CLIFFORD CHANCE

Reflections from the Clifford Chance International Arbitration Group 2016

Welcome to Reflections

In this publication, Clifford Chance international arbitration practitioners from across our global network – in the UK, Europe, Middle East, Asia Pacific and the Americas – reflect on recent trends and developments in international arbitration. We expect these to shape international arbitration through 2016 and 2017.

We note three macro developments in particular.

Oil and gas, and commodity, prices have continued to remain low. Many governments and companies are affected by a slower rate of financing as large scale projects are abandoned or mothballed until prices recover. In the meantime, major disputes have arisen. Delays and defaults throw light on the contractual arrangements and non-contractual protections.

Investment treaty arbitration remains under heightened scrutiny. States are reshaping the investment landscape. The EU's trade and investment negotiations with the US, Canada, Singapore and Vietnam indicate a drive to reframe the terms of protection available to investors and to reform the way in which investor-State disputes will be resolved in the future.

Singapore and Hong Kong continue to develop as attractive arbitral venues and their institutions are increasingly popular. They have been successful in challenging the traditional seats with modern arbitration rules and a trendsetting arbitration infrastructure.

Over the past 18 months, Clifford Chance has continued to represent clients in a very wide range of disputes, originating from around the world. We have represented our clients in over 50 merits/jurisdiction hearings, undertaking our own advocacy in the majority of cases and 27 members of our team sit as arbitrators. Our global group is currently overseeing more than 100 international arbitrations across 12 market sectors (see page 9 for sector breakdown). We are pleased to share our observations.

Jason Fry

Audley Sheppard

contents

1. Sector Focus

1.1 Between rocks and hard places: crumbling commodity prices are leading to an increase in disputes in the sector

Audley Sheppard QC, Simon Greenberg (with assistance from Jonathon Caunt & Jan Ortgies)

The global down-turn in commodity prices is leading to an increasingly litigious environment in the mining and commodities sectors as producers and buyers alike are seeking to protect margins and to avoid potentially significant losses. The iron ore market has been particularly badly affected, with prices lingering around US$ 55 per tonne, down over 70% from a high of almost US$ 190 per tonne in early 2011.

A relatively small proportion of iron ore sales (and sales of related products) are concluded on the spot market. Most iron ore, in all its forms, is traded in long-term or very long-term contracts, typically up to 25 years. These give parties the future stability which they need in order to make large-scale investments to get iron ore above ground and ready for use in steel-manufacturing. Whilst this down-turn will obviously not last forever, it is equally clear that this is more than short-term volatility. China's annual demand for steel, which has been a major driving factor in historic growth in the market, is now in decline for the first time since the 1990s. The potential long-term repercussions, if this continues, leave the pricing formulas in long-term agreements between miners and consumers concluded before the downturn subject to intense pressure. Even the best-known commodity giants are finding themselves in difficulties with half of the top ten losers in the FTSE 100 during the second half of 2015 being resources-related companies. Existing supply agreements are now being reviewed in detail by both producers and buyers, each looking for opportunities for cost-cutting through reduction of quantities and/or quality, shipping terms, amendment of pricing formulas and simply delaying deliveries until, they hope, conditions improve. These are all areas which can and do lead to disputes. With market conditions limiting the options available to desperate parties, arbitration proceedings (being a widely-used dispute resolution mechanism in the industry) seem to be looking more and more appealing.

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Cases we are seeing are diverse and each requires an individual approach. Clifford Chance's global network is well equipped to deal with such cases and we enjoy the confidence of a number of the world's biggest players, existing clients in the sector. Moreover, with every case we see, we increase our own expertise, as well as our network of good and tested expert witnesses, who are heavily relied on in such cases.

The iron ore market is diverse. While the global trend is undeniably clear, the factors leading to the price slump vary as between geographic regions and specific producers. Costs of getting ore out of the ground are causing problems for some, whereas for others it is rather the quality of the extracted product or the drop in local demand which keeps iron ore executives awake at night. In addition, different iron ore products (lump, scrap, pellets etc.) all follow their own patterns. The cases we are seeing are diverse and each requires an individual approach. Clifford Chance's global network is well equipped to deal with such cases and we enjoy the confidence of a number of the world's biggest players, existing clients in the sector. Moreover, with every case we see, we increase our own expertise, as well as our network of good and tested expert witnesses, who are heavily relied on in such cases.

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Challenge for all lawyers involved in commodities disputes is to keep things as simple and lean as possible.

Given the length of the contracts in dispute and the quantities of products being sold, disputes often run into the billions rather than mere millions of dollars. Arbitration proceedings are often scheduled to last years, with some ongoing cases not expected to receive awards until the second half of 2017 at the earliest; submissions tend to be at the longer end of the spectrum within international commercial arbitration. The main challenge for all lawyers involved in commodities disputes is to keep things as simple and lean as possible.

Quite how parties who are now at one another's throats will return to "business as usual" to see out the remaining years or even decades under their long-term agreements remains to be seen.

As the recent spate of arbitrations is likely to be a result of the slump in commodity prices, it will be very interesting to see whether, if prices start to rise again (as some industry experts believe they soon will), many of the ongoing proceedings will reach speedy settlements; it certainly seems likely that some of the proceedings will not yet have reached the award phase by then. Quite how parties who are now at one another's throats will return to business as usual to see out the remaining years or even decades under their long-term agreements remains to be seen.

While the expectation seems to be that we are at or near the bottom of the market for commodities in general and iron ore in particular, we remain prepared for further depression of prices and the disputes which such a scenario would inevitably bring.

1.2 Plummeting prices in oil and gas

Alex Panayides (assisted by Anna Kirkpatrick)

The world's supply of oil remains far above demand and 2015 was a period of radical change in the oil and gas industry. In late January 2016, the main international benchmark Brent briefly slumped to below US $ 28-a-barrel, hitting a new 13-year low. Three key developments have contributed to this. Firstly, the Organization of Petroleum Exporting Countries (OPEC) declined to cut its official production. According to the International Energy Agency this is part of a strategy designed partly to pressure American producers out of the market and lower prices appear to be taking a toll on non-OPEC supply.[1] Secondly, in July 2015 the US, Russia, France, China, Germany, the UK and the EU agreed a deal with Iran which puts limits on Iran's nuclear programme. As a result, EU nuclear-related sanctions measures against Iran were lifted on 16 January 2016, enabling it to revitalise its energy and financial markets. Iran, as an OPEC member, is likely to ramp up oil supply after years of restrictions. Thirdly, on 18 December 2015, the US lifted a ban on oil exports that has been in place since 1975 allowing the US oil producers to sell crude to the already saturated international market. The World Bank slashed its predicted oil prices forecast from US$ 52 in October to US$ 37 – prices are expected to remain low for some time.[2]

The fall in oil prices combined with lower global demand for oil has had a significant impact on oil exporting or "petro-dollar" countries. On the one hand, low prices present investment opportunities in the oil and gas sector since oil producing countries could be willing to offer more attractive fiscal terms to support investments in their oil and gas projects. For instance, on 1 January 2016, the UK Petroleum Revenue Tax rate was reduced from 50% to 35% and effectively abolished in the March 2016 budget. On the other hand, if oil prices continue to fall, or stay at low levels for a sustained period, this could lead to significant budget deficits in sovereign debt refinancing and oil-producing countries seeking to increase their "take" of revenue under petroleum agreements. In this climate, it would be prudent to consider whether there is scope to include better contractual

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1 See International Energy Agency, *Oil Market Report,* December 2015, p. 3.
2 See World Bank, *Commodity Markets Outlook, Weak Growth in Emerging Economies and Commodity Markets*, January 2016, p. 24.

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protections against adverse State action or whether any extra-contractual investment protection is available.

1.3 Environmental risk and implications for the energy sector

Jason Fry, Marie Berard and Jessica Gladstone (assisted by Anna Kirkpatrick)

Climate change has recently been a key feature in international policy-making. The Paris Agreement is cited as the first truly global deal on climate change. Agreed by 195 States in December last year, States commit to a long-term goal of keeping the increase in global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels. State parties have agreed to see global greenhouse emissions reach a peak as soon as possible and to undertake rapid reductions thereafter. In a move away from the binding emission reduction targets that were required under the Kyoto Protocol, States have committed to submit nationally determined contributions every 5 years. The Paris Agreement opens for signature in April 2016, and will enter into force 30 days after at least 55 countries accounting in total for at least 55% of global greenhouse gas emissions have acceded to or ratified the treaty. The Agreement sends a clear signal to businesses and policy-makers that the global transition to clean energy requires a shift away from fossil fuels and a push by governments to focus on policies such as renewable energy, energy efficiency projects and green financing and investment products is inevitable. In turn, this will push climate change issues higher up the corporate board agenda again, with climate change having been overshadowed in the last few years by the global economic crisis.

The consequences of climate change on business have also been more immediate. Earlier this year, the Philippines Human Rights Commission accepted a petition by 1228 Filipino typhoon survivors and several non-governmental organisations to

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investigate whether 50 investor-owned fossil fuel companies have breached their responsibilities to respect human rights by producing carbon emissions and eventually causing typhoons and catastrophic storms that annually batter the Philippines. Legally, the petition rests on a number of bases of national and international law including the UN Guiding Principles on Business and Human Rights which elaborate on corporations' responsibility to respect human rights. It remains to be seen whether the investigation will result in any formal proceedings against the companies involved, but the investigation itself is high-profile and marks increased calls for the sector to be responsible for their impacts on the environment in line with international standards. This highlights, in addition to traditional litigation risks, the governance and reputational risks that companies face.

1.4 Arbitration for financial institutions

Marie Berard (assisted by Anna Kirkpatrick)

Arbitration and the financial sector continues to be a hot topic. As the sector becomes more accustomed to its features, the industry is no longer afraid to use arbitration. The industry recognises that it is well-suited to the resolution of financial disputes, even if litigation remains the most prevalent dispute resolution mechanism. Enforceability of awards and access to decision makers with industry expertise are important considerations which arbitration caters far better than litigation.

The current focus is to understand better when and how the sector can use arbitration and how to tailor the mechanism to best suit its needs. For example, in April 2015, the Financial Services Expedited Arbitration Procedure was launched. This procedure focuses specifically on the speedy resolution of disputes by crafting procedures to achieve a 21 week arbitration (assuming one arbitrator) or 22 weeks (assuming a panel of three), based on minimal disclosure and short written pleadings. They can be used in conjunction with any arbitral rules and should be incorporated into an arbitration clause at the outset. Along with the availability of emergency arbitrator provisions under many institutional rules (which enable emergency interim relief from an arbitrator), this adds to the menu of options when tailoring arbitration to be quicker for users. In the Netherlands, PRIME Finance, the arbitral institution which offers bespoke financial institution arbitration, recently teamed up with the Permanent Court of Arbitration, which can now administer PRIME Finance cases, adding depth and sophistication to PRIME's offering. The ICC Task Force on Financial Institutions and International Arbitration to which Marie Berard contributed, is expected to report on its findings in April this year. This in-depth review considers the use of arbitration in specific financial sectors, such as sovereign lending, derivatives, Islamic Finance and secured lending. This study will provide further insight as to when arbitration can best be employed to resolve disputes related to financial instruments and how arbitration can be best tailored to suit types of disputes most common in the sector.

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Marie Berard
Partner, Clifford Chance
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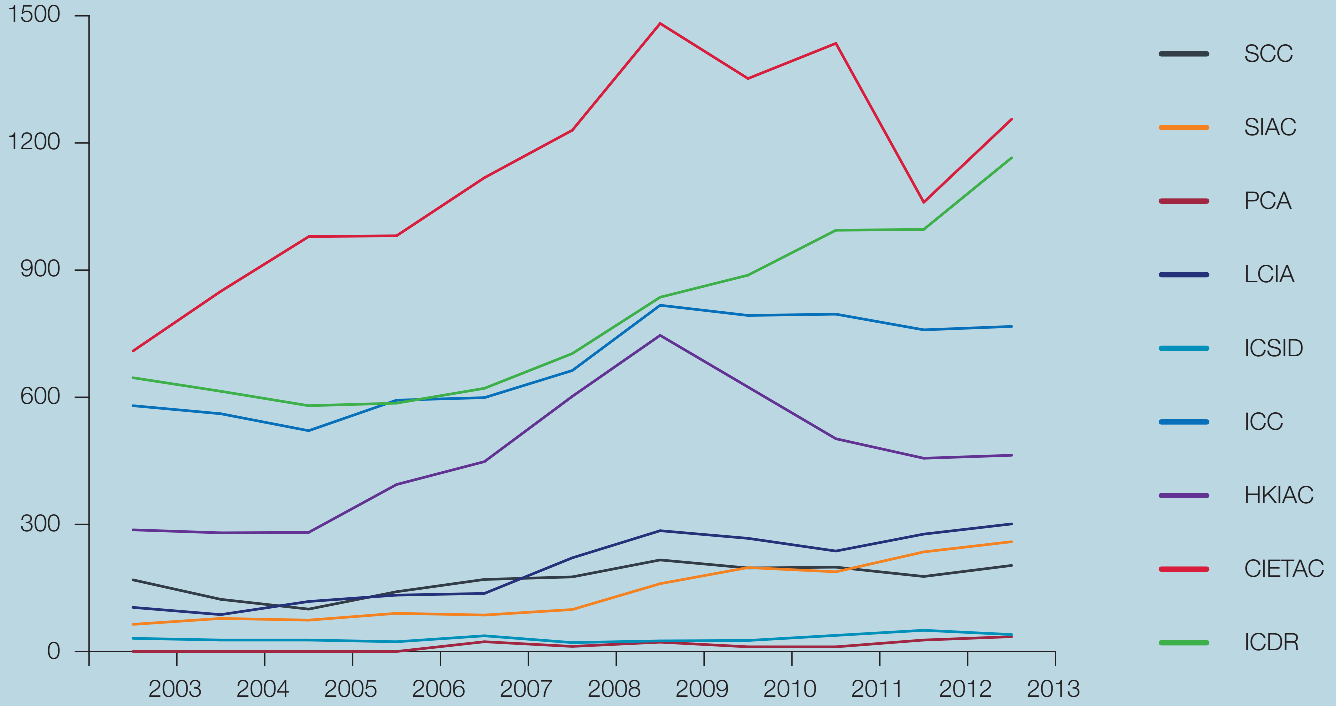
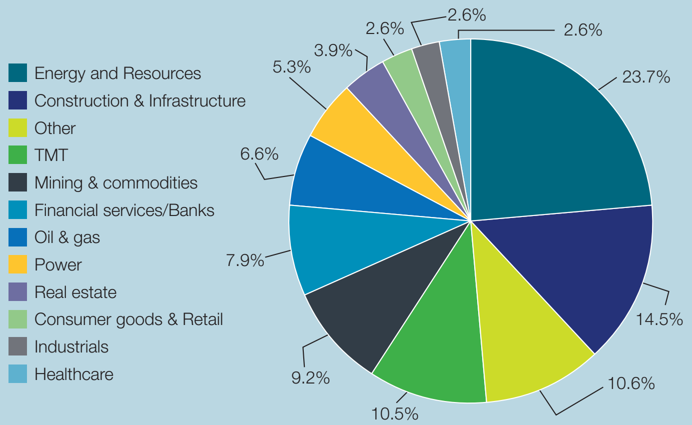
10 years in Arbitration: The number of new cases by institutions



ICDR: International Centre for Dispute Resolution
CIETAC: China International Economic and Trade Arbitration Commission
DIAC: Dubai International Arbitration Centre
HKIAC: Hong Kong International Arbitration Centre
ICC: International Chamber of Commerce
ICSID: International Centre for the Settlement of Investment Disputes
LCIA: London Court of International Arbitration
PCA: Permanent Court of Arbitration
SIAC: Singapore International Arbitration Centre
SCC: Arbitration Institute of the Stockholm Chamber of Commerce

Source: Practical Law Arbitration

Clifford Chance International Arbitration portfolio by sector (2013 – 2015)



Client comment: "I see CC as an extension of my in-house team and the collaboration levels really help to develop the best argument, strategy and case theory."

Global Arbitration Review 100 – 2016

2. Regional Attitudes towards International Arbitration

2.1 Asia

(a) Challenge to an award successful in Singapore fails in Hong Kong

Kathryn Sanger

In the landmark case of *Astro Nusantara & Ors v PT Ayunda Prima Mitra & Ors*[3] Clifford Chance acted for Astro Nusantara International B.V. and other related parties (Astro) in successfully defeating an attempt by PT First Media TBK (PT First Media) to resist enforcement of arbitral awards against it.

Astro had applied to the courts of Singapore and Hong Kong respectively to enforce five Singapore arbitral awards (the SIAC Awards) against PT First Media. Orders for enforcement in Hong Kong were granted in Astro's favour in 2010 (the 2010 Orders); owing to the absence of assets in Hong Kong, these orders were not resisted. In Singapore, it was a different story. PT First Media challenged the enforcement proceedings, and in 2013 the Singapore Court of Appeal (the Singapore CA) handed down its judgment refusing to enforce substantial parts of the SIAC Awards on the basis that the arbitral tribunal had acted outside of its jurisdiction.

On the back of its success in Singapore, PT First Media then applied to the Court of First Instance in Hong Kong (the HK Court) for an extension of time to apply to set aside the 2010 Orders, and an order to set aside the 2010 Orders on the basis of the Singapore CA's decision.

The HK Court dismissed PT First Media's application. The HK Court essentially held that it had a discretion to refuse to permit an award debtor to resist enforcement of an arbitral award where there has been a breach of the good faith or *bona fide* principle by the award debtor, and that this principle was "wide enough to cover situations recognised under our domestic law as giving rise to an estoppel or waiver".[4] The HK Court was critical of the fact that PT First Media had been fully aware of its right to raise the jurisdictional invalidity point before the Singapore court (pursuant to article 16(3) of the UNCITRAL Model Law) at an early stage of the arbitral process, but chose not to do so and instead kept the issue in reserve to be deployed before the enforcement court only when it suited its interests to do so.

Whilst noting that there is "no general obligation on the part of an award debtor to exhaust his remedies in the supervisory court" before resisting enforcement in the enforcement court, the HK Court concluded that, in all the circumstances, permitting PT First Media to resist enforcement of the SIAC Awards in Hong Kong would be contrary to the principle of good faith. The HK Court also noted that, notwithstanding the Singapore CA's decision to refuse enforcement of substantial parts of the SIAC Awards, the awards had not been set aside in Singapore and so remain valid and create legally binding obligations in Hong Kong.

The HK Court noted *obiter* that, if it was wrong in its substantive conclusion, it has a narrow residual discretion to permit enforcement of an award even where grounds for refusing enforcement can be established. The HK Court acknowledged that, in this case, and subject to its finding on good faith that it would not have been prepared to exercise the residual discretion to permit enforcement of the SIAC Awards in Hong Kong given the Singapore CA's finding that the arbitration tribunal had acted outside of its jurisdiction.

However, in respect of PT First Media's application to extend time, the HK Court held that it would, in any event, have refused this because a delay of 14 months was very significant in the context of resisting enforcement of a New York Convention award. Also, the delay in this case resulted from a deliberate and calculated decision by PT First Media not to take action in Hong Kong. Accordingly, the HK Court dismissed both of PT First Media's applications, with costs to Astro. PT First Media has since successfully sought leave to appeal.

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3 [2015] HKCU 432.
4 Although *Astro* was determined under the old Arbitration Ordinance, Cap. 341, the same principles apply under the Arbitration Ordinance, Cap. 609.

demonstrates the continued, and arguably increasing, pro-arbitration stance of the Hong Kong courts.

(b) Russia and the growing importance of Hong Kong

Kathryn Sanger

Several recent events have transformed Asia-Pacific jurisdictions and, in particular, Hong Kong, into jurisdictions of choice for major Russian businesses.

First, during 2014-2015, the EU, the US, Canada, Japan and Australia imposed sanctions on several Russian State-owned companies and influential individuals. Apart from Australia and Japan, Asia-Pacific jurisdictions, including Hong Kong, continue to remain sanctions-free zones for Russia.

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Secondly, foreign investors who had previously invested in the oil and gas and banking industries in the Crimea – against the backdrop of three Energy Charter Treaty (ECT) awards against the Russian Federation – since launched at least five investment claims against the Russian Federation over the alleged expropriation of their assets. The Russian government and Russian State-owned companies have thus been alerted to the risks of enforcement in most New York Convention jurisdictions. In this context, China has become increasingly attractive to Russia as a dispute resolution forum, given its commercial reservation to the New York Convention, as well as a low probability of successful enforcement of investment awards against Russian assets in China. Moreover, following the recent *Congo* decision given by the Court of Final Appeal in Hong Kong, it is now confirmed that Hong Kong adopts the same *absolute* doctrine of sovereign immunity as China does, thus removing the commercial exception afforded by the *restrictive* doctrine.

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Thirdly, the sanctions regime and the enforcement battles in Europe and the US have intensified Russia's efforts to integrate its far eastern regions into the Asia-Pacific circuit. This has led to Vladivostok, the capital of Russia's Primorsk Region of the Far East, becoming a Russian special economic zone since 1 January 2016.

Finally, in mid-2015 Russia joined 49 major jurisdictions in the creation of the Asian Infrastructure and Investment Bank (AIIB). The AIIB is understood to be developing an alternative to International Centre for Settlement of Investment Disputes (ICSID) within its framework. While Russia has not ratified the ICSID Convention and has rejected provisional application of the ECT, it appears willing to endorse an AIIB-based ICSID alternative. It is expected that, in the near future, most Russia-related investment disputes will be seated in Asia.

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Against this backdrop, Hong Kong is the natural nexus of these new strategic transactions, and the disputes that will flow from them, for the following reasons:

1. No procedural disruptions: the sanctions regime has called into question the ability of European and American arbitral institutions to accept deposits from sanctioned companies, while the Hong Kong International Arbitration Centre (HKIAC) (along with many other Asian institutions) has not been affected.
2. No perceived bias: appointing neutral nationals from non-sanctioning jurisdictions to sit on arbitral panels in disputes involving sanctioned companies reduces the risk of perceived bias in the tribunal's decision-making process. A number of Russian-speaking arbitrators from non-sanctioning jurisdictions are listed on the HKIAC panel and list of arbitrators, while a number of Russian and Ukrainian arbitrators have recently been included in them.
3. Sanctions-free common law jurisdiction: Hong Kong offers the sophistication of an established common law jurisdiction to which Russian companies are accustomed, and yet remains a sanctions-free haven for those companies.
4. Judicial independence: the Hong Kong judiciary has earned a stellar reputation of independent judicial support to, and minimal interference with, arbitral proceedings.
5. Gateway to China: Hong Kong's unique geographic proximity to China offers a safe access to China, which has in recent years become Russia's main geopolitical and economic interest.
6. Easy access: Travel to Hong Kong for hearings and other meetings is much easier for holders of Russian passports than travel to most other Asian jurisdictions.
7. HKIAC efforts: the HKIAC has made an effort, ahead of many other Asian institutions, to accommodate the influx of Russian disputes. For example, as well as actively tracking the developing of Russia-related disputes via its HK45 ambassadors, its new managing counsel is a Russian speaker and the HKIAC Arbitration Rules 2013 have been translated into Russian.

Hong Kong is very well-placed, and ready, to accommodate future Russia-related transactions, as well as the disputes arising from them.

(c) Singapore gearing up to become Asia's premier dispute resolution hub

Harpreet Singh (assisted by Jerald Foo and Jordan Tan)

On 4 January 2013, Chief Justice Sundaresh Menon of the Supreme Court of Singapore announced plans to establish the Singapore International Commercial Court (SICC). On 29 November, barely 11 months after that announcement, the SICC Committee, comprising senior judges, government officials and Singaporean and international jurists, submitted a report to the Government, and following public consultation on the SICC Committee's recommendations, the SICC was officially launched on 5 January 2015.

The rationale behind the SICC is compelling. Given significantly increased cross-border investment and trade into and between Asian economies, Singapore, with its well developed legal

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Singapore

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The key recommendations by the SICC Committee which aim to achieve this have since been adopted and implemented:

1. That the SICC be established as a division of the Singapore High Court to hear international commercial disputes;
2. That SICC cases be heard before justices selected from an SICC panel comprising existing Supreme Court judges and ad hoc associate judges, including eminent international jurists. This will offer international litigants the option of having their disputes heard by specialist commercial judges. Apart from the Singaporean Supreme Court Judges, the SICC features a panel of highly eminent International Judges from the UK, Australia, the US, Europe and Asia including legal luminaries such as Sir Bernard Rix, former Lord Justice of Appeal of the Court of Appeal of England and Wales, and Justice Dyson Heydon, former Judge of the High Court of Australia;
3. That the SICC shall hear cases governed by Singapore law or any foreign law chosen by the parties;
4. That in cases which have no substantial connection with Singapore, parties may be represented by foreign counsel registered with the SICC, with the registration requirement aimed at securing counsel’s adherence to a code of ethics;
5. That decisions of the SICC will be appealable to a Court of Appeal comprising international jurists from the SICC Panel and/or existing judges from the Singapore CA; and
6. That a set of rules, following international best practices for commercial dispute resolution, be created to govern SICC proceedings.

Recognising shifts in global economic trends and an undeniable economic opportunity, Singapore has crafted a proposal which offers a world-class service to address the needs of global and regional commercial parties for a reliable, efficient and effective mode of court based dispute resolution, be that through litigation or in support of arbitration.

One key challenge for the success of the SICC is the enforceability of its judgments internationally; they are only readily enforceable in countries where reciprocal enforcement agreements are in place. In this sense, litigation lags behind international arbitration, where awards can readily be enforced under the New York Convention with relative ease. Singapore has already sought to enhance this situation, for example, by signing the Hague Convention on Choice of Court Agreements on 25 March 2015 which seeks to ensure the enforceability of court judgments between member States.

Singapore is now one of the top five most preferred seats of international arbitration (alongside London, Hong Kong, Paris and Geneva). Reputation and recognition are by far the most important reasons for choosing a seat of arbitration. The development of a specific international commercial court in Singapore will consolidate Singapore’s reputation as a premier forum for commercial dispute resolution within and beyond Asia. Development is well within reach and will place Singapore at the cutting-edge of international dispute resolution.

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(d) Use of arbitral awards to enforce DAB decisions in Singapore

Paul Sandosham (assisted by Kelvin Teo)

The Singapore CA's recent decision in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation*[5] will have a major impact on the dispute resolution process for construction and infrastructure projects where the FIDIC standard form is in use.

The Singapore CA (by a majority decision) held that a tribunal's interim or partial award on a respondent's obligation to pay promptly the sums in a Dispute Adjudication Board (DAB) decision rendered under the FIDIC Conditions of Contract for Plant and Design-Build 1999 (commonly called the Red Book) is immediately enforceable under the Singapore International Arbitration Act. Previously, it was unclear whether parties could obtain a partial or interim award of this kind before the tribunal's resolution of the dispute on the merits. As a result of the CA's ruling, a favourable DAB decision now has some "teeth" as a successful claimant can seek enforcement of the DAB decision through an interim arbitral award pending the resolution of the merits of the underlying dispute, thus reducing the likelihood of cash flow difficulties stemming from a long and drawn-out arbitration.

Given the widespread use of FIDIC's standard form construction contracts (albeit as amended to suit specific requirements)

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Partner, Clifford Chance
Singapore

5 [2015] SGCA 30.

As a result of the Court of Appeal's ruling, a favourable DAB decision now has some "teeth" as a successful claimant can seek enforcement of the DAB decision through an interim arbitral award pending the resolution of the merits of the underlying dispute, thus reducing the likelihood of cash flow difficulties stemming from a long and drawn-out arbitration.

throughout the world, *Persero* cements the importance of a DAB decision as a swift and interim dispute resolution mechanism. Although strictly only binding in Singapore-seated arbitrations, it invites parties who use the FIDIC standard form or its equivalent to seek immediate enforcement of a favourable DAB decision before the arbitral tribunal. Given the relative dearth of published court authorities on the enforceability of DAB decisions, tribunals are likely to find *Persero* persuasive.

It is also worth noting that while *Persero* may on its face be considered to favour contractors "down the line" more than employers – given it is usually the contractors who need to safeguard their cash flow pending a determination of their claims at the end of what could be protracted arbitration proceedings – employers may equally enforce DAB decisions in their favour, such as a decision awarding liquidated damages in the employer's favour.

Those who are not convinced by the decision in *Persero* may yet find some support in the forceful dissent of Senior Judge Chan Sek Keong (the former Chief Justice of Singapore), who considered that only the merits of the underlying dispute were referable to arbitration, and the dispute resolution provision in the Red Book was not applicable to disputes in relation to a failure to comply with a DAB's decision, nor over whether the DAB's decision was enforceable by interim award. In his view, the relevant provisions in the Red Book did not permit a tribunal to enforce a DAB decision by way of interim award pending the resolution of the primary underlying dispute. Senior Judge Chan considered that the drafters of the Red Book did not have in mind any security of payment scheme and it was not appropriate to read such a scheme into its provisions.

(e) Reform of the Korean Arbitration Act

Thomas Walsh

As mentioned in our last issue of Reflections, Korean parties are keen users of international arbitration and the Korean government has been seeking to emulate the success of Hong Kong and Singapore in developing into well respected and popular hubs for international arbitration.

To that end, the Korean government and the national arbitration institution, the Korean Commercial Arbitration Board (KCAB), are currently working on updates to both the Korean Arbitration Act (1999) and the KCAB's international rules. However, in the process of doing so, they are having to grapple with a domestic legal community and judiciary which are broadly unfamiliar with established practice in international arbitration and are, therefore, somewhat reluctant to devolve authority and power to international arbitral tribunals.

Accordingly, the proposed updates to the Korean Arbitration Act (1999), which in its current form is based on the UNCITRAL Model Law (1985), to reflect the 2006 amendments to the Model Law, have met with domestic resistance as the amendments inevitably strengthen the power of arbitral tribunals at the expense of the Korean courts. It remains to be seen whether the final form of the updated Act will grant arbitral tribunals, for example, the wider powers in the Model Law (2006) to order interim measures. Further, at this stage, it also appears unlikely that South Korea will follow Singapore's example and include specific support for emergency arbitrations seated in Seoul or elsewhere.

The proposed amendments to the KCAB's international rules are more dynamic and follow its regional competitors in including new rules for emergency as well as multi-contract and multi-party scenarios. The consultation and revision period for both the Korean Arbitration Act and the international rules is currently ongoing with the updated versions likely to be passed later this year.

Thomas Walsh
Counsel, Clifford Chance
Seoul

In late 2015, the Korean government circulated details of a proposed act to encourage the growth of international arbitration in South Korea. This reflects similar approaches seen in countries such as Singapore and anticipates providing venues for arbitral institutions as well as certain tax incentives. It remains to be seen whether this will gain legislative support and be implemented.

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Lastly, the final stage in the liberalisation of the Korean legal market to EU and US firms under their free trade agreements is due to take place in 2016/2017. The draft of the relevant implementing act, the Foreign Legal Consultant Act, was criticised by the American Bar Association, the Law Society of England and Wales as well as the EU and US Chambers of Commerce for failing to practically liberalise the Korean market. It has, however, been passed. This may impact on Korea's attractiveness as a hub for international arbitration as it continues to restrict EU and US firms for engaging junior lawyers and/or Korean lawyers.

2.2 Europe

(a) Setting aside arbitral awards in England

Rob Lambert (assisted by Richard Boynton)

In December 2014 and February 2015, the English court's specialist Technology & Construction Court issued decisions which caused some consternation in arbitration circles.

The court set aside an arbitral award made in the long-running dispute between Raytheon Systems Limited (RSL) and the Secretary of State for the Home Department (the Authority) in connection with the e-Borders programme.

The court's decision was surprising. It was inconsistent with the usual approach of the English courts, which have a long-established "non-interventionist" approach to arbitration matters. The decision has led some to consider whether London remains a "safe" seat for parties to arbitrate their disputes.

The dispute

e-Borders was a programme for the establishment of a state-of-the-art immigration control system for the UK. It was terminated by the Home Secretary in July 2010 on the grounds of delay and missed milestones.

The underlying dispute was referred to arbitration in August 2010. The arbitration was subject to London Court of International Arbitration (LCIA) rules of arbitration and was seated in London. The Authority argued that it had lawfully terminated the e-Borders contract and claimed in excess of US$ 300 million in damages from RSL. RSL disputed the termination and made substantial counterclaims against the Authority.

In August 2014, the tribunal held that the termination was unlawful and awarded £185.6 million plus interest and costs to RSL (the Award). The Authority challenged the Award under section 68(2)(d) of the Arbitration Act 1996. It sought an order that the Award be set aside on the ground of serious irregularity, on the basis that the Award failed to deal with all of the issues in dispute. On 19 December 2014, Mr Justice Akenhead upheld the challenge to the Award whilst reserving judgment on the effect of that finding. On 17 February 2015, Mr Justice Akenhead handed down his reserved judgment, setting the Award aside in its entirety, with the effect that the dispute would have to be re-arbitrated before a different arbitral tribunal.

Mr Justice Akenhead gave permission to appeal. Both parties submitted appeals to the Court of Appeal, but on 26 March 2015 the matter was settled out of court. The Authority agreed to pay RSL £150 million in full and final settlement of its claims.

Rob Lambert,
Partner, Clifford Chance
London

As the case settled, the outcome of the appeals to the Court of Appeal must remain a matter of speculation. But the court's approach has been the subject of intense criticism from commentators.

The court's decision in the e-Borders case is open to question on a number of grounds:

1. Were issues actually overlooked by the tribunal? The court held that the tribunal had overlooked the "critical issue" of whether RSL was wholly or substantially to blame for the missed milestones upon which the Home Secretary's decision to terminate the contract was based. But RSL disputed this, on the basis that the tribunal's Award contained a clear and explicit explanation as to why that particular issue did not arise for determination, given the tribunal's findings on other issues. In particular, the Award held that the Home Secretary had failed to give any consideration to which party was to blame for the missed milestones; and that in and of itself was sufficient to render her decision unlawful.
2. Did the "overlooked" issue make any difference? The tribunal found that the Home Secretary had committed five separate breaches of the contractual requirements with which she was required to comply before she could lawfully terminate the contract, only one of which was challenged by the Authority. This left four breaches unchallenged, all of which supported the tribunal's finding that the termination was unlawful.
3. Was the "overlooked" issue actually put to the tribunal? The court concluded that an issue had been "overlooked", but RSL maintained that it had in fact never even been put to the tribunal during the course of the arbitration.
4. Was the remedy granted by the court justified? There is a serious question as to whether the decision to set aside the Award in its entirety was correct as a matter of law, given the statutory presumption in favour of remission of the Award to the same tribunal set out in section 68(3) of the Arbitration Act 1996.

One of the reasons parties often cite for choosing to arbitrate is that the arbitration process provides certainty and finality of outcome.

The effect of the court's decision in the e-Borders case was to deny the parties that outcome. Having spent four and a half years and many tens of millions of pounds in the arbitration process, the parties were, in effect, back to "square one".

Impact on English arbitration?

The court's decision in the e-Borders case may give succour to losing parties and encourage them to mount challenges to arbitral awards on the basis that issues have been "overlooked".

There is a strong prospect that the English courts in subsequent cases will confine Mr Justice Akenhead's decision to its own facts and follow the pro-arbitration approach that has generally been taken in other cases. The arbitration community in England will be hoping that is the case. If that prediction turns out to be wrong and the English courts begin to take a more interventionist approach as it did in e-Borders, there is a risk that parties will "vote with their feet" and consider choosing other more arbitration-friendly jurisdictions as the seat of their arbitrations.

(b) Dealing with witnesses – German prosecutors might investigate

Tim Schreiber

A civil court case in Germany has recently attracted close attention of trial lawyers and also sends a warning signal to the arbitral community as to a party's (or its lawyers') conduct with witnesses. State prosecutors initiated criminal proceedings for the suspicion of false testimony and attempted fraud against witnesses of a German litigant (current and former board members of a major bank) as well as against the party's in-house and external legal counsel who allegedly "prepared" the witnesses.

Tim Schreiber
Partner, Clifford Chance
Munich

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Whilst recent press coverage suggests that the prosecutors might have a tough act in proving actual wrongdoing, it is worthwhile to consider the alleged practices prompting the suspicion of the prosecutors. The lawyers are said to have prepared for the witnesses a storyline document and a Q&A questionnaire with suggestions for answers based on the records. They allegedly gave briefings to witnesses to help them preparing their interviews, and witnesses were allegedly trained in mock trials. The fact that some witnesses later corrected previous statements and allegedly construed documents "wrong in simultaneity" in court exposed this practice to the suspicion of criminal conduct.

What might have contributed to the prosecutors taking action is that the alleged measures are rather unusual in German domestic civil litigation. Hence, the inherent risks also extend to international arbitration where parties and lawyers meet from jurisdictions in which such witness preparation techniques might even be customary. The degree of acceptable witness preparation indeed widely varies:

"[A]n Australian lawyer felt from his perspective it would be unethical to prepare a witness; a Canadian lawyer said it would be illegal; and an American lawyer's view was that not to prepare a witness would be malpractice."[6]

6 K.L.K. Miller in 'Zip to Nil?: A Comparison of American and English Lawyers' Standards of Professional Conduct' (1995); p. 199-223, 204.

The disparity between common law and civil law legal cultures may even be greater:

"The United States and Germany, in their respective legal traditions, offer what might be the two extremes regarding the rules related to witness preparation in national courts."[7]

Whilst it is hardly possible to entirely exclude any potential for conflicts, the following propositions appear to be useful to mitigate the risks of dealing with witnesses in international arbitration:

1. The IBA Guidelines on Party Representation and the LCIA Annex on General Guidelines for the Parties' Legal Representatives contain some guidance on witness preparation. Both sets of guidelines, however, remain subject to applicable mandatory laws.
2. All counsel should be aware of the diverging manifestations of lawyer ethics or professional standards at the seat of arbitration: local lawyer regulations may apply directly (also) to the actors in an international arbitration, and the conduct with witnesses may be subject to (local) scrutiny in court proceedings related to the arbitration which are often commenced at the arbitral seat.
3. The permitted degree of witness preparation should be discussed or even laid down in the procedural framework of an international arbitration – just like the procedure for interviewing the witnesses. This would grant each party an equal opportunity to "prepare" witness testimony under varying ethical/professional rules, and limit the risk that testimony of a witness is ignored if the arbitral tribunal takes a strict stance and considers "well prepared" as "over-rehearsed".
4. The more counsel assist a witness in preparing for his/her testimony, the more counsel expose themselves to the suspicion that they contributed to, or even incited, criminal conduct if the witness testimony turns out to be intentionally false. The (local) subjective conditions for criminal liability in such cases may be lower than expected.

Juliette Luycks
Counsel, Clifford Chance
Amsterdam

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(c) Changes afoot? The new arbitration law in the Netherlands

Juliette Luycks

On 1 January 2015, the new Dutch Arbitration Act and the new Arbitration Rules of the Netherlands Arbitration Institute (NAI) both entered into force. Some of the key changes that apply to arbitral proceedings initiated as from 1 January 2015 are set out below.

7 Brian Cooper, 'Ethics for Party Representatives in International Commercial Arbitration: Developing a Standard for Witness Preparation', Georgetown Journal of Legal Ethics 22 (2009), 781.

1. The possibility of E-arbitration.
2. Parties can agree to appoint an independent third party (for example, an arbitral institution) to rule on challenges of arbitrators instead of the court. The NAI has installed the NAI committee for these purposes.
3. Consolidation of arbitral proceedings: if agreed by the parties, a third person can consolidate an arbitration pending in the Netherlands with an arbitration pending in or outside the Netherlands. If the NAI Rules are applicable to both arbitral proceedings, the third person to be appointed by the parties or the NAI may order consolidation of arbitral proceedings pending in the Netherlands with other arbitral proceedings (either in the Netherlands or abroad). Consolidation remains an opt-out clause.
4. Provisions regarding provisional relief and summary arbitral proceedings (also referred to as emergency arbitration). This is not a change but reworded provisions set out clearly the possibilities. Under the new Act, parties to arbitral proceedings can request the arbitral tribunal that decides on the merits to order provisional measures, provided that such measures are related to the claims on the merits. Parties can also agree to appoint a separate arbitral tribunal to deal with provisional measures in case of urgency and irrespective of whether arbitral proceedings on the merits are pending. The arbitral tribunal's decision, whether in main or in summary arbitral proceedings, is rendered in the form of an award, unless otherwise provided by the tribunal, and is thus in principle enforceable. By referring to the NAI Rules in the arbitration agreement, parties agree to this possibility of bringing summary arbitral proceedings to a separate arbitral tribunal, provided the seat of the arbitration is in the Netherlands. Unlike the International Chamber of Commerce (ICC) and LCIA Rules, the NAI Rules do not require arbitral proceedings on the merits to be brought at the same time or after the summary arbitral proceedings are initiated.
5. Preliminary witness and expert hearings: as with provisional relief and interim measures, the starting point is that a party must apply to the arbitral tribunal for preliminary witness examination, preliminary expert report or preliminary site visit. When the requested measure is too urgent to await a tribunal's decision, a party can request the court to order a preliminary witness examination or a preliminary export report.
6. Post-arbitral award actions: the length of annulment proceedings and of enforcement proceedings of foreign arbitral awards before Dutch State courts has been reduced by giving the Court of Appeal jurisdiction in such matters. If none of the parties to the arbitration is a consumer, parties may exclude appeal to the Supreme Court from a decision on the annulment and thereby limit these proceedings to a single instance.
7. Consumer protection in the Dutch Civil Code: arbitration clauses included in general terms and conditions are unreasonably onerous and therefore voidable, unless the consumer is granted a month from the written notice of the other party that it relies on the arbitration clause, to choose to have the dispute settled by the State court.

The new provisions allow parties to further tailor their arbitration agreements and arbitral proceedings to their specific needs, ensuring a fully fledged legal process with the required safeguards. The new Dutch Arbitration Act ensures that the Netherlands maintains its position as an attractive seat for international arbitration.

Bartosz Krużewski
Partner, Clifford Chance
Warsaw

(d) Poland speeds up court procedure for the enforcement and set-aside of arbitral awards

Bartosz Krużewski and Adelina Prokop

2016 brings reform in Poland that will make challenge and enforcement procedures quicker. Setting aside and enforcement actions are now recognised as one-instance proceedings by the Court of Appeal (with appeal to the Supreme Court permitted only in extraordinary circumstances). Before now, post-award court proceedings were potentially subject to two sets of proceedings and, in addition, the final decision could in some cases be appealed

The new Dutch Arbitration Act ensures that the Netherlands maintains its position as an attractive seat for international arbitration.

all the way to the Supreme Court. This was similar to the procedures still followed in other countries, such as in the Czech Republic and Finland. The changes to the Polish Arbitration Law came into force on 1 January 2016 and provide as follows:

1. Set-aside proceedings are decided by the Court of Appeal in one-instance proceedings and must be brought within two months (down from three months). The Court of Appeal's judgment can be questioned only by way of an extraordinary cassation appeal to the Supreme Court. Grounds for granting a leave for such an appeal are very limited (e.g. there must be a legal issue which has not yet been resolved in the case law or some divergent lines of case law).
2. Actions to enforce an arbitral award are also heard in one-instance proceedings before the Court of Appeal. The Court of Appeal's judgment can only be appealed to the same court in the case of domestic arbitral awards and to the Supreme Court (in the case of foreign arbitral awards). Grounds for granting a leave for such an appeal are the same as with the set-aside proceedings. Limiting the post-award proceedings in this way is likely to significantly reduce the average time span of such proceedings, which used to last up to 3 years. Similar mechanisms are already in place in such jurisdictions as France, Germany, Sweden, Italy and the Netherlands (see section 2.2 (c) on the changes in the Netherlands above). The arbitration community in Poland hopes that the recent reform to the Polish Arbitration Law will make Poland an even more attractive place for conducting arbitration.

2.3 The Americas

(a) Brazil's arbitration regime grows steadily stronger

Ignacio Suarez Anzorena (assisted by Juan Manuel Rey)

On 27 May 2015, Brazil's amendments to its Arbitration Law (Law No. 9.307/96) (the BAL) were enacted. The amendments, contained in Law 13.129/15, entered into force on 27 July 2015 (the Amendments). The Amendments formalise several arbitral practices that had not been expressly recognised legally, as well as introduce several provisions previously recognised in other bodies of law.

A number of the Amendments promote a better environment for arbitration in Brazil:

1. An express authorisation for the Public Administration to resolve certain disputes through arbitration.
2. The institution of the "*carta arbitral*", a confidential way of communicating between the arbitrators and the courts to ensure cooperation.
3. Provision to allow parties to request the court to supplement the arbitral award in cases where the tribunal is silent on issues presented to arbitration.
4. Clarifications that all shareholders are bound by any arbitration clause found in a company's by laws (although permitting any shareholders who do not consent to the arbitration provisions to leave the company).
5. An express provision authorising arbitrators to issue partial awards.
6. The possibility of choosing arbitrators that are not listed on specific rosters in institutional arbitration under certain circumstances.

The Amendments also reflect the provisions of Decree 8.465/15 which permits the arbitration of certain port related disputes between certain federal public entities and private entities in Brazil on the following bases: (i) arbitration to be resolved according to law, (ii) under Brazilian law, (iii) seated in Brazil; (iv) held in Portuguese; (v) public; and (vi) specific cost provisions, amongst others.

Some other amendments are perhaps less positive for the development of arbitration and it remains the case that Brazil's arbitration environment lags behind other seats of arbitration which

Brazil is slowly but surely reforming its regulatory landscape to ensure that arbitration is protected. With the uncertainty that lies ahead for the Brazilian economy, all attempts to advance the international arbitration environment in Brazil should be welcomed.

Ignacio Suarez Anzorena
Partner, Clifford Chance
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are internationally recognised as supportive of arbitration. However, Brazil is slowly but surely reforming its regulatory landscape to ensure that arbitration is protected. With the uncertainty that lies ahead for the Brazilian economy, all attempts to advance the international arbitration environment in Brazil should be welcomed.

(b) Enforcing investor-State ICSID awards under New York Law

Ignacio Suarez Anzorena (assisted by José García Cueto)

The ICSID Convention aims to prevent review of ICSID awards by national courts at the enforcement and recognition stage. However, the ICSID Convention does not specify the process for converting an ICSID award into a US enforceable federal court judgment.

Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela[8] relates to the recognition and conversion of a US$ 1.6 billion ICSID award rendered in respect of the expropriation of ExxonMobil entities' (Claimant) oil projects in Venezuela by the Bolivarian State of Venezuela (Defendant). The Claimant argued that the award should be recognised and converted on an *ex parte* basis pursuant to the relevant New York enabling statute. The Defendant objected on the basis of two main arguments. Firstly, that the Claimant should bring a plenary action as the enabling New York statute did not permit *ex parte* recognition. Secondly, it argued that the applicable statute for the recognition of an award is the Foreign Sovereign Immunities Act (FSIA) which contains special procedures relating to the enforcement of awards in the US against foreign States and allows foreign States to enjoy various immunities in certain circumstances.

On 13 February 2015, rejecting the Defendant's arguments, the US District Court for the Southern District of New York held that under New York law, (i) an ICSID award creditor has the option of seeking recognition either *ex parte*, pursuant to Article 54 of the New York Civil Practice Law and Rules, or by filing a plenary action; (ii) ICSID awards cannot be subject to review by the court, as these awards are subject to ICSID review alone; and (iii) that the sovereign immunities under the FSIA have no application in this case and provide no defence to the recognition of ICSID awards. However, the Court noted that the FSIA's provisions on execution will apply during execution proceedings.

The Court's judgment is pending appeal in the US Court of Appeals for the Second Circuit. However, recently the US government has expressed its objection to this ruling. In March 2016, the US government filed an *amicus curiae* brief arguing that the FSIA always applies to the recognition and enforcement of awards against a foreign State in the US, including in relation to ICSID awards. If the District Court's judgment is overturned on this basis, it may prove harder and take longer to enforce ICSID awards against foreign States.

2.4 Russia

(a) Redefining the rules of the game

Timur Aitkulov, Julia Popelysheva

Anyone trying to succinctly describe the changes that have taken place and are underway in the sphere of arbitration in Russia and the ex-USSR countries over the last several years inevitably faces a dilemma of too many choices. Extensive revisions of the

Anyone trying to succinctly describe the changes that have taken place and are underway in the sphere of arbitration in Russia and the ex-USSR countries over the last several years inevitably faces a dilemma.

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8 87 F. Supp. 3d 573 (S.D.N.Y. 2015).

legislation regulating arbitration in Kazakhstan (check); Accession to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 by Tajikistan (check); Re-defining the rules of arbitrability of and jurisdiction over disputes arising out of Public Private Partnerships (PPP) State procurement and contracts in Russia (check).

While it is impossible to say with certainty which changes ought to be considered negative developments and which should be considered positive, we highlight those that, in the authors' subjective view, will shape the landscape of international and domestic arbitration in Russia in the foreseeable future.

The new law on arbitration (domestic arbitration)

The Federal Law On Arbitration in the Russian Federation No. 382-FZ and a set of corresponding amendments to other legislative acts were enacted on 29 December 2015. The above laws will enter into force on 1 September 2016, with the exception of certain provisions, such as rules concerning registration of arbitral institutions and enforceability of arbitration clauses in respect of certain types of disputes (which will come into force on later dates).

The law is intended to regulate all aspects of domestic arbitration, starting from the arbitration agreement and the formation of an arbitral tribunal (for example, stipulating that, in the absence of agreement by the parties to the contrary, a sole arbitrator or at least one member of the panel should hold a degree in law), to the rendering of the arbitral award and grounds for its annulment. Importantly, certain provisions of the law, including a requirement that arbitral awards be deposited, will apply to international arbitrations seated in Russia.

A significant part of the new law is devoted to rules of formation and activities of permanent arbitral institutions in the Russian Federation. For instance, such activities will only be possible if the arbitral institution is granted a special permit by the Russian government. Foreign arbitral institutions that apply for such a permission should have a "widely recognised international reputation".

Another significant feature of the new law is that it puts an end to discussions concerning the arbitrability of so-called 'corporate disputes'. Ad hoc arbitration is not allowed for such disputes. In order to administer resolution of the vast majority of corporate disputes (save for disputes over legal title to shares and participatory interests and records in share registers certifying such title) the permanent arbitral institution in question must have

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a separate set of arbitration rules for corporate disputes. The seat of such arbitrations can only be in Russia.

Validity and enforceability of optional clauses in Russia

The question of the validity of optional jurisdiction clauses has been debated in Russia ever since the notorious decree of the Supreme Arbitrazh Court of the Russian Federation (formerly the highest instance of the courts adjudicating commercial disputes) was rendered on 19 June 2012 in *Russian Telephone Company v. Sony Ericsson.*[9] In what can be easily regarded as one of the most vaguely worded decisions of the SAC RF over the past decade, the court stated that an asymmetric optional clause must be balanced by converting it into a symmetric clause that allows both parties the same choice of venue.

The ambiguous wording used by the SAC RF gave rise to a plethora of court decisions where lower-instance courts found that optional jurisdiction clauses (even symmetric ones) are invalid (and consequently, awards rendered on the basis of such clauses could be denied recognition and enforcement in Russia).

This approach of the lower courts was not upheld by the Supreme Court of the Russian Federation (currently the highest instance of the Russian courts). In its decree in, *Piramida v. BOT*,[10] the Supreme Court confirmed that a symmetric optional clause is a valid and an enforceable arrangement between contractual parties, thus also confirming that optionality per se does not render the clause invalid.

9 (SAC RF) No. 1831/12.
10 [2015] 310 ES14 5919.

Validation of arbitration institutions established by major commercial entities in Russia

On 18 November 2014, the Constitutional Court of the Russian Federation (CC RF) rendered Decree No. 30-P in which it clarified the scope of application of the principle of objective impartiality in international commercial arbitration.

In its Decree the CC RF ruled that the SAC RF incorrectly interpreted the law when it refused to enforce an arbitral award that was rendered in favour of Sberbank (a major Russian bank) by an arbitral tribunal formed under the rules of the arbitration institution Centre for Arbitration Proceedings. The reason cited for denying enforcement of the award was that Sberbank is one of the founders of the non-profit organisation at which the Centre for Arbitration Proceedings was founded. The SAC RF had found that this fact alone was sufficient to deny enforcement of the arbitral award, claiming that its enforcement would contravene with Russian public policy.

In its application to the CC RF, Sberbank (represented by Clifford Chance Moscow) contended that such an approach effectively constituted an additional restriction on the activities of arbitral tribunals which is not established by law and therefore cannot be imposed by the courts; the courts should have instead assessed the independence and impartiality of each member of the tribunal, and only in the event that the challenging party had made a proper and timely objection in this regard. The CC RF agreed with Sberbank's arguments.

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Russia: New regulations applicable to jurisdictional immunities of foreign States and State-owned entities

On 3 November 2015, the Federal Law On Jurisdictional Immunities of Foreign States and Foreign States' Property in the Russian Federation No. 297-FZ (Law On Immunities) was enacted. It was almost unanimously reported in the media as being a law that was passed to circumvent enforcement of a specific award against the assets of the Russian State and legal entities controlled by the Russian government.

A detailed analysis of the Law On Immunities shows that its provisions do not stray too far from provisions of the current legislation of other States.

However, a detailed analysis of the Law On Immunities shows that its provisions do not stray too far from provisions of the current legislation of other States. For example, the approach of the Law on Immunities is predominantly in line with provisions of the European Convention on State Immunity (Basel, 16 May 1972), to which the Russian Federation is not a party.

More specifically, the Law On Immunities sets out rules applicable to foreign States' acceptance of the jurisdiction of a Russian court for the purposes of participating in Russian court proceedings, and it also lists instances where foreign States are deemed to have waived the relevant immunity. Importantly, such a waiver cannot be deemed a simultaneous waiver of immunity against interim measures and enforcement of the respective court act.

The Law On Immunities includes provisions establishing that a state entity has no immunity against interim measures if it has expressly agreed to the adoption of such measures and set aside or otherwise designated assets against which enforcement may take place should the claim against it be granted.

Further, the Law On Immunities sets out rules allowing it to be determined whether a foreign State has immunity in respect of enforcement of a court judgment in the Russian Federation. For instance, it expressly states that foreign States do not enjoy immunity in respect of property that is used or expected to be used for purposes unrelated to the "exercise of sovereign powers".

A much-debated part of the Law On Immunities is its clause 4, establishing the principle of reciprocity. In accordance with this principle, a foreign State's jurisdictional immunities established under the Law On Immunities may be limited if it is found that the Russian Federation or its property does not enjoy jurisdictional immunities in that foreign State. The practical implications of this provision have yet to be seen.

A much-debated part of the Law On Immunities is its clause 4, establishing the principle of reciprocity. In accordance with this principle, a foreign State's jurisdictional immunities established under the Law On Immunities may be limited if it is found that the Russian Federation or its property does not enjoy jurisdictional immunities in that foreign State. The practical implications of this provision have yet to be seen.

2.5 Middle East

(a) Enforcement: potential for growth in the Middle East?

James Abbott

The enforcement of both domestic and foreign arbitral awards in the Middle East represents an area of law with significant potential for growth. Although in the past ten years progress in this regard has been measured and there remains much work to do to cement the Middle East as an arbitration-friendly region, there have been numerous positive advancements.

James Abbott
Partner, Clifford Chance
Dubai

The new arbitration law reflects international best practice in that it provides for clearer enforcement of arbitration agreements and awards, as well as strengthening principles of tribunal independence and procedural powers. However, caution should still be exercised with respect to arbitration in the Kingdom because it remains to be seen how the new arbitration law will be applied in practice.

The two factors which are key to the development of a pro-arbitration environment are a solid arbitration law and a supportive judiciary. These elements exist throughout the Middle East. In 2012 the Kingdom of Saudi Arabia issued a new standalone arbitration law inspired by the UNCITRAL Model Law. The new arbitration law reflects international best practice in that it provides for clearer enforcement of arbitration agreements and awards, as well as strengthening principles of tribunal independence and procedural powers. However, caution should still be exercised with respect to arbitration in the Kingdom because it remains to be seen how the new arbitration law will be applied in practice.

In the United Arab Emirates (UAE), great strides have been made with respect to enforcement in the Dubai International Financial Centre (DIFC) and consequently on-shore in Dubai. In the

In the noteworthy decision of *Banyan Tree Corporate PTE Ltd v Meydan Group LLC* the DIFC Court confirmed that it has jurisdiction to recognise and enforce arbitration awards irrespective of the seat. In other words, awards issued in arbitration proceedings which have no connection to the DIFC can be recognised and enforced in the DIFC.

noteworthy decision of *Banyan Tree Corporate PTE Ltd v Meydan Group LLC*[11] the DIFC Court confirmed that it has jurisdiction to recognise and enforce arbitration awards irrespective of the seat. In other words, awards issued in arbitration proceedings which have no connection to the DIFC can be recognised and enforced in the DIFC. It may then be possible to enforce that award in the Dubai courts through the expedited process set out in the Judicial Authority Law.[12] For those in possession of either a domestic or foreign award which requires enforcement in Dubai, this decision paves the way to avoid commencing an action for enforcement in the Dubai Courts, which can take upwards of two years.

Continuing with their trend of innovation, the DIFC courts also enacted Practice Direction No. 2 of 2015 earlier this year which allows parties to arbitrate what is known as Judgment Payment Disputes. The effect is that in certain circumstances, judgment creditors in possession of DIFC court judgments can agree with judgment debtors to arbitrate the judgment debtors' failure to pay the judgment sum, the ultimate desired result being the issue of an arbitration award capable of recognition and enforcement under the New York Convention. In reality, the agreement to "convert" a judgment into an arbitration award will be made up-front in the relevant contractual documents between the parties (it being unlikely that a paying party will agree to this mechanism once a payment liability has arisen). The intention behind the mechanism is to improve the enforceability prospects of DIFC court judgments both within the UAE (outside Dubai) and beyond. This pioneering scheme was developed in view of the limited number of international treaties providing for the reciprocal enforcement of foreign judgments in the UAE.[13] The scheme brings with it the advantage of a wider enforcement net by virtue of the New York Convention.

The UAE is also working hard to finalise and enact a new independent Federal Arbitration Law. Based on the UNCITRAL Model Law, it is hoped that the Federal Arbitration Law will mirror international best practice and provide further certainty to parties seeking to arbitrate on-shore in the UAE.

Finally, the on-shore courts in both the UAE and Qatar have continued to shrug off the historic uncertainties regarding the enforcement of both foreign and domestic arbitration awards. In the recent past, the higher courts of both countries have sought to ensure both the consistent and precise distinction between domestic and foreign arbitral awards and the accurate application of the New York Convention to foreign awards. The UAE is also working hard to finalise and enact a new independent Federal Arbitration Law. Based on the UNCITRAL Model Law, it is hoped that the Federal Arbitration Law will mirror international best practice and provide further certainty to parties seeking to arbitrate on-shore in the UAE.

The current flavour in the region is that although advances have been made, the capacity for the enforcement environment to improve and grow remains ever-present. Most importantly, the drive to implement improvements is equally strong.

11 ARB 003/2013.
12 Dubai Law 12 of 2004 (as amended by Dubai Law 16 of 2011).
13 There are, for example, treaties with India and France and the wider GCC region. The DIFC, as a court of the UAE, is also bound by these treaties.

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International Arbitration, Chambers UK 2017

"Market commentators single out Ignacio Suarez Anzorena of Clifford Chance US LLP. They note: "He is a very solid and experienced practitioner.""

International Arbitration, Chambers Latin America-wide 2016

"Their bench strength and knowledge of our company are important. They work seamlessly with our in-house counsel and understand the need to be concise and quick."

Arbitration (International), Chambers Global 2015

Band 1 for International Arbitration Europe-wide

Arbitration (International), Europe-wide, Chambers Europe-wide 2014 and 2015

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Tier 1 for Dispute Resolution, UAE

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Regional International Arbitration: Legal 500 Asia-Pacific 2015

"Top-notch law firm" Clifford Chance fields international arbitration practices across the Asia Pacific region, which 'work well together, providing the best team for each client's specific needs'. It has particular strength in depth in Hong Kong and mainland China, where Cameron Hassall heads the 'absolutely top-rate' Greater China practice. The group recently represented Astro in the circa $130m enforcement of SIAC awards in Hong Kong against an Indonesian conglomerate. Equally highly regarded are practitioners in Singapore, including Nish Shetty, Paul Sandosham and Harpreet Singh Nehal SC, who are not only experienced in domestic-focused arbitrations spanning a broad range of industries, but also matters involving parties from jurisdictions throughout the region, including India, Malaysia and Thailand.

Elsewhere, counsel Thomas Walsh is the name to note in Seoul, while Sam Luttrell, who has experience in sovereign state arbitrations across the Asia Pacific region, is a key contact in Perth."

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"A fantastic team. They know business very well. We trust them a lot because they not only show their knowledge of legal issues but also give direction to the business."

3. Investor-State Arbitration

3.1 Overview

Jessica Gladstone

There has been a steady growth in the use of formal dispute resolution by States over the past decade shown, in part, by increased use of the International Court of Justice (ICJ) and the Permanent Court of Arbitration (PCA). For example, having heard only 47 contentious cases during its first 50 years (1948 – 1998) the ICJ has already heard more than that again since 1998. The PCA saw 128 cases in 2014 (39 of which had been initiated the same year) compared to only 7 in 2002, with even growth in between. Amongst these was the *Yukos*[14] case, in which the largest arbitral award ever was rendered against Russia following breaches of its obligations under the ECT.

This increased engagement has been coupled with increased scrutiny by States of the dispute resolution mechanisms which they agreed to. This is particularly evident in relation to investor-State arbitration where cases keep on rising; at ICSID alone, 52 cases were filed last year – the highest number ever recorded at the institution. As a consequence, some States have threatened to resile from investor-State dispute settlement (ISDS) and from the bilateral investment treaties (BITs) that provide investors with an avenue of redress against States (as seen in the cases of Indonesia, discussed below and most recently, Poland). Others, such as India, are significantly reconsidering the terms on which they will make protections available to investors.

That said, new treaties are being agreed. Most importantly, the Trans-Pacific Partnership which was agreed last year contains investment protection provisions. The combined economies of the 12 signatory States (Singapore, Brunei, New Zealand, Chile, the US, Australia, Peru, Vietnam, Malaysia, Japan, Mexico and Canada) account for 40% of global gross domestic product. While the new treaties being agreed demonstrate that States are broadly comfortable with the provision of investor protection and ISDS, there is a trend towards tailoring the scope of these

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agreements to better meet the needs of the State hosting the investment. This is seen most vividly in the suite of treaties that the EU is currently negotiating (discussed further below) which seeks to limit the protection available to investors and proposes significant reform of the scope and nature of ISDS.

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3.2 Mixed messages from Indonesia: cancelling BITs but joining the TPP?

Sam Luttrell (assisted by Peter Harris)

In 2014 Joko Widodo (known as Jokowi) narrowly defeated nationalist candidate Probowo Subianto in the presidential election. In what was reported to be a reaction to the commencement of international arbitration proceedings against Indonesia by Churchill Mining (UK) and Planet Mining (Australia) – in which proceedings Clifford Chance is counsel to the claimants – former President Yudhoyono announced the government's intention to terminate the Netherlands-Indonesia BIT and review all of Indonesia's other BITs.

While many observers expected President Jokowi to suspend this review and do more to promote foreign investment, the Jokowi administration has instead sent rather mixed signals to the investment community. On the one hand, the Indonesian Government has signalled its intention to accede to the TPP,

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14 [2014] 59 EHRR SE12.

the "mega FTA" between 12 nations of the Pacific Rim which will include investment protection provisions backed by an ISDS clause. On the other hand, the Indonesian Government has gone ahead with its BIT review, and has terminated (or elected not to renew) nine further BITs – these being the country's treaties with Argentina (mutual termination), China, Laos, Malaysia, Italy, France, Slovakia, Bulgaria and Egypt. The Indonesian government has also announced its intention to terminate a further 12 BITs in 2016.

A number of sources and commentators have linked the cancellation of these BITs to the spike in ICSID claims against Indonesia, examples being the claims by Century Bank, Newmont, Churchill and Planet. Difficult to reconcile with these developments is the fact that Indonesia maintains ambitious targets for attracting foreign investment: Indonesia's Investment Coordinating Board (BKPM) set a target of Rp 450 trillion (US$ 38 billion) in June 2014 and increased this target to Rp 519.5 trillion (US$ 38.37 billion) in 2015. However, it is worth noting that Singapore, Malaysia and Japan were the three biggest Foreign Direct Investment (FDI) contributors in Indonesia during the period of BIT cancellation, and investors from each country remain eligible for ISDS-backed investment protection under other treaties – in the case of Singapore and Malaysia, through the ASEAN Comprehensive Investment Agreement (ACIA); in the case of Japan, through the Japan-Indonesia Economic Partnership Agreement.

With Indonesia's investment treaty program in a state of flux, foreign companies with current or planned investments in Indonesia need to think outside the "BIT box". While most of Indonesia's BITs contain "sunset provisions" which give existing investments protection for a period of between 10 and 15 years after termination of the treaty, this may not be enough for investors committing capital to long-term projects. The main alternative is the ACIA, a multilateral investment treaty that entered into force in Indonesia in 2012. The ACIA contains similar substantive protections to those found in most of Indonesia's BIT: it protects ASEAN investors from unlawful expropriation, unfair or inequitable treatment and discriminatory measures. Crucially, these protections are backed-up by an ISDS scheme that allows for various forms of international arbitration, including arbitration at ICSID.

However, the ACIA is not as "investor friendly" as many of Indonesia's BITs. For example, the ACIA has more complex "gateway requirements" than most of Indonesia's BITs. One of the key points is that, to be entitled to ACIA protection, an investor must have "substantial business operations" in the ASEAN State from which it makes its investment in Indonesia. In order to satisfy this requirement, large multinational businesses are increasingly

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using existing ASEAN-based subsidiaries to hold their investments in Indonesia, rather than establishing new vehicles (which was often the approach when BITs were used). Anecdotally, there is evidence that Singapore is seeing an increased capital flow as a result of this practice, which may account for some of the Singapore-to-Indonesia FDI noted above.

Outside the Indonesian context, we are seeing our clients pay more attention to multilateral investment treaties when they plan investments in developing countries. We expect this trend to continue, particularly if the TPP completes the ratification process and enters into force. BITs still offer very favourable protection for investments in many countries and will do for years to come. But there is now reason to believe that multilateralism is emerging as the preferred means for investment promotion and protection, at least in the Asia-Pacific region. Multilateral treaties may, therefore, be a better bet than BITs in the long term.

3.3 The EU's drive to reform ISDS

Audley Sheppard QC (assisted by Anna Kirkpatrick)

The EU is driving reforms to the ISDS system which will alter the landscape of investor-State arbitration in the future. The EU-Vietnam free trade agreement (the EU-Vietnam FTA) agreed in December last year aims to promote sustainable and transparent investment between the countries, to support

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Vietnam's transition to a more competitive economy and underlines the EU's commitment to the ASEAN region. The conclusion of the EU-Vietnam FTA follows on from the agreement of the EU-Canada Comprehensive Economic Trade Agreement (CETA) in 2014 and the EU-Singapore Free Trade Agreement in June 2015. It comes in advance of further negotiation of the hugely debated and highly controversial Transatlantic Trade and Investment Partnership (TTIP) which has drawn unprecedented attention from stakeholders regarding both the extension of substantive protection to investors and the promise to grant investors access to ISDS.

The EU-Vietnam FTA provides for standard types of investment protection. Though the detail merits close review, broadly speaking, the EU-Vietnam FTA follows CETA in seeking to limit and/or clarify investor protection – a trend which is continued in the current TTIP draft. For example, both CETA and the EU-Vietnam FTA contain a closed list on which the fair and equitable treatment standard may be breached. To qualify for protection as an "investor" under the EU-Vietnam FTA, CETA and the EU-Singapore deal, a legal entity will have to demonstrate substantial business activities in the territory of which it claims to be a national – preventing mailbox companies from taking the benefit of the treaty's protections. These deals also include transparency features by rendering arbitration subject to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

Where the EU-Vietnam FTA creates precedent is in its ISDS mechanism. The typical ISDS mechanism provides an option for final and binding dispute resolution through international arbitration by a three person tribunal appointed on an *ad hoc* basis for the dispute at hand, with a significant degree of input from the parties who typically choose one arbitrator each. The resulting decision can be refused enforcement or annulled in limited circumstances only – creating a system where relative certainty could be placed in the outcome of the tribunal. This was first adopted in the late 1960s and has become a standard option for ISDS in investment agreements ever since.

This has been re-imagined in the EU-Vietnam FTA which provides instead for a two-tier mechanism comprising a Tribunal and an Appeal Tribunal, referred to as an Investment Tribunal System (ITS).

The ITS establishes two standing tribunals (of 15 members at first instance and 6 in the appellate tribunal). The members of each tribunal will be appointed one third from the EU on the one hand and Vietnam on the other, with the remaining third appointed from third States. Members are required to have expertise in public international law. Experience in the resolution of investment or trade disputes and international investment and trade law is desirable. Whilst it is not specified that the tribunal members should be judges, they must have qualifications required for an appointment to judicial offices (and for the appeal level, the "highest judicial offices" in their respective countries). From these standing tribunals, tribunals of three will be appointed to hear each case through the use of lot and rota systems – again with an even balance of nationalities represented on the tribunal. The parties to the dispute will not have input into the appointment process.

The ITS mechanism substantially mirrors the EU's proposal of an Investment Court System (ICS) provided for in the TTIP circulated late last year and underlies the EU's calls announced in September 2015 for a new permanent multilateral investment court to govern EU related investment disputes in the future. The EU's innovative policy for reform of ISDS has in part been driven by the public's concerns that the current mechanism comprises a system of private justice that lacks transparency and that is weighted towards the interests of investors.

The EU-Vietnam FTA is not likely to enter into force before 2018 and it will take some time before a dispute is heard under the ITS system. However, in February 2016, after the EU-Vietnam FTA was concluded with provisions for a two-tier system, CETA's process of legal review, or "legal scrubbing" resulted in the ISDS mechanism being replaced by a two-tier system similar to that in the EU-Vietnam FTA and the draft TTIP. The EU is intent on advancing its two-tier permanent tribunal system where it can. It remains to be seen whether the EU's reforms will significantly improve investor-State arbitration in the ways that it anticipates. But change is on the horizon.

3.4 The rise of fraud allegations in investor-State arbitration

Sam Luttrell (assisted by Peter Harris)

In recent years, there have been a number of ICSID cases in which the respondent State has alleged fraud on the part of the claimant investor. Fraud is a broad church, and can include anything from allegations of forgery of investment permits through to illegal ownership structures. It is largely because of its breadth that, as a defensive strategy, fraud is getting more attention from States.

The upside of this trend is that it has led to the development of international law jurisprudence surrounding the standard of proof for fraud cases in investor-State arbitration and the legal consequences of a finding that fraud has occurred.

As regards the standard of proof, the current practice is to apply a threshold of "clear and convincing" to allegations of fraud. This standard has been applied by ICSID tribunals, notably in *EDF Services v Romania*[15] and *Siag v Egypt*.[16] The same standard was applied by the ICSID tribunal in *Plama Consortium v Bulgaria*.[17] The general view is that, because of the gravity and potential criminal consequences of an allegation of fraud, a higher standard of proof is appropriate. As to the effects of the finding of fraud, there is more variation in arbitral practice. The two main options are (i) that a finding of fraud disqualifies the claim because the investment will not have been made in accordance with national law (and will therefore fall outside treaty protection) and (ii) that the claimant's claims will be inadmissible because the underlying rights were the fruits of criminal wrongdoing.

The downside of this trend is that there remains significant variation in the way tribunals deal with allegations of investor fraud. One of the big issues is the form in which a fraud allegation is made: is it a ground for jurisdictional objection? Or is fraud a merits issue (to be addressed after jurisdiction)? The prevailing view is that fraud is not a jurisdictional issue, but is rather a merits point. However, the consequence of this is that, if a State fails in its objections to jurisdiction, it may then raise fraud as a final impediment to the determination of the merits. This will normally be done as an "admissibility objection".

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15 ICSID Case No. ARB/05/13.
16 ICSID Case No. ARB/05/15.
17 ICSID Case No. ARB/03/24.

The upside of this trend is that it has led to the development of international law jurisprudence surrounding the standard of proof for fraud cases in investor-State arbitration and the legal consequences of a finding that fraud has occurred.

As an allegation of fraud will always be taken seriously by an international tribunal, it has good chances of being "hived off" into a separate phase. This means the claimant investor will have to allocate significant resources to defeat the State's fraud allegation – a cost pressure that has obvious advantages for a State that is looking to delay determination of its substantive liabilities. Further, if an investor is the subject of an allegation of fraud, it may well suffer reputational harm and find it more difficult to raise capital as a result (especially if the investor's shares are publicly traded). In other words, a State may see fraud as a means of opening a settlement discussion.

In order to respond to an allegation of fraud, we find it is necessary to bring in lawyers with skills not usually associated with international arbitration, such a white-collar crime specialists. Clifford Chance has two cases in which we are currently deploying a combined arbitration/white-collar team to meet an allegation of investor fraud, and the results so far have been pleasing. From the forensic perspective, this combination means that the right issues are identified, in conjunction with expert witnesses, as early as possible. From an advocacy perspective, it means that people who specialise in criminal advocacy are at hand to question witnesses (including experts).

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3.5 Court control of investment treaty arbitration in ASEAN

Kabir Singh (assisted by Matthew Brown)

In *Laos v Sanum*,[18] the Singapore High Court overturned the 2013 ruling of an ad hoc UNCITRAL tribunal that found jurisdiction over expropriation claims in an investment arbitration brought under the China-Laos BIT, finding that the treaty did not apply to Macau.

This decision shows one of the key differences between ad hoc arbitration and arbitrations brought before the ICSID, namely national court control. In this case, it was open to the parties to appeal to the courts of the seat (Singapore), whereas if the parties had arbitrated under the ICSID Convention they would not have had this option.

In this case, the court applied a *de novo* standard of judicial review under section 10(3) of the International Arbitration Act, with a full rehearing on parties' factual and legal arguments. In particular, the parties were allowed to adduce fresh evidence if they could show "sufficiently strong reasons why the evidence was not adduced" before the tribunal. Based on this approach, the court was able to consider additional evidence including a diplomatic letter dated 9 January 2014 which set out the PRC Embassy's view that the China-Laos BIT did not apply to Macau.

The decision has attracted widespread comment from the international law community, including the view expressed by certain commentators that judicial reviews of investment tribunal decisions should show greater deference to arbitrators' expertise in treaty interpretation. It has also been suggested that court cases related to the increasing volume of treaty-related disputes in the Asia-Pacific regions may in future may be prime candidates for reference to the SICC which is international in character, permits departure from local rules of evidence and may favour the notion of arbitration as a more "delocalised" form of dispute resolution.

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At a practical level, the decision highlights the need for ASEAN investors to understand the options available to them when commencing treaty arbitration. The countries of the ASEAN bloc are covered by a web of trade and investment treaties, some bilateral and some multilateral. Many of these instruments give covered investors the right to take their host State to international arbitration in the event of a dispute and often provide for a number of different forms of arbitration. Investors need to understand the relative advantages and disadvantages of each option before they elect which path to take. One of the key considerations is the extent to which national courts will be involved in the arbitration. This decision illustrates how significant this factor can be.

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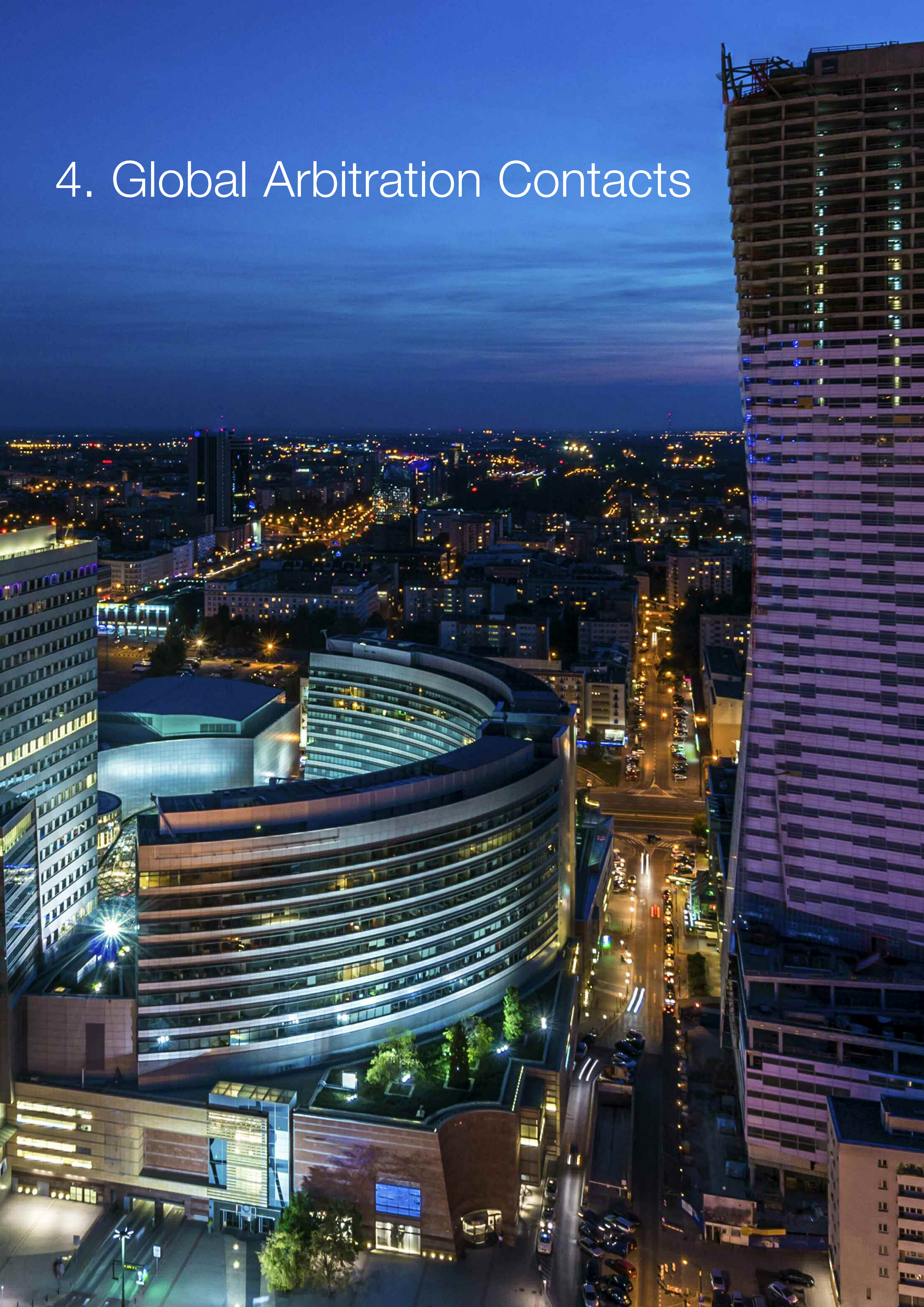
18 [2015] SGHC 15.

4. Global Arbitration Contacts



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