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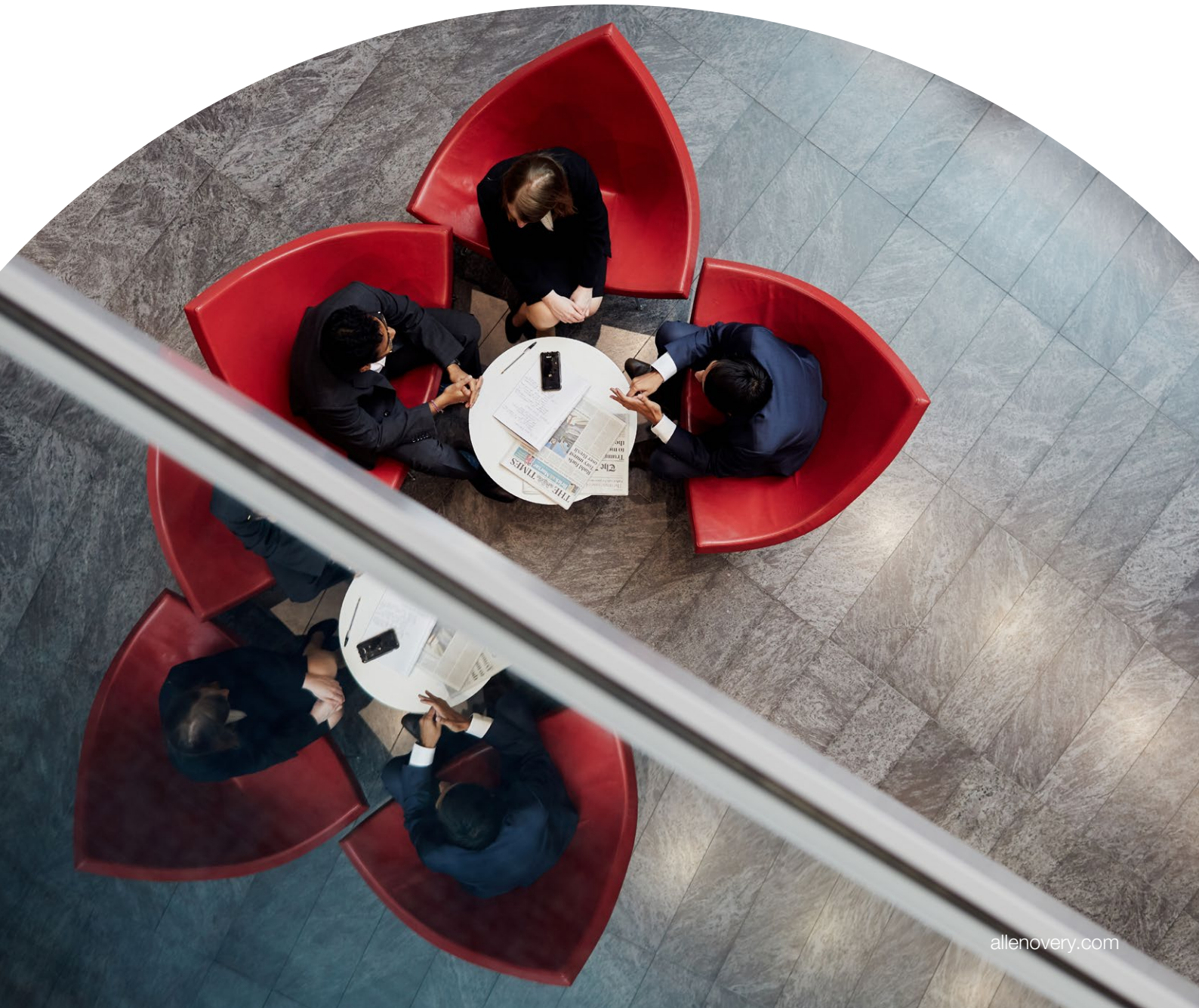
International Arbitration

The new normal? Trends in international arbitration and policy



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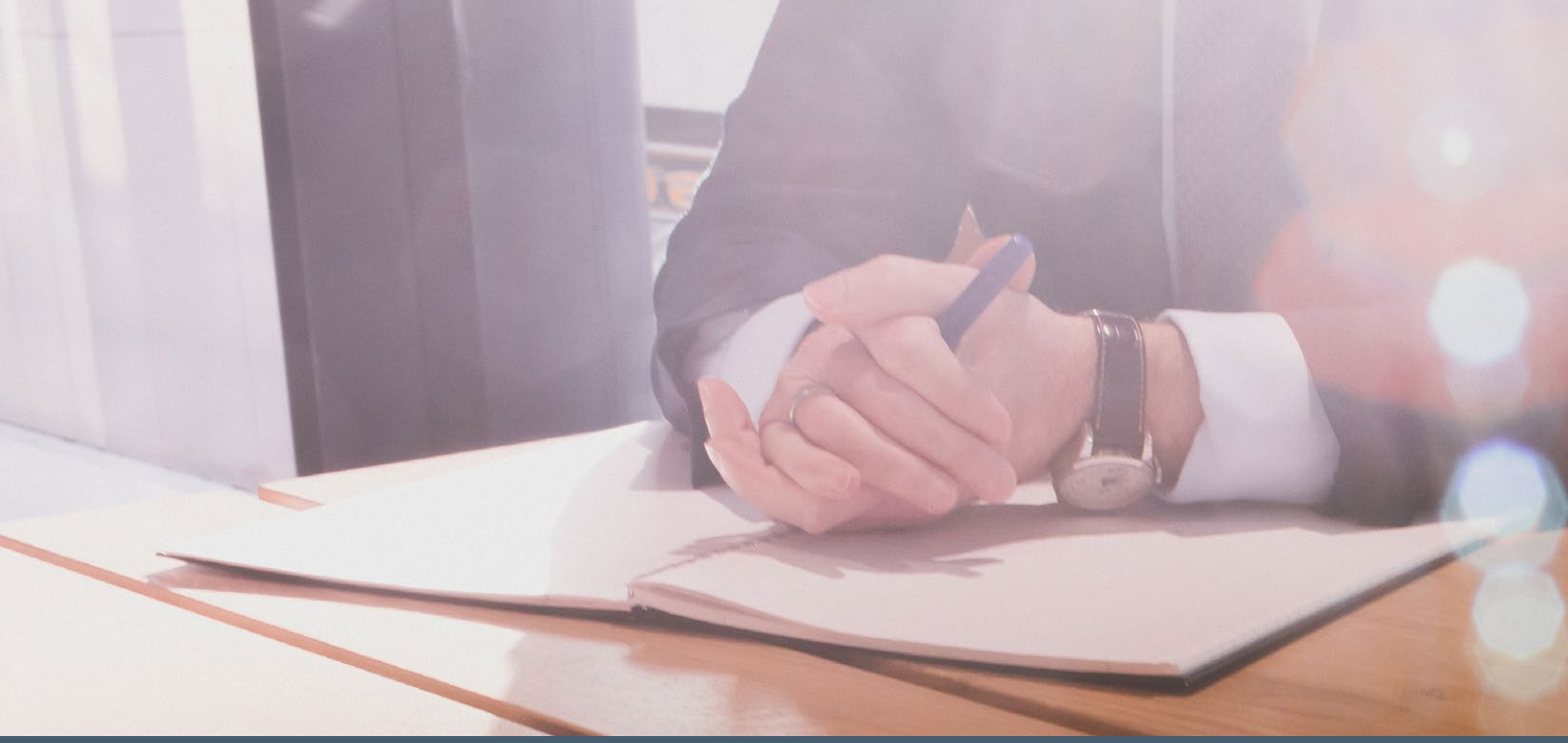


Introduction

In these unprecedented times of uncertainty, we reflect on how key developments in international arbitration law and policy over the last year will continue to shape the development of the market.

The Covid-19 pandemic dominated the agenda for much of 2020, leading to rapid changes in both the conduct and subject matter of international arbitration, which we expect to continue throughout 2021 and beyond. Last year saw other important developments across many aspects of the international arbitration landscape, some influenced by changing global trade dynamics and the long-awaited Brexit trade deal, and others by the push to reform investor-state dispute settlement, as well as the move towards making ESG and climate change commitments binding and enforceable across borders.

Meanwhile, by promoting efficiency and clamping down on conflicts of interest, rule changes at several key arbitral institutions and significant judgments of national courts should help ensure that international arbitration retains its place as the leading form of international dispute resolution. Important steps are also being taken to improve diversity and the environmental impact of arbitration practices around the world.

The following key trends will be important for our clients this year:

1.
Many types of Covid-19 related disputes will be arbitrated

2.
Brexit changes to civil justice cooperation may make arbitration more appealing for some

3.
Bilateral UK/EU investment treaties have been reinvigorated but gaps remain

4.
Government measures around the globe will lead to more investment treaty claims

5.
Increased pressure to reform use of arbitration in investor-state dispute settlement

6.
A growing number of sustainability and ESG-related disputes will be resolved through arbitration

7.
Modernised arbitration rules will offer greater efficiency and effectiveness of arbitration

Many types of Covid-19 disputes will be arbitrated

Covid-19 is giving rise to numerous disputes, many of which will be resolved through international arbitration. The subject matter of those arbitrations will be varied, but inevitably includes disputes relating to commercial contracts, M&A and investment treaty claims.

Covid-19 related contractual disputes

As the Covid-19 pandemic took hold, closed borders and lockdowns meant that many companies found they were unable to perform their contracts. Aviation, hospitality and tourism were the most immediately affected but the longer the crisis continued, the more severely supply chains – particularly in global manufacturing sectors such as automobiles, electronics and clothing – were disrupted. Government restrictions also had an impact on the ability of parties to perform contracts in the mining, construction and shipping sectors, while plummeting oil and gas prices led to disagreements over contract prices in that sector.

Many of the resulting contractual disputes will be resolved confidentially through arbitration in the coming years. They will centre on contractual provisions, including clauses such as:

- **Force Majeure**
- **Material Adverse Change (MAC)**
- **Suspension and Termination**
- **Price Revision**
- **Covenants**

Parties will also invoke legal concepts such as frustration and hardship or impracticability in seeking to excuse their non-performance.

Courts in several common law jurisdictions, whose laws frequently apply in international commercial arbitration, have already begun to hand down important Covid-19 related decisions. For example, in late 2020, a judge of the Southern District of New York found that Covid-19 qualifies as a "natural disaster," thereby excusing a contractual counterparty's non-performance under a force majeure provision in an art auction-house contract. Earlier in 2020, the English High Court decided that Covid-19 did not trigger a force majeure clause in an aviation contract, or a MAC in a fintech contract.

In civil law jurisdictions, legal principles excusing performance are generally set out in civil codes and can be invoked as implied contractual terms. In some civil law jurisdictions, governments have declared that Covid-19 constitutes a force majeure situation that may affect contractual relationships. In Peru, for example, the government did this in the context of public procurement.

While outcomes will vary depending on the terms and governing law, there is no doubt that Covid-19 related contract disputes will be a prominent feature of the international arbitration landscape in 2021. Some Covid-19 related contract-based arbitrations will take place against a backdrop of insolvency proceedings.

Covid-19 related M&A disputes

The economic hardship and uncertainty caused by Covid-19 has also disrupted many mergers and acquisitions, with buyers looking to exit deals, delay completion or renegotiate purchase prices. We expect to see an increase in 2021 disputes arising from M&A deals, with many being resolved by international arbitration, and a number featuring requests for temporary relief from emergency arbitrators in time-sensitive situations, such as where buyers refuse to complete transactions.

Disputes are also likely to arise in connection with representations and warranties in share purchase agreements regarding business operations and continuity. Some buyers may accuse sellers of pre-contractual failures to disclose information or fraud, given that success will provide the buyer with a way to exit the transaction in some jurisdictions.

Numerous price adjustment claims are likely to be arbitrated in 2021 and beyond. A significant proportion of these disputes will involve earn out clauses, which define the purchase price of a target company partially by reference to the company's future performance. Parties can be expected to differ in their interpretation and application of metrics for measuring the success of a company post-closing in light of the unpredictable effects of Covid-19. This will widen the gap between buyers and sellers regarding the valuation of the target business, making a dispute more likely.

Courts in several jurisdictions have already begun to hear Covid-19 related M&A disputes. For example, the Delaware courts have been hearing a high profile dispute over LVMH's obligation to complete its acquisition of Tiffany's, which it refused to do citing the pandemic, and a number of other M&A disputes are presently ongoing in other jurisdictions.

Government Covid-19 measures mean more investment treaty disputes

Many governments imposed unprecedented restrictions on business activity in an effort to control the spread of the pandemic, with some then taking dramatic steps to ease the economic repercussions of the crisis. Foreign investors may attempt to challenge at least some of these measures as violating the protections provided by investment treaties, while States will defend them as justified under doctrines such as state of necessity or exceptions to treaties for public health measures. Investors may allege that they should have been compensated for the impact of such measures or that they were not treated fairly and equitably, with full protection and security, or as well as others national or foreign investors. The costs of government responses to Covid-19 have also put significant pressure on the debt obligations of countries around the world, which may lead to defaults and dissatisfied creditors bringing claims for compensation.

Although it is too early to predict how many investment claims such measures will trigger, several government initiatives apparently taken in response to the pandemic have already prompted investors to threaten claims.

These include measures taken by:

- Chile that affected a concession at the Santiago International airport
- Mexico for the modification of its renewable energy framework
- Peru that suspended the collection of toll fees during the state of national emergency decreed as a result of the Covid-19 outbreak

Other governments, particularly in Latin America, have proposed or taken measures in the pensions sector in order to allow early withdrawal, which may have an adverse impact on the overall economics of protected pension fund administrators, many of which are foreign owned.

Brexit changes to civil justice cooperation may make arbitration more appealing for some

As well as representing a profound change in the UK-EU trading relationship, Brexit affects the regime for UK-EU cross-border disputes, in particular in relation to questions of jurisdiction and the enforceability of UK court judgments.

There should, however, be little immediate adverse impact on international arbitration in the UK and we do not anticipate London's position as one of the world's leading arbitral centres to change. In fact, Brexit could lead to increased use of international arbitration (and in some areas increased UK-based arbitration) and recourse to UK bilateral investment treaties.

Risk of reduced enforceability of certain English court judgments in some EU Member States

The Recast Brussels Regulation and Lugano Convention regimes no longer apply to English court judgments, save in relation to certain legacy matters. While the UK is seeking to rejoin the Lugano Convention, it is not yet clear whether the EU will consent to this. In the meantime, the UK has rejoined the Hague Convention on Choice of Court Agreements 2005, which allows for the enforcement of judgments between the UK and EU (and other Contracting States), but only where the relevant contract contains an exclusive jurisdiction clause. The Hague Convention will not apply to exclusive English jurisdiction clauses entered into before 1 October 2015, the date the UK became party to the Hague Convention in its capacity as an EU Member State. It is unclear whether it will apply to clauses entered into after that date but before the UK's departure and immediate re-accession on 1 January 2021. Pending any re-accession to the Lugano Convention, where the Hague Convention does not apply, parties must look to national law in each Member State to determine whether their English judgment will be enforced.

A potential move away from asymmetric jurisdiction clauses

In some sectors, in particular certain financial markets, "asymmetric" English jurisdiction clauses (where one party is required to litigate in the English courts but the other party is free to bring proceedings elsewhere) are commonplace. While such clauses are enforceable under English law, it remains uncertain whether certain courts in the EU will give effect to them and enforce related judgments. The French courts in particular have found such clauses to be unenforceable.

Moreover, as noted above, the Hague Convention only applies to exclusive jurisdiction clauses and related judgments. Now that the transition period has come to an end, parties may therefore increasingly opt for excusive English jurisdiction clauses for transactions where an asymmetric clause may give rise to enforcement risk in a particular Member State. As discussed below, an arbitration clause may be an alternative option.

Arbitration is not directly affected by Brexit

The enforceability of arbitration awards is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and is, therefore, unaffected by Brexit. Arbitral awards rendered in the UK are as readily enforceable in all EU Member States as they were before the end of the transition period. English law disputes can be referred to arbitration seated in the UK just as easily as another EU Member State, which is important given that English law still remains very popular (even among non-UK parties) and is likely to continue to be chosen as the governing law for many commercial contracts. As such, arbitration may represent an attractive alternative for parties who may have identified issues as to the enforceability of their UK judgment in a particular EU Member State.

For English law governed contracts, the ability of the parties to set out agreed rules for any arbitration (such as requiring the arbitrators to be English law or common law qualified) may add an additional layer of comfort.

Brexit may mean it is easier to enforce an arbitration agreement

One way in which the English courts have historically been willing to uphold parties' agreements to arbitrate is by way of an anti-suit injunction, an order restraining parties from bringing proceedings in the courts of another jurisdiction in breach of an arbitration agreement. Under the Recast Brussels Regulation regime, the English courts were prevented from granting anti-suit injunctions in relation to proceedings commenced before EU courts.

Following the end of the transition period, however, English courts may once again be able and willing to grant anti-suit injunctions to restrain parties from beginning proceedings in EU courts in breach of an arbitration agreement. This may bolster the attractiveness of English-seated arbitration.

Bilateral UK/EU investment treaties reinvigorated but gaps remain

Following the Court of Justice's 2018 judgment in Achmea, in which investor State dispute settlement (**ISDS**) arbitration provision of an intra-EU bilateral investment treaty (**BIT**) was found to be incompatible with EU law, a majority of EU Member States have moved to terminate their intra-EU BITs. In May 2020, 23 Member States signed an agreement to that effect (Austria, Finland, Sweden, the UK and Ireland did not sign; although Ireland had already terminated its only intra-EU BIT). They also agreed to contest jurisdiction in pending intra-EU investment treaty arbitrations on the basis of the Achmea judgment, and to seek the termination of such arbitration and related enforcement proceedings.

The UK, however, retains BITs with a number of EU Member States and, following Brexit, these should no longer be considered as intra-EU BITs. These treaties not only allow for recourse to binding arbitration to resolve investment disputes but also provide more robust investment protections than current EU and European human rights law. Post-Brexit, the UK's BITs with EU countries may, therefore, make it an attractive jurisdiction through which to structure certain investments into the EU and there may be a resulting increase in the number of arbitrations brought by UK investors against EU Member States. The UK also may be an attractive place to enforce intra-EU arbitral awards, in light of the UK Supreme Court's unanimous February 2020 holding in the case of Micula and others v Romania that the UK's enforcement obligations under the International Centre for Settlement of Investment Disputes (ICSID) Convention are not affected by principles of EU law.

The UK/EU Trade & Cooperation Agreement, however, has little in the way of investment protections and no ISDS provisions. Moreover, following Brexit, the UK is no longer party to the EU's international investment agreements and the first replacement agreement the UK has concluded, the new UK-Japan trade agreement, does not provide for ISDS. The UK is expected to conclude investment treaties in 2021 to fill the gap created by Brexit and it will be interesting to see if the new treaties include ISDS.

Government measures around the globe will lead to more investment treaty claims

We discussed above that measures taken by governments in response to the Covid-19 pandemic may give rise to investment arbitration claims in the year ahead, but 2020 also saw a number of other political developments that may have the same effect. As a result, the pattern of year-on-year growth in the number of investment arbitration claims filed globally looks likely to continue in 2021.

Energy sector reforms

Over the past two decades, many governments have established favourable subsidy and support schemes to attract foreign investment in renewable energy development. Faced with global economic turmoil, such as the 2008-2009 financial crisis, or the 2020-2021 Covid-19 crisis, however, many of these countries have scaled back or eliminated their original investment frameworks, thereby sparking disputes with foreign investors. Such was the case for Spain, Italy and the Czech Republic, which faced numerous claims for compensation in response to their post-financial crisis energy reforms. Mexico, Peru, France and Ukraine are also considering altering their renewable energy regimes and facing threats of claims by foreign investors. Several countries are also facing claims in response to their decisions to phase out electricity production from coal, including the Netherlands and Chile.

Technology sector interventions

The technology, media and telecoms (TMT) sector has become truly global over the past two decades, with companies making significant investments in new markets, including in infrastructure such as data centres and high speed cables. In recent years, governments have begun to intervene in the sector, ostensibly for security, consumer protection and tax purposes, but sometimes also to conduct surveillance or to censor content for political purposes. TMT companies may face fines, criminal sanctions or other penalties if they fail to comply with such laws, while they also risk failing to meet international standards of conduct, losing customers or incurring unexpected costs if they do comply. In 2020, TMT companies objected to laws in Turkey, Pakistan, Germany, Russia, India, Thailand, Burma, Australia, China, Hong Kong, Singapore, Colombia and Mexico, among others. Unsurprisingly, investment arbitrations claims involving the TMT sector are reportedly on the rise, with seven cases involving information and communications companies filed at ICSID in 2020 and others threatened, including one by a ride-sharing app against Colombia.

Armed conflicts and regime change

Foreign investors in a range of sectors, including energy, manufacturing, construction and infrastructure, have been affected by armed conflicts, territorial disputes and frozen conflicts coming to life in the past decade. Some have brought claims under investment treaties, including investors in the Ukrainian territories of Crimea and Donbas, which have been annexed and de facto controlled by Russia respectively, and investors in Libya, which was affected by armed conflict following the Arab Spring. A number of conflicts that broke out in 2020 prompted talk of possible investment arbitration proceedings, the Nagorno-Karabakh conflict between Armenia and Azerbaijan chief among them. Early 2021 also saw a coup in Myanmar and related regulatory changes, which have affected foreign investments in that country. Thus, 2021 may see more disputes involving politically charged circumstances and the interaction between investment law and other fields of international law, including human rights and humanitarian law.

Sovereign debt defaults

In recent years, dissatisfied creditors have brought investment treaty arbitrations following sovereign debt defaults or restructurings. Most notably, Argentina faced a series of high value arbitrations following its 2001 default, one of which it reportly settled for USD1.35 billion. The culmination of the economic effects resulting from Covid-19 has put significant pressure on the debt obligations of countries around the world, many of which were already facing debt struggles before the crisis. As a result, 2020 saw a record six sovereign defaults, including Argentina again,

along with Zambia, Belize, Ecuador, Lebanon and Suriname. Many fear that there will be a wave of sovereign debt crises in emerging economies this year, some of which may result in claims by foreign investors.

Regulatory changes in the pension fund sector

Governments in emerging markets have implemented regulatory changes with the intent of allowing investors in general, and specialised pension fund investment companies in particular, to diversify their holdings and obtain additional fundraising opportunities. These changes have encouraged foreign investments in the pension funds sector in a number of countries, particularly in Latin America. Now some countries, including Argentina and Bolivia, have returned their pension systems back to public administration and are facing investment arbitration claims as a result. The status of pensions systems is also under review in Mexico, Uruguay, Peru, Chile and Colombia, and some of these same states have allowed contributors to withdraw funds during the Covid-19 crisis to the detriment of pension fund administrators. Investment treaty claims can be expected as a result of some of these changes.

We may also see claims on a wider array of types of investment, including:

Project finance

In August 2020, the tribunal in *Portigon AG v Kingdom of Spain* clarified that the project finance provided by Portigon, a German financial services company, qualified as an investment protected under the Energy Charter Treaty (ECT) and the ICSID Convention. It further held that there was a direct relationship between the project financing provided by Portigon and the dispute at issue, ie whether Spain's 2013–2014 changes to its renewable energy regulatory framework breached the ECT. Portigon could, therefore, proceed with its claim that Spain's measures adversely affected the renewables projects it financed, impairing their creditworthiness, and thus the value of the project finance loans.

Loan portfolios

In March 2020, an ICSID tribunal in *UniCredit Bank Austria v Croatia* ruled on the state's jurisdictional and admissibility objections. UniCredit's claims relate to a law passed in 2015 that converted some 3.4 billion Swiss francs in loans by a number of banks, including UniCredit, into euros, and was touted as relief for borrowers who took on mortgages or other franc-denominated debt in the 2000s, when interest rates for the currency tended to be lower. While the 2020 jurisdictional decision has not been published, the case remains pending, suggesting that some claims at least will proceed to the merits and that the tribunal found that UniCredit's loan portfolio amounted to a protected investment under the BIT (a requirement for the tribunal to have asserted jurisdiction).

More mass claims against States

We may also see more mass claims pursued against States. Argentina faced mass investment treaty claims in the wake of its 2001 sovereign default, in the *Abaclat, Ambiente* and *Alemann* cases, all which settled in 2015/16. In the first mass claim since then, Cyrus now faces a claim by nearly 1,000 mostly unrelated claimants under the Cyprus-Greece and Cyprus-Belgium/Luxembourg BITs in relation to emergency measures it implemented during its 2012-2013 economic crisis. In March 2020, the ICSID tribunal hearing the case, *Theodoros Adamakopoulos and others v Republic of Cyprus*, granted permission for claims to proceed together. It held that, despite involving a very large number of claimants and falling under two separate treaties, the claims were still a single "dispute", which was capable of fair administration under the ICSID framework. This decision may well lead to more such claims coming forward.

These decisions provide welcome news for providers of debt, including project finance and loan portfolios, including mortgages. They will likely encourage financial institutions to carefully consider the structure of proposed or existing cross-border financing arrangements to ensure the availability of optimal treaty protection and drive an increase in the use of ISDS by financial institutions.

Increased pressure to reform use of arbitration in investor-state dispute settlement

While global foreign direct investment (FDI) collapsed in 2020, efforts to reform the complex system of nearly 3,000 treaties that protect foreign investment continued largely (but not entirely) unabated. In recent years, some States have challenged the use of arbitration as the primary means of ISDS. They have also sought to reaffirm their rights and limit their obligations vis-à-vis foreign investors by renegotiating their international investment agreements (IIAs). This reform agenda will undoubtedly continue in 2021 (including at several meetings that were postponed in 2020), with the potential to radically transform ISDS as we know it today.

Investor-State Dispute Settlement (ISDS reform)

In 2020, various national governments and multilateral institutions spearheaded wide-ranging reform initiatives in response to an increasing sense of political hostility to the current system.

Working Group III (WG III) of the **United Nations Commission on International Trade Law** (UNCITRAL) was tasked in 2017 with considering multilateral ISDS reform. Its discussions continued through 2020 and into early 2021 but as yet there is still no consensus amongst its members as to the timeline for discussions on the concrete substance of any multilateral instrument.

The past year also saw the publication by ICSID of its fourth working paper on proposals for amendments to its arbitration rules.

New proposals – in addition to matters such as clarifying the tribunal's power to order security for costs, mandatory disclosure of third party-funding arrangements, and a default presumption in favour of publication of awards – include a recommendation for the disclosure of ownership and control details of corporate claimants (in the request for arbitration) and a clarification that there is no presumption in favour of document production. A fifth working paper is expected shortly, with a view to presenting final proposals for a vote later in 2021.

ICSID and UNCITRAL jointly published a **draft code of conduct for adjudicators** in May 2020. The draft code seeks to address various concerns relating to the way in which ISDS is practiced, including concerns over repeat appointments for arbitrators and lawyers practising as both arbitrator and counsel in parallel. ICSID and UNCITRAL have announced that they will continue to progress the draft code in 2021.

A shift away from arbitration in Investor-State Dispute Settlement

The past year also witnessed renewed efforts towards the rebalancing of IIAs to allow States more regulatory policy space and, in some cases, to eliminate investor-State arbitration or replace it with an investment court system.

The **Energy Charter Treaty** (ECT), which now has over 50 signatories, including the EU and its Member States, is a key example of this. The first formal round of negotiations on a modernised ECT was held in July 2020 and deliberations centred on potentially narrowing the scope of the substantive measures of protection (such as fair and equitable treatment, full protection and security, and expropriation), inserting a 'right to regulate' clause, and introducing sustainable development and corporate social responsibility rules. A November 2020 report revealed significant differences among States, with the EU's proposals for extensive reform at one end of the spectrum, and Japan's preference for a minimalist approach at the other end. Calls are mounting within Europe to prepare for a coordinated withdrawal from the ECT in the event that core objectives (including alignment with the 2019 Paris Agreement on climate change) are not attained within a reasonable timeframe. It remains to be seen whether states can arrive at a consensus at the five further negotiations rounds scheduled this year.

The **U.S.–Mexico–Canada Agreement** (USMCA) entered into force on 1 July 2020, replacing the North American Free Trade Agreement (NAFTA). The USMCA substantially narrows the scope of protections that were available under NAFTA for all sectors, except oil and gas, power generation, telecommunications, transportation and infrastructure. Moreover, Canada and Canadian investors are removed from the scope of the ISDS mechanism. U.S. or Mexican investors (except those in the sectors listed above) must spend 30 months seeking to exhaust domestic remedies before initiating arbitration.

On 15 November 2020, 15 Asia-Pacific countries signed the **Regional Comprehensive Economic Partnership** (RCEP). The signatories include the ten members of the Association of Southeast Asian Nations (ASEAN) plus Australia, China, Japan, New Zealand and South Korea. While RCEP contains standard investment protections and sections on investment promotion and facilitation, it does not include ISDS. Instead, RCEP lays out a process for the parties to enter into discussions on whether to include ISDS, and apply the treaty's prohibition of expropriation to taxation measures. These talks are expected to take place in the next two years.

The **EU** continues to push for a new multilateral investment court (MIC) to replace the arbitration system for ISDS, notably in the discussions on the reform of the ECT. In recent years, it has entered into IIAs with Canada and Vietnam that establish investment court systems pending the establishment of an MIC. However, in its latest IIAs it failed to reach agreement with the UK and China on such a system (although the agreement with China commits the parties to pursuing negotiations within the next two years).

A growing number of sustainability and ESG-related disputes will be resolved through arbitration

Contrary to expectations, the 2020 Covid-19 tragedy has accelerated trends that prioritise sustainability and focus on Environmental, Social and Governance (ESG) issues. Many States have announced that low-carbon investment will be at the core of economic recovery packages, while carbon-intensive energy production will be phased out in the coming years. States have also asserted that, by tackling inequality and strengthening protections for labour rights, they will build back their economies better than they were before. Many in the private sector have also set carbon reduction targets and committed to conducting due diligence on ESG impacts. These radical changes in public and private sector priorities and ways of doing business will inevitably generate disputes, many of which will be resolved through international arbitration.

Resolving ESG disputes through commercial arbitration

Pressure is mounting on businesses in many sectors and jurisdictions to include ESG-related clauses in their commercial contracts and to make them both binding, and enforceable. This pressure is coming from regulators, litigants, investors and other stakeholders who seek to hold businesses to their ESG-related voluntary commitments, and accountable for their and their business partners' adverse impacts.

The pressure has prompted initiatives to devise ESG-related contract clauses, including the Chancery Lane Project (which produced a "Climate Contract Playbook" in February 2020), and a Working Group of the American Bar Association's business law section (which finalised "Model Contract Clauses to Protect Workers in International Supply Chains" in January 2021). Several industry-specific projects to draft model contract terms are also underway. Some companies that are already members of ESG-related risk management initiatives (such as the Equator Principles Initiative) or already impose ESG-related codes of conduct on their suppliers (such as companies in the technology, fashion or fast-moving consumer goods sectors) are reviewing their contracts to replace hortatory language with mandatory language and ensure that ESG terms are enforceable, while taking care not to assume responsibility for the failings of their counterparties.

Arbitration clauses are already included in many of the contracts between parties in the sectors that will be most affected by the increase in public and private interest in ESG. Arbitration clauses are included in many contracts governing the energy, natural resources, infrastructure and construction sectors, for example, the sectors that are the most likely to be involved in climate change related disputes. Such disputes fall into three broad categories: (a) disputes arising from specific transition, adaptation or mitigation contracts entered into in order to meet specific climate change goals or commitments; (b) disputes arising from contracts more generally where, for example, contractual performance has been affected by the parties' responses to changes in national laws and regulations; or the environmental impacts of climate change itself; and (c) disputes which the parties have agreed to submit to arbitration after the dispute has arisen.

International commercial arbitration, already the preferred method of cross-border dispute resolution for many in these sectors, is well-suited to resolve climate change and other ESG-related disputes. Companies tend to prefer arbitration where they anticipate that disputes may have adverse reputational effects, as it is generally confidential, and they value being able to choose their adjudicators where they anticipate that disputes may require

special expertise. For these and other reasons, arbitration provides an appropriate forum in which to resolve business-to-business climate change-related disputes (as acknowledged by the ICC Task Force on the Arbitration of Climate Change Related Disputes), environmental disputes (as suggested by the drafters of the PCA's Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources) and human rights-related disputes (as suggested by the drafters of the Hague Rules on Business and Human Rights Arbitration).

Given that they are generally confidential, it is difficult to assess how many international commercial arbitrations raise ESG issues. However, companies are being assessed for their ESG performance at a time when there is no official consensus about the standards that should be applied for that purpose in many sectors. For that reason alone, ESG-related disputes are sure to come before arbitral tribunals in 2021 and beyond.

Resolving ESG-related disputes through investor-State arbitration

Many States are encouraging the private sector to make huge investments to combat and adapt to climate change, and to help develop resilient economies that respond to the sustainable needs of communities. Such States realise that, if they are to meet the commitments they have made under climate change, environmental and human rights treaties, and achieve the Sustainable Development Goals by 2030, they will need assistance and cooperation from the private sector, including foreign investors.

Last year, several States turned to trade and investment treaties as a means to prevent other States from competing to attract foreign direct investment by relaxing labour and environmental standards, or their nationally determined commitments under the Paris Agreement. The USCMA, for example, requires each of the States Parties to fulfil their obligations under environmental treaties, and includes a mechanism to hear complaints if Mexican factories deny workers the freedom to organize and collectively bargain. The text also creates presumptions that any labour or environmental violation affects trade and investment. Another example from 2020 is the EU–UK Trade and Cooperation Agreement, which requires the parties to respect the Paris Agreement.

States have also been turning to investment treaties as a means to require investors to uphold human rights and environmental standards. For example, the 2019 Netherlands Model bilateral investment treaty (BIT) provides that "*[i] investors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights*". The India Model BIT directs tribunals to reduce damages to reflect "*mitigating factors*" which can include "*any unremedied harm or damage that the investor has caused to the environment or local community or other relevant considerations regarding the need to balance public interest and the interests of the investor*". At the next OECD Investment Treaty Conference (currently postponed from March 2020 due to the Covid-19 crisis), States will discuss options for further integrating policies relating to business responsibilities into trade and investment treaties.

Investment treaty arbitration is another arena in which States are beginning to challenge ESG-related misconduct of foreign investors. For instance, in the 2017 case of *Urbaser v Argentina* and the 2018 case of *Aven v Costa Rica*, tribunals accepted that corporations have responsibilities under international law and asserted jurisdiction over the States' counterclaims. Argentina's counterclaim was that Urbaser failed to provide the necessary level of investment to ensure respect for the internationally recognised human right to water, while Costa Rica's counterclaim was that Aven had failed to comply with the applicable treaty's requirement of compliance with environmental measures taken by the host State. Other tribunals have been willing to limit the damages recoverable by investors due to failures in relation to environmental or human rights standards (in *Bear Creek Mining Corporation v Peru*, for example); or find that they lack jurisdiction to hear the case on the basis that the investor procured the investment through corruption (in *World Duty Free v Kenya*, for example).

With the new focus on ESG, the conduct of investors is likely to come under increasing scrutiny, potentially affecting their ability to rely upon investment treaty protections and exposing them to counterclaims by States. Likewise, States' compliance with climate change, environmental and human rights treaties, and the interplay between their obligations under those treaties and investment treaties, are likely to be central issues in many investor-State arbitrations in the years to come.

Modernised arbitration rules will offer greater efficiency and effectiveness of arbitration

Recent months have seen rule changes at the two most popular commercial arbitration institutions, with the introduction of the LCIA Arbitration Rules (2020) in October last year and the ICC 2021 Arbitration Rules from 1 January, with others like the Singapore International Arbitration Centre (SIAC) expected to revise their rules during 2021.

Arbitration rules changes champion modernisation and virtual hearing flexibility

The updated rules of both the LCIA and ICC provide for greater use of technology and expressly permit virtual hearings, reflecting the enforced changes as a result of the Covid-19 pandemic as well as longer-term modernisation efforts and concern for the environmental impact of arbitration.

While the 2014 iteration of the LCIA rules allowed arbitrators full powers to determine the conduct of the hearing, the updated rules expressly provide that a hearing may take place virtually (Article 19(2)). The 2020 rules also provide for electronic delivery as the default means of all communications in relation to the arbitration, including the Request for Arbitration and Response (Articles 4.1 and 4.2).

The updated ICC rules provide that hearings may take place virtually (Article 26.1). In a similar vein to the updated LCIA rules, the ICC rules introduce the presumption that pleadings and written communications will be provided electronically (Articles 3.1).

New powers to dismiss claims without full hearing

In perhaps the most noteworthy update of the LCIA rules, Article 22.1(viii) provides that claims or defences may be dismissed if they are "*manifestly without merit*". While this appears to be a higher threshold than the test for summary judgment under the English Civil Procedure Rules, the new rule makes clear that arbitral tribunals may dismiss claims without the need for a full trial. This should allay concerns around the perceived lack of effective controls on weak or even frivolous claims and defences.

Consolidation and joinder simplified

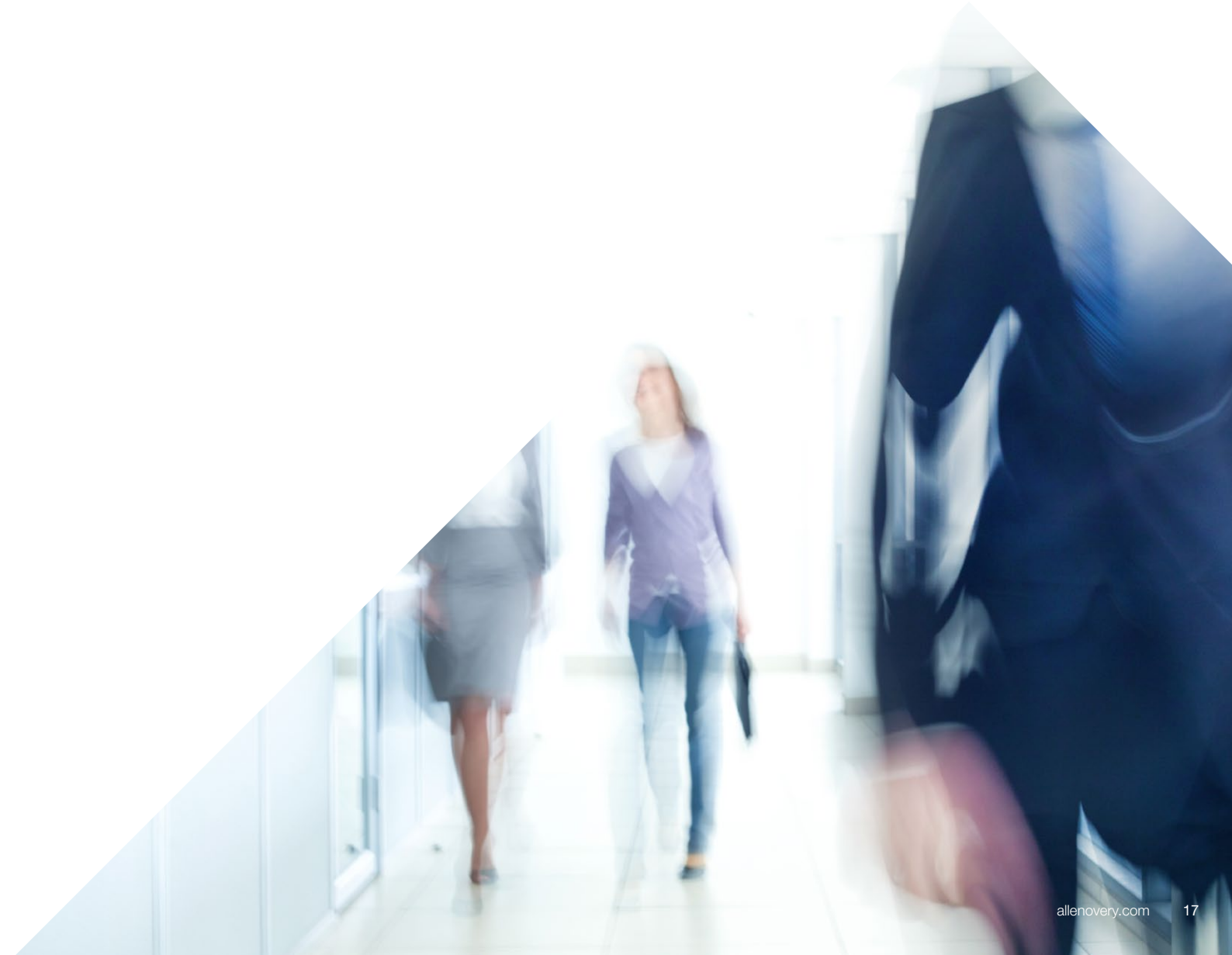
The updated LCIA rules allow the Tribunal to order consolidation (Article 22.7(ii)) or the concurrent conduct (Article 22.7(iii)) of arbitrations "*commenced under the same arbitration agreement or any compatible arbitration agreement(s) and either between the same disputing parties or arising out of the same transaction or series of related transactions*". The rules also now provide for composite Requests for Arbitration and responses (Articles 1.2 and 2.2).

The updated ICC rules simplify the joinder process, providing that an additional party may be joined to an arbitration **after** confirmation or appointment of the tribunal and without requiring the consent of all the arbitrating parties (Article 7.5). The ICC rules also clarify that arbitrations commenced under multiple contracts containing the same arbitration clause may be consolidated (Article 10(b)) and provide that arbitrations under separate arbitration agreements may be consolidated where the arbitration agreements are "compatible" (Article 10(c)).

Increased powers to improve efficiency

The LCIA rules grant the tribunal increased powers to improve the efficiency of arbitral proceedings, including by limiting the length of submissions and written and oral testimony, employing technology to enhance efficiency, dispensing with a hearing where appropriate and shortening time periods (Articles 14.5 and 14.6). The rules also aim to shorten the time taken to produce awards by providing that the tribunal will endeavour to render its final award within three months (Article 15.10).

The ICC rules include a duty upon the tribunal to manage the process efficiently (Article 22(2)). As above, the joinder and consolidations requirements have ben relaxed, while the threshold for the expedited procedure has been increased from USD2 million to USD3 million (Appendix VI, Article 1(2)).



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