NORTON ROSE FULBRIGHT

International arbitration report

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Q&A with Claudia Salomon President of the ICC International Court of Arbitration

Promoting investment in the South Pacific through arbitration reforms

Third Party Funding in the Asia-Pacific

New P.R.I.M.E. Finance Arbitration Rules

Are we facing a sovereign debt crisis?

Important developments in the application of the Energy Charter Treaty within the EU

New draft ICSID Code of Conduct for Adjudicators in International Investment Disputes

New life breathed into DIAC as axe falls on DIFC-LCIA

Climate change and sustainability disputes between foreign investors and States

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Editorial

Welcome to issue 17 of Norton Rose Fulbright's I*nternational Arbitration Report*.

In this issue, we again cover a broad spectrum of important issues in international arbitration, with a focus on international arbitration developments and important revisions to major arbitral rules and guidance.

We are joined in this issue by Claudia Saloman, recently appointed President of the ICC International Court of Arbitration, who speaks to us about her role and aspirations during her tenure.

We review recent arbitration reforms in the South Pacific, designed to attract foreign investment, as well as third party funding in Asia Pacific, with updates from Australia, Singapore, Hong Kong and India.

There have been a number of important decisions by the Court of Justice of the European Union which impact the application of the Energy Charter Treaty in the EU, in particular addressing what qualifies as an investment under the ECT as well as further curtailing intra-EU investment arbitration under both the ECT and ad hoc agreements made between EU investors and EU Member States. We consider what these mean for foreign investors looking to invest in the EU as well as those with legacy investments or disputes.

We also continue our series looking at climate change and sustainability disputes, this time focusing on disputes between foreign investors and States, and we consider the role of international arbitration in resolving such disputes.

Our lawyers consider the risks of a sovereign debt crisis, and potential implications for investors. We also cover the new Draft ICSID Code of Conduct for Adjudicators in International Investment Disputes – offering a useful summary in time for the next round of negotiations.

P.R.I.M.E. Finance has launched its new Arbitration Rules and we look at what has changed and get views from Camilla Macpherson, Head of Secretariat, P.R.I.M.E. Finance Foundation, and Professor Dr Georges Affaki, who chaired the drafting group.

Last but not least, we analyse the important changes to Dubai's international arbitration regime, with the abolition of the DIFC-LCIA Arbitration Centre and Emirates Maritime Arbitration Centre, as new life is breathed into the Dubai International Arbitration Centre.

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

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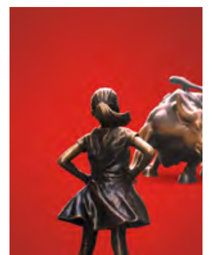
About the cover

Fearless Girl is a bronze sculpture by Kristen Visbal, commissioned by State Street Global Advisors (SSGA), a large asset management company. The statue was installed on March 7, 2017, in anticipation of International Women's Day the following day. It depicts a girl four feet high, promoting female empowerment. It is located across from the New York Stock Exchange Building in the Financial District of Manhattan in New York City.



Q&A with Claudia Salomon

President of the ICC International Court of Arbitration

Interview by Pierre Bienvenu Ad.E

We speak with Claudia Salomon, recently appointed President of the ICC International Court of Arbitration, the first woman President of the ICC Court in its almost 100-year history.

Congratulations on your election. Please tell our readers a little about what your role as President of the ICC Court entails?

The ICC is recognized as the world's leading arbitral institution. As the President of the ICC Court, I am focused on ensuring that ICC's dispute resolution services meet the needs of global business.

The ICC Court ensures that the process works. This is the most diverse ICC Court in its history – with 195 Court members from 120 different countries, with more women than men, and more Court members from African countries than ever before.

Firstly, the ICC Court reviews draft awards before they are finalized to ensure that the arbitral tribunal has considered the issues to be decided, has taken into account all of the arguments of the parties, and that its reasoning is clear. Parties then know that they are getting what they bargained for – the best likelihood of an enforceable award.

Secondly, the ICC Court determines whether to accept or reject challenges to arbitrators, assessing their independence and impartiality, and the Court's reasons are now provided to the parties if requested. This brings transparency to the process. Transparency equalizes access to important information. Instead of some participants in the process having exclusive knowledge based on their previous experience, all parties – wherever they are in the world – can get the information they need to make better decisions.

What excites you most about your new role?

I wanted this role because I really believe in the ICC – and its purpose. ICC is the global voice of business – founded in the wake of World War I, over 100 years ago, by a pioneering group of entrepreneurs, seeking to promote peace and prosperity through cross-border trade. They understood that to facilitate cross-border business, there needed to be a dispute resolution procedure that met the needs of global business. And they understood the importance of access to justice and the rule of law. That purpose is no less true than today. As cross-border business has continued to increase, businesses around the globe know that ICC is a trusted institution to resolve those disputes.

> ***I wanted this role because I really believe in the ICC – and its purpose.***

What are some of the key challenges facing you during your first term?

We are in a highly competitive environment, so I am focused on three key aspects:

First is that crucial moment when companies are entering into a contract and drafting a dispute resolution clause – what is going to make them insist on ICC arbitration and not some other method of resolving a dispute? General Counsel tell us that they use ICC arbitration because ICC is the institution they trust.

Second is the period of time from when an arbitration is filed until an award is issued, assuring that the service the parties receive exceeds their expectations and is transparent and predictable. ICC's case management team is second to none.

> ***Parties don't want to be in an arbitration; they want to resolve their dispute.***

Third is ensuring that we focus on the parties' objectives when they are in an arbitration. Parties don't want to be in an arbitration; they want to resolve their dispute.

We need to provide a suite of integrated services – the proverbial tools in a toolbox – to enable parties to achieve their objectives. To meet the needs of the global business community, we also must meet the needs of small and medium-size enterprises (**SMEs**) and the demand for additional ADR – and dispute prevention – services.

How do you feel to be the first woman elected as President of the ICC Court?

I am truly honored. And what a testament to my predecessor, Alexis Mourre, who had the audacity to insist on gender parity of the ICC Court in 2018. The significance of this change cannot be understated, given that the Court was only 10% women in 2015. I know I stand on the shoulders of those who came before me, and the generations of women who paved the way. And I am inspired by the words of U.S. Vice President Kamala Harris: *"While I may be the first woman in this office, I will not be the last."*

What can be done (and by whom) to encourage more diversity in arbitrator appointments as well as more broadly in arbitration?

Diversity, broadly defined, is fundamental to the legitimacy of international arbitration – so we reflect the entire global business community and their values.

75% of all arbitrators appointed in ICC cases in 2020 were nominated by the parties (60%) or the co-arbitrators (15%) often with input, as we know, from the parties. Only 25% of arbitrators were selected by the ICC Court either as direct appointments or as a result of proposals through national committees or groups.

In 2020, 16% of the arbitrators nominated by the parties were women (compared to 11% in 2016); 28% of the chairs nominated by the co-arbitrators were women (compared to 13% in 2016), but 37% of the appointments by the ICC Court – either upon proposal of an ICC national committee or group or directly – were women (compared to 23% in 2016).

But if we are to see a sizable increase in the diversity of arbitrators, it will be important for the parties themselves to insist that their counsel provide diverse lists of arbitrators to consider.

Much work still needs to be done, and you can expect significant diversity initiatives involving concrete steps during my term, including working with the national committees to include diversity among the factors considered when making proposals of arbitrators. But if we are to see a sizable increase in the diversity of arbitrators, it will be important for the parties themselves to insist that their counsel provide diverse lists of arbitrators to consider.

In-house counsel and outside counsel have a crucial role to play in ensuring that arbitrators in ICC cases reflect the increasing diversity of the global business community.

What other innovations is the ICC currently working on?

I am focused on ensuring that every aspect of international arbitration has a client mindset. This means that the parties – essentially our clients – are the ones driving the service requirements. I believe the best way to identify what parties want in each particular case – and to improve our ability to respond to those desires – is to engage the parties themselves more deeply in the arbitral process. With this approach, the parties can have more control over the way in which the resolution of their dispute unfolds. Given the expanding role of in-house counsel over the last decade to more of a business strategist and risk manager, we have the opportunity to ensure that the arbitration process better reflects this role.

Looking ahead, we will focus on the needs of SMEs)that drive the global economy and have been most impacted by the pandemic. We know they need an effective means of resolving low-value disputes. We are working closely with the broader ICC, which is establishing centres for entrepreneurship throughout the world providing services and assisting SMEs.

We are also focused on technology-related disputes, biotechnology, and artificial intelligence (AI). We will see tremendous and rapid growth in this area of high-end manufacturing, and can expect an increase in such disputes. About 40% of ICC cases fall in the category of energy or construction and infrastructure, and we expect to see that trend to continue.

The 2020 ICC Dispute Resolution Statistics were recently published. In your view, that are the most important takeaways from that report?

The 2020 ICC Dispute Resolution Statistics revealed the highest number of registered cases with both the ICC International Court of Arbitration and the ICC International Centre for ADR. Of the cases registered in 2020, 929 cases were filed under the ICC Rules of Arbitration, while 17 were filed under the ICC Appointing Authority Rules.

The ICC International Centre for ADR also saw marked growth with 77 new cases in 2020. The registered cases were filed under the ICC Rules of Mediation, Expert Rules, Dispute Board Rules and DOCDEX Rules, marking the largest number of cases registered in a year for the Centre. This included 45 mediations, 22 requests for expertise, seven DOXDEX proceedings and three Dispute Board proceedings.

The 2020 statistics that tell a particularly compelling story of our global strength are the following:

- Parties were from 145 countries
- There were 1008 individual arbitrators of 92 nationalities
- ICC arbitrations were seated in 113 cities, in 65 countries
- Awards were drafted in 13 languages
- The average amount in dispute among the 1,833 pending cases was US $145 million
- The average amount in dispute for new cases filed was US $54 million
- 38% of newly registered cases involved an amount in dispute not exceeding US $3 million

2020 was marked by the start of COVID-19 global pandemic. What do you think are the most important lessons for the arbitration community that came to light as a result of the pandemic?

As we hopefully emerge out of the pandemic, we are at a pivotal moment in which we have the opportunity to reshape how we work and can ensure the active participation of all skilled practitioners, including those with disabilities. In my first days in office, the ICC Commission on Arbitration and ADR, on my recommendation, issued a global call for interested candidates to participate in a new Task Force on Disability Inclusion and International Arbitration.

> *So, when travel resumes, I expect it will be rare for a tribunal to conduct a procedural hearing in person, and video-conferencing will be the norm.*

From the pandemic, we have seen that international arbitration can quickly adapt and embrace new technologies as essential tools for dispute resolution. In the early stage of the pandemic, ICC issued a guidance note on how to minimize, or even avoid, potential disruption by thoughtful use of case management tools. These included the use of video-conferencing, which has now become commonplace, but also included consideration of legal or contract interpretation issues that may be decided on a preliminary basis to narrow the issues in dispute and the scope of issues that need to be decided in an evidentiary hearing. The guidance note is available in multiple languages, including Chinese.

The 2021 ICC arbitration rules also made important changes, so ICC arbitration is even more efficient, flexible and embraces this digitalisation. The rules make clear that tribunals are empowered to conduct hearings in person and remotely to take into consideration the relevant facts and circumstances of the case. All filings are now electronic unless a party specifically requests that hard copies be served.

And the presumption that meetings and hearings will be in person has been flipped. Before the pandemic, we assumed evidentiary hearings would be in person unless there were very specific reasons for a witness or expert to testify remotely. Now, everyone needs to consider whether there's a need or a strong desire to meet in person. So, when travel resumes, I expect it will be rare for a tribunal to conduct a procedural hearing in person, and video-conferencing will be the norm. For evidentiary hearings, there will certainly be more openness to video and hybrid hearings, although some parties will want to be in person for major matters.

How do you see the practice of arbitration changing in the next 10 or 20 years?

New technologies will change the practice of arbitration. The tools available are rapidly shifting; while some tools create an opportunity for significant cost savings, others require new investments. This is a unique moment in time for the international arbitration community to embrace technology as an essential tool for efficiency and be in a position to handle the increased use of big data, block chain technology, machine learning and text mining. While not replacing human judgment in the near term, predictive justice will be an element of decision making.

What about the role of arbitral institutions? How do you see that evolving over time?

I expect ICC will be viewed as the one-stop shop for the dispute resolution – and dispute avoidance – needs of global business.

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Promoting investment through arbitration

Recent reforms in the South Pacific

By Tamlyn Mills and Mrithula Shanker

This article provides an update on the progress of international arbitration reforms in the South Pacific region, and offers observations on the potential impact of such reforms on international trade and foreign investment in the region.

Efforts to develop new international arbitration regimes in the South Pacific

International trade plays a crucial role in the economic and social development of South Pacific nations. Despite arbitration being a preferred method for resolving cross-border disputes within the international business community, until recently, most countries in the South Pacific have lacked a developed and modern international arbitration regime.

Recognising the importance of an effective commercial dispute resolution regime for boosting investor confidence, the Asian Development Bank (**ADB**) has invested in a regional capacity development technical assistance program aimed at establishing an effective commercial dispute resolution regime in Pacific countries through international arbitration reform. The ADB sees the promotion of international commercial arbitration in the region as crucial to creating a better investment climate, facilitating more cross-border trade and investment to accelerate growth, reduce poverty and economic disparity, raise productivity and employment and strengthen national institutions.

The program aims to establish well-functioning international regimes in the South Pacific through a combination of modern national laws on arbitration, accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**) as well as building domestic capability.

The ADB sees the promotion of international commercial arbitration in the region as crucial to creating a better investment climate

The importance of foreign investment and trade

Comprised of small island nations, the South Pacific region is heavily reliant on growth in international trade and foreign investment for economic development. According to the World Bank, in 2019, exports of goods and services comprised 41.7% of the GDP of the South Pacific small States, but only USD 418 million was invested in the region.

To boost international trade, nations in the South Pacific are increasingly entering into or proposing to enter into bilateral or multilateral free trade agreements (**FTAs**). For example, a regional FTA, the Pacific Agreement on Closer Economic Relations (**PACER Plus**), entered into force on 13 December 2020. PACER Plus is a comprehensive FTA covering goods, services and investment and has been signed by Australia, New Zealand, Cook Islands, Kiribati, Nauru, Niue, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. PACER Plus contains an investment chapter but does not provide for investor-State arbitration.

The South Pacific is also a region at high risk from the effects of climate change and will require significant investment in abatement and mitigation measures. Australia has set up the Australian Infrastructure Financing Facility for the Pacific to finance, by way of sovereign loans or grants, infrastructure projects that contribute to the stability of the region. Such projects may well involve private foreign investment.

However, a major barrier in attracting foreign direct investment and stimulating cross-border trade is lack of investor confidence in effective and efficient ways to resolve commercial disputes and enforce resulting decisions.

Increasingly, foreign investors rely on international arbitration as an effective, fair and timely way to resolve commercial disputes and produce awards that can be enforced globally. For many sectors that invest in the South Pacific, particularly mining, oil and gas, international arbitration

is the preferred choice for dispute resolution. The absence of effective legal frameworks to facilitate international commercial arbitration and the recognition and enforcement of arbitral awards has therefore been identified as an impediment to the growth of investment and trade in the South Pacific. Recent reforms in the region, supported by the ADB, should contribute to overcoming this barrier.

> ***A major barrier is lack of investor confidence in effective and efficient ways to resolve commercial disputes and enforce resulting decisions.***

The Reform Agenda

An effective international arbitration regime requires:

1. a modern, fit-for-purpose national arbitration law that facilitates the enforcement of arbitration agreements, provides efficient curial support for arbitration, and ensures the enforcement of arbitral awards consistent with best international practice;
2. ratification of the New York Convention and its national implementation; and
3. a well-trained legal professional and judiciary that understands and supports international arbitration.

UNCITRAL and the ADB have collaborated to facilitate commercial law reforms, legal harmonisation and implementation of arbitral frameworks in the South Pacific region. Important progress has been made in recent years in respect to (1) and (2) above.

The table further below summaries the progress of reform in key Pacific nations, with links to legislation where publicly available.

Legislators in Fiji, Papua New Guinea, Palau and Tonga have expressed confidence that their respective international arbitration laws are now among the most advanced and comprehensive in the world. In all instances, the relevant law implements the UNCITRAL Model Law. Fiji, Palau and Tonga have also borrowed provisions from the Australian, Singaporean and Hong Kong laws to ensure an attractive national arbitration framework. Nauru and Samoa are currently engaging with the ADB and UNCITRAL to develop a modern national arbitration law. At this time, Kiribati, Niue, Tuvalu and Vanuatu have not taken such steps towards reform.

However, these new legal frameworks must also be supported by the local judiciary and legal profession. For this reason, the ADB program also involves capacity building through regional awareness-building and tailored training programs for potential and practicing arbitrators, lawyers and judges. Over time, increased usage of international arbitration in the region will hopefully contribute to strong national regimes supported by a network of skilled and experienced regional arbitration practitioners.

Concluding thoughts

While international arbitration reform in the South Pacific region is in its early stages, there are clear signs that the region is embracing international arbitration as a tool to promote foreign investment and international trade. This is a positive development for companies looking to invest in the South Pacific or with existing investments in the region. As the reform agenda progresses, businesses are well advised to monitor developments in relevant countries and to ensure that contracts are drafted or updated to take advantage of new or amended legal regimes.

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Progress of international arbitration reforms			
Jurisdiction	**New York Convention**	**ICSID Convention**	**National arbitration law**
Cook Islands	Acceded on 12 January 2009 Entered into force on 12 April 2009	Not a Contracting State	*Arbitration Act 2009* implements the 1985 Model Law, as amended in 2006.
Fiji	Acceded on 27 September 2010 Entered into force on 26 December 2010	Signed on 1 July 1977 Entered into force on 10 September 1977	*International Arbitration Act 2017* implements the 1985 Model Law, as amended in 2006. This Act also incorporates 'best practice' from Australian, Singaporean and Hong Kong regimes: (i) arbitral proceedings remain confidential, (ii) ensures the autonomy of parties in selecting legal representation, (iii) limits liability and protects the immunity of arbitrators, arbitral institutions and appointing authorities; and (iv) provides for 'emergency arbitrators.' This Act applies only to international arbitration. The previous regime remains in force for domestic arbitration. *Investment Act 2021* introduces reforms to regulatory framework governing investment, aimed at making Fiji a more desirable investment destination.
Marshall Islands	Acceded on 21 December 2006 Entered into force on 21 March 2007	Not a Contracting State	*Arbitration Act 1980* requires reform to modernise in line with the Model Law. However, no steps have yet been taken to reform the arbitration regime.
Nauru	Not a Contracting State	Signed on 12 April 2016 Entered into force on 23 May 2016	Currently engaged in capacity building with the ADB and UNCITRAL. However, there is currently no official statement on the status of approval of accession to the New York Convention or national arbitration law reform.
Palau	Acceded on 31 March 2020 Entered into force on 29 June 2020 Two reservations: reciprocity and commercial transactions	Not a Contracting State	The *International Commercial Arbitration Act 2021* implements the 1985 Model Law, as amended in 2006. This Act also incorporates 'best practice' from Australian, Singaporean and Hong Kong regimes: (i) arbitral proceedings remain confidential, (ii) ensures the autonomy of parties in selecting legal representation, (iii) limits liability and protects the immunity of arbitrators, arbitral institutions and appointing authorities; and (iv) provides for 'emergency arbitrators.'
Papua New Guinea	Acceded on 17 September 2019 Entered into force on 15 October 2019	Signed on 20 October 1978 Entered into force on 19 November 1978	*Arbitration Bill 2019* implements the 1985 Model Law, as amended in 2006. As currently drafted, the Bill diverges from the Model Law in a few notable respects: (i) provides there is sufficient evidence of a written arbitration agreement if an agreement is alleged by one party and not denied by another; (ii) all arbitrations must be commenced within the statutory time bars for legal proceedings under domestic law, and (iii) the confidentiality protection includes a broad exception – disclosure can be made to protect or pursue a legal right of a party. The Bill governs both international and domestic arbitrations. The Bill is still in progress and has not yet been tabled for debate in the Papua New Guinea parliament.
Samoa	Not a Contracting State	Signed on 3 February 1978 Entered into force on 25 May 1978	*Arbitration Act 1976* is based on the English Arbitration Act 1889 and governs domestic arbitration. Currently engaged in capacity building with the ADB and UNCITRAL. However, there is currently no official statement on the status of approval of accession to the New York Convention or national arbitration law reform.
Tonga	Acceded on 10 June 2020 Entered into force on 10 September 2020	Signed on 1 May 1989 Entered into force on 20 April 1990	The *International Arbitration Act 2020* implements the 1985 Model Law, as amended in 2006. This Act also incorporates 'best practice' from Australian, Singaporean and Hong Kong regimes: (i) arbitral proceedings remain confidential, (ii) ensures the autonomy of parties in selecting legal representation, (iii) limits liability and protects the immunity of arbitrators, arbitral institutions and appointing authorities; and (iv) provides for 'emergency arbitrators.' The Act governs both international and domestic arbitrations. Amendments to the *Foreign Investment Act 2020* reserve certain business activities for Tongan businesses.

Third Party Funding in Asia-Pacific

An update on recent developments in Australia, Singapore, Hong Kong and India

By Sherina Petit, Katie Chung, Carmel Proudfoot, Johnson Teo and Nimoy Kher

Third party funding (TPF) continues to gain momentum in Asia-Pacific. Australia, Singapore and Hong Kong have established TPF regimes, supported by arbitral rules promulgated by leading arbitral institutions, and which continue to develop to be more permissive and TPF friendly. India has a nascent but growing TPF market which draws its inspiration from the others. Recent developments in TPF and other types of fee arrangements in these jurisdictions help strengthen Asia-Pacific as a pro-arbitration region.

Australia

Australia was one of the first jurisdictions to permit TPF in both arbitration and litigation. Funding is an active and growing market, particularly in domestic class action litigation.

Despite this, Australia does not have any centralised rules governing the provision of TPF. In part, this is a reflection of how TPF has developed in the states and courts.

Historically, TPF was prohibited by the doctrines of maintenance and champerty. Although all states have abolished these as crimes, they remain a tort in several states. Although the courts have upheld TPF agreements, they retain the discretion to set aside any agreement which is contrary to public policy. As a result, parties and funders need to be conscious of any divergence in the relevant states.

Australia does not have any centralised rules governing the provision of TPF. In part, this is a reflection of how TPF has developed

However, Australia is gradually moving towards a more consistent and regulated regime:

Corporations Amendment (Litigation Funding) Regulations 2020 (Cth): Overall, funders enjoy considerable freedom in Australia. That remains the case, but funders are now subject to financial services regulations. In July 2020, the Federal government enacted regulations designed to make funders more transparent and subject to greater regulatory oversight and accountability. As a result, funders are now required to hold an Australian Financial Services Licence and comply with the managed investment scheme regime as a provider of financial services.

Maintenance and champerty: The tort of maintenance and champerty arguably still exists in Queensland, Western Australia, Tasmania and the Northern Territory. In 2020, WA recommended that the tort be abolished entirely, in a positive step towards consistency across Australia.

Fee arrangements: Generally, practitioners are permitted to charge conditional fees (e.g. accept a reduced fee upfront with an uplift if successful). In 2020, Victoria became the first state to permit contingency fees in limited circumstances, permitting representative plaintiffs in class actions to apply to the Victorian Supreme Court for an order that their lawyers be paid a specified percentage of the sum recovered.

ACICA Rules: The Australian Centre for International Commercial Arbitration's 2021 rules (**ACICA Rules**) introduce new provisions dealing with the disclosure of TPF. Under those rules, parties are required to disclose the existence of TPF and the identity of the funder at the time of filing their Notice of Arbitration or Answer, or as soon as practicable after funding is agreed. Parties have a continuing obligation to disclose any changes to the funding and the tribunal is empowered to order a party to make a disclosure at any time.

Singapore

Singapore was one of the first jurisdictions in Asia to permit TPF in international arbitration and related court proceedings. Unlike Australia, Singapore still prohibits TPF in domestic litigation and is actively looking into permitting conditional fees for arbitration and Singapore International Commercial Court (**SICC**) proceedings.

There have been three noteworthy recent developments:

- ***Insolvency, Resolution and Dissolution Act (IRDA)***: The new omnibus insolvency regime came into force on 30 July 2020. This permits liquidators to enter into TPF agreements with court approval or the authorisation of the committee of inspection in respect of claims relating to transactions at an undervalue, unfair preferences, extortionate credit, fraudulent trading, wrongful trading and the assessment of damages against delinquent company officers. Recently, the Singapore High Court issued an order to the effect that a third party funder's investment in a successful international arbitration would be accorded super priority status (i.e. be paid in priority to all preferential debts and unsecured debts) in the insolvency process under the IRDA.
- **SICC and domestic arbitration**: On 28 July 2021, the Ministry of Law extended the TPF regime to include: (i) domestic arbitration and associated court proceedings; (ii) proceedings in the SICC and related appeals; and (iii) mediations relating to domestic arbitrations and SICC proceedings.
- **Fee arrangements**: Both conditional and contingency fee arrangements are unlawful. In August 2019, the Ministry of Law initiated public consultation about the possibility of allowing conditional fees in international and domestic arbitrations and certain SICC proceedings. Although the Ministry of Law has yet to announce the findings from this consultation, this remains a space to watch.

These developments reflect a gradual liberalisation of TPF in Singapore. Nevertheless, important distinctions remain. First, as noted above, TPF is still prohibited in domestic litigation. There is no sign that this will change in the near future. Secondly, lawyers registered to practise in Singapore are subject to more stringent disclosure requirements than "fly in, fly out" lawyers. Professional conduct rules require them to disclose the existence of any TPF their client is receiving in an arbitration or SICC proceeding, whilst lawyers practising outside Singapore who act for clients in Singapore seated arbitrations or SICC matters are not subject to the same disclosure obligations. This loophole creates a competitive disadvantage for lawyers practising in Singapore.

Hong Kong

Hong Kong also recently opened up to TPF. Historically, TPF was prohibited in both litigation and arbitration by the doctrines of maintenance and champerty. Common law developed three recognised exceptions, being: (i) where the third party has a legitimate common interest in the litigation; (ii) where there are access to justice concerns; and (iii) in insolvency proceedings.

This changed on 1 February 2019, when the *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017* came into force, permitting TPF in arbitration and ancillary court proceedings.

TPF remains prohibited in domestic litigation in Hong Kong.

The Ordinance was accompanied by a detailed Code of Practice for Third Party Funding of Arbitrations, which funders must comply with, including:Ensuring access to adequate capital in order to satisfy all debts for a minimum of 36 months;

- Maintaining effective processes and procedures for identifying and disclosing conflicts of interest;
- Setting out and explaining the key terms in the funding agreement regarding termination, control and liability for costs;
- Ensuring the funded party is aware of its entitlement to seek independent legal advice; and
- Providing suitable dispute resolution processes.

With the introduction of this legislation, the Hong Kong International Arbitration Centre (HKIAC) amended its rules to expressly recognise third party funders and require a funded party to promptly disclose the existence of a funding agreement, the identity of the funder and any subsequent amendments. Tribunals are also empowered to take account of TPF arrangements in determining the costs of the arbitration.

In December 2020, the Law Reform Commission published a consultation paper proposing to permit the use of outcome related fee structures. These proposals are designed to preserve and promote Hong Kong's competitiveness as a leading arbitration centre, whilst increasing access to justice.

India

India has a nascent TPF regime, which has the most potential for growth. There is no statute relating to TPF in India. Historically TPF was considered illegal in India by the application of the English law doctrines of maintenance and champerty. However, over the past decades, courts have held that those doctrines do not apply in Indian law, thereby removing the primary legal hurdles to TPF in India. There is a growing consensus that TPF is key to making India an arbitration hub in South East Asia.

This gradual progress culminated in the Supreme Court's decision in 2018 in Bar Council of India v. AK *Balaji*, which reaffirmed the legality of a non-lawyer funding litigation and recovering sums after the outcome of the dispute. The Court also reaffirmed that lawyers are barred from funding legal proceedings in which they act.

Although this decision relates to domestic litigation, it indicates a growing trend towards the acceptance of TPF in India.

A number of Indian states have independently recognised TPF by amending the Code of Civil Procedure, 1908 (as applicable within their territories), in the absence of any clear central legislation on the issue.

There has already been a marked increase in funding activity since the Court's decision in AK *Balaji*, particularly in investor-State arbitration and we expect this to continue in Indian-seated commercial arbitrations.

However, the position remains uncertain in the absence of clear statutory guidance and there are various complexities (for instance, in relation to foreign exchange management) that can only be resolved through central legislation.

> ***There is a growing consensus that TPF is key to making India an arbitration hub in South East Asia.***

India can, and is, looking towards the TPF regimes in Singapore and Hong Kong for guidance to develop centralised rules to support TPF in arbitration.

The way forward

Australia, Singapore, Hong Kong and India are each developing and strengthening TPF regimes and, in some jurisdictions, looking to conditional fees to support the growth of dispute resolution. Each face separate challenges and policy considerations, but can draw upon the lessons learnt by others to create opportunities. A clear, cohesive TPF regime addressing the disclosure of TPF, conflicts and recoverability of costs can help strengthen each of these jurisdictions' pursuit to be regional and global arbitration hubs.

The authors would like to thank Nathan Giacci, Graduate Student, Perth, Australia, for his assistance with this article.

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New P.R.I.M.E. Finance Arbitration Rules

P.R.I.M.E. Finance enhances efficiency and transparency with revised arbitration rules

By Andrew Battisson, Daniel Allman, Samson Spanier, Mrithula Shanker

P.R.I.M.E. Finance has announced revisions to its arbitration rules which enter into force on 1 January 2022 (2022 P.R.I.M.E. Finance Arbitration Rules). This article considers the key changes introduced by the 2022 P.R.I.M.E. Finance Arbitration Rules and the practical benefits of international arbitration for resolving finance sector disputes.

P.R.I.M.E. Finance

The Panel of Recognised International Market Experts in Finance (**P.R.I.M.E. Finance**) is a specialist organisation dedicated to resolving financial disputes. It offers alternative dispute resolution (**ADR**) services, such as arbitration and mediation, and facilitates engagement with sector experts and advisers. The current P.R.I.M.E. Finance arbitration rules entered into force in 2016, consisting of a modified version of the UNCITRAL Arbitration Rules (as revised in 2010) adapted to suit complex financial transactions. Arbitrations under the P.R.I.M.E. Finance Arbitration Rules are administered by the Permanent Court of Arbitration at The Hague (**PCA**).

In 2020, the organisation launched a review of its arbitration rules to ensure they remain fit-for-purpose and continue to reflect best practices. P.R.I.M.E. Finance's revised arbitration rules are the result of that review. They enter into force on 1 January 2022.

Camilla Macpherson, Head of Secretariat, P.R.I.M.E. Finance Foundation, said about the new rules:

"The new P.R.I.M.E. Finance Arbitration Rules offer a highly attractive means of dispute resolution to financial institutions, their customers and counterparties. Fundamental to P.R.I.M.E. Finance's mission is reducing uncertainty and creating stability and confidence in global finance, and the re-launch of the Rules is a key part of achieving this aim."

Importantly, the changes reflected in the 2022 P.R.I.M.E. Finance Arbitration Rules seek to streamline the procedural arbitration framework, reflecting the importance of speedy resolution for financial market users.

> ***"Fundamental to P.R.I.M.E. Finance's mission is reducing uncertainty and creating stability and confidence in global finance, and the re-launch of the Rules is a key part of achieving this aim."***

Arbitration of financial disputes

Participants in the financial services sector routinely face complex, technical disputes. Despite the potential benefits of international arbitration, such as the ability to ensure subject-matter expertise in those who adjudicate the dispute, the finance sector has not traditionally embraced arbitration as a form of dispute resolution in the same way as other industries such as construction and energy.

Nevertheless, financial institutions increasingly have turned to arbitration in recent years. For example, the International Swaps and Derivatives Association (**ISDA**) arbitration guide provides model arbitration clauses for the ISDA Master Agreement. Other arbitral institutions, namely the International Chamber of Commerce Court of Arbitration (**ICC**), the London Court of International Arbitration (**LCIA**), and the Singapore International Arbitration Centre (**SIAC**), have reported a steady increase in disputes from the banking and finance sector.

This trend reflects the following factors, among others:

- Financial products are increasingly complex, as technological innovation allows for the development and delivery of services in novel and bespoke ways. This is evident, for example, in the use of distributed ledger technology and automation. Disputes arising from detailed financial models and bespoke instruments require a high level of technical understanding. Arbitration gives the parties an opportunity to appoint subject-matter experts to determine their claims.

- Complex financial products and transactions increasingly involve parties from emerging markets. International arbitration is the preferred method of dispute resolution in circumstances where parties have concerns about bringing their disputes before domestic courts. This may be for various reasons, such as a perceived lack of neutrality of the judiciary (particularly where there is little separation with the state), concerns about the rule of law, bribery and corruption, or local courts (and juries) lacking the requisite experience in resolving complex financial disputes.
- Similarly, international arbitration is the preferred choice where the enforcement of a foreign court judgment may be problematic. This is due to the comparative ease of enforcement of foreign arbitral awards under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**) which has been implemented in nearly all regions of the world.
- International arbitration, particularly in the case of complex cross-border disputes, is recognised as offering procedural benefits over domestic litigation, including procedural flexibility, confidentiality, efficiency and finality.
- With the increasing bargaining power of counterparties to financial transactions, particularly in emerging markets, it is often no longer acceptable to insist upon the traditional default of providing for jurisdiction of the courts of England and Wales or the Southern District of New York. International arbitration offers parties an alternative neutral forum that is not tied to any particular legal system.

Key changes

P.R.I.M.E. Finance has prioritised the following elements in updating its arbitration rules: flexibility, procedural efficiency, transparency, and the resolution of urgent matters.

Flexibility

Given the multi-party and multi-contract nature of many finance disputes, the 2022 P.R.I.M.E. Finance Arbitration Rules include new provisions on joinder (Article 31), consolidation (Article 32), single arbitration under multiple contracts (Article 33), and coordination of proceedings (Article 34).

Consolidation will be permitted not only where all claims are made under the same arbitration agreement, but also where claims under multiple (but compatible) arbitration agreements arise out of (a) the same legal relationship, (b) principal and ancillary contracts, or (c) the same transaction or series of transactions (Article 32.1). Similarly, claims arising in those circumstances, even if arising under multiple contracts, may be made in a single arbitration (Article 33.1). It is possible that, in time, these types of mechanisms may be used to accommodate mass claims proceedings.

Separately, in light of the challenges presented by COVID-19 and contemporary arbitration practice generally, the 2022 P.R.I.M.E. Finance Arbitration Rules permit virtual hearings and virtual examination of witnesses (Articles 18.2, 27.3).

Procedural efficiency

Many of the changes introduced by the 2022 P.R.I.M.E. Finance Arbitration Rules are aimed at promoting efficiency of arbitral proceedings.

Importantly the 2022 P.R.I.M.E. Finance Arbitration Rules make it clear that a party may also request early determination of a claim or defence on the basis that it is manifestly outside jurisdiction, manifestly inadmissible, or otherwise without legal merit (Article 35). This is particularly important to finance sector parties.

> ***The 2022 P.R.I.M.E. Finance Arbitration Rules make it clear that a party may also request early determination of a claim or defence***

Other amendments made to the procedure for arbitrator appointments (Articles 8 to 11) remove various administrative steps that appeared in the 2016 rules. The 2022 P.R.I.M.E. Finance Arbitration Rules now also provide that if the parties have not agreed on the number of arbitrators within 30 days of commencement of the arbitration, a sole arbitrator (rather than a panel) will be appointed (Article 7). These changes should reduce some of the costs associated with arbitral proceedings and simplify decision-making.

Also, under the revised rules, a tribunal will be required to convene a case management conference within 30 days of being constituted (Article 16), and must render its final award within either 60 days (in the case of a sole arbitrator) or 90 days (in the case of three arbitrators) of closing of the hearing or receipt of the last substantive submissions, whichever is later (Articles 38, 39). This should also promote efficiency and a speedier resolution of the dispute.

Transparency

The 2022 P.R.I.M.E. Finance Arbitration Rules respond to the push for greater transparency in arbitration, in order to enhance predictability and improve confidence among users. For example, unless a party objects, P.R.I.M.E. Finance will be permitted to publish anonymised

awards (Article 39.10). Tribunals will also have the power to invite or grant leave to a third party to appear as *amicus curiae* and make submissions (Article 29).

Parties will also be required to disclose third-party funding arrangements for any claim or defence, as well as the identity of any third-party funder (Articles 5, 6, 12).

Additionally, whereas the 2016 rules specified that tribunal fees must be "reasonable", under the revised rules arbitrator fees will now be calculated either at an hourly rate or in accordance with the amount in dispute (Article 49.1), offering greater predictability of the costs of arbitration.

Emergency and expedited arbitration
The 2022 P.R.I.M.E. Finance Arbitration Rules offer emergency arbitration for parties in need of urgent interim measures (Article 25), and provide for expedited proceedings where the amount in dispute is less than EUR 4 million or where the parties agree (Article 17). In the case of expedition, the rules retain a measure of flexibility in the sense that the PCA may decide at any time, at the request of the tribunal or a party, to convert the arbitration from expedited to ordinary proceedings (Article 17.2).

Conclusion

According to Professor Dr Georges Affaki, who chaired the drafting group, the 2022 P.R.I.M.E. Finance Arbitration Rules "herald a new era in banking dispute resolution". Professor Affaki stated that: *"The new P.R.I.M.E. Finance Arbitration Rules are rules of their time. They draw on broad experiences from around the world, both in finance and in arbitration practice. They achieve an optimal balance between empowering arbitral tribunals to rule on all the situations that may arise in the course of the proceedings, while also ensuring the transparent and fair treatment of the parties, including amid situations of urgency."*

The revised rules are well-crafted to meet the needs of financial institutions. By responding to the reality of multi-party disputes, the need for efficiency of proceedings, and the push towards greater transparency, P.R.I.M.E. Finance is positioning itself to seize on the trend towards using international arbitration to resolve complex financial disputes.

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Are we facing a sovereign debt crisis?

Disputes risk implications for investors

By Alison FitzGerald, Matthew Buckle, Majdie Hajjar

The COVID-19 pandemic has greatly lengthened the list of developing and emerging market economies in debt distress. For some, a crisis is imminent. For many more, only exceptionally low global interest rates may be delaying a reckoning. Past sovereign debt crises have given rise to creditor and other foreign investor claims under international investment agreements (IIAs). This article explores lessons learned from the past crises and the role of investment arbitration in resolving such disputes. Understanding the nature and scope of protections available is critical for foreign investors to weather the looming debt crisis.

Deepening debt trouble for developing countries

Default rates are rising, and the need for debt restructuring is growing. Yet new challenges may hamper debt workouts unless governments and multilateral lenders provide better tools to navigate a wave of restructuring. A debt restructuring legal framework for sovereigns is yet to be found. Earlier this year, the G20 committed to extend their Debt Service Suspension Initiative (**DSSI**) to halt debt-service payments through the end of 2021. But there have been problems with this initiative, in part because the private sector has not fully participated.

Many of the poorest or developing countries were already in debt trouble before March 2020. The COVID-19 pandemic has exposed gaps in the sovereign debt restructuring architecture that could lead to a sovereign debt crisis unprecedented in size and complexity. There are a number of nations that are facing potential defaults as a result of unprecedented amounts of borrowing driven by the COVID-19 pandemic. Many of these nations and others were arguably on the brink prior to the onset of the pandemic. In February 2020, the IMF published a paper 'Evolution of Public Debt Vulnerabilities in Lower Income Economies' which found that half of low income countries (36/70) were at high risk of debt distress or already in distress. In March 2020, private international capital stopped flowing to emerging market countries. Once the measures, which allowed distressed nations access to easy money, expire, the number of developing countries with sovereign debt vulnerabilities will only increase

A debt crisis is likely to be hard to avoid, especially among the world's poorest countries and those with continuing high rates of COVID-19 infections. Some experts suggest it could be as many as 15-20 nations. An additional issue is that China has become the world's largest official creditor, particularly for emerging countries. This has already caused some difficulties for restructuring the debt of some nations.

In November 2020, Zambia defaulted on its external debt payments – the first African nation to default since the pandemic started. Zambia's bondholders refused to consider offering interim relief without full disclosure of the nation's agreements with its largest creditor, China. A study published in March 2021 by the Peterson Institute for International Economics noted that China's lending contracts contain confidentiality clauses that bar borrowers from revealing the terms or even existence of the debt and that "Chinese lenders seek advantage over other creditors, using collateral arrangements such as lender-controlled revenue accounts and promises to keep the debt out of collective restructuring."

> ***A debt crisis is likely to be hard to avoid, especially among the world's poorest countries and those with continuing high rates of COVID-19 infections.***

The role of international investment agreements (IIAs)

As the sovereign debt crisis unfolds and states implement strategies to manage the crisis, investors will need to carefully consider their positions and the legal options and claims routes that may be open to them, including the important protections that may be available to them under IIAs.

IIAs are agreements between states in which they mutually agree to certain minimum standards of protection for investments made in their territory by foreign investors from other states that are party to the IIA. Among the thousands of IIAs currently in force worldwide, many are bilateral investment treaties (**BITs**) between a developed and a developing state.

IIAs offer qualifying foreign investors – including creditors – a framework of protections against adverse state action, whether such action is inspired by a debt restructuring program or some other objective.

IIAs typically set out the criteria that must be satisfied in order for a claimant to benefit from such protections. For example, IIAs define who is an "investor" and what is a protected "investment".

IIAs vary in the substantive and procedural protections that they offer. But investors who satisfy the criteria typically have access to protections in the form of prohibitions against direct and indirect expropriation absent certain minimum conduct standards, such as observing due process and the principle of non-discrimination, as well as rights to fair and equitable treatment or the minimum standard of treatment at customary international law, full protection and security, national treatment and most favoured nation treatment, among other protections. Some IIAs contain carve-outs for taxation measures and particular industry sectors that may impact on an investor's entitlements, as well as 'umbrella' clauses that raise contractual breaches to treaty breaches.

Critically, these substantive protections have teeth because IIAs afford qualifying foreign investors with standing to bring claims and thus have direct access to dispute resolution in a neutral forum, usually international arbitration, before impartial arbitrators, and in accordance with neutral, transparent rules.

Critically, these substantive protections have teeth because IIAs afford qualifying foreign investors with standing to bring claims and thus have direct access to dispute resolution

Claims under IIAs tend to follow capital flows, and unsurprisingly claims most often arise between qualifying foreign investors from developed states as claimant and the developing state party hosting the investment as respondent. Though increasingly IIA claims are also against and between investors and states from developed countries.

(See also our article on investor-state claims in the era of COVID-19, in the June 2020 edition of the International Arbitration Report).

What's past is prologue?

Parallels with the looming sovereign debt crisis can be drawn with previous sovereign debt crises, such as the 1980 Latin American debt crisis, the 1998-2002 Argentina debt crisis, and the 2009 Eurozone crisis. Following each of these crises, investors brought IIA claims against defaulting states.

In the early nineties, Argentina defaulted on US $93 billion in sovereign debt. Argentina's subsequent debt restructuring process led to a number of IIA claims by Italian bondholders against Argentina under the Argentina-Italy BIT. Three cases arose from Argentina's default: *Abaclat v Argentina; Ambiente Ufficio S.p.A v Argentina; and Alemanni v Argentina*. In each case, Argentina challenged the jurisdiction of the tribunal, asserting that its consent to ICSID arbitration in the BIT did not include consent to multiparty proceedings and that its bonds were not protected investments under the ICSID Convention. Argentina also challenged the admissibility of mass claims.

In all three cases, Argentina's jurisdictional objections were dismissed. The tribunal in *Abaclat* held that the claimants' purchase of security entitlements in Argentinean bonds constituted a contribution which qualified as an investment under Article 25 ICSID Convention. On the issue of admissibility, the tribunal determined that the ICSID procedural framework could be adapted to render the claims by the Italian bondholders admissible. The majority found that the only relevant question was whether there was sufficient homogeneity between the bondholders claims, a question that the majority answered in the affirmative. The *Ambiente* and *Alemanni* arbitrations were discontinued before the issue of admissibility was adjudicated. All three cases settled before they progressed to a merits phase.

In the late 2000s, several European countries faced debt distress on the heels of the global financial crisis. Greece's default on its debt was followed by a restructuring process that gave rise to a claim under the Cyprus-Greece and Slovakia-Greece BITs: *Postova bank v Greece*. The claimants, a Slovak bank and its former Cypriot shareholder, alleged that the Greek debt restructuring was a breach of the investors' rights under the BITs. In contrast to the Argentine cases, the tribunal refused jurisdiction over the claim, holding that the bank's Greek government bonds were not protected investments under the Slovakia-Greece BIT.

More recently, in the case of *Adamakopoulos v Cyprus*, the tribunal held (by majority) that it had jurisdiction to hear a mass claim of a group of almost

1000 claimants holding financial assets in Cypriot banks. The claimants alleged that the actions by two Cypriot banks to merge in response to suffering losses due to their exposure to the Greek financial crisis had caused significant devaluation to the assets held by them. Similar to Argentina's objections in the aforementioned cases, Cyprus argued, amongst other things, that the mass claim arbitration was outside the Tribunal's jurisdiction and was inadmissible. The majority followed the reasoning in *Alemanni* in determining that the claims were admissible and could be considered together as a 'single' dispute within the meaning of the Greek-Cyprus and Luxembourg-Cyprus BITs.

> ***IIAs provide protections for qualifying foreign investors and qualifying investments against adverse state action***

The implications for today

This decade's sovereign debt crisis threatens to unfold on a wider and deeper scale than we have seen in recent past. Even if progress is made on an enhanced multilateral debt restructuring framework that includes the private sector, many foreign investors will likely fall 'outside the tent.' They will therefore need to consider available avenues to pursue remedies and recourse for loss and damage incurred.

IIAs are an important potential tool available to foreign investors.

IIAs provide protections for qualifying foreign investors and qualifying investments against adverse state action, including where such action is inspired by a debt restructuring program or related objective. Though as past cases reveal, while some IIAs expressly include debt instruments among protected investments, not all IIAs are so clear. These protections have real teeth because IIAs allow investors to bring claims directly against the state through international arbitration. They can also add weight to settlement discussions and negotiations.

As the sovereign debt crisis unfolds and states implement strategies to manage these crises, investors will need to watch those developments close and carefully consider their positions under IIAs and the legal options and claims routes that may be open to them.

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Important developments in the application of the Energy Charter Treaty within the EU

European Union closes grip on intra-EU arbitration

By Cara Dowling and Alexa Biscaro

In September 2021, the Grand Chamber of the Court of Justice of the European Union (CJEU) published a much-anticipated decision in *Moldova v Komstroy* (Case C 741/19) (*Moldova*) concerning the validity of the investor-State dispute settlement mechanism in the Energy Charter Treaty (ECT). Shortly thereafter, another important CJEU decision was published in *Poland v. PL Holdings Sàrl* (Case C 109/20) (PL Holdings). With these decisions, the CJEU has continued the trend of removing from EU investors their treaty-based rights to refer disputes with EU Member States to investment arbitration.

Key findings – the ECT's intra-EU investment arbitration mechanisms are incompatible with EU law

The preliminary reference by the Paris Court of Appeal to the CJEU in the *Moldova* matter did not raise questions related to the validity of the investor-State dispute settlement (**ISDS**) mechanism in the ECT (as discussed further below, the questions referred, *inter alia*, to the scope and meaning of the term "investment" under the ECT). But at the request of interveners, including the European Commission and a number of EU Member States, the CJEU took the opportunity to address the outstanding question of the validity of the ISDS mechanism in the ECT (Article 26(2) c) under EU law.

In its reasoning, the CJEU largely followed its prior controversial decision *Slovak Republic v Achmea BV* (Case C 284/16) (***Achmea***).

The CJEU determined that international agreements concluded between EU Members States containing provisions allowing EU investors to bring proceedings against an EU Member State before an arbitral tribunal, so-called "**intra-EU arbitration**", are precluded by the Treaty on the Functioning of the European Union (**TFEU**), one of two treaties forming the constitutional basis of the European Union (the other being the Treaty on European Union (**TEU**)).

The ECT may permissibly require EU Member States to comply with the arbitral mechanisms in their relations with investors from third States who are also ECT Contracting Parties. But preservation of the autonomy and of the particular nature of EU law precludes the same obligations under the ECT from being imposed on EU Member States as between themselves, and therefore Article 26(2)(c) ECT must be interpreted as not applicable to intra-EU disputes.

Analysis of the CJEU's reasoning

In *Achmea*, the CJEU determined that intra-EU investment arbitration provisions, such as the one found in the bilateral investment treaty (**BIT**) between the two EU Member States at issue in that case, are incompatible with EU law. However, the CJEU did not express an opinion in *Achmea* on whether the ruling also applied to multilateral treaties, such as the ECT, that involve multiple EU Member States and other States, leaving tribunals and courts to grapple with this important issue of 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 European Commission also sought to intervene in a number of intra-EU investment arbitrations arguing that position.

However, until a binding opinion was rendered by the CJEU, the question as to the applicability of Achmea to the ECT

remained live. The CJEU's decision in Moldova has addressed that question.

In a nutshell, the CJEU's reasoning in *Moldova* is as follows: ECT tribunals may be required to interpret and apply EU law. But tribunals constituted under the ECT's dispute resolution mechanism do not fall under the umbrella of the judicial system of the EU and ECT tribunals cannot make a reference to the CJEU for a preliminary ruling on points of EU law (that right is limited to a 'court or tribunal of an EU Member State' which definition does not include international arbitration tribunals). The preliminary reference procedure is the keystone of the EU judicial system, safeguarding the consistency, effectiveness and autonomy of EU law. As such, because the ECT arbitration mechanism circumvents that oversight procedure, the CJEU held it to be incompatible with EU law in respect of intra-EU disputes.

In *Moldova*, the CJEU noted that the fact that the ECT was a multi-lateral treaty was irrelevant, because in reality the treaty (and dispute resolution provisions) governed bilateral relations between two Contracting Parties, in an analogous way to a bilateral treaty.

The CJEU's decisions in *Achmea* and *Moldova* sit uneasily with prior CJEU case law confirming the validity of intra-EU commercial arbitration – which tribunals, the CJEU accepts, also may interpret and apply EU law and also sit outside the EU judicial regime. In prior decisions, the CJEU held that *commercial* arbitration was compatible with EU law and that the requirements of efficient arbitration proceedings justify limiting the scope of review of commercial arbitral awards by EU national courts, provided that the fundamental provisions of EU law can be examined in the course of that review and be the subject of a preliminary reference to the CJEU (by the EU national court), if necessary.

The CJEU sought, in *Achmea* and again in *Moldova*, to address this seeming conflict, albeit briefly and not entirely comfortably. The CJEU explained that the distinction turned on the fact that commercial arbitration *"originates in the freely expressed wishes of the parties"*, whereas ISDS provisions such as found in the ECT derive from a treaty by which EU Member States agreed to remove disputes from the jurisdiction of their own courts and thus from the required EU judicial oversight system. In those circumstances, the CJEU was unwilling to apply the considerations afforded to commercial arbitration to investor-State arbitration.

The CJEU unfortunately did not choose to elaborate much further. But the crux of the CJEU's objection appears to turn on that, in agreeing to ISDS, EU Member States choose to establish a mechanism that avoids the EU judicial oversight system– a system which Article 19(1) of the Treaty of European Union (**TEU**) requires EU Member States to establish. Such a possibility, the CJEU said, would *"call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties… and is not therefore compatible with the principle of sincere cooperation"*.

The CJEU provided further comments which appear intended to harmonize its decisions in *Achmea* and *Moldova* with the EU's plan to replace the investor-State arbitration system with an Investment Court System (**ICS**) as found in the Comprehensive Economic and Trade Agreement (**CETA**) between the EU and Canada, and prior CJEU case law confirming the compatibility of ICS with EU law.

The CJEU noted that according to settled CJEU case law, an international agreement establishing a court responsible for the interpretation of its provisions and whose decisions are binding on EU institutions, including the Court of Justice, is not in principle incompatible with EU law: the EU's competence and capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court created or designated by such agreements, provided the autonomy of the EU and its legal order is respected. But that competence cannot extend to permitting, in an international agreement, a provision that allows an intra-EU dispute that may concern EU law to be removed from the EU judicial oversight system.

What effect is there on investors?

EU investors with pre-action disputes or involved in ongoing ECT proceedings against EU Member States, whether in the briefing or hearing phase, awaiting an award or awaiting enforcement, will be impacted. They should be taking advice on their positions in those proceedings.

The crux of the CJEU's objection appears to turn on that, in agreeing to ISDS, EU Member States choose to establish a mechanism that avoids the EU judicial oversight system

There will be some uncertainty due to the potential for conflicting decisions. We saw this in the wake of *Achmea* as regards intra-EU BIT claims. Tribunals and national courts may take different views – both on jurisdictional challenges and enforceability of intra-EU ECT awards. We may see a divergence of treatment by courts within the EU and those outside the EU.

Should investors continue to pursue intra-EU proceedings, EU Member states

will likely challenge (or seek to reopen challenges) to the jurisdiction of the tribunal, and the European Commission will likely seek to intervene in support of such challenges in some cases. Prior to this decision, such challenges had only spotted success, and EU investors continued to bring ECT claims against EU Member States and some tribunals have found jurisdiction and in some instances rendered significant awards in favour of investors. Albeit, this was when it was not clear whether the *Achmea* reasoning applied to the ECT. Post-*Moldova*, we may see more jurisdictional challenges succeed and certainly a more aggressive approach by the European Commission.

Further bolstering the European Commission's position is yet another important recent CJEU decision in *PL Holdings* which was published a mere two months after *Moldova*. In *PL Holdings*, the CJEU held that ad hoc arbitration agreements between EU investors and EU Members States are also invalid under EU law as they too undermine the autonomy of EU law by circumventing the EU oversight mechanisms. So jurisdictional challenges should now also be expected in ad hoc intra-EU arbitrations.

But more significantly, the CJEU stated in *PL Holdings* that pursuant to the EU Treaties, the principles of the primacy of EU law and of sincere cooperation, the decision in *Achmea*, and the Agreement for the termination of BITs between the EU Member States, all EU Member States are *required* to challenge the validity of such arbitration agreements that are invalid under EU law, before the tribunal and before any competent national court, and ask any competent national court to set aside, annul or refrain from recognizing and enforcing the award. EU national courts also must uphold an application to set aside an intra-EU investment arbitration award.

Further, any attempt by an EU Member State to remedy the invalidity of an intra-EU investment arbitration clause by means of a contract with an EU investor runs counter to the EU Member State's obligation to challenge the validity of the arbitration clause, and would thus "be liable to render the actual legal basis of that contract unlawful, since it would be contrary to the provisions and fundamental principles governing the EU legal order".

The CJEU is clearly not messing around anymore – it is closing its fist on intra-EU investment arbitration.

In practice, the CJEU's decisions will likely affect the protections available to EU investors under the ECT and other multilateral treaties and investment agreements with EU Member States. After all, the ISDS provisions are what give real teeth to those protections. The number of claims against EU Member States is proof enough that investors need these protections as much as they do when investing in emerging markets. The CJEU's insistence that investors seek recourse in national courts overlooks the history of investor-State disputes and the reasons why investor-State arbitration evolved – namely that recourse to domestic courts was often not effective, and State to State intervention politicized what would otherwise be commercial disputes. ISDS offered foreign investors certainty that disputes with host States could be resolved in a neutral forum, and this was the backbone in many ways for the proliferation of foreign direct investment around the globe.

Investors with legacy investments should accordingly consider their position and risk profile, including what other mechanisms might be available to them in the event of objectionable host State conduct. Investors considering new intra-EU investments should likewise consider alternative protections well as considering whether to structure their investment via non-EU Member States (such as the UK, US or Switzerland). In light of the *PL Holdings* case, attempts to contract around the issue are unlikely to succeed so should be approached with caution.

It is unclear what impact, if any, the CJEU's decisions will have on the current renegotiation or "modernisation" of the ECT process which, as of March 2021, has entered a fourth negotiation round. No doubt the issue will come up, but exactly how it will be navigated by Contracting Parties and stakeholders is currently unclear – particularly given the EU's hostility to investment arbitration.

A strict reading of the term "investment"

It is also worth covering the CJEU's findings in *Moldova* on the question the CJEU was in fact asked to address – the scope of the term "investment" under the ECT, specifically whether a claim arising from a contract for the supply of electricity constituted an "investment" for the purposes of the ECT.

Article 1(6) of the ECT defines an investment as every kind of asset, owned or controlled directly or indirectly by an Investor and includes, *inter alia*, claims to money and to performance pursuant to contract having an economic value and associated with an investment (Article 1(6)(c) ECT), and rights conferred by contract which were granted to undertake economic activity in the energy sector (Article 1(6)(f) ECT). Investment is defined as "any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.".

The CJEU held that a claim arising from a contract for the supply of electricity does constitute an asset held directly by

an investor, and could in principle come within the scope of Articles 1(6) (c) and (f) ECT. However, the CJEU found that, on the facts of this case, it did not constitute an investment.

As regards Article 1(6) (f), 'investment' includes any right conferred by contract to undertake any economic activity in the energy sector – a claim may be regarded as a right conferred by contract, but the CJEU said a claim arising from a mere contract for the sale of electricity cannot, in itself, be regarded as having been granted *in order to undertake an economic activity in the energy sector*.

As regards Article 1(6)(c), 'investment' includes claims to money and claims to performance pursuant to a contract having an economic value and associated with an investment. The claim at issue in the proceedings had an economic value (being a claim for money and arising from a contract with an economic value), but the CJEU held that it was *not associated with an investment* – the CJEU said there was nothing that showed that the contract for the supply of electricity was connected with any other transaction, whether or not that transaction constitutes an investment. The contractual relationship concerned only the supply of electricity, and the electricity in question was generated by other operators that merely sold it to the on-selling contracting party. The CJEU held that a mere supply contract is a commercial transaction which cannot, in itself, constitute an 'investment' within the meaning of Article 1(6) ECT, regardless of whether an economic contribution is necessary in order for a given transaction to constitute an investment.

The CJEU noted that one of the main reasons for the existence of special protective rules for foreign investors arises from the fact that investment transactions involve the immobilisation of resources abroad which generally cannot easily be repatriated in the event of a dispute. It said that there was no such immobilization in this case.

Again, it will be interesting to see whether this decision has any ripple effect on the renegotiation process of the ECT.

Concluding thoughts

With these latest decisions, the CJEU has further empowered the EU's position adverse to intra-EU investment arbitration, enabling it to continue its strategy of gradually eliminating traditional investor-State arbitration in favour of investment court systems as found in CETA. Given the evolving state of investors' rights under EU law, investors in the EU, whether proposed or existing, should be particularly mindful of these issues when considering the risk profile of their investment and take all available steps to mitigate the risks. That may include considering how to structure their investments to benefit from investment treaty protections without falling foul of the CJEU's decisions.

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New draft ICSID Code of Conduct for Adjudicators in International Investment Disputes

An overview of key changes

By Matthew Kirtland, Jo Feldman, Alyssa Glass

The review and reform of investor-State dispute settlement continues. This article explores the latest developments, in particular the latest draft Code of Conduct for Adjudicators in International Investment Disputes prepared by the International Investment Disputes (the Code). A second draft of the Code, prepared by the International Centre of Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL).

General overview and recent developments

As part of the review and reform of investor-State dispute settlement (**ISDS**) being undertaken by UNCITRAL Working Group III, attention has turned to preparation of a Code of Conduct for Adjudicators in International Investment Disputes (**the Code**).

A second draft of the Code, prepared by the International Centre of Settlement of Investment Disputes (**ICSID**) and the United Nations Commission on International Trade Law (**UNCITRAL**), was released on 19 April 2021. This second draft reflects the plethora of comments on the initial draft released in May 2020 and suggestions made by States and stakeholders. The Working Group is due to meet again in November this year to discuss the second draft and feedback received from States and stakeholders.

Ultimately, the goal of the Working Group is to increase the efficiency and transparency of international arbitration. The Code seeks to enhance confidence in the independence and impartiality of ISDS tribunal members. There remain several key issues where agreement is yet to be reached; sticking points such as repeat appointments and double hatting will undoubtedly be the centre of attention at the Working Group's next meeting.

Hot topics

Repeat Appointments

Repeat appointments occur when an arbitrator receives multiple appointments from either the same disputing party, the same counsel, law firm, or the same disputing party type (i.e. repeat appointments by the Respondent State or by an investor).

On the one hand, a number of commentators have expressed concerns about permitting arbitrators to receive repeat appointments. These concerns include biased pre-judgment of a party's claims or defences, the ability to develop a loyalty to a disputing party who provides financial dependence, the lack of diversity, and the increase in costs and delays as a result of arbitrators being appointed to multiple proceedings.

On the other hand, some stakeholders believe the opposite, with repeat appointments increasing efficiency and cost savings, due to the arbitrator becoming more competent in certain types of disputes, and developing better case management skills. In addition, principles of party autonomy favour a party being permitted to appoint their chosen arbitrator.

As it stands, the current draft of the Code does not prohibit the repeat appointment of an arbitrator, subject to the arbitrator satisfying the independence and impartiality requirements of Article 3. Furthermore, prior to accepting an appointment, adjudicators must disclose any previous and current appointments, as part of their continuing obligation to disclose.

This is a substantial deviation from the first draft of the Code, in which repeat appointments were prohibited in circumstances where they would hinder the arbitrator's ability to render their decision in a timely manner. That provision was ultimately removed on the basis of a perceived difficulty in assessing whether an adjudicator's availability actually would be obstructed, as this would come down to varying factors such as the complexity of the case, the capacity of the individual, and the role played by the adjudicator.

Double Hatting

"Double hatting" is the practice in which an individual acts in roles across at least two different ISDS cases, either simultaneously or within a short period of time. Article 4 of the Code was included in an attempt to limit multiple roles being performed by

certain individuals. However, substantial changes have been made to the original draft.

First, amendments have been made to reflect the suggestion that double hatting could be acceptable with informed consent of the disputing parties.

Second, the prohibition of double hatting has been narrowed. The first draft applied to multiple roles as counsel, expert, witness, judge, agent or any other relevant role, and proposed a prohibition or limitation for a period before or after being an adjudicator. The updated second draft permits double hatting in relation to witnesses, judges, agents and any other relevant role that is not a counsel or expert, and is limited to situations of multiple concurrent roles.

Finally, draft text in Article 4, which likely will be a talking point in the forthcoming discussions, proposes a more lax prohibition of double hatting. Under the proposal, consent from disputing parties will only be required if an adjudicator is planning to be involved as counsel or expert in another case that has "the same factual background" and "at least one of the same parties or their subsidiary, affiliate or parent entity".

Putting the Code into Context

The overall objective of the new Code is to provide a uniform approach that harmonises and clarifies the existing standards. However, some States and commentators have expressed concerns with inconsistency between the new Code and existing standards such as the International Bar Association Guidelines on Conflict of Interest in International Arbitration (**IBA Guidelines**), and codes of conduct in free trade agreements. They are concerned this may be an impediment to the Code's overarching objective.

For example, both the Comprehensive Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) and the Canada-European Union Comprehensive Economic and Trade Agreement (**CETA**) prohibit appointed arbitrators from concurrently acting as counsel or party-appointed expert in any pending or new investment dispute under those agreements or under any other international agreement. This prohibition is not limited to cases with "the same factual background" and at least one identical or related party.

Some stakeholders have emphasised that deviating from existing standards, which reflect international consensus, should be exercised with considerable caution. They argue that not only will this generate uncertainty and confusion in the standards required but, to many, it may be perceived as a step backwards. In their view, this may result in a loss of confidence in the Code, and to questions regarding whether ICSID is the most appropriate institution to administer ISDS.

Similarly, some stakeholders have voiced their opinion that the revised draft undermines the existing IBA Guidelines, a longstanding international standard of best practice. For example, the disclosure obligations in the revised draft are considered by some as excessively wide.

> ***The overall objective of the new Code is to provide a uniform approach that harmonises and clarifies the existing standards.***

Additionally, concerns have been expressed that the revised Code appears to depart from international consensus by imposing new, ancillary arbitrator duties not previously reflected in the IBA Guidelines, including by requiring adjudicators to "refuse competing obligations" and imposing a duty to display high levels of competence. Whilst it is expected that arbitrators display a high standard of competence, by elevating the characteristic to a duty, there are concerns that this could be used as a backdoor entry to a right of appeal.

Moving forward

The development of the Code is an important step towards achieving the Working Group's overall objectives of ensuring an efficient and cost-effective ISDS process, which aims to simultaneously hold arbitrators to a high standard and strengthen confidence in and support for the system.

Whilst the work of ICSID and UNCITRAL is undoubtedly welcomed, there are still multiple issues which will need to be fleshed out before the Code is finalised. In finalising the Code, States and stakeholders are likely to continue to direct the Working Group's attention towards ensuring that the new Code, to the extent practicable, does not contradict or cause disharmony with existing guidelines, codes, and treaties.

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New life breathed into DIAC as axe falls on DIFC-LCIA

What you need to know about the changes

By Deirdre Walker, Aarti Thadani

By Decree 34 of 2021, Dubai has abolished the DIFC-LCIA Arbitration Centre, along with the Emirates Maritime Arbitration Centre, and transferred their property, staff and cases to the Dubai International Arbitration Centre – DIAC. The 10-article decree took effect on the 20 September 2021 after appearing in the Dubai Government's Official Gazette on 14 September. It seems to have taken everyone by surprise – including the LCIA and DIAC.

Key provisions – what you need to know

Article 4 abolishes the Maritime Centre and "the DIFC's Arbitration Institute" i.e. the DIFC-LCIA.

Article 5 provides for the transfer to DIAC of the "properties, moveable assets, devices, equipment and funds" belonging to the abolished centres, as well their financial allocation from the Government of Dubai, their employees and their lists of arbitrators, conciliators and members. Further, DIAC will take over all the "rights and obligations" of the abolished centres.

Article 6 provides that all arbitration agreements referring disputes to the abolished arbitration centres will be "deemed valid and effective" and DIAC will replace those centres in considering and determining disputes that arise under the agreements, unless otherwise agreed by the parties.

What this means is that unless the parties agree otherwise, ongoing DIFC-LCIA arbitrations (there are about 140 currently active) will be administered and supervised by DIAC. The Tribunals currently appointed will remain in place – just operating under the auspices of DIAC as opposed to the DIFC-LCIA.

Arbitral tribunals formed within the abolished centres will continue to determine all cases pending before them without interruption, using the "applicable rules and procedures" (unless otherwise agreed by the parties). DIAC and its administrative body will, however, supervise the cases. Current DIAC cases will proceed as normal.

Article 10 puts the onus on DIAC to implement the decree within six months of it taking effect. Essentially, by 19 March, 2022.

In light of this, DIAC will most likely open a branch in the DIFC freezone in addition to its existing premises in mainland Dubai, as permitted by Article 2 of the decree.

Following the issuance of Decree 34 the DIFC-LCIA and the LCIA announced that:

a. all DIFC-LCIA arbitrations already on foot will be administered directly by the LCIA under the rules of the DIFC-LCIA Arbitration Centre;
b. parties should not incorporate reference to the DIFC-LCIA Rules or the Centre in their arbitration agreements; and
c. all DIFC-LCIA arbitrations that are commenced after the enactment of Decree 34 will be administered by DIFC under the DIAC arbitration rules (unless of course parties agree otherwise).

What does this mean?

There seems to be a move to support DIAC which was a key player in international arbitration in Dubai, particularly during the financial boom of 2004 to 2008. However, in recent years it has attracted mostly UAE parties with the international arbitrations gravitating towards DIFC-LCIA.

The Dubai Government has, for some time now, been pursuing a modernising agenda, updating laws and regulations as evidenced by the demise of the much criticised Joint Judicial Committee (**JJC**). Some view this as merely a step in the overall ambition to a modernise and rationalise the current structures and to "bring arbitration in the Emirate" under one roof.

The key question is: what next?

The Dubai Government has, for some time now, been pursuing a modernising agenda, updating laws and regulations

Issues still to be considered

Issues which will need to be considered include the following:

1. Parties will need to consider whether they are comfortable to proceed with ongoing DIFC-LCIA arbitrations given the current uncertainties. Any changes to the status quo will require the consent of the respective parties.
2. The future uptake of the DIAC will depend on whether DIAC takes steps to improve its rules (dated 2008) to bring them into line with other rules like those of the LCIA, ICC and SIAC. Notably a new DIAC Board of Directors have been appointed.
3. One of the difficulties around ongoing arbitrations will be finances. The Decree has indicated that all assets and finances of DIFC-LCIA will be transferred to DIAC. Will tribunals be prepared to proceed if there is any uncertainty around fees?

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Climate change and sustainability disputes between foreign investors and states

Key arbitration examples (Part 2 investment disputes)

By Cara Dowling, C. Mark Baker, Dylan McKimmie, Tamlyn Mills, Kevin O'Gorman, Martin Valasek

In the first article in this series, we offered a simple introduction to the types of climate change and sustainability disputes being brought in international arbitration, using examples from recent cases. We then explored climate change and sustainability disputes arising out of contracts. In this second article, we look at climate change and sustainability disputes that might arise between foreign investors and States and consider the role of international arbitration in resolving such disputes.

State action on climate change is increasing

In October 2021, the 26th Conference of Parties (**COP26**) was held. At this global summit, the State Parties to the UN Framework Convention on Climate Change (**UNFCCC**), convened to report on action taken and negotiate new commitments. There has already been significant action undertaken over the past decade by States and cities to respond to climate change. In the wake of COP26 and as the pressure on States to act increases, there will be a further escalation of action by all levels of governments, legislators and regulators, as nations seek to transition to low carbon, sustainable and climate resilient economies whilst ensuring access to secure and affordable energy and resources.

Some State actions could impact the profitability or even viability of commercial arrangements. When that happens, high stakes, strategically important disputes will follow.

What are climate change and sustainability disputes?

It is not easy to develop a succinct, all-encompassing definition of climate change and sustainability disputes. The range of disputes brought to date is vast. It is a global phenomenon, where legal issues cross multiple fields of law and various causes of action. In addition, the risk profile is in a state of flux due to developments in technology, industry, science, regulation and law, and as society grapples with how to address these complex legal issues and who should shoulder the fiscal burden.

One helpful definition is offered by the UN Environment Programme (**UNEP**), which defined climate litigation as *"cases that relate specifically to climate change mitigation, adaptation, or the science of climate change."* It is particularly useful in that it is a broad definition, but also expressly captures disputes arising out of the rapid and deep transitions currently underway in the energy sector especially, but all other industries as well. That is critical – as noted in a recent IEA Report, *"[a]chieving Net Zero emissions [for the global energy sector] by 2050 will require nothing short of the complete transformation of the global energy system."* In the history of humanity, such deep, societal-wide change has never been attempted in such a short space of time. It will present significant opportunities but also large risks, many of which will lead to disputes.

We offer one tweak to UNEP's definition; to include "sustainability". These disputes often encompass issues which traditionally would not be viewed as climate change related but which are interdependent and interrelated. For example, human rights and other fundamental rights traditionally have been viewed as a distinct category of dispute and indeed legal practice; but in recent years there has been a significant increase in claims that are essentially climate change related disputes formulated as fundamental rights arguments, brought under international laws or national constitutions which enshrine such rights. Other examples include biodiversity and land degradation issues which are impacted by climate change and vice versa.

Disputes between foreign investors and States

The IPCC Special Report on the impacts of global warming of 1.5°C predicted the need for *"rapid, far-reaching and unprecedented changes in all aspects of society"*, which includes in particular "rapid and far-reaching transitions in land, energy, industry, buildings, transport and cities". Transitions in these key sectors, individually and collectively, will impact every private, commercial and public endeavour.

One hundred years ago, transitions in energy, industry and transport led to fundamental societal change. The advent of the automobile, for example, transformed industry and trade, and reshaped our cities as well as our private lives. Modern transitions to limit and adapt to the changing climate (not least, the energy transition) call for an equally radical reorganisation of the way our societies, cities, industries and lives are configured and run. The difference is that these transitions are occurring at a pace never before attempted or achieved.

Significant financial investment will be required. According to a 2021 report by the International Energy Association (IEA), to reach net zero emissions by 2050, the cost of annual clean energy investment worldwide will need to more than triple by 2030 to approximately US$4 trillion. The transitions in other major industries will also require significant levels of investment. In addition, according to the 2021 UNEP Adaptation Gap Report, the costs of adaptation (i.e. measures to reduce vulnerability to climate change) are expected to reach US$140-300 billion in 2030 and US$280-500 billion in 2050. Infrastructure, agriculture, water and disaster risk management make up three quarters of quantified adaptation finance needs. In 2019, climate finance flows to developing countries for mitigation and adaptation reached US$79.6 billion.

Some of that investment will be made by States. The gap will be filled by private investment, including foreign direct investment (**FDI**). Reports are already showing a significant rise in FDI in low carbon initiatives and climate financing. However, UNEP, the IEA and other stakeholders are calling for an urgent scaling up of both public and private sector investment, along with measures to overcome barriers to private investment.

Transitions are occurring at a pace never before attempted or achieved.

With a rapid increase in new FDI, there will be an increase in disputes between foreign investors and host States. In part, this is a numbers game – a proportion of all investments end up needing to navigate some form of dispute, and with a steep and rapid rise in foreign investment, we should expect a concordant rise in investor-State disputes. But many of these investments carry an increased risk of disputes due to their particular characteristics; for example, involving novel innovations (technologies, products or processes), new infrastructure and systems, new collaborations (including with State representatives), new markets and new competitors. Many will be subject to a changing regulatory environment as new regulatory regimes are introduced or old regimes adapted to be fit for purpose.

In parallel, States are more broadly imposing legal, regulatory, and other changes in response to climate change or sustainability issues. Legislative change has been happening at an unprecedented rate, and further rapid change is to be expected. States might change licencing, tariffs, subsidy or taxation regimes. Key assets or infrastructure might be privatized or nationalized, or States might expropriate assets belonging to investors. A number of investments will be heavily dependent on State behaviour, whether that be ensuring access to infrastructure or resources, or in more challenging jurisdictions it may be ensuring protection and security of foreign investments or the ability to take capital out of the jurisdiction.

Significant unilateral changes to the investment environment could be made in the name of climate change which could seriously impact the profitability or even viability of existing investments. Investors might face losing the entire value of their investment or asset. Where States do not take steps to mitigate the impacts of those changes on existing investors or fail to offer adequate compensation then high stakes, strategically important disputes could follow.

States are more broadly imposing legal, regulatory, and other changes in response to climate change or sustainability issues.

Investment arbitration

Investor-State dispute settlement, or **ISDS**, is a mechanism that enables foreign investors to resolve disputes with host States. ISDS mechanisms are commonly found in international agreements between States such as bilateral investment treaties (**BITs**) or multilateral agreements (**MITs**), sector-specific treaties such as the Energy Charter Treaty (**ECT**) or free trade agreements (**FTAs**) (such as Chapter 11 of the North American Free Trade Agreement, **NAFTA**). They may also be found in domestic legislation or in contracts between investors and States.

These instruments typically set out substantive protections that the States agrees to give foreign investors in their countries. Common protections include: fair and equitable treatment, full protection and security, national treatment, most favoured nation treatment, no expropriation without full (and prompt) compensation, and free transfer of capital.

ISDS provides the mechanism for enforcing those commitments. If a State breaches its commitments, the investor has a right to bring a claim directly against the State, typically in international arbitration. This allows investors to have their disputes adjudicated in a neutral forum, before impartial arbitrators and in accordance with transparent institutional rules. Monetary compensation is the most common remedy. But other remedies may be available, such as declaratory relief and restitution, or interim relief to preserve the status quo while proceedings are ongoing.

States offer these protections to encourage FDI. In many sectors, such as energy and resources, foreign investments involve significant upfront investments in exploration, R&D, and infrastructure, and a long term commitment before profits are even seen by investors. Foreign investors also often bring not only the capital but the required technical skills and know-how to set up and run these major projects. States' investment treaty commitments give foreign investors comfort that they will be treated fairly and have a means of protecting their investment – otherwise, investors may have no meaningful remedy in the face of arbitrary, capricious or other unfair treatment by a host State.

Prior to ISDS, foreign investors had to resolve disputes before the States' own local courts. Investors often found themselves unable to obtain full – or indeed any – recovery. Obstacles included an absence of protections under the local law, sovereign or crown immunity rules, or a lack of judicial independence. Diplomatic intervention, to the extent available, was inconsistent and usually ineffective given the politicization in direct discussions between sovereigns. ISDS emerged in the wake of World War II in part due to a desire to depoliticize investment disputes by removing them from the realm of diplomacy and inter-State relations, as well as to stimulate foreign investment. In many ways, ISDS has been the backbone of global foreign investment.

Depending on the host State's legal regime, treaty protections and remedies can be more favorable than local law protections. For example, some domestic laws permit the State to expropriate property without providing any compensation or for less than full compensation – in the absence of treaty protections, investors would have no recourse should a State expropriate their investment.

The mere availability of treaty protections can also offer powerful disincentives for State misconduct. It can also facilitate a settlement where disputes do arise, preventing escalation and associated risks to unique often inter-depended, long-term relationships.

Examples of climate change and sustainability investment arbitration

Investment arbitrations have been commenced in relation to renewable energy investments, in particular, solar, wind and hydropower. Many investments in renewable energies have been driven by government incentives such as subsidies or attractive tariffs, and the profitability of those investments (at least in the interim) may be reliant on those regimes. It is therefore unsurprising that a substantial number of investment arbitrations to date involve changes to renewables subsidy regimes. The claims (40 at last count) against Spain under the ECT following reforms Spain made to its renewable energy policies are a good example. Other European countries which pursued similar regimes have also faced ECT claims, and similar types of claims have been brought against Canada under NAFTA. There have also been claims against States for alleged expropriation of renewable energy assets, or reneging on deals with investors in joint ventures for renewables projects. In some of those, the State was found to have breached its treaty commitments to the detriment of investors and substantial damages were awarded, in others, the State's defence prevailed.

Investment arbitrations have also been brought in relation to fossil fuel investments, including disputes concerning infrastructure, exploration and exploitation. In addition, a small number of claims have been brought in response to States' decisions to phase out nuclear power or the use or extraction of fossil fuels (in particular coal), ban mining of certain materials, or deny permits to allow construction of pipelines.

Research is being undertaken by Climate Change Counsel on ECT awards to assess the interaction between investor protection, energy policy and the clean energy transition. According to their preliminary findings, the fossil fuel cases studied to date generally addressed isolated issues which had nothing to do with climate change or the energy transition, whereas the renewable energy cases tended to be more systematic in character and concerned changes to the States' entire energy mix (Annette Magnusson, Climate Change Counsel, *"Energy Charter Treaty Arbitration and the Paris Agreement: Friends or Foes?",* 7th EFILA Annual lecture, October 28th, 2021).

Is international arbitration an appropriate forum for resolving such disputes?

Anti-ISDS advocates warn of the "chilling effect" of ISDS on public interest regulatory action. That chilling effect is often wrongly blamed on ISDS as a system, and is often misstated or exaggerated.

Most BITs preserve States' rights to pursue legitimate policy objectives, such as the protection of public order, security, morality and health, and taxation, amongst others. More recent BITs, such as the Netherlands' draft model BIT, expressly reference States' rights to regulate and address to deal with environmental and human rights issues.

ISDS awards do not interfere with States' rights to regulate nor do they invalidate the legislation or State conduct in question – they simply award compensation to investors where both State breach and damage is proved. ISDS offers investors a minimum safety net, to hold States to their commitments to act in good faith and not discriminate or expropriate private property of foreign investors without fair compensation.

On the whole, there is little evidence to support the allegation that companies are abusing ISDS. Of the 767 known ISDS arbitrations, only 32 awards dealt with State measures to protect the environment and public health (statistics reported in Annette Magnusson, *"New Arbitration Frontiers: Climate Change"*, in Evolution and Adaptation: The Future of International Arbitration, ICCA Congress Series no. 20, Kluwer). Moreover, the statistics generally show ISDS outcomes are largely even and do not tend to favour either States or investors.

Concerns over the transparency of public interest disputes can also be dealt with, such as by States signing up to initiatives such as the Mauritius Convention on Transparency in Treaty-Based Investor-State Arbitration. Concerns over the ability of public interest groups to play a role in such disputes, can be addressed by amicus curiae interventions.

Anti-ISDS proponents warn of the "chilling effect" of ISDS on public interest regulatory action.

Any possible chilling effect would not be the result of arbitration as a *process*, rather it would be the result of the *substantive terms* agreed by the State in the treaty. In the rare instance that older treaties do not provide exceptions for States to pursue legitimate policy objectives, then there may be a case for renegotiation of those terms. But there is little benefit in a wholesale abandonment of the dispute resolution process that helps States and their investors resolve disputes. Especially where no viable alternative dispute resolution mechanism is currently in place.

The use of international arbitration to drive "climate-positive" policies

Often overlooked is the potential for BITs and ISDS to facilitate and enforce sustainable development and "climate-positive" policies. As noted above, a significant proportion of claims to date have related to investments in renewable energies. In addition, some BITs impose obligations on States to promote sustainable development, climate-positive trade or sharing of environmental technologies.

The Netherlands' draft model BIT is again a good example – States must ensure "high levels of environment and labor protection" and "reaffirm their commitment" to international human rights and environmental treaties, including the Paris Agreement. It also allows tribunals to take into account investors' conduct where they have not complied with the UN Guiding Principles on Businesses and Human Rights and the OECD Guidelines for Multinational Enterprises.

ISDS tribunals have already shown a willingness to engage with such issues. In *Urbaser SA & Ors v Argentina*, in the context of investor claims under the Spain-Argentina BIT, Argentina counterclaimed that the investors had breached international human rights obligations (the asserted right to water). The tribunal held that it had jurisdiction over the counterclaim and that consideration of international human rights obligations was within its competence. Ultimately, Argentina failed to establish any breach of obligations owed by the claimants, but the tribunal's willingness to accept jurisdiction was a significant development.

Some BITs impose obligations on States to promote sustainable development, climate-positive trade or sharing of environmental technologies.

Claims in other international fora

There has been a notable increase in climate change and sustainability claims being brought before other international adjudicatory bodies, often by activists (despite anti-IDS sentiment) challenging conduct by States, companies and investors.

Some international bodies are viewed as offering favourable "soft law" and procedure for climate change and sustainability claims as compared to domestic courts which may be actively unfriendly or impose difficult evidential and legal burdens (especially as regards jurisdiction and standing).

In particular, litigants are looking to bring claims under international law, treaties and conventions related to human and fundamental rights. Key treaties include, the UN Declaration on Human Rights, UN Convention on the Rights of the Child, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, Rio Declaration on Environment and Development, UN Declaration on the Rights of Indigenous Peoples, and the OECD Declaration on International Investment and Multinational Enterprises. Claims may also be brought under regional treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, or the African Charter on Human and Peoples' Rights.

In October 2021, in a landmark move, the UN Human Rights Council (**UN HRC**) recognised, for the first time, that having a clean, healthy and sustainable environment is a human right. The UN HRC called on States to work together and with other partners to implement this newly recognized right. At the same time, through a second resolution, it increased its focus on the human rights impacts of climate change by establishing a Special Rapporteur dedicated specifically to that issue. Developments like this will encourage further claims.

The general view is that, unlike States, companies do not have direct obligations under international law to *protect* human rights. But there is a growing recognition that they have a responsibility to *respect* human rights, to avoid causing harm or contributing to adverse human rights impacts, and to seek to prevent or mitigate adverse impacts directly linked to their operations, products or services. See for example, the UN Guiding Principles on Business and Human Rights (**UNGPs**).

Decisions under these conventions are generally not mandatory nor binding. But they are often influential – they influence how judges, governments, regulators, investors and other stakeholders, and the general public view the issues. And a number of such claims have resulted in a mediated settlement agreement.

Conclusion

Climate change is leading to new economic realities and legal frameworks to which all State and corporate entities must adapt. It is a challenging environment in which foreign investors encounter both significant opportunities as well as risks. In this environment, investors should undertake careful assessment of the risk profile of new and existing investments and implement mitigation measures, including dispute resolution strategies. For foreign investors, this includes considering whether a new investment can be structured so as to benefit from investment treaty protections. These may offer investors safeguards against host State conduct (especially where no domestic recourse is available), serve as a powerful deterrent against misconduct, and facilitate settlement before a dispute escalates.

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- Life sciences and healthcare
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Singapore
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Durban
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3 Alliances

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