

International arbitration report

Issue 12 | May 2019

Inside this issue

Q&A with Dr Wang Wenyong, Secretary
General of CIETAC Hong Kong

Global overview of disputes trends
in infrastructure and construction

Belt and Road Initiative

Managing disputes risk when working
with States and SOEs in infrastructure
and construction projects

Investment disputes in construction
and infrastructure

Dispute resolution for
multi-contract projects

Expert evidence in construction
disputes

Disclosure in international arbitration

Construction disputes – maximizing
time and costs efficiencies

Interim relief in construction
arbitration

Investment protection post-*Achmea*

A global round-up

Arbitrating disputes under
shipbuilding contracts



Norton Rose Fulbright

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 4,000 lawyers and other legal staff based in Europe, the United States, Canada, Latin America, Asia, Australia, the Middle East and Africa.

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

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

Norton Rose Fulbright Verein, a Swiss verein, helps coordinate the activities of Norton Rose Fulbright members but does not itself provide legal services to clients. Norton Rose Fulbright has offices in more than 50 cities worldwide, including London, Houston, New York, Toronto, Mexico City, Hong Kong, Sydney and Johannesburg. For more information, see nortonrosefulbright.com/legal-notices.

The purpose of this communication is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.

International arbitration report

Published by Norton Rose Fulbright – Issue 12 – May 2019

Editors-in-chief – Mark Baker, US; Pierre Bienvenu Ad. E., Canada

Editor – James Rogers, London

Assistant editor – Cara Dowling, Vancouver

Editorial

Welcome to issue 12 of Norton Rose Fulbright's *International Arbitration Report*. The focus of this issue is the infrastructure and construction sector.

In this issue, we offer a global overview of infrastructure and construction dispute trends. With the proliferation of major infrastructure projects across the globe, such as those under the auspices of China's Belt and Road Initiative, we delve into investor-state disputes involving that sector, and offer practical tips on how to avoid, mitigate and manage disputes when transacting with states or state-owned counterparties.

Staying with the Belt and Road Initiative theme, we interview the Secretary General of CIETAC Hong Kong, Dr Wang Wenyong, for our Q&A and discuss the development and reform of CIETAC and the impact that the Belt and Road Initiative is having on arbitration in the region.

Our FAQ article looks at frequently asked questions about drafting effective dispute resolution clauses for multi-party, multi-contract disputes. This is particularly pertinent given infrastructure contracts are generally part of a wider suite of project contracts, involving multiple parties and intersecting contracts, which often results in procedural complexities and potentially wasted time and costs for subsequent disputes.

We also cover various procedural issues such as obtaining interim relief from courts and tribunals, obtaining discovery in the US in aid of non-US legal proceedings including international arbitration, expert evidence, and practical solutions for maximizing time and cost efficiencies in construction disputes.

Turning to the European Union, we analyze the oft-maligned decision of *Achmea*, and opine on its impact on intra-EU investment protection and therefore foreign investment flows.

In our global round up, we offer an overview of recent arbitration developments across the globe such as new laws, rules and key cases.

Finally, we look at tactics in arbitrating shipbuilding disputes, in particular the importance of timing.

Mark Baker *Pierre Bienvenu*

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

Contents

- 02 Development and reform of CIETAC
Q&A with Dr Wang Wenyong, Secretary General of CIETAC
Hong Kong
- 05 Global overview of disputes trends in infrastructure
and construction
- 08 Belt and Road Initiative
Managing disputes risk when working with States and
SOEs in infrastructure and construction projects
- 11 Investment disputes in construction and infrastructure
A look at recent cases
- 14 FAQs – dispute resolution for multi-contract projects
Avoiding parallel proceedings and conflicting decisions
- 17 Expert evidence in construction disputes
Practical tips for managing party appointed experts
- 20 Disclosure in international arbitration
Using US courts to obtain discovery for non-US proceedings
- 23 Construction disputes – maximizing time and costs
efficiencies
- 26 Interim relief in construction arbitration
Comparing the courts and arbitration
- 29 Investment protection post-*Achmea*
- 32 A global round-up
Developments in international arbitration rules and laws
- 36 Arbitrating disputes under shipbuilding contracts
The importance of timing

About the cover

Our front cover for this issue features a warrior from the Terracotta Army, a collection of terracotta sculptures depicting the armies of Qin Shi Huang, the first Emperor of China. They were buried with the Emperor in 210–209 BC in order to protect him in the afterlife. These sculptures were discovered by local farmers in Lintong County, outside Xi'an, Shaanxi, China.



Development and reform of CIETAC

Q&A with Dr Wang Wenyong, Secretary General of CIETAC Hong Kong

By James Rogers and Charlotte Hornby

What was the genesis of CIETAC Hong Kong and its establishment in 2012?

While it has always been acceptable to handle cases in which parties have specifically chosen a non-Chinese mainland seat (e.g. Stockholm), CIETAC had a long-term goal to set up sub-commissions in jurisdictions that parties from China and the rest of the world considered neutral, pro-arbitration and convenient.

Among various invitations and choices, Hong Kong stood out from the rest.

Hong Kong related cases rank second in number among CIETAC administered cases. Also, CIETAC valued the support of the Hong Kong legal system, the geographical convenience of Hong Kong, and the wide pool of legal service providers in the jurisdiction. These factors were key to CIETAC accepting the invitation of the Department of Justice of Hong Kong to open its first branch out of Chinese mainland.

How does CIETAC Hong Kong differentiate itself from other regional arbitral institutions, including the other CIETAC sub-commissions?

CIETAC Hong Kong has several features which make it unique among the many newly established local arbitration centers. Its headquarters – CIETAC in Beijing – is one of the world’s oldest and busiest international arbitration centres. In 2018 CIETAC administered 2,962 new cases from more than 60 countries with a dispute amount total of more than CNY100 billion. With such case administration experience and user pool, CIETAC Hong Kong was born a capable and popular institution.

CIETAC Hong Kong has a default choice of Hong Kong as the seat for its administered arbitration cases. This differentiates it from its mainland counterparts. The CIETAC mainland sub-commissions administer cases primarily under the PRC Arbitration Law, which is quite different from the Hong Kong Arbitration Ordinance, which is based on the UNCITRAL Model Law.

Party pattern is another unique feature. Being a Chinese arbitration institution’s off-shore branch and situated in a neutral seat, CIETAC Hong Kong administers cases between Chinese mainland parties and non-Chinese parties.

Regarding appointment of arbitrators, CIETAC Hong Kong is fortunate to have a pool of arbitrators who are capable of handling cases which are cross-border and/or China-related in nature and are based in or connected with Hong Kong. Out of all the nominations CIETAC Hong Kong has made for a sole arbitrator or presiding arbitrator, more than 95 per cent are arbitrators from outside mainland China, including Mr James Rogers of Norton Rose Fulbright.

What have been the main challenges and successes for CIETAC Hong Kong since it was established?

Three milestone events stand out.

The first is the introduction of Chapter VI of CIETAC Arbitration Rules 2015.

CIETAC adopts arbitration rules which, from version to version, consistently feature what CIETAC considers to be the best practices of international arbitration (to the extent they are acceptable under the PRC Arbitration Law). Accordingly, the establishment of CIETAC Hong Kong called for special rules compatible with the procedural laws and arbitration practices in Hong Kong, a common law jurisdiction.

Chapter VI was introduced in the CIETAC Arbitration Rules 2015 (the “Rules”), which is exclusively applicable to arbitration cases accepted and administered by CIETAC Hong Kong. The Chapter provides that (unless parties agree otherwise) cases under CIETAC Hong Kong shall comply with the doctrine of *kompetenz-kompetenz* (enabling an arbitral tribunal to rule on the question of whether it has jurisdiction before intervention by national courts); and acknowledges the power of the arbitral tribunal to make interim measures. A transparently-structured fee schedule was also introduced and implemented.

The second is the “last-mile challenge” – the off-shore enforcement of a CIETAC Hong Kong award.

In late 2016, the Nanjing Intermediate People’s Court of Jiangsu Province of China (the Intermediate People’s Court) handed down its ruling ((2016) Su Ren Gang 1) to enforce an Arbitral Award issued by CIETAC Hong Kong. Relying on the Supreme People’s Court’s Arrangement Concerning Mutual Enforcement of Arbitral Awards between Chinese Mainland and Hong Kong 1999 (which mirrors the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards), the Intermediate People’s Court found that the CIETAC Hong Kong award was

in accordance with the procedural laws of Hong Kong, and enforcement would not contradict the public interest of mainland China.

The third is related to an off-shore court’s ruling in aid of an ongoing CIETAC Hong Kong administered case.

In June 2017, a local court in Guangzhou, China accepted a party’s asset preservation application forwarded by CIETAC Hong Kong to prevent the respondents from disposing of their assets. Primarily relying on Article 28 of PRC Arbitration Law and upon a financial undertaking provided by a third party, the Court held that the tests for approving such application were satisfied.

The above-mentioned case ((2017) Yue 0113 Cai Bao 237) illustrates the “brunch” feature of CIETAC Hong Kong; it carries both the characteristics of a Hong Kong seat and a sub-commission of a Chinese arbitration commission. It might also be argued that it has provided a new option of seeking interim relief in similar arbitrations, albeit (potentially limited by) the implied restriction in Article 10 of the PRC Arbitration Law.

The law was changed in 2017 to allow the funding of arbitration in Hong Kong. What impact has this had on the local arbitration landscape?

Hong Kong recently published the highly-anticipated Code of Practice for third party funders and announced that the amendments to the Hong Kong Arbitration Ordinance (which permit funding of Hong Kong arbitrations) would come fully into force on February 1, 2019. Such amendments cater to those companies with potential cash flow and legal finance issues that are engaged in (or anticipate being engaged in) an arbitration.

The amendments are widely welcomed by the legal community in Hong Kong.

It is worth noting that Hong Kong’s definition of a “third party funder” is much wider than that of Singapore’s since the latter is limited to professional funders only. In Hong Kong a “third party funder” means any “person who is a party to a funding agreement ... and who does not have an interest recognized by law in the arbitration other than under the funding agreement”. In principle, this includes lawyers and law firms.

Contemporaneously, CIETAC Hong Kong published its own Guidelines for Third Party Funding in Arbitration. The Guidelines provide practical checklists for arbitrators, funded parties and parties seeking funding, in cases administered by CIETAC Hong Kong where there is (or it is anticipated that there will be) third party funding. Lawyers from Norton Rose Fulbright were invited and joined the working group which was primarily responsible for drafting the same.

CIETAC opened a North America Arbitration Center in Vancouver last year, which is its second branch outside mainland China. What is the intended role of the North American Arbitration Center and how does it differ from the CIETAC sub-commissions, such as CIETAC Hong Kong?

CIETAC opened up its North America Arbitration Center in Vancouver and Europe Arbitration Center in Vienna in 2018. The establishment of the two Centers made CIETAC the only Asian arbitral institution that has establishments in Asia, North America and Europe.

Currently CIETAC Hong Kong is the only CIETAC sub-commission outside mainland China which administers cases. It may serve as a good example for the two newly established arbitration centres to provide more options for CIETAC users outside mainland China.

What impact do you see the Belt and Road initiative having on arbitration in the region?

The Belt and Road Initiative refers to the Silk Road Economic Belt and 21st Century Maritime Silk Road, a significant development strategy launched by the Chinese government with the intention of promoting economic co-operation among countries along the proposed Belt and Road routes. It creates unprecedented opportunities and platforms in history for financial integration, trade and investment, facilities connectivity, policy coordination and cultural exchange.

To facilitate this initiative in terms of providing dispute resolution services, several arbitration institutions came up with inspiring programmes and schemes. CIETAC's unique user pool both request and facilitate CIETAC being readily available for and capable of handling Chinese foreign investment and project disputes. Last year, financial disputes were the most common in CIETAC's 2018 newly administered cases, among which, a large portion were Belt and Road related. CIETAC Hong Kong has, in the meantime, been reaching out to a number of Belt and Road countries in Asia for capacity building and we will only do more in the coming years.

Global overview of disputes trends in infrastructure and construction

By Donald Warnock and Nicola Henshall

Competitive bidding environments, cash flow constraints and global mega-projects have ensured a high level of construction disputes over the last 18 months. Whilst a diverse range of issues have come to the fore in different jurisdictions, general trends reflect the continuing pressure from parties for more efficient and cost effective dispute resolution procedures: there has been a general movement in favor of ADR; statutory security of payment regimes continue to find favor in common law jurisdictions; international commercial courts are gaining ground; and increasing competition between arbitral institutions has resulted in amendments to rules which focus on expedited processes. At the same time, shifts in global economics combined with arbitration-friendly legal reforms are driving further diversification in arbitral seats as governments and national companies increasingly challenge the default selection of the traditional European options.

Dispute avoidance, dispute boards and mediation

Although parties are embracing collaborative working methods in theory, changes in practice have been limited so far to increased interest in the NEC family of contracts and a small number of long-term alliances. Whether these will deliver cooperative win-win relationships and better value remains to be seen. What is clear is that parties are more interested in implementing risk management procedures and more willing to participate in ADR, particularly mediation.

Given the vast number of overseas infrastructure projects that Chinese contractors have undertaken and invested in, this trend is partly driven by positive experiences on major government funded projects in China such as the Shanxi Wanjiashai Yellow River Diversion project and the new Beijing International Airport. Other factors include: positive experiences on other major projects; the high success rates reported by ADR service providers; the promotion of ADR in legislation and standard form contracts such as the pre-action protocols in England, the new Danish standard contract AB 18, the recent revisions of the Norwegian standard forms of contract for offshore construction, and the new FIDIC Yellow

Book and Silver Book contract forms; the development of major projects in jurisdictions such as Nigeria and Uganda where some form of mediation or conciliation procedure is mandatory in civil litigation processes and therefore well understood; the lengthy time, high cost, inflexibility and risks associated with formal proceedings; and the difficult economic conditions faced by many contractors.

As mediation gains popularity at the expense of more formal proceedings there are hints parties will seek a more evaluative approach, as has already been seen in the US. However, it is too early to confirm whether this will emerge as a trend in international construction

disputes and whether mediators will be prepared to accede to such requests without requiring procedural changes that result in the mediation becoming akin to adjudication.

Statutory adjudication

Statutory adjudication has been hugely successful in addressing cash-flow delays and high litigation costs. It has also transformed the timeline within which construction disputes are resolved, with the vast majority of adjudicated disputes never making it into the court system. Since its introduction in the UK in 1996, statutory adjudication regimes for construction disputes have been introduced in a number of common law jurisdictions including Australia, New Zealand, Singapore, South Africa, Malaysia and Ontario, Canada where the procedures are due to come into effect later this year.

It is expected that a statutory adjudication framework which falls somewhere between the UK model and the approaches taken in Singapore and New South Wales will be introduced in Hong Kong in the foreseeable future. Assuming the results in Ontario resemble those seen elsewhere, it is likely that other Canadian jurisdictions will follow suit. Hopefully lessons will be learnt from Australia where a key theme over the last year has been the need to increase the payment protection afforded to contractors by improving the consistency of the different rules in force across the Australian states and territories. Either way, once this legislation is in force and is applicable, experience suggests that adjudication will quickly gain popularity and that it has the potential to become the primary mechanism for the resolution of construction disputes.

In contrast to the spread of statutory adjudication across common law jurisdictions, hopes that Germany might become the first civil jurisdiction to implement a statutory regime for construction disputes following the 2008 and 2010 recommendations of Deutscher Baugerichtstag e.V. appear to have come to nothing. It was not included in the January 1, 2018 amendments to the German Civil Code and it now seems unlikely that any such framework will be introduced in the near future.

In the UK, adjudication continues to become ever more sophisticated (and consequently expensive) as the body of applicable case law grows and the scale and complexity of disputes referred increases. The turbulence in the construction sector following the collapse of Carillion, and uncertainties surrounding Brexit and the delivery of existing and future projects, have also resulted in parties being less inclined to expend significant resources challenging adjudicator decisions. Instead (and consistent with the general increase in ADR), parties are more likely to reach a negotiated settlement after the adjudicator's decision has been issued, often wrapping up not only the dispute referred but other outstanding issues between the parties.

Commercial courts

A desire to gain the confidence of foreign investors and the need to provide efficient services for business litigants has led to an increase in the number of commercial courts set up over the past few years, often utilizing the expertise of an international panel of judges. With Brexit on the horizon, we are also now seeing the introduction of measures aimed at challenging the pre-eminence of the English Commercial

Court (and the TCC) as the venue for international disputes. Special chambers for international commercial disputes where hearings can be conducted in English have already been established in Frankfurt, Hamburg, Amsterdam and Paris (where there is also the potential for other languages to be selected), and the Brussels International Business Court (BIBC) is expected to become operational this year. We have not seen any movement in favor of these courts yet, and it seems doubtful that the measures introduced so far will be sufficient to convince international companies to jump ship. However, having committed to this path, it is likely further initiatives will follow and we should expect increased rivalry between London and the other European commercial centres.

Expedited procedures in institutional arbitration

As projects continue to grow in scale and complexity, and rely on a network of global contractors, international arbitration has become an increasingly common forum for the final resolution of large construction projects worldwide.

Increased competition among arbitral institutions and consistent feedback from users concerning the need to increase the efficiency and reduce the cost of arbitration has led many institutions including the Stockholm Chamber of Commerce (SCC), Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC), and International Chamber of Commerce (ICC) to introduce (or in the case of the ICC to confirm the availability of) expedited procedures and summary determination. Whilst there is some uncertainty and even controversy surrounding the application

of such provisions, their introduction has been welcomed as a step in the right direction by parties frustrated by the seeming reticence of tribunals to dismiss unmeritorious claims at an early stage.

We expect that these changes, plus the further innovations that can be expected as competition between institutions intensifies in the future, will contribute to the broader popularity that arbitration is gaining in European jurisdictions where litigation has traditionally been favored (such as Belgium where detailed arbitration provisions were added to the judicial code in December 2016), bolster the shift from ad hoc to institutional arbitration that we are seeing in certain sectors (such as Norwegian offshore construction), and generally strengthen the position of arbitration in the global dispute resolution marketplace.

The proliferation of arbitral seats and institutions

The desire in emerging markets to attract foreign investment in order to exploit natural resources and develop infrastructure has resulted in the propagation of arbitration-friendly laws and new local arbitration centres and institutions in these jurisdictions. For example: the introduction of Cambodia's Commercial Arbitration Law in 2006 was followed by establishment of the National Commercial Arbitration Centre of the Kingdom of Cambodia (NCAC) in 2013; the Rwandan Law on Arbitration and Conciliation in Commercial Matters in 2008 was followed by the establishment of the Kigali International Arbitration Centre in 2011; Kenya, after amending its Arbitration Act in 2009, carried out a number of reforms culminating in the establishment of the Nairobi Centre for International Arbitration (NCIA) in

2013; and Myanmar, which enacted new arbitration and investment laws in 2016, has touted plans to establish a Myanmar International Arbitration and Mediation Centre (MIAMC).

The extent to which international parties are prepared to resolve their disputes in these new local jurisdictions depends on bargaining power, the degree to which reliable and consistent practices and procedures have been developed, the availability of qualified arbitrators, and the extent to which the local judiciary are perceived as actively supporting (or at least not likely to interfere with) the arbitral process.

Asia-based institutions such as SIAC, HKIAC and the China International Economic and Trade Arbitration Commission (CIETAC) continue to go from strength to strength. In April 2018, the ICC also opened a regional office in Singapore after reporting that there had been an increase of over 40 per cent in the number of ICC cases where Singaporean law was chosen as the applicable governing law between 2016 and 2017. Meanwhile the Badan Arbitrase Nasional Indonesia (BANI) is often a contentious choice and reports from August last year suggested that only 11 cases had been filed with NCAC since it became operational in 2014.

Following the amendment of the California Code of Civil Procedure in July 2018, one trend that we might expect to see going forward is an increase in the popularity of California as an arbitral seat for infrastructure and construction disputes between US and Asian parties.

In Africa, the dispute resolution landscape varies very significantly from one jurisdiction to another. Despite the well-established arbitration centres in several African countries, an increase

in the number of African arbitrators being appointed to sit on international arbitration tribunals, and a steady number of arbitration cases involving African parties, comparatively few international construction arbitrations are heard on African soil. The establishment of the China Africa Joint Arbitration Centre (CAJAC) to resolve commercial disputes between Chinese and African parties in 2015 was a major achievement. Taking into account the scale of Chinese investment in Africa, the opening of CAJAC centres in Johannesburg, Nairobi and potentially Lagos, the OHADA countries and Egypt should have a significant impact on the reluctance of foreign investors to arbitrate in Africa. At the same time, African companies and governments are increasingly in a position to insist on African seats and utilisation of Africa-based arbitration centres. The number of construction arbitrations seated in cities such as Johannesburg, Nairobi, Lagos and Port Louis will continue to grow.

For more information contact:



Donald Warnock
Partner, London
Tel +44 20 7444 2077
donald.warnock@nortonrosefulbright.com



Nicola Henshall
Associate, London
Tel +44 20 7444 3799
nicola.henshall@nortonrosefulbright.com

Belt and Road Initiative

Managing disputes risk when working with States and SOEs in infrastructure and construction projects

By Alfred Wu, James Rogers and Jasmine Landau

The Belt and Road Initiative (BRI) has encouraged investment in construction and infrastructure projects across Central and Southeast Asia, even stretching as far as Eastern Europe and East Africa and, most recently, Italy. As a Chinese initiative, these massive-scale projects have involved many Chinese state-owned enterprises (SOEs) in China contracting with other states, SOEs, contractors and investors to build railroads, highways, dams and critical infrastructure projects. This article covers the disputes risks that typically arise in BRI infrastructure projects, particularly with states or SOEs, and offers ways to mitigate those risks.

Disputes risks associated with BRI construction and infrastructure projects

BRI construction and infrastructure projects contain a myriad of elements that could lead to disputes arising, particularly for the reason that there is no one definition of what constitutes a “BRI project.” These colossal projects often use regional or local parties who may not be prepared for the pace or size of development. Further, importing foreign workers and the application of local labour laws often cause local tension. The procurement of materials and design development are other areas of major challenges. Materials may not be available or of the appropriate quality and fundamental changes to designs may introduce delays.

Political risk is another aspect that investors and contractors should consider, given how many states have renegotiated or cancelled their BRI construction projects. Some land-intensive projects like dams or generators may have significant environmental effects or displace rural populations in unanticipated ways. Rural regions may face terrorist threats targeting BRI investments, as seen recently the Balochistan region of Pakistan. This upheaval – and the substantial price tag for these projects – has caused some governments to reconsider the BRI’s benefits.

Disputes risks associated with BRI participants

Unlike other trade or investment treaties, the BRI is an informal network of states agreeing under non-binding Memorandums of Understanding (MOUs) to participate in development initiatives that are largely funded by China and carried out by Chinese SOEs and firms. While China may have previous bilateral investment treaties (BITs) with some BRI participants, there are no BRI-specific investment treaty rights and few BITs between BRI participants, which could limit recovery through investment arbitration.

Adding to the complexity of the BRI, many state participants are lower-income or developing economies

where there is a less robust rule of law. Investors will also see significant risks in operating in jurisdictions where bribery and corruption are part of doing business. Forms of security like liens may be unavailable or difficult to execute in foreign jurisdictions. Litigation in some states raises questions about the impartiality of the court and whether the resulting judgment will be enforceable abroad. International commercial arbitration can help parties with cross-border disputes to avoid an unfamiliar court system and the uncertain enforceability of the resulting judgment.

Anticipating the broad potential for commercial infrastructure disputes, numerous arbitral institutions have drafted and promoted BRI-specific rules and courts. The International Chamber of Commerce launched a BRI commission in March 2018; the Hong Kong International Arbitration Centre followed suit in creating an advisory committee for BRI project parties. China has also created two Chinese International Commercial Courts in Xi'an and Shenzhen to specifically handle BRI disputes. The China International Economic and Trade Arbitration Commission (CIETAC) promulgated the first-ever set of investment arbitration rules in China to handle investor-state disputes, with the breakaway Shenzhen Court of International Arbitration also offering both ICC and ICSID facilities.

One of the biggest challenges in cross-border investment and development is to ensure that an arbitral award, once rendered, will be recognized and enforced against assets in a foreign state.

One of the biggest challenges in cross-border investment and development is to ensure that an arbitral award, once rendered, will be recognized and enforced against assets in a foreign state. China has reciprocity and commercial reservations to the New York Convention, meaning that it will only recognize Convention awards from Convention states that recognize Chinese awards, and that it will not enforce Convention awards that are not considered commercial under Chinese law. Some BRI participants (like East Timor, the Maldives, Iraq, Turkmenistan and Yemen) are not parties to the Convention, meaning that awards granted in those states will not be recognized or enforced in China. Further, if the investment itself is tainted by bribery and corruption, a Chinese domestic court may find that enforcing a related award is contrary to its public policy under Article V of the New York Convention.

In states that have a less robust rule of law, Investor-State Dispute Settlement (ISDS) is an important mechanism for pursuing states or SOEs in default, especially when the state considers an SOE as a state entity. Each state has its own immunity laws and practices: states like China claim absolute immunity from suit and from execution of commercial awards, which often extends to SOEs. By reason of its absolute immunity position, China will generally not recognize and enforce awards rendered elsewhere against state assets in China, except in certain limited situations. China also maintains reservations to the ICSID Convention limiting suits to expropriation and nationalization. However, there may be latitude under certain BITs to bring investment disputes, as was the case under the South Korea-China BIT in *Ansung Housing Co, Ltd v People's Republic of China*, ICSID Case No. ARB/14/25.

It is important to note that sovereign immunity from suit can be waived in an arbitration clause, which prevents a state from arguing that a suit should be stayed, set aside or annulled. Immunity from execution, however, presents more of a challenge as the rule in many jurisdictions is such that a waiver of immunity from execution would only be recognized if the waiver is made by the state before the court at the time when execution proceedings are brought. As such, even if China is bound by an enforceable agreement to arbitrate, a contractor or investor succeeding in an arbitration against China or a Chinese SOE may still be unable to have the award recognized and enforced in China. The award creditor will have to identify assets in other jurisdictions for recourse.

China has recently indicated that it will not extend absolute immunity to its own SOEs except in situations where the SOE is conducting activities on behalf of the state and with appropriate authorisation. However, Chinese courts may interpret a foreign state's SOEs as having absolute immunity on less stringent grounds, and therefore prevent execution of an award against the state's assets in China. An investor may therefore have more luck enforcing awards against other BRI participant SOEs or states in courts beyond China, despite the proliferation of BRI-ready arbitration options. For example, in *Svenska Petroleum Exploration AB v Lithuania & Anor* [2005] EWHC 2437 (Comm), the UK court held Lithuania responsible for its SOE's defaults despite Lithuania arguing that the SOE in question was not a state entity because the default did not relate to a state or administrative act. Assuming the SOE was properly found to be a Lithuanian state entity, Chinese courts would have come to the opposite conclusion and resisted the award's enforcement. Investors therefore should carefully

consider the target state's immunity position as part of their BRI strategy.

Mitigate disputes before they start

Below are some suggestions on how one might mitigate and handle State or SOE arbitration risk in large-scale investment projects.

- Every lawyer knows: the best cure for a bad commercial lawsuit is a good contract. BRI project disputes can be properly reduced and managed from the outset by choosing arbitration clauses that accurately reflect the parties' wishes.
- Introducing disputes lawyers and litigation team members as early on as possible, and especially during the bidding and procurement processes, can help ensure that arbitration provisions are adequately considered and vetted and will not lead to surprises. This includes drafting comprehensive waivers of state immunity in the relevant jurisdictions.
- For BRI participants, performing thorough due diligence reduces surprises. Human Rights due diligence, political stability assessments, "Know Your Client" and other background research on SOEs, contractors and sub-parties are critical to ensuring a project's success, particularly in regions where bribery, corruption or other business ethics issues are a concern.
- When dealing with parties across cultural and national boundaries, it may be appropriate to include alternative dispute resolution mechanisms like negotiation or mediation in the contract. This is especially applicable to China and

Chinese SOEs where culturally hybrid processes such as med-arb or arb-med-arb are more prevalent and acceptable.

- Be mindful that some BRI participants are not parties to the New York Convention or ICSID Convention. There may be unexpected domestic barriers to recognition and enforcement of awards, particularly against States, so select an arbitral body and seat wisely.
- China's Arbitration Act requires parties' arbitration clauses to choose an arbitral institution and seat or the same will otherwise be found invalid; ad hoc arbitration is not an option in China. As to the choice of institution for arbitration in China, there are uncertainties as to whether foreign arbitration institutions are allowed to operate in China. Separately, even if an arbitration agreement incorporating a foreign institution is considered to be valid, there are uncertainties as to whether an award so rendered will be considered as a domestic award or a foreign award thereby affecting the regime for enforcement. The safest options for China-registered parties therefore remain with arbitral institutions in China.

The BRI has opened many new regions to investment and development opportunities, but not without some risks. Well considered and carefully drafted dispute resolution clauses can help mitigate the effects of these risks and guide large infrastructure projects to success.

For more information contact:



Alfred Wu
Partner, Hong Kong
Tel +852 3405 2528
alfred.wu@nortonrosefulbright.com



James Rogers
Partner, London
Tel +44 20 7444 3350
james.rogers@nortonrosefulbright.com



Jasmine Landau
Associate, Ottawa
Tel +1 613 780 8671
jasmine.landau@nortonrosefulbright.com

Investment disputes in construction and infrastructure

A look at recent cases

By Martin Valasek and Matthew Buckle

Investments into construction and infrastructure projects are vital for opening up emerging markets, and can contribute to long-term economic growth. Investment protection regimes in the form of bilateral and multilateral investment treaties, backed by the right to have recourse to an investment arbitration tribunal in the event of breaches of those treaties, remain an essential element of mitigating the risk of such investments. In this article we explore recent investment cases in the sector.

Construction, infrastructure and investment

In one of the best-known of all investment arbitration decisions, the tribunal in *Salini v Morocco* (ICSID Case No Arb/00/04) (Decision on Jurisdiction, 23 July 2001) laid down the “*Salini test*”, articulating four essential elements of an “investment” that must be present in order to qualify for the jurisdiction of the International Centre for the Settlement of Investment Disputes (ICSID). Oft-cited, they were (1) a contribution of money or assets; (2) an assumption of risk; for (3) an appropriate duration; and, most controversially, (4) a contribution to the host State’s economy. The criteria have been applied more flexibly by recent tribunals, with a trend towards a simpler test of (1) contribution, (2) risk and (3) duration.

Key to the development of emerging markets is foreign investment in appropriate infrastructure projects – road, rail and telecoms

One constant though, is that there are few sectors that can claim to tick these boxes, and make a positive contribution to a host State’s economy, as well as investments in the construction and infrastructure sector. It has long been well-known that key to the development of emerging markets is foreign investment in appropriate infrastructure projects – road, rail and telecoms – projects that

open the doors for further inward investment and economic growth. It is also no coincidence that the *Salini* case itself arose out of a construction contract for the building of roads.

Investors in construction and infrastructure projects continue to structure their deals to avail themselves of the important protections afforded by investment treaties. Done properly, this provides the important safety net of a right to bring claims in investment arbitration before a neutral Tribunal in the event that things go wrong, as in the following recent examples.

Borkowski v Armenia

A claim was commenced by investors in August 2018 under the Armenia-United States of America bilateral investment treaty (BIT). The dispute relates to the construction of the Southern Armenia Railway and High Speed Road Projects, which have previously been valued by the claimant at approximately US\$3 billion.

The projects, which form part of the North-South Transport Corridor between Moscow and Mumbai, are particularly important to Armenia due to the political tension on Armenia's eastern and western borders with neighboring Turkey and Azerbaijan. The projects will create the shortest transportation route from the ports of the Black Sea to the ports of the Persian Gulf, reducing freight costs significantly, whilst also opening up access to significant natural resources.

The concession terms of the public/private partnership provided specific exclusivity periods in respect of feasibility studies and construction with the option of renewal by the investors for an additional 20 years. In the arbitration Borkowski and his company Rasia claim that as they prepared to sell the exclusive concessions, Armenian officials threatened to confiscate the road concessions while simultaneously granting third parties contractual rights over the projects.

This is the third BIT claim that Armenia has faced, with the socio-political importance of the projects meaning that this will be an important case to watch. Armenia is also currently defending a claim from USA investors claiming US\$15 million in damages in relation to a dispute over the construction of luxury apartments in the capital city of Yerevan.

Way2B ACE v Libya

This dispute arose as a result of the Libyan civil war in 2011, which formed a part of the wider Arab Spring movement. Portuguese based investor Way2B brought a €60 million claim against Libyan authorities in relation to construction contracts for two university complexes which were razed during the uprising.

A key issue in the case was whether or not the Libyan contracting party (ODAC) was a state entity, and thus whether their actions and contractual obligations were attributable to the Libyan state. Despite the fact that the intangible contractual obligations, including performance bonds and advance payment guarantees, were found to fall within the definition of investment in the Libya-Portugal BIT, the Tribunal found that ODAC was not acting on the instructions of the Libyan state and was financially independent from the government. Additionally, the claimants' failure to adduce evidence to prove when and who caused the damage to the sites meant that it would not be possible to determine whether the Libyan state was diligent in protecting the investment.

A force majeure war-clause in a contract does not operate to exclude other BIT protections including full protection and security

Notwithstanding this decision, an important point to emerge from the case was whether the force majeure clause operated as an exclusion to the respondent's liability in performing obligations under the contract and in

particular whether in turn this limited liability under the BIT. The Tribunal found that a force majeure war-clause in a contract does not operate to exclude other BIT protections including full protection and security.

Deutsche Telekom v India

In January 2019, the Swiss Federal Supreme Court upheld a UNCITRAL award given in favour of Deutsche Telekom against the state of India. The claim brought under Articles 3 and 5 of the Germany-India BIT related to the 20 per cent indirect shareholding held by Deutsche Telekom's in Indian telecoms company Devas Multimedia. Devas had concluded contracts with Indian state-owned satellite company Antrix in 2005, which provided for Antrix to build, launch and operate two satellites and lease S-band spectrum, a particularly valuable band of radio wave frequencies, which can host 4G and LTE mobile services. The contract provided for the payment of reservation fees for the spectrum and an ongoing lease fee.

In 2011, Antrix terminated the contract in response to the granting of exclusive rights over the network's S-band spectrum and the Indian government's annulment of the agreement due to requests from the Indian military for use of the high-value spectrum. Following arbitration, an UNCITRAL Tribunal found in favour of Deutsche Telekom, concluding that the respondent had breached the fair and equitable treatment standard (FET) in Article 3(2) of the BIT.

India challenged the award in Switzerland putting forth three arguments: (1) the investment was indirect in nature and was not covered by the BIT; (2) the India-Germany BIT

was an example of an “admission-type” investment treaty that granted protection only after the establishment of an enterprise in the host state, and excluded “pre-investment activities”. This was to be differentiated from a “right of establishment” treaty, which might grant protections to the investor immediately upon the establishment of an enterprise in the territory of the host state, and as a consequence the Tribunal had erred in focusing on Deutsche Telekom’s purchase of shares in Devas, and not on the fact that the project itself was still at a preparatory stage at the time of cancellation of the Contract, including because various critical licences were still pending; and (3) India was protecting its “essential security interests,” which it was permitted to do under the terms of the BIT. The Swiss Court rejected these arguments and upheld the award.

Comparison can be drawn between the decision in this case (and the Swiss Court’s view in upholding the award) and a separate 2016 award under the Mauritius-India BIT, that was made in favour of a group of Mauritian Devas investors. The relevant language in the Germany-India BIT excused state action “essential” to security “to the extent necessary” to protect the host State’s interest. In contrast, the Mauritius-India BIT contains a similar but broader exclusion for action merely “directed” to the “protection of [India’s] essential

security interest”. In the Mauritius case, the Tribunal decided that because the Indian military’s requests for use of the S-Band spectrum (which led to Antrix’s termination of the contract) were for 60 per cent of the available high-value bandwidth, it followed that 60 per cent of the action in terminating the contract was “directed” to the protection of India’s security, with India liable to compensate investors for only the remaining 40 per cent of the contract value (which would have remained available to commercial interests) as a result.

Conclusion

These recent cases highlight how investment treaty protections backed by actionable rights to bring claims against host states, give investors a public, neutral and international forum to pursue remedies wherever those states fail to abide by their international obligations. But the Libya case shows that care must be taken in the structuring of the deal to ensure that the protections bite against the state, and the Deutsche Telekom case shows that often times success in the arbitration itself is not necessarily the end of the road. Further, the example of the Mauritian investors in relation to the same project shows that investment arbitrations are never straightforward (particularly where national security, public health or

environmental arguments are raised by Respondent States), and that particular care must be taken over the wording and the scope of protections offered under specific treaties. However, what is clear is that as a safety net against state misconduct, the protections in investment treaties and investor-state dispute settlement (ISDS) continue to be an important part of the investors’ toolkit for mitigating state risk.

With special thanks to Will McCaughan for his assistance in preparing this article.

For more information contact:



Martin Valasek
Partner, Montréal
Tel +1 514 847 4818
martin.valasek@nortonrosefulbright.com



Matthew Buckle
Senior associate, London
Tel +44 20 7444 5054
matthew.buckle@nortonrosefulbright.com

FAQs – dispute resolution for multi-contract projects

Avoiding parallel proceedings and conflicting decisions

By Katie McDougall and Hector Sharp

Construction contracts are commonly part of a wider suite of project contracts, involving multiple, overlapping parties. Depending on the project, this suite can include concession/license agreements, joint venture agreements, offtake agreements, financing agreements, direct agreements, guarantees and/or agreements with sub-contractors. This intertwined suite of contracts commonly means that when a dispute arises, it arises under multiple project contracts. Each of those contracts may have a well drafted dispute resolution clause, that was negotiated and agreed by the specific parties to that contract, and which reflects how those parties wish to resolve any dispute under that particular contract. However, such clauses often differ and are incompatible. This disparity in dispute resolution procedures across multi-contract projects can lead to a series of concurrent arbitrations and/or court proceedings in relation to the same, or similar, issues arising in connection to the project, potentially resulting in conflicting decisions.

The costs and time burden of dealing with multiple disputes on multiple fronts can be significant, and the difficulties of enforcing conflicting decisions will inevitably delay the satisfactory resolution of such disputes.

In some circumstances, this is the commercial reality of such projects, and may not be a priority for different parties. However, if mitigating these risks is a priority, such mitigation may be achieved through arbitration and the consolidation of arbitral proceedings. Although difficult to accomplish, there are steps that can be taken to give parties the best chance of achieving consolidation, and therefore to avoid

some of the issues associated with multi-contract projects. Below we answer some of the frequently asked questions we encounter in this respect.

What are some of the issues faced in drafting dispute resolution clauses for multi-party/multi-contract projects?

Large projects will inevitably have many moving parts; multiple parties in different jurisdictions, financiers, sponsors, and contractors, and large volumes of interlinking contracts. The contracts will often be drafted across different internal and external legal teams, including

situations where multiple firms are advising on contractual terms. Various parties to these contracts, especially Government entities and lenders, will push for particular dispute resolution procedures, based on their internal policies or commercial drivers. Other parties may have differing experience with dispute resolution procedures, or particular arbitral bodies or seats of arbitration, which lead them to prefer a particular procedure. It is this inconsistency which can cause issues when a dispute arises under multiple contracts, including concurrent proceedings and conflicting decisions.

What is the key to mitigating these risks?

Consistency across dispute resolution clauses is key. This could be achieved by choosing the courts of a particular location to have exclusive jurisdiction over disputes arising under any project document. However, if the project has a number of parties from different jurisdictions, this may not be commercially palatable.

Choosing arbitration as the dispute resolution procedure for each project contract, and ensuring that the arbitration agreement in each project contract is consistent, will likely be a more palatable option, and will give the parties a good chance of achieving consolidation of future disputes under different project contracts. Including specific drafting in relation to consolidation will also be helpful.

What is meant by “consolidation”, and how is it different to “joinder”?

“Consolidation” is where two or more separate arbitral proceedings are merged into a single arbitration. The merged arbitration can be presided over by one of the existing arbitral tribunals, or a new arbitral tribunal can be appointed for the merged arbitration. The two separate arbitral proceedings can be in relation to disputes under the same contract, or under different contracts, but arising from similar facts. However, for the purposes of this Q&A, the focus is on situations where disputes arise under different project contracts but in relation to the same facts.

“Joinder” is where, upon the request of an existing party to an arbitration, a third person not yet involved in the arbitration

is brought in to participate in the proceedings, or where the third party is allowed to intervene in an existing proceeding.

What are the recommended initial steps?

If possible, a holistic review of the proposed dispute resolution procedures for all project contracts should be conducted. The proposed dispute resolution clauses should be compared to see if consistency is possible, and negotiations should be conducted with this in mind. If a project contract has already been executed, the parties to the other project contracts should consider whether the dispute resolution procedure adopted by the executed contract can be mirrored in the remaining contracts. If not, an amendment to the signed contract can be considered.

Further, an analysis of where disputes are likely to arise should be conducted. If total consistency cannot be achieved across all project contracts, it may still be helpful to achieve consistency across a set of contracts under which similar disputes may arise.

What role does arbitration play?

For many different reasons, it is common to see arbitration as the preferred dispute resolution procedure in multi-party project contracts, especially for those projects that involve international parties. Arbitration is often seen as a more neutral forum than a local court alternative, and in many circumstances can be beneficial for enforcement. Many of the most commonly used rules of arbitral institutes, including the ICC and

the LCIA, have provisions dealing with joinder and consolidation, and give the court of the respective arbitral institution the discretion to make appropriate orders in certain circumstances. Such rules differ in their content, however the key to taking advantage of these rules, particularly in respect of consolidation, is to ensure that the essential parts of the arbitration agreement in each project contract are consistent. These essential parts will include the seat of arbitration, the arbitral rules and the number of arbitrators, however they may also include any specific procedural requirements written into the arbitration agreement.

What impact does differing governing laws between contracts have?

Parties often believe that consolidation cannot be achieved where proceedings are brought under different contracts providing for different governing laws. However, while it may impact a tribunal’s discretion in deciding whether or not to consolidate, it is not necessarily the case that different governing laws in all cases will prevent consolidation. Arbitral tribunals regularly determine points of law under different legal systems, and this would be no different in a consolidated arbitration. Accordingly, if, say, it was necessary to determine whether a particular fact scenario gave rise to a breach of an EPC contract governed by New York law, and then also whether that same factual scenario gave rise to a breach of a concession agreement governed by English law, the arbitral tribunal in a consolidated arbitration can make such determinations.

What impact do stepped or split clauses have on consolidation?

Split clauses, being clauses which provide that at the point when the dispute arises one or more parties has the option to choose the dispute resolution mechanism (whether court or arbitration), can mean that consistency across project documents, and therefore the ability to consolidate disputes, is lost.

Similarly, stepped clauses, which provide that a number of dispute resolution processes must be gone through before proceedings can be commenced (e.g. first negotiation, then mediation, then finally arbitration), can also mean that consolidation is not possible.

The perceived advantage of such clauses may outweigh the desire to achieve consolidation, however this is something that should be considered by the parties upfront.

Should a consolidation clause be included and what should it contain?

While notoriously difficult to draft, thought should be given to including a consolidation clause within the dispute resolution clause of each project contract, which expressly evidences the parties agreement to consolidation. The specific drafting of such clauses will depend on the arbitral rules chosen (as there may be different requirements in relation to agreement to consolidate), and also the contracts to which the agreement to consolidate will apply. Again, consistency of such consolidation clauses across project contracts is key.

For more information contact:



Katie McDougall
Of counsel, London
Tel +44 20 7444 3344
katie.mcdougall@nortonrosefulbright.com



Hector Sharp
Associate, Dubai
Tel +971 (0)4 369 6336
hector.sharp@nortonrosefulbright.com

Expert evidence in construction disputes

Practical tips for managing party appointed experts

By James Rogers and Amy Armitage

Large scale international infrastructure and construction projects always involve factual questions of what, where and when. However, responsibility invariably turns on more intricate questions of cause and effect and expert evidence is usually required, often across more than one discipline. The expert phase is often therefore the most critical, and sometimes costly, part of the arbitration process. In this article we give some practical tips for managing party appointed experts based on our experience of acting for both contractors and employers in infrastructure and construction and engineering disputes across the globe.

Selection of party appointed experts

It goes without saying that it is important to select the “right” expert. This means ensuring not only that the expert has the appropriate qualifications, technical expertise and reputation in the relevant field but also (if possible) suitable experience of the dispute process and of writing expert reports and giving evidence in adversarial proceedings.

Credibility is the key consideration however. It is vital that any expert has the right technical experience and can convey their expertise in a persuasive and credible manner to a tribunal of lay people, likely unfamiliar with the topic, while remaining impartial and uninfluenced by instructing counsel.

It also helps if the expert is collegiate and good to work with. This is a delicate balancing act. Not everybody possesses the necessary interpersonal skills and is able to engage a tribunal and explain complex technical issues in a convincing and credible manner.

It is always preferable, therefore, to interview potential experts where time permits. Test your expert. We also suggest that you take soundings from other individuals or practitioners familiar with the expert.

It is also worth checking whether the expert remains “active” in their relevant field of expertise and to check on their published writings – have they previously written anything which conflicts with the position they are adopting in the

arbitration? Likewise, make sure that the expert has the capacity to take on the appointment and is able to meet the relevant procedural deadlines and attend the hearing.

Scope of the expert’s role

The expert’s remit should be clearly and precisely defined in their written instructions. This requires that the issues in dispute are clearly defined between the parties. Early meetings with your expert as the case develops, and between the experts once the case is afoot, can help delineate the issues and points of disagreement. It is therefore usually advisable to instruct experts as early as possible.

The expert must also recognize that their role is ultimately to advise the tribunal independently rather than to advocate the client's position. This duty overrides any duty to the instructing party.

The primacy of the expert's independence is recognized, for example, in the IBA Rules on the Taking of Evidence in International Arbitration, which require expert reports to contain a statement of independence from the parties, their legal advisors and the tribunal. The IBA Rules also contains a duty to disclose any existing or past relationships with any of the parties, legal advisors or the arbitral tribunal.

It is not uncommon for experts to be appointed at an early stage, during the life of a project and/or to advise a party on an ongoing basis of the strength of its position. However, difficulties can arise if the expert is subsequently asked to provide independent expert evidence to a tribunal during the course of an arbitration.

There is a risk that the expert may be perceived as a "hired gun" lacking the required impartiality to fulfil the role of an independent expert witness. In all instances, but in this scenario in particular, it is important that the expert's instructions clearly scope out their intended role and that they may subsequently be required to act as expert witness and therefore remain impartial.

An expert will typically summarize the substance of their instructions in the expert report and instructions given through the life of a dispute may become disclosable. Instructions should be drafted with this in mind, in a neutral tone without conveying any comments on the merits/strategy of the instructing party's case on the technical issues.

The more objective and independent the expert appears, the more credible they are likely to appear in the eyes of the tribunal.

Objectivity

The more objective and independent the expert appears, the more credible they are likely to appear in the eyes of the tribunal. Experts should avoid acting as advocates for the party appointing them and should be encouraged to concede points where it is appropriate to do so.

It is also important that experts not stick rigidly to one fact scenario but be prepared to consider a range of possible outcomes depending upon the tribunal's findings on disputed points of fact or law.

Expert evidence should always be rigorously tested by the instructing legal team to ensure that the expert has been objective and has properly considered the contrary views/explanations provided by the opposing expert. One way of testing this is to ask whether the expert would express the same opinion if given the same instructions by the opposing party?

Experts who ignore evidence which is not helpful to their own party's case or consistently choose an interpretation or approach that gives their instructing party the "benefit of the doubt" will inevitably run the risk that less weight will be attached to their evidence by the tribunal or that the evidence of the other expert will be preferred wholesale.

Credibility is always the key consideration. And an expert's lack of credibility may bring into question other aspects of the client's case and the client's and counsel's own credibility.

Giving of evidence

The general aim in every case is to simplify what is often difficult technical evidence into an easily understandable format. This is equally true for written reports, technical presentations (which are increasingly used during hearings) and for responding to cross examination.

Counsel can play an important role in ensuring that written expert reports are presented in a sensible, easy to follow format and appropriately summarized. However, the expert must not delegate his opinions to others. The expert must own the report.

Rather than traditional cross examination, experts are brought together before the tribunal and are encouraged to discuss and debate their differences.

Expert witness conferencing or "hot tubbing" has become increasingly popular in international arbitration hearings. This is a process in which experts provide evidence concurrently (as opposed to sequentially) with the tribunal leading a discussion. Rather than traditional cross examination, experts are brought together before the tribunal and are encouraged to discuss and debate their differences.

This can be an effective and constructive means of obtaining relevant evidence on technical matters and can save time and costs. At the very least, a genuine analysis of the issues is promoted and experts are often more “honest” with their views when confronted by a peer. It does, however, require the tribunal to be extremely well prepared to ensure that the process stays on focus and is properly managed.

Tribunal appointed experts are more regularly seen also. Sometimes opposing experts can take fundamentally incompatible approaches, not engaging each other’s views and opinions. Party-appointed experts are therefore usually asked to confer and attempt to reach agreement and record in writing the points of agreement/disagreement between them. However, a third expert, appointed by the tribunal can help break deadlock in such situations. A tribunal appointed expert will add to the cost of proceedings though, as the parties will still retain their own experts.

For more information contact:



James Rogers
Partner, London
Tel +44 20 7444 3350
james.rogers@nortonrosefulbright.com



Amy Armitage
Senior associate, London
Tel +44 20 7444 2149
amy.armitage@nortonrosefulbright.com

Disclosure in international arbitration

Using US courts to obtain discovery for non-US proceedings

By Matthew Kirtland and Katie Connolly

Unbeknownst to many, a US statute (28 U.S.C. § 1782) exists that permits parties to obtain discovery in the US in aid of non-US legal proceedings including – in some instances – international arbitrations. Such discovery can include documents and sworn testimony (depositions). In conducting an arbitration seated outside the US (or other non-US legal proceedings), it is useful to understand the mechanics, requirements and key issues of § 1782 discovery.

Statutory text

Section 1782, in its present form, reads as follows in pertinent part:

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

“Since its inception, Congress has steadily increased the scope of the discovery available under [§ 1782] such that it has been given “increasingly broad applicability.” In *re Gianoli Aldunate*, 3 F.3d 54, 57 (2d Cir. 1993).

Mechanics

To request § 1782 discovery, a party files an ex parte petition in the US judicial district in which the target of the discovery “resides or is found.” The petition describes the requested discovery, the applicable non-US legal proceedings and why the discovery should be permitted. The court can rule on the petition ex parte or accept submissions from other parties and/or the target. If the petition is granted, the requested discovery is issued and proceeds under the standard rules prescribed by the Federal Rules of

Civil Procedure. If the petition is denied, an appeal may be raised.

Requirements and discretionary factors

For a district court to grant § 1782 discovery, three requirements must be met: (1) the application must be made by an “interested party” or a foreign or international tribunal; (2) the person from whom discovery is sought must “reside” or be “found” in the jurisdiction of the district court where the § 1782 petition is filed; and (3) the document or testimony must be for “use” in a foreign or international tribunal.

In addition to these requirements, the US Supreme Court has identified four discretionary factors that a district court should consider when ruling on a

§ 1782 petition: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding; (2) the nature of the foreign tribunal, the character of the proceedings, and the receptivity of the foreign government or the court or agency abroad to US federal court judicial assistance; (3) whether the § 1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) whether the discovery would be unduly intrusive or burdensome. *Intel Corp. v Advanced Micro Devices, Inc.* (*Intel*), 542 US 241, 264-65 (2004).

Key issues

Can § 1782 be used in aid of international arbitration proceedings?

Prior to *Intel*, two US courts of appeal had held that Congress had not intended international arbitrations to fall within the scope of “foreign tribunals” under § 1782. Post-*Intel*, the trend in US courts has shifted, as courts have relied on the *dicta* in *Intel* that “foreign tribunals” include “quasi-judicial” bodies and those that act as first-instance decision makers whose decisions are subject to judicial review, to include international arbitral tribunals.

The authority, however, is still not unified. In the First, Third, Eighth and DC Circuits, district courts have held that at least some types of private arbitral tribunals fall within the scope § 1782, while district courts in the Fifth, Seventh, Ninth and Tenth Circuits have held the opposite. The Second Circuit has not weighed in, but at least one Second Circuit district court, recognizing tension between circuit precedent and *Intel* on this issue, looked outside the

jurisdiction for guidance and ultimately held that a series of private commercial arbitrations occurring before the London Maritime Arbitration Association qualified as proceedings before a “foreign tribunal” within the meaning of § 1782. See *In Re Ex Parte Application of Kleimar N.V.*, No. 16-MC-355, 2016 WL 6906712 (S.D.N.Y. Nov. 16, 2016).

Must the non-US proceedings be pending?

No. In *Intel*, the Supreme Court rejected the argument that § 1782 discovery is limited to pending or imminent adjudicative foreign proceedings, holding that § 1782 requires only that a dispositive ruling by a foreign judicial or quasi-judicial body, reviewable by the courts, be within “reasonable contemplation.” *Intel*, 542 US at 259.

Is the term “interested person” limited to actual litigants?

No. In *Intel*, the Supreme Court held that § 1782’s “any interested person” requirement includes not only litigants before foreign or international tribunals, but also any other person who possesses a “reasonable interest” in obtaining judicial assistance.

The facts of *Intel* are instructive. The petitioner there had filed an antitrust complaint with the Directorate General for the Competition of the European Commission and in that proceeding held certain participation rights, including the right to submit information to the commission and the right to proceed to court if the commission discontinued the investigation or dismissed the complaint. The Supreme Court found these participation rights sufficient to give the petitioner the required “reasonable interest” in obtaining judicial assistance to qualify it as an “interested person.”

In *Intel*, the Supreme Court held that § 1782’s “any interested person” requirement includes not only litigants before foreign or international tribunals, but also any other person who possesses a “reasonable interest” in obtaining judicial assistance.

What is the meaning of “resides or is found”?

Section 1782, as the statute makes clear, can only be requested in a judicial district where a person “resides or is found.” The Supreme Court has not yet interpreted this term. One appellate court has ruled that for depositions, mere physical presence in the district, even if temporary, is enough to satisfy this requirement. See *Edelman v Taittinger*, 295 F.3d 171, 178, 180 (2d Cir. 2002). For requests for production of documents, no circuit authority yet exists, however, the weight of authority suggests that a person must meet the standard US requirements of general or specific personal jurisdiction in order to satisfy the “resides or is found” requirement.

Must the requested discovery be located within the US?

Only one circuit court has weighed in on whether § 1782 can be used to obtain documents located outside the United States. In 2016, the Eleventh Circuit held that – particularly with regards to electronically stored information – the physical location of documents does not establish a per se

bar to § 1782 discovery. See *Sergeeva v Tripleton International Ltd, et al.*, 834 F.3d 1194 (11th Cir. 2016). The court ordered production of documents held electronically in the Bahamas by an affiliate of a U.S.-based company based on evidence that the companies regularly shared documents and information, and the documents were therefore in the “possession, custody and control” of the U.S.-based company even though they were located in the Bahamas.

The few district courts that have considered the issue, both before and after *Sergeeva*, are split. A New York district court summarized the Second Circuit authority: “the bulk of authority in this Circuit suggests that a § 1782 respondent cannot be compelled to produce documents located abroad.” *In re Kreke Immobilien KG*, No. 13 MISC. 110 NRB, 2013 WL 5966916, at *4 (S.D.N.Y. Nov. 8, 2013) (citing *In re Godfrey*, 526 F. Supp. 2d 417, 423–24 (S.D.N.Y. 2007)). A California district court refused to consider the issue, but cited a Ninth Circuit case as “acknowledging support for the view that § 1782 was not intended to support discovery of material located outside the United States.” *In re Ex Parte Application of Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1036 (N.D. Cal. 2016) (citing *Four Pillars Enterprises Co., Ltd. v Avery Dennison Corp.*, 308 F.3d 1075 (9th Cir. 2002)). In 2005, the Washington, DC district court found that the existing case law suggested that “§ 1782 is not properly used to seek documents held outside

the United States as a general matter.” *Norex Petroleum Ltd. v Chubb Ins. Co. of Canada*, 384 F. Supp. 2d 45, 52 (D.D.C. 2005). However, later cases have granted § 1782 petitions where documents may be held outside the United States so long as the documents are in the possession, custody or control of a person that falls within the jurisdiction of the court. See, e.g., *In re Barnwell Enterprises Ltd*, 265 F. Supp. 3d 1, 16 (D.D.C. 2017).

Only one circuit court has weighed in on whether § 1782 can be used to obtain documents located outside the United States ... the court ordered production of documents held electronically in the Bahamas by an affiliate of a US-based company ...

Must the requested discovery be discoverable under the rules of the non-US jurisdiction?

No. In *Intel*, the Supreme Court held that there is no threshold requirement under § 1782 that the evidence being sought must be discoverable under the law governing the non-US proceeding or that the discovery would otherwise be discoverable in US domestic litigation analogous to the non-US proceeding.

For more information contact:



Matthew Kirtland
Partner, Washington, DC
Tel +1 202 662 4659
matthew.kirtland@nortonrosefulbright.com



Katie Connolly
Associate, Washington, DC
Tel ++1 202 662 0461
katie.connolly@nortonrosefulbright.com

Construction disputes – maximizing time and costs efficiencies

By James Morgan-Payler and Danielle Strain

Construction disputes by their very nature, lend themselves to arbitration as opposed to other means of dispute resolution. This is because they often involve international contracting parties, complex disputes around factual issues requiring expert consideration (which parties often wish to keep confidential). They also invariably involve large volumes of material and evidence (factual and expert) to make sense of what actually happened on site.

Whilst no project party wants to end up in arbitration, failure to put systems and processes in place to effectively capture and store project documentation at the outset can lead to unnecessary delays in the event proceedings do become a necessity.

In construction disputes a significant amount of legal time (and therefore expense) is often spent simply locating and trying to understand the relevance of key documents because of poor document management practices throughout the project lifecycle. This is generally compounded by the fact that unresolved disputes are typically referred to arbitration at the end of a project when key project personnel – who often have the best understanding of what happened on site – have moved on to other roles.

Effective management of documentation during project delivery can avoid this issue, as well as

- Reduce the risk of claims being time barred or otherwise invalidated because of non-compliance with contractual notification requirements.
- Dramatically cut down the legal time involved in preparing and reviewing documents for discovery.

This article considers some practical tips for contractors and suppliers on how information can be stored and managed throughout the project delivery phase, to ensure a smoother transition to end of project and dispute resolution.

Capturing information to ensure parties can file, or respond to claims in a timely manner

Construction projects, particularly in the energy and infrastructure space, can involve remote and/or extensive sites. It is often the case that site teams who are performing the work and therefore aware of what is going on in a day to day sense, are physically separated from the team of personnel administering the contract.

This is often the case for many energy and infrastructure projects, for example, in South East Asia, where a contractor may have its contract administration team in its head office in Singapore or Bangkok managing its projects throughout the region. Even on more traditional building projects, such as apartment tower complexes, the team administering the contract may be based in, and rarely leave, the site office.

The result of this physical separation is an information disconnect between those who know what the issues on site are, and those who have the capacity to progress any claims related to those issues through the contractual dispute resolution mechanisms. Where applicable, this can result in claims becoming time barred, and the entitlement to make that claim at a later date being lost.

It can also mean that the information relevant to that potential claim is simply never captured – for example, a photograph is never taken evidencing the issue as it existed at that point in time, and once it is discovered that a claim could be made, that opportunity is lost because work has further progressed.

The key then is to make the transmittal of information from site to those progressing claims as quick and efficient as possible. This could be done by physically locating the teams together, or where this is not possible, by creating regular and frequent meetings/catch ups to discuss the progress of works and ensure that the project is being delivered in an agile fashion.

Contractors/suppliers may also wish to consider the use of technology to facilitate this information flow. For example, the use of apps which can quickly communicate information or the dissemination of tablet devices to the site team to take photos which are automatically geo-located and can be centrally stored for use by the administration team.

It is critical to store information centrally and logically. Without a document storage protocol, those on site will store information haphazardly

Storing information

It is critical to store information centrally and logically. Without a document storage protocol, those on site will store information haphazardly on personal computer drives, in hard copy notebooks, in the same way they stored information on other projects (which may not be the same as others) or, in the worst case, not at all.

Folders should be set up on a shared drive, or project specific drive which separate out, at least

- Claim documentation by claim number. This is the most important of all, as it will save the greatest amount of legal time when drafting pleadings and assessing the merits of various claims.
- Photographs by date (and that where possible, photographs are taken at the same location at regular intervals of the project to show progress over time in specific key areas).
- Documentation such as delivery dockets, bills of lading etcetera are all separately stored by supplier in date order.

- Equipment data (where relevant), showing dates various equipment was on site, and the locations and usage of various equipment.
- Daily site diaries of key personnel, scanned and uploaded at the end of each week.

Transitioning information from site-based personnel to those involved in the dispute resolution phase

It may seem counter-intuitive, but involving your legal team to help manage the transition of information prior to the end of the project delivery phase can actually save time and cost in the long run. This is because the legal team can assist in identifying

- Key potential witnesses, and the physical location of any information they may hold. This means that personal laptops, external hard drives and hardcopy notes can be captured for the subsequent witness statements in the arbitration.
- Any obvious gaps in information which may be able to be corrected before those with the knowledge of the project leave site. For example, equipment logs may be able to be obtained from suppliers prior to them being paid at the end of the job, but once they leave the site those records may be lost.

The Norton Rose Fulbright solution – Deliver&Capture

Having been involved in arbitration in the construction sector, both domestic and international, large and small, for many decades, our arbitration group has seen "the good, the bad and the ugly" when it comes to information storage and the impact on proceedings. This includes information missing at the point of arbitration, or reviewing endless amounts of irrelevant information during discovery. We have also seen valid claim entitlements lost because of a failure to comply with contractual time bars.

To overcome these issues and to streamline project delivery, we have partnered with a major client in the infrastructure space and leading user experience (UX) designers to develop a project delivery tool utilizing the latest technology – Deliver&Capture. Our technology solution has three independent components:

Contract manual

A web-based contract manual in a user-friendly FAQ style format and flowchart to explain contractual entitlements and processes.

Claims portal

An online automated claims management system which diarizes claim dates, pre-populates information and assists users in completing claims for submission throughout the project.

Mobile application

To capture information from the site team in the form of photos and basic data, which is geo-located, and feeds into the claim portal for submission in the form of a claim, if relevant.

We are currently offering this project delivery solution on large scale infrastructure projects to both contractors and principals internationally, but also working with clients to develop a solution which can be utilized on projects of all shapes and sizes.

Conclusion

When it comes to construction arbitration, at the outset of a project hoping for the best but planning for the worst will save participants significant time and cost once it comes time to participate in the arbitral process. Setting up clear guidelines for document management and collection of information are critical to this process and will assist contractors/suppliers in making and evidencing claims in arbitration.

For more information contact:



James Morgan-Payler
Partner, Melbourne

Tel +61 3 8686 6503

james.morgan.payler@nortonrosefulbright.com



Danielle Strain
Senior associate, Melbourne

Tel + +61 3 8686 6009

danielle.strain@nortonrosefulbright.com

Interim relief in construction arbitration

Comparing the courts and arbitration

By Andrew Battisson, Paul Stothard and Nicola Thompson

With most major institutional arbitral rules now providing avenues for interim relief via emergency arbitrators, expedited arbitral appointment or expedited proceedings, when is it still worth looking to the courts for interim relief in construction arbitrations?

There are a number of scenarios in which national courts may offer advantages. In cross-border construction disputes, enforcement is often the most important driver for a claimant's strategy from the outset. In many jurisdictions, the courts will be the best route to freezing assets to ensure any award obtained will be worth something in the end. Many courts have enviable powers with bite, such as the power to grant a world-wide freezing order and provide for the most serious penalties (such as jail time) if breached.

In cross-border construction disputes, enforcement is often the most important driver for a claimant's strategy from the outset

When will the courts intervene?

The United Kingdom

The English courts are constrained by the Arbitration Act 1996 from intervening in arbitrations unless the tribunal cannot act, and then only to the extent necessary.

If the arbitration is conducted under the London Court of International Arbitration (LCIA) Rules, for example, parties are able to access interim relief within the arbitral process and prior to formation of the tribunal by appointing an emergency arbitrator or expediting formation of the tribunal to deal with urgent interim relief sooner. In light of the constraints of the Arbitration Act, the availability of these remedies within the arbitral process will often result in ousting the English courts' powers to intervene to grant interim relief, save in circumstances where effective interim relief is not available.

The English courts are however willing to accept jurisdiction over interim relief applications where a tribunal cannot grant the same relief or it would not be as effective in emergencies. Generally this will be because either

- The tribunal lacks the power
 - A tribunal has not been constituted and even if this was expedited or an emergency arbitrator was appointed, it would be too late.
 - The relief sought is against a third party, who will necessarily be outside the tribunal's reach because it is not a party to the arbitration

or

- An order of the tribunal would not be effective
 - The existing tribunal cannot hear or act on the application sufficiently quickly.

- There are other issues, such as enforceability issues in the relevant jurisdiction/s.

In October 2018 in *Recydia Atik Yönetimi & Ors. v Mr Richard Mark Collins-Thomas, Environmental Power International Limited & Ors.* [2018] EWHC 2506, the English court upheld a without notice world-wide freezing order under section 37 of the Senior Courts Act 1981 which had been granted by the court before the arbitral tribunal had been constituted. The dispute arose out of a joint venture to develop and commercialize technology for a waste-to-energy plant. The seat of the arbitration was Zurich but the assets were in the UK. When seeking the order, the claimant had not yet filed a request for arbitration with the ICC but it satisfied the High Court that it had a good case and there was a real risk that the defendant, who had control over the JV's assets and had stopped funding the JV, would put its assets beyond reach. After the assets were frozen, the defendant applied to set aside the court order, but the court refused it and decided the order should stand until final disposal of the claimant's arbitration.

Australia

Australian courts have the power to intervene and grant interim relief where necessary in international commercial arbitrations (see section 7(3) of the International Arbitration Act 1974 and Articles 8 and 17J of the UNCITRAL Model Law that applies to international arbitrations seated in Australia).

In *Duro Felguera Pty Ltd v Trans Global Projects Pty Ltd (in liq)* [2018] WASCA 174, the Court of Appeal of Western Australia upheld a freezing order over the assets of a subsidiary of a troubled global parent which had been granted prior to the commencement of arbitration. The Court of Appeal held

that the freezing order would remain in place even after the arbitral tribunal was constituted until 'further order'.

Parties are often concerned of actions to dissipate assets at an early stage, when the dispute has crystallized but arbitral proceedings are not yet or only just on foot

These facts are not uncommon. Parties are often concerned of actions to dissipate assets at an early stage, when the dispute has crystallized but arbitral proceedings are not yet or only just on foot. A contractor with liquidity issues may demobilize and take steps to remove any assets from a jurisdiction on a failing project. Without parent company guarantees, subsidiaries of global companies may be the only asset in a jurisdiction and urgent steps may be needed to preserve the status quo pending resolution of the dispute.

Should parties expedite proceedings or seek appointment of an emergency arbitrator?

There are benefits to seeking interim relief within the arbitral process. These include, for example, the ability to avoid airing confidential matters publicly, and having the ultimate decision-makers of the dispute also determine issues of interim relief and therefore being fully appraised of the issues if/when, for example, adjustments need to be made to any order for relief. However, there

will be instances when court relief offers clear advantages.

Time constraints can be an issue in practice. The process of constituting an arbitral tribunal takes time, particularly where a three-member tribunal is to be appointed. Fast-tracking that process under expedition provisions can still take time: for example, the application of expedition must be made, arbitrators must undergo conflicts checks and accept appointment, and consensus subsequently sought as between party-appointed tribunal members in order to appoint the chairperson. The parties then still need to put their application for interim relief to the tribunal once appointed. Where very urgent relief is needed, that may still take too much time and so parties may need to resort to other options.

Emergency arbitrator provisions, although useful, may not always be the answer. Arbitral institutions and the arbitrators themselves are not always immediately available on very short notice. In urgent circumstances, by the time a party applies for an appointment, an arbitrator clears conflicts and accepts the appointment, reads into the papers and/or hears the evidence, and issues a decision, it may be too late. However, in many jurisdictions, court judges will be on call to hear urgent injunction applications at very short notice and at any time, for example, on a Sunday night.

Often the last thing an applicant wants to do is give the defendant warning that an application for interim relief is in process

More significantly, often the last thing an applicant wants to do is give the defendant warning that an application for interim relief is in process, particularly if an asset freezing order is needed. Yet, unlike the court system, many institutional rules do not allow for without notice applications for relief and require the other party to be given a reasonable opportunity to respond or at least be notified of the application. So again, in these instances seeking relief from the courts may be the best option.

A further practical point to consider is that tribunals are not able to make orders under a penal notice, so any interim relief ordered by a tribunal will not have the same bite as that of a court. In practice, most orders are complied with. However, in some instances, the only thing ensuring compliance with the order is the serious ramifications of breaching an order under a penal notice.

In some jurisdictions (such as the UK) the fact that interim relief is available within the arbitral process will limit or even oust the court's ability to intervene

Drafting tips

In some jurisdictions (such as the UK) the fact that interim relief is available within the arbitral process will limit or even oust the court's ability to intervene. To preserve the ability to seek interim court relief may mean choosing to opt out of emergency provisions in the relevant arbitration rules. Parties should therefore be alive to these issues, consider at the outset what relief might be needed (by whom, against whom, where, and over what), and the arbitration agreement must be carefully crafted to avoid inadvertently excluding the preferred mechanism, whether court or tribunal.

For more information contact:



Andrew Battisson
Partner, Sydney
Tel +61 2 9330 8611
andrew.battisson@nortonrosefulbright.com



Paul Stothard
Partner, Dubai
Tel +971 4 369 6318
paul.stothard@nortonrosefulbright.com



Nicola Thompspon
Senior associate, London
Tel +44 20 7444 3581
nicola.thompspon@nortonrosefulbright.com

Investment protection post-*Achmea*

By Sherina Petit, Cara Dowling, and Charlotte Hornby

An investment protection vacuum arguably looms large within the EU following recent commitments by EU Member States, in the wake of the *Achmea* decision, to terminate the bilateral investment treaties (BITs) between them. This is notwithstanding that there is currently no viable alternative regime for protecting foreign investors or resolving disputes they might have with the host EU Member States in which they are investing. This represents a genuine threat to intra-EU foreign direct investment in the region, at a time when focus on the stability of bilateral trade relations should be a priority.

There are good reasons for foreign investors to be concerned: intra-EU investment treaty-based arbitrations comprise around 20 per cent of known global disputes between foreign investors and the host states in which the investments were made. That number is, however, expected to plunge dramatically as intra-EU investors lose the protections currently offered by intra-EU BITs, in particular the right to bring suit directly against host states.

The *Achmea* decision

On March 6, 2018, the Court of Justice of the European Union (CJEU) ruled that the investor-state arbitration clause in the Netherlands-Slovakia BIT was incompatible with EU law. The German Federal Court had referred the issue to the CJEU during its review (in its capacity

as the supervisory court of the seat of arbitration) of the validity of an arbitral award against Slovakia in the *Achmea* case. The CJEU held that the arbitration agreement in the Netherlands-Slovakia BIT impaired the CJEU's exclusive jurisdiction to interpret EU law and thereby undermined the principle of autonomy of the EU, and as such was incompatible with EU law. Following the decision, the German courts set aside the award. This decision has had a knock-on effect for other intra-EU BITs.

The CJEU's decision, however, left something to be desired in terms of clarity as to its intended scope and application. A key area of uncertainty concerns whether the decision applies only to intra-EU BITs, or extends to multilateral investment treaties (MITs) where EU Member States are also a party, for example the Energy Charter Treaty

(ECT). A number of tribunals have since had to grapple with the question of their own jurisdiction, with varying results. Shortly after *Achmea*, the European Commission weighed in, issuing a non-binding communication setting out its opinion that all intra-EU BITs and intra-EU investor-state arbitrations under the ECT were incompatible with EU law. The Commission has sought to intervene in a number of subsequent intra-EU investment arbitrations arguing that positive findings of jurisdiction are undermined by *Achmea*. However a binding decision is some way off, as we wait for the outcome of the CJEU's review of the compatibility of intra-EU arbitration under the ECT following a preliminary ruling on the issue referred by the Svea Court of Appeal in Stockholm.

Termination of intra-EU BITs

In January 2019, all EU Member States declared their agreement to terminate the BITs concluded between them by December 6, 2019. Whilst many if not all of these BITs contain sunset provisions, which provide that treaty protections will continue to apply to investments made before termination for a number of years post-termination, there is some question as to whether such provisions will have any effect following mutual as opposed to unilateral termination. Whether existing investments will benefit from continued protection in the years following termination will depend on the precise terms of the particular BITs.

Twenty-one Member States also declared that the *Achmea* judgment applies to intra-EU investor-state arbitrations under the ECT and agreed to discuss with the Commission whether additional steps are required to ensure this position is recognized. Five states declared that they considered *Achmea* was silent on the ECT, noting that such impact is presently under review by the CJEU, whilst Hungary suggested that such silence was demonstrative that *Achmea* had no effect on arbitrations initiated under the ECT. Hungary is of course notable as its national oil and gas company (MOL) is currently pursuing an ECT claim against Croatia. It will therefore be keen to avoid a finding that intra-EU ECT arbitrations are contrary to EU law; at least insofar as such a finding will impact pending proceedings.

How will this impact intra-EU ISDS?

In their declaration, twenty-one Member States agreed to inform tribunals in pending intra-EU investment arbitrations about the consequences of the *Achmea*

judgment and to dissuade investors from bringing new claims. It is yet to be seen how tribunals will respond to this development. Although, it has not deterred an ICSID tribunal (ICSID Case No. ARB/14/20) deciding a case under the France-Hungary BIT, which has since handed down an award on jurisdiction and merits in favour of Sodexo Pass International against Hungary. The Tribunal permitted the Commission to make a submission during the proceedings, but in its award it dismissed the Commission's arguments regarding the effect of *Achmea*, finding that it had jurisdiction.

Until the relevant BITs are terminated and a definitive decision or action is taken in relation to the ECT by EU Member States, tribunals may continue to make positive findings of jurisdiction. Indeed, they may continue to do so even after such actions. Interventions by the Commission thus far as to the consequences of *Achmea* have in many instances not been successful in preventing a tribunal from making such positive findings of jurisdiction. In other instances, tribunals have simply refused to permit the Commission's requested intervention. As such, direct interventions by Member States may not have the desired effect. Further, tribunals seated outside EU Member States may not consider themselves bound by EU law in this respect.

Perhaps the greater issue in practice is not whether arbitral tribunals accept jurisdiction but whether resulting awards on merits can be enforced. The area of most risk (for non-ICSID awards) is likely the public policy exception to recognition and enforcement under the New York Convention, and we have already seen a number of enforcement challenges on the basis of *Achmea*. The Commission recently intervened in a review by the New York courts of an

intra-EU investment arbitration award referencing the *Achmea* decision and the "foreign policy implications" of allowing enforcement of intra-EU awards. In a similar vein, the twenty-one EU Member States have agreed to request that the courts of any country reviewing an award made in an intra-EU investment arbitration either set aside or refuse to enforce such award.

It might be thought that ICSID awards would fare better, given they are subject exclusively to the annulment procedure contained within the ICSID Convention and therefore judicial review is technically not within the competence of national courts. However, a Swedish court ruled in 2019 that an investor could not enforce an ICSID award against Romania in light of the Commission's decision that payment of the award would constitute state aid in breach of EU law. The court said that, as with a legally enforceable Swedish ruling, the award could not be executed if its enforcement was contrary to EU law. Whilst the court did not deal with *Achmea* specifically, the decision indicates how national courts may deal with ICSID awards if persuaded that enforcement would be in breach of EU law.

This question may soon be decided definitively as the Brussels Court of Appeal recently sought a preliminary ruling from the ECJ on the relationship between EU law and Member States' enforcement obligations under the ICSID Convention in the context of an appeal against enforcement of an ICSID award. The court has also said it would seek a ruling from the ECJ on whether the 2015 decision (referred to above) by the European Commission on the state aid issue precludes the award's enforcement in the courts of a member state other than Romania.

Investors (whether from or into) countries that are applicants for EU membership, should also think carefully about the potential impact on their investments. Upon accession to the EU, any investment dispute involving the acceding country and another EU Member State will fall foul of the *Achmea* decision. Presently, Albania, the former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey are candidate countries and Bosnia and Herzegovina and Kosovo are considered potential candidates.

Conversely, when the UK leaves the EU, it will be removed from the remit of *Achmea*. Although, given the UK's inclusion in the EU Member States' recent declaration, it is presently unclear what the UK's intention is with respect to the BITs between it and EU Member States. Prior to this declaration, the assumption was that these BITs would remain in place following Brexit. In which case, any investment protection dispute brought by a UK investor against an EU Member State or an EU investor against the UK would no longer be characterized as intra-EU and avoid *Achmea*-related challenges.

Alternative protection for EU investors

The Commission's view seems to be that intra-EU investor-state arbitration is not necessary in the single market. It is true that some investor protections within the EU regime have a similar flavour to traditional BIT protections. These include the fundamental freedoms, such as the free movement of capital, and general principles of European Union law, such as non-discrimination, proportionality, legal certainty and protection of legitimate expectations.

However, the EU mechanisms in place to supposedly ensure the administration of these protections are not currently suitable for resolving complex investment disputes. Whilst some EU Member States boast high quality court systems, the standard across them is by no means consistent, and many lack the requisite expertise to provide effective remedies to investors in such disputes. That there is a gap that needs bridging is evidenced by the number of investor-state arbitrations brought outside the national courts.

EU Member States in their declarations restated their obligations to provide remedies to ensure the effective legal protection of investors' rights under EU law. They acknowledged the need to assess the EU's existing processes and mechanisms for dispute resolution and, if required, create new tools. What these might look like is as yet unknown.

The topic is highly politicized even within the EU. It would seem unlikely that those states against which intra-EU BIT claims have repeatedly been made (to date, about half of all intra-EU BIT disputes were made against Spain, the Czech Republic or Poland) would volunteer for a replacement EU-wide regime. It is thus questionable whether replacement investment protection mechanisms (if any) would be as robust.

Conclusion

It is important that foreign investors within the EU are alive to these developments and the resulting risks to their investments. Adequate consideration should be given to quantifying and structuring these risks, such as negotiation of stabilization clauses which seek to freeze applicable law or provide a contractual mechanism

to modify the contract in response to a change in law or economic circumstances, as well as seeking to take advantage of alternative, non-treaty based, protections that might be available to them.

Investors considering commencing intra-EU investment arbitration should do so carefully and upon having received appropriate advice given the inevitable challenges such claims will now face from both jurisdiction and enforcement perspectives. After all, as history shows, an investment is only valuable if there are adequate means by which to protect it.

For more information contact:



Sherina Petit
Partner, London
Tel +44 20 7444 5573
sherina.petit@nortonrosefulbright.com



Cara Dowling
Knowledge of counsel, Vancouver
Tel +1 604 687 6575
cara.dowling@nortonrosefulbright.com



Charlotte Hornby
Associate, London
Tel +44 20 7444 3865
charlotte.hornby@nortonrosefulbright.com

A global round-up

Developments in international arbitration rules and laws

By Mark Baker, Deirdre Walker, Benjamin Grant, Lena Serhan and Aarti Thadani

In recent months we have seen a number of new arbitration related developments across the globe. In this article, we look at a few of the most significant and highlight key points of interest.

ICC Construction Industry Arbitration Report

The ICC Commission recently published a 2019 update to its report on construction industry arbitrations, focussing on recommended tools and techniques for effective management (the Report).

The Report is a helpful reminder for practitioners and arbitrators of what procedural mechanisms are available which are particularly relevant to the conduct of arbitrations in the construction sector, especially given some of the characteristics of construction arbitrations. Some of the highlights of the Report are set out below.

Jurisdictional issues

A common feature of the standard form engineering contracts is the provision for pre-arbitral dispute resolution steps. For example, the FIDIC conditions since 1995 have provided for the appointment of a Dispute Adjudication Board (DAB), and for parties to refer any disputes to the DAB before proceeding to arbitration.

Such pre-arbitration steps have a number of benefits, including narrowing the issues in dispute and enabling the early and simple resolution of claims. However, practitioners must be aware of the jurisdictional risks they can pose. A tribunal appointed before any pre-arbitral steps have been completed will usually face a challenge to its jurisdiction, delaying proceedings and introducing avoidable uncertainty and cost to the arbitration.

Use of schedules

The Report notes that a tool commonly seen in construction arbitration is a schedule identifying each item complained of and the precise legal basis for each complaint. This kind of schedule is regularly used and can be a helpful aide for the Tribunal when dealing with a long list of items upon which it is asked to rule. The schedule can focus the minds of the parties and the tribunal on the issues in dispute and identify which items are contested or agreed.

However, the Report notes that it is important to clarify the status of the schedule. Unless specifically agreed, the schedule will not supersede or modify the parties' submissions. If they intend for the schedule to stand as argument, the parties should ensure that is clearly agreed at the outset to avoid confusion down the line.

Bifurcation

In light of the complex matrix of issues which commonly arise in construction arbitrations, it is usually worthwhile to consider whether some or all of those issues can be dealt with separately to expedite the proceedings.

Traditionally, this involves separating jurisdiction and merits, and then merits into questions of liability and quantum. However, depending on the circumstances of the case it may also be worthwhile splitting issues according to the parties involved (for example if there are multiple parties to the arbitration, only some of whom are affected by certain

issues) and/or by particular issue (for example issues of waiver or time bars).

The Report identifies a number of factors which practitioners and the tribunal should take into account when deciding whether one or more issues should be dealt with separately. However, it is important that in all cases the issues are properly defined beforehand, therefore this question is best examined after the close of pleadings.

Conclusion

The Report sets out some helpful pointers on the procedural tools available in construction arbitration. It is a useful reminder for practitioners and arbitrators of the various ways in which those tools can be put to good use to avoid time and cost in what are usually complex, high-stakes arbitration proceedings.

NY appellate division confirms narrow scope of the manifest disregard doctrine

In *Daesang Corporation v. NutraSweet Company*, 167 A.D.3d 1, 85 N.Y.S.3d 6 (N.Y. App. Div. 2018), the New York Appellate Division reaffirmed that the manifest disregard doctrine is a “severely limited ... doctrine of last resort” that requires more than a mere error of law to warrant vacatur of an arbitral award.

This case involved the acquisition contracts between Daesang and NutraSweet, in which NutraSweet reserved the right to rescind the deal if it was sued for antitrust law violations. After NutraSweet exercised this right, Daesang commenced an arbitration proceeding for breach of contract. NutraSweet asserted four defenses and counterclaims. The arbitral tribunal found in favor of Daesang,

dismissed NutraSweet’s defenses and counterclaims, and granted Daesang damages. After Daesang sought to confirm the award, NutraSweet filed a motion to vacate arguing that the tribunal’s award was a “manifest disregard of clearly established law.” The Supreme Court agreed, holding that the tribunal’s dismissal of three defenses amounted to a manifest disregard of New York law. However, this was overturned on appeal.

The Appellate Division explained that an award may only be vacated for manifest disregard of the law if both “(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.” It concluded that neither requirement had been satisfied and that the Supreme Court erred when it invoked the doctrine because it effectively substituted its own legal and factual judgments for those of the tribunal.

The case demonstrates that New York courts are highly deferential to international arbitral awards and that, when considering motions to vacate an award, the courts hesitate to conclude that a party has met the high standard required to establish manifest disregard of the law.

Welcomed developments in UAE arbitration laws

As reported in our [International arbitration report issue 8](#), Article 257 of the UAE Penal Code was amended in 2017 to impose criminal liability on arbitrators, experts, and translators who act contrary to the duties of impartiality and neutrality. This amendment

led to widespread disruption of the arbitration landscape of the UAE, with many international arbitrators and party appointed experts refusing appointments in UAE seated or UAE law governed arbitrations, and numerous well-known practitioners resigning from existing appointments. This did not come as a surprise given the risk of imprisonment and the ease at which parties, seeking to use guerrilla tactics, might abuse the provision. Of particular concern, was that the threshold for liability, namely making a decision, opinion or report contrary to “integrity” and “impartiality” (terms open to broad interpretation), was not clearly defined in the Penal Code.

However, on October 7, 2018, Federal Decree by Law No. 24 of 2018 (the Amending Law) came into effect, to amend Article 257 to exclude arbitrators. This was a development widely welcomed by the international arbitration community. The scope of amended Article 257 is also more narrowly defined to instances where an expert, translator or investigator appointed by the judicial or administrative authority confirms “a false matter and knowingly interprets it incorrectly”.

Whilst there have been no reports of arbitrators convicted under the previous Article 257, the Amending Law nonetheless offers international practitioners some comfort, particularly in light of the recent development in Qatar where well-known and prominent arbitrators were convicted and sentenced in absentia to imprisonment in connection with their role on a tribunal that issued an award against a senior member of the Qatari royal family.

Another positive development in the UAE, was the issue late last year of Cabinet Resolution No. 57 of 2018

Concerning the Executive Regulations of Federal Law No. 11 of 1992 on the Civil Procedure Law (Cabinet Decision) on December 9, 2018. The Cabinet Decision introduces a new set of rules regulating the enforcement of foreign arbitral awards, and is expected to come into force later this month. Whilst these provisions are yet to be tested, they are being welcomed as likely to expedite enforcement of foreign arbitral awards in the UAE.

Japanese arbitration initiatives

Japan has traditionally favoured litigation in the courts over arbitration as a means of settling both domestic and international disputes. There have been significant developments in Japan's arbitration scene during 2018 and 2019, aimed at transforming Japan into a premier venue for settling international commercial disputes in Asia.

In February 2018, the Japan International Resolution Centre (JIDRC) was established to operate a hearing facility in Japan. This hearing facility opened in Osaka in May 2018. The Osaka centre is viewed by many as the first step in Japan's conscientious effort to become the Asian arbitration hub, an effort which is fully supported by the Japanese Government as part of its basic economic policy. The centre is expected to deal not only with business disputes but also doping cases and other sport-related disputes (ahead of the 2020 Tokyo Olympics) and arbitration of disputes between states and investors. The establishment of the centre has been welcomed by Japanese businesses and their legal representatives as it will allow them to save time and costs otherwise incurred in foreign forums. The JIDRC also plans to open a hearing facility centre in Tokyo in time for the 2020 Olympics.

In September 2018, the IP-focused International Arbitration Center in Tokyo (IACT) opened, with a particular focus on resolving complex international disputes involving standard essential patents.

On January 1, 2019, the Japan Commercial Arbitration Association (JCCA) introduced amendments to its two sets of current arbitration rules (Administrative Rules and Commercial Rules) with the aim of encouraging efficiencies and restricting challenges to awards. It also introduced a new set of rules, the Interactive Rules, which are designed to provide a more cost and time efficient procedure. The Interactive Rules are similar to the Commercial Rules but enshrine a civil law approach to proceedings, such as encouraging an inquisitorial and interventionist approach by the tribunal. Arbitrators' fees are also fixed according to the claim value, and are expected to be lower than under the Commercial Rules.

Other Japanese arbitration initiatives of note include proposals by a Justice Ministry Panel to ease regulations so that overseas lawyers can participate more easily in arbitration cases involving the Japanese subsidiaries of foreign companies.

London Court of International Arbitration Casework Report

The LCIA recently released the 2018 Casework Report, giving insight into its caseload in terms of industry sectors, type of contracts, relief sought, and law applicable to the dispute. Additionally, the report provides details of arbitrator appointments, including statistics on nationality and gender diversity. Below is a brief summary of some of the key information reported.

Caseload

- 317 arbitration referrals in 2018; an 11 per cent increase on 2017 and close to the 2015 high of 326.
- Banking and finance disputes continue to dominate, representing 29 per cent of all cases; a 5 per cent increase on 2017.
- Disputes arising out of shareholder agreements, share purchase agreements and joint venture agreements increased significantly, representing 21 per cent of all contract types; a 6 per cent increase on 2017.

Appointments and diversity

- Women represented only 23 per cent of all arbitrator appointments, and 43 per cent of arbitrators selected by the LCIA Court.
- First-time appointments of arbitrators occurred in 13 per cent of cases.
- Tribunal secretaries were appointed in 28 arbitrations, of which 12 were men and 16 were women.
- Arbitrators appointed were from 34 different countries, but the majority continued to be British. The LCIA Court was responsible for 57 per cent of non-British arbitrator appointments.
- Challenges to appointments remained stable with 6 challenges of which 4 were rejected and 2 are pending.

With thanks to Harley Evans (trainee) and Will McCaughan (trainee) for their contributions to this article.

For more information contact:



Mark Baker
Global co-head of international arbitration
Partner, Houston
Tel +1 713 651 7708
mark.baker@nortonrosefulbright.com



Deirdre Walker
Head of Middle East
Partner, Dubai
Tel +971 4 369 6327
deirdre.walker@nortonrosefulbright.com



Ben Grant
Associate, London
Tel +44 20 7444 3623
ben.grant@nortonrosefulbright.com



Lena Serhan
Associate, Houston
Tel +1 713 651 3782
lena.serhan@nortonrosefulbright.com



Aarti Thadani
Associate, Dubai
Tel +971 4 369 6323
aarti.thadani@nortonrosefulbright.com

Arbitrating disputes under shipbuilding contracts

The importance of timing

By Marie Kelly and Jason Lemann

The shipbuilding industry, like many other sectors, has benefitted in recent years from innovation and new technologies. More disruption is on the horizon given the pressures on the sector to improve efficiencies and limit its impact on the environment. This innovation means that buyers and shipbuilders are entering into shipbuilding contracts for a new generation of ships, with new and complex design elements. This inevitably increases the risk of technical disputes arising. The majority of ships continue to be built in the shipyards of China, Korea and Japan. Where foreign buyers are involved, these contracts are usually subject to English law and, in the event of a dispute, arbitration. From a buyer's perspective, getting the timing right for starting arbitral proceedings, and pursuing them quickly, can be crucial, particularly in respect of pre-delivery disputes and those under Chinese refund guarantees.

Pre-delivery disputes

One of the main concerns for a buyer who comes across a technical defect during the construction of a vessel is the risk that the builder will not accept that there is a defect and insist on delivery. If the buyer refuses to accept delivery on the basis of the defect, it risks being in repudiatory breach of contract. The consequences for a buyer in those circumstances are draconian. The builder can opt to terminate the shipbuilding contract and keep the installments already paid. The builder frequently can then sell the vessel either at an auction or by private sale to a third

party with the buyer to receive only what remains (if anything) after the builder deducts from the installments paid all the costs, interest and any negative difference between the contract price and the sale price.

Of course, if the tribunal finds that the buyer's rejection was valid, it will have a claim in damages against the shipbuilder, but damages are often restricted to repayment of installments paid plus interest. This may not fully compensate the buyer in circumstances where the value of the vessel has increased. What the buyer wants, in these circumstances, is delivery of the

vessel with the technical issue resolved or a reduction in the sale price.

The risk to the buyer is generally lower where the technical issue becomes apparent at an early stage, as the dispute is generally more easily settled and issues remedied prior to delivery. In many cases, however, the defect does not become apparent until a much later stage, often at the time of the sea trial. At that point, the risk increases that the builder will dispute that there is a technical issue and terminate the vessel sale contract on grounds of repudiation if the buyer insists on delaying acceptance until the defect is

remedied. These disputes can come to a head quickly in a rising market, as the builder will usually be unwilling to delay a decision on whether or not to terminate for a protracted period of time. The builder can also be pressed to make a swift decision on termination by its obligations to deliver other orders and lack of capacity in the shipyard.

The buyer will have a substantial advantage if the shipbuilding contract contains an arbitration clause providing for expedited arbitration proceedings for pre-delivery disputes

The buyer will, however, have a substantial advantage if the shipbuilding contract contains an arbitration clause providing for expedited arbitration proceedings for pre-delivery disputes. In those circumstances, the buyer can refer the matter to arbitration seeking an urgent declaration that the builder has to rectify the defect without fear that the contract will be terminated, as long as the arbitration is commenced several months before the contractual delivery date. The pressure is then on the builder since it has to decide whether to continue with construction and risk having to re-do work or give in to the buyer's demands to make the requested rectifications. There is also benefit to the builder in agreeing to an expedited procedure for pre-delivery arbitrations since it will also benefit from having certainty at a much earlier stage as to how the defect will be treated.

A typical expedited arbitration clause would provide for a maximum 12 week window between the appointment of the arbitrators and the hearing. This is a difficult schedule to work to for both the buyer and its lawyers but it can be worth pursuing because of the benefits of an early arbitration award.

Chinese refund guarantees

Care over the timing for bringing arbitral proceedings also must be taken when looking to recover under a refund guarantee, particularly if it has been issued by a Chinese bank.

The refund guarantee is an important document in the context of shipbuilding contracts since title to the vessel usually remains with the shipyard until delivery

The refund guarantee is an important document in the context of shipbuilding contracts since title to the vessel usually remains with the shipyard until delivery, despite installments being paid by the buyer at various stages during construction. For this reason, virtually all buyers require the builder to procure one or more refund guarantees from an acceptable bank to secure the return of pre-delivery installments in circumstances where the buyer is entitled to exercise its right to cancel the contract. If the builder is encountering financial difficulties, the buyer will be especially keen to ensure its refund

guarantee remains in place – the refund guarantee may prove to be its sole realistic prospect of recovery.

Timing is not such a big issue in relation to refund guarantees from Korean or Japanese banks, however refund guarantees from Chinese banks can be tricky as often their expiry date is a short period after the date the contract was cancelled – commonly one month but sometimes substantially shorter, amounting to just a few days after the cancellation date. But time will be stopped if arbitral proceedings are commenced, pending resolution of the dispute over payment. This means that, to preserve the buyer's position, it is very important for buyers to instruct lawyers at an early stage and ensure that arbitral proceedings are commenced as soon as possible after the cancellation date.

Timing risks can also arise where changes have been agreed to the underlying shipbuilding contract, such as extending the contractual delivery date. It is common practice to agree extensions, often in exchange for a discount to the purchase price of the ship, and there may be a number of agreements for relatively short extensions over the life of the project. Given that the refund guarantee and shipbuilding contract are intended to be linked in most key respects, it is easy to forget that they are discrete obligations; the guarantee is an obligation between guarantor and buyer, separate to the shipbuilding contract between builder and buyer. This is intentional, as its purpose is to provide the buyer with security from an independent source. But where changes are made to the shipbuilding contract, it creates a risk that the guarantee may no longer operate as expected.

Extending the project delivery date can result in particularly serious problems where the guarantee has a fixed expiry date

Extending the project delivery date can result in particularly serious problems where the guarantee has a fixed expiry date (as do virtually all refund guarantees issued by Chinese banks). This is because the date on which the buyer's right to cancel the contract is linked to the delivery date, so an extension may mean the buyer's right to cancel is triggered only after the expiry date of the refund guarantee. The buyer will have lost critical security. Whilst this is an easy issue to avoid if the parties are careful with amendments, it can catch out even experienced buyers.

Conclusion

These are a few examples of the importance of arbitration proceedings in shipbuilding disputes, and where the timing of strategic steps (particularly how and when to commence arbitration) can make a huge difference to the balance of power between the parties. Indeed, such tactics can make or break a case. Buyers should keep these timing issues in mind, particularly where they are entering into shipbuilding contracts for the new generation of ships, with new design elements such as scrubbers or ballast water treatments systems fitted, as new and complex technology inevitably increases the risk of technical disputes arising.

For more information contact:



Marie Kelly
Partner, London
Tel +44 20 7444 5754
marie.kelly@nortonrosefulbright.com



Jason Lemann
Of counsel, Tokyo
Tel +81 3 5218 6825
jason.lemann@nortonrosefulbright.com

Contacts

International arbitration, Co-heads



Mark Baker
Houston



Pierre Bienvenu, Ad. E.
Montréal

Canada

Calgary
Mary Comeau
Clarke Hunter, QC

Montréal
Martin Valasek

United States

Houston
Kevin O’Gorman

Washington DC
Matthew Kirtland

South America

Mexico City
Mark Baker
Kevin O’Gorman

Europe

Amsterdam
Yke Lennartz

London
Patrick Bourke
Marie Kelly
Sherina Petit
James Rogers

Germany
Jamie Nowak

Paris
Christian Dargham

Moscow
Yaroslav Klimov

Middle East

UAE
Paul Stothard
Deirdre Walker

Africa

South Africa
Andrew Robinson

Asia

China/Hong Kong
Alfred Wu

Singapore
KC Lye

Australia

Brisbane
Ernie van Buuren

Perth
Dylan McKimmie

Sydney
Andrew Battisson

Global resources

Norton Rose Fulbright is a global law firm. We provide the world’s preeminent corporations and financial institutions with a full business law service. We employ 4000 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, the Middle East and Africa.



Our office locations

People worldwide

7000+

Legal staff worldwide

4000+

Offices

50+

Key industry strengths

- Financial institutions
- Energy
- Infrastructure, mining and commodities
- Transport
- Technology and innovation
- Life sciences and healthcare

Europe

- Amsterdam
- Athens
- Brussels
- Frankfurt
- Hamburg
- Istanbul
- London
- Luxembourg
- Milan
- Monaco
- Moscow
- Munich
- Paris
- Piraeus
- Warsaw

United States

- Austin
- Dallas
- Denver
- Houston
- Los Angeles
- Minneapolis
- New York
- St Louis
- San Antonio
- San Francisco
- Washington, DC

Canada

- Calgary
- Montréal
- Ottawa
- Québec
- Toronto
- Vancouver

Latin America

- Mexico City
- Rio de Janeiro
- São Paulo

Asia Pacific

- Bangkok
- Beijing
- Brisbane
- Canberra
- Hong Kong
- Jakarta¹
- Melbourne
- Port Moresby (Papua New Guinea)
- Perth
- Shanghai
- Singapore
- Sydney
- Tokyo

Middle East

- Bahrain
- Dubai
- Riyadh²

Africa

- Bujumbura³
- Cape Town
- Casablanca
- Durban
- Harare³
- Johannesburg
- Kampala³
- Nairobi³

1 TNB & Partners in association with Norton Rose Fulbright Australia
 2 Mohammed Al-Ghamdi Law Firm in association with Norton Rose Fulbright US LLP
 3 Alliances

Norton Rose Fulbright

International arbitration

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

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

Dispute resolution

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

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

