Arbitrating in a Modern World: Challenges and Opportunities

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This lecture was delivered as the 2023 International Dispute Resolution Institute (IDRI) Annual Lecture in Abuja, Nigeria, on 28 April 2023. It discusses the major challenges and opportunities of arbitrating in a modern world. In doing so, it addresses the increasing digitalization of arbitration, the introduction of two main new types of arbitration, i.e., *digital/online arbitrations on the one hand and free zone arbitration on the other, as well as the arbitration of new types of disputes,* i.e., *disputes involving economic sanctions and disputes related to human rights (HR). In this sense, this lecture offers a* tour d'horizon *of the changing face of arbitration in the 21st century, testifying to its innate procedural flexibility and adaptability. Arbitrators and arbitral institutions, in turn, are advised to adapt in order to stay relevant in the modernizing discourse of arbitration.*

Keywords: digital arbitration, online arbitration, greener arbitration, free zone arbitration, economic sanctions, ESG – related disputes, HR-related disputes, International Dispute Resolution Institute (IDRI)

Your Honours, Your Excellencies,

Ladies and Gentlemen,

It is an honour and a true pleasure to have been invited to deliver the Third International Dispute Resolution Institute (IDRI) Annual Lecture 2023 before such an illustrious audience.

I have fond memories of participating in events and speaking at conferences here in Abuja in the past and have, for a long time, lectured on IDRI's training courses on arbitration and ADR around the world. I take this opportunity to thank the IDRI and in particular its Chairman, Prof. Amasike, for this generous invitation to present to you here today.

I have been asked to speak on a subject that is close to my heart as a full-time arbitration practitioner: *Arbitrating in a Modern World: Challenges and Opportunities*. Evidently, this subject is vast in its scope and to complete my lecture within the time allotted to me, I will have to be selective in how I approach it.

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Blanke, Gordon. 'Arbitrating in a Modern World: Challenges and Opportunities'. *Arbitration: The Int'l J. of Arb., Med. & Dispute Mgmt* 89, no. 3 (2023): 238–265.

Judging by my own experience, arbitration in the modern world raises a number of challenging questions, both *procedural* and *substantive*, that, in turn, have given impetus to exciting new procedural and substantive developments in this field of dispute resolution. As such, it has risen to the challenge of digitalization and of dealing with new types of disputes and has even given rise to the creation of new types of arbitration.

These developments are, no doubt, far-reaching and serve as a testament to the adaptability of arbitration as an alternative dispute resolution mechanism to the requirements of the modern world. It evolves in lockstep with the needs of modern society, the society we live in, and paves the way to arbitration in the future. In doing so, it creates unanticipated challenges and opportunities for all stakeholders involved in the arbitration discourse, that is, arbitrators, arbitration practitioners (including counsel, experts and the like), specialist service providers, and last but not least, arbitration users.

To do justice to the width of the subject in the shortness of time I have, I propose to explore some of these developments in some detail, without any pretence, however, of being exhaustive.

On that note, I now invite you all to join me on a journey to – what Aldous Huxley would, no doubt, have described as – a 'Brave New World of Arbitration'.[1]

1 THE DIGITALISATION OF ARBITRATION[2]

I start with the digitalization of arbitration.

The digitalization of arbitration has been in gestation for a comparatively long period of time, starting arguably as early as the 1990s with the introduction of electronic mail or email on a global scale in communications between the parties, the arbitral tribunal and the administering institution. Since then, we have witnessed the widespread adoption of video-conferencing and more recently, accelerated by the COVID-19 pandemic, the use of internet technology, such as Microsoft Teams and Zoom, to facilitate meetings between the parties and members of the tribunal.

Whereas the use of digital technology has become the norm in the conduct of procedural meetings or hearings, merits hearings are often still conducted in person or on a hybrid basis, that is, combining IT with a physical hearing venue. This is generally for reasons of due process and more specifically the question of whether a

[1] Aldous Huxley, *Brave New World* (1932).

[2] This section is based in relevant part on the author's contributions to the debate on the motion 'This house believes that post-Covid in-person main hearings will again become the norm'. at the GAR Live Abu Dhabi 2023, ADGM – The GAR Live Debate on 25 Jan. 2023.

party has a right to a physical, in-person hearing on the one hand, and out of simple practical considerations on the other.

As regards the former, some arbitration laws may not expressly provide for remote hearings and follow instead the traditional approach to in-person hearings. Pursuant to a survey conducted by the International Council for Commercial Arbitration (ICCA),[3] there is no right to a physical hearing in international arbitration *per se* albeit that one might be created in certain jurisdictions whose civil procedure rules give rise to a fundamental right to an in-person hearing before the courts. By contrast, more recent, modernized sets of arbitration laws and rules expressly confirm that hearings may be held electronically, including for purposes of taking oral testimony, both fact and expert. The 2018 UAE Federal Arbitration Law comes to mind as a prime supporter of the fully remote conduct of a merits hearing, including the remote administration of the oath to orally testifying fact and expert witnesses.[4]

At the practical level, fully remote or virtual hearings may present a number of challenges and as such have attracted a modicum of (albeit constructive) criticism.

To start, fully remote hearings require the parties:

- to create and maintain (possibly well beyond the limited duration of the actual main hearing) a fully functioning, hyperlinked electronic hearing bundle;
- to retain specialist third-party service providers to assist in operating the e-bundle over the course of the hearing;
- to employ a document presenter to assist in the location and presentation on screen of visual aids and/or documentary evidence;
- to hire third-party service providers to ensure 24/7 technological support throughout the hearing and possibly beyond;
- to rent all necessary technological equipment;
- to train hearing participants on how to use the hearing platform and the e-bundle;
- to make arrangements for the invigilation of remotely testifying witnesses; and, last but not least,
- to establish a secure hearing platform that safeguards the privacy and confidentiality of the hearing for all participants.

Albeit that the above measures allow the parties, the tribunal and witnesses to participate in a hearing remotely and as such save on cross-border travel and hotel

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[3] ICCA, *Does a Right to a Physical Hearing Exist in International Arbitration?*, ICCA Research Project.

[4] *See* e.g., Art. 33(3) FAL and the authoritative commentary by G. Blanke, *Blanke on UAE Arbitration Legislation and Rules* Vol. I, III–317 et seq. (Thomson Reuters/Sweet & Maxwell 2021).

accommodation for all relevant stakeholders (not to mention the cost of a physical hearing venue), taken together, they do come at a significant cost.

In addition, due to often-encountered time zone differences across participants' locations and the common occurrence of 'screen fatigue' in virtual hearings, virtual hearing days tend to be much shorter than physical hearing days. This, in turn, tends to increase the overall duration of virtual hearings and as such adds further to the significant costs of such hearings.

The often underestimated, yet significant, cost of virtual hearings might present a genuine barrier to access to justice for parties that lack the means and resources to participate virtually.

1.1 Loss of the human factor

Apart from their significant costs, virtual hearings are commonly criticized for the loss of the human factor. Sadly, this applies to all hearing participants and might well produce devastating effects on the outcome of the arbitration.

To start, physical, in-person hearings make it easier to observe a witness' overall demeanour in the hearing room, in particular the witness' body language and facial expressions during cross-examination, and as such facilitate an informed assessment of a witness' credibility. Importantly in this context, in-person hearings foster a more formal atmosphere, inspire a measure of court room solemnity and afford what a party will perceive as its proper 'day in court'.

Virtual hearings, by contrast, give rise to more flexible, less rigid hearing arrangements that invite a measure of relaxation of all participants which might be counterproductive and detract from the fact-finding mission with which the tribunal is entrusted at a main hearing: To illustrate the point, it has been reported by the Berkeley Research Group in a *Report on the Experience of Virtual Hearings during the Covid Pandemic* that '*[a] lack of in-person preparation before hearings is […] said to have had a negative impact on the performance of both expert witnesses and the wider legal team, with virtual preparations "lacking intensity"*'.[5]

Another, albeit possibly isolated, incident gives rise to concerns that virtual hearings are a breeding ground for inappropriate banter between the sexes:

One anonymous contributor to the Berkeley Research Group (BRG) Report said: '*The expert witness on the other side was flirting with the arbitrator over Zoom and I just thought to myself, That is it. We are screwed. The decision ultimately went against us which really angered me because we had a very strong case and the other expert didn't do any analysis*'.[6]

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5 T. Fisher, *Report Warns of Hidden Psychological Impact of Virtual Hearings,* GAR (7 Sep. 2021).

6 *Ibid*.

To be sure, in-person hearings allow more direct (social) interaction between the parties' teams:

(1) *Firstly*, this makes it easier for counsel to take instructions and discuss the adjustment of the hearing strategy with their own instructing party as the hearing unfolds;
(2) *Secondly*, this allows opposing parties' counsel to discuss and agree procedural issues that arise during the hearing; and
(3) *Finally*, this might even create welcome opportunities for settlement between the parties at critical junctures of the hearing.

Turning to the Tribunal itself, in-person hearings facilitate ad hoc deliberations by the Tribunal members in between the hearing sessions. This will assist the Tribunal members in dealing with unforeseen procedural difficulties that might arise during the hearing (such as, for example, a party's application for adjournment). This will also help the Tribunal members to discuss their views on critical points of each party's case in order to provide informed (albeit measured) guidance to the parties and ask either party for clarification where necessary, as the hearing progresses.

In addition, physical hearings establish a more direct contact between pleading counsel and the Tribunal. This assists counsel on either side to read the Tribunal's reactions to points being made during the hearing and better gauge which way the Tribunal is leaning and how to adapt pleading style and strategy to hold the Tribunal's attention and make sure that the Tribunal members are 'with it'.

Instead, in virtual hearings, we suffer from 'screen fatigue', mired in a battle between staying awake for long enough to survive until the next break and dozing off in blissful oblivion to what is going on in the virtual hearing room around us. At best, we squint at the screen in front of us, trying to focus on one or the other hearing participant at a time, unable to read the room.

On a related point, according to findings published by the Law Society Gazette of a remote hearing research study conducted in England, virtual hearings had a negative impact on the health and well-being of 58% of judges and 54% of legal counsel: '*Judges felt significantly more pressured and tired. Magistrates felt less confident about decision-making when the legal adviser was not in the same room*'.[7]

When compared to in-person hearings, virtual hearings are also notoriously more difficult to monitor and police. As such, they raise reasoned concerns that remotely testifying witnesses may be systematically 'coached' off-screen or be

[7] M. Fouzder, *Remote Hearing Evaluation Reveals Wellbeing Woes,* The Law Society Gazette (11 Dec. 2021).

otherwise subject to undue influence during cross-examination, thus falsifying their oral testimony.

There have also been concerns about hacking intrusions and cybersecurity. More specifically, there have been trillions of USD worth of cybersecurity incidents in 2022 alone, a fair portion of which must have related to ongoing arbitral proceedings. Previous incidents that illustrate the point include the intercepted correspondence in *Libananco v. Republic of Turkey (ICSID ARB/06/8)*, and the reported attack on the Permanent Court of Arbitration (PCA) website during the China – Philippines maritime boundary dispute.[8]

Some of these developments have been driven by necessity, occasioned, in particular, by the prohibition of in-person contact during the COVID pandemic, others by choice, given the perceived sense of convenience in terms of savings of time and cost promoted by the use of IT as the default means to facilitate communications and meetings between the parties and the tribunal.

1.2 The campaign for greener arbitrations

Importantly, over time, the gradual conversion to the use of IT throughout the arbitration process has given impetus to the Greener Arbitration campaign, which aims to '*driv[e] sustainable change in arbitration*' in order to '*reduce the carbon footprint of international arbitrations through behavioural change*'.[9] As a result, greener arbitration is no longer just a slogan but has taken on an institutional framework in the form of the Campaign for Greener Arbitrations,[10] founded in 2019 and led by Lucy Greenwood, an internationally renowned independent arbitrator operating out of the US.[11]

The Campaign for Greener Arbitrations has adopted a number of protocols and guidelines for use by the arbitral profession in order to ensure the more environment-friendly conduct of international arbitrations. These variously include:

(1) the Green Protocol for Arbitral Proceedings;
(2) the Green Protocol for Arbitrators together with a Model Green Procedural Order;
(3) the Green Protocol for Arbitral Institutions;

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8 D. Sulamazra Abdul Rahman, *The Role of Arbitral Institutions in Cybersecurity and Data Protection in International Arbitration*, Kluwer Arbitration Blog (24 Nov. 2020).
9 *See* the website portal of Greener Arbitration.
10 *See* https://www.greenerarbitrations.com.
11 *See also Is It Easy, Being Green?*, GAR (15 Nov. 2019).

(4) the Green Protocol for Law Firms, Chambers and Legal Service Providers; and
(5) the Green Protocol for Arbitral Hearing Venues.[12]

For the avoidance of doubt, these protocols and guidelines are not binding upon the arbitrating parties or the tribunal. They represent soft law instruments that may be adopted by the parties and/or the tribunal wholesale or in part with a view to ensuring a cost-efficient, environment-friendly conduct of the arbitral process that contributes to the zero carbon emission targets set by the Paris Agreement on Climate Change.[13] Typical sustainability measures proposed include:

(1) the reduction of air travel by both parties and arbitrators in an international arbitration; and
(2) the full electronic conduct of the arbitral process, including electronic submissions by the parties together with electronic document management, and the conduct of remote hearings.

In order to ensure a more widespread institutional commitment, the Campaign for Greener Arbitrations also promotes the so-called Green Pledge,[14] which has, to date, been signed by hundreds of individual practitioners, law firms and arbitral institutions across the world.[15] The Green Pledge aims to secure the promotion of environment-friendly conduct by members of the arbitral profession in their day-to-day practice. Importantly, this extends beyond the conduct of arbitration cases to the physical operation of an arbitration practice in offering its services to clients in the world of arbitration. By way of example, apart from a general incentive to 'go digital', all arbitral service providers are encouraged to use as little energy as possible in all their operations and, where the use of energy is necessary, to use only clean energy.

The practice of greener arbitration has given rise to a further, exciting development: The introduction of carbon emission scorecards, which help monitoring the carbon footprint of an arbitration on a case-by-case basis.[16] This, no doubt, will prove useful in incentivizing both parties and arbitrators to reduce the carbon footprint caused by their professional involvement in the arbitration process. To illustrate the point, suffice it to recall that an average, mid-sized arbitration process generates 418,531 kg of carbon dioxide (CO2) emissions, which it would take

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12 All accessible online on the web portal of the Campaign for Greener Arbitrations.
13 Adopted by 196 countries at the UN Climate Change Conference in Paris, France, on 12 Dec. 2015, in force since 4 Nov. 2016.
14 *See* the web portal of the Campaign for Greener Arbitrations.
15 *Ibid*.
16 For further detail, *see* M. Mangan & L. Lim, *The Pursuit of Net Zero Arbitration With the Aid of Carbon Emissions Scorecards*, 39(5) J. Int'l Arb. 719–748 (2022), doi: 10.54648/JOIA2022031.

around 20,000 trees to offset, four times the number of trees in Hyde Park London or three times the number of trees in Central Park New York.[17]

Taking all the above findings in the round, it is probably fair to say that at the current stage of development a hybrid approach to the conduct of arbitral proceedings is to be recommended, procedural meetings and hearings taking place online by default, with merits hearings taking place virtually only if justified by the overall circumstances of the case (taking into account the duration of the hearing, the complexity and overall value of the dispute, the number of witnesses, etc.). Merits hearings themselves will equally benefit from a combination of modes, both in-person and virtual, where, for example, witnesses are unable to attend in person.

That said, the majority of main evidentiary hearings are nowadays still being held in person. As found by the 2021 Queen Mary University International Arbitration Survey on Adapting Arbitration to a Changing World, only 8% of respondents said they would prefer a purely virtual setting for substantive hearings.[18] This also stands confirmed by the 2021 BRG Report, which found that '*up to 90% of hearings are expected to be conducted entirely in person across the next twelve months in the US. In the UK, up to 70% of domestic arbitrations could completely return to face-to-face settings, with 20% hybrid and 10% entirely remote*'.[19]

Despite current hesitation to 'go all out digital', the more distant future will likely witness the appearance of holograms and the creation of a metaphysical environment to enable procedural meetings and hearings to be held in a truly virtual reality.

This level of digitalization takes us to our next topic, namely the introduction of new types of arbitration into the arbitration landscape.

2 NEW TYPES OF ARBITRATION

There are, at least, two new types of arbitration that I believe stand out from the arbitration landscape as newcomers to the field. These are digital arbitration and free zone arbitration. The latter, to be sure, has got nothing to do with the former but is, nevertheless, equally intriguing.

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[17] *See* study undertaken by Lucy Greenwood, Michelle Bradfield and Laetitia De Montalivet for a presentation given at an International Chamber of Commerce (ICC) conference in 2019, reported in 'Is it easy, being Green?', *supra* n. 11.

[18] '*For "substantive hearings", the mixed format was again the most popular choice (48%), but the "in-person" format was a very close second (45%). Only 8% of respondents said they would prefer a purely virtual setting for "substantive hearings". That relative lack of enthusiasm may suggest that those who prefer the mixed approach might be more motivated by the wish to preserve the ability to hold an in-person hearing than by the desire to keep open the option of a virtual arrangement*'. (at 26).

[19] Fisher, *supra* n. 5.

2.1 Digital arbitration and online arbitration

Digital arbitration is a natural result of the digitalization of arbitration as a dispute resolution mechanism. It leads to the automation of the arbitration process and, in decades to come, to the full harnessing of artificial intelligence or AI, as it is called in shorthand.

For now, digital arbitration is limited to online arbitration processes that result from the implementation of smart contracts on the basis of so-called distribution ledger technologies, also more commonly known as blockchain.[20] Albeit not yet fully operational in the current state of technological progress, there have been examples of some lesser forms of self-enforcing smart dispute resolution schemes with a minimum of human intervention.

These developments aim for perfection as a form of *smart arbitration*, which will be entirely self-executing. Exciting advances have, to date, been made by Kleros, a decentralized dispute resolution tool for use in the civil justice system, in one recently reported case in which an arbitrator recorded a so-called 'wisdom of the crowd' outcome in the terms of an arbitral award, which was subsequently recognized by the Mexican courts.[21]

A variation on the theme is *online arbitration*, in which parties make all their submissions electronically.[22] Online arbitration has been practiced in low-value cases that do not exhibit any complexity and that are suitable for processing on a documents-only basis by institutions like the World Intellectual Property Organization (WIPO) and the Hong Kong International Arbitration Centre (HKIAC). More recently, a newly established operator, the eBRAM International Online Dispute Resolution Centre Limited in Hong Kong,[23] has pioneered a multi-functional electronic case management platform that allows the seamless conduct of online arbitrations of higher value and greater complexity, including the conduct of remote procedural meetings and merits hearings. In

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[20] *See* P. Ortolani, *Blockchain Technology and Arbitration*, in *International Arbitration and Technology* 239–252 (P. Ortolani, A. Janssen & P. Wolters eds, Wolters Kluwer 2022). *See also* A. Palombo, R. Battaglini, & L. Cantisani, *A Blockchain-Based Smart Dispute Resolution Method*, in *The Cambridge Handbook of Lawyering in the Digital Age* 122–139 (L. A. DiMatteo, A. Janssen, P. Ortolani, F. de Elizalde, M. Cannarsa & M. Durovic, Cambridge University Press); and S. Hourani, *The Resolution of B2B Disputes in Blockchain – Based Arbitration: A Solution for Improving the Parties' Right of Access to Justice in the Digital Age?*, in *Access to Justice in Arbitration: Concept, Context and Practice* 251–272 (L. V. P. de Oliveira & S. Hourani eds, Kluwer Law International 2020).

[21] Reported in M. V. Carrera, *Accommodating Kleros as a Decentralized Dispute Resolution Tool for Civil Justice System: Theoretical Model and Case of Application*, quoted in Ortolani, *supra* n. 20, at 246. *See also* M. Chevalier, *Arbitration Tech Toolbox: Is a Mexican Court Decision the First Stone to Bridging the Blockchain Arbitral Order With National Legal Orders?*, Kluwer Arbitration Blog (4 Mar. 2022); and J. Lowther, *Enforcement of Kleros Awards under the New York Convention in Developing Areas* (2020).

[22] *See* the various contributions to Part I on online arbitration in Ortolani, Janssen & Wolters eds, *supra* n. 20.

[23] For further detail, *see* https://www.ebram.org.

addition, many leading international arbitration institutions have experimented with forms of online arbitration by establishing fully electronic case management platforms, which are used by the parties and the arbitral tribunal as a basis for their respective filings and communications.[24]

A common theme of both online and smart arbitration is the question of the proper enforceability of a digital award, that is, an award that does not bear a physical signature but is only signed electronically.[25] Even more elusively, the future envisions the blockchain-based signature of arbitral awards. Irrespective of the degree of digital codification, electronically signed awards might face difficulties of enforcement under the New York Convention, which was originally designed with a paper-based execution process and a wet signature requirement of arbitral awards in mind, in jurisdictions that are more conservative and as such less arbitration-friendly in their enforcement practice.

Next up, then, free zone arbitration.

2.2 Free zone arbitration[26]

As the name suggests, free zone arbitration is a type of arbitration that is dispensed by so-called free zones. Free zones commonly constitute geographic areas carved out of a national territory that are designated for the use and promotion of specific industry sectors outside the mainland (or onshore) regulatory framework. In that sense, free zones typically operate offshore, independently of the mainland and with a certain degree of economic and regulatory autonomy.

Some – albeit very few – free zones operate fully autonomously by adding a legislative and a judicial dimension to their operations. Such free zones are commonly known as *judicial* free zones. Judicial free zones benefit from an independent, autonomous judiciary and usually dispense their own self-contained body of substantive laws, including an arbitration law, which will allow the free zone to serve as a seat of arbitration in its own right.

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[24] *See* e.g., the Dubai International Arbitration Centre (DIAC) and the International Chamber of Commerce (ICC) International Court of Arbitration.

[25] *See* P. Ortolani, *The Digital Award*, in *International Arbitration and Technology* 289–211 (P. Ortolani, A. Janssen & P. Wolters eds, Wolters Kluwer 2022).

[26] This section is based in relevant part on the author's previous writings on the subject, including, e.g., G. Blanke, *Free Zone Arbitration in the DIFC and the ADGM*, 35(1) Arb. Int'l 95–116 (2019), doi: 10.1093/arbint/aiz003; G. Blanke, Free Zone Arbitration in the United Arab Emirates: DIFC v. ADGM (Part I)', 35(5) J. of Int. Arb. (2018), at 541–573; G. Blanke, *Free Zone Arbitration in the United Arab Emirates: DIFC v. ADGM (Part II)*, 35(6) J. Int'l Arb. 1–19 (2018), doi: 10.54648/JOIA2018033; G. Blanke, *Free Zone Arbitration: The Mechanics*, 6(2) IJAL 56–78 (2018). *See also* most recently, G. Blanke, *Free Zone Arbitration in the MENA: The UAE Example*, in *The MENA Leading Arbitrators' Guide to International Arbitration* (G. Blanke & S. Corm-Bakhos eds, forthcoming 2023).

Judicial free zones made their *début* in the Middle East with the arrival of the Bahrain Chamber of Dispute Resolution (BCDR)-American Arbitration Association (AAA) in Bahrain[27] and the Qatar Financial Centre (QFC) in Qatar,[28] followed by the establishment of the Dubai International Financial Centre (DIFC) and, most recently, the Abu Dhabi Global Market (ADGM). Both the Bahrain Free Arbitration Zone and the QFC are tempered versions of a judicial free zone and not quite as advanced in their structural set-up as their UAE counterparts. The operation of the DIFC as a judicial free zone has indeed been such a success that it has not only served as a blueprint for the later-established ADGM but has also been exported abroad to template the establishment of judicial free zones in developing jurisdictions. An example in hand is the establishment of the Astana International Free Zone (AIFC) in Kazakhstan, which (1) is served by independent common law courts, the AIFC Court of First Instance and AIFC Court of Appeal, (2) benefits from its own body of substantive laws, including a separate arbitration law, the AIFC Arbitration Law, and (3) operates an independent free zone arbitration centre, the AIFC International Arbitration Centre.[29]

Given the leadership status that the UAE judicial free zones have taken as a *primus inter pares* in the modern world of arbitration, please allow me to focus on these here.

2.2[a] *The DIFC and the ADGM*

Both the DIFC and the ADGM constitute common law jurisdictions and are embedded in the wider onshore civil law environment of mainland Dubai and Abu Dhabi respectively. This unique positioning of the ADGM and DIFC at the crossroads between the civil and the common law worlds has earned the earlier established DIFC the moniker '*common law island in a civil law ocean*'.[30]

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[27] For some initial guidance, *see* e.g., J. M. Townsend, *The New Bahrain Arbitration Law and the 'Bahrain Free Arbitration Zone'*, 65(1) Disp. Resol. J. 74–81 (Feb.–Apr. 2010).

[28] For some initial guidance, *see* e.g., M. Walker, B. Erygit, C. El Hage & A. El Baba, *Commercial Arbitration: Qatar* GAR (4 May 2022), https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/qatar.

[29] For further detail, *see* P. Kim, *The Astana International Financial Centre: AIFC Court and International Arbitration Centre Legal Systems to Be Based on English Common Law* Kluwer Arbitration Blog (6 Aug. 2017), http://arbitrationblog.kluwerarbitration.com/2017/08/06/astana-international-financial-centre-aifc-court-international-arbitration-centre-legal-systems-based-english-common-law/. For operational detail, *see* P. Smith, *Astana's New Dispute Resolution Institutions: Developing GCC and Kazakhstan's Relations*, in *The UAE Arbitration Yearbook* 116–121 (G. Al Hajeri & Z. Penot eds, LexisNexis 2020).

[30] As per the former Chief Justice of the DIFC Courts, Michael Hwang SC: *See* M. Hwang, *The Courts of the Dubai International Finance Centre: A Common Law Island in a Civil Law Ocean*, address at the Lawasia Conference (1 Nov. 2008).

As such, the DIFC and the ADGM each sit alongside the existing onshore UAE civil law jurisdiction and essentially form a jurisdiction within a jurisdiction.

Both the DIFC and the ADGM operate their own independent court system, the DIFC Courts and the ADGM Courts. Both court systems exist alongside the onshore Dubai and Abu Dhabi Courts. For the avoidance of doubt, there is no official judicial hierarchy between the offshore DIFC and ADGM Courts on the one hand and their onshore counterparts on the other. Constitutionally speaking, having been established by Ruler's decree, both the onshore and offshore courts form part of the same family of UAE Courts. Importantly, the DIFC and the ADGM Courts have an English-speaking judiciary sourced from various common law jurisdictions with significant arbitration experience. In addition, serving the mutual cultural integration of the onshore and offshore judiciaries, the DIFC Courts more specifically also count local Emirati judges amongst their staff.

Importantly, both the DIFC and the ADGM constitute international common law jurisdictions that have adopted their own body of substantive laws. Whereas the DIFC has promulgated its own self-contained statutes based on English law, the ADGM has opted in favour of the wholesale incorporation of almost the entire body of English statutory and common law by reference. With this in mind, the ADGM has been likened to a '*little England and Wales*' in the midst of the Middle East.[31] As such, the DIFC and the ADGM evidently represent attractive fora for common law – style dispute resolution in the UAE and the wider region, allowing contracting parties from anywhere in the Middle East to opt into their services. This stands in marked contrast to the onshore UAE civil law system, which originates in the civil law tradition and is based on codified laws modelled on the Egyptian Civil Code.

In addition, the DIFC and the ADGM have adopted their own, standalone arbitration laws, the DIFC Arbitration Law[32] and the ADGM Arbitration Regulations,[33] each based on the UNCITRAL Model Law. This enables the UAE free zones to serve as a seat of arbitration in their own right and facilitates the conduct of common law – style arbitration in the heart of the Middle East. For the avoidance of doubt, selection of the DIFC as the seat of the arbitration will trigger the application of the DIFC Arbitration Law and the corresponding curial competence of the DIFC Courts whereas the selection of the ADGM will engage the curial competence of the ADGM Courts and the application of the ADGM Arbitration Regulations. In this sense, the DIFC and the ADGM serve as common

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31 *See* the author's various writings cited Townsend, *supra* n. 27 above.

32 DIFC Law No. 1 of 2008 on Arbitration, amended by the DIFC Law No. 6 of 2013, the Arbitration Law Amendment Law.

33 2015 ADGM Arbitration Regulations, amended by ADGM Courts Regulations Amendment No 1 of 2020.

law legal transplants embedded in the civil law environment of onshore UAE, that is, Dubai and Abu Dhabi.

At the institutional level, the UAE's judicial free zones benefit from the Dubai International Arbitration Centre (DIAC), which has operations in the DIFC and whose arbitration rules provide for the DIFC as an 'initial' default seat of the arbitration.[34] A further recent addition to the DIFC's institutional offering is the Saudi Center for Commercial Arbitration (SCCA).[35] By contrast, the ADGM hosts a fully operating case management office of the International Chamber of Commerce (ICC), which, in its turn, shares its location with the ADGM Arbitration Centre, which itself operates as hearing centre for both regional and international arbitrations.

2.2[b] *Free Movement of Ratified Awards*

In order to achieve the full functional integration of the offshore common law free zones and the onshore civil law judicial and legal systems, the UAE legislator has established areas of free movement of judicial instruments, including ratified awards, between the onshore UAE and the free zone courts. To that end, according to Article 7 of the Judicial Authority Law and Article 13(15) and (16) of the ADGM Founding Law as amended:

(1) The subject award must be final and executory in the originating jurisdiction, i.e., before the onshore or offshore court;
(2) the receiving court, which is to execute the ratified award, must not perform any review on the merits;
(3) the ratified award or order for ratification must bear the required executory formula[36] and be accompanied by an execution letter to be filed with the competent execution judge; and
(4) the application needs to be accompanied by an official translation into Arabic or English, as the case may be.

This procedure ultimately ensures the free movement of judicial instruments, including ratified awards, between onshore and offshore courts, establishing a system of mutual recognition of judicial instruments onshore/offshore without a re-examination on the merits. It builds on the mutual trust between the onshore and offshore courts as part of the same family of UAE courts, whereby no judicial

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34 Article 20.1 of the DIAC Rules of Arbitration 2022.
35 *See* http://saDrorg.
36 '*Authorities must take the initiative to enforce this document and assist in implementing it even forcefully whenever requested to*'. (JAL); '*[t]he authorities and competent bodies must proceed to execute this instrument and to carry out the requirements thereof even by force if so requested*' (ADJD-ADGM MoU).

hierarchy exists between them and both are subject to (the same) UAE public policy in the enforcement process.

Apart from the new types of arbitration that I have shared with you in the first part of my presentation, modern arbitrations deal increasingly with new subject matter, being a reflection of the needs of dispute resolution as society evolves, and as such is seeking to meet the challenge of dealing with new types of disputes.

To illustrate this point, in the second part of my presentation I shall focus on the role of arbitration in dealing with disputes involving economic sanctions on the one hand and with ESG – and human right (HR)-related disputes on the other.

Let me start with arbitrations involving economic sanctions.

3 ARBITRATIONS INVOLVING ECONOMIC SANCTIONS[37]

In the 21st century, economic sanctions are becoming an increasingly common feature on the scene of world politics. Albeit striving for political, trade-related and humanitarian goals, the imposition of economic sanctions tends to produce far-reaching effects on dispute resolution processes, including more specifically arbitration.

Economic sanctions are a powerful tool (as a welcome alternative to war) to achieve political, trade-related and humanitarian goals by placing recalcitrant states under coercive economic pressure. By way of example, the United Nations (UN),[38] the European Union (EU)[39] and the United States (US)[40] presently have in place some of the most comprehensive sanctions regimes worldwide. That said, apart from affecting the trading relationship and volume as well as quality of commercial transactions between the relevant parties, economic sanctions may also produce tangible effects on the provision of dispute resolution services, including arbitration, with respect to disputes arising from those transactions and relationships.[41]

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[37] This section is based in relevant part on the author's contributions to a panel on 'Expensive Consequences: Implications of Economic Sanctions on International Arbitration' at the Linklaters' 7th CARTAL Conference, Centre for Advanced Training and Research in Arbitration Law, National Law University, Jodhpur, on 11 Feb. 2023. *See also* most recently, G. Blanke, *Economic Sanctions and How to Deal With Them: The Arbitrator's Perspective* IJIA, with 11(2) IJAL (2023), pp. 1–13.

[38] *See* https://www.un.org/sc/suborg/en/sanctions/un-sc-consolidated-list.

[39] *See* http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf.

[40] *See* US Office of Foreign Assets Control (OFAC), http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ Programs.aspx.

[41] For background, *see* e.g., F. Kremslehner et al., *Chapter II: The Arbitrator and the Arbitration Procedure, Economic Sanctions in International Commercial Arbitration: A Guide for practitioners, by Practitioners*, in *Austrian Yearbook on International Arbitration 2022* 79–119 (C. Klausegger et al. eds, Manz'sche Verlags – und Universitätsbuchhandlung 2022); S. Ngo & S. Walker, *Impact and Effects of International Economic Sanctions on International Arbitration*, 88(3) Int'l J. Arb. Med. & Disp. Mgmt

Economic sanctions may produce effects at various stages of the arbitration process. These include:

(1) Effects on logistics and procedure, including the appointment of arbitrators or the formation of the arbitral tribunal;
(2) jurisdictional effects with respect to the proper personal scope of a tribunal's jurisdiction;
(3) substantive effects on the merits of the proceedings; and
(4) effects post-award, including in particular the enforceability of a prospective award.

Each of these requires consideration early on in the process in order to ensure the responsible and efficient conduct of the arbitral proceedings.

3.1 Arbitral appointments

Starting with arbitral appointments, economic sanctions can have far-reaching consequences on the appointment of arbitrators. To start, an arbitrator nominated for appointment might be precluded from accepting appointment by a sanctioned party, e.g., to serve as that party's arbitrator on a three-member tribunal or to serve as a sole arbitrator or chair. This will inevitably be the case in any one of the following circumstances:

– *First*, where the arbitrator shares the nationality of the sanctioned party and the sanction concerned bears on the country of that nationality, the arbitrator is likely to be directly affected by the scope of that sanction purely by dint of his or her nationality; and
– *second*, where the arbitrator is a resident of the sanctioned country, again the arbitrator is likely to fall directly within the scope of the concerned sanction.

As a variation on the theme, there are circumstances in which the arbitrator's law firm or chambers are either located in a sanctioned country or are sanctioned directly. A good example of the latter are the sanctions imposed on Essex Court Chambers by China in 2021 in response to a legal opinion produced by a number of Essex Court barristers with respect to the treatment of Uighur Muslims.[42]

Importantly, in any of the aforementioned circumstances, the arbitrator might be at risk of being challenged for reasons of personal disqualification or undue

388–403 (2022); and T. Szabados, *EU Economic Sanctions in Arbitration*, 35(4) J. Int'l Arb. 439–462 (2018), doi: 10.54648/JOIA2018023.

[42] Ballantyne, *Arbitration in the Era of Sanctions*, GAR (12 May 2022).

process (or indeed unfitness to serve) under the governing arbitration law or the applicable institutional rules. By way of example, it has been reported that in an ICC reference, an arbitrator of Essex Court appointed by a Chinese party was successfully challenged.[43]

For the avoidance of doubt, the arbitrator is under an obligation to disclose any potential conflict caused by sanctioning legislation, whether at the outset of the arbitration process upon his or her nomination or as the arbitral process unfolds in accordance with his or her standing disclosure obligation under the applicable arbitration rules and laws.

3.2 Payment of registration fees, administrative costs and arbitrator fees

The payment of administrative fees and arbitration costs more generally might equally pose a challenge. This evidently includes payment of any registration fees to commence the arbitration and/or to introduce a counterclaim as well as the payment of arbitrator fees. That is to say that to the extent that payment is made by a sanctioned party or from a sanctioned country, the relevant arbitral institution and/or the arbitrators will be precluded from accepting any such payment. In a worst-case scenario, a sanctioned party might even be precluded from registering a case/ claims or counterclaims (in the event that the sanctioned party is a respondent).

Evidently, precluding a sanctioned party from bringing a claim in arbitration or filing a counterclaim in an ongoing arbitral process raises questions of access to justice and more specifically to the right to a legal remedy or the right to go to court. In order to mitigate the impact that any such preclusion might have on the sanctioned party, the stakeholders involved[44] may apply for a license to the relevant authorities in the sanctioning country for the limited release of the sanctioned party's frozen funds. This is particularly the case where the imposed sanctions regime provides for exemptions that cover the provision of legal services to the sanctioned party. Such exemptions, however, tend to be limited to contentious forms of dispute resolution, such as court proceedings, i.e., litigation, and arbitration, to the exclusion of general advisory work. That said, to obtain a license is usually time-consuming and will, as such, inevitably impact the duration of the arbitral procedure. Examples at hand are, e.g.:

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43 *Ibid*.

44 Which will usually include the arbitrators, arbitral institutions and the sanctioned party itself.

(1) EU Council Reg. 2022/1269,[45] which provides for an exemption for transactions required to '*ensure access to judicial, administrative or arbitral proceedings in a member state, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a member state*'[46,47] and

(2) the general license granted by the UK's Office of Financial Sanctions Implementation (OFSI) to the London Court of International Arbitration (LCIA) allowing it to process funds from sanctioned parties in the light of the UK's sanctions regime against Russia[48] and Belarus[49] following the invasion of Ukraine in 2022.[50]

It is also worth bearing in mind that some sanctions regimes (mostly those originating in the US) are of extraterritorial application. This means that they produce their effects beyond the US domestic market and apply to the operations of a sanctioned person even outside the US. In order to safeguard against the reach of sanctions regimes that apply extraterritorially in an arbitration context, it is advisable to use a currency other than that of the sanctioning country in the arbitration process. In arbitrations under the ICC Rules, for example, provision is made for the use of, e.g., EUR, rather than USD,[51] in order to mitigate any exposure to interventions by the US banking system in USD-denominated money transfers (whether for payment of the arbitration or compliance with the payment terms of a resultant award).

In the present context, it is also worth contemplating the application of a blocking statute and the extent to which such a statute might prohibit compliance with sanctions regimes that purport to apply extraterritorially.[52]

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45 Amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine, (21 Jul. 2022) (OJ L 193, 21 Jul. 2022, at 1).

46 Article (10)(g), EU Council Reg. 2022/1269. *See also* the guidance provided by the EU in Jun. 2020 stating that Art. 5aa of Council Regulation (EU) No 833/2014 of 31 Jul. 2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine (OJ L 229 31 Jul. 2014, at 1) had to be read in the light of the fundamental right to an '*effective legal remedy*' within the meaning of Art. 6 of the European Convention of HR and did not limit the provision of legal services required for an effective legal defense.

47 J. Ballantyne, *EU Confirms Arbitration Carve-Out in Sanctions Regime*, GAR (26 Jul. 2022).

48 The Russia (Sanctions) (EU Exit) Regulations 2019.

49 The Republic of Belarus (Sanctions) (EU Exit) Regulations 2019.

50 S. Perry, *LCIA Gets Exemption from Russia and Belarus Sanctions*, GAR (17 Oct. 2022).

51 Note to the Parties and Arbitral Tribunals on ICC Compliance (29 Sep. 2017), paras 4 and 10–11.

52 For example, Council Regulation (EC) No 2271/96 of 22 Nov. 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ L 309 29 Nov. 1996, at 1).

3.3 Party representation

Sanctions may also impose limitations on party representation and as such limit a party's otherwise free choice to appoint counsel and hence a party's right to legal representation. Thus, a sanctioned party may be precluded from appointing counsel from a sanctioned country. One way of dealing with this situation is for arbitrators to suspend the proceedings until the sanctions have been lifted. Albeit that this might be the safest way to preserve a sanctioned party's right to a counsel of its own free choice, depending on the duration of the sanctions this might create severe procedural delays and inefficiencies.

An alternative solution would be for the sanctioned party to consider a change of counsel. This again might cause undesirable procedural delays in addition to jeopardizing the sanctioned party's continuity of counsel, which, in turn, might provoke an unwanted change in case strategy and an undesirable increase in costs (with new counsel having to read up on the case in order to '*get up to speed*'). Depending on the stage which the arbitral process has reached by the time the sanction hits, this might be more or less challenging.

Finally, a sanctioned party's first-choice or incumbent counsel might contemplate securing an exemption to the extent allowed under the applicable sanctions regime. This, however, might be time-consuming and require the interim suspension of the arbitral process pending the application for an exemption.

3.4 Hearing witnesses

Hearing oral testimony may pose a further challenge, especially in circumstances in which a travel ban might be imposed on witnesses of a sanctioned nationality or from a sanctioned country. Where a party has relied on the concerned witness throughout the arbitral process and the sanctions were only adopted at an advanced stage of the proceedings, the affected party might be severely disadvantaged in the presentation of its evidence. By way of example, the sanctioned witness might not be able to travel cross-border to the venue of the evidentiary hearing and thus not be able to testify in person.

In order to limit the risk of a witness being prohibited from travel and thus prevented from testifying in person, the affected party might be well-advised to contemplate applying for an exemption to the relevant sanctioning authorities. Given the time involved, any such application should be filed as soon as practically possible following the adoption of the sanction in order to ensure that the desired exemption will be obtained in good time before the commencement of the hearing. In the alternative, a sanctioned witness might testify remotely, e.g., by video-conference. This process will arguably be facilitated by both the many soft law instruments and the amendments to arbitral legislation and rules adopted

during the COVID pandemic and allowing for remote hearings in both domestic and international arbitration.[53]

3.5 Arbitrability

Another issue might be the question of arbitrability.

In order to ensure that the sanctions concerned do not affect the arbitrability of the underlying dispute under the law of the seat, the law governing the arbitration agreement or the governing law of the merits, it is important for a tribunal to deal with the question of its proper jurisdiction over the sanctioned party or a sanctioned subject-matter in a first instance. This may require the bifurcation of the arbitral proceedings to allow the tribunal to investigate the subjective and objective arbitrability of the underlying dispute during an initial phase on jurisdiction. In doing so, the tribunal will be able to rely on the application of the principle of separability, which prevails under all leading arbitration laws. As a result, the potential invalidation of a contract in dispute does not extend to the arbitration agreement. In other words, the tribunal's *kompetenz-kompetenz* powers to determine its own jurisdiction remain unaffected by the application of a particular sanctions regime to the arbitral process.[54] In doing so, the tribunal must, of course, take care not to become privy to a public policy infringement and as such place itself in breach of the underlying sanctions (and hence expose itself to potential prosecution under the applicable sanctions regime).

Useful guidance on how to deal with the question of arbitrability in this context can be garnered from a brief review of how some of the world's leading courts have approached this question in the past. Generally speaking, the trend with the Swiss, US and Canadian courts would appear to be in favour, with only the Italian courts being an outlier. By way of example, in *Fincantieri-Cantieri v. Iraq*,[55] the Genoa Court of Appeal considered the effect produced by EU and US sanctions imposed on Iraqi parties on the ability to arbitrate a dispute relating to contracts for the supply of corvettes to the Iraqi Navy. The Court held that in the light of attendant public policy considerations, the dispute was not arbitrable and should instead be referred to the Italian courts. The Italian party then sought the recognition of the Genoa Court of Appeal decision under the Brussels

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[53] For example, Art. 26(1), 2021 ICC Rules; and Art. 19.2, 2020 LCIA Rules. As regards arbitration laws, *see* Art. 33(3), UAE Federal Arbitration Law 2018 for a prime example.

[54] By analogy to the treatment, e.g., of antitrust issues in arbitration. *See* e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*, 473 U.S. 614, 628 (1985); and Case C-126/97, *Eco Swiss China Ltd and Benetton International NV*, Judgment of the CJEU of 1 Jun. 1999, which have affirmed the arbitrability of antitrust law despite its qualification as a matter of public policy in both the US and the EU.

[55] *Fincantieri-Cantieri Navali Italiani SpA (Italy) v. Ministry of Defense, Armament and Supply Directorate of Iraq, Republic of Iraq*, Genoa Court of Appeal, 21 Y.B. Comm. Arb. 594 (1996).

Convention[56] in order to obtain a stay of ICC arbitral proceedings pending in parallel in Paris; the Paris Court of Appeal found in favour of arbitrability, holding that matters of arbitration fell outside the scope of the Brussels Convention. By contrast, in *Air France v. Libyan Airlines*,[57] the Court of Appeal of Quebec found that the UN sanctions regime against Libya did not affect the arbitrability of the underlying dispute and that as a consequence, the Tribunal's affirmation of its own jurisdiction did not breach international public policy. Finally, *Belship Navigation, Inc. v. Sealift, Inc.*[58] is an example of a case where the US District Court for the Southern District of New York compelled to arbitrate a dispute that had arisen from a charterparty involving the Cuban Assets Control Regulation.[59]

3.6 Public policy

As I stated previously, for the tribunal to affirm its proper jurisdiction it must ensure that it does not deal with sanctions in violation of prevailing public policy. The tribunal must therefore ascertain whether the sanctions concerned qualify as public policy under the governing law of the seat governing the arbitration agreement and whether public policy issues are arbitrable under that law. It is important to note in this context that, at the risk of becoming complicit in a public policy violation, arbitrators must not entertain parties that seek recourse to arbitration to avoid the application and/or effects of a sanctions regime that qualifies as public policy under the relevant law.

Some initial guidance may again be gained from instructive case law precedent from jurisdictions that have dealt with this issue. By way of example, in *Sofregaz*,[60] the Paris Court of Appeal refused to set aside an ICC award which found in favour of the Iranian Natural Gas Storage Company (INGSC) in circumstances in which INGSC had terminated a contract under Iranian law with Sofregaz, a French company, which had refused to issue bank guarantees required under the contract because of international sanctions imposed on Iran. According to the Paris Court, the sanctions concerned arose from the US sanctions regime, which – as opposed to the UN sanctions regime – did not qualify as French international public policy (*ordre public international*). By contrast, in *Iranian MoD v. Cubic Def. Systems, Inc.*,[61] the US Court of Appeal refused to set aside an ICC award on the basis that it

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[56] On jurisdiction and the enforcement of foreign judgments in civil and commercial matters 1968. Now Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 Dec. 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

[57] *Cour d'Appel du Quebec*, 31 Mar. 2003.

[58] 1995 WL 447656 (SDNY 28 Jul. 1995).

[59] 31 CFR 515.

[60] *Cour d'appel de Paris* (Chamber 50–16) 3 Jun. 2020, No. 19–07261.

[61] 665 F.3d 1091 (9th Cir. 2011).

violated the US sanctions regime imposed on Iran and hence US public policy. More specifically, the US Court of Appeal held that the US sanctions regime did not prohibit as such the payment that the award debtor had been ordered to make to the Iranian Ministry of Defence in the terms of the award and that the award debtor was eligible for obtaining a license from the US Treasury Office of Foreign Asset Controls (OFAC) to pay the ICC award. As a result, there was no breach of the US sanctions regime, nor of US public policy.

Importantly, as is evident from this case law precedent, domestic courts tend to distinguish between domestic and international public policy in the application to international sanctions regimes, treating only sanctions of UN origin as falling within the ambit of international public policy. This allows leading arbitration jurisdictions to protect their own arbitral regimes from undue extraterritorial interference and provides some comfort to arbitrators serving in arbitrations seated there.

3.7 Exclusive jurisdiction

In an attempt to restrain the effect of sanctions on a sanctioned country's nationals, sanctioned countries have been seen to arrogate to their domestic courts exclusive jurisdiction over disputes involving their nationals. In this sense, sanctions might give rise to the exclusive jurisdiction of the state courts in the sanctioned country to the extent that an arbitration agreement has become ineffective by sanctions or where a sanctioned party's representation is limited in pending arbitration proceedings.

A good example of this approach are the 2020 amendments to the Russian Arbitrazh Procedure Code.[62] These empower the Russian Arbitrazh Court to adopt anti-arbitration injunctions against pending proceedings in which Russian nationals, including both legal and natural persons, are affected by the sanctions regime of a foreign state.[63]

3.8 Award debtor's frozen assets

One of the main practical issues facing award creditors is that assets of a sanctioned award debtor or of an award debtor having assets in a sanctioned country are frozen and as such not accessible for enforcement purposes. Where an award debtor's

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[62] Russian Arbitrazh Procedure Code as amended on 19 Jun. 2020.

[63] For comment in context, *see* E. Rubinina, *Russian Sanctions Law Bares Its Teeth: The Russian Supreme Court Allows Sanctioned Russian Parties To Walk Away From Arbitration Agreements*, Kluwer Arbitration Blog (22 Jan. 2022).

assets are frozen as a result of the sanctions, it might be possible for the award debtor to obtain a license from the sanctioning authority to permit the award debtor to make payment of an award debt to the award creditor. In addition, to ensure authorized receipt of payment by the award creditor, this latter may also have to obtain a license from the sanctioning authority for permission to accept payment from a sanctioned award debtor. Importantly, similar considerations apply to entering into a settlement with a sanctioned award debtor or for securing an attachment over assets of a sanctioned award debtor.

Taking guidance from case law precedent on the subject, it is somewhat encouraging to see the constructive approach taken by leading courts to the matter. In *Crystallex Int'l Corp. v. PDV Holding, Inc.*,[64] the US District Court for Delaware stayed enforcement proceedings in order to allow the Claimant to obtain a specific license from the OFAC to enable enforcement against assets located in the US and owned by US sanctioned Venezuelan state-owned entities. In *Conoco Philips v. Venezuela,*[65] an International Centre for Settlement of Investment Disputes (ICSID) Ad Hoc Committee decided to lift a stay of enforcement of an USD 9 billion award against Venezuela in circumstances in which Conoco Philips, the award creditor, could obtain a specific license from the OFAC to enforce the award against sanctioned Venezuelan state assets. Finally, in *Al-Kharafi v. Libya*,[66] the French Supreme Court did not grant enforcement by Al-Kharafi, a Kuwaiti company, against attached assets of a Libyan sovereign wealth fund subject to an EU sanctions regime as Al-Kharafi had not sought authorization to do so from the French Treasury.

3.9 Recoverability of pre – and post-award interest

An equally challenging issue is the recoverability of pre-award and post-award interest. These will usually be limited to the period over which the sanctioned award debtor has been found to be allowed to make payments under the award.

By way of example, in *Iranian Ministry of Defense and Support for Armed Forces v. International Military Services Ltd.*,[67] the English court held that the Iranian Ministry of Defence was precluded from enforcing the interest element of an award in respect of the period that the Ministry was subject to sanctions on the basis that the EU sanctions regime in place prohibited the payment of such interest. Further, as regards pre-award interest, in *Ministry of Defence of Iran v.*

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64 2019 WL, 6785504 (D. Del. 12 Dec. 2019).
65 ICSID Case No. ARB/7/30, 2 Nov. 2020.
66 French *Cour de Cassation*, No. 19–25.108 and No. 19–21.964 (7 Sep. 2022).
67 [2019] EWHC 1994 (Comm).

Cubic Defense Systems, Inc.,[68] the US District Court for Southern California affirmed the availability of pre-judgment interest on amounts awarded in favour of the Iranian Ministry of Defence for the period from when the underlying ICC award was rendered and the commencement of the enforcement action before the courts, there being no exemption in the US sanctions regime in favour of the award debtor from paying the Ministry.

This brings me to our final topic today, the role of modern arbitration in ESG – and HR-related disputes.

4 ESG – AND HR-RELATED DISPUTES[69]

Over the past decade, international supply chains, in particular, have given rise to new types of disputes in a world that has come to measure the social and environmental impact of international corporate activity. Such disputes typically include so-called ESG – and HR related disputes.

4.1 What are ESG – and HR-related disputes?

The term 'ESG' stands for 'environment, social and governance'. Looking at the various component parts of this term more specifically:

- *First*, 'environment' connotes the (1) depletion of natural resources, including deforestation; (2) climate change and greenhouse gas emissions; (3) pollution concerns; and (4) hazardous waste;
- *second*, 'social' evokes requirements of workforce health and safety and the need for due diligence of supply chains with a view to mitigating modern slavery and child labour; and
- *third*, 'governance' relates to the need for robust corporate governance mechanisms to monitor corporate activity and covers issues such as anti-corruption, data protection, accountability and board composition.

HR-related disputes on the other hand include all disputes that deal with HR violations resulting from the conduct of international businesses, both under international and domestic laws.

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[68] (3 Jan. 2013), Case 98-CV-1165-B (SC Cal).

[69] This section is based in relevant part on the author's contributions on 'Arbitrating ESG – and HR-Related Disputes' to a panel on Supply Chain Challenges in a Dynamic Economic and Regulatory Environment: Disputes, Compliance Pitfalls, and Contractual Relief Mechanisms at the Inter-Pacific Bar Association (IPBA) Conference 2023 held in Dubai, on 9 Mar. 2023.

4.2 How do they arise?

ESG and HR disputes typically arise from an alleged breach of ESG and HR obligations, which are either contained in international and regional (treaties and conventions) or domestic legislative instruments (national laws). Examples are:

- *First*, the 2015 Paris Agreement on Climate Change, a UN instrument, which contains commitments from all signatory countries to reduce their greenhouse gas emissions and co-operate with a view to adapting to the environmental impact of climate change;
- *second*, the EU Directive on Corporate Sustainability Due Diligence,[70] which is of regional application; and
- *third*, the German Supply Chain Due Diligence Act, which applies domestically.

There are also several bilateral investment treaties (BITs) of relevance to the subject, such as:

- The Morocco-Nigeria BIT, which requires an Environmental and Social Impact Assessment for qualifying investments to comply with international environmental protection standards;
- the Indian Model BIT, under which the amount of compensation is to be reduced in the event of '*any unremedied harm or damage that the investor has caused to the environment or the local community*'[71];
- the Netherlands Model BIT, under which the amount of compensation is to be reduced, '*tak[ing] into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises*'[72] and '*the Contracting Parties reaffirm their obligations under the multilateral agreements in the field of environmental protection, labour standards and the protection of human rights to which they are party, such as the Parties Agreement*', emphasizing '*the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts of its investment*'[73];

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70 Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.
71 Article 26.3 of the Indian Model BIT.
72 Article 23 of the Netherlands Model BIT.
73 *Ibid*.

- the US-Canada-Mexico Free Trade Agreement, which includes an obligation to '*promote high levels of environmental protection*'; and, last but not least,
- the Georgia-Japan BIT, which excludes from the definition of 'expropriation' '*legitimate public welfare objectives, such as health*'.[74]

ESG and HR disputes may also arise from the implementation of international or domestic soft law measures in supply contracts, such as:

- *First*, the UN Guiding Principles on Business and HR 2006, which were officially endorsed by Coca-Cola in 2011 and imposed by FIFA, the International Football Federation, on its contractual partners;
- *second*, the Chancery Lane Project Net Zero Toolkit, a database of precedent clauses to combat climate change for incorporation into private contracts; and
- *third*, the American Bar Association (ABA), which adopted Model Contract Clauses to Protect HR in International Supply Chains in January 2021.

Finally, ESG and HR disputes may arise from the implementation of industry-specific measures, for example, the Bangladesh Accord on Fire and Building Safety, signed by international fashion brands and retailers in the aftermath of the collapse of the Rana Plaza factory building in 2013, which had fatal consequences, in order to ensure satisfactory safety standards in Bangladeshi textile factories.

4.3 The nature of ESG – and HR-related disputes

ESG – and HR-related disputes exhibit a strong public interest/public policy element. As a result, third parties, which are victims of the environmental and/or HR violations, may wish to participate in the dispute resolution process.

Given this public interest element, the dispute resolution process should be open to the public and as such transparent, at least in relevant part.

4.4 How to resolve ESG – and HR-related disputes?

Taking into account the nature of ESG – and HR-related disputes, recourse to national courts would seem the natural choice; there might also be reasoned

[74] Article 11(4) of the Georgia-Japan BIT.

concerns about arbitrability on a case-by-case basis, taking into account, inter alia, the potential exclusive jurisdiction of the courts in some jurisdictions.

That said, most subject matter is nowadays arbitrable, including matters that are of a public policy nature or that concern the public interest. To name but one example, in *Mitsubishi*[75] and *Eco Swiss*,[76] antitrust laws – despite their qualification as of public policy – have been found to be arbitrable by both the US Supreme Court and the European Court of Justice.

In addition, there are a number of advantages to the resolution of such disputes by arbitration. These include:

(1) *First*, procedural flexibility, whereby the arbitration procedure may be adapted to the needs of the individual dispute, including, e.g.,
   (a) by a potential joinder of third parties under certain institutional sets of rules; and/or
   (b) by choosing specialist sets of arbitration rules that specifically deal with environmental and/or HR disputes in arbitration, such as The Hague Rules on Business and HR Arbitration 2019 and the 2001 PCA Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment;

(2) *second*, the global enforceability of prospective awards under 1958 New York Convention;

(3) *third*, the free choice of arbitrators with expertise in HR and/or environmental law, with a list of specialist arbitrators being obtainable from PCA website;

(4) *fourth*, the transparency of the arbitral process, which is readily available as part of specialist set of rules or available *a la carte*, such as the 2014 UNCITRAL Rules on Transparency in Investor-State Arbitration, which, in turn, may be adapted for use in commercial arbitration; in this context, it is also interesting to see how international arbitral institutions have been opening up the arbitral process under their respective administrations, introducing in particular the publication of anonymized awards[77]; and

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[75] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*, 473 U.S. 614, 628 (1985).
[76] Case C-126/97, *supra* n. 54.
[77] *See* Notes to the Parties and the Tribunal on the Conduct of the Arbitration under the ICC Rules and the 2021 ICC Rules.

(5) *fifth and finally*, the involvement of an amicus curiae, which is already common practice in investor-state arbitration and markedly on the increase in commercial arbitrations that concern the public interest, such as competition arbitration, which has, for instance, seen the regular involvement of the European Commission on matters of EU competition law.

4.5 The acquis – body of actual practice

As regards the body of actual practice, both ESG – and HR-related disputes have been arbitrated on several occasions in the past albeit that, given the general confidentiality of arbitral awards, it is difficult to identify precise numbers.

4.5[a] *Commercial Arbitrations*

As regards the discipline of international commercial arbitration more specifically, the 2019 ICC Report on Resolving Climate Change Related Disputes through Arbitration and ADR provides statistics that testify to the existence of a significant body of commercial arbitrations under international institutional rules and under the administration of the PCA dealing with environmental disputes. There is also some anecdotal evidence of commercial arbitrations arising from the 1997 Kyoto Protocol. Further, the AAA lists as one of its industry sectors environmental disputes, which bears testimony, to say the least, to the AAA's ambition to offer its services to the resolution of types of disputes throughout the US and further afield.

4.5[b] *Investment Arbitrations*

Apart from international commercial arbitration, environmental and HR-related disputes have also featured prominently in investment arbitration, especially within the framework of the International Centre for the Settlement of Investment Disputes (ICSID) in Washington D.C. To name but a few examples, the ICSID Tribunals in *Burlington*[78] and *Perenco*[79] saw successful counterclaims being brought by Ecuador against an investor for environmental damages caused to the Amazon region by the investor's oil exploitation. In *Urbaser SA* et al. *v. Argentina*,[80] Argentina brought counterclaims against Urbaser for violating the human right

[78] *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5.
[79] *Perenco Ecuador Ltd v. Ecuador*, ICSID Case No. ARB/08/6.
[80] ICSID Case No. ARB/07/26.

to water by failing to make the necessary investment into a water company, which was subject to the underlying investment. Albeit that the counterclaim failed, the ICSID Tribunal did not hesitate to confirm that it had competence to determine the ESG – and HR related counterclaims.

5 CONCLUSION

After this *tour d'horizon* on the role that arbitration plays in the modern world, allow me briefly to conclude.

We have seen the many challenges and opportunities that arbitration in the modern world creates for all stakeholders in the arbitration process. If anything, the survival of arbitration as a flexible tool of dispute resolution in the modern world bears testimony to its versatile character and its ability to adapt to the constantly evolving needs and requirements of dispute resolution in the 21st century.

This, in turn, creates challenging opportunities for arbitral institutions worldwide to make their own mark and contribution to the constantly evolving landscape of arbitration as a private means of dispute resolution in the modern world.

I invite the IDRI to rise to this challenge and make its own mark on arbitration in the modern world. Having been founded in 1991, the IDRI has stood the test of time and has made a remarkable contribution to the training and qualification of arbitrators on the African Continent through its comprehensive training programmes on domestic and international arbitration. There is nothing in the way of the IDRI adapting its offering of training programmes to ensure that its graduates leave the institution fit for serving in their respective roles as arbitrators and/or arbitration practitioners in a modern world.

On this note and to conclude, allow me to propose a toast:

'Here's to the IDRI and arbitration in the modern world!'