The European Arbitration Review

2019

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The European Arbitration Review provides an unparalleled annual update – written by the experts – on key developments in the region. The 2019 edition includes new chapters on Limits to the Principle of 'Full Compensation', as well as country overviews on 17 jurisdictions. In addition the rest of the review has been revised in light of recent developments in arbitration, including analysis of the Court of Justice of the European Union's judgment in Slovak Republic v Achmea in Energy Arbitrations, the impact of Brexit in England & Wales and the protection of investments in international armed conflicts in Ukraine.

Joint Venture Disputes

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Summary

International commercial arbitration can provide a highly effective means of resolving disputes between commercial parties operating internationally. A large proportion of such commercial disputes arise in relation to joint ventures (JVs), which often involve partners from different countries operating in another country again. As JV partners will usually be unwilling to submit disputes to the state courts in each other's home jurisdiction, most international JV agreements (JVAs) provide for disputes to be resolved by means of international arbitration.

Arbitration is often the one acceptable neutral forum for the binding resolution of JV partners' disputes. Referring disputes to international arbitration has other benefits, such as the opportunity to choose arbitrators with the requisite experience and background, as well as allowing parties to tailor the procedure to the needs of the case. This article considers how parties in an international JV can best prepare and manage an international arbitration case, and provides an overview of some common issues that arise in JV disputes.

WHAT IS A JOINT VENTURE?

A 'joint venture' is not a precisely defined legal concept.[1] ***Black's Legal Dictionary***, for instance, defines a joint venture as 'a business undertaking by two or more persons engaged in a single defined project'.[2] Most JVs are based on the idea that each partner will contribute some special know-how or experience that the other partner or partners lack, and that all partners in a JV will work for a common benefit or goal. For example, several construction contractors may pool resources to complete a major project. A national oil company may work with an international company to explore for and exploit oil reserves. The local partner might have the necessary concession and manage regulatory matters, while the international partner would contribute know-how. For convenience, this article adopts a broad and non-technical definition.

JVs may take different legal forms. The form of the legal entity will vary depending on the jurisdiction. Some jurisdictions are more formal and require JVs to be registered and comply with local requirements. For instance, China not only regulates JVs in general, but also specific JVs – such as ones in the field of technology.[3]

In Switzerland, 'there is no statutory definition of the term', but scholars observed that the term JV 'covers a variety of short- or long-term cooperation arrangements between two or more parties for a common project or enterprise'.[4] The parties can opt either for a 'contractual joint venture', which is a 'purely contractual collaboration', or for a 'corporate joint venture', which represents a more complex undertaking: 'the creation of a common corporation'.[5]

Similarly, French legislation does not define the concept of JV. However, the commentaries describe a JV 'as an agreement of cooperation between independent parties (generally of similar economic weight) who venture into a common objective and who negotiate as equals'.[6] The parties to a JV share their expertise, their research capabilities, their distribution networks, etc.[7]

Further north, in England and Wales, the legal position is not very different as 'there exists neither a single body of UK law nor a distinct legal entity dedicated to the formation and operation of joint ventures'. Accordingly, a JV may be defined 'broadly as any arrangement between two or more unrelated parties to cooperate in the establishment and management of a commercial (including research and development) project or enterprise'.[8] English

commentators identify subcategories of JVs: contractual JVs, partnership JVs and joint venture companies (JVCs).[9]

Under US law, the term JV 'refers to a legal form of business enterprise either identical to or derived from a partnership'.[10] Consequently, JVs are subject to the US legal provisions on contracts, partnerships and commercial transactions.[11]

Each JV is therefore qualified differently depending on jurisdiction, and may not always constitute a distinct legal entity. In most cases, however, a JV will be formalised in a JVA and a JVC will be set up in a country or countries where the JV would operate. Moreover, irrespective of the legal status of a JV, similar tactical considerations will arise in arbitration.

Because JVs take different forms and arise in a range of industry sectors, it is not always easy to capture them in the statistics of arbitral institutions.[12] However, it is clear that disputes arising from JV projects represent a significant portion of international arbitrations globally – for example, the London Court of International Arbitration announced in 2016 that 21 per cent of the disputes arbitrated under its rules stemmed from shareholders, share purchase or JV agreements. The Arbitration Institute of the Stockholm Chamber of Commerce recorded that disputes arising out of JV and partnership agreements made up 15 per cent of new cases in 2016, in comparison to 13 per cent in 2013. The International Chamber of Commerce Dispute Resolution Bulletin does not record JV disputes as such, but notes that a quarter of all cases initiated in 2015 arose out of construction and engineering projects, with another 18 per cent energy disputes.[13] These are industries in which JVs are common.

ANTICIPATING JV DISPUTES

As most commercial parties are painfully aware, disputes can arise at almost any stage of the parties' cooperation. They may be triggered as much by the project's commercial failure as its success, which may give rise to disputes over profit-sharing, for instance. Disputes vary considerably but they all have some contractual basis in the JVA, and often involve allegations of a failure to cooperate.

A JV may fail during the early stages, for example, where the partners are unable to agree on one or more essential conditions for completion under the joint venture agreement, or, in extreme cases, a JV will fail even before the JVA has been finalised and one party will accuse the other of having breached obligations to negotiate in good faith.

More often, disputes arise over the management of the JV. The commercial failure of the project often exacerbates or creates tensions between parties. This happens especially in the case of the bankruptcy of a JVC or one of the JV partners, which in turn adds to the legal complexity of the dispute. Areas of dispute include the following related categories:

- disputes over corporate governance;
- disputes over failures of cooperation;
- disputes arising from one partner's alleged failure to commit sufficient resources to the JV and making necessary investment in the JVC;
- disputes as to the fundamental viability of a project;
- allegations of fraud and dishonesty;
- misappropriation of proprietary information; and
- where the project succeeds, the sharing of profits.

Although disputes are notoriously difficult to predict (aside from perhaps in the construction industry) some techniques at the stage of drafting the contract may avoid and manage conflicts.

- Parties should try to define their respective obligations as precisely as possible. Where partners share a task, there is a danger neither will perform it. If it is not possible to say what exactly a party should do at a future date, and at what stage, the parties might define obligations in terms of specified outcomes, eg, complete a report allowing the management committee to make an investment decision.
- Even in well-run projects delays are common. In defining target dates parties should consider what should happen if a project falls behind schedule. They may want to include a mechanism for extending deadlines or imposing contractual penalties.
- The JV partners would do well to address the risk of currency fluctuations. Despite their considerable commercial impact, serious currency fluctuations are unlikely to qualify as force majeure. However, an attempt to limit this risk through a hardship clause may prove successful as the occurrence of a serious currency fluctuation could fundamentally alter 'the equilibrium of the contract'.[14]
- Although most parties use broad language in the force majeure clause, the parties often disagree as to whether or not a change of government may constitute such an event, should a dispute arise. For JVs, which rely on specific government approvals or support, defining the consequences of a change of government or of a state policy in advance often helps to resolve or avoid a later dispute.
- Parties should consider the termination of a JVA. They should address both when a partner becomes entitled to do so and what effect termination has. If there is a JVC, this may have to be dissolved, and the parties should define their mutual obligations when the company and its assets are dissolved.
- A clause providing for a 'tiered' dispute resolution clause, with a clear timetable for the resolution of disputes, often encourages partners to find solutions outside arbitration and, if necessary, to realign their expectations. For example, in the first place, the partners may agree to refer a dispute to mediation within a fixed period after it has arisen; only if the mediation proves unsuccessful will they then refer it to arbitration. Similarly, a contract may provide that only disputes above a minimum monetary value would be referred to arbitration at all. Smaller disputes would be subject to a quicker, more informal means of resolution. This might involve referring narrow technical questions to a technical expert for determination. Importantly, such clauses should also allow the JV itself to function, while the partners attempt the resolution of their disputes.

Whether or not a dispute arises, it is important to keep a good record of the negotiation processes at the beginning of the cooperation and throughout the operation of a JV. As will be seen below, documentary evidence is vital to a party's success in arbitration.

PUTTING FORWARD AND DEFENDING A CLAIM – SOME PRACTICAL CONSIDERATIONS

Like any other claim, claims in JV disputes must be formulated with a view to obtaining a particular remedy. A claimant must first decide what it wants to achieve in the arbitration. For example, if it wants to recover substantial damages, there is no point in bringing a claim that will lead only to a declaration or order for specific performance. On the other hand, a

declaration or a cease-and-desist order may be the suitable relief in cases where monetary damages would not be sufficient or appropriate. Equally, an award for damages against an impecunious respondent may be of no value.

One of the major attractions of arbitration is that parties can, to some degree, choose the arbitral tribunal and have a wide choice of counsel. It may be more desirable to involve arbitrators and counsel with a good knowledge of arbitral practice and the relevant industry sector than specialists in the applicable law alone. In particular, it is easier to explain a claim to an arbitrator who has a realistic view of how JVs work and who is comfortable with accounting principles and damages calculations. Sympathy with the party's commercial culture may be advantageous, too, because cultural tensions aggravate many disputes, for example, where there are differing views on hierarchies, levels of formality and maintaining written records.

JURISDICTION

A number of jurisdictional difficulties may arise in JV disputes. These include the scope of the arbitration agreement and in particular whether it extends beyond the main contract to ancillary contracts, and to non-signatories such as different companies in a group of companies. Parties should consider making more than one counterparty a party to the JVA, as well as expressly linking different contracts and possibly including arbitration agreements in all of them.

Sometimes a respondent will deny the arbitrability of a dispute. This may happen where contractual claims are linked to statutory claims or local law issues, such as tax and insolvency. Respondent state entities often rely on statutory constraints under local law to evade accountability to their contractual partners.

INTERIM RELIEF OR PROVISIONAL MEASURES

The leading national arbitration statutes and arbitral rules provide that arbitral tribunals can order interim relief or provisional measures. Typically, they confer a broad discretion to do so.[15] Such relief may also be available from national courts. The criteria for granting interim relief vary, but it is usual in international commercial arbitration to do so where an applicant can show urgency, a threat of irreparable or very serious harm (ie, harm that cannot easily be compensated with a payment of damages, such as a loss of good will or serious reputational harm), and a prima facie case on the merits and jurisdiction, and that the measures will not amount to a prejudgment of the case on the merits.[16]

Interim relief may be very important in JV disputes precisely because the fate of a company may well result in a loss that cannot be compensated with monetary damages, especially where the company faces a loss of goodwill or of established client relationships, or there is a risk of confidential materials becoming public. Moreover, a JV partner may be more interested in the safeguarding of the operation of a JV and unblocking of the JV's accounts in case of a corporate governance dispute, than a declaration of liability and a damages award. Orders may be granted in the following cases:

- an order to preserve a preexisting state or status quo ante for the duration of the arbitration – where the dispute turns on whether the parties must carry on a business, the order might require the respondent to do so;

- an injunction preventing the respondent from selling or dissipating assets pending a final decision by the arbitral tribunal as to the parties' rights over the assets;
- an order requiring a party to keep certain information confidential; and
- in exceptional cases, an anti-suit injunction or order requiring a party to stop or refrain from parallel proceedings in local courts.

If a party must seek an urgent interim measure even before the constitution of an arbitral tribunal, in recent years, most of the major arbitration institutions have updated their rules to include an emergency arbitrator procedure.[17] A party seeking the appointment of an emergency arbitrator must demonstrate the urgency of its request,[18] and often satisfy a requirement that the date of the arbitration agreement occurred after the institutional rules were updated to allow for emergency arbitrator procedures.

An emergency arbitrator can order the same interim or provisional measures as an arbitral tribunal. The great advantage of the procedure is its availability prior to the constitution of the arbitral tribunal, which often takes at least a month or two. The order of the emergency arbitrator can be re-examined by the arbitral tribunal once it is constituted, however in the meantime, the party will have had a chance to safeguard its rights before an emergency arbitrator.

LEGAL BASES OF A CLAIM

Typically, any claims will be formulated as claims for breach of the JVA in the first place, because the arbitration clause in the JVA will cover disputes arising out of and under that contract. The terms of the JVA, which may include addenda and additional agreements, will likely be central to the arbitration.

The JVA in turn, will be governed by the law of a particular jurisdiction, usually chosen by the parties. The law may include certain rights and remedies of stakeholders, prohibitions on self-dealing and rules of contractual interpretation.

On a second level of relations, a claimant may also need to take account of the JVC as distinct from the JVA. In JV arbitrations, the JVA is sometimes governed by the laws of Jurisdiction A, whereas the JVC may be incorporated in Jurisdiction B and thus subject to the corporate law of Jurisdiction B. A claimant may then bring claims under the JVA but will have to consider the laws of Jurisdiction B in doing so. The need may arise where the claims touch on areas subject to local law, such as the tax liability or insolvency of the JVC. A claimant may also need to consider the law of Jurisdiction B in relation to the governance of the JVC and, for example, the status of decisions by the board or supervisory board or the directors' personal responsibility for them.

JVAs seldom regulate the minutiae of how a JVC is to be run. Parties often do not know exactly how their relationship will evolve when they sign the JVA. They may fall back on boilerplate terms and adopt loosely worded obligations, for example, that the partners should cooperate or use best efforts. In practice, cases often turn on the precise meaning of an unclear term or on defining the precise content of general obligations. The governing law of the JVA may also offer tools to close gaps in the parties' express agreement. However, a statutory obligation to act in good faith and an implied obligation to act reasonably are broad and abstract, yet the harm alleged by a claimant will be attributable to specific events. The challenge to a claimant is often to bridge the gap between a general obligation and a specific breach that occurred in a particular case.

PUTTING FORWARD CLAIMS

Claims in JV disputes differ from those in many other arbitrations. Typically, allegations of breach are based on a course of conduct consisting of many smaller events rather than a single failure of performance. The claimant may allege that the respondent continually refused to call a meeting of the management committee over a period of years. JV disputes usually turn on a failure of cooperation to a greater or lesser degree. Consequently, the arbitral tribunal will tend to judge the parties' conduct on the basis of reasonableness, fairness and good faith. Such criteria are more elusive than those applicable to many other types of dispute, where an arbitral tribunal may determine a delay based on a work schedule or a party's compliance with a technical norm. The risk in JV disputes is that a claimant's allegations will be vague and hard to substantiate. However, they also allow counsel to define breaches with some creativity and tell the vivid story of a commercial relationship. Often, the best approach is to develop a claim based on the facts of the case and with a view to what a party can realistically achieve.

The following points may help a party to formulate its claims.

- State every breach clearly – where an alleged breach involves a course of conduct by the respondent or point of local corporate law, the claim needs to be spelled out; one incident is not a course of conduct.
- Show the commercial impact of every breach – an arbitral tribunal will need to understand why, for example, a decision by a JV partner to block a project or investment was economically detrimental.
- Avoid making trivial allegations – JVs in developing economies are not for the faint of heart and arbitrators expect parties to face occasional difficulties: a series of cancelled meetings and a 'string-along' attitude may not amount to a lack of good faith.
- Keep claims simple – a claimant should use the most straightforward available legal basis in order to obtain the desired remedy; in particular, allegations of fraud, dishonesty and bad faith should be approached with caution as they can be difficult to prove, especially when the alleged conduct can be easily explained by extraneous circumstances or lack of business foresight or acumen. In practice, an arbitral tribunal may be reluctant to find that a poor business decision amounts to a breach of good faith or a best efforts obligation.

DEFENDING CLAIMS

Some of the tactics for bringing a claim against a JV partner can also be adapted to defending a claim. Again, clear factual arguments that justify actions on the basis of commercial considerations are likely to convince an arbitral tribunal.

The following tactics may also assist a respondent in defending possible arbitration claims.

- Shifting the blame on the claimant or other partners in the JV – a JV requires the cooperation of all the parties: they are all responsible for its success. A respondent accused of acting uncooperatively in the management of the JVC may be able to argue that the claimant was really at fault or that actions of another partner acting uncooperatively caused the loss or damage in question.

- Putting a claim in context – to succeed a claimant must show that the respondent's breach of contract caused its losses. Given the many variables in running an international business, this is seldom easy. A respondent may be able to deflect blame by showing that wider changes in the market, industry sector or regulatory requirements in fact caused the JV to fail.
- Redefining obligations – as explained above, parties often describe their contractual obligations using general terms such as 'best efforts' and 'cooperation'. Usually a claimant will define such terms broadly, but it may be open to a respondent to redefine them more restrictively, thus limiting the scope of its obligations.
- Blaming a third party – a respondent may try to excuse its conduct on the basis that it was required to act or not to act in a certain way by a third party. It may rely on the doctrine of force majeure. This line of argument is sometimes used by state-owned parties that argue that they were prevented from discharging an obligation to their JV partners by a government agency or other public body.

JV arbitrations are frequently fact-heavy. In order to state their cases, JV partners may need to set out a history of cooperation spanning several years; industry standards and practices relating to the JV; and evidence of damage and loss.

Every JV arbitration is the story of a commercial collaboration, told in different ways by each party. Independent of any technical legal arguments, this story must be credible. It is a particular difficulty that JVs often last several years before an arbitration is started and the arbitration will concern multiple incidents. Often, the parties' commercial relationship will continue during the arbitration and they may want to set out past events in light of present developments. This makes JV arbitrations different from, for example, a straightforward sale of goods dispute. For this reason, good record keeping is important and advantageous, especially where a party acted uncooperatively or failed to apply the required best efforts over a long period of time.

DOCUMENTARY AND WITNESS EVIDENCE

As part of the assessment of a claim, a party should analyse its chances, review, prepare and organise the documents in its possession and assess whether the opposing party or a third party is in possession of relevant documents. Usually, the procedural timetable of an arbitration will provide an opportunity for the parties to request the production of documents from each other.

Generally, arbitrators value contemporaneous documentary evidence. This may include the minutes and agenda of meetings, formal resolutions, objections to a party's conduct or reasoned responses to them. The failure of a party to record its position or respond to complaints at the time may undermine the plausibility of its subsequent position in arbitration. Email correspondence sometimes poses problems because emails are on occasion written in a condensed, casual style that is hard to understand years later. At the other extreme, letters that seem too deliberate and legalistic may appear defensive.

Witness testimony is a widely accepted feature of international arbitration and frequently invaluable in helping an arbitral tribunal to understand how decisions came to be taken at the time.

However, gathering evidence can be difficult. Company officers come and go, the witnesses may find it difficult to recount events that took place over several years, and, in some parts

of the world, there may be cultural reluctance to giving evidence. Still, for the most part, arbitrators find it useful to hear witnesses' versions of events. Almost all cases involve questions of cooperation and reasonableness that will allow the arbitral tribunal a measure of appreciation. Witness evidence can be decisive to the outcome of the case. Credible witness evidence will give the arbitral tribunal a flavour of how the partners felt, worked together and viewed commercial challenges at the time. Poor, irrelevant witness evidence or a refusal to put forward key witnesses may be especially detrimental. For example, if the case concerned an accounting dispute, a party would usually do well to call its chief financial officer or other senior financial officer.

EXPERT EVIDENCE

Experts are invaluable in technically or scientifically complex cases, or cases involving heavily regulated industries, such as the mining and pharmaceutical industries, and cases involving accounting or valuation disputes. However, parties should consider whether the arbitrators will benefit from expert evidence or can form an opinion about an issue for themselves. Moreover, if expert evidence is deemed necessary, the parties should start working with the experts from the earliest stages of their claim in order to allow the experts to provide a detailed and complete report on the case.

Sometimes a single expert is appointed by the arbitral tribunal; but the parties are often well advised to appoint their own expert witnesses as they can better control the process.[19] Although expert witnesses must be independent and impartial,[20] they tend to support the position of the party that has appointed them. Nevertheless, despite the often expressed view that experts are simply 'hired guns' out to help the party paying them, their value to a party's case should not be understated. Well-qualified and experienced experts can be valuable to the party's assessment of its own position and the realistic analysis of the claim by the tribunal.

REMEDIES

Most often a claimant will seek to recover monetary damages for loss suffered as a result of the respondent's breach of contract. The measure of damages will vary according to the governing law of the contract but the following heads of damages are commonly encountered.[21]

- Loss of future profits – a claimant may seek to recover the profits that it would have earned from the JV had its partner or partners properly performed their obligations; this involves a calculation of the future performance of the JVC if properly run.
- Loss of value of the JVC driven by a loss of a particular contract or concession, imposition of taxes or a failed transaction.
- Reputational harm – sometimes a claimant may consider that its reputation has suffered as a result of its association with a failed JV. This may happen where the inventor of a new technology has worked unsuccessfully with an industrial company on adapting an ambitious new product for mass production. In practice, however, reputational harm is difficult to prove and quantify.
- Disgorgement damages – in cases of self-dealing or breach of obligations of trust and honesty, a respondent may be liable to pay any illicit benefits or profits to the claimant party.

Whatever the damages claimed, parties should set out their claim convincingly, taking into account the legal and factual bases of their claims. Usually, the parties will appoint damages experts, especially where profit calculations or valuations are involved. A serious arbitral tribunal will only award damages if it is persuaded of a claimant's entitlement. Claims should be sober and realistic. It may be useful to break them down in subsidiary and alternative claims so that, if a claimant prevails only on some issues, it will be easy for the arbitral tribunal to award it part of the damages.

Apart from claiming monetary damages, parties may be able to claim other remedies:

- declaratory relief – this may take many forms, including declarations that a particular decision was valid;
- specific performance – an order requiring a party to perform a contractual obligation, such as contribute to the capital of the JVC;
- orders for the sale or purchase of shares to give effect to call and put options;
- orders for the JVC to be wound up or sold; or
- orders for a trustee or mandataire ad hoc to be appointed to carry out a particular order or dissolution of a JV – this may be appropriate where cooperation between the parties has broken down totally and the respondent will not carry out an order by the arbitral tribunal.

CONCLUSION

International arbitration is well suited to resolving JV disputes. There is no need to depart from standard arbitral practice. However, a JV dispute of its nature brings with it a number of practical and legal challenges that arbitrators, counsel and the parties need to bear in mind. Advocacy in JV arbitration requires commercial and cultural understanding, because the history of a JV is the history of an international business venture. Counsel need to be good 'story tellers' who are able to provide context and structure to a relationship that may have lasted many years. This also involves some appreciation of the personalities involved and their psychology. Counsel and arbitrators alike need to understand the relevant industry sector and have a head for numbers. Because damages are often only part of the remedy sought, counsel and arbitrators may need to identify and develop suitable remedies. These may, for example, involve a share transfer or sale of the company. Only then will the arbitration also resolve the parties' dispute.

Notes

[1] Jörg Risse in 'Disputes arising from joint venture agreements' in Edward Poulton (Ed), *Arbitration of M&A Transactions* (London, 2014), p 370.

[2] Edward A Garner, *Black's Law Dictionary* (2nd Pocket Ed) (St Paul, 2001), p 376. An earlier edition defined a joint venture as 'a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit' (Joseph R Nolan et al, *Black's Law Dictionary*, West Publishing Co (St Paul, 1990), p 839.

[3] Larry A DiMatteo, *International Business Law and the Legal Environment: A Transactional Approach*, Taylor & Francis, 2016, p 104.

[4] Julian Ellison, Edward Kling, *Joint Ventures in Europe*, 2nd Edition, Butterworths, 1997, p 293.

[5] Pierre Tercier, Marc Amstutz, Code des obligations II – Commentaire Romand, 2008, p 56.

[6] Julian Ellison, Edward Kling, Joint Ventures in Europe, 2nd Edition, Butterworths, 1997, p 69.

[7] Arnaud Lecourt, Groupe de sociétés, in Répertoire de droit de sociétés - Dalloz, 2015, paragraph 23.

[8] Julian Ellison, Edward Kling, *Joint Ventures in Europe*, 2nd Edition, Butterworths, 1997, p 315.

[9] Luis Morais, *Joint Ventures and EU Competition Law*, Bloomsbury Publishing, 2013, p 47.

[10] Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual and International*, OUP Oxford, 2013, p 206.

[11] Legal Information Institute, www.law.cornell.edu/wex/joint_venture, accessed on 18 August 2016.

[12] Swiss Chambers' Arbitration Institution, for instance, reported that during the 10-year existence of the institution only 1 per cent of its cases stemmed from JVs. However, at the same time, it reported that other cases that may include a JV element (such as cases from construction, shareholders' agreements and IP disputes) total 12 per cent. See www.swissarbitration.org/sa/download/statistics_2014.pdf (accessed 11 December 2015).

[13] ICC Dispute Resolution Bulletin, 2016 (Issue 1), p 17 and ICC Dispute Resolution Bulletin, 2015 (Issue 1), p 15.

[14] For a detailed discussion, see Christoph Brunner, 'Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration', *International Arbitration Law Library*, Volume 18 (Kluwer Law International 2008).

[15] For example, article 26 of the Swiss Rules (2012 edition) provides, inter alia: 'At the request of a party, the arbitral tribunal may grant any interim measures it deems necessary or appropriate'. Article 28 of the ICC Rules (2017 edition) empowers an arbitral tribunal to 'at the request of a party, order any interim or conservatory measure it deems appropriate' unless the parties have deemed otherwise. Article 25 of the LCIA Rules (2014 edition) and article 30 of the SIAC Rules (2016 edition) also give arbitral tribunals broad powers to order interim measures.

[16] For a discussion, see Gary Born, *International Commercial Arbitration*, 2nd edition (Alphen aan den Rijn, 2014), pp 2468–2483.

[17] For example, article 29 of the ICC Rules (2017 edition), article 9B of the LCIA Rules (2014 edition) and article 43 of the Swiss Rules (2012 edition) include provisions related to the possibility of demanding the appointment of an emergency arbitrator when an arbitral tribunal is not yet constituted.

[18] Article 43 of the Swiss Rules (2012 edition) requires, inter alia, that the party demanding the procedure state the reasons for its demand, 'in particular the reason for the purported urgency', while article 29 of the ICC Rules (2017 edition) refers to 'urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal'. Article 9B of the LCIA Rules (2014 edition) provides that the emergency arbitrator proceeding can be initiated 'in the case of emergency at any time prior to the formation or expedited formation of the Arbitral Tribunal'.

[19] On the differences between civil and common law approaches to expert witnesses, see, for example, Wolfgang Peter, 'Some Practical Thoughts about Expert Witnesses and Tribunal-Appointed Experts' in L'éclectique juridique – Recueil d'articles en l'honneur de Jacques Python (Zurich, 2011), pp 303–312; Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, 2nd edition (London, 2010), pp 350–353.

[20] The notion of the independence of experts is enshrined in articles 5.2 and 6.2 of the IBA Rules on the Taking of Evidence in International Arbitration (2010 edition).

[21] See generally, Yves Derains and Richard H Kreindler, 'Evaluation of Damages in International Arbitration', ICC Publication No. 668 (Paris, 2006).

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