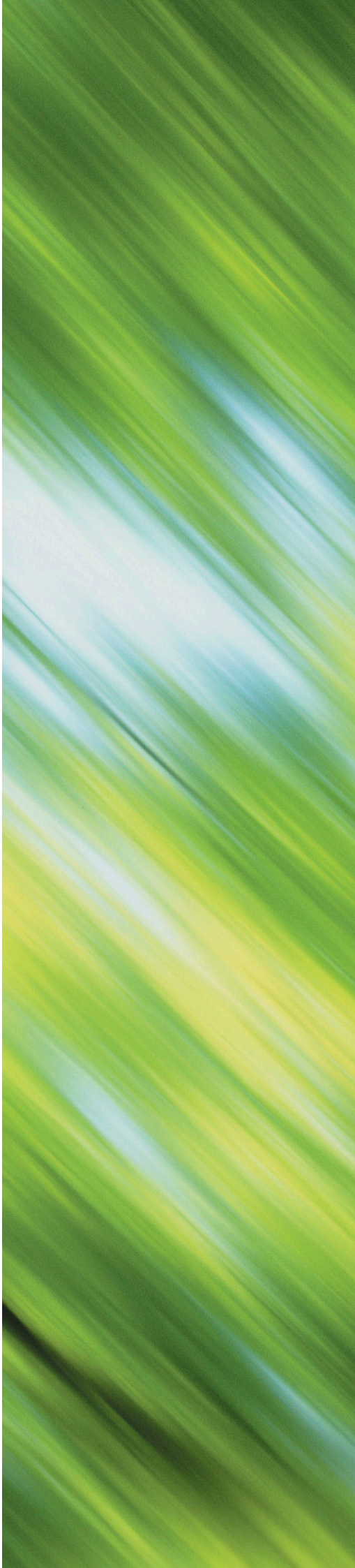
K&L GATES

ARBITRATION WORLD

30TH EDITION SEPTEMBER 2015

IN THIS ISSUE

The articles above may be accessed by clicking on the title.



WELCOME TO THE 30TH EDITION OF K&L GATES' ARBITRATION WORLD

FROM THE EDITORS

Welcome to this special 30th edition of Arbitration World, which, we are happy to announce, marks the publication's 10th anniversary.

In this edition, we are very pleased to include a short interview with the Registrar of the LCIA, Sarah Lancaster, regarding the application of the new LCIA arbitration rules and recent developments in LCIA arbitration. We are also delighted to include, as part of our series of guest contributions from expert witnesses, an article from Philip Haberman and Liz Perks, partners in **Haberman Ilett LLP** (a specialist firm providing accounting and financial expertise only in the context of disputes), exploring recent trends in expert evidence and providing thoughts on potential future improvements.

On the institutional side, we report on the launch of the new Perth Centre for Energy and Resources Arbitration, we compare the emergency arbitration procedures in the new (2015) CIETAC Arbitration Rules against other institutions' procedures and review arbitration under the rules of the Court of Arbitration of Côte d'Ivoire (CACI), one of the major arbitral institutions in West Africa. As for legal developments, we report on the new Delaware Rapid Arbitration Act and the much-anticipated forthcoming UK Insurance Act, as well as comment on a recent decision of the Supreme Court of Victoria, Australia, as to what constitutes a "commercial arbitration". We report on the new International Commercial Arbitration Subsection in Miami, Florida, a new court subdivision devoted to hearing international commercial arbitration matters. We look at the issue of who determines questions of whether a particular dispute is arbitrable in U.S.-seated arbitrations. We summarize the types of disputes that may arise in M&A transactions and the potential benefits and drawbacks of using arbitration to resolve those disputes. We also include an article looking at growth of electronically stored information (ESI) and the potential benefits of new technologies for reviewing ESI in international arbitrations and include an article specifically focused on the growth of predictive coding as a document review solution when dealing with ESI.

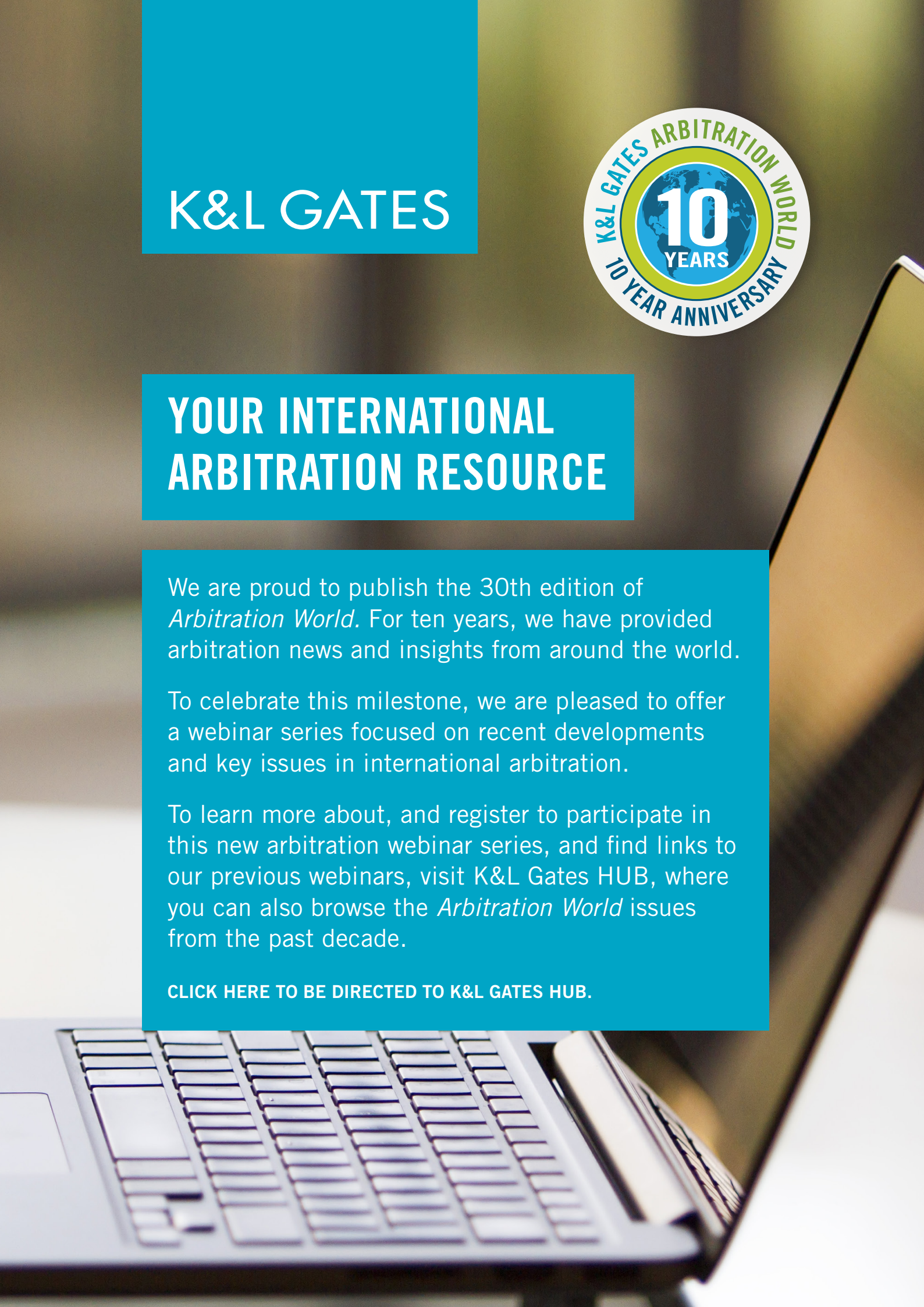
We also provide our usual update on developments from around the globe in international arbitration and investment treaty arbitration.

We hope you find this edition of *Arbitration World* of interest, and we welcome any feedback by email to **ian.meredith@klgates.com** or to **peter.morton@klgates.com.**

EDITORS

Ian Meredith
ian.meredith@klgates.com
+44.(0)20.7360.8171

Peter R. Morton
peter.morton@klgates.com
+44.(0)20.7360.8199



K&L GATES

K&L GATES ARBITRATION WORLD 10 YEARS 10 YEAR ANNIVERSARY

YOUR INTERNATIONAL ARBITRATION RESOURCE

We are proud to publish the 30th edition of *Arbitration World.* For ten years, we have provided arbitration news and insights from around the world.

To celebrate this milestone, we are pleased to offer a webinar series focused on recent developments and key issues in international arbitration.

To learn more about, and register to participate in this new arbitration webinar series, and find links to our previous webinars, visit K&L Gates HUB, where you can also browse the *Arbitration World* issues from the past decade.

CLICK HERE TO BE DIRECTED TO K&L GATES HUB.

Short Interview with the LCIA's Registrar Sarah Lancaster

Ania Farren (London)

In the **December 2014** edition of *Arbitration World,* we set out the significant features of the LCIA's new arbitration rules (the "Rules"), which came into effect on 1 October 2014. Ania Farren (Special Counsel in our London office) met with Sarah Lancaster, the LCIA's registrar to discuss these new Rules and other interesting recent developments at the LCIA.

Can you tell me how many new cases have been registered since the new Rules came into effect?

The LCIA will be publishing statistics for 2014 in the near future, so do keep an eye on our website.

Interestingly, we are still receiving requests to register matters under the old 1998 rules. This is usually where the parties' agreement to arbitrate expressly refers to the 1998 rules or, for example, to *"the LCIA Rules in force as at the date of the agreement"* (where the date of that agreement was before 1 October 2014). We have had some interesting issues on applicable rules to address since the new Rules came in. As an example, some agreements we have seen refer to the rules "currently in force"—and it is not entirely clear whether the parties intended the rules in force as at the date of the agreement or as at the date the dispute arose. Care in drafting the arbitration clause is therefore important, and we recommend that users address which rules they consider to be applicable expressly in the Request for Arbitration or the Response. This may seem obvious, and yet it is not always clearly addressed by parties.

Have there been any applications for the appointment of an emergency arbitrator (under Article 9B of the Rules)?

No, not yet. This is because the provision only applies to arbitration agreements concluded on or after 1 October 2014 (rather than to arbitrations commenced on or after that date, as is the case for the balance of the Rules). We did receive a call a month or two ago about a potential application, but my guess is that the party that wanted to make the application needed to seek consent from the other side as to the applicability of the new emergency arbitrator provisions and were not ultimately able to secure such consent.

What in your view, in practical terms, have been the most significant changes as a result of the new Rules?

I will give you the three I believe are the most significant.

First, under the new Rules, arbitrators are required to provide confirmation of their availability. This ensures that arbitrators are required before every LCIA appointment to turn their minds to whether or not their workload will allow them to devote sufficient time to the matter to ensure expeditious and efficient conduct of the arbitration. This is a very positive development. As an example, recently we had a potential arbitrator explain that he would be unavailable for a couple of months in the first half of next year (2016). As a result, we went back to the parties to ask them for their views before confirming the appointment.

Second, Article 15.10 of the new Rules requires arbitrators to provide to me as the Registrar and the parties details of the time set aside for deliberations at the same time as they set a deadline for what they anticipate will be the last submission in the arbitration. As a result of this, we are now seeing procedural orders early on

in the proceedings expressly setting aside time for the tribunal's deliberations after the oral hearing. In addition, Article 15.10 requires arbitrators to make their award as soon as possible after the last submission and to notify the parties and the LCIA in advance of the timing of the award. Again, I see these as very positive developments.

Third, is the Article 14 requirement for the parties and the tribunal to make contact no later than 21 days from receipt of written notification of the formation of the tribunal. This encourages parties to address and discuss the conduct of the arbitration very early on in the proceedings and to tailor the procedure to the dispute. The standard exchange of submissions (Statement of Case, Statement of Defence, Reply) is not necessarily going to suit all disputes.

Tell me a little about the new electronic forms available on the LCIA website for the Request and Response.

It was previously possible to file documents by email. Now there is also the option to file the Request and Response (as well as an application for an emergency arbitrator or expedited formation of the arbitral tribunal) through our new online filing system. The online forms were designed with less-experienced parties/counsel in mind. They set out all the specific questions that need to be addressed for the relevant submission. We realise that experienced arbitration counsel may prefer to set out the submissions in a different format. Our system therefore allows for this, with an option to upload the submission as a PDF instead of filling out the online form.

One advantage of using the online system is that payment can be processed using a credit card online.

The new forms make clear what information is necessary for inclusion in the Request and Response and, in particular, demonstrate that these submissions do not need to be lengthy (we would not necessarily expect more than four or five pages; we do appreciate, however, that some parties prefer to submit lengthier Requests, particularly where a party intends the Request to stand as its Statement of Case). Concise Requests are preferred, as they allow for more efficient review by the LCIA for the purposes of determining what kind of tribunal would be appropriate for the matter.

The LCIA has just introduced new Guidance Notes (i) for Parties, (ii) for Arbitrators and (iii) on the Emergency Procedures. What is the purpose of these Notes?

They are just intended to provide additional guidance on the Rules and address some of the more frequent questions we get called up about. They are a useful reference point where users feel they need a more detailed explanation of how the Rules work. The intention is that these Notes will get updated periodically to address new developments.

The Bar Council has just issued an "Information Note on Barristers in International Arbitration". What is the LCIA's view on the issue of appointing an arbitrator from the same set of chambers as one party's counsel?

The LCIA errs on the side of caution. Where possible, and unless the parties have agreed otherwise, we try not to appoint arbitrators from the same set of chambers as counsel for either party.

We thus encourage transparency with regard to the identity of counsel. This means that if a party/law firm is intending to use the assistance of a barrister at any stage in the proceedings, it is preferable to make this clear in the Request for Arbitration or as soon as possible. The new Rules (Article 18) require parties to notify us, the other party and the tribunal of any change in legal representation. The tribunal may deny approval of a change where that change would compromise the composition of the tribunal or the finality of the award. If you have not included the name of your barrister from the outset, this may prevent you from doing so at a later stage (in the event the tribunal denies approval).

What has been the reaction of users to the publication of anonymised decisions on arbitrator challenges?

Positive, I think. They have been useful in assisting parties/counsel when deciding whether or not to bring a challenge against an arbitrator as they set out some examples of the reasoning adopted in relation to decisions on such challenges. They do not, of course, deter a party intent on bringing an unmeritorious challenge—we still get those. The LCIA does intend to update the publication of decisions that came out in 2011.

Are there any particular trends emerging from the LCIA's perspective?

We are seeing a rise in the number of related arbitrations (where there are several arbitration agreements arising out of the same legal relationship or several parties to one arbitration agreement), leading to a greater need to consider whether or not consolidation is

appropriate. There are, as you know, new provisions on consolidation in the Rules (Article 22.1), which allow the tribunal to order consolidation of one or more arbitrations into a single arbitration at a parties' request and with the LCIA Court's approval, where all parties have agreed; or the arbitration agreements are between the same disputing parties and are identical or compatible and where no arbitral tribunal has yet been formed for the other arbitrations. Where no tribunal has been formed, the LCIA Court has a power to determine that two or more arbitrations subject to the LCIA Rules and commenced under the same arbitration agreement between the same disputing parties are to be consolidated.

We are also seeing a growing realisation by parties that they can decide to have the LCIA administer arbitrations even where the seat of the arbitration is not London. Equally, we have seen an increase in the number of foreign language arbitrations being referred to us. The LCIA can administer arbitrations conducted in languages other than English. By way of example, we have recently administered a couple of French language arbitrations and a Greek language arbitration under the LCIA Rules.

AUTHOR

LONDON

Ania Farren

ania.farren@klgates.com

We are also seeing a growing realisation by parties that they can decide to have the LCIA administer arbitrations even where the seat of the arbitration is not London.

In the last two to three years we have seen a trend for experts to provide evidence in chief.

Trends and Improvements in Expert Evidence

Philip Haberman and Liz Perks, ***Partners in Haberman Ilett LLP***
A specialist firm providing accounting and financial expertise only in the context of disputes.

We have participated in international arbitrations for more than 20 years, over which time we have seen changes in institutional rules, a proliferation of guidelines, and the occasional new idea, most of which have had little direct impact on expert evidence. In this article, we expand on what we have seen in practice in recent years, with a focus on how expert evidence at the final hearing has evolved, not always for the better.

EVIDENCE IN CHIEF

Having been out of fashion since the introduction of lengthy witness statements and expert reports, in the last two to three years we have seen a trend for experts to provide evidence in chief, beyond just confirming that their expert report represents their opinion. In more than 50 percent of our recent cases, each expert has given a slideshow presentation in their direct examination before the Tribunal; judging by the attention paid during these presentations, it appears that Tribunals are happy for experts to do this.

From the expert's perspective, this is good news. As the focus of cross-examination is on what the opponent wants to achieve, not the expert's opinions, our view is that it is useful for experts to explain the important issues and key opinions up front, to provide context for what follows. We believe experts should be given the chance to present the key points of their evidence with a time limit, perhaps in the region of 15–20 minutes. This can usefully be supported by a slideshow presentation, which the Tribunal members can use as a reference point during the cross-examination that follows (and indeed their own deliberations).

Not all experts use this opportunity well. In a recent case, the opposing expert read out a series of slides for 40 minutes, in effect repeating his entire report without any emphasis on the key issues or disputed opinions. We do not believe this kind of evidence in chief adds any real value to the Tribunal, and it probably detracted from the credibility of that expert. That is one reason why we would encourage Tribunals to enforce strict time limits on any evidence in chief.

Sometimes the evidence in chief may become controversial, especially if the expert introduces new information or presents their opinion in a different way to their report. In a recent case, opposing counsel strongly objected that its expert did not have the chance to examine the supposed "new" evidence and, hence, that its introduction was unfair. This "new" evidence was an additional calculation of quantum, based on a new factual scenario that had been introduced by witnesses during their oral testimony and, hence, which had not been addressed by either of the experts previously. It was, however, based on the same spreadsheet model as previous calculations (and could, therefore, be easily replicated by the opposing expert). We believe this was useful new evidence for the Tribunal, as it quantified loss under a new factual scenario that may be relevant to the Tribunal. We await with interest the Tribunal's view on whether this "new" evidence was admissible.

CROSS-EXAMINATION

Our experience in recent years is that oral testimony in international arbitrations seems to be getting shorter, especially for quantum experts. On average, even when an entire day is set aside for quantum experts, the actual time allocated for the examination of each quantum expert has been only around two hours.

It is hard to know why this is happening. Is it because many lawyers are not comfortable with cross-examining accounting experts who may

be dealing with complex technical or numerical issues? Or might it be because they fear that the opposing expert will be able to demonstrate their credibility to the Tribunal, so they prefer to limit their opportunity? We recognise that parties, lawyers, and Tribunals from civil law jurisdictions may be less comfortable with the need for cross-examination, but this trend is not limited to those cases. Our concern is that, when damages are the likely remedy and quantification is highly controversial between the parties, not enough effort may be devoted to the issue.

We were recently involved in a complex dispute with around US$800 million at stake, where there was no agreement between the quantum experts. The timetable allowed one day for the experts' evidence to be presented and examined, but much less time was used, with cross-examination of both experts taking a total of less than half the day. As a result, only a few issues were examined in any depth. If the Tribunal finds for the Claimants, it will be relying on its impression of each of the experts, together with their written reports, but without much sense of having seen their conclusions tested or challenged. While the successful party may be happy with that outcome, it risks leaving an impression that the Tribunal has not properly got to grips with the quantum issues.

This trend towards shorter oral testimony means that the expert's written reports are more important than ever. When choosing an expert, lawyers and their clients understandably have a tendency to focus on the potential expert's experience giving oral testimony but arguably this is not the most important skill for an expert, and the quality and persuasiveness of their written reports should be of equal, or perhaps even greater, importance.

In a realm where little time is spent on cross-examination, we also believe that independence and lack of bias become more important, even when the arbitral rules contain no stated duty to be independent.

If an expert comes across as partial, there is a risk that the Tribunal may not give much weight to any of their evidence, whether written or oral.

HOT TUBBING

We hear a lot about "hot tubbing" or "witness conferencing" (i.e., concurrent expert evidence), which involves opposing experts giving evidence simultaneously, usually with the Tribunal leading the discussion between them. It can be used instead of, or in addition to, traditional cross-examination. Originating in Australia around 20 years ago, it has been gradually adopted in international arbitration, including being provided for in the 2010 IBA Rules on the Taking of Evidence. While a lot has been written and spoken about hot tubbing in recent years (perhaps because it sounds so novel), the idea seems fairly slow to catch on and in our experience Tribunals are using hot tubbing for examining expert witnesses in less than 25 percent of hearings. And in these cases it was only after traditional cross-examination, not in place of it.

Our feeling is that hot tubbing should be used more often, as we believe that it can provide a useful forum for an open and frank discussion between experts. This is particularly the case if hot tubbing takes place after direct and cross-examination, by which time the Tribunal knows which issues it wants to understand better, or is used to compare the experts' views. For example, in a recent case it became clear during the hot tubbing that the Tribunal wanted to know how each expert's views would change if they used the other's assumptions (a useful way to overcome "instructions bias"). As a result, the experts agreed to prepare a joint schedule of agreed numbers on the basis of both parties' instructions. This highlighted where the real differences between us were and formed the basis for aspects of the eventual award.

Hot tubbing relies on the Tribunal being sufficiently well prepared to use the process effectively, which might be why it does not have widespread use. Certainly, where we have seen hot tubbing used most effectively, there has been one (or sometimes more) Tribunal member who is clearly financially literate and has taken charge of the questioning and led the discussion. In our view, this misses the benefit of the hot tubbing process, which provides an opportunity for all Tribunal members to clarify their understanding. If the Tribunal has not already understood the expert evidence, this might be down to the experts not having done a good enough job of explaining technical concepts in a way that a layman could understand. Ultimately, the decision being made will expose any lack of understanding and might result in an unenforceable award. For example, we recently read the damages section of an award in some dismay, as the Tribunal had clearly misunderstood part of the evidence before them on discount rates (admittedly a complex area, but one that is frequently a feature of quantum expert evidence).

Counsel may feel wary about hot tubbing as they have little control over either their own, or the opposing, expert — but this is one reason why it can be so beneficial to a Tribunal. For example, where counsel use cross-examination to try to undermine the credibility of an expert rather than to test their substantive opinions, hot tubbing between the experts gives the Tribunal an opportunity to explore their differences in opinion. In such a case that we were involved in, a good dialogue between the opposing experts allowed the Tribunal to clearly understand the differences, strengths, and weaknesses of their respective views, which was clear from the Tribunal's decision.

We recognise that there are risks to parties in allowing hot tubbing of their experts. Opponents suggest that hot tubbing can give too much weight to an expert's advocacy skills rather than the merits of their

opinion, and that less experienced experts may defer to their more experienced counterparts. These are valid concerns, but we question whether this is really more of a risk in hot tubbing than in expert evidence in a traditional form. In any event, the risk can be at least partly mitigated by the choice of expert, focusing on an expert who will not stray outside their area of expertise or make concessions without proper consideration.

Hot tubbing is sometimes argued to be more time and cost efficient but, given that we have only seen it used in conjunction with traditional expert testimony, we think it is unlikely to have achieved that aim in the cases we have been involved in. Maybe if it becomes more commonplace, and Tribunals and counsel become more inclined to adopt it as the primary method of testing expert evidence, these goals could be achieved.

CONCLUSIONS

We believe that the school report on trends in expert evidence should read "improving, but could still be better". While it is good news that experts are being given the opportunity to present the key points of their evidence in chief, and that Tribunals are making some use of concurrent evidence, we think that counsel are shying away from detailed cross-examination to the detriment of Tribunals' understanding. We suggest that the best counter to this is for Tribunals to make more use of hot tubbing, to ensure they properly understand the expert issues and have the ammunition they need to reach robust and supportable decisions.

AUTHORS

PARTNERS IN HABERMAN ILETT LLP

Philip Haberman and Liz Perks

We suggest that [Tribunals] make more use of hot tubbing, to ensure they properly understand the expert issues and have the ammunition they need to reach robust and supportable decisions.

Arbitration News from around the World

Sean Kelsey (London)

ASIA

China

It is being reported that a ruling of the Supreme People's Court (the "SPC") dated 15 July 2015 has brought to an end the jurisdictional uncertainty surrounding arbitrations conducted under the auspices of the South China/Shenzhen and Shanghai subcommissions, which broke away from the China International Economic and Trade Arbitration Commission ("CIETAC") three years ago. The subcommissions have their own rules of arbitration and panels of arbitrators and have rebranded themselves. The South China/Shenzhen subcommission became the Shenzhen Center for International Arbitration ("SCIA") on 22 October 2012, and the Shanghai subcommission became the Shanghai International Arbitration Center ("SHIAC") on 8 April 2013. CIETAC has subsequently remodelled versions of the former subcommissions in both of the relevant jurisdictions.

The ruling was made in response to requests by courts in Shanghai, Jiangsu and Guangdong, and is known as a "reply". In its reply, the SPC held that jurisdiction in cases involving either of SCIA or SHIAC is to be determined in accordance with the form of the relevant arbitration agreement and the date on which those two entities took their new names. Reportedly, where arbitration agreements concluded prior to the relevant name change refer disputes to CIETAC in Shanghai or Shenzhen, the former subcommissions will have jurisdiction. Where arbitration agreements entered into after the relevant name change still contain references to CIETAC Shanghai or

Shenzhen, CIETAC will have jurisdiction. The reply took effect on 17 July and is understood to be binding on all lower Chinese courts.

India

In a judgment dated 16 April 2015, the Supreme Court of India has provided a clear statement of the principle that an arbitration agreement is a contract separable from any wider agreement of which it forms a part. The case of *Ashapura Mine-Chem Ltd* ("Ashapura") *v Gujarat Mineral Development Corporation* ("GMDC") concerned a Memorandum of Understanding (the "MoU") into which the parties had entered in 2007 with a view to negotiating a joint venture for development with a Chinese entity of bauxite assets in the Indian state of Gujarat (the "JV"). In 2009, state policy on bauxite mining changed, and GMDC decided that it no longer wanted to play any part in the JV. GMDC purported to terminate the MoU. When Ashapura sought to commence arbitration, no agreement was reached as to the appointment of an arbitrator. GMDC successfully resisted Ashapura's application to the Gujarati court for an order making such an appointment, on the grounds that because the MoU was not binding, neither was the arbitration agreement. Ashapura appealed to the Supreme Court, which found that the arbitration agreement was a separate agreement and that its validity as such was independent of whether the MOU was a binding agreement. The Supreme Court went on to appoint an arbitrator in the case itself. This decision is in line with a number of recent judgments providing support for the arbitral process, including the *Enercon* judgment, in which it was held an arbitration agreement was valid even though the underlying agreement was null and void. The *Ashapura v GMDC* decision is a further clear signal of that tendency within Indian jurisprudence, growing in strength in recent years, towards fostering support for the arbitral process.

This [issue] stems from what is usually called the "FIDIC gap"—how can a contractor enforce a DAB decision that is binding, albeit on a temporary basis?

Singapore

We have previously **reported** on a significant development in the enforcement in Singapore of decisions reached by Dispute Adjudication Boards ("DAB") under the FIDIC Conditions of Contract for Construction 1999 (the "Conditions of Contract"). Under the Conditions of Contract, a contractor may give notice of a claim, which is determined by the Engineer. If the contractor disputes that determination, the matter goes before a DAB, which may decide that the employer should make additional payment to the contractor. If so, then under the Conditions of Contract, the employer is contractually bound to make payment in accordance with the DAB's determination but can give notice of dissatisfaction with the DAB decision within 28 days. If, having given such notice, the employer does not pay, the contractor is effectively back at square one, because, dependent on the relevant jurisdiction, it may have no alternative means of getting its money. Courts will generally defer to the requirement under the Conditions of Contract that disputes are ultimately resolved by arbitration, while an attempt to refer a dispute to arbitration pending determination of an employer's notice of dissatisfaction may result in an award, which the employer can characterise as premature if an attempt is made to enforce the award. This stems from what is usually called the "FIDIC gap"—how can a contractor enforce a DAB decision that is binding, albeit on a temporary basis? In *PT Perusahaan Gas Negara (Persero) TBK* ("PGN") *v CRW Joint Operation (Indonesia)* ("CRW"), the contractor, CRW, had secured a DAB decision that it had then 'converted' into an interim arbitral award. The employer, PGN, applied to set aside that award, arguing that it was, in fact, a "provisional" award, and therefore not recognised under Singapore's International Arbitration Act (the "Act"), which requires interim awards to be final and binding. PGN was unsuccessful. As reported in our prior article, the

Singapore High Court held that the Act does not prohibit a tribunal from issuing a provisional award and that, in any event, the award was not provisional, as it determined with finality CRW's rights with regard to the decision of the DAB. As a final decision in relation to its subject matter, an interim award enforcing a DAB decision could therefore be enforced as an interim or partial award in accordance with Singapore law. In a decision dated 27 May 2015, the Singapore Court of Appeal has upheld the High Court's judgment.

EUROPE

Andorra

The independent European principality of Andorra deposited an instrument of accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") on 22 June 2015. The Convention will come into force in Andorra on 17 September 2015, bringing to 156 the number of states that have ratified the Convention.

England

In a Commercial Court case, *Frontier Agriculture Ltd v Bratt Brothers* (A Firm), the claimant, "Frontier", sought to enforce a sole arbitrator's award (the "Award") as a judgment under section 66 of the Arbitration Act 1996 (the "1996 Act"). The Award was given in an arbitration commenced under two contracts. Bratt Brothers resisted the application to enforce the Award on the grounds that, while accepting it had entered into one of the contracts, it denied having entered into the other. Bratt Brothers actively participated in appointment of the sole arbitrator but objected to the second arbitration. Frontier argued that, because Bratt Brothers had actively participated in the appointment of the sole arbitrator,

s.73 of the 1996 Act deprived Bratt Brothers of its right to object to the jurisdiction of the arbitrator in the second arbitration. The Commercial Court agreed. By its judgment dated 25 June 2015, the Court of Appeal set aside Blair J's order granting permission to enforce the Award. The Court of Appeal found that, although Bratt Brothers had taken part in the arbitral proceedings that had taken place under the first of the two contracts, it had maintained its objection to arbitration under the second contract, in respect of which it had therefore not lost its right to object. The issue as to whether the tribunal lacked jurisdiction in respect of the arbitration commenced under the second contract has been remitted back to the Commercial Court for directions. The case is a reminder of the importance of making, and maintaining, clear and timely objections to the jurisdiction of arbitral tribunals (where appropriate), and the risks of losing the right to challenge jurisdiction.

Separately, a decision of the Court of Appeal has demonstrated the limits on the presumption, as set out in the well-known **Fiona Trust** judgment, that commercial parties generally intend that their disputes be resolved before a "one-stop" forum. In a judgment dated 30 April 2015 in the case of *Trust Risk Group Spa v Amtrust Europe Ltd,* the Court of Appeal held that two connected agreements remained subject to the separate dispute resolution procedures that each contained. An English insurance company ("Amtrust") entered into an agreement (the "First Agreement") with an Italian insurance broker ("Trust Risk"), which was subject to English law and jurisdiction. Six months later, that agreement was appended as a schedule to a Framework Agreement between the parties (as well as Amtrust's U.S. parent), which provided for Italian law and arbitration in Milan. When disputes arose, Trust Risk commenced an arbitration under the Framework Agreement, and Amtrust sued in England for breach of the First Agreement. Trust Risk argued

before the Commercial Court that the provision for arbitration in Milan had ousted the jurisdiction of the English courts. The Court of Appeal upheld Blair J's finding that the First Agreement remained a separate agreement subject to English law and jurisdiction. The judgment suggests that the Fiona Trust principle may not apply in situations involving a nexus of related, but separate, agreements, with apparently contradictory dispute resolution agreements. In a subsequent judgment dated 8 July 2015, Andrew Smith J refused Amtrust's application for an injunction restraining the Milanese arbitration, finding in particular that there was no dispute as to the existence of the arbitration agreement, that the parties must therefore have intended that a Milan-seated arbitral tribunal was entitled to decide on its own jurisdiction without interference by an English court, and that whatever decision it reached could be challenged before the Italian courts. Smith J held that, as a matter of general principle, the English courts had recognised that it would not usually be just and convenient to restrain a person from pursuing foreign arbitral proceedings, and that the high hurdle, as set by s.37 of the Senior Courts Act 1981, before the English court will restrain a foreign arbitration, had therefore not been cleared in this case.

EU

On 13 May 2015, the Court of Justice of the European Union (the "CJEU") handed down a keenly awaited judgment in a dispute between Gazprom OAO ("Gazprom") and the Republic of Lithuania. The parties are shareholders in, and their dispute related to, the running of Lithuania's principal supplier of natural gas, Lietuvos dujos AB. The relevant Lithuanian government ministry commenced court proceedings against Gazprom in Lithuania. Gazprom initiated arbitration under the auspices of the Stockholm Chamber of Commerce (the "SCC"), purportedly pursuant to the

On 13 May 2015, the Court of Justice of the European Union handed down a keenly awaited judgment in a dispute between Gazprom OAO and the Republic of Lithuania.

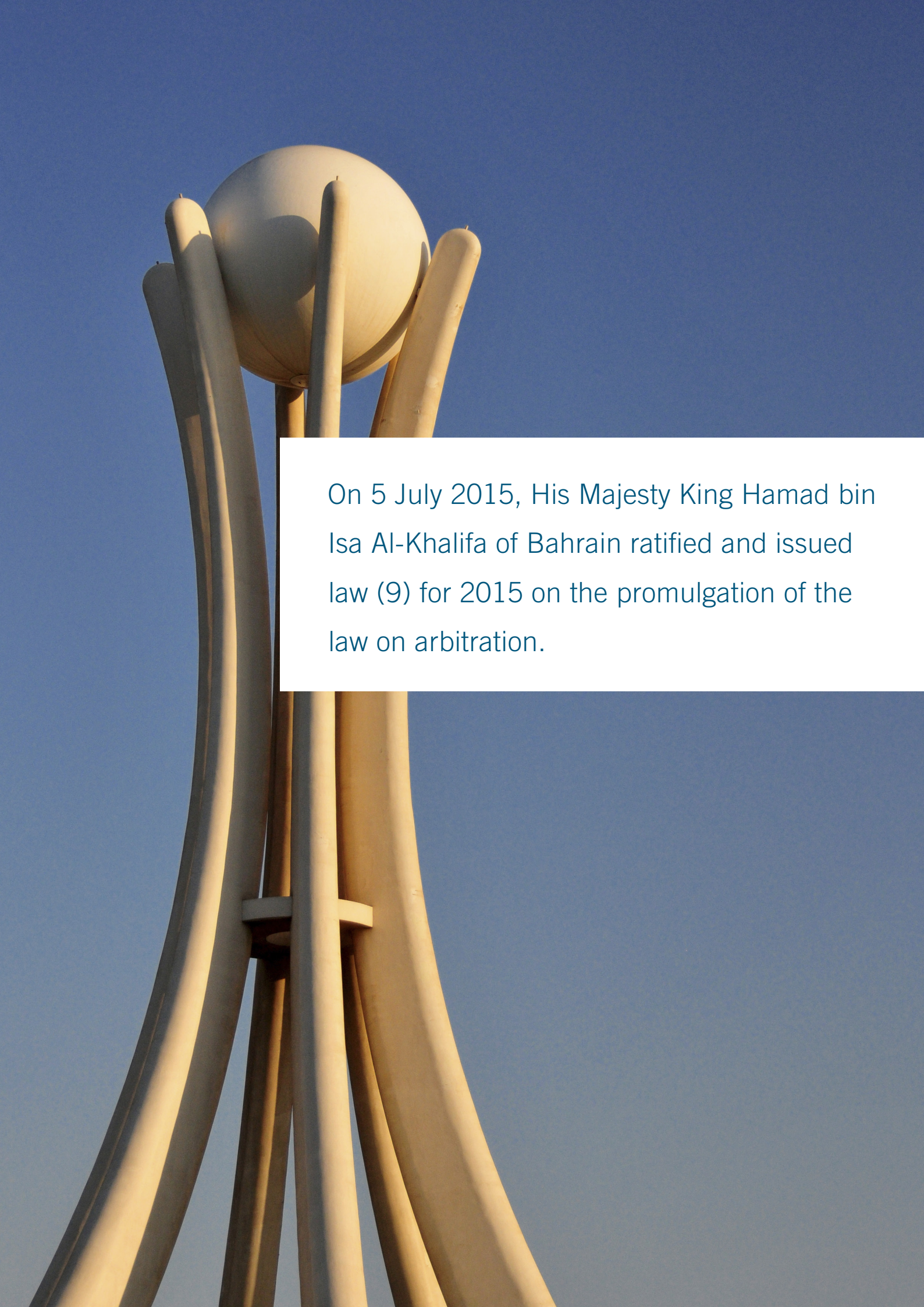
parties' shareholder agreement. The SCC tribunal rendered an award ordering Lithuania to withdraw certain court proceedings and issued an anti-suit injunction. When Gazprom sought to have the award recognised and enforced in the Lithuanian courts, a question arose as to whether Council Regulation (EC) 44/2001 (the "Brussels Regulation") precluded enforcement of the purported anti-suit injunction, reference being made to the well-known *West Tankers* case. In *West Tankers,* the CJEU held that it is not open to a court of a member state to seek to restrain proceedings (even if brought in breach of an arbitration agreement) before a court in another member state. The Supreme Court of Lithuania sought a ruling from the CJEU. The CJEU held that the Brussels Regulation does not govern the recognition and enforcement, in a member state, of an arbitral award issued by an arbitral tribunal in another member state. The CJEU accordingly held that the Brussels Regulation "must be interpreted as not precluding a court of a member state from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bring certain claims before a court of that member state." The CJEU held that issues of mutual trust between the courts of member states were not engaged, so the reasoning in *West Tankers* was of no application.

This decision provides important clarification of the position under the Brussels Regulation, and is in line with the re-emphasis of the so-called "arbitration exception" under the recast Brussels Regulation, which came into force in **January** this year. It seems likely however that the decision leaves intact the principle in *West Tankers* and that it will still not be possible for a court of a member state to issue an anti-suit injunction restraining proceedings brought before the courts of another member state in breach of arbitration agreements.

FRANCE

A judgment of the French Court of Cassation is being greeted as confirmation of a theory that holds that international arbitration is underpinned by an autonomous international legal order. The case concerned Irish budget airline Ryanair. On 8 February 2008, Ryanair entered into two French-law contracts (the "Contracts") with a public body, the Joint Syndicate of Charente Airports (the "Syndicate"). Under the Contracts, Ryanair operated a subsidised air route from London Stansted airport to the southwestern French city of Angoulême, in consideration of a subsidy from the Syndicate worth €925,000. Two years later, Ryanair sought an increase in the subsidy by €175,000. When the Syndicate refused, Ryanair terminated the Contracts on 17 February 2010, closing its air route to Angoulême. The Syndicate sued Ryanair for €2 million in the administrative court of Poitiers, arguing that the court was the appropriate forum for a dispute featuring a public body. But, in a partial award rendered on 22 July 2011, an LCIA tribunal upheld its own jurisdiction under the Contract's arbitration clause. In an award dated 18 June 2012, the tribunal held that the termination of the Contract was valid. The Syndicate was ordered to pay costs of €100,000.

The Syndicate attempted to challenge the award in the French administrative courts. On 19 April 2013, the highest of those courts, the Council of State, ruled that it was not competent to hear a challenge to the award of a foreign-seated tribunal. It was for the private law courts to hear the challenge. The Council of State ruled, however, that it would be competent to hear a request for enforcement of such an award. Later that year, the Paris Court of Appeal struck down an order for the award's enforcement from a civil court of first instance, saying that the enforcement application should be heard by an administrative court. The apparent position in the wake of that decision was that, where a foreign arbitral tribunal



On 5 July 2015, His Majesty King Hamad bin Isa Al-Khalifa of Bahrain ratified and issued law (9) for 2015 on the promulgation of the law on arbitration.

rules against a French public body in a case arising out of a public procurement contract, enforcement applications should be submitted to the administrative courts and set-aside applications to the regular courts. It was that premise that the Court of Cassation overruled as discriminatory in its judgment dated 8 July 2015. The Court of Cassation held that all arbitral awards, whether foreign or domestic, should be treated the same regardless of the seat and could be submitted to the regular courts for enforcement or set-aside. The Court of Cassation based its decision on a finding that a free-standing "international arbitral order" overrides any distinction made in France between public and private law cases.

MIDDLE EAST

Bahrain

On 5 July 2015, His Majesty King Hamad bin Isa Al-Khalifa of Bahrain ratified and issued law (9) for 2015 on the promulgation of the law on arbitration (the "Arbitration Law"). Among a number of interesting provisions, the Arbitration Law applies the UNCITRAL Model Law to all arbitrations, "whatever the nature of the legal relationship of the dispute" and provides that the Model Law will apply whether any such arbitration takes place pursuant to an arbitration agreement dated before or after the entry into force of the Arbitration Law.

NORTH AMERICA

USA

In the unanimous judgment of a five-strong bench, the Supreme Court of Hawaii (the "Supreme Court") has refused to enforce an arbitration clause on the grounds that, because it was "ambiguous"

and "unconscionable", the claimant parties had not clearly consented to arbitration. The case of *Narayan v The Ritz-Carlton Dev Co Inc* concerned a dispute over tourist accommodation. In 2006, 15 individual owners of properties on the northwest coast of the island of Maui (the "Vendors") entered into agreement with the developer Kapalua Bay, a joint venture between Marriott International, two of its Ritz-Carlton subsidiaries, and a local landholding company ("Kapalua Bay"). The Vendors agreed to sell the properties to Kapalua Bay with a view to their use by tourists, with Marriott International responsible for their maintenance and operation. A "declaration" accompanying the purchase agreements included an arbitration clause providing that all disputes would be resolved through arbitration under American Arbitration Association rules before a single arbitrator seated in Honolulu. A dispute arose when Kapalua Bay defaulted on certain loans, as a result of which Marriott International withdrew its investment. The Vendors sued Kapalua Bay in the courts of Hawaii, seeking US$1.3 million in damages. Kapalua Bay requested arbitration, and the Vendors resisted. The Vendors succeeded at first instance, but the order restraining arbitration in favour of the on-going litigation was reversed by the Hawaiian Intermediate Court of Appeals (the "ICA"), which rejected the Vendors' argument that the arbitration agreement was unconscionable on grounds that they had not had reasonable notice of the arbitration provision.

In a judgment dated 3 June 2015, which has drawn widespread comment, the Supreme Court reinstated the first instance order, saying the ICA had "gravely erred" in overturning the first instance judgment restraining the arbitration. The Supreme Court found that the purported arbitration agreement conflicted with other dispute resolution provisions in the purchase agreement and accompanying

documents, such that a "reasonable" party could not determine from the documents whether the agreement was to arbitrate or seek judicial redress, indicating that the parties lacked clear intent to arbitrate. The Supreme Court held that, in the absence therefore of "unambiguous intent" to submit disputes to arbitration, no arbitration agreement existed between the parties. The Supreme Court further held that the arbitration agreement was "unconscionable"—and thus invalid under the 1925 U.S. Federal Arbitration Act—because it was "buried" in an "auxiliary document" and because it purported to place certain limits on the arbitrator's authority (preventing the arbitrator from ordering discovery or awarding punitive or exemplary damages, for example). The matter has now been remanded back to the first instance court.

SOUTH AMERICA

Brazil

The 1996 Brazilian Arbitration Law (the "Law") has been amended. The amendments were published in the republic's official gazette on 27 May 2015, and came into effect 60 days later i.e. on 26 July 2015. It appears that the final form in which the amendments were agreed did not include an amendment proposed by the Brazilian House of Representatives which, according to the Brazilian Senate, would have made it more difficult to arbitrate disputes with state-owned entities by requiring (contrary to current Brazilian caselaw) as a condition precedent to any such arbitration that arbitration be provided as a settlement mechanism in the call for tenders.

The amendments to the Law include:

- provision that, where parties expressly agree, it is possible to arbitrate disputes involving state entities, consumer law and some employment law issues;
- new powers for the Brazilian courts to issue interim and provisional relief prior to the constitution of the arbitral tribunal and for arbitral tribunals to review, revoke or alter any interim and provisional relief granted before its constitution; and
- new means by which arbitral tribunals can enlist the support of the Brazilian courts for efforts to enforce their awards.

The amendments have been welcomed as an important step in encouraging the development of an arbitration-friendly culture in Brazil.

INSTITUTIONS

CIArb

The Chartered Institute of Arbitrators (the "CIArb") held its London centenary conference from 1 to 3 July 2015. The event was one of a series of conferences marking the 100th anniversary of the foundation of the CIArb taking place at a number of locations around the world during 2015 and saw the unveiling in draft (and subject to debate, discussion and further development) of the "CIArb Centenary London Conference Principles"—described as a set of principles "characteristic of an effective and efficient Seat for the conduct of International Commercial Arbitration" (the "Principles"). The Principles comprise 10 such characteristics. They include "a clear effective, modern international arbitration law which recognises and respects the parties' choice of arbitration"; an independent

The amendments to the Law include new powers for Brazilian courts to issue interim and provisional relief prior to the constitution of the arbitral tribunal.

judiciary; an experienced legal profession "providing significant choice" for parties seeking legal representation; a commitment to the education of all stakeholders in "the character and autonomy" of international commercial arbitration; a clear right of the parties to an arbitration to have representation of their own choice; accessibility and safety; "functional facilities"; the embracing of "developing norms of international ethical principles governing the behaviour of arbitrators and counsel"; adherence to international treaties governing recognition and enforcement of foreign arbitration agreements, orders and awards; and "a clear right to arbitrator immunity from civil liability for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as an arbitrator."

LCIA

On 29 June 2015, the London Court of International Arbitration ("LCIA") published three sets of guidance notes (collectively, the "Guidance Notes") for arbitrators, for parties and on the emergency procedures available in LCIA arbitrations. The notes are available online and offer guidance with the aim of facilitating the conduct of arbitrations under the LCIA Arbitration Rules.

The LCIA Notes for Arbitrators guide arbitrators on issues relating to independence, impartiality, availability and confidentiality, the effective management of time and costs and the need to ensure that the LCIA Secretariat is kept informed as to the progress of the arbitration, highlighting the "broad principles by which Arbitral Tribunals should be guided in the conduct of LCIA arbitrations".

The LCIA Notes for Parties provide guidance to parties and their representatives on conducting arbitrations under the LCIA Rules. They include information on commencing an arbitration, filing a Response, appointing a tribunal (including applications for expedited

formation and for the appointment of an emergency arbitrator), presentation of evidence, confidentiality and the determination of costs of an arbitration.

The LCIA Notes on Emergency Procedures provide parties and their representatives with guidance on the emergency procedures available under the LCIA Rules, including the provisions regarding expedited formation of the arbitral tribunal (or expedited appointment of a replacement arbitrator) and the emergency arbitrator procedure.

Each of the Guidance Notes makes clear that it is by no means intended to provide exhaustive guidance, nor does it supplant the relevant LCIA Rules. We cover this development, and other developments, with respect to the LCIA and the LCIA's 2014 Arbitration Rules in our report of a **recent interview** with the LCIA's Registrar, Sarah Lancaster.

PCA

The Permanent Court of Arbitration at the Hague (the "PCA") has further extended its global reach by means of two agreements. On 2 July 2015, the PCA concluded a cooperation agreement with the Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry ("CAC-CCIP"). The cooperation agreement establishes a legal framework allowing the PCA and CAC-CCIP to share facilities and to facilitate support services for hearings and meetings, as well as to promote the use of international arbitration.

Meanwhile, a host country agreement between the Republic of Chile and the PCA came into force on 23 July 2015, providing a legal framework within which PCA-administered proceedings can be conducted in Chile.

SCC

The Stockholm Chamber of Commerce (the "SCC") has adopted a model arbitration clause for use with the International Swaps and Derivatives Association ("ISDA") 2002 Master Agreement. The SCC-ISDA model clause will facilitate the use of arbitration by banks and financial institutions as a means of dispute resolution.

SHIAC

The former CIETAC Shanghai subcommission now known as SHIAC (see above) has entered into a cooperation agreement, dated 21 April 2015, with the Seoul International Dispute Resolution Center ("SIDRC"). It is understood that SHIAC and SIDRC will collaborate on the promotion of commercial arbitration, joint symposiums and provision of services for hearings in their respective countries.

In a separate development on 5 June 2015, SHIAC signed a Cooperation Agreement on Building Sino-African Dispute Resolution Mechanism (the "Cooperation Agreement") with the Arbitration Foundation of Southern Africa, the Association of Arbitrators (South Africa) and Africa ADR. It is understood that the Cooperation Agreement is aimed at closer cooperation among the four institutions in the promotion of arbitration and other ADR techniques in commercial disputes having Chinese and African subject matter.

AUTHOR

LONDON

Sean Kelsey

sean.kelsey@klgates.com

The Stockholm Chamber of Commerce has adopted a model arbitration clause for use with the International Swaps and Derivatives Association 2002 Master Agreement.

On 5 May 2015 the European Commissioner for Trade, presented a concept paper, which called for the creation of an international investment court.

World Investment Treaty Arbitration Update

Wojciech Sadowski (Warsaw)

In each edition of *Arbitration World,* members of K&L Gates' Investment Treaty practice provide updates concerning recent, significant investment treaty arbitration news items. This edition features the recent proposal of the European Commission to set up a permanent international court for investment disputes, the action launched by the European Commission against the states that are parties to the intra-European Union Bilateral Investment Treaties ("BITs"), and the attempts to enforce the Yukos awards against the assets of the Russian Federation.

PERMANENT INTERNATIONAL COURT FOR INVESTMENT MATTERS

On 5 May 2015, Cecilia Malmström, the European Commissioner for Trade, presented a **concept paper,** which called for the creation of an international investment court ("IIC"). More details are still needed on the proposal, as it was presented in a very general way in the context of a document principally concerning the negotiations of the Transatlantic Trade and Investment Partnership ("TTIP").

The proposal for a permanent investment court is not new, as the concept was discussed around 10 years ago, mostly in the United States. Conceptually, the idea of a single international court for investment disputes, consisting of a specialized and impartial judicial body delivering a consistent line of rulings, has some attractions. However, in the specific context of an individual vs. state dispute resolution mechanism, such as investment treaty arbitration, it

also carries potentially serious complications. First, a permanent investment court would be composed of permanent judges, most likely tenured and appointed by state signatories to the instrument, by virtue of which the court would be established. This would imply, in turn, that investors would not have a meaningful say on the composition of the panel deciding their case. This may considerably worsen the position of investors, who, under current arrangements, have an equal influence on the composition of investment treaty tribunals as do respondent states.

Second, given the current throughput of some 400–500 pending investment treaty cases, most of them highly fact-intense and legally complex, no permanent international court would have the capacity to manage such caseload within a reasonable time.

Third, obtaining the consent of states and/or international organisations to the jurisdiction of such a permanent court could be highly problematic. With respect to the European Union, it should be stressed that the European Court of Justice has already twice rejected the idea of the European Union joining the European Convention of Human Rights and submitting to the jurisdiction of the European Court of Human Rights. It first rejected that concept in Opinion 2/94 in 1996. Most recently, it did so eight months ago, in Opinion 2/13, dated 14 December 2014. Both times, one of the principal arguments of the European Court of Justice was the fact that there would be another court above it, even if it was to be a human rights court. With the IIC, the problem would probably be similar.

Accordingly, though the idea of a permanent IIC may seem attractive, it is quite unlikely that it would be accomplished in the foreseeable future.

INFRINGEMENT PROCEEDINGS AGAINST EUROPEAN UNION MEMBER STATES BY THE EUROPEAN COMMISSION

On 18 June 2015, the European Commission announced it had initiated infringement proceedings against five member states, requesting them to terminate intra-European Union BITs between them. The five states concerned are Austria, the Netherlands, Romania, Slovakia and Sweden. The European Commission also announced it has requested information on the existing intra-European Union BITs from other member states. It is possible that more infringement proceedings will follow this inquiry.

The European Commission argues that the investment protection treaties between the member states of the European Union create inequalities with respect to the level of protection of investors, and, hence, amount to discrimination on the ground of nationality, which is prohibited under Article 18 of the treaty establishing the European Union. It also notes that Ireland and Italy had already terminated their intra-EU BITs.

Moreover, two of the five member states against which the current infringement proceedings have been launched, notably Romania and Sweden, are parties to the BITs pursuant to which the Micula award was rendered (ICSID Case No. ARB/05/20). The Micula case, which ended with a USD 250 million damages award, concerned state aid offered by Romania to certain investors before its accession to the European Union. The European Commission holds the view that both the state aid scheme and the award compensating for the loss of that aid are unlawful under European Union law.

The infringement proceedings should probably be interpreted as a strong signal from the European Commission to the member states that all intra-EU BITs should be terminated. This, however, will be

a very lengthy process, especially since many treaties in question include sunset clauses, which extend the substantive and procedural protection granted by these treaties many years following their termination.

Moreover, the European Commission's initiative is likely to promote company-hosting services in non-European Union states, which already have a wide network of BITs, including with the European Union member states. For example, China has 130 BITs (108 of them in force), Egypt has 102 BITs (73 in force), India has 84 BITs (69 in force), Korea has 92 BITs (82 in force), Turkey has 89 BITs (73 in force) and Switzerland has 118 BITs (115 in force).

ENFORCEMENT OF THE YUKOS AWARD

In July 2014, the arbitral tribunal sitting under the auspices of the Permanent Court of Arbitration in the Hague rendered three awards ordering the Russian Federation to pay over USD 50 billion in damages to the majority shareholders of Yukos for the expropriation of the once-powerful Russian oil company.

In parallel to the proceedings initiated by Russia before the Dutch courts to set aside those awards, the shareholders of Yukos have initiated judicial proceedings to enforce them. At the present moment, countries where enforcement has been granted include Belgium, France, the United Kingdom and the United States.

At the end of June 2015, the shareholders of Yukos managed to obtain a provisional freeze on the bank accounts of the Russian Federation and a number of Russian entities in Belgium and France. Following that development, some accounts were unblocked, as it turned out they were used for diplomatic purposes, and, hence, immune from enforcement. Belgium also reported on its plans to amend its local legislation with respect to the enforcement of awards against the property of sovereigns.

In reaction to these developments, the Russian Federation filed a diplomatic protest and threatened responsive measures against the property of French and Belgian companies in Russia.

AUTHOR

WARSAW

Wojciech Sadowski

wojciech.sadowski@klgates.com

The Delaware Rapid Arbitration Act

J.P. Duffy, Tara L. Pehush, and Priya Chadha (New York)

The state of Delaware recently enacted the Delaware Rapid Arbitration Act (DRAA), which is designed to promptly and economically resolve commercial disputes between sophisticated business entities within as few as 120 days. The DRAA is significant for international arbitration practitioners because it may apply where at least one of the parties is incorporated in Delaware (or has its principal place of business there). Many U.S. counterparties, as well as the U.S. subsidiaries of non-U.S. companies, are incorporated in Delaware and can therefore avail themselves of the act.

THE DELAWARE RAPID ARBITRATION ACT

The DRAA is an act of Delaware state law, and its purpose is "to give Delaware business entities a method by which they may resolve business disputes in a prompt, cost-effective, and efficient manner, through voluntary arbitration conducted by expert arbitrators, and to ensure rapid resolution of those business disputes." Consequently, the DRAA was enacted to achieve the same "twin goals" that U.S. federal courts often point to when discussing the Federal Arbitration Act—namely, "settling disputes efficiently and avoiding long and expensive litigation."

HISTORY BEHIND THE DRAA

The DRAA is not Delaware's first attempt at creating an arbitration act. In 2009, Delaware passed the Delaware Court of Chancery Business Arbitration Program (DCCBA), which was Delaware's first attempt at a comprehensive commercial arbitration program.

Unlike the DRAA, the prior DCCBA was controversial because it provided that sitting Delaware Chancery Court judges would act as arbitrators and that hearings would be held in Delaware courthouses. That scheme was problematic as a matter of U.S. constitutional law—and was, in fact, declared unconstitutional in 2013—because private arbitrations held before judges in the courthouse violated the public right of access to court proceedings. In short, the DCCBA program was found to run afoul of the First Amendment to the U.S. Constitution because there was not any public disclosure of the parties to an arbitration and all proceedings and rulings occurred behind closed doors.

The current DRAA remedied those constitutional concerns by removing the requirement that sitting trial court judges serve as the arbitrators. Additionally, it does not require that hearings take place in Delaware courthouses, instead allowing parties to hold hearings anywhere they choose.

REQUIREMENTS TO ARBITRATE UNDER THE DRAA

Parties may avail themselves of the DRAA if they satisfy the following five requirements: (1) there is a written arbitration agreement between the parties; (2) at least one party is a business entity that is either incorporated in or has its principal place of business in Delaware; (3) no party is a consumer as defined by Delaware law; (4) the arbitration agreement provides that it will be governed by Delaware law; and (5) the arbitration agreement includes an express reference to the DRAA. Accordingly, parties must affirmatively choose to arbitrate under the DRAA and cannot be compelled to do so merely by entering into an arbitration agreement with a Delaware party.

SELECTING AN ARBITRATOR UNDER THE DRAA

Section 5805(a) of the DRAA allows parties to select "one or more" arbitrators. Accordingly, it permits disputes to be decided by three-person tribunals and permits parties to establish the appointment method.

Unlike under the previous Delaware arbitration program, sitting Chancery Court judges do not serve as the default arbitrators. Instead, the parties are free to select arbitrators of their choice.

If the parties cannot agree on a sole arbitrator or if a party fails to make an appointment, the Chancery Court acts as the appointing authority. Under the DRAA, however, the court is obligated to select the arbitrator from a list of candidates provided by the parties. Additionally, any arbitrator appointed by the Chancery Court must have been a member in good standing of the Delaware bar for at least 10 years.

SCOPE OF THE ARBITRATOR'S AUTHORITY

The DRAA grants arbitrators exclusive jurisdiction to decide issues of procedural and substantive arbitrability, thereby eliminating the role that courts sometimes play when there is a dispute regarding substantive arbitrability. Additionally, parties that have agreed to arbitrate under the DRAA are deemed to have waived the right to seek to enjoin the arbitration, to remove it to federal court, or to appeal or challenge any interim rulings. Consequently, the DRAA seeks to minimize court interference in the arbitral process while it is ongoing and to streamline the route to a final award.

TIME LIMITS ON THE ISSUANCE OF AN AWARD UNDER THE DRAA

Notably, the DRAA requires arbitrators to issue a final award within 120 days of the arbitrator's acceptance of his or her appointment. Moreover, while parties may agree to extend the time for the issuance of a final award, they may only do so for an additional 60 days. Accordingly, the DRAA contemplates that disputes will be fully resolved within a maximum of six months, so practitioners should assess at the outset whether disputes about the transaction in question are ones that are appropriate to be resolved that quickly.

The DRAA also sets clear incentives for resolving disputes within the time frames it establishes. Specifically, an arbitrator's fees are reduced by 25 percent if the award is one to 30 days late, 75 percent if the award is 30–60 days late, and 100 percent if the award is more than 60 days late.

Given the tight time frames at issue for delivering an award, it is anticipated that arbitrators will necessarily limit the scope of discovery so that they can comply with the deadlines the DRAA establishes. This can be expected to result in cost benefits.

CHALLENGES TO CONFIRMATION OF AN AWARD

Challenges to an award must be made within 15 days of issuance of the award, and the bases for challenging are the same as those set forth in Chapter 1 of the Federal Arbitration Act (FAA) and are, therefore, limited to matters that would impact a party's due process rights (such as an arbitrator exceeding its powers or permitting some procedural irregularity that prejudiced a party's rights). Challenges must be brought directly to the Delaware Supreme Court, which can only vacate, modify, or correct the final award in conformity with

the FAA. Unlike arbitrations that are subject to the FAA, however, an arbitration agreement calling for the DRAA may provide for no appellate review or, alternatively, appellate review by one or more arbitrators.

Awards are deemed confirmed five days after the period for challenge has expired or, if the agreement forbids appellate review altogether, five days after the issuance of the award.

COMMENT

The DRAA is designed to offer a means for quickly and economically resolving commercial disputes for Delaware-based parties with minimal court interference. The DRAA should, therefore, offer yet another alternative to traditional courts for businesses wishing to quickly resolve their dispute by arbitration out of the public eye.

AUTHORS

NEW YORK

J.P. Duffy
jp.duffy@klgates.com

Tara L. Pehush
tara.pehush@klgates.com

Priya Chadha
priya.chadha@klgates.com

The DRAA is designed to offer a means for quickly and economically resolving commercial disputes for Delaware-based parties with minimal court interference.

Arbitration Before the Court of Arbitration of Côte d'Ivoire

Louis Degos and Dara Akchoti (Paris)

In order to mitigate the risks associated with the outstanding business opportunities offered in Africa, contracts often include arbitration clauses (see our article **Doing business in Africa: How to Minimise the Legal Risks Resulting from Disputes,** Arbitration World, Nov. 2013). Parties may, in this regard, select well-known arbitral institutions such as the International Chamber of Commerce (ICC).

However, some African contractors may prefer institutions or rules that they consider closer to the continent. In such cases, a suitable choice could be the arbitration mechanisms of the OHADA, the French acronym for the "Organisation for the Harmonisation of Business Law in Africa" (see our article **The Democratic Republic of the Congo Joins OHADA and its Arbitration Mechanisms,** Arbitration World, Sept. 2012).

The choice of arbitral institutions more specific to a country may also be contemplated. In this respect, the Court of Arbitration of Côte d'Ivoire (CACI) is one of the major arbitral institutions in West Africa. It was established in 1997 and is located in Abidjan, which is, unless the parties decide otherwise, the seat of CACI arbitrations. CACI arbitrations are presently governed by the Arbitration Rules of the CACI, dated 19 July 2012 (the "CACI Rules"). The OHADA Uniform Act on Arbitration, dated 11 March 1999, based on the UNCITRAL Model Law, applies to issues not regulated by the CACI Rules.

The CACI Rules contain many provisions similar to the ICC Rules of Arbitration, although the same terms are not always used. For instance, the CACI Rules provide that, upon constitution of the

Arbitral Tribunal and payment of the advance on costs, the file is transmitted by the Secretariat to the Tribunal, which must then hold a "preliminary meeting" with the parties and their respective counsel to confirm the issues in dispute and procedural matters, set a procedural timetable, and establish minutes—which must be signed by the Tribunal and the parties. This system largely reflects the Case Management Conference and Terms of Reference under the ICC Rules.

Another interesting feature of the CACI Rules is the substantial role granted to the Technical Committee. If the parties fail to agree, the Technical Committee has to appoint the sole arbitrator or, if the co-arbitrators cannot agree, the President of the Arbitral Tribunal. Moreover, in case of (i) refusal by a party to sign the minutes of the preliminary meeting or (ii) reservations expressed by a party, the minutes are submitted to the Technical Committee for its approval. Last, but not least, the Technical Committee is responsible for the scrutiny of the draft award and *"may, without affecting the Arbitral Tribunal's liberty of decision, draw its attention to points of form or substance"* (Art. 28 of the CACI Rules). The CACI indicates on its website that the Technical Committee consists of nine members, but only mentions the identity of the President—for the sake of transparency, one could suggest that the parties be informed of the names of all nine members.

Furthermore, the CACI Rules set out short time limits, which constitute a key feature. For example, the Answer to the Request and Counterclaims must be filed within 10 days from the receipt of the Request for Arbitration, and the claimant has 10 days from the receipt of the Counterclaims to reply to them. Nevertheless, such time limits may be extended by the Secretariat upon request of a party. Also, the date of the hearing must be set within five months from the transmission of the file to the Arbitral Tribunal, unless the

parties request otherwise, and, in any event, the final award must be rendered within six months from this transmission.

Finally, it is interesting to note that Article 11.4 of the CACI Rules reads *"The arbitrators are chosen on the list of arbitrators of the CACI. If circumstances require so, they may be chosen outside of this list."* Although it is valuable to have an official list of arbitrators, there is no doubt that parties place considerable importance on the free choice of the arbitrators, especially for international disputes, so that they will expect the CACI to be flexible on this point. Otherwise, such provision could constitute a drawback of the CACI compared to other arbitration institutions.

In a nutshell, the CACI is a potentially interesting option when entering into contracts with Ivorian parties in particular. The thriving economy of Côte d'Ivoire may offer great prospects for the future of the CACI.

AUTHORS

PARIS

Louis Degos
louis.degos@klgates.com

Dara Akchoti
dara.akchoti@klgates.com

The CACI is a potentially interesting option when entering into contracts with Ivorian parties in particular.

The issue was whether the [disciplinary tribunal's] processes constituted a commercial arbitration for the purposes of the legislation.

What is a Commercial Arbitration?

John Kelly and William KQ Ho (Melbourne)

In late 2014, in particularly unusual circumstances, the Supreme Court of Victoria (the "Court") was asked to consider the very fundamental—but rarely asked—question: *What is a commercial arbitration?* The issue arose when a disciplinary tribunal for the Australian Football League sought the aid of the provisions of the domestic arbitration legislation to issue subpoenas to two individuals who refused to appear before the Tribunal. The issue was whether the Tribunal's processes constituted a commercial arbitration for the purposes of the legislation.

BACKGROUND

Australian Football is one of the biggest sports in Australia and is Australia's national sport. The highest league in the country is the Australian Football League (AFL). In 2013, the AFL faced one of the biggest crises that the sport had seen. It was alleged that one of the competing clubs, the Essendon Football Club ("Essendon"), had implemented a program whereby its players took banned substances to enhance their playing performance.

Those allegations drew the attention of the Australian Sports Anti-Doping Authority ("ASADA"), which is Australia's national anti-doping organisation established in 2006 by the Australian government. After nearly two years of investigation and various legal disputes, the AFL Anti-Doping Tribunal (the "Tribunal") convened over a number of days in December 2014 to determine whether 34 current and former Essendon players (the "Players") and one member of the team's

support staff (the "Support Person") had violated the *AFL Anti-Doping Code,* with ASADA acting as the "prosecutor". For the purposes of the hearing, ASADA sought to rely on the evidence of two key individual witnesses. However, both individuals indicated that they would not voluntarily attend the hearing.

Given that the Tribunal had no coercive powers requiring the attendance of the witnesses to the hearing, ASADA and the AFL made a joint application to the Court requesting that the Court issue subpoenas to, among others, the two key witnesses requiring their attendance at the Tribunal hearing. ASADA and the AFL contended that the *Commercial Arbitration Act* 2011 (Vic) (CAA) gave the Court jurisdiction to issue those subpoenas. The Players and the Support Person contended that the CAA had no application as the Tribunal hearing was not a commercial arbitration hearing for the purposes of the CAA.

Justice Croft dismissed ASADA's and the AFL's application on the basis that the Tribunal hearing could not be properly characterised as arbitration proceedings or commercial arbitration proceedings.

COMMERCIAL ARBITRATION ACT

The CAA is a domestic arbitration legislation (uniformly drafted and adopted by each of the Australian states), which is modelled on the UNCITRAL Model Law (as revised in 2006). Among other purposes, it is designed to allow parties to commercial arbitral proceedings to seek the assistance of the Court with respect to the gathering of evidence. One of the ways in which the Court can assist is by issuing subpoenas compelling nonparties to the arbitration to attend before the arbitral tribunal to give oral and/or documentary evidence.

ASADA and the AFL sought to rely on the Court's powers under section 27A to compel the key witnesses to appear before the Tribunal and

provide evidence. However, there was a real concern as to whether the CAA had application in these circumstances given that it only applied to domestic commercial arbitrations.

CHARACTERISTICS OF ARBITRATION PROCEEDINGS

Justice Croft began his analysis as to whether the Tribunal hearing was an arbitration by identifying that unless there was an arbitration agreement or a provision in another piece of legislation that mandated arbitration, there would be no basis for any arbitration.

Justice Croft then referred to the general characteristics of arbitration at common law. Justice Croft's survey of the authorities suggested that the fundamental feature of arbitration was that it was an inquiry in the nature of a judicial inquiry. While Justice Croft noted that anything in the nature of a comprehensive and prescriptive definition of "arbitration" is extremely difficult, the authorities indicated that there was some indicia of an arbitration. Most notably, the English decision of *Walkinshaw v Diniz* [2000] 2 All ER (Comm) 237 set out 10 indicia of arbitration, namely:

1. The parties should have a proper opportunity of presenting their case;
2. The arbitrators do not receive unilateral communications from the parties and disclose all communications with one party to the other party;
3. The provision of proper and proportionate procedures for the provision and for the receipt of evidence;
4. The procedural agreement must contemplate that the tribunal will make a decision which is binding on the parties;
5. The procedural agreement must contemplate that the process will be carried on between those persons whose substantive rights are determined by the tribunal;

6. The procedural agreement must contemplate that the tribunal will determine the rights of the parties in an impartial manner;
7. The procedural agreement must contemplate a process whereby the tribunal will make a decision upon a dispute which is already formulated at the time when the tribunal is appointed;
8. The jurisdiction of the tribunal must derive either from the consent of the parties, or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration;
9. The tribunal must be chosen, either by the parties or by a method to which they have consented; and
10. The agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law.

NOT ARBITRATION PROCEEDINGS

Justice Croft carefully went through and considered each of the 10 indicia. He concluded that the Tribunal hearing could not be properly characterized as arbitral proceedings for a number of reasons, including that:

- While a decision of the Tribunal might ultimately be enforceable through the web of applicable contractual provisions, this was not the same as the effect of an arbitral award, which is directly enforceable by a court under the provisions of the CAA; and
- The relevant provisions of the AFL Anti-Doping Code, which govern the appointment of members of the tribunal could not be regarded as the typical or usual process applied to the appointment of tribunal members to an arbitral tribunal.

NOT A COMMERCIAL ARBITRATION

Justice Croft held that even if the proceedings before the Tribunal could be characterised as an arbitration, they could not be characterised as a "commercial" arbitration. Justice Croft noted that relevant commentaries suggest that "commercial" was to have a broad and wide—but not boundless—interpretation. In that regard, Justice Croft referred to a number of authorities whereby labour and employment disputes were not considered to be falling within the sphere of commercial arbitration.

ASADA argued that given that Australian Football, at the professional level, is commercially orientated in the sense that issues such as player contracts, television broadcasting, and intellectual property are the subject of detailed commercial agreements, the proceeding before a tribunal involving AFL players ought to be regarded as "commercial" arbitration. Justice Croft said that while he acknowledged that the AFL contains intensely commercial aspects, he was of the view that the proceedings before the Tribunal were:

> *"primarily conduct and disciplinary proceedings with respect to players and are, consequently, not commercial in the relevant sense."*

Justice Croft ultimately decided that:

> *"The contractual provisions to which reference has been made in the preceding reasons, the suite or web of contractual provisions, indicates clearly, in my view, that these proceedings are properly characterised as being a labour or employment dispute. As I said in the course of the hearing—putting matters colloquially—the position is that an adverse finding in a proceeding of the present kind may result in the player concerned being 'out of a job', for a longer or shorter period of time. …*

Accordingly, I find that even if the proceedings conducted by the Tribunal are properly characterised as arbitration proceedings, they are not 'commercial' for the purposes of the Act and, consequently, are not within the scope of its operation."

CONCLUSION

While Australian courts are usually supportive of arbitration processes, this decision highlights that their supervisory powers in respect of an arbitration must originate from the relevant arbitration legislation. The Court was not convinced that its powers could be invoked under the circumstances where the hearing before the Tribunal could not be defined as an arbitration or a commercial arbitration. By reaching this conclusion, the Court ensured that the Court's assistance under the provisions of the domestic arbitration legislation could only be used by parties to commercial arbitrations—and not be abused by parties to any other form of tribunal hearing (such as disciplinary hearings).

AUTHORS

MELBOURNE

John Kelly
john.kelly@klgates.com

William KQ Ho
william.ho@klgates.com

While Australian courts are usually supportive of arbitration processes, this decision highlights that their supervisory powers in respect of an arbitration must originate from the relevant arbitration legislation.

Who Decides Who Gets to Decide? Challenging the Competence of U.S.—Seated Arbitrators to Determine Arbitrability of a Dispute

Max Louik (Pittsburgh), John P. Estep (Washington, D.C.), and Kaitlin C. Dewberry (Pittsburgh)

When a dispute arises between parties to a contract, the dispute resolution provisions are naturally the first place to look. If the contract contains an arbitration clause, best practices require a thorough examination to determine an important threshold question: who will decide—the arbitrators or the courts—whether the parties agreed to submit a particular dispute to arbitration? While the question may be simple, finding an answer can be rather complex.

If a party believes the dispute falls outside the scope of the arbitration agreement and seeks to resist the jurisdiction of the tribunal to hear the case, it generally has three options: (1) raise the jurisdictional challenge before the tribunal, (2) default and then resist enforcement of an award, or (3) challenge the tribunal's jurisdiction in a court where the arbitration is seated. This article addresses the third scenario for international arbitral tribunals seated in the United States and discusses how American courts answer the question of who gets to decide whether a particular dispute is arbitrable.

DEFAULT RULE: COURTS DECIDE

The interpretation of international arbitration agreements is typically governed by U.S. federal law. As recognized by the U.S. Supreme Court, arbitration is strictly a matter of consent. Thus, "it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc.*

v. Kaplan, 514 U.S. 938, 943 (1995). Under American law, the question of who decides whether the parties agreed to submit a particular dispute to arbitration is typically referred to as a question of "arbitrability."

Where an arbitration agreement appears to be silent on the question of arbitrability, the Supreme Court has held that courts—not arbitrators—will decide. Although courts are instructed to resolve any doubts concerning the scope of arbitrable issues in favor of arbitration, when it comes to the threshold question of **who** decides whether a particular dispute is arbitrable, the presumption is reversed. As explained by the Court in *First Options:*

> Courts should not assume that the parties agreed to arbitrate arbitrability unless there is **clear and unmistakable evidence** that they did so. In this manner the law treats silence or ambiguity about the question "who (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement"—for in respect to this latter question the law reverses the presumption.

514 U.S. at 944–45. (internal quotations omitted).

CLEAR AND UNMISTAKABLE EVIDENCE: HOW CLEAR AND UNMISTAKABLE MUST IT BE?

Following the decision in *First Options,* American courts will decide whether a particular dispute is arbitrable absent clear and unmistakable evidence in the parties' contract that the parties intended to submit that question of arbitrability to the arbitrators. As the caselaw has developed, courts have wrestled with what "clear and

unmistakable evidence" looks like, in the absence of an arbitration agreement which expressly states that questions concerning whether a particular dispute falls within the scope of the agreement will be submitted to the arbitral tribunal. Although a clear and unmistakable evidentiary standard seems difficult to satisfy, courts have often permitted an arbitral tribunal to resolve the arbitrability question where it is not so apparent that the parties have clearly and unmistakably manifested their intent to do so.

In particular, most courts have found clear and unmistakable evidence of the parties' intent to submit questions of arbitrability to the arbitral tribunal where: (1) the parties have incorporated certain institutional arbitration rules that call for resolution of the arbitrability question by the arbitral tribunal—see, for example, Article 6(3) of the ICC Rules of Arbitration, which provides that if a jurisdictional objection is raised *"the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitration tribunal . . ."*; and (2) where the parties have agreed to arbitrate under a broad and expansive arbitration clause—see, for example, *Bechtel do Brasil Construções Ltda v. UEG Araucária Ltda,* 638 F.3d 150 (2d Cir. 2011) (broad and unqualified arbitration clauses evince parties' intent to arbitrate all issues); *John Hancock Life Ins. Co. v. Wilson,* 254 F.3d 48, 55 (2d Cir. 2001) ("parties may overcome the First Options presumption by entering into a separate agreement that (1) employs the 'any and all' language").

CONCLUSION

Notwithstanding the unexpectedly broad universe of "clear and unmistakable evidence," best practices call for contracting parties to explicitly state in an arbitration agreement that the arbitrators will (or will not) decide threshold questions of arbitrability. Most contracting parties are likely to prefer to have arbitrability decided by the arbitral tribunal to keep dispute resolution efficient and avoid the costs associated with judicial resolution of the arbitrability question.

AUTHORS

PITTSBURGH
Max Louik
max.louik@klgates.com

WASHINGTON, DC
John P. Estep
john.estep@klgates.com

PITTSBURGH
Kaitlin C. Dewberry
kaitlin.dewberry@klgates.com

The ICA Subsection is one of the first of its kind in the United States and one of a handful across the globe.

Miami's International Commercial Arbitration Court: One of the First of Its Kind

Karen Finesilver and Jonathan Morton (Miami)

In December 2013, the state court system in Miami, Florida, added a new court subdivision devoted to hearing international commercial arbitration matters. Specifically, on December 3, 2013, the chief judge created the International Commercial Arbitration Subsection (the "ICA Subsection") of the Complex Business Litigation Section in the Eleventh Judicial Circuit in Miami-Dade County.

The ICA Subsection is one of the first of its kind in the United States and one of a handful across the globe. New York City created a similar specialized court division in September 2013; Paris, Singapore, and London also offer similar such court divisions.

BENEFITS OF THE ICA SUBSECTION

Parties to an international arbitration in Miami should not overlook this valuable resource. One of the ICA Subsection's key benefits is the guarantee that the presiding judge not only has experience with complex commercial matters, but also has been specifically trained to deal with all international commercial arbitration issues.

The ICA Subsection can grant relief that the arbitral tribunal could not otherwise provide. For instance, in one case currently pending before the ICA Subsection involving a dispute between members of an LLC, the arbitration provision in the LLC's Operating Agreement specifically provided that the arbitrator "shall not have subject matter jurisdiction to decide any issues relating to … any request for injunctive relief." Therefore, while the arbitration in Miami was pending on the monetary claims before the International Centre for Dispute

Resolution (ICDR), the international arm of the American Arbitration Association, the plaintiff was able to go to the ICA Subsection to request injunctive relief. *O'Shea v. Twofifty Collins, LLC,* Case No. 2015-009899-CA-01 (Miami-Dade 11th Jud. Cir. 2015).

Additionally, parties may (subject to any applicable rules of arbitration) utilize the ICA Subsection to decide a wealth of issues, including:

- Jurisdiction of the arbitral tribunal (where a party objects to the arbitral tribunal's finding that it has jurisdiction);
- Appointment of arbitrators;
- Challenges to arbitrators;
- Interim measures of protection (e.g., where a party seeks emergency relief to maintain the status quo and preserve assets out of which a subsequent award may be satisfied);
- Taking of evidence (e.g., where the parties require assistance to compel the appearance of witnesses, preserve evidence, or order document production from third parties);
- Setting aside an arbitration award (e.g., where the losing party argues that the award should be vacated because, for instance, it conflicts with the public policy of Florida); and
- Enforcing an arbitration award (where the successful party seeks to have the court recognize the award as binding).

HOW TO GET A CASE INTO THE ICA SUBSECTION

Although there are a few exceptions, the ICA Subsection's purview is generally broad. To have a case heard in the ICA Subsection, the case must arise under (1) the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) (the "FAA"); or (2) the Florida International Commercial Arbitration Act (Chapter 684, Florida Statutes) (the "FICAA").

A case arises under the FAA if the arbitration provision at issue is in an agreement "involving commerce." 9 U.S.C. § 2. The scope of the FICAA is more detailed. To arise under the FICAA, the case must satisfy at least one of the following criteria: (1) the parties to the arbitration agreement have places of business in different countries; (2) the arbitration venue is situated outside the country in which the parties have their places of business; (3) the place where the subject matter of the dispute is most closely connected is situated outside the country in which the parties have their places of business; or (4) the parties expressly agreed that the subject matter of the arbitration agreement relates to more than one country. FLA. STAT. § 684.0002.

Once it is determined that the case arises under the FAA and/or the FICAA, the next question to ask is whether the case stems from a relationship that is entirely between citizens of the United States. If so, the case is ineligible to be heard in the ICA Subsection, unless the relationship (1) involves property located abroad; (2) envisions performance or enforcement abroad; and/or (3) has some other reasonable nexus with one or more foreign states.

CONCLUSION

The ICA Subsection is another distinctive feature making Miami an increasingly attractive venue for international arbitration. Miami is a gateway to the Americas, has ready availability of multilingual professionals, and can offer relatively lower costs (versus New York, for example). Compared to other Latin American seats for arbitration such as São Paulo and Mexico City, Miami offers a more secure environment and infrastructure. Florida law is also amenable to international arbitration. With its enactment of the FICAA in 2010, Florida

is one of only eight states to have adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.

Tellingly, the number of international arbitrations filed in Miami through the ICDR grew from 49 in 2010 to 128 in 2013. With the establishment of the ICA Subsection in December 2013—a clear signal that Miami welcomes international arbitration with open arms—the upward trend of international commercial arbitration in Miami is likely to continue.

AUTHORS

MIAMI

Karen Finesilver
karen.finesilver@klgates.com

Jonathan Morton
jonathan.morton@klgates.com

The number of international arbitrations filed in Miami through the ICDR grew from 49 in 2010 to 128 in 2013.

PCERA has been established to coordinate and facilitate the resolution of disputes relating to all aspects of energy and resources projects.

Perth Centre for Energy and Resources Arbitration

Nicholas Brown, Venetia Stewart, and Nicolas Lee (Perth)

The Perth Centre for Energy and Resources Arbitration (PCERA) is an arbitration institute in Perth, Western Australia, launched in March 2015 to cater for participants and projects in the energy and resources industries.

Modelled in part on the International Centre for Energy Arbitration, recently launched in Scotland, PCERA has been established to coordinate and facilitate the resolution of disputes relating to all aspects of energy and resources projects, industries that are central to the Western Australian—and Australian—economy.

In an attempt to attract disputes away from the more established centres such as Singapore and Hong Kong, PCERA offers a novel dispute resolution service known as Collaborative Expert Resolution (CER), which is discussed below.

THE ARBITRATION LANDSCAPE FOR WESTERN AUSTRALIA

In line with the global trend towards increasing numbers of international arbitrations, there have been a growing number of ad hoc arbitrations in Western Australia in the energy and resources industries.

Perth holds appeal as a location for arbitrations for a number of legal, social, and geographic reasons—it is within a stable democracy with strong adherence to the rule of law; the Western Australian (and Australian) legislative regimes and judiciary are pro-arbitration; there are highly qualified and experienced practitioners, arbitrators, and experts in the energy and resources industries; Perth is in close proximity to key financial and industry hubs in Asia and shares the

same time zone; and, not least of all, its weather is enviably pleasant all year round.

PCERA ARBITRATION RULES AND PRINCIPLES

PCERA provides a model arbitration clause and set of optional arbitration rules. Its suggested rules are based on the UNCITRAL Arbitration Rules (as revised in 2010), with some minor modifications that expressly empower PCERA to act as the appointing authority.

To guide arbitrators in the exercise of their procedural discretion, PCERA has also published a set of arbitration principles. PCERA maintains a panel of arbitrators experienced in the energy and resources sectors, including industry experts drawn from Australia and Australia's major international trading partners, particularly in the Asian region.

COLLABORATIVE EXPERT RESOLUTION

CER is a unique alternative dispute resolution service offered by PCERA. As its name suggests, CER involves independent experts appointed for each party collaborating to reach a consensus on the merits of the issues in dispute with a view to resolving disputes faster and with fewer costs than is possible in the courts. The CER process has been designed to assist parties to maintain an ongoing working or contractual relationship while managing a dispute.

The CER process follows five steps:

1. the parties agree to submit their dispute to CER;
2. a number of experts, equaling the number of parties to the dispute, are appointed at random by PCERA from a shortlist panel agreed by the parties;
3. each party confidentially consults with one expert;

4. the experts confidentially confer between themselves as to the issues in dispute; and
5. the experts produce a joint agreed assessment setting out their views on the relative merits of the dispute and how they believe the main issues of the dispute are likely to be resolved.

Detailed provisions with respect to each step are provided by PCERA, including standard form agreements for referring the dispute to CER and standard terms of appointment for experts. The experts are either retired judges or practising senior counsel.

CER can be undertaken on a binding or nonbinding basis.

If the assessment is nonbinding, then the statement produced by the experts will be subject to without prejudice privilege. This can be useful to parties considering whether to take further action.

If the assessment is undertaken as a binding process, the lawyers for each party may provide a short written response to the experts' assessment, following which the experts will issue their final, binding determination.

As a relatively novel approach to dispute resolution, for binding CER processes in respect of disputes relating to the quantum of a money claim, PCERA offers an option for disputing parties to each submit a single amount for which that party contends. The experts will then select one of the submitted amounts as the binding outcome of the dispute (akin to what is sometimes referred to as 'baseball' arbitration).

As a result of this process, parties are expected to be reasonable in their assessments, while still being able to participate in discussions with the experts as to why the proposed figure should be selected.

FUTURE OUTLOOK

The timing of the launch of PCERA presents challenges and opportunities: with the sustained downturn in commodities prices, there is the potential for legal disputes to become more prevalent in an economy as exposed to the resources industry as Western Australia's.

PCERA may be able to capitalise on the downturn in economic conditions. Conversely, with fewer new projects, there may be correspondingly fewer opportunities to write arbitration agreements utilising PCERA into new contracts.

PCERA also faces stiff competition from international arbitration institutions in Asia, in particular Singapore, Hong Kong, and Kuala Lumpur. In 2014, Australia was one of the top 10 nations by number of parties represented in the Singapore International Arbitration Centre.

Despite this competition, the addition of specialised arbitration centres, such as PCERA, to complement Australia's already solid domestic arbitration platform has seen commentators predict an upswing in the number of arbitrations held in Australia.

Further information about PCERA (including its model arbitration clause and arbitration rules) can be found at **http://pcera.org/.**

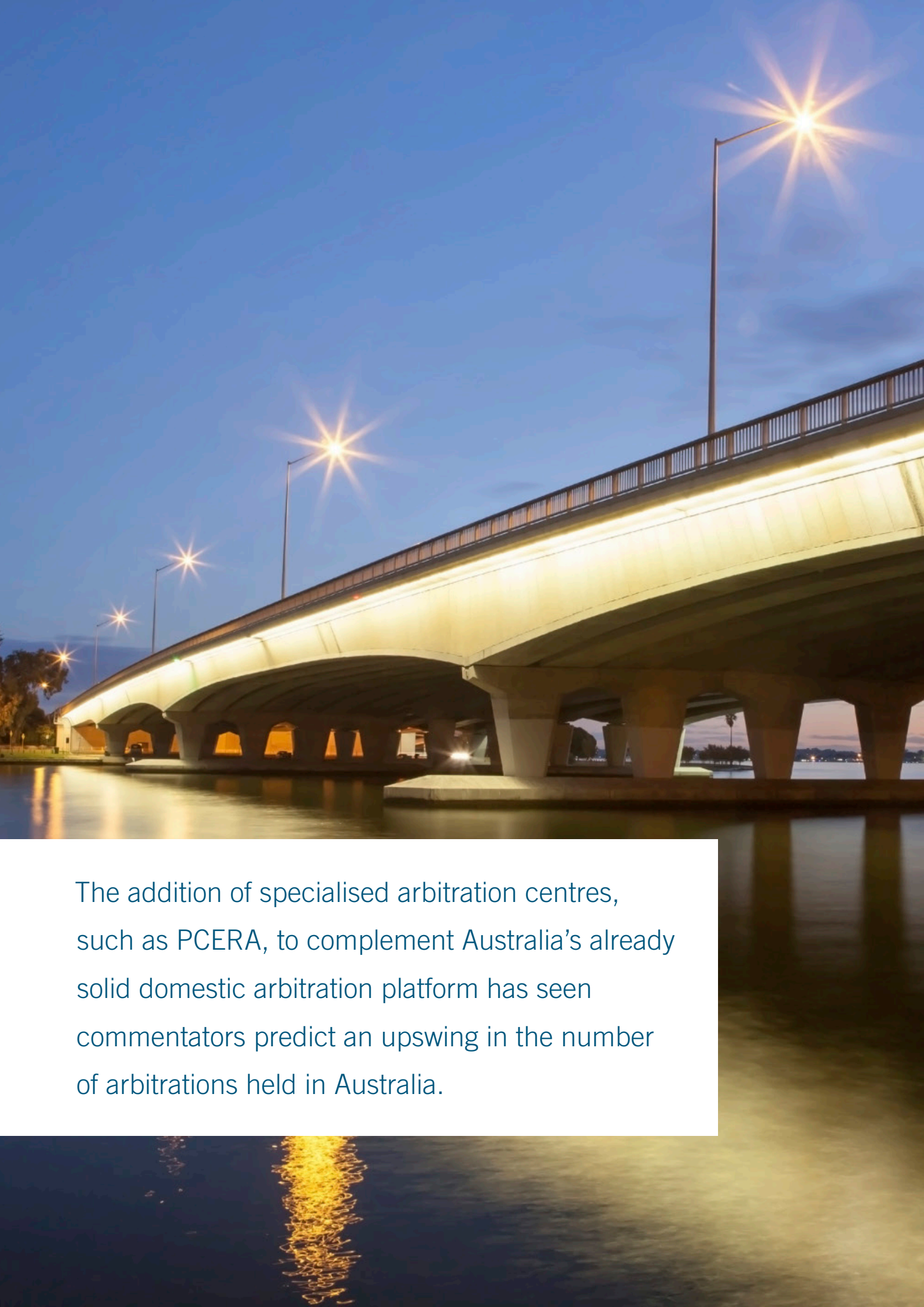
AUTHORS

PERTH

Nicholas Brown
nicholas.brown@klgates.com

Venetia Stewart
venetia.stewart@klgates.com

Nicolas Lee
nicolas.lee@klgates.com



The addition of specialised arbitration centres, such as PCERA, to complement Australia's already solid domestic arbitration platform has seen commentators predict an upswing in the number of arbitrations held in Australia.

The 2015 CIETAC Arbitration Rules: How Do the New Emergency Arbitration Procedures Compare?

Andrea Utasy (ingapore) and Sacha Cheong (Hong Kong)

The 2015 Rules of the China International Economic and Trade Arbitration Commission (CIETAC) took effect on 1 January 2015. This is the eighth revision of the CIETAC arbitration rules since their first publication in 1956.

CIETAC has introduced a number of welcome changes, which are comparable with the current rules of other major arbitration institutions in Asia and make CIETAC a viable option for parties who carry on business in China or who deal with Chinese counterparts.

Some key features of the 2015 Rules include new provisions for disputes concerning multiple contracts (Article 14), new provisions for joinder of additional parties (Article 18), enhanced provisions for the consolidation of arbitrations (Article 19), and new special provisions for arbitrations administered by the CIETAC Hong Kong Arbitration Center (Articles 73 to 80).

In this article, we focus on the new emergency arbitrator procedures and highlight a potential issue that could arise if the arbitration is seated in the People's Republic of China (PRC).

EMERGENCY ARBITRATOR PROCEDURES

Emergency arbitrator procedures have been around for several years. The Singapore International Arbitration Centre (SIAC) was the first major institution to adopt the procedure in 2010, followed by the International Chamber of Commerce (ICC) in 2012 and the Hong Kong International Arbitration Centre (HKIAC) in 2013.

Broadly speaking, emergency arbitrator procedures have the following characteristics:

- An expedited process and timetable for the appointment of an emergency arbitrator and decision on the urgent relief sought by the applicant.
- The emergency arbitrator has broad powers as to the type of relief that may be ordered.
- The emergency arbitrator's order is binding on the parties and enforceable. However, the order may be subsequently varied, extended, or annulled by the arbitral tribunal.
- The appointment of the emergency arbitrator does not prejudice the parties' rights of access to the local courts for the same relief or subsequent applications.

Under CIETAC's 2012 Rules, parties did not have any ability to seek emergency relief or other protective measures prior to formal referral to arbitration or the formation of the arbitral tribunal. Faced with this situation, parties would have had to seek recourse from the local courts or wait for the arbitral tribunal to be constituted, neither being particularly desirable. The inclusion of the emergency arbitrator procedures, set out in Article 23(2) and Appendix III, endeavours to fill this gap in CIETAC's rules and permits a party to apply to CIETAC's Arbitration Court for urgent interim relief.

However, when the rules of the various arbitration institutions are compared side by side, there are some subtle differences:

When is the earliest that a party can apply for urgent relief?

In the cases of CIETAC, SIAC, and HKIAC, a party may apply for urgent relief concurrent with or following the filing of the notice of arbitration. The ICC's rules permit an application for the appointment of an emergency arbitrator to be made even before the notice of arbitration has

been filed. This may be seen as a real advantage given the amount of work and costs that can be associated with preparing and filing a notice of arbitration.

What is the timeframe for dealing with the application?

There is not much variation between the various institutions. Under the ICC rules and HKIAC rules, the emergency arbitrator must be appointed within two days of receipt of the application, whereas in the cases of SIAC and CIETAC, the timing is just one day. The emergency arbitrator then has two days from his appointment to fix the procedural timetable for the consideration and determination of the application (whereas the HKIAC rules are silent on this). The emergency arbitrator must render his or her decision/order within 15 days from his or her appointment. Only SIAC does not stipulate a time limit by which the emergency arbitrator's decision must be made, but the norm is 15 days.

What are the associated fees?

In addition to lawyer fees, the applicant will be required to pay a deposit or application fee to the arbitral institution when applying for emergency relief. The deposit/application fee is intended to cover the administrative costs of the institution as well as the estimated costs of the emergency arbitrator. Based on the current published figures, the least expensive of the arbitral institutions is CIETAC at RMB 30,000 (approximately USD 4,850), then SIAC at SGD 25,000 (approximately USD 18,500), then HKIAC at HKD 250,000 (approximately USD 32,250), with the most expensive being ICC at USD 40,000.

There is, however, one further notable difference. Unlike the emergency arbitrator procedures of the ICC, HKIAC, and SIAC, a party's ability to invoke the emergency arbitrator procedures under

CIETAC's 2015 Rules is subject to the applicable law or the agreement of the parties. Invariably, parties will not have considered the use of emergency arbitrator procedures at the outset of their contractual negotiations, and by the time a dispute arises, any prospect of reaching an *ad hoc* agreement will have vanished. This means that the parties must fall back on the applicable law. In the case of Hong Kong, its arbitration law provides for the enforcement of a grant of emergency relief by an emergency arbitrator, and, accordingly, it appears that a party to a CIETAC arbitration seated in Hong Kong would be able to effectively avail itself of the emergency arbitrator procedures even without the agreement of all parties. However, as to arbitrations seated in the PRC, unless all parties have agreed to the emergency arbitrator procedures, these procedures are unlikely to be available to any one party, as these procedures are not provided for under the arbitration law of the PRC. Thus, for now, it remains uncertain whether and to what extent the PRC courts will give effect to CIETAC's emergency arbitrator procedures. Until the issue is clarified, a party in this situation may discover that its only recourse is to the local PRC courts.

AUTHORS

SINGAPORE
Andrea Utasy
andrea.utasy@klgates.com

HONG KONG
Sacha Cheong
sacha.cheong@klgates.com

The Relative Rewards and Risks of Predictive Coding

Julie Anne Halter, Rob Noreus, and Mike Goodfried,
K&L Gates e-Discovery Analysis & Technology Group

As personal computers, laptops, tablets, smartphones, social media, cloud computing, and other devices proliferate in the workplace, so has the number of different software applications that allow us to communicate from anywhere, at any time, and in virtually any format. As a result, the amount of information businesses create has exploded. Over the next 15 years, the digital universe is expected to more than double every two years, going from 4.4 trillion gigabytes to 44 trillion gigabytes. While generating and sharing information is critical for any business, one unexpected yet significant consequence of these enormous data volumes is the increasingly prohibitive cost of collecting, filtering, reviewing, and producing massive volumes of electronically stored information (ESI) in dispute resolution proceedings.

Electronic discovery commentators estimate that at least 50 percent of ESI maintained by a given organization is duplicative, outdated, or unnecessary for business purposes. Accordingly, when faced with legal proceedings, clients often find that most of the ESI they collect is irrelevant. The challenge for lawyers is how to best leverage rapidly evolving technologies to reduce the time and expense associated with document review, while not compromising their duties as zealous advocates for their clients.

Some document review solutions have been available for many years, but are enhanced with better technology. For example, the use of key words to search for and capture potentially relevant electronic documents, and leave aside the vast majority of likely irrelevant documents, has been prevalent for more than a decade. Newer technologies allow

for more complex searching and categorization of documents. Some of these tools are enhanced with concept clustering functionality, which uses linguistics analysis and algorithms to identify key concepts in documents and allow lawyers to quickly and easily organize them so that documents containing similar subject matter or concepts can be reviewed together. Because the reviewing lawyer is able to make relevancy and other important decisions based on groups of similar documents, instead of on a document-by-document basis, the overall document review process can be less expensive, more efficient, and more accurate. These tools continue to add helpful and sophisticated analytics to their offerings. Many now provide a framework for conducting statistical analyses of the document review, permitting the supervising lawyers to measure the effectiveness of keywords and to conduct a sampling of documents not captured by keywords to ensure nothing relevant has been missed.

One of the most recent technologies to assist with document review has garnered a great deal of publicity in recent years: predictive coding. Predictive coding is a process that involves the use of a machine-learning algorithm designed to distinguish relevant from nonrelevant documents, based on a set of training documents, known as a seed set, that has been reviewed and coded by a subject matter expert. The fundamental premise behind predictive coding technology is that once ESI has been collected and loaded into a database, a lawyer or a small number of lawyers with the most comprehensive legal and factual case knowledge about the matter reviews a set of documents that is either randomly selected or gathered using keyword terms. Using the decisions applied to this seed set, the tool's algorithm then identifies other documents within the data set that must be reviewed for the system to further learn and distinguish what is relevant and not relevant. During the training process, the relevant documents are available for lawyer review as appropriate to ensure

the algorithm correctly categorized the material. Often, adjustments must be made to fine-tune the results. In addition, it is critical that a sampling of the documents identified as not relevant by the predictive coding technology is also reviewed, so that further adjustments can be made if necessary. Once the system is "fully trained," it analyzes the remaining documents in the un-reviewed dataset and categorizes them as relevant or not relevant based on what it learned through the seeding process.

There are a number of potential benefits to predictive coding, including: 1) it can be deployed against massive data sets quite efficiently because it leverages decisions applied to representative samples of documents to find other relevant and/or irrelevant documents; 2) it limits the number of documents that a lawyer may need to review to only those necessary to form an adequate seed set; and 3) the results can be validated statistically in case of subsequent discovery challenges. As with all review technology, you should consider whether predictive coding is appropriate for your specific case. What subject matter is covered within your documents, and how do you anticipate that it will relate to the issues in your case? Given the number and complexity of the issues, as well as the volume of documents at issue, is predictive coding the most cost-effective solution? Is predictive coding technology readily accepted within your jurisdiction, or is it viewed with skepticism? What protocols and strategies will you employ for the predictive coding review? Anecdotal evidence suggests that the iterative process of training the predictive coding tool can be extensive and expensive. This is particularly true given that the predictive coding model generally requires the seed set to be a statistically significant sample to ensure the system is adequately trained. As a result, it may be necessary to engage in multiple rounds of seed set review before an acceptable level of precision and recall is reached.

The use of predictive coding technology has made headlines in the United States and more recently in Ireland. Many courts in the United States have expressed general agreement that using technology to assist in document review is appropriate and acceptable for efficiency and cost savings and may be "better" than a manual document-by-document review, particularly where there are vast quantities of documents at issue; see *Da Silva Moore v. Publicis Groupe & MSL Group,* No. 11 Civ. 1279 (ALC) (S.D.N.Y. Feb. 24, 2012). While predictive coding has not been as widely adopted in Europe as in the United States, a recent Irish court decision appears to be the first by courts in Europe to endorse its use; see *Irish Bank Resolution Corporation Limited & Ors v. Sean Quinn & Ors,* [2015] IEHC 175.

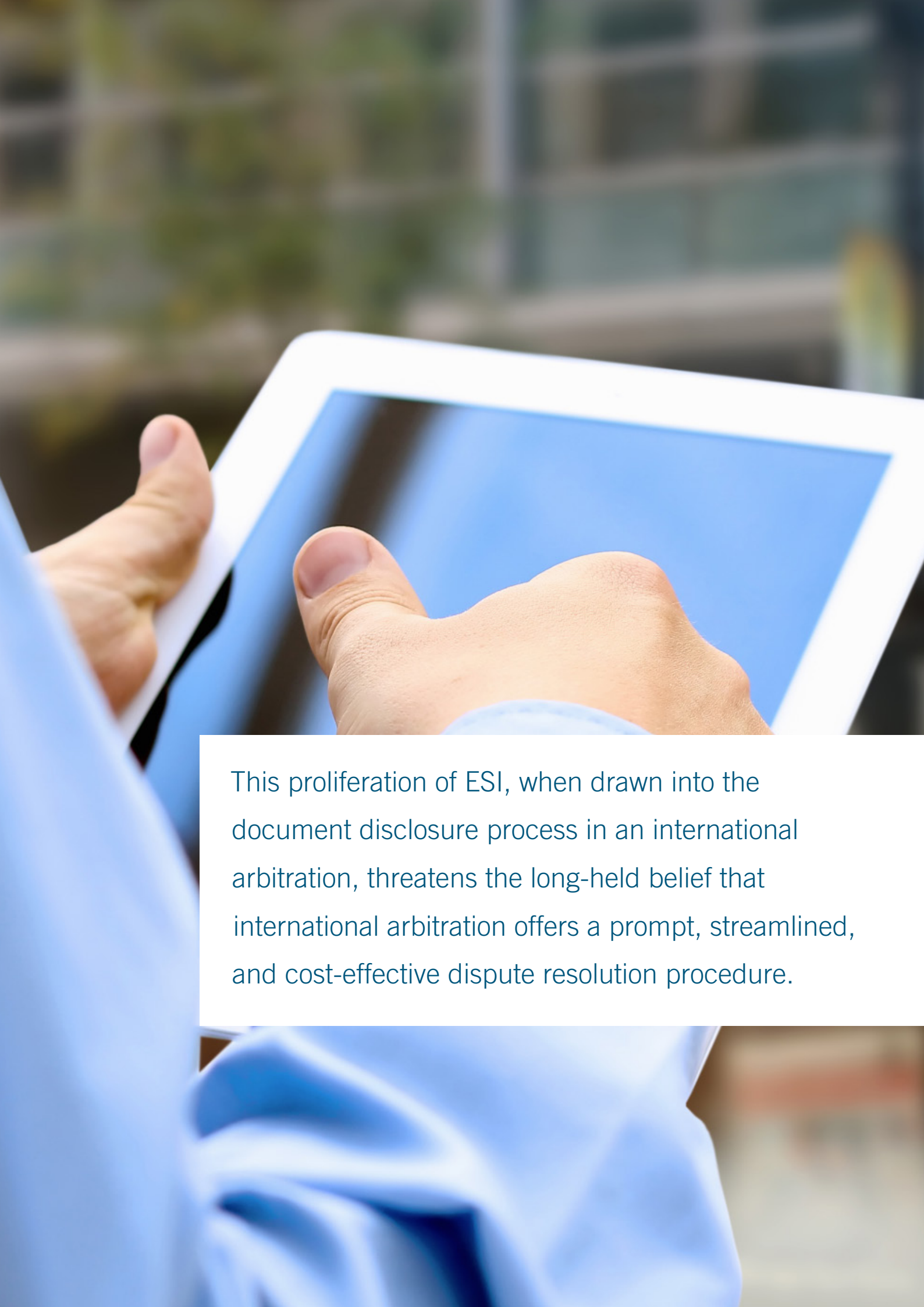
In conclusion, whatever technology is used to facilitate legal review and analysis of email and other electronic documents and, even more importantly, whatever protocol and strategies are deployed in using that technology, they must be well planned and documented. Moreover, given the various implications that the use of technology may have on the ultimate outcome of a matter, it is prudent to carefully consider and discuss the alternatives with the legal team, and it is quite often an advisable (and, in some cases, a required) matter of disclosure and discussion with your adversary.

AUTHORS

SEATTLE
Julie Anne Halter
julieanne.halter@klgates.com

Rob Noreus
robertson.noreus@klgates.com

Mike Goodfried
michael.goodfried@klgates.com



This proliferation of ESI, when drawn into the document disclosure process in an international arbitration, threatens the long-held belief that international arbitration offers a prompt, streamlined, and cost-effective dispute resolution procedure.

The Challenges Electronically Stored Information Presents in International Arbitration

Douglas J. Simmons (Pittsburgh)

With the dawn of our digital age, business tasks that had been commonly performed by telephone or by face-to-face meeting started to be accomplished by email, text, cloud computing, or other electronic means, exponentially expanding the quantity of electronically stored information ("ESI").

This proliferation of ESI, when drawn into the document disclosure process in an international arbitration, threatens the long-held belief that international arbitration offers a prompt, streamlined, and cost-effective dispute resolution procedure. After all, not only has the explosion of ESI resulted in arbitrating parties possessing more relevant ESI than ever before but also more irrelevant ESI than ever before. Although respected organizations such as the International Bar Association ("IBA") and the Chartered Institute of Arbitrators ("CIArb") have promulgated rules, protocols, and other forms of guidance aimed at establishing a consensus around a best practice for parties and Tribunals to effectively deal with ESI, those procedural mechanisms have sometimes proven to be inadequate in practice. But do recent advances in technologies for processing, filtering, and reviewing ESI — such as predictive coding (as covered in the article from K&L Gates' e-Dat group on this issue) — offer new hope to arbitrating parties and Arbitral Tribunals for the possibility of more cost-effective management of their proceedings? This author believes that such technologies do offer an additional tool to practitioners, but the design and implementation of that tool is likely to remain a debated subject for the foreseeable future.

CURRENT TRENDS IN DOCUMENT DISCLOSURE UNDER COMMON LAW FRAMEWORKS

Over the last decade, various procedural tools have been developed with the goal of empowering parties and Arbitral Tribunals following common law frameworks to handle the explosion of ESI. For example, in 2008 CIArb promulgated its Protocol for E-Disclosure in Arbitration and encouraged parties to consider adopting the Protocol in cases with "potentially disclosable documents…in electronic form and in which the time and cost for giving disclosure may be an issue." See **the Protocol**, at p. 1. The Protocol seeks to foster early discussion and planning for ESI disclosure issues and establishes certain default rules aimed at limiting waste and cost, for example, a rule that parties normally should not be required to produce ESI from back-up tapes or other types of archived data.

In 2010, the IBA amended its Rules on the Taking of Evidence in International Arbitration to more squarely address ESI issues. Under the **2010 IBA Rules**, a party must voluntarily disclose all "Documents," including ESI on which it relies to prove its claims and defences (Article 3.1). Thereafter, the party must also produce all documents responsive to an opposing party's "narrow and specific" production requests supported by, inter alia, a showing of relevance and materiality to the outcome (Article 3.3). For ESI, the requesting party may, or the Arbitral Tribunal may require it to, "identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner" (Article 3.3). Documents that a party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients, unless the parties agree, or the Arbitral Tribunal decides, otherwise (Article 3.12). Notably, the 2010 Rules clearly state that the Arbitral Tribunal shall, at the request of a party or on its own

accord, exclude from production any document whose production would create "unreasonable burden" or violate in a compelling manner "considerations of procedural economy, proportionality, fairness or equality" (Article 9.2).

In practice, these procedural tools have met with mixed success in controlling the time and expense that parties incur on the disclosure of ESI in international arbitration. On some occasions, parties are unable to agree on the adoption of any ESI-specific guidance, such as the CIArb Protocol, because one party at the outset of the proceedings believes that unfettered disclosure of ESI will reveal a "smoking gun" from the opposing party's files or will otherwise disproportionally affect the opposing party. On other occasions, criticism may (respectfully) be leveled at Arbitral Tribunals, which refuse to enforce satisfactory limitations on the disclosure of ESI, despite the IBA Rules' inclusion of provisions requiring Arbitral Tribunals to limit the scope of document production obligations to avoid the imposition of any unreasonable burden.

DO NEW DOCUMENT-REVIEW TECHNOLOGIES OFFER HOPE FOR BETTER CONTROLLING ARBITRATION COSTS?

For many years, parties have used technology to help focus or streamline the handling and review of ESI, both in court proceedings and in arbitration proceedings. Keyword searching has been a dominant technology and, indeed, can be very useful in identifying relevant documents where the underlying dispute involves a defined event, contract, or product. But where the dispute involves a concept not as easily translated into a bounded set of keywords, this technology proves imperfect.

Enter the new technology of "predictive coding." Predictive coding is a process that involves machine-learning algorithms designed to

distinguish between relevant and irrelevant documents and is discussed in greater detail in the article from K&L Gates' e-Dat group in this issue.

On the surface, it seems logical (and comforting) that technology advances such as predictive coding can efficiently and effectively resolve the challenges created by the explosion of ESI in our world of ubiquitous connectivity. But is that belief likely to prove accurate? This author's view is that although predictive coding should be used as one useful tool, for several reasons practitioners should not expect it to resolve all of the issues created by ESI.

First, even if predictive coding systems work flawlessly in separating relevant documents from the irrelevant ones, human review is likely to remain a necessary part of the document disclosure process, either to confirm the relevance of individual documents selected by the predictive coding system as potentially relevant or to accomplish some other necessary task, such as identifying which relevant documents should be withheld on the grounds of privilege or other protection from disclosure. In commercial disputes involving sophisticated parties with numerous document custodians, the sheer volume of ESI can be so substantial that a manual review of just the subset of likely relevant ESI identified by a predictive coding system is extremely time consuming and costly. Thus, parties in complex disputes will still need Arbitral Tribunals to establish and enforce reasonable limitations on the scope of ESI disclosure obligations.

Second, it realistically must be acknowledged that, just like the human review process, predictive coding systems may not work flawlessly. All systems have flaws; human reviewers sometimes accidentally skip a document or make incorrect relevance calls, and keyword searches sometimes miss important documents. So too will it be with predictive coding. Predictive coding systems rely in the first instance on fallible

humans to train the system by making consistent decisions on an adequate volume of seed documents for the computer's algorithm to learn what is relevant and what is not. In addition, some vendors' predictive coding systems will invariably be more effective than others.

Third, because there is no single accepted " standard" for when and how to employ predictive coding systems today, it is reasonable to assume that confusion, skepticism, and resulting challenges may arise when novices to predictive coding systems hear that an opponent in an arbitration is utilizing such a system. Some predictive coding systems are used in lieu of keyword searches, while others are used after traditional keyword searches have initially narrowed the universe of potentially responsive documents. Likewise, predictive coding systems can be based on different types of algorithms: some focused on concept searching, while others are focused on contextual searching. Although predictive coding systems have been used with increasing frequency by litigants in U.S. courts, and when challenged have usually been accepted by U.S. courts as a reasonable method for discharging a party's document disclosure obligations, on the whole they appear to remain relatively novel in other countries and in international arbitrations. Where one party to arbitration has access and the financial wherewithal to employ state-of-the-art technologies such as predictive coding but the other party does not, questions may arise as to whether the Arbitral Tribunal should level the proverbial playing field.

Fourth, as noted earlier, where a requesting party believes that the opposing party is in possession of a substantially greater volume of potentially relevant ESI, the requesting party may, for tactical reasons, be inclined to resist efforts to streamline the initial review and production of relevant documents (notwithstanding the benefits that the requesting party may obtain from receiving fewer produced

documents and lowering the overall costs to be shifted if the requesting party ultimately loses the arbitration). Where the suggested streamlining method employs a predictive coding system with which the requesting party has little familiarity, the likelihood of a dispute may increase.

CONCLUSION

In a world where the volume of ESI is going to continue to expand, litigants and arbitrating parties alike have an interest in keeping apprised of, and attempting to employ, new technologies for document culling, review, and production. Predictive coding should be viewed as a viable document review and disclosure tool for complex international arbitration matters. Nevertheless, because its use may prompt questions from opponents and Arbitral Tribunals, practitioners should be prepared to explain their process and demonstrate its suitability and efficiency.

AUTHORS

PITTSBURGH

Douglas J. Simmons
douglas.simmons@klgates.com

In a world where the volume of ESI is going to continue to expand, litigants and arbitrating parties alike have an interest in keeping apprised of, and attempting to employ, new technologies for document culling, review, and production.

Possible Disputes for Arbitration in M&A Transactions

Haig Oghigian (Tokyo) and CJ Hoppel (Tokyo)

The often complex and lengthy process involved in an M&A transaction can give rise to disputes at all stages. It is not the intent here to identify them all, nor comment on them in detail; instead, what follows is a list of issues that, traditionally, are frequently the basis of disputes.

APPLICABLE LAW

The law applicable to each agreement is expressly stated in most M&A contracts. Difficult issues arise, however, if it is not. These mostly come up in the pre-signing phase, certainly before the execution of a letter of intent ("LOI"), but sometimes also thereafter. This might occur if the parties felt that choosing an applicable law was unnecessary in a LOI or inappropriate, since it could imply that the document has legal effects that the parties did not intend the LOI to have.

JURISDICTION

Here, as well, delicate problems can arise, including: (a) what is the competent court if it is not specified in the relevant document (LOI or agreement); (b) whether an arbitration clause is valid, and for whom; whether it extends to the target and/or to other companies of the groups to which the seller or the purchaser belongs; and (c) whether a particular issue falls within the scope of the arbitration clause. This problem may arise if specific types of disputes have been carved out or segmented so that they are to be submitted to different bodies (e.g., experts, expert arbitrators or arbitrators) depending on their nature.

INTERIM RELIEF

Interim relief may also play an essential role in M&A disputes by preventing behaviours that could have irremediable consequences, such as the breach of a confidentiality or exclusivity clause or, most importantly, the completion of the proposed transaction with another party.

SPECIFIC PERFORMANCE

Specific performance is an important and difficult topic in the M&A environment, the main question being whether the actual implementation of the deal can be ordered by a judge or arbitral tribunal. The answer is likely to depend on the circumstances and the stage at which the issue arises.

With regard to the pre-signing phase, it is difficult to imagine cases where a court could issue an order to sign an agreement, especially if the terms and conditions of the (often complex) sale and purchase agreement have not been at least substantially agreed upon.

At the post-signing but pre-closing stage, specific performance can be envisaged, but not without carefully taking into account the nature of the transaction. Ordering the assignment of 100 per cent of the shares of a holding company could, for example, not be too problematic. On the other hand, ordering parties to set up and manage a joint venture can be expected to be more problematic.

PRE-SIGNING ISSUES

Sometimes disputes concern the behaviour of one of the parties before the purchase agreement has been signed, e.g.: (a) disputes sometimes arise with respect to breaches of pre-signing confidentiality or exclusivity provisions, giving rise to the delicate questions of proof of the breach and of the resulting damages; and (b) disputes based on

alleged breaches of LOIs are relatively common and can be complex. They often address the issue of whether and to what extent the relevant LOI is binding and, if it is not binding, what, if any, are the pre-contractual obligations of the parties deriving from the LOI. This raises the question of whether and to what extent the parties have an obligation to act and negotiate in good faith even before any binding instrument has been executed.

DISPUTES BASED ON THE TERMS AND CONDITIONS

Most controversies are based on the terms and conditions of the agreement, whether expressed or implied. They include: (a) whether all conditions precedent have been met and are still satisfied at the time of closing; (b) whether a party has done what it was reasonably supposed to in order to make sure that the conditions precedent would be fulfilled; (c) breaches of confidentiality and/or exclusivity provisions; (d) the existence and construction of MACs, i.e. no "material adverse changes" clauses; (e) cases where post-signing audits (or due diligence) do not prove satisfactory to the purchaser; (f) competition law issues; (g) breaches of covenants; (h) controversies regarding post-closing adjustments; (i) disputes surrounding the representations and warranties and related indemnification provisions; (j) the effect thereon of the due diligence, of the information memorandum and of the disclosure letter; and (k) disagreements regarding the earn-out adjustments.

DISPUTES REGARDING THE TERMINATION OF THE AGREEMENT

A very important issue that can often arise is whether or not a signed M&A agreement can be terminated. As well as issues over the applicability of an express termination provision, this question can arise if the agreement is silent in such respect or, as often occurs, when the right to terminate has been excluded (expressly or even implicitly).

The answer will be different depending on whether the question arises pre-signing, post-signing but pre-closing, or post-closing. The practical implications of any decision in this respect should never be underestimated. Indeed, the more time that has elapsed since the closing, the less possible or at least reasonable it is likely to be to invalidate an M&A transaction. Because of its nature, the taking over of any business has consequences that once performed and implemented may be difficult to "undo".

Assuming that an M&A deal has been terminated or not implemented, for whatever reason, the question usually arises as to the compensation that should be awarded to the non-defaulting party, if any. The answer to this question can have very substantial economic consequences.

Common solutions include: (a) the granting of "positive" damages, where the party that has breached the agreement will indemnify the other by paying damages sufficient to put the latter in the situation in which it would have been if the agreement had been complied with, including loss of profits; (b) "negative" damages, where the non-defaulting party is put in the situation in which it would have been, had it never started negotiating — in such cases, the damages will include the amount which has been paid, if any, the expenses suffered and, perhaps, even the loss of other opportunities; (c) "punitive" damages might be claimed under some laws; (d) "liquidated" damages or penalties may have been agreed in the contractual documents and may be advisable, but are usually subject to review; (e) not least, complex issues can derive from the necessity to wind-up all or part of the business, in particular, where the transaction led to setting up a joint-venture, whether contractual or corporate.

POTENTIAL BENEFITS AND DRAWBACKS OF ARBITRATION

Parties in M&A deals choose to use arbitration for a variety reasons, but we find the main drivers to be: (a) confidentiality of the proceedings; (b) enforceability of awards and, in particular, with respect to contracting states (of which there are currently over 155) under the New York Convention (arbitration awards obtained in a contracting state must be recognized and enforced by the courts of the other contracting states — there is no equivalent treaty for court judgments with such broad-sweeping effect); (c) greater control over the process (including through prescribing the process in the arbitration clause); (d) arbitrators generally have greater flexibility in how they tailor awards and decisions; and (e) ability to provide for arbitration in a 'neutral' seat of arbitration. The last is especially important in deals involving developing jurisdictions where the counterparty might insist on the governing law of their home country for the contract (for instance, in a deal involving a state-owned enterprise). Providing for arbitration in a neutral venue can avoid a situation where one party is seen to have a "home court advantage" and may make it more palatable to accept the counterparty's home jurisdiction's law to govern the contract. On the other hand, there are some potential drawbacks of using arbitration for

in M&A transactions. For example: (a) it is generally easier to obtain a summary route to rapid resolution from a court; (b) quick, interim relief (e.g. a Temporary Restraining Order -TRO) can be more readily obtainable from a court (although many institutional rules now provide for the appointment of emergency arbitrators and court relief in support of arbitration will often be an available option); and (c) arbitration panels do not have ability to enforce the decisions they hand down.

AUTHORS

TOKYO

Haig Oghigian
haig.oghigian@klgates.com

CJ Hoppel
cj.hoppel@klgates.com

New UK Insurance Act to Come Into Force in 2016 — The Biggest Shake-Up of Commercial Insurance Law in Over a Century

Sarah Turpin and Frank Thompson (London)

Disputes under insurance policies are often referred to arbitration, and, if the policy in question was underwritten by Lloyd's or other London market insurers, the policy will typically provide for English law to be applied to determine the coverage position. From 12 August 2016, English law that applies to commercial insurance contracts will be modified in several fundamental respects. This article summarises the principal reforms and their objectives.

WHY THE NEED FOR REFORM?

Existing English insurance law is based largely on the Marine Insurance Act 1906 (the "1906 Act"), which, despite its name, has been applied to both marine and nonmarine policies. The 1906 Act has been criticised as being out of date and insurer-friendly, especially with regard to the right of insurers to avoid the policy ab initio for breach by an insured of the duty of utmost good faith (this is a duty implied into insurance contracts under English law, which includes a duty to disclose all material information relating to the risk during negotiations for the policy). Currently, the avoidance remedy allows an insurer to tear up the policy with retrospective effect where there has been a material nondisclosure or misrepresentation by the insured (or its agents) when obtaining coverage, even if the nondisclosure was innocently made without any intention to mislead the insurer.

The overall objective of the forthcoming reforms is to produce a better balance between the interests of policyholders and insurers and to

follow best practice as it has developed in the insurance market. The aim is to preserve the reputation of the United Kingdom as one of the leading markets for insuring risk.

The new Insurance Act 2016 (the "2016 Act") will not completely replace the 1906 Act, but updates and reforms several aspects of English commercial insurance law. Two key areas to undergo significant change are (1) the regime for providing disclosure to insurers prior to the inception of the policy and (2) the extent to which insurers can rely on a breach of warranty to deny claims.

DISCLOSURE

The 2016 Act replaces the insured's current duty of disclosure with a requirement that the insured must make a "fair presentation of the risk." This will mean that commercial policyholders will be required to disclose every material circumstance that they know or ought to know. Failing that, they will need to give their insurers information that is sufficient to put the insurer on notice that further enquiries may be necessary, for the purpose of revealing those material circumstances. The onus is then on the insurer to ask additional questions following presentation of the risk.

For disclosure purposes, the insured will be taken to know what is known or ought to be known by the insured's senior management and by individuals responsible for the insurance. Such persons will, of course, vary depending on the structure of each organisation, but in practice may include insurance managers, risk managers, company secretaries, finance directors, and general counsel. An insured will also be presumed to know what should reasonably have been revealed by a reasonable search of information available to the insured.

An additional requirement is that the insured has to make the disclosure in a manner that would be reasonably clear and accessible to the insurer. The aim here is to discourage "data-dumping" or simply bombarding the insurer with vast amounts of information without any attempt to assess whether it is relevant or not. Going forward, policyholders will need to review the way in which they prepare underwriting information to ensure that they conduct a "reasonable search" for material information and to structure the process to comply with the new duty to give a "fair presentation of the risk".

The most significant change is that the 2016 Act provides for a range of remedies for breach of the duty of fair presentation, which are intended to be more flexible and proportionate. Unless the breach was deliberate or reckless, there will be no right to avoid the policy, and the onus will be on the insurer to demonstrate what it would have done had it received a fair presentation of the risk. Broadly speaking, under the new framework, where the insurer would have written the policy on different terms had a fair presentation of the risk been provided, a claim on the policy will be assessed applying those different terms. This is likely to introduce some uncertainty, and potentially disputes, at least until there is clear guidance as to how these principles are to be applied in practice.

WARRANTIES

Under the existing law, a warranty is treated as a contractual promise with the result that a breach of warranty discharges the insurer from all liability under the insurance contract, even if the breach is trivial and has no connection with the insured's loss. Under the 2016 Act, a breach of warranty will not automatically take the insurer off risk. Instead, warranties will be of suspensive effect, such that an insurer

can only rely on a warranty while the insured is in breach. Insurers will come back on risk if the breach is subsequently remedied (where the breach is capable of being remedied).

The 2016 Act also provides that insurers cannot rely on a breach of warranty or other terms that are not relevant to the actual loss. Where a loss occurs, and a policy term has not been complied with, insurers will be prevented from relying on the noncompliance to exclude, limit, or discharge their liability under the policy if the insured can show that noncompliance with the term did not increase the risk of loss that actually occurred.

Presently, insurers often rely on so-called "basis of contract" clauses as a means of converting precontractual statements and information supplied to insurers into warranties. The use of "basis of contract" clauses has been the subject of much criticism because of their potentially draconian consequences. The 2016 Act will abolish the use of "basis of contract" clauses, which is a welcome development for policyholders.

CONTRACTING OUT

The 2016 Act is intended as a "default regime" with the result that insurers are expressly permitted to "contract out" of certain aspects of the updated law. Contracting out, however, is only permitted where insurers comply with the 2016 Act's transparency requirements, by taking steps to explain to the policyholder the disadvantages of a term that they are agreeing to, in so far as it places the insured in a worse position than under the 2016 Act.

TAKING ADVANTAGE OF THE NEW LAW

The changes have been welcomed by many in the insurance industry and, while the 2016 Act does not come into force until August 2016, insurers are understood to be working on new policy wordings in anticipation of the changes coming into effect. Policyholders should take advantage of this opportunity to negotiate better contracts with their insurers. This applies not only in respect of those provisions that will be affected by the 2016 Act but the policy provisions as a whole, including the dispute resolution provisions.

There is an increasing trend among London market insurers to select arbitration for resolving coverage disputes, often as part of a stepped dispute resolution provision. However, the provisions are not always well drafted and can be weighted towards insurers, for example, in terms of the pool from which the arbitration panel is to be selected. Policyholders need to adopt a proactive approach to ensure that insurance contracts properly reflect their requirements as well as taking full advantage of the changes anticipated by the 2016 Act.

AUTHORS

LONDON

Sarah Turpin
sarah.turpin@klgates.com

Frank Thompson
frank.thompson@klgates.com

K&L GATES

GLOBAL LEGAL COUNSEL ACROSS FIVE CONTINENTS

K&L GATES

Anchorage Austin Beijing Berlin Boston Brisbane Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt Harrisburg Hong Kong Houston London Los Angeles Melbourne Miami Milan Moscow Newark New York Orange County Palo Alto Paris Perth Pittsburgh Portland Raleigh Research Triangle Park San Francisco São Paulo Seattle Seoul Shanghai Singapore Spokane Sydney Taipei Tokyo Warsaw Washington, D.C. Wilmington

K&L Gates comprises approximately 2,000 lawyers globally who practice in fully integrated offices located on five continents. The firm represents leading multinational corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit klgates.com.