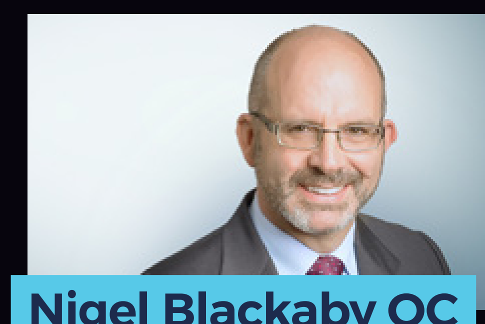
International arbitration

Illuminating the top trends in 2020

Welcome to our annual international arbitration top trends publication for 2020.

In a world of change, our 150-lawyer strong global international arbitration network has identified key trends and developments that we expect to influence the international arbitration landscape during the year ahead.



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- The COVID-19 outbreak is already having wide-ranging implications for investors, States and commercial actors in multiple sectors of the global economy. This is likely to result in new disputes in due course as parties try to recover losses resulting from the fallout. The impact on arbitration proceedings is evident with restrictions on travel and in-person meetings requiring hearings to be rescheduled and novel approaches to be adopted to minimise the need for in-person contact. The arbitration community is well placed to adapt to the evolving needs of the situation given the flexibility of the system and the technology that exists.
- Global trading dynamics continue to present challenges for our investor clients. Geopolitical instability, evolving regulatory regimes and increasing resort by States to fiscal and other measures to squeeze investors show no signs of abating during 2020. Clients are well advised to arm themselves with the necessary tools to protect their investments in this volatile climate.
- Investor-State arbitration has been subject to many changes as investor-State dispute settlement (ISDS) reform efforts continue. The backlash against the current system has solidified in three areas: the rejection by the EU of international arbitration in favour of standing investment courts; the rejection of international arbitration between capital exporting States (eg the new NAFTA (USMCA) that outlaws arbitration between US investors in Canada and vice versa); and the rebalancing of States' rights and obligations in new model Bilateral Investment Treaties (BITs). European investors are also poised to lose the benefit of all intra-EU BITs over the coming months when the plurilateral treaty agreed by EU Member States in October 2019 comes into force.
- Brexit will have no impact on arbitrations seated in London and arbitral awards will continue to be enforceable under the New York Convention as they were pre-Brexit. For UK investors, however, Brexit-related uncertainties in the UK's future trading arrangements with the EU and third States will persist through 2020 as the deadline for reaching a deal with the EU, and for securing new trading agreements with third countries, is extended to 31 December 2020. One benefit of Brexit for UK investors will be to permit the survival of existing UK BITs with other EU Member States as they will no longer be subject to the intra-EU treaty prohibition of *Achmea*, thus making the UK an attractive jurisdiction through which to structure European investments.
- We shine a spotlight on mining arbitrations and analyse specific trends affecting the sector. Mining companies are increasingly the target of resource nationalism measures by States through increased taxes, royalties or revised regulations and customs controls. Environmental and human rights issues are likely to be raised with increasing regularity as States wrestle with the balance of sustainable development.

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In a world of change, our 150-lawyer strong global international arbitration network has identified key trends and developments that we expect to influence the international arbitration landscape during the year ahead.

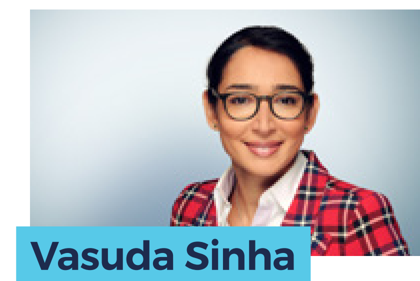
- Data protection and cyber security are gaining more prominence in international arbitration and we expect this to continue in 2020, not least because the threat of significant fines has proved real. Welcome industry guidance has recently been published, and we should see increased awareness of personal data and cyber security issues as well as heightened efforts to ensure compliance.
- The growing desire – coupled with the necessity created by the COVID-19 outbreak – to increase the use of artificial intelligence (AI) and other digital tools to aid the arbitration process, together with the expanding availability of AI-driven tools currently on the market and being developed, should lead to an increasing use of such technology in the coming year and beyond.
- The final month of 2019 saw the courts in two critical jurisdictions – the US and China – demonstrate an increased willingness to act in aid of international arbitration. While the limits of these developments have not been fully tested, they create opportunities going forward for arbitrations involving parties from the world's two largest economies.
- Various developments in the arbitration process aimed at efficiency – including expedited procedures, summary dismissal and emergency procedures – are expected to make arbitration more attractive to users and to lead to an increase in the proportion of post-M&A and shareholder disputes that are referred to arbitration.
- Global projects can give rise to multiple and complex disputes. While these are well suited to and commonly referred to international arbitration, we expect to see a renewed focus on increased efficiency and use of alternative dispute resolution (ADR), including mediation, as the arbitration community responds to the findings and recommendations of two recent studies focused on construction industry arbitration.
- Calls for more diversity in international arbitration are not new but continue to gain momentum. We are seeing gender diversity efforts leading to positive results in terms of female appointments, and initiatives being launched to address other forms of diversity. The call for greener arbitrations was partially answered in 2019, and we expect to see the trend grow in importance in 2020 and beyond, reflecting increased global momentum and awareness of climate change issues more generally.

The flexibility of the arbitration system is one of its strengths. As it continues to evolve and adapt to the changes and challenges that are taking place, our global arbitration practice will continue to participate actively in reform processes. Innovation is key and we are firmly committed to improving the arbitration process to meet the needs of our clients.

We look forward to navigating these challenges and opportunities together in the year ahead. If you would like to find out more about any of the topics in this guide, please contact one of us or another of our colleagues in the international arbitration group.

01 International arbitration in the time of COVID-19: a rapidly changing environment

Declared a pandemic and 'the worst health crisis' in recent times, the effects of the novel COVID-19 outbreak are diverse and ongoing.



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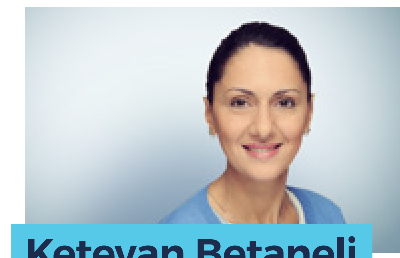

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Moving towards contactless arbitration

Measures taken by governments, corporates, law firms and arbitral institutions in response to the outbreak may affect every aspect of an arbitral proceeding. These include restrictions on travel and in-person meetings, office, city or country lockdowns and quarantine requirements for individuals. These measures are resulting in the cancellation, postponement or relocation of scheduled or ongoing hearings; they may also require a novel approach towards how oral hearings are conducted in practical terms.

The particular impact for an arbitration will, to some degree, depend on the stage of the proceedings. Where an oral hearing has already commenced or is imminent, specific policies and operational constraints applicable to the hearing venue or arbitral institution may determine whether and how the hearing can occur; parties should continuously monitor rapid developments in that regard. For example, in light of the current full lockdown in France, the International Chamber of Commerce (ICC) has postponed or cancelled any hearings and meetings scheduled at the ICC Hearing Centre in Paris until 13 April 2020. The ICC Secretariat and the LCIA have moved to working remotely and handling everything electronically (including the commencement of new arbitrations). For its part, ICSID has released a statement that it is taking steps to safeguard participants in its hearings. Parties may also wish to consider the current draft of Delos's 'Checklist on holding arbitration and mediation hearings in times of COVID-19'.

In any event, in determining whether an oral hearing should proceed in person or whether some or part of it should be held via tele- or videoconference, stakeholders should consider the location of the hearing, existing or potential travel restrictions, and the

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personal circumstances of the participants (eg location, age and health conditions). Parties should also consider how to leverage technology in order to minimise the need for in-person contact. This could include options of virtual conference rooms, an entirely electronic record and interactive web-based programs for viewing documents. It may also involve implementing appropriate home office technology to facilitate a move towards a possible reality of 'contactless arbitration'. It would be prudent for stakeholders to agree on mandatory or permitted precautionary measures to be taken during an oral hearing, such as avoiding physical contact (including handshakes), regular disinfection of microphones and a protocol for monitoring the health of the participants. These issues may be addressed through procedural orders, which would help to ensure clarity and consistency across all participants.

Where an arbitration is in its early stages, parties should use the time to plan ahead for all contingencies and look to minimise the need for in-person contact from the outset. Discussions between the parties or with the tribunal should certainly include the above-listed considerations. Again, tribunals should look to address all such issues by way of formal directions or procedural orders.

When moving towards contactless or minimum-contact hearings, parties and tribunals should consider the implications for more practical aspects of the proceedings.

- The logistics of a virtual hearing may implicate more hearing time than originally scheduled, which would require an adjustment to the timetable.
- Parties will want to ensure that a witness appearing remotely is free from interference (or the potential for interference) with his or her evidence. Such a witness will also require workable access to the record.
- Translations may need to be done consecutively rather than simultaneously.

Impact on commercial arbitration

All varieties of contracts may be affected by the legal, practical and economic consequences of the outbreak. Particularly relevant consequences include supply chain disruption, travel restrictions, currency fluctuation and other market turmoil.

In existing contracts, parties may struggle to perform them properly or try to excuse themselves from performance entirely. In these circumstances, where contractual counterparties are unable to negotiate a commercial solution and insurance policies fail to cover the outbreak or its knock-on effects, new arbitration claims will be inevitable. Whether a party will be legally excused from its contractual obligations or able to terminate a contract will depend on the terms of each contract and the relevant factual circumstances. Parties will need to consider express contractual rights, such as *force majeure* and Material Adverse Change clauses, as well as legal or equitable remedies such as frustration.

In contracts currently being negotiated, parties may wish to include commercial terms to try to apportion risk arising from the outbreak, for example pricing adjustment clauses for contracts relying on tariffs or affected by exchange rate fluctuations, or step-in or buy-out rights to address performance concerns. Parties may also want to consider whether to expressly include (or exclude) COVID-19-related events in their contracts, for example in their *force majeure* clauses, to clarify whether the outbreak falls within their scope.

> **'Looking forward, the repercussions of COVID-19 will continue long after the virus has gone. The supply chain disruptions and resulting economic instability that awaits us will inevitably lead to disputes that will run on for years. Yet, amongst all of this disruption, there may well be a silver lining: the realisation that technological solutions work, and that face-to-face contact is not always necessary, will revolutionise the way we communicate and interact with each other in the future, including in the context of international arbitrations.'**
>
> Sami Tannous, Partner

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In addition to the unprecedented challenges and global uncertainty created by COVID-19, other hurdles continue to impact on international trade and business. Cross-border trade tension seems to be the new normal. The US–China trade war persists and may continue through most of 2020. 2019 also saw threats of increased tariffs and taxes become the economic ammunition of choice, and the US rolled out tougher sanctions so spontaneously that the Office of Foreign Assets Control is struggling to keep up with their implementation. This has raised particular concerns with regard to Venezuelan and Russian investments.

In a déjà vu moment, resource nationalism has resurfaced in parts of Africa, Asia and Latin America, manifesting in the form of increased taxes and royalties, heightened requirements to protect the environment, stricter customs and export controls, and shortened stabilisation clauses. These represent subtler forms of government conduct than we witnessed from some States in past decades, but potentially equally deleterious for foreign investors.

Veteran ISDS respondent States, such as Argentina, are once again potentially giving rise to increased risks for investors. But questions are also being raised about impermissible interference with investments in jurisdictions traditionally considered stable and thus ‘safe’, such as the US and the UK.

Although by no means news, the UK and its trading partners have seen further challenges to major projects and international trade as a result of continued Brexit uncertainty.

‘Complex global trade dynamics look set to make 2020 another turbulent year for investors. Various upcoming elections and other developments such as Brexit are likely to further impact the investment landscape. We can assist clients to navigate these risks and advise on the full range of strategies for protecting their investments.’

Kate Gough, Counsel

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02 Global warnings

While this might be further political posturing, it has again brought into sharp relief the possibility of significant business interruption and related disputes. We continue to advise clients in relation to their Brexit planning, including to mitigate disputes risk and the potential impact on the enforcement of court judgments as opposed to arbitral awards.

All in all, many of our clients are concerned:

- about the impact of COVID-19 on their business, contractual performance and supply chains as well as the impact on their economic viability in the longer term;
- about the performance of obligations under contracts now potentially implicated by sanctions;
- about the renegotiation and termination of trade and investment treaties;
- about the impact of Brexit on their business, supply chains and court judgments;
- by the spectre of nationalisation, including in previously 'safe' jurisdictions; and
- about the material effects that tariffs, taxes, royalties and local content and export controls can have on their investment propositions.

Many of these challenges are addressed in more detail in the other trends. See, in particular, trends 1 (COVID-19), 3 (Reforming ISDS), 4 (Brexit) and 5 (Mining disputes).

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02 Global warnings

03 Reforming investor-State dispute settlement (ISDS)

Efforts by States to reform ISDS intensified in 2019, a trend that looks set to continue in 2020. While the responses of States vary, two common themes have emerged: the rejection of traditional international arbitration in favour of new modes of dispute resolution, including ADR; and the rebalancing of States' rights and obligations.

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In Europe, reform efforts focus on the establishment of a permanent investment court system, with full-time and tenured adjudicators. This seeks to address the EU's systemic concerns with ISDS (eg, a lack of consistency and predictability, the absence of an appeals mechanism and the mode of arbitrator appointments) and the perceived inability of arbitral tribunals to uphold EU law, encapsulated in the ECJ's *Achmea* judgment. Pending the establishment of a multilateral court, bilateral permanent tribunals have been established under the EU's trade agreement with Canada (CETA) and investment treaties with Singapore, Mexico and Vietnam. Questions remain as to the staffing of these permanent bodies, and the status and enforceability of their future decisions.

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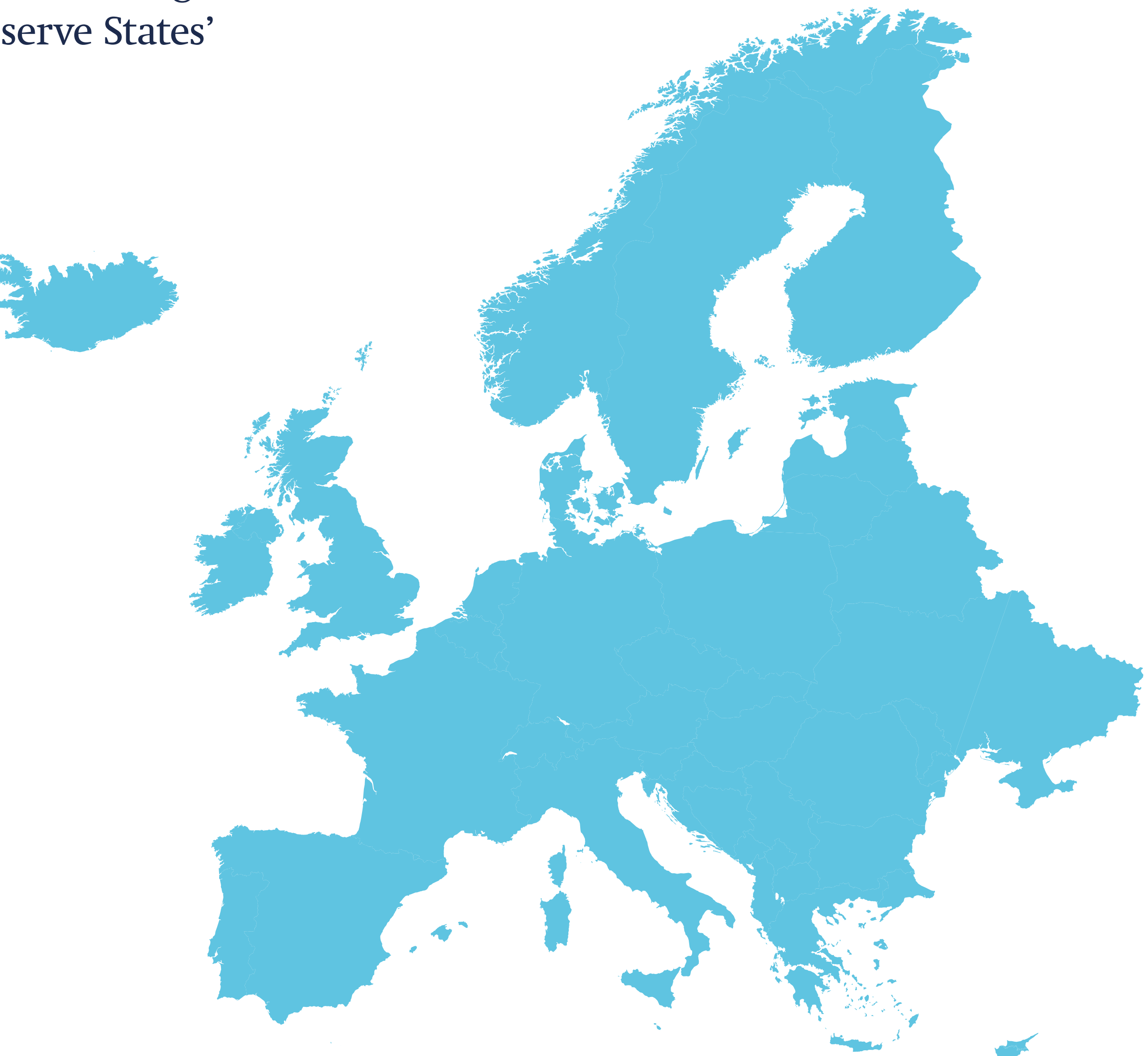
Approximate number of intra-EU BITs that will be terminated under a plurilateral treaty agreed upon by EU Member States expected to come into force in a matter of months.

Meanwhile, intra-EU BITs, including their sunset clauses, are expected to be terminated in coming months pursuant to the terms of a plurilateral agreement reached by EU Member States in October 2019.

New European treaties will seek to rebalance investors' and States' rights and obligations and preserve States' right to regulate, as illustrated by new FTAs and the Dutch Model BIT. This reduces jurisdictional coverage and substantive protections and even contemplates claims against investors for damage, personal injury or loss of life.



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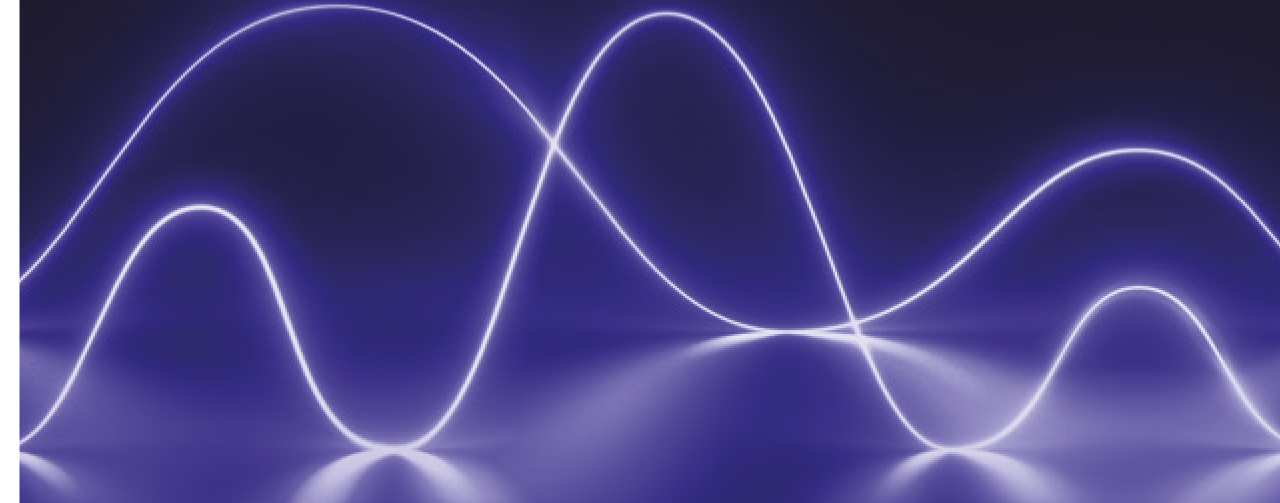

'New generation BITs and FTAs crystallise States' efforts to reform ISDS, as they seek to rebalance investors' and States' rights and obligations, and introduce other modes of dispute resolution in lieu of international arbitration. For now, investors can still rely on existing investment treaties and their sunset clauses, but given the changing landscape, they should not count on the effectiveness of future investment treaty protections.'

Gisèle Stephens-Chu, Counsel

Asian States are split over ISDS reform, with some such as Vietnam supporting the EU's investment court system, and others such as Japan resisting such change and seeking to maintain the 'old-style' ISDS system. Asian States are more united in calling for a code of conduct on arbitrators, such as that included in the Indonesia–Australia agreement (CEPA) executed in March 2019. Asian States also are aligned in calling for mandatory conciliation or mediation as part of any dispute settlement system. While conciliation is a common requirement of many BITs, mandatory mediation is not. But the recent adoption of the United Nations Convention on International Settlement Agreements Resulting from Mediation, or the Singapore Convention, which makes settlements reached through mediation enforceable across the globe much like the New York Convention does for arbitral awards, shows the Asian States' commitment to this form of dispute resolution.

In North America, NAFTA's replacement, the United States–Mexico–Canada Agreement (USMCA), has been ratified by Mexico and seems likely to be approved by the US and Canadian legislatures in 2020. If this happens, it will bring about significant changes to ISDS mechanisms once the three-year sunset period expires for claims to be brought under the existing NAFTA regime. These changes include the elimination of ISDS between US investors in Canada and Canadian investors in the US. Canadian investors in Mexico and Mexican investors in Canada will still be able to arbitrate their investment disputes under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). US and Mexican investors in each other's country must first pursue remedies in domestic courts for at least 30 months before commencing ISDS proceedings. Protections for investors also have been curtailed under the USMCA, including the elimination of claims for indirect expropriation and breaches of the fair and equitable treatment standard except for specific industry sectors including oil and gas.

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03 Reforming investor-State dispute settlement (ISDS)

The South American ISDS landscape is still marked by denunciation of numerous treaties and the ICSID Convention itself by Bolivia, Ecuador and Venezuela. This has not, however, caused a drop in the number of arbitration claims against States, because many of the denounced treaties have sunset clauses allowing investors to bring claims for many years after denunciation. Political reconfigurations in the region may bring further changes in 2020. The return of a left-wing government in Argentina may lead the State to more actively oppose traditional ISDS. Conversely, the new regime in Bolivia may prove less hostile to ISDS.

Across the African continent, States are seeking to modernise their multilateral and bilateral investment treaties, with an emphasis on socio-economic development, States' right to regulate and investors' compliance with local laws. The Morocco–Nigeria BIT requires qualifying investments to make an effective contribution to the host State's sustainable development, in the form of a lasting commitment of capital involving risk. It restricts the scope of some investor protections while imposing a range of obligations on investors. Similar considerations may shape the future Investment Protocol of the new African Continental Free Trade Agreement, assuming this includes ISDS.

In 2020, we expect treaty-making to continue the trend of imposing new obligations on investors while restricting the scope of investor protection. 2020 may see further moves towards the setting up of one or more permanent investment courts but, even if such a court comes into being, arbitrations under traditional ISDS mechanisms will remain common for the foreseeable future. Investor-State arbitration clauses are found in most existing treaties and, even after such treaties have been denounced, their sunset clauses will allow investors to commence arbitrations for years to come (save in the case of the intra-EU BITs once terminated).

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On 31 January 2020, the UK formally left the EU. Pursuant to the terms of the transitional deal for the UK's exit, enshrined in the EU (Withdrawal Agreement) Act 2020 and approved by the European Parliament on 29 January, a transitional period will apply until 31 December 2020 (unless extended as a result of COVID-19 or otherwise). During this time the UK will in most respects continue to be treated as if it were part of the EU. By the end of that period, the UK and the EU hope to have agreed a final deal setting out the terms of their future relationship, including a free trade deal.

Absent a free trade deal, the UK and the EU will proceed to trade on World Trade Organization (WTO) terms. As a third country, the UK will no longer be covered by the EU's WTO tariff schedule and will need to set its own tariffs. The UK Government has published temporary tariffs and has additionally stated that tariffs will not apply to goods imported into Northern Ireland from Ireland.

At the end of the transition period, the UK will lose the benefit of free trade agreements (FTAs) entered into by the EU. As a result, the UK has prioritised rolling over a number of these agreements into new agreements with the relevant countries. At present, the UK has successfully rolled over 20 FTAs with third countries or trading blocs (comprising approximately 7 per cent of the UK's exports and 8 per cent of the UK's imports), and is in discussions with at least 20 other countries, including the US (the UK's largest individual trading partner), Australia, New Zealand and Japan. The Commonwealth, which represents around 10 per cent of UK trade, is a key area of focus for the Government, and it has also shown an interest in joining the CPTPP, a trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

In addition, the UK will lose the benefit of all international investment agreements (IIAs), including BITs, entered into by the EU after 2009, when foreign direct investment negotiations became an exclusive formal competence of the EU. That said, the number of IIAs entered into by the EU has been limited, with CETA being the only significant trade agreement with investment protection provisions. Post-Brexit, the UK regains full control over the negotiation of its IIAs going forward, presenting an opportunity for the UK to modernise its BIT network, including the more than 90 BITs currently in force.

'Post-Brexit, the UK may offer investors an attractive base for treaty-protected investment into the EU and beyond, based on a new investment policy untethered from the EU.'

Sylvia Noury, Partner

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50% of UK imports and exports are with the EU

Proportion of FTAs that the UK has successfully rolled over to date (as at 15 January 2020)

7% UK's exports

8% UK's imports

The number of UK BITs that UK investors can rely on: 92

The UK Government has recently announced that it 'is considering a wide range of options in the design of [IIAs]', looking at current international 'best practice' in doing so, and seeking 'to achieve the correct balance between the interests of UK investors operating overseas and foreign investors in the UK, while also seeking to minimise risks to the UK'. Reading between the lines, the perspective of the UK Government maintains a strong investor focus, perhaps attributable to the fact that, as the Government itself points out (and unlike other EU Member States), 'the UK has never been a defendant in an investment dispute before a tribunal'. On the arbitration front, while the UK Government is mindful of EU proposals for an investment court system, it has signalled its preference for a system of ad hoc arbitration, which has been a means of dispute resolution that 'has worked well for UK investors over many years'. In terms of modernisation, the UK Government has indicated that it will ensure that provisions in IIAs are compatible with current policy in key areas such as development, climate and human rights, and that it expects UK investors to observe local laws, comply with environmental, labour and human rights obligations, and behave responsibly in local communities by observing the standards set out in international instruments such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. On this front, the UK looks likely to follow the recent trend of imposing additional 'good citizen' compliance requirements on investors in its IIAs.

See further discussion on this topic in trend 3 (Reforming ISDS) above.

'Parties concerned by post-Brexit uncertainty surrounding the enforcement of English court judgments within the EU may turn to arbitration, which is not impacted by Brexit.'

Oliver Marsden, Partner

One perhaps unforeseen benefit of Brexit in the arbitration arena could be an escape, for those relying on UK IIAs, from the tentacles of *Achmea*. A cloud currently sits over the status of the 12 intra-EU BITs to which the UK is a party, as well as the effectiveness of Energy Charter Treaty claims brought intra-EU. Following the *Achmea* judgment of 6 March 2018, objections have been made in arbitrations brought under intra-EU IIAs and the EU's policy is that all intra-EU BITs must be terminated. In January 2019, the majority of EU Member States, including the UK, signed a declaration pledging to terminate intra-EU BITs. Post-Brexit, however, the UK's IIAs with EU Member States will no longer be intra-EU, and the UK's pledge to terminate those BITs should fall away, along with the *Achmea*-related objections, from the end of the transitional period.

Brexit-related uncertainty also extends to the enforcement of English court judgments within the EU. Recognition and enforcement matters within the EU are currently governed by the

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Recast Brussels Regulation. Under the terms of the transitional deal, the Regulation will continue to apply to all legal proceedings instituted before the end of the transition period. However, if the Regulation is to continue post-2020, there will need to be a deal between the UK and the EU. Absent such a deal, there are two alternative sources of protection: the Lugano Convention and the Hague Choice of Court Agreement Convention. These instruments would provide a legal framework for enforcing English court judgments within the EU, but: (a) the UK would need the agreement of all contracting states to re-accede to the Lugano Convention; and (b) although the UK could re-accede to the Hague Convention unilaterally, that treaty is limited in scope – notably, orders for interim relief are not expressly provided for. If the UK is left with the Hague Convention, parties seeking to enforce interim relief from the English courts in the EU would be reliant on local law in the relevant EU Member State. Our research across our network offices and Stronger*Together* firms indicates that there would be a substantial risk of non-enforcement of interim judgments in the majority of Member States.

If parties are concerned by the uncertainties surrounding the post-Brexit framework for enforcing English court judgments within the EU, they may well turn to international arbitration. The enforcement of arbitral awards is governed by the New York Convention, which will not be impacted by Brexit: awards will continue to be enforceable under the Convention across the UK and the eurozone in the usual way.

Enforcement of UK orders and judgments in the EU27 compared to arbitral awards in a no-deal Brexit scenario:

A comparative analysis of the situation across the EU27 by our network offices and Stronger*Together* firms shows that in a 'worst-case' scenario where (a) there is a no-deal Brexit and (b) the parties are precluded from invoking the Hague Convention:

Interim orders or judgments

In **16** Member States, an interim order or judgment of the English courts would be very unlikely to be enforced.

In **9** jurisdictions, there is significant risk that such an order or judgment would not be enforced.

In **2** Member States, interim orders and judgments would in principle be enforced.

Final judgments

In **4** Member States, there would be some increased risk that a final judgment of an English court would not be enforced.

In **23** Member States, final judgments of the English courts would continue to be enforced; however, in **17** of those Member States enforcement is likely to take materially longer than under the current regime.

Enforcement of arbitral awards

There would be no change to the enforcement of arbitral awards in Member States. Parties could continue to enforce arbitral awards in all States party to the New York Convention, including all **27** EU Member States.

In **18** Member States, enforcement of arbitral awards would be materially quicker than enforcing a final judgment of the English courts.

If you would like more information on the results of our comparative survey, including which States are high risk, please get in touch.

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05 Digging deeper: mining disputes in an era of resource nationalism and global uncertainty

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In 2019, the mining sector was marked by political and economic uncertainty, increased resource nationalism and a renewed emphasis on good governance – with environmental, social and governance (ESG) criteria becoming a priority for decision-makers. For mining companies and their investors, these broader trends have led to challenges and opportunities, resulting in pricing reviews, divestments in high-risk jurisdictions and increased engagement from States and local stakeholders.

Assuming these trends continue in 2020, we expect to see an increase in commercial and investor-State mining disputes submitted to arbitration in four key areas of risk.

Tax

As recent changes to the mining and tax codes of the DRC and Zambia have demonstrated, new (or higher) taxes imposed on mining companies can lead to contractual arbitrations concerning tax warranties and indemnities given in the context of divestments, as well as investor-State disputes relating to the rights of foreign investors under international law. The risk of tax measures against miners could be heightened in 2020, as several key mining jurisdictions in Africa, Asia and Latin America head to elections and traditionally 'safe' commodities (such as gold) continue to increase in price, resulting in perceived windfall profits for foreign investors.

Customs controls

Unexpected measures taken in Sierra Leone, Tanzania and Indonesia in 2019 showed how customs controls – such as export bans or import approvals – are increasingly being used by States to achieve lawful (and unlawful) resource nationalism objectives. The consequences of these bans can be devastating, leading to commercial disputes in a supply chain and investor-State disputes, especially where the effect of the measure is to paralyse a miner's business. What remains to be seen in 2020 is whether this trend continues and whether, in response, mining companies seek to use emergency arbitral relief to suspend customs controls while the validity of a measure is challenged, or a settlement is negotiated.

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05 Digging deeper: mining disputes in an era of resource nationalism and global uncertainty

Environment

Mining companies have felt the impact of environmental concerns moving up the agenda of businesses and States – both as a result of demands from institutional investors for greater self-regulation, and due to environmental restrictions being imposed on mining companies in developing and developed countries. As climate change and sustainability become mainstream political issues, the importance of managing environmental risk shows no signs of abating. Indeed, environmental issues are often used by States to seek to reduce compensation owed for expropriated mining projects. States do so either: (a) in the case of producing mining assets, through offset claims relating to alleged environmental damage; or (b) in the case of early-stage projects, through arguments relating to environmental licensing risk. The latter can be addressed either through market valuation methods, by looking at comparable projects at a similar development stage (as held in *Clayton/Bilcon v Canada*), or by looking at market capitalisation (as in *Crystallex v Venezuela*). Such environmental issues also seem likely to give rise to an increasing number of contractual and investor-State claims in the year to come.

> **'Developing and developed countries with mining resources seem to have learned the lessons of the last several decades and are increasingly engaging with foreign investors in a more calculated way. Despite ongoing resource nationalism, gone are the days of outright 'takings'. Instead, in 2020, we anticipate more mining disputes arising out of complex issues relating to tax, customs, the environment and human rights.'**
>
> William Thomas, Partner

Human rights

Linked to environmental risk, and now falling under the broader heading of 'ESG', human rights issues can also be expected to increase in importance in investor-State mining disputes. As cases such as *Bear Creek Mining v Peru* and *Urbaser v Argentina* demonstrate, failure by a mining company properly to calibrate and manage a human rights risk can, in the same way as environmental risk, result in a counterclaim by a State or potentially affect an investment's valuation. With the launch of the Hague Rules on Business and Human Rights Arbitration in December 2019, it will be interesting to see whether, in 2020, affected communities and mining companies seek to grasp the nettle and submit business and human rights disputes to arbitration.

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05 Digging deeper: mining disputes in an era of resource nationalism and global uncertainty

06 Data protection and cyber security: emerging norms

As anticipated in last year's top trends publication, the relevance of data protection and cyber security in international arbitration is on the rise. We expect this to continue and become even more prominent in the coming year.

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The proliferation of modern data protection regimes has added complexity to cross-border disputes, pushing arbitration users to increasingly consider data protection obligations in arbitration proceedings. To name a few, the EU's General Data Protection Regulation (GDPR), Brazil's General Data Protection Law (LGPD) and the California Consumer Privacy Act (CCPA) create rights for data subjects and consumers vis-à-vis their personal data and provide varying scopes of obligations for data processers. These laws bring differing obligations to the processing of personal data before, during and even after the arbitral process. Thus, reasonable and proportionate measures need to be put in place to comply with the applicable regimes. Clients will be well advised to carefully document these measures as they may be reviewed by the competent authorities, and the consequences of a breach may be severe.

A general awareness of data protection compliance issues is on the rise. Recent developments show that the GDPR's harmonising effects reach far beyond European borders. This facilitates the resolution of cross-border disputes and reduces the number of data breaches. While the harmonising effects of the GDPR have increased awareness and encouraged parties to develop standard compliance practices in the protection of personal data, varying obligations across jurisdictions still require a tailor-made approach for each individual dispute. A consensus on best practice is beginning to emerge. This has been spurred on by the Joint Task Force on Data Protection in International Arbitration put together by the International Council for Commercial Arbitration (ICCA) and the International Bar Association (IBA). The presentation of A Roadmap to Data Protection in International Arbitration is planned in 2020. Based on this roadmap, we expect to see an increase in the use of internal checklists and guidelines to ensure data protection compliance.

'Data protection law matters. In arbitration proceedings, parties, counsel, arbitrators and institutions have to comply with data protection laws. The seriousness of the issue is reflected in the more active and aggressive approach taken by regulators. Recent fines for non-compliance in Europe range between €20m and €50m.'

Patrick Schroeder, Partner

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06 Data protection and cyber security: emerging norms

Requisite measures to ensure cyber and information security in international arbitration are essential in the digital age. Cyberattacks on institutions and law firms, as well as attempts to use evidence obtained through cyberattacks or data breaches, are becoming more common in arbitration. Given the involvement of State entities and the potential impact of arbitral awards on financial markets, ICSID arbitrations are prime targets for hackers. A recent survey carried out among 10 leading law firms revealed that 100 per cent had suffered a phishing attack, 75 per cent a malware attack and 25 per cent had experienced network intrusion. In the UK, the threat to cyber security is perceived as the second greatest concern after Brexit. The rise in cyberattacks highlights the need for stringent information security measures. The newly released 2020 edition of the Cybersecurity Protocol for International Arbitration as the end product of a two-year collaboration by a working group on cyber security – comprising the representatives of ICCA, the IBA and the International Institute for Conflict Prevention & Resolution (CPR) – provides a procedural and practical framework for arbitration users in determining the requisite information security measures.

Some arbitral institutions have responded by offering innovative solutions. The Arbitration Institute of the Stockholm Chamber of Commerce's (SCC) secure digital platform for communication and file sharing went live in September 2019. The Thai Arbitration Institute (TAI) is also among the digital platform pioneers with its e-Arbitration system in operation since July 2019. Administering institutions have an obligation to comply with data protection laws and safeguard arbitral proceedings from cyberattacks. Thus, the larger institutions may follow the lead of the SCC and TAI. However, offering such platforms brings with it a significant liability risk that major institutions may be reluctant to expose themselves to. In most cases, the onus will likely continue to fall on the parties and law firms to suggest appropriate safeguards and secure data platforms during arbitral proceedings.

These trends reflect the importance of concurrently considering data protection and cyber security when initiating and conducting an arbitration. Looking to 2020 and the future, we expect to see an increased awareness of personal data protection and cyber security issues as well as heightened efforts to ensure compliance. New challenges may continue to arise as the data landscape evolves.

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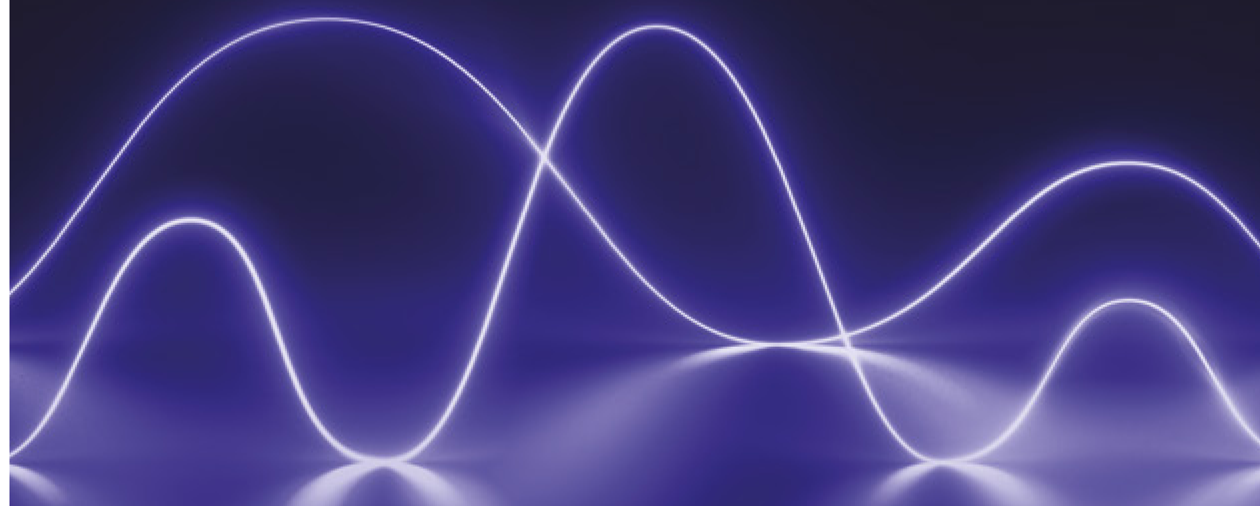
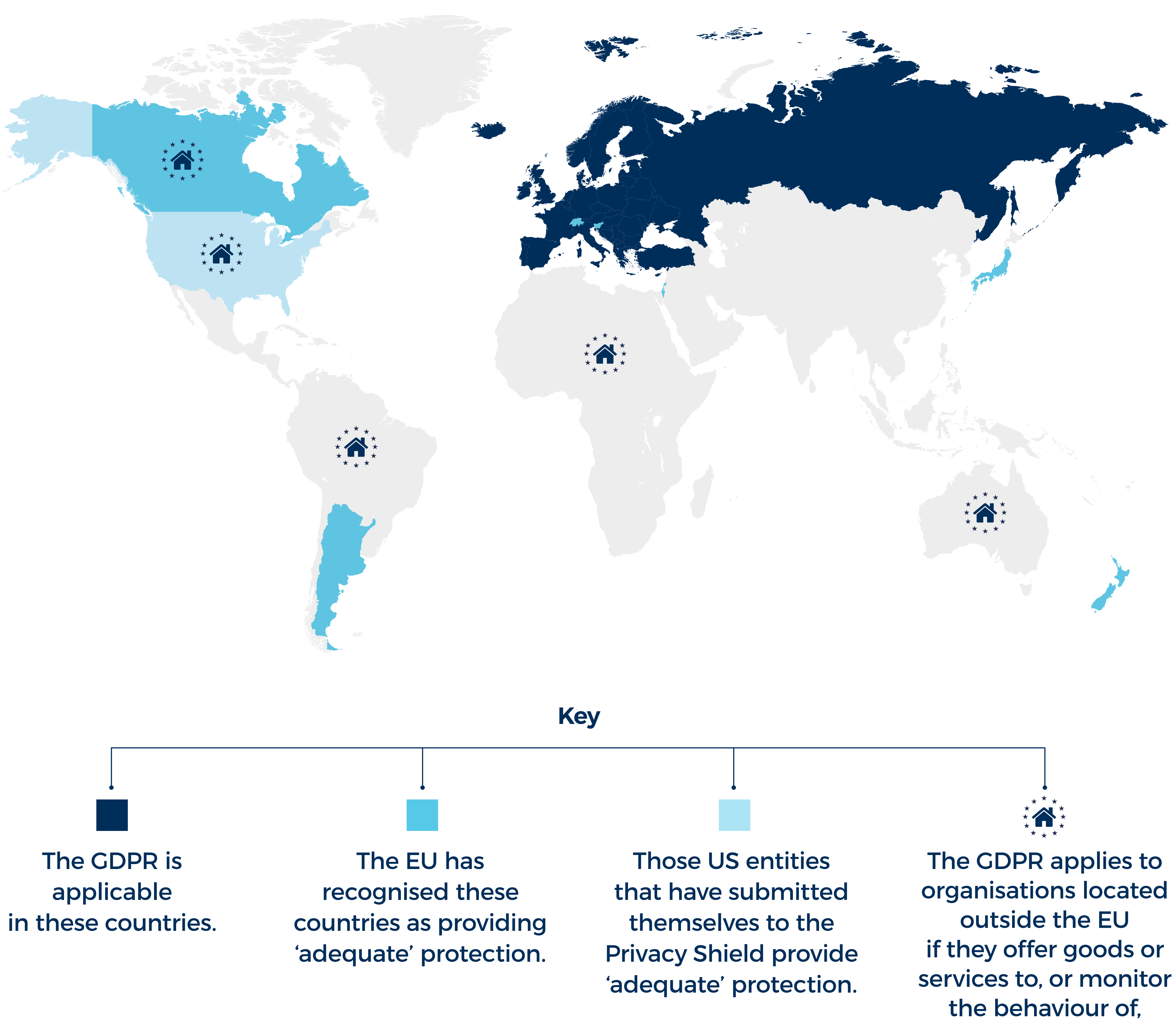
06 Data protection and cyber security: emerging norms



The territorial scope of GDPR and countries with adequacy status



Key

- The GDPR is applicable in these countries.
- The EU has recognised these countries as providing 'adequate' protection.
- Those US entities that have submitted themselves to the Privacy Shield provide 'adequate' protection.
- The GDPR applies to organisations located outside the EU if they offer goods or services to, or monitor the behaviour of, EU data subjects.

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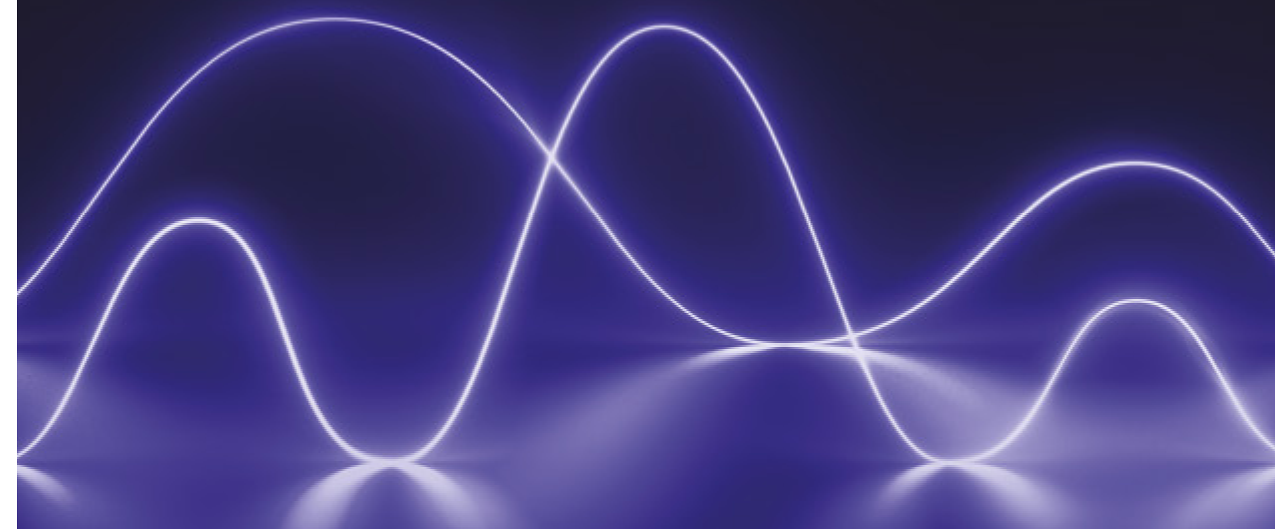
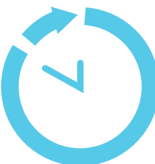


A checklist outlining essential steps to be taken and considerations before, during and after arbitration



Before the proceedings:

Data mapping is necessary to determine where the data that forms the basis for the claim (or rather the defence) is located and where it will be transferred to and processed for the purpose of the arbitration. The applicable data protection laws will be established on this basis.

Data collection and review of emails and other evidence generally involves the processing of personal data, which requires a lawful basis. Data processing should generally be adequate, relevant and limited to what is necessary for the lawful purpose of the processing, including data minimisation efforts, for example by pseudonymisation.

Information security relates to considering whether (additional) security measures are advisable in the specific arbitration proceeding. In doing so, the scope and risk of processing, including the impact on data subjects, the capabilities and regulatory requirements of the arbitral participants, the cost of implementation and the nature of the information that is to be processed or transferred shall be taken into account.

Privacy notices may be required from arbitral institutions, arbitrators, counsel, as well as business entities, and serve to inform data subjects of their rights, and how and on what legal basis data is being processed.

Data processing agreements may have to be concluded when personal data related to the arbitration is being transferred to a third party, for example experts, court reporters and translators. Compliance with any potentially applicable third country data transfer restrictions may need to be addressed in the agreement.

During the proceedings:

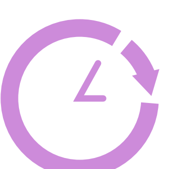
Filing the request for arbitration and appointment of arbitrators generally involves the processing of personal data and, thus, requires a legal basis. In this context, it may also be necessary to consider any restrictions in relation to third country data transfer and measures to ensure compliance.

Case management conference gives the arbitral participants the opportunity to discuss the applicable data protection laws and the measures necessary to ensure compliance.

A data protection protocol can be concluded between the arbitral tribunal, the parties and their legal representatives. It documents the appropriate mechanisms to ensure compliance with data breach notification obligations. It may also include insurance obligations and indemnities to the extent permitted by law. Such a protocol can be included in the first procedural order or the terms of reference.

Document production generally involves the disclosure and, therefore, processing or transfer of personal data. To the extent required by the applicable data protection regime, the disclosed information may need to be minimised by the application of search terms during review and redactions or anonymisation.

Arbitral awards will include personal data, which should be minimised (ie redacted) when made publicly available. Despite confidentiality obligations, arbitral awards can potentially become public, for example in enforcement proceedings.



After the proceedings:

Data retention is generally not permissible indefinitely. Personal data shall only be retained for as long as is reasonably necessary and justifiable by law.

Data deletion is required when the lawful purpose for retention has ended. Thereafter, personal data must be fully anonymised, securely destroyed or permanently deleted.

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07 The dawn of a new era: arbitration in the age of AI and digitalisation

It's a new world. Artificial intelligence (AI) is becoming ever more intelligent, and its use and availability in international arbitration is increasing.

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There is a growing desire within the international arbitration community to increase the use of AI and other digital tools. This is expected to be accelerated in light of the COVID-19 outbreak and the rapid need for alternatives to in-person hearings and meetings. In 2015, the Queen Mary International Arbitration Survey asked, 'what should arbitration counsel do more or better?' and 46 per cent of respondents suggested making better use of technology. In 2018, 75 per cent thought that AI should be used more often. But less than a third of respondents to the Survey were using AI tools with any regularity.

Meanwhile, there has been a proliferation of AI-driven tools made available on the market. Document review has for some time been technology assisted, and is now incorporating AI to improve predictive coding and minimise review time. Legal research platforms are using AI to help identify the most relevant and authoritative case law. Bespoke resources specific to international arbitration have also more recently started to emerge, including several tools that assist in the course of arbitrator selection and in research of arbitral awards.

Other aspects of the arbitration process are benefiting from digitalisation, including programmes to help run paperless hearings, video conferencing and annotative screen technology. Online secure digital platforms, such as the one recently launched by the SCC, allow for centralised, online filing and communication between all arbitral participants. Although the ICC has indicated its intentions to launch a service with similar capabilities, there are few other publicised initiatives by other institutions to follow suit, which may be at least partly due to challenges with data protection and cyber security.

At the dawn of a new decade, and in particular given the COVID-19 restrictions on in-person hearings and

75%

In 2018, 75 per cent of the respondents to an international arbitration survey thought that AI should be used more often.

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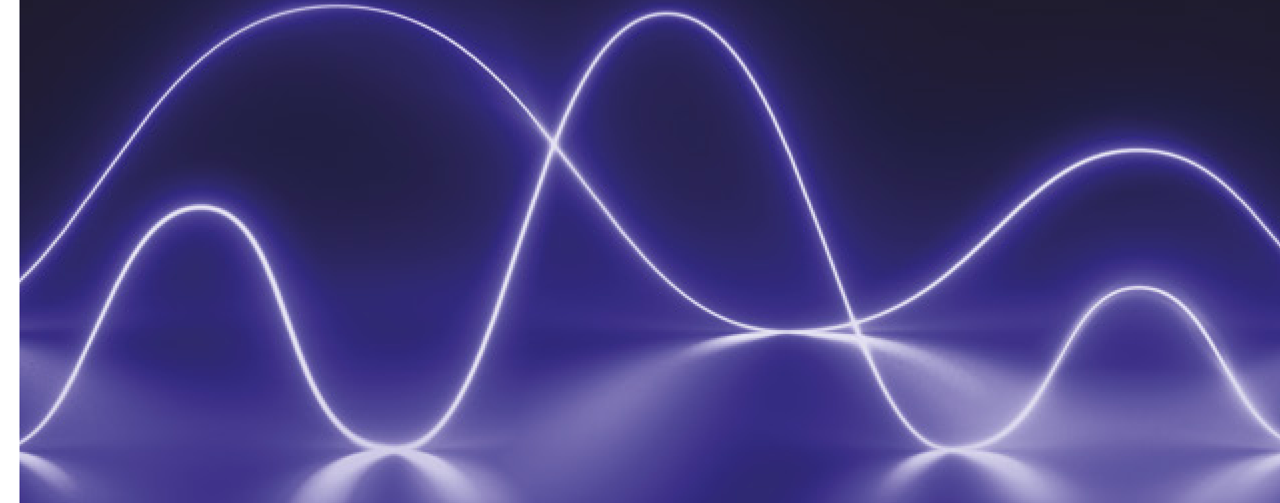

meetings, 2020 stands to be a breakout year for the international arbitration community to increase the use of AI tools. Looking into the future, one thing is clear: AI will continue to change the arbitration process.

> **'All of these tools, when used effectively, enhance counsel efficiency and improve the quality of its advocacy.'**
>
> Lee Rovinescu, Senior Associate

First, parties are likely to rely on AI more heavily for the conduct of hearings. AI speech-to-text technology has arrived so transcripts of hearings will very soon be automated. AI speech-to-speech technology used for live interpretations is not very far behind. Virtual reality headsets are coming on to the market: in the not too distant future, we may be able to create a fully immersive realistic hearing experience that parties can join by putting on a virtual reality headset.

Second, AI might be able to help with predicting the outcomes of arbitrations. There is currently no such AI software but studies indicate there is scope. For example, in a recent study, AI software reviewed the text of all judgments of the European Court of Human Rights and developed an algorithm that could predict outcomes with 79 per cent accuracy.

While confidentiality of commercial awards prevents the application of such technology to international commercial arbitration, this kind of software could potentially work for investment treaty cases where there are many publicly available awards.

Third, AI will continue to assist arbitrators in the process, but it will not replace them (yet). There is certainly more talk about the feasibility and utility of robot arbitrators, however. In fact, robot judges are already part of present-day justice. For example, in June 2019, the Beijing Internet Court launched an online litigation service centre featuring an AI judge, with gestures, facial expressions and a voice simulating that of a human. There are limitations of course: the AI judge is designed to assist judges in the administration of cases but not actually decide the case on the merits – at least for now.

At Freshfields, we are firmly committed to continue using AI and digitalisation to increase efficiency and to keep up to date on the latest AI and digitalisation tools in international arbitration.

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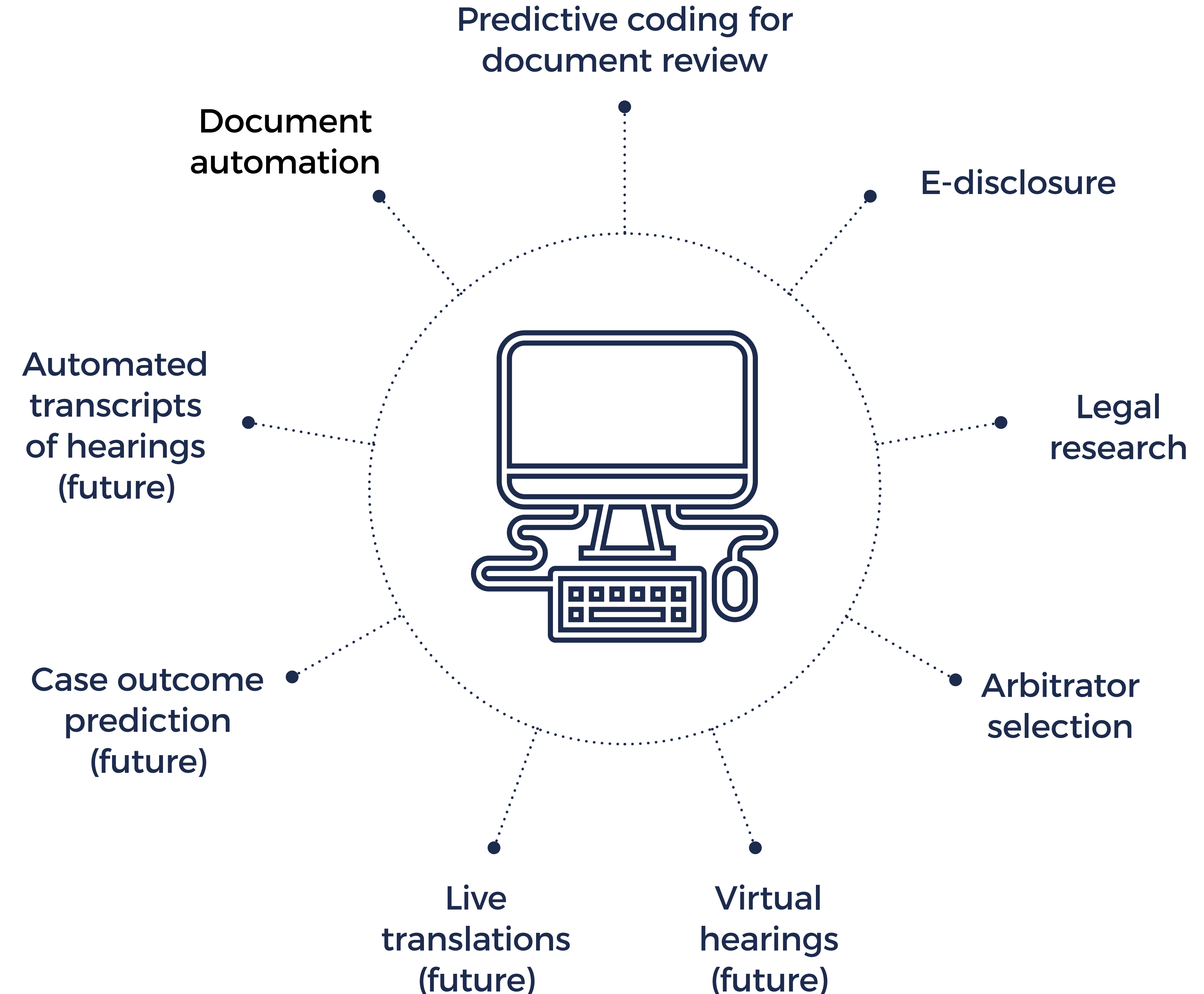
Ways in which AI may be used to transform the arbitration process



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08 Broadening role of the courts in support of arbitration

The final months of 2019 saw courts in two critical jurisdictions – the US and China – demonstrate an increased willingness to act in aid of international arbitration. This to some extent represents a broader trend of greater court involvement in international arbitration.

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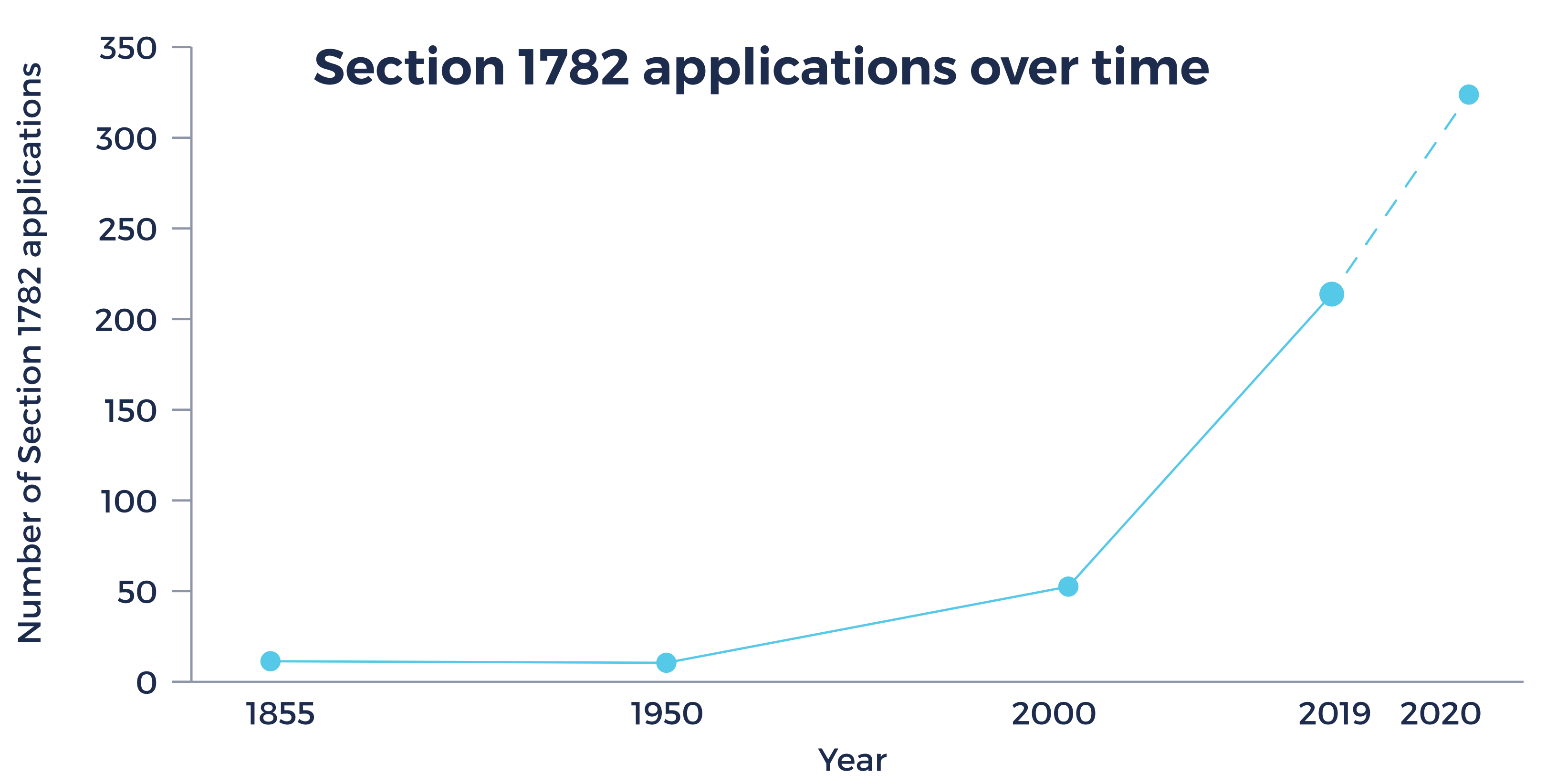
US: discovery in aid of international arbitration

In the US, this shift came in the form of decisions interpreting and expanding the scope of Section 1782 of Title 28 of the United States Code (Section 1782). Section 1782 grants the US federal courts discretion to order US-style discovery in aid of foreign or international proceedings, including international commercial and investor-State arbitrations, provided that:

- the target of the discovery is located in the US;
- the application seeks documents or testimony in support of the foreign or international proceedings; and
- the applicant is an interested person in the foreign proceeding.

The number of Section 1782 applications has skyrocketed since the early 2000s. This trend of increasing applications – there were over 200 applications in 2019, up from approximately 50 in 2000 – is almost certain to continue in 2020, in no small part because of two recent and significant federal court decisions extending the availability of Section 1782 discovery in international arbitration:

- In September 2019, a team from Freshfields won a groundbreaking victory in *Abdul Latif Jameel Transportation Company Limited v FedEx Corporation*, in which the Sixth Circuit Court of Appeals affirmed a position held by many US trial courts, but which had not found support at the appellate level, that courts have the power under Section 1782 to order US-style discovery in aid of international commercial arbitrations between private parties.
- Only a few weeks later, in October 2019, the Second Circuit Court of Appeals held in *In re del Valle Ruiz* that Section 1782 may be used to compel an entity located in the US to produce documents that are stored *outside* the US, including from a related company, provided that the US entity can access the documents.



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08 Broadening role of the courts in support of arbitration

> **‘A Section 1782 application can be a powerful tool in an international commercial or investor-State arbitration involving a party with a presence in the United States. In light of the US courts’ increasing willingness to order Section 1782 discovery, parties should give serious consideration to how they can use these applications to their advantage or, for US parties, what they can do now to minimize the impact of an application against them.’**
>
> Thomas Walsh, Special Counsel

These decisions open new avenues to discovery from parties located in the US or that have a US affiliate. Parties to an arbitration involving a US counterparty, or for which relevant documents or witnesses may be located in the US, should consider whether to seek Section 1782 discovery in aid of those proceedings. On the other hand, US entities or their affiliates may want to consult counsel regarding ways to mitigate the risk of Section 1782 discovery in current and future disputes.

China: increased availability of interim measures for arbitrations seated in Hong Kong

Prior to October 2019, courts in mainland China could not order interim measures in aid of arbitrations seated outside mainland China. This left parties in China-related arbitrations with limited options if they needed interim relief that would be enforceable on the mainland.

As of 1 October 2019, this door that was once so firmly shut has been cracked open by the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of Hong Kong SAR (the Arrangement). The Arrangement allows courts in mainland China to order interim relief in aid of arbitrations that are seated in Hong Kong and administered by one of several enumerated institutions, including the ICC, the Hong Kong International Arbitration Centre, and the China International Economic and Trade Arbitration Commission Hong Kong Arbitration Centre. The Arrangement covers arbitration agreements entered into prior to 1 October 2019, and also provides that parties to arbitrations seated in mainland China may apply to Hong Kong courts for interim measures. This is a less significant shift, however, because Hong Kong courts were already permitted to grant interim measures in support of arbitrations seated outside Hong Kong.

The Arrangement adds to the already long list of attributes that makes Hong Kong a top-tier seat for international arbitrations – a clear and comprehensive legal framework, arbitration-friendly courts, first-rate institutions to administer international arbitrations and, now, the availability of enforceable interim measures in mainland China

Although it remains to be seen how Chinese courts will evaluate and adjudicate applications made under the Arrangement in practice, going forward the Arrangement should put Hong Kong at the top of the list of potential arbitral seats for any arbitration clause in a contract involving a Chinese party, including those in connection with the Belt and Road Initiative.

Arbitration users have already begun to make use of the Arrangement, with no fewer than 11 applications between 1 October and 16 December 2019. At least four of those applications have been granted by the mainland Chinese courts – the first was granted on 8 October 2019, only one week after the Arrangement came into force. That number is certain to grow in 2020 and beyond.

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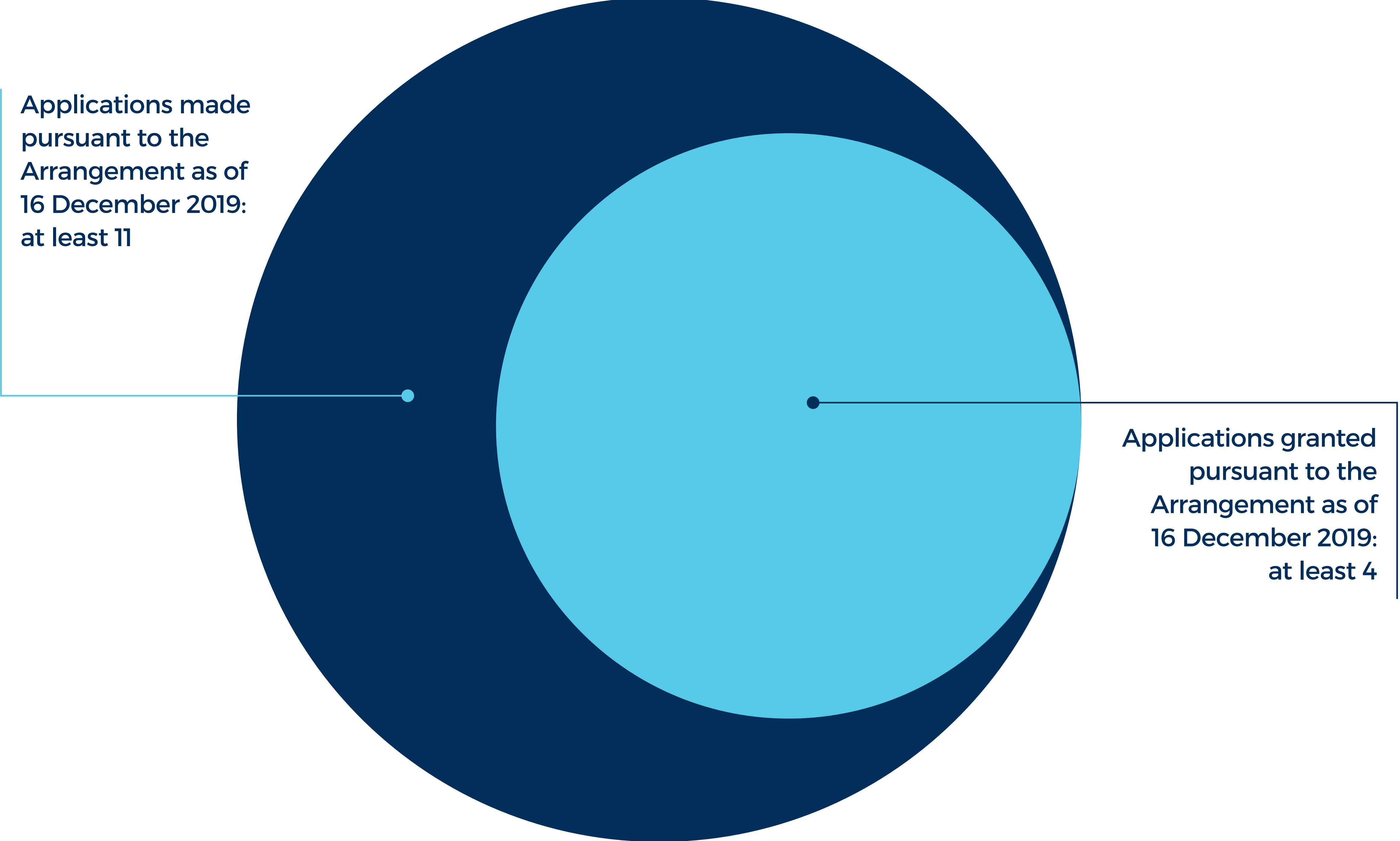
While the limits of the US and Chinese courts' increased willingness to act in aid of arbitration have not been fully tested, these developments create opportunities going forward for arbitrations involving parties from the world's two largest economies.

'The Arrangement further solidifies Hong Kong's status as a pre-eminent location for international arbitrations and the first choice for arbitral seat in international arbitrations that involve a mainland Chinese party. The availability of such relief addresses a significant historical concern of foreign parties in arbitrations involving mainland China.'

John Choong, Partner

Number of applications made and granted between 1 October and 16 December 2019



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09 Post-M&A disputes: the need for speed

Tools for resolving post-M&A disputes quickly and efficiently should lead to increased post-M&A arbitration.

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The last quarter of 2019 saw a significant uptick in M&A activity, and many observers expected that to continue into 2020, especially given the significant funds that financial sponsors continued to raise throughout 2019. But then, of course, the COVID-19 pandemic arrived – and threw all forecasts out the window. While M&A activity and its related disputes may well return to more normal levels later in the year, for now we are seeing an increase in 'Material Adverse Change' (MAC) related disputes and other efforts to avoid deals that have now become uneconomic. We expect those disputes to be a theme of 2020 and beyond.

> **'Speed, efficiency and certainty are top of the priority list when it comes to choosing the dispute resolution mechanism for financial sponsors – the flexibility of arbitration, including the evolution of expedited procedures and summary dismissal, makes arbitration an increasingly attractive option for many investors.'**
>
> Victoria Sigeti, Partner

Many cross-border M&A deals will choose international arbitration as their method of dispute resolution, particularly if there is an ongoing shareholder relationship between the parties. An internal Freshfields analysis, for example, found that 98 per cent of German M&A deals contained an arbitration clause. The benefits of arbitration in this context are well known: disputes can be resolved by an expert panel and confidentially; the process has procedural flexibility; and arbitration awards can be enforced across national borders and with relative ease.

But there are other, more recent innovations that make arbitration particularly attractive not only for these MAC disputes but also for post-M&A or shareholder disputes more generally.

That is especially so for financial sponsors who may have an eye to a potential exit in the medium term:

1. **Expedited procedures**
   Many institutional arbitration rules now provide for fast-track arbitration procedures, which include strict deadlines for the rendering of awards. In our experience, a straightforward post-M&A dispute – such as a purely legal dispute involving the interpretation of one contractual term, or a simple claim for escrowed amounts – can be resolved within six to 12 months under expedited procedures. The ICC has recently reported that 8.5 per cent of its expedited cases concern post-M&A disputes, and we expect that figure to increase in the latter half of 2020.

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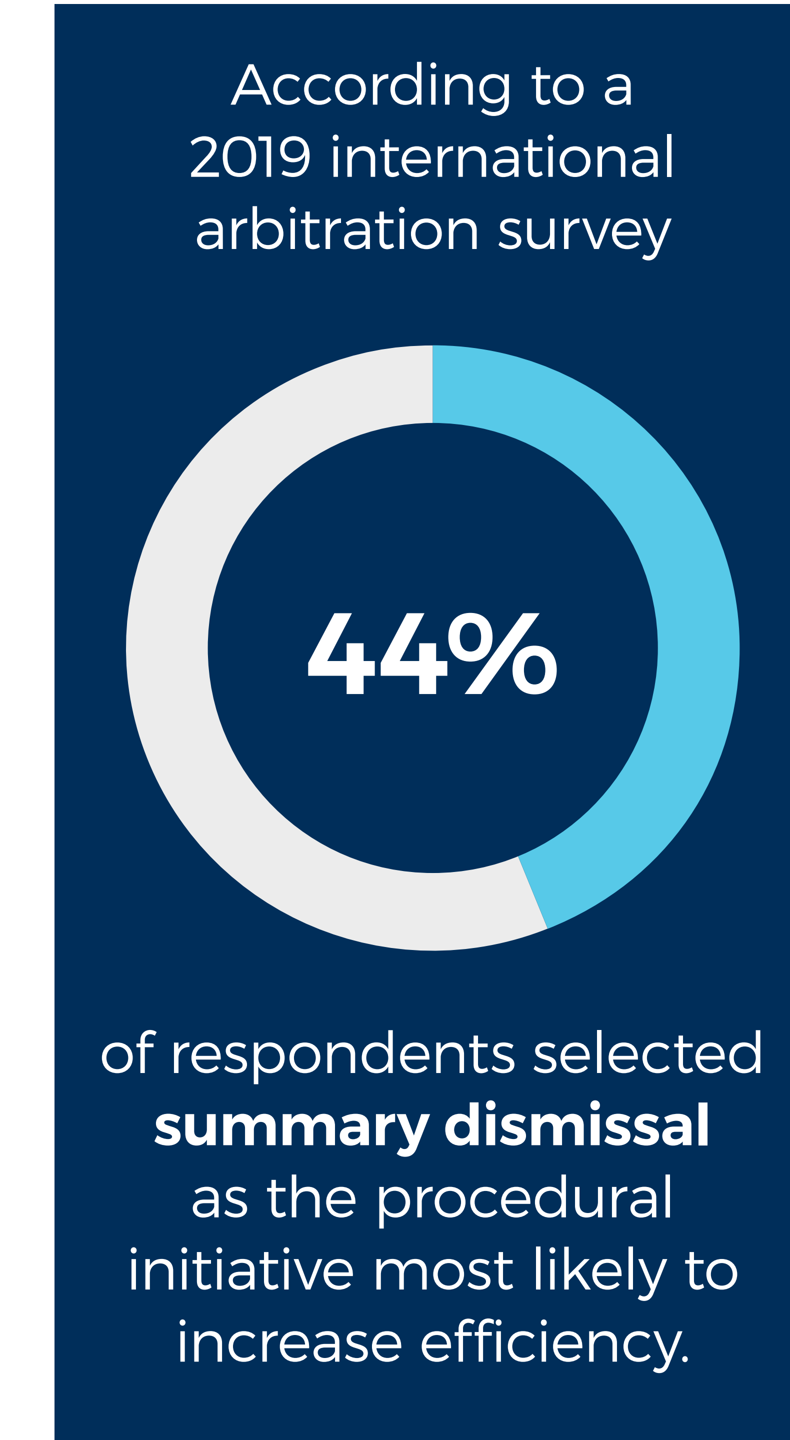
09 Post-M&A disputes: the need for speed

2. **Summary dismissal**
   Some institutional arbitration rules permit the summary dismissal of claims that are obviously and manifestly without legal merit. While requests for summary dismissal are sometimes used as a delay tactic – they introduce another round of briefing and decision-making into the procedure – they can be useful where there is a clear legal defect in a claim, such as a limitation period that has obviously run, the dispute has already been resolved or claims have been brought against the wrong entity.

3. **Emergency procedures**
   Many institutional arbitration rules now also provide for emergency arbitrator procedures, where an emergency arbitrator is appointed in a matter of days to resolve a dispute that requires immediate attention and cannot await the constitution of a full arbitral tribunal. An emergency arbitration procedure is similar to temporary restraining orders in many common law systems, and will often be useful in the post-M&A context, including, for example, when there is a risk of dissipation of a disputed escrow account or the threat of a seller taking value-destructive measures between signing and closing.

The leading arbitration institutions, such as the LCIA, ICC and SCC, have made significant efforts to refine their rules to answer the needs of dispute resolution users. Some of the recent evolutions have been adopted with post-M&A and shareholder disputes in mind, given the increasing prevalence of arbitration in M&A-related agreements. This should in turn further accelerate the proportion of high-value cross-border deals that include arbitration clauses, and of post-M&A and shareholder disputes that are referred to arbitration.



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10 Global projects: renewed focus on efficiency in arbitration and ADR

Construction and engineering disputes remain by some distance the largest percentage of disputes referred to arbitration.

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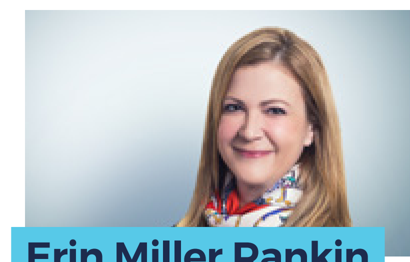
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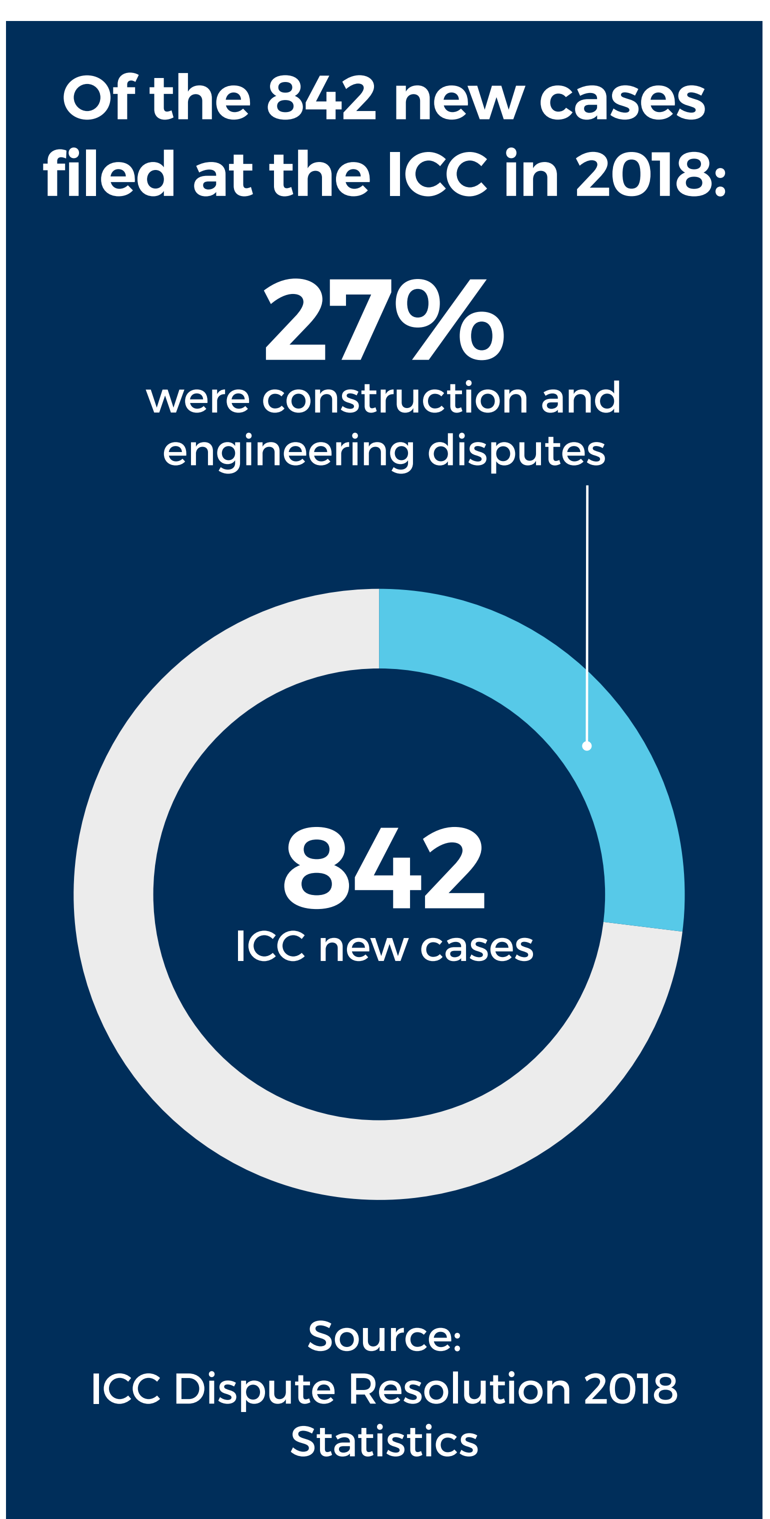
Resolution of such disputes, typified by factual and technical complexity, multiplicity of parties and the interplay with pre-arbitral procedures, are costly and time-consuming. 2019 saw recommendations from the ICC in the Report of the ICC Commission on Arbitration and ADR on Construction Industry Arbitration, and from the Queen Mary University International Arbitration Survey – Driving Efficiency in International Construction Disputes, 2019 (the Survey) on how arbitration can be made more efficient and effective.

Key questions have emerged: should compliance with pre-arbitral procedures be a condition to the right to arbitrate? Can a mediation process play a greater role? How should clients approach dispute resolution on their most complex and critical projects?

The answers to these questions provide some insight into what we can expect to see in 2020.



The Survey confirmed arbitration as the preferred method of dispute resolution for international construction and engineering disputes but encourages more robust case management by tribunals, including early dismissal of unmeritorious claims. Just short of half of respondents to the Survey favour institutional rules mandating arbitrators to strike out such claims. We can expect hot debate on this issue to balance the desire for summary decisions with the competing needs of procedural fairness and enforceability of awards. We discuss the developments in summary dismissal in arbitration in trend 9 (Post-M&A disputes).

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'Pay first, argue later'

More radically, the Survey addressed whether mandatory compliance with pre-arbitral decisions should be a pre-condition to the right to arbitrate. The Survey reports that 'the vast majority of respondents (67 per cent) showed support for mandatory compliance with pre-arbitral decisions as a pre-condition to arbitration'. This conclusion has to be treated with caution. The detailed statistics are more nuanced – only 17 per cent of the 67 per cent were prepared to make compliance with pre-arbitral decisions unconditional. The remainder excluded cases of manifest error or sought other unspecified conditions. These caveats are well-founded. Pre-arbitral procedures such as dispute adjudication boards (DABs) are designed to be fast-track to prevent deadlock during project execution. Because decisions are taken quickly, there is a greater risk of error. In our experience, final decisions typically vary, sometimes significantly, from DAB and adjudication decisions, which is echoed by respondents to the Survey: over 60 per cent reported that tribunals reached the 'same conclusion' as pre-arbitral decisions infrequently or only half of the time. Parties are, of course, always free to agree a conditional right to arbitrate in their contracts. However, the better solution to our mind is for the parties to provide in their contract that a tribunal constituted on an expedited or emergency basis can enforce DAB decisions on an urgent basis, subject to challenges to the DAB's jurisdiction and procedural compliance, by way of a partial award. The underlying merits of the DAB's decision could then be the subject of a further arbitration if either party does not accept the decision.

> **'To require compliance as the pre-condition to the very right to arbitrate would deprive a party of the legitimate means of challenging decisions prior to payment in circumstances where there may be significant sums at stake and, worse, risks of insolvency of the contractor.'**
>
> Jane Jenkins, Partner

Who is best placed to grant effective urgent relief?

Parties also need to consider how to provide for urgent interim relief. What are the options available? First, the power to grant such relief can be given to a DAB under the 2015 ICC Dispute Board Rules and the FIDIC forms of contract. But such decisions do not have the status of arbitral awards and so are not enforceable under the New York Convention. Second, where the DAB has been granted such power, emergency arbitration under the current ICC Rules will not be available pursuant to Article 29.6 (c). So what is the best forum for granting urgent interim relief? The answer in our view depends on the seat of the arbitration. If London is the seat, the parties may rely on the court to fill the gap given the availability of urgent relief on application to a judge around the clock. However, where the parties have chosen institutional rules that provide for emergency arbitration, the English courts will likely defer to the arbitral process, so careful consideration of options is essential.

What of the interplay between mediation and arbitration?

This topic is particularly important in the context of the Belt and Road Initiative given the preference of Chinese contractors for mediation so as to preserve the working relationship between parties. The ICC Guidance Notes on Resolving Belt and Road Disputes using Mediation and Arbitration acknowledges the preference for a less adversarial approach. The Singapore Convention on Mediation, which opened for signature on 7 August 2019, has so far attracted 52 signatories.

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Generally, such as under the ICC Rules, the tribunal can only assist in facilitating settlement where there is agreement among all parties and the tribunal. Contrast the approach of the Prague Rules, which permit the tribunal to assist the parties in reaching an amicable settlement at any stage in the arbitration unless one of the parties objects (Article 9.1). We predict that 2020 will see the ICC reconsidering its position under the auspices of the Task Force addressing arbitration and ADR.

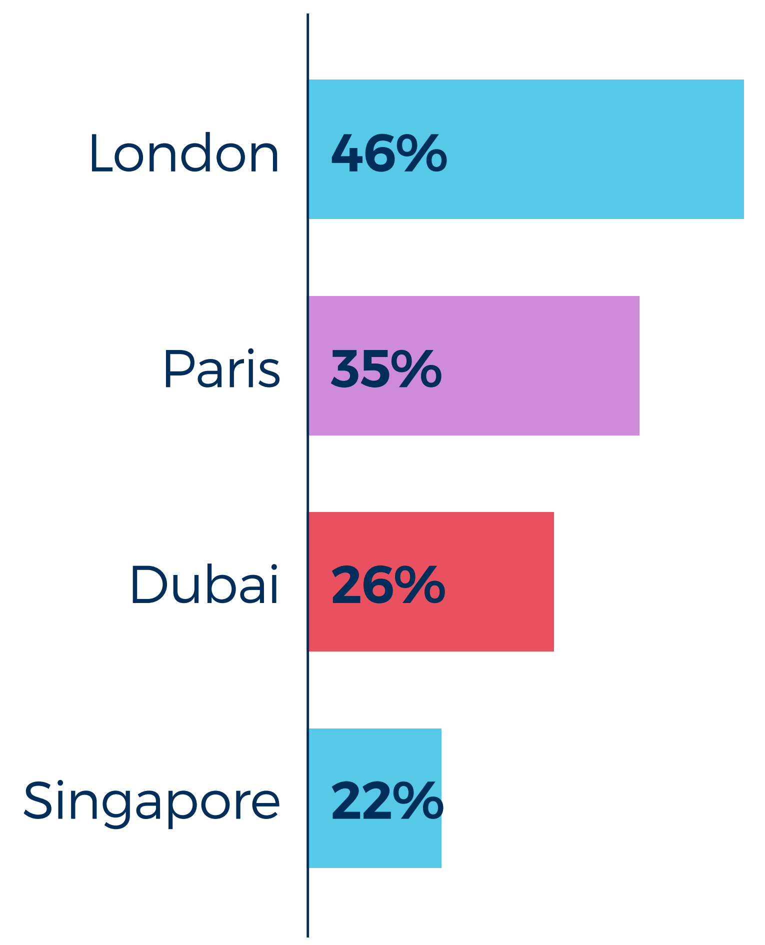
New courts and institutions for Belt and Road disputes

Belt and Road projects are throwing up fundamental questions regarding choice of forum. New courts have been constituted in Shenzhen and Xi'an for the resolution of disputes by Chinese judges. An advisory international expert panel has been appointed but plays no active part in specific disputes. China is concluding reciprocal enforcement of judgment treaties with Belt and Road jurisdictions. In a recent reform discussed above in trend 8 (Broadening role of the courts), the Chinese courts will now grant interim relief in aid of Hong Kong-seated arbitrations. These developments underscore China's desire to further develop its legal system, with a view to supporting the effective resolution of Belt and Road disputes, whether through mediation, arbitration or litigation. These are significant developments for China, and it will be interesting to see how they contribute to the development of Chinese law and judicial practice more generally. Likewise, the ICC is promoting its services in this space for not only arbitration but also mediation, expertise and dispute boards.

So will we see a shift away from ICC and LCIA arbitration in established centres? According to the Survey, London and Paris remain the predominant seats for construction arbitration, followed by Dubai and Singapore. In our view, parties outside China will prefer a neutral seat and arbitration rules with a proven track record. Parties should make their choice on a project-by-project basis: one size does not fit all.

> **'The enforceability of arbitration agreements and awards facilitated by the New York Convention is one of the driving factors that made arbitration a dominant mode of international dispute resolution. The Singapore Convention on Mediation seeks to put mediation on an equal footing with arbitration as a method of resolving international commercial disputes.'**
>
> Nicholas Lingard, Partner

Most common seats for construction arbitration:



Source: Queen Mary University International Arbitration Survey – Driving Efficiency in International Construction Disputes, 2019

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The legitimacy of the arbitral process is fundamental to the system of international arbitration as a whole, both commercial and investment arbitration.

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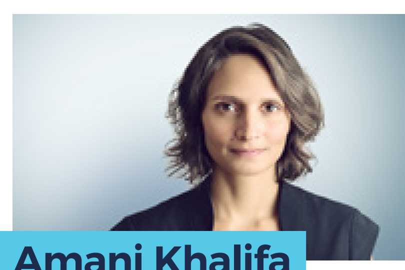

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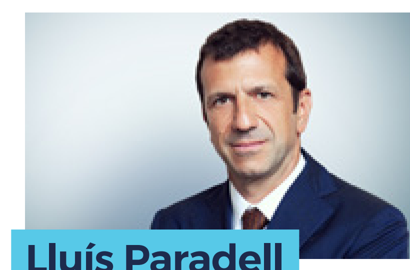

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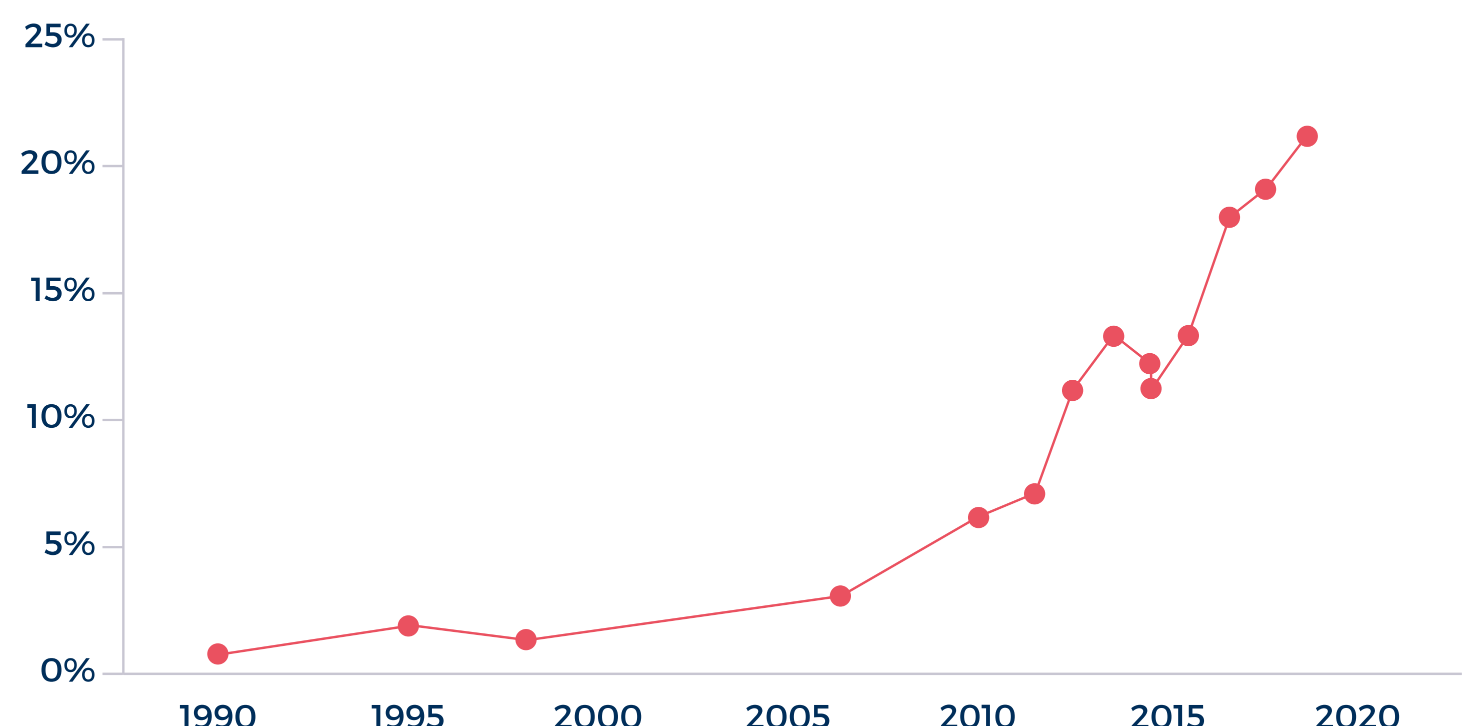
The last few years have seen international arbitration coming under increased criticism for the lack of diversity – particularly in terms of gender and ethnicity – of decision makers and, more recently, for its negative impact on the environment. Addressing these criticisms will be key to the ongoing legitimacy and attractiveness of arbitration for its users in 2020 and beyond.

In recent years, several initiatives have sought to highlight the lack of gender diversity of arbitrators resolving disputes. One of these is the Equal Representation in Arbitration Pledge (ERA Pledge). The ERA Pledge seeks to increase the number of women appointed as arbitrators on an equal opportunity basis, with the aim of securing fair representation. Founded in 2016, the ERA Pledge has now surpassed 4,000 signatories and is continuing to gain traction in association with other like-minded enterprises such as ArbitralWomen and Woman Way in Arbitration (WWA). More than three years after its launch, statistics paint an encouraging picture and show a marked improvement in the number of female arbitral appointments.



Women as a percentage of total arbitral appointments*

*Statistics from Lucy Greenwood, *Greenwood Arbitration*.

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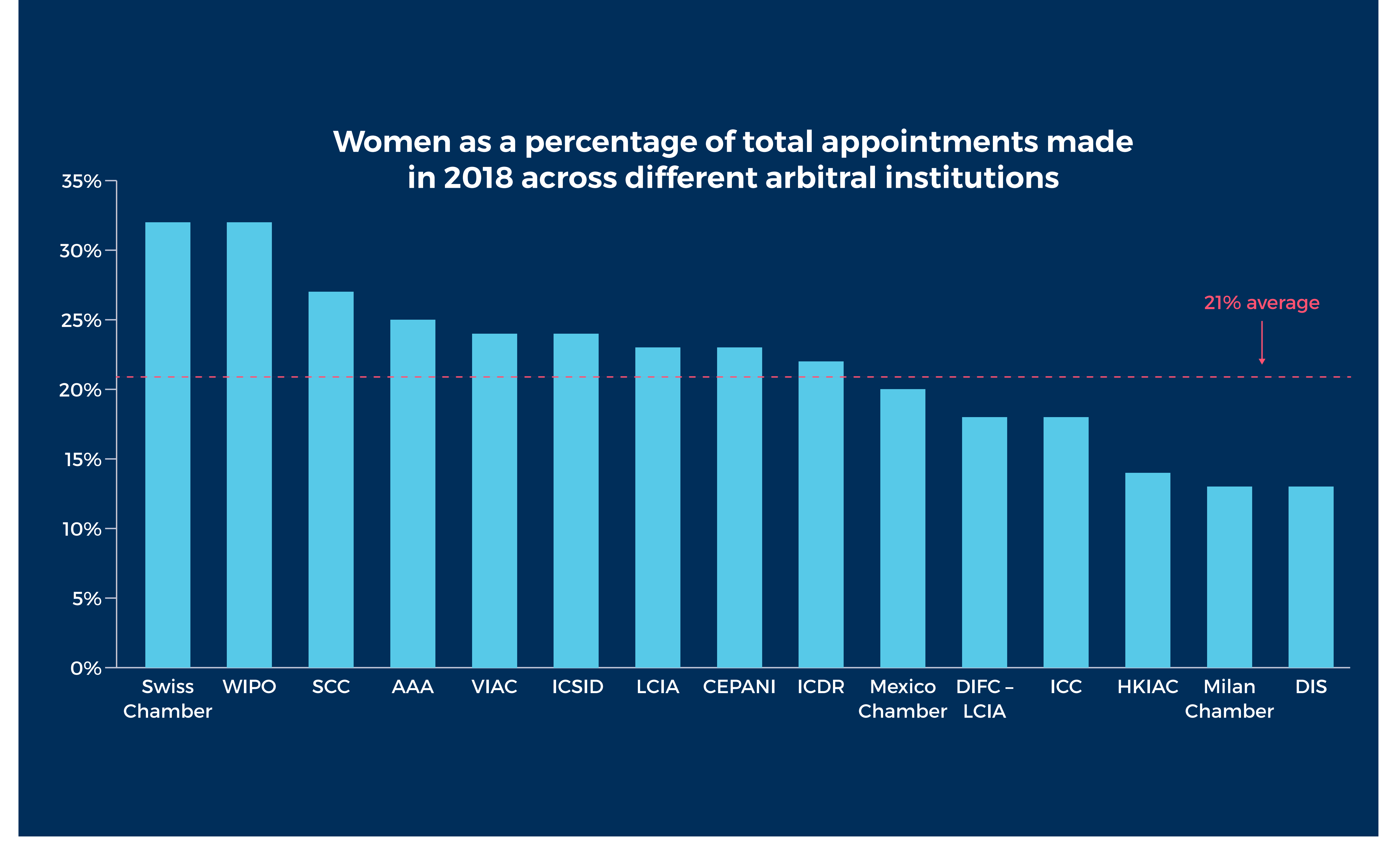
‘Although there is still a long way to go to achieve parity in arbitral appointments, what we are seeing is that awareness-raising initiatives – such as the ERA Pledge – do work and have been particularly well received by arbitral institutions and practitioners alike. The statistics on arbitral appointments are encouraging and we anticipate that this historic upward trend will continue throughout 2020 and expand to new markets and regions.’

Noiana Marigo, Partner

According to information disclosed by arbitral institutions, the average percentage of women appointed as arbitrators in 2018 was around 21 per cent – a significant increase from an average of around 10 per cent in 2015, when the idea for the ERA Pledge was first conceived.



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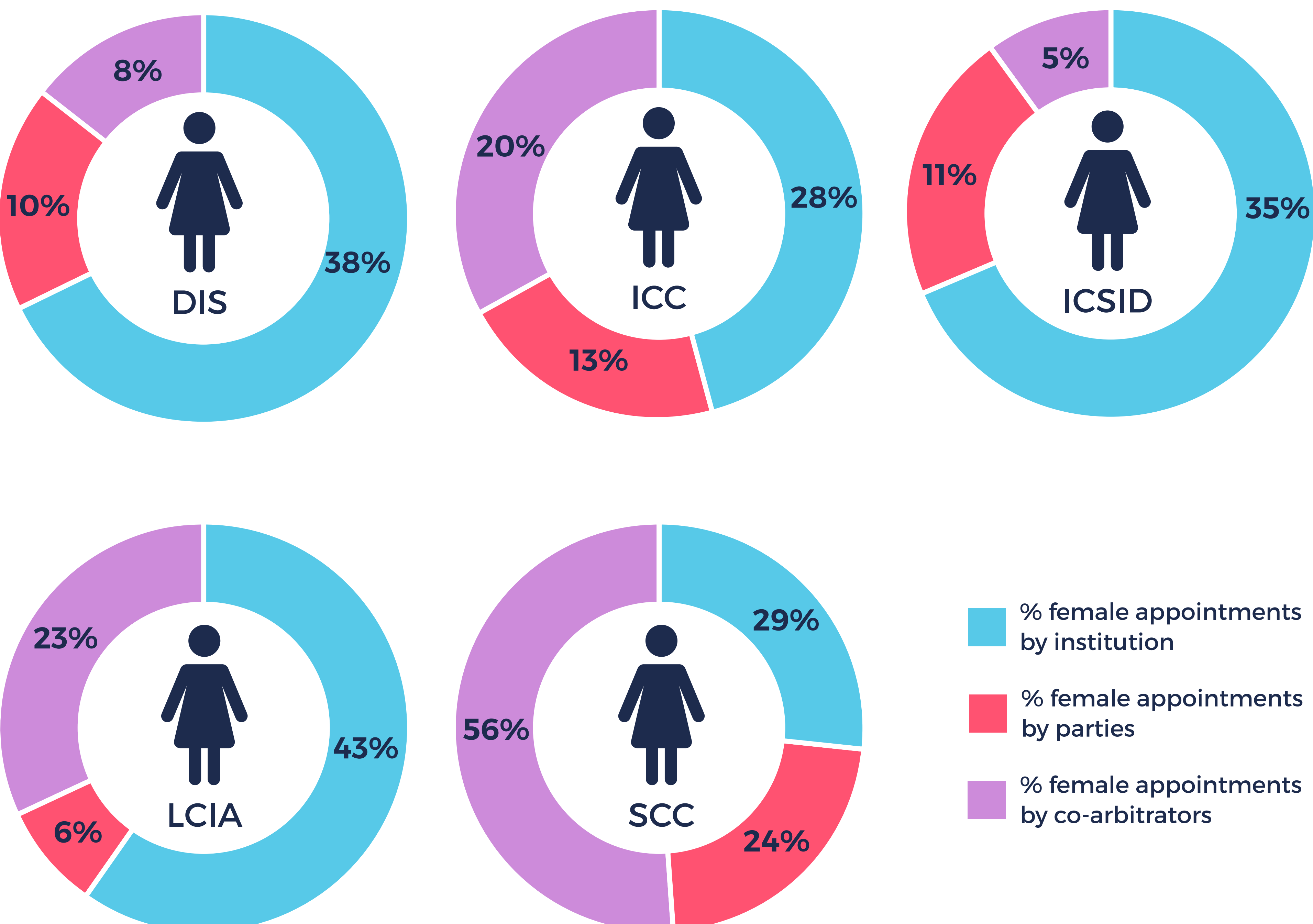
When the statistics are broken down further, however, it appears that progress is being made at a faster rate when it comes to institution-appointed arbitrators as opposed to those chosen by the parties, or by co-arbitrators, as illustrated below.

Diversity matters to clients. We have all come to expect increased innovation, better problem-solving abilities and an enhanced ability to recognise the needs of diverse stakeholders, all of which are proven to be the benefits of increased gender diversity on company boards, in leadership teams and more generally in the working world. Arbitration is no different and it is imperative that we foster the same diverse values when we select those who determine our disputes.

Samantha Bakstad, Senior Counsel at BP plc

Breakdown of appointments: selected institutions



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The focus for 2020 will then be on increasing awareness and driving change among corporates and other users of arbitration. To that purpose, the ERA Pledge has launched a corporate sub-committee and has appointed Samantha Bakstad, Senior Counsel at BP plc, as co-chair of the ERA Pledge Steering Committee, to sit alongside the founder of the ERA Pledge Sylvia Noury, head of our practice in London. Corporates have the potential to be real drivers of change: if the users of arbitration are demanding change, then it will be incumbent on their counsel and others in the arbitral system to deliver.

We also expect initiatives aimed at increasing regional diversity and other forms of inclusivity to become more prominent in 2020. For instance, the African Promise initiative identifies the lack of participation of Africans in international arbitration across all roles and seeks to improve the profile and representation of African arbitrators in international disputes, especially those connected to Africa. The ERA Pledge has also expanded to establish various sub-committees aimed at increasing other areas of diversity, including in Africa, Latin America and India.

Running in parallel to these efforts is a trend towards promoting overall social responsibility and greener, more environmentally conscious proceedings.

According to recent analysis by the Pledge for Greener Arbitrations Steering Committee, at present a medium-sized arbitration would require around 20,000 trees to offset its carbon impact. Taking the total caseload for 2018 at nine of the major arbitration institutions, this would equate to around 120 million trees.

Looking to 2020, it appears that efforts to rectify the environmental impact of arbitrations are moving towards the forefront of practitioners' minds. The Pledge for Greener Arbitrations, founded by an independent arbitrator, Lucy Greenwood, in November 2019, sets out goals for the arbitration community, including limiting documentary evidence to soft copies where possible, considering the necessity of face-to-face witness interviews and limiting air travel overall. To a certain extent, such concerns have been reflected in measures aimed at increasing efficiency in the IBA Rules and the newly released Prague Rules; both sets of rules encourage consideration of evidence formats and promote video conferencing where appropriate, with the Prague Rules going further and encouraging document-only case resolution where possible. With the international arbitration community seeking alternatives to travel and in-person meetings in response to the COVID-19 restrictions, we expect to see an accelerated uptake in usage of the available relevant tools and technology over the coming months. Amidst challenging times, one silver lining of this global pandemic could be to accelerate the reality of greener arbitrations and give rise to positive practices that may continue long after the virus threat has diminished.

'International arbitrations have a significant carbon footprint. Long-distance travel is by far the worst offender, followed by paper filings. I hope 2020 is the year that users of the arbitration system wake up to this reality and take steps, using the technology available, to make their practice of arbitration as green as possible.

Lucy Greenwood, Founder of the Pledge for Greener Arbitrations

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