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# INSIDE ARBITRATION

PERSPECTIVES ON CROSS-BORDER DISPUTES



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# WELCOME

In a global business it can often be difficult to get to know your colleagues in other offices and locations. You may deal with them by email or over the phone, but that rarely equates to understanding how, or why, they came to be doing the work they do today or the additional skills and perspectives they can bring to the table. Equally, while we can try to keep up to date with the concerns and issues facing our business in every region in which we operate, that rarely matches the insight gleaned from having someone on the ground locally.

Choosing your lawyers for an international dispute brings many of the same challenges. Reading a firm's website, brochures and partner CVs will rarely give a true feel for the people behind the marketing. While legal rankings and directories may point to firms who may have relevant experience, they are unlikely to help you pinpoint a lawyer who truly understands your business, understands the region in which you operate and with whom you will strike up an effective working relationship.

This publication, *Inside Arbitration*, is intended to give our clients that personal insight by sharing with you the perspectives of our international arbitration partners from across the globe. Our articles will look at the global landscape for disputes and dispute resolution, commenting on regional trends in particular markets or sectors or identifying future trends. We will also focus on particular points of interest arising from our cases with wider relevance and how, practically, we addressed those issues, often by combining the skills of our practitioners across our global network. Some will be interview pieces aimed at drawing out some of the truly unique skills and backgrounds of our partners. Finally, we will take advantage of our contacts across the global arbitration market to bring our clients the inside track from regional and international institutions.

In this first edition, Jacomijn van Haersolte-van Hof, Director General of the London Court of International Arbitration considers the 2014 Rules over a year on and the LCIA's recent report on cost and duration. Craig Tevendale shares his individual story and how it shapes the perspective he brings to international disputes, while Brenda Horrigan talks through her transition from transactional lawyer to arbitration practitioner in Russia, Paris and Shanghai. Larry Shore, Christian Leathley and Isabelle Michou look at the various stages at which investment risk can be mitigated by investment protection planning. Donald Robertson and Leon Chung, from Sydney, address what the Trans-Pacific Partnership means for your business while Konrad de Kerloy, Ante Golem and I will focus on pre-emption rights and some creative ways to bypass them.

I hope that you enjoy reading this first edition of *Inside Arbitration*. We would welcome your feedback.



**Paula Hodges QC**  
Partner, head of global arbitration practice

#### Editors for this issue:

**Vanessa Naish**, Professional support consultant and arbitration practice manager, London

**Hannah Ambrose**, Professional support consultant and arbitration practice manager, London

**Briana Young**, Professional support lawyer, Hong Kong

# INNOVATION AT THE LCIA

The London Court of International Arbitration (**LCIA**) is one of the main international arbitral institutions, chosen by parties across the globe as the institution to administer and supervise the resolution of their complex international disputes. In October 2014, the LCIA revised its arbitral rules substantially, introducing some key new provisions. Now over a year into their application, the LCIA is now seeing arbitrations through their door which are being run under those revised rules. In this article, Dr Jacomijn van Haersolte-van Hof, who became Director General of the LCIA in July 2014, gives us her insight into how the rules have been received and the direction the LCIA has and will take under her leadership.

## **Jackie, if we might, can we delve a little into your own background first and how you came to head up the LCIA?**

My first introduction to arbitration came while I was still a student at law school. I was trying to think of a topic for a paper I had to write and my parents suggested I speak to a lawyer friend of theirs to get some suggestions. It just so happened that this “lawyer friend” was Pieter Sanders, one of the principal drafters of the New York Convention and a true giant in the world of arbitration. He suggested I write a paper on arbitration and I’m afraid I had to look the word up in the dictionary! That led me to a PhD on the Iran-US Claims Tribunal, before moving into private practice in the Netherlands. Arbitration was still a relatively new specialism in mainstream disputes practices and I gained experience very quickly as counsel, while also building up a lot of experience as an arbitrator.

As my practice developed I was keen to get a different insight into the arbitral process. I have always had a close affinity with the LCIA, having helped set up the LCIA’s young practitioner body, YIAG, and the opportunity to become its Director General was just too good to miss.

## **You moved over to head up the LCIA just three months before the new LCIA Rules came into force. Was it difficult to take on such a new role while preparing to launch rules you had had no hand in making?**

It was both a challenge and an opportunity. I did have a little involvement in the discussions around the LCIA’s Emergency Arbitrator

provisions. I had been involved in many emergency proceedings as counsel and arbitrator. As a sole practitioner I had been quite an obvious “conflict free” choice for appointment as an Emergency Arbitrator for the Netherlands Arbitration Institute (**NAI**) and was appointed as an EA several times, which is pretty unusual in the field and I suppose it was recognised that I could add some practical insight.

While I was not involved in drafting the rules, once I had familiarised myself with them I felt quite comfortable with them. The introduction of the new rules also presented me with a fantastic opportunity to embed myself in the LCIA and get out and introduce myself and meet people. The most daunting part of joining the LCIA therefore wasn’t so much the rules themselves as my hectic travel schedule: I travelled across the world on roadshows explaining the provisions of the Rules. Trying to do this, travelling to meet our overseas ventures, talking at conferences, understanding the internal workings of the LCIA as an institution and developing my strategy for the LCIA going forward has made this an intense first year.

## **Do you have any sense as to how the rules have been received by the arbitration market?**

I believe they’ve been received well. To meet the needs of users, all arbitral institutions need to adapt their rules. The 2014 LCIA Rules introduced changes, but they did not fundamentally alter the feel of the rules. A few of the changes prompted quite a lot of comment at the time, particularly the Annex on the conduct

of party representatives, but my sense is that, a year on, people increasingly think the LCIA made sensible changes and additions and got the tone and level of the Annex right.

## **A lot of the new provisions have been aimed at improving efficiency of the arbitral proceedings. Have they made a difference?**

Perhaps the biggest difference in the new rules is actually a practical one; the e-filing system. The e-filing system enables a party to fill in a form as their Request for Arbitration (or they can just upload a pdf) and to pay the fee by credit card. It has been really successful.

Article 15.10 of the LCIA Rules has been more of a slow-burner, but is a provision that is increasingly changing the way that LCIA arbitrations are run. This provision requires the Tribunal to set out a timetable for producing their award and to set aside time for deliberation. We are starting to see arbitrators putting a timetable in their first procedural order that sets aside a hearing window, with a time for deliberations in the weeks following. Having set out a timetable like this makes a Tribunal self-policing. It is, frankly, difficult and embarrassing to have to write to the parties to tell them that you will not meet the deadline you set yourself.

Setting aside time for Tribunal deliberations also focuses the parties’ minds. If a party wants an extension of time for a pleading, it could derail the hearing schedule, but it could also derail the time set aside for the deliberation because the tribunal cannot find another window in their busy schedules. That will obviously then impact on how quickly they



get the award. Very few counsel will ask for an extra week if their client is faced with a 6 month delay in an award as a consequence.

**As we've already mentioned, perhaps the most controversial aspect of the new rules has been the Annex relating to conduct of party representatives. Can you share why these were introduced? Has the LCIA received many queries from counsel or arbitrators on the Annex and has it been applied (with any consequences) in ongoing proceedings?**

Regulating the conduct of counsel has been a topic of discussion amongst arbitration practitioners for many years now, particularly on how practitioners from different jurisdictions approach the arbitral process in different ways. The Annex was controversial because the LCIA was the first arbitral institution to seek to deal with this concern directly. Because of that, the LCIA was very careful about how the Annex was written, ensuring that it was written in very open terms, setting out key principles.

It is important to remember that the Annex is not about the LCIA policing or regulating conduct more broadly. The Annex merely sets out core guidelines for those representing a party in an LCIA arbitration and are to be used by the Tribunal to regulate an individual case. There would be very few people who, on reading the Annex, would disagree with the contents. It covers topics like not lying to the Tribunal, not concealing documents when ordered to produce them and not seeking to obstruct the arbitration.

I am particularly pleased that we haven't started to see counsel using the guidelines as a

weapon to attack counsel from the other side (which would be slightly ironic given the aim of the Annex). But what I do think we have seen is greater clarity and transparency about what the parties and their lawyers are expecting out of the process. For example, the Annex will flush out different expectations about what the document production process will involve or whether parties are allowed unilateral contact with arbitrators. This stops confusion later down the line and improves the efficiency of the arbitral process more generally. The power of the Tribunal to refuse a change or addition to a party's legal team means that we are seeing more transparency from the outset from parties about the make-up of their full legal teams, including foreign law advisers and QCs.

At this stage we have not seen much in the way of Tribunal use of their powers to sanction counsel for their conduct. Ultimately, I hope we never do. The Annex's impact so far has been quite subtle but, I believe, pronounced. The simple nature of the obligations and the clear way they are set out force parties and their representatives to police themselves on a level playing field and that seems to be working well.

**The LCIA has recently released analysis of the cost and duration of an LCIA Arbitration. What prompted you to carry out this analysis and what does it show?**

I am a great believer in transparency of information and I am also a great believer in what the LCIA offers. It was a natural step to try to share information about LCIA arbitrations with the general public so that people can make

informed decisions about whether they want to include LCIA arbitration as their method of dispute resolution. We are a not for profit organisation so we are truly not focused on growth as a goal in itself. We want people to choose LCIA arbitration deliberately, based on the facts and because they believe we offer what they need. To do that, they need information.

**"I'm a great believer in the value of having Emergency Arbitrator appointment as an option in arbitral rules"**

For many years now, the main criticisms of arbitration have been the costs involved and the time taken. I wanted to look into our cases and see how much the LCIA charged and the length of time it took to resolve the dispute (from Request to Award, including any stays). I then wanted to compare these statistics, where possible, to other institutions. In particular, the LCIA adopts a very different pricing structure for administering arbitrations than most other institutions - we charge an hourly rate rather than a sum based on the value in dispute - and I wanted to see whether that worked out cheaper or more expensive across different value disputes.

The analysis gives the mean and median length for arbitrations based on the sums in dispute, as well as the amount charged by the LCIA. I really hope that parties read it and realise that LCIA arbitration is not only respected and reliable; it is also efficient and reasonably priced.



**The LCIA recently issued three Guidance Notes. What are they about and why were they introduced? If the guidance is necessary is there any suggestion the Rules aren't sufficiently detailed?**

Two of these guidance notes have been produced to help parties to arbitral proceedings and arbitrators. The third focuses on emergency and expedited procedures.

**"I would actually say the three of our biggest challenges at the moment are ones of perception rather than reality"**

They are intended to offer practical guidance and some "dos and don'ts" and are certainly not in response to any suggestion that the Rules lack detail. In the case of the emergency and expedited procedures, the guidance note includes some case studies for parties and counsel to understand the two processes a little more clearly. The introduction of our Emergency Arbitrator provisions has been a wonderful opportunity to get out there and talk about our Expedited process which has been in the Rules now for many years. It is amazing for me to realise quite a few practitioners thought the expedited process was new.

**Do you think that the LCIA can make as good a job of choosing a Tribunal as parties can?**

The default for the LCIA Rules is that the LCIA will appoint the arbitrators. Yet in about 60% of appointments, arbitrators are party nominated, so some parties clearly prefer to

have the option of choosing their own arbitrators. Experienced users of arbitration who use equally experienced law firms to represent them may be very effective at choosing the right arbitrator for their dispute. There may be certain specific industries where the parties will be better at knowing the right people to act as arbitrator than the LCIA.

However, I do believe that in lots of situations the LCIA can make as good a job of choosing a Tribunal and, dare I say it, sometimes a better job. When we appoint a full tribunal of three, I think we can ensure better availability and choose from a more diverse, yet equally skilled, list of potential candidates than even the most experienced law firms and clients. Clients can also be reassured that appointment by the LCIA does not mean that we won't listen to the parties' views and wishes about the arbitrators we choose. If the parties want us to consider certain characteristics and qualifications we will certainly do so.

**The introduction of the Emergency Arbitration provision is one of the most talked about new additions to the LCIA Rules. Has the LCIA seen any requests for an Emergency Arbitrator yet? How does it fit with the LCIA's Expedited procedure?**

I'm a great believer in the value of having Emergency Arbitrator appointment as an option in arbitral rules. As yet, no, we haven't had any requests for an emergency arbitrator, but I don't think that lessens the value in the provisions being included. As I've already mentioned, including these has also

highlighted to lots of parties that we have a very useful expedited process for the appointment of the tribunal and I believe we will see an increasing number of applications for this over the coming years. For the right case, the two processes can be used in tandem, with an Emergency Arbitrator being appointed to proceed with requests for urgent relief while the Tribunal for the dispute is being appointed on an expedited basis. It really does offer the ultimate flexibility.

**Why would you advise people to choose institutional arbitration over ad hoc arbitration?**

My answer to this may come as a bit of a surprise: cost. I strongly believe an ad hoc arbitration will end up just costing more. In an institutional arbitration you will pay an additional cost for the administration of an arbitration by that institution. However, in both an institutional or ad hoc arbitration you have to pay for your arbitrators. An institution will usually have a cap or standard rate for its arbitrators which will be below that which the arbitrators would be paid in their usual legal practice, and is therefore often below what you would pay for your arbitrators in an ad hoc procedure. In addition, having an institution means more effective administration. An institution offers procedural handholding to both the parties and the Tribunal. Having someone there in the background checking on progress and monitoring the time spent by the arbitrators makes the process more controlled and efficient. There are none of these checks and balances in a true ad hoc process.



### What would you say are the LCIA's biggest challenges at the moment?

I would actually say the three of our biggest challenges at the moment are ones of perception rather than reality.

First, there is a perception that Russian sanctions are affecting the LCIA. That is absolutely not the case. We have not yet had an actual problem with Russian sanctions and the evidence this year suggests strongly that Russian parties are continuing to choose LCIA arbitration to resolve their disputes.

**"... we appoint a full tribunal of three, I think we can ensure better availability and choose from a more diverse, yet equally skilled, list of potential candidates"**

The debate surrounding Investor State Dispute Settlement does not affect the LCIA directly as significantly as some institutions because the LCIA historically has not administered arbitrations under investment treaties, but the critical comments made about arbitration more generally do have an impact. Commentators who don't understand arbitration are blurring the boundaries between investment treaty arbitration and commercial arbitration and tainting commercial arbitration as a result. As a consequence, I do feel a social responsibility alongside a business imperative to get out there and talk about the merits of arbitration for resolving commercial disputes.

To some extent the LCIA faces a challenge having the word "London" in its name. For some parties from certain jurisdictions, this brings some negative perceptions that the LCIA is somehow very much an English institution which, as a consequence, can mean that it is suspected that the LCIA may offer a "home turf advantage" in the same way as the English court might be viewed with suspicion. Yet while this is on one hand a problem, it can also be a benefit. The English legal system is viewed by many as the benchmark against which others are measured, and for some parties, such as Russian parties, our perceived link to London goes in our favour. In reality, the picture is more nuanced than that.

### Finally, what are the top three reasons you would give to a party to choose the LCIA Rules in their arbitration clause?

First must be our cost structure and second, our efficiency. I really hope that parties will read our analysis on cost and duration and see the value that LCIA arbitration brings to a dispute. Third must be that the LCIA is both London-based and International. We are an international arbitral institution, based in London and with that you get the best of being within a highly respected legal system, yet also a truly international organisation with an international outlook.

## ABOUT THE AUTHOR

Jacomijn van Haersolte-van Hof has sat as arbitrator in cases under the ICC, LCIA and UNCITRAL rules, as well as those of the Netherlands Arbitration Institute (NAI). She has also acted as counsel and arbitrated cases at the Royal Dutch Grain and Feed Trade Association and the Institute of Transport and Maritime Arbitration, both based in the Netherlands. She is on the ICSID roster of arbitrators and is currently sitting on an ad hoc committee. She was also involved in setting up the arbitral process for the Claims Resolution Tribunal in Zurich, which analysed claims from Holocaust survivors over dormant accounts in Swiss banks.

She is a lecturer in international arbitration at VU University Amsterdam and a member of GAR's editorial board. Her 1992 PhD thesis on the application of the UNCITRAL rules by Iran-US Claims Tribunal was one of the first books to be published on the subject.

# INVESTMENT PROTECTION: PROTECTING INVESTMENTS IN A VOLATILE WORLD

Larry Shore, Isabelle Michou, and Christian Leathley discuss the ways in which investors can pre-empt and plan for changes in the political landscape and minimise the impact on their investments and risk to their reputation. They draw on current trends in terms of contractual protections and key issues for investors in a new era of transparency. They also consider how host states can manage their investment relationships and their obligations to govern effectively against the backdrop of their international law commitments.

The last couple of decades have seen unprecedented growth in foreign direct investment. Economies which have historically been closed to foreign investors have opened their doors, adopting more liberal investment policies. Countries seek exploitation of their natural resources to fund the development of their broader economy, and across the world, development continues apace to provide and improve essential services such as power and telecommunications.

As reported by UNCTAD in their Global Investment Trends Monitor in January of last year, in 2014 developing economies saw their FDI reaching a new high of more than US\$700 billion, 4% higher than 2013, with a global share of 56%. A considerable volume of FDI is into countries in which good governance is in its infancy, the rule of law is not always enforced, and/or an effective regulatory framework is developing. The investment may be into a disputed territory or an area that is in the process of geo-political change. Even where an investment is made in a relatively stable political democracy, the Arab Spring and the EU sovereign debt crisis are just two examples from the past few years that show situations can change rapidly. Further, and impacted by changes in the political and financial landscape, in parts of the world resource nationalism has been on the rise.

**“The political and reputational risks in investing in disputed territory are significant. These may impact across an investor’s global operations...”**

No investor can completely insulate investment from these kinds of changes, and pricing of country risk will remain an integral component in deciding whether to make an investment. Our experience has shown that the way in which an investor can best position themselves is to factor in investment protection across the life-cycle of an investment, from its very early stages until a project is completed or an investment divested.

## Disputed territories and political flux

Some of the world’s most resource-rich areas are subject to boundary disputes and savvy investors seek advice on the implications of such disputes from the beginning of their decision to invest. Disputes as to sovereignty over a particular region or territory have legal ramifications. For example, there may be uncertainty as to whether the government that claims to grant rights is legally able to do so and making the investment may put an investor at risk of actions against it, for example, for aiding and abetting a breach of international law or for being complicit in alleged human rights violations committed by organs of the host state associated with the investment.

The political and reputational risks in investing in disputed territory are significant. These may impact across an investor’s global operations – for example, it may affect relationships with other governments who take an official or unofficial stance on the disputed territory, corporate partnerships in other projects, and access to finance. There may also be global pressure from protest groups or shareholder criticism for making the investment.

The complex considerations for companies wishing to do business in disputed territory are beyond the scope of this article but will be discussed in more detail in the next issue of Inside Arbitration.

## Playing the long game: domestic law, contractual protections, and forward-thinking investment structuring

An investor can take steps to create as consistent, predictable and transparent a legal backdrop for itself as possible before making its investment. This can be done on a number of levels – by understanding the domestic legal framework, negotiating appropriate contractual protections, and by structuring the investment so that the investor may benefit from international law protections. However, what is equally important is for the investor to lay the groundwork from the outset for taking advantage of these protections should there be a dispute later. This strategy is explained further below.

Turning to the layers of protection, first there may be domestic laws that can help an investor’s position. Many countries, particularly those that are seeking to attract FDI, have an investment code or investment law which contains a number of protections or guarantees about the legal treatment of investments made in the territory. Fundamental to weighing the benefits of the protections offered by an investment code is the way in which those protections can or must be enforced. An investment code may provide for a choice of dispute resolution fora, including arbitration under the ICSID Rules. This puts investors in a stronger position as they can look to a neutral forum outside the territory of the host state to resolve disputes. However, the protections offered are less attractive if the code can only be enforced in the domestic courts in the territory of the investment. The courts may not be independent of the host state government, may be slow or inexperienced, and arbitrary application of the code could be a risk.



CLOCKWISE FROM  
TOP LEFT

**Larry Shore**  
Partner, New York

**Christian Leathley**  
Partner, New York

**Isabelle Michou**  
Partner, Paris



Investors will also look to contractual protections. In particular, stabilisation clauses can be very important for an investor. Stabilisation clauses may take a number of different forms and investors must consider carefully the type, likely effect and enforceability of a stabilisation clause, and the potential remedies for breach by the host state.

The current trend on the investor-side is towards so-called “economic equilibrium” clauses, which focus on stabilising the economic return on the investment, as opposed to traditional stabilisation clauses, which freeze the legal or regulatory framework.

With the former, the host state is not fettered in its ability to change the regulatory landscape of the investment but any such change will trigger a recalibration of the economic balance of the contract and/or a right to compensation. As such clauses interfere the least with the state’s right to legislate, there is less perceived risk of the clause been struck down as unenforceable under domestic or international law.

It is also important that contracts with the host state – including joint venture agreements with state-owned joint venture partners – provide, where possible, for dispute resolution outside the host state. While the investor might prefer for disputes to be resolved in the courts of a country in which the courts are well-developed and uphold the rule of law, in practice, a host state is unlikely to agree to resolution of disputes in the investor’s home courts or even in the courts of a neutral third country. As a consequence, arbitration clauses are increasingly favoured by both investors and states, as they offer a neutral and independent forum for the resolution of disputes. An investor in particular will often favour arbitration due to the relative ease of

enforcement of an arbitral award under the New York Convention regime. Investors may push for resolution of disputes under their contracts with the host state at the International Centre for the Settlement of Investment Disputes, but may also accept institutional or ad hoc arbitration.

**“Investment treaties therefore provide an important ‘long stop’ for investors who can rely on them should there be changes in political policies, regulatory framework or additional restrictions imposed ...”**

Many investors are aware of bilateral and multilateral investment treaties and other international agreements (either regional or sectoral) between states in which those states offer investors of the other state international law protections such as compensation for expropriation of an investment and a guarantee of fair and equitable treatment. An investor can sue the host state directly for breach of these standards. Investment treaties therefore provide an important “long stop” for investors who can rely on them should there be, for example, changes in political policies, the regulatory framework for the investment, or additional restrictions imposed on the investment which affect its economic viability. When making an investment, many investors focus solely on ensuring the best investment structure for tax reasons, but it is often possible to marry tax advice with investment protection structuring to take advantage of treaty protection for the future.

Structuring of investments to take advantage of these treaty-based investment protections is a key part of protection planning. However, it is also important that an investor think through

the likely basis of any future treaty-based claims and how it would establish those claims. In many cases brought against host states under investment treaties, an investor seeks to establish that the state has failed to meet expectations held by the investor as to the future treatment of its investment (known as “legitimate expectations”) and has therefore failed to treat it fairly and equitably. The foundation for those legitimate expectations will be the words or conduct of the host state. The host state’s commitments to the investor may be communicated through assurances of a minister or other official and the way in which the investor can evidence those communications, what it understood by them, and how it relied on them, will be important. An investor should make sure that its expectations, and, importantly, what has led to them, are clearly and contemporaneously documented – this may be in correspondence or internal memoranda but, if possible, the investor may be able to achieve contractual recognition of the host state’s promises.

**“Proactively seeking legal advice in fluctuating political circumstances will put an investor in the best position to mitigate emerging risk”**

#### **Dealing with changes in the political landscape**

Political change that affects an investment rarely occurs out of the blue and an investor often feels the wind of change before any significant host state action is taken which directly impacts the investment. An investor needs to maintain a dialogue with the host state as to its intended actions and the potential consequences, as well as seeking to protect its investment.

Proactively seeking legal advice in fluctuating political circumstances will put an investor in the best position to mitigate emerging risk.

For example, where there are potential state succession issues, strategic advice on an ongoing basis can help an investor identify, understand and plan for implications to their business associated with changes in government and clashing constitutional or regulatory regimes. For investors who have not considered investment treaty protection when making their investment, these very early rumblings of changes to regulatory policy or political change may offer an opportunity for the investor to restructure its investment through other entities to improve its treaty protection. There is a careful balance to be struck here – investment arbitration tribunals have not accepted jurisdiction in cases in which “abusive” re-structuring has taken place after a dispute with a host state has arisen with the purpose of obtaining the protection of an investment treaty. However, investors who have acted quickly in restructuring investments when very early signs of political change have arisen have been able to take advantage of the protections of an investment treaty. Whether this is achievable in practical terms will depend on the size and nature of the investor’s organisation. An investor is in a stronger position if there are strong lines of communication between the operational staff in country, who are most likely to be the first aware of the stirrings of change, and those who are in a position to recognise the potential for restructuring the investment to take advantage of treaty protections.

Similarly, a host state can reap the benefits of engaging investment treaty arbitration specialists at an early stage in both its dealings with potential investors, and, once an investment has been made, in its regulatory decision-making. Bilateral and multilateral investment treaties do not, in themselves, preclude a state from regulating. However, a host state can mitigate the risk of claims thereunder, both in terms of the way in which it deals with prospective investors (for example, by way of express limits placed on the expectations which investors should derive from tender invitations), and in making sure that it regulates and manages relationships with investors in an appropriate way, conscious of the international law obligations it owes.

“The current trend on the investor-side is towards so-called ‘economic equilibrium’ clauses ...”

### Dispute resolution and reputational risk

In the event that a host government takes action which negatively affects the investment, the investor’s reactions can be crucial to both their legal case and their reputation. On a practical level, an investor who is removed from its operations needs to consider how to secure evidence that may have been left behind, as well as protecting its assets and its staff. Quick and responsive legal advice is essential to take necessary steps to get interim relief where possible. Reputational risk, both in the host state and beyond, may be significant and an investor’s counsel must work closely with its communications advisers to ensure that legal and reputational positioning is consistent. In an era of increasing transparency in resolution of investor-state disputes, it will be important to understand the extent to which information relevant to the dispute will be publicly accessible. Further, legal counsel must be sensitive to the reputational risks of investor-state dispute settlement for the investor, including by “testing” their arguments against the investor’s CSR and business and human rights policies to identify and minimise any potential perceived inconsistencies.

### Counsel choices for investment protection issues

Investment protection issues largely concern domestic host state law and international law rights and obligations. Given the focus on international law, experience in this legal field is highly transferable between regions, although in some cases, language skills and in-depth political and cultural knowledge can be an advantage. In all cases, it is undoubtedly advisable to engage a versatile and experienced specialist investment treaty counsel, who can see the position from both an investor and state perspective, no matter for which party they are acting. As explained above, early engagement can offer a legal and strategic advantage, assisting both investors and states to keep on top of their rights and obligations.

### Why Herbert Smith Freehills

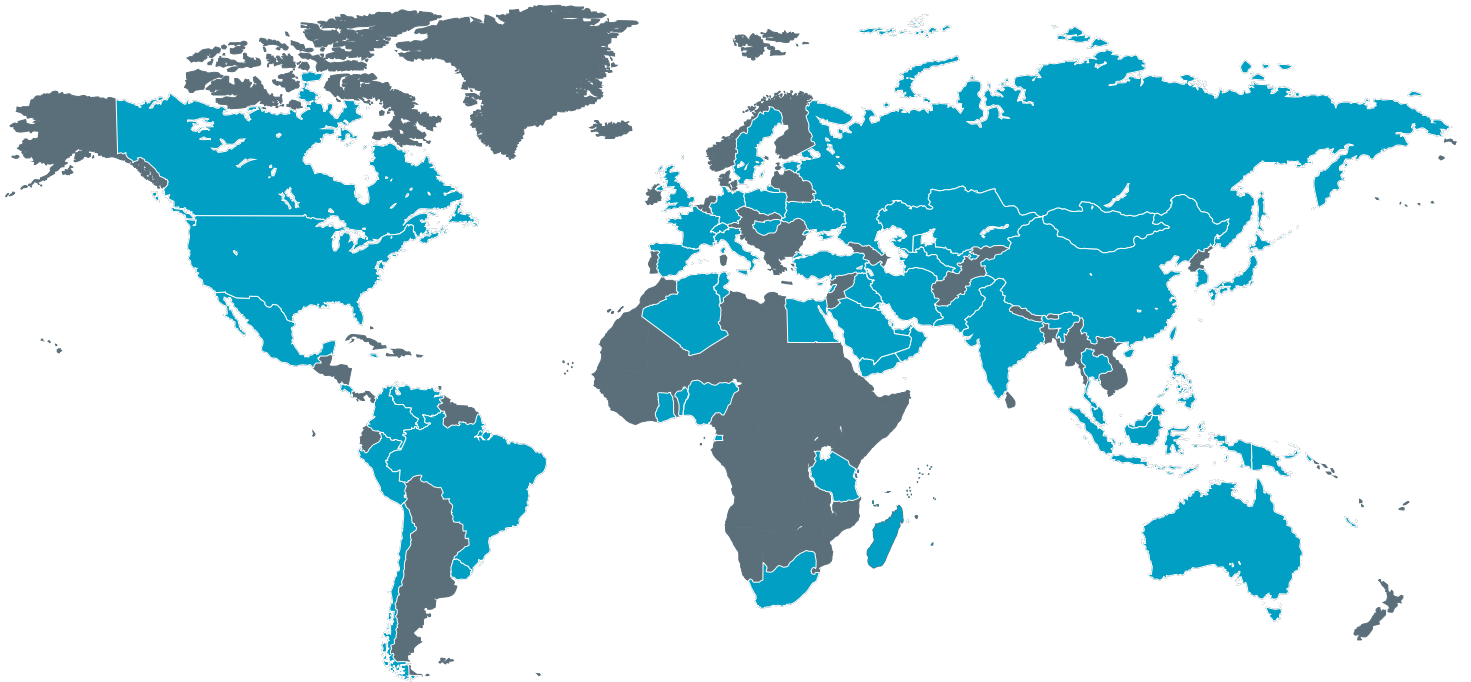
Our investment protection and treaty arbitration team can stand shoulder to shoulder with you throughout your investment, providing strategic advice to protect and assist you throughout the life cycle of your investment, not only after a dispute arises. Unlike many other firms, we advise not only private investors, but also governments. This gives us an advantage in our practice as we understand the demands and needs of both type of clients; as a practice, we are versatile and tailor our support to our client’s needs. Further, the exposure that we have gained acting for both investors and states provides us with the ability to see every angle of an issue.

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VALUE OF THE CLAIMS AND COUNTERCLAIMS IN OUR PORTFOLIO



LIVE ARBITRATIONS

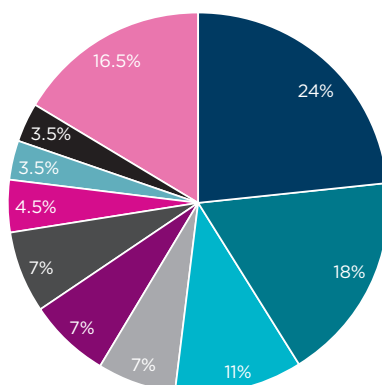


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# SPOTLIGHT ON: CRAIG TEVENDALE

Craig Tevendale, London international arbitration partner, has built a reputation for resolving disputes arising out of the Arab world, central Asia and sub-Saharan Africa. Here he discusses his love of Arabic and the road less travelled.

## **It isn't every London lawyer who speaks fluent Arabic. How did that come about?**

I went to state primary and secondary schools in Scotland and England. I very much enjoyed learning languages, and then I was very lucky that family holidays included time in Saudi Arabia, Egypt and Tunisia whilst my dad worked in the region. I developed a great admiration for the hospitality and culture of the Arab world during those holidays; the humility and warmth of the people we met made a great impression on me. Put all of that together, and it was a natural choice for me to read Arabic at university.

I spent one of my 4 years studying Arabic in Kuwait. I was there between the two Gulf wars in what was, with hindsight, quite a fragile period of peace. During the first week I was there, the airport was closed down and the British Embassy organised a helicopter evacuation plan. The Iraqi army under Saddam Hussein had amassed on the border in order to make a point about sanctions. It was a fascinating and inspiring year, developing a love of the language with a truly diverse selection of students from around the world. There were some wonderful times fishing in the Arabian Gulf, playing football and tennis in 40 degree heat and trying to explain to Omani English literature students the ins and outs of gothic literature. What a mixture of

students we had learning Arabic at that time! Not every university course will draw mature students formerly with the US Navy, the Russian army and retired Afghan Mujahideen from the 1980s...

## **Why did you choose a career in arbitration?**

Well, there were some obvious career choices with my background, and I looked into them: the Foreign and Commonwealth Office, government intelligence.... but the law became a compelling choice for me. I wanted a career that offered me real variety, challenge and a broader view of international life. I steered my career towards disputes which gave me that variety and international perspective, focusing on cross-border issues and emerging market jurisdictions. When Herbert Smith Freehills set up its dedicated International Arbitration group in 2005 to concentrate the existing arbitration practitioners in one place, I was already specialising in arbitration, and it was an easy choice to join the new group. Being an arbitration lawyer presents a wonderful opportunity to work opposite, and alongside, practitioners from across the globe with different legal and cultural backgrounds. We are fortunate to work with hugely talented people on very interesting work, and with the variety comes the occasional surprise. I remember an arbitration where the parties had appointed two very eminent expert

legal witnesses from South East Asia on complex questions of constitutional law arising in their jurisdiction. It was all very serious stuff. It then emerged under cross examination that these two experts moonlighted as DJs on the same local radio station! That was much of a surprise to our colleagues representing the other party as it was to us.

## **Do you have a particular sector or regional focus?**

One of the most appealing aspects of being an arbitration specialist is that you get to work on a broad caseload across a number of different sectors. I have always enjoyed working in the energy sector in particular, however, and that is a specialism I have built up over many years. I also had the chance to spend 15 months in house at an energy super major earlier in my career, which was a great experience. As a result, I am evangelical about the benefits for any private practice lawyer of working on matters from a client perspective when the opportunity arises. Seeing the resolution of disputes, and the arbitral process, from the client's side of the fence gives a great insight into what is important. And it's interesting to manage other law firms on cases and to learn from what they do well (or badly).



Being an arbitration practitioner, most of the time you don't expect the outcome of your cases to enter the public domain: in fact, you often work very hard to maintain the confidentiality of the process. However, it was a fascinating experience to see an important win I had for South Western trains against the Department of Transport being reported by the full sweep of the British press, from Private Eye to The Sun!

**"Put all of that together, and it was a natural choice for me to read Arabic at university"**

My Arabic background has meant that I am often involved in cases involving the Arab world. In recent years a number of my cases have been disputes arising from the aftermath of the "Arab Spring" in North Africa. But much as the broad caseload of arbitration has led to variety in terms of industry sector, there is also plenty of regional variety. I am particularly active in Central Asia and in Turkey, and have also been working a lot on African matters in recent years; cases from Madagascar, Angola, Tanzania, Namibia and other jurisdictions too. I have also done a number of Iranian law disputes and that is an area which I expect to grow.

#### **What is the future of Arbitration in the Arab World?**

Arbitration has a long history in the Arab world: the idea that disputes can be resolved by the appointment of arbitrators is mentioned in the Qur'an, and has long been recognised by Arab culture.

Generalisations about the Arab world are no easier than generalisations about 'Africa'; the Arab world has such a broad range of jurisdictions in legal, political and economic terms. Regional knowledge is valuable when negotiating dispute resolution clauses, and navigating arbitral processes, to make sure that the differences between jurisdictions are taken into account.

Some Arab jurisdictions have sought to champion the development of arbitration and have adapted their legal systems to facilitate that development, and there are success stories where arbitral awards have been enforced or court actions in breach of arbitration agreements have been stayed. It is important to be realistic, however - there remain jurisdictions in the region where arbitration is not widely practised, or where it is seen as undermining the powers of the courts or threatening the sovereignty of the state.

**"... the law became a compelling choice for me... real variety, challenge, and a broader view of international life"**

On the legislative side there are positive indications in a number of key jurisdictions, but progress continues at different rates - and, of course, sadly there are a number of more compelling priorities on some government agendas at the present time.

One interesting development in the last few years has been the increase in "intra-Arab" disputes. Whilst there have been many claims brought by non-Arab investors in the wake of political and legal change in North Africa, we have also seen a number of cases brought by Arab investors. The traditional assumption that such disputes will be resolved on an amicable basis has been challenged. We will see more of these disputes in the future.

# THE TRANS-PACIFIC PARTNERSHIP: AN ECONOMIC CONSTITUTION FOR THE PACIFIC RIM

In this edition partners Don Robertson and Leon Chung discuss the breadth and impact of the world's largest trade partnership.



FROM TOP

**Donald Robertson**  
Partner, Sydney

**Leon Chung**  
Partner, Sydney

## A transforming world of trade and investment

We are witnessing a revolution in the governance of international commerce, with 3 major regional trade and investment agreements actively being pursued.

The Transatlantic Trade and Investment Partnership (**TTIP**) is being negotiated between the EU and the United States of America. The Regional Comprehensive Economic Partnership (**RCEP**) will extend the existing ASEAN-Australia-New Zealand Free Trade Agreement into other Asia-Pacific countries, including China.

The third – the Trans-Pacific Partnership (**TPP**) – currently looks like being the first of these three treaties to be implemented. On 5 October 2015, the Trade Ministers negotiating the TPP agreed the last small number of items, after many years of hard talks.

Each of the three treaties seeks to liberalise trade and set out rules to govern that trade. They all have, or are likely to have, an investment protection chapter with dispute resolution provisions.

### What is the TPP?

The TPP is an agreement (still subject to ratification) between twelve countries around the Pacific Rim: the United States, Canada, Australia, New Zealand, Japan, Singapore, Malaysia, Vietnam, Mexico, Chile, Peru and Brunei.

A number of other states have expressed interest in acceding to the agreement, including Taiwan, South Korea, Thailand, India, Costa Rica, Bangladesh, Indonesia, the Philippines, Laos, Colombia and Uruguay.

The TPP is one route towards a free trade area of the Asia-Pacific.

China is not currently part of the TPP negotiations, although no longer hostile to it. Like other states in the region, China is actively pursuing trade and investment agreements. The RCEP is not a competing, but a complementary, trade and investment agreement.

The free trade area created by the TPP is worth nearly US\$28 trillion (approximately 40% of global GDP), and covers 11% of global population. Trade between TPP countries amounts to 25% of global trade volume.

### The special features of the TPP

The TPP is almost unrivalled in its complexity and scope. It is designed to bring together key Asia Pacific and North and South American countries, liberalising trade in nearly all goods and services. It will provide the foundational rules for the governance of cross-border trade and investment.

The TPP is much more than a traditional FTA. Although containing many usual FTA elements, of both a general and industry-specific character, it also contains “state of the art”

provisions appropriate to the modern globalizing world and trade patterns. Global value chains (“offshoring” of manufacturing processes) now dominate those trade patterns and are one possible justification for the controversial strong “property rights” and regulatory controls contained within the draft text.

The treaty sets out the basic principles as to how countries will govern their markets, insofar as they affect cross-border flows of trade and capital. Those provisions amount to a form of “economic constitution” for the region as they will fundamentally shape the way in which markets operate and are regulated.

#### (a) Regulatory coherence and best practice

The TPP will require adherence to a form of best-practice regulation within each state. Best-practice under the TPP requires a transparent decision-making process, the testing of regulations by reference to the goals set, and a form of cost-benefit assessment. The intention is that, if each state follows the same approach to decision-making and has a common understanding of what market regulation is for and how it is designed, the regulatory measures taken by each state should cohere, based on objective criteria of rationality.

To many this proposal has been viewed as a restraint upon a sovereign state’s “right to regulate” their own markets. However, the discipline required by best-practice regulation is not intended to be a restriction on sovereign rights of states, but rather to enhance the



ability of host states to engage in international trade. The TPP contains express carve outs that preserve states' rights to regulate markets where there is a public interest in doing so.

*(b) Competitive markets*

The TPP seeks to eliminate competitive advantages accruing to enterprises simply by reason of state-ownership. It will do within the Pacific Rim area what OECD countries have achieved over decades of market reforms.

*(c) Anti-corruption*

The TPP will contain rules in relation to anti-corruption, extending the steady push towards transparent and fair trade based on the underlying real economic value of goods and services, undistorted by false market signals sent by bribes.

*(d) Protection for investors*

The TPP contains the familiar promises made in bilateral investment treaties in relation to foreign investments into host states, including promises to give investors Fair and Equitable Treatment, Full Protection and Security of investments, and to not discriminate against foreign investors.

**Investor-State-Dispute Settlement (ISDS)**

Despite public anxiety about state sovereignty, the TPP contains strong ISDS provisions, allowing investors direct rights of action against

host states. Although arguably not strictly necessary under public international law, the TPP expressly provides carve outs for matters of public interest. Certain sectors get particular carve outs. It contains rules to prevent abusive and frivolous disputes and prevents the pursuit of the claim in parallel proceedings. Investment Protections will be enforced by investors through international arbitration.

**What does it mean for you?**

The TPP will impact on most industry areas and is relevant to almost every key sector of the global economy. States will amend their domestic legislative and regulatory regimes to be consistent with the commitments in the TPP (although this may happen over the course of a transitional period). They will also be required to take these commitments into account in creating new legislation, regulations and trade policies going forward.

It will therefore impact on anyone doing business within the signatory states but also from outside the TPP area but with any one of those signatory states.

The sectors and areas which will be significantly impacted include:

- **Energy**, through preferential trading arrangements, as well as changes in cross-border service provision, environmental standards and the conduct of state-owned enterprises;

- **Technology, media and telecommunications**, through new intellectual property regulations, data protections rules and access regimes for telecommunications providers;
- **Consumer products**, through changes in e-commerce rules, sanitary and phytosanitary standards and customs regulations;
- **Mining**, through changes in labour standards and environmental standards;
- **Infrastructure and transport**, through changes in government procurement regimes and visa regulations for workers providing technical cooperation;
- **Financial services**, through changes in cross-border service provision, e-commerce rules and data protection regimes; and
- **Pharmaceuticals and healthcare**, through the removal of protectionist domestic regimes and new rules regarding patent recognition.

If you would like to speak to one of our regional or sector specialists about how the TPP may affect your business, please do not hesitate to contact one of the TPP key contacts. Further information about the TPP can be found on our hub: [Trans-Pacific Partnership - Navigating a New Era Together](#).



## SPOTLIGHT ON: BRENDA HORRIGAN

We talk to Brenda Horrigan, international arbitration partner in our Shanghai office, about how she came to speak fluent French and Russian and her journey from American transactional lawyer to Shanghai arbitration practitioner.

### **You speak both French and Russian fluently. How and why did that come about?**

I studied languages and political science at university as an undergraduate. I did one semester of French, but then switched to Russian because it was more unusual. I then did a summer program in Leningrad studying Russian, which only heightened my longstanding interest in Russia. When I went to law school at Columbia University, I decided to also study for a certificate in Russian law at the Harriman Institute there. Part of the Harriman certificate requirement was proof of fluency in Russian, so I added a year onto my law school program, which I spent at Moscow State University, writing a thesis on land privatisation while also clerking at an international law firm. By the time I was done, Russian was pretty well entrenched – and then I lived in Moscow for another few years a bit later as well. As for the French, when I left Moscow the second time, I moved to Paris, where I wound up spending 11 years. In retrospect, studying French at university in addition to Russian probably would have been a good idea – instead, I had to just pick it up “on the ground”! And now there is Mandarin to learn...

### **You are recognised as one of the leading arbitration practitioners in Greater China, but after law school ended you didn't start off specialising in arbitration. Can you tell us a little of how you came to specialise in this area and why?**

During my clerkship in Moscow in 1990-91, I became enamoured with the challenges of emerging market transactional work. That was a fascinating time to be in Russia, as it was rapidly undergoing a transition from the world's largest state-controlled economy into a market-oriented economy. When I first started studying Russian law at Harriman, the entire foreign investment law of the then-Soviet Union consisted of one decree that was 6 pages long - everything else was being made up as the lawyers went along. Plus, the legal system was changing rapidly – for example, I very vividly remember sitting down at the negotiation table in 1990/91 with Russian lawyer counterparts on the other side and having to explain what “ownership” was and the concepts of shares in a company.

After I graduated from law school I went to work for a firm in Washington DC for three years. They had a general commercial group which covered both transactional work and litigation. Lots of my time was spent doing due diligence and contract drafting, but I also had the rather extraordinary experience of seeing a securities fraud class action suit through from start to finish in Virginia in six months and winning on summary judgment.

During those three years my work was heavily Russia-related and I was frequently flying in and out. I was closing deals in some fairly unlikely circumstances. I helped close a deal for a very large automotive joint venture which involved a trip to the wilds of southern Russia. I had planned ahead and called to check that they had a computer, printer and photocopier, but didn't quite think to ask if the computer had an operating system, the printer was linked to the computer and the photocopier had paper... The closing was being televised and we ended up with all the parties having to make hand-written changes to the documents and then initialling those changes. It was a somewhat fraught experience but it worked in the end.

I ended up moving back to Moscow in 1995 and stayed there (having moved firms) until early 1998 when I moved to Paris. Then in August 1998 the Russian financial crisis hit. One of my clients at the time was a multilateral financial institution that had lent a lot of money to Russian banks. Many of these Russian banks went bankrupt, and I spent my time shuttling back and forth between Paris and Moscow working to seize assets, restructure portfolios and put in place additional protections. Disputes ensued, both with the banks and with other companies affected by the crisis. Many of those resulted in arbitrations. My firm's arbitration practice needed help from another Russian speaker to manage this spate of disputes and I volunteered. Some of these arbitrations were real eye-openers: one was against a Siberian bank which politely informed

“... one day I found myself in Ukraine trying to negotiate a large privatization deal with one party while at the same time negotiating with another”



us there was no money, but they were very happy to pay their debt with shoes (which they apparently did have) rather than cash!

For a few years I managed to run my transactional and arbitration practices side by side. Then one day I found myself in Ukraine trying to negotiate a large privatization deal with one party while at the same time negotiating with another party a settlement to an on-going arbitration. At that point I decided that enough was enough, and that I needed to choose to focus on one or the other. I chose arbitration.

**“... and I spent my time shuttling back and forth between Paris and Moscow working to seize assets, restructure portfolios and put in place additional protections”**

After 11 years in Paris and becoming co-head of my firm's global arbitration group, it was time for something new and I volunteered to help my firm start up in Asia. I moved to Shanghai in 2009 and eventually over to Herbert Smith Freehills in April 2012 to be part of the Greater China arbitration team.

**Is your practice in Greater China very different from your practice in Russia?**

I have spent my career focusing on younger economies and the issues I had encountered working in the Russian and Central/Eastern European markets are many of the same

issues I encounter now in Greater China. Both jurisdictions have young legal systems in terms of the sort of commercial transactions that we are involved in and the disputes that arise from them. In the early years in particular, there were often gaps in the legislation as well as gaps in understanding for the parties who negotiate or agree to those transactions. That is hardly surprising in such an extraordinary period of compressed development: if I look back on my time in Russia, in 1990 I was having to explain the concept of “ownership”, by 1995 I was negotiating on relatively equal terms with counterparties wearing Armani suits and Rolex watches, and by 2000, was discussing complex structures devised within the jurisdiction on which I needed expert advice from colleagues. That same process of rapid change has also been happening in China.

While there are cultural differences, in terms of my day to day work, I actually notice more similarities than differences. A truly international arbitration is pretty much the same beast wherever you are, whether that is China, Russia, London or New York. That said, in younger economies the domestic arbitral institutions can be more domestic in their outlook and procedures even if international parties are involved. This is true in China just as it was in Russia and Central/Eastern Europe.

In both settings, there has been and still is a real lack of document retention. Emails are kept on laptops that are wiped when people leave the business. I also notice that similar types of

disputes arise in China and Russia that you would not tend to see in, say, Western Europe or the US. For example, I see quite a few disputes arising out of joint venture projects where one party provides the land plot and the other the facilities on it. As the JV becomes profitable the land partner shuts off water, sewerage and electricity to the property and effectively bars the other party from access.

**What recent trends are you seeing out of Greater China in terms of arbitration?**

Chinese parties are becoming increasingly involved in the arbitral process. Ten years ago, a Chinese party was often an absent respondent. There was a palpable sense that arbitration was something “foreign” and that the outcome of the process didn't apply and wouldn't be enforced in China. That attitude has shifted and Chinese parties are now actively participating, both as respondents and, increasingly, as claimants. The approach is also far more sophisticated, with Chinese clients looking for representation from international firms like ours in international disputes. About half of our clients in Greater China are now Chinese, which is a big shift in our client base over that period. This trend has shown no sign of abating and I anticipate that Chinese clients will continue to choose arbitration for resolution of their disputes, especially as the legal and institutional framework, in particular in Hong Kong and Singapore, becomes increasingly robust and responsive to user demand.

# KEEPING IT IN THE FAMILY: AVOIDING THE PITFALLS OF PRE-EMPTION CLAUSES

Pre-emption clauses are a common feature of joint venture agreements, particularly in the energy and natural resources sector. Despite their complexity and significance, such clauses are at times given little attention when the agreement is being drafted. When this happens, joint venture parties should not be surprised that disputes arise concerning the proper construction and application of the pre-emption clause. Here, Paula Hodges QC, Konrad de Kerloy and Ante Golem discuss.

Pre-emption clauses typically prohibit a joint venture participant from disposing of its interest in the joint-venture without first offering its fellow joint venturers the opportunity to acquire that interest. However, with careful drafting, this requirement can be made subject to certain caveats, such as a change of control or a transfer to a related entity.

## Third party transfers

The underlying objective of pre-emption clauses is to prevent a new third party joining the joint venture without the approval of the other joint venturers. To that extent, the provisions resemble a clause that limits free assignment of interests. The difference between the two types of restriction is that pre-emption provisions also provide the opportunity for one of the other joint venturers

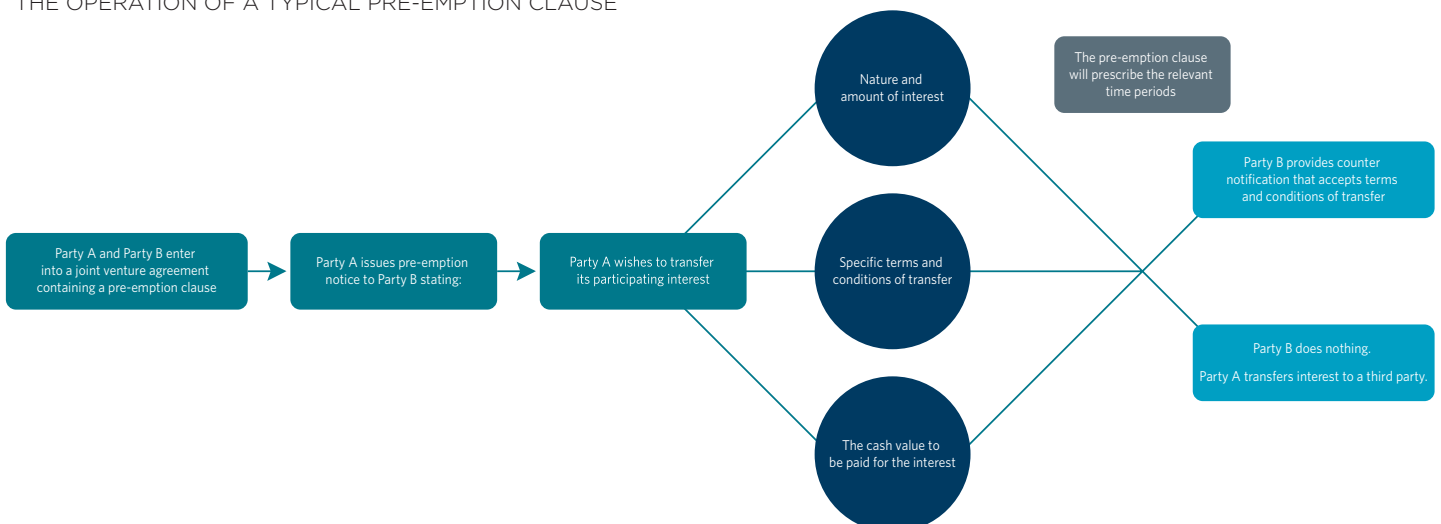
to purchase a bigger piece of the action and this has the potential to alter the dynamic within the joint venture significantly. This possibility, coupled with the alternative of admitting a new party into the joint venture, can raise corporate temperatures and lead to hard fought disputes.

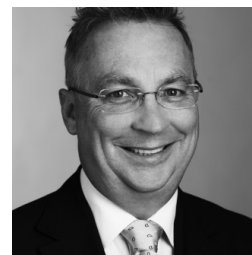
Given the aim of pre-emption clauses to police the entry of third parties to the joint venture, certain exceptions can be carved out to cover circumstances where the exiting party wishes to transfer its interest to an affiliate or where a third party is purchasing the exiting company as a whole resulting in a change of control. The justification is that in both cases, the corporate identity of the exiting co-venturer is not changing significantly and it is not being substituted with a completely new third party.

## Combination transactions

Recently, one of our clients was faced with a very difficult situation emanating from the pre-emption provisions, which threatened the future of the joint venture project. When the joint venture was put together, the participants intended to get the project up and running and then introduce a third party with both deeper experience of oil and gas exploration and downstream LNG facilities, and deeper pockets to inject additional investment into the project. However, when our client, as operator of the project, sought to introduce such a third party, the other major joint venturer objected and threatened to use the pre-emption provisions to stymie the deal. The deadlock that ensued began to impact the progress of the project and jeopardised completion of the deadlines set by the host government in the licence agreement.

## THE OPERATION OF A TYPICAL PRE-EMPTION CLAUSE





CLOCKWISE FROM TOP LEFT

**Paula Hodges QC**  
Partner, London

**Konrad de Kerloy**  
Partner, Perth

**Ante Golem**  
Partner, Perth



Our client turned to us for advice and, on reviewing the contract in question, we discovered that the pre-emption provisions exempted both change of control transactions and transfers to affiliates. We therefore advised our client to structure the deal as two separate transactions. The first step consisted of the transfer of part of our client's participating interest to an affiliate entity, followed by the sale of the shares in that affiliate to the third party wishing to join the project.

The deal went ahead and was challenged by the other major joint venturer on the basis that the pre-emption provisions should bite given the overall intention to transfer the interest to a new third party. They argued that the tribunal should apply the spirit of the pre-emption provisions, and not just the letter of them.

ICC arbitration proceedings were commenced, but the tribunal upheld the combined deal as permissible given that it consisted of two separate transactions, both of which were exempted from the application of the pre-emption provisions.

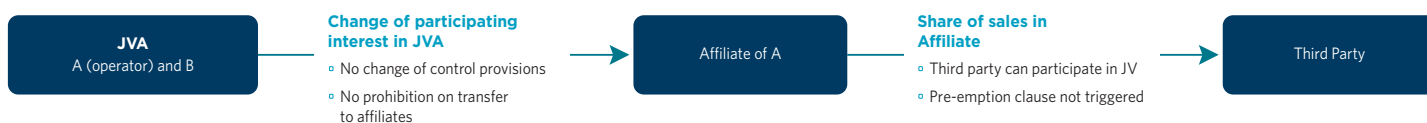
The end result was that the participating interests were kept within the (albeit extended) family and the project is now proceeding apace.

**Practical implications**

Joint-venture parties should bear in mind that:

- tribunals and courts often take a purposive approach to interpreting pre-emption clauses;
- but this cannot be relied upon, and parties should pay close attention to drafting effective pre-emption clauses;
- in particular, it should be clear what kind of transfer will trigger the clause (for example, what would be the consequences of a charging of shares to a third party which grants that third party control?), and what remedies are available for the other joint venturers in the case of a breach of the pre-emption clause; and
- the terms and conditions of a proposed sale should be disclosed to the other joint venturers in good time to allow pragmatic discussions to take place.

AVOIDING THE PRE-EMPTION CLAUSE: CASE STUDY



**BANGKOK**

Herbert Smith Freehills (Thailand) Ltd  
T +66 2657 3888  
F +66 2636 0657

**BEIJING**

Herbert Smith Freehills LLP Beijing  
Representative Office (UK)  
T +86 10 6535 5000  
F +86 10 6535 5055

**BELFAST**

Herbert Smith Freehills LLP  
T +44 28 9025 8200  
F +44 28 9025 8201

**BERLIN**

Herbert Smith Freehills Germany LLP  
T +49 30 2215 10400  
F +49 30 2215 10499

**BRISBANE**

Herbert Smith Freehills  
T +61 7 3258 6666  
F +61 7 3258 6444

**BRUSSELS**

Herbert Smith Freehills LLP  
T +32 2 511 7450  
F +32 2 511 7772

**DOHA**

Herbert Smith Freehills Middle East LLP  
T +974 4429 4000  
F +974 4429 4001

**DUBAI**

Herbert Smith Freehills LLP  
T +971 4 428 6300  
F +971 4 365 3171

**FRANKFURT**

Herbert Smith Freehills Germany LLP  
T +49 69 2222 82400  
F +49 69 2222 82499

**HONG KONG**

Herbert Smith Freehills  
T +852 2845 6639  
F +852 2845 9099

**JAKARTA**

Hiswara Bunjamin and Tandjung  
Herbert Smith Freehills LLP associated firm  
T +62 21 574 4010  
F +62 21 574 4670

**JOHANNESBURG**

Herbert Smith Freehills South Africa LLP  
T +27 11 282 0831  
F +27 11 282 0866

**LONDON**

Herbert Smith Freehills LLP  
T +44 20 7374 8000  
F +44 20 7374 0888

**MADRID**

Herbert Smith Freehills Spain LLP  
T +34 91 423 4000  
F +34 91 423 4001

**MELBOURNE**

Herbert Smith Freehills  
T +61 3 9288 1234  
F +61 3 9288 1567

**MOSCOW**

Herbert Smith Freehills CIS LLP  
T +7 495 363 6500  
F +7 495 363 6501

**NEW YORK**

Herbert Smith Freehills New York LLP  
T +1 917 542 7600  
F +1 917 542 7601

**PARIS**

Herbert Smith Freehills Paris LLP  
T +33 1 53 57 70 70  
F +33 1 53 57 70 80

**PERTH**

Herbert Smith Freehills  
T +61 8 9211 7777  
F +61 8 9211 7878

**SEOUL**

Herbert Smith Freehills LLP  
Foreign Legal Consultant Office  
T +82 2 6321 5600  
F +82 2 6321 5601

**SHANGHAI**

Herbert Smith Freehills LLP Shanghai  
Representative Office (UK)  
T +86 21 2322 2000  
F +86 21 2322 2322

**SINGAPORE**

Herbert Smith Freehills LLP  
T +65 6868 8000  
F +65 6868 8001

**SYDNEY**

Herbert Smith Freehills  
T +61 2 9225 5000  
F +61 2 9322 4000

**TOKYO**

Herbert Smith Freehills  
T +81 3 5412 5412  
F +81 3 5412 5413