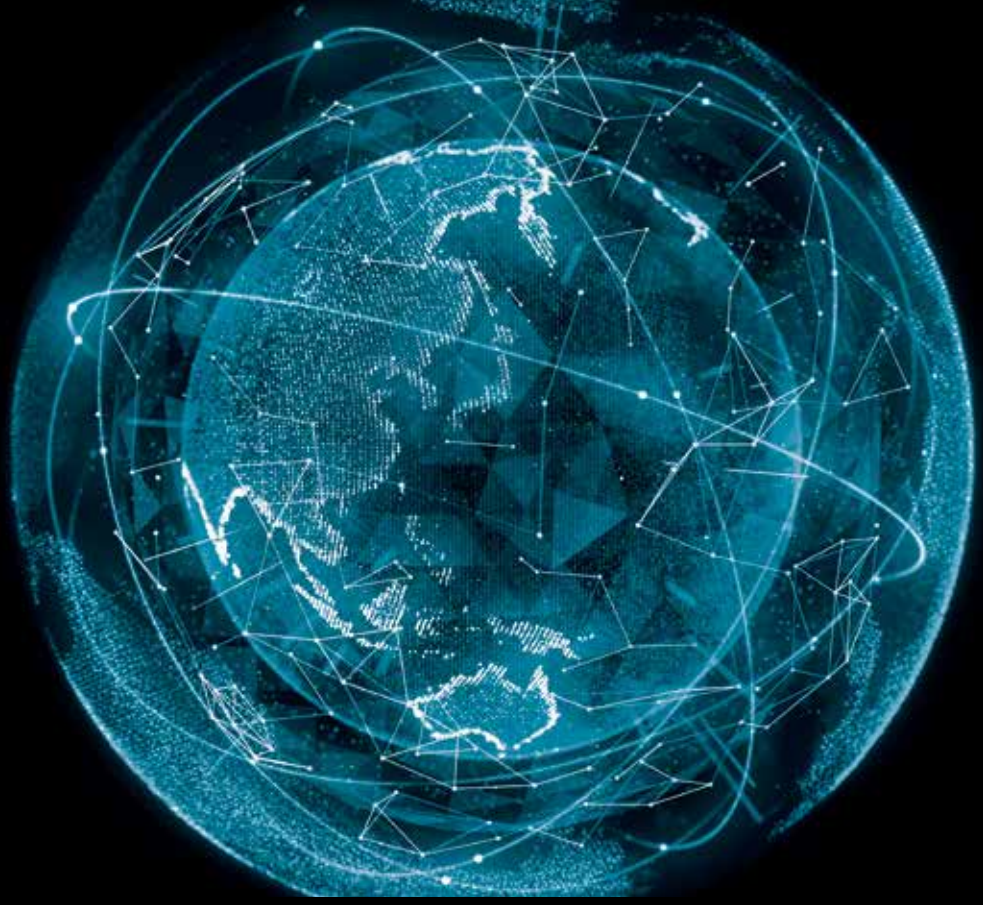

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Welcome to *The Asia-Pacific Arbitration Review 2022*, *a Global Arbitration Review* special report. For the uninitiated, *Global Arbitration Review* is the online home for international arbitration specialists the world over, telling them all they need to know about everything that matters.

Throughout the year, we deliver our readers pitch-perfect daily news, surveys and features; lively events (under our GAR Live and GAR Connect banners (GAR Connect for virtual)); and innovative tools and know-how products.

In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments in each region than the exigencies of journalism allow. *The Asia-Pacific Arbitration Review*, which you are reading, is part of that series.

It contains insight and thought leadership inspired by recent events, from 35 pre-eminent practitioners. Across 14 chapters and 92 pages, they provide us with an invaluable retrospective on the past year. All contributors are vetted for their standing and knowledge before being invited to take part.

The contributors' chapters capture and interpret the most substantial recent international arbitration events across the Asia-Pacific region, with footnotes and relevant statistics. Elsewhere they provide valuable background on arbitral infrastructure in different locales to help readers get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Australia, Hong Kong, India, Malaysia, Singapore, Sri Lanka and Vietnam and has overviews on construction and infrastructure disputes in the region (including the effect of covid-19), the state of ISDS and what to expect there, and trends in commercial arbitration, as well as contributions by four of the more dynamic local arbitral providers.

Among the nuggets this reader learned is that:

- force majeure is not necessarily the only option for project participants affected by covid-19, especially if the FIDIC suite is in the picture;
- Korea's diaspora is known as its *Hansang* and more 'international' arbitrators are now accepting KCAB appointments (the number of KCAB 'first-timers' is up by 23 per cent);
- it has become far easier for foreign counsel and arbitrators to conduct cases in Thailand;
- there have been some strongly pro-arbitration decisions from the Philippines and Vietnam of late;
- Sri Lanka's courts also seem to have turned a corner on avoiding excessive interference; and
- improvements in the arbitral environment in Vietnam are part of a concerted effort that began in 2015.

I also found answers to some other questions that had been on my mind, such as whether an increase in case numbers in the SIAC in 2020 was matched by an increase in the total value at stake there (spoiler alert: no), and a number of components I plan to consult when the need arises – including a summary of key decisions in Singapore; a long explainer on the background to the Amazon-Future dispute in India; and a fabulous chart deconstructing the arbitral furniture in Uzbekistan.

I hope you enjoy the volume and get as much from it as I did. If you have any suggestions for future editions, or want to take part in this annual project, my colleagues and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher
May 2021

Disputes in Asia-Pacific construction and infrastructure projects

Craig Shepherd, Daniel Waldek and Mitchell Dearness
Herbert Smith Freehills

In summary

In this article we discuss two major developments that we think will be significant drivers of Asia-Pacific construction disputes over the next decade. First, and perhaps inevitably, we address covid-19, which has disrupted (and will continue to disrupt) a very substantial number of emerging market projects. Second, we discuss the energy transition that will continue to provide the impetus for the development of green infrastructure in the region. Most of these disputes will not crystallise until after the projects are complete; however, in this article we explain that astute contractors and project owners can take some steps – unique to these types of disputes – at an early stage to mitigate risk and ensure that the best outcome possible is obtained in any future settlement or arbitration.

Discussion points

- Covid-19 has had a material impact on many construction projects in the Asia-Pacific and this will lead to a rise in disputes, as project owners and contractors attempt to allocate the resulting cost implications.
- Contractors and project owners should take steps to position themselves to achieve the best outcome in any future covid-19-related dispute, including by ensuring that the contemporaneous project record will support the position taken in any future arbitration.
- Often contractors focus on force majeure as the only avenue for obtaining relief; however, often other (and sometimes more appropriate) avenues exist under the contract or general law.
- The energy transition and Asia-Pacific countries' commitments under the Paris Agreement will provide the impetus for the development of green infrastructure in the region.
- Too often parties fail to appreciate that renewable energy projects are heavily political and give rise to specific sovereign-related risks, which must be carefully managed from the outset.

Referenced in this article

- ASEAN Comprehensive Recovery Framework
- Thai Civil and Commercial Code
- 2017 FIDIC suite contracts
- ASEAN Plan of Action for Energy Cooperation
- FIDIC COVID-19 Guidance Memorandum
- China Construction Industry Association
- China Energy Investment Corporation

The last edition of this article was published just as the covid-19 outbreak began to take hold. At that time we commented, 'the long-term implications of the covid-19 pandemic are unclear'. One year later, it is still impossible to quantify the precise long-term impact of the pandemic. However, insofar as international construction projects are concerned, we can safely say that it will be material. This is borne out by early analysis of the World Bank, which estimates that 256 developing country projects have been disrupted or cancelled due to the pandemic,[1] and we have seen (and will continue to see) project stakeholders battle over the resulting cost implications.

While covid-19 has disrupted projects, other factors will continue to drive long-term infrastructure development in the Asia-Pacific region, such as Vietnam's plans to develop transportation projects in excess of US$6 billion. This year we have also seen some major Asian economies affirm and increase their commitment to the energy transition. For example, Vietnam has published plans to significantly expand LNG and solar capacity, India has committed to ensuring that 40 per cent of its electricity capacity comes from non-fossil fuel sources by 2030 and President Xi has declared that China is to be carbon neutral by 2060. Meeting these targets will necessarily involve continued significant investment into renewables projects, and the covid-19 recovery stimulus packages being rolled out by governments should present an opportunity for investment into that sector. Insofar as the Asia-Pacific nations forming part of the Association of Southeast Asian Nations (ASEAN) are concerned, this has been confirmed by the Comprehensive Recovery Framework, which highlights the need to channel covid-19 stimulus towards the building of green infrastructure.[2] We believe that the disruption to the pipeline of renewable projects caused by covid-19 is likely to be short-term, and it must be so if Asia-Pacific nations are to meet their commitments under the Paris Agreement.

As at May 2021, it is clear that the covid-19 pandemic and energy transition will feature heavily in project disputes for years to come. We consider the legal issues that may arise in these disputes.

Covid-19

Since February 2020 we have been advising on many different construction-related issues caused by covid-19. Projects have been directly affected by travel restrictions, impeded supply chains, quarantine rules, border closures, changes in law – the list goes on. Below we consider when force majeure might be available to provide relief from liability and how claims for force majeure should be framed. We also consider other, often overlooked, sources of law that may, depending on the context, provide a more appropriate avenue to relief.

Force majeure – governing law

When faced with an inability to perform due to covid-19, force majeure is often turned to as the first line of defence. Many

contracts will contain a force majeure clause, but it is important to bear in mind that force majeure may, depending on the applicable laws, be available even when there is no express provision in the contract. This is because force majeure (or a concept similar to it) may arise under general law. The availability of force majeure must therefore be considered by reference to both the contract and the governing law.

In most common law systems, such as Australia and Singapore, force majeure is purely contractual, which means that a force majeure clause must exist within the relevant contract otherwise force majeure is not available at all. If there is a clause in the contract, whether or not it will apply in any specific circumstances will largely depend on how the clause has been drafted, namely does the event or circumstance fall within the scope of the clause?

In other legal systems, force majeure arises from statute and statutory rights may supersede or supplement any force majeure clause found in a contract. For example, article 8 of the Thai Civil and Commercial Code provides that force majeure arises when 'any event the happening or pernicious results of which could not be prevented even though a person against whom it happened or threatened to happen were to take such appropriate care as might be expected'.

Parties also need to be aware that there may be other legal avenues arising under statute or general law that provide some relief. For example, under Chinese law parties should also consider whether the 'change of circumstances' doctrine can be relied upon in addition to force majeure. Parties would be doing themselves a disservice by focusing only on force majeure.

Force majeure – FIDIC forms[3]

In common law systems, the onus is on the party seeking to rely on a force majeure clause to prove it applies. This generally involves establishing the circumstances that have occurred are within the scope of the force majeure clause and are outside either party's control.

In some cases this is straightforward, as the clause will expressly state that a pandemic constitutes a relevant circumstance or event of force majeure. However, more frequently, the contract will not specifically list a pandemic as an event of force majeure. Importantly, in the construction context, no such express reference is made in the FIDIC forms. This does not, however, mean that force majeure cannot be claimed; like in many contracts, the list of possible force majeure events provided in the FIDIC forms is not exhaustive. Force majeure is generally available if, pursuant to subclause 18.1 ('Exceptional Events'), the event or circumstance is '[an] event or circumstance which: (a) is beyond a Party's control; (b) the Party could not reasonably have provided against before entering into the Contract; (c) having arisen, such Party could not reasonably have avoided or overcome; and (d) is not substantially attributable to the other Party.' The term 'exceptional event' used in the FIDIC forms is, in essence, a reference to a force majeure event.

In this context, establishing the first two limbs of the test is typically more straightforward than establishing the third limb. For example, a decision by a local government to introduce social distancing requirements owing to the pandemic is generally beyond the parties' control and could not have reasonably have been provided against before entering into the contract.

However, as envisaged by the FIDIC COVID-19 Guidance Memorandum to Users of FIDIC Standard Forms of Works Contract, the 'most problematic part of the test appears to be whether a Party could not reasonably have avoided or overcome the event'.[4] At a superficial level it may seem reasonable to argue that the pandemic could not have been 'avoided or overcome', however the devil is in the detail and contractors should expect project owners to vigorously contest any assertion that performance (or at least some performance) was not possible. For parties entering into contracts after the start of the pandemic, the situation is less straightforward as arguably a 'second wave' was foreseeable at the time of entering into the contract. Parties in this position should consider including prescriptive drafting within the clause that makes it clear that future waves of covid-19 or even other pandemics (including involving variant strains) will be force majeure events.

Project owners will look to hold contractors to account, particularly to ensure that decisions concerning the cessation of work are not being driven by purely financial motives – an increase in costs is not in itself a basis for claiming force majeure. Taking the example in the preceding paragraph – could the contractor have performed some obligations while complying with the social distancing requirements? This is less straightforward and is likely to turn on the specific facts.

If possible, non-performance should be justified not just by reference to the existence of the pandemic but also by reference to the specific event (which may have arisen because of the pandemic) that has rendered it impossible to perform. For example, the China Construction Industry Association has published a survey noting that a labour shortage was the key cause of disruption for China-related projects,[5] and we expect the same issue to have affected projects in other jurisdictions, such as Malaysia, where legislation affecting the mobility of workforces has also been passed. If this is being relied upon when framing the force majeure claim, emphasis should be placed on the specific changes to the law that impeded free movement and ultimately caused the labour shortage.

At the outset, contractors should endeavour to seek agreement with project owners (and other stakeholders) on the types of work that can and cannot be completed. In this regard, it is likely that project owners will be inclined to take a more reasonable position at the time the work is being carried out, given that they too have a direct interest in mitigating project risk and ensuring the health and safety of those involved in the project. Project owners are also more likely to take a different approach when those risks do not exist after mechanical completion and the crystallisation of other claims.

The contemporaneous project record will be critical in any future dispute and correspondence needs to be written with this in mind. From the contractor's perspective, the project record should show, at a minimum, that (i) reasonable steps have been taken to mitigate the pandemic's impact on the project, (ii) the contractor was justified in not undertaking certain work and (iii) work was progressed when it was possible to do so. This is particularly important when the standard FIDIC form contract applies, given that subclause 18.3 ('Duty to Minimise Delay') provides, inter alia, that 'Each Party shall at all times use all reasonable endeavours to minimise any delay in the performance of the Contract as a result of an Exceptional Event.'

Parties intending to claim force majeure must also ensure that they comply with the procedural requirements under the relevant contract. For example, subclause 18.2 ('Notice of an Exceptional Event') of the FIDIC form provides that the party claiming force majeure must provide notice 'within 14 days after the affected Party became aware, or should have become aware, of the Exceptional Event'. This party must, pursuant to subclause 18.3, also give 'notice to the other Party when the affected Party ceases to be affected by the Exceptional Event'.

Finally, it is also important to consider whether the event or circumstance could be covered by more than one clause. For example, as we explain below, contractors may also be able to rely on changes in law to seek relief under subclause 13.6 ('Adjustments for Changes in Laws'). Owing to rules against double recovery, it would not possible to recover the same cost or loss under separate clauses, but the existence of multiple ways to make a recovery can be important as the threshold requirements for claims can vary. In this scenario, the best course would be to submit a notice of claim that refers to each possible clause in the alternative, setting out the legal basis and facts being relied upon for each specific claim made. It is, however, important to bear in mind that different notification requirements can apply depending on the provisions being relied upon.

Relief for changes in law

Relief for changes in law made due to covid-19 might be found under subclause 13.6 of the FIDIC forms ('Adjustments for Changes in Laws') in addition to the force majeure provisions. Subclause 13.6 enables contractors to claim an extension of time or for additional costs incurred by way of adjustment to the contract price, or both.

Many Asian jurisdictions have introduced laws in response to covid-19 that have directly affected construction projects. For example, almost all construction work was expressly prohibited as part of the most severe lockdowns in Malaysia and Singapore. While these are likely to qualify as changes in law for subclause 13.6 of the FIDIC forms, this in itself will not suffice. Parties must be able to clearly attribute the inability to perform to the specific change in law. For example, if legislation was passed that provided a limit on the number of workers allowed on site, contractors would need to consider carefully what impact this would have on the project and how it could be mitigated through the effective deployment of this workforce. It is unlikely that a contractor would be able to rely on this change in law to justify a complete cessation of the work.

There may be multiple changes in law that are relied upon and notification must be provided for each as required by subclause 13.6. A general notification made at the outset is unlikely to cover subsequent changes in law.

Other FIDIC-based relief

Pursuant to subclause 8.5(d) of the Red and Yellow Book standard FIDIC forms ('Extension of Time for Completion'), an extension of time can be obtained if taking over is delayed by 'Unforeseeable shortages in the availability of personnel or Goods (or Employer-Supplied Materials, if any) caused by epidemic or governmental actions'. Under the Silver Book, subclause 8.5(c) applies with regard to 'Unforeseeable shortages in the availability of Employer-Supplied Materials'. Unlike claims under subclause 13.6 ('Adjustments for Changes in Laws'), this clause only permits an extension of time and cannot be used to recover costs. Contractors should therefore consider whether it would be appropriate to make this claim in the alternative to force majeure under subclause 18 or for a change in law under subclause 13.6.

Subclause 8.6 ('Delays Caused by Authorities') of the FIDIC forms can provide relief when delays are caused by authorities in the project country. Under this provision, an extension of time can be obtained when: '(a) the Contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities or private utility entities in the Country; (b) these authorities delay or disrupt the Contractor's work; and (c) the delay or disruption was Unforeseeable'. This might be applicable if, for example, local authorities began to arbitrarily revoke work passes.

Renewable project disputes

Through the ASEAN Plan of Action for Energy Cooperation, ASEAN governments have committed to achieving 35 per cent installed renewable power capacity by 2025.[6] This would require the addition of approximately 35GW to 40GW of capacity, which will be achieved through the development of new renewable energy projects.[7] Specific types of risks arise in the context of large energy project disputes due to heavy state involvement and public interest. As we explain below, these risks must be managed from the outset.

State participation in renewables projects

States participate in renewable energy projects in different ways. Many renewable projects are entirely state-owned either directly or, more commonly, through a state-owned enterprise (SOE). The China Energy Investment Corporation is an example of such an SOE – it is the world's largest electricity company by installed capacity. Contractors need to be mindful of the fact that states or SOEs can exercise indirect power and influence in the state and may do so to strategically apply pressure in the context of any dispute. On the other hand, this can also be advantageous. For example, construction on some state-backed renewable projects continued during lockdowns in some jurisdictions in the past year.

States also participate in renewable projects as offtakers or purchasers of electricity. The price paid for electricity is typically agreed through a feed-in-tariff (FIT) and a power purchase agreement (PPA). FITs incentivise investment into renewables projects by providing competitive pricing for renewable energy and price certainty over a long period of time. The purchasing price under the FIT is typically reflected in the PPA, which is a direct agreement between the project owner and the state. FITs and PPAs impact the economics of any renewables project. State abandonment of commitments made under FITs and PPAs is the crux of many investment disputes. It is – unfortunately for investors – not uncommon for states to seek to renegotiate pricing as projects mature and the agreed price under the FIT no longer reflects the price obtained for electricity through newer projects.

Managing sovereign risk

The risks associated with projects involving states can be material but they can be managed if appropriately considered from the outset. We discussed in detail the types of risk mitigation strategies available to investors dealing with states in the last edition of this article. To recap, the key options available to investors are:

- Waiver of sovereign immunity clauses: states may claim sovereign immunity, which means that that they are immune from suit and any judgment being enforced against them. Sovereign immunity is a complex concept and it is important to bear in mind that entities (not just states) could also make such a claim if they are in is some way connected to the state. Obtaining a sovereign immunity waiver clause is never a bad idea even when the risk of the counterparty claiming sovereign immunity seems low. It is also important to consider whether the waiver is likely to be effective according to the state's local law.
- Stabilisation provisions: government change can provide the impetus for the introduction of new laws and policies. Given renewable energy is highly political and affected by government policy, renewable projects are extremely susceptible to

change in law risk. To mitigate these risks, parties should ensure that stabilisation provisions are included in their contracts.

- Neutral dispute resolution process: parties should avoid litigating disputes in the local courts of the state. An agreement to arbitrate disputes in a neutral venue should always be the preferred dispute resolution process. A neutral governing law should also be adopted – English law and Singaporean law are good choices, and are widely selected for project documents across the globe.
- Structuring to take advantage of investment treaties: investment treaties can provide additional protection for investors contracting with states. Investors should always consider whether investment-treaty protection is available. If not, investors should consider, before the agreements are signed, whether they can structure the investment in such a way so that this protection is obtained.

Conclusion

The development of new projects will be driven by growing renewable energy and public infrastructure needs in emerging economies. Expansion in the project pipeline will also inevitably lead to construction disputes. Covid-19 is (and will continue to be) a catalyst for construction disputes for many years to come, particularly as the true and longer-term impacts manifest. In short, the scene is ripe for construction disputes.

Notes

1 World Bank (24 November 2020), 'What can AI tell us about COVID-19's Impact on Infrastructure?'.
2 Association of Southeast Asian Nations (ASEAN) (18 December 2020), 'ASEAN Comprehensive Recovery Framework'.
3 In this article, reference is made to the 2017 FIDIC suite contracts unless otherwise stated.
4 FIDIC (April 2020), 'COVID-19 Guidance Memorandum for Users of FIDIC'.
5 China Construction Industry Association (15 April 2020), 'Investigation Report on COVID-19 Impact on the Chinese Construction Industry'.
6 ASEAN Centre for Energy (23 November 2020), 'ASEAN Plan of Action and Energy Cooperation Phase II: 2021–2025'.
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Craig Shepherd has helped clients resolve some of the most high-profile disputes in Asia and the Middle East. He has more than 29 years of experience in arbitration and litigation in the infrastructure sector, with 25 of those years spent in the firm's international offices solving clients' problems in challenging jurisdictions. As a highly experienced contentious construction and infrastructure specialist, Mr Shepherd is sought after by clients for his insights on the latest trends and techniques emerging across markets and industries, as well as his ability to apply these to create a robust dispute resolution strategy. He can quickly activate the right resources for clients, helping them to manage even the most complex construction disputes regardless of location or industry.

Mr Shepherd regularly assists clients to resolve disputes over energy and water projects, rail, oil and gas infrastructure and disputes under engineering, procurement and construction contracts, offtake agreements, and concessions for all types of built assets. His clients include the private developers, employers and the main contractors of multiple power and water plants, transportation projects, desalination and steam plants, and the private and public sector developers of some of the world's highest-profile building projects.

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Dan Waldek is an international arbitration lawyer specialising in construction, energy and infrastructure disputes. He has acted as counsel in arbitrations relating to onshore and offshore oil and gas projects, pipelines, major petrochemical developments, as well as road, rail, water, airport and urban development projects. Mr Waldek has advised on complex claims under production-sharing contracts, offtake and feedstock agreements, concession agreements, and a large range of construction contracts (both bespoke and standard form) covering design and build, turnkey, engineering, procurement, construction, installation and commissioning arrangements and engineering, procurement and construction management arrangements.

Mr Waldek regularly appears as counsel in complex arbitrations under a range of institutional rules, including the International Chamber of Commerce, the London Court of International Arbitration and the Singapore International Arbitration Centre (SIAC), as well as in ad hoc arbitrations, including as an advocate for both interim applications and substantive merits hearings. He has also been appointed as arbitrator by institutions such as the SIAC.

Mr Waldek's practice also involves a significant advisory component, in particular working closely with transactional teams on risk avoidance and mitigation strategies. He is sought after by clients for his experience on projects around the Asia-Pacific region and his emphasis on his clients' needs for realistic, down-to-earth advice in a commercial context.

Mitchell Dearness
Herbert Smith Freehills

Focusing on helping clients resolve complex cross-border commercial disputes in the infrastructure, energy and mining sectors, Mr Dearness has a broad range of experience acting for clients in arbitration proceedings conducted under all major institutional rules, as well as in pure ad hoc and investment treaty cases. He has advised on disputes involving the laws of many different Asian jurisdictions, including Singapore, the Philippines, mainland China, Hong Kong, South Korea, Nepal, Brunei and Myanmar, among others.

Mr Dearness' practice also involves a significant advisory component. He works closely with colleagues in front-end transactional teams on dispute avoidance and risk mitigation strategies. His experience includes advising commercial entities, state-owned enterprises and states on dispute avoidance, investment structuring and sovereign immunity issues, among other dispute-related aspects of transactional work.

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