

International arbitration report

Issue 7 – September 2016



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International arbitration report

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Editorial

Welcome to issue 7 of Norton Rose Fulbright's *International arbitration report*.

In this issue, we feature a number of articles on the hot topic of third-party funding in arbitration. Lawyers from across our global practice review various developments in this area, including the slow demise of the common law doctrines of maintenance and champerty. We also interview a panel of well-known third-party funders to get their perspectives on regulatory and market trends and some practical tips on what funders are looking for when considering a request for funding.

We discuss Brexit and explain why it is business as usual for arbitration in England and Wales.

Following on from our series on privilege, we feature a discussion on the application of privilege rules in international arbitration. We also offer a practical guide on how to draft stabilisation protections for international investment agreements, and the use of sealed offers in arbitration to protect against adverse costs consequences.

We review recent reforms to arbitration legislation in Russia and Singapore and we consider the further reforms needed to the OHADA arbitration regime for it to become a true regional contender for African-related disputes. We look at the establishment of the Istanbul Arbitration Centre (ISTAC) and the new SIAC Arbitration Rules 2016 (now in force) which have introduced an early dismissal procedure.

Our case law update analyses the English High Court case of *Egiazaryan and another v OJSC OEK Finance and the City of Moscow* and offers insight into how non-parties to the arbitration agreement may be joined in arbitral proceedings.



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

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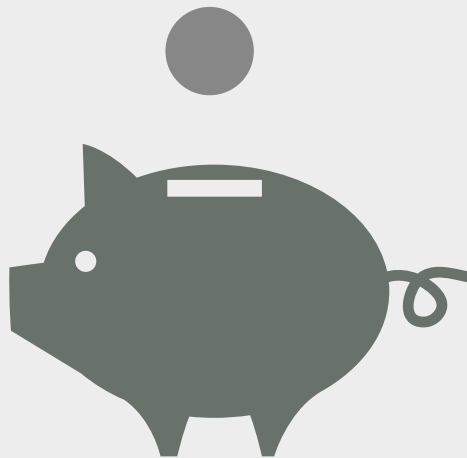
About the cover

Our front cover for this issue features the bronze statue of “Peace”, part of Queen Victoria Memorial, located in front of Buckingham Palace, London. The ICC's UK Annual Arbitration Conference will be held in London in November this year.

Third-party funding in arbitration – the funders’ perspective

*A Q&A with Woodsford Litigation Funding,
Harbour Litigation Funding and Burford Capital*

Sherina Petit, James Rogers and Cara Dowling



Our Q&A covers recent developments in third-party funding of arbitration. We speak with a panel of third-party funders, including Steven Friel, Chief Investment Officer at Woodsford Litigation Funding, Ruth Stackpool-Moore, Director of Litigation Funding and Head of Hong Kong at Harbour Litigation Funding and Christopher Bogart, co-founder and Chief Executive Officer of Burford Capital.

01 | What trends are you seeing in the types of parties, cases and markets that are attracting third-party arbitration funding?

Ruth Stackpool-Moore, Harbour Litigation Funding

The past 12 months have seen further exponential growth in the use of third-party funding generally, and particularly an increase in the number of inquiries regarding arbitrations. Demand for funding in investment treaty arbitrations has historically been strong but we are now also seeing an increase in demand for funding in commercial arbitrations. Increasingly, this comes from large, well-capitalised companies which may, in the past, have considered that funding was not for them.

We are seeing the evolution of litigation finance into corporate finance.

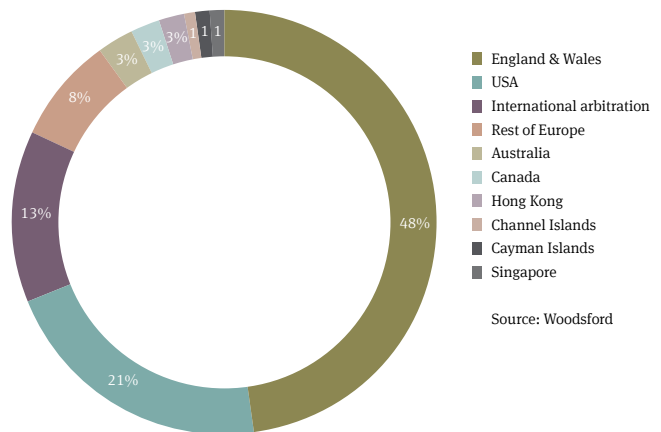
Christopher Bogart, Burford Capital

Many of the trends reflect the maturing of the industry. For example, both claimants and firms are increasingly interested in the portfolio approach to financing, where instead of seeking funding to pay fees or expenses related to a single matter, multiple matters are used as collateral to secure capital. This approach allows extraordinary flexibility: capital can be used across the portfolio of matters or even for business purposes unrelated to arbitration or litigation. We are seeing the evolution of litigation finance into corporate finance. As evidence of that, only 13 per cent of Burford’s commitments in 2015 were to single arbitration or litigation matters; all the rest of our capital was flowing to portfolios and complex investments. As to markets, we have clients from every populated continent and strong demand globally.

Particularly in high value international arbitrations, for example ICSID claims, I would be very surprised to learn of any claimant that had not actively considered funding.

Steven Friel, Woodsford Litigation Funding

The short answer is more, more, more. We are receiving more enquiries, from a wider variety of parties (including some of the biggest multinationals, seeking to hedge the risk of litigation and arbitration), and from a wider variety of jurisdictions. There has been a huge increase in levels of knowledge and understanding of third-party funding products among the international arbitration community over the past 12 to 18 months. International arbitration lawyers and their clients have rapidly embraced third-party funding, perhaps more so than the domestic litigation market. Particularly in high value international arbitrations, for example ICSID claims, I would be very surprised to learn of any claimant that had not actively considered funding.



The primary jurisdictions from which Woodsford receives funding enquiries

02 | The most commonly cited benefits of third-party funding are access to justice and leveling the playing field when a party is either under resourced or out-resourced by its opponent. What are the other less obvious benefits that parties should be aware of?

Christopher Bogart, Burford Capital

Litigation finance isn’t just used when claimants can’t pay, as a matter of necessity; it is increasingly used proactively, as a tool of choice. It can be far more efficient for corporations to pay for legal fees and expenses by moving them off their own balance sheets. Another common misconception is that funding can be used only for the prosecuting of claims. In actuality, litigation financing is appropriate for defendants and law firms themselves.

Steven Friel, Woodsford Litigation Funding

In addition to cash, we also invest our expertise. The Woodsford team includes a number of high-caliber legal and financial experts, who stand ready to assist the claimant's legal team at all stages of the arbitration. Our objective is to assist, but not to interfere.

Ruth Stackpool-Moore, Harbour Litigation Funding

Another benefit is that by taking funding for the costs of litigation the claimant will only end up paying these from the proceeds of a successful conclusion; in the event of a loss, there is no recourse to the claimant. The financial risk of an adverse outcome is passed to the funder, thereby removing the financial downside of commencing litigation. Add to this the fact that the engagement of a funder with deep experience of complex litigation and arbitration adds an extra dimension of commercial rationale, risk/reward analysis, rigour in budgeting and decision-making. In effect, funding can be seen as a comprehensive litigation risk management solution.

03 | What are third-party funders looking for when considering a request for funding in arbitration? Are there any types of case that are generally considered unsuitable?

Steven Friel, Woodsford Litigation Funding

Woodsford will fund only meritorious claims, pursued by motivated claimants against solvent defendants, where the costs are proportionate to the likely recovery, and where the governing law and jurisdiction afford relative certainty.

Ruth Stackpool-Moore, Harbour Litigation Funding

The Harbour Fund will fund all types of commercial case with a claim value greater than £10 million. The only cases considered unsuitable for funding are divorce and personal injury cases. We apply the same criteria when assessing any request for funding, be it for arbitration or litigation. We want to know: (i) the prospects of recovery in the event of a successful outcome; (ii) the level of investment required to secure the expected realistic claim value; (iii) the chances of success; and (iv) whether the legal team has the necessary experience to successfully pursue the case to conclusion.

Christopher Bogart, Burford Capital

Beyond being comfortable with the merits of the matter and the quality and experience of the lawyers, Burford doesn't apply formulaic tests. We look at each matter individually as a potential investment and consider its risk profile, likely duration and other factors. That said, it is difficult for us to

finance cases that are likely to have relatively low damages and relatively high costs, because there simply won't be room in such a case for a return on our capital investment while still providing satisfactory compensation for the claimant.

04 | Can you offer some practical advice about how to put forward a good case for funding?

Ruth Stackpool-Moore, Harbour Litigation Funding

There is no magic to putting forward a good case for funding. Providing complete and well-considered information in relation to the four criteria I mentioned above will assist us enormously in assessing the claim. If you like a claim and think it's a winner, then chances are that we will too, but you need to explain why. Conversely, if you're not convinced of the merits of a claim but think you'll have a crack at funding anyway, chances are you're unlikely to succeed.

Christopher Bogart, Burford Capital

The best advice is to do your homework—and that means doing some careful due diligence on potential funders rather than merely seeking out the best price. In transactions where some capital is to be paid in the future, claimants must be confident that a funder's capital will be available to them at the point when it is needed. Does the financier have its own capital? If the capital must be called, are the capital sources firmly bound to provide it or are there any "outs" in their investment arrangements? Are the capital sources institutional? Even where capital availability is not an issue (such as when the client is receiving all the capital up front) you must carry out due diligence on financial providers to assess their stability and the materiality of the investment to them. If your transaction is material to the financier, there are inevitably contractual provisions that will — if it comes under pressure — permit the funder to act in a manner that may be inconsistent with your interests.

Steven Friel, Woodsford Litigation Funding

Claimants and their lawyers should present the funding opportunity in a frank and objective manner, as you would with any other prospective business partner with whom you want to have a multimillion dollar relationship that could last for many years. You should certainly highlight the strengths of the case, but don't try to gloss over the weak points. Give proper thought to all aspects of the case, including quantum, likelihood of annulment proceedings and the risk that contentious enforcement proceedings will be required.

05 | There has been a great deal of discussion recently about the risk that a party might waive privilege and confidentiality when discussing its case with third-party funders. In your experience, how real is that risk and what steps can parties and funders take to best preserve privilege and confidentiality?

Ruth Stackpool-Moore, Harbour Litigation Funding

A misunderstanding certainly exists that engagement with a litigation funder – and the provision of documents to them – generates a risk that any privilege that would ordinarily attach to those documents has been waived. But if the funded party and the funder enter into suitable confidentiality arrangements, then key documents disclosed to a funder may continue to attract litigation or common interest privilege.

Christopher Bogart, Burford Capital

That sense of risk is misguided. There is substantial case law stipulating that privilege is not waived when disclosing key documents to a funder and, in fact, those documents still attract privilege.

Steven Friel, Woodsford Litigation Funding

Whilst there are some uncertainties, the legal position in most jurisdictions, and the dominant view in international arbitration, is tolerably clear: confidential communications between a litigant and a third-party funder are protected by the common interest doctrine. As long as proper confidentiality protections are put in place at the outset, there should not be a waiver of privilege in such communications. Reputable and professional funders, particularly those of us staffed by highly skilled lawyers, and who are members of the Association of Litigation Funders, are equipped to deal with privilege issues.

06 | Historically, certain jurisdictions prohibited third-party funding due largely to the legal doctrines of champerty and maintenance, and public policy considerations. A number of these jurisdictions have opened up to third-party funding, while others are showing a growing interest in doing so. What are your views on these developments?

Steven Friel, Woodsford Litigation Funding

Champerty and maintenance are historical relics of English common law that have no place in modern international arbitration between sophisticated and legally advised parties. As each year goes by, the number of jurisdictions that open up to litigation funding increases, and the number of jurisdictions that maintain restrictions based on champerty and maintenance decreases. Places like Hong Kong and Singapore are moving in the right direction. Places like Ireland will get there eventually.

Ruth Stackpool-Moore, Harbour Litigation Funding

Hong Kong and Singapore immediately come to mind as examples of jurisdictions slowly opening the door to third-party funding in arbitration. Singapore recently published two draft bills for consultation which, once enacted, will legalise the use of funding in international arbitration there. Hong Kong – arguably currently more open to funding in arbitration than Singapore – is expected to introduce new legislation in the next 6 to 12 months.

Christopher Bogart, Burford Capital

Such revisions are inevitable, but happening at varying speeds and variously determined by case law or legislation. For example, Singapore recently paved the way for change by publishing draft legislation on the subject of litigation funding for public consultation. This could well prompt other markets in the region competing with Singapore as a dispute resolution hub to allow similar changes.

Champerty and maintenance are historical relics of the English common law that have no place in modern international arbitration between sophisticated and legally advised parties.

07 | In many jurisdictions, third-party funding is largely self-regulated. But more recently, external regulation seems to be in the spotlight. Some commentators are calling for, among other things, external regulation to set minimum ethical and financial standards, as well as regulate conflicts and disclosure of funding (if not the specific terms). Do you see any place for external regulation?

Christopher Bogart, Burford Capital

We would argue both that additional regulation is not merited, and that more regulation targeting simply “third-party funders” would be unfair. Self-regulation has accomplished many, if not all, of the objectives that some have called for, including minimum capital requirements and an ethical code of conduct. It’s important not to lose sight of the fact that each funded case is effectively regulated (by a tribunal, judge or arbitral panel). They’ve shown their willingness in the past to sanction bad actors and there is no reason to believe this will change. There is a long history of outside financing being provided from a diversity of sources in accordance with a variety of financial models. All of these sources of outside financing – contingent fee firms, banks, private funds, insurers and specialists – could be considered “third-party financing”, and that is precisely how the International Bar Association sees it. It would seem unfair to regulate merely one portion of this activity based on semantics, and it clearly would be unwieldy to attempt to regulate all of it.

Steven Friel, Woodsford Litigation Funding

Professional third-party funders are staffed with lawyers bound by the ethical standards of the legal profession and by other professionals (like accountants) bound by their own professional rules. The arbitrations in which we invest are handled by sophisticated legal teams and play out before specialist tribunals. There is no precedent for external regulation of this type of situation, and the last 10 to 15 years of third-party funding has given rise to no issues that would warrant external regulation.

Ruth Stackpool-Moore, Harbour Litigation Funding

One result of the huge increase in awareness of the potential of third-party funding is a discernible uptick in the number of new funders seeking to enter the market and greater debate about the extent to which the industry should be regulated. External regulation and self-regulation are models that have

been variously adopted by different jurisdictions to try and achieve this goal. If implemented sensibly, with a view to ensuring the system applies to all providers of funding equally, external regulation can offer one route to establishing a useful framework.

08 | Some jurisdictions have proposed empowering tribunals not only to consider third-party funding when allocating costs or deciding security for costs but also to order third-party funders to pay security for costs or to make third-party funders directly liable for adverse costs orders. What are your views on such proposals?

Ruth Stackpool-Moore, Harbour Litigation Funding

What we seek in relation to the twin issues of adverse costs and security for costs is certainty. We simply want to know when and on what bases we will be liable to pay these amounts. Moves by certain jurisdictions and institutions to make third-party funders directly liable seem to overlook the absence of the tribunal’s jurisdiction over the funder. Unless the funder is a party to the arbitration agreement, the tribunal lacks the necessary power to make the orders envisaged.

Christopher Bogart, Burford Capital

There is a line of case law which maintains that the mere presence of a funder is not sufficient grounds to award security for costs. This must particularly be right as multinational corporations turn to funding, not because of lack of capital but because of a desire to share the risk or better manage their balance sheet. Tribunals are better off looking to more determinative factors such as conduct. The majority of funders in England have, for some time now, been working with a limited liability for adverse costs in the event of a loss and it hasn’t stopped them funding new cases.

Steven Friel, Woodsford Litigation Funding

My decision on whether to invest in an arbitration and, if so, on what terms, requires a risk/reward analysis. Any developments that increase the risk for funders will necessarily have an effect on our appetite for the case, and will likely affect pricing. In turn, there is a potential for creating undue impediments to access to justice.

Sherina Petit and James Rogers are partners and Cara Dowling is a senior knowledge lawyer in the London office of Norton Rose Fulbright.

Third-party funding for international arbitration in Singapore

New legislation will open up access to “war chests”

KC Lye and Katie Chung



The Singapore Government has proposed new legislation to permit third-party funding for international arbitration seated in Singapore. Its aim is to further promote Singapore’s growth as one of the world’s leading arbitration seats. Enactment of this new law is also expected to pave the way for contingency fees in international arbitration.

On 30 June 2016, the Singapore Ministry of Law proposed new legislation to permit third-party funding for international arbitration seated in Singapore, as well as related court proceedings and mediation. The Civil Law (Amendment) Bill 2016 and Civil Law (Third-party Funding) Regulations 2016 will allow parties to access “war chests” to seek pre-action advice and pursue claims, and shift the financial risk to third-party funders.

In introducing the new legislation, the Ministry acknowledged that parties require flexibility in how they fund disputes, that third-party funding is increasingly used in international arbitration in other major arbitral seats, and that the availability of funding options is crucial to enhancing Singapore’s growth as a leading international arbitration seat.

The proposed legislative amendments are expected to be in force before the end of 2016. Singapore has now taken the lead on these issues ahead of regional competitors, including Hong Kong which closed its own consultation on third-party funding in February 2016.

The new framework

The legislative amendments will enact a new framework for third-party funding. The Bill will formally abolish the common law doctrines of champerty and maintenance in Singapore. It will clarify that third-party funding contracts for international arbitration seated in Singapore – as well as related litigation, mediation, setting aside of an arbitral award and enforcement of an award or a foreign award – are not contrary to public policy or illegal.

Subsidiary legislation will be introduced to regulate third-party funders, including the qualifications and other requirements that funders must meet to enter into a third-party funding contract. Funders who fail to comply with those conditions will be unable to enforce their rights under the funding contract.

Lawyers will be able to recommend third-party funders to their clients or advise their clients on third-party funding contracts, so long as they do not receive any direct financial benefit from their recommendation or advice.

Contingency fee arrangements

The abolition of champerty and maintenance is expected to pave the way for future legislative amendments to allow for contingency fee arrangements (CFAs) between lawyers and their clients in international arbitration and mediation. A CFA links the lawyer’s remuneration to the outcome of the case. In Singapore, CFAs are currently only permitted for non-contentious work. However, an ad hoc committee of the Council of the Law Society of Singapore appointed in 2014 proposed that lawyers be allowed to enter into CFAs with clients for contentious work – specifically international arbitration and mediation – with a statutory limit on the success fee that can be applied.

Singapore’s competitiveness as a preferred arbitral seat will be further enhanced by the legalisation of third-party funding for arbitration in Singapore.

Looking ahead

The number of disputes and the value of claims being resolved by arbitrations seated in Singapore have risen steadily over the last few years. Increased investment flows to Asia and the popularity of bilateral and multilateral investment treaties, such as the Trans-Pacific Partnership Agreement and Transatlantic Trade and Investment Partnership, point to a further shift towards resolving disputes in the region. Singapore’s competitiveness as a preferred arbitral seat for such disputes will be further enhanced by the legalisation of third-party funding for arbitration in Singapore.

KC Lye is a partner and Katie Chung is a senior associate in the Singapore office of Norton Rose Fulbright.

Maintenance and champerty

An end to historic rules preventing third-party funding?

Sherina Petit and Daniel Jacobs

Historic rules prohibiting third parties from funding arbitration are being phased out in a number of jurisdictions, creating opportunities both for third-party funders and parties involved in arbitrations.

Historically, third parties were prohibited from funding an unconnected party's litigation under the doctrines of maintenance and champerty. Maintenance refers to an unconnected third-party assisting to maintain litigation, by providing, for example, financial assistance. Champerty is a form of maintenance, where a third-party pays some or all of the litigation costs in return for a share of the proceeds.

Reasons for the rules

The rules prohibiting maintenance and champerty were first introduced in medieval England. These were intended to prevent abuses of justice by corrupt nobles and royal officials who associated themselves with fraudulent and vexatious claims, strengthening the credibility of the claims in return for a share of the profits.

In more modern times, the prohibition of third-party funding was based on the public policy ground of protecting the purity of justice. There was a fear that a third-party could manipulate the litigation process and, as Lord Denning put it, "be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses" (*Re Trepcza Mines* (No 2) [1963] Ch 199).

A modern approach

In the current era of encouraging access to justice, these concerns are widely considered to be out of date. Addressing the issue in 2013, Lord Neuberger, the president of the UK Supreme Court, said that "access to the courts is a right and the State should not stand in the way of individuals availing themselves of that right."¹

The rules against maintenance and champerty have been relaxed in a number of jurisdictions, including England and Wales and parts of Australia, Canada and the US, where third-party litigation and arbitration funding is now permitted.

The modern approach of courts in these jurisdictions is to consider whether the arrangements are contrary to public policy and unenforceable as a result. For example, in England and Wales, in order for an arrangement to amount to maintenance or champerty there must be an element of impropriety, such as disproportionate profit or excessive control on the part of the third-party funder. The courts in Australia have gone further and have held that there is no public policy objection to a third-party not only financing but also controlling the litigation.

Implications for arbitration

The rules against maintenance and champerty extend to arbitration, which accordingly prevented the use of third-party funding in arbitration. As a result of the relaxation of these rules, third-party funding in arbitration has been growing steadily. Singapore and Hong Kong are both taking steps to allow third-party funding of arbitrations seated in those jurisdictions. This has created opportunities for funders looking to invest in such claims and for parties who would not otherwise be able to pursue their claims without funding.

Sherina Petit is a partner in the London office of Norton Rose Fulbright and Daniel Jacobs is a trainee solicitor.

¹ Lord Neuberger, "From barrety, maintenance and champerty to litigation funding", Gray's Inn speech, May 8, 2013

The third-party funding debate

We look at the risks

Sherina Petit, Cara Dowling and Andrew Sheftel



In this article we set out the debate over third-party funding. We look at the concerns that are commonly raised and suggest how parties can best minimise risks associated with funding.

The benefits of third-party funding are well known. Funding can provide access to justice for under-resourced parties (as is often the case in investor–state disputes) enabling them to pursue proceedings which a lack of financing would otherwise have prevented. For parties that are adequately resourced, funding can offer a more convenient financing structure, allowing capital which would otherwise be spent on legal fees to be allocated to other areas of their business during the proceedings. Against those benefits, however, there are concerns expressed about funding and there is a level of risk involved. Clear insight into potential downsides and sufficient risk preparation are therefore essential elements of making a decision on funding.

Unmeritorious claims

Could funding give rise to an increase in unmeritorious claims? In our view, it is more probable that the opposite could happen. Funding arrangements are more likely to act as a control on unmeritorious claims. Because their return is dependent on the success of the case, funders have no desire to take on weak – let alone unmeritorious – cases. They conduct due diligence on each case, weighing the merits of the parties’ respective claims and the likelihood of recovery before deciding whether to make an offer of funding. Parties may even benefit from this further analysis of the merits of their case (in addition to that already conducted by their legal advisors) – particularly where funders have seasoned arbitrators on their review boards.

The high cost of funding

If a party is successful, most funders will expect to recoup the sum funded plus a substantial fee – this can be a percentage of the damages recovered (often 20 to 40 per cent), a multiple of the amount advanced by the funder, or a combination of the two. That said, if a party would be otherwise unable to pursue proceedings without funding, recovering 60 per cent of the claim may be better than nothing.

There can be significant upfront costs of putting third-party funding in place. A party’s legal team must conduct due diligence on funders, put in place confidentiality agreements and then draft a bespoke funding agreement (this is necessary, given the terms will vary depending on the parties and the case). Some or all of these costs may be wasted if an offer of funding is not made. Similarly, where multiple funders have been approached. However, some funders will agree to back

roll funding to cover these costs – this is a point to consider when negotiating with the funder.

In addition, parties that have obtained third-party funding are often vulnerable to a security for costs application, which, even if unsuccessful, can drive up the costs of the proceedings. The existence of funding can be a factor which the tribunal will consider in making its decision on such an application – although it will not be the sole determining factor.

Recovery of costs against funders

In English litigation, a third-party funder of an unsuccessful litigant may be liable to contribute towards the costs of the other side, though currently such contribution is limited to the amount of funding provided. In the context of arbitration, the outcome is not quite as simple – the tribunal may not have jurisdiction to make a costs award against a funder, given that it is unlikely to be a party to the arbitration agreement. Whether the tribunal has jurisdiction will depend on the procedural law and rules governing the particular arbitration. Either way, if an unsuccessful party is unable to meet an adverse costs award/order, the successful party may find itself unable to recover the full amount from the funder (or indeed any of the sum owed). A party whose opponent is funded should therefore consider whether to make an early application for security for its costs.

Conflicts of interest

Third-party funding arrangements may result in undisclosed conflicts of interest – perceived or actual. This can occur, for example, where there is a prior relationship between the funder and a party or law firm involved in the proceedings or between the funder and an arbitrator. Such conflicts can result in costly satellite disputes, including challenges to the arbitrator’s appointment and applications for disclosure of funding arrangement. Parties seeking third-party funding should consider whether they should disclose those arrangements (and if so, how and when). Again, the applicable law and rules of the arbitration will play a determinative role here.

Confidentiality and privilege

Rules of privilege vary across jurisdictions, as do approaches to the confidentiality of arbitration. In advance of entering into correspondence with third-party funders, these issues must

be considered under all applicable laws. Failure to do so risks having to later disclose such communications – which often contain confidential or privileged material. Parties should enter into confidentiality or non-disclosure agreements with prospective funders. Parties should also consider what material in fact needs to be shared: a balance must be struck between limiting risk and meeting the funder's need for adequate information (both when considering whether to make an offer for funding and throughout the proceedings).

Improper influence over proceedings

Maintenance and champerty are historic common law rules barring third parties with no legitimate interest in the proceedings from supporting or maintaining proceedings in return for a share of the proceeds. In jurisdictions where these rules still apply, third-party funding is prohibited.

But even in jurisdictions where there is an increasingly relaxed attitude to these doctrines, there can be concerns over the influence funders may have over proceedings. As a funder has a direct financial interest in the outcome of a dispute, there is a risk that it might seek to interfere with the conduct of the proceedings. It is easy to see where tensions could develop – for example, if it is in a funder's interest, it might pressure a party to agree to settlement even if this is not in the party's best interest. Another concern is that, if the terms of the funding agreement allow, a funder might simply withdraw funding upon limited notice, leaving the party unable to continue the arbitration. To avoid these issues, the funding agreement should ensure that the funder does not have excessive control and may not unreasonably withdraw funding.

Is regulation the answer?

In the main, there is currently little to no mandatory regulation of third-party arbitration funding, whether in domestic laws, international conventions or the rules of the major arbitration institutions. In England – one of the largest funding markets alongside the US, Australia and Germany – a voluntary Code of Conduct for Litigation Funders has been in existence since

2011 and covers capital adequacy requirements for funders as well as rights to terminate or control proceedings. The Association of Litigation Funders is the body responsible for overseeing this self-regulation. However, currently only seven funders are members of that association, leaving a large proportion unregulated. This poses real questions over the viability of self-regulation.

The Queen Mary University of London 2015 International Arbitration Survey reported that a significant majority of respondents (71%) thought that third-party funding required regulation.¹ This may be a reflection of the fact that a lack of mandatory regulation puts a greater burden on parties – both those seeking funding and those facing a funded opponent. A party seeking funding must undertake due diligence on its funder (for example, to ensure that it has adequate available capital to meet the cases in its portfolio) and carefully negotiate the funding agreement. A party facing a funded opponent is often obliged to incur costs protecting its position with regards to recovery of costs. These additional burdens come at a time when parties are often under significant pressures – time, financial and business.

The international arbitration third-party funding market has to date operated adequately without mandatory regulation. But given the increase in cases that are funded, the number of new funders entering the market and the globalisation of the industry (many funders operate across multiple jurisdictions), there may be grounds for the introduction of external regulation. A number of jurisdictions and arbitration institutions are considering just this issue. The concern, however, is that different standards could be set in different jurisdictions and under different arbitral rules. It would be far preferable – for parties and the funding industry – to have minimum common standards. The question is what that would look like and how that could be achieved.

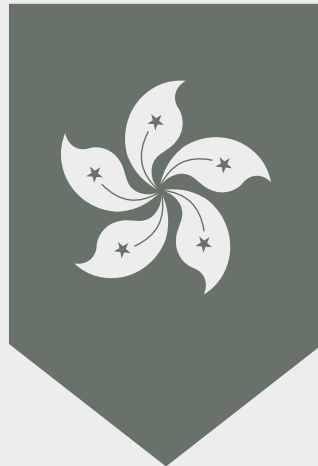
Sherina Petit is a partner and Cara Dowling and Andrew Sheftel are senior knowledge lawyers in the London office of Norton Rose Fulbright.

¹ The Queen Mary University of London 2015 International Arbitration Survey

Third-party funding for arbitration in Hong Kong

CIETAC HKAC's draft guidelines on third-party funding for arbitration

James Rogers



The draft guidelines on third-party funding for arbitration published by CIETAC's Hong Kong Arbitration Center will be a helpful resource for parties and tribunals unfamiliar with third-party funding. The draft guidelines define third-party funding and set out best practice and conduct for issues such as confidentiality, due diligence checks on funders, funders' control over proceedings, conflicts of interest, security for costs, and disclosure of funding arrangements.

In 2015, Hong Kong ranked as one of the world's most preferred and widely used arbitral seats of arbitration, alongside London, Paris, Singapore and Geneva.¹ In the area of third-party funding, however, the position under Hong Kong law has always differed from its European counterparts. This seems set to change and, in anticipation, CIETAC's Hong Kong Arbitration Center (CIETAC HKAC) released draft guidelines for third-party funding for arbitration.²

Hong Kong has traditionally been hostile to third-party funding, largely due to concerns over the doctrines of maintenance and champerty. However, a sub-committee of Hong Kong's Law Reform Commission recently recommended that Hong Kong law be amended to clarify that third-party funding for arbitration is permitted.

It also proposed that a system of safeguards be established to protect against perceived risks of funding. Commonly raised concerns include that third-party funding could give rise to undisclosed conflicts of interest, or lead to breaches of confidentiality or to funders exercising excessive control over proceedings.

CIETAC HKAC's draft guidelines attempt to address these concerns, setting out best practice and conduct including in respect of confidentiality, due diligence on funders, funders' control over proceedings, conflicts of interest – both for parties and tribunals, security for costs, and disclosure of funding arrangements. The guidelines offer a practical approach to funding that should, in particular, be a helpful resource for parties and tribunals unfamiliar with such arrangements.

The public consultation period on the draft guidelines concluded on 19 July 2016. CIETAC HKAC is considering the responses received, however, we understand that the responses thus far have been overwhelmingly supportive.

James Rogers is an editor of International arbitration report and a partner in the London office of Norton Rose Fulbright.

¹ International Arbitration Survey: improvements and innovations in international arbitration, Queen Mary, University of London, 2015

² CIETAC HKIAC draft Guidelines on third-party Funding for arbitration

Key provisions of the CIETAC HKAC draft guidelines:

Third-party funding defined

Third-party funding is defined as when a professional third person or entity contributes funds or other material support to a party in arbitration and has a direct economic interest in the award to be rendered in the arbitration. However, the draft guidelines exclude situations where a party arranges financial support from a group company, procures insurance, and/or obtains legal services on a deferred or contingency basis.

Best practice and conduct

The draft guidelines set out principles of practice and conduct which parties are encouraged to observe. These are voluntary and non-binding.

Checks on the funder

A party seeking funding should satisfy itself that the funder is duly incorporated and has adequate capital.

Confidentiality and disclosure of communications

A party seeking funding or negotiating funding terms should consider whether communications with prospective funders may be discloseable in subsequent proceedings, should take early legal advice, conclude non-disclosure agreements with all prospective funders, and consider the effects of any applicable confidentiality provisions or laws.

A formal agreement

The terms of a funding arrangement should be set out in a formal agreement.

Funders' control over proceedings

A party seeking funding should consider the nature and extent of the prospective funder's control over proceedings, and termination and withdrawal provisions under the prospective terms, and take legal advice where necessary.

Party conflicts of interest

A funded party should disclose circumstances arising from any funding that might give rise to possible issues of conflict of interest under applicable laws and rules.

Tribunal conflicts of interest

A tribunal should, upon becoming aware of the existence of funding, consider its own independence and impartiality and take such steps as required under applicable laws or rules.

Disclosure

A tribunal may, where appropriate and in consideration of applicable laws or rules, invite or direct a funded party to disclose its funding.

Security for costs

A tribunal can consider the nature and extent of funding as a relevant factor when determining an application for security for costs.

How will Brexit impact arbitration in England and Wales?

It's business as usual

James Rogers, Simon Goodall and Charles Golsong



Will Brexit have any significant long-term effect on the English arbitration market? The consensus amongst commentators is no: it will largely be business as usual. The advantages of London-seated arbitration do not derive from EU law or from UK membership of the EU, and will remain in place after the UK exits the EU. We give five good reasons for this level of confidence.

Put simply, the advantages of London-seated arbitration do not derive from EU law or from UK membership of the EU, and will remain in place after the UK exits the EU.

01 | **Brexit will not diminish the many advantages of London as a seat of arbitration**

Where an arbitration is seated influences the efficiency and effectiveness of proceedings, the availability of court measures in support of arbitration, challenges to awards, and the enforceability of awards. The choice of seat is therefore of critical importance.

For some time, London has enjoyed an almost unrivalled status as one of the most popular seats of arbitration. Parties frequently choose to resolve international disputes by London-seated arbitration, even where the parties have no connection to, and the contract was neither made nor performed in, the UK. London's success as a seat of arbitration can be attributed to certain features of English law and the confidence of parties in the English judicial system, its efficiency, impartiality and effectiveness.

The English Arbitration Act 1996 (1996 Act) provides a modern and comprehensive framework for resolving disputes by arbitration. The principles which underlie the 1996 Act are that arbitrations should be resolved by an impartial and fair arbitral tribunal without unnecessary delay or expense; that parties should be free to agree how their disputes are resolved, subject only to minimum safeguards which are necessary in the public interest; and that the courts of England & Wales should intervene only in limited circumstances.

The 1996 Act gives arbitral tribunals a wide discretion to decide on procedural matters, subject to the parties' right to agree otherwise. It also allows (limited) intervention by the courts to support arbitration, including *inter alia* to require a party to adhere to a tribunal's procedural orders, to order injunctive relief, to compel witnesses to give evidence, and to preserve evidence. Such supportive measures can be important for the smooth running of arbitral proceedings, particularly where a party is attempting to delay and disrupt the process.

The English judiciary is internationally recognized for its impartiality, experience and skill, particularly in dealing with complex and multi-jurisdictional matters in an efficient manner.

English courts also have a proven track record of supporting arbitration and recognising and enforcing arbitral awards.

English law upholds the principle of confidentiality of arbitral proceedings – something that is not common amongst all jurisdictions.

The popularity of London-seated arbitrations can also be attributed in part to the prevalence of English law, given that the choice of English governing law often goes hand in hand with the choice of London as the seat. English law is by far the most frequently chosen governing law in commercial contracts between international parties.¹ English contract law is trusted internationally because it is an established and effective legal system, placing importance on freedom of contract, but without awards of punitive or exemplary damages.

Another significant benefit of arbitrating in London is the availability of high quality and specialist professionals who can act as arbitrators, legal counsel and expert witnesses. There is also a well-established legal support infrastructure, including specialist arbitral institutions and centres.

None of these features are likely to change following the UK's withdrawal from the EU. The role and attitude of the English courts are likely to remain unaffected (subject potentially to increased powers to order injunctive relief, as discussed further below). English contract law – which (with the exception of consumer law) has developed largely independently of EU legislation – is also unlikely to be affected. Put simply, the advantages of London-seated arbitration do not derive from EU law or from UK membership of the EU, and will remain in place after the UK exits the EU.

02 | **Brexit will have no impact on the enforcement of English arbitration awards**

The UK's withdrawal from the EU will have no impact on the enforcement of English arbitration awards in EU countries (or elsewhere). Generally, parties seeking recognition and enforcement of arbitral awards do so under the New York Convention. There are 157 states that are signatories to the New York Convention, including all 28 EU member states. The Convention does not depend on EU membership, and so enforcement of English awards in EU countries under its provisions will be unaffected by Brexit.

¹ 2010 International Arbitration Survey: choices in international arbitration, Queen Mary, University of London, 2010



Brexit may have some impact on EU-wide litigation, not least because currently EU law sets out the EU-wide regime for court jurisdiction, mutual recognition and enforcement of judgments, and choice of contractual and non-contractual governing law. That may serve in the short term to increase the attractiveness of London-seated arbitration, at least until the uncertainty is settled by negotiations between the UK and EU.

03 | **Brexit might enable English courts to issue EU-wide anti-suit injunctions again**

Historically, the English courts had demonstrated a willingness to act in support of arbitration and to protect their own jurisdiction by issuing anti-suit injunctions to restrain parties who brought court proceedings in breach of an arbitration agreement or an exclusive jurisdiction clause. However, EU law severely curtailed the English courts' power to do so where

the offending court proceedings have been brought in an EU member state. (The English courts can and do still issue anti-suit injunctions in respect of proceedings before non-EU courts.) The Court of Justice of the European Union (CJEU) has long held that intra-EU anti-suit injunctions are incompatible with EU law.

This position was set out in the CJEU's ruling in 2009 in the long-running West Tankers case (*Allianz SpA v West Tankers* Case C-185/07), where the court held that an anti-suit injunction obtained in the English courts against a party who brought court proceedings in Italy in breach of an arbitration agreement was incompatible with EU Law. Similarly, the CJEU's ruling in the *Turner v Grovit* case (Case C-159/02) confirmed the prohibition on anti-suit injunctions in respect of EU court proceedings brought in breach of exclusive jurisdiction clauses.

These rulings gave precedence to a ‘mutual trust’ amongst EU Member States, including to uphold the EU regime on court jurisdiction and to restrain court proceedings in favour of binding agreements to arbitrate. However, for many parties this offers little comfort as, in practice, not all EU member state courts effectively enforce arbitration or exclusive jurisdiction agreements; a number still prioritise their own jurisdiction or the process is prohibitively slow or expensive. Parties with EU-related disputes are therefore left with little remedy in the face of a counterparty breach of the dispute resolution clause. Parties in arbitral proceedings could seek an anti-suit injunction from the tribunal, which they could then seek to have enforced under the New York Convention, but they would be reliant on the foreign court’s willingness and ability to enforce that award.

Post-Brexit, this may be set to change. Once the UK has left the EU, English courts will no longer be bound by EU law or jurisdiction. In which case, the English courts may once again be free to grant anti-suit injunctions in respect of court proceedings brought before EU Member State courts – though this will depend on the post-Brexit framework negotiated with the EU. If this is the case, London might gain a competitive advantage as a seat of arbitration. The courts of EU Member States will remain prohibited from issuing anti-suit injunctions in support of arbitration for other EU court proceedings. They will be free, of course, to grant anti-suit injunctions to restrain a party from pursuing a claim before the English courts – but that said, the courts of a number of EU Member States either do not grant anti-suit injunctions (irrespective of the EU law position) or they appear reluctant to do so. An anti-suit injunction can be a powerful weapon in international disputes. The English courts’ ability and readiness to order such measures might prove attractive to many parties.

04 | **Brexit may spark a rise in London-seated arbitrations**

Exactly when the UK will give notice of its withdrawal from the EU is still not known. It is clear, however, that the process of withdrawal and negotiation with EU Member States will

take a number of years. In the meantime, prior to the UK’s withdrawal, little will change for the English arbitration market. Existing arbitration clauses specifying London as a seat of arbitration will continue to operate as before.

Undoubtedly, there will be London-seated arbitrations generated by Brexit, as the number of commercial disputes in general is expected to rise. A perfect storm of uncertainty and change, disruptions in financial markets and fluctuations in asset values, leads inevitably to parties defaulting on or looking for ways to avoid or exit their contractual obligations. International parties engaged in arbitral proceedings may find that the comparative weakness of the pound sterling makes London a less expensive place to arbitrate disputes.

05 | **The forecast is business as usual for the English arbitration market after Brexit**

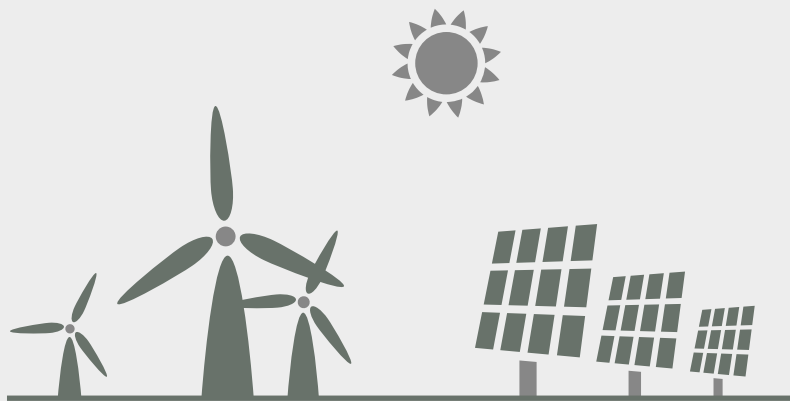
At this stage, Brexit is not expected to have any real impact on the English arbitration market. In the long term, the consequences are less predictable. London’s status as a global centre for dispute resolution is undeniably influenced by its role as an international business hub, so if Brexit does have an impact on the UK’s global trade and economy as a whole that may have a knock-on effect – but this is expected to be minimal. English arbitration law and practice has thrived independently of the UK’s membership of the EU, not because of it, and London has a well-deserved reputation as a first-rate jurisdiction for resolving complex multi-jurisdictional commercial disputes. The choice of arbitral seat is of critical importance, not least because it influences the arbitral procedure as well as the availability of court measures in support of arbitration and appeals against awards. Commercially savvy parties will be well aware that the significant advantages of arbitrating disputes in London will remain even after Brexit.

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Contractual protections available to international investors

Securing investment stability in energy and natural resources projects

Neil Q Miller and Holly Stebbing



For international companies investing in energy and natural resources projects, ensuring contractual stability over the lifetime of the project is critical. Securing this stability requires careful drafting of the contract and the use of the full suite of contractual and non-contractual protections available to investors. Stabilisation clauses form part of this wider suite and, if well drafted, can provide investors with greater certainty in their dealings with host states.

International investment contracts in the extractive sector commonly provide that disputes arising under the contract are to be resolved by reference to international arbitration. This choice is largely driven by the fact that a state or state entity will generally be a party to the contract and arbitration is perceived to offer a more neutral forum for dispute resolution than state courts and better enforcement prospects. These contracts include a number of other distinctive provisions also necessitated by the fact that a state or state entity will be a party to the contract, including stabilisation clauses. International arbitration practitioners operating in this sector need to be familiar with these provisions and with their limitations.

The tension between stability and flexibility

Investors' desire for stability is easily understood. They are entering into a long-term relationship with a sovereign state, in industries characterised by high upfront capital costs and lengthy lead times if and before revenues start to flow. They typically bear the costs of exploration and development, and also the costs of production once it commences. At this point, they can find themselves vulnerable to unilateral action by a host state, including amendments to national laws and tax provisions, as the state seeks to take a bigger bite of the cherry. Therefore, when investment contracts are negotiated, investors seek certainty that the deal struck will be honoured by the state throughout the life of the project.

Host states generally do not have the same motivations. They are looking to derive maximum benefit from their natural resources and contractual flexibility will enable them to respond to changing political, economic and social conditions – including circumstances where acreage proves more profitable than projected and the investor stands to benefit from windfall profits.

As a result, there is a tension between investors' desire for stability and host states' desire for flexibility which parties need to anticipate and prepare for when negotiating investment contracts.

Contractual stabilisation mechanisms

International investors use various mechanisms to mitigate the risk of changes to an investment contract's legal and fiscal regime. This includes the use of stabilisation clauses. These are not boilerplate clauses: their terms vary widely, including in defining the event that triggers the protection (this could be a formal change in law, or a broader change in the application of existing law) and the nature and extent of protection offered

(such as monetary compensation or compensatory revision of the underlying contract).

A traditional form of stabilisation clause is the 'freezing' clause, which freezes the provisions of the national law applying to the contract as at the date of the contract. The validity (and therefore enforceability) of such clauses – which effectively handcuff a state – is uncertain. They are seen as impeding a state's sovereign right to develop its own law and its sovereignty over its national resources.

More modern forms of stabilisation clause either provide for a right to reopen the contract upon occurrence of an adverse change in law or circumstances, or for a right to compensation for adverse consequences of a change to the fiscal circumstances or legal regime. As these clauses provide for an adjustment to the contractual regime, they represent a departure from the international law principle of *pacta sunt servanda* ('agreements must be kept'). The aim of such clauses is to reconcile the investor's desire for stability with the host state's sovereignty and need for flexibility by providing a mechanism to adapt to changed circumstances. This reduces the risk of conflict and deadlock between the parties. Unlike traditional freezing clauses, it is generally accepted that modern stabilisation clauses are binding under international law. However, economic rebalancing clauses are yet to be the subject of particular arbitral or judicial scrutiny, so modern jurisprudence on the interpretation and operation of such clauses is limited.

Common categories of modern stabilisation clause

The terms of a contract's stabilisation provisions will differ depending on the specific clause; these are generally tailored to the parties and circumstances. There are, however, four commonly recognised categories of modern stabilisation clause.

01 | Intangibility clauses

Intangibility clauses prohibit any unilateral change to the contractual regime without the consent of all parties. The effect of this is to freeze the contract, rather than the law. In this sense, intangibility clauses can be seen as a sub-category of traditional freezing clauses.

02 | Allocation of burden clauses

Allocation of burden clauses shift the burden of a unilateral change in the legal or regulatory environment from the affected investor to the host state, so the host state sets off the adverse

impact to the investor. These clauses are commonly used for changes to tax and customs rules.

03 | **Adaptation clauses**

Rebalancing of benefits – or adaptation clauses – provide for the contract to be adapted so as to rebalance the position of the parties to the original contract equilibrium.

04 | **Renegotiation clauses**

Renegotiation clauses provide for the contract to be renegotiated either upon the occurrence of specific pre-agreed events or the occurrence of any event which was unforeseen as at the date of the contract, is outside the control of the parties and which negatively affects the economic equilibrium beyond a stated threshold. A renegotiation clause may also provide that parties are to consult on a periodic basis to consider whether the economic balance of the contract requires adjustment.

Poorly drafted stabilisation clauses may undermine the stability of the contract

Poorly drafted stabilisation clauses may fail to have the effect sought and may even undermine the stability of the contract. Parties drafting stabilisation clauses must therefore ensure that whichever clause it chosen, all key elements are carefully defined.

Adaptation and renegotiation clauses are often the most problematic. The key elements to consider are:

- the change of circumstances triggering the renegotiation or rebalancing
- the effect of the change on the contract
- the objective of the renegotiation or rebalancing
- the procedure for the renegotiation or rebalancing
- the solution in case of failure of the renegotiation or rebalancing process, in order to avoid deadlock.

Additional considerations

In order for investors to avail themselves of the protection of a stabilisation clause (in whatever form), they must ensure that

the contract includes suitable dispute resolution provisions which can be triggered in the event of a breach or a failure to reach agreement on renegotiation. International arbitration is recommended for international contracts of this kind.

Investors should also consider including complementary hardship and force majeure provisions, as these can offer additional protection.

Careful consideration should be given to the governing law of the contract. Investors must consider any domestic law limitations that might undermine the validity of the stabilisation clause. Where international law applies, a stabilisation clause will only be enforceable to the extent that it complies with norms of international law, so these too must be considered – in particular the principle of permanent sovereignty of states over natural resources and the right of the state to develop its own laws.

Finally, investors should be aware that even if held to be binding, tribunals can be reluctant to compel states to comply with stabilisation clauses. Compensation for breach is much more likely to be ordered than specific performance. In these circumstances, the legality of the state's action will be relevant to the measure of compensation awarded. If the actions taken by the state were non-discriminatory and in the public interest (but nonetheless amounted to a breach of the stabilisation clause), compensation for fair market value will typically be used. Where, however, the state's actions were discriminatory and/or not in the public interest, the party may be awarded actual loss together with future profits.

Conclusion

Contractual stabilisation clauses – whether in the form of a traditional freezing clause, a more modern rebalancing clause, or some form of hybrid – are part of a wider suite of contractual and non-contractual mechanisms which investors should consider at the outset of any natural resources project. Notwithstanding questions over enforceability, if carefully drafted, stabilisation clauses can increase the protection available to investors, and provide substantially more certainty and stability in their dealings with host states.

Neil Q Miller is a partner and Holly Stebbing is a senior associate in the London office of Norton Rose Fulbright.

OHADA arbitration at the crossroads

*Reform of the OHADA arbitration regime
is necessary to restore confidence*

Christian Dargham and Janice Feigher



Despite the growing number of disputes involving African interests, the majority of Africa-related arbitrations are not conducted using the OHADA arbitration framework. This is, in part, due to inherent flaws in the OHADA arbitration regime and to the perception that arbitrations seated in OHADA Member States are not sufficiently certain in form, substance and enforcement. The system has to change if OHADA arbitration is to become a strong regional contender.

Reform of OHADA arbitration is necessary if it is to flourish and become a cornerstone of dispute resolution in Africa.

A scaling-up of economic and foreign investment activity across the African continent over the past 20 years has led to an increase in the number of international arbitration proceedings involving African parties or interests, particularly in the mining, oil and gas, telecommunications and construction sectors. Most of these arbitrations are seated outside Africa and do not involve African administering institutions or arbitrators; they are primarily conducted through international institutions such as the ICC or the LCIA.

This is not because of an absence of regional institutions. OHADA arbitration, a supranational African dispute resolution mechanism, was introduced over 15 years ago. Yet that regional regime has not emerged as a favoured dispute resolution method for Africa-related disputes. In this article we look at why that is and what reforms are necessary if OHADA arbitration is to flourish and become a cornerstone of dispute resolution in Africa.

OHADA

The Organisation for the Harmonisation of Business Law in Africa

Established in 1999

A regional organisation aimed at developing economic activity and investment in the territory of its members

Set up to harmonise commercial law in the OHADA zone

Current OHADA Member States:

Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Ivory Coast, Mali, Niger, Republic of the Congo, Senegal and Togo

The OHADA arbitration framework

Under the OHADA arbitration framework, parties of OHADA Member States who are either conducting business with each other or with foreign investors have the option to arbitrate under two separate regimes:

- 1 The Rules of Arbitration of the Common Court of Justice and Arbitration (CCJA Rules). These are similar to the ICC Rules of Arbitration. Parties may commence an institutional arbitration administered by the CCJA under the CCJA Rules if at least one party is domiciled in a OHADA Member State or if the contract is wholly or partially enforced or will be enforced in the territory of a contracting state.
- 2 The Uniform Act on International Arbitration 1999 (Uniform Act). This is directly applicable in all OHADA Member States. Parties may commence an ad hoc arbitration or institutional arbitration administered by an institution other than the CCJA under the Uniform Act, if the seat of the arbitration is located in an OHADA Member State.

In many respects, these regimes mirror best practice in international arbitration. The Uniform Act and the CCJA Rules both embrace the cardinal principles of international arbitration including party autonomy, autonomy of the arbitration agreement, kompetenz kompetenz (the competence of the tribunal to rule on its own jurisdiction), the independence and impartiality of the arbitral tribunal, and the availability of provisional measures.

However, the fact that the majority of Africa-related arbitrations are not conducted using these regimes is a clear indication of a lack of confidence in the OHADA system. This is, in part, due to inherent flaws in the OHADA arbitration regimes. It is also a consequence of the perception that arbitrations seated in OHADA Member States are not sufficiently certain in form, substance and enforcement.

That the majority of Africa-related arbitrations are not conducted using these regimes is a clear indication of a lack of confidence.

Certain domestic courts within the OHADA zone remain hostile to arbitration

Even though the Uniform Act and CCJA arbitral regimes incorporate the fundamental principles of international arbitration, not all domestic courts within the OHADA zone satisfactorily uphold those precepts. Under the Uniform Act, for instance, state courts are required, upon request of either party, to declare their lack of jurisdiction when court proceedings are commenced before them in breach of a valid arbitration agreement (article 13). Despite this, some domestic courts have regularly, and without justification, declared themselves competent notwithstanding the existence of a valid arbitration agreement. Such an attitude has unsurprisingly damaged the credibility of the OHADA system.

No uniform exequatur under the Uniform Act

The enforcement of awards rendered under the Uniform Act regime is complicated by a lack of uniformity of procedure across all OHADA Member States. To enforce a Uniform Act regime award, the ‘competent state judge’ must issue an order of exequatur converting the award into an order enforceable within the domestic jurisdiction. There is, however, no uniform exequatur across all OHADA Member States. Instead, parties must apply for exequatur in each state where enforcement will be sought. Further complicating matters, not all OHADA Member States have designated their ‘competent judge’ for this purpose.

These issues are unique to arbitration under the Uniform Act regime and do not arise under the CCJA regime. CCJA regime awards are enforced by an order of exequatur issued by the CCJA (not a state court), and that order is binding and enforceable across all OHADA Member States. This is one advantage of the CCJA regime over the Uniform Act regime.

Potential conflicts of interest in the CCJA

The CCJA acts as an administering institution in which capacity (like the ICC Court of Arbitration) it supports and supervises arbitral proceedings including confirming and appointing arbitrators and reviewing the form of awards before they are made. Unusually however, the CCJA also acts as a judicial court in which capacity it rules on challenges to the validity or

enforceability of awards rendered in CCJA arbitral proceedings (amongst other matters). This duality – of supervising arbitral proceedings and then determining the validity and enforceability of awards rendered in those proceedings – is seen as creating a structural conflict of interest and has for that reason attracted criticism.

Moreover, there is concern about potential state influence over the CCJA’s decision-making process. The CCJA judiciary consists of seven judges, elected to renewable seven-year terms by secret ballot from a list of candidates nominated by OHADA Member States. There is no obligation on a Member State to recuse its judicial representative from the CCJA court in proceedings in which it is itself a party. That means, for example, that a state’s judicial representative may preside over proceedings brought by the state to annul an award rendered against it. This is rightly seen by many as a major risk to the integrity of the proceedings.

In addition, some of the CCJA’s judicial rulings have attracted criticism and undermined its credibility within the international arbitration community.

The case of *Getma v Guinea* (19 November 2015) provides an example of all of these concerns playing out. In this case, on the application of the Republic of Guinea (an OHADA Member State) the CCJA annulled a US\$42.2 million award against Guinea in favour of Getma (a subsidiary of a French group). The ground for annulment was that the arbitrators had exceeded their mandate by entering a side agreement with the parties to increase the tribunal’s fees to US\$250,000, exceeding the US\$66,000 cap imposed by the CCJA in its supervisory capacity.

There have been a number of concerns raised over this decision. It is considered a draconian response and unfairly prejudicial to parties who had spent a significant amount of money conducting the arbitration. In ignoring that Guinea and Getma had agreed to the fee arrangement, it fails to respect party autonomy – a principle on which international arbitration is founded. The cap the CCJA imposed on the arbitrators’ fees is viewed as very low. Also of concern is the tribunal’s claim that when it was appointed, it had received assurances from the CCJA in its supervisory capacity that the tribunal would be able to adjust its fees. Last but not least, Guinea’s judicial representative sat on the CCJA panel that heard Guinea’s application to set aside the award against it.

All of these factors could make CCJA arbitration unattractive for parties, as well as experienced international arbitrators. If OHADA arbitration is to flourish, conflicts of interest – perceived or real – must be avoided. Users of international arbitration must feel confident that OHADA arbitration is reliable, ethical and free of conflicts of interest.

OHADA Member States and state entities are immune from execution

The Uniform Act enshrines the arbitrability of disputes involving OHADA Member States and state entities, and that state parties to arbitration are not entitled to immunity from jurisdiction (article 2). However, OHADA Member States, state-owned entities and public institutions still enjoy immunity from execution under the Uniform Act Organising Simplified Recovery Procedures and Measures of Execution 1998 (article 30). This is irrespective of the activity performed by the entity and of the use of the assets targeted by the enforcement measure. The CCJA has ruled that this immunity is absolute. In 2005, for example, the CCJA granted state immunity to a state-owned Togolese company, even though Togolese law excludes immunity from execution for state-owned companies (7 July 2005).

Seizure of state-owned assets is not possible without an express waiver from the state party. Even in the presence of a waiver, some domestic courts remain extremely reluctant to allow any such seizure.

State immunity from execution therefore remains a substantial limitation to OHADA arbitration involving states or state entities.

Awareness of OHADA arbitration

More could be done to raise awareness of OHADA arbitration among local arbitration stakeholders and within the legal and business communities but there are always budgetary constraints. For instance, ERSUMA (the regional school in Benin which trains judges and officers of OHADA Member States) suffers from budget constraints that impedes the delivery of training sessions to stakeholders.

That said, partnerships with foreign universities, international organisations and law firms are developing fast and these connections facilitate dissemination of information about OHADA law and arbitration. It is hoped that the partnership between the ICC and OHADA, formalised in June 2016, will achieve its objective ‘to promote, professionalise and standardise the practice of arbitration’ in OHADA Member States.

Conclusion

Ultimately, for OHADA arbitration to emerge as a strong regional contender for African-related disputes, what is needed is reform of the OHADA system. In particular, concerns over conflicts of interest and impartiality, and predictability of recognition and enforcement of arbitration agreements and awards (especially where state parties are involved) all need to be addressed. Without this, confidence in the system will remain low, and parties will continue to prefer international alternatives.

Christian Dargham is a partner and Janice Feigher is a senior associate in the Paris office of Norton Rose Fulbright.



Russian arbitration law reform

A new regulatory landscape

Yaroslav Klimov and Andrey Panov



Russia has reformed its arbitration law to bring it more in line with the UNCITRAL Model Law, and to implement greater regulation of domestic and foreign arbitral institutions operating in the region. We analyse the changes to Russia's arbitration law, including the new regulatory landscape for domestic and foreign arbitral institutions, the status of ad hoc arbitrations, and the arbitrability of disputes.

Drivers of reform in Russia

The most recent round of legislative reform of Russian arbitration law concluded in December 2015 with two bills signed into federal law. These laws came into force on September 1, 2016, with certain provisions becoming effective at a later date.

The legislative reform has updated the Law on International Commercial Arbitration (ICA Law) to bring Russia's arbitration regime more in line with the UNCITRAL Model Law. This reform was primarily driven, however, by the desire to change the Russian arbitration landscape and to develop the domestic arbitration services market. Hundreds of arbitral institutions across Russia offer their services. Reportedly, many of those have been used for fraudulent goals, such as enforcing non-existent debts for the purpose of bankruptcies. Others were established by corporations to handle disputes with their contractual partners, raising significant concerns over impartiality. Reform was needed.

New Russian registration and authorisation requirements for arbitral institutions

The new legislation requires that arbitral institutions be established only by non-profit organisations and that they be registered with the Russian Ministry of Justice. Most existing institutions will therefore need to be reorganised, though this reform does not affect the International Commercial Arbitration Court or the Maritime Arbitration Commission at the Russian Chamber of Commerce and Industry. In addition, arbitral institutions, including foreign institutions, must obtain authorisation from the government to administer Russia-seated disputes.

If an institution does not obtain both registration and authorisation, any arbitrations administered by it will be considered ad hoc (rather than administered), which has significant consequences under Russian law. Ad hoc tribunals are prohibited from resolving corporate disputes between the shareholders of Russian corporations; ad hoc arbitrations do not enjoy the same judicial support as do administered arbitrations; and parties to ad hoc arbitrations cannot exclude recourse to Russian courts against awards on jurisdiction or final substantive awards. Perhaps more controversially, after the conclusion of the matter, ad hoc tribunals must send the arbitral award and the case file to the Russian court for safekeeping.

Parties drafting arbitration agreements therefore need to exercise care when choosing which institution and institutional rules will apply.

Changes to the rules governing arbitration agreements

Changes to the rules governing arbitration agreements introduced by the reform are largely based on the 2006 version of the UNCITRAL Model Law (article 7, option I). The requirement that an arbitration agreement be in written form will be satisfied if the agreement is concluded in a form which allows access to the information contained in it for subsequent use. This may include electronic communications; an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other; or incorporation by reference. The arbitration agreement can also be included in the rules of exchange houses and in some cases in the charter of a Russian legal entity.

The reform also clarifies that in the case of an assignment, both assignor and assignee will be bound by the arbitration agreement. Further, all doubts around interpretation of an arbitration agreement should be construed in favour of its validity and enforceability.

Parties to Russia-seated administered (but not ad hoc) arbitrations may, by agreeing on the finality of the award, exclude recourse to the courts against an award on jurisdiction and exclude proceedings to set aside an award.

New clarity in Russia on the arbitrability of particular types of dispute

The new law has removed uncertainties over the arbitrability of certain types of dispute. Prior to the reform, the ICA law generally allowed for civil law disputes to be arbitrated but this did not affect the application of other federal laws. Russian courts could, therefore, regard as non-arbitrable: disputes concerning immovable property (until 2011, when the Constitutional Court overturned this practice); corporate and procurement disputes; and other disputes with a concentration of public interest (as, for example, disputes concerning lease of forest plots).

Under the new legislation, express federal law provision is required before a category of disputes will be treated as non-arbitrable. The list of non-arbitrable matters so far includes:

- bankruptcy disputes
- privatisation disputes
- disputes concerning public procurement
- employment and family matters
- environmental damage disputes
- personal injury cases.

One of the most widely discussed reforms is that certain corporate disputes involving shareholders of a Russian legal entity are now arbitrable; provided the cases are administered by registered arbitral institutions and the arbitration is seated in Russia.

The new legislation distinguishes between three categories of corporate dispute as outlined below:

- 1 Disputes involving a public element: these cannot be referred to arbitration. (Examples include disputes on state registration of corporations.)
- 2 Disputes involving contracting parties only: these are arbitrable. (Examples include disputes arising from share purchase agreements.)
- 3 Disputes involving a greater number of parties: these may be arbitrable under certain circumstances. (Examples include disputes relating to the challenge of corporate resolutions or to shareholders' agreements.) These disputes can be only referred to arbitral institutions which have adopted specific rules for corporate arbitrations, among them that the shareholders be informed of the dispute and that shareholders be able to join the proceedings at any stage.

The option of arbitrating corporate disputes may be appealing primarily in the context of Russian-registered joint venture companies with a limited number of shareholders. Parties should note however, that arbitration agreements concerning corporate disputes can only be concluded after February 1, 2017. Agreements concluded before that date will be deemed incapable of being performed.

Judicial assistance to Russian-seated arbitrations

The reform allows tribunals in administered Russian-seated arbitrations to request the Russian courts' assistance in the taking of evidence – obtaining material (physical) evidence and documents. The courts will not assist tribunals with obtaining other categories of evidence or witness statements.

Setting aside and enforcement

A party seeking to enforce an award in Russia should first send a written demand to the respondent requesting that it voluntarily comply with the award. An application to court can only be made if that demand is not satisfied within 30 days. (This change came into effect on 1 June 2016.)

With effect from 1 January 2017, a first instance court will have one month from the date of filing of the application to render its decision on enforcement (or setting aside) of the award.

Russia's legislative reform has also introduced a provision on recognition of foreign declaratory judgments and arbitral awards. If Russia is signatory to an international treaty which provides for the recognition of such judgments and awards, then these will be recognised in Russia without enforcement proceedings. Since Russia is already a party to the New York Convention, declaratory awards rendered in another New York Convention jurisdiction, therefore, may be directly applicable in Russia and relied upon in the Russian courts. The respondent will bear the burden of opposing recognition and must do so within one month from the date on which it learned of the judgment or the award. The grounds for refusal of recognition are essentially the same as the grounds for refusal of enforcement.

Conclusion

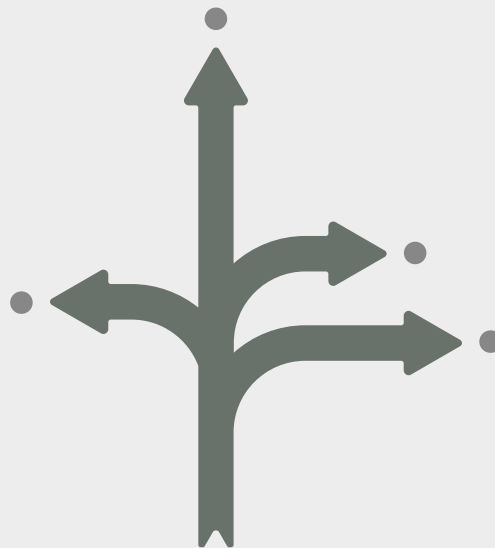
Reform of Russian arbitration law, in particular with respect to the rules on arbitrability and arbitration agreements, will be welcomed by arbitration users. It is hoped that reform will drive further improvements to the Russian arbitration market to make it more transparent and reliable, in turn improving trust amongst users and judges.

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Conflict of privilege rules in international arbitration

A call for clearer guidance

Ruth Cowley and Yasmin Lilley



Where participants in international arbitration come from different legal jurisdictions, disputes over what is or is not privileged can be complicated by disagreement over which jurisdiction's rules of privilege apply. In the absence of party agreement, determining these issues can prove complex and costly. Clearer guidance on how such privilege issues might be resolved is needed.

Most countries recognise, in one form or another, the concept of legal privilege: a right to protect from disclosure communications between lawyers and their clients, and documents prepared for the purposes of litigation or arbitration. The precise rules, however, vary across jurisdictions, sometimes significantly. What is accepted as privileged in one country will not necessarily be privileged in another. (We explored this previously in our *International arbitration report*, when we looked at the US and English laws on privilege in issues 5 and 6.)

How, then, are privilege issues to be resolved in international arbitration where claimants, respondents and arbitrators may all come from different jurisdictions? The answer is not easily found.

The existing guidance on determining privilege

There is, in fact, very little guidance on this issue. It is almost unheard of for parties to provide expressly in their dispute resolution agreement which privilege rules are to apply. Most arbitration laws and most institutional arbitral rules offer little to no guidance. For example, the UNCITRAL Model Law, English Arbitration Act 1996, ICC Rules and LCIA Rules are all silent on this question; they simply provide that, in the absence of agreement between parties, it is for the tribunal to determine procedural and evidential matters at its discretion, subject to overriding principles of fairness and equality of treatment.

The 2010 IBA Rules on Taking of Evidence in International Arbitration (IBA Rules) go a little further, confirming that privilege as a general concept should be respected, and that evidence may be excluded on the basis of “legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable”, taking into account factors such as the following:

- any need to protect the confidentiality of a document created or communication made for the purpose of settlement negotiations or providing or obtaining legal advice
- the expectations of the parties and their advisors at the time the legal impediment or privilege is said to have arisen
- any possible waiver of privilege
- the need to maintain fairness and equality between the parties, particularly if subject to different legal or ethical rules.

However, this does not assist the parties or the tribunal to ascertain which privilege rules should be applied. Nor does it answer other crucial questions such as: What happens when the expectations of the parties as to privilege are different? What about if the parties’ expectations differ from their own advisors who, particularly in cross-border transactions, might foreseeably be based in different jurisdictions? What if privilege would have been waived according to the laws of one jurisdiction, but not another? How is the tribunal to ensure fair and equal treatment where conflicting legal or ethical rules apply?

Similarly, the International Institute for Conflict Prevention and Resolution Rules for Non-Administered Arbitration (CPR Rules of Non-Administered Arbitration) require tribunals to “apply the lawyer–client privilege and the work product immunity”. Lawyer–client privilege is a largely generic term, but work product immunity is a term most commonly used in the US. The rules, however, fail to confirm whether the tribunal must apply US privilege rules, or whether they can read into those terms a reference to equivalent privilege rules in other jurisdictions. If so, which jurisdiction’s version should the tribunal adopt?

The International Centre for Dispute Resolution International Arbitration Rules (effective 1 June 2014) (ICDR Rules) are an exception in that they do offer some substantive guidance, following what is commonly known as the ‘most favoured nation’ approach, as is discussed further below.

What methods do tribunals deploy when a conflict of privilege rules arises?

In practice, there are a number of methods which tribunals deploy, depending on the facts and circumstances of the case. In every case, the tribunal must treat the parties fairly and equally and in accordance with their legitimate expectations – not least so as to avoid exposing the award to later challenge.

The ‘choice of law’ approach

One method is the ‘choice of law’ approach – determining the proper law governing privilege. The difficulty with this is that there is no consensus as to whether privilege is a substantive or a procedural matter. It is therefore not as simple as choosing between the substantive governing law of the contract and the procedural law of the arbitral seat.

A common solution is to seek to identify the law of the jurisdiction with the ‘closest connection’ to the documents or communications in question, taking into account factors such as where the document was created, where the communication took place, where the document is located, and where the parties or their lawyers reside. This can prove difficult in practice and can produce arbitrary results. Consider, for example, cross-border or electronic communications, documents stored in a location with no connection to the underlying transaction, or parties with legal advisors in different jurisdictions. The ‘closest connection’ approach can also be unwieldy where there is a large quantity of material with potentially different grounds for asserting a closest connection.

The ‘least favoured nation’ and ‘most favoured nation’ approaches

Two other methods are the ‘least favoured nation’ and ‘most favoured nation’ approaches. Under the ‘least favoured nation’ method, the tribunal chooses from the various options the law that provides the least privilege protection. Under ‘the most favoured nation’ method the tribunal chooses the law that provides the most privilege protection. Each approach has the advantage of treating all parties equally. On balance, however, the latter seems the sounder method.

The ‘least favoured nation’ approach is unlikely to be acceptable to a party who would have enjoyed greater protection under other privilege laws. It can also cause serious difficulties for the parties’ legal advisers, for example if they who would be committing a criminal offence in their home jurisdiction if forced to disclose information revealed to them by their clients.

The ‘most favoured nation’ approach, on the other hand, ensures that the parties’ minimum expectations as to what is privileged are met – even though it may go on to grant greater privilege protection to a party who may not have been expecting it.

The role of the supervisory court

A tribunal may be able to refer the question to the supervisory court; this should usually be a last resort, as it can lead to further costs and delay.

Is it possible to draft around the issues?

Parties could deal with the question of privilege in the arbitration agreement. In theory, that would be sensible as it would offer greater certainty, prior to communications being made, as to what will or will not be protected in subsequent proceedings. It could also avoid satellite disputes over privilege once a dispute arises. Moreover, one can imagine drafting the “perfect” privilege clause, circumventing the limitations of rules of privilege. For example, where legal advice privilege under English law is not limited by a narrow definition of who is the client, or where documents protected by the work product doctrine in the US would remain protected even if the other side could show substantial need and an inability to obtain the equivalent information elsewhere without due hardship. In practice, however, this is likely to take considerable time and be heavily negotiated. Most arbitration clauses are based on standard clauses and including a provision dealing with privilege is in most circumstances unlikely to be commercially acceptable.

Conclusion

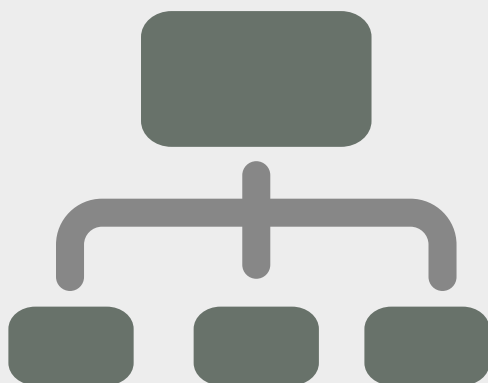
Given the unlikelihood of a prior agreement between the parties on questions of privilege, the development of a fair default rule – such as the ‘most favoured nation’ approach – may be the best solution. There is also some strength to the suggestion that guidance on the approach to privilege should be incorporated into institutional rules so that arbitrators have a reference point on which to base their decisions and parties would not be put to the cost of arguing over the right approach. This could offer parties greater certainty as to what will or will not be privileged at the crucial point before a document is created.

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Subsidiary's agreement to arbitrate brings in parent

*Egiazaryan and another v
OJSC OEK Finance and the City of Moscow*

Ruth Cowley and Andrey Panov



We discuss an English judgment which provides an interesting analysis of the circumstances in which non-parties to an arbitration agreement can be joined in arbitration. In the *Egiazaryan* case, the court found that an arbitral tribunal had jurisdiction over a Russian public authority, even though it was not a party to the arbitration agreement. This case will be of interest to anyone advising on Russian-related disputes, which frequently involve allegations of tortious misconduct by non-parties to the agreements – often parent companies.

***Egiazaryan and another v OJSC OEK Finance and the City of Moscow* [2015] EWHC 3532 (Comm)**

In the *Egiazaryan* case, the English court considered a challenge to an award on jurisdiction under section 67 of the Arbitration Act 1996 (1996 Act) on grounds, among others, that the London-seated tribunal was wrong to conclude that it lacked jurisdiction over a Russian public authority (the City of Moscow) which was not a signatory to the arbitration agreement. The English court held that, notwithstanding that it was not a party to the agreement, the tribunal had jurisdiction over the City of Moscow because its subsidiary's agreement to arbitrate was sufficient under Russian law to join it in the arbitration. This judgment provides an interesting analysis of the rules applicable to the question of whether and how non-parties to an arbitration agreement – including municipal bodies – can be joined in arbitration.

English law recognises limited circumstances where a non-party may be bound to arbitrate

Under English law, the general principle is that due to the consensual nature of arbitration only the parties to an arbitration agreement are bound by that agreement, and any award is effective only against those parties and persons claiming through or under them. However, English law recognises limited circumstances where a third-party may be bound by an arbitration agreement to which it was not a party. These include:

- assignment
- subrogation
- merger
- agency
- statutory provisions – for example, the Third Parties (Rights Against Insurers) Act 1930 and the Contracts (Rights of Third Parties) Act 1999 (CRTPA 1999) which enable third parties, in certain circumstances, to enforce contractual terms; these third parties may be bound by arbitration agreements in the relevant contract

- circumstances where a non-party otherwise seeks to exercise a right under a contract containing an arbitration clause – in which case it will be bound by the arbitration clause despite not being a party to the contract (*The Padres Island* [1984] 2 Lloyds Rep 408).

English law recognises limited exceptions where a non-party can be joined in an arbitration

Another general principle of English law is that only the parties to an arbitration agreement may participate in an arbitration. Again, English law recognises limited exceptions where a non-party can be joined in an arbitration. These include:

- under CRTPA 1999 (as above) – however, without clear wording, unless the non-party is seeking to enforce a contractual term in the agreement to which it is not a party, CRTPA 1999 does not impose an obligation on the third-party, or indeed a right, to arbitrate (*Fortress Value Recovery Fund I LLC and others v Blue Skye Special Opportunities Fund LP and others* [2013] EWCA Civ 367)
- under section 82(2) 1996 Act – non-parties claiming under or through a party to an arbitration agreement are treated as a party to the agreement
- by piercing the corporate veil – the circumstances in which this can be done are not clear as the law is not yet settled.

The facts of the *Egiazaryan* case

The dispute arose from allegations that the respondents had tortiously orchestrated a corporate raid to oust the claimants from a hotel redevelopment project in Moscow. The relevant contracts were a shareholders' agreement and a share purchase agreement (the Agreements). These were governed by English law and contained an arbitration clause stating that "any dispute, controversy or claim arising out of, relating to or in connection with [the Agreements], including any question regarding its existence, validity or termination, or regarding a breach" shall be referred to arbitration in London.

The second respondent (a Russian public authority) was not a party to the Agreements though its subsidiary was. The claimants argued that, although a non-signatory, the second respondent could be joined in the arbitration by virtue of article 105 of the Russian Civil Code (Article 105). The tribunal concluded, having heard Russian law expert evidence, that Article 105 “makes a parent jointly and severally liable on the relevant contract as a whole... this includes liability to perform the Arbitration Agreement.”

The tribunal refused jurisdiction, however, on the ground that, as English law was the proper law of the Agreements, Article 105 had no effect. The tribunal also declined jurisdiction over the tort claim, finding that it was not covered by the arbitration clause. The second claimant challenged these parts of the tribunal’s award before the English High Court.

The English High Court judgment

The court was asked to consider (amongst other things) whether the tort claim fell within the arbitration clauses and whether Russian law had any effect on whether a non-signatory to an English law arbitration agreement could be joined in the arbitration. There was no challenge to the tribunal’s findings on the operation of Article 105.

Burton J held that the tort claim did fall within the arbitration clause – section 6(1) 1996 Act is clear that an arbitration agreement is “an agreement to submit to arbitration present or future disputes (whether they are contractual or not)”.

Burton J also held that the second respondent had been properly joined. The question was whether there was jurisdiction over the non-signatory – not who were the parties to the arbitration agreement. Under English conflict of laws principles, the law applicable to the question of whether a parent is liable to perform an agreement entered into by its subsidiary is the law of the place of incorporation of the subsidiary. Given that the subsidiary was incorporated in Russia, Russian law applied and, applying Article 105, the non-signatory parent could be joined.

Burton J’s judgment highlights the important distinction between identifying the parties to an arbitration agreement and determining who can be made a party to English-seated arbitral proceedings. The former is a question governed by

the substantive law of the agreement. The latter is a more complicated question: which law applies will be determined by applying English choice of law principles to the circumstances, and therefore depends on the grounds on which it is asserted the non-party should be joined.

Burton J’s judgment highlights the important distinction between identifying the parties to an arbitration agreement and determining who can be made a party to English-seated arbitral proceedings.

The Russian perspective on the *Egiazaryan* case

Russian shareholders’ agreements are commonly governed by English law and provide for London-seated arbitration, and such disputes often involve allegations of tortious misconduct by non-parties to the agreements – frequently parent companies. This case will therefore be of particular interest to anyone drafting Russian shareholders’ agreements or advising on Russian shareholder disputes.

The decision in the *Egiazaryan* case has been received with some surprise by the Russian legal community for a number of reasons. In particular, some Russian lawyers have suggested that the Russian courts would have taken a different approach to the question of arbitral jurisdiction over state entity parent companies.

In the only reported Russian court decision on the question of whether, by virtue of its subsidiary being a party to an arbitration agreement, a tribunal had jurisdiction over a non-signatory state entity parent, the Russian Supreme Arbitrazh Court held that the tribunal had no jurisdiction (*Government of Moscow v S+T Handelsgesellschaft* case no. A40-41781/13). However, that case turned on the doctrine of piercing the corporate veil, which the Russian court held could not be used in that context.



We can only speculate why the parties in that case did not seek to rely on Article 105. However, some Russian lawyers have suggested that, under Russian law, Article 105 does not in fact apply in the manner accepted by the tribunal in the *Egiazaryan* case. The reasons given are various. The first is that Article 105 applies in the context of relationships between a parent company and subsidiary, whereas the second respondent is a public law entity and would not be considered a parent company in Russia. The second is that the scope of Article 105 is narrow, applying only where there is a specific legal or contractual obligation on the subsidiary to follow the directions of the parent company. The third is that Article 105 is a statutory basis for joint liability not for deeming the parent to be a party to the contract in question or to assume obligations thereunder. The fourth is that the wording of Article 105 indicates that it would only apply in the context of contractual liability, not non-contractual claims.

However, as the tribunal's findings on the Russian law evidence regarding the operation of Article 105 were not challenged in the appeal, the English court was not asked to give its view on these issues.

Comment

The *Egiazaryan* case demonstrates the tricky conflict of laws issues that can arise in international arbitration. It is also an excellent example of why it is often inappropriate to use a standard form template arbitration clause in a contract – if parties wish to avoid expensive satellite disputes, arbitration agreements must be carefully drafted to suit the circumstances and parties involved. The lesson from the *Egiazaryan* case is that, when drafting, parties must ensure that they consider all relevant laws, including the laws of the place of incorporation of signatories as those may impact the parties' rights and obligations. Parties must also consider the position of third-party non-signatories, and whether an express consent (or indeed, refusal) to arbitrate is warranted, to avoid subsequent arguments over the tribunal's jurisdiction.

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SIAC Arbitration Rules 2016 come into effect

Upping the stakes for arbitration in Singapore

KC Lye and Samuel Leong



The SIAC Arbitration Rules 2016 are now in effect. SIAC has improved on the provisions in its prior rules dealing with expedited procedures and emergency arbitrator proceedings, and incorporated comprehensive new provisions for multi-contract and multi-party disputes. However it is SIAC's inclusion of an early dismissal procedure that is expected to be a game-changer for parties arbitrating in Singapore.

The sixth edition of the Singapore International Arbitration Centre's Arbitration Rules (SIAC Rules 2016) came into effect on August 1, 2016. They are the product of an extensive revision process undertaken by the SIAC Court of Arbitration and the SIAC Secretariat which included lengthy public stakeholder consultation. The new rules are a substantial improvement on a set of arbitration rules that was already highly regarded. SIAC's commitment to respond to market feedback and its refusal to rest on its laurels (it has revised its arbitration rules every three years since 2007) have contributed to its own growth as an arbitral institution (with 271 new cases in 2015), and to Singapore's establishment as one of the most popular arbitration jurisdictions in the world. We set out below the key changes.

Early Dismissal of Claims and Defences

The SIAC Rules 2016 are the first set of arbitration rules published by a major arbitration institution to incorporate an early dismissal procedure. Its introduction appears to be SIAC's answer to the criticism that international arbitration has no equivalent to the summary judgment and striking-out procedures found in litigation, thereby allowing parties to advance unmeritorious claims or defences.

Under the SIAC Rules 2016, a party may request the tribunal to dismiss a claim or defence at an early stage of the proceedings where the claim or defence is either 'manifestly without legal merit' or 'manifestly outside the jurisdiction of the tribunal' (rule 29). The legal test to be satisfied is therefore a stringent one. Only claims and defences which 'manifestly' do not withstand scrutiny, whether on the legal merits or on the jurisdictional basis asserted, may be dismissed.

As a safeguard against unmeritorious applications for early dismissal, the tribunal has the discretion whether to allow the application to proceed. If it does, the tribunal is then required to render its decision on the application, with reasons in summary form, within 60 days of the date of application – unless, in exceptional circumstances, the registrar extends the time. We don't know yet how SIAC tribunals will deal with applications for early dismissal but the imposition of this deadline of 60 days suggests that parties may have relatively limited time to make their submissions on early dismissal, whether in writing or at a hearing.

From a practical perspective, the introduction of the early dismissal procedure may place an increased emphasis on the 'Response to Notice of Arbitration' (Response). A respondent may no longer be able to safely defer setting out its defence until the submission of its Statement of Defence by making bare denials against the claimant's claims in its Response. The risk is that a claimant may apply for early dismissal, which would compel the respondent to assert the prima facie strength of the defence set out (if at all) in the Response against the 'manifestly without legal merit' test. Respondents in any SIAC arbitrations commenced after August 1 should be prepared to include in their Response substantive comments on the defence arguments that are likely to be relied on in the arbitration.

Multiple contracts, joinder of third parties and consolidation of arbitrations

The SIAC rules include new provisions on how arbitral proceedings involving multiple contracts and/or multiple parties may be administered in a more cost-effective way.

Arbitral proceedings involving multiple arbitration agreements may now be commenced by way of a single filing. Unless the SIAC Court of Arbitration concludes that the disputes may not be determined in a consolidated proceeding, the claimant will only be required to pay a single filing fee.

The SIAC Rules 2016 also allow for consolidation applications to be made, either before or after the appointment of the tribunal, on any of the following grounds:

- all parties have agreed to the consolidation
- all of the claims in the relevant arbitrations are made under the same arbitration agreement
- the arbitration agreements are compatible and the disputes arise out of the same legal relationship(s) or out of contracts consisting of a principal contract and its ancillary contract(s) or out of the same transaction or series of transactions.

Under the prior rules, the tribunal had the power to join third parties to arbitration upon an application by an existing party to the arbitration. Under the SIAC Rules 2016, an application for joinder may be made by an existing party to the arbitration (as before) or by a non-party seeking to join the proceedings. The application may be made to the SIAC Court of Arbitration before the appointment of the tribunal or to the tribunal after it has been appointed. Parties thus gain flexibility and the opportunity to optimize the efficiency of the arbitral process.

Improvements to Expedited Procedure and Emergency Arbitrator proceedings

Expedited Procedure and Emergency Arbitrator proceedings were first introduced in the 2010 edition of the SIAC Rules. Since then, SIAC has received more than 260 applications for the Expedited Procedure and more than 45 applications under the Emergency Arbitrator procedure. The SIAC Rules 2016 build on these successes, offering practical improvements. These largely were motivated by demand for quicker, more cost-effective proceedings and for arbitrators and counsel to handle proceedings more efficiently.

SIAC responded by extending the Expedited Procedure – whereby the tribunal must render its award on merits within six months of appointment – to a wider range of cases. Now the procedure may apply to any case where the maximum aggregate amount in dispute is SG\$6 million (US\$5.4 million). This is an increase from the prior rules which set the cap at SG\$5 million (US\$3.7 million).

Also, arbitrations conducted under the Expedited Procedure may now be decided on the basis of documentary evidence only – whereas, under the pre-2016 rules, the tribunal had no discretion to decide whether a hearing was required. This expansion of the tribunal's power to determine appropriate procedures for arbitrations conducted under the Expedited Procedure may lead to further cost and time savings.

Emergency Arbitrator proceedings were introduced in the SIAC Rules to assist parties in need of emergency interim relief before the tribunal is constituted. Upon application, an emergency arbitrator can be appointed ad hoc by SIAC to exercise interim jurisdiction over a specific application. The earlier rules provided no deadline within which the emergency arbitrator should render his/her order or award. Under the SIAC Rules 2016, an emergency arbitrator must render an order or award within 14 days of appointment – unless the deadline is extended by the registrar in exceptional circumstances. This amendment has offered welcome clarity that a party in need of specific urgent interim relief has a relatively short window to make an application for such relief to the emergency arbitrator.

SIAC introduces remedy against party refusing to pay deposits

It is not uncommon for claimants to be forced to bear the financial burden of the entire amount of the parties' deposits for the cost of the tribunal's and SIAC's fees and expenses. While this was obviously unsatisfactory, unless the respondent had asserted a counterclaim there was little that the SIAC Secretariat could do to compel an unwilling respondent to pay its share. In such a situation, the claimant would usually be required to pay the respondent's share of the deposits in order for the arbitration to continue.

Under the SIAC Rules 2016, the tribunal has the power to issue an order or award against a party which is refusing to comply with SIAC's directions to pay its share of the deposits on the costs of arbitration (rule 27 (g)). This allows a party to begin recovering the amount paid on the refusing party's behalf, even before the award on merits has been rendered.

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The Istanbul Arbitration Centre and the ISTAC Rules

Turkey aspires to be a major regional hub for arbitration

Paul Stothard and Simon Goodall



The Istanbul Arbitration Centre and the ISTAC Arbitration Rules were introduced in October 2015, with the aim of Istanbul becoming a major regional hub for international arbitration. We give an overview of ISTAC and its rules and ask whether, in light of national and regional instability, Istanbul can fulfil its promise as an arbitration centre.

Over the last decade, Turkey has developed into a major regional political and economic power, notwithstanding recent political instability. As Turkish and regional business and trade has grown, so has the number of cross-border disputes. Many of these are resolved by international arbitration, most commonly under the ICC Rules of Arbitration and seated outside of Turkey. The Turkish government hopes that this may change with the establishment in 2015 of the Istanbul Arbitration Centre (ISTAC). ISTAC is looking to find a definitive role in a region that currently lacks an established international arbitration centre.

ISTAC is an independent, autonomous arbitral institution. It aspires to become a major regional hub for the resolution of commercial disputes between European, Asian and Middle Eastern parties. ISTAC's Arbitration Rules are broadly comparable with rules of other major institutions.

ISTAC's launch has been welcomed by regional practitioners. ISTAC seems to be off to a promising start, as it recently announced that in the short time since its launch, two substantial Turkish public infrastructure contracts have incorporated ISTAC arbitration clauses and at least two arbitration cases under ISTAC Rules are pending. In due course, legislative amendments to modernise Turkey's international arbitration law could follow.

The Istanbul Arbitration Centre

ISTAC comprises a General Assembly, Board and Secretariat. The General Assembly has 25 members who are elected as representatives by various business, legal and governmental institutions in Turkey. The Board (elected by the General Assembly) consists of eight leading domestic and international arbitration practitioners whose role is to assist with the administration of disputes. The Secretariat (elected by the Board) assists the Board with its work and takes questions from parties, their legal advisors and tribunals.

ISTAC Arbitration Rules

ISTAC's Arbitration Rules (summarised below) came into force on 26 October 2015. Although these rules are most heavily influenced by the ICC Rules of Arbitration, there are areas where ISTAC has taken a different approach. For example, the ISTAC Rules contain fast track arbitration rules for small claims. The current ICC Rules do not contain any similar provisions, though in July this year the ICC announced its

decision to incorporate a set of expedited rules for small claims when its rules are next revised. Also, the ISTAC Rules do not contain a waiver of the parties' rights to recourse against awards to the extent permissible by law. Under Turkey's international arbitration law, only non-domestic parties may waive their rights of appeal. This is a factor to consider if drafting an agreement to arbitrate under the ISTAC Rules.

Key provisions of the ISTAC Rules include:

Seat

Istanbul is the default seat of arbitration, unless the parties agree otherwise.

Terms of Reference

Terms of Reference are drawn up by the tribunal and signed by parties at the outset of proceedings.

Advance on Costs

Parties pay an advance based on the value of the dispute at an early stage in proceedings to cover the fees and expenses of the tribunal and ISTAC.

Time limit

The tribunal must render its final award within six months, subject to the parties' agreement or the Board granting an extension.

Emergency Arbitrator rules

A party can apply for provisional appointment of an emergency arbitrator to grant interim measures before the tribunal has been constituted.

Fast Track Arbitration rules

Fast Track Arbitration rules apply to claims below TRY300,000 (approximately US\$100,000), under which a sole arbitrator must render its final award within three months from receipt of the file and within one month from the last statement or last hearing, whichever occurs later.

Impact of regional political events

ISTAC has enormous potential. The ISTAC Rules are of a high standard and the institution will be administered by credible and knowledgeable experts. More remains to be done if Turkey is to emerge as a genuine regional player. Turkey's statutory regime for international arbitration needs to be updated. Most importantly, both domestic and foreign parties will also need to be convinced that there is a commitment to ensure that the judiciary, who will be charged with supervisory jurisdiction over arbitrations seated in Istanbul, have the independence necessary to be inured from the political upheaval in the region.

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Sealed offers in international arbitration

Frequently asked questions

KC Lye and Tim Robbins



If properly drafted, a sealed offer can be a major incentive for parties to settle cases at an early stage of proceedings, as well as protecting them against the costs consequences of arbitration. A sealed offer can therefore be a valuable tool in arbitral proceedings. We answer frequently asked questions about sealed offers.

01 | What is a sealed offer?

A sealed offer is an offer from one party to another to settle a dispute that is made on a “without prejudice save as to costs” basis; under English common law it is commonly known as a ‘Calderbank offer’.

Parties cannot disclose the details of a sealed offer to the tribunal until after its decision on merits, when the question of costs is to be decided. Although generally not binding on a tribunal, a party’s unreasonable failure to accept a settlement offer may be a factor considered by the tribunal when deciding how to allocate costs. Therefore, aside from the obvious benefit of possibly achieving early settlement, a well-pitched offer can prove to be an important tactical device.

02 | What are the advantages of a sealed offer?

A sealed offer presents the parties with an opportunity to settle the dispute without fear that the terms of the offer will be disclosed to the tribunal and negatively affect their case in the proceedings.

It may also provide the party making the offer with a level of protection from costs consequences. The widely followed rule in many jurisdictions is that ‘costs follow the event’ and the “winner” of the arbitration will be awarded its reasonable costs. Failure to accept a reasonable offer, however, may be grounds for the tribunal to depart from the general rule.

Parties can be incentivised to reach a settlement. Potential costs consequences stated in the offer will oblige the recipient to take the offer seriously, as well as to consider carefully the strength of the parties’ respective cases.

03 | What are the disadvantages of a sealed offer?

Some parties fear that their position may still be weakened if the tribunal becomes aware that an offer to settle the claim has been made – even if the terms of the offer are not disclosed. This concern can be avoided by bifurcating the merits award from the award on costs. The existence of the offer will therefore not be disclosed to the tribunal until after the merits award.

A sealed offer presents the parties with an opportunity to settle the dispute without fear that the terms of the offer will be disclosed to the tribunal and negatively impact the parties’ positions on merits.

Although the concept of sealed offers is now relatively well known amongst experienced arbitration practitioners, it is not common to all jurisdictions. Where a party’s legal representatives or members of the tribunal come from jurisdictions in which such offers are not common, the impact of a sealed offer may be diminished. Advice from local counsel may need to be sought before making such an offer. A party making the offer should set out the intended consequences of the offer when making and/or seeking to rely on it.

04 | What are the consequences of accepting or rejecting a sealed offer?

If an offer to settle the dispute is accepted, the proceedings are brought to an end on the terms agreed. If, however, the issue of costs has not been settled as part of that agreement, the parties may ask the tribunal render an award in respect of costs only, and the parties will make submissions on both the allocation and quantum of costs. Where a sealed offer is rejected, the parties may refer to that offer in their submissions. The effect of a sealed offer will depend on the tribunal’s ruling on merits.

If the party which rejected the offer succeeded in its claim and obtained an award more favourable than the terms of the offer, the tribunal should apply the normal rule that costs follow the event. In such a case, the party is viewed as justified in rejecting the settlement offer.

If the party which rejected the offer succeeded in its claim but failed to obtain an award more favourable than the terms of the offer, this may be a reason for the tribunal to depart from the usual rule – the tribunal may instead order the winning party to pay the other side’s costs from the last date on which the offer was open for acceptance.

05 | How is a sealed offer made?

Sealed offers are usually made by a respondent to the claimant, although a claimant may wish to make a sealed offer in particular circumstances. There is no formal procedure for making sealed offers in arbitration. Traditionally, such offers were made by passing a sealed envelope to the tribunal, to be opened once the tribunal had made its decision on merits. This is no longer common practice; instead sealed offers are most often communicated to the tribunal at an appropriate time. Alternatively, parties may agree that the sealed offer is to be held by a trusted third-party, such as an arbitral institution, which will disclose the offer to the tribunal once a decision on merits has been reached.

Generally, a sealed offer should:

- be in writing and state that it is “without prejudice save as to costs”
- state that the offer is intended to have cost consequences
- set out the terms of the offer, including the date by which any settlement payment would be made
- be unconditional (not, for example, subject to subsequent board approval)
- state a time limit within which the offer must be accepted (generally at least 21 days)
- state whether the offer includes legal costs up to the date of the offer, including arbitrators’ fees/expenses and institutional costs.

Parties should also consider requesting separate awards on merits and costs.



06 | Is the tribunal obliged to take a sealed offer into consideration?

The question of costs is usually within the tribunal’s discretion. Unless the parties have expressly agreed or are arbitrating under procedural rules or law which provide that sealed offers will have costs consequences, a tribunal will not be obliged to take a sealed offer into consideration when deciding how to allocate costs.

Arbitration agreements are often silent on the allocation of costs of arbitration. Most major institutional rules do no more than allow the tribunal to consider parties’ conduct when allocating costs. There are few arbitration laws that expressly refer to sealed offers – one example is the New Zealand Arbitration Act 1996 (section 6(2)(a)). Some local civil procedural rules for litigation deal with sealed offers (such as the English Civil Procedure Rules, Part 36). These may be persuasive on a tribunal.

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