Lexis PSL

Where next for International Arbitration?

Ahead of Queen Mary University of London's School of International Arbitration (SIA)'s 30th Anniversary Conference, 'The Evolution and Future of International Arbitration: The Next 30 Years', distinguished members of SIA's faculty and leading arbitration practitioners reflect on their careers and discuss notable developments in international arbitration.

Professor Stavros Brekoulakis Professor in International Arbitration and Commercial Law at the SIA
Alexis Mourre Partner at Castaldi Mourre & Partners and vice president of the ICC International Court of Arbitration
Nigel Rawding Dispute resolution partner at Freshfields Bruckhaus Deringer and head of the firm's London-based international arbitration practice
Dr Debbie De Girolamo Senior lecturer in law at QMUL
Professor Julian Lew QC Head of the SIA and arbitrator at 20 Essex Street
Christopher Newmark Partner/member Spenser Underhill Newmark LLP
Professor Loukas Mistelis Director of the SIA and the Clive M Schmitthoff Professor of Transnational Commercial Law and Arbitration
Dr Stefan Kröll International arbitrator, lecturer and co-director of the Willem C. Vis Arbitration Moot
Professor Phillip Capper Partner and head of international arbitration at White & Case in London

LexisNexis®

Lexis®PSL ARBITRATION

Which international arbitration development has surprised you most?

***Professor Stavros Brekoulakis* has been impressed by the increasingly sophisticated resolution of complex international disputes:** What has impressed me (rather than surprised me) most is how multipolar and complex dispute resolution has become at an international level.

In the past, international disputes generally speaking used to be resolved either before arbitral tribunals or national courts. Today, we see—in an increasingly larger number of cases—different aspects of a single dispute to be submitted to a number of different dispute resolution fora. For example, different aspects of the *Yukos* dispute were submitted to a number of investment treaty arbitrations on the basis of a bilateral investment treaty (BIT), an Energy Charter Treaty arbitration, litigation before the national courts of Russia, the Netherlands and England, and even before the European Court of Human Rights. Another similar example is the *Lago Agrio* dispute between Ecuador and Exxon. Litigants are becoming increasingly sophisticated in their approach to disputes, and are willing to explore different dispute resolution avenues.

This means that law firms have to be able to provide expertise in investment and commercial arbitration as well as in litigation, human rights, energy and other complex areas of international business transactions and disputes.

***Alexis Mourre*, partner at Castaldi Mourre & Partners, focuses on a highly topical issue:** Certainly the brutal backlash against investor-state dispute settlement (ISDS), in particular in the context of the Transatlantic Trade and Investment Partnership (TTIP) negotiations.

Freshfields Bruckhaus Deringer partner *Nigel Rawding* considers how international arbitration shed its niche practice area status and also reflects on matters that, surprisingly, have changed little: My first exposure to international arbitration was in the early 1980s, at a time when it was still something of a niche practice area. Once hindsight is stripped away, it is the development of international arbitration into a mainstream practice area—and an essential skill set of disputes lawyers the world over—that has surprised me most.

Over the last 30 years we have seen international arbitrations increase exponentially in number and value. This growth has been fuelled by an increase in international trade and a corresponding increase in the number of arbitration-friendly jurisdictions. Legislation based on the UNCITRAL Model Law has been adopted in a total of 97 jurisdictions and there are now 154 parties to the New York Convention. Since the early 1990s there has been a proliferation of BIT disputes, and corporates now regard maximising BIT protection as a key priority in structuring (or restructuring) investments.

The players in international arbitration have also grown in number and location. International arbitration was previously the preserve of a select number of law firms operating largely out of Western Europe and the USA. Now, however, there are an ever increasing number of law firms developing their own specialist international arbitration teams, and arbitral institutions are opening offices in the Middle East, Asia and Africa. In his November 2014 Freshfields Arbitration Lecture, Professor Emmanuel Gaillard noted the roles played by a growing number of stakeholders such as court reporters, case management firms, publishers of international arbitration literature, third party funders, directories etc.

Conversely, it is just as surprising that, despite this huge expansion of international arbitration, so little has changed in terms of the mechanisms and procedures used by tribunals and practitioners. While technology may have introduced new techniques to optimise the conduct of arbitration such as e-production and electronically searchable transcripts; the rudiments of marshalling facts, presenting legal arguments etc have changed very little. *Plus ça change*, as they say at the ICC.

Dr Debbie De Girolamo: What has been most surprising is the extent to which international arbitration has become a primary adjudicatory process for the resolution of complex international commercial disputes, usurping the function of the court system in this regard.

***Professor Julian Lew QC* highlights the growth and diversification of international arbitration institutions:** The speed at which regional centres for international arbitration have grown is significant. Traditionally favoured seats, such as London and Paris, are, for many parties and disputes, less attractive than they have been. Arbitral institutions such as the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKAC) and the Dubai International Financial Centre (DIFC) have experienced significant growth as more parties look elsewhere for the resolution of their disputes.

***Christopher Newmark* partner at Spenser Underhill Newmark, received the first ICC emergency arbitrator appointment. Mr Newmark shares his views on this much-discussed development:** When the ICC was considering whether or not it should add emergency arbitrator provisions to its 2012 arbitration rules, I was very sceptical as to the need for such provisions. In part, that scepticism came from my background as a lawyer based in London where the English courts have supported international arbitration proceedings by granting urgent interim measures where a tribunal is not in a position to grant the relief that is required (for example, where it has yet to be constituted). My view was that in London at least, a party needing an injunction would always be better served by the courts, since the courts are able to act immediately where the urgency so requires, can deal with ex parte applications, and can make orders that are enforceable against the parties to the arbitration and against third parties. Those seemed to me to be attributes that emergency arbitrator provisions would be unable to match.

While I was persuaded that the utility of emergency arbitrator provisions was much greater in other parts of the world, I did not expect to see parties queuing up to use the new ICC emergency arbitrator procedures in London. I was therefore surprised to be contacted in late 2013 by the ICC Secretariat enquiring as to whether I was available to act as an emergency arbitrator in the first case brought under the ICC's new rules. One of the key reasons for my selection was that the place of arbitration was London. Notwithstanding the availability of the English courts, the claimant had preferred to seek relief from an ICC emergency arbitrator than from an English judge.

Other applications to an ICC emergency arbitrator in London-based arbitrations have followed, as have applications in other jurisdictions where the courts are regarded as being reliable when granting urgent interim measures. Notwithstanding the upfront cost of emergency arbitrator proceedings and the inherent uncertainty as to what standards an emergency arbitrator will apply, emergency arbitration proceedings are proving to be a tool that parties are finding useful. Given my initial scepticism, this has certainly been a surprise to me, though I do wonder whether the trend will continue once the prospects of success for such applications are better understood.

Like Mr Newmark *Professor Loukas Mistelis* has found the emergence of emergency arbitration surprising: During the negotiation of the amendments to the UNCITRAL Model Law (adopted in 2006), the emergency arbitration was discussed in the periphery and my reaction was that arbitration should not try to emulate court proceedings by attempting to offer all services provided by national courts, particularly as obtaining emergency relief in many cases will be more expedient and effective when sought from a judge. However, the American Arbitration Association's inclusion of emergency arbitration provisions had a catapult effect and many other institutions have adopted similar procedures (eg SCC, ICC, ICDR and LCIA). There are cases where going to court is not an option (eg for reasons of confidentiality or where the local courts are hostile to one or both parties) and emergency

arbitration provisions can be useful. Further, the ICC has taken steps to ensure that those appointed as emergency arbitrators have the right experience for dealing with applications for emergency relief.

It is also interesting to observe the expansion of arbitration in Latin America and South Asia, as well as the increasing use of arbitration to resolve financial, IT and telecoms disputes.

Dr Stefan Kröll: The speed with which attitudes towards arbitration have changed in some jurisdictions with the adoption of new laws. The best example is Brazil where after the new law had been enacted its constitutionality was questioned and where within one decade arbitration is fully embraced not only by the business community but also the courts. At the Vis Moot we have seen an enormous increase in the participation of Brazilian teams over the last years with great success.

Which international arbitration development has concerned you most?

Professor Phillip Capper: The global demand and necessity for international arbitration is so great that it has to depend on the involvement of many practitioners not experienced in it. They routinely make the mistake of believing that it is their own notions of state court civil procedure (often at the seat of arbitration, but not always) that will govern the arbitral procedure. This problem is particularly prevalent for procedural issues where legal traditions differ greatly, for example questions of evidence and document production.

Further difficulties stem from different conceptions counsel may have regarding the procedural or substantive nature of certain matters, such as privilege for instance. The impulse to bring baggage from state court litigation practice into truly international arbitration, in disputes arising from cross-border transactions, and where the seat is likely to be in yet a third jurisdiction, is a threat to the development of a coherent international best practice.

What is, or will be, the most significant challenge to the integrity and development of international arbitration?

For *Professor Julian Lew QC*, the practice and regulation of international arbitration must better reflect its broad international user base: Nationalism, specifically a failure to recognise the truly international nature of arbitration and to fully integrate different approaches and attitudes towards arbitral law and practice. Despite some developments, international arbitration remains developed world-focused. It is important that international arbitration adapts to reflect the cultures of a broader range of players from around the globe. Currently, international arbitration embodies, to a large extent, Western standards, but a key question is whether or not those standards are the correct standards. The IBA Guidelines on Party Representation were criticised by some for failing to take adequate account of non-developed world approaches to counsel ethics. The survival and success of international arbitration is dependent on its appeal to a growing base of users. Merging different arbitration cultures (eg East, West, developed and developing) will be a significant challenge, but not an insurmountable task provided this issue receives the attention it deserves.

***Professor Stavros Brekoulakis* considers that international arbitration must respond to growing concerns over the identity and status of its arbitrators:** Decision-making is at the heart of arbitration and public discourse, and I expect it to be the single most significant challenge to the integrity and development of international arbitration.

As international arbitral tribunals become more popular in the resolution of a wide range of commercial and investment disputes which previously fell under the exclusive jurisdiction of national courts, many critical voices coming from the public raise legitimate questions: who are these people that have such a power to decide disputes that involve public policy and the exercise of sovereign discretion? People want to know more about who are deciding important disputes and how they are deciding these disputes.

Arbitration is currently perceived by a large number of public media and scholars as biased favouring big investors and corporations (there have been scholarly works and media pieces to that effect in various publications). I personally believe that such characterisation is inaccurate and indeed unfair, but if this accusation is consolidated, international arbitration will be diminished.

Alexis Mourre: The ability of international arbitration to maintain the trust and support on the part of states and their judiciary.

***Christopher Newmark*, partner at Spenser Underhill Newmark, considers the risk that some developments in international arbitration will make the DR mechanism less attractive to its core user base:** International arbitration practitioners and institutions are continually striving to adapt the product of international arbitration so as to make it the dispute resolution procedure of choice in as many different scenarios as possible. This has been successfully achieved in the investor-state sector and the growth of investor-state arbitration has been one of the main reasons why law firms the world over have been keen to develop an international arbitration specialism so that they can enjoy a slice of what is viewed as being a very tasty pie.

But the growth of international arbitration generally, its development into new fields, and the increasing number of practitioners working in the area have all had other effects on the practice. International arbitration no longer enjoys some of the features which were once viewed as being unique selling points. It is a long time since it has been able to boast that it is faster or cheaper than litigation. As the move towards transparency gathers pace, in many scenarios, it will not be able to claim confidentiality as a key feature. And as the pool of arbitrators increases (which I generally view as a good thing) so does the mix in quality and the unpredictability of outcomes.

As international arbitration adds ever more features in order to compete with court litigation in as many situations as possible (such as, by way of example, class actions, emergency relief, summary relief, anti-trust follow on actions, inter-state tax disputes), there is an inevitable risk that international arbitration will end up becoming less distinctive and ultimately less attractive to what has historically been its core constituency: international business to business commercial disputes. Only time will tell whether or not the continued growth of international arbitration is best served by focusing on the quality of the plain vanilla product or by the continuing drive to diversify.

***Dr Debbie De Girolamo*, senior lecturer at QMUL, shares concerns with Professor Lew and Christopher Newmark:** In some respects, the proponents of international arbitration themselves could become a challenge to its development if they become complacent about the process. Work must continue to be done to:

- recognise the changing demands of the users of the process
- be flexible in response to those demands, and
- ensure that the complexity of the process does not become a barrier to its use

Professor Loukas Mistelis: The absence of an appeal mechanism in most investment treaty arbitration is a significant challenge. There is no possibility of appeal in ICSID arbitration, which means that the introduction of an appeal mechanism would require an amendment to the ICSID Convention and ICSID Arbitration rules or, alternatively, the introduction of separate protocol on appeal.

Some States have called for the introduction of an appeal mechanism. In the summer of 2010, Argentina won a series of annulment proceedings and called for the introduction of an appeal mechanism to ensure consistency of tribunal decisions. Despite receiving some support for this approach, the initiative did not progress. It will be

interesting to observe whether or not a separate ICSID appeal protocol will be introduced. There are logistical difficulties with the introduction of an ICSID appeal board. It is perhaps unlikely that many arbitrators will wish to sit on any appeal board as that will impact on their ability to take other appointments.

Overall, while some States seem to be quite critical of and reluctant to engage in investment arbitration as well as commercial arbitration, others slowly become supporters of these procecesses. This is, for example, the case with several States in the Middle East and Gulf region.

***Dr Stefan Kröll*, like Christopher Newmark, is keen to preserve arbitration's unique selling points:** Maintaining arbitration as a flexible, speedy and cost-efficient dispute settlement mechanism where the arbitrators and the parties conduct the process according to the requirements of the particular case and not try to use a one size fits all approach.

Arbitration should not turn into off-shore litigation, ie mirror court proceedings with the only difference being that the parties have to pay for the judges and the hearings are not held in a court house. 'Best practice' in arbitration should not, for example, be any particular practice of taking evidence, but that procedures are tailored for the particular case.

***Professor Phillip Capper*, head of international arbitration at White & Case, considers the challenges surrounding confidentiality:** There are challenges and issues around the proper limits of confidentiality. Privacy of arbitration does seem to be a strong factor of choice for commercial arbitration (according to the SIA's empirical studies, it is even a 'deal-breaker' for several corporations when negotiating arbitration clauses). It is also the reason for relatively light reporting of commercial arbitrations. Investor-state arbitrations, on the other hand, deal with issues of public international law and, in many cases, involve issues of public interest, so that greater transparency may indeed be justified. But the more public nature of investor-state arbitrations should not, of itself, be a reason to challenge the fundamental principle of privacy in commercial arbitration.

***Nigel Rawding*, like Professor Brekoulakis, identifies transparency as a challenge to the integrity and development of international arbitration:** Improving the transparency of the arbitral process and arbitral decision-making is necessary to promote accountability and increase public trust in the process. This is a particularly cogent challenge in the context of investor-state arbitration, with critics expressing concern that decisions which may have implications for public policy as well as public finances are being made 'in secret' by a relatively small pool of (mainly) Westernised arbitrators. These concerns were aired during the public consultation organised by the European Commission on the inclusion of an investor-state dispute settlement mechanism in the Transatlantic Trade and Investment Partnership. The consultation revealed polarised views and powerful opposition to the perceived carte blanche power granted to companies to use trade agreements and private arbitration panels to challenge national laws and regulations which do not suit their corporate agenda.

This perceived lack of transparency and the inherent suspicions it engenders risks undermining the legitimacy and credibility of the arbitral process itself. The limited public scrutiny of arbitrator appointment, conduct and decision-making raises concerns that tribunals may be biased in favour of wealthy private investors and parties may lose faith in the arbitral process altogether.

There have been some efforts to improve transparency in investor-state proceedings, such as the new 2014 UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration. The rules reverse the presumptions of confidentiality and privacy in investment treaty arbitration in favour of a presumption of openness. These rules face a number of challenges which have not yet been tested in practice, and it remains to be seen how effective they will be.

What single, positive change to the law or practice of international arbitration would you like to see in the immediate future?

***Professor Phillip Capper*, head of international arbitration at White & Case, desires appropriate recognition for international arbitration's role in resolving disputes:** A welcome change would be greater recognition that international arbitration is the final method of dispute resolution of choice for global business, not merely an alternative to state court litigation (as the concept of 'ADR' would suggest). International arbitration is a necessary substitute system. As such, arbitration must not be thought of as just doing things differently than courts. Rather, it should develop more systemic qualities to meet all of its users' needs, and be universally understood to be a full and final dispute resolution method fully equivalent to, but substituting for, state courts.

Dr Stefan Kröll: I would like to see an updated New York Convention taking into account some of the deficiencies of the present convention and being equally successful.

***Professor Stavros Brekoulakis* identifies diversity as an area for improvement:** I would like to see more diversity in international arbitration, and see more arbitrators coming from different legal traditions, nationalities, cultures and regions that are currently under-represented. This will enrich the practice of international arbitration and address issues of integrity. Unfortunately, diversity is not achieved by a change in law (equality legislation has not yielded results in national judiciaries for example), but a change in the culture surrounding selection and appointment of arbitrators. Here the role of arbitration institutions is critical, and they are already doing an excellent job in appointing new arbitrators from a wide range of backgrounds.

Dr Debbie De Girolamo: Creative use of other alternative dispute resolution processes within the arbitration process, such as mediation in investor-state disputes, has the potential to augment the benefits of international arbitration for its users. Further research in this area would be welcome.

***Chris Newmark*, partner at Spenser Underhill Newmark, would like to see greater use of institutional tribunal appointments:** The recent debate as to the pros and cons of party appointed arbitrators resulted, as far as I could tell, in a win on points (if not a knockout blow) in favour of continuing with the party appointed system. Proponents for that system argued with vigour that the users of international arbitration are in favour of being able to choose their own arbitrator.

While there were no doubt many users and their counsel that expressed that view, I remain concerned that this preference is based on a misunderstanding of what the party appointed arbitrator can (or should) deliver. In my experience, tribunals where every member owes his or her appointment to an institution are more consistent in being able to work as an efficient and cohesive unit that produces a timely and good quality award. That is not to say that I have not had good experiences on party appointed tribunals—to the contrary, many of those have been excellent. But there remains the higher risk of rogue arbitrators that can be so damaging to the smooth running of the arbitral process.

So while it may not be the majority view, I would be very pleased if the practice of international arbitration moved towards greater use of institutional appointment of all members of a tribunal. If the parties give the institution some criteria for selection and the institution gives the parties a list of names to choose from, the parties can retain the control they need without the problems that can come with party appointments.

***Professor Julian Lew QC*, Head of the SIA, seeks reduced court interference in arbitration:** In addition to embracing different arbitral cultures (as discussed in the previous part of this article), I'd like to see further recognition for the autonomy of arbitration from court proceedings. Whilst it is important that courts support the arbitral process, I believe that a reduction in court interference would be beneficial. The development of flexible standards of arbitral practice (not the equivalent of the Civil Procedure Rules SI 1998/3132 or Code Civil) may encourage greater autonomy.

Alexis Mourre: The arbitral community should depart from established practices in the management of proceedings and invent new ways to avoid duplications and losses of time and resources.

***Nigel Rawding*, head of international arbitration at Freshfields Bruckhaus Deringer, like Professor Brekoulakis, calls for:** Greater diversity in arbitral tribunals. The number of female appointees continues to be dismally low, even lower than the number of women in leading positions within the legal profession. The conservatism displayed by clients and their advisors in the selection process too often results in the appointment of the more-or-less usual suspects. This call for greater diversity is not (just) altruistic; it is essential to address challenges of legitimacy and efficacy facing the system.

More diverse arbitral tribunals will counter criticisms about lack of impartiality and the perception that decisions are being made by an 'old boys' club'. Studies by leading management consultancies have demonstrated a statistically significant relationship between gender-balanced leadership and improved decision-making by reducing the risk of 'group-think'. And by broadening the population of properly-qualified arbitrators, we will hopefully be able to remedy the problems inherent in having a too-limited pool of arbitrators, most obviously the resulting delays in scheduling hearings and receiving awards. It is the responsibility of the entire arbitration community—institutions, clients, law firms, arbitrators—to address this key issue.

The Director of the SIA, *Professor Loukas Mistelis*, identifies three areas that are ripe for change: Increased harmonisation internationally on the meaning and scope of key concepts such as public policy and arbitrability may introduce greater certainty and result in fewer satellite disputes. This could be achieved by the introduction of authoritative guidance or protocols, although the work involved would be significant.

I'd also like see the wider introduction and use of streamlined, summary arbitration procedures for simple money claims. This will expand the use of arbitration to cover a greater number of disputes.

In addition, smarter use of technology in arbitration should be employed. While it is useful to have a hard copy bundle of documents for the final hearing, all submissions and evidence (including disclosure and witness evidence) should be exchanged electronically. A cultural shift is required to make this happen, but there are positive signs in practice.

Which features of international arbitration do you envisage will have experienced fundamental change in ten years' time?

In addition to changes necessary to reflect international arbitration's increasingly diverse user base, *Professor Lew QC* predicts changes to features of investment treaty arbitration: More parties from a greater diversity of legal traditions and a wider spectrum of industries will turn to international arbitration to resolve their disputes. It's vital that their needs are taken into account and international arbitration must adapt accordingly.

The current debate surrounding the legitimacy of certain features of investment treaty arbitration is likely to result in some change. The global legal and political landscape has altered dramatically since, for example, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States was concluded. Increasingly, the legitimacy of a tribunal's jurisdiction to determine the extent of a sovereign State's liability to an investor in respect of an investment is coming under scrutiny. Is it right for an investment tribunal to determine the extent of State A's liability under a bilateral investment treaty (BIT) in respect of an investment made pursuant to legislation concluded by a previous administration in light of various external factors, such as economic crisis? I expect that we will see States moving away from general consents to investment treaty arbitration in favour of more bespoke agreements so as to protect their sovereign interests.

***Nigel Rawding*, head of international arbitration at Freshfields Bruckhaus Deringer, discusses potential changes in procedural transparency and mass claims:** As I mentioned previously, international arbitration is facing challenges due to a perceived lack of transparency in the process. One way to address these challenges would be to make arbitral awards publicly available. Arbitrations would still be conducted privately; however the awards would be open to public scrutiny. They could, if necessary, be redacted/sanitised to conceal the identities of the parties and/or to protect any (genuine) trade secrets or other commercially sensitive information. Although there would still be no right of appeal, publication would instil its own discipline and would improve the quality of arbitral decision-making and reasoning. Publication may also aid diversity, as repeat appointments would be subject to greater scrutiny and hence may encourage experienced arbitrators to prioritise quality over quantity, allowing new players to gain experience and build public profiles.

I think we may also see an increase in mass claims, particularly in investor-state arbitration, following the decision in *Abaclat and others v Argentina* (ICSID Case No ARB/07/5). In this case the International Centre for Settlement of Investment Disputes (ICSID) tribunal found that the jointly filed claims of 60,000 individual investors arising out of Argentina's 2001 sovereign debt default and subsequent state actions were within the tribunal's jurisdiction and admissible. By consenting to ICSID arbitration generally under the Argentina-Italy BIT, Argentina was held to have consented to mass proceedings being brought against it

before ICSID. It is not clear whether arbitration will ever be able to fully embrace mass actions, however, similar reasoning has been applied *in Ambiente Ufficio SpA and others v Argentina* (ICSID Case No ARB/08/9, 2013) and *Giovanni Alemanni and Others v The Argentine Republic,* (ICSID Case No ARB/07/8, 2014) to justify collective claims.

Dr Debbie De Girolamo: Given the preponderance of use of the process, the development of a system of precedence could very well take hold within the field. There are challenges to such a development, not the least being the confidential nature of the process, however, movement is occurring in this area, and the trend may well take hold.

Professor Capper: Because international arbitration is the only workable solution for cross-border disputes, for which state court litigation is not suitable, it should develop as a system. For that to happen, the fundamental concept of consent is bound to evolve. Two example areas are interim measures, and consolidation and joinder. In the future, the parties should only need to give their consent at the outset, to agree to recourse to arbitration as their final dispute resolution method. After such consent is provided, the system should be able to provide all the necessary procedural tools—and the arbitral tribunal should have the corresponding powers—without there being any risk to the enforceability of the award.

Like Mr Rawding, *Professor Brekoulakis* predicts increased transparency in commercial arbitration and greater use of third party funding: I envisage changes in two areas. First, there is a trend towards restricting confidentiality which has been one of the fundamental features of international arbitration all these years. In investment arbitration there are now the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the ensuing Mauritius Convention on Transparency in Investment Arbitration. I expect that transparency will creep into commercial arbitration too in the following years.

Second, funding of arbitration claims will be increasingly shifted to third parties. Third party funding is now a reality and I expect it to be the widely prevailing form of funding in ten years' time. This is either because claimants are lacking the necessary funds to bring a claim (especially since costs in arbitration are becoming larger), or because claimants, who do have the sources to fund a claim, elect to keep their cash flow or diversify risks.

Professor Mistelis: I expect that we will see greater publication of awards by institutions in an effort to promote their services, whether by way of extract or anonymisation. Such a development would increase collective knowledge of the arbitral process and will aid the development of arbitration law and practice.

In respect of investment treaty arbitration, the production of a model BIT is anticipated with more emphasis on the use of negotiations and mediation to resolve disputes, perhaps as conditions precedent, before the parties resort to arbitration. State parties are increasingly concerned by the costs involved with investment treaty arbitration and the greater use of ADR may help ameliorate this concern.

Dr Stefan Kröll: I assume that in ten years' time the discussion about arbitration being an old boys club will be history. The pool of arbitrators is increasing and my experience is that, particularly in smaller cases, parties are willing more and more to appoint new faces to ensure speedy proceedings.

Alexis Mourre: Transparency will have established itself as an accepted feature of arbitration, not only in the field of investment protection, but also in commercial arbitration. That means that more awards will be published, institutions will be more transparent, and more information will be provided on who sits with whom. In parallel, the culture of conflicts disclosures will have considerably evolved, with more readiness on the part of arbitrators to make full declarations.

Christopher Newmark: I have a bad track record in predicting which future developments will stick and which will not (my comments on emergency arbitrators prove that point). But my best guess—and this follows on from my observations about possible challenges to international arbitration—is that a form of international commercial arbitration will develop which is more akin to the type of procedure that was commonplace (particularly in civil law jurisdictions) twenty years ago.

This form of international arbitration will be based largely on documents, with less reliance on witnesses, it will be confidential, hearings will be short and, while the proceedings will not be 'fast-track', the time and cost of the entire proceeding will be contained.

I am not suggesting that such a return to a bygone era will replace the all singing, all dancing arbitration proceedings that have become commonplace. But as large scale international arbitration proceedings continue to become ever more like court litigation, certain business users will be interested in having recourse to a more traditional arbitration procedure that retains the distinctive features that have in the past made it an attractive alternative to court litigation.

One response to this suggestion might be that the existing rules of the major arbitral institutions are already sufficiently flexible to enable parties to choose what sort of procedure they want. While this is correct in theory, it does not work in practice. Arbitration agreements rarely describe in detail how the arbitration procedure will be conducted (for good reason), and once a dispute has arisen, parties often find it hard to agree on such matters.

As I see it, the way in which this more basic form of international commercial arbitration is likely to gain some traction, is through one of the leading arbitral institutions offering it via an alternative set of arbitration rules.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

Links to biographies:

Professor Phillip Capper
www.whitecase.com/pcapper/#.VQll946sXTo

Dr Stefan Kröll
www.rechtsanwalt-kroell.de/en/

Professor Stavros Brekoulakis
www.law.qmul.ac.uk/staff/brekoulakis.html

Dr Debbie De Girolamo
www.law.qmul.ac.uk/staff/degirolamo.html

Christopher Newmark
www.sunlaw.co.uk/about-us/christopher-newmark/

Professor Julian Lew QC
www.20essexst.com/member/julian-dm-lew

Alexis Mourre
www.castaldimourre.com/en/alexis-mourre/

Nigel Rawding
www.freshfields.com/profiles/Nigel_Rawding/

Professor Loukas Mistelis
www.law.qmul.ac.uk/staff/mistelis.html

For further information, please visit lexisnexis.co.uk/QMU30/Arbitration