NORTON ROSE FULBRIGHT

International arbitration report

Issue 15 | November 2020

Q&A with Eleonora Coelho, President of CAM-CCBC

Global overview of disputes trends in the mining and metals sector

Disputes avoidance and mitigation for the mining sector

Mining arbitration in Africa

The rise of China – impacts for mining arbitration

Foreign investment in Papua New Guinea

Streaming finance agreements – disputes

Disruptive technology in the mining industry

Recent trends in JV disputes in the mining sector

Proving corruption allegations in international arbitration

Reflecting on ‘the New NAFTA’

The *competence-competence* principle under scrutiny in Canada

UK Supreme Court arbitration update - *Enka v Chubb*

Modernisation of the LCIA Rules

Amendments to the Indian Arbitration and Conciliation Act, 1996

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Editorial

Welcome to issue 15 of Norton Rose Fulbright's *International Arbitration Report*.

In this issue we continue our industry series to focus on the mining and metals sector.

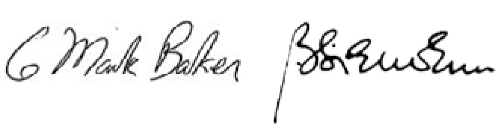
We review global arbitration trends in the mining and metals sector, both commercial and investor-state disputes, in a world where 'volatility is the new normal.' Our authors also offer articles that delve into key mining sector trends – from novel financing arrangements such as streaming contracts, to developments in good faith obligations in joint ventures, to disruptive technologies in the mining sector – and for each we look at associated disputes risk and techniques for mitigating such risk.

In our 'Q&A with' feature in this issue, we speak to Eleonora Coelho, President of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC), about trends and developments in arbitration in Brazil and Latin America. In other regional analyses, we cover mining arbitration in Africa, as well as the rise of China and the impacts on dispute resolution in the mining sector.

With investor-state relations being particularly important in the mining sector, we look at investor-state dispute settlement (ISDS) in the mining sector, and the implications for foreign investors of the changes to investment protection under 'the New NAFTA.' In addition, we review the growing trend of allegations of corruption in mining arbitration and examine how tribunals deal with these issues, in particular the evolving standards of proof.

In our latest case law updates, we look at the recent UK Supreme Court judgment in *Enka v Chubb* which provides important guidance on interpreting arbitration agreements as well as anti-suit injunctions. We also review an important Canadian Supreme Court judgment in *Uber Technologies Inc. v David Heller* in which the *competence-competence* principle came under scrutiny by the court.

We also analyze recent developments in arbitral rules and arbitration legislation, including the modernisation of the LCIA Rules 2020, and amendments to the Indian Arbitration and Conciliation Act, 1996.



C. Mark Baker **Pierre Bienvenu, Ad. E**

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About the cover

The front cover for this issue features the National Mining Monument in Sudbury, Ontario, Canada. The statue, which stands over 15 feet tall, is a tribute to miners of the past, present and future. The statue depicts hundreds of miners, from pick and axe days to modern miners.

Q&A with Eleonora Coelho

President of CAM-CCBC

Interview by Cara Dowling, Of Counsel, Knowledge

We speak with Eleonora Coelho, President of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC)[1].

You were appointed in 2019, the first female President in CAM-CCBC's history. Please tell us a little about the organizational structure of CAM-CCBC and the key elements of your role?

I was very honored to be elected as the first female President of CAM-CCBC. Prior to my election, I had been Secretary General for the past four years and so was already involved in the Center's administrative activities.

The Center's Direction includes the President and three Vice Presidents, all elected and pro bono roles. CAM-CCBC also has two Advisory Boards, one for Arbitration and the other for Mediation, that give support to the President in conducting the Center's practices and development. Within the Center's organizational structure, the General Secretariat is in charge of senior management and supervision of the Center's activities, and also entrusted with day-to-day decisions in proceedings. The Deputy Secretary General is responsible for matters such as people management and assists in the decision-making process. The General Secretariat team is also composed of assistants. CAM-CCBC has eight Secretariats, formed each of a case manager and an assistant case manager, lawyers with specialization in practice areas who oversee the conduct of administration of proceedings from start to end. Two coordinators oversee the Secretariat's work and develop best practices. We also have support teams, including finance, IT, marketing, events and so forth. Finally, the Institutional Development team is composed of three lawyers who manage the Center's institutional matters, as commercial relations, public and customer relations, academic initiatives and so forth.

> *CAM-CCBC is the leading arbitration center in Brazil, one of the most important in Latin America and among the best-known institutions worldwide*

My role as President has two main fronts: administration of proceedings and institutional development. I am personally involved in institutional and technical developments, the formation of specialized committees, promotion of important domestic and international events such as the São Paulo Arbitration Week and our annual Arbitration Congress, etc. In respect of administration of proceedings, I am responsible for deciding on any matters presented to CAM-CCBC within proceedings prior to the Arbitral Tribunal's constitution. Apart from the daily work on ongoing cases, I also coordinate activities as the revision of our regulations, approval of new administrative resolutions (**ARs**) and any other initiatives to develop the Center's service quality in case management.

What are the key strategic objectives that you wish address during your presidency?

CAM-CCBC is the leading arbitration center in Brazil, one of the most important in Latin America and among the best-known institutions worldwide. The goal is to maintain this leadership, whilst improving even more the quality of the services rendered – mainly to technically improve our tools so we may strengthen our position as an international reference.

In addition, we will continue to carry out our indirect but no less important missions, such as fostering the growth of arbitration in Brazil and in the world, through the promotion and support of academic student training events, among others. We are always attentive to the needs of the market, to the development of arbitration as a whole and how the Center may contribute as best practices creator and developer.

My work philosophy is based on horizontal management, diversity and transparency and a constant fight for the common good.

1 Ms. Coelho is also an arbitrator and partner of Eleonora Coelho Advogados

Furthermore, it is essential to reflect on the tremendous changes we lived through in 2020. I candidly believe that the covid-19 pandemic and other relevant events have reinforced my views regarding the importance of social responsibility and the significant role of leadership in promoting affirmative actions. For instance, it became a personal mission to battle gender and racial bias in the field of arbitration, and I am steadily encouraging CAM-CCBC to become an even more influential player in this issue.

I believe we have a promising – and more equal - path ahead.

What do you see as some of the challenges that you will face during your presidency, and/or for international arbitration in Brazil more generally, in the coming years?

Arbitration is consolidated as an adequate method for dispute resolution in Brazil and abroad. The future looks bright, but there are always challenges ahead.

In Brazil, we see a phenomenon of democratization of ADR – i.e. arbitration is reaching and developing in the four corners of the country. I believe future challenges will be related to the further use of arbitration by new markets. Some business sectors are still reluctant and adaptations are needed to fit other markets, be it in prices, general promotion of arbitration or even infrastructure matters.

The covid-19 pandemic was also an unfortunate and unforeseen event that presented several challenges for CAM-CCBC. However, we take our commitment to the parties, attorneys, and arbitrators very seriously. Even in the face of a lockdown, we were sure that we must continue to provide safe, efficient, and responsible case management.

In a country with such an overloaded judicial system, to promote adequate access to justice is also a form of exercising our social responsibility. Hence, in just 48 hours after the pandemic began, CAM-CCBC organized itself internally to ensure the continuity of the more than 300 procedures in progress. Also, 100% of our staff started to work from their homes.

One can certainly state that Brazil is an arbitration-friendly jurisdiction

It was indeed a challenge, but we managed to act resilient and focused on the evolution of the ADR system.

Moreover, the digital era brings some relevant challenges for arbitration: cybersecurity, machine learning and other technological advances bring the challenge of adaptation for international arbitration institutions, practitioners and other professionals. For institutions, especially, adaptation is needed to cope with digital proceedings and provide security for online exchange of information.

Another great challenge is the revision of our Rules, published in 2012. The Rules are efficient and technically adequate, but already call for some adjustments, especially to consolidate provisions of our ARs that regulate pressing and trending topics such as emergency arbitration, proceedings governed by UNCITRAL Rules, etc.

However daunting future challenges may be, I am confident arbitration will continue to develop as a preferred dispute resolution method for complex international commercial disputes.

In 2019, CAM-CCBC celebrated its 40th anniversary. Please tell us about CAM-CCBC and its approach to dispute resolution, and how it has developed over the past 40 years?

CAM-CCBC was founded on July 26, 1979 by a group of lawyers and law professors, initially as the CCBC Arbitration Commission. The Center anticipated the regulation of the activity in Brazil. When the Arbitration Law was published in 1996 (Law no. 9307/96), the Center stood out in the national scene because it was already structured to offer reference services in line with the best international practices.

Brazil's development of an arbitration market was fast and steady. The enactment of the Brazilian Arbitration Act took place in 1996, based on the UNCITRAL Model Law. In 2001, the Superior Court of Justice confirmed the constitutionality of arbitration through a decision rendered in a paradigmatic case. With that and the adoption of the New York Convention, ratified through a presidential decree in 2002, the legal system established was arbitration-friendly and in line with international standards from its conception.

Brazilian courts have also consistently shown a deep understanding and respect for party autonomy and for best practice in arbitration. These are also the reasons why São Paulo, one of the most important financial hubs and largest business centres in Latin America (and where CAM-CCBC's main unit is located), is considered one of the safest seats in Latin America and the wisest choice for arbitration according to relevant arbitrators, lawyers and companies throughout the globe.

CAM-CCBC and Brazil developed hand in hand. Today, CAM-CCBC aims to maintain its leadership role and continuously improve the quality of its services. The unique case management formula, certified by the ISO 9001:2015 – an international certification of quality in administration processes – seeks to ensure efficiency and celerity to arbitral proceedings administered by the Center.

Finally, like most arbitral institutions and as a non-profit organization, in addition to providing case management services, CAM-CCBC also carries out an institutional role to promote arbitration. Academic initiatives, scholarships, seminars and promotion of arbitration in several countries and continents are some of the Center's main focuses.

This year, CAM-CCBC was once more recognized by Leader's League as a leading Brazilian institution, apart from having been appointed as 8th top of mind institution by QMUL and White & Case Survey in 2018. These are just some examples of the recognition the Center has received throughout the globe.

On March 2020, CAM-CCBC launched its inaugural CAM-CCBC Annual Report. Can you share some of the key statistics or trends identified in that report?

CAM-CCBC's first Annual Report – Facts and Figures aims to provide a precise overview of CAM-CCBC's key activities in 2019, in line with our transparency pillar. The report includes statistics, institutional developments and new rules and regulations. It is also an important market tendency that allows the community to better understand the arbitration market, future trends and the Center's business, due to CAM-CCBC's position as market leader in Brazil and benchmark position abroad.

Among the statistics presented about the 2019 casework, some highlights are the nature of contracts involved in proceedings and business sectors of the parties involved, which provide an overview of the markets using arbitration for dispute resolution. Data about CAM-CCBC's administrative decisions show matters presented by parties before the constitution of the Arbitral Tribunal and the solutions provided by the Center. Diversity, Brazilian Public Administration entities and data concerning the amounts in dispute and others are also tackled on the report.

The institutional developments are highlighted right at the beginning of the report and include Secretarial developments, new transparency channels, a new unit inaugurated and much more. Finally, an example of new rules and regulations is Administrative Resolution 35/2019, which establishes the publication of information about constituted Arbitral Tribunal's on the Center's website.

CAM-CCBC's Annual Report is available in full at our website.

Please tell us about the international arbitration market in Brazil and (if any) key recent developments or issues affecting the use of international arbitration in Brazil?

Firstly, it is important to contextualize that the Brazilian Arbitration Act was based on the UNCITRAL Model Law, importing its most important concepts and principles. The Act opted to follow the monist approach that makes no distinction between domestic and international arbitration.

The Act applies to all arbitral proceedings seated in Brazil and only regulates the process of recognition and enforcement of foreign arbitral awards. The control exercised by the Superior Court of Justice – which is competent to assess matters of recognition and enforcement of foreign arbitral awards – is restricted to formal aspects of the award, and once recognized it becomes *res judicata* in Brazil. These provisions are in line with international standards established by the New York Convention of which Brazil is a signatory.

In addition, the case law has evolved through the years manifesting support to arbitration by the judiciary. São Paulo, for instance, has specialized courts that built a positive dialogue with arbitration. Last year, CAM-CCBC promoted a debate among two judges of the specialized courts and the members of the Center's list of arbitrators.

In terms of legal framework, including judicial support, one can certainly state that Brazil is an arbitration-friendly jurisdiction.

This issue of our International Arbitration Report is focussed on the extractive industries. Can you share any insights or trends in extractive industries-related arbitration in Brazil?

The mining industry is in exponential and constant growth in Brazil. In 2019 alone, the industry grew 39.2% in comparison to the previous year, jumping from US$ 25.2 billion to US$ 35.1 billion (according to data from journal Agência Brasil as at 02.19.2020. 1 US$ = 4,37 R$). Brazil is a great exporter of minerals and import is also growing – last year it grew 9.73%, for instance. Apart from the constant and booming growth of the market, the mining sector is one of the largest business sectors in the country, representing 25% of Brazil's commercial balance and 4% of Brazil's gross national product. Therefore, it is also an important market for arbitration.

CAM-CCBC has administered over 30 cases involving mining industry companies, involving approx. US$ 700 million, of which 8 are ongoing. The nature of such disputes relates mainly to corporate matters and contracts for supply of goods and/or services and only one of them involves public administration entities.

We expect that this area will further develop in the next five years due to foreign investments and the industry's natural growth. This, in consequence, will surely expand the arbitration market in the business sector as well, considering the amounts involved in disputes of the sector and the complexity and commercial nature of such disputes.

What steps has CAM-CCBC taken to address current issues in arbitration such as transparency, efficiency and costs, the use of technology etc?

CAM-CCBC's pillars are impartiality, independence, efficiency, transparency and continuous improvement of case management. Therefore, issues as transparency and efficiency were always on CAM-CCBC's radar and the use of technology has been an integrating part of the development of proceedings-administration best practices at the Center.

Transparency is an especially sensitive issue in international and Brazilian arbitration. Aware of its importance, CAM-CCBC is preparing and has already implemented several measures to improve the topic. Our Annual Report already mentioned is one example of a transparency initiative.

Another example is the study group formed in 2019 for the design of a method for publication of extracts of awards rendered in proceedings administered by the Center. The methodology is already complete and will be published soon.

CAM-CCBC also publishes on its website key information concerning proceedings involving direct public administration entities, following local legislation and an ARs published by the Center. Also, the Center publishes information on arbitral tribunals constituted starting from 2019, based on another AR.

Apart from those specific initiatives, the Center has several communication channels with the public and publishes ARs on sensitive topics for further transparency – e.g. specific notes on CAM-CCBC's support of hearings and meetings.

Efficiency is an important professional attribute for the Center. CAM-CCBC has been certified since 2004 according to the ISO 9001 – internationally recognized standard for Quality Management Systems – attesting the quality of its arbitration-proceedings management system. Last year CAM-CCBC expanded this certification to all dispute resolution methods. This attests the quality and efficiency of our processes, which are indispensable for successful proceedings.

Concerning the use of technology, and as mentioned before, the Covid-19 pandemic demanded immediate action to ensure the electronic processing of proceedings.

On April 2nd, 2020, CAM-CCBC enacted the Administrative Resolution 40/2020 establishing rules for conducting 100% online proceedings. Therefore, we fully anticipated an ongoing project to transfer all our case management activities to the virtual environment.

Following this path, we also designed the "Notes on CAM-CCBC Remote Meetings and Hearings" in order to guide our clients with all the best practices and technical requirements for Online Hearings.

Nonetheless, it is important to mention that all these steps forward were taken very cautiously and with constant supervision of our IT team. Moreover, all of our staff received extra training in cybersecurity and data protection to better deal with this new reality of ADR's.

Finally, as for costs, CAM-CCBC has published AR 36/2019: no administrative fees are paid to CAM-CCBC for mediation when the parties, following mediation proceedings, commence arbitral proceedings at the CAM-CCBC; and 50% discount is granted when the parties request, in the course of arbitral proceedings, suspension thereof to start mediation proceedings.

Has CAM-CCBC been developing any other innovations recently?

CAM-CCBC has structured an Institutional Development team in 2019, which will further establish the Center commercially and institutionally, focusing on external relations, academic initiatives, client relations and other important aspects of the Center. This innovation will further establish the Center's activities before the general public.

Equal opportunities for women in the field of Arbitration is another focus. CAM-CCBC is determined to have a List of Arbitrators with 30% of women in 2020, apart from already establishing that same percentage as a minimum for speakers in events which CAM-CCBC organizes, sponsors or supports since 2019.

Another innovation worth mentioning is related to the Secretariat: the professionalization of the case management is a strategic objective of my presidency, as I have already mentioned. In this sense, we have taken some innovative steps. Firstly, Ms. Patrícia Kobayashi is now General Secretary of CAM-CCBC and deals with administrative decisions submitted to the Center within proceedings. Secondly, each of our eight case management teams is specialized in a procedure and/or a sector – e,g, emergency arbitration as a procedure, or oil & gas as a sector – so each proceeding is not only carefully administrated but handled by a lawyer acquainted with the case's subject matter.

Recently, we also completed a renovation project for the Hearing Center to enable face-to-face hearings, in exceptional circumstances. The Administrative Resolution 43/2020 sets out all the guidelines regarding face-to-face meetings, taking into consideration the public health recommendations related to Covid-19.

How is CAM-CCBC fostering the growth of arbitration in Brazil and/or globally?

To foster the development of arbitration in Brazil and abroad is one of CAM-CCBC's strategic objectives as a non-profit organization, and it does so by celebrating cooperation agreements with peer institutions, granting scholarships to law students, lawyers and practitioners, promoting internships, granting sponsorships, supporting academic initiatives and promoting academic events.

Nationally, CAM-CCBC is recognised as the pioneer institution in assisting the study and practice of arbitration. The centre regularly grants scholarships to Brazilian law students and practitioners in universities, such as the Washington College of Law and the University of Miami School of Law, or organisations such as the Max-Planck Institute for Comparative and International Private Law in Germany, the Société de Legislation Comparée in Paris and the International Dispute Professional Academy in Vienna.

As a non-profit organisation, CAM-CCBC also provides financial aid to law students and numerous sponsorships to events such as the International Arbitration Competition of Asunción, the International Negotiation Competition, the Consensual Dispute Resolution Competition, as well as the Willem C Vis International Commercial Arbitration Moot.

The Center also promotes the annual CAM-CCBC Arbitration Congress, one of the largest arbitration congresses in Brazil, and the São Paulo Arbitration Week, which is a collaborative platform conceived as an organised calendar for law firms, universities, associations and institutions to promote events in a productive environment in benefit of the development of ADR.

During the pandemic, we persevered this academic commitment to our community. We managed to organize the first 100% online congress with high-level debates and, of course, keeping our formal pledge to promote gender diversity. In this year's congress, 50% of the speakers were women from different backgrounds and jurisdictions.

We also organized several webinars and co-organized numerous online events. In each of them, we encouraged donations to social institutions.

CAM-CCBC is also involved in many events, initiatives and institutional activities worldwide. In 2018, the Centre's representatives attended the International Council for Commercial Arbitration Sydney, promoted a roadshow in London on the occasion of the III Oxford Symposium on Comparative International Commercial Arbitration, and, of course, is always in Vienna for the Willem C Vis Moot, among other activities.

In 2019, CAM-CCBC received an LLM candidate at Sciences-Po Paris for a three-month experience at the Centre. The project will be further developed into an international internship programme, improving the exchange of information and experience with foreign students and practitioners. In addition, CAM-CCBC has entered into several cooperation agreements with distinct arbitral institutions worldwide, such as the Permanent Court of Arbitration in the Hague, the Hamburg Arbitration Circle, the Chamber of Arbitration in Milan in Italy; the CAM-Santiago in Chile, among others (read more about our partnerships here).

CAM-CCBC's work goes far beyond the delivery of cutting-edge services in the administration of arbitral proceedings. The Centre is continuously contributing to the development of the market in its daily activities. This hard and constant work, along with the serious commitment to its role in the administrative, institutional and international fields, guarantees CAM-CCBC leadership among the arbitral institutions not only in Brazil and Latin America, but in the world.

Global overview of disputes trends in the mining and metals sector (Part 1)

Volatility as the new normal

By Mark Baker, Cara Dowling and Patrick Aana

There are few who would disagree that the current and near-future global risk landscape is particularly challenging to assess and navigate. It is volatile and multi-faceted, with many of the risks intersectional and in continual flux. In times such as these, considerations of agility, resilience and risk mitigation – in particular disputes-risk mitigation – must feature high on every corporate agenda.

Volatility as the new normal

When looking back on 2020, without a doubt it will be seen as the point at which 'volatility became the new normal' globally. Significant events such as the COVID-19 pandemic, the hardening of nationalistic rhetoric, geopolitical instability, trade wars and a downturn in major economies have impacted almost every major financial market and sector. The unstoppable march of automation and digitalization has continued at pace – indeed, it has been propelled forward in 2020, leading to a fundamental reshaping of the workforce and many industries including the mining sector. Although 2020 shortly will be drawing to a close, there are few indicators yet of a reprieve. The impact of recent events will be felt for many years, with many leading commentators still warning of a downturn in all major economies and a rise in corporate insolvencies. Meanwhile, other significant geopolitical and macroeconomic risks are forecast for the near future. Some, such as climate change, are predicted to bring disruption on an equal if not greater global scale as the pandemic – indeed, disruption arising out of climate-related physical risks and transition risks (in particular, the energy transition) is already evident, and the impacts on global financial markets and industry are expected to increase exponentially in coming years.

Challenges and opportunities for the mining sector

Mining has certain intrinsic elements which further compound the complexity and variability of the risk landscape for the sector. Mining is one of a few essential sectors with a significant footprint across the globe – including by way of customer base, supply chain, group company reach, as well as physical operations. Mining investments are always capital-intensive, long-term, heavily regulated, invariably involve state or state-owned entities, and not infrequently based in emerging or challenging foreign markets and in remote and physically challenging locations. They also involve enormously valuable physical assets, which are often of strategic national value to the host state and economically and politically important to local communities. There are significant political and country-specific risks, and accordingly economic risks.

As such it is difficult to offer an accurate 'one size fits all' global assessment of risks for mining companies or investors. However, a review of mining sector risk reports produced this year by leading analysts (including EY, PwC, KPMG, Deloitte, and McKinsey) and our own experience indicates a number of common general sector trends as discussed below.

Mining is by its very nature extremely vulnerable to political and regulatory risk, and often that risk is not solely in respect of captive local operations and assets but permeates the value chain. Geopolitical and macroeconomic risks currently faced by the sector include political instability and changes to the global power balance that threaten the operating dynamics for miners (in particular the changing role of the US, EU stability, China-Australia and US-China relations), rising nationalism, trade wars, and a likely downturn in many major economies. Such risks have led to physical security risks to workers and operations, license or permitting issues, adverse regulatory change, taxation issues, direct or indirect expropriation in some instances, community engagement and license to operate issues, as well as volatility in commodities markets, to name but a few. Indeed, EY's September 2020 mining and metals report indicated a clear protectionist trend with 58 percent of respondents expecting governments to increase royalties and taxes after COVID-19.

From a financial perspective, for miners, commodity price risks remain at the top of key concerns, along with currency and credit risk. There are also related risks arising out of insurance market conditions (from a buyer's perspective) which can impact financing.

The pandemic has of course also been of concern. According to a McKinsey August 2020 survey of mining executives, COVID-19 has had a significant impact on mining operations, with 75 percent reporting moderate disruption and 65 percent expecting fundamental changes to their operational models. It also reported that on average the pandemic triggered a 42 percent decrease in production, attributable to reduction in demand and impacts on workforce availability.

Notwithstanding this, the mining sector has not been hit as hard as other sectors. According to PwC's June 2020 mining report, this is owing to the mining sector having come out of 2019 in a relatively stable financial position, combined with the fact that many miners have been able to continue operations during the pandemic albeit with precautions in place. In part this is thanks to robust existing safety protocols that facilitated the swift adaptations needed to minimize outbreaks of COVID-19, combined with a willingness to embrace remote working and autonomous systems. The impact of the pandemic on commodities prices has been more varied, with some up, some stable and others down. Gold and silver retained their status as safe havens. China's swift economic rebound has kept up demand for iron ore but this is potentially more volatile. Demand for copper and battery minerals is being driven by the demand for telecoms and renewables (perhaps the oversupply of lithium is correcting). But there is concern that future disruption could see this change fast. Overall, however, PwC predicts a "relatively moderate" outlook for the sector.

There have, however, been lessons for the mining sector out of the pandemic. Like most sectors, mines need to take a hard look at their critical supply chains, customer base and transient workforce in order to achieve on the one hand more global diversification and on the other hand greater localization. This will inevitably lead to new contractual counterparties and markets, as well as assessment of existing contracts. Miners are also reassessing the viability of just-in-time and lean production methods to minimize the impact of future supply chain disruption on operations. Businesses and sector reliant on mining commodities are likewise making similar assessments and adaptations to their supply chains.

More generally, the traditional mining model is seen as increasingly difficult to maintain. There has been a push towards new business models, including strategic partnerships, private equity and public private partnerships. This shift is likely to continue to play out in coming years. Appetite for major deals remains low currently (understandable given the post-pandemic environment) but there remains an expectation of some new mergers and acquisition (M&A) activity, including potential consolidations and mergers of small-mid market players which might not have weathered recent volatility as well as the largest players, plus diversifications and divestments. There is also likely be an increase in joint ventures, partnerships or strategic alliances both within the industry and with new players to the sector.

There remain concerns around capital, including liquidity. Growth will require investment, yet access to traditional sources of debt and equity capital is deteriorating. This is leading to alternative financing arrangements, such as streaming contracts, becoming more mainstream. In parallel, there is a focus on controlling capital expenditure and operational costs. This crunch comes, however, at a time when there are competing pressures to invest in infrastructure essential to continue operations, ensure resilience, and deliver productivity and efficiency gains.

Greater automation and use of digital technology makes mining companies more vulnerable to cyberattack

Mining companies have embraced the role of technology. Further investment in innovation and disruptive technology is seen as a key strategy for achieving growth (importantly, long term sustainable growth), reducing costs, driving productivity and efficiencies, and enhancing resilience, safety and environmental management. But there are associated risks with innovative processes and technologies. Cyber-security risk is the obvious risk given that greater automation and use of digital technology makes mining companies more vulnerable to cyberattack – and in the mining context that could literally mean matters of life or death. There are also inherent risks associated with implementing novel processes or technologies, many of which are evolving faster than corresponding laws or regulation, which can lead to unpredictability as to allocation of legal liability. Such projects often also involve partnerships or joint ventures with non-mining counterparties and in non-mining sectors, which also means inherently greater risk than traditional transactions and projects which travel well-trodden roads for miners. Last but not least, there are also equally pressing practical concerns such as how to ensure a technologically skilled workforce, as well as how to manage related community stakeholder issues arising out of the changing ways of working and the impact on the traditional workforce.

Climate change is another key risk for the mining sector and an area where investment is needed. Mines are particularly exposed to the physical risks of climate change (including changing climactic conditions and more frequent and extreme weather events) given mine operations often are: based in remote, difficult to access locations (many with already challenging climactic conditions); reliant on resources, such as water, which are predicted to become more scare or harder to access; vulnerable to extreme weather events (including floods, droughts or extreme heat) which can damage infrastructure, impede operations, transport and supply chains, as well as increase the risk of environmental pollution or health and safety events; and vulnerable to the resulting security risks associated with political and economic instability that environmental pressures create for local communities and governments.

In the last decade there has been an enormous surge in such cases globally

Mines are also exposed to transition risk of climate change. As significant contributors of greenhouse gasses they are under increasing social, political and regulatory pressure to disclose emissions (potentially along the entire value chain), divest from carbon-intensive assets, and transition to lower-emission and more sustainable operations. Proposed new investments face significant social, political and regulatory scrutiny by governments, investors and local communities on climate change grounds.

Managing or mitigating these physical and transition risks will require comprehensive risk analysis combined with investment in new or improvements to existing infrastructure and processes. Digital and technological innovation, including AI, IOT and data analytics, are again expected to have a significant role to play.

Mines and investors are also exposed to legal and regulatory risk related to climate change. This category of climate-related risk is on the rise globally as governments implement new legislation or regulatory change to respond to the climate crisis, limit or prohibit certain activities or industries, or seek to apportion liability for the very significant costs of mitigation or adaptation. In many instances, such issues are also being fought out before national courts or international tribunals – reflecting this, in the last decade there has been an enormous surge in such cases globally. Activism more broadly, including shareholder activism, related to climate change or other ESG issues is widespread and targets of activism and litigation have expanded from governments and oil and gas companies, to other significant emitters as well as those that facilitate carbon-intensive industries (such as banks, investment and trading houses, insurers and pension funds). With those sectors facing their own significant pressure to divest and transition to lower-risk and lower-emission investments, it has had an impact on access to finance and insurance.

Regulatory and legal risk is an area that requires regular monitoring and attention, particularly for global companies, given there is no common regime globally, and in each region this area of law is developing and in flux.

Paradoxically, climate change also presents significant opportunities for the mining sector. The energy transition will be mineral intensive. Billions of tons of metals and minerals will be needed to develop and produce clean or green technologies. According to a World Bank Report on Minerals for Climate Action: The Mineral Intensity of the Clean Energy Transition, demand for minerals such as lithium, cobalt, copper, aluminum, graphite and nickel is expected to grow up to 500% by 2050.

Related to climate change risk is a continued focus on broader environmental, social and governance (ESG) issues, including modern slavery, along the entire supply chain. Increasingly, there is a close link between ESG and raising capital, with ESG requirements becoming more stringent, and pressure pressure on disclosure and reporting. Likewise, social license to operate and indigenous rights remain a hot topic. Ignoring these issues (whether through systemic failures of governance or just failure to take sufficient account) can have disastrous consequences, with both C-suite and reputation taking a major hit, as well as potential legal or regulatory proceedings.

Developments such as the energy transition and digitalization are also bringing new players into the mining sector. Non-mining companies have started to participate more directly in the industry – whether as participants in novel joint ventures or other arrangements (such as is seen in renewable power arrangements) or as investors seeking to increase control or even take ownership over production of minerals needed for their primary business. Businesses reliant on mining for materials are also looking to directly or indirectly influence the mining sector and even transfer risk as they themselves face pressure, for example to demonstrate sustainable supply chains.

As just one example of the rising involvement of non-mining companies, in September 2020, Tesla officially entered the mining sector, announcing its lithium claim on 10,000 acres in Nevada and the development of its own lithium extraction and processing method. Reportedly, this lithium would be enough to support electrification of its entire US fleet. It would also achieve another goal of localizing its cathode supply chain and production as well as reducing the miles travelled by materials used in production. Weeks prior, Elon Musk promised a "giant contract for a long period of time if you mine nickel efficiently and in an environmentally sensitive way."

Such participation – and indeed competition – from companies that traditionally have not operated in the mining sector will inevitably lead to change to business practices and may even ultimately shape the future of the industry.

In the following companion piece to this article, *Global overview of disputes-risk avoidance and mitigation for the mining sector (Part 2)*, we explore the disputes trends for the sector and ways of mitigating disputes-risk.

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Global overview of disputes avoidance and mitigation for the mining sector (Part 2)

Volatility as the new normal

By Mark Baker, Cara Dowling and Patrick Aana

This article is a companion piece to *Global overview of disputes trends in the mining sector (Part 1)*. In Part 1 we reviewed the challenging global risk landscape for the mining sector, noting that it is volatile and multi-faceted, with many of the risks being intersectional and in flux. In challenging times such as these, considerations of agility, resilience and risk mitigation – in particular, disputes-risk mitigation – must feature high on every corporate agenda. In this Part 2, we look more closely at the disputes trends for the sector and ways of mitigating disputes-risk. A disputes-risk mitigation and management strategy is a crucial part of any modern corporate risk protocol, and can save management time, money and crucially, can preserve important counterparty relationships.

Disputes-risk avoidance and mitigation

Disputes-risk considerations must be a keystone of any risk assessment – as history shows, volatility almost inevitability leads to a surge in commercial disputes, and in a tumultuous environment there is a greater risk of such disputes becoming "bet the company" concerns.

> ***As history shows, volatility almost inevitability leads to an surge in commercial disputes***

There are a number of categories of disputes in the mining sector that are on the rise or anticipated to rise. The first category is disputes with states and state-owned entities. The trend towards resource nationalism is a key threat in this regard, as are fluctuating regulatory and judicial responses to evolving macroeconomic threats such as climate change, ESG issues and the pandemic. Disputes with states commonly manifest in the context of licensing, permitting or regulatory changes (including taxation or tariffs), as well as conduct such as direct or indirect expropriation of assets. As noted above, many in the sector are concerned about protectionist governmental responses to improve the economy post-pandemic such as changes to resource tax or royalties policies.

To mitigate this risk, mines and investors need to focus at the outset of a project on embedding mechanisms to manage or transfer political risk. This may include contractual mechanisms such as stabilization clauses or material adverse change clauses. Another key tool in the investors' toolkit is foreign investment treaty protections. If structured appropriately at the outset, an investment made by a foreign investor in a host state may benefit from additional protections found in bilateral or multilateral investment treaties, or sometimes in free trade agreements such as NAFTA. Frequently, such treaties afford investors greater substantive protections of their assets than might otherwise be available under domestic law or under contract. Common substantive treaty protections include: fair and equitable treatment, full protection and security, national treatment, most favoured nation treatment, no expropriation without full (and prompt) compensation, and free transfer of capital.

What gives these protections teeth is that such treaties also often contain investor-state dispute settlement (ISDS) provisions. Those commonly provide that the foreign investor has the right to bring proceedings against the host state directly in a neutral forum should the state breach its treaty obligations. This is a powerful avenue of recourse for investors. Without such rights they may have little to no recourse for state conduct before the local courts. That would mean the only other recourse would be state to state diplomacy, something that is not always available, effective nor even appropriate (given it politicizes an otherwise commercial dispute).

The dispute resolution mechanism provided for in investment treaties is often international arbitration. This allows disputes to be resolved in a neutral forum, before impartial adjudicators, and in accordance with transparent rules. Monetary compensation is the most common remedy. However, in certain cases other remedies, including declaratory relief and restitution, may be available. Interim relief whilst proceedings are ongoing may also be available, including interlocutory measures to compel or restrain a party from certain conduct (such as might aggravate the dispute or render the dispute resolution process nugatory). For more information on investor-state dispute resolution in the mining sector, also see our FAQ on ISDS in issue 11 of the International Arbitration Report.

No matter how beautifully crafted, a contract that is unenforceable is not worth the paper it is written on

Another key category of disputes on the rise are claims relating to the contractual obligations underpinning the various transactions discussed above – exploration or operations enhancement projects, project finance arrangements (in particular alternative financing disputes), digital or technological investments, mergers and acquisitions, joint ventures, partnerships and arrangements with shareholders or third parties, as well as new contracts with new counterparties in new markets, or the renegotiation of existing contracts, in the interests of greater diversification of supply chain, customer base and workforce.

Risks of disputes arise in every transaction, but these increase where miners are engaging with new contractual counterparties and new markets. This risk is compounded where non-traditional players are involved, or miners are crossing over into non-mining sectors. This is because the parties' expectations and understanding of sector norms or common commercial practices may not be aligned.

For example, there may be less impetus to preserve relationships, which has historically been a hallmark of long-term, capital intensive mining investments.

Areas of law and regulation that are still in flux, such as climate change and ESG, also complicate matters and raise unique risks. Those breaking new ground (pardon the pun) in space mining or deep sea mining also face novel and fluctuating risks – and therefore complex disputes – as laws and regulations develop, parties create new contractual mechanisms to allocate risk, or resort to international law principles, to deal with novel issues (such as how to take security over something, like a satellite, that would be very difficult to recover). Similar issues and potential disputes-risk come up in respect of new ways of working and doing business (such as the use of drones for virtual due diligence by deal teams in place of site visits).

Along with carefully crafted terms to allocate risk between the parties, a valid and effective dispute resolution clause – tailored to the parties, needs and circumstances – is *the* crucial risk mitigation tool. This is because it is often the key to viable legal proceedings. After all, no matter how beautifully crafted, a contract that is unenforceable is not worth the paper it is written on.

Many mining sector commercial contracts, regardless of subject matter, contain international commercial arbitration agreements. International arbitration has been popular in mining sector contracts for decades, with good reason. The cross-border nature of many mining investments, combined with the involvement of emerging or challenging jurisdictions and state or state-owned counterparties, has meant that many parties prefer to arbitrate disputes privately than risk ending up before local courts. Local courts in many jurisdictions present real risks of state influence, lack of judicial independence, corruption, delay, or simply lack of expertise in dealing with complex international commercial legal disputes. The ability of parties to select their own specialist arbitrators is also seen as important in mining disputes, particularly as many mining sector disputes involve technical or complex issues. This applies equally to disruptive technology disputes. Confidentiality and the ability to adapt the arbitration procedure to suit the parties' needs is also welcomed – indeed, this procedural flexibility came into its own during the COVID-19 pandemic, allowing parties to progress disputes in arbitration despite a near global shut-down that closed or seriously restricted the operation of most courts.

However, most frequently it is enforcement that provides the main impetus for arbitration. International arbitration (unlike litigation) benefits from a straightforward enforcement regime, the New York Convention, that has near-global uptake, with some 166 states having ratified the convention as at the date of this article. As noted above, contractual rights are worthless without a means of enforcement – but that pithy comment should be caveated to say that successful litigation without means of ultimately enforcing the judgment or award against assets is a far worse sin as it will mean an expensive and time-consuming Pyrrhic victory. At the risk of sounding like a character from Alice in Wonderland the end (enforcement) is always where any experienced disputes advisor should begin. And that applies whether advising on disputes-risk mitigation at the outset of a transaction, or dispute management or mitigation after the onset of a dispute.

Another key element of proactive disputes-risk mitigation (one which is unfortunately too frequently overlooked) is an assessment of where, how and why disputes are arising. This involves a strategic analysis of the factual circumstances and contractual arrangements in which disputes have arisen. Or, in the case of innovative relationships or projects, an analysis (often based on analogous deals) of likely key areas of disputes-risk. This assessment can be holistic or focused – such as limited to a particular suite of transactions, a particular time period, or a particular region. Commonly, patterns can be observed which allows for identification of underlying issues and early commercial or strategic intervention to avoid similar disputes in the future. Such disputes-risk assessments are critical because too often in the heat of battle or in the relief of the aftermath, the underlying issues that caused a major dispute are forgotten. Similarly, a spate of lower value or less commercially important disputes can slip individually beneath the radar, despite amounting collectively to a significant drain on financial and management resources. The opportunity to identify a common cause underlying those disputes can be missed. In the case of smaller skirmishes, it can also mean missing a red flag that the conditions for a major dispute are forming.

Related to this is the importance of having in place appropriate systems to record disputes as well as to preserve documentary and other evidence from the earliest stages of a dispute. Such systems lead to more efficient and effective dispute resolution proceedings, but importantly also allow earlier and more informed decisions as to the appropriate strategy for resolving the dispute and avoiding future disputes.

Investing in the assessment of disputes-risk (both at the outset of a deal and in the post-mortem of a dispute), and implementing processes for managing disputes can prove invaluable. In the long run it can save management time and money – and crucially, preserve important counterparty relationships. With operations and finance under pressure and disputes-risk on the rise in the face of global volatility, this is an important component of any risk protocol.

Conclusion

The risk landscape for the global mining sector is volatile and complex, and one that is increasingly challenging to assess and navigate. Given the capital-intensive, long-term projects that are the norm in the mining sector, it has always been important to consider operational and supply chain resilience and risk mitigation. However, these factors are even more crucial in the current environment given the range of significant disruptors that are impacting and will continue to impact not only the mining sector but also global geopolitical relations, financial markets and businesses in the wake of the pandemic and in coming years. With 'volatility being the new normal', there will inevitably be an increase in disputes, which will have impact on miners' finances, management time and counterparty or stakeholder relations. A strategy for disputes-risk assessment, avoidance and mitigation should be a key component of any modern comprehensive risk strategy.

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Mining arbitration in Africa

An overview of recent disputes trends

By Philippe Hameau, Janice Feigher, Marc Robert, Chloé Deydier[1]

Africa's economic growth has historically been linked to the fluctuation of commodity prices. Modern economy indeed increasingly relies on a number of components derived from minerals such as copper, cobalt, bauxite, iron-ore, tin, lithium or gold. For instance, smartphones and electric vehicles are powered by rechargeable lithium-ion batteries, a component of which is cobalt. According to the African Natural Resources Centre of the African Development Bank, minerals account for an average of 70% of total African exports and about 28% of gross domestic product and the potential for growth is immense. The Democratic Republic of Congo (DRC) alone concentrates over half of the world's cobalt reserves.

Against this background, some states and state-owned counterparts of mining investors in Africa have, over the past few years, taken a series of measures perceived by investors as an attempt to force them to renegotiate their long-term agreements.

Overview of disputes trends

In particular, several African countries have amended their national legislation to significantly increase taxes and royalties on revenues derived from mining activities with immediate effect. Major changes to customs regimes have also been introduced. African states claim that the changes are aimed at better distributing revenue from mining activities to the local population.

The mining industry requires significant capital expenditures from investors in the sector. Return on investment can only be expected in the long term. This is the reason why domestic mining codes typically include provisions which guarantee a stable tax and customs regime to investors over a protracted period of time, providing foreseeability on these heads of costs.

Legislative changes introduced by several African states to their national mining code have given rise to multiple disputes

In light of the above, the legislative changes introduced by several African states to their national mining code have given rise to multiple disputes. International mining companies have or may thus initiate arbitration proceedings for breach of the stabilisation clause in the mining code or on the basis of bilateral investment treaties.

Other bones of contention between state-owned entities and foreign investors relate to their respective rights under joint venture agreements. Contractual relationships between state-owned entities and mining title holders are typically governed by a joint venture agreement which refers to the domestic mining code as applicable law. The investing mining company contributes the capital investment, know-how and expertise to the joint venture, whereas the state-owned entity, which generally holds a minority shareholding, contributes the mining licences. African state parties have shown a growing dissatisfaction with the contribution/revenue balance set forth in joint venture agreements, in particular regarding the underlying value of the mining title and all the more so in greenfield projects. In this regard, indexation clauses and the basis for valuation of the licence (mining capacity versus actual extraction) are specific areas of concern. Mine shutdowns by investors in the presence of a slump in commodity prices is another source of litigation.

1 This article is an updated excerpt from the authors' article in GAR's Mining Guide – Africa, 2019 and is reprinted with permission of the publishers. The full article can be read here.

Faced with investors' reluctance to renegotiate the joint venture agreements on their terms, some state-owned minority shareholders may attempt to obtain the dissolution of the joint venture company before local courts, on the ground that it is undercapitalised, in breach of OHADA law. This strategy may enable the minority shareholder to exert further pressure on the investor or to eventually regain control over the mining titles which could then be allocated to another investor on more favourable terms.

Another recent trend in mining arbitration in Africa is the increased reliance by states and state-owned entities on environmental issues but also the treatment of such issues by arbitral tribunals. Recent case law tends to show that compliance with domestic legislation aimed at protecting the environment could become a requirement for an investor to claim protection of its investment in international arbitration proceedings. Could this be the sign of the emergence of an international environmental public order?

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The rise of China

Impacts for mining arbitration

By Alfred Wu, Anita Fong and Muriel Cheng

In the past six years, China has vastly expanded its presence in the mining sector by establishing dominance in the export of mineral resources such as rare earth elements and processed chemicals. China's Belt and Road Initiative (BRI) expansion has also created opportunities for new investments and acquisitions in mineral resource-rich hotspots overseas, such as in Africa and Latin America, through state-owned enterprises as well as state-linked private firms. China's rapid acquisitions have also extended its footprint beyond the developing world to Australia and the United States. Accompanying this rapid expansion is the emergence of Chinese engineering and construction companies as frequent players in overseas mining-related projects. This rapid expansion is reflected in the rising number of corporate finance deals but also disputes. Increasingly, disputes relating to mining and construction projects involve Chinese counterparties. This article explores China's increasing focus on enhancing its position as a key arbitration destination for mining disputes and beyond.

The Belt and Road Initiative and the CICC's first cases

Anticipating an increased volume of high-quantum, foreign-party commercial disputes related to the BRI, in 2018 the Supreme People's Court (**SPC**) announced a specialized tribunal, the China International Commercial Court (**CICC**), with two locations in Xi'an and Shenzhen.

The CICC is described as a "one-stop shop" for dispute resolution. The CICC can hear cases referred by the SPC that are international in character (i.e., one or both parties is foreign) or of national importance, and where the amount claimed is over 300 million RMB ($42 million USD). The CICC also has jurisdiction to hear applications for preservation measures in arbitration, and for setting aside or enforcing international commercial arbitration awards.

Parties are encouraged to resolve a dispute by way of mediation, arbitration or litigation with support from various well-established Chinese arbitration centres like CIETAC, Shenzhen International Arbitration Centre, Shanghai International Arbitration Centre, and Beijing Arbitration Centre.

The CICC is described as a "one-stop shop" for dispute resolution

The CICC's mandate is still developing, given that some parties may still choose to use arbitration or mediation centres directly without applying to the CICC. It is unclear whether an award rendered by a Chinese arbitration centre via the CICC would be considered an SPC judgment or a foreign-related arbitral award for recognition and enforcement purposes. Foreign-related arbitral awards rendered in mainland China are interpreted pursuant to China's Civil Procedure Law and not the New York Convention.

In early 2019, The CICC accepted 11 SPC-referred cases and heard substantive arguments in two cases, although final decisions have not yet been rendered. The first, *Guangdong Bencao Medicine Group Co., Ltd. v Bruschettini S.R.L.*, involved a product liability dispute brought against the Italian pharmaceutical company Bruschettini by its Chinese distributor. The second CICC proceeding was *Ruoychai International Group Co., Ltd. v Red Bull Vitamin Drink Co., Ltd.* from Thailand regarding multiple long-running shareholder disputes. In each matter, the CICC offered to conduct mediation with its International Commercial Expert Committee. The substantive hearings each lasted between three to four hours before a five-judge panel.

Although these matters are not directly related to the BRI or to China's foreign mining projects, and it remains to be seen whether the CICC will find acceptance by foreign parties to bring claims before it as plaintiffs, they reflect China's developing commitment to servicing high-value claims in its domestic courts.

Positive changes in Chinese arbitration policy yielding greater success for arbitration awards on judicial review

Parties seeking to recognize or enforce foreign arbitral awards in China have seen rising success rates in recent years. Between 2011 and 2015, over 86% of foreign arbitral awards were upheld upon application for recognition and enforcement. In late 2017, the SPC provided clarity on the grounds for judicial review and expanded the Prior Reporting System so that intermediate courts could refer any matters where they intended to refuse recognition or enforcement of an arbitral award for judicial review.

Related to this, the SPC appears to be expanding the CICC's mandate to conduct judicial review of arbitration cases. On September 18, 2019, the CICC released its first jurisdictional ruling in the three interrelated Luck Treat Co., Ltd. matters against Zhongyuan Cheng Commercial Investment Holdings Co., Ltd. which the SPC were referred from the Shenzhen Intermediate Court. The CICC confirmed that the contract's arbitration clause was valid, independent of whether the parties actually entered into the contract.

Parties pursuing foreign arbitration awards should be mindful that Chinese courts will examine foreign arbitral awards (including those rendered in Hong Kong, Macau or Taiwan) under Article V of the New York Convention, but also as subject to the public policy exceptions in China's Civil Procedure Law, articles 237 and 274.

However, public policy exceptions are rarely applied; only two cases in the last ten years were declined on this basis.

In 2016, the SPC rejected enforcement of an award where the arbitration clause had previously been found invalid by a mainland China court, since enforcing the award would effectively undermine the Chinese judiciary. In 2017, the SPC held that an apparent sham arbitration award must be rejected in the public interest because the parties had manipulated arbitration to obtain illegal interests by improper means; enforcing such an award would mislead the public and pose a serious threat to the credibility of the judiciary.

Other pro-arbitration developments

China is taking a more pro-arbitration approach as reflected in the SPC's three provisions in relation to judicial review and enforcement of arbitration awards implemented in 2018. Besides implementing the above-noted measures to facilitate arbitration awards, the Chinese courts have also in recent cases ruled in favour of arbitration.

For example, the December 2018 case of *Chinalight Tri-union Int'l Trade Co., Ltd. v Tata International Metals (Asia) Limited* concerns a challenge of an arbitration clause that named a non-existent arbitration institution in Singapore. The Beijing Intermediate Court confirmed that the *Law on Foreign-Related Civil Relations* and the related SPC Judicial Interpretation on Law of Application applied where the defendant is a Hong Kong-incorporated entity, and so the Beijing Fourth Intermediate People's Court ("Beijing Court") had jurisdiction to determine the clause's validity. Pursuant to those provisions, since the disputed arbitration clause did not include an express agreement on the applicable law, the Beijing Court determined that the law of the place of the arbitration institution or the juridical seat should be adopted instead. The parties' intention to arbitrate in Singapore was clear, and so the Beijing Court decided that the arbitral seat was Singapore and the applicable law was Singapore law. The Beijing Court further opined on the SPC's pro-arbitration position as expressed in the Judicial Interpretation.

China is taking a more pro-arbitration approach

The SPC does not stop there. In a recent case published in January 2020, three conflicting dispute resolution clauses were in place in one single contract – the first was a litigation clause (Art. 2), followed by an arbitration or litigation clause (Art. 7), with a further arbitration clause at the end of the Chapter. Pursuant to *Article 7 of the Interpretation of the Supreme People's Court on Certain Issues relating to Application of the Arbitration Law of the People's Republic of China*, an arbitration agreement shall be ineffective if it contains both a litigation and arbitration clause. As such, the Beijing Court intended to rule the arbitration clause invalid. The clause, however, was subsequently saved when the SPC applied the contract interpretation rule "*latter stated clauses take precedence over earlier stated clauses*."

In essence, the SPC ruled that although three dispute resolution clauses existed in the contract, the arbitration clause was placed last among the three (in the last paragraph of the Chapter), which "clearly" reflected the parties' "latest" intention. As the arbitration clause was also found to be in full compliance with the *PRC Arbitration Law*, the clause should therefore prevail.

This case illustrates the SPC's willingness to promote arbitration through applying its own "last clause rule" to contract interpretation. The SPC applied this rule for the first time in a 2011 case involving multiple contracts and conflicts regarding business clauses, instead of dispute resolution clauses as in the current case.

Another important development is that China entered into the *HK-Mainland Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitral Proceedings*, which took effect on 1 October 2019. Pursuant to the Mutual Arrangement, Hong Kong would become the first jurisdiction outside China where parties to arbitral proceedings administered by designated Hong Kong arbitral institutions (such as the Hong Kong International Arbitration Centre and CIETAC HK) would be able to apply to the mainland China courts for interim measures. This arrangement makes Hong Kong a unique and important venue for parties that wish to have access to interim relief from a mainland Chinese court but do not wish to seat their arbitration in mainland China.

Concluding remarks

While China's expansion in the mining sector across the BRI is creating more business opportunities, it is also inevitable that more disputes will arise on the investment, construction or operation fronts. China has taken the initiative to promote its position as an arbitration-friendly destination, which should encourage foreign entities facing Chinese counterparties in mining-related disputes to consider choosing the numerous institutions available in China or Hong Kong as their arbitral seat.

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Foreign investment in Papua New Guinea

Positive developments

By Martin J. Valasek, Alison G. FitzGerald, Cara Dowling

Canada enjoys a friendly and steady trade relationship with Papua New Guinea (PNG) and has more ties with PNG than with most other Pacific Island nations. Although there is limited publicly available data on Canadian foreign direct investment (FDI) in PNG, reports by Statistics Canada indicate total Canadian FDI in PNG reached approximately $272 million in 2018, much of which was in mining. PNG has considerable subsurface resources, including gold, silver, copper, nickel, petroleum and natural gas, and Canada is home to almost half of the world's publicly listed mining and exploration companies. Around 700 of these companies are currently active in over 100 countries, including in PNG. According to Natural Resources Canada, the total value of Canadian mining assets abroad amounted to $169 billion in 2017. Over the past year, there have been a number of legislative changes in PNG that may benefit or further incentivize Canadian investment in PNG. This update tracks these local PNG developments.

Domestic legislative changes to promote international investment

PNG held consultations in March 2019 on proposed amendments to its *Investment Promotion Act* 1992 (**IPA**) that would, among other things, create a Registrar of Foreign Investment, introduce an improved and expedited foreign enterprise certification process and generally bring greater clarity to compliance with and enforcement of the IPA. (For further information, see also our related article *What foreign investors need to know about the Investment Promotion (Amendment) Bill 2019*. The Government of PNG is currently considering the proposed amendments and it is expected they will be tabled before Parliament once approved by cabinet.

More recently, on September 17, 2019, PNG acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**). The convention came into force for PNG on October 15, 2019. This is a welcome development, both for PNG and for companies investing or operating in PNG. With PNG's accession to the New York Convention, companies are afforded greater certainty that agreements to arbitrate disputes and resulting foreign arbitral awards will be enforceable in PNG.

> ***With PNG's accession to the New York Convention, companies are afforded greater certainty that agreements to arbitrate disputes and resulting foreign arbitral awards will be enforceable***

The New York Convention requires the domestic courts of contracting states to give effect to arbitration agreements and recognize and enforce awards made in other states. Courts may only refuse enforcement pursuant to a limited number of exceptions, such as an invalid arbitration agreement, incapacity of a party, or the tribunal lacking or exceeding its jurisdiction. The next step is for PNG to update its domestic *Arbitration Act*, 1951 to ensure its procedures appropriately integrate the New York Convention's recognition and enforcement provisions. Adopting the UNCITRAL Model Law on International Commercial Arbitration, as part of this legislative update, would be a further welcome reform.

The Asian Development Bank's role in encouraging legal reform

The Law and Policy Reform Program by the Asian Development Bank (**ADB**) assisted with bringing PNG and other South Pacific states into the New York Convention as part of a technical assistance project to improve rule of law and facilitate investment, trade and finance in the region. Introduced in 2016, the *Promotion of International Arbitration for a Better Investment Climate in the South Pacific* initiative aims to establish an effective commercial dispute resolution regime in the ADB's South Pacific developing member countries, in part by introducing modern international commercial arbitration laws. It notes that the lack of a modern commercial dispute resolution and enforcement regime potentially impedes foreign investment in the Pacific Developing Member States (citing Pouget, Sophie. 2013. "Arbitrating and Mediating Disputes: Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment." Policy Research Working Paper 6632, World Bank, Washington, DC.). It also notes that the lack of an effective dispute resolution regime affects a country's World Bank's Doing Business rankings.

Initiatives such as these has led to a significant number of other Asia-Pacific countries recently acceding to the New York Convention. These include the Cook Islands, Fiji, the Republic of Marshall Islands, the Maldives, the Seychelles, Tonga and Palau. Like PNG, many of these acceded to the New York Convention in an effort to boost their investment climates by making alternative dispute resolution mechanisms available to investors.

Some of these, such as the Maldives, also became a party to the UN Convention on International Settlement Agreements Resulting from Mediation (Singapore Mediation Convention) when it opened for signature in August 2019. The Singapore Mediation Convention offers a global framework for businesses to settle disputes out of court and enables the enforcement of international mediated settlement agreements in member states. For more information on the **Singapore Mediation Convention**, see our recent article in the International Arbitration Report.

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Streaming finance agreements

A dispute resolution perspective

By Martin J. Valasek, Geoffrey Gilbert

Streaming agreements, although not new to the mining sector, are increasingly relied on by mining companies as a primary source of financing. As always, in parallel with the increase in popularity of particular transactions, a corresponding increase in disputes between counterparties is seen. This article explores the nature of streaming agreements, the types of disputes that can arise and how contracting parties can take steps at the outset to put themselves in the best position to mitigate disputes risk.

Streaming agreements

Under a typical mine streaming agreement, the owner or seller, as they are often described in the streaming agreement, agrees to sell a portion of the future production of a mine in exchange for an upfront payment and a significantly discounted purchase price upon delivery of the mineral. Streaming agreements tend to be long term and can last the entire life of a mining project.

Each streaming agreement is unique and complex and can have significant implications for the parties

Streaming agreements are an attractive form of financing for owners because they provide a form of non-equity financing that injects cash into a project. The upfront payment (deposit) paid by the buyer is typically applied by the mining company towards the construction or redevelopment of the mining project. For buyers, streams are attractive because they provide potential upside on increases in commodity prices and secure long-term supply of minerals. The buyer also receives the benefits from production and exploration growth without having any ongoing capital-expenditure obligations.

The core terms of streaming agreements include the deposit (i.e. the upfront payment to the seller, which in some instances may be staged, milestone-related installments); the price to be paid for the mineral on delivery (typically a percentage of market price, but can also be a fixed price); and the delivery terms for the mineral, which can also take the form of a tradable credit. The buyer often takes security over the seller's assets to secure performance and will look to take control over the company and the mine in a default scenario. Buyers frequently enter into heavily negotiated inter-creditor agreements with other lenders to establish each party's rights to the seller's assets in a default scenario.

Each streaming agreement is unique and complex and can have significant implications for the parties, especially with respect to tax. Specialized advice is required on terms and conditions to carefully consider the consequences and implications of the various commitments.

Considerations relating to disputes involving streaming agreements

Streaming agreements generally give rise to complicated, high value, high-stakes, multi-jurisdictional disputes. Unlike other forms of financing, international arbitration is often chosen as the dispute resolution mechanism for such disputes. A key reason for this is because streaming disputes benefit from being resolved by sophisticated and specialized arbitrators chosen by the parties for their familiarity with the issues that underpin the dispute, such as technical problems at the mine site, the application of pricing formulae, or the quality of minerals delivered under the stream. Another advantage is that arbitration allows parties the freedom to tailor the arbitration procedure to meet the specifics of the dispute and the commercial needs of the parties. Furthermore, as buyers and sellers are often in different jurisdictions (and not infrequently involve difficult or emerging markets), contracting parties are attracted to the benefits of resolving disputes in a neutral forum (outside state courts) and one which offers procedural safeguards that may not be available in domestic courts. Last but not least, the ease of enforcement of arbitration awards globally under the New York Convention is another fundamental advantage over litigation, which does not have any equivalent global regime for enforcement of foreign court judgments.

A carefully tailored arbitration clause at the outset is critical to setting in place the key components of the arbitral process, which will ensure efficient and effective dispute resolution proceedings once a dispute arises.

Streaming agreements are multifaceted agreements that can give rise to complicated high-value disputes

The suite of security documents that accompany streaming agreements, including the instruments that create security interests and any inter-creditor agreement that establishes creditors' rights, also often include arbitration clauses. In some circumstances, creditors may refer questions of interpretation of the security instruments to arbitration. However, in practice, creditors may wish to waive their right to arbitrate and instead consent to have disputes over establishing security rights resolved before a court in the context of insolvency proceedings. Depending on the circumstances, this could be more efficient in time and costs as all concerned parties are together in one proceeding. Considerations of this type must also be addressed at the drafting stage and reflected in a properly tailored dispute resolution clause.

Investor-state disputes

Another serious consideration for buyers under streaming agreements is the potential of a total loss of the mining project due to an unlawful expropriation or other taking by a host government. In such cases, the seller will be forced to default under the streaming agreement, the project will be lost, and often the only asset of the seller upon which the buyer may derive any value as a creditor is the legal claim the seller has against the government. After executing on its security in insolvency proceedings, the buyer/creditor may find itself owning the seller or may have the right to any monetary damages amounts collected by the seller following an arbitration. Therefore, at the outset, the value of the buyer's security interest in the seller depends, at least in part, on the seller's ability to seek a remedy against the host government. In many instances, there is no remedy available under domestic law or under the contract, alternatively, where such remedies are in theory available they are not enforceable in practice due, for example, to state control of or interference with domestic judicial processes. Potentially, however, in such circumstances the affected party may have additional alternative remedies against the host government – outside the contractual regime – under an investment treaty, enforceable via investor-state arbitration.

Prospective buyers under streaming agreements should therefore investigate at the outset of the transaction (as part of their due diligence) whether the seller has structured its investment to take advantage of treaty protection. Likewise, prospective buyers should investigate if the company has a form of stabilization agreement that provides for protections against state conduct as well as international arbitration with the government under the terms of a contract. If carefully implemented, such provisions provide a backstop remedy to an otherwise total loss. However, buyers should be aware that steps prior to the initial investment, or indeed the project, are often necessary in order to take advantage of these rights later when a dispute arises.

Conclusion

Streaming agreements are multifaceted agreements that can give rise to complicated high-value disputes. International arbitration can provide an effective dispute resolution mechanism if the parties tailor the procedure to their needs. Specialized disputes counsel should be consulted at an early stage to avoid problems at the time a dispute arises. The value of a streaming investor's security can be influenced by how the seller has structured its investment and whether the seller has investment treaty protection or the ability to assert rights under a stabilization regime. Such protection allows buyers to seek a remedy in the event of total loss of the mining project due to unlawful government action in the host state. A buyer/creditor should carefully assess the existence and strength of a claim, and exploring various options for seeking recovery before proceeding.

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Disruptive technology in the mining industry

Opportunities, risks, and avoiding and resolving disputes

By Matthew Buckle

Technological innovation continues to disrupt the status quo in established industries. While new technologies offer many new opportunities within the mining industry, the corresponding risks and potential disputes are not far off. In this article, we focus on these opportunities and risks as well as disputes that might arise from changes in the mining industry and emerging avenues for avoiding and resolving such disputes.

Opportunities

New technology has the ability to increase efficiency and productivity of mining operations. The industrial internet of things automatically connects machines and people using intelligent sensors and radio frequency identification devices (RFID) to create an extensive network of interactions which can enable computes to interact with mining operations without human intervention. This has the potential to improve visibility and traceability throughout the life cycle of a mine and to automate maintenance and operation. New computing technology enables information collected from this network, which would have previously been too large and complex to deal with in traditional ways, to be processed in real time allowing for informed, data-based decisions to be made efficiently and accurately. Efficiency and productivity are also advanced by predicative maintenance and 3D and 4D printing which allows for replacement parts to be printed and ready on site exactly when needed minimizing maintenance shut downs.

As mining is one of the most energy and water intensive industries, green technologies not only contribute to lowering the environmental impacts of a mine but can also reduce operating costs. Mining companies have started to replace diesel powered trucks with electric vehicles. Through autonomous systems and machine learning, equipment can adapt to the grade and hardness of materials which allows for the optimization of energy use in mining processes such as crushing.

Biological techniques have also begun to reduce the environmental impacts of mines and increase revenue. New technologies are being developed to replace the use of cyanide for treating tailing with a new mixture safe for human consumption that can be used many times over. Research on the ability of micro-organisms to eat the copper present in tailings which can later be extracted from the bacteria to be reprocessed before sale is being developed so that minerals present in residual waste can be recovered and used to help fund waste treatment expenses.

As the demand for certain metals, such as lithium and cobalt, which are vital to new technologies, increases the mining industry is turning to new technologies to mine what could not be mined practically or profitably before. Big data and digital twinning have reduced the cost of exploration while robots and drones bring mining to new depths and smaller spaces unsuitable for human workers. Machine learning allows for the optimization of mining operations and the mining of metals and minerals which would have previously been too expensive.

The safety of workers has always been a concern in the mining industry. Advancements in virtual reality and robotics have been able to protect workers by creating the ability to test dangerous operations in virtual environments or by removing workers altogether. Virtual reality blast walls project onto a canvas and allow workers to test blast holes and practice detonating explosives to observe how rocks react. Some equipment, such as smart helmets, can enhance vision, indicate danger zones, and even record when a driver is fatigued and needs to take a break.

Along with increased safety comes a reduction in associated liability risks. As industry names like Komatsu, Cat, and Hitachi are bringing forward automated haulage systems, the prevalence of autonomous trucks have reduced accidents in mines making jobs safer for workers and profits higher in the absence of injury payouts and lost productivity.

One of the largest impacts technology will have on the mining sector is on the workforce. With automation and robots taking away jobs, predominantly male and lower skilled workers will be the most significantly impacted. But not all employment impacts will be negative. Technology has introduced new fields outside the core competencies,' such as biochemistry, bio engineering and computer science into the mining industry. With advancement come more opportunities for educated and skilled workers and for the existing workforce to be trained to take on new opportunities.

Mitigating risks associated with innovation

Any business innovation, whilst creating opportunities, also creates new areas for disputes. Legal and regulatory risk in the mining industry is already a complex matrix, complicated by the fact that industry players are often global, operating in multiple legal jurisdictions.

New technologies inherently come with significant risk (some known, but many 'known-unknowns') as well as often novel regulatory and legal issues. Add to that, new players in the sector have emerged as technology companies begin to invest into mining operations. For example, automotive companies such as Tesla, have begun strategically investing in mining to ensure access to the metals required for production. This brings risk with the opportunities, as the sector expands beyond familiar counterparties and new players introduce uncertainty stemming from different approaches to doing business. Technological innovation also requires new arrangements between host governments and mining companies, particularly where upfront investments are still high but do not necessarily guarantee significantly higher profits. Disputes with local communities and host states may also arise where technology disrupts the benefits of industry for locals, including for example by reducing the need for infrastructure and workforce. A balance between positive and negative impacts on local communities must still be found and new disputes require expedient and innovative solutions.

These issues are complicated by the fact that there is no single, universal legal system. Global companies implementing cutting edge technologies across multiple jurisdictions find themselves facing a plethora of different and often conflicting legal and regulatory systems. Frequently, laws that would apply to new technology and any arising dispute were developed in a world and a time that did not even contemplate the existence of such technologies. Take autonomous vehicles as an example, as AVs become the status quo, regulatory and legal frameworks for vehicles premised on human control be found inept to deal with related issues. Liability for coding errors is likewise more complicated in situations without any human involvement. With emerging technologies in a global industry there are often fundamental questions of jurisdiction and governing law, raising key questions of which court(s) has jurisdiction to hear disputes and which law(s) should be applied.

As disputes arise, multiple legislators and courts will grapple with these issues and laws will evolve to address challenges created by fast emerging new business realities. Given the pace of legislative change, much of this evolution will occur as a result of litigation. In many instances, mining companies may not be willing to be the first to tackle these issues in public courts, particularly where precedents may be set.

A key role for arbitration

International arbitration has always played a significant role in resolving disputes in the mining sector. Its core tenets – including a near global regime for enforcement of arbitral awards (due to the global reach of the New York Convention); use of specialist arbitrators; confidentiality; and flexibility of process. Arbitration is equally particularly well suited for dealing with disputes arising out of innovative technologies. Arbitration, being a flexible process which may be designed by and adapted to the parties and specific circumstances, is best placed to cope with the speed and uncertainty of rapid change. Arbitration allows the appointment of specialist arbitrators who understand the particular issues within the industry or the technology in question – indeed, many tribunals include an appointed non-legal arbitrator who is an expert in a particular field. They can also be supported by expert evidence. Arbitration can also offer efficiencies that the courts cannot, although such efficiencies – as with everything in the arbitral process – is largely within the parties' control. Last but not least, it allows for global enforcement of awards – a particularly important element given many ventures involving technological innovation are cross-border, or indeed, transnational.

Conclusion

In these exciting times, with emerging technologies offering incredible opportunities, parties need to ensure they consider the potential for new areas of risk as well as the opportunities. Parties must ensure that they incorporate appropriate contractual protections but also effective and enforceable mechanisms for enforcing their contracts and resolving disputes. A robust and broad arbitration agreement remains one important a part of risk mitigation.

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Recent trends in joint venture disputes in the mining sector

Staying faithful

By Holly Stebbing and Joshua Coates

This article considers the duties, both express and implied, that joint venture (JV) partners may be under when dealing with one another – can a party simply 'look out for its own' or does it have to take into account its partners' interests when conducting JV business? And how do arbitrators approach these questions?

Joint ventures and mining

Joint ventures are a popular tool to share financial and development risk in the mining sector. Junior miners focused on exploration seek to access capital and expertise by teaming up with larger mining companies who need to replace reserves and diversify portfolios but do not want to take on exploration risk. States look to partner with international mining companies in order to have an operational stake in projects and skill up their local workforce. Private equity firms willing to bear short term volatility for long-term returns inject cash into capital-constrained mining companies.

Whilst JV partners may therefore appear to have a common goal – a successfully operating mine – parties are often entering into these relationships for different strategic reasons and interests can sometimes diverge. JV disputes are common in the industry and take many forms – disagreements about work plans and budgets, challenges to operatorship, defaults for failing to meet cash calls and disputes about offtake arrangements. In an international market, these disputes are typically arbitrated before tribunals from different backgrounds and jurisdictions.

Good faith: civil law v common law approach

Good faith is a topic where the approach of civil and common law practitioners diverge: civil lawyers will naturally expect principles of good faith to apply in the JV context, whereas their common law counterparts will not consider parties to be under any general duty to "*put one's cards face up on the table*" (Bingham LJ in *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd* [1989] Q.B. 433). Where JV disputes are being arbitrated, this can lead to different views amongst the tribunal and the parties and the panel will need to pay close heed to the applicable law governing the relationship to determine the parameters of the parties' obligations to one another.

Good faith in English law: recent developments

While there remains no general obligation to act in good faith in English law, there have been a number of recent cases in the English courts which have considered whether a more limited duty of good faith should be implied into certain contracts, such as joint venture agreements, where the parties are committed to cooperating together over the long-term for mutual benefit – so-called 'relational contracts.'

The trend started with *Yam Seng Pte Ltd v International Trade Corporation* [2013] EWHC 111 (QB) when Leggatt J (as he then was) found that relational contracts may require "*a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements.*" In other words, applying the usual business efficacy test for the implication of terms, the judge found that, in the circumstances (i.e. as a matter of fact), the contract was such that the term as to good faith was so obvious that it went without saying. In his judgment, Leggatt J specifically mentioned joint venture agreements as possible examples of these relational contracts.

More recently, in *Bates v Post Office* [2019] EWHC 606 (QB), Fraser J found that good faith obligations may be implied in relational contracts (in fact, he arguably went further in his judgment which can be read as suggesting that a duty to act in good faith would be implied as a matter of law into relational contracts). The judge did not seek to articulate a definition of what constitutes a relational contract but he did list certain features which these agreements are likely to have: long-term, mutual interest, high degree of cooperation and communication, substantial financial commitment and exclusivity. Obviously these are common features not only in joint venture agreements but in many other contracts in the mining industry (long-term offtake agreements may be another example).

That is not to say, however, that good faith will be implied into joint venture agreements as a matter of course. Indeed recent cases have indicated that the English courts remain reticent about implying such terms. In *Russell v Cartwright* [2020] EWHC 41 (Ch), for example, Falk J refused to imply a general duty of good faith into a joint venture agreement on the basis that "*it was neither obvious, nor essential to the proper working of the contract*". Further, Falk J held that the existence of two express obligations to act in good faith meant that the parties had intended to limit the duty to act in good faith to those specific circumstances. Implying a more general obligation of good faith would therefore be "*inconsistent with the express terms*". Similary in TAQA v RockRose [2020] EWHC 58 (Comm), Pelling J refused to imply a good faith term into an oil and gas joint operating agreement (JOA) on the basis that the language of the contract was unambiguous and the right (which was to terminate operatorship) was clearly intended to be unqualified. The judge observed that JOAs were "*sophisticated and complex agreements drafted by skilled and specialist professionals*" and therefore would be interpreted principally by textual (rather than contextual) analysis.

What is good faith?

In circumstances where a party is required to act in good faith, either by the express terms of the contract or because a term has been implied, what conduct would amount to breach of that standard?

The courts have used phrases such as behaviour which "*would be regarded as commercially unacceptable by reasonable and honest people*". Whilst this is relatively difficult to give practical meaning to, in Bates, Fraser J said that obligation was not a demanding one and therefore it would appear that the behaviour complained of would need to be relatively egregious to amount to breach of contract. If breach is established however, the consequences can be serious. In *Yam Seng* for example, the covering up by the defendant of the pricing arrangement it had with another distributor entitled the claimant to terminate the contract and claim damages.

Conclusion

JV agreements are par for the course in the mining sector and the complexity of such relationships coupled with the risky nature of the business mean disputes are not uncommon. Where one party is aggrieved at the behaviour of another, it is perhaps inevitable that it will plead that its partner failed to act in good faith, whether as a standalone cause of action or to bolster its case. In those circumstances, the parties and the tribunal will need to consider the governing law of the contract and how it addresses good faith. If the contract is governed by English law, there will be no general duty to act in good faith. However, there may be good faith obligations in the contract, either express or implied. The starting point is to look at the words used. Are there are any express obligations to act in good faith? If there are not, consider whether there may be an implied term. Have the parties agreed to exclude any term as to good faith being implied? If not, does the JV agreement bear the hallmarks of a relational contract? If it does, when considered in context, was it the reasonable intention/expectation of the parties that they would each act in good faith? Finally, even if there is an obligation to act in good faith, does the behaviour complained of breach that standard?

With thanks to Madeline Hallwright, trainee, for her contribution to this article.

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Proving corruption allegations in international arbitration

A return to the balance of probabilities standard?

By Paul Stothard and Lolan Sagoe-Moses

Corruption allegations have blossomed as an area of interest in international arbitration since at least 2006, when an ICSID tribunal in *World Duty Free v Kenya* found that a claimant's conduct in procuring an investment contract through bribery was sufficient as a matter of law and international public policy to render any claim under that contract unsustainable. Since then, numerous other published awards show that states are increasingly relying on allegations of corruption to defend treaty and commercial claims. Despite this trend, no established approach currently exists for the standard of proof that applies to such allegations. However, recent awards such as in *Vale v BSG Resources Limited* show that while corruption is always a serious accusation, the standard of proof applicable in arbitration should be no higher than the standard required in other civil cases.

The prevailing approach

Institutional rules of arbitration do not contain clear definitions of corruption nor guidelines on how tribunals should examine evidence of corruption. In light of this uncertainty, investment and commercial tribunals have developed their own approaches to the standard required to prove corruption allegations. Published awards to date have predominantly concerned investor-state arbitrations, where states raise corruption allegations as a defense against investors' claims.

Historically, investment arbitration tribunals view allegations of corruption as a serious matter requiring a high standard of proof akin to that which would be applied to criminal proceedings. Tribunals have also found that the severe consequences of finding that corruption exists, including that the underlying contract would be rendered voidable for illegality and the investor deprived of any treaty protections, justify this higher "clear and convincing evidence" standard (*World Duty Free v Kenya; Fraport v Republic of the Philippines*). Antonio Crivellaro's survey of arbitral case law on corruption in 2003, for example, found that tribunals applied a 'clear and convincing evidence' (or similar) standard of proof in 14 out of 24 cases where corruption was raised.

Challenges with the 'clear and convincing evidence' standard

Where a state raises a corruption allegation, a heightened standard of proof may be more readily justified. States enjoy the power to undertake investigations and compel the production of evidence of the alleged corruption prior to arbitral proceedings.

Where corruption allegations are raised by private parties against states, however, the challenges surrounding this higher standard are revealed. For example, in *EDF v Romania*, EDF alleged a Romanian government official demanded a USD 2.5 million bribe to renew EDF's contract. While acknowledging that corruption is "*notoriously difficult to prove, since typically, there is little or no physical evidence*," the tribunal insisted on the 'clear and convincing evidence' standard because of the seriousness of the accusations in the case given it involved officials at the highest level of Romania's government.

Ironically, the involvement of high-level government officials in corruption is precisely one of the flaws of insisting on the 'clear and convincing evidence' standard. As noted in the UN Anti-Corruption Toolkit, "*Senior officials actively engaged in corruption are often in a position to impede investigations and destroy or conceal evidence, and pervasive corruption weakens investigative and prosecutorial agencies to the point where gathering evidence and establishing its validity and probative value becomes problematic at best*."

Even in cases between two private parties, any party alleged to have received bribes is unlikely to admit to doing so when questioned as a witness before a tribunal, because he or she risks subsequent criminal prosecution should state authorities find out about the confession. Written evidence is often equally as scarce as parties seldom memorialise their agreements to give and receive bribes in written contracts admitting these purposes.

Since tribunals also lack the powers of courts or the police to seize documents, compel the attendance of a party's witnesses, or force relevant third parties to participate in proceedings, any heightened standard of proof would render a plea of corruption unsustainable despite the existence of credible evidence in support.

Where a state raises a corruption allegation, a heightened standard of proof may be more readily justified

A more pragmatic approach emerges

These and other challenges have prompted tribunals in a number of more recent cases to reject a higher standard of proof in favour of a more pragmatic approach. In a 2013 dispute over a molybdenum joint venture, the tribunal in *Metal-Tech v Uzbekistan*, after hearing argument on the applicable standard of proof, found the standard of proof was because the facts of the corrupt "lobbying" payments had emerged in oral evidence by the claimant's own primary witness and the tribunal itself sought further evidence of the nature and purpose of such payments. The tribunal held that the factual matrix did not require the tribunal to resort to presumptions or rules of burden of proof. Instead, the tribunal would make its determination on the basis of the evidence before it whether corruption has been established with reasonable certainty. The tribunal also noted that "*[i]n this context, …corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence*." The tribunal ultimately conducted an enquiry into the facts using a red-flag analysis of indicators of corruption.

Similarly, in its 2019 decision on alleged corruption, the tribunal in *Niko Resources v Bapex and Petrobangla* refrained from deciding between the heightened standard of proof proposed by the claimant and the preponderance of evidence standard proposed by the respondent. Quoting from Aloysius Llamzon on Corruption in International Investment Arbitration, the tribunal noted that "*Because corruption is a serious charge with serious consequences attached, the degree of confidence a tribunal should have in the evidence of that corruption must be high. However, this does not mean that the standard of proof itself should necessarily be higher*."

The "Balance of Probabilities" standard as the starting point

As helpful as these more pragmatic approaches are, these tribunals appear deftly to dodge the central question: what should be the most appropriate standard of proof? While the red-flag analysis adopted in Metal-Tech can assist a tribunal to recognise indications of corruption in evidence provided by parties where a thorough investigation may be all but impossible, it cannot detract from the widely accepted principle in international arbitration that each party must prove the facts on which it relies. Likewise the Niko Resources tribunal only tacitly affirmed the 'balance of probabilities' standard.

The 2019 *Vale v BSG Resources Limited* award, on the other hand, explicitly affirmed the 'balance of probabilities' standard as the starting point in determining the standard of proof.

Once this base of departure was established, the tribunal drew adverse inferences from BSG Resources' failure to respond substantively to evidence Vale had presented to demonstrate a prima facie case of the alleged corrupt acts. The tribunal then addressed the need to attach sufficient seriousness to corruption allegations by insisting on a "high evidentiary threshold" for the tribunal to find fraud against BSG. The high evidentiary threshold or high degree of confidence requires parties to produce strong evidence without requiring that the entire body of evidence points overwhelmingly towards the facts, as would be required should the 'clear and convincing evidence' standard have been applied.

Conclusion

Recent decisions signal a return to the traditional standard of 'balance of probabilities' – at least as a starting point – in determining corruption claims. The tribunals' awards in *Metal-Tech, Niko Resources and Vale* demonstrate that, contrary to early consensus, the 'clear and convincing evidence' standard is no longer the default standard of proof for corruption allegations in international arbitration.

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Reflecting on 'the New NAFTA'

Implications of USMCA on the rights and protection of foreign investors

By Martin Valasek, Alison FitzGerald, Cara Dowling and Jenna Anne De Jong

On November 30, 2018, Canada, the United States, and Mexico announced they had signed a new trade agreement, known in the United States as the United States-Mexico-Canada Agreement (USMCA) and in Canada as the Canada-United States-Mexico Agreement (CUSMA). That agreement replaced the North American Free Trade Agreement (NAFTA), and came into force his year, on July 1, 2020. The coming into force of the USMCA/CUSMA heralds significant changes in protections available for Canadian and US companies investing in Mexico and Mexican companies investing in the US or Canada. It is important – particularly for existing investors with legacy investments – to carefully and quickly consider their options as well take a close look at the risk allocation and dispute resolution arrangements within their investments.

Changes to investor-state dispute settlement

As we previously reported, the most significant development concerns changes to the current investor-state dispute settlement (**ISDS**) provisions under Chapter 11 of NAFTA, which grant foreign investors from each of the state parties to NAFTA the right to bring a direct claim in arbitration against another state party should that state breach its NAFTA obligations and cause damage to the investor's investment. Under CUSMA, however, Canada has withdrawn its unilateral consent to ISDS with foreign investors. These changes took effect immediately for new investments made after July 1, 2020. But for investments made prior to July 1, there is a window in which "legacy investment" claims may be brought against Canada under the provisions of NAFTA Chapter 11.

Currently under NAFTA Chapter 11, all of the state parties have granted unilateral consent to ISDS and the investment provisions apply to "investors of another Party" and "investments of investors of another Party." Subject to specific carve-outs, all types of investments receive Chapter 11 protection and are subject to the ISDS provisions, which provide for the arbitration of claims for breaches of the protections enumerated in Chapter 11.

In contrast, under its replacement, CUSMA Chapter 14, investors may only submit Legacy Investment Claims or Pending Claims to arbitration under Chapter 14 (Annex 14-C), claims in respect of Mexico-United States Investment Disputes (Annex 14-D), or Mexico-United States Investment Disputes Related to Covered Government Contracts (Annex 14-E).

> ***Currently under NAFTA Chapter 11, all of the state parties have granted unilateral consent to ISDS***

Under Annex 14-C, foreign investors with "legacy investments" may bring claims against Canada, the US or Mexico under the provisions of NAFTA Chapter 11 for three years after NAFTA's termination (i.e., to June 30, 2023), when each NAFTA party's consent to such arbitrations will expire. A "legacy investment" is defined to mean an investment of an investor of another party in the territory of the party established or acquired between January 1, 1994 (when NAFTA came into force), and the date of termination of NAFTA, and that existed on the date of CUSMA's entry into force. Arbitrations that have already been commenced under NAFTA Chapter 11 (i.e., pending claims) will be permitted to proceed to their natural conclusion.

New investor-state claims under Chapter 14 are restricted to claims by US or Mexican investors against Mexico or the United States, respectively. The types of claims that may be submitted to ISDS are also more restricted. For instance, claims for direct expropriation may be submitted to ISDS but claims for indirect expropriation may not.

Furthermore, in terms of the substantive obligations the parties have agreed to in Chapter 14, investors will see more limited protection than previously available under NAFTA Chapter 11. These more limited obligations include a narrowed definition of "expropriation."

What do these changes mean for foreign investors?

Disputes between foreign investors and host states are not uncommon, even in developed countries. There have been at least 67 NAFTA Chapter 11 claims brought by investors in the 26 years that NAFTA has been in force. Canada has been the respondent state to more than a third of those claims (at least 28), Mexico has been the respondent in 22 cases and the US has been the respondent in 17 cases. Canadian investors have been claimants in 18 cases, US investors in 48 cases, and Mexican investors in only one case. Absent ISDS protections, these disputes would have all had to run their course under domestic laws and before the domestic courts of the host states. Alternatively, investors would have had to consider alternate routes for applying pressure to resolve disputes – such as negotiation or seeking intervention by their home government (thus politicizing an otherwise often commercial dispute). The limitations of these options was what led in large part to the global dominance of international arbitration as a system for resolving investor-state disputes. The withdrawal of ISDS rights and narrowing of state obligations to protect foreign investments will necessarily shift the risk landscape for investors.

What foreign investors should do to protect their investments

With CUSMA in force, foreign investors should take several steps to protect themselves and their investments.

Existing Canadian investors with potential legacy investment claims under NAFTA Chapter 11 against the US or Mexico, and conversely US or Mexican investors with potential legacy investment claims against Canada, must carefully and quickly assess their options. If they wish to pursue these claims through ISDS they must ensure that any claim is timely brought in accordance with the transitional provisions in CUSMA to avoid any jurisdictional challenge that may risk ultimately barring their claim entirely.

Even if there is no current dispute, given that the availability of ISDS and investor rights is gradually narrowed under the CUSMA, existing investors should also re-consider the risk allocation and dispute resolution tools available to them to seek redress for state wrongdoing. The withdrawal of these important rights and protections may change the risk profile of the investment as compared to when the investment was first made. Both existing investors and foreign investors considering new investments in Canada, Mexico or the US, will need to carefully consider the domestic law protections afforded to them by the host state – under the law as it stands currently, as well as the likely extent to which it might change. They will also need to assess the adequacy of remedies and the availability of recourse to domestic courts. This is especially the case where the investment involves state or state-owned entities and there is a risk that political pressure may come to bear. There may be concerns over bias, corruption, political interference, excessive delay or cost, or in some instances the domestic judiciary's capability to deal with these types of disputes, which often involve complex questions of international law. Their investment structure and agreements will need to take into account and mitigate these risks (to the extent possible). For pre-existing investments, they may need to consider what options are available to them to negotiate additional protections or ensure proper treatment.

Investors may need to consider, for example, structuring the investment to benefit from other treaties which do contain ISDS provisions, or contractual mechanisms that offer some protection against state conduct, such as material adverse change clauses or waivers of state immunity. If the investment is directly with the state under an investment agreement, they may also consider inserting stabilization clauses and/or ISDS provisions into the agreement. The viability of other avenues of recourse (e.g., state to state negotiation) should also be considered.

Where the investment is by a Canadian national into Mexico, or a Mexican national into Canada, then ISDS may still be available through other legal instruments, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) to which both Mexico and Canada are a party. Foreign investors from other countries may have rights under other investment treaties. And of course, investors should also look to what is provided in their contractual documentation in case additional rights of recourse are available.

Conclusion

The current global economic and political environment is tumultuous – there are pressures from the COVID-19 pandemic, actual and predicted economic downturn in most major economies, an expanding trade war between two of the world's largest economies, historically low oil prices, deepening concerns over climate change, and disruption posed by technological innovation and the digitalization of many industries. In response to these pressures, many states are implementing or considering implementing significant legislative and policy changes. There is little doubt that some foreign investors will find their investments significantly impacted as a result. Now more than ever, foreign investors need to be alive to the investment protections available to them – as well as any limitations in those protections.

Although CUSMA came into force on July 1, 2020, it is important for investors of the NAFTA parties with investments made in the NAFTA territory up to July 1 to be aware that the ISDS mechanisms under NAFTA will, in principle, remain available to them for three years following the entry into force of the new agreement. New investors as well as investors with legacy investments should carefully consider their rights and protections under CUSMA and other treaties and/or seek to ensure that any new contracts they enter into with states concerning their investments contain appropriate dispute resolution provisions that will offer procedural protections in the event of a dispute.
This is a challenging time for foreign investors globally, albeit one that still offers significant opportunity where risks can be sensibly mitigated – and understanding rights and protections to mitigate against state activity should be a key component of any investor's tool-kit.

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The *competence-competence* principle under scrutiny in Canada

A case study

By Pierre Bienvenu Ad. E. and Alison FitzGerald

The *competence-competence* principle, which recognizes the power of an arbitrator to determine his or her own jurisdiction under the arbitration agreement, is widely recognized in most jurisdictions around the world. However, the so-called "negative effect" of the principle - the notion that courts ought not to pronounce on the validity and scope of the arbitration agreement, which should first be determined by the arbitrator - is less widely and consistently accepted. In a case involving Uber Technologies Inc. and its related companies (Uber), the Supreme Court of Canada has re-affirmed the application of the *competence-competence* principle to the vast majority of challenges to an arbitrator's jurisdiction, including challenges based on the alleged invalidity of the arbitration agreement, but created a new and narrow exception where referral of a jurisdictional challenge to the arbitrator would effectively prevent access to arbitration (*Uber Technologies Inc., et al. v. David Heller*, SCC No. 38534).

Factual background

In 2017, David Heller, an Uber driver based in Ontario, Canada, commenced a proposed class action on behalf of Ontario Uber drivers who provide services using Uber apps. In the proposed class action, Mr. Heller sought declarations that Uber drivers are employees of Uber and therefore governed by the *Ontario Employment Standards Act* (**ESA**), that Uber has violated the ESA, and that the mandatory arbitration provisions of the services agreements between Uber and the drivers are void and unenforceable. He also claimed $400 million in damages on behalf of the putative class.

Before the class received certification, Uber moved to stay the action in favour of arbitration based on the arbitration clause in the standard service agreement between the parties. The arbitration clause required the parties to engage in International Chamber of Commerce (**ICC**) mediation and, failing resolution, ICC arbitration. The service agreement is governed by the laws of the Netherlands and provides that Amsterdam shall be the place of arbitration.

The motions judge determined that the arbitration clause was valid and granted Uber's motion to stay the proposed class action. The Ontario Court of Appeal unanimously reversed. The Court of Appeal held that the *competence-competence* principle has no application where challenges to the jurisdiction of an arbitrator are based on the alleged invalidity of the arbitration agreement. The court proceeded to hold that the arbitration clause was invalid as an illegal contracting out of the *ESA*.

Further, the Court of Appeal found that, even if the clause were valid, the clause was unenforceable because the cost of overseas mediation and arbitration, relative to a driver's salary, rendered the clause unconscionable. The evidence before the court was that the up-front costs that an Uber driver could be expected to incur in pursuing the ICC med-arb process provided for in the agreement were approximately USD$14,500. The Court concluded that this was out of proportion to the amount in dispute, by reference to Mr. Heller's individual claim and his weekly salary of $400 to $600, which he earns based on 40 to 50 hours of work as an Uber driver.

The Court of Appeal also determined that the Uber app's click-through interface, contract of adhesion and drivers' lack of independent legal advice created an overwhelming imbalance in bargaining power. The Court concluded that Uber had crafted the dispute resolution clause in its service agreement to take advantage of its drivers and that it did so "willingly and intentionally".

Appeal to the Supreme Court of Canada

Uber appealed to the Supreme Court of Canada. Seventeen separate organizations intervened in the appeal, evenly divided between those intervening on arbitration-related issues and those intervening on access to justice and employment-related issues. The ICC, represented by the authors, intervened on two arbitration-related issues raised in the appeal:

- **First,** on whether the competence-competence principle applies where a challenge to the jurisdiction of the arbitrator is based on the alleged invalidity of the arbitration agreement; and
- **Second**, on the proper approach for determining the suitability of arbitration, including ICC arbitration, for resolving certain categories of disputes.

Does *competence-competence* apply to validity challenges?

The ICC submitted that allegations of invalidity should be addressed in the same manner as other jurisdictional challenges. There are two aspects to this position.

The first aspect, as that the Supreme Court of Canada had decided in a prior case (*Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34), is that courts, when faced with a challenge to the jurisdiction of an arbitrator on the basis of the alleged invalidity or inapplicability of the arbitration agreement, should refer the matter to the arbitrator for determination in the first instance, save where the challenge raises (1) a pure question of law or (2) one of mixed fact and law that requires for its disposition only superficial consideration of the documentary evidence.

It was argued that, absent clear legislative language to the contrary, there is no basis to treat challenges relating to the validity of the arbitration agreement any differently than other jurisdictional challenges, such as those relating to the scope of the arbitration agreement. This too was consistent with a prior Supreme Court of Canada decision engaging consumer rights issues (See *Seidel v. TELUS Communications Inc.*, 2011 SCC 15; see also *TELUS Communications Inc. v. Wellman*, 2019 SCC 19).

The Supreme Court of Canada affirmed the applicability of the competence-competence principle to questions concerning the validity of an arbitration agreement

The second aspect relates to the strong emerging international consensus in commercial cases in favour of a *prima facie* review by courts of the arbitrator's jurisdiction. That is the approach favoured in Model Law jurisdictions, as well as in key non-Model Law jurisdictions such as France, the US and the UK. While the approach in non-Model Law jurisdictions does vary, the trend appears to be in favour of courts undertaking a more limited review rather than, in every case, deciding objections to the arbitral tribunal's jurisdiction in priority to the arbitral tribunal itself.

When is arbitration unsuitable to resolve a commercial dispute?

With respect to the second issue, the ICC took the position that the suitability of arbitration to resolve certain categories of dispute should be decided having regard to clearly-expressed **legislative** policy choices, applying the *competence-competence* principle and the allocation of judicial and arbitral responsibilities reflected in the Model Law.

A fundamental tension in the case, on which the parties and many of the interveners expressed diametrically opposed views, pertained to the proper characterization of the relationship between Uber and its drivers: are Uber and its drivers in a commercial relationship, subject to the principles of the Model Law, or an employment relationship, subject to the mandatory provisions of local employment standards legislation?

The Supreme Court of Canada's ruling

In a majority judgment, the Supreme Court of Canada affirmed the applicability of the *competence-competence* principle to questions concerning the validity of an arbitration agreement, consistent with the Court's prior jurisprudence. That is, normally courts should systematically refer to the arbitrator questions relating to the arbitrator's jurisdiction, including questions relating to the validity of the arbitration agreement, all of which should be decided by the arbitrator in the first instance.

However, the majority of the court developed a new and narrow exception to the rule of systematic referral in circumstances where the jurisdictional challenge "would never be resolved" (at paragraph 38 of the judgment) or, as articulated by Justice Brown in his concurring opinion, where referring the jurisdictional challenge to the arbitrator would "effectively prevent access to arbitration" (at paragraph 125).

The majority was alive to the possibility that, in creating an exception to the rule of systematic referral, its decision risked encouraging plaintiffs to raise spurious validity challenges. The majority therefore adopted a two-part analysis requiring that a court assess, first, whether, assuming the facts pleaded to be true, there is a genuine challenge to arbitral jurisdiction and, second, whether there is a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator.

The majority acknowledged that the second limb of the analysis requires some limited assessment of evidence and cautioned that the assessment must not devolve into a mini-trial. However, this assessment appears indeed to go well beyond a *prima facie* review of the case, insofar as it may entail a review of contested evidence. While the court proposed means for managing the risk of this assessment turning into a mini-trial, namely efforts on the part of counsel and judges to ensure the hearing remains narrowly focused, these are unconvincing.

Observations

The Uber judgment is unlikely to affect commercial arbitration in Canada, where courts display an overall positive attitude toward commercial arbitration.

A live issue in the appeal was whether there should be a broad carve-out from the legal framework developed by the Supreme Court of Canada in its prior cases for challenges to arbitral jurisdiction based on the alleged invalidity of the arbitration agreement. The Court did not accept to make such a carve-out.

While judicial attitude toward commercial arbitration in Canada is unlikely to change as a result of the Uber judgment, the development of an exception to the rule of systematic referral of validity challenges to the arbitrator has the potential - at least in the immediate aftermath of the judgment, as parties seek to test the limits of the exception - of multiplying validity challenges and rendering them more complex and therefore more costly. It will be important for the courts to assert clearly the narrow scope of the newly-developed exception to the *competence-competence* principle.

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Enka v Chubb

UK Supreme Court clarifies how to determine which law governs an arbitration agreement in absence of an express or implied term

By Sherina Petit and Joshua Coates

The Supreme Court has brought welcome clarity to the English law approach to determining the law governing an arbitration agreement in its judgment in *Enka Insaat Ve Sanayi A.S. (Respondent) v OOO Insurance Company Chubb (Appellant)* [2020] UKSC 38. In summary, the Supreme Court ruled that if parties to a contract have not expressly or impliedly specified the law that governs their arbitration agreement, then the governing law of the contract (if specified) would apply. This is the case even if the seat is different to the governing law of the contract. But if the governing law of the contract is not specified, whether expressly or impliedly, then the arbitration agreement will be governed by the law most closely connected with the arbitration agreement. In general, that will be the seat of the arbitration. This article considers the reasoning of the Supreme Court judges as they worked through what has been an academically and practically contentious area of English law. This judgment was eagerly anticipated and reflecting that it was resolved on an expedited basis, with the appeal proceeding via both the Court of Appeal and the Supreme Court in a matter of months.

Key prior cases

The English law approach to determining the governing law of an arbitration agreement has, since the Court of Appeal judgment in *Sulamerica CIA Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, been determined by reference to a three stage test: (i) an express choice of law; (ii) an implied choice or (iii) the law with the closest and most real connection with the arbitration agreement. In the years following Sulamerica, courts and practitioners alike have differed in analyses of points (ii) and (iii). A key dividing question has been whether an express choice of the law governing the substantive contract could amount to an implied choice of the law governing the arbitration agreement, or whether the law of the seat of arbitration would, as the law most closely connected, govern the arbitration agreement.

This line of authority was further developed in the recent 2020 Court of Appeal judgment of *Kabab-Ji S.A.L. v Kout Food* [2020] EWCA Civ 6. The Court of Appeal held that a governing law clause reading "[t]his Agreement shall be governed by and construed in accordance with the laws of England" was also an express choice of law governing the arbitration agreement as a matter of construction of the particular terms of the contract and the arbitration clause in that case.

Facts

The claimant, Enka Insaat Ve Sanayi AS (**Enka**), entered into a subcontract with CJSC Energoproekt for certain works relating to the construction of a power plant in Russia. The subcontract contained an arbitration agreement requiring all disputes in respect of the subcontract to be referred to international arbitration seated in London and conducted under the ICC Rules. However, the subcontract contained no express choice of law governing the substantive contract nor the arbitration agreement.

A fire erupted at the Plant causing significant damage. The owner of the Plant received 21.6 billion Roubles with respect to the damage under its insurance policy with the first defendant, OOO "Insurance Company Chubb" (**Chubb**). By doing so, Chubb became subrogated to any rights the owner had against Enka or others in respect of liability for the fire. Chubb argued that Enka was responsible for the fire due to allegedly low-quality of works provided by Enka. In 2019, Chubb commenced proceedings in the Moscow Arbitrazh Court against Enka and 10 co-defendants. As a result of this, Enka issued an Arbitration Claim in the Commercial Court in London seeking a declaration that Chubb was bound by the arbitration agreement in the subcontract, and sought an anti-suit injunction restraining Chubb from continuing the Russian Proceedings on the basis that they violated the arbitration agreement. Enka asserted that the arbitration agreement was governed by English law.

Whether a choice is express or implied is not a distinction with any legal consequence; an implied choice is as effective as an express choice

At first instance, the Commercial Court held that the Moscow Arbitrazh Court was the appropriate forum to determine the scope of the arbitration agreement and refused the injunction on *forum non conveniens* grounds. The Court of Appeal overturned that decision and held that, in the absence of an express choice of governing law of the arbitration agreement, the governing law is the law of the seat – the choice of seat also amounting to an implied choice of governing law of the arbitration agreement – and granted the anti-suit injunction. In his reasoning, Popplewell LJ referenced the Kabab-Ji case, and sought to achieve clarity by setting out a default rule. Firstly, he noted that an express choice of the law of the arbitration agreement may be found in the arbitration agreement itself, alternatively in the express choice of law governing the substantive contract, or in a combination of such express choice with the terms of the arbitration agreement, properly construing the contracts. In all other cases, the governing law of the arbitration agreement is the law of the seat "*as a matter of implied choice, subject only to any particular features of the case demonstrating powerful reasons to the contrary*" ([2020] EWCA Civ 574, para 91).

The Supreme Court, in a split decision of 3:2, disagreed with Popplewell LJ's reasoning, interpretation of the authorities and default rule, and substituted their own versions of clarity in this long disputed area of law.

The majority judgment

Lord Hamblen and Lord Leggatt (with whom Lord Kerr agreed) delivered the Supreme Court's majority judgment. As a starting point, the majority stated that where an English court must decide the law governing an arbitration agreement, it must apply English common law conflict of law rules. A court should apply the common law rules rather that the provisions of the Rome I Regulation on the Law Applicable to Contractual Obligations ((EC) No 593/2008) (**Rome I Regulation**) because Rome I expressly excludes arbitration agreements (and choice of court agreements) from its scope. (Although the court noted that given the similarity between the two regimes, it would be rare to yield a different result under the two regimes). According to English common law rules, the law applicable to the arbitration agreement will be: (i) the law expressly or impliedly chosen by the parties; or (ii) in the absence of such choice, the law "most closely connected" with the arbitration agreement.

In determining the first question – whether the parties have made a choice of law – the court held that it is a question of interpretation, and the court should construe the arbitration agreement by applying English law rules of contractual interpretation as the law of the forum seized. In this, the Supreme Court disagreed with the Court of Appeal which had asserted that to construe the contract, the court should apply the principles of the law of the substantive contract, even if different to English law. The Supreme Court definitively stated "*The main contract law, if different, has no part to play in the analysis.*" – the law of the forum only should be applied. The court also noted that there is no sharp distinction between an express or implied choice – and in any event whether a choice is express or implied is not a distinction with any legal consequence; an implied choice is as effective as an express choice.

In determining the law governing an arbitration agreement, the majority offered a default 'rule': where the parties have not specified the law applicable to the arbitration agreement, but they have chosen the law to govern the contract containing the arbitration agreement, this choice will generally apply to the arbitration agreement on the basis that it is an implied choice of law governing the arbitration agreement. The court stated that the assumption that, unless there is good reason to conclude otherwise, all the terms of a contract are governed by the same law, applies to an arbitration clause as it does to any other clause of a contract (although the court noted that an arbitration clause may more readily than other clauses be governed by a different law given it has a different subject matter and purpose than the substantive contract). The majority further stated that: "*it is natural to interpret such a governing law clause, in the absence of good reason to the contrary, as applying to the arbitration clause for the simple reason that the arbitration clause is part of the contract which the parties have agreed is to be governed by the specified system of law*". This rule encourages legal certainty and consistency of approach.

The court held that it was wrong to assert (as the Court of Appeal had done) that there is a "strong presumption" that the parties have chosen, by way of implied choice, the law of the seat of the arbitration to govern the arbitration agreement. The basis on which the Court of Appeal had made this assertion was rooted in the principle of separability and that the law governing a contract had little bearing on the arbitration agreement as a "*different and separate agreement*". The majority reasoned that this overstated the separability principle which, in its essence, is used where applying the law governing the contract would render the arbitration agreement invalid or ineffective. This, the court said, is reflected in the wording of section 7 of the Arbitration Act 1996 (the **Act**), which provides that "*an arbitration agreement which forms or was intended to form part of another agreement … shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall* **for that purpose** *be treated as a distinct agreement*" (our emphasis).

The majority also gave significant weight to section 4(5) of the Act which states that a "choice of a law other than the law of England and Wales… as the applicable law in respect of a matter provided for by a non-mandatory provision… is equivalent to an agreement making provision about that matter". The majority reasoned that only the mandatory provisions of the Act would apply by virtue of section 4(5) if the arbitration agreement is governed by a law other than English law. It therefore followed that the Act provides for a situation where the law governing the arbitration agreement and the law of the seat are distinct, which militates against an implied choice of the law governing the arbitration agreement merely by virtue of selecting the seat.

Where there has been no express choice nor implied choice – including by virtue of choosing the law governing the substantive contract, as was the case here – the court turns to the second limb of the test above and must determine the law with which the arbitration agreement is most closely connected. Again, the majority supported a default 'rule', namely that the law of the seat of arbitration would be the law most closely connected with the arbitration agreement, subject to strong countervailing factors. Such default rule was justified on the following basis:

1. the seat is the legal place of performance of the arbitration;
2. this approach is consistent with international law and legislative policy;
3. to the default rule upholds reasonable expectations of contracting parties who specify a seat of arbitration without turning their minds to a governing law clause; and
4. this approach provides legal certainty and predictability in the absence of choice.

As the seat of the arbitration was London, the majority upheld the Court of Appeal's judgment that English law governed the arbitration agreement – the end result being an agreement with the Court of Appeal in substance, albeit a significant difference as to reasoning.

As regards the injunctive relief sought, the Supreme Court affirmed the Court of Appeal's decision that it makes no difference whether the arbitration agreement is governed by English law or foreign law as the inquiry is the same: whether there been a breach of the arbitration agreement in commencing proceedings and, if so, whether it is just and convenient to grant an injunction to restrain that breach. English courts will generally give significant weight to the parties' bargain in considering whether it is appropriate to grant injunctive relief.

The dissenting judgment

Given the narrow majority, it is also worth briefly covering the dissenting judgment. Lord Burrows delivered the dissenting judgment with whom Lord Sales agreed. Lord Burrows agreed with the majority that where parties have expressly or impliedly chosen the law of the contract then that choice applies to the arbitration agreement. His dissent concerned how and when an express or implied choice had been made, and the default position in the absence of an express or implied choice.

Lord Burrows agreed that where there has been no express choice of law governing the arbitration agreement the starting point for the analysis should be to assess the law with which the arbitration agreement is most closely connected. He held that the law with which the arbitration agreement is most closely connected must be the law with which the substantive contract is most closely connected.

Unlike the majority, Lord Burrows started by applying the Rome I Regulation (which is the EU and therefore English conflict of law rules) to determine the law governing the substantive contract. Applying Rome I, he found that the contract was governed by Russian law. On his reasoning, it therefore followed that the law most closely connected with the arbitration agreement was also Russian law.

The question of validity of the arbitration agreement under Russian law did not specifically arise in this case, and the dissenting judgment offered no substantive comment on whether their assessment would alter if the arbitration agreement would be invalid as a matter of Russian law. In obiter, Lord Burrows suggested that a narrow approach to this question would be preferred, agreeing with written submissions by Enka's counsel that "*It is impossible to say that just because Russian law takes a narrower view of AAs than English law does … that the parties must have intended English law to apply. That is results-based reasoning that ignores the fact that there are legitimate reasons for adopting a narrower approach*".

The dissenting judgment agreed with the majority that questions of granting an anti-suit injunction do not depend on the law governing the arbitration agreement, rather whether pursuing the foreign proceedings is a breach of the arbitration agreement. Given that they had concluded that Russian law governs the arbitration agreement, they held that they would remit to the Commercial Court the question of whether, applying Russian law, there had been a breach justifying the grant of an anti-suit injunction.

This dissenting judgment of Lord Burrows and Lord Sales highlights that there remains diverging views within the judiciary which will no doubt continue to be debated in the arbitration community.

Conclusion

The Supreme Court decision in *Enka* is an important development of English arbitration law, and one worthy of note for all commercial parties who choose to include arbitration agreements in their contracts. However, in practice, good drafting has always prescribed expressly stating both the choice of governing law of the substantive contract as well the governing law of the arbitration clause. Failure to specify both has the potential to lead to disputes and extensive satellite litigation as evidenced in this case. With this recent Supreme Court judgment, however, there is now greater certainty as to how such disputes will be resolved.

With thanks to Aman Tandon, trainee, for his contribution to this article.

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Modernisation of the LCIA Rules

Key changes

By Sherina Petit and Nimoy Kher

The new LCIA Rules 2020 (2020 Rules) came into force on 1 October 2020 and will apply to all LCIA arbitrations commencing from that date onwards. The amendments are an attempt to streamline and modernise the LCIA Rules. This article presents the key changes introduced by the new Rules and their likely impact on the parties involved.

Early determination

An important amendment is making explicit the tribunal's power to order early dismissal of claims or defences which are manifestly without merit, inadmissible or outside the tribunal's jurisdiction (Article 22.1(viii)). This allows for proceedings to be dismissed at an early stage where it is clear that the claim or defence is unmeritorious. This change brings the LCIA Rules in line with other international arbitration rules (e.g. SIAC and HKIAC Rules).

This addresses a common criticism of arbitration as compared to litigation, and should make the 2020 Rules more attractive to parties concerned with saving time and costs.

Consolidation of multiple proceedings and composite requests

The 2020 Rules widen the powers of the tribunal and the LCIA Court to consolidate multiple arbitrations commenced under the same arbitration agreement or any compatible agreement and *arising out of the same transaction or series of related transactions* (Article 22.7). This expands the circumstances in which proceedings can be consolidated: the parties do not need to be the same in each dispute.

Parties who want to commence multiple arbitrations, whether against one or more parties and under one or more arbitration agreements, are now able to serve a single Composite Request (Article 1.2). The arbitrations will still proceed separately, unless they are later consolidated.

This addresses a common criticism of arbitration as compared to litigation

Tightening the length of proceedings

The 2020 Rules have tightened the timelines for arbitrations. The LCIA Court has 28 days rather than 35 days to appoint the tribunal (Article 5.6) and the tribunal is required to endeavour to release the final award within 3 months (Article 15.10).

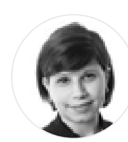
Modernisation of LCIA Rules

As a result of the COVID-19 global pandemic, the 2020 Rules address virtual and hybrid hearings in detail (Article 19.2) compared to the 2014 Rules. They also make electronic communication the new default (Article 4). Taken together with the new provisions allowing awards to be signed electronically (Article 26.2), the 2020 Rules are a welcome modernisation. However, care should be exercised to ensure that use of electronic signatures and other technologies is permitted in the jurisdictions of enforcement to avoid any risk of later challenge.

Concluding remarks

As the 2020 Rules have only recently come into force, it remains to be seen how they will be applied in practice by the LCIA Court and tribunals. Overall, however, the changes constitute a pragmatic and modern update, which should help make LCIA proceedings more efficient, expeditious whilst also preserving fairness and due process.

With thanks to Aman Tandon, trainee, for his contribution to this article.



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Amendments to the Indian Arbitration and Conciliation Act, 1996

By Sherina Petit and Nimoy Kher

On 4 November 2020, the Indian Ministry of Law and Justice passed an ordinance to amend the Arbitration and Conciliation Act, 1996 (the Act). This article considers the key changes arising out of those amendments.

Key changes

The Act introduces two key changes (**the Amendments**):

1. It grants Indian courts the power under section 36 to grant an unconditional stay on enforcement (until a challenge to the award under section 34 is disposed of) of an arbitral award passed in Indian-seated arbitration proceedings, provided that the court is satisfied that there is a prima facie case that the arbitration agreement, the contract on which the award is based, or the arbitral award itself, was induced or effected by fraud or corruption; and
2. It omits the detailed criteria for accreditation of arbitrators introduced by the 2019 amendments to the Act contained in the Eight Schedule.

Power to stay enforcement for fraud or corruption

Under the pre-existing statutory framework, an Indian court has the power under section 36 of the Act to stay the enforcement of a commercial arbitral award "*subject to such conditions as it may deem fit…have[ing] due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.*" This has generally been interpreted as a wide power available to the courts to consider a range of circumstances and factors in an application for a stay on enforcement. It covers the circumstances specified by the 2020 amendments. A party may also challenge an award on the basis of fraud or corruption under the "public policy" grounds section 34 of the Act (Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996). Consequently, the need for the new amendment to section 36 is not immediately clear.

> ***Requirements in the Eight Schedule effectively barred the appointment of a foreign lawyer as an arbitrator, thereby dissuading some commercial parties from choosing India as a seat of arbitration***

There are concerns however, that the amendment is likely to allow further delay of enforcement of arbitral awards in India. At the outset of an Indian-seated arbitration, respondents may seek to plead that the underlying contract was induced by fraud and/or corruption, in order to provide future grounds for a stay on the enforcement of an unfavourable award. The amendment has also been made with retrospective effective, and shall be "*deemed to have been inserted with effect from 23 October 2015*". It is therefore likely that the Indian courts will see a flood of new applications seeking to stay enforcement proceedings involving arbitral awards passed after that date which are currently under challenge on the grounds set out in section 34 of the Act.

In any event, it remains uncertain how the Indian courts will take a "*prima facie*" view in relation to the involvement of fraud or corruption in the contract, arbitration agreement or arbitral award, at the enforcement stage. If this issue has not been previously raised between the parties, it may be difficult for courts to form a preliminary view without asking parties to produce detailed evidence in support of their positions.

Deletion of the Eight Schedule to the Act

Previous amendments to the Act in 2019 introduced the Eight Schedule. The Eight Schedule, however, was not "notified" by the Government of India and consequently did not come into effect. The Eight Schedule set out certain eligibility requirements for the accreditation of an individual as an arbitrator in Indian-seated arbitrations. It faced criticism that in doing so, it restricted party-autonomy and curtailed parties' ability to choose their own arbitrators. In particular, the requirements in the Eight Schedule effectively barred the appointment of a foreign lawyer as an arbitrator, thereby dissuading some commercial parties from choosing India as a seat of arbitration.

The 2020 amendments to the Act delete the Eight Schedule. Section 43J of the Act now states that "*The qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations* [prepared by the Arbitration Council of India]." This too is a welcome development.

Concluding comments

The Amendments are the latest in a series of changes to the Act since 2015. These amendments have been received with mixed reviews. While the deletion of the restrictive requirements in the Eight Schedule is a welcome step, the amendments to section 36 may act to further delay the enforcement of awards in Indian-seated arbitrations.

With thanks to Aman Tandon, trainee, for his contribution to this article.

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Sydney
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Harare[3]
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Kampala[3]
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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.

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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.

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