referrals’.

China

China’s rise in the past 10 years has been almost unprecedented in terms of economic growth and global expansion. In particular, China’s Belt and Road policy has the potential to reform the economic and geopolitical landscape, but it will also be a great source of investment disputes. With the policy still in its infancy, disputes are yet to take off, but many expect Shanghai, Hong Kong and Singapore’s respective arbitration institutions to be the go-to centres to settle any disputes and not forgetting the SICC, which could be a strong contender given its position in the region. China has recently established the China International Commercial Courts (“CICC”) specifically to deal with Belt and Road disputes, with courts to be based in Shenzhen and Xian. Whether parties will agree to have their disputes settled in the CICC is another question, of course.

Costs

The idea that arbitration is cheaper than litigation is now a myth which cannot be spun to prospective parties to a claim. An ISDS claim on average typically takes four years and will cost a claimant USD 6,019 million (a rise of about USD 1.5 million since 2012) and a respondent USD 4,855 million. The tribunal’s costs usually come in at around the USD 1 million mark, but the pressing issue is the lack of certainty (and consistency) of the recoverability of costs for the winning party. Figures show that the successful party only recovers some portion of their costs in 51% of cases, and successful investors are more likely to recover than successful states (58% vs. 47%). Considering the significant costs involved these days, there have been calls that arbitrators should employ a ‘costs follow the event’ approach as an express, but rebuttable, presumption. ICSID is listening and is considering including this measure in its new set of rules, the committee’s reports on which are set to be published shortly, which will offer guidance as to the direction the new ICSID rules are heading.

With rising costs we have seen a paralleled rise in third-party funding (“TPF”) in the arbitration space, which has been recognised and subsequently enabled by institutions and courts: Hong Kong enacted the Arbitration and Mediation Legislation (TPF) (Amendment) Ordinance on 23 June 2017, Singapore made several amendments to its Civil Law Act in March 2017 and the English Commercial Court confirmed in Essar Oilfields Services Ltd V Nor Scot Rig Management Pty Ltd [2016] EWHC 2361 (Comm) that an arbitrator may award costs incurred by a successful party to an arbitration for engaging a third-party funder. Early disclosure of TPF is strongly advisable to take advantage of these radical new rules.

Commercial arbitrations tend to be more expensive than a comparable commercial court claim (at least in England and Wales), Again, controlling costs is a “hot” topic (has been since 2008 and will be in 2028).

Conclusion

ISDS has suffered a rough ride in the past 10 years, but in its defence so has the rest of the world, and ISDS is still standing. To look on the bright side, these tumultuous years have highlighted ISDS’s deficiencies in the eyes of the host-states and the claimant-investors and thereby acted as a catalyst for change. Whilst the theme for ISDS for the last 10 years has been somewhat gloomy, life on the commercial side of the fence has seen some positive developments in terms of growth, diversity and transparency, which we foresee feeding into, and strengthening, ISDS. Reform within investment arbitration is moving at a faster pace than ever before and, as our other articles show, although Trump might be trying to make the future orange, the future is bright for arbitration.

17 For a more in-depth look at transparency see Emily Crossgrove and Acacia Hosking’s article, “Open Up! How far should transparency in international commercial arbitration go?”, https://www.kwm.com/en/p/knowledge/insights/how-far-should-transparency-in-international-commercial-arbitration-go/20180812
24 For more insights into the Queen Mary Survey, see Paul Starr’s, Felicity Ng’s and Nick Lee’s article, ‘The Queen Mary Survey – Our Crystal Ball into the Future’ on p.17.
25 A prediction supported in our article on p.26 “10 predictions about international arbitration in 2028 in a post-Brexit UK”.
28 Dorothy Murray and James McKenzie look at arbitration’s bright future in their article ‘Domo Arbitrato, Mr Roboto: where and under what rules will we be arbitrating commercial arbitration claims in 2028’.
Arbitration arose as a private out-of-court means to resolve disputes. Features such as party autonomy, confidentiality, flexibility, neutrality, and finally attracted users. Ease of enforcement stemming from the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), for the most part, secured its place as the preferred forum for resolving international commercial disputes. However, some of these very features that made arbitration attractive have generated scrutiny in more recent years. Perceived shortfalls include lack of efficiency, undisciplined application of procedural rules, protracted discovery, increased costs, lengthy proceedings and lack of transparency.

Arbitration institutions have responded with various innovations to try to address these issues. So too have states, national courts, and international organisations. A number of developments have emerged that signal a possible resurgence of national and international courts as a viable option for international dispute resolution. These include the creation of international commercial courts and specialist national courts which incorporate the strengths of litigation and preferred features of arbitration. States are also working to improve the recognition and enforcement of foreign court judgments, with the Hague Convention on Choice of Court Agreements (the “2015 Convention”) entering into effect and more liberal enforcement of foreign court judgments at the national level. A new draft convention – the Hague Convention on the Mutual Recognition and Enforcement of Foreign Court Judgments – is also anticipated next year.

This article will consider some of these developments that may make national courts more attractive to parties involved in international disputes. It will compare these developments against some important benefits of international arbitration.

**Increase in specialist commercial courts**

Over the past 15 years, we have seen the emergence of specialist international courts that cater to parties engaged in cross-border commercial transactions. They include the Singapore International Commercial Court (“SICC”), the Dubai International Financial Centre (“DIFC”) Courts, the Qatar International Court and Dispute Resolution Centre, the Abu Dhabi Global Market Courts, and most recently the China International Commercial Court (“CICC”). Many of these courts were inspired by the well-established English Commercial Court system, which dates back to 1855.

The DIFC, Qatar, and Abu Dhabi commercial courts were established in 2004, 2009, and 2015, respectively, pursuant to mandates to develop world class international financial centres. They were part of a design to create neutral, transparent, and sophisticated legal and dispute resolution systems to attract foreign investment. These courts are English language common law courts, resident in civil law countries, with international panels of judges. Most have jurisdiction over civil and commercial matters having some connection with their respective financial centres. The DIFC Courts permit opt-in jurisdiction and will accept jurisdiction over disputes with no connection to the DIFC provided the parties have entered into a written jurisdiction agreement in favour of the DIFC Courts.

Singapore took the lead in establishing Asia’s first international commercial court in 2015. The SICC was established as part of Singapore’s aim to enhance its status as a leading hub for international dispute resolution. It also has the ambition of, along with other international commercial courts, creating a body of international commercial law that harmonizes commercial law and practice from both common and civil law jurisdictions. Like the DIFC, the SICC will accept jurisdiction over any action of an international and commercial nature where the parties have agreed to the court’s jurisdiction pursuant to a written jurisdiction agreement, regardless of whether there is a connection to Singapore.29 The SICC may also hear cases that have been transferred from the Singapore High Court.

International commercial courts are also emerging in Europe, with courts in France, Belgium, Germany, and the Netherlands being established or anticipated. This is partially in response to Brexit, as European Union courts anticipate hearing international disputes that would otherwise have been heard by UK courts and international arbitration tribunals.

Most recently, in July 2018, the CICC was established by the PRC Supreme People’s Court (“SPC”). The CICC was likewise created to hear disputes of an international and commercial matter and is established for the purpose of providing an effective judicial mechanism for resolving disputes arising from China’s Belt and Road Initiative. To adjudicate disputes before the CICC, a jurisdictional nexus to China is required. The CICC has jurisdiction over disputes where the parties have agreed to litigate in the SPC according to Article 34 of the Chinese Civil Procedural Law and the amount in dispute exceeds RMB 300 million (approximately USD 44 million); disputes which should have originally been litigated in a high court but were submitted to the SPC; disputes that have an impact nationwide; disputes where one party applies for interim measures in assistance of arbitration, setting aside and enforcement of arbitral awards according to Article 14 of the SPC Regulations on Several Matters Concerning the Establishment of the China International Commercial Court (effective 1 July 2018) and any other international commercial disputes that the SPC considers appropriate to be heard by the CICC.

Aside from the emergence of new international commercial courts, there has also been an increase in specialist national courts and specialised lists within existing national courts. In China this has seen the creation of specialist intellectual property courts, while in Singapore the High Court has developed a comprehensive range of specialised lists to ensure complex commercial disputes are placed before judges who are able to bring expertise in specialist areas of law, including building and construction, shipbuilding, finance, securities and banking, and intellectual property and information technology.

**Increased ease of enforcement**

Ease of enforcement is one of the prominent benefits of arbitration. The New York Convention has provided an unrivalled framework for global recognition and enforcement of arbitral awards in the nearly 160 contracting states.


No similar treaty for the recognition and enforcement of court judgments on a global scale exists. The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971 (the “1971 Convention”) failed to replicate the success of the

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29 Section 18F Supreme Court of Judicature Act 1969 (Singapore)
New York Convention with only three states ratifying the convention (Cyprus, The Netherlands and Portugal). The 2015 Convention provides for the mutual recognition and enforcement of court judgments, provided those judgments were rendered pursuant to an exclusive jurisdiction agreement for the courts of a particular country. Again, this convention has limited reach. To date, there are 31 contracting states to the 2015 Convention, including Singapore, Mexico, Montenegro, and the 27 European Union member states. The US, China, and Ukraine have all signed the Convention but have not ratified it. Pending ratification, the 2015 Convention is not yet binding on these states.30 As a result, despite attempts, it has not been possible to create a regime providing predictable enforcement of court judgments globally like there has been for arbitral awards pursuant to the New York Convention.

In the absence of a global enforcement regime, foreign court judgments may be enforceable pursuant to regional enforcement regimes. A framework for the recognition and enforcement of civil and commercial judgments exists between member states within the European Union under the recast Brussels Regulation (Regulation (EU) No 1215/2012). Under Articles 36 and 39 of the Brussels Regulation, a judgment given in a member state is recognised and enforceable in all other member states without any special procedure or declaration of enforceability being required and with few defences available which could prevent enforcement. Similarly, in the UAE and Qatar (neither of which are contracting parties to the 2015 Convention), there is the 1983 Riyadh Arab Agreement for Judicial Cooperation, which provides the framework for the recognition and enforcement of judgments made by the courts of any other contracting party.

Most recently, members of the Hague Conference on Private International Law have been advancing a draft Convention for the Recognition and Enforcement of Foreign Court Judgments. The draft Foreign Judgments Convention is broader than the 2015 Convention and does not require that a judgment be rendered pursuant to an exclusive jurisdiction agreement as a precondition for enforcement. Several drafts of the Convention have been released. A final version is expected to be presented for diplomatic consideration sometime in 2019.

In the absence of an international convention or bilateral or multilateral treaty, a party must rely on national law to recognise and enforce foreign court judgments, which can significantly thwart recognition and enforcement. Outside of regional regimes such as those in the EU and the Middle East, mutual recognition and enforcement treaties are not widespread. China, for example, has entered into less than 40 treaties for the mutual recognition and enforcement of foreign court judgments. It also has arrangements with Hong Kong SAR and Macau SAR for the mutual recognition and enforcement of court judgments, but the arrangements apply only to judgments rendered pursuant to an exclusive jurisdiction clause. China likewise has judicial provisions in place to guide the recognition and enforcement of judgements issued by Taiwan courts (Provisions of the Supreme People’s Court on the Recognition and Enforcement of Civil Judgments of Courts of the Taiwan Region (1 July 2015)). China does not have judicial assistance arrangements with Hong Kong SAR and Macau SAR for the mutual recognition and enforcement of court judgments, but the arrangements apply only to judgments rendered pursuant to an exclusive jurisdiction clause. China likewise has judicial provisions in place to guide the recognition and enforcement of judgements issued by Taiwan courts (Provisions of the Supreme People’s Court on the Recognition and Enforcement of Civil Judgments of Courts of the Taiwan Region (1 July 2015)). China does not have judicial assistance treaties with key trading parties such as Australia, the US, and the UK.

However, in recent years Chinese courts have shown a willingness to recognise and enforce foreign judgments, first with the Nanjing Intermediate People’s Court (Jiangsu Court) recognising and enforcing a civil judgment made by the Singapore High Court in 2016 and then last year the Intermediate People’s Court of Wuhan, Hubei Province (recognising and enforcing a civil judgment made by the Los Angeles Superior Court in California. In both cases recognition and enforcement was granted based on the principle of reciprocity in the absence of a treaty for mutual recognition and enforcement of judgments. While these developments are encouraging, commercial parties cannot be confident that court judgments will be enforced in a predictable manner in the same way they can with arbitral awards.

**Increased adaptability to international users**

Confidentiality is a hallmark of arbitration which international commercial courts are seeking to make available. In the 2018 International Arbitration Survey undertaken by Queen Mary University of London, 87% of respondents noted that confidentiality in international commercial arbitration is of importance and is a feature that distinguishes arbitration from national courts. The SICC seems aware of this issue and while proceedings will generally take place in open court, parties have the option to apply for the proceedings and judgment to remain confidential.31 In deciding to make a confidentiality order, the SICC will take into account whether the case is an offshore case and whether there is an agreement between the parties on the making of such an order. This is an interesting development in cross-border litigation given the calls within the international arbitration community for greater transparency and one not seen in other international courts to the same extent. The DIFC, for example, requires hearings to be held in public as a general rule, but does allow proceedings to be heard in private if certain limited factors are present, including whether publicity would defeat the object of the hearing; confidential information is involved and publicity would damage that confidentiality; and the court considers it necessary in the interest of justice.32

The common criticism by parties that judges may be biased towards an international party or lack the specialist technical knowledge to properly decide a dispute is also being addressed. As discussed earlier, many countries now have specialist lists within their national courts that ensure highly complex disputes are heard by judges that have particular subject matter expertise. Further, many of the international commercial courts have international panels of experienced and prominent judges who join prominent local judges in presiding over disputes. While in the case of the CICC, the current PRC law does not permit foreign judges to adjudicate disputes in China, the CICC bench is comprised of top PRC judges from the SPC and other jurisdictions. Further, the CICC has an Expert Committee comprised of prominent international arbitration and litigation practitioners who can advise on foreign law issues and act as mediators in disputes for the court. In the case of the SICC and the DIFC, both courts allow the appointment of foreign judges. Since its commencement, judges have been appointed to the SICC from both common and civil law countries, including Singapore, the United States, Australia, Austria, France, England, Hong Kong and Japan. The DIFC has followed a similar pattern but with judges appointed from common law countries including Singapore, England, Malaysia, Australia and New Zealand.

Finally, a court has the ability to join third parties, which is only permitted in some circumstances in an arbitration. The SICC has the power to join third parties to an action, even if the third parties are not parties to a written jurisdiction agreement and do not consent to being joined as a party.

**Conclusion**

Recently, there has been much activity directed to promoting the international dispute resolution capabilities of national courts. Although national and international efforts have sought to make international dispute litigation more attractive, it has yet to match some of the unique benefits of international arbitration, key to these being enforcement, confidentiality and neutrality.

The critical feature of arbitration for many commercial parties is enforcement. There is still no convention to rival the New York Convention’s ability to offer predictable enforcement across the globe. Whether the new conventions will be able to attract the attention of sufficient states to ratify them in order to close this gap is questionable with keen interest.

31 It is not clear when they will do so. The US signed the convention in 2009; China signed in 2017.
By Dorothy Murray (London) and James McKenzie (Hong Kong)

In 2028, 45% of international commercial arbitrations will be seated in Asia, 15% will be in Africa and 5% will be delocalised (“seat less”) with only 35% in traditional Western centres. Blockchain technology will not just have created new disputes but will have required and driven new methods of dispute resolution designed for a delocalised world and for millennial and post-millennial participants who by 2028 make up most of the business community and who have grown up dealing with all aspects of their lives remotely and with technology.

In terms of traditional seats, by 2028, we will have completed the first Asian quarter-century. Asian capital will have dominated, and will continue to dominate, global investment flows with the result being that more investments and therefore more disputes will involve Asian parties, likely to favour geographically closer and more familiar seats and arbitral institutions.

As to Africa, African parties are regular participants in international arbitrations today but, by 2028, the focus will have shifted. More African disputes will involve Asian, typically Chinese, parties driven in part by increased investment from the Belt and Road Initiative (“BRI”). This will lead to an inevitable uptick in the prominence of construction and infrastructure arbitrations in African as well as Asian seats such as Hong Kong and Singapore, which are often chosen as a “neutral” compromise seat. In the meantime, local African institutions will have gained some long-awaited traction and will be more popular choices themselves for two key reasons: first, they will have a track record to draw on and second, at least some key African seats will have achieved greater political and economic stability and therefore be more attractive venues for international parties.

The arbitral rules parties will choose from in 2028 will, in one sense, be increasingly homogenous, adopting all commonly recognised aspects of best practice. Rules will offer a menu of options to increase efficiency and reduce costs, with developments from the technological (such as online depositories, virtual hearing rooms and the like) to the procedural (such as expedited procedures and emergency arbitration mechanisms) becoming the norm. On the other hand, arbitral institutions will seek to differentiate themselves in a marketplace crowded not just with other institutions but with international commercial courts issuing widely enforceable judgments under the Hague Convention35, and new forms and forums of dispute resolution. Rules and centres will compete to be the quickest to adopt innovative technologies, offer the most cost efficient result and to promote the latest expertise and specialisms in their arbitral panels.

Why do we predict this? We summarise below some of the current trends we see in arbitral centres and rules and explore the drivers for these.

Sitting pretty: new, newer and nowhere seats

The rise of Asian centres and why this trend is here to stay

The authors break no new ground here by saying that Asian seats and arbitral centres are on the ascendancy. As Asia’s economies have grown and caught up (and in many cases, surpassed) those in the West, so too has the desire of their countries’ governments to secure a share of the international arbitration market.

34 Credit to Valentine Kerboull (London), Cassandra Ditzel (London) and Ray Chan (Hong Kong) for assisting the authors with their research.

35 The Hague Choice-of-Court Convention, formally the Convention of 30 June 2005 on Choice of Court Agreements is an international treaty reached within the Hague Conference on Private International Law. It was concluded in 2005 and entered into force on 1 October 2015. The aim of the Convention is to promote international trade and investment by encouraging judicial cooperation in the field of jurisdiction and recognition and enforcement of judgments. (The content of the Convention: https://www.hcch.net/en/instruments/conventions/full-text/?cid=98.)
Since it began reporting in 2007, the Singapore International Arbitration Centre’s ("SIAC") yearly new cases have increased fivefold from 86 cases in 2007 to 452 in 2017. In 2017, the Hong Kong International Arbitration Centre ("HKIAC") reported it had a total of 532 new cases (a 15.7% increase from 2016) and a 100% increase in the total value of the amounts in dispute (from HKD19.4 billion in 2016 to HKD39.3 billion).

The two leading European arbitral centres (and the most preferred centres globally), the London Centre for International Arbitration ("LCIA") and the International Court of the International Chamber of Commerce ("ICC") had 285 and 810 new cases respectively last year. The top two Asian centres therefore almost equalled the top two European centres in total new cases last year and (perhaps most remarkably) have managed to achieve this rise over a period of a mere few decades.

This rise in Asian centres is driven not just by these two leading international centres but other centres including both the stalwart (such as the China International Economic and Trade Arbitration Commission ("CIETAC") and the Japanese Commercial Arbitration Association) as well as the emerging (such as the recently rebranded Asian International Arbitration Centre in Kuala Lumpur, formerly the KLICA).

With the inexorable movement eastward of the world’s economic centre of gravity and the increased global economic connectivity of the region through projects such as the BRI, we predict the trend to continue. Asian seats and institutions will only continue their rise.

The rise (finally) of Africa

Travelling optimistically, Africa is poised on the edge of economic changes that it will be able to seize over the next decade. There is an increasing call for the Africanisation of arbitration. The African Regional Centres for Arbitration were expressly set up to provide an alternative to traditional western centres, and since 2008, a number of new centres have opened their doors, including the Arbitration Foundation of South Africa, which adds to those already in existence in Cairo, Lagos, Kigali and Mauritius. Whilst Cairo has long been a popular and respected venue, as other African centres mature, modernising their rules and demonstrating a more solid track record, they will become more attractive choices.

Chinese investors will make up an even greater proportion of counterparts to African investment and infrastructure projects in 2028 than they do today and will culturally understand the desire of African counter-parts to choose local centres (and in our experience may be willing to trade their common seat choices of Singapore or Hong Kong for other contractual benefits) and have no historical attachment to western centres.

Further, we predict that at least some African countries will have made noteworthy progress in offering more secure environments for international parties, with better infrastructure, less local corruption and more arbitration friendly (or at least commercial arbitration friendly) laws. They will therefore be more common choices as an arbitral seat for contracting parties. We see the ability of blockchain technologies to assist this necessary economic development being felt most powerfully in the African continent.

While most commonly discussed use-cases for blockchain or distributed ledger technology are cryptocurrencies, these are not the ones that will have the widest impact. The adoption of

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38 Please see our other article discussing the Queen Mary Survey.
39 This is further evidenced in the Queen Mary University of London survey, in which Singapore and Hong Kong are the 2nd and 3rd most preferred seats in Asia and the 3rd and 4th most preferred seats globally.
40 Established in 1956 and with a caseload of 2183 cases in 2017, of which 485 were "foreign-related."
blockchain by the oil and gas and natural resources sectors will dramatically reduce the potential for leakage, fraud and corruption, by allowing improving tracking and transparency in the chain of custody, verification of origin, verification of transactions and simplifying cross border payments. Origin tracking will also drive ethical, environmental and socially responsible extracted and produced commodities. These developments will benefit the African continent more than any other, with its wealth of natural resources but sad history of exploitation and embezzlement. Wealthier, more secure jurisdictions, with better infrastructure and less corruption will (we predict) drive modernisations in, and attract users to, African international arbitration, similar to developments seen in Asia over the last few decades.

No seat is the new seat

In terms of cryptocurrencies, parties wishing to invest and transact outside a fiat currency are typically unwilling to resolve their disputes within any national system of law (even though those courts may only be exercising a supervisory jurisdiction). In terms of smart contracts, much of their attraction and utility is their cost effectiveness, in terms of entry and automatic execution. The uncompromising mantra “the code is the law” may be somewhat discredited after the Ethereum fork, but the incident highlighted the need for effective yet flexible dispute resolution methods to be agreed in advance.

Despite the rise of international commercial courts and court judgments for disputes regarding more traditional subject matter, we predict that the greater neutrality of arbitration and its flexibility will prove more attractive to smart contract coders and users. While contracts will begin by selecting an arbitral seat in the traditional way, by 2028 we will also see completely delocalised decisions. Parties will see no need for any court to have supervisory jurisdiction or to have to enforce through the courts: concerns about enforcement of a delocalised decision made by an autonomous delocalised arbitral panel will be minimised by their auto-execution according to the code.

Playing by (and with) the rules

Arbitral institutions constantly face two related but conflicting pressures: to adopt all generally recognised best practices and to be different.

The debate about efficiency and costs has been ongoing for much more than a decade and will still be a hot topic in 2028. By 2028, however, arbitral institutions will be facing ever increasing pressures in these areas, from each other, from completely new DR forums (see above as to blockchain) and also from the international commercial courts or ICCs (see the article “The Rise of the Courts in this edition of Crossing Borders) and increased adoption of the Hague Convention, which does for court judgments what the New York Convention does for arbitral awards, ensuring simple international recognition and enforcement.

These ICCs are being set up as a response to Brexit (in Paris and the Netherlands, to offer English language common law dispute resolution outside of England and in Europe) and as a response to the BRI (with China setting up two new international commercial courts in Xi’an and Shenzhen, and with other countries along the old Silk Road seeking to offer alternatives themselves, such as Kazakhstan’s Astana International Financial Court). The new ICCs join the existing Singapore International Commercial Court, established in 2015. As for the Hague Convention, China signed in September 2017, joining the EU, Singapore, Mexico, the US and Ukraine and we have already seen the Chinese and US courts recognising each others’ judgments even outside the Convention framework, under the principle of mutual recognition. By 2028, we see the courts, and therefore the international commercial courts, being a credible challenge to international arbitration, especially given the calls for transparency not just in investor-state disputes but also in the commercial sphere.

Most widely used sets of international arbitration rules (or the arbitration law of their home jurisdiction) already contain many common features, namely: expedited procedures, emergency arbitrations, interim relief, joinder, consolidation, third party funding, transparency, ethical rules for counsel. The following table shows how such trends have spread:

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42 Witness Everledger’s recording of conflict-free diamonds on the blockchain and certifications against child labour and modern slavery.

43 In short: a distributed autonomous blockchain venture capital fund, the DAO, was the subject to an arbitrage attack. It was intended to invest Ether (the Ethereum cryptocurrency) into projects on the Ethereum blockchain by majority vote of its investors. In mid-2016, it was not hacked, but rather its code was exploited in a way that many considered unethical such that one person gained control of Ether worth around USD 50m. The Ethereum community decided to hard-fork the Ethereum blockchain to unwind the offending transactions, which led to a schism: the original un-forked blockchain continues, with two active Ethereum blockchains each with its own cryptocurrency.


1 The default seat of the LCIA is London, the default seat of the ICC is Paris and the default seat of the ACICA is Sydney. In all three of these locations, third party funding is permitted.

2 The HKIAC has a Code of Ethical Conduct for arbitrators.

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<td>Emergency Arbitration</td>
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<td>Summary/Expedited Procedures</td>
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<td>Joinder</td>
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<td>Ethical Rules</td>
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<td>Transparency Rules</td>
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Key:
- ACCIA
- CIETAC
- HKIAC
- ICC
- LCIA
- SIAC
- UNCITRAL

This diagram represents the adoption of certain procedures by international arbitration centers over a period from 1998 to 2017, with key events marked in different colors.

- **Red**: Adoption of a procedure
- **Blue**: Implementation of a procedure
- **Pink**: Introduction of a new procedure
- **Black**: Elimination of a procedure
<table>
<thead>
<tr>
<th>Default no of arbitrators</th>
<th>CIETAC</th>
<th>SIAC</th>
<th>ACICA</th>
<th>HKIAC</th>
<th>LCIA</th>
<th>ICC</th>
<th>UNCITRAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>1</td>
<td>ACICA decides</td>
<td>HKIAC decides</td>
<td>1</td>
<td>1 or 3 in complex cases</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Who appoints arbitrators?</td>
<td>1 – Parties agree or CIETAC</td>
<td>1 – Parties agree or SIAC appoints</td>
<td>1 – Parties agree or ACICA appoints</td>
<td>1 – Parties agree or HKIAC appoints</td>
<td>1 – parties agree or ICC</td>
<td>1 – parties agree or appointing authority</td>
<td>3 – each party appoints one, arbitrators appoint chair</td>
</tr>
<tr>
<td>3 – Presiding arbitrator should be jointly appointed by the parties or, absent their agreement, by the Chairman of CIETAC.</td>
<td>3 – Each party appoints one, SIAC appoints chair.</td>
<td>3 – Each party appoints one, ACICA appoints chair</td>
<td>3 – Each party appoints one, arbitrators appoint chair</td>
<td></td>
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<tr>
<td>Time limits for challenge to panel</td>
<td>10 days</td>
<td>14 days</td>
<td>15 days</td>
<td>15 days</td>
<td>14 days</td>
<td>30 days</td>
<td>15 days</td>
</tr>
<tr>
<td>Joinder</td>
<td>Yes, by filing the Request for Joinder with CIETAC, based on the arbitration agreement invoked in the arbitration that prima facie binds the additional party.</td>
<td>Yes with consent or if third party is bound by arbitration agreement.</td>
<td>Yes with consent but only if third party is bound by arbitration agreement.</td>
<td>Yes by decision of Tribunal but only if third party is bound by arbitration agreement.</td>
<td>Yes with consent</td>
<td>Yes with consent</td>
<td>Yes by decision of Tribunal but only if third party is party to arbitration agreement and if no prejudice</td>
</tr>
<tr>
<td>Consolidation</td>
<td>With consent of all parties or if claims are under the same or compatible arbitration agreement.</td>
<td>With consent of all parties or if claims are under the same or compatible arbitration agreement.</td>
<td>With consent of all parties or if claims are under the same or compatible arbitration agreement.</td>
<td>With consent of all parties or if claims are under the same or compatible arbitration agreement.</td>
<td>With consent of all parties or if claims are under the same or compatible arbitration agreement.</td>
<td>No</td>
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<tr>
<td>Interim measures</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Emergency arbitrator</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
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<tr>
<td>Confidentiality</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>On application by a party</td>
</tr>
<tr>
<td>Summary procedure</td>
<td>Yes if disputed amount&lt;HKD25m unless otherwise agreed by the parties; or where the amount in dispute exceeds HKD 5,000,000, yet one party applies for arbitration under the Summary Procedure and the other party agrees in writing, or where both parties have agreed to apply the Summary Procedure.</td>
<td>No</td>
<td>No</td>
<td>Likely to feature in next version of rules in late 2018</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Expedited procedure</td>
<td>N/A</td>
<td>Yes if disputed amount&lt;SG$6m and parties consent or if exceptionally urgent.</td>
<td>Yes if disputed amount&lt;SG$5m, the parties consent or if exceptionally urgent.</td>
<td>Yes prior to formation of tribunal if disputed amount&lt;US$25m, parties agree or if exceptionally urgent.</td>
<td>If exceptionally urgent</td>
<td>Yes if disputed amount&lt;US$2m and if parties consent</td>
<td>No</td>
</tr>
<tr>
<td>Award timing</td>
<td>Within six (6) months from the conclusion of the hearing, unless extended by the President of the Arbitration Court of CIETAC at the request of the Tribunal.</td>
<td>Draft to Registrar within 45 days of close of proceedings.</td>
<td>No time limit</td>
<td>No time limit</td>
<td>No time limit</td>
<td>6 months from date of case management conference</td>
<td>No time limit</td>
</tr>
<tr>
<td>Costs recovery</td>
<td>At Tribunal’s discretion</td>
<td>At Tribunal’s discretion unless otherwise agreed</td>
<td>At Tribunal’s discretion but costs usually follow event.</td>
<td>At Tribunal’s discretion</td>
<td>At Tribunal’s discretion but will consider relevant factors including conduct of parties</td>
<td>At Tribunal’s discretion but costs usually follow event</td>
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</tr>
<tr>
<td>Arbitrators Fees</td>
<td>Amount in dispute as default but parties can also agree to hourly rate.</td>
<td>Amount in dispute</td>
<td>Hourly rate unless otherwise agreed.</td>
<td>Hourly rate or value of dispute.</td>
<td>Hourly rate</td>
<td>Amount in dispute</td>
<td>Amount in dispute, complexity and time spent</td>
</tr>
</tbody>
</table>

**Arbitrators’ fees**

| Amount in dispute as default but parties can also agree to hourly rate. | Amount in dispute | Hourly rate unless otherwise agreed. | Hourly rate or value of dispute. | Hourly rate | Amount in dispute | Amount in dispute, complexity and time spent |

<table>
<thead>
<tr>
<th>International Arbitration - Comparing the Rules</th>
<th>Asian Centres</th>
<th>European Centres</th>
</tr>
</thead>
<tbody>
<tr>
<td>CIETAC</td>
<td>SIAC</td>
<td>ACICA</td>
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<tr>
<td>3</td>
<td>1</td>
<td>ACICA decides</td>
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<tr>
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<tr>
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<tr>
<td>Arbitrators Fees</td>
<td>Amount in dispute as default but parties can also agree to hourly rate.</td>
<td>Amount in dispute</td>
</tr>
</tbody>
</table>
Rules will continue to reflect and adopt best practice, in line with each other and the ICCs.

In terms of trends between now and 2028, we anticipate that to attract more Asian parties, more rules will expressly include med-arb protocols, allow for broader joinder and consolidation procedures and expressly deal with multilingual procedures. By 2028, disputes arising along the Belt and Road will be widespread and arbitration rules that accommodate for Chinese preferences and typical practices, will be popular choices.

Med-Arb, joinder and consolidation

Whilst med-arb is already an extremely popular and accepted practice in Mainland China, we predict this trend will follow Chinese investors along the BRI. SIAC and SIMC, for example, already have an established arb-med-arb protocol. CIETAC’s recent new arbitration rules for international investment disputes were expressly designed to fill the gap between Chinese and Western practices and were presented as combining the best features of modern international arbitral practice with those elements of Chinese arbitration law and practice seen as indispensable. These include med-arb procedures such as directed mediation and low fees.

The HKIAC Rules Committee is currently also considering the express inclusion of similar ADR provisions along with expanded provisions for joinder and single arbitration under multiple contracts. This is to be welcomed as BRI projects will be complex beasts frequently involving separate employer, contractor, subcontractor, guarantor and lender contracting mechanisms. The ability to more easily consolidate existing construction and infrastructure disputes or enjoin parties to them will be crucial to effective and efficient resolution of disputes and potentially reducing a common and undesirable problem in this sector: inconsistencies in the outcomes in upstream and downstream disputes.

The SIAC Proposal on Cross-Institutional Consolidation will be widely recognised as addressing a real concern of parties about the expenses and risks in parallel proceedings at different institutions. We predict, however, that consolidation agreements and terms will still be under discussion by several working groups in 2028 (the devil being in the detail and arbitration practitioners loving committees). Joinder and consolidation within one institution’s purview or by party agreement will however become increasingly common.

More flexibility in adducing evidence and summary dismissal for the brave few

We also see the need for greater flexibility in how factual, witness and expert evidence can be adduced and eventually presented at a hearing. This is a key bug bear for Chinese users (as well as their lawyers) where translating primary documentation, and witness and expert written evidence remains a substantial additional cost to the arbitral process.

By 2028, some braver institutions will have adopted express summary dismissal provisions, but we see many institutions treading carefully here, conscious of the risk of challenges to awards and at enforcement on the basis that a party has not had the reasonable opportunity to present its case, and the risk of the process being used for unmeritorious applications as a further delaying tactic. We expect a spectrum of options ranging from the SIAC or SCC model of summary dismissal to softer touch provisions giving greater discretion to tribunals in terms of timetabling, and document only decisions.

Specialist (robot?) arbitration panels

To differentiate themselves from each other, and the international commercial courts, institutions will rely on their ability to adapt quickly to change and offer specialist arbitral expertise which the courts cannot. For example, the HKIAC already offers a specialist panel of financial services specialist arbitrators. We predict panels of arbitrators able to code.

In 2028, arbitral institutions and centres will also compete to offer the latest technology, whether in terms of venue and services support (witness Maxwell Chambers’ “Smart Maxwell” initiative with robo-assistants), or virtual reality (VR) and augmented reality (AR) for presentation of facts and exhibits (bringing remote witnesses, site visits, schematics and 3D presentation of complex data sets to the Tribunal). Faulty industrial components will be examined in virtual 3D in the hearing room, failed projects will be built and rebuilt in different counterfactuals by each side and damages models will be presented by AR. Institutions will also amend their rules to allow greater publication of anonymised data from past arbitration and awards, and parties and institutions will use AI to analyse this data.

New technologies and the “millennial” viewpoint will create an even greater need for streamlined quick resolution. New sets of rules for such disputes will provide for paper only arbitrations, with short timelines (expedited procedures will get even shorter) and for smaller value disputes to be resolved by algorithm with limited ability to appeal to a human arbitrator.

Robots will not just be used to provide legal advice (see the legal services provided through AI robots in the north-western Chinese province of Qinghai) or to determine straightforward traffic violations (the pilot in the eastern Chinese province of Jiangsu), but will also determine commercial cases. AI will have developed the ability to appeal to a human arbitrator.

The millennial generation, which expect to be able to obtain justice at a hearing, and have faith may be placed in judiciary and decision makers, robots will not just be used to provide legal advice (see the legal services provided through AI robots in the north-western Chinese province of Qinghai) or to determine straightforward traffic violations (the pilot in the eastern Chinese province of Jiangsu), but will also determine commercial cases. AI will have developed the ability to appeal to a human arbitrator.

Further, as a greater proportion of disputes arise from economies with less to no history of a rule of law or of an independent judiciary and decision makers, more faith may be placed in “ROBOTribunal” than human decision makers.

Remember: you heard it here first. See you in 2028.
By Meg Utterback (London)

Distributed Ledger Technology (DLT) is changing the way business is done and will impact dispute resolution. This article addresses the plan to use DLT in Belt and Road Initiative (BRI) projects and how the use of blockchain and smart contracting may impact dispute resolution.

DLT allows parties to enter into smart contracts that will facilitate transactions and payments along the Road. Investopedia defines distributed ledgers as an asset database that is consensually shared and synchronized across network spread across multiple sites, institutions and geographies.

A key feature of this shared information is that it is protected and verifiable in its entirety by cryptographic hashes that can be checked by anyone to guarantee the sequence and content of the changes recorded within it. Changes to the ledger are agreed upon by a network consensus mechanism and propagated to all users on the network, ensuring that every user has an identical and verified copy of the ledger. Transactions on the digital ledger are thus “witnessed” by all the users making the system transparent.

Ledgers can be designed and dedicated to certain industries and applications, e.g., the use of a diamond registry and tracking system, or a ledger that tracks courier movements and deliveries. The self-executing, self-authenticating and public nature of these transactions is the future for the Belt and Road, especially, in the near term, for contracts of insurance, loans, sale of goods, and logistics.

Smart Contracting

We have been unwittingly or wittingly entering into digital contracts for years – the online bank application, the acceptance to software terms and conditions, are all forms of digital contracts. Smart contracts are “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). Thus, smart contracts are a step beyond the rudimentary digital contracting we know, because smart contracts reflect and automate the terms of the agreements.

Smart contracts are software programs built onto the blockchain that are triggered in response to transactions. Once initiated a smart contract is irrevocable. They cannot be recalled and will begin to self-execute. Thus, they present unique challenges to traditional notions of contracting. The challenge is to ensure that the programmer of the smart contract has accurately and thoroughly captured all the terms the parties wished to incorporate. Whereas traditional contracts are ultimately subject to the interpretation of legal systems, with smart contracts the code is the law and the results of a transaction are immutable.

Recently, I have asked several Chinese blockchain entrepreneurs about whether we could expect smart contracting on the Belt and Road. The consensus is that smart contracting is still being developed and has quite a long way to go before it will be widely used. However, there has already been some success using smart contracts in the insurance industry. Most entrepreneurs I spoke with believe we are looking at least three to five years before they are used more generally in the commercial market. Similarly, some scholars in the field are of the view that Ethereum as a platform for smart contracting is not enough. They view smart contracts as limited because of cost and question the
ability of smart contracts to fully address all the variables that are present in more complex contracts. Mark Beer, President of the International Association for Court Administration, and Chief Executive of the DIFC Dispute Resolution Authority, takes a much more optimistic view. Mr Beer believes that we will quickly be in an era of rapid adoption. He feels that the Ethereum proofs in use are half way there and that the remaining challenge is one of cost. “The pricing will come down with increasing ability to code complex contracts. The beauty is that it makes contracting in emerging markets better.”

Smart contracts will reduce disputes over quality and pricing. And, the contracts themselves cannot be changed once implemented, reducing the risk of fraud and corrupt payments. The use of smart contracting will result in paperless electronic international documents, facilitating trade and logistics. “It is no longer just about e-commerce, but e-customs and e-government.”

If we can imagine into the future, one could see a BRI project being automated and that same project being replicated in other jurisdictions with the same parties. A general contractor building a co-generation facility in Egypt might require GE turbines manufactured in France. The contractor, a Chinese party, enters into a digital contract with GE France but underneath that transaction are a host of steps that have to occur to complete the transaction from factory to installation and commissioning. The self-executing nature of the contract could allow for payment to transfer as soon as the equipment is on board ship. Additional software could use the contract to process any related export approvals and shipping documents. On arrival in Egypt, the contract would further trigger software that processed import documents. The contract might also link to other software for port logistics that automatically would arrange the transportation from port to project. At the project, once the installed equipment meets certain programmed test requirements further payments might be triggered as well as final acceptance documentation and the release of any bonds. The smart contract would provide for a series of transactions from start to finish automated through code along the blockchain, entirely paperless and self-executing. As one can imagine, the software infrastructure requirements between the parties, third parties and governments is a massive undertaking that will take time to develop.

Smart Contract Disputes

Despite the advent of smart contracting, dispute resolution, other than for small cases, will still use traditional venues—namely courts, international courts and arbitration. Smaller matters may be handled using artificial intelligence, just as online sales companies currently resolve consumer complaints. However, larger matters will continue to require a human review of evidence and determination of facts and law.

The nature of the disputes may differ. Disputes may be focused on issues of whether the coding accurately reflected the intent of the parties, or whether some failure of the coding resulted in an improper payment or misdirected goods and who should bear the costs of that error. For these disputes there will be a technical overlay. The disputes may be more complicated in that first, lawyers will need to prove the terms of the underlying contract, and second, lawyers will need to demonstrate that the code was an accurate reflection of the agreement.

As a result of the technical aspects underpinning these disputes, the profiles of judges and arbitrators will need to be considered. We may see the development of specialized international courts or arbitral institutions to handle these types of cases. At a
minimum, the existing institutions will need to adapt to this new landscape.

Smart contracts of course present unique challenges in terms of disputes. Use of pseudonyms in contracting may present issues for identifying proper parties. If the contract is written in code in the Czech Republic for parties in China and the US, if not clearly stated, what country will claim jurisdiction over the contract and related dispute? What if some of the countries involved do not recognize smart contracts as enforceable contracts? As such, smart contracts may present unique enforcement questions. If the seat of the arbitration allows for smart contracting but it is illegal in the country of enforcement, then the arbitration award will likely be challenged on public policy grounds. Disputes will likely occur at earlier stages of the project as failures in performance of a contract will become clear if the expectations of the parties are not realized in the code. Will traditional concepts such as repudiation, wrongful termination and waiver, still have a place in the world of smart contracts? These are but a few questions that will arise as this technology advances to be a reality.

**Sovereign Backed Cryptocurrency**

Given the challenges of the convertibility of the Renminbi (RMB) in most jurisdictions, one could also easily foresee the Chinese government electing to develop a sovereign-backed cryptocurrency for use on Belt and Road projects. There are a number of advantages, including convertibility and control over currency fluctuation. Moreover, it would create a closed ecosystem of regular players on the BRI and increase the quality and efficiency of those projects by virtue of known reliable parties all working on projects where they have ease of contracting and currency. The cryptocurrency would likely be pegged to a currency to allow purchases outside the BRI ecosystem. The concept of a sovereign-backed and regulated cryptocurrency goes against the intent of the founders of Bitcoin and other cryptocurrencies, who hoped to move outside a regulatory environment in favor of a decentralized DLT platform that would rely on users to create the value by mining coins and engaging in transactions along the blockchain. However, China could not allow such freedom on Belt and Road projects, so they would likely have a controlled approach. Despite its regulated nature, it could still be a facilitator on the BRI. A sovereign-backed currency gives users confidence. Sovereign-backed cryptocurrency would facilitate payments under smart contracts across the many jurisdictions of the Belt and Road.

**Institutions proactively addressing technology in trade, trade finance and disputes**

Mark Beer is the co-founder of the Courts of the Future Forum, a joint initiative of the DIFC Courts and the Dubai Future Foundation. Mr Beer and a group of forward-thinking business and legal professionals and scholars are representatives of the Courts of the Future ("COF") Forum, who are focused on analyzing the judicial implications of emerging technologies.

The COF held a Forum in March 2018 where five key pillars were reviewed to gauge how disputes on these topics would be decided in the future: artificial intelligence, self-driving cars, blockchain, 3D-printing and unmanned aircraft systems. These pillars are certainly topical and undoubtedly appeal to the millennial base which will become our industry’s future. The COF also considered the future of technology in law. Increasing efficiency and reducing the backlog of cases is viewed as a key area where blockchain and artificial intelligence could be employed.

Another interesting development is the Memorandum of Understanding ("MOU") between Singapore and Hong Kong on cross-border trade on 13 December 2017, known as the Global Trade Connectivity Network ("GTCN"). The MOU is the first of its kind to promote DLT as the intended infrastructure to digitise trade and trade financing between the two cities, which they hope to roll out across the region as it has been designed with ‘open architecture’, allowing other prospective users to plug into it relatively easily. Hong Kong’s Monetary Authority is due to launch its Trade Finance Platform ("TFP") in September 2018 which is based on blockchain technology and feeds into the larger GTCN. If the TFP runs successfully, this could bring blockchain technology to mainstream financial trade in a revolutionary way.

Many institutions are only now beginning to grapple with the implications of DLT. Those who are already studying and evaluating its impact may be uniquely placed in ten years. Even if you choose not to be at the vanguard of this new technology, it behooves you and your company do understand what it means and the implications for your business in the years to come.

**Conclusion**

I suppose in my mind’s eye I foresee a future on the Belt and Road of smart contracts executing projects seamlessly and insuring payments in digital currency. It would be an ecosystem in which the players have experience and are using technology to speed project completion. Paid in digital currency, the projects will be immune from political and economic influence of the local governments or foreign governments. But there are limitations. How will digital ledger technology address the ad hoc regulations issued by nations that impact the implementation of the terms? For example, in the earlier turbine case, the turbines would be efficiently transferred to the project. If a third-party nation imposes regulation with extra-territorial reach, e.g., the US imposes sanctions on one of the countries or actors in the transaction, then the transaction could become illegal. A smart contract unless somehow revocable could result in an unintended illegal consequence. These and other issues may delay the implementation of smart contracting or limit its application. I remain optimistic that DLT will be increasingly used to automate systems, such as shipments, and tracking and processing associated logistics paperwork. As this infrastructure develops, the variables that now challenge smart contracting success will decrease and ideally allow for the more efficient contracting on the Belt and Road. Invariably, those contracts will be breached, and it will be exciting to see how practitioners manage those disputes, which will require both technical and legal expertise.

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By Paul Starr, Nicholas Lee and Felicity Ng (Hong Kong)

The year is 2028. KWM is ranked at No. 1 in the Global Arbitration Review Top Thirty international arbitration law firms.

Clearly, as exemplified by Brexit, Donald Trump’s tweets and North Korea/US relations, predicting even the immediate future is no easy feat. When it comes to what international dispute resolution will look like in the medium-term – how we resolve disputes, where we hear those disputes, what tools we will use to resolve them – it gets even trickier. But doing so can give us a fresh perspective on the challenges and opportunities of today.

We discuss below our predictions following the four key findings arising out of the 2018 International Arbitration Survey by Queen Mary University, London (the “Survey”), namely:

- **Finding 1** – Singapore displaces Hong Kong as the most preferred arbitral seat in Asia-Pacific;
- **Finding 2** – Enforceability of awards as arbitration’s most valuable characteristic;
- **Finding 3** – Cost as arbitration’s worst characteristic; and
- **Finding 4** – 97% of respondents are aware of third party funding in international arbitration with the majority of respondents having a generally positive perception.

**Finding 1. The Hong Kong vs Singapore arbitration rivalry continues – how Hong Kong will maintain its competitiveness**

Survey respondents displaced Hong Kong’s previous ranking, as the most preferred arbitral location in Asia-Pacific, in favour of Singapore. Singapore became the world’s third most preferred arbitral seat, according to the Survey. Singapore International Arbitration Centre (“SIAC”) swapped rankings with Hong Kong International Arbitration Centre (“HKIAC”).

In this close rivalry, the two cities share key characteristics which make them highly favourable arbitral seats. Both: have enacted arbitration laws based on the UNCITRAL Model Law; are parties to the New York Convention; and are known for their pro-arbitration stance with specific arbitration court lists and judicial power to grant interim orders to assist arbitration proceedings. Emergency arbitration is also a vehicle available in both jurisdictions.

Singapore was ranked in the top four in all regions except Latin America, where it came sixth as the most preferred arbitral seat. Hong Kong only came third in Asia-Pacific. At the institutional level, SIAC had a record-breaking caseload in 2017, 452 cases, the most significant contributors being parties from China and India, with Japan and several countries from Europe and the Middle East breaking into the top ten.49 SIAC proposed a cross-institution cooperation initiative for consolidation of arbitral proceedings.50 Recently, Singapore’s Ministry of Law and Maxwell Chambers announced plans to become the world’s first “smart hearing facility”, working together with Singapore tech start-ups to introduce smart booking, secretariat and concierge services, and a logistics assistant robot in its “Smart Maxwell” initiative.

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49 SIAC, 2017 Annual Report (7 March 2018)
So how will Hong Kong regain its position as the most preferred arbitral location? For a start, legislative reform has confirmed the arbitrability of intellectual property disputes in 2018. At the institution level, HKIAC has proposed amendments to its 2013 Administered Arbitration Rules, including use of secured online document repositories, multilingual procedures, disclosure of third-party funding (“TPF”) and issuing investment arbitration rules. HKIAC recently introduced a panel of arbitrators specialising in financial services disputes with multi-jurisdiction and multilingual expertise, and signed a cooperation agreement with the Institute of Modern Arbitration of Russia.

Most significantly of all, we see the rise of China’s Belt and Road Initiative (“BRI”) leading to an increased use of Hong Kong as a neutral dispute resolution centre to facilitate these disputes. We discuss the impact below.

**Finding 2. Enforceability of awards as arbitration’s most valuable characteristic - how award enforceability will bring opportunities to Hong Kong in the Belt and Road context**

According to the Survey, enforceability of awards continues to be perceived as arbitration’s most valuable characteristic. Preferences for a given seat continue to be primarily determined by the seat’s track record in enforcing agreements to arbitrate and arbitral awards. As between China mainland and Hong Kong, beneficiaries of arbitral awards made in Hong Kong can apply for enforcement in the mainland under the ‘Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong’ (the “Arrangement”). The Intermediate People’s Court at the place of domicile of the party, or the place where the party’s property is located, has jurisdiction over the enforcement application. That application will be governed by the relevant PRC laws, including the Arrangement.

This makes Hong Kong an especially attractive seat for arbitration with mainland Chinese-related parties. The Arrangement’s importance is expected to increase further as Hong Kong continues to be the seat of choice for Chinese and foreign parties seeking a neutral venue. Indeed, this has already been the case, with HKIAC noting that it “has the largest caseload involving Chinese parties among all international arbitral institutions”. The BRI continues to drive growth in emerging markets around Asia. As these BRI disputes will involve Chinese parties, enforcement may take place in mainland China against Chinese assets. Over the next 10 years it will therefore be important that parties choose the correct seat and arbitral institution to administer these disputes. HKIAC notes that “HKIAC maintains a strong record of enforcement in China. Over the past seven years, the Chinese courts have only refused to enforce one HKIAC award.” CIETAC also has its own Hong Kong Centre, and a Hong Kong award issued under their auspices can be a powerful tool for enforcement in the mainland.

It follows that the BRI is expected to bring more arbitrations to Hong Kong. The Central Government repeatedly stresses Hong Kong’s role as Asia’s premier international legal dispute resolution centre for the BRI. Hong Kong enjoys unique advantages given its combination of highly-ranked judicial independence, its familiarity to Chinese litigants, and its many arbitration experts for example in the construction, infrastructure and maritime fields. It is therefore a very reliable platform for Chinese companies to go global whilst offering reassurance to international partners as an excellent legal and dispute resolution buffer should disputes arise. China’s Greater Bay Area Initiative (“GBA”, itself part of the BRI) will only add to the importance of Hong Kong as a dispute resolution centre.

Over the next 10 years, we see Hong Kong continuing to expand its geographical footprint in light of the BRI. By the time Hong Kong hosts the 26th ICCA Congress in 2022, the world’s largest

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51 Sections 103C and 103D of the Arbitration Ordinance (Cap. 609) of the Hong Kong Ordinances 2018-2019. 52 See HKIAC Website at www.hkiac.org.arbitration/why-choose-hkiac. 53 Ibid. 54 See, for example the Arrangement between the National Development and Reform Commission (NDRC) and the Government of the Hong Kong Special Administrative Region for Advancing Hong Kong’s Full Participation in and Contribution to the Belt and Road Initiative dated December 2017 with a dedicated section on dispute resolution. 55 For more on the BRI, see KWM’s bilingual Belt & Road Hub on our website: kwm.com/belt-and-road.
Finding 3. Cost as arbitration’s worst characteristic – how costs in arbitration can be effectively mitigated and reduced

Survey respondents cited Cost as arbitration’s worst feature. This issue is not new. It was recognised by previous Queen Mary surveys dating as far back as 2006, all indicating cost as the factor with which users are most discontent.

The starting point of any arbitration is inevitably the arbitration agreement. In previous articles we have stressed the importance of a properly drafted arbitration agreement within a contract to mitigate risks down the road, which in turn will help to reduce cost. Techniques such as joinder, consolidation, and sole arbitrators are just a few methods to reduce the costs of an arbitration. It is also important for legal advisors to select the most appropriate arbitral institution in line with their client’s needs.

Some arbitral institutions have expedited procedures which give the tribunal a fixed time for the delivery of an award, such as the China International Economic and Trade Arbitration Commission (“CIETAC”). Under the 2013 HKIAC Administered Arbitration Rules, expedited procedures can be used where the claims are under HK $25 million (over US $3 million), or if the parties agree.

Beyond the parties themselves, the significant majority of Survey respondents (80%) consider arbitral institutions to be best placed to influence the future evolution of international arbitration. More than half of the Survey respondents (61%) think that increased efficiency, including through technology, is the factor most likely to have a significant impact on the future evolution of international arbitration. The Survey cites examples such as utilising cloud-based storage, videoconferencing, and virtual hearing rooms as ways to reduce costs. We have seen an increase in the use of these tools in our own arbitration experience.

Ultimately for arbitration, technology will be developed with a view to reduce time and costs. Document review and legal research are examples of labour-intensive tasks which practitioners are increasingly completing with the assistance of software programmes or algorithms. There are, however, limitations which explain the reluctance of some in fully embracing technological tools. For one, data breaches might occur and confidentiality of claims might be compromised if technological systems are not sufficiently secure. Additional disputes may arise out of the use of such tools. It remains to be seen the extent to which new technology will find itself adopted in arbitration.

Finding 4. Third party funding in international arbitration

The Survey shows a clear shift in perception of TPF from neutral to positive since its 2015 results: the more users encounter TPF in practice, the more favourable they tend to perceive it. Typically, TPF is offered on a “non-recourse” basis, which means the funded party does not have to reimburse the funder if the case is unsuccessful. Historically, TPF assisted financially-distressed claimants to pursue meritorious claims, but nowadays well-resourced companies also utilise the process to reduce legal budgets and hedge legal cost risks.

The positive perception of TPF is exemplified by recent legislative developments in Hong Kong and Singapore. Both historically prohibited TPF based on English law doctrines of champerty and maintenance, but have introduced “light touch” legislation permitting TPF in arbitration. The Hong Kong TPF guidelines are still awaited at the time of this publication, themselves required to kick-start TPF in Hong Kong. Once they are in place, the existence of a funding agreement and the identity of the funder must be disclosed on the commencement of the arbitration. Where a funding agreement is entered into after the arbitration commences, disclosure must be made within 15 days if in Hong Kong or “as soon as practicable” in Singapore.

With increasing acceptance of TPF, further clarity on practices and harmonisation across different jurisdictions is anticipated. The ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration released in April 2018 formulated principles and best practices on disclosure and conflicts of interest, privilege and professional secrecy, allocation of costs in final awards and security for costs. These recommendations will likely be transposed into soft law instruments and tested by arbitral tribunals in future. TPF users should be prepared for these developments and engage advisors at the outset to consider the following:

- specifying in the funding agreement conditions for and the degree of control a funder has over case strategy, settlement proposals and how disagreements between the funder and the funded party will be resolved;
- including provisions in the funding agreement dealing with scope and extent of funding, potential adverse costs, award enforcement costs, termination and dispute resolution between the funder and the funded party; and
- entering into a separate non-disclosure agreement between the funded party, its counsel and the funder to address confidentiality obligations.

Final remarks

Given the Survey findings, Hong Kong is well-positioned to benefit from recent developments to return to its place as the most preferred seat for arbitration in Asia-Pacific. The immense scale of opportunity offered to Hong Kong as a result of the BRI, coupled with Hong Kong’s bold infrastructure projects within the GBA such as its high-speed rail and bridges connecting it to the Chinese mainland, are likely to bring in many more users of Hong Kong’s independent legal system. The huge advantages which Hong Kong arbitration enjoys regarding the special Arrangement for enforcement in the Mainland should prove attractive to BRI host entities, providing they are educated about that Arrangement. Coupled with continued advancements in technology, innovation and new arbitration procedures designed to reduce costs, we see in our crystal ball that Hong Kong will eclipse other venues as the dispute resolution Centre for years to come.

57 Hong Kong: Part 10A to the Arbitration Ordinance (Cap. 609); Singapore: Civil Law (Amendment) Act 2017
58 Hong Kong: section 98T(2)(a)-(b) of Part 10A to the Arbitration Ordinance (Cap. 609); Singapore: section 29(A)(2)(b) of the Legal Profession (Professional Conduct) Rules 2015 (as amended 1 March 2017)
60 As supported by Hong Kong’s Justice Secretary, Teresa Cheng, in her keynote speech at the ICC’s Asia Conference on International Arbitration, available at https://zhiku.hongkong.com/video.html?videoId=118902
Intra-EU investment arbitration in 2028: will there be any BITs at all?

By Alfredo Guerrero (Madrid), Fernando Badenes (Madrid) and Alexis Namdar (London)

There is considerable uncertainty regarding the future of investment arbitration based on investment treaties concluded between Member States of the EU and, in particular, ongoing and future investment arbitrations under the Energy Charter Treaty (“ECT”). This article examines the impact of the landmark decision of the Court of Justice of the European Union (“CJEU”) in Slovak Republic v. Achmea B.V.61 (“Achmea”), regarding intra–EU investment arbitration, focusing on the impact on arbitrations under the ECT and looking at the example of the Spanish renewable energy sector and recent disputes therein.

In 2028, we predict there will no investment arbitrations under intra–EU BITs but a post-Brexit UK will have carved a niche for itself as a jurisdiction in which to situate European investment vehicles, seeking protection under both BITs and under the ECT (in relation to which uncertainty will still reign).

The EC’s decision on Spain’s member state aid

On 10 November 2017, the European Commission (“EC”) issued a decision (“EC Decision”) confirming that any compensation granted by an arbitral tribunal to an investor in relation to Spain’s modification of its renewable energy scheme would constitute member state aid, and that arbitral tribunals are not competent to authorize the grant of such aid as this is within the exclusive competence of the EC.62 If tribunals award compensation, that compensation would be EU member state aid notifiable to the EC pursuant to Article 108(3) of the Treaty on the Functioning of the European Union (“TFEU”) and, therefore, subject to the standstill obligation provided therein. The EC also considered that any arbitration clause providing for investor-state arbitration between two Member States is contrary to EU Law because EU law provides for a complete set of rules on investment protection and Member States are not competent to conclude bilateral or multilateral agreements between themselves. By doing so, they may affect common rules or alter their scope. According to the case law of the CJEU an arbitral tribunal is not entitled to make references to the CJEU as it is not a court or a tribunal of an EU member state under Article 267 of the TFEU.

Does this mean that no arbitral tribunal is competent to rule on arbitration proceedings commenced under any intra–EU bilateral or multilateral investment treaty? The view from Europe appears to be yes. Views from the arbitration community and some Tribunals appear to differ.

The Achmea judgment

The latest judgment of the CJEU on the issue was delivered in March 2018. The CJEU, in a judgment which departed significantly from that of the CJEU Attorney General’s (“AG”) decision in September 2017 (which found no incompatibility with EU law) ruled in Achmea that the arbitration clause in the BIT between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic was incompatible with EU law and, in particular, contrary to Article 344 of the TFEU. It reasoned that an arbitral tribunal constituted under an intra–EU BIT necessarily rules on the basis of law in force in EU contracting states, and therefore an arbitral tribunal may be required to interpret or apply EU law. However, as in the EC Decision, it held that an arbitral tribunal under an intra–EU BIT is not a court or a tribunal of a member state under Article 267 of the TFEU. The real question in this context is whether the arbitration clause in the BIT was incompatible with EU law.

61 Case C-284/16, Slovakische Republik v Achmea, EU:C:2018:158.

Slovak Republic v. Achmea B.V.
The underlying dispute

Achmea concerned an investment in Slovakia by a Dutch insurer, Achmea B.V., at a time of deregulation of Slovakia’s health insurance market. Following the initial investment, in 2006, Slovakia increased regulation in the health insurance sector. On the basis of this regulatory change, in 2008, Achmea commenced adhoc proceedings under the Dutch-Czech and Slovak BIT for breach of the BIT. In 2012, the arbitral tribunal found that Slovakia had breached the BIT and ordered the payment of EUR 22.1 million damages to Achmea. Slovakia subsequently brought set aside proceedings before the German courts. Slovakia argued the arbitral tribunal lacked jurisdiction to hear the claims because the arbitration clause (in Article 8 of the BIT) was incompatible with EU law. The first instance court in Frankfurt rejected Slovakia’s arguments. On appeal, the German Federal Court of Justice referred the question to the CJEU.

What was the CJEU asked to decide?

The TFEU (Article 267) gives the CJEU jurisdiction to deliver preliminary rulings on the validity and interpretation of EU law. The primary purpose of that jurisdiction is to ensure consistency and uniformity of EU law in all member states. The referring court questioned whether the arbitration clause in the BIT was incompatible with the TFEU.
TFEU. As EU member states undertake not to submit disputes concerning the interpretation or application of the EU law to any method of settlement other than those provided for in the governing EU treaties (Article 344 TFEU) the BIT had established a mechanism for settling an investment dispute which was contrary to both Article 344 TFEU and EU case law.

Impact of the EC Decision and Achmea on ongoing ECT-based investment arbitrations

The Achmea decision related to an intra-EU bilateral investment treaty. The CJEU did not make any findings on the compatibility of arbitration clauses in multilateral agreements where the EU itself is a member, as with the ECT. The impact of the EC Decision and the Achmea judgment on multilateral investment treaties, including the ECT, therefore remains uncertain.

In May 2017, an ICSID tribunal ruled in favour of the investor for the first time in an ECT-based claim against Spain, rejecting Spain’s argument (made even before the EC Decision) that the tribunal was not the competent authority to rule on investment disputes between two Member States of the EU.63 The tribunal decided that there is no limitation in the ECT relating to intra-EU Member State disputes and therefore that the arbitration clause contained in Article 26 of the ECT was applicable. The successful investor is yet to enforce the award in Spain, as Spain has filed an annulment action before ICSID (echoing the EC Decision’s reasoning), which is still pending.

In February 2018, and despite the enactment of the EC Decision, a Stockholm Chamber of Commerce tribunal declared its own competence to rule on a new case against Spain under the ECT (Novenergia v. Spain)64 (“Novenergia”) and decided, again, in favour of the investor against Spain. The tribunal considered the EC Decision “entirely irrelevant”65 as the tribunal was not applying EU law to resolve the dispute and, thus, was of the opinion that the EC Decision was not binding. The Swedish Svea Court of Appeal subsequently stayed the enforcement of the award pending Spain’s argument that the arbitration clause in Article 26 of the ECT is incompatible with EU law and, therefore, that the tribunal lacked jurisdiction based on the same reasoning in Achmea. In parallel, Spain has asked that the Swedish court to refer the question of compatibility of the ECT with EU law to the CJEU.

In a case concluded in May 2018 (“Masdar”),66 Spain argued (after the case had officially closed) that the Achmea decision confirmed a previously submitted jurisdictional objection. In that case, the tribunal dismissed the submission because the claim was brought under the ECT.67 The tribunal reasoned the Achmea judgment “cannot be applied to multilateral treaties, such as the ECT, to which the EU itself is a party”.68 In a very recent ICSID decision, issued on 31 August 201869 (“Vattenfall”), the tribunal agreed with the Masdar tribunal and found no rule relevant to the interpretation of the ECT in the Achmea ruling. The Vattenfall tribunal stressed, however, the ambiguity both in the Achmea judgment itself and of Achmea’s application to the ECT, stating: “[t]here remains unclear what alleged rule of international law arising from the [Achmea] Judgment exists and is of application to the present case … it is an open question whether the same considerations [in Achmea] necessarily apply to the ECT”.70 Masdar and Vattenfall therefore still leave uncertainty as regards multilateral treaties concluded with or without the EU as a party.

Concluding remarks

The Achmea decision will doubtless have wide reaching implications for the existing 196 intra-EU BITs currently in force. The EC has already stepped up its efforts to require EU member states to amend or terminate incompatible intra-EU BITs. Some member states have already announced such measures; for instance, in May 2018 the Netherlands declared that it intends to terminate its bilateral intra-EU investment treaties.

Going forward, the decision creates an increased degree of uncertainty for parties looking to rely on the existing intra-EU BITs to protect their investments or to enforce awards in the EU. Most importantly, respondent EU States will inevitably seek to rely on the CJEU to challenge the jurisdiction of tribunals hearing disputes and to resist the enforcement, or to challenge the validity, of awards. In addition to Spain, since Achmea, Hungary has also applied to set aside awards in part on this basis.

Clients investing in the EU are advised to structure or restructure their investments through a vehicle incorporated outside of the EU, if possible. In this way, a client can be sure to be protected by a BIT between a Member State (or the EU) and a third State not affected by the CJEU’s judgment. Perhaps there is a silver lining for post-Brexit English investment arbitration practitioners after all as the UK may soon become a jurisdiction outside the EU keen to attract and structure investments. The UK retains a number of BITs with countries now in the EU and is a signatory to the ECT.

As for investment arbitrations under the ECT, for the time being, it appears that arbitral tribunals are not applying the EC Decision or the Achmea judgment and do not accept that EU law is of application to arbitration disputes where it is not strictly necessary to apply EU law to resolve the dispute. The next word will come from the Courts of the Member States and the Swedish Svea Court of Appeal in Novenergia, and from the enforcement actions in Masdar and Antin v. Spain.71 Only time (and the CJEU) will tell whether the EC Decision and Achmea will bring the end to investment arbitration under the ECT between Member States.

Achmea is a signpost along the road to a clear destination for intra-EU dispute settlement. That destination is the replacement of all pre-existing intra-EU BITs with a single multilateral agreement among EU member states. The solution, already proposed by both Germany and France, would terminate all intra-EU BITs and provide for wide substantive protections for EU investors. Post-Brexit, it is inevitable that Europe will have a renewed incentive to solve the EU dispute resolution puzzle. There will be a new desire to underscore political cohesion between the remaining member states, to streamline perceived inefficiencies in the EU and to face down the threat of an “offshore solution” from the UK. We think this fresh impetus will finally prompt a resolution to the long-standing debates surrounding the procedural mechanism to hear the disputes arising from a new multilateral treaty (be that at the CJEU itself, under the auspices of the Permanent Court of Arbitration or in an entirely new permanent investment court). The disappearance of intra-EU BITs from the legal landscape is by far the most likely outcome by 2028.
10 Things to bear in mind regarding arbitral confidentiality

By Brendan Palmer (Dubai)

One reason for electing for arbitration as a dispute mechanism is often the confidentiality of the proceedings. But what exactly does that mean? Here are 10 things to bear in mind:

1. **Privacy versus confidentiality:** These are separate concepts. Privacy generally refers to the exclusion of third parties from hearings, whereas confidentiality is a wider obligation not to release details of the arbitration to non-parties.

2. **What law determines the scope of the confidentiality:** In jurisdictions where confidentiality takes effect as an implied term, its scope will be governed by the law of the arbitration agreement, whereas in jurisdictions where confidentiality arises from statute, the law of the seat is likely to apply.

3. **The extent:** In many jurisdictions, including England, confidentiality includes both the hearing and documents generated. Depending on the seat, and any further agreement, confidentiality might also attach to the existence of an arbitration, the parties and awards. It is generally accepted that the deliberations of arbitrators are confidential.

4. **The persons to whom it applies:** Typically confidentiality extends to both the parties and the arbitrators. It may also extend to witnesses, but acting prudently, an express agreement should be sought.

5. **Source:** In some jurisdictions confidentiality is statutorily provided for, in others it arises as an implied term of the arbitration agreement (as is the case in England). Some arbitral rulesets provide for confidentiality by default (LCIA, DIAC), others do not.

6. **Agreement:** In the absence of any binding legislative confidentiality or confidentiality provisions in the chosen arbitral ruleset, parties should consider an explicit agreement with respect to confidentiality, either as part of their arbitration agreement or separately. Even where confidentiality is otherwise provided for, an express agreement gives the parties the opportunity to clarify and/or tailor the extent of confidentiality agreed to apply.

7. **Prohibited disclosure:** Confidentiality obligations may prevent disclosure of an award by a subsidiary to a parent company.

8. **Exceptions:** Depending on the law governing the confidentiality agreement, exceptions may include (as in England): where the parties have agreed otherwise or consented to disclosure; where disclosure is required by Court Order; where disclosure is necessary to protect a legal right; or where disclosure is in the interests of justice.

9. **The Award:** Whilst an award is likely to be subject to confidentiality, exceptions are likely to apply, in particular where, for example, disclosure is required to the competent court for enforcement.

10. **Related Court Proceedings:** Many states legislate to preserve the confidentiality of arbitral proceedings before the Courts, with a presumption that confidentiality should apply to arbitration claims, and that hearings should be held in private.

By Marco Toracca (London)

1. **CEAC** Based in Hamburg, the Chinese European Arbitration Centre has been operating since 2008. It was born from the cooperation between the Hamburg and Tianjin Bar Associations and is operated under a European-Chinese management. Its rules were initially based on the 1976 UNCITRAL Arbitration Rules, but were amended in 2010 to bring them in line with the 2010 UNCITRAL Arbitration Rules.

2. **MCIA** The Mumbai Centre for International Arbitration is the first centre of its kind in India, and is trying to challenge India’s traditional preference for ad hoc arbitration. The rules are modern and incorporate provisions catering for expedited procedures and the appointment of emergency arbitrators. There is a very clear fee structure linked to the value of the dispute.

3. **KCAB** The Korean Commercial Arbitration Board is based in Seoul and has handled over 4,000 arbitrations since 1966, the year it was established. It is the only Korean arbitration institution and is considered one of the leading arbitration centres in Northeast Asia.
4. **IAC** The International Arbitration Centre operates within the Astana International Financial Centre ("AIFC"), which is aimed at encouraging the creation of a favourable environment for foreign investment in Kazakhstan. The AIFC benefits from a special legal regime based on English common law. Parties may agree to arbitrate under the IAC Rules, the UNCITRAL Rules or other ad hoc arbitration rules.

5. **SAC** Operating out of Edinburgh, the Scottish Arbitration Centre was opened in 2011. It was behind the setting up of the International Centre for Energy Arbitration ("ICEA").

6. **SCCA** The Saudi Centre for Commercial Arbitration was established in 2014 and issued its own rules in 2016. It is based in Riyadh. Its aim is to create a system for dispute resolution to encourage investment in the Kingdom and to become the preferred ADR choice in the region by 2030.

7. **ACIC / TRAC** Founded in 2002, the Arbitration Center of Iran Chamber is the first Iranian arbitration centre set up to deal with international disputes. The Tehran Regional Arbitration Centre was established in 2005 as a regional arbitration centre out of the cooperation between the Iranian Government and the Asian-African Legal Consultative Organization. Its rules are based on the 1976 UNCITRAL Arbitration Rules.

8. **CRCICA** The Cairo Regional Centre for International Commercial Arbitration is oldest arbitration centre in Africa and the Middle East, which has been recognised as one of the best arbitration centres in Africa by the African Development Bank. It is based in Cairo and covers both domestic and international arbitrations. It enjoys all privileges and immunities of independent international organizations within Egypt.

9. **KIA** The Kigali International Arbitration centre was set up in 2012, partly as a response to the backlog of cases within the commercial courts in Rwanda. Arbitrations can be run under either the KIA Rules (similar to ICC Rules), UNCITRAL Rules or other ad hoc rules.

10. **AIAC** Based in Kuala Lumpur, the Asian International Arbitration Centre builds on over 40 years of history. It has its own procedural rules covering the whole life of an arbitration, which are largely based on the UNCITRAL Arbitration Rules 2013. It provides support for domestic and international arbitrations.
10 predictions about international arbitration in 2028 in a post-Brexit UK (and a review of relevant English Court decisions of the last quarter)

By Dorothy Murray, Chloé Bakshi, Dina Suliman, Llewellyn Spink, Cassandra Ditzel and Valentine Kerboull (London)

1. The English Courts will still be hard at work promoting the jurisdiction as arbitration friendly …by allowing only limited challenges to arbitral awards and recognising the wide powers and discretions of Tribunals, especially those governed by the Arbitration Act 1996. There will be no change to the approach of the English Courts under s68 or s69 of the 1996 Act as exemplified by the recent cases of Reliance Industries Limited & Ors v The Union of India [2018] EWHC 822 (Comm) and SCM Financial Overseas Ltd v Raga Establishment Ltd [2018] EWHC 1008 (Comm)

In Reliance, the Claimants made nine challenges to an arbitral award in the English Court under sections 67, 68 and 69 of the 1996 Act. All but one of the challenges failed. Two are particularly worthy of note. First, a claim that there was serious irregularity under s.68 as the Tribunal majority reached a conclusion on contractual construction based on a new point on which the parties had not specifically made submissions. The Court held there was no serious procedural irregularity. Where a point of construction is squarely in play and addressed by both parties, the Tribunal is not obliged to put to the parties all aspects of the analysis in support of its conclusion in order to fulfil the Act’s s.33 duty of fairness. A party will have had sufficient opportunity if the “essential building blocks” of the Tribunal’s decision were in play. Second, Claimants also argued that the foreign act of state principle of non-justiciability did not apply to arbitration (whilst the Tribunal had found its jurisdiction was limited, in part, because of this). In the first English authority on this point, the Court found that the principle applies to arbitration just as it applies to litigation.

In SCM, the English Court dismissed a challenge under s.68 of the 1996 Act claiming serious irregularity arising from the Tribunal’s refusal to defer their award pending Ukrainian court proceedings which could have had a significant impact upon the Tribunal’s decision. The Court accepted that a decision not to defer the issue of an award until further evidence is available is capable of amounting to a breach of s.33 (and serious irregularity under s.68) but this depends, on all the circumstances of the case. Section 34 of the Act affords arbitrators wide discretion regarding procedure and evidence, and they were entitled in this case not to wait for the Ukrainian court decision.

2. …and by upholding the “nuclear weapon” of the World Freezing Order (WFO) and ensuring it continues to have teeth. The recent case of PJSC Commercial Bank Privatbank v Igor V Kolomoisky and ors [2018] EWHC 1910 (Ch) demonstrates the continued challenges to WFOs. Privatbank obtained a WFO against Ukrainian oligarch Igor Kolomoisky and some of his non-trading companies. The English Court ruled that payment by one of the companies of Mr Kolomoisky’s legal fees as co-claimant in an investment arbitration did not fall within the exception for “ordinary and proper course of business”. If this was acting in the “course of business”, said the Judge, then anything he did managing, dealing or disposing of assets would be excluded from the WFO, denuding it of any effect.

3. There will be no change to the enforcement of awards made in England in other jurisdictions, or of foreign awards in England. The New York Convention which applies to the recognition and enforcement of arbitration agreements and awards will have been entirely unaffected by the departure of the UK from the EU.

4. The now 11-year old Fiona Trust case1 will still be the leading decision about the interpretation of arbitration agreements, just as is today. In Dreymoor Fertilisers Overseas PTE Ltd v Eurochem Trading GmbH [2018] EWHC 909 (Comm). Dreymoor and Eurochem entered into contracts for the purchase and resale of fertilizer (which contained arbitration agreements) and Dreymoor acted as Eurochem’s agent under agency agreements (some of which did not). Eurochem alleged in an LCIA arbitration that Dreymoor bribed its employees to secure favourable terms.

1 Fiona Trust & Holding Corp v Privalkov [2007] EWCA Civ 20.
Dreynoor challenged jurisdiction under section 67 of the 1996 Act contending that Eurochem’s allegations related to the agency agreements and so were not within the scope of the arbitration agreements in the sales contracts. The court applied the liberal interpretation in Fiona Trust and dismissed the challenge: the dispute did fall within the arbitration clauses in the sales contracts. The wording of the arbitration clause was wide enough (and would be considered such by reasonable business people when entering the agreements), to cover the disputes referred to arbitration, including non-contractual claims, including bribery inducing the contract.

5. People will still be writing articles entitled “West Tankers sails on”, but that ship will no longer call at the UK as English Courts will have regained their full common law powers to issue anti-suit injunctions in support of arbitrations which can be a powerful weapon in international disputes. Post-2028, while the UK government has indicated that it intends to remain in the Hague Convention and Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the Court of Justice of the European Union (“CJEU”) will no longer have direct jurisdiction in the UK. In the meantime though, the Commercial Court recently confirmed that the decision of the CJEU in West Tankers Inc v Allianz SpA [Case C-185/07] [2009] AC 1138 that a court in one European member state cannot grant an injunction to restrain proceedings brought in breach of an arbitration clause in another member state remains good law and has not been reversed by recital 12 of the Recast Brussels Regulation and the reasoning of Advocate General Wathelet in Proceedings concerning Gazprom OAO [Case C-536/13] [2015] 1 WLR. In Nori Holding Limited & Ors v PJSC Bank Otkritie Financial Corporation [2018] EWHC 1343 (Comm), the Court refused to grant the anti-suit injunction sought to restrain the pursuit of court proceedings in Cyprus which the Claimants alleged were brought in breach of arbitration clauses. An anti-suit injunction ordered by a court was incompatible with the Regulation, although an award of arbitrators to the same effect was not. By 2028 however, we will see more cases like Atlas Power Ltd & Ors v National Transmission and Despatch Co Ltd [2018] EWHC 1052, where the Court granted an anti-suit injunction to restrain the Defendant from challenging, by way of proceedings in Pakistan, a partial final award issued in a London seated LCIA arbitration. The Court held firmly that it had exclusive supervisory jurisdiction given the London seat and therefore had the power to injunct.

6. The Court will no longer have to balance the competing obligations under the ICSID Convention and EU as it did in Viorel Micula and others v Romania and European Commission (intervenor) [2018] EWCA Civ 1801. Put simply, an ICSID award will be res judicata from the date of the award, without needing to wait for the result of any annulment procedure, and the English Court will be bound to recognise and enforce it under the Arbitration (International Investment Disputes Act) 1966. In Micula, the Micula brothers sought to enforce their ICSID award against Romania in England under the 1966 Act, but the Court at first instance granted a stay of the enforcement proceedings pending the General Court of the EU’s decision on whether payment of the award sum constituted illegal state aid (the European Commission having decided that it did). The English Court of Appeal considered its competing obligations under the national law, the ICSID Convention and EU law and dismissed an appeal against the stay but ordered Romania to pay security, albeit on the basis that the sanction for non-payment of security was not termination of the stay.

7. Parties wanting the certainty of English law will have chosen English law plus arbitration as a default provision in their contracts rather than the English courts, given the greater ease and certainty as to global enforcement of arbitral awards (see point 3 above) such that by 2028, the London market and English based arbitration lawyers will see an increase in arbitrations arising under such contracts.

8. In fact, Brexit will lead into Brinlet (as far as arbitration practitioners are concerned). There will have been such a boom of Brexit-induced London seated arbitration disputes under pre-existing contracts that EU arbitration practitioners will have set up branch offices in London to compete to take them on (and to cater to their pre-existing and new UK-based international clients).

9. By 2028, the debate about transparency and ethical conduct in international commercial arbitration will have progressed such that multiple appointments of the same arbitrator in cases with overlapping subject matter as happened in Halliburton Company v Chubb Bermuda Insurance Ltd and others [2018] EWCA Civ 817 will no longer occur. The tension between party autonomy and arbitrator impartiality will have been resolved in favour of avoiding all risk or perception of bias, given the wider pool of arbitrators available for appointments and the increased transparency that will be seen in commercial arbitrations (more institutions following the ICC’s example since 2016 of publishing arbitrator names for all ICC cases). In Halliburton, one of the three arbitrators, “M” was appointed by Chubb in arbitration proceedings between Chubb and Halliburton. M was subsequently appointed in arbitral proceedings arising from the same set of facts between Chubb and Transocean, but did not disclose this to Halliburton. Halliburton sought his removal as arbitrator. The Court of Appeal clarified that a simple lack of independence was not ground for removal; the test was impartiality. Although there is a link between the two, in this case, M’s involvement (and regretful failure to disclose his involvement) in the other proceedings did not suggest any impartiality. Halliburton’s appeal was dismissed.

10. By 2028, London will have a new high-tech hearings centre, rivalling those of key Asian centres. Recognising the need to attract international disputes and match facilities provided elsewhere, one global law firm will have created an investment consortium together with Chinese venture capital and the KWM Arbitration Chambers, with its central London location but Asian style, will be a popular choice.

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10 Things you need to know about the new draft ICSID Rules

By Edmund Northcott (London) and Acacia Hosking (Perth)

1. All filings will be electronic! Parties will benefit from lower printing costs and a quicker, simpler process (Rule 4).

2. Disclosure of third-party funding, and the source of such funds, must be provided at the outset of proceedings, or at the point when a funding agreement has been entered during an arbitration (Rule 13).

3. To publish an award ICSID still requires the consent of both parties but a new provision deems consent given if no objection is raised within 60 days of the award being published (Rule 44). However, ICSID will still publish legal extracts where a party does object.

4. Security for costs (Rule 51) and bifurcation (Rule 37) each receive their own stand-alone rule offering clarity to parties making these applications.

5. The process for challenging arbitrators has been amended – parties must now file a disqualification motion within 20 days after the basis for a challenge arises, rather than “promptly” (Rule 14).

6. New timelines for issuing awards: within 60 days after the last submission on an application to dismiss a case for manifest lack of legal merit; 180 days after the last submission on a preliminary objection; and 240 days after the last submission on all other matters (Rule 59).

7. Parties can agree to a new expedited procedure but must do so within 20 days from the notice of registration (Rule 69) and must select a tribunal within 30 days from registration (Rule 74).

8. ICSID listened to requests from both states and investors and have introduced new sets of rules governing conciliation and mediation (Annexes C and E respectively).

9. ICSID is working with UNCITRAL on a code of conduct for arbitrators, but until such a code is ready ICSID has expanded the disclosure obligations for arbitrators (Rule 36) and regarding third-party funding (Rule 21).

10. Finally, ICSID have re-drafted the rules to be gender-neutral and resolved the inconsistencies between the French, Spanish and English versions.


ICSID member states are meeting in Washington, DC, on 26 September 2018 to discuss the proposed amendments so watch this space for further developments.

Regional updates

Australia

By Acacia Hosking (Perth)

While Australia remains a highly arbitration friendly jurisdiction, in three recent decisions, the Courts reminded parties about their powers to preserve assets, and to police and protect issues of jurisdiction.

Freezing Orders available while awards are pending: In Trans Global v Duro72, the Supreme Court of WA issued a AUD $20million freezing order against Duro pending the arbitral award, finding a “good arguable” case and a danger that a prospective judgment based on the award would be wholly or partly unsatisfied.

Court will use anti-suit and anti-arbitration injunctions to ensure justice: In Kraft v Bega73, Kraft had initiated US arbitration proceedings in respect of the sale of peanut butter, alleging misleading or deceptive conduct by Bega. The FCA Federal Court of Australia restrained Kraft from taking further steps in the US arbitration, pending the determination of ongoing FCA proceedings between the parties, on the basis the arbitration could affect those proceedings with a risk of inconsistent findings.

Courts will conduct de novo hearing on the question of an arbitral tribunal’s jurisdiction: In Lin Tiger Plastering v Platinum Construction74, the contractual dispute clause provided for some disputes to be determined by the Victorian Civil and Administrative Tribunal (VCAT) and others by a single arbitrator. Whether the tribunal here had jurisdiction turned on the meaning of “domestic building works”. That question was found to have been answered by the arbitral tribunal in its jurisdictional ruling, which the Victoria Supreme Court affirmed.

72 Trans Global Projects Pty Ltd (In Liquidation) (TGP) v Duro Felguera Australia Pty Ltd (Duro) [2018] WASC 136
74 Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd [2018] VSC 221
Belt and Road Advisory Committee
In April, to support parties and projects related to China’s Belt and Road Initiative (BRI), the Hong Kong International Arbitration Court launched an industry-focused Belt and Road Advisory Committee and a BRI-dedicated online platform.

New Panel of Arbitrators for Financial Services Disputes
In May, HKIAC established a Panel of Arbitrators for Financial Services Disputes, comprising some of the world’s leading experts in arbitrating financial services matters. The Panel currently includes 30 members from 17 jurisdictions and was established with the aim to facilitate the use of arbitration to resolve disputes involving financial institutions and to promote the use of Hong Kong as the seat for financial arbitration. The Panel is HKIAC’s second specialist panel of arbitrators following the launch of the Panel of Arbitrators for Intellectual Property Disputes in March 2016 and will be the primary source for HKIAC’s appointment of arbitrators for financial services cases.

IP arbitration and mediation
On 29 May 2018, CIETAC Hong Kong Arbitration Center and the Hong Kong Institute of Patent Attorneys (HKIPA) established a strategic cooperation in relation to IP arbitration and mediation.

ICC’s Asia Conference on International Arbitration
On 27 June 2018, Hong Kong hosted the ICC’s Asia Conference on International Arbitration. Highlights included lively discussions on the ICC’s Expedited Procedure Provisions and the keynote address by Hong Kong’s Justice Secretary Teresa Cheng on the promotion of international arbitration in Hong Kong and the advantages of using Hong Kong as an arbitral seat.

Looking forward
Hong Kong has been chosen to host the ICCA Congress in 2022.

Two international commercial courts to settle cross-border commercial disputes
Two international commercial courts to settle cross-border commercial disputes in June, the Supreme People’s Court announced75 the establishment of two international commercial courts to settle cross-border commercial disputes mainly in the Belt and Road Initiative: the first in Shenzhen, Guangdong which has a unique locational advantage in promoting the construction of the Great Bay Area76, and an important economic zone for the Maritime Silk Road, and the second in X’ian, capital of northwest China’s Shaanxi province, which is located at the starting point of the ancient Silk Road.

The new courts aim to protect both Chinese and foreign parties’ legal rights and interests, create a stable, fair, transparent business environment by respecting party autonomy, and provide fair, efficient and convenient dispute resolution. They will be coordinated by No.4 Civil Division of the Supreme People’s Court in Beijing. Many of the details still remain to be developed and understood. The Courts are discussed in the article ‘The Rise of the Courts’ on page 6.

New financial court in Shanghai
Another new court was announced in March and April 2018, this time a new financial court in Shanghai. An intermediate court, it will enjoy jurisdiction over all commercial disputes involving securities, futures, insurance, bills and financial lending in Shanghai. It will also deal with bankruptcy cases where financial institutions are the debtors and administrative cases with financial regulators as defendants. Appeals are to the Shanghai High People’s Court. The establishment of the specialized financial court is designed to prevent major financial risks, protect national economic security, and provide legal support for financial activities.

75 “Regulation on Several Issues on Setting up International Commercial Court to further develop the dispute resolution mechanism for the Belt and Road Initiative.”

76 The “Greater Bay Area” refers to the Chinese government’s scheme to link the cities of Hong Kong, Macau cities of Guangdong province into an integrated economic and business hub.
New UAE Federal Arbitration Law
On 16 June 2018, the long-awaited new UAE Federal Arbitration Law (Law No 6 of 2018) (the “Arbitration Law”) came into force in what has been viewed as a positive development for the legal landscape in the UAE. The Arbitration Law is based on the UNCITRAL Model Law. The Arbitration Law repeals Articles 203 – 218 of the UAE Civil Procedures Law and has immediate effect to all arbitrations in the UAE, including with respect to on-going proceedings, unless parties have agreed otherwise.

Memorandum of Understanding between Abu Dhabi Global Market and Abu Dhabi Courts
On 4 April 2018, the courts of the Abu Dhabi Global Market, a relatively new free zone similar to the DIFC, and the Abu Dhabi Courts entered into a Memorandum of Understanding in respect of reciprocal enforcement as between the two jurisdictions.

Relaxing of foreign ownership restrictions
Also in April 2018, the UAE Minister of Economy said that new legislation will be passed relaxing foreign ownership restrictions in UAE onshore companies. On 20 May 2018, the UAE Cabinet announced that onshore foreign ownership restrictions will be relaxed to allow for up to 100% foreign ownership (instead of the current maximum of 49%). The new ownership laws are expected to lift foreign investment by fifteen percent.

The Joint Judicial Tribunal
The Joint Judicial Tribunal (“JJT”) was established by Dubai Decree No. 19 of 2016 to resolve conflicts of jurisdiction between the Dubai and DIFC Courts. The JJT’s initial judgments quashed hopes of general use of the DIFC Court as a conduit jurisdiction, especially in respect of awards arising from Dubai (non-DIFC) seated arbitrations. Notwithstanding, the recent case of Isai v Isabelle ARB 006/2017 shows that the DIFC Courts still consider themselves to have jurisdiction to recognise and enforce Dubai (non-DIFC) seated arbitral awards, provided there were no annulment proceedings on foot before the Dubai Courts.
Our people

• **Patric McGonigal** (Tokyo) has been appointed as a Singapore International Mediation Centre (SIMC) Specialist, invited to serve as a Member of the Singapore International Arbitration Centre’s (SIAC’s) and invited to act as a facilitator at the SIAC’s Academy in Tokyo this September.

• **Meg Utterback** (London/Shanghai) was appointed by the ICC Court of Arbitration as an Ambassador to its Commission on the Belt and Road Initiative (the “Commission”). A key mandate of the Commission will be to help the ICC determine how best to respond to dispute resolution opportunities arising from projects along the Belt and Road, China’s US$900 billion infrastructure development campaign.

• **Wilson Antoon** (London) was promoted to Of Counsel

• **James McKenzie** (Hong Kong) was appointed to HKIAC’s HK45 committee.

• **Dorothy Murray** (London) has become an accredited member and Representative Neutral of the Mediation and Conciliation Network (MCN).

• **Alex Baykitch** named in Who’s Who Legal: Arbitration 2019

• Daisy Mallett and Edwina Kwan named in Who’s Who Legal: Arbitration - Future Leaders 2019

• **Edwina Kwan** appointed to Steering Committee of ACICA 45

Public wins for our clients

Andrei Yakovlev (Dubai) and Dorothy Murray (London) and team secured a major victory for Ukraine as an ICSID tribunal unanimously rejected all claims made by a British investor, Krederi Ltd. The value of the claims was in excess of USD 137 million. The investor brought the claims in 2014 under the bilateral investment protection treaty between Ukraine and the UK alleging expropriation of a land plot in the historic centre of Ukraine’s capital city Kyiv. The win was recognised in the Global Arbitration Review.

Andrei Yakovlev (Dubai) and Dorothy Murray (London) and team secured a win for the Ukrainian National Oil and Gas Company Naftogaz as an LCIA tribunal has partly upheld claims by Ukrainian state entity Naftogaz in a battle over the country’s largest oil and gas producer, ruling that corporate governance provisions in a shareholders’ agreement with companies linked to controversial Ukrainian billionaire Igor Kolomoisky are unenforceable.

Articles and insights

In June, Paul Starr produced an article on 10 Recommendations to Resolve Belt and Road Disputes Effectively for China International Contractors Association’s monthly journal.

Paul Starr and James McKenzie will be contributing an article on third party funding of arbitration in Hong Kong for Practical Law China, Thomson Reuters platform.

Tim Taylor, partner in Dubai has produced a collection of articles entitled Tales for the Year of Zayed linking UAE’s past to DIFC and UAE Courts present.

Edmund Wan and Katherine Cheung authored a KWM article on “Why does such a small application for extension of time need to go to the Hong Kong Court of Final Appeal?”

Alex Baykitch and Edmund Bao published a KWM article titled “Arbitrating ISDA master agreements – new developments and considerations”

Meg Utterback published an article on JV Disputes in China in the September 2018 edition of the American Chamber of Commerce in Shanghai’s publication “Insights”.

Industry recognition

Asialaw and Benchmark Litigation Dispute Resolution Awards 2018 – winners

King & Wood Mallesons was named National law firm of the year for China; Tao Huang (Beijing) and Paul Starr (Hong Kong) received awards for ‘Disputes Star of the Year.’ King & Wood Mallesons also won ‘Matter of the year’ for a novel case in Hong Kong’s High Court – the criminal trial of Donald Tsang.

Global Arbitration Review 2018 – GAR30

King & Wood Mallesons named as the Top 30 world’s leading international arbitration firm by Global Arbitration Review 2018

Events

15-18 April – ICCA Congress, Sydney

28 June – Paul Starr (Hong Kong) was invited by the Department of Justice to moderate a panel on “Arbitration and Dispute Resolution” at the third annual HKTDC Belt & Road Summit.

19 July – Paul Starr (Hong Kong) was invited to be a speaker at the “Belt and Road Initiative – Next Chapter of Hong Kong” jointly hosted by Invest HK, KPMG and KWM in Beijing

16 September – James McKenzie (Hong Kong) spoke at a CIETAC Hong Kong event as part of China Arbitration Week

11 and 13 October – The Hong Kong office partnered with ICC-HK to host the inaugural International Commercial Mediation Competition. James McKenzie and Dr. Fan Yang (Hong Kong) are organising and acting as mediators.
**Key regional contacts**

### Australia

- **Justin McDonnell**  
  Partner  
  Brisbane  
  T +61 7 3244 8099  
  justin.mcdonnell@au.kwm.com

- **Chris Fox**  
  Partner  
  Melbourne  
  T +61 3 9643 4116  
  chris.fox@au.kwm.com

- **Juliana Jorissen**  
  Partner  
  Perth  
  T +61 8 9269 7070  
  juliana.jorissen@au.kwm.com

- **James Wang**  
  Partner  
  Perth  
  T +61 8 9269 7215  
  james.wang@au.kwm.com

- **Alex Baykitch**  
  Partner  
  Sydney  
  T +61 2 9296 2118  
  alex.baykitch@au.kwm.com

- **Daisy Mallett**  
  Partner  
  Sydney  
  T +61 2 9296 2643  
  daisy.mallett@au.kwm.com

- **Peter Pether**  
  Partner  
  Sydney  
  T +61 2 9296 2416  
  peter.pether@au.kwm.com

### Meg Utterback

Global International Arbitration Coordinator, Partner  
London  
T +4 20 7550 1524  
meg.utterback@eu.kwm.com

### Paul Starr

Global International Arbitration Coordinator, Partner  
Hong Kong  
T +852 3443 1118  
paul.starr@hk.kwm.com
The Editorial Committee

Dorothy Murray
Partner
London
T +44 20 7550 1521
dorothy.murray@eu.kwm.com

Wilson Antoon
Of Counsel
London
T +44 20 7550 1530
wilson.antoon@eu.kwm.com

Edmund Northcott
Associate
London
T +44 20 7550 1535
Edmund.Northcott@eu.kwm.com

Editorial Assistance

Marco Toracca (London)

Contributors

Wilson Antoon (London), Fernando Badenes (Madrid), Chloé Bakshi (London), Holly Blackwell (Shanghai), Parnika Chaturvedi (Dubai), Cassandra Ditzel (London), Guan Feng (Shanghai), Alfredo Guerrero (Madrid), Acacia Hosking (Perth), Valentine Kerboull (London), Nicholas Lee (Hong Kong), James McKenzie (Hong Kong), Dorothy Murray (London), Alexis Namdar (London), Felicity Ng (Hong Kong), Edmund Northcott (London), Daisy Mallet (Sydney), Brendan Palmer (Dubai), Llewellyn Spink (London), Paul Starr (Hong Kong), Dina Suliman (London), Marco Toracca (London), Meg Utterback (London), Daniel Xu (Dubai), Dr. Fan Yang (Hong Kong), Chen Yizhe (Shanghai).
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