

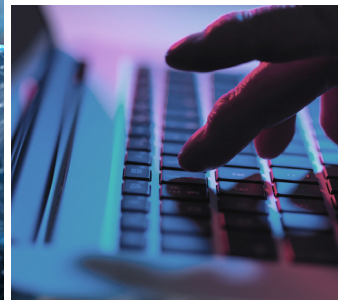


INSIDE ARBITRATION

PERSPECTIVES ON CROSS-BORDER DISPUTES

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Public International Law blogs at

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

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

Welcome to the tenth issue of Inside Arbitration

This issue comes at a busy and exciting time for me in my role as President of the London Court of International Arbitration. The release of the updated LCIA Rules 2020 has been avidly anticipated by the arbitral community and clients alike, and I am delighted that the updated Rules have now been published.

The Rules will come into force in October 2020 once everyone has had the chance to digest the changes. It is not always easy deciding how far to adjust the Rules - it is a fine balance between updating the Rules to take account of new developments and not over-complicating what is, and should remain, a straightforward party-led process. I hope that the LCIA has struck the right balance in refreshing the Rules to meet the evolving needs of its users, but I should welcome your feedback and look forward to discussing the impact of the changes with you over the coming months. To get the ball rolling, UK Head of Arbitration, Craig Tevendale, and London Partner, Andrew Cannon, have analysed the revisions and highlighted the more significant changes. We have also produced some helpful resources on the updated Rules for our clients, including a podcast and post on our Arbitration Notes blog.

The recent promotion to partnership of two of our talented arbitration practitioners, Chad Catterwell (in Melbourne) and Gitta Satryani (in Singapore) is another exciting development. The two spotlight articles in this issue focus on their personal areas of practice and their expectations for arbitration in their regions.

Amid challenging times, a number of important trends are emerging as a result of the COVID-19 pandemic. Many corporates have been seeking to identify risks and limit their exposure, while looking to resolve disputes in a collaborative fashion. At this stage, many of our clients are in "watch and see" mode, seeking advice and guidance on their legal positions and potential disputes options. We have not seen a large number of arbitrations being started, but that may change as we emerge from the crisis and parties look to recover their losses. Indeed, we may see a similar picture unfold to that which followed the 2008 Financial Crisis, when there was a period of calm followed by a spike in disputes and a long trail of claims.

The arbitration process has proved both resilient and adaptable in recent months and in many ways was already ahead of the game, given the international nature of arbitral proceedings and the need to embrace technology to enhance efficiency. The arbitration

community has responded to the pandemic by moving up a gear to answer the need for virtual proceedings. Together with Frankfurt Partner Patricia Nacimiento and Professional Support Consultant Vanessa Naish, I have produced an article and podcast looking at the digitalisation of arbitration and virtual hearings in a post COVID-19 world.

Many investors are currently exploring investment treaty protections and potential rights to claim compensation from host state governments in respect of measures introduced during the pandemic. While investors recognise that governments have had to make difficult decisions, there are concerns that some of the steps taken may breach investment treaty protections. London Partner Andrew Cannon, New York Partner Christian Leathley and Senior Associate Hannah Ambrose have written an article and recorded a podcast on the likely profile of treaty claims in the context of the pandemic.

Another important recent development has been the new legislation giving the Russian courts exclusive jurisdiction over disputes involving Russian individuals and companies subject to sanctions. Moscow Partner Alexei Panich, Senior Associate Sergei Eremin and Associates Polina Podoplelova and Olga Dementyeva look at how this will impact arbitrations.

To finish this issue, we explore the role of experts in international arbitration, with London Partner Emma Schaafsma and Senior Associate Elizabeth Kantor discussing how best to manage expert evidence.

I hope this issue of Inside Arbitration provides some useful insights and that you enjoy reading it. Do take a quick look at our "watch this space" page, where we briefly mention trending issues and our "did you know" page, where you can find out about our sustainability in arbitration initiative.

Feedback on the content is, as always, welcome and we should be delighted to hear from you to discuss your thoughts on any of the topics covered



Paula Hodges QC
Partner, Head of Global
Arbitration Practice

Watch this space...

Arbitration news and developments to keep an eye on

The new arbitration rules of the London Court of International Arbitration ("LCIA") come into force on 1 October 2020. The new Rules allow for the commencement of multiple arbitrations in a 'composite Request' and expand the circumstances in which consolidation may be available. They also confirm the wide discretion of the Tribunal in all aspects of arbitral procedure, including the ability to order Early Determination of claims or counterclaims without legal merit and to order virtual hearings. Importantly, the changes introduce a more "Plain English" drafting style to the whole set of Rules. These changes are discussed further in our article below.

Leading arbitration institutions CRCICA, DIS, ICC, ICDR/AAA, ICSID, KCAB, LCIA, MCA, HKIAC, SCC, SIAC, VIAC and the International Federation of Commercial Arbitration Institutions released a joint statement to the arbitration community on COVID-19 in April 2020. This statement expressed the institutions' willingness to assist parties to progress cases amid challenging times, including by offering guidance on how arbitrations can be progressed virtually if necessary. This announcement has been covered on our blog [here](#).

In a potentially significant development in the intra-EU investor state dispute resolution arena, 23 member states of the European Union have signed an agreement to terminate the Bilateral Investment Treaties in place between them. It is currently unclear how quickly this agreement will enter into force and how it will be interpreted and applied. For more information, or to discuss the impact of the agreement on existing, or prospective intra-EU investor state arbitration proceedings, get in touch with Partner [Andrew Cannon](#).

ICSID and UNCITRAL have now released the long-awaited Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, prepared by their secretariats. The Code aims to address a number of ethical concerns in investor-State dispute settlement (ISDS). The draft Code is due to be discussed by UNCITRAL Working Group III (ISDS Reform) in due course. For more information, contact Partners [Christian Leathley](#) or [Amal Bouchenaki](#).

In May 2020 HKIAC announced new Co-Chairs and Co-Vice Chairs. Herbert Smith Freehills Professional Support Consultant Briana Young, HKIAC Council Member, has been promoted to Co-Vice Chair. If you would like more information, get in touch with Professional Support Consultant, [Briana Young](#).

A group of six international law firms (led by Herbert Smith Freehills, and including Ashurst, CMS, DLA Piper, Hogan Lovells and Latham & Watkins) have developed a Protocol to help deliver a globally consistent approach to the use of online case management platforms for conducting disputes.

The Protocol has been published in draft form for public consultation and can be accessed [here](#). The consultation period will run until 31 August 2020.

In March 2020 the ICCA-IBA Joint Task Force released for consultation their Roadmap to Data Protection in International Arbitration. The consultation closed on 30 June 2020. Once finalised, the Roadmap will help arbitration professionals identify and assess data protection and privacy obligations that may arise in an international arbitration context. If you would like more information, get in touch with Partner, [Nicholas Peacock](#), or with Senior Associate [Charlie Morgan](#), who is a member of the Task Force.

The US Supreme Court may soon decide the question of whether parties involved in international arbitrations seated outside the US can rely on 28 USC Section 1782 to obtain documents from parties within the US. In March 2020 the Fourth Circuit decided such discovery is permissible, but two of the parties in that case are expected to file a petition of certiorari with the Supreme Court this year. Further information can be found in our blog post [here](#). If you would like to discuss, please contact Partners [Christian Leathley](#) or [Amal Bouchenaki](#).

In the April 2020 judgment in *Enka v Chubb* [2020] EWCA Civ 574, the English Court of Appeal set out how the court of the seat should handle applications for anti-suit injunctions. The judgment also contained important guidance on how the governing law of the arbitration agreement will be decided, emphasising the importance of the law of the seat where there is no express choice of law. Further information can be found in our blog post [here](#). The decision has been appealed to the Supreme Court and was heard in July. If you would like to discuss, please contact Partner [Craig Tevendale](#), Professional Support Lawyer [Rebecca Warder](#) or Associate [Olga Dementyeva](#).

A new Russian law came into force on 18 June 2020, providing for exclusive jurisdiction of Russian commercial courts for disputes involving Russian sanctioned individuals and entities, and foreign entities controlled by them. This will apply even where parties have agreed to foreign court jurisdiction, or arbitration, or there is a relevant international treaty, if the relevant dispute resolution provisions cannot be enforced. For more information please contact Partner [Alexei Panich](#), or Associates [Olga Dementyeva](#) and [Polina Podoplelova](#).



The new LCIA Rules 2020: Refreshing the LCIA's approach?



The London Court of International Arbitration (LCIA) has announced changes to its rules which will come into force on 1st October 2020.

The revisions to the LCIA Rules have been couched in terms of an "update" rather than a wholesale rewrite. Nonetheless, some changes of note have been made. The new Rules allow for the commencement of multiple arbitrations in a "composite Request" and expand the circumstances in which consolidation may be available. They also confirm the wide discretion of the Tribunal in all aspects of arbitral procedure, including the ability to order Early Determination of claims or counterclaims for being manifestly without legal merit. In addition, the revision seeks to codify within the Rules themselves the LCIA's approach to Tribunal secretaries (previously contained within a Guidance Note to arbitrators) and to address some slight quirks introduced by the 2014 rule revision. More generally, it feels as though a red pen has been taken to extraneous clause fragments and phraseology and a more "Plain English" drafting style to the whole set of Rules has been introduced. This modernisation also extends to the way the LCIA operates, with a move to the use of electronic submission and communication as the default. We also see a recognition of the reality of current practice, with express drafting included to allow the Tribunal discretion to order a virtual hearing, or a combination of remote and in person attendance.

Breadth of Tribunal discretion

There have been some fairly substantial changes to Articles 14 (Conduct of Proceedings) and 22 (Additional Powers) of the Rules. On one view, these are not changes per se, but rather a confirmation of powers that arbitrators have always had under the LCIA's Rules but which, through lack of express inclusion within the Rules themselves, arbitrators have been reluctant to exercise.

In terms of Article 14, this is certainly a sustainable position. The new Rules have moved around the existing provisions in Article 14, moving up the general duties of the Tribunal from old 14.6 to the beginning of the Article at new 14.1, but leaving them unchanged. New Article 14.2 mirrors old 14.7 in making it clear that the Arbitral Tribunal shall have the widest discretion to discharge these general duties and is, again, unchanged. What follows at new 14.5 and 14.6 seeks to clarify (but not necessarily limit) what this "widest discretion" entails in terms of procedure, including shortening timescales, limiting evidence, restricting pleadings, and adopting technology. Few would disagree that these fall within the existing parameters of arbitrator discretion, exercisable in pursuit of efficient and expeditious conduct. These wide powers would enable a bespoke expedited

procedure if required. This all sits well with the changes in Article 15 of the Rules which confirm the Tribunal's overall control of the written procedure, its extent and timescales.

Whether the changes to Article 22 also fall within that same confirmatory category will very much depend on your view of how far Tribunal discretion extends in terms of summary dismissal. The provisions at Article 22 (viii) allow for a tribunal to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an "Early Determination").

Other institutions (eg SIAC, HKIAC) have already provided for summary dismissal or early determination in their rules or confirmed (ICC) that such a power exists in a practice note. It was therefore a very obvious addition for the LCIA in any rule change, particularly given the rising use of the LCIA Rules by financial institutions who have historically chosen English court jurisdiction over arbitration for the ability to apply for summary judgment.

Composite Requests and Responses

The English court's decision in *A v B* [2017] EWHC 3417 (Comm) (21 December 2017) confirmed that the LCIA Rules 2014 did not permit a party to commence a single arbitration in respect of disputes under multiple contracts. Rather, parties instead needed to issue multiple separate Requests for Arbitration and then seek to have the separate arbitrations consolidated.

Other arbitral institutions have allowed for the issue of single requests for multiple disputes in certain circumstances for a number of years, and this court decision made the LCIA seem at odds with what clients and the arbitral community expected. The changes to Article 1.2 allow for composite Requests for Arbitration to be issued in order to commence multiple arbitrations (under certain circumstances) at once. This is then followed at Article 2.2 by the ability for a Respondent to file a composite Response. While the issuance of a composite Request may be accompanied by a request for consolidation of those disputes, consolidation is not automatic. Whether or not those multiple arbitrations are then consolidated and resolved together will be determined by the Tribunal and/or the LCIA.

Widening the circumstances for the consolidation of disputes

The LCIA Rules have historically been viewed as being quite restrictive in terms of the circumstances in which consolidation could be sought under the Rules themselves. Unless multiple arbitrations were taking place under the same arbitration agreement or under compatible agreements with the same parties, consolidation had to be provided for in free-hand drafting in the arbitration clause itself.

The 2020 rule change introduces a new Article 22A called "Power to Order Consolidation/Concurrent Conduct of Arbitrations". Much of the language here is unchanged, providing for both the Arbitral Tribunal and the LCIA to order consolidation in certain circumstances. However, the tweaks and additions that have been made have changed the LCIA's approach quite considerably. 22.7(ii) now allows for the Tribunal to consolidate arbitrations under compatible arbitration agreements between the same disputing parties or arising out of the same transaction or series of related transactions. Being able to argue that arbitration

"These apparently small alterations provide for a far more modern and flexible provision that will be very useful"

agreements are compatible and arising out of the same transaction or related transactions opens up opportunities for consolidation in a far wider set of circumstances. This expansion has also been applied to the powers of the LCIA Court under Article 22.8(ii) to consolidate prior to the appointment of a tribunal in similar circumstances. Also new is Article 22.7(iii) which provides for a tribunal to conduct arbitrations concurrently in similar circumstances and where the same arbitral tribunal is constituted in respect of each arbitration. In practice, this is likely to occur where parties have already agreed to concurrent arbitrations in their contract or where it is standard market practice in the relevant industry.

These apparently small alterations provide for a far more modern and flexible provision that will be very useful, particularly alongside the new provision for composite Requests.



Craig Tevendale, Partner,
UK Head of International Arbitration and UK Head of Energy, London

Thoughts on the New LCIA Rules

The LCIA 2020 rule change will likely be viewed with approval by the arbitral community. These are a refreshed and modernised set of rules that have retained their essential LCIA flavour.

What do I mean by that? Well, the LCIA has always taken a "less is more" approach to its rules unless there is a compelling reason for greater regulation, an innovation that is beneficial to its users, or a need to clarify existing provisions.

This is a difficult balance to strike but one that these rules seem, by and large, to deliver. The LCIA has clearly decided that it will aid users if its rules contain more detail regarding the procedural techniques that fall within the Tribunal's discretion – particularly in terms of limiting pleadings and evidence, utilising technology and ordering virtual hearings, and for Early Determination. This should increase flexibility, and hopefully encourage arbitrators to use the full remit of their discretion to bring about greater efficiency through a procedure better tailored to individual disputes. There has also been careful thought given to the new provisions of consolidation. These introduce a much wider scope for consolidation, but without adding levels of complexity. Practitioners and users alike will also appreciate the efforts that have been taken to use "plain English" wherever possible.

For now, there are a few question marks that will be answered over time with the benefit of practical experience. The introduction of a "Composite Request" – by which multiple arbitrations can be commenced – is novel. Other arbitral institutions allow for the commencement of a single arbitration in respect of multiple disputes. The LCIA's approach arguably responds first and foremost to challenges in the LCIA's fee structure, rather than providing something which users want or expect. As with all such changes, we shall have to see how it works in practice and whether consolidation by the LCIA following the issue of a Composite Request is more of a formality than a hurdle.

I also recognise the challenge faced by the LCIA in deciding whether, and how, to address the 2016 case of *Gerald Metals*. The LCIA's light touch amendments were perhaps the only sensible option, but they do still leave open the question of when English court-ordered interim relief will be available to support arbitrations under the LCIA Rules. Guidance on the interaction between the new Rules and the Arbitration Act can only come from the Court – and it will take time for jurisprudence to confirm whether these small changes have brought about any clarity.

Tribunal Secretaries

Arbitration moves very quickly as a practice area. Since the last LCIA rule change in 2014 it has become standard practice for the role of tribunal secretary to be formalised and placed on a similar footing to arbitrators in terms of conflicts, independence and impartiality. The LCIA responded to that shift in practice by providing some quite detailed guidance in 2017 in its Guidance Note to Arbitrators. However, the rule refresh was an obvious chance to put that guidance on a more formal footing.

The LCIA's approach to tribunal secretaries came under some scrutiny in the case of *P v Q and others* [2017] EWHC 194 (Comm). *P v Q* involved an application to remove an entire tribunal under s24 of the English Arbitration Act on the basis of alleged "over-delegation" of their duties to their secretary. The Court's decision was based on a review of the Act and, importantly, the LCIA Rules 1998. The decision gave judicial backing to the LCIA's approach in that case, and provides judicial support to the LCIA Court's decision-making process on arbitrator challenges.

Given this support, particularly following the LCIA's updated approach in its 2017 Guidance, it is not surprising to see that the new Article 14A is not "new" per se, but rather formalises LCIA current practice within the Rules. The provision makes it clear that parties have to agree in that case of tribunal secretaries and that tribunal members must not delegate decision-making powers. There is also clarity about the need for tribunal secretaries to disclose any conflicts of interest and also that the obligation of confidentiality under Article 30 applies to any tribunal secretary.

"Authorised Representatives" and the Annex on Conduct

The introduction of the LCIA's Annex on Counsel Conduct in the 2014 Rules was an extremely innovative move and remains so. It is noteworthy that there have been no efforts to remove or limit the Annex in the 2020 Rules revision. This shows continued confidence from the LCIA in its approach to this issue.

What has been addressed in this latest revision is a change that was introduced in 2014 and caused considerable discussion. In Article 18 of the 1998 LCIA Rules it was clear that a party could be represented by legal practitioners or by any other representative, whether legally qualified or not. However, in 2014 that language shifted to "one or more authorised legal representatives". It was not clear at the time whether the LCIA had intentionally restricted party representation in LCIA arbitration to lawyers only. The rule change in 2020 has reverted to clarifying that representation can be legal or non-legal, but that, legal or non-legal, the Annex on Conduct still applies.

Refreshing and modernising

The 2014 amendments introduced some important new concepts into the LCIA Rules. But they also introduced a few quirks that needed to be rectified. Moreover, the bedrock of the 1998 rules was largely unchanged, meaning that some of the turns of phrase have started to seem a little archaic.

The 2020 update is exactly that. A red pen has been taken to unnecessary additional words and to spare sub-clauses throughout. The fax machine has been removed from the equation and the Rules now require that the Request and Response be submitted electronically unless prior written approval is given by the LCIA Registrar. The default throughout is that correspondence will be through electronic means unless the LCIA Court or the Tribunal direct otherwise (under Article 4). This modernisation also extends to the process of signing and distributing awards, with Article 26.2 now permitting an award to be signed electronically and/or in counterpart and assembled into a single instrument unless the parties agree or the Tribunal or LCIA Court directs otherwise. We also see a recognition of the reality of current practice, particularly during the COVID-19 pandemic, with express drafting included in Article 19 to allow the Tribunal discretion to order a virtual hearing, or a combination of remote and in person attendance. In doing so, the LCIA has chosen to "future-proof" its Rules with the use of the term "other communications technology" to allow for remote hearings technology to continue to evolve over time.



The challenge of addressing *Gerald Metals*

It had been widely anticipated that the revised Rules would address the 2016 case of *Gerald Metals SA v The Trustees of the Timis Trust and others* [2016] EWHC 2327. *Gerald Metals* was about the availability of court-ordered interim relief in support of arbitration. The English court found that the test of "urgency" under s44(3) of the English Arbitration Act 1996 (the "Act") would not be satisfied unless:

- the matter was so urgent that there was insufficient time to form an expedited tribunal or appoint an emergency arbitrator; or
- an expedited tribunal or emergency arbitrator could not exercise the necessary powers.

Leggatt J held that if an expedited tribunal could be constituted or an emergency arbitrator appointed within the relevant timeframe, and the expedited tribunal or emergency arbitrator could practically exercise the necessary powers, the test of "urgency" under s 44(5) of the Act will not be satisfied and the court will not have power to grant urgent relief.

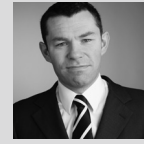
Whether and how to deal with this case in the Rules has been much discussed at Tynley Hall and, no doubt, by the LCIA drafting committee. Article 9B of the Rules clearly states that the availability of an emergency arbitrator shall not prejudice any party's right to apply to a state court or other legal authority for any interim or conservatory measures before the

formation of the Arbitral Tribunal; and it shall not be treated as an alternative to or substitute for the exercise of such right.

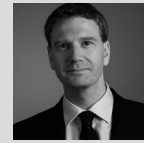
Leggatt J dealt with this provision in his judgment. He found that, while the Rules make it clear that Article 9B is not intended to prevent a party from exercising a right to apply to the court (for example under section 44 of the Arbitration Act), this does not prevent the powers of the court from being limited as a result of the existence of Article 9B.

The LCIA has taken a light touch in its changes to the Rules to address the case. In particular, it has made some small alterations to old Article 9.12 (now Article 9.13) and to Article 25.3 (relating to interim relief before an arbitral tribunal rather than before an emergency arbitrator specifically) to simplify the language and to confirm the availability of court-ordered interim relief in certain circumstances. However, the relatively limited changes demonstrate the challenge this case poses for any arbitral institution. The institution can attempt more clearly to signpost how its rules should be interpreted, but it remains up to the court to decide how it applies or construes the Act alongside those rules. s44 provides for the court's discretion in this area – not for the institution. While the changes are welcome, their impact remains uncertain and will depend entirely on how the Court approaches the interaction between the new LCIA Rules and the Act on this point.

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Getting to grips with the changes: Resources to help you

The LCIA Rules 2020 are more of a refresh than a fundamental revision. However, it can still be challenging as a user to get to grips with what the changes will mean for you or to see how they compare with other similar institutions.

To help our clients, Herbert Smith Freehills' Global Arbitration Team has produced an updated Step by Step Guide to Arbitration under the LCIA Rules 2020 and an interactive PDF table which compare the rules of key arbitral institutions and the UNCITRAL Rules. To receive an electronic copy of these documents, please contact arbitration.info@hsf.com.





Running an arbitration in challenging times: **COVID-19, “digitalising” arbitral procedure and the new world of virtual hearings**

The arbitration community has steadily adopted new technologies over time to assist in the resolution of disputes, increase efficiency and cut down on cost. The result is that much of the “standard” process in an arbitration already takes place digitally.

The COVID-19 pandemic has created an unprecedented need for arbitral institutions and organisations to adapt at very short notice to new and different ways of working, and offer solutions to parties and practitioners that will enable disputes to continue to be resolved at a time of quarantine, enforced social distancing and fast-changing government guidance from across the globe.

Many arbitral institutions have come up with several innovative responses, enabling cases to be filed, parties and tribunals to communicate and, where necessary, for merits hearings to be conducted virtually. Indeed, the leading arbitral institutions have issued a joint statement encouraging parties and tribunals to be constructive in their approach to the challenges presented by COVID-19.

But this fast-changing world also presents considerable challenges to parties already involved in an ongoing arbitration or currently considering their dispute resolution options. How will these changes affect the running of an arbitration and do virtual hearings work? In this article we look at what this new world means for the arbitration process and the options that are available to parties considering whether or not to agree to a virtual hearing.

Use of technology in “normal times”: has the COVID-19 pandemic had a significant impact on standard arbitral procedure?

The standard process in international arbitration has taken place digitally for many years. The practical reality of running an international arbitration with parties and participants across the globe is that it makes sense both financially and in terms of timing to do so. As a consequence, most parties will commence an arbitration by email or by using an arbitral institution’s filing platform – although that may be followed up by a hard copy of the filing. After the arbitration has been commenced, correspondence, pleadings, witness statements and expert reports will usually be exchanged by email or through an institution’s electronic platform. Hard copies will not always follow, and rarely as far as routine correspondence is concerned. The exchange of documents at the document production stage will usually be carried out by exchange of password protected memory sticks, secure electronic file transfer or through document review platforms.

It is also standard practice for most case management conferences to be run using a virtual platform, by video conference or simply over the phone. It’s an established practice—where the circumstances require it—for the cross-examination of some witnesses and experts to take place remotely via a video link. It’s not often done, but it is a recognised alternative, for example where there are visa problems.

The fact that travel to hearings is often required for some or all of those involved means that electronic document storage, trial presentation and electronic bundling are practical options for many arbitrations, although some practitioners and arbitrators do still prefer to use hard copy hearing bundles.

But whilst parties, counsel and arbitrators might embrace technology throughout the process, most arbitrations, until now, have ended with a face-to-face substantive hearing on the merits. That will take place at a hearing venue in an agreed location and be attended by counsel, arbitrators, party representatives, witnesses, and experts, and be recorded by a stenographer/court reporter.

Institutional and organisational impact: how has the pandemic affected case administration?

Arbitral institutions and other organisations responded to the COVID-19 situation very quickly. All of the leading arbitral institutions and bodies involved in ad hoc proceedings (like the LMAA and GAFTA) issued specific guidance. In general terms, this guidance mirrored that of many of the national courts around the world—that delaying the resolution of disputes was not really a practical option in such uncertain times, and that it was up to the parties, counsel, judges and arbitrators to find solutions to keep things moving.

To that end, leading arbitral institutions (the CRCICA, DIS, ICC, ICDR/AAA, ICSID, KCAB, LCIA, MCA, HKIAC, SCC, SIAC, VIAC and the International Federation of Commercial Arbitration Institutions) released a joint statement to the market on 16 April 2020 encouraging parties and arbitrators to engage constructively with each other in these challenging times.¹

Like all businesses, arbitral institutions have had to change their working arrangements to comply with the national legislation regarding “lockdowns” or social distancing. Most institutions closed their offices, but many including the LCIA, ICC and SIAC (as examples), promptly introduced remote working arrangements for all or a majority of employees. As countries move along their own “curve” in face of the virus, some institutions are beginning to staff their offices in whole or in part again.

These remote working arrangements have had different levels of impact on the institutions. Those institutions (like FINRA, SCC and VIAC) which had digitalised aspects of their case management processes before the pandemic struck, have largely continued to operate unaffected. Others who have had a blend of electronic and hard copy processes have had to permit or require that requests/notices of arbitration be filed via email for the duration of the pandemic, while some (like ICSID, SCAI and DIS) have continued to accept hard copies using ad hoc arrangements. Some institutions have also developed interim procedures relating to payments and transmission of awards.

Virtual hearings: should you agree to one or postpone?

As the truly global nature of the pandemic unfolded, one of the first questions faced by parties, arbitrators and arbitral institutions was whether merits hearings ought to be held virtually or postponed. For many, a shift to a fully virtual merits hearing was, at least initially, viewed as a step too far. We saw many arbitration hearings in March and early April being postponed to later in the year rather than taking place virtually.

However, as the realisation that this “new normal” might be with us on a global scale for some time, so came the realisation that there might need to be a change in attitude towards virtual hearings. The institutional joint statement in April 2020 mirrored the approach of many national courts in encouraging parties to continue with the resolution of disputes, and many of the arbitral institutions began encouraging arbitrators to adopt virtual hearings wherever possible. As a consequence, many parties with upcoming merits hearings found, and will continue to find, their arbitrators inclined towards that option. This is particularly the case for arbitrators with busy hearing calendars later in the year.

As a party facing an upcoming merits hearing, it can be difficult to know how to respond to a tribunal seeking to consult the parties on whether or not to hold a virtual hearing. When deciding whether to postpone or hold the hearing virtually, tribunals will ask the parties’ views and will give them an opportunity to comment. The Tribunal has duties to the parties to give them each a reasonable opportunity to put their case and to act fairly and impartially. However, they will also be under an obligation to avoid unnecessary delay or expense and adopt procedures suitable to the circumstances of the case. Tribunals have historically been reluctant to push ahead with procedural steps that a party is deeply opposed to, but may do so if it considers that approach to be justified.

A decision on whether to hold or postpone a hearing will ultimately need to be made by the tribunal on a case-by-case basis considering all the relevant circumstances. These might include:

- The provisions of the dispute resolution agreement (eg time limits, expedited arbitration etc.) or any requirements at the seat of arbitration or under the applicable institutional rules;

1. “Arbitration and COVID-19”, Joint Statement of 16 April 2020: <https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf>.

- The consent of the parties to a virtual hearing or the strength of views expressed by the parties for or against one. Parties may be concerned about the efficacy of cross-examination via video conference, particularly where translation is required;
- Uncertainty about the future date at which another in-person hearing may be scheduled or the significant delay that might result. There might also be questions over the availability of the Tribunal members and parties' counsel to hold the hearing in-person in short order if it were to be postponed (especially in light of uncertainty as to when travel restrictions will be lifted and the likelihood of congested diaries in the aftermath of COVID-19);
- The time zones involved for parties, counsel, witnesses and Tribunal members, and whether it is possible to hold an effective hearing in light of that;
- The potential due process implications of merits hearings not being held in-person;
- The impact on witnesses' recollection in postponing their evidence;
- The lost expenses in preparing for a hearing that does not take place; and
- The continuing uncertainty in not having a dispute settled.

The decision of whether to hold or postpone a hearing will therefore be very fact and case specific and be taken by the Tribunal considering all of the relevant circumstances. Any party who is opposed to a virtual hearing should give real thought to the strength of their arguments. This is particularly the case where concerns are technical ones, as these can often be overcome with the help of service providers.

As countries emerge from lockdown at different times, arbitrators may suggest that

hearings take place through a combination approach, with some participants attending in person and others attending remotely. There may be concerns about whether such an approach provides a fair hearing for those who cannot attend in person and each such proposal will need to be considered in light of the specific circumstances of the case.

Getting your award: will the COVID-19 pandemic mean it will be delayed?

For parties who have already had a hearing (whether virtually or in person), there may be concerns about the impact the pandemic may have on their award being issued. Most institutions either already have an electronic process for signing, receiving and sending out awards, and those that don't have changed their procedure in the short term. Our experience so far is that there is no delay in receiving awards – in fact, perhaps the opposite. The reduction in travel, the postponement of some hearings and the lack of conferences means that some professional arbitrators may have more time at present to push ahead with writing awards. Our partners who have sat as arbitrators and delivered an award recently have also found arbitral institutions to be highly responsive. However, it remains to be seen what impact there will be for hearings held in the Autumn, as many arbitrators may find themselves facing a particularly busy hearing schedule.

Will virtual hearings become the norm in future?

It seems likely that virtual substantive hearings will be the new normal, at least over the next year. But the ability of parties and the arbitral community to adapt due to circumstance does not mean that this will necessarily remain so in future.

That said, there has been a very positive response from a number of practitioners who have participated in virtual hearings, with many surprised at how efficiently and effectively they have been run. Others have focused on the dramatic reduction in the carbon footprint of these virtual hearings and whether there may be an environmental "silver-lining" to the pandemic in terms of changes in business practice for many, including international arbitration.

Some are anticipating a real change in approach for the long term. The IDRC expects the development of "semi-virtual" hearings where only the arbitrators and counsel are at the centre and other participants such as the parties and witnesses participate by videoconference even after the pandemic has ended. The newly announced alliance between Maxwell Chambers, the Arbitration Place of Toronto and Ottawa, and the IDRC offering "global hybrid hearings" involving a mixture of virtual and physical attendance during the pandemic might provide some indication as to what this future might look like. While currently aimed at mitigating the effects of travel restrictions introduced in response to COVID-19, these "global hybrid hearings" enable those involved in hearings (such as the parties and their counsel, the Tribunal and any witnesses or translators that might be involved) to participate to the fullest extent possible.

The effectiveness of all these new proposals will depend on the willingness and ability of tribunals, practitioners and parties to embrace these technologies and share best practice in arbitration. Whether the current public health crisis will result in longer term changes to the way arbitration is practised remains to be seen.

Practical guidance on running a virtual hearing

While it is beneficial to have services available to facilitate online hearings, such hearings will only be effective if they are well run. We outline valuable insight on conducting hearings from members of our Global Arbitration Team, who sit both as counsel and arbitrators.

How can we help?

Our team of specialist lawyers can provide legal, strategic and practical advice in order to run your arbitral proceedings smoothly in the age of virtual hearings.



Planning

- Carefully consider the **choice of platform** for the hearing and use a professional provider.
- Look for tried and tested, resilient platforms which can work on multiple devices and operating systems and can be accessed and function globally, including:
 - Commercially available services such as FaceTime, Skype, Bluejeans, Microsoft Teams or Zoom; or
 - Institutional bespoke services such as SIAC & Maxwell Chambers' Virtual ADR service, ICSID's video conferencing platform, JAMS' Endispute™ mediation platform and the IDRC's collaboration with Opus 2.
- Ensure the **hardware** that is required is available to all parties:
 - Explain what equipment is needed;
 - Provide parties with rented IT if required;
 - Suggest using "wired" rather than wireless connections; and
 - Provide 4G "dongles" to use the cellular network if a domestic connection is insufficient.



Witnesses and Experts

- Remember that commercial courts and arbitral tribunals have managed cross-examination via video conferencing for many years.
- Ensure witnesses and experts have access to the **document bundles** they need.
- Ensure they are aware of their **duties** to the tribunal, particularly in refraining from discussing their evidence during any breaks.
- Consider parties' various **time zones** and build **flexibility** into the timetable;
- Where witnesses or experts give evidence in their native language, simultaneous **translation** is possible, given enough notice and the right kit;
 - Alternatively, consider sequential translation.
- **Court reporting and transcription** services can also be delivered by a stenographer as a member of the video conference.



Advocacy

- Merits hearings will usually have **breakout rooms** for different parties and their counsel and for the arbitral tribunal to share thoughts and strategies.
- When involved in a face-to-face hearing, counsel teams will **pass down notes** to each other during cross-examination. These are critical aspects of a hearing and somehow need to be recreated.
- There are many digital options to accommodate these face-to-face practices:
 - WhatsApp distribution lists;
 - virtual "break out rooms" within conferencing platforms
- All of these would achieve the same end and they might even be more efficient and easier.
- Your advocate and your tribunal will all have had some experience of "**virtual advocacy**" in cross-examining witnesses by video conference for an in-person hearing. However, it is critical that your advocates have the right hardware to deliver effective advocacy and both side's advocates are operating under the same rules (see **virtual hearing protocol** below).

Running the hearing

- It is imperative during a truly "virtual" arbitration to make sure that cybersecurity is maintained throughout and that any personal data is only processed in ways that are compatible with applicable laws. Helpful guidance includes:
 - ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration; and
 - Consultation draft of the ICCA/IBA Joint Task Force's Roadmap on Data Protection in International Arbitration.
- The approach to bundling and providing documents will depend entirely on the number of documents, the size of the case and the resources available to you. Consider:
 - agreed case management systems (e.g. Opus2 Magnum) which can be expensive;
 - an OCR enabled PDF as a low cost electronic option; or
 - hard copy bundles.
- Electronic trial presentation may be included in a case management system, but there are also very good and zero cost ways of presenting documents to a witness and arbitrators, simply by sharing a screen through many of the video conferencing platforms.
- It is very important that all those involved in the hearing are operating under the same rules. Tribunals should either produce or ask the parties to agree a virtual hearing protocol on how they will approach timing, questioning and putting documents before witnesses and experts.

Experiences from within the practice

"Over the last couple of months, I have participated in two "semi-virtual" arbitration hearings – one procedural and one merits hearing. For both hearings, the HSF team met in person in a very large meeting room at our London office where we were able to maintain the necessary social distancing. The other side did the same from their office, while our tribunal and local counsel connected from their respective homes in the UK and South Africa. One of the witnesses gave evidence from his home in the US and our clients connected from Russia. We agreed a virtual hearing protocol in advance and used Zoom as the platform, with the IDRC administering the process for the merits hearing - this worked very smoothly with both sides and the tribunal having their own break-out rooms. From my perspective, the virtual hearings delivered a fair and efficient process and I would definitely consider virtual hearing options in future regardless of travel and other restrictions."

PAULA HODGES QC

"I was involved in the first virtual hearing in the English High Court. While it wasn't an arbitration matter, I was extremely impressed by how well the whole process ran. The hearing involved testimony from witnesses and experts in 4 jurisdictions, some with translation. About 30 participants took part from their homes. As with any dispute resolution process, preparation and organization is key. A well thought through and well planned process can deliver what the parties need. In that respect, a virtual hearing is no different to an in-person hearing."

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For more information on Herbert Smith Freehills' initiatives in promoting greater environmental sustainability in the way we work and reducing the carbon footprint of an arbitration, take a look at the article "Towards Greener Arbitrations – Achieving Greater Environmental Sustainability in the Way We Work" at the end of this issue

This podcast looks at the impact of the COVID-19 pandemic on ongoing and future arbitral proceedings and the challenges of resolving disputes in a time of social distancing. It explores what arbitral institutions and other organisations have been doing to assist parties and arbitral tribunals and shares practical tips on how to manage virtual hearings given the current restrictions on travel and social distancing. Listen to the episode [here](#).

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The challenges of resolving disputes in a time of social distancing: The impact of the COVID-19 pandemic on arbitration

Vanessa Naish, Professional Support Consultant
Craig Tevendale, Partner, UK Head of International Arbitration
Patricia Nacimiento, Partner, Co-Head of German Dispute Resolution team
Kathryn Sanger, Partner

A balance of obligations: The response to the COVID 19 pandemic and investment treaty protections

The impact of the COVID-19 pandemic has been felt across the globe. States have had to make some difficult decisions in response to the spread of the virus while trying to mitigate both economic and societal damage in the short and longer term. This has led to the introduction of a whole range of measures designed to protect public health, including mandatory social isolation, the suspension of contractual rights, the requisitioning or nationalisation of private property, the closure of borders, and export and travel restrictions.

In such extraordinary times, a degree of interference by states with private rights is almost inevitable. But, even in times of crisis, there may be legal ramifications from this sort of wide-ranging action. In this article we consider the balance that states must strike between their response to this pandemic and their obligations to foreign investors under investment treaties. We also offer some thoughts to both states and investors in assessing the measures that have been introduced against the standards of protections these treaties offer.

States' international law obligations under investment treaties

The international law obligations of states may be relevant in this crisis in a myriad of ways. But in this article, we focus on the international obligations assumed by states under investment treaties, which are particularly pertinent to both our state and investor clients.

An investment treaty is an agreement between states which contains reciprocal undertakings for the promotion and protection of private investments made by the nationals of one state in the territory of the other state. The treaty may be "bilateral" (between two states) or "multilateral" (between a number of states). Some treaties are specifically focused on investment alone but investment protections may be found in treaties with broader scope, such as free trade agreements or sectoral agreements. These investment protections are usually agreed by states to provide confidence to foreign

investors that their investment will not be negatively affected by certain types of irregular action by the state hosting the investment (known as the host state). Significantly, whilst these are state-to-state agreements, they usually contain provisions allowing a private investor from one state to enforce the protection their investment is afforded against the host state. That enforcement is usually through international arbitration.

Who can rely on an investment treaty?

For a foreign investor to be able to rely on investment protections there needs to be an applicable treaty between the host state taking the measures affecting the investment, and that foreign investor's "home" state (commonly, in the case of a company, the state of its incorporation).

That foreign investor also needs to have an "investment". Each treaty will usually contain its own definition of "investment" and it is important that an investor is able to show that their activity falls within this definition. In many treaties, the definition of "investment" is quite broad. Many treaties use the phrase "every kind of asset" followed by a non-exhaustive list of types of assets that fall within the definition. In some treaties an "indirect" investment in a host state through a subsidiary may also qualify.

Are all investment treaties the same?

Investment treaties are entered into by many different states. While there are many common features, precisely what the treaties include may depend on a number of factors, such as the state's negotiating power, experience and expertise, its economic situation, and whether it is a largely capital exporting or capital importing country. Also relevant is the date when the treaty was entered into – older treaties tend to include standard protections without further definition, while modern treaties can be more sophisticated, for example including carve-outs for certain state behaviours, CSR and environmental issues and in some cases investor obligations.

While there may be many similarities in the types of protections included in treaties, subtle differences in language can have a significant impact. There can also be differences in key terms like qualifying "investor" or qualifying "investment" which will mean that the scope of protection offered by individual treaties will differ.

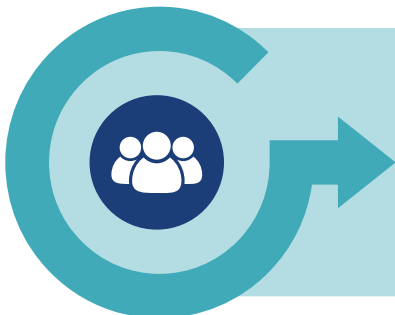
It is therefore really important to look carefully at the specific provisions of any treaty.

What are the investment protections commonly offered by investment treaties?



Protection against the **unlawful expropriation** of an investment without adequate compensation.

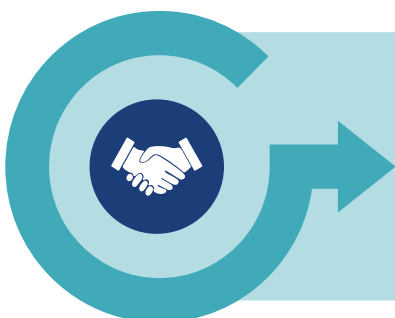
- “Expropriation” means having your investment taken away from you, and the protection may apply whether that “taking” happens directly, or indirectly through a series of governmental acts which encroach on an investment and result in it being deprived of value.
- Expropriation itself is not unlawful provided certain conditions are met. These are usually that: (i) the taking of property is for a public purpose, (ii) the expropriation is on a non-discriminatory basis, and (iii) prompt, adequate and effective compensation is provided to the investor.



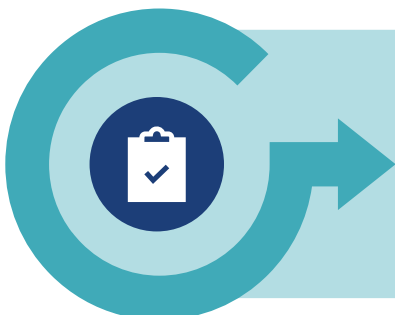
A guarantee of **fair and equitable treatment** or “FET”. Claims under FET provisions fall into a number of categories: for example, breach of legitimate expectations, denial of justice and claims based on administrative decision-making. Not all regulatory changes will be a breach of the FET standard, but a FET claim might be possible where a state’s exercise of its regulatory power is arbitrary, discriminatory, based on procedural unfairness or lack of due process, or fails to protect an investor’s legitimate expectations as to how they will be treated.



There is usually a guarantee of **full protection and security** for the investment and for the investor. This is usually understood as an obligation for the host State to adopt all reasonable measures to physically protect assets and property from threats or attacks that may target foreigners or certain groups of foreigners, although it has also been interpreted to refer to legal security.



There may be guarantees of treatment for the investor that is no less favourable than that given either to nationals of the host state of the investment – so-called “**national treatment**”, or to investors of third states – so-called “**most favoured nation treatment**” (“MFN”). The national treatment protection depends on the standard of treatment that nationals of the host state receive from their government. The MFN treatment may be breached where, for example, a host state treats investors from one country better than another or where the protections offered to investors of a different home state under another investment treaty are more favourable.



Some treaties also specifically guarantee **non-discriminatory treatment** with respect to restitution, compensation or other valuable consideration for losses due to civil strife or state of emergency. They may also guarantee an investor the right to repatriate profits and limit state power to introduce capital controls.

Investment Treaties and how they might apply in the context of the COVID-19 pandemic

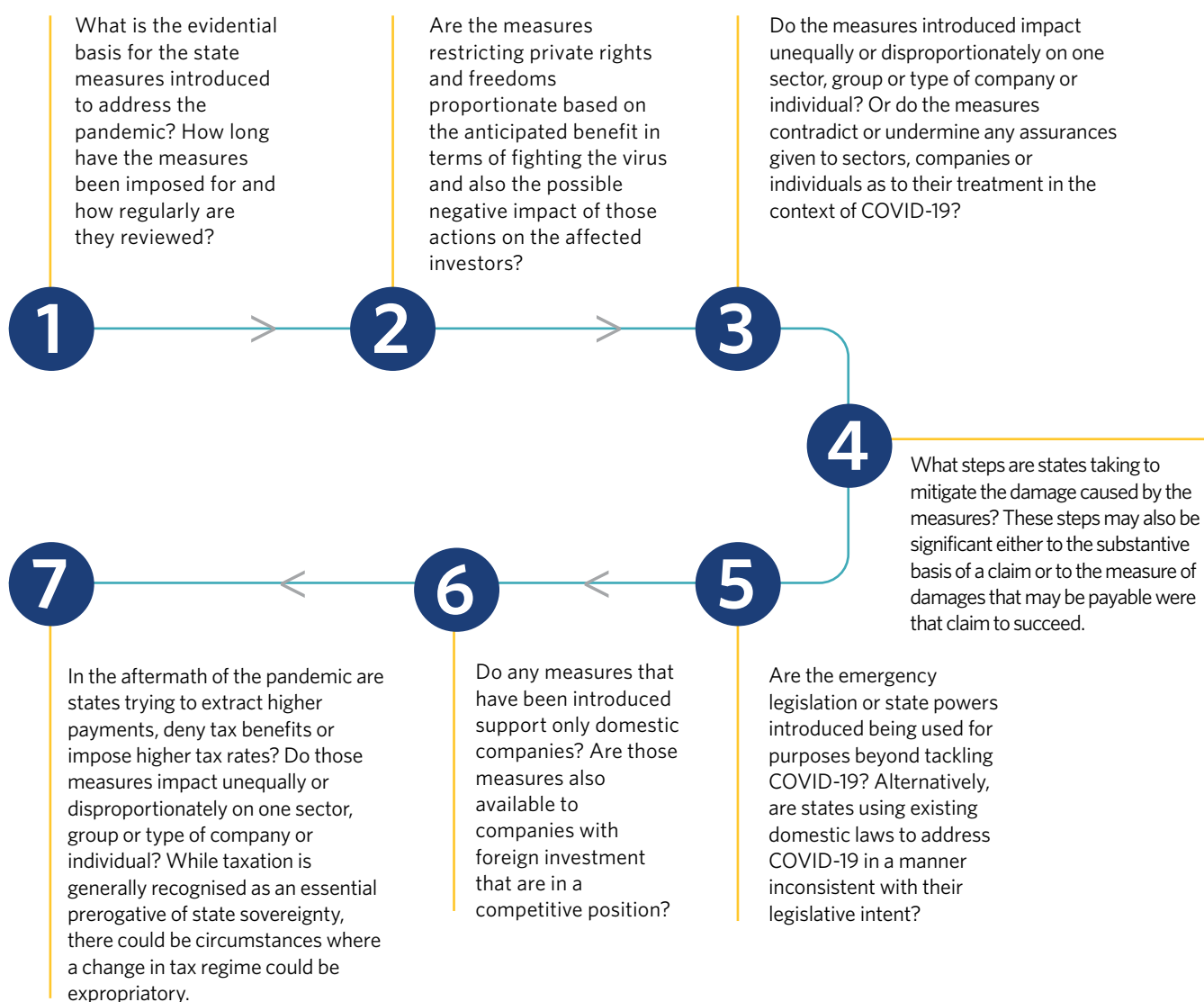
Even in extraordinary times such as these, states must continue to comply with their obligations under investment treaties. Legitimate questions may exist regarding whether the extent of the measures imposed in certain jurisdictions is justified, or whether the measures are proportionate to the serious economic damage which they may inflict. Depending on the circumstances, state action taken in response to the COVID-19 pandemic or indeed, in response to the longer term economic fall-out as a result of the pandemic, could potentially breach the

protections outlined above that are offered by these treaties. Investors may then be able to take direct action against that state through international arbitration and claim for the losses caused by the breach of those protections.

However, assuming there is an applicable treaty, the question of whether there has been a breach will depend heavily on the nature of the state action, the circumstances in which it was taken, and the wording and interpretation of the treaty. Each investor’s potential claim against a state will therefore need to be considered on its own merits. It is also important to note that some treaties carve out, or permit state behaviour which interferes with the

foreign investment in certain circumstances (for example, where the measures the state introduces are intended to protect public health or preserve national security or public order). There are also a number of defences that may be available under customary international law, based on necessity, distress or force majeure.

What does this mean for investors looking to investment treaties for protections or for state representatives (in either the legislature, executive or judiciary), who are weighing their various obligations? There are some important questions to ask when assessing whether a state’s response to COVID-19 is consistent with its treaty obligations. These might include:



Exploring your options

Whether or not state actions in response to COVID-19 result in a breach of treaty protections, and whether an actionable claim arises as a consequence, will be heavily fact- and treaty- specific.

Where measures introduced by particular states raise concerns, investors are well-advised to look at the investment structure underpinning their investment in that host state and carry out a treaty audit to identify potentially relevant treaties. Investors may also want to consider obtaining external legal advice to identify and assess any potential claim, and to help ensure that any discussions with a host state get off on the right foot.

States may likewise wish to keep a careful eye on their matrix of investment treaties and be aware of the treaty rights that foreign investors may have. Seeking

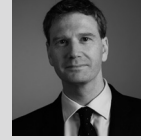
external legal advice through this developing situation on how to balance their treaty obligations against broader public duties and obligations in light of the pandemic may be invaluable in the successful defence of future claims.

Helping to protect your position: keeping records

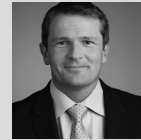
States should retain comprehensive contemporaneous records of the basis for decision-making and the state of knowledge at the time. They should also be careful to ensure that communications with individual investors, as well as industry and sector groups, are clearly documented.

Likewise, investors will want to keep contemporaneous records of the impact on the investment(s) affected by state action. Any communications with states, particularly those seeking or receiving assurances as to treatment, should be carefully recorded and those records preserved.

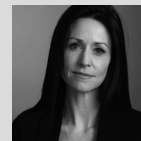
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This podcast looks at the international investment law protections that are relevant to investors and states in the context of the COVID-19 pandemic. It also touches on the key considerations for both states and foreign investors when assessing whether state action taken in response to the pandemic could infringe those protections. Listen to the podcast [here](#).

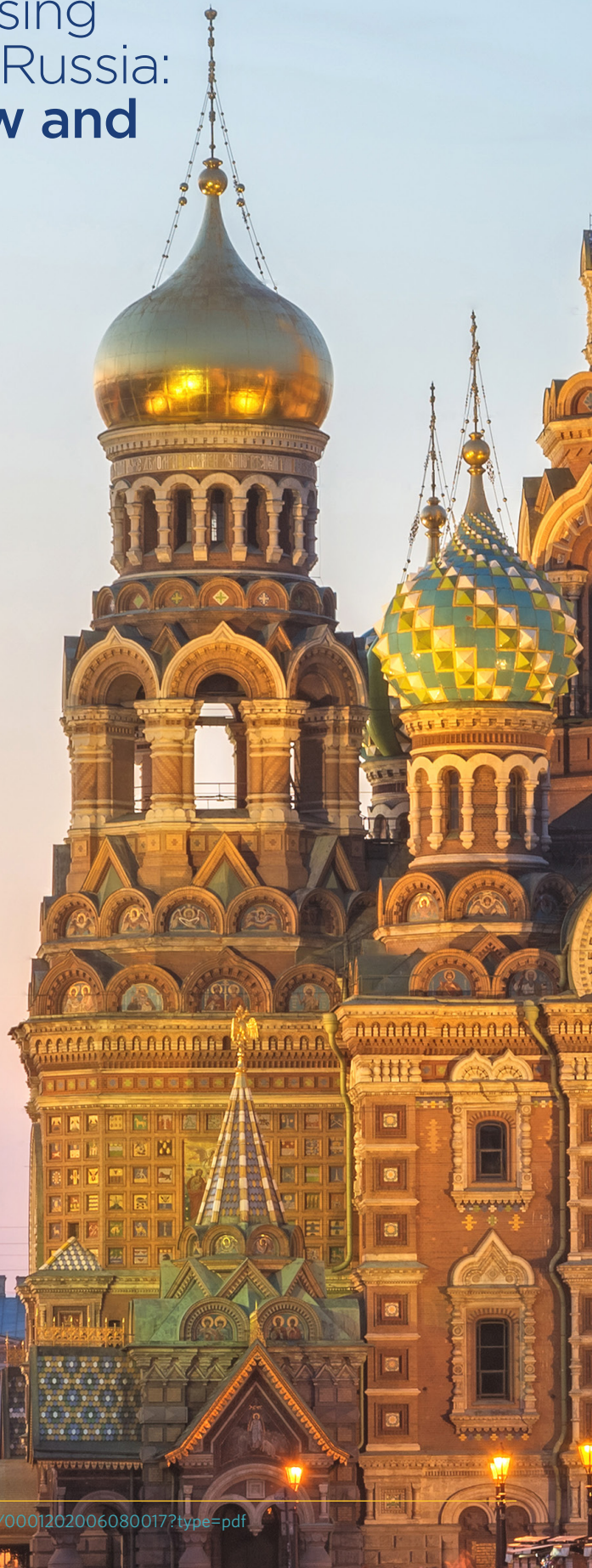
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A balance of obligations:
The response to the COVID-19
pandemic and investment treaty
protections

Andrew Cannon, Partner
Christian Leathley, Partner
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Russian courts to have exclusive jurisdiction over sanctioned persons and disputes arising out of sanctions against Russia: **Overview of the new law and practical implications**

On 8 June 2020, the Russian President signed a new federal law (No.171-FZ)¹ amending the Russian Arbitrazh (Commercial) Procedure Code (the “**Law**”), which will significantly change the dispute resolution landscape involving Russian individuals and entities subject to international sanctions. The Law came into force on 19 June 2020 and represents a significant development: it establishes exclusive jurisdiction of the Russian state arbitrazh (commercial) courts (the “**Russian Courts**”) with respect to disputes involving sanctioned Russian individuals and entities, as well as foreign entities controlled by them (together, the “**Sanctioned Persons**”), and disputes arising out of sanctions against Russia. According to the Law, such disputes may, in certain circumstances, be forcibly heard by the Russian Courts, even if the relevant contract or international treaty provides otherwise.



When will the Russian Courts have exclusive jurisdiction over Sanctioned Persons?

In accordance with the Law, a Sanctioned Person can disregard the dispute resolution provisions in the contract and elect to refer the dispute to the Russian Courts, even if the contractual parties have agreed to the jurisdiction of a foreign court or an arbitral tribunal seated outside of Russia. This can be done where such provisions cannot be enforced because the imposition of sanctions has created obstacles to the Sanctioned Person's access to justice.

Some of the obstacles to justice arising out of sanctions against Russia with respect to Sanctioned Persons which are "SDNs" or "designated persons" under US and EU law respectively, may include, in particular, certain payment processing restrictions that are imposed on banks in relation to arbitration fees or state duties payable by them (and they may need to apply for a special exemption to make such payments). Sanctioned Persons may also experience difficulties in relation to appointing arbitrators or experts. In contrast, Sanctioned Persons falling under sectoral sanctions do not face such difficulties; however, in theory, they might also be able to refer their disputes to the Russian Courts because the Law does not require Sanctioned Persons to prove the connection between the dispute in question and the applicable sanctions.

In practice, Sanctioned Persons will assess the effect of the sanctions on their contracts, and, if there are grounds to believe that the applicable dispute resolution provisions cannot be enforced due to those sanctions, they will be entitled to refer their disputes for adjudication by the local Russian Courts. However, such referral will only be possible if there are no parallel foreign court or arbitration proceedings between the same parties in relation to a similar dispute.

A broad interpretation of the Law could also lead to the possibility of Sanctioned Persons disregarding dispute resolution provisions in a contract or an international treaty irrespective of their unenforceability, provided that parallel foreign court or arbitration proceedings between the same parties in relation to a similar dispute have not already been initiated. However, it remains to be seen how the Russian Courts will interpret the Law.



What a Sanctioned Person will be able to do if the foreign court or arbitration proceedings are pending or imminent?

If there are pending foreign court or arbitration proceedings in place or such proceedings are imminent, and either the Sanctioned Person believes that the applicable dispute resolution provisions agreed by the parties cannot be enforced due to the sanctions or no dispute resolution clause was agreed by the contractual parties, the Sanctioned Person is entitled to apply to the Russian Courts for an anti-suit injunction preventing the commencement or continuation of such proceedings. The onus will be on the Sanctioned Person to demonstrate that the foreign proceedings are either pending or imminent.

The Sanctioned Person may apply for an order requiring an opposing party who fails to comply with the anti-suit injunction to pay monetary compensation to the Sanctioned Person of up to the amount claimed in the foreign court or arbitration proceedings, plus legal and court fees. There is also a high risk that a decision or award rendered by a foreign court or an arbitral tribunal as a result of such parallel proceedings will not be enforceable in Russia.

In any event, it remains to be seen whether anti-suit injunctions imposed by the Russian Courts will be enforced by foreign courts or

arbitration institutions seated outside of Russia. For instance, the Russian Courts refuse to enforce anti-suit injunctions against the commencement and continuation of proceedings in the Russian Courts which have been issued by foreign courts². Nevertheless, the opposing parties will bear the negative consequences of failing to comply with the anti-suit injunctions imposed by the Russian Courts in the territory of the Russian Federation.

How will the Russian Courts determine that the dispute resolution clause is unenforceable?

It remains to be seen on what bases the Russian Courts will determine that a dispute resolution clause involving a Sanctioned Person may be rendered unenforceable due to sanctions creating obstacles to the Sanctioned Person's access to justice. Equally, at present it is unclear what factors will influence the Russian Courts' views when making a determination as to enforceability.

This issue has already been discussed by the Russian Courts in at least one case prior to the adoption of the Law. In *Instar Logistics LLC v Nabors Drilling International Ltd* (Case number [A40-149566/2019](#)) ("*Instar Logistics*"), the Arbitrazh (Commercial) Court of Appeal held that an ICC arbitration clause was unenforceable

2. See para 32 of Informational letter of the Supreme Arbitrazh Court Presidium No. 158 dated 09 June 2013.

due to the imposition of US sanctions, concluding that the Russian Courts should have jurisdiction instead. According to the Court, the claimant, a Russian company subject to US sanctions, could not recover a debt from the defendant, a Russian branch of a US company, in reliance on the arbitration clause in the contract. The Court decided that the clause placed the defendant in a more favourable position, given that an arbitral award in favour of the claimant would not be enforceable due to bank transfer restrictions as a result of the sanctions. Therefore, it seems that the Court of Appeal effectively equated the “enforceability of a dispute resolution provision” with the “enforceability of a foreign court decision or an arbitral award”.

The Arbitrazh (Commercial) Court of the Moscow District has recently upheld the decision of the Court of Appeal in *Instar Logistics*. The Moscow District Court dismissed the defendant’s appeal on formal grounds without making any substantive comments in relation to the provisions of the Law, or the manner in which the phrases “enforceability of a dispute resolution clause” and “obstacles to access to justice” should be interpreted (even though the claimant made a reference to the Law in its submissions). Although the decision of the Moscow District Court does not set a binding precedent under Russian law, its silent agreement with the Court of Appeal may well have a persuasive effect in the future, such that the lower courts will follow suit.

What has been the response of foreign arbitral institutions to sanctions?

In August 2015, the London Court of International Arbitration (the “**LCIA**”), together with the Stockholm Chamber of Commerce (the “**SCC**”) and the International Chamber of Commerce (the “**ICC**”), published a joint note confirming that sanctions do not impose a general prohibition on parties seeking arbitration administered by these arbitral institutions, and Sanctioned Persons are

not treated differently from other parties (subject to compliance measures that arbitral institutions are required to implement).³

The LCIA has also confirmed that it has not experienced a significant impact on its ability to administer arbitrations involving Sanctioned Persons, although a limited number of administrative steps have been added to the case management process, so as to ensure that any necessary exemption application can be made to the relevant authorities.⁴

Further, on 17 June 2020, the Hong Kong International Arbitration Centre (the “**HKIAC**”) held a webinar which addressed, in particular, the consequences of the Law.⁵ It was stressed that since (1) Hong Kong has not adopted sanctions against Russia, and (2) on 25 April 2019 the HKIAC was granted permanent arbitration institution, there is a compelling argument that choosing the HKIAC as the arbitral forum in the relevant contract should not create an obstacle to access to justice with respect to a Sanctioned Person.

It remains to be seen whether the Russian Courts will take into account the statements and practices of foreign arbitral institutions, such as the LCIA, the SCC, the ICC and the HKIAC, when applying the Law.

The new Law should not affect the arbitration clauses providing for the competence of arbitral institutions with a seat in Russia.

Will an arbitral award or a foreign court decision affecting a Sanctioned Person be enforceable in Russia?

The Law clarifies that, despite the Russian Courts having exclusive jurisdiction over disputes involving Sanctioned Parties, a foreign court decision or an award of an arbitral tribunal seated outside of Russia that affects a Sanctioned Person can nevertheless be recognised and enforced in Russia (albeit in limited circumstances) in

accordance with the general recognition and enforcement rules.

Russia has been a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1960 (the “**New York Convention**”) (replacing the former Soviet Union as a member state in 1991), and is a party to a number of international treaties which provide for enforcement of foreign court judgments and arbitral awards.⁶ Therefore, the foreign party could rely on the relevant international instrument to ensure recognition and enforcement of the relevant court decision or award against the Sanctioned Person in Russia.

This will be possible where the Sanctioned Person did not object to the jurisdiction of the foreign court or the arbitral tribunal during the court or arbitration proceedings and did not apply for an anti-suit injunction in the Russian Courts.

In addition, recognition and enforcement of a foreign court decision or an award of an arbitral tribunal seated outside of Russia that affects a Sanctioned Person will be possible where it was the Sanctioned Person that filed the claim which resulted in the arbitral award or court decision in question.

What are the practical implications of the Law for businesses dealing with Russian counterparties?

Businesses dealing with Russian counterparties will need to do their due diligence and carefully monitor whether the counterparty is, or has become, a Sanctioned Person and whether sanctions could affect the enforceability of the dispute resolution clauses in their contracts. If this is the case, they need to be aware that their disputes may be considered by the Russian Courts, even though the parties have agreed to, or an international treaty provides for, an arbitration with a non-Russian seat or the jurisdiction of a foreign court.

3. <https://www.lcia.org/News/the-potential-impact-of-the-eu-sanctions-against-russia-on-inter.aspx>

4. <https://www.lcia.org/adr-services/lcia-notes-for-parties.aspx#20.%20SANCTIONS,%20RESTRICTIVE%20MEASURES%20AND%20ABILITY%20TO%20PARTICIPATE>

5. <https://hkiac.eventbank.com/resources/protected/organization/917/event/21180/1e6323b8-d786-4138-8734-06deac824381.pdf> and https://zoom.us/rec/share/x9MoNLStqTPOE4n1yE_5UflwFKa5aaa8gCQW_fRcxEqGxMTydZYF7rgcg1_GUOSH?startTIme=1592378735000

6. Such treaties are currently in force with several countries that are members of the Commonwealth of Independent States and some former socialist states in Eastern Europe, but only a few Western jurisdictions. Russia is not a party to the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, or the 2005 Hague Convention on Choice of Court Agreements.

As Russian law does not have extraterritorial effect, the foreign counterparty could nevertheless succeed in obtaining and enforcing abroad a foreign court decision or a foreign arbitral award in spite of the anti-suit injunction granted by the Russian Courts. However, the foreign counterparty will also need to assess whether the relevant Sanctioned Person has any readily available assets outside of Russia that could be subject to foreign enforcement proceedings.

In addition, the foreign counterparty will have to deal with and bear the consequences of any parallel proceedings in the Russian Courts which are initiated in accordance with the Law. The foreign counterparty will need to assess whether the Russian Court judgment issued as a result of such proceedings (including, if applicable, the anti-suit injunction order) can be enforced against any assets in Russia. Likewise, it should consider whether the Russian judgment could be recognised and enforced against its assets abroad.

The Law has no provisions on application in time, meaning it may have consequences not only for future, but also for existing disputes.

Are there any issues to consider at the time of contracting?

At the time of contracting the foreign counterparty will need to consider whether any substantive contractual mechanisms are available to protect its interests in circumstances where the Sanctioned Person decides to rely on the new Law in the future. The availability and extent of such mechanisms will, in particular, depend on the governing law of the contract and the parties' respective bargaining powers.

The parties may also consider selecting dispute resolution mechanisms that are less likely to be affected by sanctions (and, consequently, by the Law) so as to mitigate against the possible impact on any proceedings. For example, one method might be to select a seat of arbitration or an arbitral institution that is unlikely to be

affected by the EU or the US sanctions or an arbitral institution with a seat in Russia. Alternatively, the parties may consider including a so-called "cascade" arbitration agreement that would allow the parties to refer their dispute to arbitration proceedings which will be administered by an alternative arbitration institution if, due to sanctions, the dispute cannot be administered by a first choice arbitration institution.

Comment

The Law generally conforms with the trend determined by the amendments to the Russian Constitution, which effectively establish the primacy of Russian law and the Russian Constitution over international law⁷, which were adopted following the referendum on 1 July 2020.

The Law may further complicate the already complex arbitration regime established as a result of the Russian arbitration reforms in 2016 and 2019, which aimed to eliminate the widespread practice of companies setting up their own "pocket" arbitration institutions to administer disputes.

Although international sanctions only apply to certain Russian companies and nationals, and do not impact or restrict dealings with Russian companies in general, the new Law could impact the investment climate in Russia due to the additional level of complexity and uncertainty it introduces.

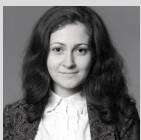
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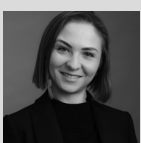
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7. The text of the amendments to the Russian Constitution is available at <http://duma.gov.ru/news/48045/>



Working with experts in international arbitration: **Maximising the value of expert evidence**

Experts can play a central role in an arbitration, whether they advise behind the scenes or testify in proceedings. In either case, their input or opinion will be relied on by a party in order to persuade the Tribunal of the merits (or demerits) and quantum of a claim. It is likely that any expert evidence required for a hearing will be on a subject that is outside of the Tribunal's expertise or comfort zone, so the Tribunal will be looking for impartial guidance. In many cases the outcome of the case will depend heavily on the persuasiveness of the expert's opinion.

Issues requiring expert evidence will vary hugely from dispute to dispute. Common examples include chartered accountants on M&A and pricing disputes, lawyers giving evidence on matters of foreign law, and scheduling experts on construction project delays and disruption. However, sometimes disputes require expertise in a niche or technical area - anything from the ground movement at a particular site caused by an earthquake, to turbine blade failure, to document forgery.

Emma Schaafsma, a Partner in our international construction and engineering disputes team, and Liz Kantor, a Senior Associate in our arbitration practice, give some practical insights into selecting and working with experts in arbitrations.

Selection stage

Timing

It is sensible (and common) to commence the search for an expert as soon as a dispute starts to crystallise. There are a number of reasons why an early search could be necessary. First, if you are looking for an expert in a niche field you may well find yourself competing with the counterparty to hire the “perfect” expert. Indeed, it may well be that as the search progresses it becomes apparent that, rather than looking for one expert to opine on a number of issues, you need a number of experts to deal with discrete points, which could well extend the process longer than initially envisaged. Second, where the dispute arises on a large project or venture with multiple parties and advisors, it may be that some of the candidates that have the necessary experience are conflicted out of taking an appointment by reason of their colleagues’ previous roles. Finally but equally important, where the case outcome is heavily dependent on expert evidence, it is highly recommended to obtain a preliminary view on the technical merits as early as possible, and certainly before formal proceedings commence. This can flush out unmeritorious arguments and provide focus to the case strategy going forward.

Conflicts

The expert will need to conduct a conflict check to ensure that they (or the organisation for which they work) have not been involved with the dispute, the project or one of the parties (or a related party) in such a way that may compromise their independence. Conflicts should be checked on the basis of minimal information about the dispute, in case candidates are already working for a counterparty. As the expert is provided more information about the matter, and indeed as the case evolves, the expert will need to update their conflict check to ensure that there is no risk that their independence might be called into question. Following a [recent case](#) in the English Technology & Construction Court, we expect experts to include in their terms and conditions the client’s consent that they and/or other experts from the same organisation may accept future appointments against the clients on separate disputes related to the same project or transaction. The acceptability of these should be considered carefully in light of anticipated future disputes and revised accordingly.

Other potential hurdles to instruction

You will need to research more widely to understand whether there are any other factors that might affect, or otherwise call into question, the expert’s impartiality and credibility. For example, an expert may have published an article giving a view or opinion on an issue similar to the one now in dispute, which would not be consistent with the opinion they are inclined to give in the arbitration. If you are able to find the article your counterpart will most likely locate it too and use it in cross-examination to try to undermine the expert’s credibility.

Expertise and suitability

It is crucial that the expert has the requisite expertise for the role. For example, you may find a candidate with multiple degrees and doctorates on their cv, but with little or no experience of practical application in the field which will be an essential element of the opinion required. Equally, the candidate may be technically excellent at, for example, deciphering pages of computer coding, but unable to communicate their analysis and conclusions in a manner that is properly understood by the Tribunal. The more complex the dispute, and the higher the stakes, the greater the imperative to interview the potential experts to gauge the full scope of their experience and get a sense of how they might come across as a witness and ensure that the way they present their conclusions will resonate with the Tribunal. It may also be appropriate for the client’s technical team to be involved in interviewing candidates who will be opining on technical issues, in order to ascertain and/or test their relevant technical expertise or competence. Depending on the case and the role, you may also want to ensure that the expert is comfortable with participating in a joint expert meeting and ultimately being cross-examined at a hearing. Finally, it’s worth noting that it is becoming increasingly common for experts to provide references from lawyers and clients from previous mandates – it is worth following up on these as they can provide extremely useful information on how “user-friendly” the expert is likely to be. If the wrong expert is selected, hours of time can be wasted in focusing an expert’s mind on the issues relevant to the case, or helping the expert phrase their conclusions in an intelligible way, or chasing the expert in the run up to a critical deadline.

Availability

Just as Tribunals’ diaries get booked up, so do those of good experts. It is therefore important to ensure that your expert will be able to dedicate sufficient time to the case. Whilst it may be cost efficient for experts to be assisted by juniors (particularly if you hire an expert from a big firm), it is important to make sure that (i) the expert feeds in their knowledge and experience to the report and (ii) the person actually signing the report and giving the evidence is fully on top of the issues. Otherwise this could come back to bite the expert in cross-examination.

Instruction stage

Role

In addition to independent experts who are formally instructed to provide an expert report and give testimony, it is also common to instruct “shadow experts” (sometimes referred to as “dirty” experts) on a consultancy basis, to work behind the scenes with the lawyers and the client to advise on case strategy as it relates to technical matters. It is important to keep these roles distinct so that your testifying expert remains impartial and “clean”. These two roles can be equally important, but of course you are looking for different skills and should tailor your selection process accordingly.

Instructions

In order to provide a framework for an independent expert’s report, it is common for the legal team to produce a “letter of instructions”. This will outline the issues in dispute and contain the questions that the expert is expected to answer, along with the key assumptions that they should bear in mind. It will often attach the key documents and evidence that the expert will need to rely on. These instructions must be drafted very carefully in order to avoid them becoming contentious in due course – often disagreements between party-appointed experts stem from the fact that they have each been given different starting assumptions.

Privilege and disclosure

It is also worth bearing in mind the circumstances in which expert instructions and draft reports could be disclosed to your counterparty, which will depend on the applicable rules of privilege in the arbitration. For example, under English law, instructions to experts are not privileged,

but are also not ordinarily disclosable unless there are reasonable grounds to consider the expert's statement of instructions to be inaccurate or incomplete. Earlier drafts of an expert report are privileged. However, where a party wishes to substitute an expert who is already on the record, the first expert's report may be required to be disclosed as a condition of granting permission to change experts (to prevent a party from "expert shopping").

Rules and guidelines

The rules and guidelines applicable to an expert's report will depend on the seat of arbitration and the parties' agreement. However, it is common for the parties to agree, for example, that the IBA Rules on the Taking of Evidence (2010) ("the IBA Rules") apply. These rules contain guidance as to, for example, the content of an expert's report and the circumstances in which an expert is required to give evidence at a hearing. Other relevant rules include the CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration and the IBA Guidelines on Party Representation in International Arbitration 2013, which are intended to provide guidance where the arbitration is between parties of differing legal backgrounds.

Working with experts during proceedings

"Teach-in"

It can be useful to invite an expert to attend a teach-in session with the client and legal team after they have undertaken a review of the documents and their instructions. This can also be a good opportunity to flush out an expert's preliminary views and concerns at a very early stage and ensure that the case strategy is aligned.

Communication and document management

An expert may be required to provide a list of all documents they have reviewed and or relied upon in their analysis, or otherwise confirm this at the hearing. It is therefore good practice to set up at the outset a log that tracks what documents have been provided to the expert and when. It is also a good idea to put in place a protocol governing how the expert communicates with the legal and client team, not only to ensure that confidentiality and privilege are maintained, but also to avoid conflicting instructions or indeed something being missed. For cases which involve complex working documents, such as financial

models used by quantum experts, it can be necessary to ensure that the format of the model is user-friendly, such that it can be shared with the Tribunal if needs be. Dynamic workbooks can be a very effective tool to assist the Tribunal at the hearing and in arriving at their decision.

The expert's report

Scrutinising an expert's work

The expert must provide their own independent opinion in their report. Therefore the role of the legal team is to ensure that the report answers the questions posed and that it is drafted as clearly and accessibly as it can be. The legal team should also ensure that the expert's report complies with any rules or protocol that the parties have adopted. For example, Article 5 of the IBA Rules contains a list of requirements concerning the content of an expert's report.

Expert declaration

Experts are also commonly required to make a declaration in their report that they consider their opinion to be complete and accurate, and that it constitutes their true, professional opinion. For example, the CIArb Protocol contains a standard declaration to be included in an expert report, and other rules, such as the IBA Rules, contain a requirement that the expert includes an affirmation of their genuine belief in the opinions expressed in the report. This is an important confirmation to the Tribunal of the expert's impartiality, duty to the Tribunal and accountability for the contents of their report.

Joint expert meetings

It is increasingly common for Tribunals to ask experts to hold joint expert meetings (without lawyers or clients present) with a view to narrowing the issues in contention – often recorded in a list of matters agreed and disagreed. This is sometimes done before experts prepare their reports, but it is more common for them to be held after the first round of reports, so as to narrow the scope of the reply reports and oral evidence at the hearing. Therefore it is important that the expert you instruct is comfortable doing this, and indeed ideally has had experience of doing so. Experts will need to bear in mind throughout the process that their primary duty is to the Tribunal and not as advocates of their clients' position. If experts become entrenched in their positions and refuse to consider and properly respond to their counterpart's view, the process can be

extremely frustrating and, ultimately, fruitless. However, if done well, it can be very helpful for the Tribunal to focus on the real issues.

"Expert shopping"

It is generally not acceptable for a party to change its expert because it does not like what its first expert has to say. However, that does not necessarily mean that once an expert has prepared a report, you have to use it. For example, a report may not be used if as a result of the analysis a head of claim is dropped, or the issue is considered no longer relevant to the dispute.

At the hearing

Performance at the hearing

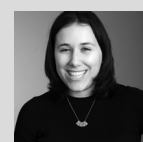
As mentioned above, the role of an expert at the hearing is to assist the Tribunal in resolving the dispute – they owe their principal duty to the Tribunal. If the Tribunal thinks that an expert has become an advocate for their side, the expert's credibility is diminished. Conversely, an expert who tries to be as helpful as possible to the Tribunal will retain their credibility. It is also quite common for expert "hot-tubbing" or "conferencing" to be arranged, where two party-appointed experts give their evidence side by side. This can provide the Tribunal a valuable opportunity to question the experts on the same issue at the same time, and allow the experts to directly challenge each other's views, to facilitate the Tribunal's decision-making.

Expert evidence is critical to the outcome of many disputes and careful planning is required to ensure the right approach to expert selection, instruction and management. It is difficult to over-estimate the importance of thinking ahead and covering all the bases.

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Spotlight Article: Chad Catterwell

Chad was promoted to the firm's partner in 2020. Based in Melbourne, he spent time in the Hong Kong office between 2013 and 2016, and has worked on matters in the broader Asia Pacific region.

You are a Herbert Smith Freehills "lifer" – you have been with the firm your entire career. Can you tell us a bit about your background and the key stages of your career leading up to your promotion?

I started with the firm in 2007 as a Graduate in the Melbourne office, or more specifically what was then known as an Articled Clerk. In the early years, most of my work was litigation focused; in particular a number of significant class actions in the Australian courts. When Freehills and Herbert Smith merged in 2012, I saw an opportunity to expand my horizons and adopt a more global mind-set by pivoting my practice towards international arbitration. That led to a secondment to the firm's arbitration team in Hong Kong, which was a "game-changer" for me. I spent just under three years in Hong Kong, and really benefitted from being part of a practice that is internationally-facing, and leads the field in Asia. What's been great is that I've continued to work seamlessly with the team in Hong Kong and elsewhere in our global network since returning to Australia.

What attracted you to dispute resolution?

I gravitated very early towards disputes work, and have never looked back. In a dispute, there are always two sides to every story. Sophisticated commercial parties rarely behave capriciously and generally have reasons for their actions. Regardless of the legal merits, clients place a premium on knowing that their side has been heard and understood by a court or tribunal. It's my role to tell my client's story, and ensure it is properly heard. This can be challenging, even more so where the dispute crosses borders and takes the client outside its comfort zone. I find it particularly rewarding to shepherd my clients through an international process like arbitration.



How do arbitration and litigation compare, in your view?

The core elements of both processes – the preparation of evidence and related legal analysis – are very similar, but the material is packaged and presented in different ways. So you need the same core skills, but also a familiarity with the procedural and practical nuances.

I find that arbitration often "gets to the point" more quickly; there aren't the pleadings points, for example, that can become somewhat pedantic in the litigation space.

One area in which arbitration and litigation differ is that court procedure is of course specific to the jurisdiction in question, whereas international arbitration has developed a broadly "standard" procedure that applies regardless of the seat. Personally, I am fortunate to practice in both international arbitration and the Australian courts, where the courts are robust and the procedure, although obviously different from arbitration, is reasonably smooth and effective. I might have answered this question differently if my experience of litigation was in another jurisdiction.

"I gravitated very early towards disputes work, and have never looked back"

Is it necessary to be a "specialist" arbitration lawyer, or can a litigator do arbitration equally well?

Depending on your local market, I think you can certainly practice in both fields, but you need to be mindful of the differences in procedure and practice between the two mechanisms and adapt your approach as appropriate. You do need to have, at least, some "specialist" arbitration expertise to effectively run an international arbitration. It only leads to frustration if you try to approach an international arbitration exactly as you would approach litigation before a local judge. For example, courts and arbitrations take very different approaches to pleadings. In my experience, arbitration pleadings are more flexible; the parties' cases tend to adapt and develop during the course of the arbitration. As long as the cases are clear by the time of the hearing, most arbitrators have no objection to that flexibility. Litigators and judges, on the other hand, can find that fluidity uncomfortable compared to the more rigid rules of pleading they are used to.

You have moved back to Australia, but continue to work for clients in Asia. How do you manage the geographical gap?

Pretty seamlessly, to be honest. Technology really does allow us to collaborate effectively across borders. It is crucial that I already had strong contacts across Asia – both within the firm and with clients. That really makes a difference; once you have those relationships, it is possible to deliver a great product and first-class service across offices and borders. The Global Arbitration Practice at Herbert Smith Freehills has been operating this way for a long time, but COVID has really proven how effective it can be. I also have a time zone advantage; Australia is a couple hours ahead of Asia, so I can get ahead of overnight developments before the day starts for my colleagues and clients in Asia.

What is your view of the Australian arbitration landscape?

Arbitration is now firmly established here as a key method of resolving disputes in the construction sector. Depending on the mix of parties those arbitrations may be either domestic or international arbitration. The same is true of the Australian energy and resources sector, particularly in Western Australia. Since I returned to Australia in 2016, the number of draft arbitration agreements that come across my desk has increased steadily. I can only anticipate that that will result in more live arbitrations here in the future.

If you look at Australia's export markets, Australian corporates are very active across Asia, for example, in manufacturing and industrials and in some consumer goods, particularly food and beverages. Australian technology start-ups, in the fintech space and more generally, are also increasingly active regionally and globally. I think there is potential to grow the practice of arbitration in Australia in all those sectors.

Australian Centre for International Commercial Arbitration has a survey that is "in the field" now, which will provide some more data on the scale of arbitration happening in Australia and involving Australian corporates. It will be very interesting to see the results.

In terms of expertise, I think the local arbitration community has reached critical mass in terms of the numbers of practitioners with genuine international experience and an international mind-set. Our firm, for example, benefits from having

a large number of lawyers who have spent time outside Australia, in more established arbitral centres like Hong Kong, Singapore, and London. When we return, we bring that expertise back with us. It is incumbent on us to help educate our clients and colleagues on the real benefits of arbitration when transacting across borders and in the sectors I mentioned above.

My sense is that there has also been an uptick in the number of judgments dealing with arbitration related matters. Those judgments are addressing some very thorny issues in a very sophisticated way.

"Our firm benefits from having a large number of lawyers who have spent time outside Australia, in more established arbitral centres like Hong Kong, Singapore, and London. When we return, we bring that expertise back with us."

COVID-19 has vastly increased the use of technology in business. How will that impact dispute resolution?

Technology, like arbitration, is not constrained by national borders, so the two are a natural fit. We're seeing a number of sectors – banking, mining, logistics and others – moving fast to embrace digitisation and automation opportunities. These projects are typically high-value, and usually business critical. Against that background, we will almost certainly see more technology-related disputes, many of which will have a cross-border element. Arbitration is the natural forum.

The technology projects we're seeing at the moment are also very complex. They often involve a complicated array of configuration and customisation of software to create a solution that is fit for purpose. Disputes emerge where there are cost overruns, delays, scope changes and outcomes that fall short of expectations. That will sound very familiar to arbitration lawyers who practice in the construction sector. Often, as in construction disputes, it is not one issue that leads to a total relationship breakdown or project failure, but rather "death by a thousand cuts" that build over time. Unpicking the complex web of allegations to attribute "blame" and, more

pertinently, contractual responsibility, becomes a detailed forensic exercise.

We're also seeing some corporates opt for partnering and alliance contract models for some longer term technology development projects. It will be interesting to see whether those structures prove resilient to disputes. However, experience tells us that disputes do commonly arise in the course of these longer term arrangements, despite best intentions, as those who practice, for example, in the energy sector will know well. The digitisation agenda is straining some more business-as-usual IT outsourcing relationships, so we may see some contentious terminations and challenges in that space too.

Finally, we're also, of course, seeing a wide array of M&A activity as well as private equity and venture capital investment into the tech sector. There's a mass of start-ups, all jockeying for position and often, it seems, looking to deploy the "get big quick" strategy to stay ahead. They're often involved in repeat M&A and other investment activity, where the valuations are tricky and there can commonly be risks and challenges that are undiscovered at the time of transacting. All of this will be familiar to lawyers and clients who do post-M&A disputes in other sectors. The energy in the M&A market and the very significant valuations that we are seeing looks, to me, a lot like the sort of activity that we saw during the boom in investment into China 5 to 10 years ago that led to a raft of post M&A disputes.

Overall, I see a lot of opportunity for arbitration in the technology sector. Arbitration lawyers will need to upskill their understanding of the substance of these disputes, though. This creates a real opportunity for younger lawyers in this space, and for those with relevant tech expertise, who will stand out from the crowd.

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Spotlight Article: Gitta Satryani

Congratulations on your promotion. Tell us about your career up to now - what did your path to partnership look like?

That's a good question. I think it's best described as the scenic route, rather than a straight path!

I am Indonesian originally - I was born there, and speak the language - but I trained and qualified at Baker McKenzie in Singapore. I moved to Herbert Smith's Singapore office in late 2009, and was seconded to the London office in 2013 and 2014, before returning to Singapore.

When I got back, I was trying to figure out where I fit in, and how I could best contribute to the firm. The office did Indonesia disputes work, but at that time it was largely focused on international clients who were involved in Indonesian litigation. As Singapore developed into a key hub for Southeast Asia arbitration, the practice shifted its focus towards arbitration as well. I was in the right place at the right time to market the firm's Singapore arbitration practice to Indonesian clients. For a long time, I have split my time between the two countries. This arrangement works for me personally, and it mirrors the way the firm's clients conduct their business in the region. Typically, I act for clients who invest in Indonesia but have their head offices in Singapore. Splitting my time means I can be on the ground and available to all parts of the business.

What led you to the law?

My parents' cheapness! I was offered places to study either Chemical Engineering in the US, or Law in Singapore. It was a lot less expensive to stay in Singapore. Jokes aside, I am glad I took this path, I have enjoyed my time as a lawyer.

What attracts you about international arbitration?

My introduction to arbitration was an accident: a friend persuaded me to join the moot programme at the National University of Singapore. Through that, I participated in the Vis Moot, and really enjoyed it. It felt very international. At the beginning of my career,



arbitration was one of the few options that offered an immediate path to an international practice, and that really attracted me. Even now, I really enjoy the international aspects of arbitration. Every case has connections to at least two different countries - often a lot more. There are links to international investors, international projects; no two cases are the same. There's always something different, always something challenging.

"Even now, I really enjoy the international aspects of arbitration...there's always something different, always something challenging"

Your practice focuses on SE Asia. What kinds of disputes are you seeing in that part of the world? What developments have you witnessed in SE Asian arbitration during your career?

The mainstay in Southeast Asia is energy and infrastructure, as well as commodities disputes. Increasingly, though, I am seeing post-M&A disputes, shareholder disputes and disputes involving investment funds. The countries I most often see are Malaysia, Indonesia, Thailand; all are trying to move away from a historic over-dependence on energy. Over the next five to ten years, we should see that translate into a more diverse range of disputes as well.

In the arbitration space, I have noticed a lot more regional players getting involved in international arbitration. Regional and local (meaning, a firm with no footprint outside its home country) Southeast Asian law firms (sometimes but not always staffed by expat lawyers) and Australian law firms, are all entering a market that was historically dominated by international firms staffed by international lawyers. In the past, the local and regional firms would bring on an international firm to co-counsel in an international arbitration. Increasingly, those regional and local firms are seeing that they can do the work alone.

I'm also seeing much greater diversity in the pool of arbitrators, which is fantastic. Alongside the "household names", there are many more Asian arbitrators, and a healthy mix of men and women. There may be reasons for this that are specific to the region; for example, women working in Asia typically have better access to affordable childcare than their counterparts practising in the West. Whatever the reasons, it is great to see.

"Singapore has benefitted from its continued legal and political stability"

Singapore has been phenomenally successful in establishing itself as a leading seat for SE Asian disputes. What is the secret to its success?

Singapore has benefitted from its continued legal and political stability. This stability has led to our clients opting to put their headquarters in Singapore. The legal sector mirrors the way our clients work, including in the dispute resolution space.

Another factor is that Singapore benefits from a consistently high level of government support for the dispute resolution sector.

Are there any other seats you recommend for SEA arbitrations?

Traditionally, if a client wants to arbitrate in Asia, I would recommend Hong Kong as the main alternative to Singapore. Kuala Lumpur is making a major push to compete as a lower cost alternative to both Singapore and Hong Kong. On the whole, it is doing well, and I think it will give those seats a run for their money over the next few years. Malaysian court support for arbitration isn't yet thoroughly tested, but otherwise it seems to be a strong alternative.

Outside Asia, it's the usual suspects: London, Paris, possibly Stockholm for certain cases (typically energy cases). Another good option is Western Australia (Perth); it has a great legal sector, strong courts, and a history of handling energy disputes and commercial arbitrations.

International arbitration has historically involved lots of international travel. COVID has stopped that in its tracks. Will these changes be permanent, or will arbitrators be back on the road as soon as it is safe?

I don't know. I think the changes probably won't all be permanent. By its nature, arbitration attracts people who crave international exposure and contact with people. The aftermath of COVID is likely to affect the frequency of travel, though, and the length of hearings, and make us consider more carefully whether to travel. In future, we may see travel concentrated more heavily, but I don't think travel will disappear from arbitration altogether.

You divide your time between Singapore and Jakarta, often with your children. How do you feel about the advent of more remote working, virtual hearings, etc?

Having young children means I have to travel "smart", and not stay away for too long at a time. That's part of the reason it works well for me to travel to Jakarta and within the Southeast Asian region. It also means that working remotely is completely familiar to me; it's something I've been doing for a long time.

For me, the jury is still out on virtual hearings. I'm about to do my first one, which will include testimony from a witness who is based at a mine in Borneo. We'll see how it goes. There is something very physical about the ability to read the witness in person, and to read the room. We are using a virtual hearing protocol, but

have reserved the right to apply to discontinue if the proceeding is materially affected by bad connections or anything else related to it being held virtually.

How do you view the arbitration landscape in Indonesia?

Unfortunately, it's not ideal at the moment. It is affected by many of the same factors that affect litigation in Indonesia, including a general lack of certainty. There is an ongoing dispute between the "two BANIs" [Indonesia's main arbitral institutions], and inconsistent application by the courts of the standards for setting aside and enforcing arbitral awards. The pool of qualified arbitrators is very small, and there is little real choice because the domestic arbitral institutions operate closed lists of arbitrators. It is hard to break in to those lists. Also, arbitrator fees are very low in Indonesia, so well-known and experienced Indonesian and international arbitrators often decline appointments.

On the other hand, Indonesian parties now see arbitration as a real alternative to litigation, not a completely foreign concept. They now understand that there are tangible benefits to a private dispute resolution process, where they have a say in the procedure and in the choice of arbitrator. Arbitration is also seen as a way to mitigate the traditional risks associated with litigating in the Indonesian courts. Finally, there is greater awareness that selecting an Indonesian seat doesn't mean parties must use an Indonesian arbitral institution or opt for ad hoc arbitration. Opting for SIAC, ICC, HKIAC, AIAC or LCIA arbitration seated in Jakarta helps to internationalise the standard and conduct of the proceedings as well as enlarging the available pool of arbitrators. So there is significant progress in that regard.

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Towards greener arbitrations: Achieving greater environmental sustainability in the way we work

At Herbert Smith Freehills, we have stringent sustainability targets, as do many of our clients. As a business, we strive to find innovative ways to ensure we work in a more environmentally-friendly manner, and assist our clients in meeting their sustainability targets.

In a bid to identify how we can reduce our environmental impact, we have conducted an arbitration case study, which has enabled us to understand where most carbon emissions come from in our arbitrations and what action we can take to decrease and limit them.

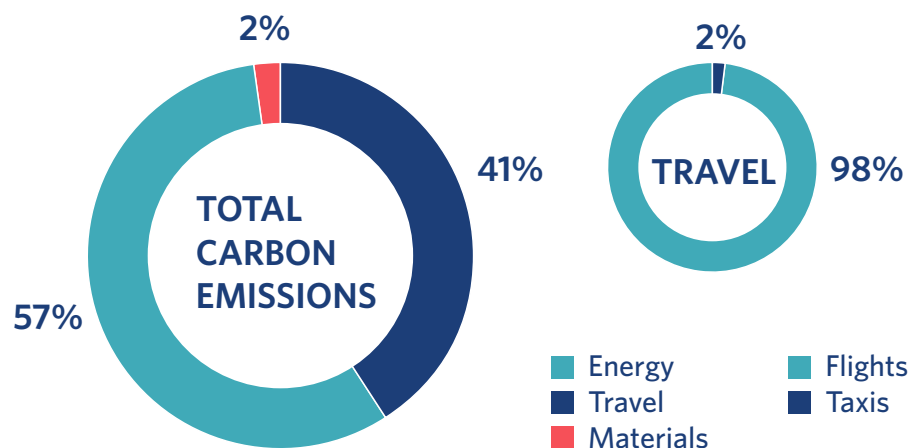
Following the results of our study, our London arbitration team has launched an environmental sustainability initiative aimed at helping our clients reduce the carbon footprint of their arbitrations by introducing changes to the way our cases are run. As part of our relationship with our arbitration clients, throughout their arbitrations, we can explore ways of working that will directly impact on the carbon footprint of the proceedings, and help our clients meet their own sustainability goals. Please get in touch with us if you would like to hear more.

HSF arbitration case study: the carbon footprint of a medium-sized arbitration

We have mapped out the carbon footprint of one of our previous London-seated arbitrations on which London-based fee earners have worked.¹

- The figure relating to **energy** is based on the number of fee earner hours recorded on the matter. It has been assumed that these hours were recorded in the London office.
- The figure relating to **travel** represents the CO₂ emissions (kg) resulting from flights and taxis fares.
- The figure relating to **materials** represents the CO₂ emissions (kg) resulting from the production of the materials used in the arbitration.
- The **materials** considered comprise paper used for printing and photocopying and USB drives.

A medium-sized arbitration on average requires just under **20,000 trees** to offset the carbon emissions created by that one arbitration – a number equivalent to four times the number of trees in Hyde Park or all the trees in Central Park.²



Contacts



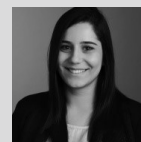
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1. Details of these data calculations are available separately on demand.
2. Data published by Lucy Greenwood, founder of the Pledge for Greener Arbitration.

Previous issues of Inside Arbitration

We hope that you have enjoyed reading this issue of Inside Arbitration.

Previous issues can be accessed below or on our website at www.herbertsmithfreehills.com/latest-thinking/inside-arbitration. If you would like to receive a hard copy of a previous issue please contact paul.mckeating@hsf.com or louise.fuller@hsf.com.

Issue 1



Issue 2



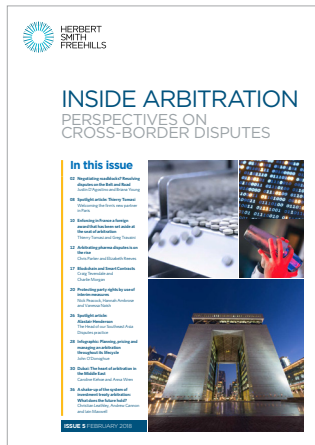
Issue 3



Issue 4



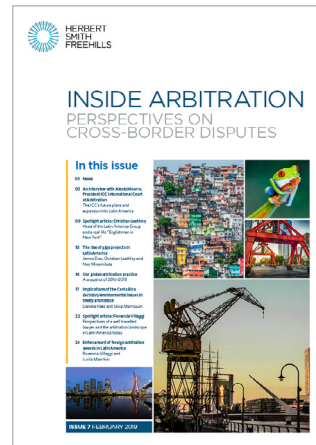
Issue 5



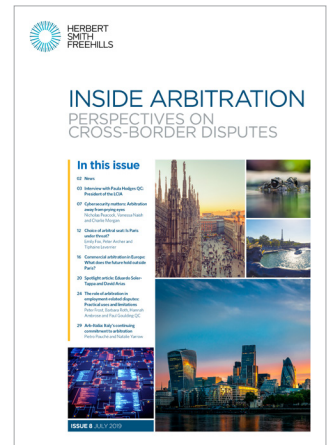
Issue 6



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Issue 8



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