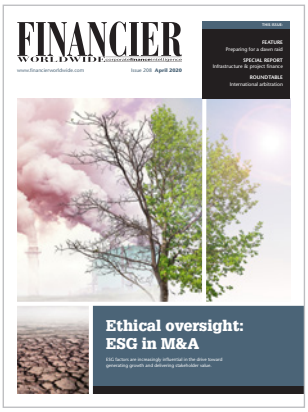

Published by Financier Worldwide Ltd

ROUNDTABLE April 2020

INTERNATIONAL ARBITRATION

Significant issues brewing in the international arbitration arena are now taking centre stage. Investor-state developments, cyber security and data protection, the growth of third-party funding, cross-border enforcement of judgments and mediated settlement agreements – all these and more are testing the mettle of arbitrators across the globe. Increasingly competitive and innovative, international arbitration continues to evolve. ■

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FW: In your opinion, what key trends and developments have dominated the international arbitration space over the past 12 months or so?

Rangachari: Transparency remains a big issue, as stakeholders demand reform and a response to the 'legitimacy crisis' of international arbitration. Arbitral institutions began sharing more data as they explored the complex relationship between transparency and confidentiality for an evolving and best fit dispute resolution system. For example, the International Chamber of Commerce (ICC) Court of Arbitration began publishing details on the composition of an arbitral tribunal, including the names of arbitrators appointed to registered cases, nationality, role within the tribunal and method of appointment, recently expanded to include industry sector and counsel representation. Furthermore, the American Arbitration Association-International Centre for Dispute Resolution (AAA-ICDR) now publishes its case data infographics detailing number of cases, size of claims and industry type. Diversity equally remains top of mind as we scrutinise whether the playing field is changing in synch with several noteworthy initiatives nominated for the Equal Representation in Arbitration (ERA) Pledge Award to be announced at the GAR 2020 Awards in April.

Rana: There have been several significant matters that have been brewing for the past few years but have recently taken centre stage. They are the implementation and effects of Brexit, the Belt and Road Initiative, investor-state developments, new and improved rules on subjects such as cyber security and data protection, the growth of third-party funding and the introduction of global regimes for the cross-border enforcement of court judgments and mediated settlement agreements to rival the New York Convention regime for enforcing arbitral awards. These areas will continue to develop and impact upon dispute resolution generally, but international arbitration more specifically, over the next 12 months.

Rosher: In relation to investment arbitration, the aftermath of the *Achmea* decision has continued to make its effects felt, with several EU countries continuing to terminate their intra-EU bilateral investment treaties (BITs). In parallel, there has been increasing concern as to the adverse effects of the 'nationalisation' of arbitration, notably by the appearance of national domestic arbitral institutions of varying competence. On another note, there have been a number of publicised cases involving issues of corruption, which have put the issue in the spotlight and illustrated that attitudes toward tolerating certain business practices have been changing. The last 12 months has also seen a number of initiatives designed to promote greater legitimacy and transparency. For example, the ICC announced that its awards may be published in their entirety, unless parties opt out or require anonymisation of the award to be published.

Stepek: The volume of competition that is taking place among various arbitral fora is quite interesting. This competition is driving both changes in curial laws, such as between Singapore and Hong Kong, which appear to be passing copycat legislation to increase their attractiveness. Additionally, the proliferation of regional arbitration centres is driving the use of technology in arbitration through rules changes and draft protocols for dealing with technological advances useful in international arbitration. This competition is also driving various innovative ideas designed to reduce the cost of arbitration.

Mcilwrath: There have been several key trends. First, applications for security for costs seem to be made with increasing frequency, accompanying a possible trend of claimants with questionable financial health and highlighting a lack of guidelines for tribunals to issue or deny these requests. The issue often comes up in cases with a third-party funder, but it is not solely related to it. Second, the use of technology by arbitration institutions and arbitrators, and whether more can be done to simultaneously reduce travel and increase efficiency. Third, and probably the most visible trend, is the demand for greater transparency, and the expectation of users for better or more reliable information about international arbitrators before they are appointed, especially their case management skills, procedural inclinations, and quality of decision making. There are a number of notable initiatives in this area, such as Arbitrator Intelligence, a project to publish data analytics about arbitration awards, that represent real progress.

FW: Have any recent arbitration cases gained your attention in particular? What can they tell us about the current international arbitration environment, and what impact could they have on future cases?

Rana: *Halliburton v. Chubb* was heard by the UK Supreme Court in November 2019. The decision is due soon. It will have important implications regarding repeat appointments of arbitrators. At issue in this particular case is whether, and to what extent, an arbitrator is allowed to accept appointments in multiple arbitrations – with only one common party – that concern either exactly the same or merely overlapping subject matter without, as a result of it, giving rise to an appearance of bias. Furthermore, a question arises whether an arbitrator may accept such appointments without disclosure.

Rosher: Two recent cases are of significant interest for arbitration practitioners since both address the obligation of disclosure on arbitrators. First, in a decision in the Volkswagen case, the French Supreme Court extended the disclosure obligation to encompass circumstances which are likely to affect the arbitrator's independence or impartiality, regardless of whether or not they were arguably already in the public domain and even where they arise after acceptance of his or her appointment. Second, in the *Halliburton v. Chubb* case, the English Court of Appeal dealt with the issue as to whether an arbitrator can accept multiple appointments in related arbitrations, and separately not disclose such appointments, without giving rise to an appearance of bias and found in favour

of full disclosure. Interventions from the London Court of International Arbitration (LCIA) and the ICC, among others, were made in the proceedings before the Court of Appeal. The issue is on appeal before the Supreme Court of England and Wales and the decision is eagerly awaited.

Stepek: The dispute *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* is of interest and came to light by virtue of an enforcement request in the UK of an award issued by a Paris tribunal. The case concerned a franchise development agreement (FDA) entered into by Kabab-Ji SAL and Al Homaizi Foodstuff Company (AHFC). Following a corporate reorganisation, AHFC became a subsidiary of Kout Food Group (KFG). A dispute arose under the FDA, leading Kabab-Ji SAL to commence an arbitration against KFG but not AHFC. This raised a jurisdictional question as to whether KFG had become an additional party to the FDA, and therefore to the arbitration agreement, and if so how. The Paris tribunal found that it had jurisdiction over KFG on the basis that there had been a novation. The claimant then sought to enforce the award in England which the English Court of Appeal refused to do, finding that KFG was not a party to the arbitration agreement. The award was also challenged in the Paris court, which has not yet ruled on the issue, setting up a potential divergence of opinion.

Mcilwrath: The most notable commercial arbitration case for us in 2020 was the *Monster Energy* decision in the US, in which an arbitration award was set aside because of the arbitrator's failure to disclose his ownership interest in the arbitration institution administering the case and repeated work that the institution did with one of the parties. This may have repercussions on the scope of disclosures of arbitrators and institutions, even outside of the US.

Rangachari: The 2019 Schein case decided by the US Supreme Court was a noteworthy and necessary pro-arbitration affirmation in the current climate that explores the boundaries of arbitration on non-signatories and employment contracts. Schein affirmed the arbitral tribunal's competence to decide gateway issues of arbitrability per the contract and the role of courts to enforce arbitral clauses as written – therewith limiting the wholly groundless exception as incongruous with past precedent and the FAA. In the 2020 term, in *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA,* the US Supreme Court hotly debates whether a subcontractor and non-signatory of the contract and resulting arbitration agreement can be brought into arbitration and the role of equitable estoppel.

FW: In your opinion, are any political or macroeconomic developments set to have an impact on the arbitration landscape in your jurisdiction?

Rosher: Brexit is undoubtedly an important political change. Its consequences for the arbitration landscape have been hotly debated but should be relatively limited, as the features that historically and currently make London a popular seat for arbitration should not fundamentally change. Other jurisdictions, however, have already put in place measures to strengthen their positions as leading arbitration seats. France, for example, has created an international commercial division of its Court of Appeal, designed to better suit the needs of international commerce. This division now handles all challenges of international arbitration awards made after 1 January 2019, whether in English or French language.

Stepek: The most obvious political development that may have an impact on the arbitration landscape here in Europe is of course Brexit. While the final terms of the UK's exit from the EU are as yet unknown, it seems likely that the Brussels Convention may cease to apply. If so, this would likely put judgements of courts in the UK without a streamlined process for the reciprocal enforcement of judgments between the courts of EU member states. Although the government has indicated that it intends to become a member of the Hague Convention on Choice of Court Agreements 2005 in its own right at the end of the transition period under the withdrawal agreement, the Hague Convention is more limited in scope than the Brussels Convention. Most particularly, the Hague Convention applies only to final judgements. These limitations and related uncertainty have the potential to increase the attractiveness of arbitration over court litigation as the preferred forum for resolving disputes.

> "INTERNATIONAL ARBITRATION IS OFTEN THE ONLY WAY IN WHICH ALL OF THE PARTIES TO THE TRANSACTION MIGHT BE BROUGHT BEFORE THE SAME FORUM."

MICHAEL STEPEK
Winston & Strawn LLP

Rangachari: The US heads into its November 2020 elections with presidential candidates on either side of party lines equally critical of investor-state dispute settlement (ISDS). The US withdrew from several multilateral investment treaty discussions in 2017, each calling for ISDS overseen by supranational bodies. In the new United States-Mexico-Canada Agreement (USMCA), ISDS is very limited for covered sectors and unavailable between the US and Canada. This comes in the wake of international critique of the ISDS system lacking independence and impartiality, as countries denounce and withdraw from bilateral and multilateral investment treaties, thereby fuelling calls for reform. UNCITRAL's Working Group III is tasked with addressing the best reform mechanisms in its upcoming April session in New York. Proposals include the European Union's reinvention with the multilateral investment court and appellate review body, while others in Chile, Israel and Mexico call for revision with enforced adjudicator codes of conduct. Only time will reveal US policy and the broader rules of engagement between investors and states in this modern era of dispute resolution.

Mcilwrath: In the industry where we operate, a continuing trend of low oil prices, which depresses both the capital expenditure and operational expenditure of major oil & gas operators, has had a 'trickle down' effect of low liquidity from major oil & gas operators down through their supply chains, tipping more cases into arbitration than would have been in the past. Separately, Brexit is now coming up as a recurring topic in international contract negotiations over both choice of law and choice of forum for disputes. I do not understand why choice of law should be affected, as Brexit should not impact the reliability of English law. Yet we have seen this. And colleagues in other companies have also told me of experiences in contract negotiations where London is either less preferred as a seat or is being replaced by another well-known arbitration forum. A lot of this seems to have been driven just by the uncertainty of what might happen. It remains to be seen whether, now that Brexit is proceeding, this will reduce or accelerate fears of London as a reliable seat, or if it will have no impact at all.

> BREXIT IS UNDOUBTEDLY AN IMPORTANT POLITICAL CHANGE. ITS CONSEQUENCES FOR THE ARBITRATION LANDSCAPE HAVE BEEN HOTLY DEBATED BUT SHOULD BE RELATIVELY LIMITED.
>
> PETER ROSHER
> Reed Smith LLP

Rana: Regarding Brexit, the arbitral law and supervisory court will continue to be as business-friendly, neutral and supportive us usual. English contractual law will continue to be as commercially practical and predictable and English arbitration awards will remain enforceable in the EU. Political turmoil in Hong Kong is influencing business confidence in the island's economy and institutions. However, while it is difficult to judge what the overall effect is or will be, from an arbitration perspective, disputes are likely to be dealt with by other institutions or force the adoption of technology. It would be in the interests of the Hong Kong International Arbitration Centre (HKIAC) to retain as much of its business as possible since its caseload over the past decade has remained largely constant, whereas that of the Singapore International Arbitration Centre (SIAC) has more than doubled during the same period. Concerning third-party funding, jurisdictions are legislating to allow and regulate funding, such as Singapore, Hong Kong and the United Arab Emirates (UAE). New legislation in this area may be introduced in the US this year. The arbitration community is starting to develop accepted practices around funding.

FW: Have you noted any sectoral trends in international arbitration in the past 12 months or so? How do you expect these trends to unfold?

Stepek: One sectoral trend is the frequency of arbitrations arising out of private equity transactions. These transactions tend to be large in monetary terms, complex and cross-border, with multiple corporate vehicles organised under the laws of several jurisdictions. Also, such transactions often involve groups of related contracts with the potential to involve different parties, different governing laws, different languages and different arbitral clauses or forum selection clauses, thus adding to the complexity. International arbitration is often the only way in which all of the parties to the transaction might be brought before the same forum. As a result, the industry seems to be generating an increasing number of international arbitrations.

Rangachari: The winds have shifted on the relationship between banking and finance industries and international arbitration. Preferred, past practice saw parties filing claims in the national courts of major financial capitals, such as New

York, London and Hong Kong, with concerns over time, cost and efficiency as drivers away from arbitration, in addition to fears of arbitral tribunals 'splitting the baby' in the final award. In contrast, financial institutions and their counsel are contemplating arbitration with much greater interest than ever before. One reason may be greater optionality within the industry-specific rules of arbitral institutions that drive party autonomy. For example, the ICC Commission Report on Financial Institutions and International Arbitration (2016) provides recommendations from financial institutions and experts to best structure an arbitration, addressing concerns of confidentiality and enforcement. Others like the AAA-ICDR have diversified their rules and created a financial advisory committee to address case growth. Arbitration cases within this sector should continue to increase on par with cross-border deals in emerging markets, where reliability and neutrality of the process are of key importance.

Rana: Most of the significant developments and trends have been set in the Asia-Pacific region. China's Belt and Road Initiative is the biggest investment and construction programme that has ever been undertaken. Arbitral institutions in the Asia-Pacific region will benefit most from the disputes work arising from the many complex, multi-party projects that make up the initiative. Another significant development was the announcement by China and Hong Kong to allow arbitrations seated in Hong Kong to be supported by interim or protective measures issued by courts on the mainland. The key point here is that the arbitration can be administered by any institution, so long as it appears on an official list of permitted bodies. The International Chamber of Commerce appears on that list, as does the HKIAC and a handful of other institutions. Reform of the Energy Charter Treaty is long overdue and needs to address climate change and clean energy issues, as well as promoting sustainable development, human rights and international labour standards. However, care must be taken to ensure that reform does not lead to a radical watering down of protections for investors.

Rosher: Construction remains an important sector for international arbitration. This was reflected with the release last year of the updated ICC Commission report on construction industry arbitrations. The energy, both traditional and renewable, sector is seeing an increasing interest in arbitration, as is also the case with the life sciences industries. All of these sectors have been addressing growing concerns in relation to the use of technology – data protection, artificial intelligence (AI) and cyber security – and environmental ethics and 'humanisation' of business relationships. In this connection, the Pledge for Greener Arbitrations, the Hague Rules on Business and Human Rights Arbitration, and the recent ICC Commission report 'Resolving Climate Change Related Disputes through Arbitration and ADR' are key tools, and likely to showcase a change in arbitration users' business habits in the foreseeable future.

FW: Although known as binding and enforceable, how robust is arbitral award enforcement in practice, especially when pertaining to enforcement in a jurisdiction different from the venue of the arbitration?

Mcilwrath: Of course, most arbitration awards are voluntarily complied with. Because of the New York Convention, the question of enforceability often has little to do with the seat, and more often is about the arbitration law and quality of the courts at the place of enforcement. So, it is really impossible to generalise. For example, suppose you have Paris and Kabul as seat of arbitration and enforcement. You may have a solid award that survives challenge in Paris, but you may find it impossible to collect in Kabul where the award debtor has assets.

Rana: Efforts to improve cross-border enforcement will see increasing cooperation between states and courts over the enforcement of judgments. The Singapore Mediation Convention was signed in July 2019, which aims to ensure cross-border enforceability of settlement agreements arising from mediation. Signatories include the US, India and China. Along with the New York Convention on enforcement of arbitral awards, there are now agreements covering the three key modes of dispute resolution: litigation, arbitration and mediation. Additionally, in 2019, UNCITRAL published new model rules on the enforcement of insolvency-related

> "IT IS A POSITIVE ELEMENT THAT COUNTRIES CONTINUE TO RATIFY THE NEW YORK CONVENTION, ESPECIALLY WHERE FOREIGN DIRECT INVESTMENT IS INCREASING."
>
> REKHA RANGACHARI
> New York International Arbitration Center

judgments. The Standing International Forum of Commercial Courts published a memorandum promoting cooperation on cross-border enforcement at the judicial level. The work of the standing forum is significant, and a meeting is scheduled in Singapore for March 2020 after which an enhanced memorandum is expected. In time we may see international judges create a body of soft law which allows them to move more quickly than intergovernmental negotiations allow.

Rosher: Enforcement remains one of the most systemic challenges faced by arbitration. While the New York Convention has done much to harmonise the grounds for refusal to enforce an award, interpretation by local courts is not always uniform. As demonstrated by the Dallah and Kout Food cases, national judges from the venue and from the place of the execution of the award may interpret the same set of facts and law in different and incompatible ways. While there is no obvious solution, the effectiveness of the international enforceability of arbitral awards has enjoyed an impressive track record, in large part as a result of the principles enshrined in the New York Convention. Over 160 states worldwide have ratified that Convention, including in the last 12 months the Seychelles, the Maldives and Papua New Guinea.

Rangachari: Awards are usually enforced, with narrowly tailored grounds for refusal to enforce under the New York Convention. Best practice will be to consider the enforcement jurisdictions and existing political climate, in addition to court backlog if timing is an issue. It is a positive element that countries continue to ratify the New York Convention, especially where foreign direct investment is increasing. This is matched by a general international sentiment to collaborate in cross-border disputes even at the judiciary level, as seen by the recent interim measures arrangement by courts in China. In the arrangement, parties in arbitration under selected arbitral institutions can apply for interim relief in mainland Chinese courts in advance of filing or during proceedings.

> “ARBITRAL INSTITUTIONS ARE REVISING THEIR RULES AND PROCESSES THROUGH THE INTRODUCTION OF CASE MANAGEMENT TECHNOLOGIES.”
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> RASHDA RANA
> Kier Group

Stepek: Awards rendered by international commercial arbitration tribunals are quite robust. Most awards do not need judicial assistance in their enforcement. The New York Convention recently had its 61st birthday and is well received in most jurisdictions around the world. Even in parts of the world where the New York Convention is relatively new, such as in the UAE which became a party to it in 2006, a recent study showed that the Convention has been effective in its first 12 years in that jurisdiction. Perhaps as a result, in the commercial sphere it seems more often than not the case that the losing party pays the award voluntarily rather than forcing the prevailing party to formally enforce it. This, of course, presumes that no dispute exists over fundamental issues in the arbitration, such as jurisdiction, which are the types of questions prone to form the basis of a challenge to enforcement. The enforcement of awards against sovereign governments, however, are similarly much more complex and are often prone to litigation over enforcement.

FW: Regional initiatives have been on the rise in relation to international arbitration. In your opinion, which ones are noteworthy, and why?

Rana: The globalisation of dispute resolution is leading to new ‘international’ commercial courts coming under consideration, six such courts having been founded in the past six years. Arbitral institutions are revising their rules and processes through the introduction of case management technologies. International courts for cross-border tort claims and international tribunals for business and human rights cases are also on the horizon. Singapore is likely to join Hong Kong and England in permitting arbitral awards to be appealed on a point of law, providing parties opt into this arrangement. In England, parties opt out, according to section 69 of the Arbitration Act 1996.

Rosher: Asia, India and Africa are ‘must-watch’ regions. China has passed a reform allowing institutions to accept and administer arbitrations in the Shanghai Pilot Free Trade Zone. Chinese courts now have the ability to order interim measures in support of institutional arbitrations seated in Hong Kong. On the African continent, the boom in construction and infrastructure projects being led by foreign companies has fuelled the impetus in many African countries for practitioners to invest in training in commercial and investment arbitration, and for African states to modernise their arbitration laws. India passed a new arbitration law early in 2019,

followed by a landmark Supreme Court ruling, by which enforcement of awards in certain arbitrations was to be stayed as soon as an award was challenged.

Mcilwrath: The shift from ad hoc or UNCITRAL arbitration in the emerging world toward institutional arbitration has been a noteworthy development. The latter now seems to be much more accepted than a decade ago. As others have noted, this has also been accompanied by a proliferation of regional or national centres of arbitration, which also represent a challenge to us users in being able to assess quality.

Stepek: Regional initiatives are quite interesting as this is where one often sees more innovation, as the regional centres focus on competing against more established institutions. Noteworthy initiatives centre on the use of technology to assist the arbitral process. These initiatives include electronic case management systems, automating portions of the arbitration proceedings and protocols on video conferencing. Regional initiatives also often provoke innovation in arbitral rules, such as the Japan Commercial Arbitration Association's (JCAA's) new set of interactive rules, which incorporates aspects of a civil law system, or the Prague 'Rules on the Efficient Conduct of Proceedings in International Arbitration', which were designed to address issues of the cost and efficiency of international arbitration. There are also interesting regional initiatives intended to address diversity in arbitration where the pool of arbitrators skews male and Caucasian despite advances in recent years. For example, the Association of Young Arbitrators, which was set up for lawyers in Africa under the age of 40, is both a platform where young lawyers can share ideas but also provides a mentoring programme to assist them in their development.

Rangachari: There has been a surge of regional arbitral centres administering cases in recent years. These provide a more localised counterpart to institutional headquarters, with access to cultural norms, societal trends and on-the-ground services in seats with large domestic caseloads. For example, the LCIA has regional offices in Paris, Dubai, New Delhi and Mauritius. And, the ICC International Court of Arbitration in Paris has regional offices in Hong Kong, New York and São Paolo. The AAA-ICDR in New York has three ICDR regional offices in Miami, Houston and Singapore. In addition, the SIAC has regional offices in Shanghai, Mumbai, Seoul and Gujarat. In light of these office openings, an open question remains whether international commercial arbitration is becoming increasingly domestic in practice.

FW: Would you say companies are now more inclined to include international arbitration provisions in their commercial agreements? What factors should they consider when doing so?

Rosher: Whether companies are more inclined to include international arbitration agreements in their contracts is difficult to assess with any 'scientific' accuracy. Statistics available from leading arbitral institutions only give an insight as to the current number of administered disputes. That said, for companies expanding their international business globally, such an inclination is a necessity. Not because of any innate love of international arbitration, but because of the lack of any alternative for the enforcement of state judgments internationally that has a transnational currency as effective as that offered by the 1958 New York Convention. Another point worth noting is that the call for arbitration can vary significantly by sector and is generally stronger where the nature of disputes requires high-level industry expertise. Take the international construction and infrastructure sector as an example, wherein international arbitration is by far the preferred dispute resolution method. When choosing international arbitration, a key factor to consider is the seat of the arbitration, as this often has the greatest potential impact in terms of both the supervisory function of the courts of the seat and the enforceability of an award.

Rangachari: Confidentiality and choice are often cited as cornerstone reasons why companies opt for international arbitration over litigation. Confidentiality under arbitral rules usually limits the institution and arbitrator to release information to the public, with confidentiality clauses and agreements often included to maintain confidential uniformity between all. Separately, as disputes become even more global and increase with emerging market economies, efficiency of proceedings and

> "THE SHIFT FROM AD HOC OR UNCITRAL ARBITRATION IN THE EMERGING WORLD TOWARD INSTITUTIONAL ARBITRATION HAS BEEN A NOTEWORTHY DEVELOPMENT."
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> MICHAEL MCILWRATH
> Baker Hughes

a seat with reliable national courts are key considerations. Transparency also continues to be a guiding principle in arbitrator selection. An initial analysis should consider the myriad offerings of arbitral institutions.

Stepek: Those in industries which traditionally use arbitration, such as the construction and extractive industries, remain inclined to include international arbitration provisions, whereas other industries which have not traditionally used international arbitration may not. One still sees large, multiparty, cross-border transactions which select a national court to hear disputes based on the law chosen to govern the dispute, rather than choosing for that dispute to be heard in international arbitration, despite the substantive law chosen. Choosing a national court can of course be a perfectly fine selection, if it is made for the right reason. Often, however, one is faced with explaining to a client that the relief needed involves enforcement over a party to the transaction who is not present in that jurisdiction and in a country where enforcement of court orders or judgements is not ensured. The primary factors in choosing international arbitration are both the need to enforce an order or award in multiple jurisdictions and whether there is a risk of courts in more than one jurisdiction exercising concurrent jurisdiction.

Rana: Studies show that international arbitration continues to be the favoured means of dispute resolution for disputes arising from cross-border transactions. The popularity of arbitration stems from some of its core features – arbitration between international parties is perceived to be more neutral than litigation in any of the disputing parties' home jurisdictions. Through the arbitrator appointment process, the parties can influence the composition of the tribunal and ensure the necessary level of expertise, both in matters of construction law and the technical issues at stake. Additional advantages are the confidentiality and privacy of arbitration proceedings and the international enforceability of arbitral awards under the New York Convention. Arbitration users have called for improvements in efficiency, more expeditious proceedings and reasonable costs. The main causes of inefficiency in international arbitration can be attributed to obstructive party tactics, poor case management, large amounts of evidence, lack of experience of arbitrators and counsel in specialised areas in dispute and the general factual and technical complexity of some areas, such as construction disputes. Matters to consider remain the same – confidentiality, rules, seat, the appointment of good robust arbitrators, case management efficiencies and a keen eye on costs.

FW: Looking ahead, how do you envisage the international arbitration landscape developing over the coming months and years? What trends are on the horizon?

Rangachari: Business is in a state of great flexibility with an uptick in cross-border deals. Arbitration may increasingly explore the options for videoconference testimony and sophisticated e-hearings through online dispute resolution (ODR) platforms. International arbitration will necessarily grow to be more elastic in the face of global health and safety as populations surge. With the recent COVID-19 pandemic, discussion naturally lends itself to *force majeure* clauses in contracts and resulting contingency plans, with consideration to insurance policy updates excluding coverage of such health outbreaks and use of safety procedural orders by arbitral tribunals to best address buildout of efficient, cost-effective and safe proceedings.

Rana: Diversity and 'green awareness' are themes which are likely to dominate debate in arbitration. More needs to be done to improve the diversity of arbitral panels from different points of view, be it gender, ethnicity, race, religion or social background. Initiatives are also being developed to find ways of reducing the carbon footprint of arbitration. New efficiency tools for lawyers will lead to wider adoption of technologies. For that reason, technology will start to play a big part in dispute resolution. We are seeing the automation and digitalisation of the process, such as automated transcription, semi-automated research and drafting, and guided workflow systems, making the case management system entirely electronic, the increasing acceptance of video conferences as a cost-effective alternative to court hearings which means some institutions are introducing protocols for the use of the technology, and the introduction of mobile application platforms. New analytical tools for dispute lawyers are being developed, with AI on the verge of breaking into the mainstream, enabling lawyers to construct more effective cases and litigation funders to make better investments. There will be emerging use of AI in national court systems and increasing interest from national courts in AI. Current automated dispute resolution platforms are likely to enter the mainstream.

Stepek: Given the amount of competition and the innovation being fostered, there is a clear trend in offering choice to the user in the type of arbitration they want and believe is most efficient and effective. The market for international arbitration thus can be expected to continue to evolve and develop more specialised procedures and options to users. Additionally, new analytic and efficiency tools will become increasingly prevalent. These include AI or machine learning (ML) to increase accuracy and predictability of outcomes.

Mcilwrath: Several trends seem to be developing or are on the horizon. First, all the major institutions have either introduced or enhanced their expedited arbitration rules. The ICC has taken the further bold initiative of changing its rules so that all arbitrations below a certain monetary threshold will be sent to expedited arbitration with only one arbitrator, even if the parties have agreed to appoint three. This has proved to be very popular among my in-house colleagues who see this as a reasonable limitation on the time and costs of the dispute procedure. Related to speed is the growth of mediation as a part of the dispute resolution process, as a step before finding oneself in arbitration. Today, I would estimate at least half of all our international arbitrations pass

through a mediation step first, most often because it is a contract requirement. And many of them settle there, before reaching the arbitration stage, or they settle early in the arbitration process. Increasingly, stakeholders think that methods of resolving disputes should become more fluid and allow a greater intersection of different dispute methods. Regarding transparency, the Global Arbitration Review (GAR) now has a for-fee database of arbitrators that includes 'soft skills' and comments from parties. The Milan Court of Arbitration introduced a rule for publishing arbitration awards in anonymised form. The ICC has begun publishing the names of arbitrators sitting in ICC cases and plans to shortly begin publication of its awards, which is the largest number of international arbitration awards issued each year. One thing that I am hoping is an emerging trend is the number of initiatives on the costs of international arbitration, from containing costs to providing better guidance on awarding costs, and when to require security for costs. Regarding arbitral seats and nationalism, we continue to see pressure to accept seats of arbitration outside of the major, well-known locations like London, Paris, New York and Geneva. It seems connected at least indirectly with the anti-globalisation movement.

Rosher: In relation to investment arbitration, the aftermath of the *Achmea* ruling will continue to unfold. The European Court of Justice (ECJ) is due to rule on the validity of arbitrations under the Energy Charter Treaty between member states and nationals of other member states. Also, at present, details about the EU investment court and its functioning remain vague. The reform of the International Centre for Settlement of Investment Disputes (ICSID) arbitration rules is now well underway and could conceivably be adopted later this year. More generally, diversity issues will rightly continue to preoccupy the arbitration community. Although efforts and incentives are ongoing, ICC statistics show that in 2019, 21.1 percent of arbitrators were women, compared to 10.4 percent in 2015. I would also expect the business human rights arbitration trend to develop. Finally, I would not be surprised to see a surge in intellectual property (IP)-related arbitrations, arising out of licensing issues, data protection and cyber security. ■