NORTON ROSE FULBRIGHT

International arbitration report

issue 19

Norton Rose Fulbright

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 3500 lawyers and other legal staff based in Europe, the United States, Canada, Latin America, Asia, Australia, Africa and the Middle East.

Recognized for our industry focus, we are strong across all the key industry sectors: financial institutions; energy, infrastructure and resources; consumer markets; transport; technology; and life sciences and healthcare. Through our global risk advisory group, we leverage our industry experience with our knowledge of legal, regulatory, compliance and governance issues to provide our clients with practical solutions to the legal and regulatory risks facing their businesses

Wherever we are, we operate in accordance with our global business principles of quality, unity and integrity. We aim to provide the highest possible standard of legal service in each of our offices and to maintain that level of quality at every point of contact.

International arbitration report
Published by Norton Rose Fulbright – Issue 19 – November 2022

Editor-in-chief – C. Mark Baker, US
Editor – James Rogers, London
Junior Editor – Sarah Gosling, London

Editorial

Welcome to Issue 19 of International Arbitration Report, which, showing the growing strength of our international practice, features 11 articles from over 20 of our lawyers across four continents. In this issue we provide updates on important legal and practice developments from around the world, from the impact of the European energy crisis on international arbitration and a review of regional developments in Dubai, to a refreshed look at some of the more perennial procedural issues in international arbitrational.

Our lawyers take a look at recent trends in arbitration, including how the importance of ESG in corporate policies and investment decisions has resulted in a surge in the number of disputes in this area, and the likely impact this will have on claims brought in international arbitration. We also consider the topic of energy prices in Europe, a matter currently at the forefront of many of our clients' minds, which will prompt greater scrutiny of existing contracts, particularly in respect of sanctions relief, and mechanisms for early exits and price reviews. With the invasion of Ukraine still ongoing, the inevitable fall out will be legal disputes, most of which we are expecting to see determined in international arbitration, and perhaps even under the emergency measures provided by certain institutional rules.

We explore some new developments across our practice, such as the creation of the Hague Court of Arbitration for Aviation, the new 2022 DIAC rules in Dubai, recommendations for reform of the Arbitration Act in England and Wales, and the impact of two recent decisions that have redefined the landscape around US discovery in support of arbitration. Our contributors even take us off the planet in a consideration of the rights of, and recourse available to, those impacted by debris falling from space.

Finally, we revisit some age-old issues, with our lawyers providing a guide to the anatomy of the arbitration agreement, reviewing the various procedural requirements around serving a Notice of Arbitration and continuing our analysis of enforcement of arbitral awards against states, particularly in light of the current geopolitical climate.

C. Mark Baker

Global Head of International Arbitration,
Norton Rose Fulbright

Contents

The anatomy of an arbitration agreement

By Bryan Walker and Clinton Slogrove

Arbitration is an inherently flexible mechanism, intended to streamline the dispute resolution process to meet the parties' specific needs. Yet, despite free and readily available resources on the drafting of arbitration agreements (see our December 2021 article, *How to draft an arbitration agreement*), courts are all too frequently asked to resolve disputes over standard aspects of an arbitration clause. To quote Justice Steel in *Thompson General Hospital v CSL Hospital Services Ltd*. 30 BLR (2d) 280, 112 Man R (2d) 211 "*if the parties, having the freedom to craft a process that perfectly suits the context of the parties and their situation, choose to relinquish this power by the use of a standard form or 'boilerplate' clause, they have only themselves or more properly, their solicitors to blame*." This article dissects the 'standard' components of arbitration agreements and provides examples of where poor drafting has resulted in unnecessary litigation.

Scope

The scope of the arbitration agreement is intended to outline which disputes must be referred to arbitration. The scope may be broad, covering for example "*any and all disputes relating to or touching upon the breach, performance or interpretation*" of an agreement. Conversely, the scope may be much narrower, applying only to a specific aspect of an agreement, such as disputes over invoicing or budget approvals.

Specifying exactly what is and is not covered by the arbitration agreement is essential, requiring careful attention and precise wording. The importance of precision increases where the parties seek to introduce multiple dispute resolution mechanisms into one agreement. In *Lovelock v Exportles* [1968] 1 Lloyd's Rep. 163, the arbitration agreement provided that "*any dispute and/or claim*" was to be submitted to arbitration in England and "*any other dispute*" to arbitration in Moscow. Lord Denning commented that "*it is beyond the wit of man…to say which dispute comes within which part of the clause*". It was so vague that it was "*devoid of meaning*", effectively frustrating the intentions of the parties by requiring any dispute to instead be decided by the court.

Specifying exactly what is and is not covered by the arbitration agreement is essential

Seat

In international arbitration, it is common for arbitration agreements to identify the seat of the arbitration as a different jurisdiction than the actual location where the arbitration is to take place. The seat of the arbitration determines the procedural law that will apply to practical aspects of the arbitration, for example supervision and support of the arbitration and interim remedies.

In *Roger Shashoua, Rodemadan Holdings Limited, Stancroft Trust Limited v Mukesh Sharma* [2009] EWHC 957 (Comm), an arbitration agreement provided that the venue of the arbitration was London, but was silent on the seat. The English Court found that the seat was London, stating that "[for] *a choice of place not to be given effect as a choice of seat, there will need to be clear evidence that the parties…agreed to choose another seat for the arbitration*." The Indian Supreme Court, where relief was sought by one of the parties, agreed.

Governing law

While it may be assumed that an arbitration agreement contained within a main agreement will be subject to the same governing law of the main agreement, it is not always clear-cut. This is especially the case where the parties are from different jurisdictions, the main agreement is performed in another jurisdiction, or the seat of the arbitration is in a different jurisdiction to the governing law of the main agreement.

In *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors* [2012] EWCA Civ 638, Lord Justice Moore-Bick explained that "*although one may start from the assumption that the parties intended the same law to govern the whole of the contract, including the arbitration agreement*," other factors, such as the seat of the arbitration, may lead to the conclusion that this was not their intention. Specifying the law of both the main agreement and the arbitration agreement in advance prevents the possibility of a dispute over which law is to apply.

Choice of arbitral institution

Selecting the appropriate arbitral institution, and thereby the appropriate procedural rules, requires an understanding of the various institutional rules. This is important for a number of reasons including the costs associated with each institution, whether the arbitration is to be confidential, any expedited procedures that the parties may wish to benefit from, and the quality-control the various institutions exercise over decisions made under their supervision. (See our May 2022 article, ***Choosing the right arbitral rules***).

It is also essential to understand which rules each arbitral institution can and will apply. In the Dubai International Financial Centre (**DIFC**) case of *Limeo Investment & Real Estate LLC v Landia Educational Services S.A.L* [2019] DIFC ARB 012, the parties had agreed that the "*dispute shall be finally settled in accordance with the rules of the London Court of International Arbitration [LCIA]*" and that the arbitration "*shall take place in the LCIA Arbitration Centre in Dubai International Centre, in Dubai, the UAE*". A dispute arose as to which procedural rules applied, as (at the time) the DIFC-LCIA was a related but distinct arbitral institution to the LCIA. The DIFC Court found that the rules of the DIFC-LCIA applied, stating that "*if the choice of rules and centre provided for by the Arbitration Agreement pertain to one and the same institution, it follows that the rules which are the analogue of the DIFC-LCIA Arbitration Centre can only be those of the DIFC-LCIA*."

Arbitrators

Choosing the number, characteristics and mechanism for appointment of the arbitral tribunal will depend on the nature, complexity, and value of potential disputes. Ensuring that the arbitration agreement is clear on these issues can prevent an unnecessary visit to court to determine who should be appointed. Being too prescriptive as to characteristics in advance may limit the parties' options for appropriate arbitrators later on.

Failing to provide for the selection of arbitrators at all will inevitably result in court intervention, increased costs and delay for the parties. In *Sherwin-Williams v Walls Alive*, 2000 ABQB 811, the arbitration agreement was silent on the appointment of the tribunal and, in the absence of any guidance in the agreement itself, the Court appointed a retired judge, preferring legal experience over the accounting expert put forward by one of the parties.

In *Broken Hill City Council v Unique Urban Built Pty Ltd* [2018] NSWSC 825 the arbitration agreement provided that the "*President of the Australasian Dispute Centre*" was to nominate the arbitrator. It transpired that the Australasian Dispute Centre did not exist, but the Court salvaged the agreement, though at the expense of increased costs and delay, by finding that since parties did intend for disputes to be arbitrated, the agreement was operative despite the oversight of the appointing authority and the Court would appoint the arbitrator instead.

Multi-tiered dispute resolution

While every effort should be taken by parties to avoid litigating disputes, creating prerequisites to arbitration through multi-tiered dispute resolution procedures should be articulated clearly to avoid uncertainty as to the compulsory nature of the steps.

In *Emirates Trading Agency v Prime Mineral Exports Private* [2014] EWHC 2104 (Comm), the agreement provided that "*the parties shall first seek to resolve the dispute by friendly discussion*", and that if no solution could be reached for a continuous period of four weeks, the dispute could be referred to arbitration. The Court found that the use of the word "*shall*" indicated that the obligation was mandatory, thus making four-week long "*friendly discussions*" a condition precedent to arbitration. Findings like this can have a significant impact on a party's rights, particularly where the limitation period for a claim is nearing expiry.

Conclusion

To quote Justice Feasby in *Singh v Modgill*, 2022 ABQB 369, arbitration "*is not some lesser form of litigation than that being conducted in the courts… unless that is what the parties bargained for*." To avoid unintended bargains, parties are advised to consider the drafting of arbitration agreements carefully, with a view to mitigating uncertainty and providing clear answers to foreseeable issues.

Bryan Walker
Partner
Tel +1 403 267 8162
brian.walker@nortonrosefulbright.com

Clinton Slogrove
Consultant
Tel +1 403 267 8121
clinton.slogrove@nortonrosefulbright.com

Recognition, enforcement and recovery of investment treaty awards: Part II

By Andrew Battisson and Tamlyn Mills

In Part I of our series on the recognition, enforcement and recovery of investment treaty awards, we provided a concise summary of the enforcement framework for investment treaty awards under the 1965 Convention on the Settlement of Disputes between States and Nationals of Other States (the ICSID Convention) and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Because of the inherent nature of investment treaty arbitration as a form of recourse for investors against sovereign states, foreign state immunity is often raised at the point of recognition or enforcement of investment treaty awards, either as an objection to the exercise of subject matter jurisdiction against states by domestic courts or to protect certain types of state property from measures of execution.

In Part II, we examine foreign state immunity laws and their interaction with domestic regimes for the recognition and enforcement of investment treaty awards in more detail.

Principles of foreign state immunity

The doctrine of foreign state immunity occupies a fundamental place in international law and international relations. Foreign state immunity comprises two related concepts, relevant at two stages of the recognition/enforcement process:

- immunity from suit, i.e. immunity of foreign states from the jurisdiction of domestic courts (**jurisdictional immunity**); and
- immunity from execution, i.e. immunity of a foreign state's property from execution of a judgment or award against it (**execution immunity**).

As there is no single international treaty regime in force to govern foreign state immunity, the application of immunity has primarily been left to domestic law, resulting in a lack of uniformity. For this reason, practitioners are advised to consider closely the specific laws of the jurisdictions in which they are engaged.

The doctrine of foreign state immunity occupies a fundamental place in international law and international relations

Originally, foreign state immunity was (broadly) absolute and a small minority of states today maintain a doctrine of absolute foreign state immunity, including the People's Republic of China. However, a majority of states have now adopted a concept of restrictive immunity.

Restrictive jurisdictional immunity

Restrictive jurisdictional immunity is a general immunity, subject to exceptions. The main exceptions are:

- waiver and/or submission (**waiver**); and
- engaging in a commercial activity.

Waiver

A foreign state cannot rely on jurisdictional immunity to the extent that it has waived such immunity. A waiver can be express or implied but must be clear and unequivocal. For example, an appearance before a court merely to assert immunity is not a waiver. Equally however, a submission to jurisdiction is implied when a state appears before a court and takes active steps to defend the merits of a dispute, and will be treated as binding.

Waiver by prior agreement is also often recognised as an exception to jurisdictional immunity but is a common source of contention. In the case of a non-ICSID arbitration, submission to the supervisory jurisdiction of the courts of the seat is regarded as uncontroversial. However, there are divergent approaches between states as to whether an agreement to arbitrate under the law of one state amounts to an implied waiver of jurisdictional immunity in other states where recognition or enforcement of the award is sought.

Contention concerning waiver by prior agreement extends to the treatment of the New York Convention and the ICSID Convention. Domestic courts, particularly in the US and Australia, have considered whether ratification of these treaties, either alone or in conjunction with some other step such as agreement to arbitrate, amounts to a waiver or submission.

In relation to the New York Convention, see for example: *Seetransport Wiking Trader v Navimpex Centrala* 989 F.2d 572 (2d Cir.1993); *Creighton Ltd v Qatar* 181 F.3d 118, 126 (D.C. Cir. 1999); *Tatneft v Ukraine* 771 F. App'x 9, 10 (D.C. Cir. 2019); and *Process and Industrial Developments Ltd v Federal Republic of Nigeria* 506 F.Supp.3d 1, 8 (2020).

Waiver by prior agreement is also often recognised as an exception to jurisdictional immunity but is a common source of contention

In relation to the ICSID Convention, see for example: *Société Ouest Africaine des Bétons Industriels (SOABI) v Senegal* (1991) 30 ILM 1169; *Benvenuti & Bonfant v People's Republic of the Congo*, Cour d'appel, Paris (26 June 1981) 65 ILR 88; *Blue Ridge Investments LLC v Republic of Argentina* 735 F3d 72 (2nd Cir 2013); *Mobil Cerro Negro Ltd v Bolivarian Republic if Venezuela* 863 F3d 96 (2nd Cir 2017); and *Eiser Infrastructure Limited v Kingdom of Spain* [2020] FCA 157 (affirmed in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l* [2021] FCAFC 157 and currently on appeal to the High Court of Australia).

In practice, the case law warrants close attention. Divergence remains between jurisdictions so practitioners should carefully consider the scope of exceptions in the jurisdictions in which they are engaged.

Commercial transactions

The basic principle upon which the commercial transaction exception to jurisdictional immunity rests, is that when a foreign state acts in a 'commercial' matter within the ordinary jurisdiction of municipal courts it should be subject to that jurisdiction. The principle is notoriously easy to state at this high level of generality but often difficult to apply to particular factual scenarios.

Restrictive Execution Immunity

Execution against a state's property is only permissible in two main scenarios:

- through an explicit or implied waiver of execution immunity; or
- through enforcement against a state's commercial property.

Waiver

Explicit waivers of execution immunity may relate to general state property or some specific property earmarked by the state to satisfy a liability or arbitral award. In respect of implied waivers of execution immunity, generally, a waiver of jurisdictional immunity does not extend to a waiver of execution immunity.

In respect of the ICSID Convention, no implied waiver of execution immunity is available given that Article 55 of the ICSID Convention expressly preserves execution immunity to the domestic laws of contracting states. In contrast, the New York Convention contains no express provisions addressing foreign state immunity, whether as to jurisdiction or execution. However, a small number of civil law jurisdictions, principally France and Switzerland, have found that a waiver of jurisdictional immunity through submission to arbitration in a New York Convention state extends to a waiver of execution immunity. Thus, in *Société Creighton v Ministre des Finances de L'Etat du Qatar et autre*, Cour de cassation [Cass.] l e civ, July 6, 2000, 127 J.D.I. 1054 (2000), the French Cour de Cassation held that Qatar had impliedly waived its execution immunity by entering into an arbitration agreement providing for the ICC Rules, which provide that an award will be binding upon the parties and that the parties are obliged to comply.

Commercial property

The doctrine of restrictive immunity in many jurisdictions rests on the premise that states are not immune in relation to acts undertaken by a state as a commercial actor, in contrast to acts undertaken by a state in a sovereign capacity. As a consequence, it is generally accepted that execution immunity does not extend to a state's commercial property. However, the question as to what constitutes commercial property is complex. For example, a contract for the supply of goods or services in return for monies may be commercial in nature but be entered into in furtherance of a sovereign purpose. Similarly, the commercialisation of state owned natural resources involves both commercial and sovereign acts. Domestic laws differ in how to address this issue, particularly as to whether the inquiry is focused upon the nature of the act or its purpose.

In some jurisdictions, the law focusses on the nature of the act. Section 1610(a) of the U.S. Foreign Sovereign Immunity Act 1976 permits execution against foreign state property in the United States *"used for a commercial activity in the United States."* 'Commercial Activity' is defined in section 1603(d) to mean *"…either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."*

Section 3 of the United Kingdom's State Immunity Act 1978 provides that a state is not immune in respect of proceedings relating to 'a commercial transaction', where a 'commercial transaction' includes *"any contract for the supply of goods or services' and 'any loan or other transaction for the provision of finance…"* It therefore distinguishes commercial transactions and contracts from transactions or activity into which a state engages in the exercise of sovereign authority.

However, the United Nations Convention on Jurisdictional Immunities of States and Their Property adopts a hybrid nature and purpose approach, providing in Article 2(2):

"In determining whether a contract or transaction is a 'commercial transaction'…reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the state of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction."

The application of exceptions to both jurisdictional and execution immunity are nuanced and can give rise to complex issues of law and fact

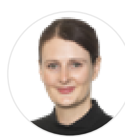
A further practical issue is that in seeking to establish that state property is not sovereign but commercial, there is often information asymmetry between a state and a private entity in favour of the state, which can make discharging the evidentiary burden challenging.

Conclusion

Domestic laws in relation to foreign state immunity take different approaches when seeking to balance the sovereign rights of states against the rights of award creditors, including between jurisdictions that have adopted a restrictive immunity approach. The application of exceptions to both jurisdictional and execution immunity are nuanced and can give rise to complex issues of law and fact. This extends from the interaction of domestic immunity laws to the recognition and enforcement regime for investment treaty awards under the New York Convention and ICSID Convention.

As domestic courts continue to grapple with these issues, investors and their legal advisers should closely and carefully consider the scope of exceptions to immunity in prospective enforcement jurisdictions.

Andrew Battisson
Partner
Tel +65 6309 5471
andrew.battisson@nortonrosefulbright.com



Tamlyn Mills
Partner
Tel +61 2 9330 8906
tamlyn.mills@nortonrosefulbright.com

Taking flight: the Hague Court of Arbitration for Aviation

By Jo Feldman, Alan de Rochefort-Reynolds and Daniel Allman

Launched into the "*final, nearly untouched frontier of arbitration*", the Hague Court of Arbitration for Aviation (HCAA) aims to provide "*specialised arbitration and mediation services*" for the global aviation industry. This article is an early review of the HCAA, in which we consider the need for an aviation-specific arbitration centre and take a look at the key features of the HCAA and its arbitration rules (HCAA Rules).

Commercial arbitration in global transport

Aviation is an inherently international industry; airlines carry passengers and cargo from one country to another, and a smooth flight also depends on commercial cooperation between service providers across the globe. But aviation is one of the few global industries in which commercial disputes are generally resolved by litigation rather than arbitration.

While litigation may be appropriate in regulatory and personal injury claims, international commercial arbitration is often better suited for other common aviation disputes. In a dispute over the manufacture of a landing system, for example, arbitration enables the parties to have their dispute determined by decision-makers with industry or engineering expertise which few courts can offer. It also avoids concerns about a 'home field advantage' by removing the dispute from local courts. The practices used in international commercial arbitration have developed specifically to meet the needs of parties from different countries and legal traditions, and widespread adoption of the New York Convention means that most arbitral awards can be enforced abroad more easily than court judgments.

These features have led maritime shipping to rely heavily on international commercial arbitration. The London Maritime Arbitrators Association (**LMAA**) handled over 1600 disputes in 2019 alone, and the Society of Maritime Arbitrators, Inc. (**SMA**) in New York, the Singapore Chamber of Maritime Arbitration (**SCMA**) and the Chambre Arbitral Maritime de Paris add many more cases to that tally. Indeed, the most widely used standard form documents in shipping, like the New York Produce Exchange Form, provide for arbitration using rules developed specifically for the shipping industry.

The reason parties in the aviation industry have traditionally preferred litigation, despite the advantages of arbitration, is a matter of some debate. A small but growing number of disputes are being referred to commercial arbitration: see e.g. *Helice Leasing SAS v PT Garuda Indonesia (Persero)* TbK [2021] EWHC 99. But when aviation disputes do go to arbitration, the proceedings use generalist commercial arbitral institutions and their rules: see e.g. *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130. This raises the question of whether parties to arbitration in the aviation industry would benefit from aviation-specific institutions and rules.

Specialised arbitration institutions offer several benefits to parties involved in highly technical industries

Ready for boarding – specialised arbitration centres

Why use a specialised arbitration institution and rules? After all, the world's leading international commercial arbitration centres like the International Chamber of Commerce or the Singapore International Arbitration Centre are generalist institutions.

Specialised arbitration institutions offer several benefits to parties involved in highly technical industries. One is access to decision-makers with specialised knowledge in the industry. Arbitrator-members of the LMAA, for instance, must have at least 15 years' experience in the maritime industry. Professional knowledge and expertise is equally relevant in aviation disputes, which can simultaneously involve the commercial, economic and scientific issues, as well as industry practice.

Another benefit is that specialised institutions have developed rules and procedures tailored to the specific industry. For example, the SCMA has developed a specific fast-track procedure for marine fuel claims which reflects the commercial need in the shipping industry to keep ships at sea and discharge debts quickly. A similar rationale underpins the default position under the AMTAC (Australian Maritime and Transport Arbitration Committee) Arbitration Rules that arbitrations be conducted on paper only, that is, without a hearing.

As a trans-national industry with complex disputes, the global aviation industry would seem to be a natural fit for specialised arbitration. Recognising this, the Shanghai International Aviation Court of Arbitration (**SHIACA**) opened in 2014 and more recently, the United Kingdom began to allow some aviation consumer disputes to be resolved through a streamlined arbitration process. The Australian Competition and Consumer Commission has also lent its support to a proposal for 'baseball arbitration' to resolve aeronautical services disputes between airlines and airports (see our May 2022 article, ***Baseball arbitration pitched to level the playing field in aviation***).

Lifting off – the Hague Court of Arbitration for Aviation

> **As a trans-national industry with complex disputes, the global aviation industry would seem to be a natural fit for specialised arbitration**

Located in The Hague, the HCAA is a step towards greater user of specialised arbitration procedures to resolve disputes in the aviation industry. Several features of the HCAA position the institution well to accomplish its goal of providing and promoting aviation-centric arbitration and mediation services. For example the HCAA is a private, non-government institution, situated in a jurisdiction whose domestic courts are known for their pro-arbitration approach and which is supported by the Netherlands Arbitration Institute.

Another key aspect of HCAA arbitration is that it is conducted using the HCAA Rules. These rules were developed specifically to resolve aviation disputes, and include the following features:

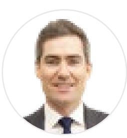
- **Model arbitration clauses**: The HCAA Rules begin with model arbitration clauses that can be used for existing and future disputes. Parties are encouraged to set out particular qualifications for an arbitrator, like specific industry knowledge or expertise. When used well, such a requirement can ensure that disputes are heard and decided by tribunals with a sufficient grasp of the subject matter.
- **Use of electronic communications**: The default position under the HCAA Rules is that communications and submissions are to be provided electronically (Article 3). This is in keeping with the global nature of aviation and the shift towards electronic communication. Although email is often used for communications in international commercial arbitration, not all arbitral rules specifically provide for electronic communications to be the default mode of communication and the fact that the HCAA Rules provide clarity on this point will help to avoid dry procedural disputes.
- **Expedited proceedings**: The HCAA Rules provide for expedited proceedings where the amount in dispute is less than €10m (approximately US$11m) or where the parties consent (Article 37). Under the HCAA Rules, the tribunal in an expedited proceeding must issue its award within five months of the initial procedural conference (Article 37d), giving the parties certainty that the dispute will be dealt with quickly, and relatively inexpensively. In a further effort to reduce time and costs, the arbitration can be determined on paper only, as is common in maritime arbitration (Article 37(c)(5)). Crucially, expedited proceedings can be converted to standard arbitration under the HCAA Rules—using the full suite of procedural steps—where it becomes evident that the standard procedures are better suited to the dispute (Article 37(c)(9)).
- **Interim and emergency measures**: The HCAA Rules empower a tribunal to make interim and emergency measures, which can offer protection to a party in arbitration by preserving the status quo until the underlying dispute is determined. For example, in an aircraft leasing dispute a claimant might seek an order preventing the lessor from seizing the planes until the merits of the dispute are determined. In a dispute over airport services, an interim order could require runway access to be provided during the arbitration.

Conclusion

As the world emerges from the COVID-19 era and as supply chain disruptions continue to wreak havoc, there will be no shortage of commercial disputes in the aviation industry. It remains to be seen whether parties in the aviation sector will join other international sectors, including maritime shipping, in embracing international commercial arbitration as a preferred means of resolving commercial disputes. In any event, the HCAA is a welcome step forward; it gives parties in the aviation industry another option for resolving their commercial disputes, and the HCAA Rules include procedural measures well suited to the sector.

Jo Feldman
Partner
Tel +61 8 6212 3409
jo.feldman@nortonrosefulbright.com

Alan de Rochefort-Reynolds
Associate
Tel +61 2 9330 8307
alan.derochefortreynolds@nortonrosefulbright.com



Daniel Allman
Special Counsel
Tel +61 2 9330 8183
daniel.allman@nortonrosefulbright.com

Notices of arbitration: getting off on the right foot

By Denton Nichols and Olivia Fox

More than simply a procedural step, the notice of arbitration serves a vital due process function: to apprise the respondent that arbitral proceedings have been initiated, thus giving it the opportunity to participate and to defend itself. Given its importance, a major deficiency in the notice could spur later challenges that might derail the arbitral proceeding or even the enforcement of a resulting award. What should be done to ensure that the arbitration gets off on the right foot? In this article, we highlight points for drafting and delivering notices of arbitration that pass muster.

Where to find applicable requirements

When a claimant decides to arbitrate, it must usually communicate a written notice of arbitration (also known as a 'demand' or 'request for arbitration' under certain institutional rules). To minimize the chances of the respondent alleging a deficiency in the notice, a claimant should ensure it has complied with all relevant requirements, of which there are at least three potential sources:

- **The arbitration agreement:** Because arbitration is a contractual dispute resolution mechanism, the parties may specify in their arbitration agreement how any proceedings should be commenced.
- **Institutional rules:** Should the parties have chosen in the arbitration agreement itself any applicable institutional rules, the chosen rules in turn prescribe requirements for the contents and delivery of the notice.
- **Applicable procedural law:** This is usually that of the seat of arbitration, which oftentimes mandates requirements for delivery of notices of arbitration and, somewhat less commonly, their contents.

Claimants initiating arbitration usually have their bases covered if they have checked off all of these items.

Most arbitration agreements specify a particular institution's arbitration rules which, in turn, provide detailed requirements for the notice of arbitration

Requirements frequently found in institutional rules

Most arbitration agreements specify a particular institution's arbitration rules which, in turn, provide detailed requirements for the notice of arbitration. A number of common requirements exist, for example:

- **Method of delivery**: Many institutional rules dictate where, and by what method, claimants should deliver a notice of arbitration. Such rules are generally aimed at ensuring that the respondent receives proper notification and is given a fair chance to respond. In an appropriate case, the claimant may be well advised to use, in addition to the delivery method prescribed by the rules, another delivery method that shows proof of actual receipt by the respondent. This proof will rebut any later claim by the respondent that they have missed the notice.
- **Specifying the seat and number of arbitrators**: Many institutional rules require that a notice of arbitration contain any agreed details as to arbitral procedure, such as the arbitral seat and number of arbitrators. When such details have not yet been agreed, a party is sometimes required to put forward its proposal. Many arbitral rules also require that a party provide details of its nominated arbitrator in its notice. Requiring the claimant to specify or propose these types of details can reduce delays in ascertaining the seat and panel composition, thereby ensuring that the arbitral process commences in a prompt and efficient manner.

- **Description of the claim and factual background**: Institutional rules usually require that any party filing a notice of arbitration provide some description of its claims and relief sought. This may include an estimated monetary amount. It is also customary to require factual details in relation to the transaction, contract or legal instrument that is the subject of the dispute. Of course, the claimant's disclosure of information about its claims enables the respondent to understand them and to decide how to respond. In addition, specifying the claim amount may allow the administering institution, if any, to determine the proper filing fee, whether any specialized procedures should be applied, and the number of arbitrators to be appointed (if not already agreed).
- **Commencement date**: The rules usually specify the event on which the arbitration is deemed to have commenced. For instance, some arbitral rules, including the LCIA rules, provide that an arbitration does not commence until after receipt of not only the notice of arbitration, but also the mandatory filing fee. Establishing the commencement date of the arbitration can be important for calculating subsequent deadlines. In certain jurisdictions, it is also important for ascertaining the date on which an applicable statutory or contractual time bar has been interrupted.

For a summary of the mandatory formalities for notices of arbitration under the key institutional rules, please see our table at the end of this article.

Possible consequences of deficient notices of arbitration

If a claimant has not adhered to all requirements, it may be left open to arguments that there was some deficiency with the notice of arbitration, the consequences of which can be costly. Some of the most severe consequences are considered below.

- **Jurisdictional challenges**: The law of the arbitral seat regulates notices of arbitration, and it may provide a basis for a jurisdictional challenge to an arbitral award in the case of a deficient notice. For instance, consider a case in which a claimant issues one composite notice of arbitration in a multi-contract dispute, i.e., a single notice asserting multiple contract claims pursuant to separate arbitration agreements. Can a respondent challenge the resulting award by alleging that the composite notice was deficient?

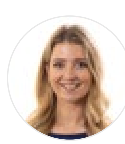
  The recent English case of *LLC Agroneftеprodukt v Ameropa AG* [2021] EWHC 3437 dealt with such a jurisdictional challenge. The English court looked at the substance of the relevant notice of arbitration, as opposed to its singular form and determined that, when read as a whole, the language used in the notice sufficiently apprised the respondent that separate arbitrations were commenced. The flexible, less formalistic approach taken by the English court saved the award in that case, but this approach may not be mirrored in all jurisdictions.
- **Limitation periods lapsing**: As mentioned, the commencement of arbitration may interrupt a statutory or contractual time bar in various jurisdictions. Conversely, a failure by the claimant to follow all requisite procedural steps to formally commence arbitral proceedings may result in the loss of its claim once a statutory or contractual time bar has lapsed.
- **Inability to recognise or enforce an arbitral award abroad**: In this area, international law has a key role in regulating notices of arbitration. The New York Convention and Inter-American Convention both provide that recognition and enforcement of a foreign award may be refused when a party was not given proper notice of the arbitration.

  The U.S. case of *CEEG (Shanghai) Solar Science & Technology Co., Ltd v. Lumos, LLC*, 829 F.3d 1201 (2d Cir. 2016) exemplifies how improper notice might undermine international enforcement of an award. In that case, a Chinese company had an English-language contract with a U.S. company, and all of their pre-arbitration interactions had been in English. Yet the Chinese company delivered a notice of arbitration written entirely in Chinese, which the U.S. company had to have translated to understand. By the time the translation was completed, the U.S. company had missed the opportunity to participate in selecting arbitrators. The U.S. courts ultimately refused to enforce the foreign award based on the New York Convention's improper-notice exception.

Conclusion

In all cases, parties are advised to check the arbitration agreement, the applicable arbitration rules, and the law of the seat to make sure their notice of arbitration is compliant in all respects. As always, an ounce of prevention is worth a pound of cure.

Denton Nichols
Partner
Tel +1 713 651 8304
denton.nichols@nortonrosefulbright.com



Olivia Fox
Associate
Tel +44 20 7444 3332
olivia.fox@nortonrosefulbright.com

With thanks to Jake Burke.

Mandatory formalities for a notice of arbitration under the key institutional rules

	LCIA (2020)	ICC (2021)	UNCITRAL (2021)	ICDR (2021)	CPR (Int) (2019)	SIAC (2016)
How is an arbitration commenced?	Filing a Request for Arbitration with the LCIA Registrar.	Filing a Request for Arbitration with the Secretariat of the ICC Court.	Sending a Notice of Arbitration to the respondent(s).	Sending a Notice of Arbitration to the ICDR Administrator and the respondent(s)	Sending a Notice of Arbitration to the CPR and the respondent(s)	Filing a Notice of Arbitration with the SIAC Registrar.
Is it possible* to issue one Request for Arbitration/ Notice of Arbitration in multi-contract disputes? *Subject to any applicable criterion being met, and any mandatory information being provided in the composite Notice of Arbitration.	Yes. Separate arbitrations would be commenced. A request for consolidation could be made subsequently where a single arbitration is desired. (Art 1.2)	Yes. Claims arising out of or in connection with more than one contract may be made in a single arbitration. (Art 9)	No express provision, but separate proceedings may be consolidated subsequently.	No express provision, but separate proceedings may be consolidated subsequently.	No express provision, but separate proceedings may be consolidated subsequently.	Yes. Separate arbitrations would be commenced. A request for consolidation could be made subsequently where a single arbitration is desired. (Art 6)
How does a claimant file its Request for Arbitration/Notice of Arbitration with the arbitral body?	Electronic filing (online filing system or email), unless prior approval has been obtained to file via an alternative method. (Arts 1.3 and 4.1)	Email until further notice, in accordance with on-going COVID-19 measures. Numerous hard copies may also be required where the claimant requests that onwards transmission by delivery against receipt, registered post or courier.	N/A - The UNCITRAL Rules provide a framework for ad hoc arbitrations, it does not administer arbitrations.	Choice between electronic or hard copy filing (hand delivery, registered post or courier service). (Arts 2 and 11)	Electronic filing until further notice, in accordance with on-going COVID-19 measures.	Choice between electronic or hard copy filing (hand delivery, registered post or courier service). (Art 3.1 and 2.1)
Is there a mandatory filing/ registration fee?	Yes, £1,950 (plus VAT). If filing a composite request, each arbitration requires a separate fee.	Yes, $5,000.	N/A - UNCITRAL does not administer arbitrations. There is accordingly no filing fee.	Yes, filing fee depends on amount of claim (minimum $ 600).	Yes, $1,750.	Yes S$2,000 (or S$2,140 for Singapore parties).
Is it the claimant's responsibility to serve a copy of the Request for Arbitration/Notice of Arbitration to respondent(s)?	Yes, service on the respondent(s) must take place at the same time or as soon as possible after filing.	No, the ICC transmits to the respondent(s).	Yes.	Yes, service on the respondent(s) must occur at the same time as filing.	Yes, service on the respondent(s) must occur at the same time as filing.	Yes, service on the respondent(s) must occur at the same time as filing, and the SIAC Registrar must be notified of service.

	LCIA (2020)	ICC (2021)	UNCITRAL (2021)	ICDR (2021)	CPR (Int) (2019)	SIAC (2016)
What is the required method of service on respondent(s)?	Service by electronic means, unless prior approval from the LCIA Registrar has been granted to serve in an alternative way. (Arts 4.1 – 4.3)	No express provision governing method of service on respondent(s). The ICC transmits the Request to respondent(s). In practice, the Request will be transmitted by email unless the claimant requests transmission against receipt, registered post or courier.	Any means of communication that provides or allows for a record of its transmission. (Art 2.1)	Any means of communication that allows for a record of its transmission, including email, mail, courier, fax, or other written forms of electronic communication. (Art 11)	Registered mail, courier, telex, facsimile transmission, email or any other means of telecommunication that provides a record thereof. (Art 2.1)	By hand, registered post or courier service, or transmitted by any form of electronic communication (including electronic mail and facsimile), or delivered by any other appropriate means that provides a record of its delivery. (Art 2.1)
Address/location for service on respondent(s)?	Any electronic means as agreed or designated by the respondent(s) for the purposes of receiving any communication in relation to the arbitration agreement. In the absence of agreement or designation, a party may use electronic means that have been "regularly used in the parties' dealings". (Arts 4.1 – 4.3)	The claimant should ensure that it notifies the ICC of the address of the respondent (as specified in the relevant agreement between the parties). The claimant should highlight (i) the relevant clause in the agreement; and (ii) where that information is provided in the Request for Arbitration.	An address that has been designated by a party specifically for the purpose of arbitration. In the absence of designation or authorisation, delivery should be made physically at the place of business, habitual residence or mailing address of the addressee. (Art 2)	The party's or (its representative's last- known address. (Art 11)	An address specified in writing by the recipient or, if no address has been specified, to the last known business or residence address of the recipient. (Art 2.1)	To: (i) the addressee personally or to its authorised representative; (ii) to the addressee's habitual residence, place of business or designated address; (iii) to any address agreed by the parties; (iv) according to the practice of the parties in prior dealings; or (v) if, after reasonable efforts, none of these can be found, then at the addressee's last-known residence or place of business. (Art 2.1)
What is the commencement date of the arbitration?	Date of electronic filing of Request for Arbitration, provided that the registration fee is paid simultaneously. (Art 1.4)	Date that the Secretariat receives the Request for Arbitration (Art 4(2)).	Date that the respondent(s) receives the Notice of Arbitration. (Art 3(2)).	Date that the Administrator receives the Notice of Arbitration (Art 2.2).	Date that CPR is in receipt of the Notice of Arbitration. (Art 3.4)	Date that SIAC is in receipt of a "complete" Notice of Arbitration (including payment of the requisite filing fee). (Art 3.3)

What if space junk trashes your business?

By Jo Feldman, Daniel Allman and Alan de Rochefort-Reynolds

The proliferation of space activities in the 21st century is creating an unprecedented amount of human-made space debris, better known as space junk. In just the last few months, SpaceX debris has landed on Australian farms and Chinese Government satellite space junk came down on villages in Côte d'Ivoire and India. What rights are available to those affected by the falling objects? While we are yet to see any major destruction caused by space debris, it is no longer just the stuff of science fiction.

Potential forums in which to bring a claim

The increasing occurrence of these incidents mean we need to start asking novel questions, such as whether a company can seek compensation if falling space debris hits a factory or port, or knocks production in a gas field off-line for months at a time. And importantly, if so, from whom can compensation be sought. Broadly, there are four potential options for resolving these types of cross-border disputes.

While we are yet to see any major destruction caused by space debris, it is no longer just the stuff of science fiction

Litigation

One option is traditional litigation. This presents a host of issues from the outset however, including finding a court with jurisdiction over both parties, reliance on the domestic laws of compensation, and in the case of government space junk, issues of state immunity from liability in the relevant jurisdiction (see our article, ***Recognition, enforcement and recovery of investment treaty Awards: Part II***).

International Arbitration

Another possibility is international commercial arbitration. However, as commercial arbitration requires the express consent of those involved to refer their dispute to arbitration, it is only available where both parties agree. In reality, it is highly unlikely that the victim of falling space junk will have an arbitration agreement with the spacecraft's owner or operator, or that both parties will agree to submit the dispute to arbitration after it has arisen.

International space law

International space law is also not a promising avenue for recourse, in particular as it does not govern private actors (see for example the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies 610 UNTS 205 and the Convention on International Liability for Damage Caused by Space Objects 961 UNTS 187).

Instead, international space law is state-based; only states can enforce and seek compensation under these agreements. While the current international system does allow a state to bring a claim against another state on behalf of a company or natural person, it was held in *Mavrommatis Palestine Concessions (Judgment)* [1924] PCIJ (ser A) No 2, 12, that when the state does so it *"is in reality asserting its own rights".* The current international system of space law has, in the main, not been designed to provide a company or person with direct recourse against a state for damages.

Investor-state dispute settlement (ISDS)

ISDS has the potential to provide commercial actors with an avenue for compensation by requiring states to protect foreign investors and their investments. ISDS offers recourse against a state for violations of internationally accepted legal protections offered to foreign investors in an effort to promote inbound foreign investment. If investment treaties are violated, a qualifying foreign investor may be able to bring an ISDS claim against the host state. The question is whether the constellation of bilateral investment treaties (**BITs**) and free trade agreements (**FTAs**) can provide a framework for resolving space-based disputes. For example, in the event that a company's port or gas field is knocked offline, could it utilise ISDS to pursue its own claim for potentially millions of dollars of damage and lost revenue?

Bringing an ISDS claim

Under the current ISDS regime, a claim for damage caused by space junk might work as follows.

The first step would be to identify the relevant state against which to bring a claim. There would be three potential options: (i) the state in which the foreign investment is located; (ii) the state that launched the equipment that became space junk, or to which the space junk is registered; or (iii) the state that hosted the launch of that equipment. Of the options, the most feasible may be the state which hosted the launch (**the launching state**). This is consistent with the position under current international space law instruments, which provide that a launching state is responsible for the resultant space junk.

The next step would be to locate an applicable investment treaty. This is important because investment treaties, whether BITs or FTAs, only impose obligations on a state which is a party to the treaty and only provide protection to 'investments' made in that state by 'investors' of another state which is also a party. For example, if a spacecraft was launched from Australia and a Canadian company's gas field in Australia was damaged by debris from the spacecraft, the Canadian investor might try to bring a claim under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**), to which both Australia and Canada are parties.

Attention would then turn to the protection available under the CPTPP and assessing whether any such protection had been breached. The protection most likely to be relevant to a space-junk claim is "full protection and security", which bestows an obligation on the host state not to harm an investment through its action or inaction. It is found in most investment treaties and has been given broad operation, requiring at its most basic that a host state must take steps to protect an investor's investment from physical damage (*Rumeli v Kazakhstan* (Award) (ICSID Case No ARB/05/16, 29 July 2008) [668]), and extending to damage caused to an investment by a third party (*Eastern Sugar v Czech Republic* (SCC Case No 088/2004, 27 March 2007) [203]).

Claimants bringing this type of claim may seek to argue that the standard of protection required from a host state should be informed by reference to a number of international instruments, for example, the UN Office for Outer Space Affairs' Space Debris Mitigation Guidelines 2010. This instrument provides that states should regulate for the controlled re-entry of space junk to ensure that debris does not put lives and property at risk. It may therefore be possible to base an argument for breach of full protection and security on the premise that a launching state did not take sufficient steps to regulate the re-entry of space junk or the actions of launch facilities in its territory, and thereby failed to protect an investment from the conduct of private actors.

Trickier questions arise in the more likely event that the investment is in a state other than the launching state. Under existing treaties, it is difficult to imagine how an investor from state A could have a claim in ISDS against state B over harm caused to its investment in state C. The ISDS regime is not designed to address this problem, and so the question becomes whether it is possible to fill this lacunae.

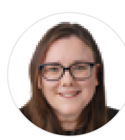
Possible alternatives

States could negotiate a multilateral arbitration treaty (**MAT**) providing for arbitration of disputes involving space debris or space activities more broadly. One permutation of a MAT might be to mirror investor-state arbitration, making arbitration against launching states available to parties injured by space debris. It is unlikely though that this option would be palatable for states in the absence of a clear, countervailing benefit. While space junk is an important issue, the reason for the expansion of ISDS was that states see direct economic benefits in offering protections to foreign investors – namely, benefits in the form of increased foreign investment.

Conclusion

In the heavens, as on earth, disputes will inevitably arise. Presently, the regulation of space activities remains a grey zone, which, according to the Australian House of Representatives Standing Committee on Industry, Innovation, Science and Resources, is *"not keeping pace with the reality that space is now accessible to more nations and, increasingly, private entities".*

We continue to test and expand the limits of what we do in space; the question remains whether the same appetite exists to test and expand the limits of our dispute regimes to enable private entities to seek compensation for damage caused by falling space debris.



Jo Feldman
Partner
Tel +61 8 6212 3409
jo.feldman@nortonrosefulbright.com

Daniel Allman
Special Counsel
Tel +61 2 9330 8183
daniel.allman@nortonrosefulbright.com

Alan de Rochefort-Reynolds
Associate
Tel +61 2 9330 8307
alan.derochefortreynolds@nortonrosefulbright.com

An overview of the 2022 DIAC rules: a new start in Dubai

By Deirdre Walker and Alexander Field

In our December 2021 issue, we wrote about Dubai Decree 34 of 2021 (the Decree), which abolished the DIFC-LCIA Arbitration Centre and transferred the DIFC-LCIA's cases to the Dubai International Arbitration Centre (DIAC) (see our article, *New life breathed into DIAC as axe falls on DIFC-LCIA: What you need to know about the changes*). At the time, the Decree was an unexpected development in Dubai's arbitration landscape, which had the effect of consolidating the DIFC-LCIA and the Emirates Maritime Arbitration Centre into DIAC, and giving DIAC a six month period to March 2022 to step up into the role.

In our previous article we commented that the success of the Decree would depend on what steps were taken to update DIAC's arbitration rules, the last edition of which came into force in 2007. In this article, we provide an overview of DIAC's new Arbitration Rules (the New Rules), in effect as of March 21, 2022, which we believe bring DIAC into line with global best practice and afford parties and practitioners several useful procedural mechanisms to ensure that proceedings are conducted effectively, efficiently, and fairly.

Background to the DIAC

DIAC was established by the Dubai Chamber of Commerce and Industry in 1994 as the Centre of Commercial Conciliation and Arbitration. It is the oldest arbitration centre in Dubai and is now Dubai's sole arbitration centre.

Seat of DIAC Arbitrations

The New Rules provide that unless the parties agree otherwise, the default seat of an arbitration under the New Rules will be the Dubai International Financial Centre (**DIFC**), save where the Tribunal determines that circumstances warrant otherwise. Previously, the default seat for DIAC arbitrations was onshore Dubai. Accordingly, unless the parties specify a different seat in their arbitration agreement, the common law DIFC Courts will have supervisory jurisdiction over the arbitration proceedings, as well as the ratification and/or annulment of awards. As the DIFC Courts are typically arbitration friendly, we consider this to be a positive development.

Procedural Innovations

The New Rules introduce a range of procedural innovations aimed at redressing time, cost and environmental concerns. Where the 2007 DIAC Rules required paper copies of documents to be filed with the Arbitration Centre and the tribunal, the 2022 DIAC Rules provide that Requests for Arbitration, Answers, and pleadings can be filed and exchanged electronically (see, for example, Articles 4.3 and 5.3 of the New Rules).

Further, there is now greater flexibility for tribunals, parties, and witnesses. For example:

- the tribunal now has greater flexibility to hold hearings by telephone or video conferencing, as well as in person (Article 20.2 of the New Rules);
- witnesses can appear and give evidence at a hearing virtually (Article 27.6 of the New Rules); and
- awards can be signed electronically or physically (Article 20.3 of the New Rules), thereby avoiding the idiosyncratic practice of arbitrators having to fly into Dubai to physically sign DIAC awards.

The New Rules address some other difficulties which arose under the 2007 DIAC Rules, including providing the tribunal with an express power to award legal and other arbitration costs.

The New Rules now permit the use of third-party funding in arbitration provided that the funded party discloses that fact, the identity of the funder, and whether the funder has committed to an adverse costs liability.

The New Rules adopt several of the procedural mechanisms found in the rules of other leading institutions, bringing DIAC into line with the likes of SIAC, the LCIA, and the ICC. This modernisation can be observed in the following new features of the DIAC New Rules.

Article 8 and 9: Consolidation and Joinder

The New Rules provide for the consolidation of claims which, subject to certain criteria in Article 8, allow a party to combine multiple claims into one arbitration. This provision brings the New Rules broadly in line with Article 9 of the ICC Rules.

Like other leading arbitral institutions, the New Rules now provide a mechanism for hearing the dispute on an expedited basis

Additionally, similarly to Article 7 of the ICC Rules, the New Rules allow third parties to be joined before the constitution of the tribunal with the agreement of the parties or with permission of the DIAC Arbitration Court where: (i) a tribunal has been constituted in one arbitration and no arbitrators have been appointed in the other(s); or (ii) the same tribunal has been appointed across multiple arbitrations. A third party may also be joined after the constitution of the tribunal if all parties agree to the joinder, or the tribunal determines that the third party is a party to the relevant arbitration agreement.

Articles 8 and 9 of the New Rules ensure that the tribunal can deal efficiently with all claims between parties, and ensure that the proper parties to the dispute have joined the arbitration.

Article 32: Expedited Proceedings

Like other leading arbitral institutions, the New Rules now provide a mechanism for hearing the dispute on an expedited basis. A party can make such a request where:

- the amount in dispute is less than AED1m (exclusive of interest and costs);
- the parties agree in writing to the expedited procedure;
- the case is one of *"exceptional urgency"*; or
- if the DIAC Arbitration Court considers it appropriate.

Such expedited proceedings would be decided by a sole arbitrator on the basis of a documents-only process, with the final award being issued within three months.

The AED1m claim threshold appears to be rather low, especially as this amount includes the value of counterclaims. In contrast, the ICC Rules and the SIAC Rules provide for expedited proceedings for arbitrations with a value of up to US$3m and S$6m respectively. These higher thresholds appear more reasonable given the amounts often in dispute in international arbitration, for example, the ICC 2022 Preliminary Report states that the median dispute figures for cases filed between January and October 2021 was US$5.7m. We anticipate that the threshold will be reviewed in due course.

Article 2, Appendix II: Emergency Arbitration

It is also notable that a party can now apply for the appointment of an emergency arbitrator and seek urgent interim relief. This change broadly aligns with Article 29 of the ICC Rules, serving to ensure that parties can obtain interim relief at the start of the proceedings before a tribunal has been formally constituted.

Conclusion

The reforms brought about by the Decree and the New Rules mark a sea-change for arbitration in Dubai. The New Rules, and the selection of the DIFC as a default seat, demonstrates a renewed commitment by the Emirate to ensure that arbitration proceedings are robust and that awards will be enforced. This modernisation should create the right environment for the future success of DIAC and secure Dubai's reputation as a leading hub for arbitration.

Deirdre Walker
Partner
Tel +971 4 369 6327
deirdre.walker@nortonrosefulbright.com

Alexander Field
Associate
Tel +97143696366
alexander.field@nortonrosefulbright.com

With thanks to Elizabeth Yong and Ashleigh Giles.

The Law Commission's provisional recommendations for reform of the Arbitration Act 1996

By Amy Armitage

On September 22, 2022, 25 years after the Arbitration Act 1996 (the Act) came into force, the Law Commission for England and Wales (the Commission) published a consultation paper containing its provisional proposals for reforming the Act. The paper contains some interesting and very welcome proposals for change and clarification, which we summarise in this article.

Key areas shortlisted for reform

The Commission has made it clear that the overwhelming response from the arbitration community is that the Act works well and that *"root and branch reform"* is not desired. It has however suggested that some aspects could be improved in order to bring the Act in line with modern arbitration practice(s) and ensure that it remains *"state of the art"* for use in domestic arbitration and international arbitrations.

1. Confidentiality

The Commission has provisionally proposed that the Act should not codify English law on confidentiality in arbitration. It was felt that the current regime worked well and any such codification would be complex and difficult to express, particularly when it came to identifying the necessary exceptions to the rule. The Commission concluded that this was better left to be developed by the courts.

The Commission has made it clear that the overwhelming response from the arbitration community is that the Act works well and that *"root and branch reform"* is not desired

2. Arbitrator independence and disclosure

The Commission considered whether the Act should impose express duties of independence and disclosure on arbitrators in addition to the existing express statutory duty of impartiality. The provisional conclusion was that there should be no express duty of independence. It was suggested that an express provision should be introduced to impose a continuing duty on arbitrators to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality. Views were also invited on whether the Act should also stipulate whether the arbitrator's state of knowledge should be based on their actual knowledge or also upon what they ought to know after making reasonable inquiries.

3. Discrimination

The Commission considered whether the Act should be amended to prohibit discrimination in the appointment of arbitrators. It concluded that the appointment of an arbitrator should not be open to challenge on the basis of the arbitrator's *"protected characteristics"* (which include age, sex, disability, religion or belief as defined in Section 4 of the Equality Act 2010) meaning that any agreement between the parties in relation to the arbitrator's protected characteristic(s) (e.g. *"the arbitrators must be commercial men"*) would be unenforceable.

4. Arbitrator immunity

Whilst the Act already provides arbitrators with immunity for liability for anything done in the discharge of their functions as arbitrator (section 29), it does not protect arbitrators from incurring liability for resigning. The Commission emphasised the importance of protecting the immunity of arbitrators both as a means of upholding the finality of the process and promoting impartiality. It acknowledged that there may be valid reasons for an arbitrator to resign (e.g. where they subsequently learn of a conflict of interest) and asked consultees to comment on whether arbitrators should incur liability for resignation at all, or whether this should be limited to circumstances where there the resignation is shown to have been unreasonable.

5. Summary disposal of proceedings

Whilst section 33(1)(b) of the Act gives the tribunal the power to adopt procedures that limit unnecessary delay and expense, there are no express provisions in the Act that allow a tribunal to adopt a summary procedure to dispose of a claim or a defence that *"has no real prospect of success".* The Commission reported feedback which suggested that some arbitrators were reluctant to use section 33(1)(b) in this manner due to concerns that their ruling would be challenged on grounds of serious irregularity because they had failed to act fairly by not allowing each party a reasonable opportunity to put their case (pursuant to section 33(1)(a)).

The Commission proposed that the Act should explicitly provide that an arbitral tribunal may adopt a summary procedure but that such a provision should be non-mandatory, thereby allowing parties to opt out in their arbitration agreement. It was considered that an express provision would provide reassurance to arbitrators that a summary procedure could be fair in appropriate circumstances and would help to ensure that disputes were resolved without unnecessary delay and expense.

The Commission proposed that the Act should explicitly provide that an arbitral tribunal may adopt a summary procedure but that such a provision should be non-mandatory, thereby allowing parties to opt out in their arbitration agreement

6. Court orders in support of arbitral proceedings

Section 44 of the Act grants powers to the court to make orders in respect of arbitration proceedings. There has been some debate in case law as to whether: (i) the court can make orders against third parties; and (ii) the extent to which section 44 applies where the parties have also agreed a regime that provides for an emergency arbitrator.

(a) Orders against third parties

The Commission confirmed its view that section 44 allows the court to make orders against third parties and asked consultees whether the Act needs to be amended so that this is set out explicitly. The Commission also suggested that third parties should have the usual full right of appeal (rather than the restricted right of appeal which applies to arbitral parties who have consented to the arbitration) in respect of any orders made against them.

(b) Emergency arbitrators

The Commission suggested that section 44(5), which was originally intended to prevent the court from usurping the role of the tribunal, may be redundant in light of sections 44(3) and (4), which already restrict the court's power to: (i) an urgent case where an order is needed to preserve evidence or assets (i.e. to preserve the status quo); or (ii) where the case is not urgent but there is agreement between the parties or with the permission of the tribunal.

The Commission proposed that the Act should be amended to empower the court to order compliance with any interim order made by an emergency arbitrator, or alternatively that consent for an application to court may be given by an emergency arbitrator, to ensure that the requirements in each case mirrored the provisions that are currently only available to a fully constituted tribunal.

7. Section 67 (Jurisdictional challenge)

The current position under English law is that a jurisdictional challenge under section 67 is dealt with in a full re-hearing in which the court re-hears all the arguments/evidence on jurisdiction that were made directly to the tribunal and no weight is given to the tribunal's previous ruling on jurisdiction. The Commission has proposed that the challenge under section 67 should instead be dealt with by way of an appeal, in which the court would be limited to a review of the tribunal's ruling and would not hear any oral evidence or new evidence.

The Commission also suggested that section 67 is amended to include an additional remedy that the court can order that an award on jurisdiction has no effect to ensure consistency with other similar remedies available under section 68 (challenge for serious irregularity), and to make it clear that the tribunal has the power to award costs where it has determined that it has no substantive jurisdiction.

8. Section 69 (Appeal on a point of law)

Section 69 allows a party to appeal to the court in limited circumstances where it is perceived that the tribunal has got the law wrong. The Commission's view is that no change is needed to section 69. The Commission noted that it is non-mandatory provision from which parties can *"opt out"* and its conclusion was that section 69 was a *"defensible compromise"* between upholding the finality of the arbitral awards and ensuring that errors of law are corrected.

Other matters

The Commission also asked consultees:

- whether section 7 of the Act, which provides that an arbitration agreement is separable from the main contract in which it appears, should be made mandatory;
- whether sections 32 (application to court to decide a preliminary point on jurisdiction) and 45 (application to court to decide a preliminary point of law) should be simplified so that the additional *"satisfaction"* of the court requirement is removed; and
- whether the Act should expressly empower the tribunal to order remote hearings and utilise electronic documentation.

Next steps

The consultation process is open for responses until December 15, 2022, following which the Commission is expected to publish its final recommendations in mid-2023.

Amy Armitage
Counsel
Tel +44 20 7444 2149
amy.armitage@nortonrosefulbright.com

US discovery in support of arbitration

By Kevin O'Gorman and Katie Connolly

Two recent decisions have further defined the landscape around US discovery in support of arbitrations. In June 2022, the Supreme Court issued a decision in *ZF Automotive US, Inc. v. Luxshare, Ltd.* (ZF Automotive) and *AlixPartners, LLP v. The Fund for Protection of Investors' Rights in Foreign States* (AlixPartners) holding that *"only a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under 28 U.S.C. §1782."* This decision will chill the use of Section 1782 in commercial international arbitration. Then, in August 2022, the Ninth Circuit issued a unanimous decision in *Jones Day v. Orrick, Herrington & Sutcliffe* (Jones Day), ordering that under the general Federal venue statute in the US, 28 U.S.C. § 1391, two Orrick partners had to comply with an arbitrator's subpoena in a venue other than the seat of arbitration. This decision may provide alternative means of obtaining discovery.

ZF Automotive and AlixPartners

Section 1782 permits parties to obtain discovery in the United States in aid of non-U.S. legal proceedings stating:

> *"(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation."*

Post-Intel, some Circuits shifted away from NBC and Biedermann, relying on the Intel dicta to hold that discovery could be ordered for private commercial arbitrations abroad

In 1999, the Second and Fifth Circuits held that Congress had not intended private commercial arbitrations to fall within the scope of *"foreign or international tribunal"*. See *National Broadcasting Co. v. Bear Stearns & Co.* (**NBC**), 165 F.3d 184, 188, 190–91 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l* (**Biedermann**), 168 F.3d 880, 881–83 (5th Cir. 1999).

Then, in *Intel Corp v Advanced Micro Devices, Inc* (**Intel**), 542 U.S. 241 (2004), the Supreme Court recognized the Directorate-General for Competition of the Commission of the European Communities as a "tribunal" because it acted as a first-instance decision-maker. Post-Intel, some Circuits shifted away from NBC and Biedermann, relying on the Intel dicta to hold that discovery could be ordered for private commercial arbitrations abroad.

In ZF Automotive, the lower court granted in part discovery requested by Luxshare in support of a proceeding before the German Institution of Arbitration, holding that it was bound by precedent that "*the word 'tribunal' in § 1782(a) encompasses private, contracted-for commercial arbitrations of the type at issue here[.]*"

In AlixPartners, the Fund for Protection of Investors' Rights in Foreign States initiated an *ad hoc* UNCITRAL arbitration against Lithuania under a treaty between the Government of the Russian Federation and Lithuania. It then initiated Section 1782 proceedings against AlixPartners. The lower court found the nature of the arbitration—a treaty arbitration—was the type of proceeding that Congress intended to encompass under Section 1782.

The Supreme Court reversed both decisions holding "*only a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under 28 U.S.C. §1782*" and that a "*foreign tribunal*" is a tribunal imbued with governmental authority by one nation, and an "*international tribunal*" is a tribunal imbued with governmental authority by multiple nations. The Court noted its concern that "*[e]xtending §1782 to include private bodies would also be in significant tension with the FAA, which governs domestic arbitration, because §1782 permits much broader discovery than the FAA allows. Interpreting §1782 to reach private arbitration would* *therefore create a notable mismatch between foreign and domestic arbitration."*

Jones Day

Section 204 of the FAA provides that "*an action or proceeding over which the district courts have jurisdiction… may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought…*" 28 U.S.C. § 1391(b) states "*A civil action may be brought in—(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located[.]*"

A dispute arose between Jones Day and one of its former partners, now at Orrick. The Jones Day partnership agreement provided for arbitration of disputes, seated in Washington, DC governed by the FAA. The arbitrator issued a subpoena to two partners at Orrick. Orrick failed to comply and Jones Day filed an enforcement motion in Washington, DC – where the arbitration was seated. The court dismissed that motion for lack of personal jurisdiction since Orrick's principal place of business is in San Francisco. The court held that Section 7 of the FAA required Jones Day to bring the action in the jurisdiction in which the arbitration is seated: "*arbitrators…may summon in writing any person…if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court… in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person…*".

The arbitrator then agreed to sit for a hearing in Northern California, where Orrick has its principal place of business, and issue its subpoena from that district. Orrick again refused to comply, and Jones Day filed an enforcement motion in Northern California. Like its Washington, DC counterpart, the Northern California court denied the enforcement motion under Section 7 of the FAA, which it construed to limit an arbitrator's enforcement powers to the district in the arbitration is seated (i.e., Washington, DC).

The Ninth Circuit has overruled that decision interpreting Section 204 of the FAA as containing a venue provision applicable to proceedings related to the arbitration: those actions or proceedings "*may be brought in any such [district] court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.*"

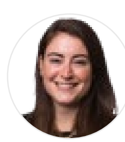
The Ninth Circuit refused to interpret Section 7 in a way which would create a "*venue gap*", i.e., where there would be no venue in the US in which the dispute could be heard, in spite of the fact that there is clearly jurisdiction. It held that Section 204 of the FAA supplements, and does not supersede, Section 1391, which "*ensures that so long as a federal court has personal jurisdiction over the defendant, venue will always lie somewhere.*" Applying the general Federal venue statute, the Ninth Circuit concluded that Northern California was a proper venue because it is Orrick's principal place of business and enforced the subpoena.

Applying the general Federal venue statute, the Ninth Circuit concluded that Northern California was a proper venue because it is Orrick's principal place of business and enforced the subpoena

Conclusion

These two recent decisions have provided arbitration practitioners with additional considerations when initiating discovery in the United States. In ZF Automotive/AlixPartners, the Supreme Court's holding that only a governmental or intergovernmental adjudicative body constitutes a *"foreign or international tribunal"* will chill the use of Section 1782 in international commercial arbitrations. However, the Ninth Circuit's unanimous decision in Jones Day ordering that Section 204 of the FAA supplements and does not supersede the Federal venue statute, could provide an alternate avenue for pursuing discovery in the United States.


Kevin O'Gorman
Head of Arbitration, United States
Tel +1 713 651 3771
kevin.ogorman@nortonrosefulbright.com


Katie Connolly
Senior Associate
Tel +1 628 231 6816
katie.connolly@nortonrosefulbright.com

ESG disputes in international arbitration

By Holly Stebbing and India Furse

Environmental, Social and Governance, or ESG, is an umbrella term for issues relevant to an organisation's assessment of its impact on society and the environment. As the importance of ESG in corporate policies and investment decisions increases, so too will the number of disputes arising out of ESG-related issues. We are already seeing that those issues are broad-ranging, with a huge variety of ESG-related claims already being brought across a variety of judicial and quasi-judicial forums, but there are two categories of claims that are especially appropriate for resolution by arbitration: (1) commercial contract claims; and, (2) treaty-based claims. In this article, we look at recent ESG-related developments and how they are likely to affect international arbitration in the near future.

Commercial contract claims

Appropriate management of commercial contracts is one of the ways that companies are able to tackle ESG risks. Exceptional supply chain disruption following the Covid-19 pandemic has presented an opportunity for companies to review their existing supply chains and seek to incorporate ESG principles into their contract portfolio. These ESG principles may derive from a company's own ESG goals and policies, or from applicable laws. ESG contractual provisions will be particularly key where there are different standards, laws or regulations, and levels of transparency, between various countries along the supply chain. Jurisdiction-based differences can be addressed via contractual provisions requiring all counterparties to comply with stipulated ESG-related obligations.

Examples of ESG-related provisions include:

- Climate change/net zero goals, for example, the Chancery Lane Project, which is a collaborative effort among UK lawyers to develop contractual provisions that support the fight against climate change.
- Responsible business commitments, for example, the code of conduct of the Responsible Business Alliance, which is used by companies to develop contractual provisions covering various ESG issues.
- Renewable energy and/or sustainability commitments.
- Human rights and/or anti-discrimination commitments, for example the American Bar Association's model contract clauses, which were updated in 2021 to expand the scope of ESG obligations to include human rights obligations for buyers in international supply chains.
- Indemnity provisions covering environmental incidents.

Most of these types of provisions are new, innovative and accordingly untested. They are also likely to contain broad obligations that may be difficult for companies to comply with or demonstrate compliance with in practice. Inevitably, this will lead to disputes between counterparties, concerning both novel questions of interpretation, enforceability and measurement of compliance with ESG-related provisions, as well as more typical breach of contract claims for non-performance of ESG-related obligations or overstated ESG-related representations or warranties.

As many of the companies now including ESG-related provisions in their contracts operate globally, we can expect that international arbitration will commonly be the chosen forum for the resolution of ESG-related disputes.

Treaty-based claims

ESG-related protections are also increasingly being included in international trade and investment treaties. This could give rise to a new and novel claims and defences in investor-state dispute settlement, with more claims being brought by, rather than against states, for example, being entitled to bring claims (or counterclaims) against investors for ESG failures and/or the dilution of investor protection where that protection conflicts with a state's ESG objectives. Usually, the forum for dispute resolution will be investment treaty arbitration under ICSID.

Some notable examples of new ESG-related treaty provisions include:

1. **The Energy Charter Treaty:** Tentative agreement in principle on a modernised treaty was reached by the contracting parties in June 2022. Although we will not know full details

of the modernised text until late 2022 at the earliest, and it will still require ratification by every contracting state before it could come into force, a number of the proposed changes would radically limit the protection of traditional fossil fuel investments and promote investment in the renewable forms of energy and related technology. (See our May 2022 article, *Going green? Modernizing the Energy Charter Treaty*)

2. **EU-Angola Sustainable Investment Facilitation Agreement:** The EU Commission began negotiating its first bilateral investment agreement in June 2021 with Angola. The intention of the agreement is to achieve "*good governance and cooperation*", with goals including "*facilitating investment by enhancing the transparency and predictability of investment measures*" and "*promoting sustainable development and responsible investment*".

3. **Singapore/Australia – Green Economy Agreement:** Negotiations between Singapore and Australia for a bilateral *"green"* trade agreement have also begun. The purpose of the Green Economy Agreement is to help the countries achieve their common target of net zero emissions by accelerating the adoption of low-carbon and green technologies, low-carbon and renewable energy, and decarbonised production processes. There is also a broader aspiration for the Green Economy Agreement "*to serve as a pathfinder that contributes to multilateral and regional policy development by establishing policies, standards and initiatives that will not only create good jobs in green growth sectors, but also strengthen environmental governance and global capacity to address environmental issues, in particular climate change*."

In part, this modernisation of international investment treaties is being driven by the wave of treaty claims in recent years arising out of changes to domestic energy regulation

In part, this modernisation of international investment treaties is being driven by the wave of treaty claims in recent years arising out of changes to domestic energy regulation. For example, numerous claims have been brought against Spain, Italy and the Czech Republic since feed-in tariff regimes to support renewables investment were withdrawn in the early 2010s, and two energy companies commenced ICSID arbitrations against the Netherlands under the Energy Charter Treaty following its announcement that coal power plants would be phased out by 2030. Many of these cases actually concern the withdrawal of policy aimed at promoting clean energy, as opposed the imposition of such policy on investors in traditional energy sectors. In any event, states are looking for greater freedom to regulate in the area of ESG without exposing themselves to claims from investors, whilst also trying to remain attractive to foreign investment.

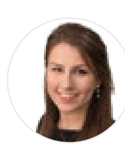
There additionally seems to be a developing trend of including ESG-related obligations for investors in treaties. For example, the Netherlands 2019 Model BIT provides that investors can be held responsible for a failure to comply with the UN Guiding Principles on Business and Human Rights and the OECD guidelines for multinationals. As the purpose of BITs has historically been to provide protections and a means of recourse for investors against foreign states, not the other way round, this marks a definite shift in priorities and emphasises the increased importance of ESG-related issues in foreign investment. It remains to be seen whether and how states might enforce these types of obligations against investors, but there have been instances in the past where corporates have been held directly accountable under BITs. One high profile example is the ICSID case of *Urbaser v Argentina* ICSID Case No. ARB/07/26, where the tribunal found in favour of Argentina's counterclaim based on the allegation that Urbaser's failure to provide the relevant investment violated the human right of access to water.

There is also the possibility for treaties to include a mechanism where damages are reduced to account for harm caused to the environment or local community, such as that included in the India Model BIT. If this type of mechanism starts appearing in more treaties, investors may see tribunals decrease the damages that they are awarded in treaty-based arbitrations as a result of ESG-related issues.

Conclusion

Whilst courts have been the forum for most ESG disputes to date, with the rise in ESG-related contract clauses and the inclusion of ESG provisions in international investment treaties, commercial and investor state arbitration is expected to play a much greater role in ESG dispute resolution in the future.

Holly Stebbing
Partner
Tel +44 20 7444 5143
holly.stebbing@nortonrosefulbright.com



India Furse
Associate
Tel +44 20 7444 3617
india.furse@nortonrosefulbright.com

Impact of the current geopolitical climate on award enforcement against states

By Alison G. FitzGerald, Daniel Allman

Enforcing an arbitral award against a state presents unique challenges, distinct from the commercial arbitration sphere. Where a state fails to voluntarily comply with an arbitral award, award creditors face the oft-times daunting task of pursing enforcement against state assets wherever they may be found in the world, subject not only to the enforcing state's laws on award enforcement but also its laws on state immunity. This has posed a perennial challenge for award creditors against Russia. The current geopolitical climate may, however, be changing that enforcement landscape

General considerations in enforcing awards against states

A recent survey of 170 arbitration cases found that award creditors against states ordered to pay damages began enforcement proceedings 40 percent of the time, indicating that foreign investors are often required to pursue enforcement proceedings before national courts in order to secure the payment adjudged to be due to them. The cost of enforcement and the time taken to enforce can both be high. The enforcement of an arbitral award involves an analysis of both national and international laws. National laws matter because courts apply domestic rules, which may or may not include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (**New York Convention**), when enforcing awards. Even when domestic rules include the New York Convention provisions, their interpretation and application can vary widely, particularly as regards the public policy exception to enforcement.

International laws matter because they inform a state's rights and obligations, whether under treaty or at customary international law, that impact on award enforcement. For example, contracting states of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**ICSID Convention**) are obligated to give effect to ICSID Convention awards as though they were final judgments of their national courts. Equally, however, states, including ICSID member states, benefit from rights of sovereign immunity including vis-à-vis award enforcement. The ICSID Convention in particular gives precedence to the municipal law on sovereign immunities in the state where an investor seeks to enforce an award.

Award enforcement against states therefore often pits an award creditor's rights to compensation against a state's right to be immune from the exercise of a foreign court's jurisdiction over it and/or the attachment of state assets. While jurisdictional immunity and execution immunity typically apply to sovereign acts or properties of a state, many states recognize exceptions in respect of commercial acts and properties. Some domestic laws on sovereign immunity, such as the Foreign Sovereign Immunities Act of 1976 in the United States, also contain express exceptions in cases where a judgment presented for enforcement relates to a claim for acts of terrorism by a state designated as a state sponsor of terrorism (see our December 2016 article, ***Layperson's Guide-Justice Against Sponsors of Terrorism Act***).

Even where an exception to state immunity may apply, award creditors may face protracted litigation seeking to enforce their award against some states, Russia being notable in this regard. In *Franz Sedelmayer v. Russian Federation*, SCC, Arbitration Award (July 7, 1998), a German investor who commenced arbitration proceedings against Russia in 1996, received an award in his favour in 1998, but spent the next ten years seeking to enforce it due, in part, to the sovereign immunity defences raised by Russia.

(For a further analysis of enforcement of awards under the ICSID Convention and the New York Convention, see our May 2022 IAR article, ***Recognition, enforcement and recovery of investment treaty awards: Part I***)

Enforcing awards against frozen and seized assets of sanctioned persons tied to a state

Russia's latest invasion of Ukraine, commenced on February 24, 2022, has received wide-spread international condemnation. The primary response of many countries has been to impose economic costs on Russia and Belarus through sanctions. The scale of economic statecraft is unprecedented. Sanctions introduced by the United States and its allies and partners, including the European Union, the United Kingdom, Canada, Australia, and Singapore, target economic activity in and with Russia as well as the assets and operations of Russian investors outside of Russia.

The result is a highly complex geopolitical environment with a potentially enormous impact on foreign investment in Russia and the surrounding region. Russia has international investment treaties in place with more than 60 countries. Many of those treaties include an arbitration mechanism whereby foreign investors with investments in Russian territory can bring claims against Russia seeking compensation in the event of losses caused by treaty violations.

Two types of claims against Russia may be available to foreign investors under those treaties:

1. Claims related to investments in Russian territory, for example, in the event that assets are nationalized, funds transfers are suspended, or intellectual property rights eliminated. Russia has threatened these types of measures, and firms from 'unfriendly countries' more generally.
2. Claims related to investments in Ukrainian territory that is occupied or purportedly annexed by Russia, for example, in the event that assets are seized, destroyed, or otherwise made inaccessible by Russian forces or authorities in territory where Russia exercises effective control.

While historically award enforcement against Russia has been fraught with difficulty, partly due to its assertions of sovereign immunity, the current geopolitical environment may be shifting the enforcement landscape.

Since Russia's invasion of Ukraine, allied states in opposition to Russia's invasion of Ukraine have focused on freezing Russian assets linked to sanctioned persons in their respective jurisdictions. Since February 24, 2022, the European Union has frozen approximately €13.8 billion worth of Russian assets, the United Kingdom has frozen approximately US$13 billion worth of Russian assets, and Canada has frozen approximately CAD$123m worth of Russian assets. A U.S.-based global task force (which includes the European Commission and Britain) is estimated to have frozen a total of US$330 billion worth of Russian assets.

The basis for these sanctions is the connection believed to exist between sanctioned persons and the Russian state. Canada has therefore now gone a step further through the introduction of Bill C-19, which received royal assent on June 23, 2022 and which allows Canada to seize and repurpose the assets of sanctioned persons. A similar bill has been introduced and passed in the U.S. House of Representative titled the "*Asset Seizure for Ukraine Reconstruction Act*".

These measures invite consideration of whether (and, if so, how) frozen and seized assets may be subject to award enforcement proceedings. Accessing and attaching such assets would require consideration of the enforcing jurisdiction's sanctions rules in addition to the applicable award enforcement regime. A further question arises as to whether sovereign immunity defenses would nevertheless be available to prevent enforcement.

Enforcing awards against so-called *"state sponsors of terrorism"*

Lithuania and Latvia have also both designated Russia as a state sponsor of terrorism, and have called upon other NATO states to do the same. A U.S. Senate bill introduced in September 2022, titled the "*Russia is a State Sponsor of Terrorism Act*", similarly proposes to designate Russia as a state sponsor of terrorism. Any such designation has significant consequences in these jurisdictions for whether sovereign immunity defenses would be available to Russia to thwart the enforcement of arbitral awards.

Conclusion

Foreign investors holding investments in Russia or Russian-occupied territory that are harmed by retaliatory measures in Russia or armed conflict in Ukraine should carefully assess whether they may have a treaty claim to seek redress for their losses, and take early and appropriate advice on such a claim. Funders should also carefully assess funding opportunities through a lens that takes account of the shifting enforcement landscape and its implications for long-term success in value recovery.

Alison G. FitzGerald
Partner
Tel +1 613 780 8667
alison.fitzGerald@nortonrosefulbright.com

Daniel Allman
Special Counsel
Tel +61 2 9330 8183
daniel.allman@nortonrosefulbright.com

With thanks to Alexandra Redhead and Sanika Kulkami.

Turning the taps off? Arbitration and the European gas crisis

By Holly Stebbing and Majdie Hajjar

Since Russia invaded Ukraine, energy prices in Europe have soared. Europe is heavily reliant on Russian gas and alternative sources of gas are not viable in the short term. Unlike oil, gas cannot be easily diverted – it is either transported by pipelines or liquefied, which requires dedicated liquefaction and regasification facilities. The price of natural gas has increased by approximately 400 percent since September 2021. Despite European governments intervening to mitigate the effects of the war and related sanctions on energy markets, the scale of the crisis as Europe enters winter is likely to mount. Against this backdrop, suppliers and buyers alike will be reviewing their contracts, looking for sanctions relief, early exits, price reviews and considering whether they could get a better deal elsewhere.

The Rouble Decree

On March 31, 2022, Vladimir Putin enacted a Presidential Decree (the **Decree**) under which Russian gas sold to 'unfriendly' countries (including the UK and EU member states) would have to be paid for in Roubles to counteract the impact of international sanctions levied against Russia. Under the mechanism set out in the Decree, buyers must first transfer funds to a Gazprombank account. This sets in motion a process whereby Gazprombank purchases Roubles and credits them to a second buyer account, and then to the seller's account. Under the Decree, the buyer's payment obligation is only deemed to have been fulfilled when this process is complete.

The response of buyers to the Decree has varied across Europe but, for those who refused to comply, Gazprom was quick to turn off supplies earlier this year. We also saw Gazprom shut off the Nord Stream 1 pipeline for ten days in July 2022. This was followed, in early September 2022, by a further shutdown with no end date in sight at the time of writing. Additionally, even when open, the pipeline has been operating at greatly reduced capacity (less than 20 percent at times) since the introduction of Western sanctions against Russia.

Gas supply agreements (**GSAs**) usually specify that prices must be paid in either US Dollars or Euros. The buyer's payment obligation will be deemed fulfilled as soon as the relevant payment is made into the contractually-specified bank account. The Decree has therefore unilaterally changed the provisions in numerous GSAs.

These changes raise various issues. First, because payment obligations are only deemed fulfilled at the end of a complex conversion process handled by Gazprombank, exposure for buyers is significantly increased whilst this is effected – which can take days. The effect of the Decree is that buyers essentially transfer control over making payment to a third party.

Buyers are having to decide what their commercial objectives are and how to respond: do they wish to continue buying Russian gas or do they wish to exit or suspend arrangements?

Secondly, the European Commission has suggested that compliance with the Decree could be in breach of EU sanctions because: (i) it would put foreign currency in the hands of Russian entities for an undefined period; and (ii) the conversion process is *"entirely in the hands of the Russian authorities".*

Buyers are having to decide what their commercial objectives are and how to respond: do they wish to continue buying Russian gas or do they wish to exit or suspend arrangements? If they accept the terms of the Decree and formally amend their GSAs, they risk being in breach of EU sanctions. Alternatively, if they reject the Decree's terms as an invalid and unilateral amendment, they risk having their gas supplies disrupted, further exacerbating the Europe energy crisis.

A potential middle ground was proposed by the European Commission, which stated that buyers are permitted to use the Decree mechanism so long as they expressly state that they consider their payment obligations to be fulfilled when they transfer the contract price to Gazprombank. While this may be an attractive option for some buyers, it is unclear whether this approach would be acceptable to the Russian authorities.

What does the contract say?

The actions that parties to GSAs can take in response to the current gas crisis will depend on the terms of their contracts, including: sanctions clauses; force majeure and change in law provisions; price review clauses; and, the governing law and dispute resolution mechanisms. With non-performance being seen on both the buy and sell side in this crisis, parties are scrutinising risk and liability allocation in their contracts.

During the July 2022 interruption, many buyers received letters from Gazprom declaring force majeure in relation to GSAs, citing 'extraordinary' circumstances. Force majeure claims (or claims for sanctions relief) are also being made by buyers wishing to extricate Russian GSAs. Whether these claims will be effective in suspending liability will depend on the express terms of the contract. Force majeure however, generally involves two broad elements:

1. an event/circumstance prevents one party from performing its obligations. It is not sufficient for the event/circumstance to have merely made performance more difficult or expensive; and
2. the event in question is unforeseen and outside the control of the relevant party.

GSAs also usually define specific events which will fall within the scope of force majeure. While the prospects for success for a buyer seeking to dispute a force majeure claim will largely depend on the construction of the force majeure clause in the contract, a seller would likely struggle to succeed in arguing that sanctions qualify as a force majeure event if the seller itself is the sanctioned entity.

Non-Russia linked GSAs are also impacted by the turmoil, with prices negotiated pre-invasion now out of step with market. Long term GSAs (still common in Europe) generally include price review clauses permitting the parties to revisit the pricing formula if market conditions change (or on a periodic basis).

Dispute resolution

In the face of non-supply from Gazprom, buyers could seek specific performance. However, this outcome may be of limited value due to ongoing doubts surrounding enforceability. More likely, we will see buyers seeking damages for breach of contract. Whilst GSAs will often include a cap on the total amount of recoverable damages, this is the more attractive option; a buyer is more likely to be able to enforce an award of damages as gas sellers are likely to have assets in other jurisdictions outside Russia.

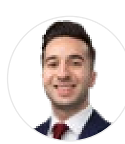
GSAs usually contain arbitration dispute resolution clauses, with the ICC and SCC being the most commonly chosen institutions. However, this is not a swift route to resolution, with this type of complex arbitration usually taking at least 12 months and often considerably longer between the request for arbitration being issued and the tribunal issuing an award.

A potential solution to this issue which is offered by various institutions (including the ICC and SCC) to parties that require urgent measures to be taken, would be to apply for an emergency arbitration. If permission is granted by the relevant institution, an arbitrator can issue an emergency order or award within a considerably shorter timeframe. That said, whilst speed is attractive, enforcement of emergency orders may not be straightforward.

Conclusion

As we enter the European winter with the war in Ukraine ongoing, the terms of GSAs are going to be tested, with drafting being scrutinised and challenged across a whole raft of provisions – sanctions, force majeure, variation, change in law, price review, termination, governing law and jurisdiction. Inevitably the fall out of this crisis will be legal disputes, most of which we would expect to see determined in international arbitration.

Holly Stebbing
Partner
Tel +44 20 7444 5143
holly.stebbing@nortonrosefulbright.com



Majdie Hajjar
Associate
Tel +44 20 7444 2836
majdie.hajjar@nortonrosefulbright.com

Contacts

International arbitration head

C. Mark Baker
Houston

Canada

Calgary
Clarke Hunter, QC

Montréal
Martin Valasek

Ottawa
Alison FitzGerald

United States

Houston
Kevin O'Gorman

Washington DC
Matthew Kirtland

South America

Mexico City
Mark Baker
Kevin O'Gorman

Europe

Amsterdam
Yke Lennartz

London
Patrick Bourke
Sherina Petit
James Rogers

Germany
Jamie Nowak

Paris
Christian Dargham

Moscow
Yaroslav Klimov

Middle East

UAE
Paul Stothard
Deirdre Walker

Africa

South Africa
Jeffrey Kron
Malcolm Hartwell

Asia

China/Hong Kong
Kevin Hong
Alfred Wu

Singapore
Katie Chung
Andrew Battisson

Australia

Brisbane/Perth
Dylan McKimmie

Sydney
Andrew Battisson
Tamlyn Mills

International arbitration

At Norton Rose Fulbright, we combine decades of international arbitration experience with a commercial approach to offer our clients the very best chance of determining their disputes promptly, efficiently and cost-effectively. Our international arbitration group operates as a global team, regardless of the geographic location of the individual.

We deliver experience across all aspects of international arbitration, from commercial arbitrations to investment treaty arbitrations; skilled advocates experienced in arguing cases before arbitral tribunals, who will oversee the dispute from start to final award; and a commercial approach from a dedicated team experienced in mediation and negotiation and skilled in promoting appropriate settlement opportunities.

Dispute resolution

We have one of the largest dispute resolution and litigation practices in the world, with experience of managing multi-jurisdictional disputes across all industry sectors. We advise many of the world's largest companies and financial institutions on complex, high-value disputes. Our lawyers both prevent and resolve disputes by giving practical, creative advice which focuses on our clients' strategic and commercial objectives.

Our global practice covers alternative dispute resolution, international arbitration, class actions, fraud and asset recovery, insolvency, litigation, public international law, regulatory investigations, risk management and white collar crime.

NORTON ROSE FULBRIGHT

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 3500 lawyers and other legal staff based in Europe, the United States, Canada, Latin America, Asia, Australia, Africa and the Middle East.

Law around the world

nortonrosefulbright.com

GLO_45423 – 11/22