NORTON ROSE FULBRIGHT

International arbitration report

Issue 6 – May 2016

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Norton Rose Fulbright

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Editors-in-chief – Mark Baker, US; Pierre Bienvenu Ad. E., Canada
Editor – James Rogers, London
Assistant editor – Tim Robbins, Singapore

Editorial

Welcome to issue 6 of Norton Rose Fulbright's *International arbitration report*.

In this issue, we provide an overview of the investment provisions of the Trans-Pacific Partnership, including its dispute settlement mechanisms, and discuss the early days of the Hague Convention on Choice of Court Agreements. We have practical guides to the English law of privilege, and on the treatment of the principles of *res judicata* and issue estoppel in arbitration.

We interview Richard Naimark, Senior Vice President at ICDR, discuss the establishment of a speciality court in Atlanta for arbitration matters, and explore the opening of foreign arbitral institutions in China. Case law updates discuss the 'Ten Commandments' for the enforcement of arbitration awards set out by the Hong Kong Court of First Instance in *KB v S*; the Federal Court of Australia's dismissal of a challenge to the appointment of arbitrators in *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd*; the Swiss Supreme Court's treatment of using the 'group of companies' doctrine to extend an arbitration agreement; and the tribunal's decision to decline jurisdiction in the treaty case of *Philip Morris v Australia*.

Following up from our series on mediation, this issue features a Q&A on the use of 'med-arb' procedure, and an overview of the developments for the enforcement of international mediated settlement agreements.

Mark Baker and Pierre Bienvenu Ad. E.
Co-heads, International arbitration
Norton Rose Fulbright

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About the cover

Our front cover for this issue depicts a statue of Confucius, an influential Chinese teacher and philosopher, at the Confucian Temple in Shanghai, China, host city of the 19th Annual IBA International Arbitration Day held in March 2016.

Q&A with Richard Naimark

Senior Vice President, ICDR Global Operations

Mark Baker and Mark Stadnyk

We speak with Richard Naimark, Senior Vice President of ICDR Global Operations, about the ICDR's extensive presence in Latin America, its efforts to address party and counsel misbehavior, and its unique experience with implementing and managing emergency arbitrators.

01 | Party autonomy is the ICDR's guiding principle. How does that work in practice in your approach to arbitration?

Party autonomy is the guiding principle of the ICDR. We aim to engage the parties at an early stage and to involve them as much as possible in the procedural aspects of the arbitration. This emphasis leads to a case management strategy and guidance process that seeks to have the parties participate actively and to express their needs and wants. Of course, we recognize that cases would not frequently make it to us unless the parties diverged in some respects. For this reason, the ICDR provides a strong framework for those who stray – for errant participants or those who flat out refuse to participate. This framework provides good tools for arbitrators and for administrators. Other than that, we emphasize practical and pragmatic solutions, with a heavy emphasis on expedition.

02 | The ICDR now has US offices in Houston and Miami. How about Latin America? Should arbitral institutions have a Latin American presence?

It is important for us to have a Latin American presence. After all, this is the hemisphere of our home office, in New York. We recognize the significant demand for arbitration in the region: many local countries' economies have had recent booms, like Brazil's, and the pre-existing arbitration infrastructure is very good in many of these locations. We have a strong relationship with the chambers of commerce in many of these countries, like Colombia and Brazil. Luis Martinez, one of our Vice Presidents, spends a significant amount of time in the region. There are many different ways to have a presence in Latin America; we seek to be a resource for practitioners and users in varied ways, according to local demand and needs.

The uptick in Latin American arbitration and mediation cases has been modest, rather than explosive. Certainly, the interest among practitioners and users has been explosive – but actual cases and filings have increased rather steadily over the past five or six years.

The ICDR has developed Canada-specific dispute resolution procedures but we have no plans at the moment to develop rules specifically for Latin America. That being said, we are frequently asked to cooperate, advise or otherwise strengthen our ties with local arbitration groups, such as chambers of commerce. Our cooperative projects with Amcham-Brasil, the Chamber (CCB) in Bogotá and the Brazil–Canada Chamber of Commerce over the past few years come to mind. We make a sustained, careful effort to acclimatize to each country, and seek to make long-term commitments. The high and consistent demand for our presence and advice, formal and informal, reflects the ICDR's approach and stature in the region.

03 | What is the ICDR doing to ensure that awards are delivered expeditiously?

Under the AAA's domestic commercial rules, there is a 30-day deadline. Previously, the ICDR rules imposed a 'soft' deadline. Under the revised rules, we imposed a hard deadline of 60 days from the date of the closing of the hearing (article 30). It is extremely rare in the ICDR process for arbitrators to go beyond that hard deadline.

04 | What can be done to encourage more diversity in arbitration appointments by arbitral institutions? By parties?

Many international arbitral institutions, including ICDR, typically do not have a lot of control over individual appointments. In the ICDR procedures, we do very few direct administrative appointments of arbitrators. We emphasize the list method: we provide lists of arbitrators to the parties from which to select arbitrators. We encourage the parties to agree on somebody from the list, even if it means going to a second or third list of candidates. The ICDR has an active work group focusing on the issue of diversity. Encouraging diversity in our activities is an official focus of the AAA and the ICDR. We seek to give talented individuals exposure in articles and conferences. We also aim to make sure that the arbitrator candidates on the lists that we propose to the parties are truly competent. Everybody shares this responsibility to encourage diversity.

05 | Thinking about the ethics of counsel conduct in international arbitration, does the ICDR plan to issue any guidelines on the conduct of party representatives or parties?

Unethical behavior does not affect many cases, but is present enough to raise an eyebrow. From my standpoint, I do not see more frequent abhorrent behavior by counsel today – but certainly the magnitude of unethical behavior has increased recently. I wouldn't say that unethical behavior is a widespread problem.

When these problems arise, it isn't just counsel, but the parties themselves that may be the primary instigators. Most cases of counsel misbehavior have, in my experience, been ultimately

problems with the parties those counsel are representing. For this reason, the ICDR is developing a code of conduct directed to counsel and to the parties themselves (under the ICDR Arbitration Rules, article 16). The primary way in which this code of conduct will be helpful is not in stopping abhorrent behavior but in empowering arbitrators with the authority to address problems, in a clear framework.

As for the substance of this code, everything is being considered. All types of remedies, including cost-shifting, are being reviewed, but we don't anticipate mandating any particular remedy or result. Lawyers too frequently think that problems can be anticipated and drafted away with sufficiently specific provisions. In my experience, it is better to set a clear guiding principle or principles and defined framework and leave implementation to the arbitrators. We do not want to attempt to prejudge the issues for the arbitrators.

06 | What has the ICDR's experience been with emergency arbitrators? What learning is available for parties, and for institutions that have recently introduced emergency provisions?

I would say that the emergency arbitrator was a radical proposal, implemented conservatively.

The ICDR was the first – in 2006 – to provide an opt-out emergency arbitrator procedure, rather than one the parties needed to opt into. This significantly predates many other institutions' emergency arbitrator provisions.

The ICDR always aims to be practical and pragmatic. In discussions before we introduced the emergency arbitrator provisions, our overriding concern was whether this would be a tool that attorneys and their clients would realistically use. At the time, emergency arbitrators (of the type we were proposing) were unheard of in international arbitration. The ICDR was not afraid to take a bold position on this, as long as it would be useful to parties. For us, the key value was that parties would get a one-stop shop. Getting a dispute adjudicated partly in arbitration and partly in, say, national courts, increases costs and promotes inefficiencies. The emergency arbitrator allows parties to address all these issues in one process.

The emergency arbitrator rules have been an amazing success, and we get rave reviews from parties. We have had 55 emergency arbitrator matters to date. All but one was completed within three weeks or less. One went longer with party consent. The attorneys have embraced it, and other arbitral institutions have begun to introduce it into their rules.

Drawing on the ICDR's experience with emergency arbitrators, speed is all-important, so emergency arbitrators must be appointed by the institution. There is a need to canvass candidates for arbitrator quickly and maintain quality control over who is appointed. The ICDR has a pool of experienced and thoughtful emergency arbitrators. Sometimes it takes many calls by the ICDR to get an emergency arbitrator in place. The arbitrator candidates take their responsibilities seriously, and will typically decline if they are not immediately available. We ensure that the emergency arbitrator holds a meeting or conference call within 48 hours of their appointment.

As for enforcement, I am aware of one case in Los Angeles in which an emergency arbitrator's order or award was challenged before a court and that challenge denied. Ultimately, though, attorneys have embraced the emergency arbitrator procedure, in part because awards or orders can be modified or replaced before the full arbitral tribunal. There are safeguards, of course – the arbitrators can require bonds or other security from the moving party.

The emergency arbitrator provisions are generally very well received. We do not anticipate making or needing any revisions, though we occasionally review the time limits in the procedure, while recognizing that these are often the best feature.

07 | If you could give advice to lawyers starting out as arbitrators, what would it be?

If you are really serious as a young talent with a future as a neutral, you have to be patient and realistic and able to take a long-term view. It is important to build a strong foundation and career demonstrating your excellence and integrity. By far the most important attribute is your listening skills. Party feedback frequently focuses on this one characteristic.

Mark Baker is a partner in our Houston office and global co-head of international arbitration, and Mark Stadnyk is an associate in our New York office.

The Trans-Pacific Partnership Agreement

Chapter 9: the Investment Chapter

Martin Valasek and Katie Chung

The Trans-Pacific Partnership Agreement (TPP) is a comprehensive, multilateral free trade agreement (FTA) among 12 states representing nearly a third of the world's trade. Chapter 9, the investment chapter of the TPP, tightens standards of investment protections, sets out the role of the TPP Commission and adopts investor-state arbitration. Although the Investment Chapter alludes to the possibility of an appellate mechanism, none has been specified in the TPP.

The TPP is a 30-chapter, 6,000-page FTA among 12 states bordering both sides of the Pacific that represents nearly 40 per cent of the world's GDP and almost a third of the world's trade. The TPP builds on the 2006 Trans-Pacific Strategic Economic Partnership Agreement between Brunei, Chile, New Zealand and Singapore, expanding that to include Australia, Canada, Japan, Malaysia, Mexico, Peru, the United States of America and Vietnam (TPP States).

Significant milestones of the TPP thus far are as follows

- Text of the TPP finalized on October 5, 2015
- TPP formally signed on February 4, 2016
- Ratification of the TPP through domestic law within two years from the date of signing to bring it into force
- TPP may also be brought into force after two years if six signatories representing at least 85 per cent of the combined GDP of the TPP States ratify the TPP.

This article briefly reviews the some of the key features of the Investment Chapter, namely the substantive protections and provisions on investor-State dispute settlement (ISDS).

Substantive protections in the TPP

The TPP represents a departure from the typical bilateral investment treaty (BIT) of the past. Taking its cue from modern treaty-making practice (notably from the US and Canada), the TPP tightens the applicable substantive standards to create greater certainty for State parties and qualified investors.

Definition of 'Investment'

(Article 9.1)

'Every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'.

Article 9.1 includes examples of what constitutes an investment, and expressly excludes 'an order or judgment'. This definition is broadly consistent with the definition of 'investment' of the tribunal in *Salini v Morocco* (Decision on Jurisdiction, July 23, 2001, [56]).

Definition of customary international law

(Annex 9-A)

'Customary international law' is 'a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens'.

Minimum standard of treatment

(Article 9.6.2)

Fair and equitable treatment includes 'the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world'.

This likely acknowledges recent cases involving denial of justice e.g. *Saipem S.p.A v The People's Republic of Bangladesh* (ICSID Case No. ARB/05/07, Award dated June 30, 2009), where the Bangladeshi courts failed to enforce international commercial arbitral awards, and *White Industries Australia Limited v Republic of India*, where the Tribunal found that India breached an obligation to provide 'effective means of asserting claims and enforcing rights' because White Industries faced severe delay in enforcement of an award in the Indian courts (Final Award dated November 30, 2009, [11.1.5]).

Full protection and security is confined to 'police protection required under customary international law', and excludes more expansive definitions in past ISDS cases (e.g. *Azurix v Argentina*, Award, July 14, 2006).

Direct or indirect expropriation

(Article 9.7)

Expropriation of a 'covered investment' is permitted only if it is: for a public purpose; implemented in a non-discriminatory manner; accompanied by payment of prompt, adequate and effective compensation; and effected in accordance with due process of law.

A non-discriminatory regulatory action by any TPP State that is designed and applied to protect legitimate public welfare objectives, e.g. public health, safety and the environment, does not constitute indirect expropriation except in 'rare circumstances'. A 'rare circumstance' is not defined in the Investment Chapter.

The TPP clarifies that 'a Party's decision not to issue, renew or maintain a subsidy or grant, or decision to modify or reduce a subsidy or grant' does not itself constitute an expropriation (Article 9.7.6).

Non-conforming measures

(Article 9.11)

The TPP States may maintain 'non-conforming measures' which are not subject to the TPP national treatment and most-favoured-nation treatment standards.

Regulatory objectives

(Article 9.15)

The TPP States may adopt measures to ensure that investment activity in their territories is undertaken in a manner sensitive to their environmental, health or other regulatory objectives, provided that such measures are not otherwise inconsistent with the Investment Chapter.

Parallel claims and forum shopping

(Article 9.20)

The Investment Chapter attempts to preclude parallel claims and forum shopping. A claimant needs to provide a written waiver (together with the notice of arbitration) of its right to continue or initiate any proceedings before domestic courts or under other dispute settlement procedures concerning events for which the claimant is commencing arbitration for breach of the TPP.

This does not prevent an affiliate of the claimant from commencing action under a different treaty based on the same events and affecting the same investment.

TPP Commission

(Article 27.1)

The TPP Commission comprises ministers and senior officials of the TPP States and is empowered to seek the advice of non-governmental persons or groups. One key function of the Commission is to 'issue interpretations of the provisions of the Agreement' (27.2(f)). An arbitral tribunal is required to render decisions that are consistent with these interpretations.

What remains to be seen is whether the TPP Commission will promulgate such interpretations of the TPP in accordance with international investment law or public international law.

Investor-State Dispute Settlement (ISDS) in the TPP

(Chapter 9 Section B)

ISDS in the Investment Chapter includes

- Pre-arbitral negotiations and consultations between a claimant and State party
- Choice of procedural rules (ICSID Rules, ICSID Additional Facility Rules, UNCITRAL Rules or other institutional rules by agreement of the parties)
- Consolidation of claims
- Transparency provisions, e.g. documents generated in an arbitration are available in the public domain, open hearings
- Interim measures of protection
- The option for a respondent to raise preliminary objections, e.g. that a claim is manifestly without legal merit.

The TPP alludes to the possible development of an 'appellate mechanism' under 'other institutional arrangements'. The EU-Singapore FTA alludes to an appellate mechanism but envisages that an appeal could only arise on a point of law.

By contrast, the current draft of the Transatlantic Trade and Investment Partnership (TTIP) provides for a unique two-tier arbitration mechanism consisting of a first instance tribunal and an appellate tribunal. Each tribunal would have three members selected from a roster of 'Judges' or 'Members'.[1] An appeal of an award rendered by the first instance tribunal may be brought within 90 days of its issuance on the basis of, inter alia, an error of law or manifest error of fact. This two-tier arbitration mechanism has been adopted in the Canada-EU FTA (CETA), as seen in the revised text published on February 29, 2016.

Trends to watch

Given that the majority of TPP States are from the Asia Pacific, the TPP is likely to increase the involvement of APAC parties in investment arbitration.

Once in force, the TPP may also end up trumping the North American FTA (NAFTA) as Canada, Mexico and the US are TPP States.

Currently, there are at least 35 overlapping treaties among the TPP States, so qualified investors could look to use related entities as claimant to bring claims under different treaties for different breaches arising out of the same investment.

While the EU and Canada have agreed to an appellate mechanism in CETA, this may depend on whether the EU and the US agree to an appellate mechanism in the TTIP.

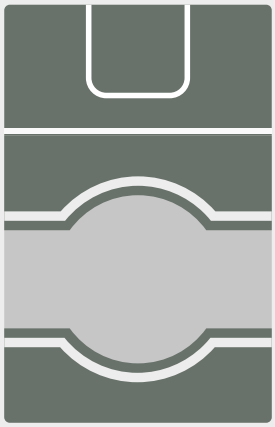
Martin Valasek is a partner in our Montréal office and Katie Chung is a senior associate in our Singapore office.

1 Article 9.2 TTIP provides that the Tribunal of First Instance will have 15 judges – five judges shall be EU nationals, five judges shall be US nationals and five judges shall be nationals of third countries. Under Article 10.2, the Appeal Tribunal has six Members – two Members shall be EU nationals, two Members shall be US nationals and two Members shall be nationals of third countries.

Philip Morris Asia v Australia

Tobacco plain packaging BIT dispute

Guy Spooner and Samuel Leong



Philip Morris Asia's claim against Australia concerning Australia's plain packaging laws has come to an end. The tribunal ruled (in December 2015) that it had no jurisdiction to decide the claim, which was filed in 2011, under the 1993 HK–Australia BIT.

The ruling

On December 17, 2015, the arbitral tribunal constituted to decide Philip Morris's claim against Australia concerning Australia's plain packaging laws (enacted in 2011) ruled that it had no jurisdiction to decide Philip Morris Asia Limited's claim under the Hong Kong–Australia BIT (the Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments of 1993). The tribunal was unanimous in upholding Australia's jurisdictional challenge.

Regulation of tobacco packaging

This decision forms the latest development in a series of legal proceedings, in domestic courts and before international tribunals, that have been commenced by tobacco companies and other countries in response to measures taken by governments to regulate the appearance of packaging used to contain tobacco products. These measures restrict the ability of tobacco companies to differentiate their brands in the design of the packaging. Australia, by introducing plain packaging legislation, is the first country to standardize the appearance of all cigarette packaging. All cigarettes sold in Australia are now required to be packaged in standard-sized boxes with an unappealing colour and look (by design); tobacco companies operating in Australia can no longer include their logos or marketing content (apart from the brand name and variant names, in standard font) on their products.

The tribunal

The tribunal constituted to decide Philip Morris' claim comprised

1 Professor Karl-Heinz Böckstiegel (presiding arbitrator, appointed by the Secretary-General of the Permanent Court of Arbitration)

2 Professor Gabrielle Kaufmann-Kohler (appointed by Philip Morris Asia Limited)

3 Professor Donald M McRae (appointed by Australia).

Redaction of confidential information

As the Permanent Court of Arbitration, the arbitral institution administering the arbitration, has not yet published the award, the full rationale behind the tribunal's decision has only been communicated to the parties. Due to the sensitive nature of the parties' submissions, the tribunal had issued procedural directions permitting the parties to request the redaction of confidential information from any award, decision or order. This procedure for the redaction of the tribunal's award has been triggered and is ongoing at the time of writing.

The 2011 notice of arbitration

Philip Morris Asia Limited is a company incorporated in Hong Kong. In its Notice of Arbitration dated November 21, 2011, it asserted that Australia had violated its intellectual property rights, as an investor in Australia, through the enactment and enforcement of the Tobacco Plain Packaging Act 2011 (Cth). Philip Morris Asia argued that by enacting and enforcing this Act, Australia breached its obligations under the HK–Australia BIT in two ways: by failing to provide Philip Morris Asia with the investment protections guaranteed under the treaty; and by depriving Philip Morris Asia of its investments, including the intellectual property and goodwill relating to Philip Morris's tobacco products.

Australia's response

Australia argued, in its Response to the Notice of Arbitration dated December 21, 2011, that Philip Morris Asia's claim did not satisfy the jurisdictional conditions for the arbitral tribunal to exercise jurisdiction under the HK–Australia BIT. Australia also denied that it had breached any substantive obligation under the treaty by enacting the Tobacco Plain Packaging Act.

Australia contended that at the time that the dispute between the parties arose, Philip Morris Asia did not own an interest in the investments that it claims are covered by the investor protection provisions of the HK–Australia BIT.

Australia relied on the fact that Philip Morris Asia only acquired ownership of the relevant investments in February 2011, i.e. almost a year after Australia's April 2010 announcement of its decision to introduce plain packaging legislation.

Australia also asserted, as a separate argument, that the HK–Australia BIT only accorded protection to investments that had been 'admitted' by the host State 'subject to its law and investment policies applicable from time to time' (article 1(e)). Australia argued that it was up to Philip Morris Asia to satisfy the tribunal that the investments which formed the subject of the dispute met the definition of an 'investment' covered under the BIT.

Australia had also requested that its jurisdictional objections and arguments be heard and determined at a preliminary phase, before any ruling by the tribunal on the merits of Philip Morris Asia's claim. This request appears to have led to the award, albeit more than four years after the commencement of the arbitration.

The question of balance

It is now clear that these arbitral proceedings will not address the thorny issue of the 'balance' to be struck between the rights and expectations of a foreign investor and the right of a State to exercise its legislative and regulatory powers without incurring any obligation to pay compensation for the consequences.

The need for treaty planning

In light of the emphasis placed on the timing of Philip Morris Asia's acquisition of the relevant investments in Australia's arguments on jurisdiction, the award when published will likely reinforce the importance of early 'treaty planning', i.e. conducting an audit of the scope and nature of the treaty protections afforded to foreign investments, at an early stage.

This article was finalized for print before the Permanent Court of Arbitration released a redacted version of the award on May 16, 2016.

Guy Spooner is a partner and Samuel Leong is an associate in the Singapore office of Norton Rose Fulbright.

Enforcement of mediated settlement agreements

Time for an international standard

KC Lye and Tim Robbins

The current methods of enforcement for international mediated settlement agreements – by way of litigation or arbitration; enabling legislation; and consent awards – are considered inadequate. To address this matter, UNCITRAL has undertaken work on creating a new legal instrument for the expedited enforcement of such agreements.

In the past 20 years, mediation has become a common way to resolve international commercial disputes. There are now a variety of international mediation centres, such as the ICC International Centre for ADR and the Singapore International Mediation Centre.

An enduring challenge to mediation as a means of settling an international commercial dispute is that the result of a successful mediation is an international mediated settlement agreement (or IMSA), which traditionally has no better legal status than any other contract. There is currently no mechanism for IMSAs to be directly enforced internationally. This means that if one of the parties to an IMSA refuses to honour the parties' agreement, the other party will have to rely on one of the available methods, which are discussed below.

Current IMSA enforcement

Litigation or arbitration

Traditionally, if one party to an IMSA refuses to honour the parties' agreement, the other party has to sue on the settlement agreement, whether through court or arbitration. This undermines the benefits behind the original reason to go through mediation. Enforcement proceedings may well be simplified (because the dispute has been narrowed through the IMSA, as opposed to re-litigating on the terms of the original dispute), but additional time and costs will be incurred, perhaps substantially so. In addition, if a party is seeking to enforce an IMSA through domestic litigation, enforcement options outside the home jurisdiction will be limited (in the same way as domestic judgments).

Enabling legislation granting IMSAs award/ judgment status

Certain states have enacted legislation that provides for an expedited process whereby settlement agreements are converted into enforceable judgments or arbitral awards. The Swiss civil procedure code (article 217) and the Italian decree on mediation in civil and commercial disputes (28/2010) are both good examples of this type of enabling legislation. Whether the law in question covers IMSAs will depend very much on the particular legislation.

Where an IMSA can be converted into a judgment, this method faces the same difficulties around enforcement by parties outside the home jurisdiction.

A technical issue arises in legislation that converts an IMSA into an arbitral award (usually by the appointment of an arbitrator to endorse the IMSA). Most commentators agree that the New York Convention requires that a dispute exists at the time of appointment; if, therefore, an arbitrator is appointed after the settlement, the converted IMSA will likely not be enforceable as an arbitral award under the New York Convention.

> It is time to dispense with the legal fiction which has been created between consent awards issued after – as opposed to before – the commencement of an arbitration.

Consent awards

The consent award method involves reaching a settlement after the commencement of arbitration proceedings and requesting that the arbitrator record the parties' IMSA as a consent award. As discussed above, consent awards are generally regarded as enforceable under the New York Convention. These types of awards are expressly referred to in the Model Law (article 30) and in most arbitration institutions' rules.

This solution does little to assist parties that did not consider commencing arbitration before reaching a mediated settlement.

Arbitration–mediation–arbitration

One cannot help but question whether there is any legitimate reason to distinguish between consent awards on the basis of whether the arbitrator was appointed before or after the IMSA was agreed.

However, to avoid this issue, parties considering mediation should first commence arbitration, after which they can immediately suspend the arbitration in favour of mediation. Where the mediation is successful, the IMSA can then be recorded as an enforceable consent award. Should the mediation fail, the parties can resume the arbitration. This method is the rationale behind provisions such as SIAC's Arb-Med-Arb protocol.

This approach may attract some criticism as an attempt to legitimize what would otherwise be an 'unenforceable' IMSA, but it does comply with the technical requirements of the New York Convention.

Future IMSA enforcement

A 'New York Convention' for IMSAs

UNCITRAL is preparing an international instrument for the enforcement of IMSAs. This process is ongoing, with no clear idea yet as to what form such an instrument might take.

What has become clear is that the treatment and enforceability of IMSAs should not focus on the timing of the appointment of an arbitrator to bestow award status on the settlement agreement. It is time to dispense with the legal fiction which has been created between consent awards issued after – as opposed to before – the commencement of an arbitration. The terms of such agreements are primarily entered into without the supervision of the tribunal, and the tribunal has little or no input into the substance and form of the settlement agreement. The timing of the appointment of the tribunal therefore has limited effect on the content of an IMSA.

Perhaps the real question that we need to ask is this: do we want an international mechanism for the expedited enforcement of IMSAs? If the answer is yes, then we must determine what formal requirements should be in place before expedited enforcement can be granted.

Most of the participants in the UNCITRAL working group appear to favour an international mechanism for IMSAs. This view is not universal: some participants have expressed concern that there is no fundamental difference between agreements which are the outcome of negotiation and agreements resulting from mediation or conciliation. In other words, the legal status of an IMSA is no different from any other contract and, therefore, it is questionable whether such contracts should be granted special status.

Significant work remains to be done by the working group to agree a framework, starting with basic concepts: determining the scope and nature of agreements to be covered; developing a functional definition of 'international commercial mediation/conciliation'; setting out form and substance requirements for IMSAs; setting out requirements of due process. Even when the committee reaches consensus, many barriers still exist before a convention (or other instrument) is drafted and, eventually, ratified.

Regardless of the results of the UNCITRAL process, it is clear that the current avenues for enforcing IMSAs are inadequate, and there is interest for a more effective and internationally cohesive method of recognizing such agreements abroad. If, when and how this will occur – and how such an instrument would co-exist with other international dispute settlement mechanisms such as arbitration – will only be determined in due course.

KC Lye is a partner and Tim Robbins is an associate in the Singapore office of Norton Rose Fulbright.

The med–arb Q&A

The Hong Kong take on this PRC phenomenon

Philip Nunn and Matthew Townsend

For clients whose commercial contract includes a Chinese element or whose dispute resolution clause specifies China-seated arbitration – our Hong Kong arbitration lawyers share their practical experience of 'mediation-arbitration', a form of dispute resolution growing in popularity in the People's Republic of China.

01 | What is med-arb?

Med-arb is the process by which an arbitrator acts as mediator in arbitral proceedings. A mediator-arbitrator moves between the adjudicative role that he/she plays in the arbitration (reaching determinations based upon the facts and the law) and the conciliatory role of mediator (assisting the parties towards settlement based on their respective bargaining positions). If the mediation fails, the arbitrator switches roles, putting on her adjudicative hat, and may render a binding decision on the merits.

02 | When might med–arb arise?

Med–arb can be initiated by the parties or by the arbitral tribunal. It is usually commenced at an early stage of proceedings, but this is not always the case – we have participated in med-arb procedures which were not commenced until the oral hearing.

Many common law lawyers view med-arb critically, so tribunals consisting mainly of common law lawyers are unlikely to prefer med–arb.

Med-arb procedures are most common in arbitrations in the People's Republic of China, or in arbitrations that have a significant PRC element.

03 | What are the advantages of med–arb?

Med-arb can be an effective means of resolving disputes. It allows an arbitrator to render an early evaluation of the parties' cases, and that can impel parties to reconsider their bargaining positions, making settlement a possibility.

There are also potential cost savings in med–arb. There is no duplication of time and cost in bringing different individuals up to speed with the legal and factual background.

The terms of a mediated settlement may be readily rendered as an arbitration award. The award will in turn benefit from the cross-border enforcement mechanism for these awards (arising from the New York Convention).

> Critics of med–arb see a potential tension arising from a single person taking both an arbitrator's and a mediator's role. This applies particularly to the treatment of confidential and privileged information in the med–arb process.

04 | How is the mediation part of med–arb conducted?

There are two approaches. One is evaluative: a mediator appraises each party's case and directs them towards settlement. The other is facilitative: a mediator facilitates a dialogue but offers no evaluation.

PRC arbitrators tend to take the former approach, which is often effective if a bit rough and ready.

The evaluative mediation style can be a two-edged sword. Its power arises from the fact that the arbitrator has given an advance warning of his/her determination should the mediation fail. This puts the parties under pressure to change their bargaining positions. The risk is that the arbitrator, in making an evaluation, will prompt the party to make greater efforts to defend itself, so prolonging and complicating the mediation and the subsequent arbitration. A further, serious, concern is that, by consciously favoring one party's case over another before a full hearing, the tribunal may by some be seen to be prejudging the parties' cases, compromising its neutrality and even giving rise to challenges around its independence and impartiality.

05 | Who sets the med–arb procedure?

Parties are free to set their own med-arb procedure, but in practice (at least in the PRC) they defer to the tribunal on the conduct of any mediation–arbitration. They may also be subject to the rules of an arbitration institution and the applicable law. For instance, if the proceedings are in Hong Kong the mediator has a duty to disclose to all parties any confidential information obtained during the mediation which

he/she considers material to the arbitral proceedings. No equivalent requirements apply in (for example) Singapore or China.

Non-compliance may jeopardize the enforceability of a subsequent arbitration award. Parties should check on the required procedure in the seat of the arbitration.

06 | Why is med–arb controversial?

Critics of med–arb see a potential tension arising from a single person taking both an arbitrator's and a mediator's role. This applies particularly to the treatment of confidential and privileged information in the med–arb process. The mediator-arbitrator may, during the mediation phase, be exposed to information, such as a party's bottom-line negotiating position or prejudicial allegations made privately regarding the other parties' conduct or motivations. If mediation fails, the information or allegations might influence the arbitrator's determination. This unease persists even if the arbitrator is instructed to disregard the prejudicial information in question – she may be unable to do so.

07 | Are there alternatives to med–arb?

Med-arb is voluntary, not compulsory. A party may simply refuse to participate. Instead, it may choose to press ahead with the arbitration or it may propose mediation by an independent third party. This latter option is the usual method of mediating in international arbitration proceedings. As the mediator is not a member of the tribunal, the conciliatory mediation process is kept separate and distinct from the adjudicative arbitration process; and, since the mediation is confidential, prejudicial information revealed may not be divulged in the arbitration.

08 | What can I do to protect myself from the risks of med–arb?

Parties concerned over the risks of med–arb can and probably should insist upon an independent mediator who is not a member of the tribunal.

There is scope for parties to include safeguards in the process. In practice, however, a tribunal will push hard to conduct the form of med–arb it prefers: the parties will have limited scope to introduce safeguards.

What form might these safeguards take? Parties concerned about the possibility of prejudicial statements being made in private caucus sessions may agree that all communications between the arbitrators and the parties shall be made collectively, not separately. This will allow parties to reply to any allegations. Parties may also reach written agreement on the treatment of information learned in confidence by the arbitrator during the mediation phase, requiring disclosure in certain instances.

09 | Should I agree to med–arb?

Parties should embark on any med–arb procedure with open eyes. Third-party mediation is a better alternative in most instances, especially where the dispute is high-value. This offers many of the benefits of med–arb, but without the concerns over prejudice and confidentiality.

In our experience an evaluative med–arb is best suited to a dispute where the amount in dispute is low and where the costs of proceeding with a full arbitration may be out of all proportion to the benefits of proceeding with the arbitration.

Philip Nunn is a consultant and Matthew Townsend is an associate in the Hong Kong office of Norton Rose Fulbright.

The Hague Convention on Choice of Court Agreements

Kyle Kashuba and Pedro Saghy

The Hague Convention on Choice of Court Agreements might achieve for litigation what the New York Convention managed for arbitration.

The Hague Convention on Choice of Court Agreements (30 June 2005) entered into force October 1, 2015.

Some observers say that the pro-arbitration trend in international commercial transactions could shift in favor of litigation as a result of the coming into force last year of a treaty that makes it easier to enforce choice-of-court agreements (or 'forum selection clauses') and foreign court judgments. The Hague Convention on Choice of Court Agreements aims to create a system of recognition of court decisions with the same level of predictability and enforceability as arbitral awards under the New York Convention.

Could the Hague Convention on Choice of Court Agreements achieve for litigation what the New York Convention has secured for arbitration?

The New York Convention v the Hague Convention

The 1958 New York Convention has been in force for more than 55 years, in which time it has secured 156 ratifications and seen the publication of influential academic materials and a growing body of case law from across jurisdictions, enabling a degree of common interpretation of the meaning of its 16 articles.

The New York Convention lays down two fundamental provisions. The first provides that 'each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any difference'. The second states that 'each Contracting State shall recognize arbitral awards as binding and enforce them'. In practice, this means that when the parties agree to resolve their dispute through arbitration, they know that the subsequent award will be almost universally enforceable. Where any party elects to ignore the arbitration agreement or avoid the consequences of the award, the affected party can also submit a request to the tribunal of the contracting state to refer the parties to arbitration and/or enforce the award (articles 2 and 3). The Hague Convention on Choice of Court Agreements contains similar provisions regarding the recognition of choice of court agreements and the resulting judgments from such courts.

The Hague Convention on Choice of Court Agreements has to date been ratified only by Mexico and the European Union (excluding Denmark). It contains 34 articles, so one cannot presume the same level of understanding as now exists around the New York Convention (which contains half as many articles). However, the Hague Convention on Choice of Court Agreements was created by the Hague Conference on Private International Law – an organization founded in 1893 and which, in 2015, had 79 countries and the European Union as members – so is clearly an important instrument to be factored into strategic planning for international disputes.

Client resource

2015 Litigation Trends: annual survey

Norton Rose Fulbright's 2015 survey polled more than 800 corporate counsel representing companies across 26 countries on disputes-related issues and concerns. Around 25 per cent of the individuals polled believe that the number of legal disputes their company will face in the next 12 months will increase. 'Given the choice, nearly half of respondents prefer to use arbitration as a means of resolving disputes, with one-quarter preferring litigation and about the same proportion saying 'it depends'.'

Kyle Kashuba is a partner in our Calgary office and Pedro Saghy is a principal in our Caracas office.

Hong Kong

Ten enforcement principles

James Rogers and Matthew Townsend

In the 2015 case of *KB v S*, Hong Kong strengthened its reputation as a pro-arbitration judiciary, by setting out ten principles underpinning the enforcement of arbitral awards.

The Hong Kong courts are known for their pro-arbitration approach. In the 2015 case *KB v S and Others* [2015] HKCFI 1787, Chan J laid down ten principles summarizing the Hong Kong judiciary's attitude to the enforcement of arbitration agreements and awards. We expect this case – and these principles – to be much cited in the future, particularly as these same principles will apply in applications to set aside arbitral awards (*cf China Solar Power (Holdings) Ltd v ULVAC Inc* [2015] HKEC 2559).

Hong Kong's 'Ten Commandments' of enforcement

1 'The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards.'

2 'Under the Arbitration Ordinance, the court should interfere in the arbitration of the dispute only as expressly provided for in the Ordinance'.

3 'The parties to a dispute should be free to agree on how their dispute should be resolved' although this freedom should be subject to 'safeguards that are necessary in the public interest'.

4 The '[e]nforcement of arbitral awards should be "almost a matter of administrative procedure" and the courts should be "as mechanistic as possible"'.

(cf the 2011 *PetroChina* decision [2011] 4 HKLRD 604 and the approach taken by the Hong Kong Court of Appeal)

5 'The party opposing enforcement has to show a real risk of prejudice and that its rights are shown to have been violated in a material way'.

(cf the 2012 *Grand Pacific Court of Appeal* decision [2012] 4 HKLRD 1 (CA); in *Grand Pacific*, the Court of Appeal reinstated an arbitral award that had previously been set aside on the basis of perceived procedural impropriety, on the grounds that the alleged violations were not sufficiently important to justify such steps)

6 'The court is concerned with the structural integrity of the arbitration proceedings' and so 'the conduct complained of 'must be serious, even egregious', before the court would find that there was an error sufficiently serious so as to have undermined due process'.

(cf the 2012 *Grand Pacific Court of Appeal* decision)

7 'In considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction.'

8 'Failure to make prompt objection to the Tribunal or the supervisory court may constitute estoppel or want of *bona fide*'.

(cf the 1999 *Hebei Import* decision (1999) 2 HKCFAR 111, in which the Court of Final Appeal upheld enforcement of an award, finding that a party who wishes to rely on non-compliance with procedural rules should do so promptly and not proceed with the arbitration regardless, 'keeping the point up his sleeve for later use')

9 'Even if sufficient grounds are made out either to refuse enforcement or to set aside an arbitral award, the court has a residual discretion and may nevertheless enforce the award despite the proven existence of a valid ground.'

(cf the 1999 *Hebei Import* decision)

10 The parties to the arbitration have a duty of good faith.

(cf the 1999 *Hebei Import* decision)

James Rogers is a partner in our London office and Matthew Townsend is an associate in our Hong Kong office.

Non-signatories to arbitration agreements

'Group of companies' beware

Hazel Brasington and Andrey Panov

Where a non-signatory is involved in performing a contract it may be bound by the arbitration agreement. 'Good faith' will play a role, as case law concerning the 'group of companies' doctrine reveals. The solution is to be absolutely clear in your arbitration agreement as to whether you wish it to extend to non-signatories involved in a project.

Introduction

Parties' consent is the foundation of any international arbitration. Usually, this consent is expressed in an arbitration agreement, binding the formal signatories to the contract.

There are circumstances where non-signatories to the original agreement may be bound by it and benefit from it.

The New York Convention states that international arbitration agreements are binding on the parties involved (article II). It provides no guidance as to how those parties are to be determined. National laws are also almost universally silent on this matter. The non-signatory position is therefore developed through case law across jurisdictions: this can cause difficulties when drafting arbitration clauses.

The arbitration clause is binding on the basis of assignment, succession or agency: no surprises there. In certain circumstances, however, the court or tribunal may extend the arbitration clause to include a party other than a signatory to the arbitration clause, in particular if that party has corporate ties with the original signatory.

'Group of companies' and 'piercing the corporate veil'

Two well-known doctrines which allow extension of the arbitration agreements to non-signatories are 'group of companies' and 'piercing the corporate veil'. These two theories are often mixed up.

Essentially, both are justified by considerations of fairness and good faith, both of these general principles of contract law (although these general principles are not applicable under English law, they are relevant in Australia and many civil law jurisdictions). Veil piercing focuses on fraud or abuse of right where the real party is shielded from liability by the corporate structure. The 'group of companies' doctrine addresses the (presumed) intention of the parties to arbitrate.

Drafting the arbitration agreement

It may not be unusual for companies within the same group to be involved in carrying out various parts of a project, even without contracts formally setting out their roles. If there is no wish to allow extension of an arbitration agreement to non-signatories involved in a project, this has to be very clearly indicated in the agreement. Companies may otherwise find themselves drawn into arbitration proceedings with related companies and find that the circumstances justify that. In order to ensure the effectiveness of corporate structures created with the intention of allocating profit, cost and risk between different entities, companies will need to review all transactions and associated arbitration agreements to check where and how best to put the necessary express provisions in place.

The 'group of companies' doctrine addresses the (presumed) intention of the parties to arbitrate.

Case law on 'group of companies'

The Dow Chemical Company and others v ISOVER Saint Gobain

A prominent case covering 'group of companies' is the *Dow Chemical v ISOVER* ICC arbitration.

The dispute arose out of several contracts executed by various Dow Chemical Company subsidiaries (but not Dow Chemical Company itself) and Isover. Dow Chemical Company together with its subsidiaries commenced arbitration. Isover objected to jurisdiction over the claims asserted by Dow Chemical Company on the ground that the latter was not a party to the contract. The tribunal upheld its jurisdiction.

The award is often misinterpreted as suggesting that the corporate ties within the group were sufficient to establish the tribunal's jurisdiction, and has thus been subject to criticism. In fact the reasoning was more nuanced, taking into account the role of the non-signatory 'in the conclusion, performance, or termination of the contracts'.

Government of Pakistan, Ministry of Religious Affairs v Dallah Real Estate and Tourism Holding Company

The ICC analysis based on the non-signatories' involvement with the contract was supported by the French courts in the 2010 case of *Pakistan v Dallah*. The Paris Court of Appeals dismissed the challenge of an ICC award which upheld the jurisdiction against Pakistan arising out of the contract signed by Dallah and a trust established by Pakistani presidential

ordinance. The court found that the government's involvement in negotiations, performance and termination of the agreement showed that it (and not the trust) was the 'true party' to the agreement and, hence, to arbitration.

The UK Supreme Court had earlier refused to enforce the award in England on the basis that the Government of Pakistan was not a proper party to the arbitration.

Case No. 4A_450/2013

In 2013, the Swiss Supreme Court applied a similar test. The facts of this case are a little complicated. It involved three contracts between Iranian company A and Italian company B1 (part of B Group of companies). The project was suspended and parties sought to resolve the dispute by negotiation. During the negotiations the parties agreed that the project would be carried out by a specific division of B1's parent company – B2 – instead of B1, and that a member of this division would become responsible for the project. It was also agreed that B2 was to provide a guarantee for performance of the contract.

The division responsible for the project was later acquired by B3 (also a company within B Group). Subsequently, B1 started arbitration against A, and A brought a counterclaim against B1 and B3. The tribunal upheld B3's objection against jurisdiction, but the Swiss Supreme Court set aside this part of the award and remitted the case to the tribunal.

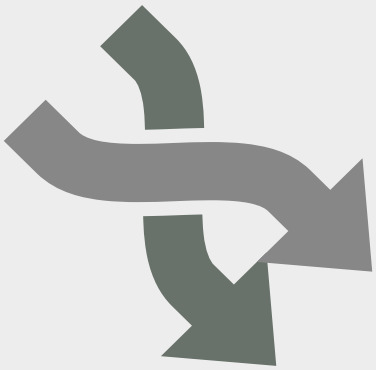
In its decision, the Swiss Supreme Court relied not only on the involvement of B1, B2 and B3 in carrying out the project, but also on the principle of good faith: the court considered that the confusion that existed among the B Group of companies was a valid reason for A's inability to identify the actual contracting party.

Hazel Brasington is a partner in our Sydney office and Andrey Panov is a senior associate in our Moscow office.

Res judicata and issue estoppel in arbitration

Procedural or substantive law?

Camille Jojo and Ben Ridgeon



Res judicata and issue estoppel exist at the intersection of procedural and substantive law. Deciding what law should apply remains at the discretion of arbitration tribunals. This makes *res judicata* a potential area of uncertainty in the arbitration process.

Whether and to what extent an arbitral tribunal determines itself bound by earlier judgments and findings of a court or tribunal may fundamentally affect the outcome of an arbitration. This includes which factual and legal issues are to be explored, tried and determined in the arbitration. When assessing the probable legal costs and overall strategy of an arbitration, a party will have to take this into account, particularly in international arbitrations likely to touch upon a number of legal systems and laws.

Sample scenario
For example, a supply contract governed by French law may contain an arbitration clause providing for disputes to be arbitrated in Hong Kong. In an arbitration, how should a tribunal seated in Hong Kong approach questions of *res judicata* and issue estoppel concerning an earlier determination of a court on a central issue in related proceedings not subject to the arbitration clause? What law should it apply? (If, for example, a US judgment had confirmed that goods supplied under the contract in the US were in breach of FDA regulations and therefore unfit for purpose.)

There are major differences between the common law and civil law approaches to the application of the doctrine of *res judicata* and its ambit.

Res judicata under common law

Res judicata as applied in common law jurisdictions covers a number of distinct concepts. Key amongst these are 'cause of action estoppel' and 'issue estoppel'. Broadly speaking under common law, a plea or defence based on cause of action estoppel, if accepted, prevents a party pursuing a claim which has already been determined by a court of competent jurisdiction in previous litigation between the same parties (or their privies).

On the other hand a plea or defence of issue estoppel, if successful, prevents a party in proceedings from contradicting a finding of fact or law that has already been determined in earlier proceedings between the same parties (or their privies) – provided that the determination was central to the decision in those proceedings.

A 'privy' under common law is one who claims title or right under, through or on behalf of a party bound by a decision. A privy has been held to include persons or entities with an interest, legal or beneficial, in the previous litigation or its subject matter.

A further type of issue type estoppel related to *res judicata* is the rule in *Henderson v Henderson* which operates to prevent a party raising claims and defences that could have been raised in the earlier proceedings but were not.

Res judicata under civil law

In civil law jurisdictions the concept of *res judicata* is also followed, often in a codified form. Parties are barred under the principles of *res judicata* from litigating the same dispute again, once a final judgment has been rendered by a competent court.

It is generally acknowledged, however, that in civil law jurisdictions the concept of *res judicata* has a much narrower application. This is reflected, for example, in the French Civil Code (article 1351), which applies a strict triple identity test for the application of the doctrine of *res judicata*:

> The authority of *res judicata* applies only to what was the object of a judgment. It is necessary that the thing claimed be the same; that the claim be based on the same cause; that the claim be between the same parties and brought by them acting in the same capacity.

The requirement under the third limb of the test that there be an absolute identity of parties can be contrasted with the common law position, which extends *res judicata* to apply to 'privies' of parties.[1]

In some civil law jurisdictions, the concept of issue estoppel is not recognized (one reason being that the operative order of court rather than the underlying reasons or factual findings is seen to be binding); the rule in *Henderson v Henderson* (or its equivalent) is also not followed.

1 Under US common law, the concept of 'privies' in *res judicata* has been extended beyond the confines of English law to operate generally with respect to third parties such as controlling parties considered to have been 'virtually represented' at the earlier trial (eg holding companies). It is also to be noted that mutuality is not a requirement for issue preclusion (the equivalent of issue estoppel) under US law and can be used to prevent a party re-litigating an issue with third parties. For more detailed summary of international approaches see International Law Association, International Commercial Arbitration Committee, 'Interim Report: *Res Judicata* and Arbitration (71st Conference, Berlin, 2004).

Procedural or substantive law?

The question of which law should be applied by an arbitration tribunal (as in the sample scenario outlined above) in its consideration of *res judicata* turns on whether *res judicata* (and its related concepts) should be seen as a question of procedural or substantive law.

The case for *lex arbitri*

In common law jurisdictions, *res judicata* can be said to be a rule of evidence[2] and admissibility concerning the earlier decision, and whether it must be regarded as conclusive and binding.

In civil law jurisdictions, *res judicata* is usually codified in procedural codes. There would appear to be good reason why *res judicata* should therefore be regarded as essentially a question of procedural law[3] rather than substantive law. As we know, the location of the seat of an arbitration is significant in that it determines the procedural rules which govern an arbitration (incorporating any mandatory local laws applicable to arbitration). The law of the seat of the arbitration (the lex arbitri) appears, therefore, to be the appropriate law to be applied by the arbitration tribunal when it considers the application of *res judicata* in an arbitration – if *res judicata* is a question of procedural law.

The case for *lex causae*

There is also a school of thought that *res judicata* is actually a substantive rule of law.[4] In that case, the tribunal should apply the governing law of the contract (*lex causae*) when it considers the application of *res judicata* and issue estoppel.

In this regard, *res judicata* and issue estoppel can operate to prevent a party from advancing a claim or arguments in an arbitration which can be said to fundamentally affect the substantive rights of a party.

The wording of the arbitration agreement

Proper regard must be had to the actual agreement between the parties and their intention to be bound thereby. The wording of the arbitration and proper law clause in a contract might be viewed as sufficiently wide in ambit as to encompass and apply to issues of *res judicata* which might arise.

For example,

> The parties irrevocably agree that all disputes and questions arising under or in connection with the negotiation, existence, legal validity or enforceability or termination of the Agreement shall exclusively be governed by and determined only in accordance with French Law.

No right or wrong answer

The concept of *res judicata* straddles the intersection between substantive and procedural law. There is no right or wrong answer, nor any established approach[5] as to whether the *lex causae* or *lex arbitri* should be adopted by an international arbitration tribunal in its consideration of *res judicata* issues. It will probably remain within the discretion of the particular tribunal, to be decided after due consideration of all relevant factors to the particular dispute, including the arbitration agreement and earlier decision.

This makes *res judicata* a potential area of uncertainty for parties and their legal representatives going into arbitration.

Camille Jojo is a partner and Ben Ridgeon is an of counsel in the Hong Kong office of Norton Rose Fulbright.

2 See Peter Barnett, *Res Judicata*, Estoppel and Foreign Judgments (Oxford: Oxford University Press, 2002) at para 2.33 and cases cited, *inter alia*, *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (No 2) [1967] 1 AC 853, at 919, 933; *Vervache v Smith* [1983] 1 AC 145, at 162. In *Republic of India v India Steamship Co Ltd*; The Indian Endurance and The Indian Grace [1993] AC 410, at 422, Lord Golf of Chieveley stated 'the principle of estoppel per rem judicatam is not more than a rule of evidence'.

3 This was the view taken by the committee of the International Law Association: see International Law Association, International Commercial Arbitration Committee, 'Interim Report: *Res Judicata* and Arbitration (71st Conference, Berlin, 2004).

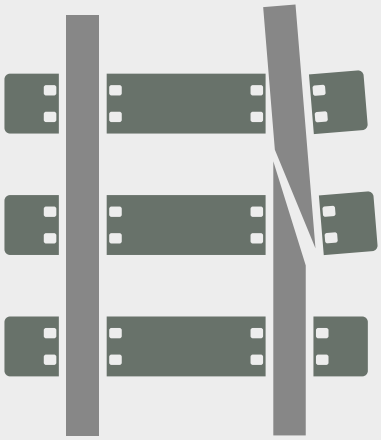
4 This view has been expressed in the recent English decisions in *Price v Nunn* [2013] EWCA Civ 1002 at para. 69 and *Arts & Antiques Ltd v Richards* [2013] EWHC 3361 (Comm) at [18], [2014] PNLR 10. It has also received support from commentators, eg: see David A.R. Williams and Mark Tusingham, 'The Application of the *Henderson v Henderson* Rule in International Arbitration' (2014) 26 SAcLJ. See also Lord Sumption in *Virgin Atlantic Airways v Zodiac Seats UK Limited* [2013] UKSC 46 at [25].

5 It has been suggested that rather than following national laws (either *lex causae* or *lex arbitri*), it would be preferable for a transnational approach to *res judicata* issues to be adopted by arbitration tribunals. The International Law Association adopted this view in in its reports and put forward recommendations outlining common core *res judicata* principles and solutions to be adopted: see International Law Association, International Commercial Arbitration Committee, Interim Report: *Res Judicata* and Arbitration (71st Conference, Berlin, 2004), subsequent Recommendations and Final Report.

Federal Court of Australia

Attempt to derail the arbitration process frowned upon

Dylan McKimmie and Meriel Steadman



In Australia, any attempt to derail the arbitration process by involving the courts will be looked upon unfavourably. If you are unhappy with the process, go to the tribunal, wait for them to decide on the issues you raise, and do not seek court intervention prematurely. This point was underlined in 2015 when the Federal Court of Australia dismissed a challenge to the appointment of two arbitrators in the *Sino Dragon v Noble Resources* dispute.

In Australia, any attempt to derail the arbitration process by involving the courts will be looked upon unfavourably.

Sino Dragon Trading Ltd v Noble Resources International Pte Ltd [2015] FCA 1028

In October 2015 the Federal Court of Australia dismissed a challenge to the appointment of two arbitrators.

Case: *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2015] FCA 1028

Client learning: arbitration in Australia

In Australia, any attempt to derail the arbitration process by involving the courts will be looked upon unfavourably. If you are not happy with the arbitration process, you first need to exhaust the avenues available to you by approaching the tribunal and waiting for them to decide on the issues you have raised, rather than prematurely seeking court intervention.

*Sino Dragon v Noble Resource*s examines the interplay between the courts' jurisdiction and an arbitral tribunal's jurisdiction under Australia's International Arbitration Act (1974) (Cth) (which gives legal force in Australia to the Model Law), the UNCITRAL Model Law and the UNCITRAL Arbitration Rules.

The *Sino Dragon v Noble Resources* dispute

The dispute concerned whether Hong Kong company Sino Dragon Trading Ltd had breached its contract with Singaporean company Noble Resources International Pte Ltd (a subsidiary of the Noble Group) or whether the parties had varied the contract.

The contract contained an arbitration agreement. Noble Resources served an arbitration notice on Sino Dragon proposing ACICA (the Australian Centre for International Commercial Arbitration) as appointing authority and appointing M as an arbitrator. Sino Dragon did not respond and did not appoint an arbitrator.

Two months later, Noble Resources wrote to the Permanent Court of Arbitration in the Hague requesting that the Secretary-General designate the appointing authority and that it select ACICA.

The Permanent Court of Arbitration wrote to Sino Dragon and Noble Resources regarding Noble Resources' request. When no response was received from Sino Dragon, W was appointed as the appointing authority.

When Sino Dragon still did not appoint an arbitrator, W appointed B as a second arbitrator. M and B appointed H as the third and presiding arbitrator.

Noble Resources advised W that they were not aware of any circumstances likely to give rise to justifiable doubts about B's impartiality or independence. However, 'for the sake of good order', they advised that the firm in which B was a partner was acting for another subsidiary of the Noble Group in separate, unrelated proceedings in China, which might subsequently involve proceedings in Hong Kong. To the best of Noble Resources' knowledge, B was not directly involved. B confirmed this, and added that the Chinese division was financially separate from the Australian division of the firm in which B was a partner.

Sino Dragon submitted to the Tribunal several challenges to the arbitrators' appointments and then – before the last challenge had been determined – filed a court application challenging the appointments.

Sino Dragon argued that the court had power to consider a challenge to arbitrators (Model Law, article 13(3)); that the court had an independent common law jurisdiction to remove an arbitrator; and that the arbitrators had breached article 14 of the Model Law. It also sought a declaration that the arbitrators had not been validly appointed.

The court's judgment

The court commented that Sino Dragon's court application was brought 'in the teeth of' express provisions of Australia's International Arbitration Act and the Model Law; it interrupted the arbitration process and created the potential for unnecessary delay to an arbitration which was not in itself complex.

The court held that article 13 of the Model Law sets out a stepped procedure for challenging an arbitrator. The parties had agreed on a procedure for challenging an arbitrator in their contract (which stated that any arbitration was to be conducted under the UNCITRAL Rules). On that basis, article 13(1) of the Model Law applied, not article 13(2). A court's power under article 13(3) would only come into play if a challenge under article 13(1) were unsuccessful. That challenge was still before the appointing authority. Until W rejected Sino Dragon's challenge, it was premature to ask the court to determine the challenge under article 13(3).

The court rejected what it referred to as Sino Dragon's 'surprising' submission that the court had an independent common law jurisdiction to remove an arbitrator outside the application of article 13(3). It gave the following reasons

- A court can only intervene in matters governed by the Model Law where each instance of court involvement is set out in the Model Law; the courts do not have a general or residual power to intervene in arbitration proceedings (article 5, Model Law).
- If a court had such a power, it would amount to an unrestricted common law regime sitting alongside the prescriptive regime in article 13, thereby wholly undermining the efficacy of article 13.
- There was no authority in support of Sino Dragon's submission; all authority was against that submission.

The court rejected Sino Dragon's submission that the arbitrators had failed to act without undue delay, in breach of article 14 of the Model Law. It gave the following reasons

- Whether an arbitrator has failed to act without undue delay has to be considered in the context of the arbitration as a whole. Nothing suggests a breach of article 14; the evidence suggests the opposite.
- The deferral of jurisdictional issues to the arbitration hearing is a procedural and case management decision, is an efficient and effective way of progressing the matter due to the fast-approaching arbitration hearing date, is not suggestive of undue delay and should not be second guessed by a court.

The court held that it could not rule on the tribunal's jurisdiction before the tribunal itself did so, as this would contravene article 16 of the Model Law and be subject to appeal. The court held that, even if it had the power to make a declaration, given the discretionary nature of that remedy, there were 'strong reasons' in this case to refuse to exercise that discretion.

The court considered further criticisms levelled at the arbitrators by Sino Dragon. It stated

- The decision to withdraw is a decision for the individual arbitrator, not for the tribunal. However, an arbitrator may consult the tribunal and consider its view when deciding whether to withdraw. In so doing, the challenged arbitrators had adopted the approach required by the UNCITRAL Arbitration Rules (article 13(3)).
- In a court application challenging the appointment of arbitrators, it is appropriate for the challenged arbitrators to file a submitting appearance (that is, not to challenge the application but to submit to the court's decision).

Dylan McKimmie is a partner and Meriel Steadman is a special counsel in the Perth office of Norton Rose Fulbright.

Privilege under English law

The rules and definitions

Ffion Flockhart and Yasmin Lilley

Privilege is a fundamental legal right. It allows individuals and corporate entities to resist disclosure of confidential and sensitive material. There are strict rules on when privilege applies under English law: not all communications with lawyers and other advisers will be protected. Privilege can be lost by circulating privileged material without adequate safeguards.

Privilege is a fundamental legal right and a powerful legal tool under English law, granting individuals and corporate entities the right to resist disclosure of confidential and potentially sensitive material in the context of arbitration, litigation and investigations. There are two main types of privilege under English law: legal advice privilege and litigation privilege. There are strict rules for when each type applies.

Client learning

Whether a document is privileged is a question of substance rather than form: simply marking documents as privileged and confidential, or forwarding them to a lawyer, cannot make a non-privileged document into a privileged one. The rules and definitions set out below clarify when privilege will apply as a matter of English law. It should not be assumed that all communications with lawyers and other non-legal advisers will be protected from disclosure. While privileged documents can be circulated under English law, this must be done with the utmost care. Confidentiality is key, and privilege can be lost by circulating privileged material in the absence of adequate safeguards.

Legal advice privilege

Legal advice privilege protects (written or oral) confidential communications between a lawyer and a client for the purpose of giving or receiving legal advice. Legal advice privilege also protects documents which reflect such a communication.

There must be a lawyer present

There must be a lawyer in the communication for legal advice privilege to apply. While this is widely defined to include solicitors, barristers and foreign lawyers admitted to practice in their home jurisdiction, the term 'lawyer' does not extend to other professionals such as accountants, even where they are purporting to provide legal advice. Where a lawyer is not involved, legal advice privilege will not apply.

English law does not draw any distinction between in-house lawyers and lawyers in private practice. The European Court of Justice, however, has held that communications between a company and its in-house lawyers in the context of EU competition investigations are not protected by legal advice privilege; this is on the basis that in-house lawyers, unlike external lawyers, are not deemed sufficiently independent.

> The loss of confidentiality will lead to a loss of privilege.

There must be an 'authorized' client present

Only communications between a lawyer and a client will be protected by legal advice privilege. This does not mean that all communications which the lawyer has with any of the employees at the corporate client will necessarily be privileged. The term 'client' is narrowly construed under English law to refer only to individuals who, as a matter of fact, are authorized to give instructions to and receive advice from the lawyer concerning the issue in hand.

Under litigation privilege, communications between lawyers and employees who are not part of the corporate client group may be privileged under English law. This is explained below.

There must be a communication

As a general rule, for legal advice privilege to apply under English law, there must be a communication between a lawyer and a client, or a document which reflects such a communication.

Not all preparatory material is privileged

Preparatory material of the client which is not communicated to the lawyer may not be privileged. By contrast, a lawyer's preparatory material is privileged. The general rule is that if a lawyer commits to paper, during the course of her retainer, matters which she knows only as a consequence of the professional relationship with her client, those papers will be privileged even if they are not sent to the client.

The communication must be 'legal advice'

Legal advice privilege under English law arises in the context of giving or receiving legal advice. The term 'legal advice' is widely construed to cover advice given in 'a relevant legal context': this includes advice on how to present a case to an inquiry but may not cover situations where the lawyer is acting as general business adviser and advising on, for example, investment or finance policy or other business matters. This is where difficulties can sometimes arise in practice when assessing whether or not a particular piece of advice provided by an in-house lawyer attracts legal advice privilege.

Litigation privilege

Litigation privilege protects confidential written or oral communications between client or lawyer (on the one hand) and third parties (on the other), or other documents created by or on behalf of the client or his lawyer, which come into existence once litigation is in contemplation or has commenced and which is for the dominant purpose of use in the litigation.

The term 'litigation' includes arbitration here.

There need not be a lawyer present

Litigation privilege is wider than legal advice privilege and can protect communications with and documents prepared by accountants and other non-legal advisers in preparation for arbitration. Unlike legal advice privilege, which requires a lawyer in the communication, communications with or material produced by non-legal advisers can be privileged under English law where litigation privilege applies.

Litigation must be afoot or in contemplation

Litigation privilege only applies where litigation (or arbitration) is afoot or contemplated. There does not have to be a greater than 50 per cent prospect of litigation, but litigation must be more than a mere possibility: it is not necessarily sufficient for there to be a distinct possibility that sooner or later someone might make a claim.

The communication must have litigation as its dominant purpose

Even once litigation can be said to be 'in contemplation' or to have commenced, the dominant purpose of the communication must be for use in the actual or contemplated litigation. The term 'dominant purpose' has been described as the ruling, prevailing, paramount or most influential purpose. Where a communication has more than one purpose, a court will assess its purpose objectively, taking into account all the relevant circumstances.

Waiver and loss of privilege

Sometimes, it may be necessary for legal advice to be circulated outside of the client group (those individuals within the client who are dealing with the matter on a day-to-day basis) – for example, to the board of directors, who may not constitute 'the client' for legal advice privilege purposes. This is possible under English law, but it must be done carefully.

The loss of confidentiality will lead to a loss of privilege

Confidentiality is a fundamental component of privilege. The loss of confidentiality will lead to a loss of privilege. It is therefore important to not circulate privileged material too widely.

When you do circulate privileged material, it is important to mark the document as 'confidential and privileged' and not for onward circulation, and to emphasize to the recipients the importance of treating the material as confidential.

Avoid adding any written commentary

The sender should refrain (so far as possible) from providing any written commentary on the advice, as that commentary may not itself be privileged. The exception to this is where the sender is an in-house lawyer giving legal advice.

The same risks arise when circulating legal advice to third parties outside the corporate client, including to regulators and prosecutors. In addition to the above safeguards, it will be prudent to specify the limited purpose for which the advice is being disclosed and to make clear that no broader waiver of privilege is intended. Confidentiality agreements may also be appropriate.

As a practical measure, labelling can help to maintain privilege – at least by helping to prevent inadvertent wider circulation of privileged material. Portals and/or 'read only' documents can be used in appropriate cases.

Avoid emailing sensitive information

It is prudent to avoid, as far as possible, the transmission of particularly sensitive information by email, as it is more difficult to control the limits of distribution. Put IT safeguards in place to minimise risks.

Ffion Flockhart is a partner and Yasmin Lilley is a senior associate in the London office of Norton Rose Fulbright.

Arbitration hub in the southern United States

Atlanta jockeys for position

Lucy Greenwood

Update from the US: Atlanta now has a specialized court to handle international arbitration as well as a centre for international arbitration and mediation (established 2015) and an arbitration code (enacted 2012) based on the UNCITRAL model law.

Since the launch of the Atlanta International Arbitration Society in 2012, Atlanta has sought to position itself as an international arbitration hub for disputes in the southern United States. 2015 saw two developments, with the opening of the Atlanta Centre for International Arbitration and Mediation and the announcement that the superior court of Fulton County – Georgia's trial court of general jurisdiction – had been granted authority by Georgia's Supreme Court to hear disputes brought under the 2012 Georgia international commercial arbitration code.

The decision to dedicate a specialized court to arbitration-related issues reflects the strides that Atlanta has made toward becoming a preferred venue for international arbitration. Arbitration provisions and awards will now be enforced by a court with expertise in dealing with this type of dispute. Matters should also be dealt with swiftly; the Fulton County business court reported that, over the last two years, the average time for motion resolution once the issues were fully before the court was 15 days.

Atlanta was given a further profile boost when twelve countries – representing 40 per cent of the world's economy – signed the long-awaited Trans-Pacific Partnership trade agreement in the city in 2015.

Atlanta's Centre for International Arbitration and Mediation hosts institutional or ad hoc cases, even where a jurisdiction other than Georgia is designated as the seat of arbitration. Georgia's international commercial arbitration code (enacted in 2012) provides Atlanta with UNCITRAL Model Law-based legislation which governs international arbitrations seated in the state. Changes were also made to the state Bar rules in 2012 to permit lawyers who are not licensed in Georgia to handle international arbitration cases in the state.

Atlanta claims some of the most arbitration-friendly courts in the US. The Eleventh Circuit is the only judicial circuit to have eliminated domestic arbitration law grounds for annulling international arbitration awards: the only grounds for set-aside are now the same as those set out in the New York Convention.

Client resource

Atlanta International Arbitration Society

www.arbitrateatlanta.org

Lucy Greenwood is a foreign legal consultant in the Houston office of Norton Rose Fulbright.

Best practice in China

SIAC and ICC to join HKIAC in Shanghai FTZ

James Rogers and Kevin Hong

Good news: by the end of 2016, HKIAC, SIAC and the ICC will all have opened offices in the Shanghai Free-Trade Zone. This signals a new era of closer cooperation with China's arbitration commissions and a higher profile for best practice training.

Timeline

November 2015 – HKIAC representative office opens in China (Shanghai) Pilot Free-Trade Zone.

February 2016 – Shanghai Municipal Commission of Commerce approves ICC application to open an office.

March 2016 – SIAC representative office opens in China (Shanghai) Pilot Free-Trade Zone.

Three prominent international arbitration institutions are establishing a presence of the People's Republic of China, a reflection of the importance of the Chinese economy and the growing number of China-related arbitrations.

HKIAC in Shanghai

In 2015, the Hong Kong International Arbitration Centre became the first offshore arbitration institution to establish a presence in the PRC, heralding a new era of closer cooperation with local arbitration commissions. Through its Shanghai office, HKIAC intends to assist in promoting best practice, training Chinese arbitrators and practitioners and facilitating the development of a pro-arbitration policy across China.

Now one of the world's most important international arbitration institutions – particularly for the resolution of China-related disputes – HKIAC's record for enforcement in the PRC is impressive: in the period 2010 to 2014, PRC courts did not refuse to enforce any HKIAC awards.

SIAC in Shanghai

The aims of the Singapore International Arbitration Centre, when it opened its own office in Shanghai in March this year, were similar to HKIAC's: to work with China's arbitration commissions to encourage best practice through networking events and training workshops for practitioners.

ICC in Shanghai

The International Court of Arbitration of the International Chamber of Commerce will open its own office in China in 2016. The ICC is currently completing its registration with the Chinese State Administration for Industry and Commerce.

China-seated arbitrations

None of the three institutions will, at least initially, administer China-seated arbitrations. This is not surprising. Readers will recall that it was once commonly held that arbitration agreements providing for disputes to be arbitrated in the PRC before a foreign arbitration institution are invalid, as a matter of PRC law. This position shifted in 2014, when the Anhui court in the *Longlide* case – supported by the Supreme People's Court – upheld the validity of an arbitration agreement that provided for an ICC arbitration seated in Shanghai (*Longlide Packaging Co Ltd v BP Agnati SRL*).

Whether any award rendered by a foreign arbitration institution in the PRC jurisdiction will be regarded as a domestic or non-domestic award – and whether it can therefore be enforced in the PRC – is still not absolutely clear.

Our view is that parties should always think carefully before agreeing to a foreign arbitration institution administering arbitration proceedings seated in the PRC.

James Rogers is a partner in our London office and Kevin Hong is an associate in our Hong Kong office.

International arbitration at Norton Rose Fulbright

Our review of 2016

Stay up to date on current developments in international arbitration with our international arbitration video series available on our website.

Awards and appointments

2016 Client Choice Award – ILO/Lexology
Mark Baker was a recipient of the 2016 Client Choice Award for Arbitration and Alternative Dispute Resolution as selected by the International Law Office (ILO) and Lexology through a readership survey of ILO and Lexology in-house counsel subscribers.

Guides to the World's Leading Lawyers – Legal Media
Sherina Petit was featured in the 2015 edition of Expert Guides – Legal Media Group Guides to the World's Leading Lawyers magazine as a rising star in commercial arbitration.

National Law Journal ADR Trailblazer
Mark Baker has been named a 2016 National Law Journal ADR Trailblazer.

ICC India Arbitration Group
Sherina Petit has been invited to be a member of the ICC Indian Arbitration Group, which aims to promote the ICC International Court of Arbitration in India.

Global Pledge on Diversity in International Arbitration
Lucy Greenwood has been appointed to steering committee of Global Pledge on Diversity in International Arbitration.

LCIA Board of Directors
Sherina Petit has joined the LCIA Board of Directors for a 3 year term commencing December 2015.

SIAC Users Council – UK
Sherina Petit has been appointed to the SIAC Users Council's Regional and National Committee for the United Kingdom.

Legal Business: Rising stars
Sherina Petit has been featured as one of 'the next generation of partners setting the disputes agenda' in the Legal Business Disputes Yearbook 2015.

Activities

'*International Arbitration Under Review*' Event
Our London office co-hosted an event with Woodsford Litigation Funding to celebrate the release of 'International Arbitration Under Review', a collection of essays in honour of John Beechey, former President of the ICC International Court of Arbitration, February 2016.

CIETAC Hong Kong committee
James Rogers was a member of the CIETAC Hong Kong committee tasked with preparing Guidelines to Third Party Funding in Arbitration.

HKIAC Third Party Funding Task Force
James Rogers was a member of the HKIAC Third Party Funding Task Force which responded to the Hong Kong Law Reform Committee recommendation that Hong Kong law be amended to allow for third party funding of arbitration.

Foundation for International Arbitration Advocacy Workshop
James Rogers participated as a faculty member at the Foundation for International Arbitration Advocacy workshop – cross examination of experts in international arbitration, Hong Kong, March 2016.

Frankfurt Investment Arbitration Moot
Matthew Buckle coached in the Frankfurt Investment Arbitration moot and sat as an arbitrator for the competition.

Speaking engagements

International Arbitration and Disputes Conference – Beijing
Norton Rose Fulbright hosted its regular International Arbitration and Disputes Conference in Beijing in March 2016. Speakers included representatives from the HKIAC, CIETAC Hong Kong, the ICC and Harbour Funding. The event was hosted by James Rogers and Alfred Wu, with contributions from Dylan McKimmie, Phil Nunn, Mark Baker and Jason Lemann.

Norton Rose Fulbright Energy Academy
Mark Baker hosted the Norton Rose Fulbright Energy Academy: International Disputes & Incident Management Seminar: International Disputes Resolution, Houston, November 2015.

LCIA Seminar: Cost and Duration
Mark Baker hosted an LCIA Seminar on Cost and Duration at our offices in Houston, October 2015

Launch of new CPR Rules
Mark Baker hosted at our Houston offices a CPR Launch Event: The New CPR Rules for Administered Arbitration of International Disputes, Houston, October 2015.

ICC-ITA-IEL Joint Conference: International Energy Arbitration
Mark Baker was co-chair at the 3rd Annual ICC-ITA-IEL Joint Conference: International Energy Arbitration (co-chair), Houston, January 2016.

ICC YAF Conference at NLU Delhi
Tim Robbins was a panellist at an ICC YAF Conference on the Allocation of Costs in International Arbitration at NLU Delhi, New Delhi, February 2016.

NPAC Annual International Conference
Sherina Petit spoke as part of a panel discussion entitled 'The Arbitral Process – Viewpoint of Arbitrators' at the NPAC Annual International Conference on Emerging Frontiers of Arbitration Law, Mumbai, February 2016.

UNESCO International Arbitration Conference
Lucy Greenwood chaired the UNESCO International Arbitration Conference: Improving the Role of Women in Dispute Resolution: Evolution or Revolution?', Paris, March 2016.

ICC VII International Arbitration Congress
Lucy Greenwood chaired the ICC VII International Arbitration Congress: Promoting & supporting female practitioners in international arbitration to more senior positions, Costa Rica, March 2016.

ICDR International Arbitration Conference
Lucy Greenwood chaired the ICDR International Arbitration Conference: Unconscious Bias in International Arbitration, Miami, January 2016.

Publications

Global Arbitration Review
India: The new arbitration act analyzed – Sherina Petit, Abhimanyu George Jain and Daniel Jacobs discuss recent Indian arbitration law.

India releases a new Model BIT
Sherina Petit, Mathew Buckle and Daniel Jacobs analyzed the recently released Indian Model Bilateral Investment Treaty.

India Business Law Journal
Sherina Petit and Raj Karia were featured in one of India's leading law journals, which has featured Norton Rose Fulbright as a significant player in the Indian legal market.

Lexpert Magazine (Thomson Reuters)
Sherina Petit gave her views on the forthcoming amendments to India's Arbitration and Conciliation Act.

Law360
Defining 'Success' In An International Mediation, Mark Baker (Co-Author), February 2016.

Austrian Yearbook on International Arbitration
Puppies or Kittens? A Modest Proposal to Help Arbitrators Better Match Themselves with User Expectations – Lucy Greenwood (Co-Author), 2016.

TDM Special Issue on Diversity
Could 'Blind' Appointments Open Our Eyes to the Lack of Diversity in International Arbitration – Lucy Greenwood (Co-Author), July 2015.

Contacts

nortonrosefulbright.com

International arbitration, Co-heads

Mark Baker
Houston

Pierre Bienvenu, Ad. E.
Montréal

Canada

Calgary
Mary Comeau
Clarke Hunter, QC

Montréal
Martin Valasek

United States

Houston
Lucy Greenwood
Kevin O'Gorman

Washington DC
Matthew Kirtland

Latin America

Caracas
Ramón Alvins

Europe

Amsterdam
Yke Lennartz

Athens
Marie Kelly

London
Sherina Petit
James Rogers
Deborah Ruff

Paris
Christian Dargham

Moscow
Yaroslav Klimov

Middle East

UAE
Patrick Bourke

Africa

South Africa
Donald Dinnie

Asia

China/Hong Kong
Jim James
Alfred Wu

Singapore
KC Lye
Guy Spooner

Australia

Brisbane
Ernie van Buuren

Perth
Dylan McKimmie

Sydney
Rob Buchanan

Norton Rose Fulbright

International arbitration

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

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

Dispute resolution

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

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

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