



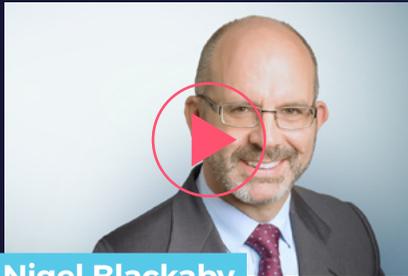
International arbitration

Illuminating the
top trends in 2018



Freshfields Bruckhaus Deringer

International arbitration: the top trends in 2018



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Foreword

Welcome to the international arbitration trends we have identified across our network for 2018, as a consequence of the legal, political and economic forces that continue to buffet the ever more complex world in which our clients operate.

A tumultuous 2017 has provided us some insight into where arbitration's greatest challenges (and greatest opportunities) lie in the year ahead. I highlight a few examples:

- With the **re-emergence of protectionism** in the West and retrenchment from multilateralism in the US, the inclusion of investor-state arbitration in trade and investment treaties remains under attack from the left and right of the political spectrum, including the protections afforded by NAFTA Chapter Eleven.
- Some capital-importing states, such as Venezuela, Ecuador, Bolivia, South Africa and Indonesia, are withdrawing from or seeking to renegotiate their network of bilateral investment treaties (BITs) as a consequence of multiple investor claims. At the same time, the rebalancing of economic and political power from Western states to emerging economies is **changing the type of claims we see in international arbitration**, with a marked increase, for example, in claims where both investor and host state are from traditionally capital-importing states (South-South claims) or from capital-exporting states (North-North claims). We are also seeing an increasing focus on the responsibilities of investors with regard to social and environmental issues (particularly in the natural resource sector) and the inclusion in new BITs of greater regulatory discretion for states on questions of the environment and tax.

International arbitration: the top trends in 2018

- The European Union (EU) is increasingly turning its back on ad hoc arbitration as the mechanism of investment dispute resolution in favour of an investment court system with permanent judges (as in recent agreements with Canada and Vietnam). This may be the approach taken in a future EU-UK agreement post-Brexit. Meanwhile, the storm of **Brexit** will have little impact on the status of London as an arbitral seat. Indeed, given the uncertain international enforcement status of English court judgments in a post-Brexit world, arbitration appears ever more attractive as the New York Convention on the Recognition and Enforcement of Arbitral Awards continues to ensure enforceability within and outside the EU.
- As **China's Belt and Road initiative** continues to gather momentum in 2018, its impact for Asia and beyond will be far-reaching. Arbitration is the dispute resolution process of choice in many of the related international infrastructure projects. With thousands of projects now in progress, we can expect an uptick in the number of disputes, with a likely focus on Hong Kong and Singapore as arbitral seats.
- **Technology** is driving change across the world economy, bringing opportunities and risks for corporates and states alike. The fast pace and sheer scale of digital transformation is likely to give rise to disputes, as seen with the recent increase in intellectual property arbitrations, an emerging trend that is set to accelerate.
- **Diversity** will remain firmly on the agenda with an increasing number of signatories to the Equal Representation in Arbitration Pledge. 2018 will be a litmus test of the commitment of signatories and the community more broadly to ensure that women are appointed as arbitrators on an equal opportunity basis.
- The **funding of arbitration claims** has entered the mainstream with increasing numbers of claimants offsetting the multi-year exposure of capital through bespoke arrangements with specialist funders. Funding is also being increasingly employed by multinationals with regard to portfolios of claims. It continues to ensure access to justice for claimants whose financial means of bringing a claim has been destroyed by the conduct of the respondent.

These tectonic moves will require constant adaptation to ensure that international arbitration survives and thrives by serving its ideals of prompt, expert and independent adjudication. We look forward to facing these challenges in the year ahead with our clients, who entrust us with their most important disputes in a world of change. If you would like to find out more about any of these topics, please contact me or my colleagues in the international arbitration group.

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Investor-state dispute settlement in the age of Trump



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While the Trump Administration has called into question the terms of its international trade agreements, including investor-state dispute settlement (ISDS) provisions, ISDS looks set to remain a feature of such agreements in 2018 and beyond, albeit in amended form.

At the beginning of 2017, we questioned the future of ISDS under a Trump Presidency. The Administration had campaigned on a protectionist agenda and promised to renegotiate and/or withdraw from multilateral trade agreements, which inevitably would prompt reconsideration of the ISDS mechanisms in those treaties.

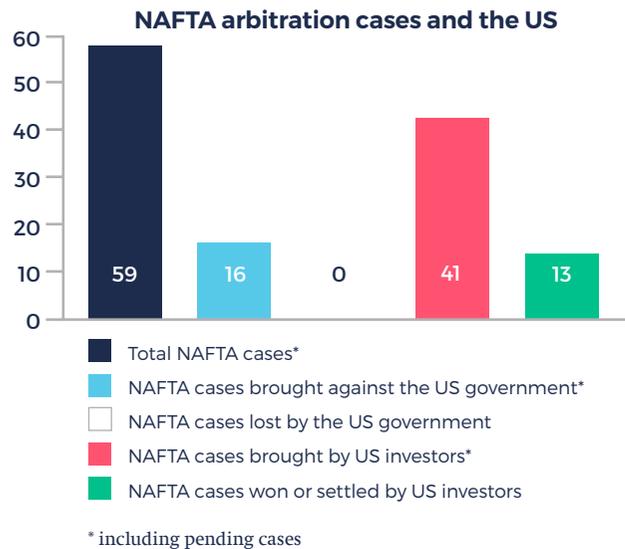
Over the last year, campaign promises against multilateralism were transmuted into various forms of government action and policy:

- in January 2017, the US withdrew from the Trans-Pacific Partnership (TPP), but the remaining 11 signatories agreed to a revised version of the treaty exactly one year later in January 2018, known as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPATPP). While the text of the CPATPP had not been released as of the publication of this briefing, it reportedly includes only minor amendments to certain ISDS provisions that had been agreed in the TPP, including the suspension of ISDS to investment agreements and authorisations;
- the Trump Administration gave some insight on its views on ISDS in the US Trade Representative's 2017 Trade Policy Agenda, published in March

2017. The agenda bemoaned the country's 'deference to international dispute settlement mechanisms' and called for a new policy 'that defends American sovereignty';

- in May 2017, the US announced that it intended to renegotiate the North American Free Trade Agreement (NAFTA) and, since then, the US, Canada and Mexico have held several rounds of negotiations. ISDS has reportedly been a point of contention, in particular; and
- negotiation of the Transatlantic Trade and Investment Partnership (TTIP) between the US and the EU was put on hold in 2017. The Trump Administration cited a preference for pursuing bilateral agreements (for instance, with Germany) instead of a multilateral approach, but has since suggested that it may recommence negotiations on TTIP. Despite years of prior negotiation on TTIP, the form of ISDS remains an open issue. In particular, the EU has proposed a permanent investment court, with first instance and appellate tribunals. The Trump Administration is yet to express a view in this proposal.

Investor-state dispute settlement in the age of Trump



Against this backdrop, the debate over the scope and form of ISDS is primed to continue into 2018. While some states and commentators continue to advocate for tweaks to the existing system or the replacement of ad hoc arbitration with more permanent investment courts, others are in favour of wholesale removal of ISDS. In October 2017, more than 200 law and economics professors from US universities wrote to President Trump urging him to remove ISDS provisions from NAFTA and other US trade deals in favour of national courts.

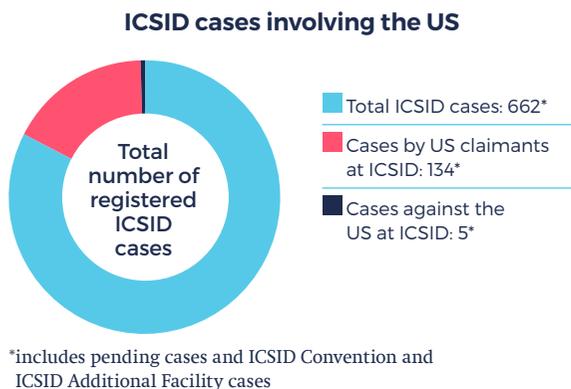
While a confidentiality agreement prevents publication of the NAFTA negotiation documents, press reports suggest that the US has proposed a system by which the state parties could ‘opt-in’ to ISDS. Meanwhile, the US Trade Representative has published summaries of its renegotiation objectives. The November 2017 iteration is silent on whether ISDS should be ‘opt-in’ but cites various priorities for ISDS, notably including that any such mechanism should ensure that NAFTA’s contracting parties can address situations when a panel has erred in its assessment of the facts or the obligations that apply – suggesting a preference for some form of appellate review. The objectives also note that the ISDS system should ‘provide meaningful procedures for resolving investment disputes, while ensuring the protection of US sovereignty and the maintenance of strong US domestic industries’. Given the US Trade Representative’s hostility towards ISDS, this may signal a preference for weakening the existing rules.

The renegotiation objectives appear to be designed to address some of the public concern with ISDS, including that international tribunals are empowered to review US policy and the lack of a right of appeal. Conversely, the finality of ISDS is seen as a key benefit by both investor and state users alike.

What ISDS will look like in trade and investment agreements negotiated by the Trump Administration is likely to come to light in 2018, when the NAFTA renegotiation is currently projected to conclude. The form of ISDS in a renegotiated NAFTA may form the blueprint for such mechanisms in subsequent US agreements with China, Japan, the UK (post-Brexit) and, if TTIP is to be revived, the EU, all of which have been cited as potential priorities for the Administration.

‘Notwithstanding the Trump Administration’s apparent hostility towards multilateral trade and investment deals, ISDS remains an effective method of resolving investment disputes. The trend points to more investment treaties in the future, not less, and ISDS will remain a core feature of the investment treaty system.’

Caroline Richard



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Arbitration in the age of Brexit



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As the Brexit negotiations continue into 2018, one thing is clear: arbitration has an important role to play.

On 29 March 2017 the UK gave notice to leave the EU under Article 50 of the Lisbon Treaty, giving effect to the June 2016 referendum vote and triggering a two-year period of intense negotiation with the EU leading up to the UK's withdrawal.

Brexit will have no impact at all on the robust legal framework for arbitration in London under the Arbitration Act 1996 or the other key features that commend London as an arbitral seat, including language and legal culture, skilled counsel and experienced arbitrators, and a supportive and non-interventionist judiciary. Brexit will also have no impact on the enforcement of arbitral awards: UK awards will continue to be enforceable in all remaining EU member states, and vice versa, under the New York Convention.

The enforcement of court judgments in a post-Brexit world is less certain. If the enforcement regime in the Recast Brussels Regulation is to continue, there will need to be a deal between the UK and the EU. If there is no deal, the UK can take the following steps: accede to the Lugano Convention, which has been ratified by the EU, Switzerland, Iceland and Norway; and/or accede to the Hague Choice of Court Convention, which has been ratified by the EU,

Mexico and Singapore (China has signed but not yet ratified).

Both instruments provide a framework for the enforcement of court judgments, but neither course would be plain sailing:

- the UK would need the agreement of all EU member states to accede to the Lugano Convention. If there are political issues that prevent a deal to maintain the Recast Brussels regime, those same issues could be a roadblock to obtaining the consents required for accession to Lugano; and
- the UK could accede unilaterally to the Hague Convention, but that is limited in scope: it is directed at disputes under commercial contracts containing exclusive jurisdiction clauses (non-exclusive jurisdiction clauses and sole option clauses are not protected), and it is prospective: it applies only to clauses concluded after its entry into force 'for the State of the chosen court'.

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Arbitration in the age of Brexit

If the UK does not accede to the Lugano Convention or the Hague Convention, parties wishing to enforce court judgments would be compelled to rely on legacy bilateral enforcement treaties (there are treaties between the UK and France, Belgium, Germany, Austria, the Netherlands, Italy and Norway) or local law in the state of enforcement.

‘As the Brexit negotiations continue into 2018 and the future framework for the enforcement of court judgments remains uncertain, parties may turn to arbitration and the security of the New York Convention as a safe harbour to avoid Brexit-related enforcement risk.’

Arbitration may also have a role to play as a dispute resolution mechanism in the Withdrawal Agreement and the Future Partnership Agreement (FPA) between the UK and the EU. Negotiations on this front are at an early stage and there are several options on the table, including ‘ad hoc’ arbitration before a three-member tribunal or the use of a standing supranational court or joint tribunal. The EU is pushing for a jurisdictional role for the Court of Justice of the European Union (CJEU) where disputes touch on EU law, but the UK has made clear that Brexit will mark ‘an end to the direct jurisdiction of the CJEU’. For claims involving citizens’ rights, the two sides compromised in December 2017 on a mechanism that facilitates voluntary references to the CJEU by the UK courts and promotes close co-ordination to avoid divergent case law. It will be interesting to see what approach is taken in other areas.

‘It remains to be seen whether the FPA will include an investment chapter and, if so, whether that will provide for traditional investor-state arbitration or the investment court system used in recent trade agreements between the EU and Canada and Vietnam.’

Bilateral investment treaties: rebalancing between ‘the West’ and ‘the rest’



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The shift in political and economic power from Western states to emerging economies is giving rise to new types of arbitration claims.

Investor-state dispute settlement (ISDS) is often depicted as being a battle between investors from Western capital-exporting states against developing capital-importing states. While bilateral investment treaty (BIT) claims against Eastern European states from the 1990s onwards mean that the distinction was never quite so binary, recent years have been characterised by unquestionable changes to this traditional narrative, with claims against capital-exporting states (so-called ‘North–North’ disputes) as well as by investors from developing states, and claims where both parties are from developing states (so-called ‘South–South’ disputes).

Termination and re-negotiation of investment treaties

Following a series of negative decisions against them, Venezuela and Bolivia have rejected ISDS by withdrawing from a series of BITs. Indonesia has also indicated its intention to allow existing BITs to expire without renewal. While some states may well adopt a similar approach, others have opted for a different route.

For example, several African states have engaged in a form of ‘resource nationalism’ so as to strike

a different balance of rights and obligations of investors and states. South Africa has sought to replace BITs with a domestic framework for investor protection under the Protection of Investment Act 2015, which permits state-to-state dispute resolution, but only allows an investor to engage in domestic mediation. These regional developments are further exemplified through the African Union’s Pan-African Investment Code of 2016, the Southern African Development Community’s revised model investment code, and the Common Market for Eastern and Southern Africa’s expected investment revisions, which exclude certain substantive protections typically seen in BITs, reducing potential avenues of redress for investors.

Claims in the renewable energy sector

Government policies to incentivise investment in renewable energy, followed by the withdrawal or modification of such incentives, have led to a boom in investment claims against developed states, such as in *Masdar v Spain*, brought by a UAE government-owned entity. We represent investors in several claims against Spain, including a claim by various claimants ultimately owned by an Israeli fund, Sunflower SIT, and another by a Japanese company,

Bilateral investment treaties: rebalancing between ‘the West’ and ‘the rest’

Eurus Energy Holdings Co. With the *Vattenfall II* matter soon to conclude, which concerned legislation phasing out nuclear power plants, Germany is now faced with further investment treaty claims arising from amendments to its energy market legislation. Italy, the Czech Republic, Poland, Croatia, Bulgaria and Hungary are also facing similar claims involving the renewable energy sector.

Some of these claims have now attracted the attention of the EU. In a decision issued in December 2017, EU Commissioner for Competition, Margrethe Vestager, observed that any compensation that an arbitral tribunal might grant to an investor on the basis of Spain’s modifications to its incentives regime in the renewables sector would constitute state aid. The EU Commission’s position, therefore, is that any payment by Spain of arbitral awards would require its approval. We are likely to see further developments in this area in the coming year.

Human rights and the environment

Parties have increasingly argued for the application of human rights to investment treaty arbitration (although this is controversial and remains unsettled). For example, in *Urbaser v Argentina*, it was argued that a supranational corporation should be bound by human rights standards, a view also held by Philippe Sands QC in a dissenting opinion in *Bear Creek Mining v Peru*. In certain BITs, states are seeking to recognise human rights obligations over the

promotion of foreign investment: for example, in the Morocco–Nigeria BIT (not yet in force).

As governments increasingly seek to fight climate change, this is giving rise to a new area of disputes, with instruments such as the Geneva Convention on Long-Range Transboundary Air Pollution, the Paris Agreement and the United Nations Framework Convention on Climate Change including dispute resolution clauses that permit or provide for arbitration. Climate change-related issues are also likely to arise in investment treaty arbitration. Huge sums of money will be required to fund the transition to the green economy and much of it will have to be provided by private enterprise. Investment treaties have an important role to play in encouraging this investment and investment treaty arbitration will be essential in assisting to resolve resulting disputes.

Looking forward

We see this ‘rebalancing’ continuing in 2018.

Recent examples include a claim at the International Centre for Settlement of Investment Disputes (ICSID) by a Jordanian hotelier against Hungary (*Al Ramahi v Hungary*); a UAE ports operator against Belgium (*DP World v Belgium*); an Egyptian telecoms group against Canada (*Global Telecom Holding S.A.E. v Canada*); and an Iranian investor against South Korea (*Dayyani v South Korea*) (in which we represent South Korea).

Investors continue to bring claims against traditional capital-exporting states (eg in Europe), as well as states traditionally viewed as ‘off limits’ due to the perceived repercussions of bringing such claims. One of the clearest recent examples of the latter is two recent claims against Saudi Arabia (*Makae Europe SARL v Saudi Arabia*; *Samsung Engineering v Saudi Arabia*).

‘We are seeing an increasing number of climate change-related disputes. Given that these disputes are of a complex, international nature and key treaties provide arbitration options, we expect to see the importance of climate change-related arbitration grow in the years to come.’

Moritz Keller, Counsel, Arbitration

China's Belt and Road initiative: opportunities and risks



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China's Belt and Road initiative (BRI) is transformative – for Asia and beyond.

The numbers are staggering. To date, over US\$1tn has been committed to thousands of BRI projects around the world. With the continued backing of the Chinese government and other governments jumping on board, we expect the BRI to gain further momentum in 2018, and to present opportunities for both Chinese and foreign companies investing in significant infrastructure projects in Asia, the Middle East, North Africa and Europe. Indeed, some estimates place cumulative investment in BRI projects at US\$4tn to US\$8tn over the longer term.

The impact of the BRI certainly will be felt in the arbitration sphere. The BRI can be expected to generate disputes in arbitration over the years to come. In fact, some BRI projects already are experiencing difficulties, with delays in the construction of the Sino-Thai high-speed rail line and the Colombo port project, and cancellations of dam construction projects in Kashmir and Nepal being some of the better known examples.

We expect to see a number of arbitration-related trends emerging as a result of the BRI.

First, China, as an arbitration seat, and Chinese arbitration institutions may well become increasingly prominent as options for resolving BRI disputes. This is a consequence of the negotiating power of Chinese parties investing in BRI projects, and their natural preference for a China seat. Hong Kong and other Asian seats – most notably Singapore as a leading seat in the region – can expect a further uptick in cases. Hong Kong will be seen as a 'compromise' option where the foreign party is able to resist a mainland China seat and the Chinese party is resistant to a non-China seat. China's International Economic and Trade Arbitration Commission (CIETAC) has a Hong Kong office and there is now precedent for CIETAC Hong Kong awards being enforced in mainland China.

China's Belt and Road initiative: opportunities and risks



BMI Research (A Fitch Group Company)

‘Given the vast number and scale of international infrastructure projects under China’s BRI, in Asia, the Middle East, Africa and Europe, we expect to see an increase in related arbitrations. Given our expertise in infrastructure disputes, we are well placed to advise parties on the issues that are likely to arise.’

Erin Miller Rankin, Partner, Arbitration

Second, in anticipation of the pipeline of arbitration matters arising from BRI projects, we are seeing a number of arbitration institutions in Asia updating their arbitration rules and guidelines. 2017 saw CIETAC establish a separate arbitration centre for resolving public-private partnership disputes and adopt specific rules for international investment arbitrations (building on a lead established by the Singapore International Arbitration Centre in 2016). In 2018, the Hong Kong International Arbitration Centre will update its arbitration rules, with changes likely to be made to further facilitate the resolution of complex disputes involving multiple parties and contracts – a common feature in BRI projects. Separately, in 2016, the International Academy of the Belt and Road published the ‘Blue Book’, which includes arbitration rules.

Third, with the significant amounts potentially at stake in BRI disputes, third-party funding likely will take on added importance. This is particularly the case because of the significant growth in available funds, the number of funders with an Asian presence, and legislative developments liberalising the regulation of third-party funding in key Asian jurisdictions such as Singapore and Hong Kong. Furthermore, contingency fee arrangements are widespread in China – and much welcomed by Chinese parties – so third-party funding is but a natural step in a similar direction.

Fourth, we expect the wave of China-related construction arbitrations to continue. As Chinese construction contractors follow the Chinese money into BRI projects around the world, and many Chinese contractors are able to price competitively to win roles on global projects, Chinese parties will become a fixture in major construction disputes around the world at many levels in the supply chain.

Finally, given the nature of BRI investments – often involving massive sums invested in regulated sectors – over the longer term, there likely will be an increase in the number of investor-state disputes, as investors in BRI projects seek recourse under relevant bilateral and multilateral treaties against host states. Already, we are seeing significantly increased interest in – and familiarity with – such treaties among our Chinese clients who are investing abroad. One interesting question is how this might affect the approach taken by the Chinese government in its negotiations and treatment of such treaties, as outbound investment continues to grow from Chinese companies – in BRI projects and more generally.

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Intellectual property arbitration: an emerging trend



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Parties have been turning to international arbitration in increasing numbers to resolve cross-border intellectual property (IP) disputes.

While difficult to quantify (in light of confidentiality), several sources suggest that this trend is picking up steam. For example, the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center – which tailors its services to IP-related disputes – has reported a doubling in the number of cases year on year. Given the increasing importance of emerging technologies in the global marketplace, we expect this trend to accelerate going forward.

Companies with substantial cross-border IP exposure are turning to international arbitration for a number of reasons. Arbitration offers a flexible procedure suited to the unique subject matter, specialised arbitrators in a neutral (international) forum and confidentiality protections. Most importantly, however, international arbitration is usually better suited than domestic courts for obtaining finality and avoiding the pitfalls of multijurisdictional litigation. These features provide substantial advantages for companies that rely heavily on IP rights for their business model and operate on a global scale.

We anticipate further growth in two particular areas: first, we expect an increase in the use of arbitration to determine fair, reasonable and non-discriminatory (FRAND) compensation for the use of standard essential patents (SEPs) in the technology space. SEPs are patents protecting a technology that is necessary for implementing an industry standard (eg the technology that allows mobile phones made by different companies to connect to available wireless networks). Standard setting organisations, which oversee the development of industry standards, have been promoting arbitration to resolve FRAND disputes. In 2017, we saw significant arbitration awards in this area. For example, Nokia reportedly achieved major victories in International Chamber of Commerce (ICC) arbitrations against LG (in September 2017) and Blackberry (in November 2017).

Intellectual property arbitration: an emerging trend

We anticipate many more such disputes in the future, in particular as the number of SEPs is expected to grow exponentially with the Internet of Things.

Next, companies are increasingly resorting to arbitration to protect their investments in IP rights under international investment agreements (IIAs). Legal developments in 2017 indicate an increasing openness to claims against states for allegedly harming IP rights. For instance, the tribunal in *Bridgestone v Panama* ruled that an exploited trademark constituted a protected investment. Additionally, while the tribunal in *Eli Lilly v Canada* dismissed the company's claims on the facts, it did not reject – and appeared willing to consider – the legal argument that an investor may rely on a host state's international commitments (such as under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement) to support the investor's legitimate expectations in respect to the treatment of its IP rights. As companies learn the benefits of IIAs for protecting their IP rights against state interference, we expect such claims to become more common.

So what should businesses with significant IP exposure (such as pharmaceutical and tech companies) have in mind for 2018? First, they should consider the potential advantages of international arbitration for current and future cross-border IP disputes. Arbitration is normally agreed up front (usually in a larger contract), but it can also be agreed after the dispute arises – which often happens in FRAND cases. Next, companies should make themselves aware of the protections afforded for IP rights under international investment treaties, and the possibility of bringing arbitration claims against states that interfere with those rights.

For further reading, our Frankfurt-based arbitration lawyers Boris Kasolowsky and Robert Whitener, together with IP litigator Wolrad Prinz zu Waldeck und Pyrmont, have recently published the guide [International Arbitration of Intellectual Property Disputes](#) (CH Beck-Hart-Nomos 2017).

'Across a number of jurisdictions, we see clients increasingly considering the advantages of arbitration as an alternative, efficient and confidential means of resolving IP disputes – especially in the technology and pharmaceutical sectors.'

Wolrad Prinz zu Waldeck und Pyrmont,
Partner, Intellectual Property Dispute Resolution

Gender diversity in international arbitration



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Since its launch in 2016, the Equal Representation in Arbitration Pledge has evolved rapidly from a proposal to tackle the historic under-representation of women in international arbitration to an award-winning global campaign that has put the issue of gender diversity firmly on the agenda.

Once a subject debated at the fringes, the Pledge has made a significant contribution to the movement of gender diversity into mainstream dialogue in 2017, thereby challenging long-held attitudes. In recognition of its contribution, the Pledge was awarded 'Best Development' in international arbitration at the 7th Annual *Global Arbitration Review Awards* in 2017.

Conceived as a call to action aimed particularly at addressing the paucity of women sitting as arbitrators, the Pledge has two objectives. First, it aims to improve the profile and representation of women in international arbitration. Second, it seeks the appointment of women as arbitrators on an equal opportunity basis. Signatories to the Pledge (including counsel, arbitrators, judges, academics, representatives of corporates, states and institutions) commit to taking steps in furtherance of these aims.

In so doing, signatories recognise that, while there are numerous well-qualified female arbitrator candidates, they often lack visibility vis-à-vis their male peers, who are repeatedly selected from the same, relatively small pool of well-known candidates. Having arbitrators drawn from a small, non-diverse pool not only raises questions of unconscious bias, quality of decision-making and perceptions of a lack of legitimacy, but also risks resulting in procedural inefficiencies, such as a lack of availability of arbitrators and delays in awards. The Pledge seeks to address these issues by broadening the pool of arbitrators with equally qualified women and paving the way for greater diversity more broadly in international arbitration.

As of January 2018, the Pledge enjoys the support of over 2,500 signatories, comprising approximately 2,000 individuals and 500 organisations, drawn from over 100 countries across the globe. Organisation signatories include major arbitral institutions, such as the CIAC, CRCICA, DIFC-LCIA, DIS, HKIAC, ICC, ICDR, LCIA, SCC and SIAC, and major corporations, including BP, ConocoPhillips, GE, Repsol and Shell.

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Gender diversity in international arbitration

2,500+

signatories

100+

countries



For more information see arbitrationpledge.com

In a sign of their commitment to the Pledge's objectives, many arbitral institutions have begun to publish their statistics on the appointment of female arbitrators. Several institutions also have adopted specific policies on diversity in the appointment of arbitrators. For example, in 2017 the Stockholm Chamber of Commerce (SCC) published a revised policy on arbitrator appointments stating that 'the SCC seeks to foster diversity in all appointments. This includes but is not limited to acting in the spirit of its commitment as a signatory to the Equal Representation in Arbitration Pledge.' Similarly, the Board of the Swiss Arbitration Association (ASA) adopted a new policy in 2016 of including 'gender' as a criterion in its arbitrator search tool.

Figures from arbitral institutions suggest that the number of female arbitrators appointed by those institutions is increasing. For example, the International Chamber of Commerce (ICC)'s International Court of Arbitration reported that its proportion of female arbitrators increased from

10 per cent to 15 per cent from 2015 to 2016, while the London Court of International Arbitration (LCIA) reported an increase from 16 per cent to 20 per cent in the same period (2017 figures are not yet available). This evidences a trend that we expect to continue as more institutions embrace the Pledge and make their statistics public.

In 2018, we expect the issue of diversity in arbitration to gain further momentum. On the gender front, we foresee a marked increase in the visibility of women in the field: in leadership roles, on conference panels, committees, boards, lists and panels of arbitrators and, ultimately, tribunals. We also expect to see the debate on diversity broaden beyond the issue of gender. As the Commentary to the Pledge states: 'The Pledge aspires to be a first step in the direction of achieving more equal representation of all under-represented groups in our arbitration community.'

Third-party funding: beyond the traditional model



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In our 2017 briefing, we discussed the continued move of third-party funding of international arbitration into the mainstream. This trend continues and is expected to accelerate in 2018.

Third-party funding in the arbitration space continues to broaden its global footprint. It is now permitted in the arbitration hubs Singapore and Hong Kong. Similarly, while funders have been aware of the potential of emerging economies as funding markets for a number of years, we are now seeing tie-ups emerge between international funders and local counterparts in emerging economies, such as the 2017 co-operation agreement between London-based funder Woodsford Litigation Funding and Brazil-based funder Leste. It is not clear that the emergence of local market practices for funding will necessarily follow, however. Many of the principal funders maintain an international portfolio of cases and are often anchored in more 'traditional' jurisdictions (ie the US and the UK).

The range of funding arrangements on offer is also expanding. For example, as an alternative to or in combination with third-party funding, clients have access to a multitude of bespoke insurance options.

Furthermore, some funders are also beginning to propose financial support on a portfolio basis, where funding is provided for – and the funder's investment is secured against – multiple disputes involving the same company (or law firm), rather than a single dispute. This would expand the scope of cases that could receive third-party funding, as a portfolio can include cases where a favourable result will not involve payment of money, such as those where the funded party is defending a claim.

Despite this continued movement in the mainstream, third-party funding arrangements in international arbitration are still highly bespoke and heavily negotiated, even among the most frequent users. We can also anticipate seeing additional debates (and disputes) regarding the obligation to disclose the identity of a third-party funder to the arbitral tribunal, and the impact of third-party funding on costs orders (including security for costs).

Third-party funding: beyond the traditional model

Reports have suggested
that as much as

£10bn

has been raised from investors
to invest in legal disputes

The conversation about best practices in this space will be advanced by the launch of the final report of the ICCA-Queen Mary University Task Force on Third-Party Funding – scheduled for April 2018 – through which key industry stakeholders (including funders) seek to facilitate informed dialogue and decision-making about funding in international arbitration.

Until there is established market practice in terms of both how funders are selected and how agreements are negotiated, it is crucial that those seeking funding ensure they have advisers with sufficient expertise to guide them through the process. To give just one example, parties seeking funding need to be aware of the possibility of situations when the interests of a funder and the funded party are not aligned – this can take place when there is a disagreement in strategy or, more likely, when considering an offer to settle the dispute. This possibility of misalignment will have a significant impact on negotiating the terms of the funding agreement.

‘Successfully navigating the world of third-party funding – including the shifting array of players and the evolution of funding structures – requires both market familiarity and legal expertise. We are on the cutting-edge of third-party funding in international arbitration, and can bring that know-how to bear to achieve the best possible funding arrangements for our clients.’

Noah Rubins

Arbitrating international tax disputes: what next?



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While disputes in relation to tax have become a prominent feature of commercial and investment treaty arbitration in recent years, the resolution through arbitration of state-to-state disputes arising under international tax treaties is an emerging trend.

Following last year's 'resource nationalism' trend, we continue to see more and more disputes between foreign investors and host states arising in relation to taxation, as states around the world seek to maximise fiscal returns through individual tax measures or general changes to their fiscal regime. Such disputes are particularly prevalent in the extractive sectors (oil and gas, and mining), but fiscal measures are also being challenged in numerous other contexts. These cases concern matters as wide-ranging as retroactive profits taxes, corporation tax, VAT, capital gains tax, transfer pricing, tax stabilisation mechanisms, taxation of income trusts, tax procedures, tax audits and investigations or the removal of tax incentives. They may give rise both to commercial arbitrations in respect of disputed contractual tax obligations and to investor-state arbitrations, as may arise under bilateral or multilateral investment treaties (BITs and MITs).

As well as potentially constituting unfair or discriminatory treatment in violation of a relevant investment treaty, some taxation measures have been held by tribunals to amount to an expropriation of the investment. Importantly, the recent prevalence of investment arbitration to resolve such international tax disputes can be explained by the ability for qualifying investors under investment treaties directly to access international arbitration against a host state.

By contrast to international investment treaties, international tax treaties have historically offered relatively limited opportunity to investors, as taxpayers, to vindicate claims or concerns about states' tax decisions. Disputes under international tax treaties typically concern the allocation between states of taxation rights over a particular source of income or profit, and the avoidance thereby of double taxation on multinational companies.

Arbitrating international tax disputes: what next?

Such disputes have historically been resolved through mutual agreement procedures (MAPs): at the instigation of an affected taxpayer, competent tax authorities of Contracting States to a tax treaty endeavour to resolve by mutual agreement any disputes arising out of situations of double taxation, or other differences in the interpretation or application of the relevant treaty. In this relatively informal process, the taxpayer has little control over whether the case is accepted by the relevant competent authority. Nor does the taxpayer have any input on the MAP itself, its timing and its outcome. While arbitration is sometimes available in existing tax treaties, it is accessible only relatively rarely, and in relation to a limited scope of issues.

However, recent developments in the field of international tax suggest increasing interest in using arbitration more frequently to resolve disputes under tax treaties. For example, the OECD's new Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS) includes a detailed and harmonised arbitration procedure (on an opt-in basis). As of January 2018, 28 of the 78 signatories to the Convention have already opted in, thus committing to arbitrate future disputes under tax treaties.

Meanwhile, at EU level, a new set of rules to develop the resolution of tax disputes (to supplement the EU Arbitration Convention) has been adopted through Council Directive EU 2017/1852. This establishes a new mechanism to address intra-EU tax treaty disputes in the absence of a mutual agreement, including via binding arbitration or other forms of alternative dispute resolution.

Various questions remain as regards states' preferred form of arbitration ('final offer' or 'reasoned opinion') in tax treaties, how transparent the proceedings should be, who the relevant decision-makers will be, and how much input in the process taxpayers themselves will have. However, the inclusion of more structured mechanisms for dispute resolution in future tax treaties will likely create greater opportunities for affected private parties actively to participate in and influence the outcome of disputes between state tax authorities.

'The nascent state-to-state arbitration mechanisms presently envisaged for international tax treaties may usefully be informed by experiences gained, and decisions made, in the longer established fields of investment and commercial arbitration.'

Will Thomas

Summary dismissal gains ground: a welcome development for financial institutions



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The ability to defeat meritless claims at an early stage of arbitral proceedings may attract more financial institutions to international arbitration.

Following the adoption of summary dismissal procedures by the Singapore International Arbitration Centre (SIAC) and the Stockholm Chamber of Commerce (SCC), other institutions have clarified the availability of summary dismissal under existing rules or begun to study the issue. We expect this trend to continue in 2018, as more institutions address the availability of summary dismissal.

In October 2017, the International Chamber of Commerce (ICC) published an update to its practice note on the conduct of arbitration, affirming that applications for the ‘expeditious determination of manifestly unmeritorious claims or defences’ may be dealt with under the tribunal’s broad case management powers pursuant to Article 22 of the ICC Rules. This clarifies that the 2017 ICC Rules of Arbitration, despite not containing any specific summary dismissal provisions, allow for summary dismissal. In terms closely following SIAC Rule 29, the ICC guidance states that a party may apply for the expeditious determination of claims or defences on grounds that such claims or defences are ‘manifestly devoid of merit or fall manifestly outside the arbitral tribunal’s jurisdiction’.

Meanwhile, the Hong Kong International Arbitration Centre (HKIAC) is considering whether to introduce express provisions in its rules to allow preliminary determinations of factual or legal issues.

We expect other arbitral institutions will take similar steps in this regard, either by amending their rules or clarifying them as the ICC has. It will be interesting to see how tribunals will apply these tools to enhance the efficiency and effectiveness of arbitration proceedings.

While no statistics are yet available on the use of SIAC’s or SCC’s new rules, the International Centre for Settlement of Investment Disputes (ICSID), the first major international arbitration institution to adopt a summary dismissal provision, saw that provision invoked 26 times from 2006 to 2016. However, such applications succeeded (in whole or in part) in only six cases.

Summary dismissal gains ground: a welcome development for financial institutions

We have already seen evidence of increased use of **arbitration by financial institutions** in recent years.



Cases filed with the ICC relating to the **finance and insurance sector**

The most recent ICSID award granting an application for summary dismissal, issued in March 2017, was the first time since 2010 that an ICSID tribunal had disposed of a case in full on this basis. This low success rate may reflect, at least in part, a common concern that such decisions are vulnerable to challenge for a lack of due process.

It remains to be seen whether the recent ICSID dismissal is a harbinger of tribunals overcoming that fear. As more institutions expressly support summary dismissal, we expect tribunals will become more willing to dismiss claims or defences early when justified in doing so.

We also expect that this growing trend among arbitral institutions to promote the dismissal of unmeritorious claims at an early stage will make arbitration a more appealing alternative in sectors where litigation traditionally has been favoured. This is particularly true in the financial services industry, where institutions have been hesitant to use arbitration.

According to a November 2016 report by the ICC Commission on which we have previously reported, one of the key drawbacks of arbitration that financial institutions identified was the perceived inability to obtain summary dismissal of unmeritorious claims or defences (as compared to, for example, the availability of motions to dismiss or to strike out in the courts of New York or London).

We have already seen evidence of increased use of arbitration by financial institutions in recent years: approximately 20 per cent of the cases filed with the ICC in 2016 related to the finance and insurance sector, up from 9.1 per cent in 2010.

In 2017, we represented a number of clients in the financial services industry in both commercial and investor-state arbitration proceedings under various procedural rules, pointing to a trend for 2018 of increasing use of arbitration in this sector. The expanding availability of summary dismissal proceedings will only enhance that trend.

The transformative potential of technology



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Technology is driving change in virtually every sector of the economy. International arbitration is no different.

Clients will continue to expect their counsel to use technology to increase efficiency, reduce cost and enhance the quality of legal services – and at the same time to stay abreast of the latest offerings. Clients will also continue to expect their counsel to identify and mitigate the risks posed by new technologies, especially risks to the integrity of data.

Harnessing technology to enhance the international arbitration offering

The collection and analysis of data, often powered by machine learning or artificial intelligence, has the potential to affect every stage of the arbitral process. Most obviously, technology has had a major impact on document disclosure. Increasingly sophisticated artificial intelligence tools offer lawyers the ability to expedite the review of ever-larger numbers of documents with increasing accuracy and achieve significant cost savings for clients. These tools can also identify subtle trends across evidence.

Technology – and data analytics in particular – is also poised to affect how we choose arbitrators. Traditionally, arbitrator selection was based on a combination of personal experience and discussions with colleagues. While these forms of information gathering will remain invaluable, several new initiatives promise to enhance the arbitrator-selection process by collecting and analysing quantitative data about arbitral decision-making and an arbitrator's conduct of proceedings. The move towards more objective, measurable data analysis may also serve to boost gender and other forms of diversity in arbitrator selection.

At the same time, technology is transforming the way in which arbitral hearings are conducted, leading to greater procedural efficiencies. The use of digital tools for evidence and case presentation is becoming more mainstream, and we can expect to see less frequent reliance on costly and cumbersome hard copy evidence.

The transformative potential of technology

‘We are continuously looking at changes in the legal services sector and the sectors in which our clients operate in order to create collaborative matter management tools, develop time-saving apps and make the best use of data analytics.’

Rob Kirkness

Protecting your data

Arbitrations typically involve the transfer of vast amounts of data between counsel, clients, arbitral institutions and the arbitral tribunal. Once transferred, the data may be stored for years by the different participants. Some of that data may be highly sensitive. In today’s age of constant cyber threats, we must remain vigilant to safeguard the security of that information.

There is no one-size-fits-all solution, and the different national data regimes may restrict the menu of available options in any particular situation. Counsel and their clients must work together with the institution administering the proceedings and the arbitral tribunal to identify potential cyber security issues and ensure that appropriate safeguards are put in place to protect confidential data.

The potential for arbitration lawyers to enhance the quality of their offering by harnessing new technology is obvious, but not all technology-inspired initiatives will achieve that objective. Clients do not want change for the sake of change, or the latest bells and whistles just because they exist. Clients will continue to rely on counsel to help them navigate the different options available and mitigate the associated risks.

‘Every case can benefit from the appropriate use of new technologies. Finding the right approach for our clients requires both legal expertise and a deep understanding of the available technologies. We combine both to deliver the best results.’

Elliot Friedman



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