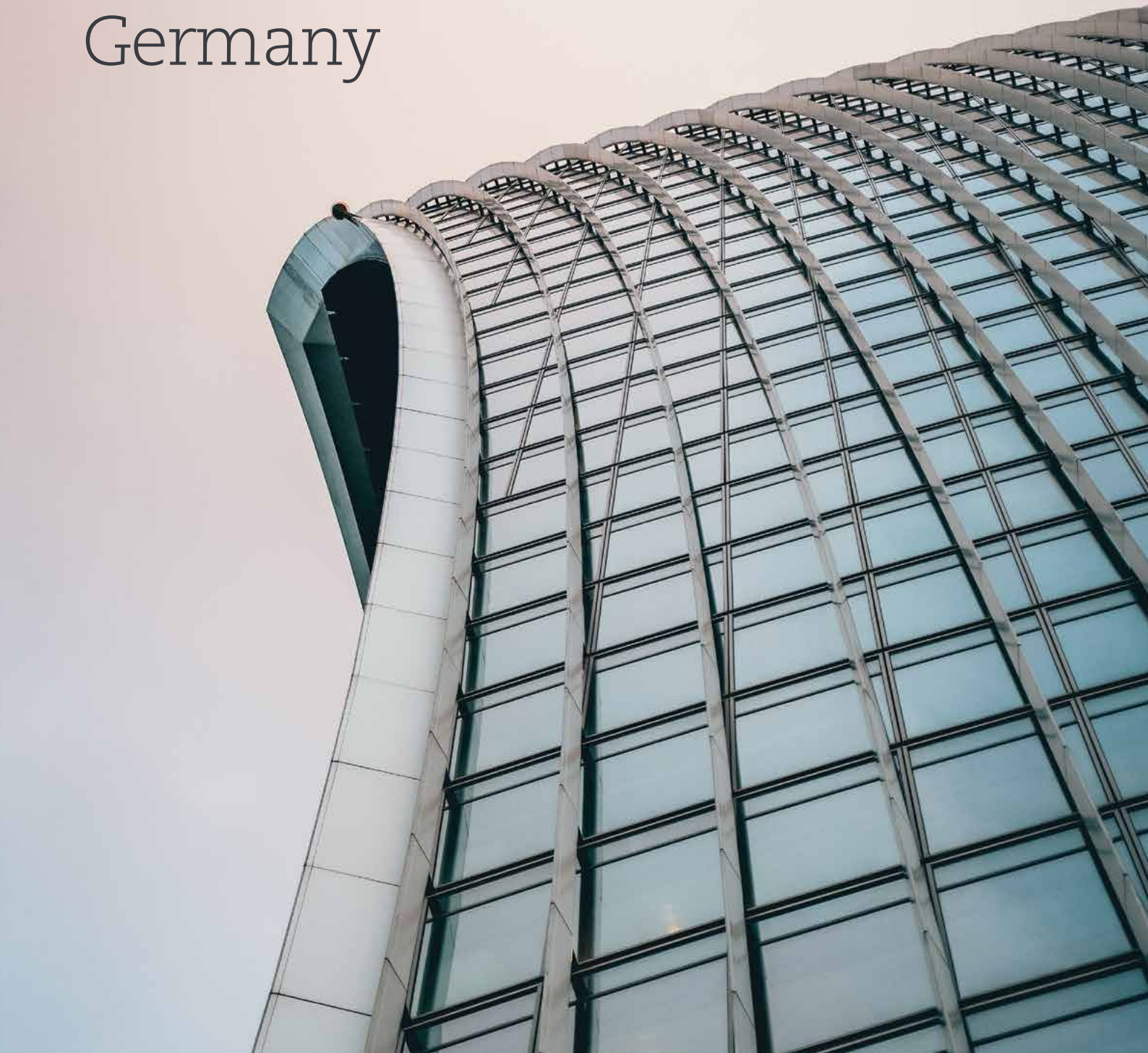
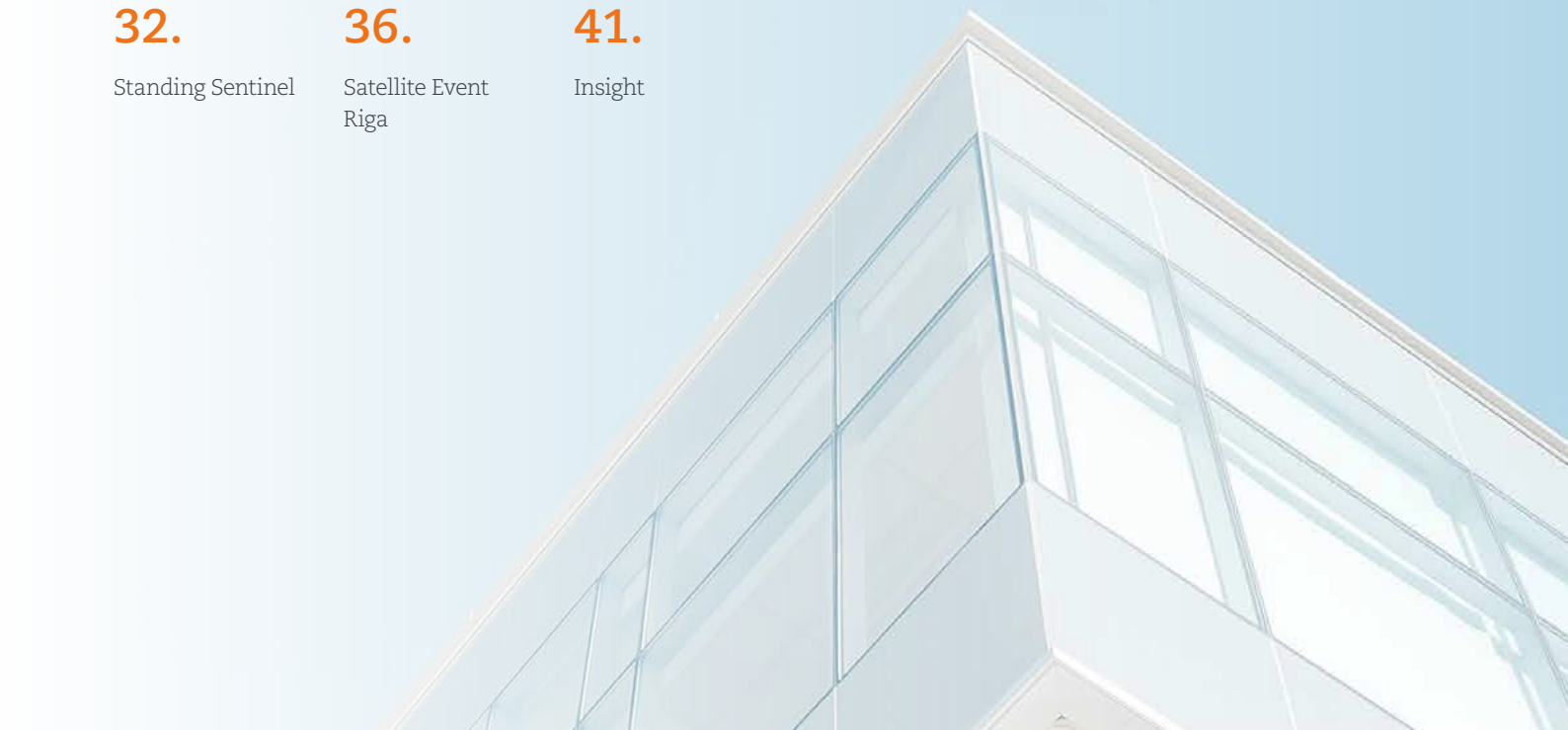
CLYDE&CO

Arbitration & Litigation

Quarterly Update 3/2021 Germany



Inhalt



Liebe Leserinnen und Leser,

Nach hoffentlich entspannten Sommerwochen halten Sie ein weiteres Quarterly Update in den Händen, das Sie prägnant und praktisch relevant über Entwicklungen im Bereich Arbitration und Litigation auf dem Laufenden hält. Von einer Sommerpause war insoweit keine Spur. Unter anderem fanden Mitte August die 10. Baltic Arbitration Days statt, die auch von Clyde & Co gesponsort wurden. Georg Scherpf war als Referent zum Thema Investment Arbitration eingeladen. Des Weiteren haben Anna Falk und Cornelia Kunze eine Veranstaltung zum Thema "Virtual Hearings – from a temporary necessity to a real alternative" organisiert. Ein weiterer Schwerpunkt waren virtuelle Verhandlungen in Schiedsverfahren. Dieses wichtige Thema – auch vor dem Hintergrund der andauernden Pandemie – ist ebenfalls ein Schwerpunkt dieser Ausgabe unseres Updates.

Folgende Beiträge haben wir in diesem Quarterly Update 03/2021 für Sie vorbereitet:

- Rechtskraft eines ausländischen Schiedsspruchs
- International Commercial Courts – an alternative to arbitration?
- The new norm: virtual arbitration
- Virtual hearings
- Virtual arbitration: A junior lawyer's virtual experience
- Summit Virtually Beckoning - Australia's International Arbitration Credentials Stoutly Anchored
- Contract adaption - a legal response to climate change
- Construction Contract Risks
- Standing Sentinel: Australia's Arbitral 'Pro-Enforcement Bias' Comprises Sand Lines
- Event Report: Clyde & Co participates in the 10th Baltic Arbitration Days 2021 in Riga.

Wir wünschen Ihnen eine interessante Lektüre und freuen uns über Fragen, Anregungen und Feedback. Schreiben Sie uns gerne dazu an **arbitration.germany@clydeco.com.**

Ihr Arbitration Team Germany

Dear readers

Summer is drawing to a close and you are now holding in your hands another issue of our Quarterly Update that shall keep you concisely informed about developments in the field of arbitration and litigation with a particular practical relevance. Among other things, the 10th Baltic Arbitration Days took place in mid-August, which were also sponsored by Clyde & Co. Georg Scherpf was invited as a speaker on the topic of investment arbitration. Furthermore, Anna Falk and Cornelia Kunze organized a satellite event on "Virtual Hearings – from a temporary necessity to a real" alternative. Another issue covered by Clyde & Co in the conference were virtual hearings in arbitration. This important topic - also against the background of the ongoing pandemic - is also a focus of this issue of our Update.

Topics in Quarterly Update 03/2021 include:

- Rechtskraft eines ausländischen Schiedsspruchs
- The new norm: virtual arbitration
- Virtual hearings
- Virtual arbitration: A junior lawyer's virtual experience
- Summit Virtually Beckoning - Australia's International Arbitration Credentials Stoutly Anchored
- Contract adaption - a legal response to climate change
- Construction Contract Risks
- Standing Sentinel: Australia's Arbitral 'Pro-Enforcement Bias' Comprises Sand Lines
- Event Report: Clyde & Co participates in the 10th Baltic Arbitration Days 2021 in Riga.

We hope you enjoy reading. Please feel free to contact us at **arbitration.germany@clydeco.com** with your questions, suggestions and feedback.

Sincerely yours

Arbitration Team Germany

Unser Team / Our Team

Nadia Darwazeh
Partner
nadia.darwazeh@clydeco.com
+33 1 44 43 88 90

Daniel Jones
Partner
daniel.jones@clydeco.com
+49 40 8090 30201

Dr Tim Schommer
Partner
tim.schommer@clydeco.com
+49 40 8090 30204

Georg Scherpf
Counsel
georg.scherpf@clydeco.com
+49 40 8090 30250

Anna Falk
Senior Associate
anna.falk@clydeco.com
+49 40 8090 30208

Dr Michael Pocsay
Senior Associate
michael.pocsay@clydeco.com
+49 211 8822 8818

Dr Sven Förster
Partner
sven.foerster@clydeco.com
+49 892 4442 0103

Dr Henning Schaloske
Partner
henning.schaloske@clydeco.com
+49 211 8822 8801

Christoph Pies
Counsel
christoph.pies@clydeco.com
+49 211 8822 8860

Dr Styliani Ampatzi
Senior Associate
styliani.ampatzi@clydeco.com
+49 211 8822 8824

Yesra-Cecile Pauly
Associate
yesra-cecile.pauly@clydeco.com
+49 211 8822 8808

Sita Rau
Associate
sita.rau@clydeco.com
+49 211 8822 8828

Rechtskraft eines ausländischen Schiedsspruchs (OLG Hamm, Urteil vom 25.11.2019 – 8 U 86/15)

Sofern die Anerkennungsvoraussetzungen gemäß § 1061 Abs. 1 ZPO i.V.m. dem New Yorker Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche vom 10. Juni 1958 ("NYÜ") erfüllt sind, können die deutschen Gerichte die Rechtskraftwirkung eines ausländischen Schiedsspruchs in Deutschland anerkennen. Wenn das deutsche Recht die Rechtskraftwirkungen des Schiedsspruchs anerkennt und diese nicht dem ordre public widersprechen, hat der Schiedsspruch nach der Anerkennung die gleichen Rechtskraftwirkungen wie nach dem Recht des Schiedsortes.

Grundsätzlich gibt es keine exterritoriale Wirkung von staatlichen gerichtlichen Entscheidungen. Diese Regel hat jedoch Ausnahmen. Staaten können die Anerkennung von ausländischen staatlichen Gerichtsentscheidungen unter bestimmten Voraussetzungen zulassen. Innerhalb der Europäischen Union ist die EU-Verordnung Nr. 1215/2012 des Europäischen Parlaments und des Rates vom 12.12.2012 über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen, „EuGVVO" oder Brüssel-Ia-Verordnung die wohl bekannteste Rechtsgrundlage für die Anerkennung von Gerichtsentscheidungen. Zahlreiche bilaterale Abkommen über die Anerkennung und Vollstreckung von gerichtlichen Entscheidungen gibt es auch. Vor diesem Hintergrund hat sich der Grundsatz der Wirkungserstreckung entwickelt, nach welchem eine ausländische Gerichtsentscheidung im Inland eines anderen Staates die gleichen Wirkungen entfaltet wie in dem Staat, in dem sie ursprünglich erlassen wurde.

Die Theorie der Wirkungserstreckung ist in Deutschland vom Bundesgerichtshof anerkannt und von der Literatur angenommen. Kürzlich hat das Oberlandesgericht Hamm diese Theorie jedoch auf ausländische Schiedssprüche übertragen und angewandt (OLG Hamm, Urt. v. 25.11.2019 – 8 U 86/15, BeckRS 2019, 38848).

Die Klägerin, eine zyprische Gesellschaft, gehörte zu einer Unternehmensgruppe, die vorhatte, mit einer deutschen Aktiengesellschaft (Beklagte zu 1)) ein Joint Venture zu gründen, um in den russischen Energiesektor zu investieren. Die Unternehmensgruppe und die Beklagte schlossen einen Letter of Intent („LI") und einen Vorvertrag (Preliminary Agreement „PA"), um ihr Interesse an dem Abschluss eines sogenannten „Investment and Shareholder Agreement" (ISHA) als Grundlage für das Joint Venture zu bekunden. Das PA enthielt eine Schiedsklausel, die alle Streitigkeiten aus dem PA der Zuständigkeit eines Schiedsgerichts nach der Schiedsgerichtsordnung des London Court of International Arbitration (LCIA) mit Sitz in London unterwarf. Vorgesehen wurde im PA auch, dass russisches Recht das auf die Streitigkeit materiell anwendbare Recht (lex causae) war, während das Schiedsverfahren dem englischen Verfahrensrecht unterlag. Die Klägerin und die Unternehmensgruppe leiteten ein Schiedsverfahren vor dem LCIA gegen die Beklagte ein, als die Beklagte die Verhandlungen abbrach, ohne das ISHA abzuschließen. Erwähnenswert ist in diesem Zusammenhang, dass die Klägerin keine Partei des PA oder der Schiedsvereinbarung war. Der Beklagte zu 1) hatte jedoch keine Einwände gegen die Teilnahme der Klägerin am LCIA-Schiedsverfahren, sofern bestimmte Bedingungen erfüllt waren, darunter ein entsprechender formeller Antrag der Klägerin gemäß den LCIA-Regeln. Nach einem Schiedsverfahren, das mehr als

zwei Jahre angedauert hat, wies das Schiedsgericht alle Ansprüche ab, da kein Recht festgestellt werden konnte, das nach dem Klägervortrag missbraucht wurde.Im Anschluss erhob die Klägerin vor dem Landgericht Essen eine Klage auf Schadens- und Aufwendungsersatz wegen des Abbruchs der Verhandlungen und des nicht zustande gekommenen Joint Ventures gegen die Beklagte zu 1) sowie deren ehemaligen Vorstandsvorsitzenden (Beklagter zu 2), der an den gescheiterten Verhandlungen in Deutschland beteiligt gewesen war. Die Klägerin vertrat die Auffassung, ihrer Klage stünden weder die Schiedseinrede noch der Schiedsspruch entgegen, da ihre nunmehr geltend gemachten Ansprüche nur auf das negative und nicht mehr das positive Interesse gerichtet waren. Mit einem Teilurteil wies das Landgericht Essen die Klage gegen die Beklagte zu 1) aufgrund des bereits bestehenden LCIA-Schiedsspruchs als unzulässig ab. Das Gericht hielt aber die Klage gegen den Beklagten zu 2) für zulässig, da der Schiedsspruch Ansprüche gegen ihn nicht ausschließe. Sowohl die Klägerin als auch der Beklagte zu 2) legten Berufung beim Oberlandesgericht Hamm ein. Das Oberlandesgericht Hamm hat die Entscheidung des Landgerichts Essen, die Klage zurückzuweisen, bestätigt. Die Berufung sowohl der Klägerin als auch des Beklagten zu 2) waren ohne Erfolg.

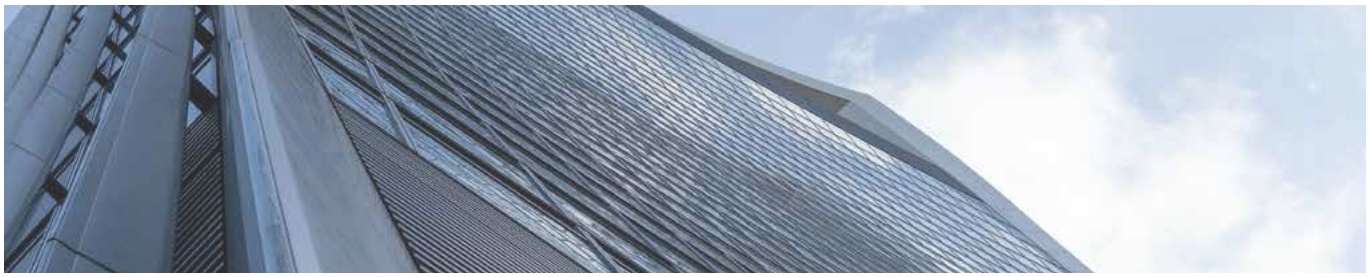
Nach dem Oberlandesgericht Hamm erfolge die Anerkennung der prozessualen Wirkungen eines Schiedsspruchs in Deutschland ipso iure, soweit die Anerkennungsvoraussetzungen nach § 1061 Abs. 1 ZPO und Art. III NYÜ erfüllt sind, ohne dass es eines gesonderten Anerkennungsverfahrens bedarf. Zusätzlich sei ein Schiedsspruch gemäß Artikel 58 Abs. 1 des englischen Arbitration Act rechtskräftig und verbindlich, ohne dass es weiterer Schritte bedürfe, um eine Bindungswirkung zu erzielen. Das Gericht führte weiter aus, dass die Rechtskraftwirkungen, die ein ausländischer Schiedsspruch in Deutschland entfaltet, von den Wirkungen abhängen, die der Schiedsspruch nach dem Recht des Schiedsortes (lex arbitri) entfaltet. In diesem Zusammenhang befand das Gericht, dass die Theorie der Wirkungserstreckung anzuwenden sei: Ausländische Rechtskraftwirkungen sind anzuerkennen, soweit das deutsche Recht vergleichbare Rechtsinstitute kennt und die Wirkungen nicht gegen den deutschen ordre public verstoßen. Dadurch lehnt das Gericht die Gleichstellungstheorie, nach welcher eine ausländische Entscheidung die gleiche Wirkung wie eine inländische Entscheidung hat, wobei weitergehende oder zurückbleibende Wirkungen der ausländischen Entscheidung unberücksichtigt bleiben, sowie die Kumulationstheorie, die Elemente der Wirkungserstreckung und Gleichstellungstheorie kombiniert, ab.

Das Oberlandesgericht Hamm wandte das englische Prinzip des „cause of action estoppel“ an und kam zu dem Ergebnis, dass die Ansprüche der Klägerin gegen die Beklagte zu 1) aufgrund bestehender Rechtskraft ausgeschlossen waren, da sie mit den Ansprüchen im LCIA-Schiedsverfahren identisch seien. Dabei sei also die Identität zwischen früherer und späterer (Schieds-) Klage bzw. zwischen den Klagebegehren maßgeblich. Unter Anwendung des englischen Rechtsgrundsatzes der “privity of interest” entschloss sich das Gericht weiter, dass dies auch für die der Klägerin von ihrer Schwestergesellschaften abgetretenen Ansprüche, die die Klägerin vor dem deutschen Gericht geltend gemacht hatte, der Fall war. Dabei sei nicht von Bedeutung, dass die Beklagte zu 1) dem Schiedsverfahren freiwillig beitrat. Der Schiedsspruch verhindere dagegen nicht, so das Gericht, die Klage gegen den Beklagten zu 2), der am Schiedsverfahren nur als Zeuge und nicht als Partei teilgenommen habe und daher nicht als privy of interest zu qualifizieren sei. Dementsprechend ist der Beklagte zu 2) nicht von der Rechtskraft nach der cause of action estoppel erfasst und kann von der Klägerin in Anspruch genommen werden. Das Gericht stimmte des Weiteren dem Beklagten zu 2) nicht zu, dass die Klage gegen ihn als Verfahrensmissbrauch (abuse of process) anzusehen war.

Erwähnenswert ist auch, dass das Oberlandesgericht Hamm das Vorlieger eines Anerkennungshindernisses gemäß Art. VI lit. c UNÜ wegen sachlicher Überschreitung der Schiedsabrede Abgelehnt hat. Auf ein solches könne sich die Klägerin gemäß § 242 BGB wegen widersprüchlichen Verhaltens aber ohnehin nicht berufen. Vor den deutschen staatlichen Gerichten trug die Klägerin trotz jahrelangen und umfangreichen Schiedsverfahren vor, dass die Schiedsabrede die in Frage stehenden Streitigkeiten nicht umfasse. Die Klägerin habe jedoch bereits im Schiedsverfahren partizipiert und somit das Vertrauen der Beklagten zu 1) geschaffen, dass sämtliche Streitigkeiten im dortigen Verfahren geklärt würden. Aus diesem Grund sei es nach Ansicht des Gerichts treuwidrig, sich auf eine unterschiedliche Interpretation der Reichweite desselben Schiedsspruchs in Schiedsverfahren und Gerichtsverfahren zu berufen.

Die Entscheidung des Oberlandesgerichts Hamm stellt einen klaren Ansatz zur in der Rechtsprechung und Literatur viel diskutierten Frage dar, wie die Rechtskraftwirkungen eines ausländischen Schiedsspruchs auf ein nachfolgendes deutsches Verfahren zu beurteilen sind. Sie kann als schiedsfreundlich empfunden werden, insoweit die Parteien eines Schiedsverfahrens sich auf einen ausländischen Schiedsspruch und dessen Rechtskraftwirkungen in Deutschland berufen können. In diesem Zusammenhang ist es auch wichtig, dass für die Anerkennung der Rechtskraftwirkungen des ausländischen Schiedsspruchs kein gesondertes Anerkennungsverfahren oder gerichtliche Erklärung erforderlich ist. Des Weiteren hat das Gericht den Umfang der Rechtskraft des ausländischen Schiedsspruchs nach der Wirkungserstreckungstheorie bestimmt. Ausländische Rechtskraftwirkungen sind insoweit anzuerkennen, als das deutsche Recht vergleichbare Rechtsinstitute kennt. Hervorzuheben ist schließlich, dass jede Partei ihre Entscheidung, einem Schiedsverfahren beizutreten, sorgfältig abwägen muss, da dies einer späteren Rechtsverfolgung derselben oder ähnlicher Ansprüche vor staatlichen Gerichten entgegenstehen kann.

Dr Styliani Ampatzi, LL.M.



International Commercial Courts – an alternative to arbitration?

In recent years, international commercial courts (Commercial Courts) have been emerging as a new institutional mechanism to resolve cross-border disputes. Since 2015, Commercial Courts were established in Singapore, China, France, the Netherlands, Dubai and most recently in Germany. Furthermore, Belgium for 2021 and Switzerland for 2022 already announced their intention to establish Commercial Courts as well.

What are Commercial Courts? How do they operate? And what is their actual or perceived advantage over international arbitration? Besides providing answers to these questions, we will also look at recent developments and legislative initiatives relating to Commercial Courts in Germany.

Introduction

If one were to define Commercial Courts, it would be possible to describe them as specialised, English speaking courts, exclusively dealing with cross-border commercial and corporate cases, sometimes with a certain threshold amount in dispute as a jurisdictional hurdle. The development of Commercial Courts is hardly homogenous and the procedural mechanisms between the courts vary significantly, which will be highlighted in this article.

The justifications for establishing Commercial Courts are broad – and not all of them are entirely convincing. Some argue that due to the success of arbitration in the last decades and the resulting lack of those disputes being decided in state courts, there is a detrimental lack of published jurisprudence that impedes the development of the law. Other justifications include the negative publicity that arbitration has received more generally in the discussion regarding the legitimacy of investment arbitration during the negotiation of the Transatlantic Trade and Investment Partnership (Spillover effect). Finally, the cost of arbitration has also been advanced, claiming that state courts are less expensive – for the parties – but equally suited to decide complex international disputes. Moreover, States seem to fear that their commercial centres lose attractivity if they cannot provide a modern forum for international disputes, besides arbitration. This is especially true for some Members States of the European Union, which try to absorb work from London as a leading financial and legal centre following Brexit.

In a similar vein, and outside of Europe, the Commercial Courts based in Singapore and Dubai were created to promote these locations as commercial and judicial centres. In addition, the idiosyncrasies of the domestic law in the UAE may also have been a driving force in the creation of specialised Commercial Courts (see DIFC-Courts). China established its Commercial Court in the first place to settle disputes in connection with its Belt and Road Initiative and later extended the jurisdiction of the court to other international commercial matters. Looking at the various Commercial Courts already in existence and the many ongoing initiatives, it would be fair to say that a new form of judicial competition has emerged between Commercial Courts in different countries, and it is not always clear whether it is this perceived competition or actual demand from the business world that drives the development of Commercial Courts. Nevertheless and no matter how different the reasons for the establishment of those new courts were or are, the main idea remains to provide an alternative to arbitration and to bring international commercial disputes back into the realm of state courts. Whether Commercial Courts are a real alternative, will be discussed here.

Key Characteristics

What most Commercial Courts have in common, is the way how they determine their jurisdiction. A written clause (cf. choice of court agreement, arbitration clause) needs to be concluded between the parties, a cross-border business matter needs to be in dispute, the language of the proceedings must be in English, and sometimes a certain minimum amount needs to be in dispute as well. A closer look at the individual courts reveals, however, that the similarities end here.

Language

Even if most of the Commercial Courts are hallmarked as courts fully working in English language, this does not hold true for all courts. Most Commercial Courts, except the China International Commercial Court, conduct proceedings, or parts thereof, in English. This includes, mostly, the taking of evidence, the oral hearing, all communication between the parties and the court, and finally the judgment rendered by the court. Before the Chamber of the Paris Commercial Court however, the parties will only be provided with a translation of the judgment. Court communications as well as the original judgement will be in French only. Also, the existing Commercial Courts in Germany (see further discussion below) do not offer fully English language proceedings, but rather only an oral hearing in English.

Contrast Arbitration:

As much as it is advertised to have proceedings in English, Commercial Courts do not offer the same flexibility in terms of language as arbitration. For example, many international arbitrations with parties in francophone Africa are resolved in French. Many arbitrations between Swiss, German, or Austrian parties are often resolved in German and so on. Therefore, English language is not really a unique selling point but rather the limiting factor of Commercial Courts. Moreover, arbitration tends to extend the selected language to the entire dispute resolution process, from the taking of evidence through to the final award.

Procedural Rules

Regarding the rules of procedure, most Commercial Courts apply statutory provisions of civil procedure which are often those of the respective state courts. For example, the Chamber of the Paris Commercial Court, as well as the Netherlands Commercial Court ("NCC") use the national provisions of civil procedure. Both courts, however, complement those national laws with additional rules of procedure and commentaries, to make these more accessible for foreign parties. The Singapore International Commercial Court ("SICC") on the other hand developed a distinct set of procedural rules. To make it more attractive, the SICC rules are partially based on typical arbitration rules comparable to ICC-Arbitration Rules. The International Commercial Court in Dubai (DIFIC-Court), in contrast, developed a new procedural code, more akin to common-law proceedings.

Contrast Arbitration:

Arbitral institutions usually provide ultimate flexibility due to a wide choice of tested arbitration rules which are usually well commentated and updated on a regular basis. In most Model Law jurisdictions, the parties and arbitrators are also free to adopt their own procedure with very few mandatory provisions as a limiting factor. Furthermore, there are many (more or less) accepted procedural rules and guidelines, which are often applied directly or as guidance to international arbitral proceedings, for example when it comes to the taking of evidence or to conflicts of interest (IBA Guidelines). These guidelines provide for certainty, predictability, and a fair process. Many institutional arbitration rules also provide for expedited procedures and emergency arbitrators, unless excluded by the parties.

Appointment of Judges

All current Commercial Courts are staffed with judges, who have experience either as judge or as lawyer in the field of commercial and business law. However, commercial disputes can be diverse both legally and factually (post-M&A, energy, insurance, transport & logistics, pharmaceuticals, finance etc.). The only exception to this is again the SICC, where not only judges sit, but also so called "international judges" can sit as adjudicators. The list of the "international judges" consists of

judges, lawyers and academics from common-law states who have special expertise in commercial matters.

Contrast arbitration:

One of the key features of arbitration is the selection of the arbitrators by the parties. It provides the parties with an opportunity to appoint arbitrators who have special expertise relating to the specific sector or legal field involved. Parties often also include specific arbitrator qualifications in the arbitration clause to ensure that appropriately qualified arbitrators decide the dispute. It rarely happens, that a party cannot find an arbitrator that matches the sought-after qualifications. It is unlikely that commercial courts will ever be able to offer an equivalent breadth of expertise to choose from. Moreover, in arbitration, parties often schedule pre-appointment interviews with the arbitrators to make an informed decision as to who they appoint.

Confidentiality

An important aspect for commercial parties is the confidentiality of the dispute resolution process. This protection is usually not available in state courts and therefore also not in the newly established Commercial Courts where the principle of public hearings prevails. Even before the SICC, where the public may be excluded from certain cases, the parties will struggle to keep confidential the material content of their case, let alone its existence.

Contrast arbitration:

The confidentiality of the proceedings is an important consideration for the parties when choosing arbitration. Most arbitral institutions provide for confidentiality in their rules. Some national arbitration laws even imply confidentiality. Where neither is the case, the parties often agree separately on confidentiality. Some arbitral institutions encourage the publication of awards, but only where the parties consent or fail to object. Only where it comes to court interventions (jurisdictional or arbitrator challenges, setting-aside proceedings, assistance in evidentiary matters etc.), the confidentiality is reduced. However, in many jurisdictions there are also safeguards that prevent business secrets from being made public in such cases. The full arbitration case file practically never has to be disclosed when state courts get involved.

Appeals

Another major difference to arbitration is the appeal system most Commercial Courts provide. At the SICC for example, the parties have the possibility to appeal to the Singapore Court of Appeal. This appeal mechanism can, however, be excluded by party agreement. However, the appeal instance does not provide the same procedural framework as the SICC. The NCC provides in the first and in the appeal instance for a specialized tribunal, applying the same procedural framework as in the first instance.

Contrast arbitration:

Most arbitral institutions and national arbitration laws do not provide the opportunity to appeal to a second instance. A prominent exception is the 1996 Arbitration Act, which provides for an appeal on a point of law where the arbitration is seated in England and the substantive law is English law, and unless excluded by the parties (Section 69 of the AA 1996). Many arbitration rules explicitly exclude any right to appeal (see ICC-Rules and LCIA-Rules). Some commodity arbitration rules (FOSFA, GAFTA) also provide for a second instance. However, these are an exception to the one-stop-shop that arbitration usually provides for. Arbitrations are often perceived as complex and long. When compared to two or more instances before state courts, arbitration is, however, often quicker.

Enforcement

Enforcing decisions of Commercial Courts is as simple or difficult as enforcing every other state court judgement. Mechanisms like the Recast Brussels Regulation (1215/2012), Hague Convention on the Recognition and Enforcement of Foreign Judgments (Hague Judgements Convention 2019 – not yet in force) and a web of reciprocal agreements regulate the enforcement of state court judgements. The 2019 Hague Judgements Convention was intended to bring some uniformity to the recognition and enforcement, but few states have so far signed the convention and the prospect of it taking-off and "spanning the globe" are dim.

Contrast Arbitration:

A hallmark of arbitration is the enforcement of awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), with its 168 contracting parties. The contracting parties are obliged to recognise arbitral awards and enforce them at the request of a party with only a limited possibility to refuse recognition and enforcement (see Art. V New York Convention).

Commercial Courts in Germany

The first Commercial Courts in Germany were established on 1 November 2020 under the auspices of the Regional Court of Stuttgart and the Regional Court of Mannheim. Parties can resolve their cross-border commercial, corporate as well as banking and finance disputes (the latter only in Mannheim) at these new courts. The minimum amount in dispute is two million Euros. Moreover, the Regional Court (Landgericht) Hamburg offers the possibility to conduct proceedings – partially - in English and the newly created Chamber for International Commercial Disputes at the Higher Regional Court Frankfurt also allows proceedings to be conducted – again partially - in English and under certain preconditions. These Commercial Courts apply the German Code of Civil Procedure (CCP).

The German Commercial Courts are limited by the Courts Constitution Act (Gerichtsverfassungsgestz, GVG), which stipulates that the court language is German (section 184 GVG). However, the oral hearing can be conducted in English (section 185(2) GVG) and English language documents can be submitted to the record. However, written submissions and judgments must be in German. Previous legislative efforts to change the GVG and allow proceedings conducted fully in English have been shelved.

The CCP contains few mandatory provisions, and it is possible for the parties to adapt the individual procedures for their proceedings by means of party agreement. However, this would require parties – and especially foreign parties – to study the CCP and deviate from certain procedural rules where desired.

Conclusion

Commercial Courts can provide a modern and specialised dispute resolution alternative in English language – this is a welcome development. However, most of the advantages international arbitration provides, cannot (or not yet) be met by these Commercial Courts. Arbitration provides the ultimate flexibility in the selection of arbitrators, established practices in the taking of evidence, confidentiality throughout the proceedings and unparalleled enforceability. We will continue to watch the developments for you relating to Commercial Courts in Germany and around the globe.

George Scherpf

Maximilian Jacob

Katharina Uedelhoven

The new norm: virtual arbitration

Partners Benjamin Knowles and Milena Szuniewicz-Wenzel, together with Yuan Xing (Partner) and Cynthia Xiao (Consultant) from Beijing Huanzhong & Partners, answered some of the most frequently asked questions about virtual arbitration, which gained substantial popularity since the beginning of Covid-19 pandemic.

Ben and Milena have attended a number of virtual hearings in the last two years and they have also gotten involved in the creation of a website, **https://virtualarbitration.info/**, which contains a great amount of up-to-date news, information and guidance about virtual arbitration. Similarly, Yuan and Cynthia also have some experience in virtual arbitration mainly after the pandemic, and as authors of Huanzhong WeChat official account, Huanzhong Commercial Arbitration, have been focusing on changes brought up by virtual hearings long before.

Here is a summary of the questions being asked and answered.

Prior to the pandemic, have you ever attended a virtual hearing?

Benjamin: "In my 28 years of practice, I have never seen a fully virtual hearing until the pandemic, whereas I have been involved in many hearings where witnesses have given evidence by video conference. This latter practice, however, was often limited to certain circumstances, where, for instance, witnesses either could not travel due to their unavailability or health reasons or simply it would be more sensible for relatively insignificant witnesses to join hearings virtually to bring the costs down."

Yuan: "Neither have we experienced a fully virtual hearing before the pandemic, but in fact Chinese laws always allow witnesses to testify virtually in certain circumstances. If a witness has difficulties in testifying in person (for example, if due to illness, inconvenient traffic, and some force majeure events), he/she can apply for testifying by written statement or giving testimony via audio-visual transmission technology or audio-visual materials. However, as Chinese courts tend to place greater value on documentary evidence, there are relatively fewer witnesses attending hearings in civil courts. If there are witnesses involved, we will usually try to ask them to attend court and give oral evidence in person.

So before the pandemic, we've never had witness testified online in domestic litigation or arbitration proceedings, but we did encounter some international arbitration cases where the tribunals held directions hearings via telephone or video conferences and witnesses might also apply to attend virtually due to health issues. Nevertheless, virtual hearings were rare before the pandemic."

Could you describe how the attitude of arbitral institutions, tribunals, and counsels was towards virtual hearings in the pre-pandemic world?

Milena: "Looking at the different stages of arbitral proceedings: it was already common to see the directions hearings being held remotely by tele-conferencing even before the pandemic. Now, I expect that this type of hearings will be more commonly held using video conferencing given the familiarity of the legal profession with such technologies. On the other hand, with regards to merits hearings at which evidence needs to be given, I do not recall having been involved in a fully virtual hearing before the pandemic. In fact, even in partially virtual hearings where only some of the evidence had to be given remotely, the default position for the opposing counsels had been to initially object to any request for witnesses to give evidence using video conferencing. As such when tribunals allowed evidence to be given remotely, this has often been subject to certain conditions. For example, that a representative from the opposing side would be present where the witness gave evidence, or that the witness was required to give evidence in a local arbitration centre."

Yuan: "In international arbitration, we saw the same picture before the Covid-19 pandemic. In some ICC and UNCITRAL cases we advocated before, when the parties were in different countries, the tribunal would usually hold a directions hearing via teleconference. While as for substantive matters, an in person hearing is the norm. However, tribunals in China usually communicate procedural matters with parties in written form, and secretaries may call the counsels separately to make the arrangements. Tribunals rarely hold hearings solely about procedures. Even so, Chinese arbitral institutions have tried this novelty since decades before. Since 2001, CIETAC adopted Online Dispute Resolution to resolve domain name disputes. On May 1, 2009, CIETAC implemented the Online Arbitration Rules, extending the scope to e-commerce disputes. On November 20, 2019, Nansha International Arbitration Center, co-founded by Guangzhou Arbitration Commission, for the first time used the technology of virtual hearing allowing a party in Cambodia to participate in the hearing via video conference.

We also agree with Milena that it is necessary to supervise witnesses to testify remotely to ensure that the witness is not improperly interfered. In a CIETAC case we represented in 2020, there was a similar situation. The case was held in Beijing, and the witness was cross-examined in Hong Kong, accompanied and supervised by the lawyer on behalf of the other party."

What changes have you observed in the sector since the beginning of the Covid-19 pandemic last year?

Milena: "The short answer to your question is that there has been a clear change in the attitude of tribunals and parties to hearings being held virtually. Whereas the initial reaction of tribunals and parties to the pandemic was to postpone the upcoming hearings, we now observe that they are ready to go ahead with hearings, whether in-person or not. In my experience, this change was initially reflected in smaller cases, where the legal profession could much more quickly adapt to the changes. As such, the initial emphasis was on keeping smaller cases on track, which often involved cases where an interim hearing was to be held or where an oral hearing was not very important. However, within six months after this initial stage, it became clear that tribunals and parties were more open to the idea of fully virtual hearings. This was particularly prompted by the lockdowns, which were being unexpectedly eased and tightened throughout the pandemic as a result of which travel and in-person meetings, became almost impossible to plan."

Cynthia: "The Covid-19 outbreak took place at the end of January 2020, almost all scheduled hearings were cancelled, but as the pandemic in China was under control in about August, the domestic situation was different. In February 2020, many Chinese courts released online hearing systems, and many cases were heard online thereafter. By the end of 2020, there were 856,000 online hearings, among which 40% were held in Beijing. Since August 2020, as the pandemic was under control, the courts had gradually resumed on-site hearings. However, for parties' convenience, some courts would still organise online hearings for parties from different regions.Since the pandemic, Chinese arbitration institutions have actively promoted virtual arbitration and issued their own guidelines and rules for virtual hearings, such as CIETAC, BIAC, HKIAC and CMAC. Virtual hearings for domestic cases were mainly held during the period from March to August 2020. There was usually the parties' consent necessary to have the cases heard virtually, and the cases themselves were not complicated focusing on written evidence. After August 2020, on-site hearings were gradually resumed. However, for some cases involving participants in other regions, a combination of 'online + offline' hearings may still be adopted, that is, people in mainland China attend in person, while others participate remotely. So the pandemic did change the way the courts and tribunals hear cases."

Could you tell us about your experiences with the use of different technologies in virtual arbitration hearings?

Milena: "In our experience, the key to a successful virtual hearing is both having the right equipment and being prepared for all eventualities. First, you need to have a good broadband connection to ensure the smooth running of the chosen platform where the hearing will be held. Having said that, it is important to have pre-agreed protocols in place so that parties know what to do if things go wrong as it is common to have connection problems. Second, the chosen platform, which not only needs to be trustworthy, but also must be operational in the country from where the parties are attending. There are many platforms, which are either not supported in certain countries or prohibitively expensive to access. Third, you need the right device set-up, which should make your life easier. I would recommend having at least three devices, if not more: one with a camera for the video link, one for reviewing your documents and one for the internal communication with your team. Besides these, if simultaneous translation is being used during a virtual hearing, it is also important to have the right tech-support given that translation technology can be quite tricky."

Cynthia: "As Milena said, virtual hearings require a high level of technical arrangements of the attendees, such as equipment and software. Currently, we think technology will not be a problem for holding virtual hearings as long as participants get well-prepared in advance. In terms of platforms, some arbitral institutions use third-party software to conduct hearings, while others may start to develop and use their own systems for confidentiality purposes (for example, around April 2020, CIETAC launched its own intelligent hearing platform). In the case mentioned just now, a combination of "online + offline" hearing was applied with equipment provided by the arbitration institution. While the equipment debugging was conducted by the institution, lawyers cooperated to take tests before the hearing. It is also noted that many institutions require that their staffs (secretaries) should assist pre-hearing tests and instruct participants to use the software and platforms. Such tests have gradually become an essential part of pre-hearing preparation. In terms of devices, sometimes the signal may not be stable, and the audio reception may be not clear in virtual hearings, so participants tend to have a separate monitor for hearing transcript. On the one hand, it is convenient to follow up the hearing at any time. On the other hand, it can help to correct the mistakes in the transcript in time."

Do you think the virtual nature of such hearings requires the adoption of a different style addressing the tribunal or questioning witnesses/experts?

Ben: "Style is certainly important as you need to find an appropriate way to present your case in a virtual environment. An aggressive approach will not be very effective given it is not easy to listen to someone speaking loudly and aggressively on a screen for a prolonged period of time. However, it does not end there. One must also be mindful of the fact that those visual cues are not present on a virtual hearing. An advocate can no longer impose their physical presence in the room. As such, it is even more important to think carefully about what you need to say and how you say it. Instead of your physical presence, you need to be able to use your voice, eyes, and mimics to communicate."

Yuan: "We agree that virtual hearings do require a high level of lawyers' advocate skills, especially in some cases involving examination on witnesses. Compared with in-person hearings, as lawyers are separated from the cross-examined witness and the arbitrator, tempo of the lawyer's questioning is occasionally affected by issues such as audio reception and telecommunication. Lawyers may also lack necessary eye contact, so they need to speak more clearly with a powerful voice and ask questions more patiently. Sometimes lawyers may also need to explain their questions to witnesses in detail."

How has the document handling been affected by the pandemic?

Ben: "Document handling has already been changing before the pandemic as there has been a gradual move away from hard copy documents. Yet, this change has not always been welcomed and it was not a complete transformation given not all parties, tribunals and witnesses had the equal familiarity with the technologies used for electronic viewing and storage of documents. Against this backdrop, the pandemic acted as a catalyst to accelerate this transformation that has been already happening. With the tribunals and parties becoming more flexible to be able to conduct hearings during the pandemic, they had to make peace with the new technologies. As such, over the last year the legal profession gained a great familiarity with using and sharing documents electronically. In our hearings we have now seen an increased number of document sharing platforms being used, which includes both third party and in-house platforms. Having said that, we have also witnessed the use of more traditional and old-fashioned technologies like USB sticks."

Cynthia: "In recent years, people have increasingly used electronic means to present evidence and materials in on-site hearings, but there are some technical difficulties in virtual hearings. Previously in a virtual hearing, we have also tried to remotely present documents to arbitrators and witness via screen sharing, but the platform provided by the institution did not have such a function itself, so a third-party platform had to be used to share files online. Considering the confidentiality of arbitration, we finally chose to present the documents to the arbitral tribunal in hard copies. As for the witness, a separate electronic hearing bundle was prepared after negotiations between the parties. The hearing bundle was numbered with labels, so the witness could easily locate the evidence during the hearing."

How have you dealt with witnesses requiring translation during the virtual hearings?

Milena: "Before the pandemic, it was already common for witnesses to give evidence in their mother-tongue and tribunals would often require simultaneous interpretation to enable this. However, when hearings were virtualised, simultaneous translation has proven to be difficult due to the intricacies of the translation technology. Consequently, tribunals had to become more flexible to accommodate consecutive translations, despite them being slower. This aside, a major problem with virtual hearings is the distance between the various individuals. You may no longer be in the same room with the witnesses and interpreters. As such, Counsel need to be short and precise when raising questions and need to ensure that all parties have access to the documents being used. This also means that before the hearing Counsel need to prepare the witnesses, who may not have any assistance during the hearing. The witnesses will need to know how to (i) find and read documents and (ii) ask questions if there is anything they do not understand during the hearing."

Cynthia: "Regarding the issue of interpretation, in the cases we participated in before the pandemic, we mainly used consecutive interpretation. Although it is slower, consecutive interpretation is relatively clearer and more accurate. We had not involved translation issues since the pandemic, but we did encounter an online transcription recording. In that hearing, the reporter said that it was difficult for him to promptly identify who was speaking through the video, and asked all parties to introduce the main speakers before the hearing. Each person may also need to repeat his or her name before speaking for accuracy of the transcription."

Having covered some of the fundamental elements of virtual hearings, do you think there are any other remaining issues, which may affect the quality of virtual hearings?

Ben: "There are still many legal and practical issues, which certainly have an influence on virtual arbitrations. Whereas virtual hearings are not allowed in some countries, there is also some legal uncertainty around the enforcement of an arbitral award where no in-person hearing was held. Nevertheless, the important thing is to realise that virtual arbitration is relatively new, and these issues have not yet

been tested at the enforcement stage. From a more practical perspective, one difficulty faced in virtual hearings is that parties may attend from different time zones, making synchronisation substantially more difficult. As such, we may come across new ways to deal with such synchronisation problems going forward. Asynchronous hearings, where parties from different time zones record their submissions prior to the tribunal's screening, are yet to be tested. Similarly, where written submissions could partially replace certain parts of the oral hearings such as openings and closings, we may replace oral hearings with written submissions."

Yuan: "First, we agree with Ben that lawyers need to be more cautious about how to present their cases in virtual hearings, about what can be presented orally and what should be put into written opinions. In this regard, we would like to add that it is very important to have complete, systematic and accurate written submissions, whether the hearing is held online or in person.

Second, regarding the legality issue, one of the hottest topics is whether a virtual hearing requires consensus of the parties. Arbitration rules of some institutions give the tribunal broad discretion, like the CIETAC Arbitration Rules and the ICC Arbitration Rules. However, some rules on virtual hearings (such as the BIAC and the CMAC) expressly stipulate that consensus of the parties is prerequisite for virtual hearings. Besides, the issue of enforcing awards for such cases, especially in foreign-related cases arises. The UNCITRAL Model Law provides that the arbitral tribunal should give parties the opportunity to fully present their cases; otherwise it will constitute grounds for setting aside the arbitral award. In practice, we have not yet learned of a case where one party applied for setting aside an arbitral award on the ground that the tribunal holds a virtual hearing without its consent. In jurisdictions where the Model Law is applied (such as Singapore, China Hong Kong, Germany, Japan, etc.), scholars generally believe that if a party requests the court to set aside the arbitration award merely on the ground that the virtual hearing was conducted without its consent, such request is unlikely to be upheld. The applicant also needs to prove that the arbitral tribunal treated parties unequally during the hearing, and that such unequal treatment has a substantial impact on making the award."

Having identified some of the important issues affecting virtual hearings, how do you think one could improve the overall virtual arbitration experience?

Ben: "To improve the experience of virtual arbitration, one needs to be prepared for all possibilities which may materialise in a virtual setting. Many law firms and institutions have already issued protocols, aiming to regulate the virtual hearing process. In essence, these protocols were created with an intention to form a part of the agreement between parties as to the arbitration, perhaps already at the Terms of Reference stage. The use of such protocols is certainly recommended. However, even more drastically, by providing for a virtual hearing in the arbitration agreements, parties could maximise the efficiency of virtual arbitration. As such, since the beginning of the pandemic, all major arbitral institutions have either updated their arbitration rules (e.g. ICC and LCIA) or issued guidelines to address virtual arbitrations (e.g. CIETAC, HKIAC and ICC). There is a shift towards the acceptance of virtual arbitration as a permanent component of international arbitration and incorporating this into arbitration agreements could certainly render such agreements more reliable against the uncertainties."

Cynthia: "Exactly. As mentioned just now, arbitral institutions have been playing an essential role in leading a wave of virtual arbitration. Some virtual hearing guidelines, such as the ICC and CIArb rules also provide checklists, which recommend the parties to incorporate procedural arrangements into a cyber-protocol in advance, or the arbitral tribunals to direct such arrangements by issuing procedural orders for virtual hearings. We believe that such guidance lists are very pragmatic, and no matter which form the parties choose, by a cyber-protocol or by terms of reference, or the arbitral tribunal may issue a procedural order, they could all refer to such a list. The key is to clarify and settle the procedural and technical arrangements at the earliest stage, so that all people involved in the hearing can effectively arrange their work, ensuring that the parties enjoy equal rights in terms of procedures, technology and network security. Nevertheless, it is fundamental to know how to communicate and cooperate with lawyers from the other party. Even though the lawyers represent the opponent parties, they need to work together on carrying out the arbitral procedures, especially when more complicated and detailed arrangements are involved. In this context, the cooperation between lawyers from both parties is particularly significant for promoting virtual hearings."

What do you think the future holds for virtual arbitrations?

Milena: "Virtual arbitration has become the new norm and it is here to stay. It is logical and consistent with business practice. The biggest advantage of it is that organising hearings is no longer as complicated and expensive as it used to be. Given the nature of such hearings, there is no longer the need to spend substantial amounts of money and time to bring witnesses from the other side of the world for just a few hours to give evidence. Similarly, it has also eliminated the difficulty of finding a hearing date that would fit in with the schedules of all the parties and the tribunal, which often leads to delays in proceedings. "

Ben: "Even when the travel restrictions are lifted, the benefits of virtual arbitration will continue. Virtual hearings are likely to be used where either party is in relatively inaccessible parts of the world or the cost of travel renders physical hearing difficult. Full virtual hearings aside, it can be said with certainty that more and more evidence will be given remotely."

Yuan: "Overall, we are relatively optimistic about the prospects of virtual arbitration in China. Chinese arbitral institutions have always been devoted to the development of Internet arbitration. For these institutions, the pandemic is also an opportunity for real changes. For parties, virtual arbitration can save time and costs. Although it still has some shortcomings, with the development of science and technology, we believe that virtual arbitration will gradually be accepted by more and more people. Originally, how to choose the arbitration procedure depends on the parties' autonomy. Retaining the virtual arbitration procedure will provide the parties with a new option to resolve disputes."

Cynthia: "After today's discussion, we deeply feel that virtual arbitration seems to be gradually taking shape. Although this new form has not emerged until the pandemic, it indeed provides a more convenient and efficient way for dispute resolution. With evolution of rules and technologies, many cases in international arbitration may wholly or in part move on to the 'cloud'. We look forward to further innovation and progress, and also need to prepare ourselves for such novelty. Just as Judge Cardoso said, 'the law, like the traveler, must be ready for the morrow.' As legal practitioners, we also need to become travellers and get ready for new changes in this profession."

Ben Knowles

Milena Szuniewicz-Wenzel

Virtual hearings - here to stay?

COVID-19 has caused virtually all businesses to adapt their operating models. In some cases, COVID restrictions have accelerated changes which were already afoot, while in others entirely new ways of working have developed. In arbitration and litigation specifically, the duration of governmental lockdown measures particularly in the UK and Europe, combined with restrictions on international travel, have forced the use of virtual, or semi-virtual, hearings instead of hearings in person. Has this been a change for the better, or for the worse, and are virtual hearings here to stay?

Has this been a change for the better, or for the worse, and are virtual hearings here to stay?

The authors of this, and the following article have represented clients in numerous virtual (and semi-virtual) hearings over the past twelve months, in arbitration and in the English courts. This article looks at some of the broad considerations when undertaking a virtual hearing and considers the future of the phenomenon, while the second article looks at virtual hearings from the perspective of a more junior lawyer and contains a host of tips for preparing for virtual hearings.

The most obvious difference between an in-person hearing and a virtual one, particularly if there is an international dimension, is probably felt in the wallet. When the travel and accommodation costs of the hearing participants are stripped from the budget, significant savings can be realised. Similarly, where physical bundles are not feasible or desirable because of the logistics of providing and updating those documents, the parties may save hefty photocopying costs. Those who are concerned about the environment—as everyone should be—will welcome these changes on environmental grounds, too.

However, travel savings may be offset, at least in part, by document hosting charges, particularly if it is necessary to change platforms as one progresses from level to level of the English Courts. (The Supreme Court, for instance, will generally only use bundles made of a single (or multiple) page numbered .pdfs, while lower courts may be more amenable to trial hosing software, such as Opus2). Smaller matters can be undertaken effectively using widely available conferencing platforms (such as Zoom, Teams, or (a particular recent favourite) BlueJeans) and bookmarked .pdf documents for submissions and cross examination. However larger, more document-heavy matters, are likely to require dedicated solutions.

The differences in the oral element of the hearing itself are probably more balanced. Connection delays and sound quality difficulties can make it difficult to build momentum in cross-examination. Meanwhile the addition of translation—particularly if simultaneous translation is required—can be a technical challenge, as well as producing a disjointed (or even unusable) result. This leads to what can be a less confrontational, but possibly a more frustrating, environment for all involved.

There are benefits, however, in the semi-virtual hearing environment for a legal team assembled in the same room. Careful use of the muting function allows legal teams to confer more readily than they might be able to in an in-person hearing. This is even more pronounced where the agreed practice is to turn off opposing counsel's video feeds for cross examination. In a similar vein, it is certainly arguable that a virtual hearing is a better starting point for the junior advocate, because facing a row of opposing leading practitioners in person can be daunting.

Set against that—and notwithstanding the mid-afternoon lull which can affect even the most exciting in-person hearing—anecdotal evidence suggests that sustained concentration is more difficult over a video link. Building in breaks, and shorter days, could be an answer, as could visual aids to assist the advocate in getting the point across. An engaging delivery is perhaps more important than ever.

In international cases, if parties are not travelling, it may only be possible to conduct the hearing for a few hours every day. In those circumstances, more sitting days may be required than would be for an in-person hearing. Asynchronous hearings—where different elements of the hearing take place at different times, and possibly only with some participants—may form part of the solution. In a London-based hearing, for instance, cross examination of a fact witness based in Australia could take place first thing in the morning, with less time-sensitive elements of the hearing taking place at other times (and maybe on different days). Witness examination could be de-coupled from oral submissions, with cross-examination taking place in person, perhaps. There are many variations.

The forced reliance on technology at all stages of proceedings has demonstrated that virtual hearings are not only achievable, but in some cases commercially preferable. Remote hearings present a host of new opportunities. However, the transition away from physical documentation and in person hearings is not necessarily a smooth one, and there are new challenges to be faced. As can be seen from the next article, virtual hearings can require more logistical preparation on top of the same amount of substantive legal work compared to physical hearings and a significant amount of preparation and planning, especially from the junior members of the team, is critical to ensure virtual success.

Ben Knowles

Ian Hopkinson

Virtual arbitration: A junior lawyer's virtual experience

Virtual arbitrations present a host of new opportunities for clients, firms and junior lawyers. Virtual hearings allow junior members of the team to gain greater exposure and responsibility throughout the hearing process and demonstrate their value to the team. However, successfully transitioning to a virtual setting is not straightforward. It will require a significant amount of planning, preparation and proactivity from junior lawyers.

As the pandemic is not going away anytime soon, we thought we would share our international arbitration team's recent experience of two virtual hearings. The arbitrations remotely spanned six jurisdictions with the legal teams in their respective European offices, tribunal members sitting in separate locations and with clients, witnesses, translators and court reporters all attending from different places.

To offer junior lawyers a practical guide to preparing for virtual arbitrations, we will explore a number of key considerations that parties should take into account in advance of the hearing. We have broken down these into key topics each accompanied by a recommended checklist.

The room

If you plan on assembling your legal team in the office to enjoy the benefits of in person collaboration and hardcopy documents, then the first port of call is to ensure that you book a suitable room well in advance. This booking should cover the lead up period to the hearing to allow you to confirm that the layout matches your specified requirements as this can take several variations and test runs.

In terms of layout, the primary step is complying with the requirements of the Tribunal's procedural order and if this is not possible then collaborating with the other side to amend it. Our procedural order required everyone participating in the hearing room to be visible. To achieve this we opted for the classroom set up with a main screen and microphone at the front. This focused the attention on the advocates sitting at the front and allowed the rest of the team to sit behind with dual screens allowing them to easily communicate and pass notes. By using a trainee to control the laptop linked to one screen, it minimised feedback and reduced the number of cameras connected to the call to avoid cluttering the shared screen platform.

Room checklist

- Is the hearing room booked?
- Have IT/Facilities received your layout requirements?
- Can everyone in the team been seen by the camera?
- Is the focus on the advocates?
- Is everyone socially distanced, but still able to pass notes?
- Check that everyone in the room can hear and decide whether additional speakers need to be stalled?
- Do the team members have enough screens to quickly read documents?
- Are there enough power ports in the room?
- Are the wire locations dangerous?

On top of this you need to make sure that standard hearing preparation takes place, such as organising the hardcopy bundles, stationery, food and drinks. Equally important to the layout of the room is ensuring the technical aspects of the hearing have been chosen, set up and tested.

Hosting platform

The parties and the Tribunal will need to determine which platform is the most appropriate for the hearing. In choosing a platform, the parties should take a number of factors into consideration, including audio visual quality, video capabilities, the number of participants that can be seen at once, messaging functionality, file handling and screen sharing capabilities. For both our hearings Bluejeans was chosen as the system of hosting as it was a secure platform, worked in all six jurisdictions and was easiest platform to use for our witnesses.

Hosting platform checklist

- Change the name of the Bluejeans account to the firm's name
- Ensure your subscription has sufficient recording capability
- If you are the host and are responsible for coordinating the meetings then make sure you circulate the links in advance to all attendees
- Check that the laptop controlling the screen has its email and notifications turned off to avoid disruptions

Internal testing

Once the platform has been sorted, internal testing of the equipment is fundamental. Early practice sessions, such as running through the opening statement might reveal flaws or inconsistencies with the technology. These tests will also help the team anticipate what could go wrong and arrange for viable back up plans. Additionally, it is important to walk through and test the technology with your witnesses, experts - and transcribers to ensure that they are comfortable and know what to expect.

Internal testing checklist

- Check the volume of the speakers
- Check the sensitivity and feedback of the microphone or headphones that your team is using in the hearing
- Are your witnesses, experts and translators comfortable with platform and technical requirements of the hearing?
- Are the computers wired to the internet connection? - and if they are wireless, check that the bandwidth is strong enough
- Arrange to have a technical assistant on hand for the hearing

Test hearing

A test hearing with the Tribunal is fundamental and in both cases the Tribunals were flexible and accommodating to the parties' suggestions. At the test hearing we checked the visibility and sound of the attendees, demonstrated the sharing of documents, and had a walkthrough of the platform's functions. If your party is the host of the platform, then you should be prepared to guide the parties and the Tribunal through the workings of the platform and we suggest that you circulate basic instruction and FAQs.

Once this is established, it is important to agree on ground rules of the hearing. The key rule in both our hearings was that everyone should be on mute with cameras off save when they were speaking. This is an approach we recommend as it minimised feedback and maintained focus on the lead advocates, witnesses and Tribunal.

Test hearing checklist

- Walk through the platforms functionalities
- Demonstrate sharing documents
- Establish ground rules on muting video/microphone
- Make sure your client, witnesses and experts are aware of the ground rules of the hearing

Electronic documents

It is critical that all key documents from the hearing bundle and the opening presentation are accessible and easy to locate as you will be required to quickly share documents following the Tribunal's question. For the cross examination it was particularly helpful tocollate all the referenced exhibits into one bookmarkedmdocument as it allows you to react to what the advocate is saying and minimise the delay on retrieving documents.

[On platforms such as Bluejeans and Zoom, there is a "pause" function that will effectively freeze your screen. After you hit pause, scroll to the point in the document to which you want to take the arbitrator or witness and once you arrive, hit "play". This will minimise the distraction of scrolling through pages of a document.]

Electronic document checklist

- Organise digital files so that they are easy to access
- Bookmark key exhibits for opening statement and cross examination
- Familiarise yourself with functions and short cuts of the different platforms

The hearing

A noticeable difference in virtual hearings is being reduced to one small panel video. Reading people is much more difficult and you lose the panorama of your vision. Not only do people tend to be more reserved when they are in a virtual setting but you no longer have the ability to see counsel, the arbitrators and witnesses all at once. However, the ability to go visually and audibly dark was one of the major benefits of a hybrid hearing. We found that working in this way allowed the whole team to be effectively deployed. As opposed to the restrictions of a physical hearing, associates had the ability to actively participate by preparing for re-examination and addressing questions from the Tribunal.

Communication & conduct at the hearing

It is important to establish the communication links that you will use in the hearing with your team. This requires some thought and testing. As we operated in a hybrid setting we favoured passing notes and deliberating while on mute over instant messaging. Platforms such as WhatsApp were too slow and caused distraction by either being swamped with messages or by being unnoticed by the team.

Finally, conducting hearings virtually is more tiring than in person so short breaks should also be accommodated in the timetable. As a rule of time, we recommend you schedule a short break every hour and accommodate the different time zones that witnesses are working in.

Hearing checklist

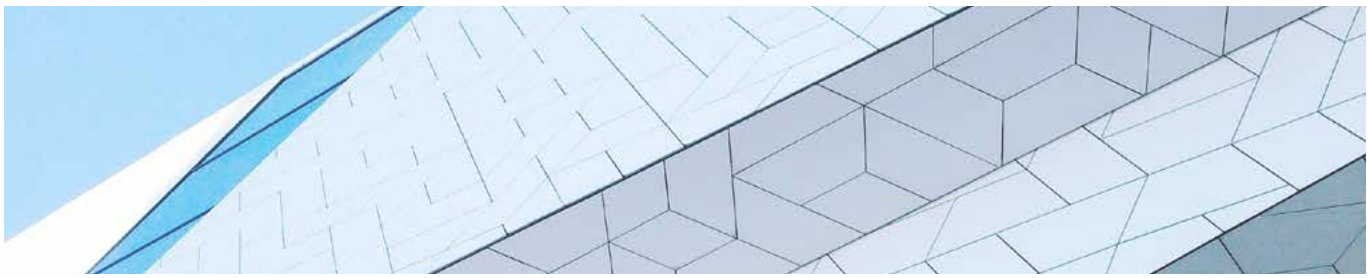
- Arrange for a technical assistant to be on call for the hearing
- Confirm and practice the team's communication strategy
- Plan regular breaks and check the different time zones

Conclusion

Realistically we are only a year into virtual hearings becoming common and they have already enjoyed notable success. Having this in mind, as the technology improves, support increases and we build on our expertise, the process can only become more effective. As long as you have the key ingredients for virtual success: good preparation, a reliable broadband connection, and an understanding from the Tribunal, the experience is overwhelmingly familiar. Therefore, we hope sharing our virtual experience from a junior lawyer's perspective will help support a smooth transition to remote hearings.

Ben Knowles

Ian Hopkinson



Summit Virtually Beckoning - Australia's International Arbitration Credentials Stoutly Anchored

The COVID-19 pandemic has been a catalyst for change in the international arbitration space globally. For Australia especially, the playing field has arguably become more levelled, untethering its ability to optimally compete and ascend greater heights joining the apex hubs for cross-border dispute resolution. Encouragingly, whilst further shifts in conventional practice are still required, recently reported arbitral growth statistics suggest that Australia is in a prime position to fully exhibit its first-rate arbitration credentials and take advantage of this somewhat unorthodox opportunity. Particularly so, given the increased volume and success of virtual hearings negating the frequent jarring appraisal that Australia's 'inconvenient' geographical location will perpetually frustrate its potential to attract the highest-stakes international disputes enjoyed by the more 'proximate' leading arbitral seats, such as Hong Kong and Singapore.

Background

Travel restrictions, border closures and quarantine requirements during the COVID-19 pandemic (COVID) have had a significant impact on all facets of everyday life, business and travel. Owing to its innately cross-border dimensions, the field of international arbitration is no exception. Only very seldom will the anatomical components of an international arbitration bring together disputants, counsel, witnesses, experts and tribunal members all based in the same geographic location or even same time zone. Resultantly, as it so often does, international arbitration has been forced to adapt quickly to the changing environment, embracing virtual hearings and tailoring procedures to address potential issues arising from a delocalised, virtual arbitration reality[1].

The Australian Centre for International Commercial Arbitration (ACICA) recently published its 2020 Australian Arbitration Report (ACICA Report)[2] which is the first empirical study of arbitral activity in Australia and offers meaningful insight into the dynamics of the arbitration market Down Under. The ACICA Report considered 223 arbitrations (both domestic and international) concluded, conducted or commenced between 2016 and 2019.

The findings indicate a significant Australian connection in respect of the arbitrations reviewed, with the majority of reported disputes arising within the construction and engineering sectors. Overall, however, the findings also reveal that oil and gas disputes with an Australian nexus were much more likely to be the subject of international arbitration as a means of resolving controversies, rather than reverting to domestic arbitration procedures.

[1] Prior to COVID, all major institutional procedural rules already allowed for wide discretion in the procedures to be adopted in conducting arbitrations. Since the pandemic, the majority of international arbitration institutions have supplemented their rules by issuing guidelines on virtual hearings.

Across the 223 arbitrations studied, the ACICA Report approximates that the total amount in dispute was AUD 35 billion, with some 75% of that value the subject of international arbitrations. The ACICA Report further states that the inclusion of ACICA clauses in new contracts has become more commonplace, likely leading to an increase in future arbitration filings adopting the ACICA Rules[3].

For Australia, and its prospects as an irrefutable leading international arbitration hub, this empirical data makes for a heartening read. Even more so, bearing in mind the reported arbitrations all precede the COVID outbreak; the consequences of which (coupled with the pre-existent growth trends) ought - if anything - to fortify Australia's confidence that it presents as a compelling arbitral seat of choice. Moreover, this new state of affairs ought to fortify the confidence globally vested in the seat by international arbitration users and participants alike.

Furthermore, the Asia-Pacific region's most active arbitral institutions, the Hong Kong International Arbitration Centre (HKIAC)[4] and Singapore International Arbitration Centre (SIAC)[5] have both enjoyed a strong uptick in case filings for the year 2020 – in fact record volumes in each instance. Other Asian arbitral centres are also statistically thriving, including some striking year-on-year growth trends, such as the Vietnam International Arbitration Centre (VIAC)[6], the Korean Commercial Arbitration Board (KCAB)[7], the China International Economic and Trade Arbitration Commission (CIETAC)[8], and the Asian International Arbitration Centre (AIAC) in Malaysia[9].

As these reports collectively bear out, Asia-Pacific is increasingly regarded as one of the most favoured geographical regions for arbitration filings. Despite the neighbourhood competition, for Australia this is surely carpe diem terrain – an opportune window to redirect some of the hitherto gravitational pull towards Hong Kong and Singapore where international arbitrations feature an Australian nexus.

[2] In collaboration with FTI Consulting, the WA Arbitration Initiative, Francis Burt Chambers and the Australian Bar Association. A full copy of the ACICA Report is available here
[3] The most frequently used international arbitration rules were those of the ICC, SIAC and UNCITRAL, with ACICA Rules being fourth choice.
[4] HKIC's 2020 report is available here
[5] SIAC's 2020 report is available here
[6] VIAC's annual reports are available here
[7] KCAB's annual reports are available here
[8] CIETAC's 2020 report is available here
[9] AIAC's annual reports are available here

Observations

Of course, whilst anecdotal evidence may strongly hint at a favourable shifting of the needle, only statistical analyses drawn over the next few years will truly determine whether or not Australia seizes this moment to fulfil its long-held ambitions as a 'go-to' arbitral hub. In that cause, some promising signs emerge from the recent statistics reported throughout the Asia-Pacific region:

- As outlined above, Australia has long been considered an attractive seat for international arbitration in all respects but one: the constraints of its geographical location and what has been commonly termed its "tyranny of distance" have often seen international arbitration users opt for more geographically attractive seats in the Asia-Pacific region. The ACICA Report highlights that this may no longer be the case in the wake of COVID, which has forced international arbitration users and institutions to embrace arbitrating disputes in a virtual world.
- The impact of COVID could result in greater movement away from the long-established and customarily most popular arbitral seats of London and Paris, in preference for arbitral centres in the Asia-Pacific region. This, for Australia, perhaps represents the 'circuit-breaker' it has been waiting for. Whilst not required, in-person hearings often took place at the arbitral seat. Virtual hearings, on the other hand, are delocalised. This allows arbitral seats traditionally considered geographically remote, such as Australia, to come to the fore as a more appealing option.
- Virtual hearings allow parties the freedom to select the arbitral seat based purely on juridical / procedural advantages, without concern for any perceived geographical disadvantages.
- Where parties have a clear preference for in-person hearings, Australia possesses within its borders an exceptional calibre of specialist international arbitration practitioners. This option may, however, require parties to select Australian-based counsel and tribunal members while the international border closures remain in force.[10] Although this may be considered too limiting for some users, others may welcome the opportunity to hold in-person hearings, particularly where there are perceived strategic disadvantages to conducting a virtual hearing.
- Judicial support for international arbitration is robust in Australia, which has continued to demonstrate its 'pro-arbitration bias' and enduring policy of minimalist interference[11], ranking it among the gold standard jurisdictions for judicial neutrality, independence and integrity. Especially so, where recent times have shown other traditionally 'safe' arbitral seats to be less stable from a geopolitical perspective, such as Hong Kong.

Adding to Australia's international arbitration cache, it has become a frequent home to 'mega' projects whereby the project value exceeds USD 1 billion. In particular, megaprojects in the construction, infrastructure, natural resources and energy sectors throughout its various states. Projects of this mammoth scale:

- are statistically prone to large risks and significant blowouts in respect of the time, quality and budgetary deliverables, therefore giving rise to complex, substantial value, high-stakes disputes; and
- innately involve international stakeholders, asset owners and participants (often operating through joint venture vehicles) along the entire project value chain. This broad confluence of nationalities, investments and interests characteristically predisposes international dispute resolution, outside the auspices of the domestic Australian courts, as the ultimate 'neutral' guardian of those interests when they misalign or splinter.

[10] Depending on where witnesses are based, there may be a need for a "hybrid" hearing, allowing the use of video conferencing systems where necessary
[11] See for example the Author's recent article:

"In the middle of difficulty lies opportunity" stated Albert Einstein. For Australia, the COVID-catalysed virtual epoch in which arbitration is now immersed constitutes precisely that. To capitalise on and attain Australia's wider recognition as a preferred arbitral seat, concerted efforts will be essential in actively promoting its clear strengths, particularly where an Australian nexus exists within the underlying contract or the dispute itself. Such efforts may entail some legal advisers and arbitration users suffering the initial discomfort of adopting more innovative approaches to their customary contractual drafting and dispute resolution practices.

Plainly, absent the 'tyranny of distance' headwind, the prevailing conditions are now perfect for Australia to climb the summit of international arbitration hubs. Indeed, if the moment is not seized now, then when?

Diana Kuitkowski

Damian Watkin

Is contract adaption the legal answer to evolving climate change regulations? And why arbitration plays a key role…

The Paris Agreement, which has been ratified by 189 countries, to date, including Germany, contains commitments to reduce carbon emissions as soon as possible in order to limit global warming to well below 2, preferably to 1.5, degrees Celsius compared to pre-industrial levels. The German government adopted the **Climate Action Plan 2050 in November 2016**, making Germany one of the first countries to submit the long-term low greenhouse gas (GHG) emission development strategy to the UN as required under the Paris Agreement. The Climate Action Plan 2050 maps out the process for achieving Germany's climate targets for various sectors including energy, buildings, transport, trade and industry, agriculture and forestry.

However, governments around the world are struggling to meet their emission reduction targets and its legislative measures are being challenged. Two recent decision by the German Constitutional Court and the Hague District court have illustrated this implementation deficit and called on governments – and indirectly companies – to ramp up their efforts in the fight against climate change.

Insufficient state action

In line with the Climate Action Plan 2050, the German government had approved, at the national level, the **Federal Climate Change Act** (Act) in 2019. Under the Act, Germany is obliged to cut GHG emissions by 55% by 2030, compared to 1990 levels. The Act set out annual upper limits for GHG emissions across various sectors requiring each government department to reduce its CO2 emissions as well as providing incentives to the industry to reduce their emissions.

The Act was recently challenged in **Germany's Constitutional Court.** The case was brought by a group of nine people (and supported by several environmental organisations) and argued that the Act did not introduce an adequate legal framework for swiftly reducing GHG emissions and would not sufficiently limit climate change in violation of their fundamental right to a humane future. They argued that a temperature increase above 1.5°C (which they asserted would occur on the current wordings of the Act) would risk the crossing of tipping points with unforeseeable consequences for the climate system. As such, they argued that the German government had failed to comply with its constitutional duties of protecting their lives and health and properties. **The Constitutional Court** agreed finding that the Act's provisions on adjusting the reduction pathway for GHG emissions from 2031 onwards are not sufficient to ensure that the necessary transition to climate neutrality is achieved in time. It has given the legislature until the end of next year to draw up clearer reduction targets for GHG emissions for the period after 2030. `

This judgement, which will not be discussed here in detail, is the most recent in a series of climate change litigation against governments in Europe. In 2018, **the Administrative Court of Paris** found that France's inaction on climate change had caused ecological damage and in 2019, in **State of the Netherlands v Urgenda Foundation**, the Supreme Court of the Netherlands upheld an initial ruling which ordered the Dutch government to meet an emissions goal of 25% reduction from 1990 levels by 2020 affirming that reduction in emissions was necessary for the Dutch government to protect human rights. Most recently, in a case brought by several environmental NGOs, the **Hague District Court** has ordered Royal Dutch Shell (RDS) to reduce the CO2 emissions of the Shell group ("both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group") by net 45% in 2030, compared to 2019 levels, and that RDS has a "significant best-efforts obligation" to reduce emissions along its entire value chain, including those of its suppliers and consumers. While RDS announced its intention to appeal the decision, the decision is "provisionally enforceable" and immediately effective.

What are the consequences?

The move for states to act more firmly in setting climate change related, and specifically emission focused goals, will affect every industry. In Germany, the Act is already addressing the energy sector, heavy industry, buildings, transportation, agriculture, land use, and waste management, as well as other undefined sectors. Individual actors in these industries will need to review their business models, their own ESG policies and their long-term agreements.

The judgements of the Constitutional Court and the Hague District Court make it clear that companies will need to address climate change issues both at company level and also throughout their supply chains. There is also a general and hard to miss policy in states targeting high GHG emission sectors and practices. Companies will need to actively consider potential future changes in legislation and public policy. Additionally, companies will be increasingly exposed to climate-related risks which may impact the way they approach contracts with third parties. In short, thought will have to be given to the wording of contracts to ensure they are more resilient and/or adaptable for future climate change scenarios and regulations.

This article looks first at the possibility of adapting contracts under German and English law in case of changed circumstances and, in a second step, describes recent initiatives to prepare contracts for evolving climate change regulations.

Contract adaption in German law

Section 313 of the German Civil Code (BGB) allows for a party to a contract to request a modification where the underlying circumstances of the contract have significantly changed, and the parties would not have entered into the contract or would have entered into it on different terms if they had foreseen the change. If such adaption is impossible, the German courts may terminate the contract. In order for section 313 BGB to be triggered, the circumstances which have resulted in the significant change must not be allocated to the risk sphere of one of the parties (as a result of the contract, the purpose of the contract and non-mandatory law). However, the risk of unforeseeable legislative changes is usually not to be borne by a specific party and therefore could trigger section 313 BGB. If triggered, the court assesses whether upholding the contract would lead to an intolerable result. This exercise requires a comprehensive balancing of interests.

In the context of the Covid-19 pandemic the German legislator has introduced a rebuttable presumption in Section 7 to Art. 240 of the German Introductory Act to the Civil Code that where commercial lease agreements are affected by state lock-down measures, there is a presumption that this constitutes a significant change of the underlying circumstances. Despite this presumption, the courts nevertheless have to undertake a balancing exercise in accordance with section 313 BGB. Whether the legislator will introduce a similar presumption for climate change related measures remains to be seen. It is however clear from the introduced presumption that evolving legislation can in principle constitute a significant change within the meaning of section 313 BGB. In relation to the presumption created for commercial leases, there have been diverging decisions by the courts regarding both the allocation of risks and whether the change leads to an intolerable result. It is therefore arguable that a change in the legislation can amount to a significant change.

Contract adaption in English Law

The position in English law is more restrictive. A contract might contain express provisions in relation to variation. In the absence of such provisions, a variation can be **oral** or in writing (although for evidentiary purposes it is recommended that the variation is documented in writing) and must be supported by consideration (or executed as a deed). A party may also argue that a contract has been frustrated such that it is impossible to perform. Frustration of a contract may occur where an unforeseen event (not the fault of either party) causes disruption and renders the contract physically or commercially impossible (as opposed to merely difficult) to perform, in which case the parties are automatically released from their obligations. English courts very rarely take a favourable view of frustration arguments. Recently, in **Salam Air SAOC v Latam Airlines Groups SA**, the High Court found that there was no frustration as a result of Covid-19 in relation to aircraft leases where the claimant argued that regulations issued by the Public Authority for Civil Aviation in Oman restricting air travel and substantially decreased demand for flying due to the pandemic were frustrating events.

By way of further example, Brexit may have a significant impact on cross-border commercial contracts which were entered into before Brexit (including major delays caused by customs formalities and costs implications of the ending of the free movement of goods) which could result in a contract becoming loss making or difficult to perform. The overwhelming advice to commercial parties in the leadup to Brexit has been to ensure force majeure and non-performance clauses are appropriately worded to protect the parties in these eventualities including by adding "material adverse change" clauses into contracts. For example, in **Canary Wharf v European Medicines Agency (2019)** a lease of an office in Canary Wharf was not allowed to be cut short when EMA relocated to Amsterdam as a consequence of the UK referendum decision to leave the EU (i.e. the contract had not been frustrated). The message is clear – if parties wish to have an option to amend contracts governed by the laws of England and Wales, they must include such express contractual wording.

Contract adaption is possible under German law under certain circumstances. Whether climate change related state measures constitute a significant change depends on the specific facts of the case and on possible future presumptions created in view of evolving climate change regulations. In any case, it is not a panacea for necessary climate related changes to contracts. Under English law, besides explicitly agreed provisions providing for variation, the concept of frustration is even more restrictive in its application. It is therefore recommended to provide for evolving climate change regulation in contracts from the start.

Issues of contract adaption are complicated by the fact that supply chain contracts often cover multiple jurisdictions and different choice of law clauses. This makes it difficult to negotiate amendments to long-term contracts (for example to deal with emission targets) and makes potential disputes complicated, fragmented and costly.

Effects on supply chains

Many companies have already implemented sustainable and emission-focused policies and targets in anticipation of changes in legislation and to tackle climate related risks. In order to meet such targets, companies may make several changes to their own actions, however, without also considering their supply chain companies will not be able to fully meet their sustainability and emission targets.

The Chancery Lane Project, a UK based pro bono initiative that brings legal professionals together to collaborate and rewrite contracts and laws in order to fight climate change and achieve net zero carbon emissions, has helpfully produced a series of contractual precedents targeting supply chains. For example, the **Termination for Greener Supply** precedent clause will give a company the right to switch suppliers if its existing supplier is unable to match a 'greener' offer made by an alternative supplier (with a limit on the number of times this clause can be used to safeguard against abuse of the clause). There are also precedent clauses which target supply chains aimed, among other things, at disclosure obligations, carbon footprint targets and green supplier pricing models.

Arbitration disputes clause

While companies may consider clauses for creating more resilient supply contracts, they will also need to consider the dispute resolution options. Globalization has made supply chains complex with different legs of a supply chain likely in different jurisdictions and, with climate change obligations cascading down a supply chain, there is a possibility of complex, multi-party disputes arising due to the number of stakeholders involved.

An arbitration dispute resolution clause is ideally placed to deal with the likely multi-jurisdictional, multi-party aspect of disputes which may arise when making supply chains greener and more resilient. With its more flexible approach, arbitration can more easily deal with the flow of contracts across jurisdictions and parties. Arbitral Institutions have begun addressing questions of third party joinders (e.g. the supplier of your supplier) to increase efficiency and provide, ideally, for a single dispute resolution process for the entire supply chain. This is already possible to some extent through careful contract drafting and anticipatory consent of parties and compatible arbitration clauses all the way down the supply chain.

Arbitration has also begun to address its own impact on climate change. **The Green Pledge**, which has garnered a number of arbitration practitioners committed to achieving more climate-friendly arbitrations, includes commitments to correspond electronically, avoiding unnecessary travel, and to look for opportunities to reduce/offset carbon emissions (for example by reducing energy consumption and waste). More recently, the Swiss Arbitration Association, previously the Swiss Chambers Arbitration Institution, has followed suit by revising its **rules of arbitration** to allow for paperless filings (article 3(1)) and remote hearings (article 27(2)).

Closing thoughts

The decision of the German Constitutional Court and the Hague District Court are significant – it is likely that other jurisdictions will follow suit whether through legislation or decisions of national courts. Such actions make it clear that companies will have to address climate change issues in their supply contracts both by adding active obligation clauses and also by ensuring termination and green dispute resolution clauses are well suited to the changing climate change landscape. Contract adaption may not be the answer to climate change, but it is our belief that it will play a significant part with continually evolving obligations to reduce emissions being imposed on companies. Making your contracts greener also makes them more resilient.

Georg Scherpf

Elnaz Amiri

As offshore wind scales globally, developers should be wary of construction contract risks

The offshore wind sector has reasons to be cheerful, with Joe Biden's win in the US presidential election providing further good news for the sector. This follows Boris Johnson's pledge last month that offshore wind farms will generate enough electricity to power every home in the UK by 2030.

Continued success in the offshore wind sector — and the achievement of the PM's wind power pledge — needs continued focus on construction contract risk management. Construction contract risk management allows key risks to be identified and mitigated, and disputes to be avoided.

If the construction works do not complete on time, to budget and to specification, then revenue cannot be generated and obligations under the offtake agreements cannot be met. Additional funding may be needed to complete the works and bring them into compliance. It is therefore essential to successfully manage risks that might have an impact on cost, delay completion or affect the quality of the asset. This applies at the contract negotiation stage, during the construction phase, and into the operation phase.

To do this, it is important to identify key risk areas. These include:

Design responsibility and design life commitments – There is often a tension between the project developer wanting to impose a fitness for purpose obligation, which is resisted by contractors in favour of a less onerous obligation to use reasonable skill and care. Achieving clarity in the contract as to the required standard of care is fundamental. A careful review of the contract before signature, to ensure that the technical specification at the 'back' of the contract matches the legal conditions at the 'front' of the contract, will help avoid nasty shocks as regards design liability.

Package interface issues – The most common procurement route for construction contracts in this sector is through the appointment of multiple contractors, dealing with individual specialist elements of the project, rather than a single contractor responsible for all elements. An inherent risk of this approach is that the various contractors will cause delay and disruption both to each other and to the project as a whole. The inclusion of appropriate contractual mechanisms to manage the interface between different contractors is an important first step. Contractual mechanisms alone are not enough. A high standard of project management throughout the lifetime of the project (including regular interface meetings, appropriate early warning notices and the careful maintenance of a risk register) significantly reduces risk and the scope for disputes.

Weather risk – It goes without saying that adverse weather is one of the greatest delay risks to offshore projects. Clear allocation of the delay risk within the contract is essential (perhaps by reference to 'worked examples' if that helps), so that all sides understand the risk that they are accepting and the contract price reflects it. Good programming at the start and good reporting during the project are equally important.

Defects – The term 'defects' covers a multitude of potential issues. It may be that one party's 'defect' is in fact not a defect, but a misalignment between the parties as to scope. The implementation of correct procedures for variations (and omissions) is important. If defects disputes do arise, have a look at the regime for defects liability within the contract. It may be that there is a different liability period for each individual turbine or collections of turbines. There may also be provision for extending the liability period where parts are repaired or replaced. Contractors may seek to carve out certain obligations and/or resist any obligation to repair serial defects which require extensive (and often costly) investigation.

Payment procedures – Payment procedures (in particular pay less notices) can often be managed better, so as to offer optimal cash flow protection.

Think it through

Even with careful contract drafting and excellent project management, disputes can and do arise. It is almost inevitable given the scale and complexity of offshore wind projects.

A clear analysis of the main issues and a bespoke strategy for finding a resolution will change a potentially frustrating, costly and time-wasting experience into a successful outcome. This can take the form of scenario testing – for instance we have found that the offshore wind construction risk reduction games we run with clients can help generate clear thinking around strategies for the way forward.

Make sure you have taken a step back and considered your dispute resolution strategy as a whole. Arbitration is often the ultimate way of settling disputes (and if it is chosen, then proper preparation and careful planning are key), but there may be other options, such as seeking the opinion of an independent expert to strengthen your position; seeking a quick determination of the issue through an adjudication; and/or a facilitated negotiation and settlement process such as mediation.

In summary, construction contract risk reduction throughout all project phases is a key tool in the successful delivery of offshore wind projects.

Mary Anne Roff

Standing Sentinel: Australia's Arbitral 'Pro-Enforcement Bias' Comprises Sand Lines

A recent Federal Court of Australia appellate judgment ruled that a foreign arbitral award is non-enforceable where the tribunal was not constituted in strict accordance with the parties' arbitral agreement, thereby affirming the primacy of those terms and reiterating that local enforcement of international arbitration awards is a confined exercise despite the contextual backdrop of Australia's perceived 'pro-enforcement' bias.

Deep dive

Allowing an appeal from its own first instance decision[1], a Full Court of the Federal Court of Australia (Full Court) in **Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company** [2021] FCAFC 110 declined to enforce a foreign arbitral award in Australia owing to a failure to validly compose the Qatari-seated tribunal in proper accordance with the prescriptive terms of the disputants' underlying arbitration agreement. This is one of the rare occasions on which an Australian court has denied enforcement of an international arbitration award. The judgment also sheds instructive light on the approach senior Australian courts will adopt regarding the nature of a residual discretion to enforce an award in circumstances where a ground for denial of enforcement is properly made out: an issue previously unexplored in Australian curial jurisprudence.

Background

The case concerns an arbitral award issued in 2017 against Hub Street Equipment Pty Ltd (Hub), following a dispute arising under a contract for supply and installation of street lighting and street furniture in Energy City, **(the Contract)**. The Contract was governed by the laws of Qatar and provided for resolution of disputes by arbitration under the Qatari arbitration rules. Importantly, the Contract set out a procedure for appointment of a three-member arbitral tribunal, requiring each party to nominate an arbitrator, with the president of the tribunal to be selected by the two nominated arbitrators. The Contract further stipulated that all matters relating to the Contract were to be conducted in English.

Energy City Qatar Holding Company (ECQ) made a US $820,322.16 advance payment to Hub but subsequently decided not to proceed with the Contract and sought repayment of this sum. By-passing the arbitrator nomination procedure under the Contract, ECQ instead filed a claim in Qatar's Plenary Court of First Instance seeking orders that the Court appoint a three-member arbitral tribunal. The Court appointed three arbitrators, who subsequently rendered an award in favour of ECQ. The award was rendered in Arabic, with an English translation provided. Hub participated in neither the Qatari Court proceeding nor the arbitration. ECQ sought enforcement of the award in Australia, on the basis that Hub is an Australian incorporated company.

At first instance, Justice Jagot granted enforcement of the award, holding that there would be no resultant unfairness as Hub had adequate opportunity to participate in the arbitration and had received actual notice of the proceedings and constitution of the tribunal. Accordingly, judgment was entered in favour of ECQ together with costs of the proceeding.

There were two key issues on appeal:

- whether enforcement of the award should be refused on the basis that Hub was not given proper notice of the arbitration proceeding and the tribunal was not constituted in accordance with the parties' agreement; and
- where a ground for non-enforcement was established, whether enforcement should nevertheless be granted by virtue of the residual discretion conferred under section 8(5) of the International Arbitration Act 1974 (Cth) (IAA).

[1] Per Jagot J in Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd (No 2) [2020] FCA 1116.

Decision

The Full Court, comprised of a three-judge appellate bench, upheld the appeal. In lead judgment, with which the other justices agreed, Justice Stewart ruled that the award should not be enforced in Australia because the arbitral tribunal was not constituted in accordance with the parties' arbitral agreement, thereby lacking requisite authority to determine the dispute and grant relief. As such, the Full Court held that there was little, if any, scope to exercise the residual discretion to enforce the award and it should therefore be withheld. On this basis, the Full Court set aside the first instance orders and declarations, ruling that the proceeding be dismissed.

In arriving at its determination, the Full Court adjudged ECQ's failure to follow the agreed procedure for appointment of the arbitral tribunal enlivened the ground for non-enforcement under section 8(5)(e) of the IAA,[2] and Article V(1)(d) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (New York Convention).[3] The Full Court also dismissed ECQ's principal argument that the Qatari Court's appointment of the tribunal must be regarded as valid under the law of the seat, and Hub's remedy was to challenge this decision in Qatar rather than resist enforcement in Australia:

"There is no detraction from the principle of comity, so understood, by not enforcing the award in this case on the basis that the Qatari Court acted on a misapprehension of the true position in appointing the arbitral tribunal. There are several considerations that lead to that conclusion. First, there is no disrespect of, or lack of goodwill towards, the Qatari Court to recognise that it acted upon a misapprehension of what we now know the facts to be. Secondly, any exercise of jurisdiction of the Qatari Court to appoint arbitrators to the dispute of the parties rested on the parties' agreement, and since what they agreed was not followed the basis for the exercise of that jurisdiction was lacking; the failure goes to the very heart of the decision that ECQ would have this Court recognise. […] Hub has the right (subject to the question of discretion which I will come to) under the law of Australia to not have enforced against it here an arbitral award by an arbitral tribunal that was not composed in accordance with what it had agreed. Section 8(5)(e) of the IAA is a law of the Commonwealth of Australia that the Court cannot merely brush aside in the interests of comity; the Court is duty bound to apply it."

Having therefore decided that a ground for non-enforcement was fully made out, the second issue arising for determination by the Full Court was whether, as a matter of discretion, the award can or should nevertheless be enforced. Finding that there was no authoritative statement in Australia on the nature of the discretion to enforce an award under the IAA,[4] the Full Court instead had regard to international arbitration authorities on the issue. The Full Court also had regard to the New York Convention's "pro-enforcement bias" which finds expression in the limited and narrow non-enforcement grounds an award debtor must establish, determining there is:

"no justification in the text and structure of the Convention to justify a broad-ranging or unlimited discretion to enforce even when one of the narrow grounds for non-enforcement is made out. There is, equally, no justification in the text and structure to conclude that there is no discretion, or to limit it to such an extent that in cases of irregularity that has caused no material prejudice the court must nevertheless not enforce the award."

Accordingly, the Full Court found that the irregularity arising by virtue of the arbitration being conducted in Arabic, while contrary to the parties' agreement, was immaterial and would justify an exercise of the enforcement discretion because Hub had received several notices of the arbitration in English and had chosen not to participate.

[2] Section 8(5)(e) of the IAA provides: "Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that: […] (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; […]"

[3] Article V(1)(d) of the New York Convention provides: "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: […] (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; […]"

[4] The reference to the discretion is a reference to the permissive language used in section 8 of the IAA and Article V(1) of the New York Convention, namely that recognition and enforcement of the award in question "may be refused" on one or more enumerated grounds.

The irregularity in respect of the constitution of the arbitral tribunal, on the other hand, was "fundamental to the structural integrity of the arbitration" and went to "the very heart of the tribunal's jurisdiction". The Full Court therefore deemed this was not a matter warranting positive exercise of the enforcement discretion.

Finally, a separate question arose as to whether the Full Court should hand down judgment in circumstances where the parties communicated to the Court that they had reached a settlement in principle.[5] In ruling that judgment should be delivered, Chief Justice Allsop (with whom the other justices agreed) noted that no notice of discontinuance had been filed, and referred to the Court's discretion to publish judgment where the private interests of the parties to settle are outweighed by the countervailing public interest in making the judgment available to the public.

Observations

For award creditors and debtors alike, this important decision provides further useful guidance on Australia's curial enforcement of international arbitration awards and judicial preparedness to draw hard lines in the sand, particularly where the award in question contains significant procedural irregularities. Notably:

- Far from in any way diminishing Australia's status as a pro-arbitration and pro-enforcement jurisdiction, the Full Court's decision affirms Australia's commitment to uphold international arbitration principles by recognising that manifest defects in the arbitral tribunal's jurisdiction must not cede to any undesirable policy of 'enforce at all costs' or quarrels favouring the doctrine interests of international comity.
- Central to the Full Court's decision, and a core tenet of international arbitration, is the primacy it bestows upon the terms of the parties' arbitral agreement. By upholding the strict letter of the arbitration agreement and making the (otherwise successful) award creditor fully accountable to its spirit and terms, the Full Court confirms itself a willing sentinel in the protection of party arbitral autonomy. This adds to the rich corpus of Australian case law exhorting parties' stringent adherence to the fundamental terms of arbitration agreements, else risk imperiling the validity or enforceability of any awards flowing from them.
- The Full Court's decision highlights the readiness of Australia's senior courts to closely scrutinise international arbitration awards and robustly evaluate their enforceable properties. This can only serve in bolstering arbitration users' confidence in the independent, intellectual and procedural rigour of Australia's judicial system when petitioned to support arbitration related matters.
- Where procedural irregularities in the arbitral award constitute a valid ground for non-enforcement under the IAA and/or the New York Convention, but those same defects do not cause material prejudice, the award is nonetheless likely to be enforced under the curial residual discretion.

[5] This communication was made only four days before judgment was to be handed down.

- In respect of the burden and onus of proof shouldered by the award debtor seeking to resist enforcement, the available exceptions to enforcement under the IAA are "finite and narrow".[6] Parties with assets in Australia disinclined to participate in active arbitral proceedings, and electing instead to resist any subsequent award at the enforcement stage,[7] will therefore need to carefully consider that strategy in the context of later enforcement efforts: a 'head in the sand' tactic may not ultimately prosper.
- For litigation practitioners, the judgment draws interest in the shape of the Full Court's declaration that important considerations of public policy and public interest will, in given circumstances, tilt the balance towards publishing judgment in the face of private party interests.

Diana Kuitkowski

Damian Watkin

[6] Although it should be noted that the standard of proof is no higher than the ordinary 'balance of probabilities' test applied in civil cases.
[7] As a general rule of international law, including under the text and structure of the New York Convention, it is not incumbent upon an award debtor to take positive steps at the arbitration seat to set aside the award.

Satellite Event Riga Report

Clyde & Co participates in the 10th Baltic Arbitration Days 2021 in Riga

The Baltic Arbitration Days 2021 took place in Riga from 12 to 13 August 2021 celebrating its 10th anniversary this year. Clyde & Co was again Amber Sponsor as in the year before.

Germany is closely connected to the Baltics through culture, politics, trade, and the history of the Hanseatic League. With Hanseatic Cities in Latvia (Riga, Kuldiga), Lithuania (Kaunas), Estonia (Tallin) and Germany (e.g. Hamburg, Lübeck, Bremen, Rostock, Wismar), the countries can look back at a thriving history of trade and commerce on land and at sea of hundreds of years. Today, trade and commerce are more intertwined than ever before and grounded on the membership to the European Union. Clyde & Co has always been conscious of this connection and fostered their relationship with their clients in the region. Therefore, Clyde & Co has gained unique knowledge of the Baltics and in the core sectors that connect the Baltics and Germany. We have been working closely with local law firms in Tallinn, Riga and Vilnius for many years.

In our current **Baltics brochure**, we identified and discussed the core sectors to watch out for in the Baltic countries, namely Transport & Logistics, Commodities, Offshore-Wind and Digitalisation & Cyber Security.

The Conference & Clyde's Satellite Event

The conference was organised as a hybrid event onsite and virtually. For many this was the first in person event since the beginning of the pandemic last year. The possibility to attend virtually opened the conference to a wider audience with attendees and speakers from all over the world.

Before the official start of the conference Clyde & Co had organised a satellite event on "Virtual Hearings – from a temporary necessity to a real alternative". Anna Falk, Cornelia Kunze and Georg Scherpf (all Clyde & Co) discussed with Dr Christian Aschauer (Independent Arbitrator and Professor at the University of Graz), Giacomo Rojas Elgueta (Partner at D|R Arbitration & Litigation and Professor at Roma Tre University) and Jamey Johnson and Andrew Skim (both FTI Consulting) the technical as well as the legal challenges of virtual hearings. Participants attended from all over the world – virtually and in-person - such as Melbourne, New York, Singapore, Dar es Salaam, Hamburg and (naturally) Riga. FTI organised the technical set-up of the hybrid event.

The event discussed several issues, including the fundamental question of "Does a right to a physical hearing exist in international arbitration?", covering technical issues from the presentation of evidence, simultaneous interpretation, and prevention of witness tampering to the benefits of virtual hearings when it comes to structuring the oral hearing(s).

Jamey Johnson and Andrew Skim (both FTI Consulting) began by outlining the technical challenges and possibilities of virtual hearings. They shared their experience over the last 1.5 years and demonstrated the technical hearing kits that can be made available to all hearing participants, including 360-degree camaras and tablets to be used as hearing bundles. They also offered a short preview of what virtual hearings may look like in the future.

We continued with discussing practical concerns such as how to make the most of the technical assistance when it comes to document bundles and how to best navigate the tribunal, the parties and the witnesses through them, simultaneous translations in multilingual proceedings and inter partes communication. Anna addressed one of the frequently raised concerns on how parties best communicate in private if need be during a virtual hearing in cases where parties and their counsel are not in the same room. Jamey highlighted that FTI as a provider recommends turning off the chat function in the platform used for virtual hearings, in most cases Zoom, entirely. That is the safest way to avoid the commonly feared "oops"-moment when you send something into the chat to the wrong person. The parties and their counsel can, for example, communicate via Whatsapp or other internal chat programmes (MS-Teams) outside the official virtual hearing and ideally on separate technical equipment.

When asked about the next five to ten years, Jamey pointed out that based on their experience and feedback from the institutions as well as the legal professionals, virtual hearings are here to stay. In terms of the technical side, we will most likely see the permanent installation of the equipment necessary to conduct virtual hearings in law firms, arbitration centres, etc., improvement on equipment, as in more adoption of the equipment to the needs of the arbitration community and – naturally - bandwidth improvements.

Giacomo Rojas Elgueta followed by providing an overview on the research project he initiated together with James Hosking and Jasmine Lahlou and in collaboration with the International Council for Commercial Arbitration (ICCA). With the help of national reporters Giacomo and his Co-editors have been compiling a comparative survey covering some 86 jurisdictions to assess whether there is a right to a physical hearing. As a preliminary result, not all reports have been received yet, the most used seats seem to not provide for a right to a physical hearing. When Cornelia asked about any notable exceptions to this rule, Giacomo highlighted that some jurisdictions, such as Vietnam, Ecuador, Venezuela, do however provide for a right to a physical hearing to some extent. The most interesting and controversial exception however, is in the report from Sweden. The Swedish reporters take the view that a right to a physical hearing could be inferred based on the preparatory work on the Swedish procedural rules and the Arbitration Act ("but some would disagree" country report Sweden) and that an oral hearing cannot be held fully virtually. This report has been discussed controversially in Sweden. The question is currently pending in the Swedish Appeal Court and the outcome of this matter will be closely watched.

Dr Christian Aschauer then gave an instructive overview of his experience with virtual hearings in different settings. In his opinion even hybrid hearings, where for example some participants are present in the hearing room whilst others – such as witnesses and experts - participate remotely are a possibility that should not per se be excluded. The decisive factor is whether the conduct of the hearing - it being virtual or in person - ensures equal treatment to all parties.

Moreover, Georg discussed with Christian the practical benefits of virtual hearings and concerns regarding cross-examining witnesses on screen. Virtual hearings offer the possibility, for example, for a longer interval between the last day of the taking of evidence and the closing submissions to allow counsel to prepare more detailed closing submissions (instead of the overnight PowerPoint) thus perhaps even reducing the need or scope of post hearing briefs. With in-person hearings, this would require the arbitrators to travel again or to sit idly by and wait for the closing some days later. Finally, all speakers agreed that cross-examining witnesses and experts is not necessarily less effective or less immediate and, as always, a cost-benefit analysis has to be undertaken.

Concluding Remarks on the Satellite Event

It has become clear that there are as many benefits to virtual hearings as there are reservations. Already today, the technology is in place to allow large scale hearings to be held fully virtual. The capability to handle these virtual hearings efficiently and effectively will be driven by cost and time considerations. In future, flying large legal teams, experts and witnesses around the globe will require more justification – and rightly so.

Following our satellite event, the official part of the conference was opened by Dr Galina Žukova (ZUKOVA Legal, Paris) and keynote speeches presented by David Greene (Edwin Coe LLP, London), Kevin Kim (Peter & Kim, Seoul) and Chiann Bao (Arbitration Chambers). The conference itself continued Friday with panels covering arbitration in transport disputes, IT in arbitration, third party funding and an update on investment arbitration.

Investment Arbitration Panel IV

Georg Scherpf (Clyde & Co) was invited to speak on Panel IV Investment Arbitration Update.

Speakers included Alicja Zielińska-Eisen (Queritius, Warsaw), Eveli Lume (Squire Patton Boggs, Berlin / Tallinn), Huawei Sun (Zhong Lun, Beijing) and Qian Wu (SIAC). The panel was moderated by Diana Tsutieva (Foley Hoag, Washington, D.C.). Topics covered treaty shopping post Achmea and in light of Brexit, the ECT modernization and the question how green the ECT is, commercial institutions and specialised investment rules and disputes and the Belt and Road Initiative.

Georg Scherpf provided a comment on the current criticism levelled at the substantive investment protections provided under international treaties as opposed to purely procedural concerns (transparency, consistency, amicus curiae etc.), which are addressed by the UNCITRAL Working Group III. Georg's comments were made against the backdrop of Nicolás M. Perrone's recent book Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules. After reviewing the historical analysis provided by Nicolás M. Perrone – from the Abs-Shawcross Draft Convention to the modern investment treaties and practice – Georg responded to the criticism that the "binary relationship" and "transactional model" of investment protection neglects other stakeholders and makes local communities "invisible". In particular, Georg pointed out that foreign direct investments are not – as many think – detached from local laws. Foreign investors must adhere to local laws just like domestic investors but are provided an additional layer of protection under international law. It is not the purpose of investment protection to make up for an insufficient balancing of interests or protection under domestic law. Although reforms regarding environmental protection, sustainable development and human rights within investment treaties are critical for future legitimacy and will create better treaty standards in the future, investment protection is not a panacea for deficient domestic legal systems.

Anna Falk

Cornelia Kunze

Georg Scherpf

Insight: Clyde & Co

Clyde & Co feiert 5 Jahre in Deutschland

Vor fünf Jahren hat das erste Büro von Clyde & Co am 1. September 2016 in Düsseldorf eröffnet. Seitdem liegt eine rasante Entwicklung hinter uns. So ist aus den anfänglich sieben Berufsträgern durch die Eröffnung eines weiteren Büros in Hamburg 2019 und München zu Beginn dieses Jahres mittlerweile ein Team vom rund 50 Anwälten*innen gewachsen. Unsere Beratung ist Marktspitze wie die Auszeichnungen als „Kanzlei des Jahres für Versicherungsrecht" bereits 2018 von JUVE und von Handelsblatt/Best Lawyers als „Kanzlei des Jahres" in diesem Jahr belegen. Dahinter steht insbesondere auch unsere breite Tätigkeit in nationalen und internationalen Gerichts- und Schiedsverfahren über zahlreiche Bereiche wie Manager-, Berufs- und Produkthaftung wie auch Datenschutz / Cyber Security, in Regressverfahren und in vielfältigen weiteren vertragsrechtlichen Themen.

Wir sagen „Danke" an unsere Mandanten und Geschäftspartner für ihr Vertrauen und die langfristigen Partnerschaften wie auch allen Mitarbeiter*innen, die durch ihren großen Einsatz, ihre Loyalität und unseren Clyde Spirit diese Erfolge ermöglicht haben.

Team

Wir gratulieren Dr. Styliani Ampatzi, LL.M. herzlich zur Beförderung zum Senior Associate ab dem 01.07.2021. Styliani Ampatzi ist bereits seit 2018 bei uns in Düsseldorf tätig. Sie vertritt regelmäßig internationale und nationale Mandanten in handels- und haftungsrechtlichen Streitigkeiten in Gerichts- und in Schiedsverfahren. Styliani Ampatzi konzentriert sich insbesondere auf komplexe Streitigkeiten in den Bereichen internationaler Handel, Corporate Disputes und Versicherung. Dabei hat sie umfassende Erfahrung bei der Betreuung von nationalen und internationalen ad-hoc und institutionellen Schiedsverfahren sowie bei dem Abschluss von Streitbeilegungsvereinbarungen und der Vollstreckung von inländischen und ausländischen Schiedssprüchen. Styliani Ampatzi arbeitet regelmäßig mit den Arbitration Teams der anderen Büros von Clyde & Co in Deutschland sowie insbesondere in London, Paris und Griechenland.

Clyde & Co fördert die 10. Baltic Arbitration Days

Unsere Kanzlei ist Förderer der 10. Baltic Arbitration Days. Die Veranstaltung fand am 12. und 13. August teils online und teils in Präsenz in Riga statt. Zahlreiche Vortrags- und Diskussionsrunden zu den Themen Arbitration in Transport Disputes, IT in Arbitration, Third Party Funding und Investment Arbitration gehörten zum Konferenzprogramm.

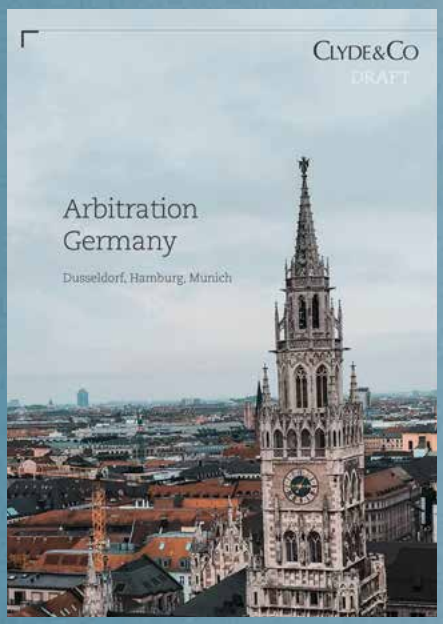
Georg Scherpf trat für Clyde & Co als Speaker des Panels "Investment Arbitration Update" am zweiten Tag der Konferenz auf und teilte in einem internationalen Panel mit weiteren Speakern aus Beijing, Singapur, Warschau und Berlin seinen Blick auf neue Entwicklungen im Bereich Investitionsschiedsgerichtsbarkeit. Anna Falk und Cornelia Kunze haben eine Satellitenveranstaltung zum Thema "Virtual Hearings"organisiert und begleitet.

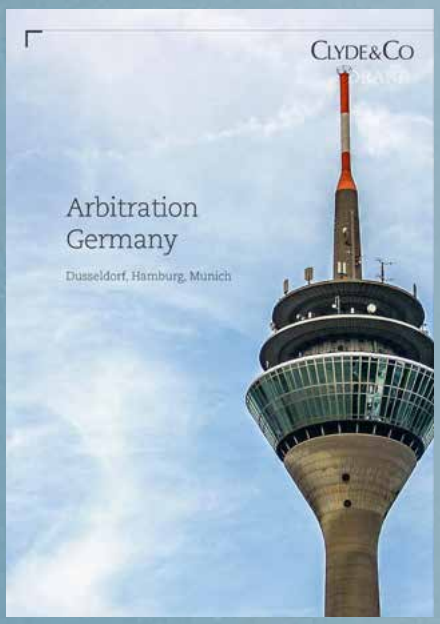
We are delighted to introduce our international arbitration team in Germany, comprising more than 25 lawyers across our offices in Dusseldorf, Hamburg and Munich. Our arbitration team has significant experience in complex international and domestic arbitrations (ICC, LCIA, DIS, SIAC, SCC, AAA, LMAA, GMAA, ad hoc) across various industry sectors.

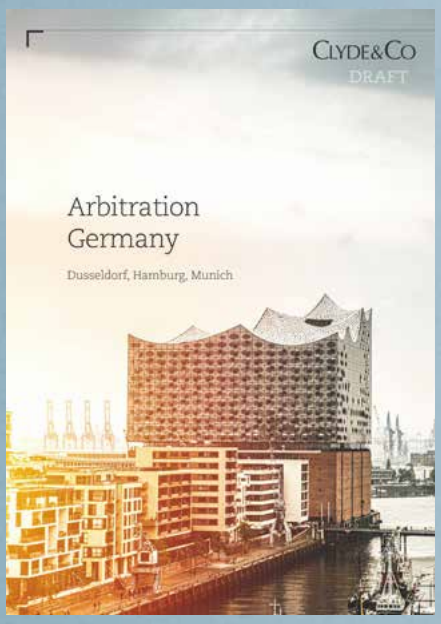
Besides commercial arbitrations, we advise investors on investment protection and represent them in investment arbitrations (ICSID, UNCITRAL and ad hoc) when their investments abroad are at stake. We support our clients in jurisdictional disputes, arbitrator challenges, setting-aside and enforcement of arbitral awards. The lawyers of our German arbitration team work closely with damage, forensic or technical experts in order to argue complex cases and to achieve the best possible outcome. We have extensive experience in oral advocacy before international tribunals. Further, our lawyers not only act as counsel in complex and high value disputes but also regularly sit as arbitrators themselves – making them better advocates. Our German arbitration team works closely with our European arbitration teams in London, Paris and Madrid as well as with our 50+ offices worldwide to provide our clients with dispute advice and representation on a global level.

If you would like to receive a copy of our Arbitration Germany brochure or have any questions, please get in touch with

Georg Scherpf
georg.scherpf@clydeco.com


CLYDE&CO
DRAFT
Arbitration
Germany
Dusseldorf, Hamburg, Munich


CLYDE&CO
Arbitration
Germany
Dusseldorf, Hamburg, Munich


CLYDE&CO
DRAFT
Arbitration
Germany
Dusseldorf, Hamburg, Munich

440

Partners

1,800

Lawyers

4,000

Total staff

50+

Offices*

www.clydeco.com

*includes associated offices

Clyde & Co (Deutschland) LLP trades as Clyde & Co and is a limited liability partnership registered in England and Wales under number OC413029 and with its registered office at The St Botolph Building, 138 Houndsditch, London, EC3A 7AR, United Kingdom. Clyde & Co (Deutschland) LLP is registered in the partnership register of the Amtsgericht Essen under number PR 3857.