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# INSIDE ARBITRATION

## PERSPECTIVES ON CROSS-BORDER DISPUTES

### In this issue

#### 02 News

#### 03 Smart contracts versus smart (and) legal contracts:

Understanding the distinction and  
the impact of smart legal contracts  
on dispute resolution

#### 06 Crimean investment treaty arbitration claims:

Recent developments

#### 16 Trendspotting:

What do recent arbitration statistics  
tell us about what's to come in  
international commercial arbitration  
in 2020 and beyond?

#### 22 Data analytics in international arbitration:

Balancing technology with  
the human touch

#### 26 Spotlight on Bangkok:

Chinnawat Thongpakdee and  
Warathoron Wongsawangsiri.

#### 30 Attaining maturity:

South Africa's transition  
to an international arbitration  
friendly jurisdiction

#### 34 Common drafting issues in arbitration:

Do arbitration agreements in  
unilateral documents work?

#### 38 Our global arbitration practice:

A snapshot of 2017-2019

#### 39 Spotlight article:

Nick Peacock





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# Welcome to the ninth issue of Inside Arbitration

With a new decade afoot, the articles in this edition of Inside Arbitration focus on trend spotting and change.

Hong Kong Partner, Kathryn Sanger, and London Senior Associate, Marco de Sousa, have produced a fascinating article looking at the statistics of the main arbitral institutions, highlighting interesting similarities and differences and offering some predictions for the future. Our Disputes Director in Johannesburg, Jonathan Ripley-Evans, interviews Professor David Butler, Emeritus Professor of Law at Stellenbosch University and lead advisor to the South African Government on the International Arbitration Act in South Africa. Jonathan and David provide us with insights into the future of arbitration in South Africa, following the recent revision of its arbitration legislation and the development of new international rules for its leading arbitral institution, AFSA.

Technology is an obvious area of fast paced change and we recognise that our clients are keen to anticipate what the future will hold in the realm of dispute resolution (and the legal industry more generally) and how this will impact their way of doing business. Our Australian practice has been at the forefront of one of the most exciting innovations, Blockchain, and Head of Digital Law, Natasha Blycha, Head of International Arbitration (Australia), Brenda Horrigan, and Senior Associate, Guillermo García-Perrote, provide a fascinating update on what smart legal contracting may mean for businesses and dispute resolution in the future. In addition, Digital Law Lead (UK) and Senior Associate, Charlie Morgan, begins the first of a series of short articles looking at technology as a disruptor for arbitration and considers how data analytics may change the way we approach all stages of the arbitral process.

As usual, we have two spotlight articles in this issue. The first focuses on our Bangkok arbitration partners, Chinnawat Thongpakdee and Warathorn Wongsawangsi. Chinnawat has led our disputes team in Bangkok for many years and the arrival of Warathorn has further strengthened our market leading arbitration

expertise in Thailand. Chinnawat and Warathorn offer their insights into the Thai arbitration market and how Bangkok is developing as an arbitral seat. Our second spotlight article is on London Partner and Head of our India arbitration practice, Nick Peacock, who has a very varied practice indeed. Nick has deep expertise in the banking & finance and technology sectors and shares his views on arbitration trends in those sectors, including some insights on cybersecurity issues in arbitration. Our clients also benefit from Nick's regional knowledge, including not only his deep understanding of the Indian arbitration world, but also his strong experience of arbitration in Russia. Nick has contributed a Russia-focused article to this issue, co-authored with Associate, Olga Dementyeva, which looks at investment treaty claims that have arisen from the dispute over Crimea and what the future may hold for investors.

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 ways that you can find out more. I also invite you to take a look at our infographic, a snapshot of our arbitration practice from August 2017 to August 2019, which offers us a chance to share with you some statistics about our global arbitration practice and our case load.

Last, but certainly not least, I should like to congratulate Hong Kong Partner, Simon Chapman, who will become Queen's Counsel in March - an outstanding honour for Simon and our arbitration practice as a whole.

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

Hong Kong-based arbitration partner Simon Chapman has been appointed Queen's Counsel (QC) in England & Wales. Simon is one of only four solicitor-advocates among the 114 QCs appointed this year and he is the fourth QC currently practising at the firm.

The UK left the European Union on 31 January 2020. The arbitration enforcement regime is based on an international treaty and enforcement of arbitrations seated in England and other seats and is unaffected by Brexit. The content of the future UK-EU relationship is not currently clear, but is similarly unlikely to affect arbitration. If you would like more information, refer to our Brexit hub or get in touch with Partner, [Andrew Cannon](#).

Change appears to be on the horizon for Investment Arbitration as the UNCITRAL Working Group continues to discuss large structural reforms to the arbitral process, including the idea of a "multilateral investment court", the introduction of an appellate mechanism and counterclaims by states against investors. A meeting was held in January, with a further meeting scheduled for April. For more information or to discuss the impact of these reforms on your business, get in touch with Partners [Christian Leathley](#) or [Andrew Cannon](#).

On 28 November 2019, the International Chamber of Commerce Task Force on Arbitration of Climate Change Related Disputes released their Report on Resolving Climate Change Related Disputes through Arbitration and ADR ("ICC Report"). The 66-page ICC Report explores existing and anticipated climate change-related disputes and the benefits of using arbitration to resolve these. The ICC Report shortly preceded the publication of the much-anticipated Hague Rules on Business and Human Rights Arbitration, launched on 12 December 2019 ("Hague BHR Rules"), which propose an arbitration framework to deal with human rights-related disputes and therefore also climate change, environmental, and human rights-related claims.

In a judgment issued on 3 October 2019, the Cour de cassation (French Supreme Court) upheld a Court of Appeal decision setting aside an award as a result of an arbitrator's non-disclosure. The judgment sets out the scope of arbitrators' obligations in respect of disclosure once a tribunal has been constituted – and a warning to arbitrators of the need to be proactive. The decision has attracted some negative comment from some in the arbitration community. However, our French practitioners strongly consider that the decision is an illustration of an existing principle of French arbitration law and that there should be no implications on a choice of Paris as a seat. The case has been covered on our blog [here](#). If you would like to discuss, please contact Partners [Laurence Franc-Menget](#) or [Thierry Tomasi](#).

The ICCA-NYC Bar-CPR Working Group have published their Cybersecurity Protocol for International Arbitration 2020, which has been welcomed as a helpful contribution to the drive to improve cybersecurity in arbitrations. The Protocol will assist parties to address cybersecurity issues and seek appropriate procedural directions from the tribunal. If you would like more information, get in touch with Partner, [Nicholas Peacock](#) or Senior Associate [Charlie Morgan](#).

The interim relief arrangement between Hong Kong and Mainland China came into effect on 1 October 2019. Mainland Chinese courts can now order interim measures in support of Hong Kong-seated institutional arbitral proceedings, including HKIAC proceedings. This is a unique and important arrangement in that Hong Kong is now the only seat outside Mainland China to benefit from this support. If you would like more information, get in touch with Partner, [Helen Tang](#).







# Smart contracts versus smart (and) legal contracts: **Understanding the distinction and the impact of smart legal contracts on dispute resolution**

The legal industry is (rightly) increasingly interested in the impact of digitalisation on contracts, legal disputes and our profession more broadly. The starting point for any useful and meaningful discussion around the inevitable transition to a digitised form of contracts with code (and the impact this will have on disputes) must begin with some key agreed definitions. Unfortunately there is a growing body of scholarship within both the legal and “coding” professions where “arguments [particularly in respect of ‘smart contracts’] can be based on ill understood technical concepts... and uninformed use of legal nomenclature”.<sup>1</sup> This is generating both technical and legal analysis that does not assist the profession in moving forward in its understanding of the institutional, process and rule based changes required as a result of digitalisation.

This article will first set out the context and definitions of both smart contracts and smart legal contracts, and second set out some considerations for the legal profession in the use of smart legal contracts and how their use and form might impact dispute resolution going forward.

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<https://www.herbertsmithfreehills.com/our-expertise/services/digital-law-group>

## Smart Contract v Smart Legal Contract – lost in translation?

Definitions are of course only as “correct” as some tipping point of common usage finds them. While citizens of a particular country might like to call a cake a “sock”, it is not surprising to expect that they might encounter difficulties when travelling elsewhere to find that their purchased “sock” is not fit for purpose (indeed – a sock is not best served with tea!).

This facetious example describes the current state we find ourselves in in respect of the (perhaps linguistically more explicable) conflation of discussions around smart contracts (transactional code on a blockchain<sup>2</sup>) and the digitalised version of the legal contract (which we refer to as a Smart Legal Contract or SLC), where the latter is indeed worthy of significant legal scholarship and attention. As one academic recently put it: “the unfortunate labelling of these technologies as ‘contracts’ has spawned a plethora of legal theories, which are built on unsubstantiated technical claims and terminological misunderstandings...Concepts such as ‘validation’ or ‘self –enforcement’, both of which constitute permanent fixtures of the ‘smart contract’ narrative, seem to have hijacked common sense with promises of certainty and guaranteed performance to the point where a structured and logical argument is rendered difficult.”<sup>3</sup>

With this in mind we return to our definitions; a widely accepted definition of Smart Contract is some version of:

- computer code that, upon the occurrence of a specified condition or conditions, runs on a distributed ledger (or blockchain).

Equating a Smart Contract *ipso facto* with a legally enforceable contract because it contains the word “contract”, is technically the same as suggesting that any software program could be called a contract – this is clearly incorrect.

Alternatively, a Smart Legal Contract (SLC) can be described as:

- A legally binding, digital agreement in which part or all of the agreement is intended to execute as algorithmic instructions.

The Blycha and Garside model sets out five key components to an SLC<sup>4</sup>:

- Status: legally binding – an SLC must conform to the established rules of contract;
- Form: the machine readable or digital state;
- Contents:
  - Natural Language, as in any traditional legal contract being any typical contracting and business language used in the jurisdiction of the contract; and
  - Computer code, or other forms of machine-readable or algorithmic instructions intended to run digitally.
- Active Function: the how, when and why the digital components of an SLC are triggered or affected by data or events generated from external or internal data sources, including the results of previously executed algorithms
- Digital Execution Mechanism: the digital hosting or domain of the SLC.

As we can see, an SLC might include code or smart contracting components (as set out in (3)(b) of the model above), but this is only one component of the digitally transformed contract.

Smart Contracts and SLCs are therefore two very different animals. Discussion on the topic of smart contracts tends to conflate these different concepts and focus on the technological aspects, often disregarding the legal aspects. Here we focus on SLCs as facilitators of the integration of computer code and natural language into a technically functional and legally enforceable contract. Indeed, an SLC incorporates coded elements to give legal efficacy to a contract with those automated

components. These coded elements add an entirely new characteristic to an SLC as compared to a traditional contract, namely the automation of the performance of certain (but not all) rights and obligations via the inclusion of coded instructions, which in turn creates new areas of tension (and opportunities) in the contracting process.

Having established a definitional base line for an SLC, we can now discuss how the use of SLCs might impact dispute resolution processes and institutions. By moving away from the more commonly debated question of how a Smart Contract interacts with the law and disputes, to asking the same questions but in respect of SLCs, we are able to generate some practical and exciting new discourse on what lies ahead for the legal profession.

## Impact of Smart Legal Contracts on dispute resolution

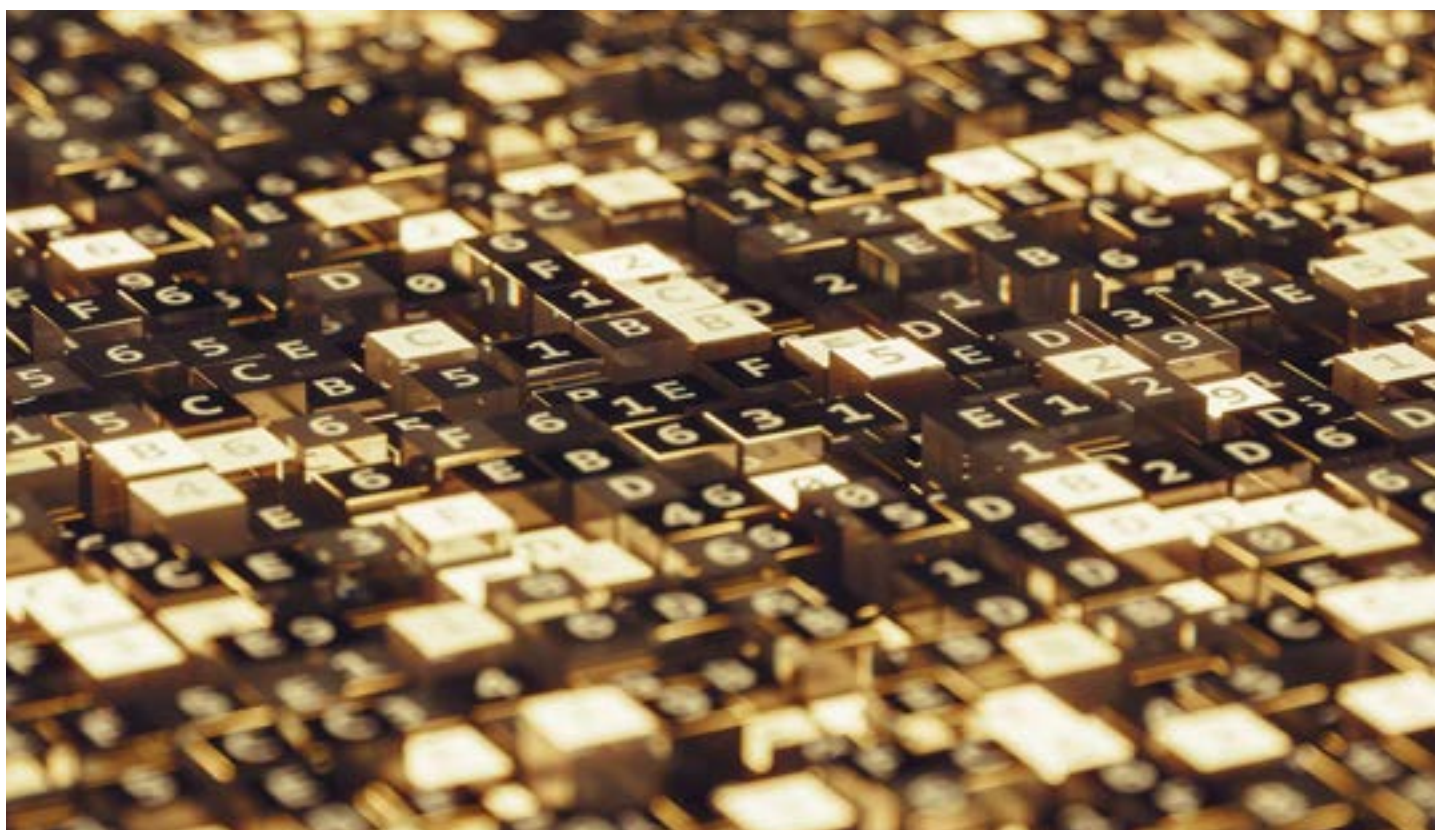
The impact of SLCs on dispute resolution is manifold.

First, the inclusion of code and the automation of certain aspects of the contract add a layer of complexity to the operational issues in Smart Legal Contracts. As an illustration, the operation of the SLC contract may be impacted by coding bugs, bad ‘oracles’ (or external providers of information and inputs to the coded element of the SLC), or hacking resulting in a failure to execute the contract properly. Relevantly, the consequence of the mistake or error will be felt in real-time – rather than being litigated post-facto, the incorrect code/data has already had consequences that must be made good. Thus, when code is incorporated into a contract, the parties should specify in advance whether the failure of code to run as expected gives rise to a breach of contract, or whether alternative manual means of performing the job the code was meant to perform will still suffice as performance. Under the model proposed by Blycha and Garside<sup>5</sup>:

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1. Eliza Mik - *Smart Contracts: a Requiem* (2019) 36 Journal of Contract Law at 70.  
 2. Where an equally large number of people (both inside the legal industry and out) through insufficient understanding of the myriad technical nuances in distributed ledger technology, proffer flawed commentary and scholarship as to how that technology ‘blanket style’ pertains to the law.  
 3. Eliza Mik - *Smart Contracts: a Requiem* (2019) 36 Journal of Contract Law at 70.  
 4. Natasha Blycha and Ariane Garside – *Smart Legal Contracts: A Model for the integration of code into contracts* [publication pending 2020].  
 5. Natasha Blycha and Ariane Garside – *Smart Legal Contracts: A Model for the integration of code into contracts* [publication pending 2020].





- for certainty, a new contractual mechanism 'pairs' a natural language clause or expression of the relevant obligation to the coded expression of that obligation. The contract should make it evident that the relevant code acts as a translation, expression or agreed performance mechanism for its 'paired' natural language clause or obligation;
- there should be overarching interpretation provisions and drafting to reflect the intention of the contracting parties (including for where the codes fail) that assists in managing, interpreting and using the data inputs and outputs which form part of the active nature of an SLC; and
- clauses that can be expressed or automated via incorporated codes should be carefully selected and classified, based on principles of good legal drafting.

These provisions ensure there is certainty of terms, and enable the parties to manage the risks of automation or reliance on data to trigger performance, because they provide a method by which contracting parties can remove the prospect of inadvertently breaching a contract due to automation failures, or of an Internet of Things (IoT) device linked to an automated contractual obligation providing incorrect information. This certainty and management of risk through the SLC in turn facilitate effective dispute resolution.

Second, to ensure enforcement and the ability of the parties to resort to legal remedies in case of non-compliance, the parties must be able to determine which decision-maker has jurisdiction to hear and decide their disputes. In this regard, the inherent flexibility of arbitration proceedings, and the straightforward enforceability of awards globally pursuant to the New York Convention, make international arbitration a prime candidate for resolving SLC disputes.

Third, among other impacts of SLCs on dispute resolution, we also highlight the following:

- The use of code in an SLC to automate notifications and certain steps of the dispute resolution mechanism will require careful, specialist drafting to ensure effective dispute resolution is available to users.
- The impact of the generated data arising from the running of a SLC over time as evidence (i.e., a digital audit trail of performance) bolsters the debate about the arguable insufficiency of procedure and evidence law, and the need for enhanced rules of evidence to respond to the impact of digitalisation.
- Determining the legal state of the code within the relevant SLC will entail an analysis on whether the code forms a part of the contract, and whether a failure of the code constitutes a breach of the contract and in what circumstances.

- Courts and arbitral tribunals may coin new implied terms for SLCs or at least adapt the words or provisions that the decision maker assumes were intended to be included to respond to digitalization.
- Courts and arbitral tribunals may need new civil procedure rules governing their access to digital platforms, and the ability to make the corresponding rulings affecting code.

## Conclusion

In sum, the growth of SLCs will require adaptation by the legal profession and modification of approaches to dispute resolution, but one which is not a whole-cloth reinvention, but rather a modification and supplementation of existing rules and procedures.

## Authors



**Natasha Blycha**  
Head of Digital Law, Perth  
T +61 8 9211 7298  
[natasha.blycha@hsf.com](mailto:natasha.blycha@hsf.com)



**Brenda Horrigan**  
Partner, Head of International Arbitration (Australia), Sydney  
T +61 2 9225 5536  
[brenda.horrigan@hsf.com](mailto:brenda.horrigan@hsf.com)



**Guillermo García-Perrote**  
Senior Associate, Sydney  
T +61 2 9322 4903  
[guillermo.garcia-perrote@hsf.com](mailto:guillermo.garcia-perrote@hsf.com)



# Crimean investment treaty arbitration claims: Recent developments

Over five years have passed since the upheavals in Crimea. Tensions between Ukraine and Russia continue to run high. Since 2014, a number of investment arbitration claims have been filed, first against Russia, then against Ukraine. Over this period, the landscape around what some have termed the “legal war”<sup>1</sup> between the two countries has been in flux, as more investment claims have been filed and Russia changed its defence strategy in May 2019. This article is a follow-on to our previous reports (June 2019 article and a blog post in October 2019) providing an overview of the dynamic development of the Crimea-related disputes landscape to date.

Whether every claim discussed in this article is directly connected to the events in Crimea is by no means clear-cut. All of these claims do, however, form a part of wider tensions between Russia and Ukraine since the events of 2014.

## Crimean investment treaty arbitration claims: dispute landscape overview

According to the UNCTAD Investment Dispute Settlement Navigator<sup>2</sup> and other public sources, thirteen Crimea-related investment arbitration claims have been filed to date (see Summary Table):<sup>3</sup>

- out of the thirteen claims, twelve claims<sup>4</sup> were filed under the 1998 investment treaty between Russia and Ukraine (the “**Russia-Ukraine BIT**”)<sup>5</sup>, and one claim under the 1994 Netherlands-Ukraine BIT (the “**Netherlands-Ukraine BIT**”)<sup>6</sup>;
- unlike the early Ukrainian investors’ claims, all of which were administered by the Permanent Court of Arbitration (“**PCA**”) under the 1976 UNCITRAL Arbitration Rules, some of the later disputes are administered by other institutions, such as the Arbitration Institute of the Stockholm Chamber of Commerce (“**SCC**”) and the International Centre for Settlement of Investment Disputes (“**ICSID**”);
- the seats of arbitration vary, and include Paris, Geneva, the Hague, and Stockholm;
- the cases concern various economic sectors such as oil and gas, financial services, air transportation, and real estate.

In addition to these thirteen claims, two actions against Russia may be initiated in the near future. In July 2019, the State Hydrographic Service of Ukraine announced that it was considering bringing expropriation claims against Russia in an investor-state arbitration administered by the PCA because Russia had allegedly been unlawfully producing sea navigational charts that cover the territory of Ukraine.<sup>7</sup> Later, in October 2019, Ukraine’s state-owned Administration of Seaports announced that it was preparing an investment treaty claim against Russia over the seizure of its assets in Crimea which value was estimated to be US\$51 million.<sup>8</sup>

To date, all arbitral tribunals considering cases against Russia (that went past the award stage; Cases 1-7, Summary Table) have found that they have jurisdiction to hear the claims. Although the bases of such findings have not been fully disclosed, the tribunals appear to have held that the territorial scope of the Russia-Ukraine BIT extends to protect investments in Crimea, a territory currently under the effective control of Russia, but which was not a Russian territory when the BIT was made. During enforcement proceedings in some of these cases, national courts (such as the Swiss Federal Tribunal) have also confirmed the tribunals’ jurisdictions.





An aerial photograph of a park area with many trees showing yellow autumn foliage. A blue building is visible in the lower left, and a parking lot with several cars is in the upper left. A road or path curves through the middle of the image.

### Russia's change of strategy: consequences and further developments

Initially Russia did not participate in the arbitrations other than to issue protest letters and to challenge some of the resultant awards [See, eg, *Aeroporto Belbek*, Case 1, Summary Table]. In particular, Russia refused to recognise the legitimacy of such proceedings and sent letters to the PCA protesting against the formation of the arbitral tribunals and the PCA's powers to administer the claims. Yet, the tribunals proceeded with hearing the claims (and the PCA with administering these claims). Russia attempted to challenge the awards in national courts, however, none of Russia's challenges in set-aside and enforcement proceedings have been successful to date. National courts that reviewed Russia's applications have so far upheld jurisdiction of the tribunals and the admissibility of the claims [See, eg, Cases 3-5, 7, Summary Table].

In May 2019, Russia's Justice Minister Mr Konovalov announced a change in Russia's defence strategy, declaring that Russia would deal with the claims at their "early stages" before awards are made. This meant that, going forward, Russia would fight the cases on all fronts, including issues of jurisdiction, admissibility, liability, quantum, and enforcement.

Russia's change of strategy has already had an impact, with some of the tribunals making orders in favour of Russia. For example, since the change of Russia's strategy, tribunals in *PrivatBank* [Case 2, Summary Table] and *Lugzor* [Case 6, Summary Table] have allowed Russia (over the respective claimants' objections) to present its arguments after the final awards on jurisdiction and admissibility were issued. Further, as we describe in more detail below, in *Lugzor* [Case 6, Summary Table], the tribunal rejected the claimant's security for costs application, ruling in favour of Russia.

Below, we will discuss various updates in relation to (i) the claims against Russia brought by companies associated with Mr Kolomoisky (the "**Kolomoisky Claims**"); (ii) other claims against Russia (the "**Non-Kolomoisky Claims**"); and (iii) the claims Russian investors brought against Ukraine.

#### Kolomoisky claims

Five cases against Russia have been brought by companies associated with the same Ukrainian businessman, Mr Igor Valerievich Kolomoisky, a former governor of Ukraine's Dnipropetrovsk region<sup>9</sup> with ongoing strong

political connections.<sup>10</sup> An overview of the procedural history of these cases is summarised in Cases 1-5 of the Summary Table, and details of recent developments in these cases are summarised in more detail below.

The parties' submissions on compensation are due in 2020 in *Airport Belbek* [Case 1, Summary Table] and *PrivatBank* [Case 2, Summary Table], after the tribunals in those cases ruled that Russia was not entitled to make submissions on jurisdiction following its change in strategy.<sup>11</sup>

In *Ukrnafta* [Case 3, Summary Table] and *Stabil* [Case 4, Summary Table], following the tribunals' rulings in favour of the claimants in both cases in April 2019, Russia challenged the respective awards before the Swiss court on grounds that the tribunal failed to establish that Crimea was the sovereign territory of Russia, and that the claimants acquired the investments in an illegal manner.<sup>12</sup> On 12 December 2019, the Swiss Federal Supreme Court upheld the awards of both the *Ukrnafta* and *Stabil* cases and ordered Russia to pay US\$80 million in total.<sup>13</sup>

After the tribunal in *Everest* [Case 5, Summary Table] issued a unanimous award on the merits in May 2018 awarding Everest US\$159 million in damages, two sets of national court proceedings in Ukraine and the Netherlands followed. Upon receiving the investors' enforcement application in July 2018, the Kiev Court of Appeal arrested assets related to various Russian banks to enforce the award in September 2018.<sup>14</sup> In January 2019, the Supreme Court of Ukraine upheld the Court of Appeal's decision, clarifying that it was for the Ukrainian bailiffs to determine, in accordance with Ukrainian law, whether property held by Russian or Ukrainian legal entities constitutes property of Russia (and was therefore subject to attachment to meet an award against Russia).<sup>15</sup> Meanwhile, Russia moved to suspend enforcement of the award in the Netherlands. In June 2019, the Hague Court of Appeal refused to suspend enforcement of the award or require the claimants to post security, but is still considering Russia's bid to set aside the award.<sup>16</sup>



### Non-Kolomoisky claims against Russia

Ukrainian investors other than Mr Kolomoisky-associated companies have also brought claims against Russia. Claimants in three cases—*Lugzor*, *Oschadbank*, and *Naftogaz* [Cases 6-8, Summary Table]—are related to Ukrainian state-owned entities. An overview of the procedural history of these cases is summarised in Cases 6-10 of the Summary Table, and details of recent developments in some of these cases are summarised below.

#### **LLC Lugzor v. Russia<sup>17</sup>**

After it changed its defence strategy, Russia requested permission to file a request for bifurcation in order to separately address questions of jurisdiction.<sup>18</sup> Russia further indicated that, if the arbitration were to proceed beyond the jurisdictional phase, it wished to make submissions on issues of merits and quantum.<sup>19</sup> The *Lugzor* tribunal made a procedural order allowing Russia to make a “single, comprehensive submission on all issues of jurisdiction, admissibility, responsibility and quantum.”<sup>20</sup> The tribunal made this decision, in particular, because no final award had yet been made.<sup>21</sup> Following this decision, the claimants proceeded to make an application for security for costs requiring Russia to pay all their costs in this phase of the proceedings and provide €200,000 as security for costs.<sup>22</sup> In August 2019, the tribunal rejected the claimants’ security for costs

application, deferring the decision on the allocation of costs between the parties until the conclusion of the proceedings.<sup>23</sup> Russia filed its comprehensive submission on 17 October 2019,<sup>24</sup> and the parties are currently awaiting the tribunal’s final award.

#### ***Oschadbank v. Russia<sup>25</sup>***

Following a November 2018 award that granted *Oschadbank* US\$1.1 billion in damages plus interest, in August 2019, Russia requested the tribunal to revoke the award and issue a new award declaring that it lacked jurisdiction.<sup>26</sup> In support of its request, Russia claimed that, after the award was made, it retrieved *Oschadbank*’s internal documents which showed that the bank’s Crimean branch was established before 1 January 1992, the date when the investment protection of the Russia-Ukraine BIT starts.<sup>27</sup> The parties are awaiting the tribunal’s decision.

Meanwhile, two sets of set-aside and enforcement proceedings have followed in France and Ukraine. Russia challenged the 2018 award in the French courts, but failed to stay enforcement. In October 2019, the Paris Court of Appeal concluded that, since *Oschadbank* had yet to successfully enforce the award against Russia, Russia had not suffered any harm that justified a stay of enforcement while it pursued a set-aside application before the same court.<sup>28</sup> Meanwhile, on 17 July 2019, the Kiev Court of Appeal recognised the award in proceedings held without Russia’s participation.<sup>29</sup>

### Claims against Ukraine

Russia and Ukraine share a long history of economic integration, so it is no surprise that some Russian investors caught in the increasingly hostile environment between the two countries have initiated their own claims against Ukraine. Among those, three cases may loosely be considered to be Crimea-related: the ongoing *Emergofin* [Case 11, Summary Table] heard by an ICSID tribunal,<sup>30</sup> the *VEB* case heard by an SCC Tribunal [Case 12, Summary Table], and *Gazprom* [Case 13, Summary Table]. The *Gazprom* case was settled in December 2019 together with *Gazprom*’s SCC dispute with *Naftogaz*.<sup>31</sup>

#### **What next?**

While the geopolitical tension between Russian and Ukraine remains, the legal landscape of the Crimea-related cases continues to evolve. Now that Russia has started actively participating in the arbitration proceedings (in some cases after the final award was issued), this will inevitably raise more jurisdictional, substantive, and procedural issues for the parties, tribunals, and potential claimants to consider. Further fights are likely at the set-aside and enforcement stages, especially as the claimants seek to target the assets of state-related entities. The story of the “Crimea cases” still has a long way to run.





## Endnotes

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10. See, eg, Anton Troianovski, *A Ukrainian Billionaire Fought Russia. Now He's Ready to Embrace It*, *N.Y. Times: Europe* (Nov. 13, 2019), <https://www.nytimes.com/2019/11/13/world/europe/ukraine-ihor-kolomoisky-russia.html> (describing Kolomoisky as "Ukraine's most powerful figure outside government").
11. *Arbitration Between Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky*, *Perm. Ct. Arb. Press Release* (Nov. 22, 2019), <https://pcacases.com/web/sendAttach/5620>; *Arbitration Between JSC CB PrivatBank as Claimant and the Russian Federation*, *Perm. Ct. Arb. Press Release* (Nov. 22, 2019), <https://pca-cpa.org/wp-content/uploads/sites/6/2019/11/2015-21-Press-Release-dated-22-November-2019.pdf>.
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15. Markiyani Kliuchkovskiyi, Oleksandr Volkov, *No Sovereign Immunity Defence Against Enforcement of Arbitral Award Against Russia*, *Westlaw: Practical Law UK* (Feb. 19, 2019), [https://uk.practicallaw.thomsonreuters.com/w-019-0772?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-019-0772?transitionType=Default&contextData=(sc.Default)&firstPage=true).
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23. Id.
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25. Case 7, Summary Table.
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30. Case Details, *Emergofin B.V. and Velbay Holdings Ltd. v. Ukraine* (ICSID Case No. ARB/16/35), <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/16/35> (last visited Jan. 13, 2020, 01:07AM GMT).
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## Crimean Investment Treaty Arbitration Claims: Summary Table<sup>1</sup>



### Kolomoisky Cases Against Russia

1. **Aeroporto Belbek and Mr Kolomoisky v. Russia**  
(PCA Case No. 2015-07 commenced 2015)

**Treaty:** Russia-Ukraine BIT  

**Seat:** Netherlands 

**Arbitral Rules:** UNCITRAL (1976)

**Institution:** PCA

#### Arbitrators

- Dupuy, P.-M. - President;
- Bethlehem, D - Claimants;
- Mikulka, V - Respondent.

#### Type of Investment/Claims (as pleaded)

- **Investment** - rights under an operations contract concerning the commercial passenger terminal at the Belbek Airport near Sevastopol (the "Terminal") including investments in various upgrades and renovations.
- **Claims** - expropriation of the Terminal.

#### Arbitration Proceedings & Recent Developments

- **Feb 2019** - unanimous partial award upholding tribunal's jurisdiction and deciding on issues of Russia's liability.
- **June 2019** - Russia starts participating in the arbitration requesting to make submissions on jurisdiction.
- **Aug 2019** - tribunal rejects Russia's applications, noting it would only accept submissions on compensation.

#### Status of Enforcement Proceedings

- **June 2019** - Russia initiates set aside proceedings before the Dutch courts.

#### Status of Original/ Follow-on Proceeding


Pending; parties' submissions on compensation due in 2020.

<p><b>2.</b> JSC CB PrivatBank v. Russia (PCA Case No. 2015-21) commenced 2015</p> <p><b>Treaty:</b> Russia-Ukraine BIT </p> <p><b>Seat:</b> Netherlands </p> <p><b>Arbitral Rules:</b> UNCITRAL (1976)</p> <p><b>Institution:</b> PCA</p>	<p><b>3.</b> PJSC Ukrnafta v. Russia (PCA Case No. 2015-34) commenced 2015</p> <p><b>Treaty:</b> Russia-Ukraine BIT </p> <p><b>Seat:</b> Switzerland </p> <p><b>Arbitral Rules:</b> UNCITRAL (1976)</p> <p><b>Institution:</b> PCA</p>	<p><b>4.</b> Stabil LLC et al v. Russia (PCA Case No. 2015-35) commenced 2015</p> <p><b>Treaty:</b> Russia-Ukraine BIT </p> <p><b>Seat:</b> Switzerland </p> <p><b>Arbitral Rules:</b> UNCITRAL (1976)</p> <p><b>Institution:</b> PCA</p>
<p><b>Arbitrators</b></p> <ul style="list-style-type: none"> <li>• Dupuy, P.-M. - President;</li> <li>• Bethlehem, D. - Claimant;</li> <li>• Mikulka, V. - Respondent.</li> </ul> <p><b>Type of Investment/Claims (as pleaded)</b></p> <ul style="list-style-type: none"> <li>• <b>Investment</b> - US\$1 billion into the banking operations in Crimea encompassing loans, real estate and an ATM network.</li> <li>• <b>Claims</b> - expropriation of the claimant's subsidiary and investment in Crimea, including confiscation of cash holdings and real estate assets, totalling nearly US\$200 million.</li> </ul> <p><b>Arbitration Proceedings &amp; Recent Developments</b></p> <ul style="list-style-type: none"> <li>• <b>Feb 2019</b> - unanimous partial award upholding tribunal's jurisdiction and deciding on issues of Russia's liability.</li> <li>• <b>May 2019</b> - Russia starts participating in the arbitration requesting to make submissions on jurisdiction.</li> <li>• <b>Sept 2019</b> - tribunal rejects Russia's applications, allowing it to make submissions on compensation.</li> </ul> <p><b>Status of Enforcement Proceedings</b></p> <ul style="list-style-type: none"> <li>• <b>2019</b> - Russia initiates set aside proceedings before the Dutch courts.</li> </ul> <p><b>Status of Original/Follow-on Proceeding</b></p> <p>Pending; parties' submissions on compensation due in 2020.</p>	<p><b>Arbitrators</b></p> <ul style="list-style-type: none"> <li>• Kaufmann-Kohler, G. - President;</li> <li>• Price, D. M. - Claimant;</li> <li>• Stern, B. - Respondent.</li> </ul> <p><b>Type of Investment/Claims (as pleaded)</b></p> <ul style="list-style-type: none"> <li>• <b>Investment</b> - ownership of 16 petrol stations in the region of Crimea (the "Ukrnafta Petrol Stations").</li> <li>• <b>Claims</b> - expropriation of the Ukrnafta Petrol Stations.</li> </ul> <p><b>Arbitration Proceedings &amp; Recent Developments</b></p> <ul style="list-style-type: none"> <li>• <b>Apr 2019</b> - award ordering Russia to pay US\$44.5 million in damages.</li> </ul> <p><b>Status of Enforcement Proceedings</b></p> <ul style="list-style-type: none"> <li>• <b>Apr 2019</b> - Russia challenges the award before the Swiss court.</li> <li>• <b>Dec 2019</b> - Swiss Federal Supreme Court upholds the award.</li> </ul> <p><b>Status of Original/Follow-on Proceeding</b></p> <p>Decided in favour of investor. Award upheld by Swiss Federal Court.</p>	<p><b>Arbitrators</b></p> <ul style="list-style-type: none"> <li>• Kaufmann-Kohler, G. - President;</li> <li>• Price, D. M. - Claimants;</li> <li>• Stern, B. - Respondent.</li> </ul> <p><b>Type of Investment/Claims (as pleaded)</b></p> <ul style="list-style-type: none"> <li>• <b>Investment</b> - ownership of 31 petrol stations in Crimea (the "Petrol Stations").</li> <li>• <b>Claims</b> - expropriation of the Petrol Stations.</li> </ul> <p><b>Arbitration Proceedings &amp; Recent Developments</b></p> <ul style="list-style-type: none"> <li>• <b>Apr 2019</b> - award ordering Russia to pay US\$34.5 million in damages.</li> </ul> <p><b>Status of Enforcement Proceedings</b></p> <ul style="list-style-type: none"> <li>• <b>Apr 2019</b> - Russia challenges the award before the Swiss court.</li> <li>• <b>Dec 2019</b> - Swiss Federal Supreme Court upholds the award.</li> </ul> <p><b>Status of Original/Follow-on Proceeding</b></p> <p>Decided in favour of investor. Award upheld by Swiss Federal Court.</p>

Non-Kolomoisky  
Cases Against Russia

**5. Everest Estate LLC et al v. Russia (PCA Case No. 2015-36) commenced 2015**

**Treaty:** Russia-Ukraine BIT  

**Seat:** Netherlands 

**Arbitral Rules:** UNCITRAL (1976)

**Institution:** PCA

#### Arbitrators

- Rigo Sureda, A. - President;
- Reisman, W. M. - Claimants;
- Knieper, R. - Respondent.

#### Type of Investment/Claims (as pleaded)

- **Investment** - ownership of a large number of properties in Crimea, including offices, apartment buildings and villas (the "**Properties**").
- **Claims** - expropriation of the Properties.

#### Arbitration Proceedings & Recent Developments

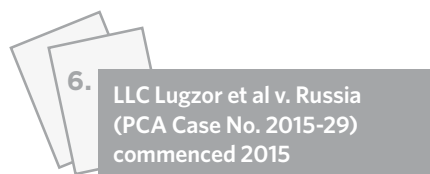
- **May 2019** - award awarding Everest US\$159 million in damages.

#### Status of Enforcement Proceedings



- **Sept 2018** - Kiev Court of Appeal issues a judgment allowing enforcement.
- **Jan 2019** - Ukrainian Supreme Court upholds the judgment of Kiev Court of Appeal.
- **June 2019** - The Hague Court of Appeal rejects Russia's application to suspend enforcement.


#### Status of Original/Follow-on Proceeding

Decided in favour of investor. Enforcement underway.



**6. LLC Lugzor et al v. Russia (PCA Case No. 2015-29) commenced 2015**

**Treaty:** Russia-Ukraine BIT  

**Seat:** Netherlands 

**Arbitral Rules:** UNCITRAL (1976)

**Institution:** PCA

#### Arbitrators

- McRae, D. M. - President;
- Simma, B. - Claimant;
- Zuleta, E. - Respondent

#### Type of Investment/Claims (as pleaded)

- **Investment** - real estate assets in Crimea (the "**Assets**").
- **Claims** - expropriation of the Assets.

#### Arbitration Proceedings & Recent Developments

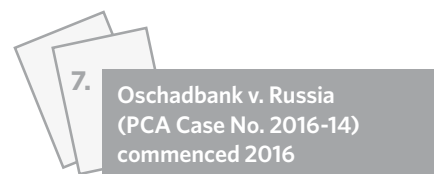
- **Feb 2019** - unanimous partial award upholding tribunal's jurisdiction and Russia's liability.
- **Apr 2019** - Russia starts participating in the arbitration requesting to make submissions on jurisdiction, merits and quantum.
- **June 2019** - tribunal allows Russia to file a single, comprehensive submission.
- **Oct 2019** - Russia files the comprehensive submission.

#### Status of Enforcement Proceedings

N/A


#### Status of Original/Follow-on Proceeding

Pending.



**7. Oschadbank v. Russia (PCA Case No. 2016-14) commenced 2016**

**Treaty:** Russia-Ukraine BIT  

**Seat:** France<sup>2</sup> 

**Arbitral Rules:** UNCITRAL (1976)

**Institution:** PCA

#### Arbitrators

- Williams, D. A. R. - President;
- Brower, C. N. - Claimants;
- Perezcano Diaz, H. - Respondent.

#### Type of Investment/Claims (as pleaded)

- **Investment** - ownership of a bank branch in Crimea (the "**Branch**").
- **Claims** - expropriation of the Branch.

#### Arbitration Proceedings & Recent Developments

- **Nov 2018** - award ordering Russia to pay US\$1.1 billion in damages plus interest.
- **Aug 2019** - Russia requests the tribunal to revoke the award and issue a new award declaring that it lacked jurisdiction.





#### Status of Enforcement Proceedings

- **2018** - Russia initiates set aside proceedings in the French courts.
- **Oct 2019** - Paris Court of Appeal refuses to stay enforcement.
- **July 2019** - Kiev Court of Appeal enforces the award.

#### Status of Original/Follow-on Proceeding

Decided in favour of investor. Set aside and enforcement proceedings ongoing.



<p>8. NJSC Naftogaz of Ukraine et al v. Russia (PCA Case No. 2017-16) commenced 2016</p> <p><b>Treaty:</b> Russia-Ukraine BIT </p> <p><b>Seat:</b> Netherlands </p> <p><b>Arbitral Rules:</b> UNCITRAL (1976)</p> <p><b>Institution:</b> PCA</p>	<p>9. PJSC DTEK Krymenergo v. Russia (PCA Case No. unknown) commenced 2017<sup>3</sup></p> <p><b>Treaty:</b> Russia-Ukraine BIT </p> <p><b>Seat:</b> unknown</p> <p><b>Arbitral Rules:</b> unknown</p> <p><b>Institution:</b> PCA</p>	<p>10. NEK Ukrenergo v. Russia commenced 2019</p> <p><b>Treaty:</b> Russia-Ukraine BIT </p> <p><b>Seat:</b> unknown</p> <p><b>Arbitral Rules:</b> UNCITRAL</p> <p><b>Institution:</b> unknown</p>
<p><b>Arbitrators</b></p> <ul style="list-style-type: none"> <li>• Binnie, I. - President;</li> <li>• Poncet, C. - Appointing party unknown;</li> <li>• Stanivuković, M. - Appointing party unknown.</li> </ul> <p><b>Type of Investment/Claims (as pleaded)</b></p> <ul style="list-style-type: none"> <li>• <b>Investment</b> - Oil and gas assets (the "O&amp;G Assets").</li> <li>• <b>Claims</b> - expropriation of the O&amp;G Assets and the transfer of the O&amp;G Assets to a Russian state-owned company.</li> </ul> <p><b>Arbitration Proceedings &amp; Recent Developments</b></p> <ul style="list-style-type: none"> <li>• <b>Mar 2019</b> - Naftogaz announces that the tribunal found Russia liable.</li> <li>• <b>2019</b> - Russia starts participating in the arbitration.</li> </ul> <p><b>Status of Enforcement Proceedings</b></p> <p>N/A</p> <p><b>Status of Original/Follow-on Proceeding</b></p> <p>Pending.</p>	<p><b>Arbitrators</b></p> <ul style="list-style-type: none"> <li>• Unknown</li> </ul> <p><b>Type of Investment/Claims (as pleaded)</b></p> <ul style="list-style-type: none"> <li>• <b>Investment</b> - company assets in Crimea with an aggregated value of US\$500 million.</li> <li>• <b>Claims</b> - unknown.</li> </ul> <p><b>Arbitration Proceedings &amp; Recent Developments</b></p> <ul style="list-style-type: none"> <li>• <b>2019</b> - Russia starts participating in the arbitration.</li> </ul> <p><b>Status of Enforcement Proceedings</b></p> <p>N/A</p> <p><b>Status of Original/Follow-on Proceeding</b></p> <p>Pending.</p>	<p><b>Arbitrators</b></p> <ul style="list-style-type: none"> <li>• Unknown</li> </ul> <p><b>Type of Investment/Claims (as pleaded)</b></p> <ul style="list-style-type: none"> <li>• <b>Investment</b> - certain assets in Crimea.</li> <li>• <b>Claims</b> - expropriation.</li> </ul> <p><b>Arbitration Proceedings &amp; Recent Developments</b></p> <ul style="list-style-type: none"> <li>• Unknown</li> </ul> <p><b>Status of Enforcement Proceedings</b></p> <p>N/A</p> <p><b>Status of Original/Follow-on Proceeding</b></p> <p>Pending.</p>



## Claims Against Ukraine

11.

**Emergofin B.V. and Velbay Holdings Ltd. v. Ukraine (ICSID Case No. ARB/16/35) commenced 2016**

**Treaty:** Netherlands-Ukraine BIT



**Seat:** unknown

**Arbitral Rules:** ICSID Convention

**Institution:** ICSID

### Arbitrators

- Douglas, Z. - President;
- Beechey, J. - Claimants;
- Wood M.G. - Respondent.

### Type of Investment/Claims (as pleaded)

- **Investment** - interests of two subsidiaries of Rusal, a Russian Aluminium producer in the Zaporozhe Aluminium Plant (the "**Plant**").
- **Claims** - arising out of Ukraine's 2015 nationalisation of the Plant, followed by further restrictive measures against Rusal.

### Arbitration Proceedings & Recent Developments

- **March 2018** - the Claimants file a memorial on the merits.
- **March 2019** - the Respondent files a counter-memorial on the merits.
- **Sept 2019** - the Claimants file a reply on the merits and counter-memorial on jurisdiction.

### Status of Enforcement Proceedings

N/A

### Status of Original/Follow-on Proceeding

Pending.

<p><b>12.</b> Vnesheconombank (VEB) v. Ukraine (SCC Case No. unknown) commenced 2019</p> <p><b>Treaty:</b> Russia-Ukraine BIT </p> <p><b>Seat:</b> unknown</p> <p><b>Arbitral Rules:</b> SCC Rules</p> <p><b>Institution:</b> SCC</p>	<p><b>13.</b> PJSC Gazprom v. Ukraine (PCA Case No. 2019-10) commenced 2018</p> <p><b>Treaty:</b> Russia-Ukraine BIT </p> <p><b>Seat:</b> Switzerland </p> <p><b>Arbitral Rules:</b> UNCITRAL</p> <p><b>Institution:</b> PCA</p>
<p><b>Arbitrators</b></p> <ul style="list-style-type: none"> <li>• Tirado, J - Emergency Arbitrator;</li> <li>• Unknown.</li> </ul> <p><b>Type of Investment/Claims (as pleaded)</b></p> <ul style="list-style-type: none"> <li>• <b>Investment</b> - 99.8% shareholding in Prominvestbank, a Ukrainian commercial bank ("PIB").</li> <li>• <b>Claims</b> - expropriation of PIB.</li> </ul> <p><b>Arbitration Proceedings &amp; Recent Developments</b></p> <ul style="list-style-type: none"> <li>• <b>Aug 2019</b> - Emergency Arbitrator made a decision prohibiting Ukraine from selling PIB shares.</li> </ul> <p><b>Status of Enforcement Proceedings</b></p> <p>N/A</p> <p><b>Status of Original/Follow-on Proceeding</b></p> <p>Pending.</p>	<p><b>Arbitrators</b></p> <ul style="list-style-type: none"> <li>• Mayer, P. - President;</li> <li>• Beechey, J. - Claimant;</li> <li>• Stern, B. - Respondent.</li> </ul> <p><b>Type of Investment/Claims (as pleaded)</b></p> <ul style="list-style-type: none"> <li>• <b>Investment</b> - shareholdings in various Ukrainian gas companies.</li> <li>• <b>Claims</b> - arising out of a multi-billion dollar fine imposed on the claimant by Ukraine's Antimonopoly Committee in 2016.</li> </ul> <p><b>Arbitration Proceedings &amp; Recent Developments</b></p> <p>N/A</p> <p><b>Status of Enforcement Proceedings</b></p> <p>N/A</p> <p><b>Status of Original/Follow-on Proceeding</b></p> <p>Claim withdrawn.</p>

### Authors



**Nicholas Peacock**  
Partner, London  
T +44 20 7466 2803  
[nicholas.peacock@hsf.com](mailto:nicholas.peacock@hsf.com)



**Olga Dementyeva**  
Associate, London  
T +44 20 7466 7644  
[olga.dementyeva@hsf.com](mailto:olga.dementyeva@hsf.com)




**Denise Choung**  
Arbitration Intern, London  
T +44 20 7466 3836  
[denise.choung@hsf.com](mailto:denise.choung@hsf.com)

### Endnotes

1. See generally UNCTAD, INV. POL'Y HUB: INV. DISP. SETTLEMENT NAVIGATOR, <https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search>; PCA Cases, <https://pca-cpa.org/en/cases/>; PCA Press Releases, <https://pca-cpa.org/en/news/>; ICSID Case Database, <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>.
2. Alison Ross, *Ukrainian Bank Wins Billion-Dollar Award Against Russia* (Nov. 26 2018), <https://globalarbitrationreview.com/article/1177269/ukrainian-bank-wins-billion-dollar-award-against-russia>.
3. Aeroport Belbek LLC and Mr Kolomoisky v. Russia ("Aeroport Belbek"); JSC CB PrivatBank v. Russia ("PrivatBank"); PJSC Ukrnafta v. Russia ("Ukrnafta"); Stabil LLC et al v. Russia ("Stabil"); Everest Estate LLC et al v. Russia ("Everest Estate"); LLC Lugzor et al v. Russia ("Lugzor"); Oschadbank v. Russia ("Oschadbank"); NJSC Naftogaz of Ukraine et al v. Russia ("Naftogaz"); PJSC DTEK Krymenergo v. Russia ("DTEK"); NEK Ukrenergo v. Russia ("NEK"); Emergofin B.V. and Velbay Holdings Ltd. v. Ukraine ("Emergofin"); Vnesheconombank v. Ukraine ("VEB"); PJSC Gazprom v. Ukraine ("Gazprom").







## **Trendspotting: What do recent arbitration statistics tell us about what's to come in international commercial arbitration in 2020 and beyond?**

In the coming months, many arbitral institutions will publish their annual summary of case statistics for 2019. These round-ups offer a valuable insight into trends across the market more generally. Which institutions are parties turning to more frequently, and which ones appear to be in decline? Are global political developments influencing the institutions that parties in specific jurisdictions and sectors choose to use? What progress is being made in the gender and nationality diversity of arbitrators? And what can these statistics tell us about what to expect in the commercial arbitration market in 2020 and beyond?

In this article, we look at the annual statistics for 2016 to 2018 published by five major arbitral institutions: the Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Stockholm Chamber of Commerce (SCC), the Singapore International Arbitration Centre (SIAC), and the Hong Kong International Arbitration Centre (HKIAC). These 'Big Five' are likely to be a bellwether for wider market trends – they have consistently been ranked as the most preferred institutions by users of international commercial arbitration, most recently in the [2018 International Arbitration Survey](#)<sup>1</sup> published by Queen Mary University and White & Case (2018 QMUL Survey).



## Caseload statistics: the resilience of London as an arbitration hub

New case numbers across each of the institutions remain healthy, with the ICC and the LCIA posting small increases since 2017, and HKIAC ending with a marginally higher caseload in 2018 than 2016. The ICC's 842 new cases is, by contrast, somewhat lower than its 2016 peak of 966 cases, although that figure included 135 small-claim cases. Early figures for 2019 published by the ICC suggest another modest increase on 2018's numbers, to 869 new cases.

The statistics suggest that London's popularity as an arbitration hub has not been materially affected by the Brexit referendum in 2016: the LCIA has posted steady increases in its caseload each year since 2016, and approximately 40% of cases commenced in 2018 arose under agreements signed between 2016 and 2018. The 2018 QMUL Survey indicates that London remains the most preferred seat: 64% of respondents placed London first, compared with Paris at 53%.

Notably, the SCC posted a drop of nearly 25% in new cases in 2018, with only 76 of 152 cases involving international disputes, the lowest number since 2006. This coincided with a marked reduction in the number of

SCC cases involving Russian parties, down from 30 in 2016 and 29 in 2017 to just 12 in 2018. The LCIA, by contrast, remains a popular destination for Russian parties who participated in approximately 10% of the LCIA's cases in each of 2017 and 2018. Despite the decline in case numbers, the amount in dispute at the SCC rose to a record EUR 13.3 billion, significantly higher than 2017's EUR 1.5 billion.

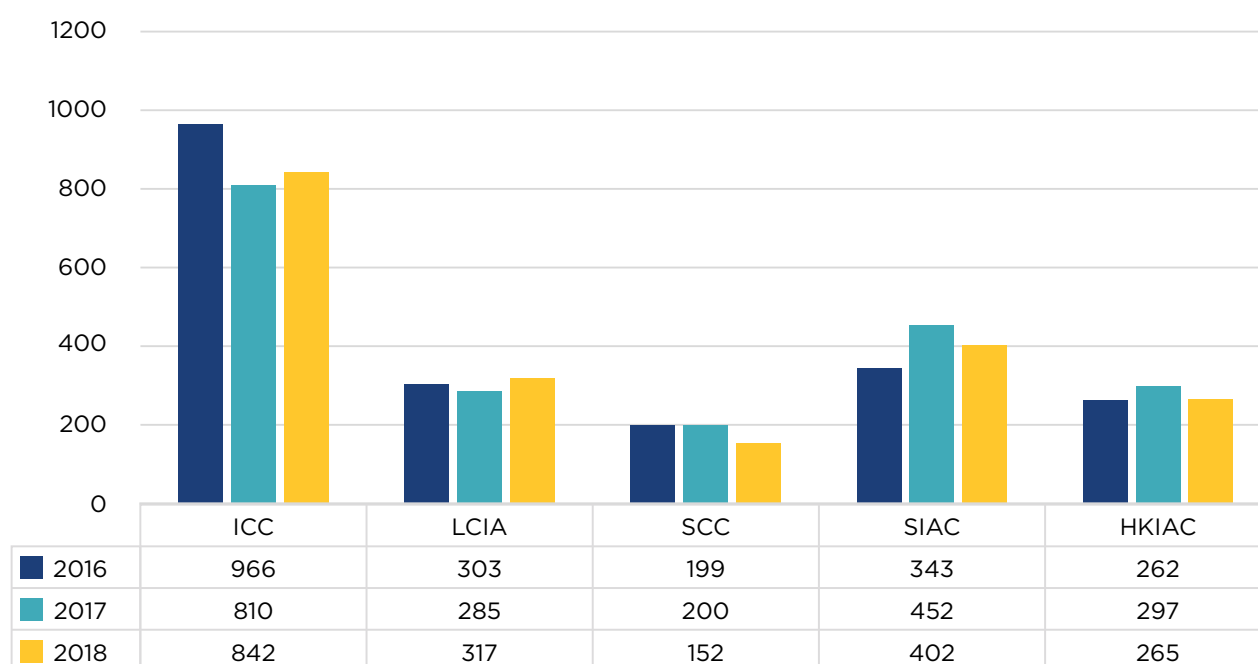
It is too early to tell whether these changes are statistically significant, or what is driving the reduction in Russian parties using the SCC. The drop may be connected to the EU Russian sanctions, although a similar dip in LCIA and ICC cases involving Russian parties might be expected if this were the case. It will be interesting to see whether the SCC was able to recover these numbers in 2019, and how it fared with Russian parties in particular.

In Asia, SIAC and the HKIAC saw a slight levelling-off of case numbers. However, the HKIAC achieved several significant milestones in 2019 which are likely to boost its popularity. It became the first foreign institution accredited to hear Russian corporate disputes since the sweeping legislative reforms introduced in Russia in 2016. It will also be interesting therefore to see if the HKIAC picks up some of the Russian-related disputes that might

historically have been destined for European institutions. The HKIAC was also designated as one of the institutions that enjoys the benefit of the mutual assistance arrangement on court-ordered interim relief in support of arbitration signed between China and the Hong Kong SAR (the **Interim Relief Arrangement**), which took effect on 1 October 2019. While these developments are encouraging, it remains to be seen whether recent political events in the territory will affect its standing as a global arbitration hub.

Looking outside the 'Big Five', some regional centres also saw growth in their case numbers. The Cairo Regional Centre for International Commercial Arbitration (**CRCICA**) received 77 new cases in 2018, up from 65 in 2017. The Arbitration Foundation of South Africa (**AFSA**) has seen an "exponential" increase in its case load since the reform of South Africa's International Arbitration Act in 2017, prompting a revision of its International Arbitration Rules, which promises to encourage further growth. The Kigali International Arbitration Centre (**KIAC**) registered 26 new cases between July 2018 and June 2019, up from 23 the year before. These figures demonstrate the continued vitality of regional centres, particularly in Africa.

## New arbitration cases 2016-2018<sup>2</sup>



1. <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf>.  
2. With thanks to LexisPSL Arbitration.



## Arbitrator appointments: institutions lead the way on gender diversity

The statistics on arbitrator appointments confirm that it is the institutions, rather than parties, who are leading the way on gender diversity in the make-up of tribunals. By and large, however, appointees from jurisdictions outside the West remain under-represented, even among institutional appointments.

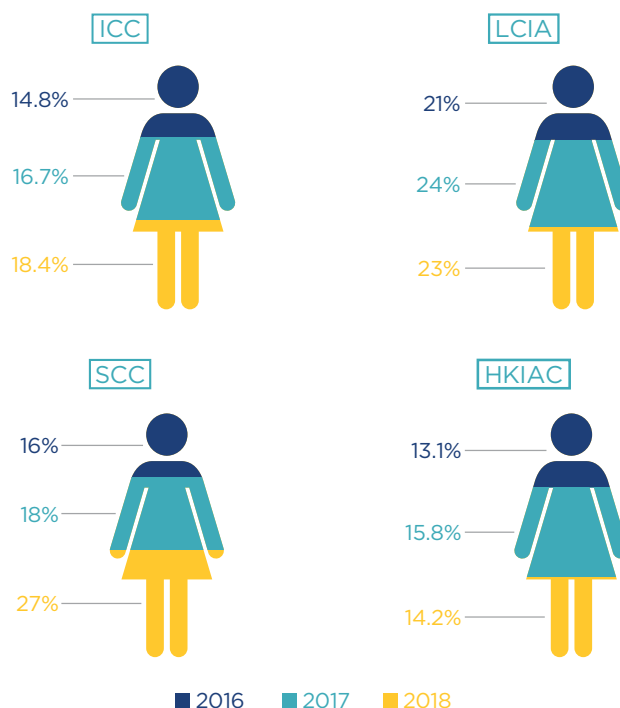
There has been a steady improvement in the number of female arbitrator appointments across all five institutions. The SCC saw the proportion of women appointed increase dramatically from 18% of all appointments in 2017 to 27% in 2018. The ICC posted a marginal increase in 2018, while the proportion of women appointed in LCIA arbitrations remains steady at 23%.

The figures similarly show that institutions remain important drivers of gender diversity on arbitral panels. The LCIA and HKIAC were each responsible for making approximately 70% of their total recorded female appointments in 2018. 41% of all female appointments at the ICC were made by the institution, similar to 2017's 42%.

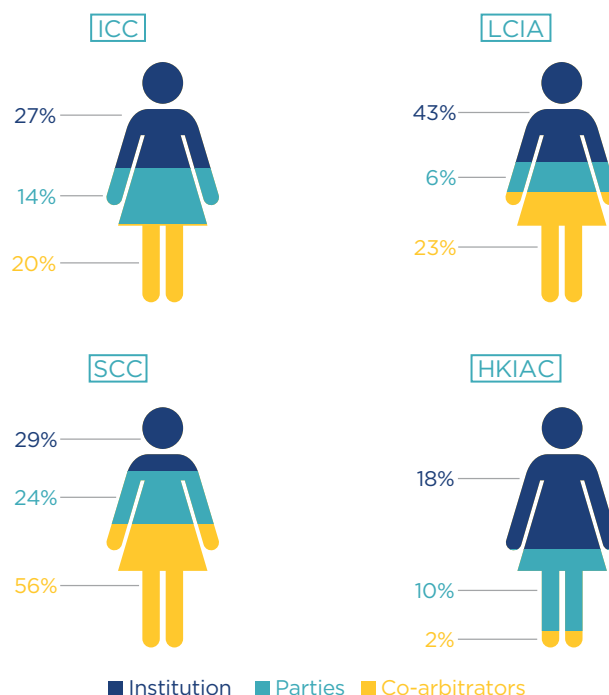
The statistics will, perhaps, cause parties to look at their own appointment processes and decision-making. Parties continue to lag behind the institutions in the gender diversity of their appointments. Just 6% of all the arbitrators selected by the parties in LCIA arbitrations in 2018 were women, down significantly from 17% in 2017. The LCIA, by contrast, appointed women 43% of the time (up from 34% in 2017). At the ICC, the parties appointed women 14% of the time, while the institution did so 27% of the time. The HKIAC appointed women 18% of the time, while parties to HKIAC arbitrations only did so 10% of the time. At SIAC, 34% of appointments made by the institution were women, up from 22.8% in 2016 and 29.7% in 2017 (SIAC does not publish the number of women appointed as a proportion of all appointments).

This is not a problem for arbitration alone. These figures mirror those in other industries and sectors, with women making up 16.6% of Fortune 500 board members, 15% of partners in the largest law firms,<sup>3</sup> and 19% of surgeons, despite comprising well over half of the graduates in relevant subjects.<sup>4</sup> Each of the 'Big Five' institutions is a signatory to the Equal Representation in Arbitration Pledge, together with nearly 4,000 other institutions and individuals. It will be interesting to see whether parties and counsel take up the mantle of gender diversity in the years to come.

## Female arbitrator appointments (% of total appointments)



## Source of female arbitrator appointments (% of total appointments, 2018)



3. As at 1 May 2019, Herbert Smith Freehills had 26% women in its global partnership, and 23% women in partner leadership roles, including Paula Hodges QC, Head of Global Arbitration.

4. 'Reed's Diversity Equation', Global Arbitration Review, 6 April 2018 (<https://globalarbitrationreview.com/article/1167732/reed%E2%80%99s-diversity-equation>).

## Nationality of parties and arbitrators: good news and bad

The users of the 'Big Five' institutions continue to hail from an impressive variety of jurisdictions. The ICC saw the most jurisdictions represented, with parties from 135 countries and independent territories.

While parties from Northern and Western Europe and North America continue to dominate, 2018 saw encouraging increases in the number of parties from non-Western jurisdictions across the board. In 2018, the ICC saw a 17.5%

increase in the number of cases involving parties from North Africa, and a 14.6% increase in cases involving parties from Central and Western Africa. That trend looks set to continue thanks to the launch of the ICC's dedicated Africa Commission in 2018, with a mandate to co-ordinate the ICC's activities on the continent.

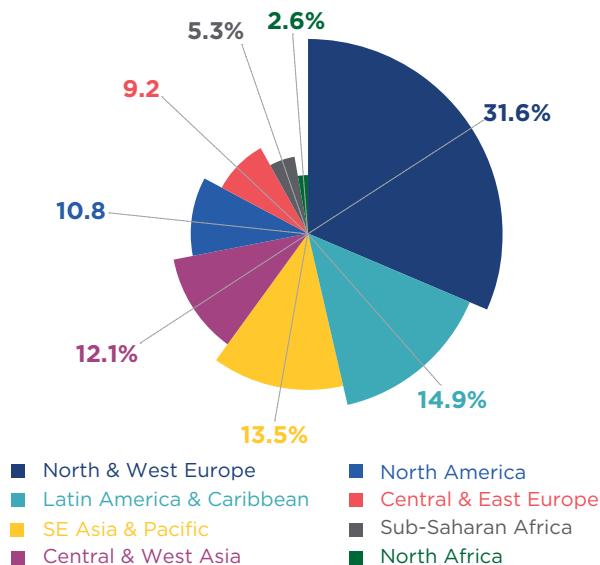
The ICC's strategy of opening regional offices in Brazil in 2017 and Singapore in 2019 appears to have borne fruit. Brazil now ranks third in the ICC's overall nationality ranking (117 parties), behind the USA (210) and France (139).

The LCIA reported statistically significant increases in the number of parties from India (8%), MENA (5%) and Mexico (3%). The proportion of cases involving African parties also rose slightly, to 8% (from 5.2% in 2017).

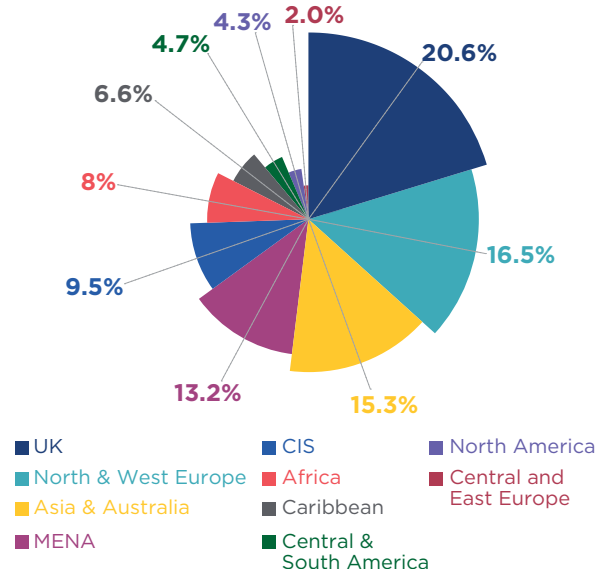
The HKIAC saw 40 jurisdictions represented in 2018, up slightly from 39 in each of 2016 and 2017. Parties from Hong Kong and Mainland China remain the Centre's most frequent users, a trend that is likely to continue, enhanced by the signing of the Interim Relief Arrangement in 2019.

### Nationality of Parties (2018)

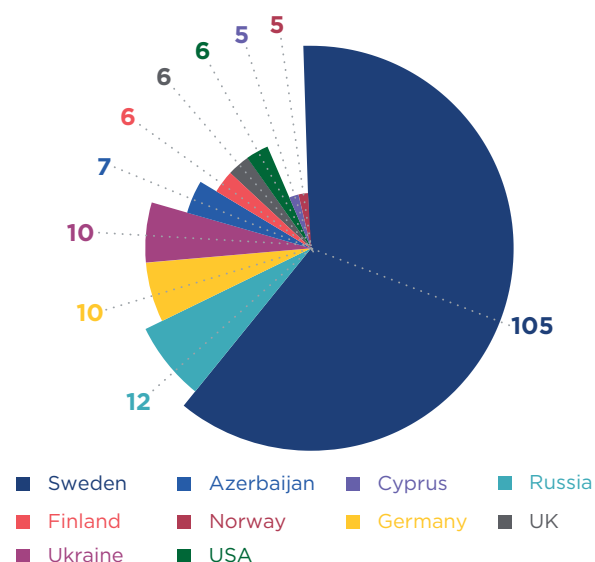
ICC



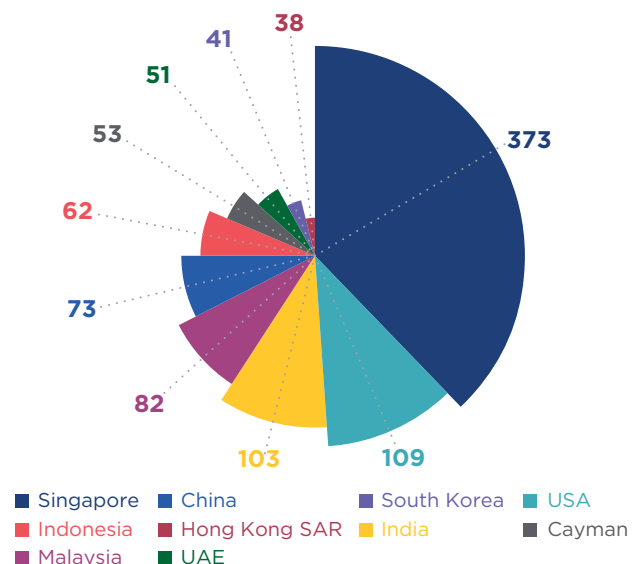
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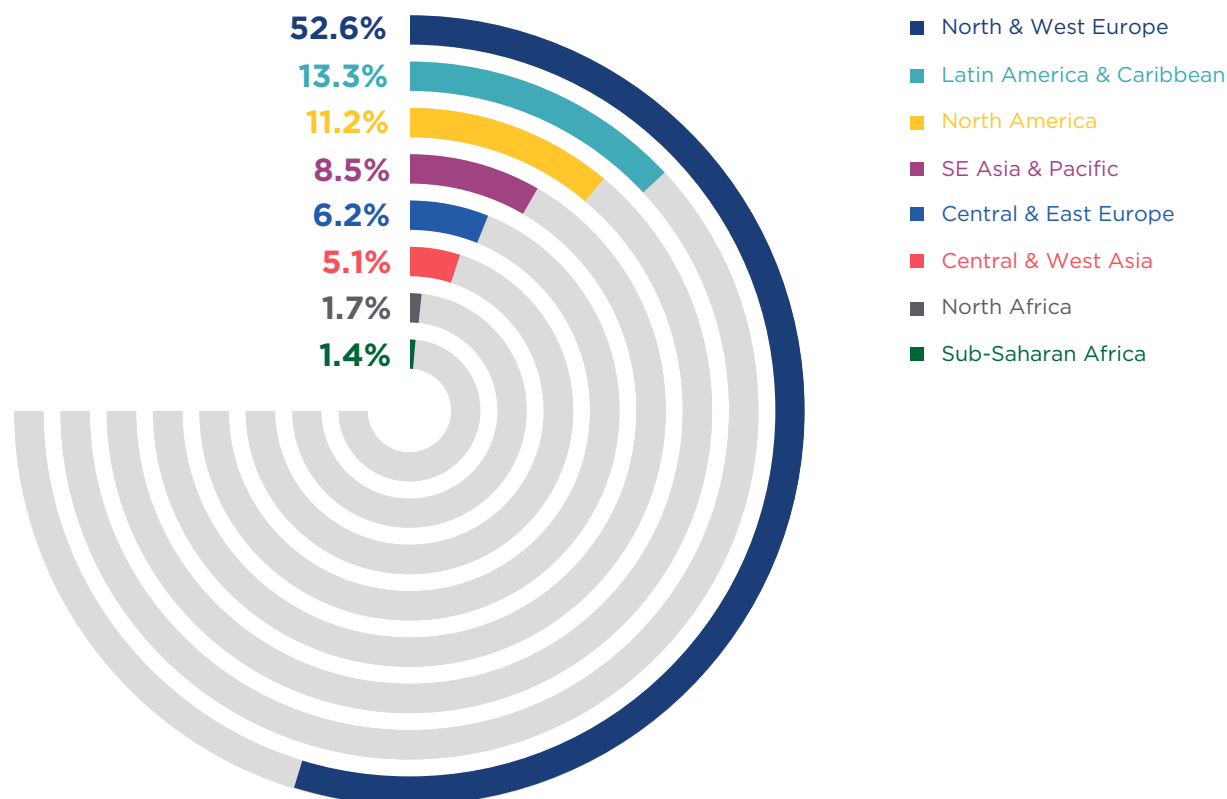
SCC



SIAC



### Arbitrator Nationality ICC 2018



The increasing diversity in the nationality of the parties has, unfortunately, not been reflected in arbitrator appointments. While 8% of the ICC's cases involved parties from North and Sub-Saharan Africa, just 3.1% of the arbitrators appointed in 2018 were nationals of those regions.

This disparity may be down to the prevalence of seats and governing laws from Western jurisdictions: the top 4 seats in ICC cases were in the USA and Western Europe, and English law was chosen in 16% of ICC cases, followed by the law of a US state in 12% of cases. However, given the importance of the geographic context in most disputes, one might have expected to see a broader spread of nationalities represented among the ranks of arbitrators. Clearly, more needs to be done in this respect.

#### Sectors: who will win the Belt and Road prize?

The statistics indicate that the ICC remains the go-to institution for construction and engineering disputes, posting a record 224 new disputes in this sector in 2018 (27% of its 2018 caseload, up from 23% in 2017). The LCIA's caseload continues to be dominated by banking and finance disputes (29% of new cases in 2018, up from 24% in

2017 and 21% in 2016). The HKIAC saw a marked jump in cases involving international trade and the sale of goods, from 10% in 2016 to 31.9% in 2017 and 29.6% in 2018, closely followed in 2018 by M&A and shareholder disputes.

The ICC, HKIAC and SIAC have all aggressively positioned themselves to take advantage of the expected wave of disputes arising out of China's Belt and Road Initiative (**BRI**), announced in 2013.

In 2018, the ICC launched its Belt and Road Initiative Commission, chaired by Herbert Smith Freehills' Justin D'Agostino, to develop the ICC's existing procedures to respond to BRI disputes. The ICC will be looking to leverage its network of secretariats and national committees in over 100 jurisdictions, many of which lie on the Belt and Road route.

In 2019, SIAC signed a memorandum of understanding with the Shanghai International Arbitration Centre (**SHIAC**), following the signing of similar agreements with the Xi'an Arbitration Commission, the China International Economic and Trade Arbitration Commission (**CIETAC**) and the Shenzhen Court of International Arbitration. These agreements appear designed to

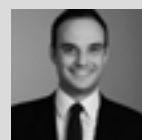
capitalise on the expectation that Chinese state-owned entities involved in BRI projects will favour referring disputes to institutions based in the Mainland.

The HKIAC launched its Belt and Road Advisory Committee in 2018, together with an online resource centre containing publications and reports relating to the BRI. Maritime (15.1%), construction (13.7%) and banking and finance disputes (11.9%) made up over 40% of the HKIAC's case load in 2018. While none of the institutions yet specify what proportion of their cases involve BRI disputes, it will be interesting to see how the figures for cases in these sectors change in the coming years, as BRI disputes begin to crystallise.

#### AUTHORS



**Kathryn Sanger**  
Partner, Hong Kong  
T +852 21014029  
[kathryn.sanger@hsf.com](mailto:kathryn.sanger@hsf.com)



**Marco de Sousa**  
Senior Associate, London  
T +44 207 466 2191  
[marco.desousa@hsf.com](mailto:marco.desousa@hsf.com)









## Data analytics in international arbitration: Balancing technology with the human touch

Any form of dispute resolution can arguably be described as nothing more than the structured presentation of data analytics. Arbitration is no different.

At the outset of a claim, information (data) is collected and analysed to determine the facts of relevance to a dispute. Contractual and statutory documentation is reviewed to ascertain the applicable legal framework. Individuals are interviewed to capture information not recorded in contemporaneous documents. Legal counsel and arbitrators are selected and appointed based on the parties' (or an arbitral institution's) understanding of their experience, credentials, any conflicts and (where such information is available) their previously stated views on issues in dispute between the parties.

As a case progresses, vast swathes of documents are harvested, exchanged and reviewed. Relevant case law is analysed with a fine tooth comb, witnesses' testimony is presented and challenged and - ultimately - a legal case which draws together a (hopefully consistent) legal and factual story is presented in writing and, more often than not, at an oral hearing. In turn, the arbitral tribunal will process the data submitted to it and, based on its own analysis of that information, rule on the dispute.

## Data analytics in Arbitration

Each of the above steps involves the analysis of data and over the course of an arbitration all four primary types of data analytics are required and used:

- **Descriptive analytics** help to answer questions about what happened, drawing on potentially large datasets to provide the essential insight into what has occurred in the past.
- **Diagnostic analytics** help to answer the question of why those things happened in the way they did. The techniques take the findings from descriptive analytics and dig deeper to find a cause.
- **Predictive analytics** help to answer the question of what may happen in the future. These techniques draw on historical data to identify trends and determine whether they are likely to recur.
- **Prescriptive analytics** help to answer the question about what should be done. Drawing on predictive analytics, decisions can be made about the best way in which to proceed (e.g. how best to present an argument or case to a particular tribunal).

Historically, the analysis of data in an arbitration was carried out manually (by humans), drawing on their individual skill and expertise and those of their colleagues.

Lawyers would manually review all data received from their clients, laboriously research narrow points of law, study relevant publications or conference notes from tribunal members on salient issues (or rely on 'word of mouth' based on colleagues' past experiences). However, going forward technology will play an increasingly central role in these processes and will help to make the relevant analysis more efficiently and effective.

This will enable lawyers to take decisions in a more data-driven way, offer greater certainty to their clients (e.g. in relation to cost estimates or prospects of success), foster early settlement between parties in dispute, select more efficient or suitable decision-makers and better guarantee that an award can ultimately be enforced, if needed.

### The transition: using technology to making human processes more efficient

In recent years, LegalTech across the entire legal sector has boomed. Within this, a large number of products have been designed to help arbitration practitioners (and litigators) streamline existing (largely human) processes. Those products include software tools that help amplify human review capabilities in the face of growing volumes of unstructured data and tight

deadlines, help predict the behaviour of courts, judges/arbitrators, lawyers and other arbitral participants like expert witnesses, streamline legal research, produce first drafts of standardised documents, suggest indexes for hearing bundles or help estimate the likely length, cost and complexity of a given arbitration.

These legal analytics tools rely on technologies like machine learning and natural language processing to clean up, structure, and analyse raw data to identify and interpret patterns and trends within the relevant dataset. While the output that they achieve may be akin to the result of a human-led process, the means by which they achieve it is usually very different.

New tools have been designed to assist with each of the 4 types of data analytics explained above. However, many of those tools remain 'point solutions' aimed at improving a specific (and often narrow) process within the arbitration. A period of consolidation within the LegalTech market can be expected in years to come, mirroring what has happened in other sectors. Similarly, platforms and software tools will become more intelligent and better able to present information, as datasets increasingly become more structured and integrated as well.





Even now, the use of technology in the arbitration process is no longer a luxury and arbitration practitioners (including arbitrators, in particular, who are called upon to make decisions on what technology should be implemented and how) need to understand the capabilities and limitations of these tools. They also need to grasp the new, often complex, legal and regulatory issues that arise from the need to analyse increasing volumes of data relevant to and generated in an arbitration.

**Any form of dispute resolution can arguably be described as nothing more than the structured presentation of data analytics. Arbitration is no different.**

Indeed, insofar as technical upskilling is concerned, arbitration practitioners need to have sufficient digital literacy and data science skills to understand what datasets are being interrogated and how outputs are produced. If arbitration participants fail to grapple – at a high level at least – with the functionality of the tools used in the arbitration, this may lead to unanticipated or undesirable results (due, for example, to potentially unforeseen biases in the algorithm through which relevant trends in the datasets are identified). Data analytics tools often tend to focus on data that is most readily available (e.g. older awards and judgments that are publicly available). In the context of arbitration, which is a private and largely confidential process, available data may not therefore give the full picture.

As to the new legal and regulatory issues associated with the use of electronic data analytics tools through the arbitral process, relevant data protection laws need to be identified and complied with insofar as any personal data is being processed. Similarly, adequate steps must be taken to secure the data exchanged in an arbitration and ensure, both legally and in practice, that issues of control, possession and responsibility for the cybersecurity of the data are adequately addressed and that responsibility can be properly allocated if an arbitral participant falls short of the required standard of diligence.

### **The road ahead: moving from replication of human processes to a more disruptive technology-driven redesign of arbitral processes**

The capabilities of data analytics software will continue to grow exponentially over the years to come. As software develops and becomes more sophisticated, the accuracy of its descriptive, diagnostic, predictive or prescriptive analytics will improve significantly. The adoption and use of these tools will become more widespread in arbitration, particularly for large complex disputes involving significant volumes of data and justifying the associated costs of licensing these tools.

As the accuracy of these tools gets better, parties will increasingly be driven to identify and settle disputes at an early stage. The tools will enable a more detailed calculation of return of investment on the time and cost involved in proceeding to a trial. However, new opportunities arising from emerging technologies and new applications of existing technologies may lead to a more fundamental redesign of arbitration processes.

Indeed, with arbitration being a creature of contact, this dispute resolution mechanism is a more likely to see party-driven change in the short to medium term than court based litigation for instance. The end users of arbitration are already driving greater efficiency in the arbitral process thanks to tools already on the market. In the years ahead, through the bundling of machine learning, natural language processing, internet of things (IoT) and other 'smart' devices and the huge processing capabilities of cloud and edge computing and, looking ahead, quantum computing, we will no doubt see some radical shifts in the processes proposed for resolving disputes through arbitration.

Might human arbitrators be supported by new software or hardware in their decision making, as is the case already for surgeons both at the diagnostic and surgery stage? Will a legal-led approach to dispute resolution be displaced by a 'game theory' analysis of party's positions? Or will human discretion and creativity remain a necessary part of dispute resolution to ensure that the law can continue to evolve and that fairness is achieved in all cases (including those outlier cases which do not follow a trend borne out in historical data)?

Lawyers need to engage with these questions today and work hand in hand with technologists and data scientists to help ensure that the dispute resolution methods of the future are fit for purpose and continue to have legal weight so that any ultimate decision or direction is valid and enforceable in the 'real', physical world.

### **Conclusion**

Data analytics are nothing new in the context of arbitration. However, technology is already transforming the way in which those analytics are performed and making existing processes more efficient and effective. Going forward, new technologies or new applications of existing technologies stand to disrupt the arbitral process more significantly.

Some lawyers may resist this transformation out of fear that new technologies might change how they practice law or even make their jobs obsolete. Similar concerns were voiced when legal research moved from books to computers. However, that transition did not reduce the need for lawyers skilled in legal research and analytical reasoning. Instead, it enabled lawyers to be better and more effective at their jobs.

Similarly, technology-driven data analytics will not make the judgment and expertise of experienced lawyers obsolete. It will, however, enable those who employ such software to provide better and more cost-effective representation for their clients and better tailor their advocacy to the relevant audience. The widespread adoption of these new and emerging technologies in businesses across all industries will also generate new types of disputes which will continue to keep lawyers (and their artificially intelligent assistants) busy for years to come.

Lawyers and law firms who embrace legal analytics software now will reap those benefits sooner and have a competitive advantage over those who do not.

#### **AUTHOR**



**Charlie Morgan**  
Digital Law Lead (UK),  
Senior Associate  
(International  
Arbitration), London  
T +44 20 7466 2733  
[charlie.morgan@hsf.com](mailto:charlie.morgan@hsf.com)

# Spotlight on Bangkok: **Chinnawat Thongpakdee and Warathoron Wongsawangsi**

Herbert Smith Freehills' Bangkok office was established in 1998. Since then, it has become one of Thailand's premier commercial litigation and arbitration practices, offering both Thai and international disputes and regulatory advice. Bangkok is an important pillar of our Southeast Asia international law practice, which extends to Singapore, Jakarta and – most recently – Kuala Lumpur. We caught up with partners Chinnawat Thongpakdee and Warathorn Wongsawangsi to learn more about the office, the practice, and their predictions for arbitration in Southeast Asia.









**Warathorn, you have recently joined the firm. What prompted your move?**

I worked at Weerawong, Chinnawat & Partners, a leading Thai firm, for almost 15 years, and was promoted to partner there in January 2016. Weerawong C&P was the Bangkok office of White & Case, until spinning off to be a standalone Thai law firm around 2010. My practice included both domestic and international arbitration. I was attracted to Herbert Smith Freehills by the quality of the arbitration practice, and by the firm's network, which is second to none. Instead of selecting new co-counsel (or lead counsel) every time my clients have a cross-border dispute, I can now call on a fully Herbert Smith Freehills team almost anywhere in the world. That really enhances my ability to serve my clients. I left Weerawong C&P last summer, and joined Herbert Smith Freehills in September.

Bangkok holds its own as a seat, and is making great strides in its development

**Chinnawat, you joined us from the same firm as Warathorn, but your career has spanned both public and private practice. Can you tell us more?**

I joined from Weerawong C&P in 2012. But I started my legal career in the public sector, as a prosecutor in the white collar crime division of the Thai Attorney General's office. I did that for thirteen years, but found myself looking for a change of direction, so I moved into private practice at Baker McKenzie.

My old boss wooed me back to the Attorney General's office in 2004; this time in the legal counsel department, where I advised and assisted the Thai government and also Thailand's state-owned enterprises. It was a great role, but I ultimately concluded that I preferred private practice. Joining Herbert Smith Freehills in 2012 was a new challenge, and a great opportunity to join a small office with a big reputation, both locally and globally.



Chinnawat Thongpakdee

**What is the focus of the Bangkok disputes practice?**

**Chinnawat:** we are lucky enough to have a broad range of work, encompassing arbitration, regulatory and compliance work, and litigation in the Thai courts. Arbitration – both domestic and international – is a significant focus, and we are very proud of our capabilities in this area. Thai litigation is our other main focus. Thai parties typically prefer litigation in their home courts, but in cross-border deals we generally see the other side proposing arbitration instead; we and our clients are very familiar with both.

We do a lot of cross-office work; the ability to draw on a global team is one of the things that distinguishes this firm from its competitors in Thailand. We also work closely with Kyle Wombolt and his team across Asia on corporate crime and investigations matters, and with the firm's powerhouse financial services and regulatory practice.

**Warathorn:** We work in a number of industries and sectors as well; everything from energy and infrastructure to TMT, construction, hotel and real estate, employment and insurance. Class actions are another area of expertise.

**What trends are you seeing in the Thai arbitration market?**

**Warathorn:** Thai parties are getting more and more familiar with arbitration, both domestic and international. This is a result of both growing inbound investment in Thailand, and of Thai entities investing outside the country and transacting with non-Thai parties. In all these deals, arbitration is the mechanism of choice, and it is definitely increasing in popularity here.

**Chinnawat:** I agree; arbitration or litigation are by far the most common ways of resolving disputes involving Thai parties. We don't see a lot of ADR (alternative dispute resolution) in the Thai market.

In terms of trends, they tend to fluctuate with the economic cycle. A few years ago, we were seeing a lot of projects and construction work. More recently, our work is more focused on financing: unpaid loans, disputed debts, etc. We typically act for financial institutions

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**What can Thailand offer as an arbitral seat, compared to Asia's more established seats Hong Kong and Singapore?**

**Chinnawat:** Bangkok holds its own as a seat, and is making great strides in its development. Thailand has active arbitral institutions, including the Thai Arbitration Institution and the Thailand Arbitration Center, which are working hard to promote Bangkok. Thailand is a New York Convention signatory and a Model Law jurisdiction. The Thai courts are generally supportive of arbitration, and now have a strong enforcement record – they have come a long way in that regard. Notably, we have seen a number of significant cases recently where the Thai courts have enforced arbitral awards against the Thai government. I put this down, at least in part, to a strong programme of judicial enforcement and a new generation of judges with more international backgrounds than their predecessors.



Warathorn Wongsawangsi

Bangkok is still not at the same level as Hong Kong or Singapore, but it is steadily improving.

**Warathorn:** Bangkok is an ideal seat for an arbitration involving a Thai party, or where the disputed contract is governed by Thai law. We are looking forward to watching it grow and develop over the next several years.

**Get in touch**

**Chinnawat Thongpakdee**  
Managing Partner, Bangkok  
T +66 2 857 3829  
[chinnawat.thongpakdee@hsf.com](mailto:chinnawat.thongpakdee@hsf.com)

<https://www.herbertsmithfreehills.com/our-people/chinnawat-thongpakdee>

**Warathorn Wongsawangsi**  
Partner, Bangkok  
T +66 2 857 3828  
[warathorn.wongsawangsi@hsf.com](mailto:warathorn.wongsawangsi@hsf.com)

<https://www.herbertsmithfreehills.com/our-people/warathorn-wongsawangsi>



# Attaining maturity: South Africa's transition to an international arbitration friendly jurisdiction





Professor David Butler is Emeritus Professor of law at Stellenbosch University, South Africa, and was the main advisor to the South African Government on the International Arbitration Act with his work as part the South African Law Reform Commission's work reforming South Africa's arbitration legislation. Professor Butler is a life fellow of the Association of Arbitrators of Southern Africa, and has authored authoritative texts on the subject of arbitration, including his textbook *Arbitration in South Africa Law and Practice*. He has also previously been chairperson of the Department of Mercantile Law at Stellenbosch and has taught Company Law.



In 2017, South Africa introduced its new International Arbitration Act following a quarter of a century of discussion regarding the reform of South Africa's legislative regime. In this issue of *Inside Arbitration*, Director, Jonathan Ripley-Evans interviews Professor David Butler, Emeritus Professor of Law at Stellenbosch University, and main advisor to the South African government on the 2017 International Arbitration Act (the "IA Act"). They discuss the background to this reform and the Act on developments in South African law, as well as the current attitude of South Africa towards investment arbitration. They look at recent court decisions and consider the future of international arbitration in South Africa.

**Professor Butler, 2019 saw a lot of buzz around South Africa's new IA Act. That revision has been a long time coming. You've been involved in discussions around the revision since they first began. Could you share with us some of the background?**

The reform of South Africa's international arbitration regime (a process which took over twenty years) was first envisaged in the South African Law Reform Commission ("SALRC")'s Report of July 1998. The Commission started on this project in 1996.

In 1994 South Africa emerged from an era of isolation and was faced with the difficulty that many of its laws in the area of international trade and investment were outdated and inadequate. This was a serious issue in the context of foreign investment. The old Arbitration Act of 1965 was intended for domestic arbitration and contained no specific provisions for international arbitration. Nonetheless it applied to international arbitration seated in South Africa by default. The main recommendation in the 1998 report was that South Africa should adopt the

UNCITRAL Model Law for international arbitration only. Domestic arbitration was the subject of a separate investigation and in 2001 the Commission recommended that South Africa should have a dual system with separate laws dealing with international and domestic arbitration. While we have a new act for international arbitration, new domestic legislation has yet to be enacted.

**So how have things changed over this period? Does the IA Act resemble the drafts which were in existence in 1998?**

Although the 1998 report was initially met with much enthusiasm, many hurdles (mainly political) hindered progress in the field and led to considerable delay in the IA Act being passed.

The IA Act changed considerably between the first draft and the version that became law in December 2017. There were two primary reasons for that. Firstly, UNCITRAL itself updated the Model Law in 2006 and these amendments had to be carefully considered, and where appropriate, adopted. Secondly, in the interests of harmonisation and so that the South African version of the Model Law would be familiar to foreign users, modifications to the UNCITRAL text were kept to those regarded as essential. The revision process officially commenced through the SALRC in 2013. It was decided that modifications to the UNCITRAL text should be kept to those reasonably necessary for the Model Law to work effectively in South Africa. This therefore included some minor technical adjustments in the light of experience in other Model Law jurisdictions.

**If you were to identify the biggest changes brought about by the IA Act, what would these be?**

Before the new IA Act, South Africa had no legislation specifically designed for an international arbitration with its seat in South Africa. The 1977 legislation that gave effect to South Africa's accession to the New York Convention also had some serious technical defects. The new IA Act incorporates the UNCITRAL Model Law which, as we know, aims to create an internationally accepted standard upon which countries can model their local IA laws. As a result, South Africa's arbitration laws are now aligned with international best practice.

In addition, the IA Act replaces the 1977 legislation on the New York Convention. Chapter 3 of the IA Act now properly recognises and gives effect to South Africa's obligations under the New York Convention.

**In your view, how does the new IA Act compare with similar legislation found in other jurisdictions?**

The incorporation of the Model Law brings South Africa's legislation on international arbitration in line with similar (Model Law-based) statutes in other jurisdictions. In the case of South Africa, although there are some South African-specific adjustments, the IA Act incorporates the version of the Model Law adopted by South Africa, in Schedule 1. The Law Reform Commission strongly favoured this approach, as opposed to the alternative of rewriting the UNCITRAL text in the Act itself.

In contrast, the majority of other Model Law jurisdictions have chosen to incorporate the principles of the Model Law in the body of their Acts, as opposed to putting the adapted text of the Model Law in a Schedule, as South Africa has done. The majority approach can and does cause interpretation difficulties, which South Africa will hopefully avoid.

The IA Act therefore brings the South African IA regime in line with internationally accepted standards. As mentioned, there are, however, certain country-specific adaptations which have been included. For example, section 11 mandates that arbitration proceedings to which a public body is a party, are to be held in public, unless for compelling reasons, the arbitral tribunal directs otherwise.

**Given the fact that South Africa is clearly moving towards a more “global” approach to IA, do you have any insight into why SA took the decision to not accede to the Washington (or ICSID) Convention?**

Initially, the South African Law Reform Commission's report of 1998 also recommended that South Africa adopt the Washington Convention and subscribe to the International Centre for the Settlement of Investment Disputes. This recommendation has not been followed.

Many of the Bilateral Investment Treaties which were entered into by South Africa were concluded at the time of South Africa's transition into a constitutional democracy, mainly in an effort to encourage foreign investment in the country. However, since 2001, a sharp rise in international investment disputes was noted, which caused South Africa to review its BITs.

As a result of this review, in 2013, South Africa's Department of Trade and Industry reached the conclusion that it does not agree that there is a correlation between BITs and increased inflows of foreign investment. Additionally, South Africa's current socio-economic policies do not necessarily correlate with the best interests of foreign investors. As such, this could present a fertile breeding ground for disputes under BITs. As a result, South Africa has reviewed and cancelled many of its existing BITs.

In addition, in 2015, South Africa published its Protection of Investment Act. Section 13(4) of that Act provides only for the international arbitration of investment disputes once all domestic remedies have been exhausted, and only with the consent of the government of South Africa. As a result, the South African government

clearly regards international arbitration as a means for resolving investment disputes as an exception to the rule, and not as the preferred mechanism.

It seems fair to conclude that the Washington Convention is no longer a priority for South Africa.

**Having had the benefit of almost 25 years of debate on the issue, one would expect that the local legal community would at least be familiar with the changes brought about by the IA Act. Recent debates, however, at a local level, seem to indicate that this is not actually the case. Is this something you have seen?**

Yes, I suspect that this is mainly due to the fact that South African practitioners need to acquaint and familiarise themselves with the difference between how domestic litigation and international arbitrations are run. South African practitioners are often wedded to South African local practices, which are not necessarily suited to international arbitrations. It is common to see South African practitioners falling back on the safety net of the manner in which arbitrations were conducted under the previous, domestic focused, Arbitration Act.

As we know, the reality is that international arbitrations operate in a sphere outside of the ambit of the courts (by design). This is not something that comes naturally to the average South African-trained lawyer, where the four corners of the law, precedent and court rules reign supreme.

When conducting international arbitrations, South African practitioners must learn to separate governing law and seat and to not assume that domestic principles of law or procedure will apply. That may mean they have to detach themselves from their usual reliance on the legal system of judicial precedent, the habit of falling back on domestic case law and practice and the reliance on the rules of the South African domestic courts.

**For many years South Africa implemented an extremely restrictive policy in relation to the jurisdiction of its courts. This meant that the local courts would only take jurisdiction over a dispute if there was the existence of a “jurisdictional link” to South Africa. Can you explain the justification for this approach?**

Traditionally, this narrow approach of the South African courts meant steps had to be taken in order to “found” the jurisdiction in South Africa. For example, when one was dealing with a foreign defendant, an

application for an attachment of assets had to be made in South Africa. Now, this would work if assets were available in the jurisdiction. But if no assets were attached, or no other link could be established, the court would then lack the jurisdiction to hear a matter. This applied across the board, including where an application was made to enforce a foreign arbitration award. The main justification for this approach was due to the fact that the courts wanted to ensure the effectiveness of their judgments – in other words, that there was some asset against which the judgment could be executed.

**But this historic approach surely contradicts the international approach to arbitration and, more importantly, the requirements of the New York Convention?**

Absolutely. International arbitration is designed to operate in an environment that is free from court interference. It is not for a domestic court to decide on the effectiveness of an award. As you say, South Africa has been a party to the New York Convention since 1977 and the court's approach to the enforcement of awards was at odds with its obligations under that Convention.

The IA Act has sought to remedy this. The Convention has been annexed to the IA Act at Schedule 3, and its obligations under the Convention have been further clarified in Chapter 3 of the IA Act. South African courts are therefore obliged, under the international treaty (which has now been enacted by the IA Act), to recognise and enforce foreign arbitral awards. In addition, and importantly, you will note that the IA Act does not include a “lack of jurisdiction” as a ground upon which the court is entitled to refuse to enforce a foreign arbitral award.

As a result, a failure to recognise an award on grounds not stipulated in the New York Convention constitutes a breach of the country's obligations.

**Could you expand upon our courts' recent confirmation of the development of the concept of jurisdiction, in light of the new IA Act?**

This is probably best summarised by the following quote by Adams J, which is contained in the recent decision of *Vedanta v KCM*:

I think that the importance of the doctrine of ‘effectiveness’ has become somewhat eroded in the context of jurisdiction. This may very well relate to the fact that the world has become a global society in which the fact that an entity, which has agreed to





an international arbitration and the concomitant jurisdiction of the overseeing court, chooses not to be bound by an order of such a court, may be frowned upon by the international business community.

**But the argument has been raised that this has created a lacuna in the law – specifically, there is a tension between the concept that South African courts are empowered by local law and local law requires that the court must hold jurisdiction to entertain a matter. On the other hand, international obligations impose a duty to recognise and enforce foreign arbitral awards, regardless of the nationality of the parties and the effectiveness of an award. How is this conflict then resolved?**

Well the concern arises from an incorrect or perhaps incomplete understanding of the law. In South Africa, the jurisdiction of the local courts is derived from section 21 of the Superior Courts Act. It is true that matters arising within its area of jurisdiction are to be resolved before that court and historically, applications for the attachment of assets to found jurisdiction were required in order to found jurisdiction over matters not otherwise within the jurisdiction of the court.

But it is often forgotten that section 21 also grants jurisdiction to the court, over all other matters of which it may according to law take cognisance. The commentary to the Superior Courts Act makes it clear that jurisdiction is also to be determined with reference to relevant statutes.

The IA Act is indeed one statute that the court is entitled to rely upon in exercising its jurisdiction and as such, applications for the attachment of goods to found jurisdiction should be unnecessary when seeking to enforce a foreign arbitral award, under the IA Act.

**But is this necessarily a principle that is being applied uniformly in practice? Take, for example, the case of *Steyn v Tanzanian Government* where an application to attach an aircraft owned by the Tanzanian Government was sought (and obtained) in order to found the jurisdiction of the court. In light of cases such as *Steyn*, can it be said that the principle is always adhered to?**

The *Steyn* judgment is unfortunate in a number of respects, one of which is indeed the impression created that an attachment was required to found the jurisdiction of the court. But it would appear that the application for attachment was used as a tool to freeze the asset which was likely to be removed from South Africa in a short period of time. So, rather than the attachment being a necessity, it would appear that it was used as a mechanism to attach an asset which was likely to be removed.

It is also unfortunate that the learned judge in *Steyn* found that the arbitration award ceased to exist once it was made an order of court. Whilst one can appreciate why the judge came to this conclusion, such a determination is inconsistent with the New York Convention in that an arbitral award is capable of enforcement in any number of jurisdictions without affecting the nature of the award.

**The South African court ultimately found that there was no arbitration award capable of enforcement in South Africa. But South Africa was not the seat of the arbitration and so the local courts are not empowered to determine the validity of a foreign award. Is this not a further issue with the *Steyn* judgment?**

That is correct – The South African court was asked to enforce a foreign arbitral award. Section 16 of the IA Act obliges the court to enforce such awards upon request. Only in limited circumstances can a court

refuse to enforce an arbitral award. These are set out in Section 18 of the IA Act.

The court was not empowered to pronounce on the validity of the award – it could only enforce or refuse to enforce the award if one or more of the grounds specified in Section 18 of the IA Act were satisfied. By declaring that the award no longer existed, the court exceeded its authority and usurped the power of the courts at the seat of the arbitration.

**But these decisions are not all doom-and-gloom as we often see such decisions in jurisdictions coming to terms with new legislation. Do you think it is important that these decisions are scrutinised and commented upon so that ultimately, the courts can learn from the arbitration community and correct the position in due course?**


That is indeed so. As long as practitioners are debating these decisions, we can only hope that, ultimately, we will arrive at the correct outcome.

## Author



**Jonathan Ripley-Evans**  
Director, Johannesburg  
T +27 10 500 2196  
[jonathan.ripley-evans@hsf.com](mailto:jonathan.ripley-evans@hsf.com)  
[hsf.com](http://hsf.com)





**Common drafting issues in arbitration:  
Do arbitration agreements in unilateral  
documents work?**

### The problem in a nutshell: Consent

Documents executed by only one party in favour of a non-signatory are commonplace in commercial transactions, for example in the financial services and construction sectors where guarantees and bonds are often issued in this way. However, when parties are trying to resolve disputes arising under what are, for convenience, referred to as "unilateral documents" in this article, they may encounter a number of legal hurdles.

Arbitration is based on the consent of all parties to arbitrate rather than to resolve their disputes in the local courts. Given the important nature of this agreement, it is generally required to be "in writing". The English Arbitration Act 1996 defines "in writing" relatively widely, accepting that agreements to arbitrate may be "evidenced" in writing or even be non-written agreements referring to written terms. An arbitration agreement in a unilateral document is therefore generally seen as enforceable under English law.

Other jurisdictions, however, follow more closely the stricter requirement in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Under the New York Convention, an "agreement in writing" shall include ... an arbitration agreement, signed by the parties or contained in an exchange of letters..." This is generally seen as requiring all parties to execute the arbitration agreement.

Where the arbitration clause provides for an arbitral seat in one of these foreign jurisdictions, or where the seat is in England but enforcement of an award may take place abroad, there is a risk that a foreign court will refuse enforcement of any award issued pursuant to an arbitration clause in unilateral document.

While the New York Convention generally allows parties to enforce arbitral awards in most countries worldwide, enforcement may be refused by local courts on the ground that the award is contrary to the jurisdiction's public policy by virtue of a lack of consent to arbitrate.

To avoid this enforcement risk from the outset, this article sets out practical solutions to ensure that arbitral awards will be enforceable, thus avoiding incurring time and expense resulting in an unenforceable award.

### Unilateral documents in commercial practice

A number of common commercial transactions involve the use of unilateral documents, and often these will contain arbitration clauses, especially when this is consistent with the remainder of the transaction documents. Where the unilateral document is subject to English law, it is most commonly executed in the form of a deed poll, which is a deed signed by one party in favour of another party.

Such unilateral documents are used, for example, in the following scenarios:

- Company A contracts with foreign company B and requests a guarantee from B's parent company C which is incorporated in A's jurisdiction.
- Contractor A subcontracts works in relation to its construction project to subcontractor B; the subcontract may envisage B obtaining a performance or on-demand bond from its bank C as security in favour of A.
- Company A novates or assigns its contract with B to its subsidiary C which is a project company without significant assets; A may issue a guarantee in favour of B in order to give B confidence that it will receive what it is promised under the contract even where C defaults.

None of these guarantees or bonds is necessarily signed unilaterally; in many instances parties opt for 'traditional' execution by two or more parties. Where parties opt for unilateral execution, this can be for a number of reasons: in some cases, it is simply faster and more convenient to execute the document unilaterally rather than to send a physical copy to the counterparty. In other cases, tax or regulatory reasons prevent the party receiving the bond or guarantee from signing the document; this can be particularly relevant where the parties are not based in the same jurisdiction. A further situation where parties tend to sign documents unilaterally is where a benefit is conferred upon a large number of counterparties, or a varying class of counterparties (eg, employees, bondholders or shareholders in a publicly traded company) – in such cases it would be impractical to arrange for signature by every member of the class and to obtain further signatures whenever an individual joins the 'class' of individuals identified.



## Solutions in practice: Drafting tips for a consistent and effective dispute resolution clause

Unilateral documents often fulfil ancillary functions in larger commercial transactions, or guarantee the obligations in a main contract. In most (but not all) cases the subject matter of the unilateral document and the other, related contracts overlaps which makes it desirable to provide for the same dispute resolution mechanism in all contracts, whether arbitration or court litigation.

Practitioners may face a scenario where a party is about to execute a unilateral document containing an arbitration clause and the other party's assets are in a jurisdiction where the enforceability of arbitration clauses in unilateral documents is in question due to the lack of written consent to arbitrate. How can practitioners seek to ensure that the parties' choice of arbitration will be respected?

### Step 1

Is unilateral execution really necessary?



### Step 2

Is an umbrella agreement an option?



### Step 3

Umbrella-'light':  
Can an arbitration agreement in another contract cover the unilateral document?



1

Where the use of unilateral documents results in an enforcement risk, the obvious solution is to avoid their use altogether. By making the party in whose favour the bond or guarantee is to be executed a signatory, concerns about the parties' consent to arbitrate fall away. However, this may not always be an option, for example, where signature by all parties is not possible within the available timeframe, or for tax or regulatory reasons. Where a guarantee is issued in favour of a varying class of shareholders or employees, it may also not be practical to make all beneficiaries signatories to the agreement.

2

Where unilateral execution of a document cannot be avoided, a preferred dispute resolution option in complex commercial transactions is for all parties to enter a so-called umbrella agreement.

The most common approach is to include mirror image arbitration clauses in each transaction document, ensuring – through complex and bulky drafting – that disputes under different contracts can be consolidated and that transaction parties can be joined to arbitrations even where they are non-parties for the purposes of the relevant arbitration agreement. An umbrella agreement, instead, is a separate agreement between all parties involved in the transaction (including the issuer of the unilateral document) providing for a consistent dispute resolution mechanism for all disputes arising under any of the transaction documents.

The arbitration clause in a unilateral document will be replaced with a short clause incorporating the umbrella agreement's dispute resolution provision by reference. Under English law, express and clear language is required to do so. In this way, the arbitration agreement incorporated into the unilateral document is an arbitration agreement signed by all relevant parties and thereby complying with the formality requirements set out in the New York Convention and any corresponding local law.

While this is a clean solution in theory, it can be difficult to implement in practice. For example, it is possible that some of the transaction documents will have already been signed by the time the parties are drafting or negotiating the guarantee or bond. In that case, an umbrella agreement may no longer be practical. There may also be significant reluctance from some parties to enter into what is perceived as another legal document produced at further cost in the context of an already complex commercial transaction with various inter-related contracts.

3

Where the party executing the unilateral document and the party in whose favour the unilateral document is issued are both parties to another transaction document, a further solution is to amend the drafting of the arbitration clause in that bilateral or multilateral contract to effectively become a kind of umbrella agreement covering the unilateral document.

In practice, this can be achieved by drafting the arbitration clause in the multilateral contract so as to refer to disputes arising under the multilateral contract as well as under the unilateral document. Care should be taken that all references in the arbitration clause are amended accordingly, including any joinder and consolidation provisions. In return, the arbitration clause in the unilateral document will be replaced with wording incorporating by reference the arbitration clause from the multilateral contract.

This option can be preferred in some cases as it dispenses with the need for an additional document while also reducing any enforcement risk. This option will not be available in practice, however, where the unilateral document is the issuing party's only involvement in the transaction, as is the case, for example, where a bank issues a bond in favour of a construction contractor.



## Dealing with risk: What to do when a dispute has arisen?

Where a dispute arises under a unilateral document and the above options were either not available or not used, parties should seek advice in relation to the risk of proceeding to resolve the dispute by arbitration. In particular, local law advice from the jurisdiction where enforcement would likely be sought can shed light on how significant the enforcement risk will be in the particular factual scenario.

Another relevant factor will be which party is contemplating bringing a claim under the arbitration clause contained in the unilateral document. Where the non-signatory party is commencing the arbitration, the enforcement risk may be lower, because the argument that there was a lack of consent to arbitrate will be less convincing. Indeed, commencement of the arbitration by the non-signatory party could likely indicate that consent. If, however, the issuer of the bond or guarantee is bringing the claim, the enforcement risk will tend to be higher. In this case, the non-signatory party might bring a jurisdictional challenge. Even if this was to fail, the challenge could be relied upon at the enforcement stage as evidence indicating that there was no consent to arbitrate. If the resisting party chooses not to participate in the arbitration, this might lend further weight to any application resisting enforcement in foreign courts at a later stage.

A practical solution to avoid legal uncertainty would be for both the non-signatory and the signatory party to enter into a written agreement to submit their dispute to arbitration after it has arisen. This should significantly reduce the enforcement risk, as the enforcing party will be able to point to an arbitration agreement which satisfies the formality requirements set out in the New York Convention and, as a consequence, of any local law.

In practice, however, where a dispute has arisen, parties tend to be reluctant to agree even on basic points. Any party which contemplates that an arbitral tribunal may issue an award which is not in its favour may be unwilling to facilitate enforcement of such an award. As a consequence, an arbitration agreement post-dating the dispute is only likely to be an option where both parties have advanced claims against each other and both have concerns about the enforceability of a potential award because the other side's assets are located outside the jurisdiction, or where the alternative dispute resolution venue (eg, a local court) is unattractive to both disputing parties.

## Key takeaway

Parties negotiating a unilateral document should consider carefully whether or not to include an arbitration clause in this contract. While some jurisdictions may recognise arbitration agreements in unilateral documents as enforceable, this does not mean a resulting arbitral award will necessarily be enforceable in the usual way under the New York Convention. Wherever possible, an arbitration agreement should be concluded between all relevant parties – whether in the guarantee or bond, or in a separate document incorporated by reference.

Careful planning is crucial when it comes to structuring the dispute resolution mechanism in a complex commercial transaction. Dealing with the arbitration agreement at the 11th hour often means that it is no longer practical to put in place alternative arrangements such as creating an umbrella arbitration agreement.

Where a guarantor is unwilling to accommodate the non-signatory's request to adopt one of the practical approaches set out above, parties should carefully consider how significant the enforcement risk is in their particular case and whether it can be mitigated in any other way.

## AUTHORS



**Nicholas Peacock**  
Partner, London  
T +44 20 7466 2803  
[nicholas.peacock@hsf.com](mailto:nicholas.peacock@hsf.com)



**Vanessa Naish**  
Professional Support  
Consultant, London  
T +44 20 7466 2112  
[vanessa.naish@hsf.com](mailto:vanessa.naish@hsf.com)



**Jerome Temme**  
Associate, London  
T +44 20 7466 2607  
[jerome.temme@hsf.com](mailto:jerome.temme@hsf.com)

A version of this article first appeared in the Practical Law Arbitration Blog.



# Our global arbitration practice

A snapshot of 2017 - 2019

US\$72.06  
BILLION

value of the claims  
and counterclaims  
in our portfolio

## Our locations



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

working on arbitration across **22 offices**

across **17 different seats\***

**19** members of the practice sitting as  
arbitrator in **53** cases

**32** arbitrator appointments as presiding or  
sole arbitrator

**120+** appointments and roles at arbitral  
boards, bodies and working groups

settled **47** cases

## Our sectors



Energy



Construction



Financial



Infrastructure



Mining



Insurance



IT / TMT



Manufacturing



Trading



Pharmaceuticals



Travel and leisure



Real Estate

## Facts and figures



**40+** Partners



**200+** total qualified Lawyers working  
across the globe



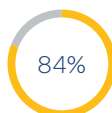
**168** live arbitrations and **12** active treaty  
based arbitrations



**13** cases worth more than **US\$1 billion**



we have worked on arbitrations governed  
by **25** sets of rules



we have conducted the advocacy in **84%**  
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## Spotlight article: Nick Peacock

"The Summer of '95 was all about Britpop, photocopying, and pagination", says Nick Peacock of his first stint working as a paralegal managing the (then paper) disclosure in a large case inside the London office of the firm then known as Herbert Smith. This followed his undergraduate studies at Oxford University, and before going as a Herbert Smith 'future joiner' to Nottingham Law School. After returning for his training contract and qualifying into the Disputes division, Nick then spent 10 years in the London office before going to South-East Asia where he headed up the Singapore international arbitration practice. He moved back to the London arbitration group in 2012.

Over his 20+ year career, Nick has handled disputes ranging from ultra-mega power projects to the child-proof widgets on the tops of paint cans. He has become known for his expertise both in various sectors including banking and finance and TMT, and also for his work in relation to India and Russia. Nick has been recognised as a leading global arbitration practitioner and is ranked both as a "Global Leader" and arbitration "Thought Leader" in Who's Who Legal 2020.



**Nick, you've been at Herbert Smith Freehills for over two decades now and have a very broad practice covering both commercial and investment arbitration and a range of jurisdictions and sectors. Do you have a career highlight you could share with us?**

The last 20 odd years have passed, if not in a flash, certainly at a canter. The pace of the work and the sheer variety of subject matter is both the challenge and the reward. No two cases have been the same, but my strongest memories are often of the hearings, which are the highlight of acting as counsel. Early in my career, I was lucky enough to appear as a counsel in the glorious surroundings of the Peace Palace in the Hague, to argue before an eminent tribunal led by the brilliant advocate Larry Shore. After two weeks and not enough sleep, even the vast marble halls felt comfortably familiar. Less grand, but just as interesting, were some of the wonderful

hearings I did in South East Asia, including one hearing at the (old) BANI arbitration centre in Jakarta where counsel's submissions and the translator's voices were simultaneously competing with both the noise of the traffic through open windows, and, on the Friday morning, a very loud call to prayer from a nearby mosque.

**You have recently been podcasting on how to enforce awards. Enforcement is often cited as the critical advantage of arbitration, but looking at the content of your podcasts, do you think there is any risk that this advantage is sometimes overstated?**

The enforcement advantages of arbitration are unique, so I don't think it is possible to overstate them. However, you have to be realistic about the challenges and what I am aiming to do with the podcast series is to encourage thinking about enforcement at an early stage. It's vitally important for

businesses to make sure that enforcement is part of their strategy, not just when the award is produced, but when starting an arbitration, and also when planning the strategic conduct of any dispute with an arbitration component.

Once you step outside what you might consider as 'developed jurisdictions', having an arbitration award and being able to call on the New York Convention are real and substantial benefits. There are many jurisdictions where the judgment of the court of another country will have very little status, whereas the overwhelming majority of countries in the world have, at least in principle, signed up to recognise arbitration agreements and arbitral awards under the New York Convention. While some countries' courts struggle a little to know what that means in practice, at least parties can point the judge to the Convention and (hopefully) the local implementing law and try to guide them along that journey.

There is of course significant voluntary compliance in relation to arbitral awards, because enforcement in arbitration in many jurisdictions is so effective. Fewer cases go to a hearing, or to an award, where it is clear that enforcement will be relatively straightforward. You notice this trend in particular when sitting as arbitrator where there are some jurisdictions where most cases settle, and some where you can always expect to be writing an award.

**You have a focus on banking and finance arbitration and last year saw the announcement of the significant increase in banking and finance arbitrations handled by the LCIA. What do you think is driving this increase?**

The LCIA is an attractive institution for finance parties, many of whom have regional legal teams based in London. The simple and streamlined procedure is attractive to some. The absence of an appeal mechanism in arbitration also attracts some – but not all – banks. That said, I think the fees structure is probably the main attraction. Hourly fees, rather than ad valorem fees, works well for users where disputes can often be very high value, but not factually or legally complex. When you want to pursue a lending default for several billion dollars, you would prefer to pay your arbitrators by the hour, rather than based on the loan value.

That said, outside London, arbitration in other centres and with other institutions is also increasingly being agreed for financial transactions. The ICC, SIAC, HKIAC, DIFC, SCC and others, and ad-hoc arbitration, are all I think feeling the trend. Over the coming decade, we can expect an ever greater volume of banking and finance arbitrations will be handled across all the major arbitration institutions.

Enforcement is very much the driver, where local courts cannot produce a judgment that is capable of being enforced in the relevant jurisdiction. Even banks that will never look at arbitration for intra-European transactions, are being forced to turn to arbitration, almost as a default, when doing business in developing jurisdictions.

**You have published guidance on cyber security issues in arbitration and in the last few months Herbert Smith Freehills has launched a Digital Law Group. In addition, the ICCA Cyber Security Protocol for International Arbitration 2020 has just been released. Why has this become such a hot topic?**

A lot is being written about cyber security in arbitration right now because getting to grips with these issues is no longer optional. The days of sending around large volumes of confidential documents by unencrypted email are, or should be, over. It is incumbent on all the parties in the arbitral process to get a better understanding of the threats and to become better at addressing them through enhanced cyber security. All contributions to this process are welcome and I'm pleased to see the launch of the Protocol. Better and more secure document platforms are coming and are most likely to be hosted by the arbitration institutions. In my view, those new platforms will be a game changer and using these secure platforms will, in time, become normal for us all.

The practice of law has changed radically, certainly since I started my career, but even within the last 5 years. We are all being 'disrupted', but we should also be trying to disrupt our own practices. This is why HSF started our Digital Law Group, to take a group of experienced lawyers out of their 'business as usual' in order to look with fresh eyes on what is really needed, what might be coming down the track, and what we should be doing now, or in the coming years to reinvent ourselves and the services we offer to clients.

**You head up HSF's India arbitration practice and have spent a significant amount of time based in Singapore which is a key centre for India-related arbitration. What originally sparked your interest in arbitration in India?**

I started working on arbitrations in relation to India some 15 years ago while still in London, because we were doing a lot of work on outbound investments by Indian corporates, which necessarily then gave rise to a number of disputes for those clients. The growth of Singapore as an arbitration centre and seat has definitely been linked to its ability to attract cases from India, and so during my time in Singapore I did even more work with an India focus. Since returning to London in 2012, I am pleased to say that India-related work (in the broadest sense) has remained a large part of my diet. While Singapore is almost the default Asian seat for Indian parties, it remains the case that London is a very popular and well-used venue for Indian parties to hold their cross border arbitrations.

**It is clear that Brexit will not affect the enforceability of English arbitration awards, as the UK will remain a party to the New York Convention. However, it has been suggested that Brexit may still affect the popularity of London as a seat. Do you think Indian parties will be more likely to choose Singapore as a seat post-Brexit?**

I think most Indian parties who know and like London will not fundamentally change their views based on shifts in intra-European arrangements. Certainly, I see no reason to think that the growth of work in Singapore will not continue. The sheer volumes and upward trajectory of transactions involving Asia, and intra-Asia, means that all arbitration centres that serve that business can expect to grow. I think London's popularity as part of that ecosystem will continue.

Fundamentally, London's reputation for pro-arbitration supervisory courts and legal excellence is not going to be overturned by Brexit. For Indian parties in particular, there has been an additional pull factor in the last few years as the number of Indian counsel setting up chambers in London has grown. The presence of leading Indian advocates in London chambers has only enhanced the continuing relevance of London as a legal hub

**Alongside your work for Indian clients, you also focus on Russian disputes. You have been commenting on recent claims related to Russian-Ukrainian investments in the wake of events in Crimea. Are you expecting more claims?**

There have already been a lot of Crimea-related claims and, yes, I think more are coming. It is a feature of investment arbitration, as with many other spheres, that once a precedent is set and when parties see others using certain remedies, this prompts them to consider their own situation and the use of similar options. Many claims have already been filed by Ukrainian investors against Russia, and we have even reached the enforcement battles on several of those claims. In turn, the impact of the geo-political situation on Russian investors in Ukraine is also starting to give rise to claims in the other direction against Ukraine. More are likely to follow.

## Get in touch

**Nick Peacock**  
Partner, London  
T +44 207 4066 2803  
[nicholas.peacock@hsf.com](mailto:nicholas.peacock@hsf.com)

<https://www.herbertsmithfreehills.com/our-people/nicholas-peacock>



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## Issue 2



## Issue 3



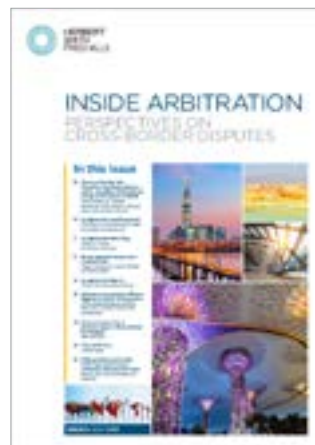
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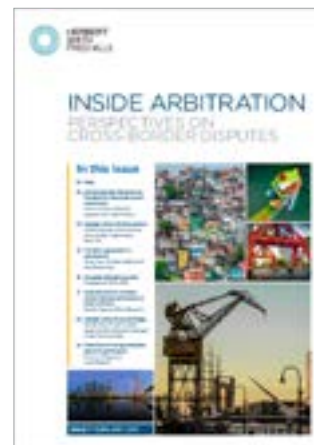
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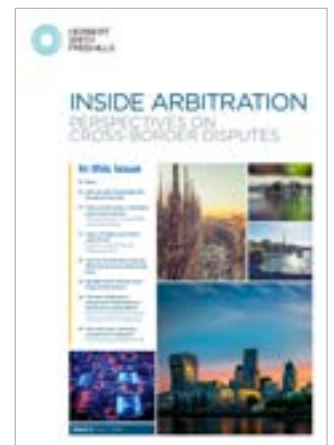
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