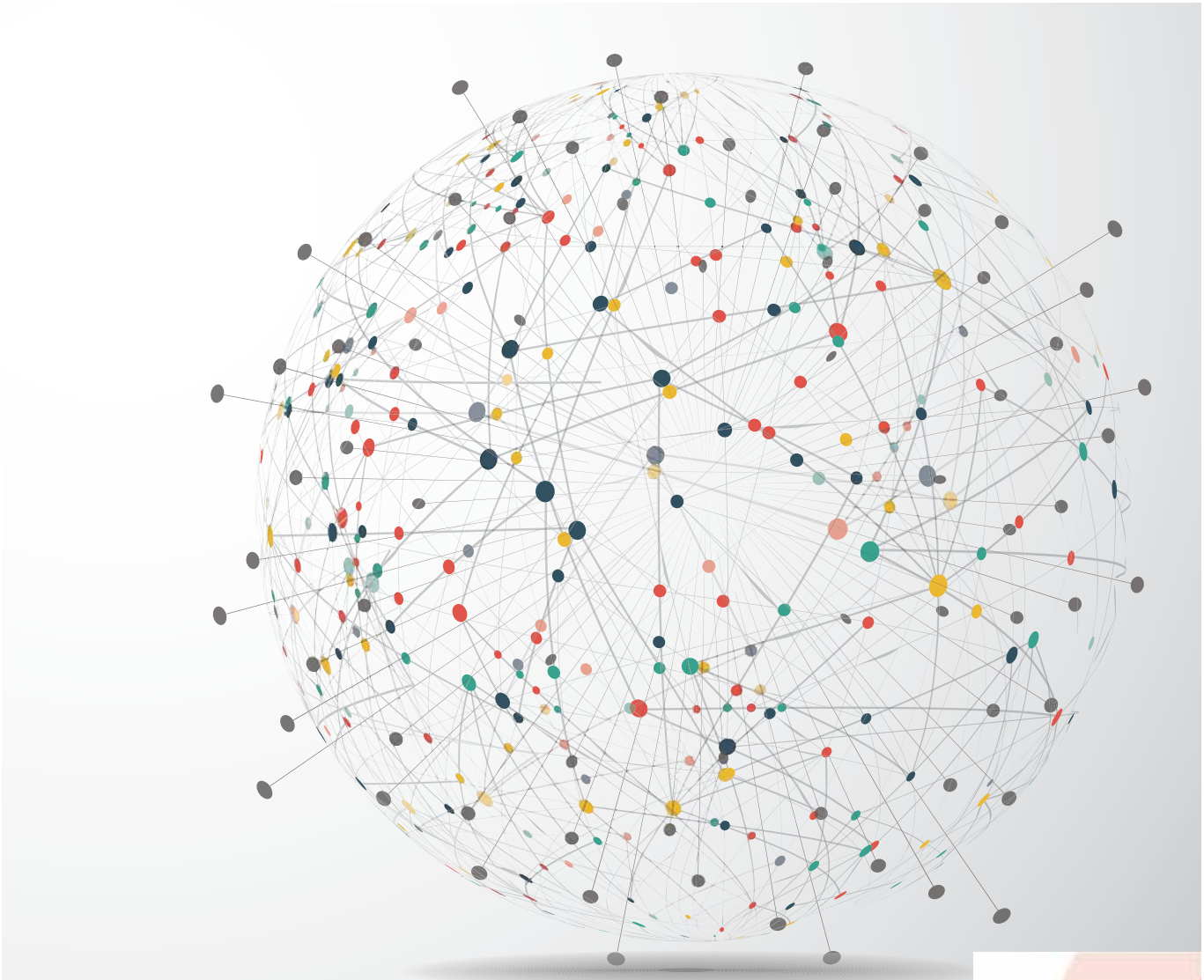
NewStatesman

Going global: trust and trade worldwide

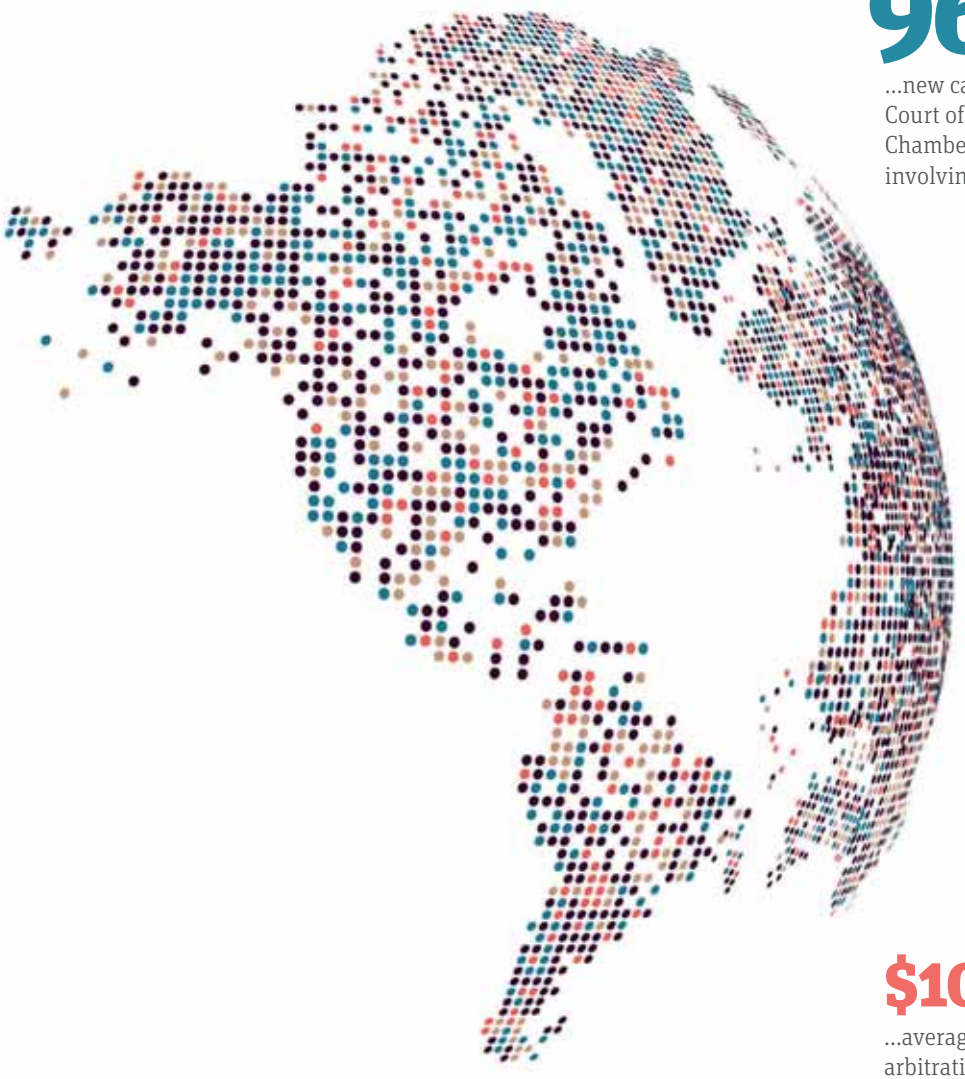
A stable framework for business in uncertain times

Nayla Comair-Obeid / Sundaresh Menon / Laurence Burger / Renaud Sorieul



BY THE NUMBERS

Arbitration and global business



966

...new cases were filed at the International Court of Arbitration of the International Chamber of Commerce (ICC) in 2016, involving 3,099 parties.

137

...different countries filed cases at the ICC.

90%

...of respondents said that international arbitration is their preferred dispute resolution mechanism in the most recent survey School of International Arbitration at Queen Mary University of London.

$1.47tn

...in Foreign Direct Investment (FDI) flowed worldwide in 2016.

$10.5m

...average value per claim in international arbitration cases in 2013.

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SHUTTERSTOCK/LIU ZISHAN

A framework of trust in an age of disruption

In interesting times, international trade must be supported by effective and efficient legal recourse, writes CIArb president Nayla Comair-Obeid

We live in an age of disruption. The world's political and social landscape is evolving, and global business needs a reliable framework for stability and progress.

International forms of alternative dispute resolution (ADR), such as international commercial arbitration, are underpinned by a network of international rules and conventions. The best-known of these is the "New York Convention", which ensures that courts in over 150 countries give effect to arbitration agreements and enforce arbitration awards, supporting markets across the globe.

Political commentators describe the present as a time of readjustment, in which a rules-based system underpinned by liberal international institutions is being undermined, at a global level, by a new wave of nationalist populism. Amid the uncertainty this trend creates, the ADR sector and a robust framework for dispute resolution for business have never been more relevant.

At the same time, the legitimacy of international arbitration is being challenged. With some arbitrators wearing multiple hats, there is an increased perception of conflicts of interest. In response, arbitral institutions and other experts in the field have worked to put together guidelines and practice standards aimed at the issues of ethics and conflicts of interest.

Populism sees liberal international business institutions as easy targets. On his first day in office, President Trump took steps to withdraw the US from TPP and his administration has confirmed the renegotiation of NAFTA as a priority. TPP retains ad hoc investment arbitration, introducing summary dismissal, provisions for submissions by *amicus curiae* and greater transparency. Withdrawing from TPP may determine the US to look into something similar to CETA. For instance, under CETA's investment provisions, investor-State disputes are subject to an arbitration system that is significantly different from the "traditional" ones, providing for a permanent and institutionalised dispute settlement tribunal, with the members of the investment court being appointed by the states party to CETA.

Transparency, too, has increasingly come to fore, following the 2015 QMUL – White & Case Survey, which recommended more transparency in institutional decision-making. In response, arbitral institutions have started publishing practice notes and this effort is likely to continue in the future.

Transparency, fairness and accountability in the arbitrator selection process are also being aided by advances in technology, specifically the development of publicly available arbitrator research tools.

Over the past few years, there has been a significant increase in the use of Third Party Funding (TPF) in arbitration. TPF is becoming more appropriate in commercial arbitration, and jurisdictions such as Hong Kong and Singapore have changed to their legislation to allow it. It is likely that more jurisdictions will follow suit to remain competitive in the arbitration market.

For the past two years, diversity in gender and ethnicity has been an emerging issue. Arbitral Women has pledged to address the gender imbalance on arbitral tribunals, with almost 1,000 signatories from 40 different countries. The pledge is likely to expand to different countries and arbitral institutions, and organisations such as the CIArb are also taking active steps to address these issues.

Finally, arbitral institutions are updating their arbitral rules to promote efficiency in arbitral proceedings. Each of them have unique features and they are not automatically applicable to every dispute. Therefore, there is an increasing interest for practice notes, conferences and seminars, which aim to address the appropriate use of emergency arbitration, expedited proceedings and summary dismissal.

Making use of the middle man

Kevin McIver, associate at Arcadis, looks at the use of Alternative Dispute Resolution(ADR) in the international construction market

The Arcadis Contract Solutions team specialise in avoidance, mitigation and resolution of complex construction and engineering disputes across the world. The team primarily provide expert witness evidence, and advice on claim preparation and defence relating to construction and engineering disputes. Gary Kitt is a practising quantum expert, highly experienced dispute resolver and head of the Arcadis Contract Solutions capability in the UK. Meanwhile, I'm an associate in the London office, and regularly provide both expert quantum evidence, and advice in relation to resolving construction disputes related to quantum.

The Contract Solutions team specialise in providing expertise in quantity surveying, delay analysis and technical expertise. Whether the dispute value is small or large, the primary benefits that the team see in adopting ADR is not just a more timely resolution, but a more economical resolution which can help maintain the relationship with the other party. A resolution which can maintain the relationship with the other party is particularly important in construction and engineering, as a considerable proportion of the disputes that were handled last year involve a Joint Venture, or were procured through a long-term contractual arrangement such as a Design, Build, Finance & Operate model.

Gary worked extensively as an expert in both domestic and international disputes last year. He said:"Our research has found that the international construction market continues to be buffeted by both unexpected events and shifts in growth and economic conditions that will impact the global construction industry's business. Fluctuating currency, commodity prices and politics can directly affect project capital expenditures and supply chain performance. These unexpected events, can have serious consequences on projects which highlights the importance of parties establishing an ADR process.

"The most popular forms of alternative dispute resolution internationally are party-to-party negotiation, and arbitration. Arbitration remains popular with contractors and developers when contracting with a client that is a state entity, and the project is based in that state. The parties have the ability to form their own dispute resolution process, with a procedure and governing law which is not necessarily connected with the contracting state entity."

I've worked predominantly in the domestic disputes in the UK over the past four years. In the UK, for the disputes that we come across, the most popular choice of ADR is adjudication. Legislation in the UK gives parties to a Construction Contract the right to adjudicate a dispute at any time. Whilst this right has been available for 20 years, companies within the industry are now well aware of their rights to adjudicate interim issues relating to disputes such as payment issues, and contract interpretation. The decision on the issue is made by the adjudicator within 28 days of the adjudication referral notice, and is binding upon the parties. In a sector where cash flow is so important, the relatively fast resolution of the dispute is the main reason why it has become so popular.

We have also seen an increase in mediation as a result of the civil justice reforms, which introduced an obligation on litigating parties to consider mediation as a way to settle their dispute. Parties are aware of the potential consequences of refusing to mediate without good reason, and are encouraged to mediate, or narrow the issues in dispute.

Building the frame: arbitration around the world

Experts in arbitration from across the globe explore local trends

A global capital

Jonathan Wood

When Shakespeare's character, Dick the Butcher, called for the death of all lawyers, arbitration was not yet an asset to the UK economy. Now, however, dispute resolution brings in £379m per annum, and much of that comes from abroad.

According to the lobbying group TheCityUK, more arbitrations take place in London than in any other city. English Courts are renowned as a forum in which litigants can be confident that their disputes will be determined on their intrinsic merits. England is one of the pre-eminent venues for the resolution of international disputes. Recent figures show that foreign litigants accounted for more than 70 per cent of cases before the English Commercial Court.

This pre-eminence is underpinned by a number of factors. English Law is seen internationally as a gold standard for businesses. English legal advice and dispute resolution services have a superb reputation, and UK judges are renowned for their intellectual ability, integrity and wealth of commercial experience. The UK has a long history of resolving disputes by arbitration relating to global trade, shipping, insurance, finance, energy and construction, and UK judgments and arbitral awards are reliably enforceable.

To maintain this pre-eminence, the courts handling business disputes have been rebranded the Business and Property Courts, with a view to streamlining their services nationwide. Other developments include the establishment of the Financial List, designed to hear complex financial cases add. The Lord Chief Justice, with the support of the Chartered Institute of Arbitrators, has set up an ad-hoc body, bringing together perhaps for the first time the major arbitral institutions based in London and the judiciary, to work together in promoting England as a centre for international dispute resolution to the business community worldwide.

Economic interests may well dampen Dick the Butcher's enthusiasm.

Jonathan Wood is head of international arbitration at Reynolds Porter Chamberlain and chair of the board of trustees at CIArb

Emerging trends

Sundaresh Menon

At least two trends have altered our traditional notions of dispute resolution. First, the increasingly transnational nature of disputes and, second, the rise of alternative dispute resolution (ADR). It is in this context that global ADR has come to the fore. Today, dispute resolution extends well beyond national courts. A selection of examples from the Singapore experience illustrates this.

First, international arbitration is now a critical feature of Singapore's dispute resolution landscape. It has been almost 60 years since the New York Convention came into being. Because of the cross-border currency that it affords arbitral awards, the Convention has been highly influential in establishing arbitration as the presumptive choice when it comes to the resolution of transnational disputes.

Mediation has also been gaining traction. Like arbitration, mediation offers neutrality and flexibility, but it also allows for the consideration of extra-legal issues as the disputants' desire for a solution with which they are mutually happy. It can reduce acrimony and save costs, and its growing importance and popularity are encouraging and to be encouraged.

Third, the last few years have also seen various innovative developments in the broader context of global ADR. One example of this is the Singapore International Commercial Court, which was launched in January 2015 to provide a court-based mechanism for the resolution of transnational commercial disputes. Another is the recent inaugural meeting of the Standing International Forum of Commercial Courts in May 2017, hosted by the Commercial Court in London. This involved a coming together of more than 25 courts from around the world, to develop cross-court collaboration and share information. These promising developments herald exciting times ahead for transnational dispute resolution.

Sundaresh Menon is the chief justice of Singapore

Change and challenges

Lucy Greenwood

North America is a key region for both international commercial arbitration and investor-state arbitration. International commercial arbitration remains ↵

prevalent in North America, with the ICDR (the international arm of the American Arbitration Association) having one of the largest annual caseloads of the international arbitration institutions. Arbitration in North America does suffer from criticism in relation to the costs of arbitrating in the region. This is due to US litigation procedures such as extensive document production and occasionally even depositions being imported into the international arbitration process. There is also a perception that there is a limited pool of experienced international arbitrators in North America, although initiatives like the creation of the Energy Arbitrators List by the ICDR are changing this perception. One major global trend is the increased use of emergency arbitrator proceedings. It is notable that the ICDR was the first arbitration institution to include emergency arbitration procedures back in 2006 and it has seen a steady increase in the use of these proceedings ever since. The US and Canadian courts have also been supportive of emergency relief regarding arbitration proceedings in their treatment of challenges to such relief. Key arbitration venues in North America include New York, Washington DC, Miami, Chicago and Houston in the US and Toronto, Vancouver, Calgary and Montreal and Ottawa in Canada. Atlanta, Georgia has made significant progress in promoting itself as an arbitration-friendly venue.

The change in the administration has affected investor-state arbitration, with the US withdrawing from the Trans Pacific Partnership Agreement in January 2017 and continuing questions over whether the investor-state dispute settlement provisions in NAFTA will survive. President Trump has now indicated that he will not, contrary to previous indications, withdraw entirely from NAFTA but will seek to renegotiate it. He has given no detail as to the form the renegotiations will take.

Lucy Greenwood is dual qualified in English and Texas law and has practised in Houston since 2008. She is chair of the North America branch of the CIArb

Moving forward

Ijeoma Ononogbu

Africa is the world's fastest growing region for foreign direct investment. As such international trade is on an upward level. On the 16th June 2017, African and Chinese law firms signed a Memorandum of Understanding which aims to boost Chinese trade in Africa. The essence of the relationship is to enable a smooth relationship and worthwhile experience in Africa. A notable challenge for businesses in the African region is the difficulties they find themselves whenever they are in legal disputes with African governments or companies.

In 20 years, international arbitration has skyrocketed on the continent, with an increase in trade compared to global average. Consequently, there has been the emergence of some arbitral centres , such as Nigeria, Rwanda, Cairo, Egypt, Mauritius. Nigeria is the most populous country in Africa; invariably she has the highest number of legal practitioners. Nigerian cases that went to arbitration include Nigerian National Petroleum Corporation (NNPC) and the IPOC Nigeria Limited. In IPOC v NNPC, the dispute arose from a contract for design and construction of a petroleum export terminal between IPCO (respondent) and NNPC (appellant). The contract was subject to Nigerian law and arbitration in Nigeria. However, an appeal was made to the final award which was allowed by the court. Given the thriving of arbitration, governments too are glad to participate. In the case of the Enron Nigeria Power Holding v Federal Republic of Nigeria, Enron Unit requested for $18.7M for Final Nigeria Arbitral Win. In both landmark arbitrations, commercial disputants were noted as better off arbitrating their disputes than litigating same. The legal policy framework for international trade of many African countries has become similar to that of most other emerging economies. Due to the opportunities in international trade, Africa has as a whole is working on the importance of improving its investment climate. Consequently, many African countries have established investment promotion agencies to highlight the benefits of international trade, as well as, to facilitate investment.

Ijeoma Ononogbu is an international dispute resolution solicitor trained in dual common law jurisdictions and a delagate of CIArb at the United Nations Commission on International Trade Law

Improving, bit by BIT

Laurence Burger

The 20th century saw the big break for international commercial arbitration in Europe, with the creation of the London Court of Arbitration (LCIA) in 1903, of the ICC Court of Arbitration in 1923, and of the signature of the New York Convention in 1958. Since then, this mode of dispute resolution has become prevalent in the resolution of commercial disputes because the Convention provides for great security and flexibility to facilitate the enforcement of arbitral awards by foreign courts.

While international commercial arbitration remains a favoured means of dispute resolution in Europe, investment arbitration has been the object of much criticism of late, especially in Europe. Investment arbitration is a treaty-based form of arbitration that allows investors to bring claims against states for damages to their investments in that state.

The Lisbon Convention, which entered into force in 2009, has granted ample centralization powers to the Commission for investment protection. In its wake, many questions arose, which lead to two different systems depending on whether the Bilateral Investment Treaties entered into by Members States were with countries outside of the EU (so-called "Extra-EU BITs") or within the EU (so-called "Intra-EU BITs"). The first set was left untouched for the moment, while the Commission considered that Intra-EU BITs lead to an unacceptable difference in treatment and thus had to

be eliminated or left unapplied.

To date many of the Intra-EU BITs are still in place, with only Italy and Ireland relying solely on EU rules. This leads to legal uncertainties which have a damaging effect on trade and business in Europe.

Laurence Burger is a partner at Landolt & Koch in Geneva. She is chair of the European branch of the CIArb

The future is virtual

Rashda Rana

The rapid advances in communications technology, transport and trade that have fuelled globalisation cross sovereign state boundaries, and give rise to disputes with an international character. This has resulted in a growing recognition in the business community that international dispute resolution processes provide a flexible and effective alternative to costly and time-consuming litigation.

Australia has traditionally been an early adopter of ideas and an innovator of processes. It was one of the first jurisdictions outside the USDA to adopt and successfully deploy mediation in the quest for more effective means of resolving disputes. It has also been one of the most successful in the use of dispute boards, having enjoyed to date a 100 per cent success rate.

Following its reputation for innovation, the state of Western Australia has created a virtual international arbitration centre, the Perth Centre for Energy and Resources Arbitration (PCERA). This co-ordinates and facilitates dispute resolution in the energy and resources sectors and related industries through arbitration and innovative forms of alternative dispute resolution. It draws on the expertise and knowledge base of those engaged in the energy and resources sectors who understand the complex and technical issues in such disputes. The resolution of those issues benefits from industry expertise and a knowledge of industry practices. It can handle project infrastructure, commodity & shipping, joint venture and gas pricing disputes. Its arbitration rules and principles have been streamlined to produce efficient fast-track outcomes. It has also developed an innovative new model for collaborative expert determination in energy and resources disputes.

PCERA is leading the way since the virtual dispute resolution centre is likely to be the way of the future.

Rashda Rana is a barrister and international arbitrator in Sydney, London and Singapore, and the president of Arbitral Women

THE VIEW FROM THE UN

A global mandate

Renaud Sorieul

Divergence in national laws can make it difficult for businesses to trade across borders, due to potential uncertainty in how laws may be interpreted and applied by national courts in the event of a dispute. International frameworks for commercial dispute resolution can offer alternative mechanisms in these situations through the promotion of harmonized international commercial standards, which can reduce uncertainty, simplify procedures, lower costs, facilitate co-operation and enhance transparency. As law is modernised, the harmonized standards become better able to embrace new concepts, practices and technology, and extend their use to fields of law or geographical areas in which they were not previously used.

For the past 50 years, UNCITRAL has been actively formulating international legal standards in commercial law that reduce legal barriers to international trade. Its universal, inter-governmental process enables UNCITRAL to take advantage of innovation at national and regional levels, and factor it into the standards it formulates as global norms. The practical adoption of UNCITRAL texts across a range of different topics is constantly expanding, establishing new global norms that form the basis of law reform in many countries and regions. UNCITRAL's broad mandate to promote the harmonization and modernization of international trade law ensures its continued focus on developing a sound and stable international legal framework for trade. New work on the cross-border enforceability of international settlement agreements reached through conciliation, possible reform of investor-state dispute settlement, and in other areas, will add to the existing texts and contribute to the stability and predictability of the legal frameworks for international trade.

Renaud Sorieul is Secretary of UNCITRAL and director of the UN's International Trade Law Division

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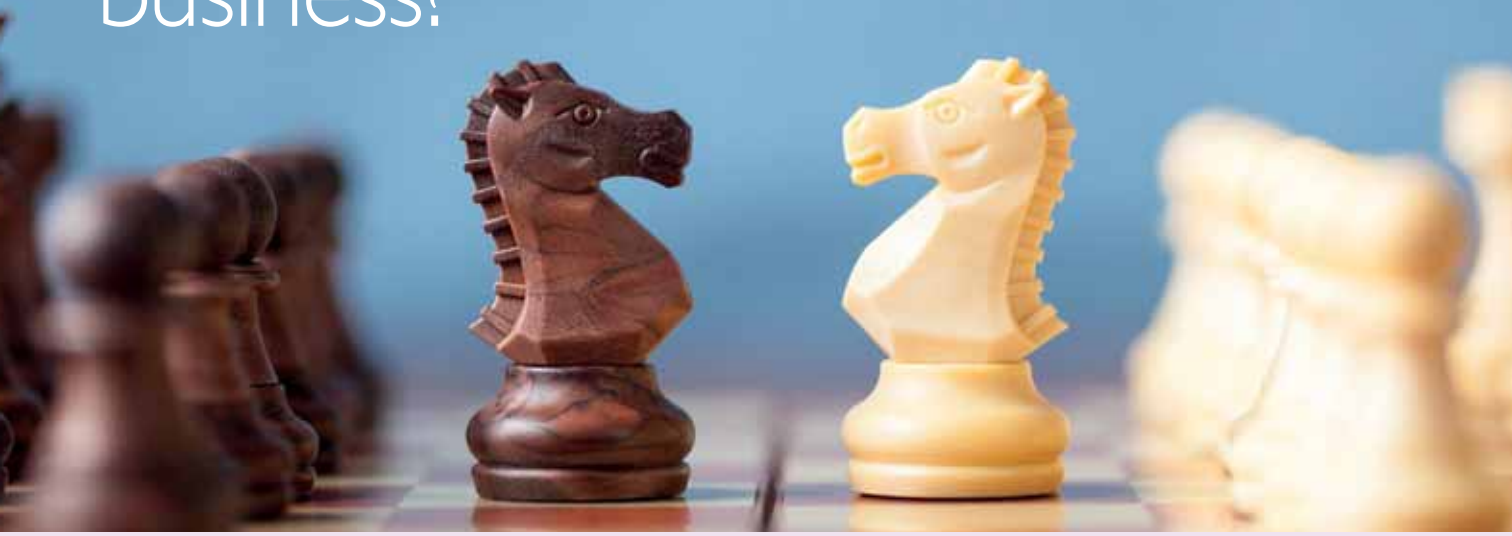

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