

## International arbitration review 2022

# Managing risk and resolving disputes in challenging times

In this publication, members of our Global Arbitration group look back at some of the key developments in 2021 affecting the resolution of complex international disputes and consider their likely impact in the years ahead, and the steps that businesses can take to address them. This is not, on the whole, a review of individual cases. Rather, we aim to take a high-level view and pick the major changes over the past 12 months which are likely to have a lasting impact.

In what is hopefully a small harbinger of a return to normal life, the effects of the COVID-19 pandemic do not feature in this list. The practice of virtual hearings is no longer a development to note; it is accepted. There has not (yet at least) been a wave of disputes arising directly from the pandemic.

While the pandemic has continued, events have not stopped. Far from it. A number of significant changes have taken place in the arbitration world, which international businesses need to understand and address.

For example, we cover a line of decisions by the Court of Justice of the European Union, which threatens to fatally undermine the legal protection of cross-border intra-EU investments. In a similar vein, we discuss a decision of the Russian Supreme Court, which poses a fundamental danger to international arbitration involving sanctioned Russian parties. We have also seen governments take surprising steps in relation to the use of international arbitration,

with the Government of Dubai abolishing by decree a respected and widely used arbitration centre. These are three 2021 developments, which require new approaches to business or deal terms in 2022 and beyond.

We also look more broadly at global developments that will likely lead to new types of disputes, which may require resolution through arbitration. In particular, following COP26 and the commitments made by States to decarbonise their economies to meet the challenge of climate change, there will be a difficult balancing exercise for governments as to how they reduce their reliance on fossil fuels, while observing their commitments under investment protection treaties to protect foreign investors in their energy industries. At the same time as this challenge on Earth, in the skies above, we see a huge rise in commercial activities in Space. This is creating novel risks in an already crowded orbital space, which are anticipated to lead to numerous disputes. These are most likely to find their way to arbitration.

Allen & Overy has continued to invest in our [market-leading Global Arbitration group](#) to ensure that we provide our clients with the best advice and support to manage these evolving risks, and efficiently resolve disputes with minimum disruption to their businesses. Our innovative, multi-faceted strategies place the focus on the resolution of disputes, not on the dispute resolution process. In 2021, [Gaela Gehring Flores](#) joined our team in the Washington, [bringing](#) her distinguished track record of leading winning teams in high-stakes commercial and investment treaty disputes across the Americas. We were also delighted by the [promotions to partner](#) of [Joanne Lau](#) and [Lucia Raimanová](#) in Hong Kong and Slovakia, respectively, as well as the honour bestowed upon London partner [Kate Davies McGill](#), as it was [announced](#) that in 2022 she will be appointed Queen’s Counsel.

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**Mark Levy QC**  
Global Head of Arbitration, London  
Tel +44 20 3088 3700  
mark.levy@allenoverly.com



**James Freeman**  
Partner, London  
Tel +44 20 3088 2496  
james.freeman@allenoverly.com

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# States face a complex task balancing investment protection obligations and decarbonisation commitments

More investment treaty disputes are likely to arise from the global energy transition as States reduce their reliance on fossil fuels and introduce ambitious renewables programmes in line with their international commitments.

## COP26 provides States with a new challenge

The UN Climate Change Conference in Glasgow (COP 26) once again focused the world's attention on tackling the climate crisis. While the meeting did not secure as far-reaching commitments from participating States as many hoped it would, some progress was made to introduce reforms to 'keep 1.5° alive'. Many reforms will relate to decarbonisation, as transitioning away from fossil fuels is fundamental to achieving climate targets. A significant shift to renewables (and other innovations) is, however, bound not only to prove challenging but also to generate contention. We expect, in particular, to see an increase in the number of investment treaty arbitrations relating to decarbonisation measures taken by States.

Under investment protection treaties, States agree to afford certain protections to investments made in their territory by foreign investors. These protections commonly include guarantees of fair and equitable treatment and 'full protection and security', commitments not to discriminate or expropriate unlawfully, and, sometimes, confirmation that the State will abide by its undertakings (the so-called "umbrella clause"). If a State does not meet its obligations, an investor can typically bring a claim for damages directly against the State in international arbitration.

Some investment treaties include exemptions for government acts designed to protect fundamental public interests, such as the protection of the environment and public health. Even in the absence of express provisions, some argue that arbitral tribunals should take into account these policy objectives when considering claims by investors. For example, tribunals may find that investors should not be compensated for changes in laws and policies that protect the environment, or should share the burden with States, provided such measures are not discriminatory or arbitrary.

## Balancing investment protection obligations against emission reduction targets

Finding a balance between a State's investment treaty obligations and its carbon emissions commitments is not going to be straightforward. We have already seen numerous claims commenced against States, which have moved to reduce reliance on power generated from fossil fuels, and even more claims arising where States have introduced, but then retreated from, ambitious renewables programmes.

In the first category, for example, are two ongoing claims against Canada brought by U.S. investors under the North American Free Trade Agreement (NAFTA) relating to: (i) a scheme introduced by the Alberta government to phase out coal power (*Westmoreland Coal Company v Government of Canada*); and (ii) the Quebec government's decision to revoke certain shale gas exploration licences (*Lone Pine Resources Inc. v The Government of Canada*). Similarly, in 2021, German energy companies Uniper and RWE filed claims against the Netherlands under the Energy Charter Treaty (ECT) after the Netherlands introduced a law prohibiting the use of coal for the production of electricity, with the aim to phase out coal plants by 2030.

As noted, investment treaty claims are also likely to arise as States find their feet with the regulation of renewable and clean technologies. Indeed, more than 45 claims have already been brought under the ECT by investors against Spain following its rollback of favourable tariffs for renewable energy producers. The modification of renewable energy incentive regimes has also resulted in claims (under the ECT and other treaties) against Italy, Romania, the Czech Republic, Mexico and Ukraine.



Even as States consider how best to balance their commitments to decarbonise with their obligations to treat foreign investors fairly, it is possible that a failure to introduce adequate decarbonisation measures could give rise to claims against States too. Notably, negotiations are ongoing to reform the ECT. While the focus of these discussions is primarily on limiting States' exposure to investor-State claims resulting from progressive environmental measures (by restricting investor protections), there is also a proposal by the EU to include an obligation in the treaty on States to adhere to their climate-related obligations (for example, under the Paris Agreement). Should a reform like this be agreed, States may in future be held to account for their failure to act to advance the clean energy transition. States and investors should keep abreast of relevant developments.

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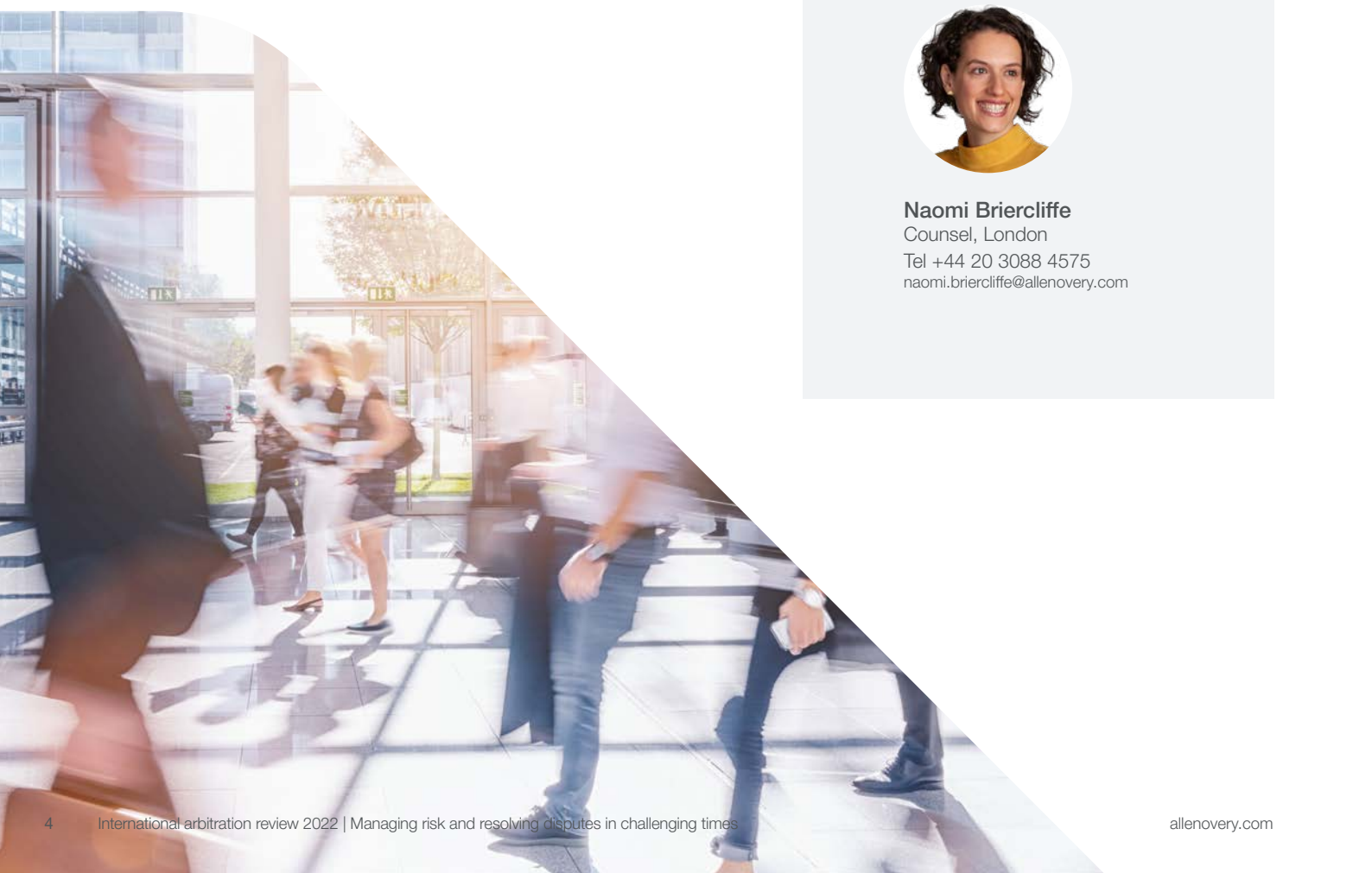
**Anna Masser**  
Partner, Frankfurt  
Tel +49 69 2648 5482  
anna.masser@allenoverly.com



**Suzanne Spears**  
Partner, London  
Tel +44 20 3088 2490  
suzanne.spears@allenoverly.com



**Naomi Briercliffe**  
Counsel, London  
Tel +44 20 3088 4575  
naomi.briercliffe@allenoverly.com



# Sanctions pose an increasing risk to the international arbitration process

Russian Supreme Court rules that sectoral sanctions imposed on Russian entities are a basis to avoid international arbitration agreements in favour of the exclusive jurisdiction of the Russian courts.

## Move from sanctions complicating the arbitral process to thwarting it

International sanctions cast an increasingly long shadow over international commerce. Recent years have seen a growing number of States issue an increasing array of sanctions, which in turn affect an increasing number of entities and individuals. The UK sanctions regime alone lists more than 3,000 entities and individuals. Further complexity arises from the different forms that sanctions regimes might take—whether, for example, freezing the assets of a person or prohibiting business only in specified sectors (such as defence).

Arbitration is not immune from the impact of sanctions. Users of international arbitration have become accustomed to considering the impact sanctions may have on the merits of a dispute—for example, whether the sanctions may give rise to force majeure or frustration defences. Sanctions have also led to challenges to the arbitral process such as arbitrators sometimes requiring regulatory consent before receiving payments. To date, however, the arbitration process has been hampered but rarely thwarted completely (although there have been exceptions).

## Russian court rules sectoral sanctions provide basis for avoiding arbitration clauses

As we enter 2022, we see sanctions regimes arguably having a more fundamental impact on international arbitration and, indeed, dispute resolution more generally. On 9 December 2021, the Russian Supreme Court rendered a judgment with potentially far-reaching consequences, affecting numerous international arbitrations involving Russian parties. The case of *Uraltransmash vs PESA* concerned the interpretation of Russian legislation dating from 2020, which provides that:

- the Russian courts have exclusive jurisdiction in cases involving individuals and entities, including their subsidiaries, targeted by foreign sanctions;
- this exclusive jurisdiction of the Russian courts exists even if there is an arbitration or jurisdiction clause providing for exclusive dispute resolution outside Russia, where the arbitration or jurisdiction clause is “unenforceable” on the basis that sanctions would “impede access to justice” for the sanctioned person;

- the sanctioned person—legal or natural—may apply to the Russian court for an anti-suit injunction prohibiting the claimant from commencing or continuing the foreign proceedings; and
- the Russian court may even make an order against the claimant for payment of the amount in dispute in the foreign proceedings if the Russian anti-suit injunction is ignored.

Uraltransmash is a Russian company subject to EU sectoral sanctions (concerning trading in transferable securities of the company and provision of long-term loans to the company). The contract in question involved a supply of tram cars by a Polish counterparty, which started an arbitration against Uraltransmash in Sweden under the Arbitration Rules of the SCC seeking recovery of unpaid amounts. It was clear from the outset that the EU sectoral sanctions did: (i) concern or affect the contract that was the subject of the arbitration; and (ii) prevent Uraltransmash from participating in the arbitration proceedings in Stockholm, paying its share of the advance on costs, appointing an arbitrator or hiring legal counsel.

Nevertheless, on application by Uraltransmash, the Russian Supreme Court reasoned that the mere introduction of sanctions against a Russian person is sufficient to conclude that there are obstacles to access to justice for such a person in proceedings in a foreign State that introduced such sanctions (here, Sweden, as an EU Member State). In essence, the Supreme Court concluded that there were justified doubts that the sanctioned person’s due process rights would be observed on the territory of the state that introduced sanctions. As such, the Russian Supreme Court concluded that Uraltransmash would have been entitled to avail itself of the exclusive jurisdiction of Russian courts but refused to grant the anti-suit injunction, as the arbitration proceedings in Sweden were concluded by the time the case came before the Supreme Court.



### Shift seat of arbitration and arbitral institution to mitigate risk

The Supreme Court's reasoning suggests that a Russian entity subject to *any* sanctions will be able to opt for the exclusive jurisdiction of the Russian courts if the place of arbitration or administering arbitral institution is located in a State that imposed sanctions against that entity. Accordingly, this judgment puts at risk both existing and future dispute resolution clauses with Russian parties (even those subject to sectoral sanctions only) providing for arbitration in the U.S., UK or an EU Member State. While the precise impact and reach of the decision remains to be seen, the safest course—as we enter into 2022—for contracts involving Russian sanctioned parties, short of dispute resolution in Russia, seems to be opting for dispute resolution in jurisdictions without Russian sanctions regimes, such as Hong Kong and Singapore.

Against that backdrop, however, it is interesting to note a survey published by the Russian Arbitration Association in January 2022, which discusses the impact of sanctions on commercial arbitration. The results showed that only a minority of users had faced situations where arbitral proceedings had been affected by sanctions. Survey respondents were aware of situations where an arbitral institution refused to administer a dispute (21%) or was unable to accept payments from the sanctioned persons (38.5%). Other impacts recognised included arbitrators refusing to act due to sanctions (18%), and the arbitrators rejecting, or reducing the quantum of, claims because of sanctions (20%). These results suggest that, despite the sweeping nature of the Russian Supreme Court's decision in *Uraltransmash*, the actual impact felt by sanctioned parties to commercial arbitrations is more limited.



**Andrey Panov**  
Counsel, Moscow  
Tel +7 495 662 6552  
andrey.panov@allenoverly.com



**James Freeman**  
Partner, London  
Tel +44 20 3088 2496  
james.freeman@allenoverly.com



# Dispute resolution in a vacuum? Arbitration's role in resolving space disputes

The rapid disruption of the space industry and the increasing commercialisation of Earth's orbit is likely to lead to more disputes, and uncertainty as to how parties should resolve those disputes. Arbitration can play an important role.

## Record-breaking 2021 highlights some of the risks facing the space industry

2021 was a record-breaking year in the space industry. It witnessed the most active satellites in orbit (over 4,000); the most successful orbital missions (134); the most space tourist flights (6); the most people in weightless space at the same time (19); the most SpaceX rocket launches (31); and the launch of the world's most powerful space telescope (James Webb Space Telescope). There were 7,389 individual satellites—active and inactive—in Space at the end of April 2021, which is an increase of 27.97% compared to 2020.

Yet 2021 also saw a number of concerning developments. The dangers of an ever-expanding satellite population and excessive levels of space debris were highlighted when the Chinese Space Station (with three astronauts on board) had to conduct emergency avoidance manoeuvres to avoid a SpaceX satellite. The International Space Station was also forced into emergency avoidance measures to avoid the space debris generated when Russia tested its anti-satellite missile system, destroying a defunct satellite.

Congestion of Earth's orbit poses a serious risk for future space activities, not only in the form of direct collisions but also the increasing costs of debris avoidance and removal, as well as the consequential disruption to satellite-provided services. Developing workable rules and procedures to determine liability for these costs is a fundamental challenge facing the industry.

## The overall landscape for space-related disputes

The defining feature of activities in space today is accessibility. No longer is space the exclusive domain of wealthy state actors. Orbit is increasingly democratic, with almost all countries having an opportunity to be 'space-faring'. Most importantly, space is increasingly commercialised, with private companies and commercial interests driving many of the developments at a pace not previously seen. SpaceX, for example, owns one third of all active satellites currently in orbit around Earth. This represents a fundamental change in the conduct of space activities and the interests driving them.

Much like the onset of the digital age, the space industry is developing at a faster pace than the supporting legal framework. The international legal regime governing liability for incidents in outer space is directed at States and is out-of-date, with no specific regulation on the rights and obligations of private enterprises. In the face of this legal black hole, it remains to be seen whether, and if so how, States will coordinate to maintain minimum standards across national licensing regimes, particularly as governments race to attract space-industry investment.



## The role of arbitration in space-related disputes

While there are a number of unsettled questions as to how space-related disputes will be resolved, there are three indications that arbitration will play a key role in space-related dispute resolution.

First, space-related disputes are likely to increase significantly simply by virtue of more contracts being entered into as the global space economy grows, and as new space-related industries appear. Given that arbitration provides a confidential forum in which decision makers with relevant expertise can be appointed, many of these contracts provide for disputes to be resolved by international arbitration.

A number of arbitral institutions are considering the need to develop specific rules to cater for the anticipated increase in space-related disputes, similar to the Permanent Court of Arbitration's Rules for Arbitration of Disputes Relating to Outer Space Activities (which celebrated their ten-year anniversary in 2021). Plans among arbitral institutions to attract space disputes will no doubt be accelerated by the UAE's creation of a dedicated 'space court', announced in February 2021.

Secondly, at an investor-State level, the increase in foreign investment in the space industry alongside the development of new regulatory regimes will likely lead to further investment-arbitration disputes related to space activities. There have been signs of this trend already. Earlier in 2021, it was reported that Mexico prevailed in its investment-treaty dispute with Eutelsat, arising out of a dispute over capacity requirements imposed on satellite companies. This may well be a sign of disputes to come.

Thirdly, at a State-to-State level, the international framework governing liability in outer space is set out under the 1967 Outer Space Treaty and the 1972 Liability Convention. This regime permits States to file claims against each other for damage incurred either by themselves or their nationals. The predicted increase in orbital collisions will test whether it is a workable forum to resolve space-related disputes. As noted above, however, the treaties were drafted at a dramatically different stage in space exploration and it is likely that an update is required to accommodate the commercial reality of current activities. The international community has acknowledged as much. In December 2021, the United Nations General Assembly First Committee created a working group to develop norms, rules and principles of responsible behaviour in space, with a view to the negotiation of legally binding instruments. Arbitration will certainly be one of the key options that are being considered.



**Werner Eyskens**

Partner, Brussels

Tel +32 2 780 26 02

werner.eyskens@allenoverly.com



**Jack Busby**

Associate, London

Tel +44 20 3088 3968

jack.busby@allenoverly.com





# The rise of construction disputes in investor-state arbitration

Recent years have seen a growing trend of construction disputes being referred to the International Centre for the Settlement of Investment Disputes (ICSID). Construction disputes have accounted for around 15% of new cases registered at ICSID each year since 2017, more than double the previous five years. When construction disputes serve as the basis of treaty claims, it can significantly increase the overall complexity, duration and cost of the dispute.

It is likely that we will see more construction disputes referred to investment arbitration in 2022 and beyond, in view of:

- complications resulting from the COVID-19 pandemic, which impacted contractors and employers alike;
- the availability of third-party litigation funding for contractors with viable, or potentially viable, claims; and
- continued government investment in infrastructure projects in a number of regions, which is giving rise to increasingly complex construction projects.

We set out below some of the key issues that distinguish these disputes from other investment treaty arbitrations and which must be considered at the outset.

## Getting the blend of experience right on the tribunal

Choosing the right tribunal is always important but it is critical for treaty claims arising out of construction disputes. The tribunal should, of course, be experienced in treaty claims and public international law but, ideally, in construction disputes as well.

Construction disputes typically involve a high degree of technical complexity specific to the construction industry. Familiarity with the types of contracts commonly used, the expert disciplines relied upon in construction disputes and the relevant terminology can be a significant advantage. As the rise of construction disputes in public international law is relatively recent, there is at present a comparatively small pool of arbitrators combining these disciplines.

## Establishing there is a protected investment

Another key issue will be whether the construction project constitutes a protected investment under the relevant investment treaty and, where relied on, the ICSID Convention. Subject to any particular wording in the treaty, a construction project may qualify as a protected investment, provided it satisfies certain criteria. These include that the project has a certain duration, involves the would-be investor undertaking a degree of risk and making a contribution to the economic development of the host State, ie the State where the project is being constructed.

Past examples of construction projects deemed to be protected investments include the reconstruction of a highway (*CMC Muratori v Mozambique* (ICSID Case No. ARB/17/23)), the construction of an airport (*Staur Eiendom v Latvia* (ICSID Case No. ARB/16/38)), the planning and construction of bridges (*Garanti Koza v Turkmenistan* (ICSID Case No. ARB/11/20)), and the renovation of a four-star hotel (*Alpha Projektholding v Ukraine* (ICSID Case No. ARB/07/16)).

## Attributing the impugned conduct to the State

It will also be important to address the identity of the employer in the construction project. Where the employer is not the State or government itself, but rather a State-owned or State-funded entity, a critical question will be the extent to which the employer's conduct can be attributable to the State under international law. Relevant to this assessment will be whether that entity or agency is a State organ, exercises any government or sovereign power, or that it acted under the direct control or instructions of the State.



## Proving breach of the construction contract may not be enough to show a breach of treaty

Even where a party has a protected investment and can attribute conduct to the State, it still has to demonstrate a treaty breach. Establishing that alleged conduct amounts to a breach of investment protection standards is a different, and significantly higher, standard than showing a breach of contract. Treaty standards that are commonly invoked in construction disputes include:

**Unlawful expropriation:** Investment treaties often prohibit a State from expropriating the rights of the investor without compensation. There would be an expropriation if, for instance, the State deprived the investor of remuneration under the relevant contract (eg *Alpha Projektholding GmbH v Ukraine* (ICSID Case No. ARB/07/16)), such that the investment is significantly deprived of its value.

**Fair and equitable treatment:** Investment treaties commonly oblige States to provide investors with fair and equitable treatment. This far-reaching protection may be breached if, for example, the State unexpectedly and fundamentally changed its legislation and regulations applicable to the project (eg *PSEG v Turkey* (ICSID Case No. ARB/02/5)).

**Umbrella clause:** Certain investment treaties provide a so-called “umbrella clause”. These require that States comply with undertakings entered into with regard to protected investments. Umbrella clauses are usually highly specific and their effects remain debated. Certain parties have argued that, if a State breaches its contractual undertakings through the exercise of sovereign power, the umbrella clause may elevate the contractual breach to treaty level, resulting in potential liability under international law (eg *Malicorp v Egypt* (ICSID Case No. ARB/08/18)), but this view is not universal.



**Kirsten O'Connell**  
Partner, Dubai  
Tel +971 4 426 7133  
kirsten.oconnell@allenoverly.com



**Guled Yusuf**  
Counsel, London  
Tel +44 20 3088 3502  
guled.yusuf@allenoverly.com



**Godwin Tan**  
Associate, London  
Tel +44 20 3088 1791  
godwin.tan@allenoverly.com

# Arbitration's role protecting intellectual property rights in life sciences disputes

The global pandemic has highlighted the increasing complexity of the life sciences landscape. The need to pursue collaborations to develop new vaccines, treatments and technologies is likely to drive a new wave of disputes, particularly around the protection of intellectual property (IP) rights and trade secrets. International arbitration is well placed to facilitate the resolution of these disputes.

## Protecting IP in the era of life sciences collaborations

The COVID-19 global pandemic has seen alliances between pharmaceutical giants and, on the one hand, universities (Oxford University and Astra Zeneca) and, on the other, small, family-owned biotechnology companies (BioNTech and Pfizer) to develop vaccines. We have also seen institutions, governmental agencies, foundations and global vaccine alliances join forces with industry to manufacture and deliver the vaccines at a pace never seen before.

Partnership and collaboration is not new to the life sciences sector, however. They are established tools for sharing the know-how, skills and resources needed to conduct clinical trials, and then commercialise, market and distribute a product into the markets where it is most needed. The collaboration benefits from the respective skills of each partner, be that proprietary technology, vaccine R&D, regulatory capabilities or a global manufacturing and distribution network.

## Resolving collaboration disputes through international arbitration

In a continuously globalised world, these partnerships are increasingly cross border and built on a foundation of complex, heavily negotiated agreements, typically with valuable IP rights at their heart. International arbitration is often, and perhaps will increasingly become, the dispute resolution mechanism of choice. International arbitration's global reach, the relative ease of enforcement, the neutrality of the venue and the potential for confidentiality are a hard combination to beat.

This need for partnership, collaboration and joint ventures is only going to increase, as is their complexity. The growing role of technology in the life sciences sector (medtech) means that pharmaceutical companies are increasingly having to deal with a sector (technology) that is outside their comfort zone. This heightens the risk of collaborations encountering difficulties, or even failing. Expectations may be misaligned from the outset, parties may not perform as expected or the technology may never work. Again, arbitration provides an effective system for resolving these types of disputes – in addition to enforcement, confidentiality and neutrality, parties are able to select the tribunal with the skills and expertise relevant to the dispute that has actually arisen.

## Government overreach in the life sciences sector

Regulation has been a long-time burden in the life sciences sector but the COVID-19 pandemic has arguably increased the risk of government interference, whether by way of compulsory licensing or otherwise. While there is a legal framework that surrounds compulsory licensing (TRIPS), there may be circumstances where government actions in relation to IP rights amount to adverse interference in breach of international law. This is potentially actionable under bilateral or multilateral investment treaties. Notable investment treaty cases in this area include *Wellcome Limited v. Ukraine* (Notice of Investment Dispute 16 December 2021), *Diag Human SE and Josef Stava v. The Czech Republic* (PCA Case No. 2018-20), *Raimundo Santa Marta Devis v. Bolivarian Republic of Venezuela*.



## Renewed focus on trade secrets laws to protect IP

Those in the life sciences industry go to great lengths to protect their innovations through IP law. Undoubtedly, patent protection remains the most common approach to such protection. Recent developments, however, have led to a heightened focus on using trade secret rights to protect at least certain elements of life sciences IP. In the U.S., for example, this has accelerated since the passage in 2016 of the Defend Trade Secrets Act, which provided trade secrets holders with the ability to address the misappropriation of their trade secrets on a national level, instead of through individual state courts. This legislative broadening of the trade secrets rights corresponded with the U.S. Supreme Court and Federal Circuit narrowing of the scope of patent eligibility.

As nearly all trade secret misappropriations involve an employee or a third-party partner—with whom there will be some contractual relationship—trade secret holders, including those in the life science space, are spending an increased amount of time and money protecting their innovations through trade secrets law. Indeed, the increase in life sciences collaboration has seen a concomitant rise in disputes (and concerns about potential disputes) regarding trade secrets. This is unsurprising given the exchange of confidential information that takes place in these license agreements, partnerships, collaboration or joint venture agreements.

The premium placed on maintaining the confidentiality of sensitive commercial information in the life sciences sector highlights the benefit of turning to arbitration to resolve the dispute. The very proceedings can be kept confidential and this avoids the public disclosure of information, which is so common in the courts. It is not the case, of course, that confidentiality is the default under the law of all arbitral seats, nor all arbitral rules. To ensure the parties take the maximum benefits that arbitration offers, a focus on, and deep understanding of, how to tailor the parties' arbitration agreement to their specific needs is required when negotiating the collaboration agreement. Should a dispute arise, it is equally important that the disputing parties engage counsel experienced in preserving the confidentiality of trade secrets during the arbitration proceedings.



**Kate Davies McGill**  
Partner, London  
Tel +44 20 3088 2090  
kate.davies@allenoverly.com



**Gaela K. Gehring Flores**  
Partner, Washington, D.C.  
Tel +1 202 683 3861  
gaela.gehringflores@allenoverly.com



**Paul B. Keller**  
Partner, New York  
Tel +1 212 610 6493  
paul.keller@allenoverly.com

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# Is the end of intra-EU investment arbitration on the horizon?

In 2021, the European Court of Justice (the Court) continued to reshape the landscape for investment treaty arbitration between EU investors and EU Member States—so-called “intra-EU arbitration”—with potentially serious ramifications for both non-ICSID and ICSID awards. With further developments anticipated in 2022, EU investors in other EU Member States should consider (re)structuring their investments through non-EU entities.

## Court’s judgments undermine longstanding intra-EU investment protection regime

In its much-criticised 2018 judgment in *Slovak Republic v Achmea*, the Court held that dispute resolution clauses in bilateral investment treaties between EU Member States (intra-EU BITs) are invalid. In two 2021 judgments, the Court stretched this line of reasoning still further.

The case of *Republic of Moldova v Komstroy LLC* did not concern an intra-EU arbitration and the questions referred to the Court for determination did not raise this issue. Nevertheless, in its 2 September 2021 judgment, the Court held that intra-EU arbitration under the multilateral Energy Charter Treaty (the ECT), to which the EU itself is a party, is incompatible with EU law.

Then, on 26 October 2021, the Court gave its decision in *Republic of Poland v PL Holdings*, ruling that an ad hoc arbitration agreement concluded on the same terms as an intra-EU investment treaty arbitration clause would also be contrary to EU law. In other words, the Court held that parties cannot circumvent the Court’s decision on the invalidity of intra-EU investment treaty arbitration clauses by independently agreeing to submit an intra-EU investment claim to arbitration.

## Judgments have serious implications for awards, ongoing arbitrations and existing investments

Despite the Court’s judgment in *Achmea*, to date, arbitral tribunals constituted in intra-EU arbitrations have consistently taken the position that they retain jurisdiction as a matter of public international law. Tribunals faced with jurisdictional challenges based on *Komstroy* and *PL Holdings* are likely to reach the same conclusion and, indeed, some already have. EU Member State courts, however, are expected to take the contrary position.

Any intra-EU arbitration award that comes for review by an EU Member State court (because the arbitration is seated in the EU) is, therefore, likely to be annulled.

Beneficiaries of non-ICSID intra-EU arbitration awards are also likely to face difficulties enforcing those awards in EU Member States. The New York Convention (which will apply to the enforcement of most, if not all, such awards) allows enforcement to be refused if the enforcing national court considers the tribunal did not have jurisdiction. In addition, while it is expected that the analyses of national courts outside the EU are more likely to be aligned with those of the arbitral tribunals that have considered the issue to date, this is not certain.

The future looks potentially brighter for holders of intra-EU arbitration awards rendered under the ICSID Convention and Rules. Article 52 of the ICSID Convention requires ICSID Member States, which includes all EU Member States except Poland, to enforce ICSID awards as if they were final domestic judgments. In other words, there is no power for national courts to review the substance of the tribunal’s decision.

Nevertheless, within the EU, complications are foreseeable. Indeed, following *Komstroy*, issues have arisen in two ICSID intra-EU arbitrations even before final awards have been rendered. In *RWE v Netherlands* and *Uniper v Netherlands* (both ECT cases), the Netherlands has commenced proceedings before the German courts (where the claimants are incorporated) seeking determinations that the claims against it are inadmissible because, applying *Achmea* and *Komstroy*, there are no arbitration agreements between the Netherlands and the claimants.

Developments in 2022 (and beyond) should be watched closely. In the meantime, both intra-EU investors seeking treaty protection, and investors outside the EU that have previously structured investments in reliance on intra-EU protection under the ECT or an intra-EU BIT, should take advice on restructuring their existing investments, and managing future investments, for protection in the EU. Read more [here](#).

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Chambers UK 2022: Investor State Arbitration



**Naomi Briercliffe**  
Counsel, London  
Tel +44 20 3088 4575  
naomi.briercliffe@allenoverly.com



**Pierre-Baptiste Chipault**  
Associate, Paris  
Tel +33 1 40 06 50 22  
pierre-baptiste.chipault@allenoverly.com





# Are states at UNCITRAL on the brink of agreeing the creation of an investment court system to replace investment arbitration?

As discussions at UNCITRAL Working Group III pick up pace, fundamental reforms to investor-state dispute settlement (ISDS) are closer than ever, with a new code of ethics for adjudicators anticipated, in addition to the potential for a multilateral investment court system.

With more than 80 States and numerous inter-governmental and non-governmental organisations contributing, the United Nations Commission on International Trade Law (**UNCITRAL**) Working Group III on Investor-State Dispute Settlement Reform (**WG III**) has been working on a wide-ranging reform initiative for the current ISDS system since late 2017.

In the earlier stages of WG III's mandate, it sought to identify issues in the current system requiring reform. These included (i) the independence and impartiality of tribunal members, (ii) the coherence, predictability and correctness of outcomes, and (iii) the costs and duration of ISDS proceedings. On the third issue, A&O's study on costs, damages and duration in investor-state arbitration (co-authored with the British Institute of International and Comparative Law) was frequently cited in deliberations. The third edition of this study, published in 2021, can be found [here](#).

In May 2021, WG III finalised a [workplan](#) for 2021 to 2025, divided into eight key streams of work, namely: (i) ADR mechanisms and dispute prevention; (ii) selection and appointment of arbitrators; (iii) Code of Conduct for adjudicators; (iv) ISDS procedural rules reforms; (v) multilateral advisory centre; (vi) appellate mechanism; (vii) multilateral permanent investment court; and (viii) multilateral instrument to implement reforms.

The eight streams of work at WG III reflect extensive negotiations among the participating States, which have different perspectives on how the ISDS system ought to be reformed: a number of States have expressed a preference for reforms based upon the existing party-appointed, ad-hoc structure of ISDS, while others, notably the EU Member States, prefer reforms that would more radically alter the existing ISDS framework through the creation, for example, of a multilateral investment court system.

In 2022, WG III will conduct first readings of draft solutions on the appellate mechanism and the multilateral investment court. It remains unclear whether there is sufficient support for these proposals. If adopted, however, these developments would represent the most significant reform of the ISDS landscape to date. In recent years, the EU has taken the first steps towards the adjudication of investment disputes by bilateral investment courts, through its investment protection agreements with a number of States, including Canada, Vietnam and Singapore. Whether the courts created by these EU treaties work as desired and are effective in addressing concerns such as excessive costs and delay will be closely followed by WG III.

It is also expected that WG III will finalise a Code of Conduct for adjudicators, which seeks to provide ethical guidance to arbitrators (in the existing ISDS system) and judges (in any investment court(s)), and the finalised draft may be incorporated in the drafting of future investment treaties.

“They are very sharp-minded and incredibly motivated to put their best efforts in for their clients. They also make the effort to really understand the client’s technical and commercial-driven views on a dispute in order to translate this into the best coherent legal argumentation”

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**Matthew Hodgson**  
Partner, Hong Kong  
Tel +852 2974 7135  
matthew.hodgson@allenoverly.com



**Lucia Raimanova**  
Partner, Bratislava  
Tel +421 2 5920 2470  
lucia.raimanova@allenoverly.com



**Hongchuan Zhang-Krogman**  
Associate, Singapore  
Tel +65 6671 6153  
hongchuan.zhang@allenoverly.com

# Key amendments to the ICSID rules focused on transparency and efficiency go to a vote in 2022

If adopted by ICSID Member States, the first amendments to the ICSID Rules since 2006 will be available for use from July 2022 onward, bringing greater transparency to the process and offering clearer guidance on key issues such as allocation of costs and disclosure of third-party funding.

The International Centre for Settlement of Investment Disputes (ICSID) is a part of the World Bank Group and the principal global forum for investor-State arbitrations. Long-running consultations on reforms to the ICSID Rules, which were last updated in 2006, came to a close in 2021. Of particular note are the proposed amendments to the [ICSID Arbitration Rules](#) and the [Arbitration \(Additional Facility\) Rules](#), which are commonly used in investment arbitration. ICSID Member States will vote on the amended package of rules in early 2022. If approved, as expected, the new rules will enter into force on 1 July 2022.

The amendment process represents a significant effort by the ICSID Secretariat and Member States to do two things. First, there is a need to update the arbitration rules to reflect matters that have become commonplace in modern arbitration practice since the last update in 2006. These issues include requests for bifurcation, security for costs applications and third-party funding. Secondly, the changes are designed to address some criticisms of the ISDS system, including a perceived lack of transparency, a lack of guidance surrounding cost allocation and excessive delays in the arbitration process.

Seeking to level the playing field with specialised arbitration rules for investment disputes issued by a number of arbitral institutions, the proposal expands the scope of the Arbitration (Additional Facility) Rules to make them available to Regional Economic Integration Organisations (eg the EU and ASEAN) and in circumstances where neither the respondent State nor the investor's home State is an ICSID Member State.

Assuming the amendments are adopted, users of the Arbitration Rules can expect the following key changes:

- **Greater transparency in the conduct and outcome of proceedings:** possibly the most significant change relates to increased transparency, including new rules providing for the publication of a final award by default, absent objection by any party within 60 days (proposed rule 62); publication of orders and decisions with redactions agreed upon by the parties (proposed rule 63); publication of written submissions or supporting documents upon parties' consent, with redactions to be agreed upon by the parties (proposed rule 64); and observation of hearings by third parties, unless either party objects (proposed rule 65).
- **A new rule on the bifurcation of proceedings:** currently there is no express provision dealing with bifurcation and such requests are left to the tribunal's broad discretion. Proposed rule 42 specifies factors (broadly reflective of existing arbitral best practice) that the tribunal shall consider in exercising its powers.
- **A new rule on security for costs:** again, there is currently no provision dealing with security for costs applications. These applications are, instead, typically made under Arbitration Rule 39 on provisional measures but they are rarely granted and there is some question as to whether Rule 39 is broad enough to allow them at all. Proposed rule 53 codifies a party's right to request security for costs and sets out factors that the tribunal shall consider, including the existence of third-party funding.
- **A standalone rule on objections to claims that manifestly lack legal merit:** existing Arbitration Rule 41(5) deals with such preliminary objections. In an effort to flush out manifestly unmeritorious claims earlier in the process, proposed rule 41 would require such objections to be raised within 45 days of the constitution of the tribunal and the tribunal would have to render its decision within 60 days after the later of the constitution of the tribunal or the last submission.





- **Required disclosure of third-party funding:** under the proposed rule 14, funded parties are required to file a written notice disclosing the name and address of any non-party that funds the proceedings through a donation, grant or in return for remuneration dependent on the outcome of the proceedings. Disclosure of further information regarding the arrangements may be ordered by the tribunal.
- **Clearer guidance on the tribunal’s discretion in cost allocation:** existing Arbitration Rule 28 gives the tribunal a broad discretion to decide on cost allocation but most of the feedback received during consultation indicated that it was desirable for there to be clearer guidance on how and when to allocate costs. Proposed rule 52 addresses this, with the outcome of the proceedings, parties’ conduct, the complexity of the issues and the reasonableness of the costs claimed among the factors to be considered.
- **The option to fast-track proceedings through the new expedited arbitration rules:** proposed rules 75–86 set out an expedited process, which applies on an opt-in basis and is suitable for lower value claims and/or cases where the dispute is not factually complex. Even if adopted, it remains to be seen whether many parties will consent to the use of the expedited procedure in practice.

Clients say the team’s work is “exemplary” and “very precise” and that we “really understand the client’s technical and commercial-driven views on a dispute in order to translate this into the best coherent legal argumentation.”

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**Matthew Hodgson**  
Partner, Hong Kong  
Tel +852 2974 7135  
matthew.hodgson@allenoverly.com



**Lucia Raimanova**  
Partner, Bratislava  
Tel +421 2 5920 2470  
lucia.raimanova@allenoverly.com



**Hongchuan Zhang-Krogman**  
Associate, Singapore  
Tel +65 6671 6153  
hongchuan.zhang@allenoverly.com

# If it ain't broke, don't fix it?

## The Law Commission's review of the English Arbitration Act 1996

The Law Commission of England and Wales announced in November 2021 that it will carry out a review of the Arbitration Act 1996 (the Act) to ensure that “the UK remains at the forefront of international dispute resolution”. The Commissioner leading the review suggests that the Arbitration Act 1996 “could be improved in light of modern arbitration practices”, which “will enhance the experience for those who choose to arbitrate in England”.

For any successful seat of arbitration, its arbitration law is a cornerstone. According to the surveys by the Queen Mary School of International Arbitration, London has been the world's most popular seat for a number of years. In the most recent survey in 2021, London held on to the top spot but, for the first time, had to share it (with Singapore). London's rivals, such as Singapore and Hong Kong, have amended their arbitration laws periodically over the past two decades to keep pace with rapid changes in arbitration practice. The competition between jurisdictions for the business of arbitration (and dispute resolution more generally) has become more overt, with a growing appreciation of the value of legal services to national prosperity.

Meanwhile, the English Arbitration Act has stood unchanged for a quarter of a century since 1996. This partly reflects the statute's success. It is described by one leading textbook as “an exemplary piece of legislation”. Its ability to stand the test of time is all the more remarkable considering that it was effectively a new start for English arbitration law. Nevertheless, the law and practice of arbitration has moved on in numerous ways, which could not have been predicted 25 years ago. It has increasingly been argued that developments in arbitral best practice have highlighted gaps and faults in the Act, which, in the words of Law Commissioner Professor Sarah Green, should be remedied to “maintain English law as the gold standard in international arbitrations”. Similar updates and revisions have been made to the arbitration statutes in jurisdictions including France, Hong Kong, Singapore and Switzerland in recent years.

It is, therefore, a significant development for 2022 that the Law Commission has announced a review of the Act. This does not necessarily mean that the Act will be amended, although at least some updates seem likely. Nor does it mean that any amendments would be sweeping, given the strong reputation of the Act and the attractions of a stable and predictable framework for arbitration in England and Wales. Moreover, no amendments will take place in the short term: as first steps, the review will be launched in the first quarter of 2022 with a view to publishing a consultation paper in late 2022, with a potential proposal for law reform in Spring 2023.

Nevertheless, some degree of change is likely on the cards, with the Law Commission's announcement of the review highlighting a number of “possible areas” of focus. These are:

- the power to summarily dismiss unmeritorious claims or defences in arbitration proceedings;
- the courts' powers exercisable in support of arbitration proceedings;
- the procedure for challenging a jurisdiction award;
- the availability of appeals on points of law;
- the law concerning confidentiality and privacy in arbitration proceedings; and
- the electronic service of documents, electronic arbitration awards, and virtual hearings.

Further topics may be added to this provisional list. For example, any review of the procedures for challenging awards might consider more than just the subset of jurisdiction awards. Additionally, it is understood that the Law Commission is looking closely at areas such as whether the Act should include a requirement that arbitrators are independent, in addition to the current standard of impartiality. An alternative also under consideration is the introduction of a statutory duty of continuing disclosure along the lines ruled upon by the UK Supreme Court in *Halliburton v Chubb*.

Generally, the areas of focus reflect changes in arbitration practice since the 1996 Act was enacted. For example, the courts' powers exercisable in support of arbitration proceedings may need to be updated to reflect the emergence of emergency arbitration, which was not known in 1996. Equally, electronic communication was in its infancy in the late 20th century but predominates in the COVID era. It has also become clear that arbitration users in the finance sector may value a statutory power to summarily dispose of unmeritorious defences in English-seated arbitral proceedings. In these senses, the 1996 Act needs a new lick of paint to reflect the passage of time and ensure that it is fit for the next 25 years. The consultation period will reveal whether more fundamental changes are needed to its engineering.

It is to be hoped that users of international arbitration in England and Wales, as well as practitioners, will engage with the consultation to ensure that any reforms address the wishes of arbitrating parties.

On 7 March, Allen & Overy will be hosting a panel discussion on the Law Commission's review which the responsible Law Commissioner, Professor Sarah Green, is due to chair. For information on the event and to register, please visit [here](#)



**James Freeman**  
Partner, London  
Tel +44 20 3088 2496  
[james.freeman@allenoverly.com](mailto:james.freeman@allenoverly.com)

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# Dubai government decree abolishes the DIFC arbitration institute impacting current and future DIFC-LCIA arbitrations

Dubai Decree No. 34 of 2021 (the Decree), which came into force on 20 September 2021, impacts current and future DIFC-LCIA arbitrations. All arbitration users in the region will have to take its effect into account in determining how to resolve their disputes as we move into 2022.

## **DIFC Arbitration Institute abolished and operations transferred**

In an unexpected move in September 2021, the Dubai Government issued the Decree, which abolished, with immediate effect, the DIFC Arbitration Institute (the **DAI**). The DAI was a key stakeholder and administrator of the DIFC-LCIA Arbitration Centre (the **DIFC-LCIA**), one of the most widely used arbitration institutions in the region. The Decree also provided for the transfer of the DAI's assets and operations to the Dubai International Arbitration Centre (the **DIAC**), which is the main onshore Dubai arbitration institution and is undergoing a number of constitutional changes pursuant to the Decree.

## **Varying impact on DIFC-LCIA arbitrations and arbitration agreements**

### **No material impact on DIFC-LCIA arbitrations commenced prior to 20 September 2021**

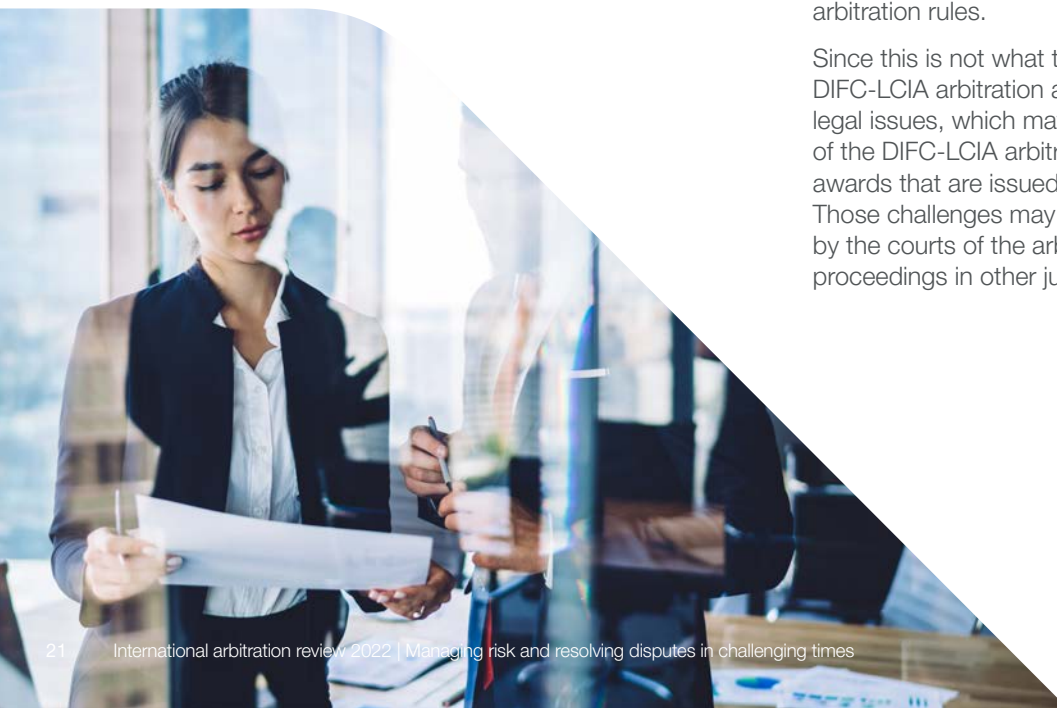
There should be no material impact on DIFC-LCIA arbitrations commenced prior to 20 September 2021.

It is understood that the LCIA Arbitration Centre in London (the **LCIA**) has been invited to assist in administering such arbitrations under the DIFC-LCIA arbitration rules until their conclusion, with assistance from the DIFC-LCIA casework team on secondment from the DIAC.

### **Potential challenges to arbitration agreements and awards in DIFC-LCIA arbitrations commenced on or after 20 September 2021**

DIFC-LCIA arbitrations commenced on or after 20 September 2021 will be administered by the DIAC under the DIAC arbitration rules.

Since this is not what the parties had agreed in their DIFC-LCIA arbitration agreements, this gives rise to complex legal issues, which may result in challenges to the validity of the DIFC-LCIA arbitration agreements, and any arbitral awards that are issued pursuant to such proceedings. Those challenges may need to be finally determined by the courts of the arbitral seat or during enforcement proceedings in other jurisdictions.



### No impact on the DIFC as an arbitral seat

The Decree has no legal impact on the Dubai International Financial Centre (the **DIFC**) as an arbitral seat. It is, therefore, still a valid choice to specify the DIFC as the seat of arbitration in agreements, but it will be key to select an alternative set of arbitration rules to the DIFC-LCIA arbitration rules.

### Administrative delays and challenges going forward

There has been very limited guidance on the implementation of the Decree since it came into force. So far, DIFC-LCIA arbitrations commenced prior to 20 September 2021 which A&O is acting on have proceeded without administrative issue. However, we understand that parties have experienced administrative delays in commencing DIFC-LCIA arbitrations after 20 September 2021.

Going into 2022, parties should not be providing for DIFC-LCIA arbitration in their new contracts and we anticipate that parties will want to obtain legal advice on the risks associated with either:

- commencing or participating in any ongoing DIFC-LCIA arbitrations commenced on or after 20 September 2021; and
- any existing DIFC-LCIA arbitration agreements, and may want to consider amending those agreements to provide for another set of arbitration rules, if an agreement is possible between the parties. This would reduce the potential uncertainties and risk of challenges to the validity of the clause down the line.



**Yacine Francis**  
Partner, Dubai  
Tel +971 4 426 7228  
yacine.francis@allenoverly.com



**Arash Koozehkanani**  
Senior Associate, Dubai  
Tel +971 4 426 7176  
arash.koozehkanani@allenoverly.com



# Arbitration awards: a new asset class

Secondary market players show a growing appetite for acquiring rights to the proceeds of international arbitration awards. The sale and purchase of arbitration awards make commercial sense for both the award-creditor and the buyer. However, these transactions raise novel practical and legal issues to consider, over which arbitration practitioners can advise.

## **An emerging secondary market in arbitration awards**

We are now accustomed to the involvement of secondary market players in international arbitration proceedings and investment arbitrations in particular. Most prominent, of course, are third-party litigation funders, which fund the claimant's arbitration costs in return for a share in the proceeds of the arbitration, should the claimant succeed.

The secondary market for participation in arbitration proceedings is expanding, however, with various investors—in particular, investment funds—showing a keen interest in investing *after* the arbitration proceedings are over, and an award has been rendered in favour of the claimants. At that point, some claimants, wishing to avoid potentially protracted enforcement proceedings, will 'sell' their award to a third party, typically at a discount on the face value of the award. In exchange, the 'buyer' assumes the risks associated with the award-debtor's compliance with the award. Funds that do this regularly will be experienced in the enforcement of awards and price their purchase according to the risk and costs they see in that process.

This growing interest is particularly acute in relation to investment treaty awards. Driven in part by the greater transparency around investment treaty proceedings, as compared to commercial arbitrations, investors also see certain sovereign States refusing to comply voluntarily with a number of final and binding awards issued against them.

## **Sale and purchase of interests in arbitration awards are win-win transactions**

There are a variety of reasons why an award-creditor may want to monetise its award. One should also not underestimate the 'fatigue' that a successful claimant may feel, after potentially spending several years and a substantial amount of capital arbitrating a dispute, only to see their counterparty refuse to honour the tribunal's final award. This is particularly acute in investment arbitration, where the prospect of enforcing against a State's assets may seem daunting. Accepting a discount on the nominal value of the award can, therefore, be an attractive and commercially sensible way for an award-creditor to achieve a positive outcome, without committing further resources to a long-running dispute.

Funds, on the other hand, are in a good position to take over: once an award has been rendered, they no longer face any uncertainty as to the outcome of the underlying dispute. They often have the necessary financial means to bear the costs associated with lengthy and difficult enforcement proceedings. Some increasingly specialise in asset tracing and enforcement procedures, in addition to strategies. Whether or not a fund decides to go ahead is ultimately a business decision and depends on its risk appetite, as well as its time horizon for obtaining a return on its investment. That decision is partially informed by the legal advice the fund receives, which will analyse, among other things, an award's susceptibility to annulment and the likely obstacles to enforcement.





## Practical and legal issues for buyers to consider

Buyers will need to take into account several factors in order to decide whether or not the prospective investment will be profitable, and the price they are willing to offer to the award-creditor. Amongst these issues are assessing the prospects of success that the State may have in annulment proceedings, and the steps that may need to be taken to enforce the award. The enforcement considerations will include the location of the State's assets worldwide, sovereign immunity issues that could arise in the various jurisdictions where enforcement may be sought, any asset-freezing and asset-location procedures that may be available, and the standing of the assignee to seek enforcement before local courts. These considerations will in turn inform the advice on how to structure the acquisition to avoid any potential pitfalls. These are complex issues and are increasingly turning asset tracing and enforcement into a distinct sub-specialism for investment treaty practitioners.

One client reports: “What I value is that the lawyers are available and bring commercial insight to the advice they give. They understand my business, which for me is essential”

Chambers Europe 2018: International Arbitration



**Marie Stoyanov**  
Partner, Paris  
Tel +33 1 40 06 51 31  
marie.stoyanov@allenoverly.com



**Antonio Vazquez-Guillen**  
Partner, Madrid  
Tel +34 91 782 99 53  
antonio.vazquezguillen@allenoverly.com



**David Ingle**  
Senior Associate, Washington, D.C  
Tel +1 202 683 3835  
david.ingle@allenoverly.com



**Pablo Torres**  
Senior Associate, Madrid  
Tel +34 91 782 98 72  
pablo.torres@allenoverly.com

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