International arbitration

10

trends
in 2017

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Continuity and change

The year since our inaugural annual international arbitration trends publication has seen dramatic political developments — including the UK's Brexit referendum and the election of US President Donald Trump. These changes will, of course, affect the future of international arbitration, but looking forward we see a high degree of continuity for international arbitration with the trends we highlighted last year continuing to dominate discussion and shape the practice of international arbitration.

Challenges remain, but 2016 saw steady progress towards addressing some criticisms, including revisions to institutional rules to take account of the needs of a more diverse group of users. For 2017, we anticipate continued efforts to optimise international arbitration for both commercial and investment treaty proceedings, new participants and an increasing range of subject matter.

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1.
Third party funding continues its move into the mainstream

In 2016, third party funding expanded its footprint – and attracted greater scrutiny.

We noted in 2016 the increasing use of third party funding by non-traditional parties — large, well-funded corporates, which joined the small- to medium-sized companies that are the more traditional users. That trend continues, as does the growth of third party funding in absolute terms, with now approximately $1bn of capital available in the global litigation funding market.

In 2016, third party funding continued its move into the mainstream with significant legal developments in three key areas.

First, in terms of the footprint for third party funding, 2016 saw moves to pave the way for third party funding in arbitration in two traditionally reticent jurisdictions: Hong Kong and Singapore. Previously, Hong Kong lacked a legal framework expressly permitting third party funding, and Singapore prohibited it.

Following consultations that concluded in October 2016, Hong Kong's Law Reform Commission proposed amendments to the Arbitration Ordinance that would disapply traditional common law doctrines of champerty and maintenance to arbitrations seated in Hong Kong or to funding agreements in respect of funds to be provided from Hong Kong. These doctrines had been the principal legal bulwark against third party funding in Hong Kong. In 2016, Singapore's Ministry of Law proposed the draft Civil Law (Amendment) Bill 2016 and accompanying Civil Law (Third Party Funding) Regulations 2016 to permit and provide a legal framework for third party funding in international arbitration.

These enactments have yet to come into force — this is expected in 2017 — but they are a clear sign of the increasing prevalence and acceptance of third party funding in international arbitration around the world.

Second, as is reflected in the Singapore and Hong Kong enactments and other developments, a clear trend towards transparency about third party funding also gained ground in 2016. The Singapore and Hong Kong frameworks are notable for the more hands-on approach they take to regulating third party funding, compared to the regulatory framework in, for example, England and Wales. A key feature of the proposed regulatory framework in both Hong Kong and Singapore is the requirement of the prompt disclosure of the existence of a funding agreement and the identity of the funder to the arbitral tribunal and all other parties. This is consistent with the International Chamber of Commerce's (ICC) February 2016 'Guidance Note for the disclosure of conflicts by arbitrators', which specifically advises arbitrators when disclosing any relationship that may give rise to a conflict of interest to consider 'relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award', advice that depends on disclosure of funding arrangements.

A similar requirement is also reflected in the Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules, which came into effect on 1 January 2017.

These rules empower a tribunal to order the disclosure of the existence and identity of third party funders and, in appropriate circumstances, to order disclosure of additional details about the funding arrangement. Newer-model investment treaties, such as the now defunct Transatlantic Trade and Investment Partnership (TTIP) agreement, include a similar disclosure requirement.

More broadly, and even in the absence of a requirement in the applicable arbitration rules or treaty, investment arbitration tribunals are increasingly ordering disclosure concerning third party funding, as did the tribunal constituted under the UNCITRAL Rules in *South American Silver v Bolivia* in January 2016. In that case, the claimant was ordered to disclose the existence and identity of the third party funder, but the tribunal stopped short of ordering disclosure of the funding agreement itself.

Third, as such funding agreements come more fully into view in the proceedings to which they relate, they are starting to be taken into account in costs awards. In England and Wales, it had been established since the 2014 decision in *Excalibur Ventures v Texas Keystone* that in some circumstances a funder may be liable to pay adverse costs orders on an indemnity basis. 2016 saw the other side of that coin when, in *Essar Oilfield Services v Norscot Rig Management*, the High Court of England and Wales refused to set aside an ICC award in which a successful claimant had been awarded as part of its arbitration costs the fee of some £2m it had paid to its third party funder. The court recognised these as arbitration costs based on findings that (i) the funded party would not have had the resources to bring the claim without funding, given the financial pressure caused by the other party's conduct; and (ii) the fee reflected standard market rates.

Although the facts in *Essar* may not be present in all cases, the decision was unquestionably supportive of third party funding. We will be watching in 2017 to see whether the logic of *Essar* finds favour in other jurisdictions and whether the decision opens the door more generally to the recovery of not only fees paid to third party funders but the costs of such other products as after the event insurance and the uplift component of conditional fee arrangements. We will be looking in particular to Singapore where, as noted above, 2017 will see the entry into force of the SIAC Investment Arbitration Rules, which expressly empower tribunals to take into account any third party funding arrangements in apportioning the costs of the arbitration.

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2.
Arbitration aims for new sectors

An ICC report explores the reasons arbitration has been less widely used than it might be by financial institutions.

Arbitration is widely used in some sectors, such as the oil and gas industry, and less widely used in others. In November 2016, the ICC produced a report probing the reasons for the relative lack of popularity of arbitration in the financial services sector. That report indicates that only 30 per cent of the financial institutions surveyed had participated in any arbitration in the last five years and that, for the majority of that 30 per cent, the disputes that they had referred to arbitration represented 5 per cent or less of the disputes on their books at the time.

The ICC's analysis attributes the relative lack of prominence of arbitration in the financial services sector to a range of factors, including in some cases simple lack of familiarity with arbitral procedure and traditional (and possibly outdated) assumptions about what the process can and cannot achieve. The ICC found that disputes in the financial services sector are typically submitted to national courts, suggesting that such transactions are generally structured in such a way as to secure the jurisdiction of an appropriate judicial forum, whether by express agreement or otherwise. And the ICC found, perhaps not surprisingly, greater openness to arbitration in areas of the industry involving sovereign parties or parties in emerging markets, where submitting disputes to local courts is often not perceived as an attractive option.

In terms of arbitration procedure itself, the financial institutions surveyed by the ICC highlighted a number of perceived shortcomings of arbitration that deterred its wider use by the industry, including:

- questions about whether it would be possible to secure effective interim relief on an urgent basis;
- the perceived lack of availability of 'summary judgment' or similar mechanisms in arbitration;
- impediments to joining third parties to arbitrations or consolidating multiple related disputes into a single arbitration; and
- the fact that arbitration awards do not set binding precedents for future cases.

As the ICC report highlights, some of these issues can readily be addressed in the drafting of arbitration agreements. Indeed, arbitration institutions are continually in the process of refining their ready-made procedural rules in order to respond to such issues. (And of course experienced arbitration practitioners are accustomed to tailoring standard clauses to suit their clients' needs.)

We reported last year on the trend to establish 'emergency arbitrator' mechanisms or the possibility of expedited formation of an arbitral tribunal in order to close the temporal gap between a dispute arising and the constitution of an arbitral tribunal able to address it. Based on (limited) available statistics, uptake of these procedures has so far been relatively low. This may be attributable as much to the fact that many leading sets of arbitration rules make the emergency arbitrator option available only under arbitration agreements entered into relatively recently (October 2014 in the case of the LCIA and January 2012 in the case of the ICC) as to reticence on the part of parties to engage the mechanism.

With respect to summary judgment or other methods for early determination of claims without a full hearing, as the ICC report notes, parties are free to provide expressly for such a procedure in their arbitration agreement to the extent that there is uncertainty about tribunals' inherent power to use such case management techniques absent express agreement. In fact, as we explore in more detail here, some arbitral institutions have codified such procedures in their rules. If parties want to ensure that a summary procedure is available in their arbitration, they may either opt in to those rules or use them as a model for drafting a bespoke arbitration clause.

Consolidation and joinder are provided for to some extent in the rules of various arbitration institutions. That said, given that arbitrators' jurisdiction depends to a large extent on the consent of parties, there can be limits on how fully consolidation and joinder may be achieved if all relevant parties have not consented. In most jurisdictions, arbitrators cannot order consolidation without consent. A notable exception is the Netherlands, where the New Dutch Arbitration Act (which entered into force in 2015) allows Dutch courts to consolidate Netherlands-seated arbitrations in appropriate circumstances.

With respect to the precedential effect of prior awards, as a practical matter this is as much a function of the relative privacy or confidentiality of arbitration — which is something many parties rate as one of its key advantages — as it is a function of the relevant legal framework. In our experience, when previous arbitral decisions on relevant issues are available and brought to the attention of tribunals, they can have significant persuasive effect.

This discussion is not to suggest that there are not important differences between arbitration and litigation — differences that may in a given case make arbitration the wrong choice for parties. But if parties wish to avail themselves of the advantages of arbitration, many of which have traditionally been seen as drawbacks of the process, these can be addressed with skilled drafting of arbitration agreements. It will be interesting to see, over the course of 2017 and beyond, whether greater engagement by arbitral institutions and practitioners influences the choice of dispute resolution forum by parties in relatively untapped sectors such as financial services.

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3.
Speed and cost

Arbitration institutions adopt new approaches to meeting user critiques about the cost and duration of arbitration proceedings.

One of the trends we reported on last year was the groundswell of concern from users of arbitration that too often the process takes too long and costs too much. We explored the relationship between the increasing complexity of some matters submitted to arbitration and the duration and cost of proceedings, and we highlighted efforts that were being made by arbitration institutions to respond to this concern by tightening up procedures and incentivising efficient case management by tribunals.

These efforts continued throughout 2016. For example, the DIFC-LCIA Arbitration Centre announced updates to its rules in October 2016 that reflect changes similar to many of those undertaken by other institutions to increase efficiency, avoid delays, allow for the appointment of an emergency arbitrator and provide for a greater degree of consolidation of related arbitrations.

In addition, 2016 saw a raft of revisions to institutional arbitration rules specifically designed to give parties and tribunals options for quicker and more focused proceedings in appropriate cases.

These revisions included the broader availability of expedited arbitration proceedings. On 4 November 2016, the ICC joined the group of arbitration institutions that have formulated rules for expedited proceedings (which includes the DIS, HKIAC, ICDR, SIAC, SCC and Swiss Rules), when it announced revisions to the ICC Arbitration Rules that will come into effect on 1 March 2017. Those revisions introduced the Expedited Procedure Rules, which apply automatically to any arbitration in which the amount in dispute is less than $2m and may be applied by agreement to any other arbitration. Notable features include:

- the ICC Court will normally appoint a sole arbitrator for disputes subject to the Expedited Procedure Rules, notwithstanding any contrary agreement by the parties;
- the Terms of Reference stage of the proceeding is dispensed with;
- awards must be made within six months from the initial case management conference, with extensions to be granted only in limited circumstances where justified;
- the tribunal will have discretion to decide the case on the papers submitted by the parties, with no hearing, no requests to produce documents and no examination of witnesses; and
- proceedings are subject to a reduced costs scale.

It will be interesting to see, over the course of 2017 and beyond, whether parties in fact opt for the faster and cheaper proceedings they have been calling for.

Other institutions have met critiques of the efficiency of the arbitral process by including provisions for early dismissal or summary determination in appropriate cases. For example, pursuant to Rule 29 of the Revised SIAC Rules, which took effect on 1 August 2016, at any stage of arbitration proceedings, any party may apply for early dismissal of a claim or defence that is 'manifestly without legal merit' or 'manifestly outside the jurisdiction of the tribunal'. The tribunal has discretion to determine whether to allow summary proceedings. If, after affording the parties 'the opportunity to be heard', summary proceedings are allowed by the tribunal, the tribunal is required to issue a reasoned order or award within 60 days of the application.

The Stockholm Chamber of Commerce (SCC) has adopted a similar provision in its new rules, which took effect on 1 January 2017. The SCC procedure allows for summary proceedings 'without undertaking every procedural step that might otherwise be adopted for the arbitration' upon an application of any party that is accepted by the tribunal in its discretion. Summary procedure may be requested whenever a party contends that is appropriate, including:

- when it is contended that 'an allegation of fact or law material to the outcome of the case is, on its face, unsustainable' — akin to a strikeout application or motion to strike;
- when it is contended that 'even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law' — akin to a motion to dismiss; or
- when it is contended that 'any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure'.

The SCC Rules are not prescriptive concerning the form that summary proceedings should take. Instead the party applying for summary procedures is to propose a procedure and explain the basis on which it is justified. After giving the other party an opportunity to comment, the tribunal is to determine the application for summary procedures and, if it decides that they are appropriate, the form such procedures are to take. Unlike the SIAC Rules, the SCC Rules do not impose a deadline for determination of the issue subjected to summary procedures, but require the tribunal to 'seek to make its order or award on the issues under consideration in an efficient and expeditious manner having regard to the circumstances of the case, while giving each party an equal and reasonable opportunity to present its case'.

These rules now expressly authorise arbitration tribunals to entertain motions for summary disposition — something that tribunals have arguably always had the authority and discretion to do pursuant to broad case management powers, but which concerns about due process and the enforceability of arbitration awards (sometimes criticised as 'due process paranoia') appear to have deterred. It will be interesting to see how often parties apply for summary disposition and how often those applications succeed.

In order to inform the development of arbitral practice in this respect, we hope that arbitration institutions that offer such proceedings will devise systems for gathering and disseminating information about tribunals' practice under these mechanisms.

These rules revisions provide a ready answer to one of the perennial critiques of arbitration — that it deals too timidly with unmeritorious claims or defences. It remains to be seen whether building in the possibility of litigation-style motion practice does in fact reduce the overall duration and cost of arbitration proceedings.

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4.

Free trade Trumped – and whither ISDS?

With CETA agreed, TTIP on hold, the US out of the TPP and NAFTA set to be revisited, 2017 ushers in an uncertain future for trade and investment agreements and the regime of investor-state arbitration they incorporate.

In 2016, we considered the future of multilateral trade and investment agreements such as the Trans-Pacific Partnership (TPP), the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the Transatlantic Trade and Investment Partnership (TTIP). We also flagged the ongoing debate over investment treaties and the investment chapters of free trade agreements, specifically the critiques of the mechanisms in those treaties for investor-state dispute settlement (ISDS).

Over the past year, that debate slowed the approval of the CETA, but did not prevent it. The CETA was signed in October 2016, after approval on behalf of all EU member states. And the TPP was signed in February 2016.

As we head into 2017, the narrow ISDS debate is somewhat overshadowed by the bigger-picture debate caused by the revival of protectionist rhetoric on the part of the world's largest economy and other events that have called into question the legal framework for trade and investment:

- as part of his campaign for the US presidency, Donald Trump pledged to withdraw from the TPP — which had already run into significant opposition in the US Congress — and to renegotiate the North American Free Trade Agreement (NAFTA);
- following President Trump's election, the European Commission announced a suspension of TTIP negotiations;
- President Trump took action to withdraw the US from the TPP on his first full day in office, and his administration has confirmed renegotiating NAFTA as an early priority; and
- as and when the UK exits the European Union as a result of the Brexit referendum, the UK will need to either negotiate opting in to whatever multilateral trade agreements remain or reach new bilateral trade and investment deals with its trading partners.

The new generation of trade and investment agreements is notable for different approaches to ISDS, each self-consciously designed to address criticisms of the traditional system but taking different approaches to doing so.

Under the investment chapter of the CETA, investor-state disputes are subject to a system that the European Commission has described as a 'clear break from the old' system for the arbitration of such disputes. The new system contemplates a permanent and institutionalised dispute settlement tribunal, an investment court whose members are to be appointed not by parties to disputes as they arise, but by the states parties to the CETA.

The TPP retains investment arbitration with arbitrators appointed on an ad hoc basis by the parties to each dispute, but tweaks the traditional system to introduce:

- a mechanism for state parties to impose binding interpretations of substantive provisions;
- a mechanism for summary dismissal of unmeritorious claims;
- provision for submissions by third party *amici curiae*; and
- greater transparency, including publicity of filings, hearings and awards.

Until the existing regime of bilateral investment treaties is removed (by denunciation or replacement), older vintage investment agreements will remain in force, with traditional ad hoc investor-state arbitration as the ISDS mechanism.

Where does all of this leave ISDS at the beginning of 2017?

For the moment, it seems likely that there will continue to be a mix of ISDS options in force and ongoing debate about the preferred model, given the uncertain direction for trade and economic policy around the globe. And of course, given the existing network of investment protection, and the sunset provisions of the treaties that are terminated that provide for their continued application for up to 20 years, governments will have to consider obligations to foreign investors in implementing large-scale policy changes, such as Brexit.

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5. Broadening the pool

The drive for greater diversity in arbitrator appointments gains momentum and yields ethics benefits.

Last year we highlighted the groundswell of support for efforts to increase the gender diversity of arbitrators. These efforts gained significant momentum in 2016.

The Equal Representation in Arbitration Pledge (the Pledge) was launched in May 2016 with a call for all participants in the arbitration system — parties, counsel, arbitrators and institutions — to commit to improving the profile and representation of women in arbitration with the objective of ensuring that women are appointed as arbitrators on an equal opportunity basis. As of January 2017, the Pledge has attracted over 1,600 signatories worldwide, including 300 organisations (arbitral institutions, law firms and corporates). The Pledge Steering Committee has grown from its origins around a London dinner table through the appointment of local representatives from around the globe following events in major arbitration jurisdictions. And since May 2016, further events have been held to promote the Pledge in places as diverse as South Korea, South Africa, Ecuador, the Dominican Republic, Bolivia, Nicaragua, Egypt and Japan, with plans to roll out the Pledge in other jurisdictions during 2017. In an effort to assist parties and counsel to select female arbitrators who have had less visibility, a subset of the Pledge Steering Committee, hailing from the arbitral institutions, has set up a 'search' function through the Pledge website, offering suggestions of female arbitrators tailored to any particular case.

Arbitration institutions have responded to the call to action on diversity with concrete and positive steps. The ICC, SCC and Swiss Chambers' Arbitration Institution (SCAI) have all started publishing data on the number of female arbitrators appointed in their cases. The ICC revealed its 2015 caseload statistics in May 2016, followed by the SCC statistics in July and the SCAI statistics in August. The ICC and the Milan Chamber of Commerce have also started publishing the names of arbitrators sitting in their cases on their websites. The board of the Swiss Arbitration Association has decided to include 'gender' as a criterion on the search tools of its website and app, along with an explanation of the reasons for including this new option. Other members of the arbitration community are also assisting with the drive to collect relevant statistics, with Global Arbitration Review requesting data on the appointment of women arbitrators from law firms in their annual ranking submissions.

These data are a critical tool for evaluating progress against the objective of increasing gender equality in arbitral appointments. We will be watching these statistics over the course of 2017 and beyond in the hope of seeing evidence that the arbitration community's diversity efforts are bearing fruit. The Pledge Steering Committee intends to publish an annual assessment of progress in this regard based on the increasingly available statistics, starting in 2017.

Events of 2016 also highlighted the practical importance of broadening the pool of arbitrators as a way of limiting and managing the conflicts of interest that can arise or appear to arise out of the repeat appointment of the same arbitrators. By way of example, the February 2016 decision in the case of *Cofely v Bingham* in the High Court of England and Wales underscored that repeat appointments can give rise to an apparent bias that can result in the removal of an arbitrator. In addition to advancing the core principle of equal opportunity, and other benefits that are judged to result from diversity and have been widely discussed elsewhere, increasing diversity in arbitral appointments increases the pool of experienced arbitrators, which can help reduce apparent conflicts that may arise from the repeat appointment of a limited pool of arbitrators.

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6.
Brexit: impact on London as an arbitration seat

Brexit has shaken the political landscape but leaves the regime for arbitration in London standing strong.

One of the biggest political events of the year was the result of the UK's June 2016 referendum on membership of the EU. The 'Leave' vote prevailed and, at the beginning of 2017, one thing that seems certain is that change is coming. Following the Supreme Court's Article 50 ruling on 24 January 2017 and the promulgation of short and to-the-point draft legislation authorising the UK Government to do so, the starting gun on exit negotiations will soon be fired.

One thing that has not changed and will not be impacted by Brexit is the robust framework for arbitration in London. The 2015 edition of a survey of in-house counsel and other arbitration users conducted by Queen Mary University recorded that 47 per cent of respondents preferred London as a seat of arbitration compared with 38 per cent for Paris and 24 per cent for Singapore. The reasons for that no doubt include London's advantages of geography, language and legal culture, all underpinned by modern and effective arbitration legislation, the existence of a pool of skilled arbitrators and a judiciary that is broadly non-interventionist and supportive of arbitration. Brexit had no impact on any of the features that commend London as a seat for international arbitrations.

Arbitration is commonly chosen to resolve cross-border disputes because of its independence from national legal systems, the high degree of certainty it provides as to the method by which disputes will be resolved and the enforceability of awards. These reasons to choose to arbitrate disputes still apply and will continue to do so whatever substitute for the Brussels regime for the enforcement of English court judgments (and the enforcement of EU member state court judgments in the UK) will be agreed as part of the Brexit negotiations. Arbitration in London remains an attractive option for the resolution of English law/English language disputes whatever form Brexit takes.

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7.
Russian arbitration reform – half measures?

Legislative reform in Russia brings some welcome harmonisation but also sets traps for the unwary when it comes to the resolution of disputes involving Russian companies.

As we reported last year, new arbitration legislation came into force in Russia in 2016. The reform legislation seeks to harmonise Russia's domestic and international arbitration regimes, generally on the basis of the UNCITRAL Model Law.

The legislation also imposes greater regulation of arbitral institutions operating in Russia, and requires all such institutions to go through a licensing procedure — except for the International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission with the Russian Chamber of Commerce and Industry. Although licensing is open to foreign institutions, these institutions are not eligible to administer disputes involving Russian corporations in Russia unless and until they are licensed. And it is unclear whether and when major arbitration institutions such as the ICC, LCIA and SCC will apply for and/or receive a licence enabling them to administer arbitrations in Russia.

The most significant impact of the reform is in the sphere of arbitrating corporate disputes, which includes disputes arising out of M&A transactions in respect of Russian companies. These disputes may only be submitted to licensed institutions (as explained above) and cannot be arbitrated ad hoc.

Depending on the nature of a dispute, additional requirements may apply, including that the seat of the arbitration be in Russia, that specialised 'corporate arbitration rules' be applied, and even the requirement that the Russian company and all of its shareholders accede to the arbitration agreement. The reform legislation also makes certain types of corporate disputes (eg, disputes in respect of Russian 'strategic' target companies) non-arbitrable. Arguably, the reform also invalidates pre-existing arbitration clauses in respect of corporate disputes, although this issue is currently being debated in Russian legal circles.

In view of these developments, drafting arbitration clauses in M&A agreements, including share purchase agreements and shareholders' agreements relating to Russian companies, now requires extra attention and care.

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8.
Two steps forward, one step back

2016 saw a mix of reform and retrenchment in the approach to international arbitration in the Middle East.

The Middle East has seen exponential growth in the use of arbitration in recent years. However, as in many other respects, the region's arbitration trends can be unpredictable. 2016 was no different.

For example, 2016 saw further development of the United Arab Emirates' (UAE) dispute resolution framework through the launch of the Abu Dhabi Global Market (ADGM) — Abu Dhabi's response to the well-established Dubai International Financial Centre (DIFC). The ADGM now gives users of arbitration yet another choice of arbitral seat in the UAE, in addition to the DIFC and 'onshore' UAE, through the ADGM Arbitration Regulations of 2015, a carefully crafted arbitration law based on the UNCITRAL Model Law, but with a number of modifications and enhancements to reflect international arbitration best practice.

Despite this unique arbitral offering, 2016 also saw a surprising change to Article 257 of the UAE's Penal Code. The newly amended Article 257, which was originally directed at court-appointed experts, now provides for the possible imprisonment of arbitrators, experts, translators and 'fact finders' who fail to maintain their 'integrity and impartiality'. While the practical application of the amended Article 257 remains unclear, the circumstances in which it was enacted and its potential implications have already led a number of arbitrators and experts to refuse new appointments and, in some cases, resign from existing ones where the seat of the arbitration is in the UAE (including in the DIFC and ADGM, which remain subject to the UAE's criminal laws).

That being said, in response to the enactment of Article 257, a vigorous lobbying campaign was launched by the arbitration community in the UAE, and initial indications are that the UAE authorities have recognised the harm caused to the UAE's position as a regional arbitration hub and have indicated that Article 257 will be repealed or amended in due course.

In contrast, Saudi Arabia, traditionally one of the jurisdictions most hostile towards arbitration, has finally shown positive signs of change. Despite having been a signatory to the New York Convention since 1994 and having enacted new arbitration and enforcement laws in 2012 and 2013, there had been no reported case of a foreign arbitral award being recognised, let alone enforced, in Saudi Arabia. This changed in 2016, with details emerging publicly of the enforcement of a London-seated ICC award — a development we have seen echoed in our own practice in securing leave to enforce a foreign arbitral award against a Saudi debtor. While it is too early to make any definitive statements, this is a groundbreaking development in a country that has traditionally been deeply sceptical of arbitration.

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9.
Perspectives from Asia

Economic developments in Asia drive disputes trends in the region.

In 2016, we observed two clear trends in disputes in Asia, both of which we expect to continue in 2017.

First, investment treaties and disputes arising under them continue apace in Asia.

Notwithstanding US President Trump's decision to walk away from the Trans-Pacific Partnership, Asian states continue to enter into bilateral and multilateral investment treaties and free-trade agreements with investment chapters. Most of those instruments include a provision permitting foreign investors to enforce their investment protections through investor-state dispute settlement, typically international arbitration proceedings. As investments by Asian investors around the world mature and disputes arise, those investors increasingly are prepared to enforce their contractual and treaty-based protections against host states through arbitration. At the same time, Asian states that have sought to attract international capital and expertise for major investment projects are facing claims by foreign investors as their conduct is assessed against the investment protection standards agreed under investment treaties and contracts.

Second, falling commodities prices have led to a rise in related disputes.

Demand from Asian states affects a wide range of commodity prices. For instance, LNG prices continue to be driven by demand from the world's two largest LNG importers, Japan and South Korea, and China's thirst for commodities drives prices for a wide range of other commodities. As demand slackens for some commodities and the potential for oversupply increases for others, there is a real risk that prices agreed under long-term supply contracts may no longer reflect the commodity value under current market conditions in Asia. This increases the risk of disputes as parties benefiting from the divergence between the contract price and current market prices seek to enforce their rights through international arbitration and their counterparties seek to renegotiate their contractual pricing terms to obtain market-reflective prices.

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10.
Resource nationalism in Africa – the next wave of investor claims?

2016 crystallised a trend of opportunistic resource nationalism in Africa and a consequential rise in investor-state disputes.

Resource nationalism — in the form of efforts by states to gain greater benefit from the natural and other resources within their territory, at the expense of foreign investors — is nothing new. In recent years, however, we have seen states deploying increasingly sophisticated measures to achieve that objective. 2016 saw the continued spread of this trend in Africa.

While in some jurisdictions resource nationalism still takes the form of outright seizure or expropriation of investors' assets — Zimbabwean President Mugabe's declaration in March 2016 that 'the state will now own all the diamonds in the country' is an example — the more contemporary manifestation of the trend in Africa is more nuanced. For example, we have increasingly seen states imposing unilateral re-interpretations of previously agreed contractual terms; taking creative tax measures, often through the retroactive re-interpretation of tax legislation; and/or redirecting profits from the exploitation of natural resources by imposing 'indigenisation' or 'local content' legislation.

African states that have opted for the unilateral re-interpretation or replacement of contract terms include Nigeria and Egypt, both mature energy economies where the governments appear to be more concerned with maximising value from their producing assets in the short term than attracting foreign investment into the country over the longer term.

Adverse tax measures adopted by African states include:

- Algeria's windfall profits tax on the revenues earned by international oil companies;
- Mozambique's and Equatorial Guinea's efforts to extend the jurisdiction of their tax authorities to offshore transactions involving the transfer of interests in their natural resources;
- Kenya's imposition of capital gains tax on the sale of rights in the extractive sector;
- Tanzania's assessment of capital gains tax on transactions involving the sale of rights in the extractives sector; and
- Uganda's imposition of both capital gains and value added taxes in contravention of contractual tax exemption and stabilisation clauses.

South Africa is probably the most well-known example of a government introducing indigenisation or local content rules through its 'black empowerment' rules, in particular in the mining sector, although Zimbabwe has followed suit and earlier this year Namibia proposed similar empowerment legislation in the mining sector.

Although previously the imposition of government measures to 'rebalance' profit-sharing with foreign investors seemed to correspond to a rise in commodity prices (eg, the imposition of windfall profits taxes), this trend has continued in Africa despite currently prevailing low commodity prices.

As a result, investor-state disputes in Africa are on the rise. In 2015, 19 per cent of new cases registered with ICSID involved an African party (compared to only 10 per cent involving a state party from the South or Central American regions, previously the dominant regions for resource nationalism disputes). And as of the middle of 2016, disputes involving African states constituted 26 per cent of ICSID's caseload.

We expect these trends to continue. Given low commodity prices, it will be interesting to see the extent to which these tactics to squeeze the profitability of investors will impact investors' willingness to continue to invest in certain African jurisdictions.

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