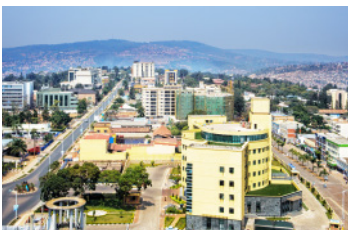
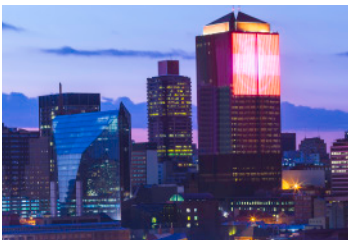




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# INSIDE ARBITRATION

PERSPECTIVES ON CROSS-BORDER DISPUTES



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# WELCOME

Welcome to the third issue of Inside Arbitration.

We are pleased to feature two articles focusing on Africa in this issue. Over a number of years, Africa-related disputes have featured heavily in our arbitration practice and Partners Peter Leon, Craig Tevendale and Chris Parker join me in sharing insights into the development of commercial arbitration on the African continent. We also consider dispute resolution choices for parties negotiating Africa-related contracts, considering both "on-shore" options in Africa and "off-shore" options.

We are also thrilled to share a further perspective on dispute resolution in Africa in an interview with Dr Fidèle Masengo, Secretary General and Board member of the Kigali International Arbitration Centre, Rwanda (KIAC). Since it became operational in 2012, the KIAC has been remarkably successful, having a caseload of 52 cases which includes both domestic arbitrations and arbitrations with an international element. Dr Masengo discusses the nature of arbitration under the auspices of the KIAC and the challenges and opportunities for arbitration across the African continent.

This issue also offers a view of arbitration developments in Germany. Dr Patricia Nacimiento and Dr Mathias Wittinghofer in Frankfurt and Thomas Weimann in Dusseldorf consider the impact of German parties participating in international arbitration on the global stage. They also consider why, when German practitioners are in demand as both counsel and arbitrators, German cities are under-used as seats of arbitration and consider the benefits of arbitration seated in Germany.

We continue our series of interviews with some of our partners from around our global practice. In the spotlight in this issue are Dr Larry Shore, Partner in New York and Peter Godwin, Partner in Tokyo. Larry discusses his path into public international law and the development of his interest in treaty disputes, as well as the differences in arbitration practice in the US and the UK and trends in US arbitration. Peter reflects on his 16 years in Asia and the changes in attitudes towards dispute resolution amongst Japanese parties.

Many of you will be aware of the legal maxim "Rex non potest peccare" - the king can do no wrong. In this issue we consider the modern-day manifestation of this maxim in our feature on state immunity. This is an area of law with considerable practical implications for both private and state-owned entities

entering into international contracts. In our practice we have noted an ongoing rise in the number of transactions entered into with states or state entities and the article examines the importance of ensuring that, if things go wrong, the private counterparty can sue the state counterparty. We highlight a number of key considerations for parties negotiating contracts with state and state-owned entities across the globe. A number of practitioners from across our global practice also contribute to a handy table comparing the legal position with regard to immunity in a variety of jurisdictions.

Finally, Partners Chris Parker and Elaine Wong and Senior Associates Gitta Satryani and Elizabeth Kantor draw on recent experiences across a number of the firm's matters to consider how to ramp up the pressure and protect your position by applying for security for costs or security for the amount in dispute in international arbitration. This article emphasises the practical and tactical considerations involved in these applications and how to maximise your chances of success.

I hope that this issue of Inside Arbitration offers something for everybody and that you enjoy reading it. Feedback is, of course, always welcome.



**Paula Hodges QC**

Partner, head of global arbitration practice

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

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# COMMERCIAL ARBITRATION IN AFRICA: PRESENT AND FUTURE

Africa's economy is growing. The International Monetary Fund forecasts growth at 4% for sub-Saharan Africa for 2016 and at 3.6% for North Africa. But with volatile commodity prices, growth is not guaranteed, and investment is required or sought across all sectors of the economy in all African countries. In this article partners **Paula Hodges QC, Peter Leon, Craig Tevendale** and **Chris Parker** consider the importance of Dispute Resolution in Africa in fostering investment and as a source of investment in its own right. They also analyse the growth and development of arbitration in Africa and discuss whether parties should seek to resolve their disputes “on-shore” in Africa or “off-shore”.

## Dispute resolution: Fostering investment and a source of investment in its own right

Much has been written about the factors that affect investment in emerging market jurisdictions. One factor that is relevant – some might say crucial – to the decision to invest is a country's legal system and legal structure. A country will be a more attractive venue for investment if it has:

- a clear and predictable legislative framework regulating the sector in which the investment is to be made, suggesting a predictable regulatory environment;
- an efficient, effective, impartial judicial system; and
- State acknowledgment of investor concerns regarding a predictable investment environment and enforcement of the rule of law, and awareness of preferred international practice with regard to resolution of disputes.

This third criterion requires that the state in question recognise that domestic courts may not always be the preferred or appropriate method of dispute resolution for international or domestic investors. This in turn requires acceptance of arbitration as a forum for dispute resolution. Arbitration is regarded as a sign of a country being open for business and aware of investor concerns and market practice.

Accepting arbitration is not only important to encouraging wider investment into a state's economy. A market in dispute resolution, particularly arbitration, is a source of economic

activity; it can be a driver for growth and prosperity in its own right. If a state can be a “safe” place to arbitrate (as a seat of arbitration) or a suitable venue for holding hearings, there will be foreign companies and law firms spending significant money there. Conference centres, hotels, translators, transcribers and local lawyers can all benefit.

It is not just about being an attractive location to resolve disputes linked to your own country. Once established as an “arbitration-friendly” jurisdiction, it is possible to attract international disputes from across Africa and, in due course, across the world. Just as many disputes related to Francophone Africa are currently often resolved by arbitrations seated in Paris, in future these disputes may increasingly be resolved in a Francophone African country.

Many African countries have recognised this potential for investment and opportunity and there are efforts across the continent to develop and grow arbitration as an industry. Whilst there are a number of countries with ambitions to develop as the epicentre of “African dispute resolution”, the crown has not yet been won and many are vying for it, including Egypt, Rwanda, Kenya and Morocco. The island of Mauritius, within Africa yet geographically equally close to many countries in Asia, is also a contender. We must not forget that the continent is huge: there is certainly room for more than one arbitration hub.







**Acceptance of arbitration by a state can come in many forms. It could mean:**

- **Allowing domestic or international arbitration for international parties when contracting with the state:** For example, states with plentiful hydrocarbon or other natural resources may allow international oil companies to enter into agreements with the state oil company which contain an arbitration clause. However, this does not necessarily mean that the arbitral procedure allowed for is fit for purpose.
- **Allowing arbitral awards to be enforced:** By signing and ratifying or acceding to the New York Convention. However, this is not enough in and of itself. An investor will require some comfort that the local judiciary will support arbitration and uphold the New York Convention, interpreting its provisions in accordance with accepted international practice.
- **Actively encouraging arbitration in that country:** This may take the form of developing a modern domestic and international arbitration act (which may be based on the UNCITRAL Model Law or other modern arbitration legislation). It may also involve support or funding of locally established arbitral institutions and/or welcoming and supporting international arbitral institutions. Again, ensuring the judiciary is trained in, and supportive of, arbitration is very important.
- **Becoming a safe venue to hold an arbitration hearing:** To become a safe venue to hold arbitration hearings, investors will want reassurance that bringing their hearing into the country will not open them up to interference by the courts of the state. Parties will also want safe and easy travel into and out of the jurisdiction, ability of parties to freely choose their own counsel to represent them in the arbitration, good "business quality" hotels and necessary infrastructure.
- **Becoming a safe seat:** This requires all of the above, together with comfort that the local judiciary will actively support, or at the very least not interfere with, the arbitral process. This reputation is built over time by demonstrating a pro-arbitration stance, with independent and impartial decisions on both challenge to arbitral awards and requests for judicial involvement to support arbitral proceedings.

### The growth and development of commercial arbitration in Africa

The potential benefits to a state in developing their judicial system and “accepting” arbitration are clear and the race to develop as the centre of African arbitration is undoubtedly on. But has this translated into growth and development in arbitration in Africa in recent years?

First though, it is important to be clear about what we mean by “arbitration in Africa”. This could mean the choice of arbitration (over other methods of dispute resolution) to resolve disputes related to African projects, contracts or other investments, or arbitrations involving African parties, or arbitrations taking place or seated in Africa.

At the moment at least, we are seeing growth in arbitrations related to Africa. However, often these disputes are between or involve international investors. Whilst African parties are involved in arbitrations, there has not been a huge rise in disputes being resolved by

arbitration domestically or internationally between solely African parties. However, some arbitrations are certainly being commenced between African parties, and local African institutions are picking up much of this work. For example, the Kigali International Arbitration Centre has registered 52 cases since its creation, and its caseload includes arbitrations between and involving parties from across the continent.

In terms of the international arbitral institutions, 2014 witnessed a rise in the number of disputes from Sub-Saharan Africa being resolved at the International Chamber of Commerce, but this level was not sustained in 2015. The number of parties from North Africa has remained stable in 2014 and 2015. Nigerian and South African parties are the most frequent African users of ICC arbitration, representing half of all parties from the continent.

The expectation in the longer term though is that this will change and that arbitration will gain considerable ground on the continent –

both in terms of the choices which African parties make for their dispute resolution forum and the scope for those parties to choose to resolve their dispute by arbitration on their continent. This is particularly the case in certain jurisdictions where we have seen continuing investment and development in arbitration.

Herbert Smith Freehills' Guide to Dispute Resolution in Africa highlights changes to legislation, attitude and approach across a number of jurisdictions in the past few years. We have seen government-led programmes to develop their jurisdictions as centres for dispute resolution, such as in Kenya, Rwanda and Mauritius. Countries are modernising their arbitration legislation, for example South Africa. The OHADA states have sought to foster and grow a consistent and stable arbitration framework. Meanwhile other states have reached out internationally to ratify or accede to the New York Convention to signal their receptiveness to arbitration. The most recent example is Angola.

The Organisation pour l'harmonisation en Afrique du Droit des Affaires or **OHADA** was set up in 1993 to harmonise commercial law in the African Franc zone. As explained in our Guide to Dispute Resolution in Africa, seventeen African countries have signed the OHADA Treaty, which sits at the heart of a project to increase the attractiveness of the region to potential investors. OHADA is an example of the quick growth and development of the legal situation on the continent: it demonstrates willingness to engage externally, while developing internal systems and laws to foster a consistent and stable structure that investors can rely on.

Increasing confidence in international arbitration as a means of resolution of commercial disputes across signatory states is among the core purposes of OHADA. OHADA has established a dual track for arbitration: institutional arbitration administered by the Cour Commune de Justice et d'Arbitrage (**CCJA**) and ad hoc arbitration where the CCJA acts as the Supreme Court.

The CCJA provides an administered arbitration mechanism. It has made considerable efforts towards modernisation and greater transparency, including the publication of decisions and a number of documents relating to arbitration.

In recent developments, the CCJA set aside an arbitral award in the case of *GETMA v Republic of Guinea* on the grounds that the international tribunal was paid greater fees than those that the CCJA had set. The decision is double-edged. It may discourage international parties from OHADA arbitration because international arbitrators will not be happy to be paid the sums the CCJA would set. But there are also some positive aspects. First, the CCJA has emphasised the need to maintain transparency throughout the arbitration process. Second, the CCJA has shown that it will uphold its decisions on the fees it sets for arbitrators. Given that the costs of many European-based arbitration institutions are deemed prohibitive in the region, the CCJA's decision will give parties comfort that the

costs set by the CCJA will not be exceeded as a result of separate negotiations by the arbitrators.

The Uniform Act on Arbitration (**UAA**) provides a basic foundation for all arbitrations seated in the 17 OHADA countries and guarantees that all OHADA-governed arbitral awards – including ad hoc arbitration awards – will be enforceable in all member states. This is particularly useful as some OHADA states are not party to the New York Convention. There are some shortcomings in the UAA and we understand that OHADA has begun a tender process for the revision of the UAA. In June 2016 OHADA also signed a partnership agreement with the ICC with the aim of enhancing cooperation between the two organisations and to promote, professionalise and standardise the practice of arbitration in the 17 member countries of OHADA.





assume that awards will not be enforced in Africa. As our Guide to Dispute Resolution in Africa shows, in many jurisdictions, even those which are not signatories to the New York Convention, it may be possible to enforce an arbitral award. It is important to get accurate information about processes and procedures and, importantly, how long these may take.

### African institutions

#### North Africa

- In Morocco the Casablanca International Mediation and Arbitration Centre (**CIMAC**) is a possibility. In 2014, CIMAC organised an inaugural arbitration conference, Casablanca Arbitration Days, which attracted a number of high profile guest speakers from the global arbitration community. The event was supported by the ICC International Court of Arbitration (**ICC**), the International Centre for Dispute Resolution (**ICDR**) and the London Court of International Arbitration (**LCIA**). However, CIMAC is in its relative infancy and it is difficult to find information, including a copy of the CIMAC Rules of Arbitration.

*“Many consider CRCICA to be the leading African arbitral institution and, as it nears its fortieth anniversary, it can point to an experienced team, high-quality facilities and a strong track record of case administration”*

**CRAIG TEVENDALE, PARTNER**

- The Egyptian capital is home to the oldest African arbitration institution, the Cairo Regional Centre for International Commercial Arbitration (**CRCICA**). Created in 1979 by the Asian-African Legal Consultative Organisation, CRCICA was ranked as one of the leading arbitration centres across the African continent by the African Development Bank in a survey published in April 2014. By 30 June 2016 the CRCICA had registered 1109 cases. In 2015, 13 non-Egyptian parties were participating in arbitration cases under the auspices of CRCICA and 10 arbitrators appointed in CRCICA-administered cases

were also foreign nationals. Non-Arab arbitrators came from the USA, the UK, Germany, France and Spain, whilst Arab arbitrators came from Egypt, Lebanon, Saudi Arabia, Libya and Tunisia.<sup>3</sup>

#### East Africa

- In Rwanda, Kigali has been making efforts to win a slice of the arbitration market, notably by opening the Kigali International Centre of Arbitration (**KIAC**). Administrating cases under its own KIAC Rules and under the UNCITRAL Rules, it provides both a domestic and an international panel of arbitrators. KIAC actively seeks to attract internationally renowned arbitrators. The centre has registered 52 cases since its creation.

#### Southern Africa

- The Arbitration Foundation of Southern Africa (**AFSA**) offers a domestic option for international investors. Based in South Africa and established in 1996, AFSA's caseload is mainly domestic, but it has facilitated at least twenty international arbitrations, involving parties from Europe, the United Kingdom, the United States, Australia, Asia and Africa. AFSA maintains a panel of more than 700 experts and has offices in Johannesburg, Cape Town, Durban and Pretoria. To increase its international reach, AFSA entered into an agreement in June 2015 with the Shanghai International Arbitration Centre in China to establish the China-Africa Joint Arbitration Centre (**CAJAC**). CAJAC aims to serve as one of the primary arbitration facilities for disputes involving Chinese and African parties.
- Although geography places Mauritius within Africa, it does not form part of continental Africa. Its island location means it is closer to many countries in Asia than to many other African jurisdictions. Mauritius can therefore be viewed as both an "on-shore" and an "off-shore" seat of arbitration. Mauritius has certainly made concerted efforts to take the crown of "African arbitration venue", including the passing of a new arbitration law in 2008 based on the UNCITRAL Model Law. In July 2011, the Government of the Republic of Mauritius, the LCIA and the Mauritius International Arbitration Centre Limited (**MIAC**) entered into an agreement for the establishment and operation of a new

**Kenya:** A number of significant reforms have been achieved in Kenya in recent years through the concerted efforts of both the government and the private sector. This includes amendment of the Arbitration Act in 2009 and the drafting of the 2010 Constitution which actively promotes arbitration and other ADR mechanisms.

As part of these reforms, Kenya established the Nairobi Centre for International Arbitration (**NCIA**) in 2013 by an Act of Parliament. Beyond its broad mandate to administer domestic and international arbitration in Kenya, the NCIA also seeks to promote arbitration by organising international conferences, seminars and training programmes for arbitrators and scholars, providing advice and assistance for the enforcement and translation of arbitral awards, and by entering into strategic agreements with other regional and international bodies. In December 2015, the NCIA published its own set of arbitration and mediation rules. These detailed rules include modern mechanisms such as provisions for the appointment of an emergency arbitrator.

**Rwanda** is a jurisdiction seeking to take the crown as a leading arbitration centre in Africa. The Kigali International Arbitration Centre currently has the largest caseload of all African arbitral institutions. Turn to page 11 of this edition of Inside Arbitration to read an interview with the Secretary General of the International Arbitration Centre, Dr Masengo.

**South Africa** offers considerable attractions as a seat of arbitration but does not have modern arbitration legislation to match. Earlier this year South Africa proposed new legislation to update its arbitration laws. For further details, please see Partner Peter Leon's article in Issue 2 of Inside Arbitration.





arbitration centre in Mauritius, to be known as the LCIA-MIAC Arbitration Centre. It administers arbitrations and other forms of ADR, whether according to LCIA-MIAC's own rules, the UNCITRAL Rules, or any other procedures agreed by the parties.

*“The attractiveness of these institutions will be enhanced once South Africa adopts legislation incorporating the UNCITRAL Model Law on International Commercial Arbitration, in relation to which a draft bill was published in April 2016”*

**PETER LEON, PARTNER**

#### West Africa

- The region has been relatively slow to adopt the dispute resolution machinery typically sought by foreign investors. Nigeria is the only country in the region to have a modern arbitration law, the Arbitration and Conciliation Act (**ACA**), based on the UNCITRAL Model Law. Nigeria is home to

various arbitral institutions, including the Lagos Regional Centre for International Commercial Arbitration (**LCRICA**) and the Lagos Court of Arbitration (**LCA**). Established in 1989, the LCA amended its Rules in 2013 to introduce its own form of emergency arbitrator procedure. Whilst Nigeria has been proactive in its attempt to foster an arbitration-friendly environment, the approach of the courts to arbitration matters remains inconsistent and court involvement can slow the resolution of a dispute considerably.

If considering any of these institutions (or indeed, any other institution with which you are not familiar), it is important to check that the rules and/or the arbitration agreement preserves the right to appoint experienced international arbitration practitioners to the tribunal and the fee levels are sufficient to ensure a high calibre tribunal would be willing to determine the dispute. Serious consideration would also need to be given to the combination of institution and seat.

#### Is an African-seated arbitration an option?

Choosing an arbitral institution is different to the seat of arbitration. The institution will administer the arbitration and provided the institution is robust and is working off a modern set of rules,

this should be effective. However, when you choose the seat of arbitration you are also choosing that country's court to supervise your arbitration, potentially decide issues like interim relief and, ultimately, consider any challenge to your award. There needs to be a modern, fit for purpose arbitration law and local judges who are impartial and with the requisite expertise in arbitration related matters, gained through training and/or experience. You need to be able to choose international counsel to represent you in the arbitration if you so wish and many laws are silent on that issue. You need arbitrator immunity in order to attract quality arbitrators. You need the parties and lawyers to be able to enter and travel into the country.

In some jurisdictions which have active and modern arbitral institutions, there may still not be these necessary underlying legal structures. Some countries do not have modern arbitration laws which are consistent with those usually found in arbitration-friendly jurisdictions, for example, in respect of the grounds available for challenging an award. Some Arabic-speaking jurisdictions require that court submissions must be in Arabic, which might limit parties' willingness to use that seat for non-Arabic language arbitrations. In others, the legislative framework might have outpaced experience and expertise, including amongst the judiciary.

### DID YOU KNOW?

In a Nigerian-seated arbitration in which the firm was involved, the Legal Practitioners Act was interpreted as precluding parties from being represented by international counsel and requiring that all oral advocacy be conducted by Nigerian counsel to avoid a potential challenge to the resulting arbitral award. This is not necessarily something that you would find out from looking at the legislation.

In all jurisdictions, there may be procedural hurdles or pitfalls that only experience can highlight. That is exactly what our Guide to Dispute Resolution in Africa is intended to do. Whilst it sets out the structure of dispute resolution in each jurisdiction, it also aims to identify the practical reality on the ground.

For many international clients and investors, assurance that all these facets are present in a particular jurisdiction is not enough. They also want evidence. And for that, you need past satisfactory experience and court decisions showing a pro-arbitration stance and sensible rulings on challenges to arbitral awards.

For many African jurisdictions this is unfortunately the sticking point. It is a vicious circle: in order to develop that jurisprudence, parties need to choose to seat their arbitrations within the jurisdiction but are reluctant to do so as they are unwilling to trust a jurisdiction without a track record. Established seats like London, Paris and New York have developed a long history of pro-arbitration decisions which is difficult to replicate in a short time unless there is a sufficient caseload, however supportive the

government and judiciary are of arbitration. But whilst it may be challenging, it is not impossible. The key is to be consistently and proactively arbitration friendly, and to persevere.

At the moment, the front-runner for the most likely contender as a “safe” African seat is Mauritius. There has been substantial investment by the government in building its profile as an arbitration centre, and it is 32nd in the World Bank “ease of doing business” rankings. There is also promising (albeit still limited) case law from the Mauritian courts regarding arbitration. The Mauritian Supreme Court has held that enforcement applications must be made to the court’s arbitration branch (a specially constituted three-judge panel designed to create a single body with advanced expertise in international arbitration), even where the arbitration is not governed by Mauritius’ 2008 arbitration legislation. Our recent experience of the Mauritian courts has been positive – we have been involved in obtaining a stay of Mauritian proceedings in favour of arbitration proceedings in Singapore, and also obtained a freezing order from the Mauritian courts in support of arbitration proceedings seated in Dubai.

Herbert Smith Freehills is an acknowledged market leader in Africa-related work, both in a transactional and disputes context. In September 2016 the firm launched its updated Guide to Dispute Resolution in Africa, providing insight into litigation and arbitration in all 54 countries in Africa. The Guide is available on the Herbert Smith Freehills website.

Whether African-seated arbitration is appropriate will depend on bargaining power, the nature of the transaction, the likely amounts in dispute, where assets are and where enforcement is likely to take place, and the seat which is being proposed.

If the concern of the counterparty is that the dispute is not “exported” outside Africa, it may be possible to agree on:

- an “African” governing law, but off-shore arbitral seat and institution
- an “international” governing law and off-shore arbitral seat, but an “African” institution
- an “international” governing law, on-shore venue of the arbitration but off-shore legal seat, with an “African” institution
- In limited jurisdictions it may be possible to keep all aspects of the dispute on-shore and still ensure that an international party is confident the dispute will be resolved effectively

We can advise on all aspects of clause drafting in Africa-related transactions. Please do contact one of the partners named in this article for advice.

### ENDNOTES

1. [www.imf.org/external/pubs/ft/weo/2016/update/01/pdf/0116.pdf](http://www.imf.org/external/pubs/ft/weo/2016/update/01/pdf/0116.pdf)
2. <http://crica.org.eg/newsletters/nl022016/index.html>
3. <http://crica.org.eg/newsletters/nl042015/nl042015a001t.html>
4. [www.kiac.org.rw](http://www.kiac.org.rw)
5. [www.lcia-miac.org](http://www.lcia-miac.org)
6. [www.doingbusiness.org/rankings](http://www.doingbusiness.org/rankings)

# A REGIONAL SUCCESS STORY THE DEVELOPMENT OF ARBITRATION IN RWANDA

A dialogue with Dr Fidèle Masengo, Secretary General of the Kigali International Arbitration Centre.



Arbitration has been a relatively recent arrival in Rwanda. In 2003, Rwanda's courts had a huge backlog of cases as the country struggled to come to terms with, and seek reconciliation following, the genocide. At that time, Rwanda was also looking to attract greater foreign investment and increase investor confidence. The Ministry of Justice therefore established a commission to look at the question of commercial justice and how to ensure the backlog of cases through the Rwandan courts did not affect investors' access to justice.

**In 2007 the Commercial Courts were established and in 2008 a new Arbitration Law based on the UNCITRAL model law was proposed**

Over the next ten years, Rwanda's justice system underwent huge change. In 2007 the Commercial Courts were established and in 2008 a new Arbitration Law based on the UNCITRAL Model Law was proposed. Rwanda also ratified the New York Convention. The aim was to ensure that commercial parties in Rwanda would be able to access an alternative way to resolve their disputes. In 2010 the Rwandan government passed an act of Parliament establishing an independent body tasked with promoting Rwanda as a venue of efficient arbitration services and a centre of excellence for research and training of professionals in ADR. That independent body was to become the Kigali International Arbitration Centre (**KIAC**). Arbitration had truly arrived in Rwanda.

Since May 2012, KIAC has become fully operational. The Centre has acquired its purpose-built facility, with modern hearing rooms, well-equipped with IT and video conference facilities. The Centre is available for use for arbitrations organised under the

KIAC rules or for ad-hoc arbitrations and also for mediations. However, despite strong Government impetus behind the project, in order for arbitration to be an effective means of dispute resolution, there needed to be a huge push to get all possible stakeholders on board. Branches of the Chartered Institute of Arbitration in Nigeria and Kenya were invited to train arbitrators in Rwanda. Rwanda now has over 300 trained arbitrators, many of whom are members or associate members of the CI Arb. The Rwandan judiciary, particularly those in the Commercial Courts, were trained in arbitration and the court's role in the arbitration process. KIAC also launched a campaign to speak to Rwanda's business community in all sectors of the economy about the potential use of arbitration.

This government-led push to promote the efficient resolution of commercial disputes, both in the courts and through arbitration was coupled with an aggressive policy to build an investor-friendly environment and to promote Rwanda as a place to do business in East Africa. Rwanda is now ranked second in Africa in the World Bank's Ease of Doing Business rankings for 2016, behind Mauritius, but ahead of South Africa.

## **Arbitrating at the Kigali International Arbitration Centre**

KIAC's management and organisation is very similar to that of many arbitral institutions. It has a Board of seven Directors, four of whom are from Rwanda and three are international members. KIAC also has a Secretariat that oversees the day-to-day case management. The arbitration rules for KIAC will look pretty familiar to anyone who has been involved in an ICC Arbitration as they draw heavily on the 2012 ICC Rules.

KIAC is also very conscious of the need for the arbitral tribunal to be representative of the user parties. When a case is registered, the case manager will provide the details of the

case to the Secretary General who then sends out the first letter to the parties. If the parties themselves have not nominated an arbitrator, the Secretary General will propose a particular candidate from either KIAC's domestic or international panel of arbitrators as appropriate. A committee of the Board of Directors will then consider the proposal and either query the choice or confirm the appointment. In the event that an international arbitrator is being considered, the committee of the Board of Directors will be formed by a majority of KIAC's international directors.

**We have some excellent lawyers on the continent who need to experience sitting with respected international arbitrators so they get the necessary training to be able to sit independently**

Once the tribunal has been confirmed, that tribunal then takes over the process with the background support of the Secretariat. KIAC does carry out some limited scrutiny of the Award before the Award is finally issued to the Parties.

## **Real growth in users**

KIAC has had 52 cases since it was established in 2012 but that statistic doesn't really show the whole picture. In the first year from July 2012 - June 2013, there were 5 cases; in the second year, 12; in the third, 11 and in the fourth 12. But in the last six months alone, we have already received 12 cases. This sign of growth is very encouraging.

All of these cases have been seated in Rwanda but they are certainly not all domestic. Almost one third of the cases







“We need a number of strong, respected seats of arbitration and arbitral institutions across the continent”  
**DR FIDÈLE MASENGO**

have involved international parties, with 12 countries, including the US, Pakistan, Italy, South Africa, Kenya and Senegal. In all of these international cases, well-known international arbitrators have been appointed. The cases have come from a wide variety of sectors from construction and engineering to infrastructure and services.

Given that all 52 of the cases have had a Rwandan seat, it has also presented an opportunity to see how effective the training of the Rwandan judiciary has been. None of the awards issue by KIAC has been set aside in the Rwandan courts - again a hugely encouraging sign.

#### **Arbitration across the African continent**

Arbitration in Africa faces some challenges.

The main challenges are ones of trust. Various governments across Africa recognise that there is potential to become the dispute resolution leader for the continent. But some governments also struggle with the idea of establishing a dispute resolution body which is truly independent. Many retain some sort of governmental control, often where the Attorney General appoints the key figures at the arbitral institution. Local lawyers and users will struggle to trust those institutions and will question their independence, particularly if they do not have full confidence in the government that established it. They also worry that if the institution is not independent, they cannot have full trust in the local arbitrators or in the courts' support of arbitration. They worry that the arbitration will simply end up being re-litigated.

You cannot convince investors to come and arbitrate in your country if you cannot demonstrate that you have the trust of your own business people. There are not many well-established arbitral institutions on the African continent and few have a large international caseload. But a good reference point has to be whether or not the institution has a strong and growing domestic caseload as that signifies trust and acceptance in the local community. There are some centres in Africa that have been established for some time but have not yet administered a single case, domestic or international. That is a good signal that something isn't quite working.

Africa also doesn't have many established and recognised arbitrators. You need experience of sitting as an arbitrator and you need to develop a reputation as an arbitrator in order to become

established. Here, Africa does struggle. We have some excellent lawyers on the continent who need the experience of sitting with respected international arbitrators so that they get the necessary training to be able to sit independently. In Rwanda, we are now gradually developing these skills in our arbitrators as we get more cases with international parties and arbitrators, but it will take time.

Africa also faces the challenge of sheer scale. We need a number of strong, respected seats of arbitration and arbitral institutions across the continent.

But with these challenges come opportunities, particularly for jurisdictions that manage to ensure that arbitration has the trust of their local business communities and can start to develop a track record. Hopefully Rwanda is well on its way to demonstrating that.

*Dr Masengo was speaking with Vanessa Naish, Professional Support Consultant, Herbert Smith Freehills.*

Dr Fidèle Masengo is a Board member of the Kigali International Arbitration Centre (KIAC) and KIAC Secretary General.

Dr Masengo has served in various key legal positions in Rwanda, most notably in the Rwandan Ministry of Justice as the Director of Public Prosecution Services and Relations with the courts (from 1999 to 2001) and as the Director of the Administration of Justice (from 2001 to September 2004). Dr Masengo also served as Legal Adviser and long term consultant for Rwanda Utilities Regulatory Agency and worked for the USAID-LAND Project in Rwanda.

Dr Masengo holds a Bachelor's Degree from the National University of Rwanda (1999), a Master's Degree in Economic Law from Catholic University of Louvain La Neuve-Belgium (2003) and a PhD in Law from the University of Antwerp-Belgium (February 2010). He lectures in law at a number of universities in Rwanda, and speaks extensively on arbitration.

# SPOTLIGHT ON: PETER GODWIN REGIONAL HEAD OF DISPUTES ASIA

After a school careers counsellor steered him away from a degree in accountancy, Peter Godwin went into law, and hasn't looked back. Here, he reflects on a long legal career, life in Asia, and international arbitration in the Japanese context.

## What brought you to Asia originally?

I studied maths and sciences at school, and was heading towards a degree in accountancy, until my school careers teacher warned me that I would find it "boring". I ended up reading law at Bristol University – really for want of any better idea – then stumbled into the legal hiring "milk round", and landed a training contract at a London City firm.

A few years later, my wife was posted to Hong Kong, and I followed her as a trailing spouse. I joined Herbert Smith Hong Kong in July 1998, and spent my first six months with the firm in a portakabin at Hong Kong Airport, assisting the Airport Authority with its enquiry into multiple failures that had occurred when the airport opened. After that, I spent a few years doing IP and general commercial litigation in the Hong Kong courts.

**"My move to Japan was the result of a chance encounter in a Hong Kong taxi queue with David Willis, then the firm's Asia Managing Partner"**

He had just come off the plane from Tokyo, where he had signed a lease on temporary offices, and asked if I fancied joining the new office. My wife and I went for a look-see, which

involved a side-trip to Disneyland with our three year old son. He loved it so much that we had no choice but to move. I signed a two-year contract, and here I am, sixteen years later.

## Until very recently, Japan was known for avoiding disputes, not arbitrating them. What did a foreign litigation lawyer think he could do there?

When I arrived in Tokyo in 2000, Japanese companies did everything they could to avoid litigating a dispute. If they were ever involved in litigation, it was as defendants, having failed to settle. It was extremely rare for a Japanese party to initiate a claim. Involving a foreign lawyer was unheard of. The firm had sent me to Tokyo to do international arbitration, but no Japanese client I met had ever even heard of it, and I myself had never done one. Not an auspicious start.

I set out to educate both myself and my clients about the process of arbitration. It's taken time, and a lot of shoe leather, but the market has slowly changed. The recession in the mid-2000s played a significant part. Japanese companies found themselves without the funds to settle claims against them, so they started to fight them. At the same time, these companies were seconding more employees abroad, particularly to the US. The secondees were influenced by the US mindset and practice, and returned to Japan more comfortable with the idea of openly defending a claim. In the last five years, things have changed even more.

Japan has evolved into a significant market for cross-border, contentious, legal work. The majority of my work today involves helping Japanese clients to bring claims, usually against non-Japanese counterparties.

## Compared to Singapore, Hong Kong or even Korea, Japan isn't usually associated with arbitration – has it really changed that much?

Yes and no. As I have said, Japanese clients are much more comfortable with the idea of pursuing or defending a claim than they were 15 years ago. There is much broader awareness of international arbitration at the corporate level, particularly among the trading houses and other sophisticated companies that do business overseas. Originally, senior Japanese lawyers tended to be more familiar with the courts, and steered their clients toward litigation, not arbitration. Most good-size Japanese companies now understand the advantages of arbitration, and consider it the preferred dispute resolution mechanism for their deals.

A number of Japanese law schools now offer arbitration courses (including one at Tokyo University that I teach). The Japan Commercial Arbitration Association (JCAA) has modernised its rules. In addition, Japanese lawyers have begun to understand the benefits of specialising in disputes work. When I first arrived, law students all wanted to focus on transactional work which was seen as more prestigious.





So, there has been some progress, but relatively little and relatively slow.

**"There remain a number of hurdles for Japan to overcome before it can compete with other Asian arbitral centres"**

For example, some Japanese clients have tried arbitration but had bad experiences, often because they have instructed lawyers who don't understand the process themselves, or lack experience. Understandably, these clients are reluctant to arbitrate again.

To avoid this, clients must instruct specialist arbitration lawyers, most of whom are registered foreign lawyers in Tokyo, or lawyers based outside Japan. However, Japanese law distinguishes between international and domestic arbitrations, for the purposes of instructing counsel. An "international arbitration" is defined as "a civil arbitration case which is conducted in Japan and in which all or part of the parties are persons who have an address or a principal office or head office in a foreign state". This is interpreted so that an arbitration between two Japanese subsidiaries of non-Japanese parent companies is not international arbitration, even where the parties' agreement clearly indicates that they intended any arbitration to be international.

Clients cannot instruct foreign lawyers unless the arbitration is international. Instead, they are forced to fall back on the less experienced local lawyers.

Yet, because there are so few arbitrations seated in Japan, there are few opportunities for these lawyers to gain the experience they need; it becomes a vicious circle.

Finally, Japan has not invested in arbitration to anything like the same degree as other Asian centres. For example, though there are perfectly adequate hearing facilities in Tokyo, it lacks anything comparable to HKIAC's state-of-the-art rooms, or Singapore's Maxwell Chambers arbitration hub. While this remains the case, Japanese parties have little incentive to select a Japanese seat over one outside Japan. In turn, choice of seat influences choice of rules: the majority of HSF's Japan-related cases are under SIAC or ICC Rules, not those of JCAA, which registered only 20 cases in total during 2015, and 14 the previous year.

I have witnessed many improvements during my time in Tokyo, but there is still more to do.



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# A VIEW FROM GERMANY IS GERMANY ON ITS WAY TO BECOMING A TRUE ARBITRATION POWERHOUSE?

Germany, the dominant economy in the European continent, appears to be an anomaly in the world's current economic climate. While other countries continue to discuss concerns regarding the Euro or are worried about the UK's exit from the European Union, Germany's economy works like Swiss clockwork with quite literal German efficiency. Germany manages to maintain its GDP and to grow its exports, with exports increasing by 6.2% to €1,193.6 billion compared with 2014.<sup>1</sup> Germany's largest companies help to power this continuing growth as world leaders in auto manufacturing, finance, electronics, automation, pharmaceuticals and chemical production. Even the US legal enquiries focused on Deutsche Bank or VW led only to a temporary shiver in the stock price but did not affect the market's generally bullish attitude. Germany also hosts the European headquarters of many international corporates, including numerous Japanese and Chinese companies. Given Germany's importance on the world stage and the extent of its international trade, it comes as no surprise that arbitration has grown in popularity and importance as a method of dispute resolution for cross-border transactions.



The growth in popularity of arbitration in Germany is driven by the same factors that steer any multi-national towards arbitration. Confidentiality, autonomy, party choice, neutrality of venue and the ability to appoint arbitrators with experience in the sector or subject matter are all considered crucial. While some national court systems may have their attractions, particularly in Germany where a statutory cap on costs borne by the losing party makes litigation attractive, these attractions may not outweigh the very obvious draw of arbitration.

The involvement of German parties in arbitration is very apparent from the statistics of one of the major arbitral institutions, the International Chamber of Commerce (ICC). German parties were the second most frequent nationality using ICC arbitration in the cases filed in 2015, up from fourth in 2014. The German arbitral institution, DIS, has also seen growth since 2005, from 72 cases in 2005 to 140 in 2015, many of which are international, rather than domestic.

Germany's importance in arbitration is not confined to the realm of commercial arbitration. As the creator of the concept of a Bilateral Investment Treaty, albeit without an investor-state dispute settlement mechanism, it is unsurprising that Germany has one of the highest number of BITs and Treaties with investment provisions - 132 and 54 respectively, that are in force.<sup>2</sup> It is therefore also not a surprise that Germany features highly as the nationality of claimants in investor state cases, with 53 known cases where the claimant is German.<sup>3</sup> Germany emerges relatively unscathed though in terms of claims made against it as the respondent state, with only three known cases.

So it is clear that German parties are arbitrating in both the commercial and investment arbitration spheres. And German arbitration practitioners are also in high demand, both as counsel and arbitrators. The ICC statistics for 2015 demonstrate that German nationals are the fifth most frequent nationality chosen, behind the UK, USA, Switzerland and France. Yet whilst Germany features strongly for its users of arbitration and for its arbitrators, Germany is not as well renowned as many other jurisdictions for being an arbitral seat. Germany does not have one, single place where arbitrations take place.

Germany's federal system means that Frankfurt, Hamburg, Dusseldorf, Munich, Stuttgart and Berlin are all commonly chosen seats of arbitration. But as a result, that "key" city is somewhat lacking. In contrast, the cities of Paris, London, Stockholm, New York and increasingly, venues like Hong Kong and Singapore, far eclipse any alternative venues for arbitration within those countries: it would be a rare group of international parties that

When parties are choosing a seat for their arbitration, German cities may also lose out on the basis that another seat has a particular perceived quality. Stockholm may be seen as "neutral" while Paris has a long established history of arbitration and is the centre of operation of the ICC. London has the benefit of English as a global language and the prevalence of English law in contract and finance transactions. The Asian centres benefit from proximity to many of the newer, fastest growing corporates.

seated their English, French or Swedish seated arbitration in Bristol, Lille or Örebro!

Because of the vast involvement of German business in multi-national trade and industry, German arbitral seats may also not be seen as neutral; it may be viewed as better to choose another civil law jurisdiction rather than offering a home turf advantage to one of the contracting parties.

But all of Germany's potential seats warrant real consideration and their attractions are starting to be properly recognised. Germany is a modern and efficient economy, offering excellent infrastructure and hearing venues, whilst being very easily accessible from across Europe and the wider world. A signatory to the New York Convention, Germany also has modern arbitration legislation based on the UNCITRAL Model Law, incorporated as §1025 ff of the German Code of Civil Procedure (ZPO). The Courts of Appeal of Germany's Federal States all have experienced judges who are assigned to deal with applications related to, or in support of, arbitration. The grounds for annulling or challenging an arbitral award under German law are limited, offering parties real legal certainty. Germany also offers strong options for arbitral institutions,

from DIS to the Germany Maritime Arbitration Association and the Chinese European Arbitration Centre in Hamburg. Frankfurt also offers the Frankfurt International Arbitration Centre to host Treaty arbitrations under the ICSID Convention following an agreement of cooperation with ICSID in 2005.

Even if the parties do not choose a German seat, the increase in German users of arbitration makes German counsel attractive. Arbitration agreements may require that arbitrations be held in the German language or bilingually. Many of Germany's international arbitration counsel will be fluent in English and potentially other languages as well. For the German client, these language skills, understanding of international arbitral procedure, but also the national court process can be invaluable. German counsel will recognise that their German client will not be expecting the cross-examination process. German counsel may also be able to push for a more "civil law" approach to document production and seek to limit the burden on their client.

For all these many and varied reasons, it is perhaps of little surprise that Herbert Smith Freehills' German disputes practice, opened in Frankfurt and Berlin in 2013, has developed into a full-size offering, with an additional office opened in 2015 in Dusseldorf. Opening with one partner, Dr Mathias Wittinghofer, the team now includes two additional well-known German arbitration practitioners, Dr Patricia Nacimiento and Thomas Weimann. Their team of associates has also expanded, with 8 associates working full time on arbitration matters in Germany. Working for both German and international clients on commercial and investment arbitration, the team is set to continue their rapid growth in coming years.

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1. [www.destatis.de/EN/FactsFigures/NationalEconomyEnvironment/ForeignTrade/OverallDevelopment\\_Annual.html;jsessionid=FOA07018912D026213EDF17D26FB7F78.cae4](http://www.destatis.de/EN/FactsFigures/NationalEconomyEnvironment/ForeignTrade/OverallDevelopment_Annual.html;jsessionid=FOA07018912D026213EDF17D26FB7F78.cae4)  
2. <http://investmentpolicyhub.unctad.org/IIA/CountryBits/78#iialInnerMenu>  
3. <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>



# A GLOBAL PERSPECTIVE ON AVAILABILITY OF SECURITY FOR COSTS AND CLAIM IN INTERNATIONAL ARBITRATION

## MIRAGE OR OASIS?

Security for costs and security for claim are interim protective measures available during an arbitration. They are sought when one side is concerned that the other side may not have enough money to pay an adverse costs order or satisfy an award made against it. They require the party against whom they are ordered to set aside a sum of money to satisfy any eventual award or costs order. In theory, they are available under most arbitral rules but in practice they can be difficult to obtain in international arbitration. In this article, **Elaine Wong** and **Gitta Satryani** in Tokyo and Singapore respectively, and **Chris Parker** and **Liz Kantor** in London, draw on their recent experiences to consider the "optimum" conditions for seeking and obtaining these interim reliefs.

### What is security for costs?

Security for costs is an interim measure that allows an applicant (usually the respondent) to secure an amount representing its arbitration costs, ie legal costs, tribunal's fees, administrative costs etc. This measure is grounded in the common law rule of costs following the event which provides that a successful party in legal proceedings is entitled to recover its legal and other costs incurred in the arbitration from the unsuccessful party.

There must be good reasons for securing such sums in advance, based on the claimant's inability to pay an adverse costs order against it. If security for costs is granted in favour of the applicant, the opposing party will be required to set aside a sum of money, usually an estimate of the applicant's arbitration costs, either in an escrow account or more commonly by way of a bank guarantee, until the tribunal issues its final award dealing with arbitration costs.

### What is security for claim?

Security for claim is an interim measure that allows an applicant (ie the claimant or the respondent in respect of its counterclaim) to

secure the amount that it is claiming against the opposing party before the award is issued.

Like security for costs applications, there must be good grounds for securing the amounts claimed in advance of an award to that effect, based on the opposing party's likely inability to pay.

### Availability of security for costs and security for claim in international arbitration

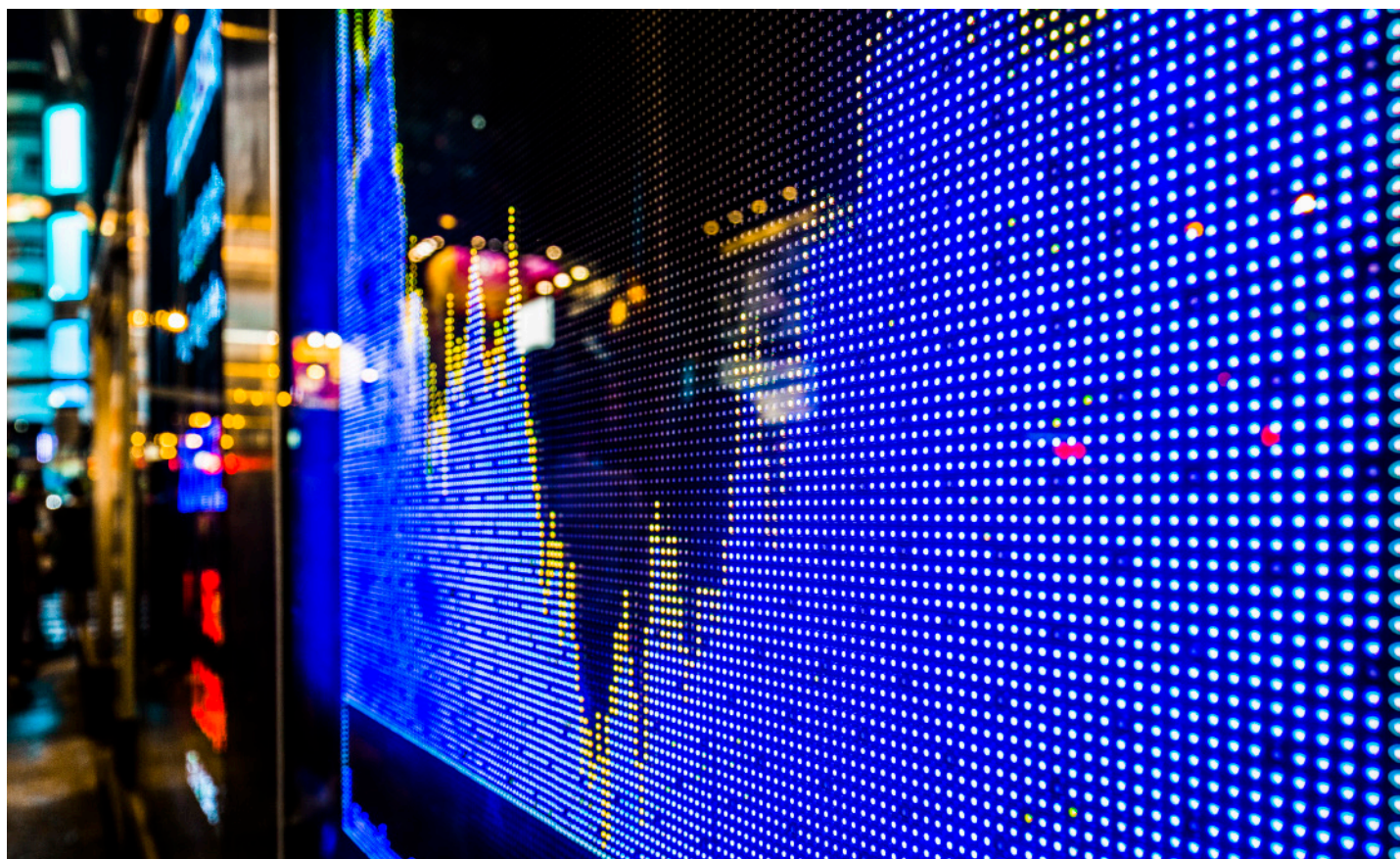
Most arbitral rules give a tribunal the power to award security for costs and claim, either expressly or by implication. The London Court of International Arbitration (**LCIA**) Rules and the Singapore International Arbitration Centre (**SIAC**) Rules both expressly provide powers to award security for costs (Article 25.2 and Rule 27(j) respectively) and security for claim (Article 25.1(i) and (iii) and Rule 27(k) respectively).

In contrast, the International Chamber of Commerce (**ICC**) Rules and the United Nations Commission on International Trade Law (**UNCITRAL**) Arbitration Rules do not make specific reference to these forms of relief in Article 28 (ICC Rules) and Article 26 (UNCITRAL Arbitration Rules) but it is recognised and accepted that they fall within

the ambit of the general power awarded to tribunals to order conservatory or interim measures. Similarly, on the investment arbitration front, Article 47 of the International Centre for Settlement of Investment Disputes (**ICSID**) Convention and Rule 39 of the ICSID Arbitration Rules, which grant tribunals the power to order provisional measures, have been used by a party seeking security for costs.

Given their wide availability in the commonly used arbitration rules, you might assume that these measures would often be applied for by parties in arbitration proceedings. Yet this is not the case. Applications for either measure are seldom made and many in the arbitral community consider them difficult to obtain. A 2014 ICC publication looking at decisions concerning security for costs in ICC arbitrations noted that of the 9 or 10 applications surveyed, only three were successful. Where granted, they were granted only in part and subject to conditions.

Yet this picture is not mirrored in our own more recent experience. While security for costs or claim applications have arisen in only a small percentage of our global caseload, we have seen more positive outcomes, with some 50% of applications being granted. Furthermore, the arbitrators have been



ARBITRAL RULES	SECURITY FOR COSTS	SECURITY FOR CLAIM
UNCITRAL	General power under Article 26 - <i>Interim Measures</i>	
ICC	General power under Article 28 - <i>Conservatory and Interim Measures</i>	
CIETAC <sup>1</sup>	General power under Article 23 - <i>Conservatory and Interim Measures</i>	
ICDR <sup>2</sup>	General power under Article 24 - <i>Interim Measures</i>	
ICSID	General power under Article 47 of the ICSID Convention read with Rule 39 - <i>Provisional Measures</i>	
LCIA	Article 25.2	Article 25.1
SIAC	Rule 27(j)	Rule 27(k)
HKIAC <sup>3</sup>	Article 24	General power under Article 23 - <i>Interim Measures of Protection and Emergency Relief</i>

receptive to the idea of granting relief in the particular circumstances in play in each of those cases.

Does this indicate a shift amongst arbitration practitioners towards using these forms of relief and amongst arbitrators to granting them? It may well be that parties, counsel and arbitrators have begun to recognise that in the right cases, these are tools which can help protect parties and, used appropriately, assist in bringing about the efficient and effective resolution of disputes. If this is so, what are the

"right cases"? When should security for costs and security for claim be sought and what are the criteria needed to obtain them?

**Criteria for obtaining security for costs and security for claim**

There is no uniform test which applies to an application for security for costs or claim and the rules of arbitral institutions are generally silent as to the exact circumstances that need to exist or conditions that need to be met. The 2015 Guidelines issued by the Chartered

Institute of Arbitrators in relation to security for costs applications suggest that tribunals should take into account:

- the prospects of success of the claims and defences;
- the claimant's ability to satisfy a future adverse cost award and the availability of the claimant's assets; and
- whether it is fair in the circumstances to make the order<sup>ii</sup>.





#### SECURITY FOR COSTS

Likelihood that the party who would be subject to the order would satisfy a final costs award

Whether the tribunal has *prima facie* jurisdiction over the merits of the claim

Whether there has been a change in financial circumstances since the parties agreed to arbitrate their disputes (whether the balance of risk allocation under the contract has changed)

Whether the likely harm prevented (by the order sought) outweighs the likely harm caused by granting the application (the 'balance of convenience')

Whether it is fair in all the circumstances to make the order (the 'fairness test')

The prospects of success of the claims and defences in the case (whether the applicant has a *prima facie* case on the merits)

#### SECURITY FOR CLAIM

Likelihood that the party who would be subject to the order will satisfy the final award

Our experience suggests that in considering applications of this nature, tribunals are less concerned about what law should be applied and tend instead to focus primarily on the justice of the case – for example, in the context of security for costs, balancing the applicant's interests and the risk that any order granted may prevent the opposing party from pursuing a meritorious claim. Based on our experience, the above table distils factors that have been considered relevant or important for tribunals when considering such an application. It is important to note that which (if any) of these principles will be relevant will depend on the particular facts of a case: as discussed below, some tribunals will disagree about the relevance of, or the weight to be placed on, a number of these criteria.

Clearly, these considerations (and the major arbitration rules) leave the tribunal with a considerable latitude to reach what it considers to be the right outcome – indeed, the balance of

convenience and the fairness test are very much dependent on the equities of the case and are often assessed by tribunals at the end of their consideration to justify ruling one way or the other. To use the words of ICC's previous Secretary General, these considerations "exemplify arbitration as an art"<sup>iii</sup>.

#### Making the case for security for costs or claim: considerations for the applicant

##### i. Proving the opposing party's inability or unwillingness to pay

It is fundamental for the applicant party to show that the other party does not have the finances to satisfy an adverse costs order or award. The applicant party will invariably need to demonstrate that there is a high risk that the opposing party will not satisfy any final award, on costs or on the claim, as the case may be. The applicant may be faced with the practical problem of producing evidence to this effect. Evidence required may involve the

claimant's financial records, evidence of lateness or missed payments and may require evidence from fact witnesses familiar with the opposing party's financial position.

Tactically, a good way of addressing this issue is to write to the party that would be subject to the order (or their lawyers) asking for information regarding their financial status, which, if provided, can then be used to evidence the application. This can often be a win-win tactic. You may obtain the information you need to make the application or, in the event that evidence of financial solvency is provided, save yourself the cost and time of making an application that will likely fail. Equally, if the party refuses to provide such information, that refusal can also be evidenced in the application, and may be a critical factor in the tribunal's decision. In a recent successful application for security for costs, the tribunal listed as a key consideration in its decision to award our client security for





costs the fact that the party responding to the application had led insufficient evidence of its financial status, such that the tribunal could not be satisfied that it would be able to meet an award of costs.

Where security for claim is sought, it is very unlikely to be enough to simply show that the opposing party is resident or has assets outside of the jurisdiction of the arbitral seat or is resident or has assets in a jurisdiction where the enforcement record is uneven. As discussed below, these may well be seen as part of the risk the applicant took in choosing to transact with the opposing party in the first place. More commonly, the applicant needs to show that the opposing party is actively seeking to move or dissipate its assets to avoid paying a future award against it. This information may not be easy to come by. It may require detailed analysis into a company's legal structure and ownership, and the services of local legal advisors or investigators to carry out in-depth analysis into transactions which may evidence such an intention.

In a recent successful security for claim application, the applicant was able to persuade the tribunal by providing evidence that:

- the opposing party was a state-owned enterprise with no significant assets outside of its home state, coupled with evidence that the courts in that state have a poor record of enforcement of arbitral awards, especially arbitral awards against the state and state owned entities;

- the opposing party was actively trying to move assets back into its own jurisdiction and out of reach of the applicant;
- the opposing party's key asset, over which the applicant had security, was in the process of being wound up on suspicious grounds and was subject to a foreign injunction preventing enforcement of that security.

#### ii. The opposing party's financial circumstances: material change and the role of the applicant party

Once the applicant has demonstrated the respondent's likely inability to pay, further hurdles need to be overcome. For example, it will assist an application if the applicant can demonstrate that the respondent's inability to pay has not been caused by the applicant's actions. In looking at this question, the tribunal will usually focus on whether that "causation" has been in some way intentional or "unfair"; not simply as a result of the commercial terms of the parties' agreement. Equally, tribunals will be unlikely to exercise their discretion in favour of an application for security for costs, however impecunious the opposing party, if they believe it is being used to stifle a genuine claim.

Another common roadblock to an order being granted is the degree or extent of the change in circumstances of the opposing party's financial position between the time the arbitration agreement was entered into and the commencement of the arbitration. The argument here is that the risk of the counterparty's impecuniosity should have been investigated as part of the due diligence carried

out before contracting and factored into the parties' commercial terms. The application will therefore be stronger if it can be shown that any change in the other party's financial position was unforeseeable at the time the arbitration agreement was entered into.

In one recent arbitration, the tribunal hearing the application for security for costs noted that the applicant did not seem concerned when it entered into the agreement containing the arbitration clause that the opposing party was a special purpose vehicle with no sizeable assets. On this basis, the tribunal did not think that the opposing party's impecuniosity was sufficient reason to grant security for costs for the applicant.

Conversely, in an application for security for claim where the writers successfully obtained an order securing a portion of the amount in dispute, the tribunal noted that our client (the applicant) was comfortable entering into the arbitration agreement because the opposing party's participation (and financing) was backed by a state party. However, by the time the arbitration was commenced, the opposing party had lost the state-backed financing. This change was considered by the tribunal to swing the balance in favour of granting security for claim.

Of course, the weight attached to arguments such as this may vary from case to case: if, for example, the applicant can show why issues of this nature were not a concern at the time of the contract (or, at least, not a concern that





could be addressed), it may be able to persuade the tribunal to attribute limited weight to this criteria.

### iii. Relevance of the merits

Whether the prospects of the applicant's claim should be a relevant consideration in granting these protective measures is often debated. Whilst the merits of a claim are usually a key factor in court applications (and indeed are specifically listed in the test under the English Civil Procedure Rules, for example), it is arguable that different considerations apply to arbitration proceedings. This is because the judge hearing the application in court is usually not the judge who will decide the merits of the dispute. Conversely, there is often a concern in an arbitration context that, as the same tribunal hearing the merits of the dispute will also decide interim applications, taking account of the merits could amount to a

prejudgment of the merits of the case before any evidence has been heard.

In a recent successful application, the tribunal even noted the paradox that the Chartered Institute of Arbitrators Guidelines refer to both the relevance of the merits of the claims and the need not to prejudge the merits of the case. On that basis, the tribunal stated that it did not consider the merits an appropriate factor in that case.

Nonetheless, where a party believes it has a robust position on the merits, it may still be worth making the most of the merits position, as this could still influence the decision-making process implicitly, even if the tribunal does not wish to be perceived as prejudging the merits of the dispute.

### iv. Relevance of third party funding in security for costs applications

Applicants have increasingly tried to rely on the use of third party funding by the opposing party to justify security for costs on the basis that (i) the claimant/opposing party is likely to be impecunious (hence the need for third party funding) and will not be able to satisfy any costs award, and (ii) the third party funder who is not a party to the arbitration has no obligation to satisfy any costs award and will be able to walk away if unsuccessful.

There is currently no consensus as to whether this fact alone is sufficient to order security for costs. In a particular security for costs application in which we were involved, the tribunal considered this to be relevant but not determinative. There had to be other factors, ie exceptional change in circumstances, to persuade the tribunal.





However like an oasis in the desert, security for costs or claim are not often available and there is certainly a high bar to be met in order to obtain these reliefs

The concern over third party funding has been seen most clearly in recent investment treaty cases. In the ICSID case of *RSM v St Lucia*<sup>iv</sup>, which was the first known case to grant security for costs in an ICSID matter, the claimant was relying on third party funding to bring the claim against St Lucia. The majority of the tribunal found that the third party funding, coupled with the claimant's proven history of non-compliance with costs orders and awards gave rise to concerns that the claimant would not comply with a costs award against it. Some members of the tribunal had very strong views on the subject, with one arbitrator suggesting that, once third party funding was demonstrated, the onus was placed onto the claimant to make a case as to why a costs order should not be made. Another, however, strongly disagreed and maintained that third party funding should not have been a factor in the decision-making process.

#### v. Your tribunal's legal approach

Orders for security for costs are part of the civil procedure of many common law systems. They aim to protect respondent parties from bearing the legal costs of an unmeritorious claim by an impecunious claimant. This, in turn, is tied to the underlying principle that a losing party should have to pay the costs incurred by the successful party. While rare, security for claim is also an accepted part of the common law approach, again, seeking to protect the worthy claimant from efforts by the respondent to dissipate assets.

However, whilst this principle is accepted in common law jurisdictions, it is rarely seen in civil law jurisdictions. This is not to say that arbitrators coming from civil law jurisdictions will never grant security for costs. Experienced arbitration practitioners from all backgrounds will be open to the idea of such an application,

but some civil law practitioners may be less ideologically inclined towards the idea. Where a party is aware from the outset that they may wish to make such an application, this may be a relevant factor in choosing their arbitrator.

#### Tactics for making and defending a security for costs or claim application

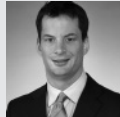
The discussion here is intended to show that these reliefs are not illusory – they have been made available to applicants who are truly in need of protection. However, like an oasis in the desert, they are not often available. This does not mean that prospective applicants should write them off. They bring very real benefits and under the right circumstances can (and should) be granted.

As discussed above, certain approaches and tactics may assist an applicant in maximising its

chances of success. These include creating a paper trail of refusal to provide financial information, collating evidence of bad faith behaviour or the dissipation of assets, and tailoring the application so that it fits with the tribunal's background. Prospective applicants should always consider whether they should make an application early on in the proceedings, carefully considering whether the evidence needed to tip the balance in its favour is available.

On the flipside, the opposing party needs to be alive to the evidence that an applicant will need to provide to convince a tribunal that the balance of convenience and fairness lies with them. For example, it will want to make arguments that will resonate with the tribunal, appear co-operative and dispel any conspiracy theories. It may be worth arguing, for example, that the applicant should have known the position all along and that the position has not changed. In a security for costs context, the claimant will often argue that a genuine claim would risk being stifled by an order. While it might seem counter-intuitive, real consideration should also be given to whether it may be advantageous to co-operate with requests for financial information or evidence of ability to pay or even to provide bank guarantees.

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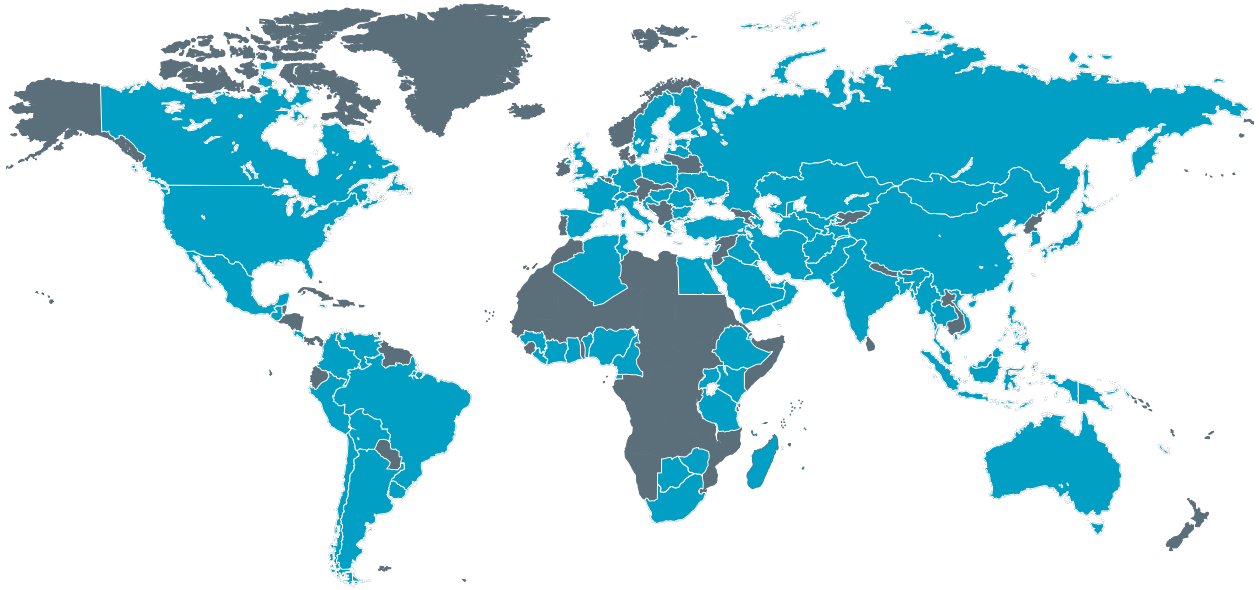
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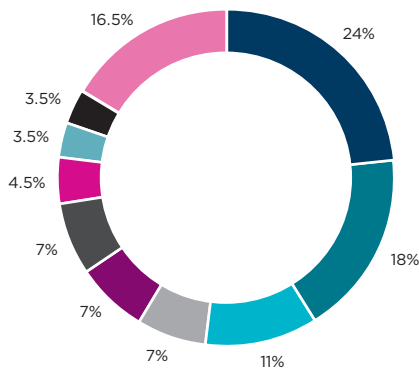
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VALUE OF THE CLAIMS AND COUNTERCLAIMS IN OUR PORTFOLIO

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LIVE ARBITRATIONS

**37**

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**14**

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# SPOTLIGHT ON: DR LARRY SHORE

Dr Larry Shore, partner in the New York office, leads the firm's investment treaty arbitration practice. Larry worked in the HS-London office from 1995-2008, and then moved back home to the United States, serving as co-head of Gibson Dunn's international arbitration practice group. When Herbert Smith Freehills opened in New York, he returned to the firm to help build our arbitration group in the Americas. Here he discusses how he came to be interested in public international law/treaty arbitration, the differences between working in London and in the US in disputes, and his views on the future of international arbitration in the US.

## What motivated you to work in the treaty arbitration field?

I was fortunate to attend law school at Emory University when Thomas Buergenthal had just joined the law faculty. In addition to living one of the most extraordinary lives of the twentieth and twenty-first centuries – which included being sent to Auschwitz as a child -- Professor Buergenthal became one of the earliest and best modern public international law scholars in the United States. Buergenthal was at that time also a judge on the Inter-American Court of Human Rights. Although I took his course in advance of the treaty arbitration mini-explosion of the 1990s, he made the law of treaties an intriguing subject of study and law practice. Simply recalling Thomas Buergenthal's clarity, modesty, and breadth and depth of knowledge has continually given me energy to work in the fields of public international law and international arbitration generally, and treaty arbitration specifically.

## How did a law school interest translate into law practice?

Immediately after law school I started working as a litigation associate at Williams & Connolly in Washington, D.C. I did a lot of work with Gregory Craig (who later served as President Obama's first White House Counsel), and became involved in a number of cases that involved diplomatic immunity and the foreign relations law of the United States. That led me to work for a year in the State Department's Office of the Legal Adviser, where I worked in

the Ethics department and prosecuted foreign-service officers for failing to carry out US foreign policy. On Greg Craig's sound advice, I declined the opportunity to work on the US government's "Case B1" under the Iran-US Claims Tribunal; this notorious military sales case apparently only recently settled, as part of the 2016 US-Iran 'agreement'. We had a large docket of cases in Ethics, and it was a tremendous experience appearing before three-member Foreign Service Grievance Board tribunals. When I moved to London in 1995, I was hired by Lawrence Collins and Julian Lew at Herbert Smith (Lawrence later became a Law Lord). There were more commercial than treaty arbitrations in the firm, but I was able to work on a number of cases under the NATO Status of Forces Agreement. Christopher Greenwood QC, now a judge at the International Court of Justice, often worked with us. It was a good introduction to treaty disputes.

## How did this background help you develop into a treaty arbitration practitioner?

By the time I started doing treaty arbitration advice and cases, I had been around some great public international law lawyers (including the ghost of Dr Francis Mann) and had studied how they approached problems. Moreover, I had been an advocate in a number of complex, high-value international commercial arbitrations, working closely with Lawrence Collins, Julian Lew, and Adam Johnson. As a more junior lawyer I had also

been trained in cross-examination and oral argument by terrific trial lawyers at Williams & Connolly.

"So when I began to appear before distinguished treaty arbitration panels, I felt that I was in a position to develop arguments and examinations that give our clients the opportunity to prevail in their disputes"

Once I started sitting as an arbitrator in commercial cases, I also became a more effective advocate in treaty cases: I learned very directly, for example, that an angry advocate rarely is a persuasive advocate. It now seems that many counsel seeking to work in this field believe that it is important to have been a BIT arbitration lawyer from birth. I think the field is not so arcane. Neither, for that matter, is international commercial arbitration. There is no necessary path; you have to be an advocate with an appreciation for and experience of difference, and you have to be willing to immerse yourself in the awards and judgments of a variety of international tribunals.





**Speaking of difference, you have practiced in offices in London, New York City, and Washington, D.C. What are the key differences in being an international arbitration practitioner in the US as compared to the UK?**

"It is often said that international arbitration in the US is more parochial, more US litigation-style, less 'international' than it is in London or in Europe"

Probably that is true in terms of a concentrated mass of practitioners with vast international arbitration experience, which exists in London but not as much in New York (or anywhere else in the US). But if your seat is New York and the governing law of the contract is New York law, and your tribunal members are Americans with significant international arbitration experience as are your opposing counsel, I think the procedure and tone will feel every bit as international as a London seat/English law case populated by Germans, Italians, Dutch, French, and English. But I have to concede that, as much as I love my home jurisdiction, it is the only place in the world where you are at risk of hearing your opposing counsel in an arbitration request a 'discovery deposition'.

**What trends do you see in the US arbitration market, commercial or international investment? And how is the NY office positioning itself to take advantage of those trends?**

Like anywhere, high value international arbitration matters involving US parties remain heavily concentrated in the energy, construction, engineering, telecommunications, and license distribution sectors. The pharmaceutical and intellectual property sectors have also become very significant sources of arbitration cases. In geographic terms, a US-based arbitration team is well-placed to do LatAm-related cases. Until very recently, HSF-NY was a disputes-only boutique, so we have been pragmatic and careful in building a New York team that would not be too dependent on a transactional platform. Christian Leathley is building a LatAm-facing group of Spanish-speaking arbitration specialists. Uniquely in New York, we have two arbitration specialists (including of counsel Amal Bouchenaki) who are native Arabic speakers, and this gives the office an opportunity to get Middle East and northern African-related work, often together with the Paris/Dubai offices, which have been incredibly supportive of the New York-based group, as have all of our offices in Asia. We have a great group of NY-qualified associates who also have substantial international arbitration experience. Another key aspect of building an arbitration practice in New York

City is expanding our non-contentious offerings in New York. We have made an excellent non-contentious start with two project finance lawyers who have substantial Latin American experience. So we think we are accomplishing in New York what the great Herbert Smith public international law lawyers accomplished in previous decades in London: being the firm to see when a treaty dispute arises.



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# "REX NON POTEST PECCARE": ARBITRATION AND STATE IMMUNITY

## What is state immunity?

- Historically, most legal systems recognised a doctrine known as "absolute immunity", whereby no sovereign state could be sued before the courts of another state without its clear and express consent.
- However, as states have engaged in increasing commercial activity, many jurisdictions have embraced a "restrictive" doctrine of state immunity. In a number of jurisdictions, the restrictive doctrine has been enshrined in statute (for example, in the UK by the State Immunity Act 1978 ("SIA") and in the US in the Foreign Sovereign Immunities Act 1976 ("FSIA")). It is also recognised in international conventions such as the 2004 UN Convention on the Jurisdictional Immunities of States and Their Property, and the 1972 European Convention on State Immunity. Central to the restrictive doctrine is a legal distinction between public or sovereign activities, where states generally continue to enjoy immunity, and commercial activities, where they do not.
- State immunity will apply at two principal stages: first, at the jurisdiction stage (immunity from suit) and, second, at the execution stage (where a party seeks to enforce a judgment or an award against state property).

## Which law is relevant?

- The applicable law on state immunity depends on the forum in which a defence of immunity is raised and in this sense can be seen as a matter of procedure, rather than a substantive issue under the governing law of the contract. Accordingly, parties must consider the state immunity laws of any country in which: (i) the courts may have jurisdiction to determine a dispute; and (ii) enforcement and execution is likely to take place.
- It may also be necessary to consider the law of the state itself with regard to whether the state entity in question is properly to be considered as an emanation of the state and therefore to have the benefit of immunity, and/or whether it is performing sovereign functions (which may also be a relevant consideration).

## Key points to consider

1. Negotiate express waivers of immunity in respect of jurisdiction and execution. Any such waiver should expressly apply in relation to both pre-judgment attachment and other interim relief and post-judgment execution of awards.
2. The state should not only waive its immunity but also expressly submit to the jurisdiction of the relevant court or courts.
3. Ensure that the waiver is valid in all relevant jurisdictions, in particular where an award is likely to be enforced. Take local law advice; certain jurisdictions retain the doctrine of absolute immunity, notably including Hong Kong and China, Russia and many jurisdictions in Africa.
4. Consider whether a waiver should specify the categories of asset over which the state waives immunity from execution. In some jurisdictions it is necessary to specify categories of assets over which immunity is waived (see, for example, France, although the law in this area may develop in the course of 2017 following the adoption of a new law). In other cases, such express provision may avoid later disputes about the scope of the waiver and



The immunity of states and their assets from the reach of national courts is an area of law with considerable practical implications for both private and state-owned entities entering into international contracts. State immunity may affect whether a court or arbitral tribunal will take jurisdiction over a state. Then, assuming it is possible to establish that a court or arbitral has adjudicative jurisdiction over a state, immunity may hinder enforcement of any judgment or award. In this article, we consider a number of key considerations for parties negotiating contracts with states and state-owned entities across the globe, as well as providing a comparative look at the legal position with regard to immunity in a number of key jurisdictions.

whether it includes non-commercial assets. Bear in mind that certain classes of asset are unlikely to fall within any relevant "commercial use" exception, including the property of a state's central bank, diplomatic or consular missions, military and cultural property.

5. Consent to resolve disputes by arbitration may be sufficient to constitute a waiver of immunity in relation to the supervisory jurisdiction of the courts of the seat of arbitration (for example, if an application to the court was necessary in relation to the constitution of the tribunal or a challenge to an arbitrator), although this implied waiver may not extend to enforcement and execution. An arbitration clause can therefore provide a useful mechanism to overcome at least jurisdictional immunity where a clear contractual waiver of immunity cannot be obtained.
6. It can also be useful in the relevant contract to specify the agreement of all parties that the contract involves only private and commercial acts, thereby invoking the "restrictive" doctrine of immunity.

7. Immunity remains a consideration in relation to the enforcement and execution of ICSID awards. Article 55 of the ICSID Convention makes it clear that a state does not, by becoming a party to the Convention, waive such immunity from execution of an award as the state might enjoy under national laws.

We set out in a separate table, key principles of state immunity in the strategic jurisdictions of the UK, Hong Kong, the USA, France and Germany. The table can be accessed by clicking this [link](#).

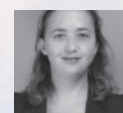
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