

THE YEAR AHEAD

Developments in Global Litigation
and Arbitration in 2021

With analysis from:

**The
Economist**

**INTELLIGENCE
UNIT**

Introduction

Welcome to the fourth annual edition of The Year Ahead. When we wrote last year's guide, we did not foresee a global pandemic and the worst economic crisis since the Great Depression. We live in difficult times, and now more than ever, the future is uncertain.

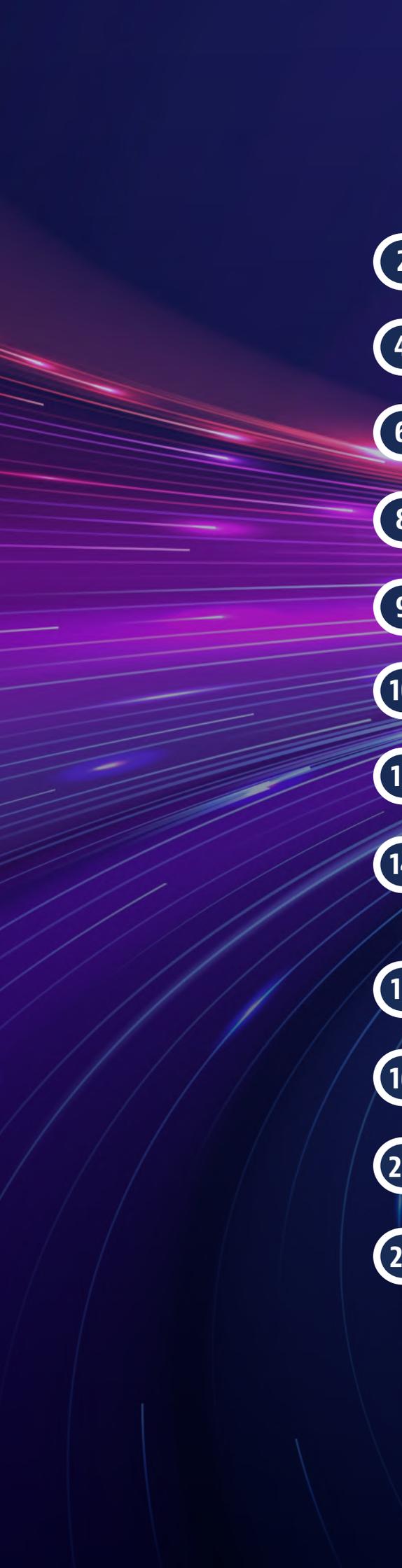
But still we should look ahead. The most common request from our clients around the world is to help them to see what lies ahead, to plan for the future. Already we can look to court data and see the types of cases are emerging from Covid. We can also gain insights from past disputes that flowed from SARS and the Global Financial Crisis.

And of course, the big issues have not gone away. The pre-Covid hot topics - such as data breaches and sustainability - will be the ones we talk about once the crisis has passed. They will continue to drive litigation and arbitration around the world.

In this guide we draw together these themes to set out our predictions for the world of disputes in 2021. We hope you find it useful.



Claudia Benavides
Global Chair, Dispute Resolution



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Global Economic and Political Trends

As we reach the end of an extraordinarily tough year, it is high time to put 2020 in the rear view mirror and focus on the road ahead for 2021.

The novel coronavirus that we came to know as Covid-19 is still with us, has cost more than one million people their lives, and wreaked havoc on the global economy. Very few countries have managed to avoid a substantial contraction in GDP. The positive news that everyone has been waiting for – that an effective vaccine is imminent – is an important shot in the arm (both literally and figuratively) for the prospects of recovery.

Just as the depths of recessions around the world have differed, depending on a variety of factors, including the scale of the infection and the effectiveness of the public policy response, the expected rates of return to pre-Covid levels of GDP are also highly variable.

Among G20 countries, Indonesia and South Korea will be first to bounce back in 2021, while South Africa, Italy and Mexico will have to wait until late 2024 or early 2025 before their economies recover to Q4 2019 levels.

We will witness a couple of unusual phenomena in 2021. The first is that Europe will be the fastest growing region. This is not because its prospects are particularly exciting, but it suffered the steepest economic contraction in 2020 and has further to bounce back, so its strong recovery should be seen in that context.

The second is that we will see developed economies outperforming emerging markets (EMs). Normally GDP growth in EMs outpaces that of Organisation for Economic Co-operation and Development (OECD)

nations, as they have greater headroom and more “easy wins” available. But a combination of factors exacerbated by Covid will weigh on developing nations until at least 2022, including relatively high borrowing costs, weak health systems and macro imbalances.

EMs are also likely to be at the back of the jostling queue for vaccines, despite the efforts of Gavi, the vaccine alliance, and others to facilitate equitable access.

We exclude China from our definition of EMs, because it is a special case. Incredibly, China – where the coronavirus was first detected – could yet derive significant competitive advantage from the disruption it experienced first, particularly versus its great political and economic rival the US, with which it remains engaged in a tit-for-tat trade war.

By the end of 2021, the US economy will be slightly smaller than it was in Q4 of 2019, but China’s will be 10% bigger.

The election of Democrat Joe Biden as US president-elect on 3 November is unlikely to soften US foreign policy towards China. But the language of the trade war and its tone will become more diplomatic and less purely transactional in nature than under Donald Trump’s presidency.

“America First” was a “Trumpism” designed to encourage the US to become less reliant on imports. But Covid has undoubtedly increased nationalistic instincts all around the world. Although globalization will not be reversed, in the short term supply chains will shorten and simplify as businesses prize reliability and security over efficiency and complexity – think “just in case”, rather than “just in time” logistics.

While businesses grapple with operational challenges, governments will have to focus on significant second order effects of the pandemic: the risks of unemployment, social unrest and debt.

Sovereign debt spiraled upwards in 2020 as policymakers around the world deployed huge fiscal stimuli to mitigate the harmful economic effects of the coronavirus.

There is no such thing as free money, despite historically low interest rates, so there are three ways out of this.

Austerity seems unlikely. And tax rises on the public will be largely off limits, in favor of increases in corporate taxation, as payback for the government support the business community has received.

Default is certain for some poorer countries, especially where their debt levels are small compared to the creditor economy and where it is largely owned by foreigners. But for wealthier countries, this kind of restructuring would be hugely damaging.

Instead, many economies will take a "wait and hope" approach to paying down debt. In normal circumstances, hope doesn't sound like much of a strategy, but these are not normal times or normal levels of debt.

Finance ministers will hope that GDP growth tracks above interest rates, enabling them to pay down their debt. They will also need to achieve a

"Goldilocks level" of inflation – not too much, not too little, but just the right amount to erode away their arrears.

But this is something that will potentially take decades.

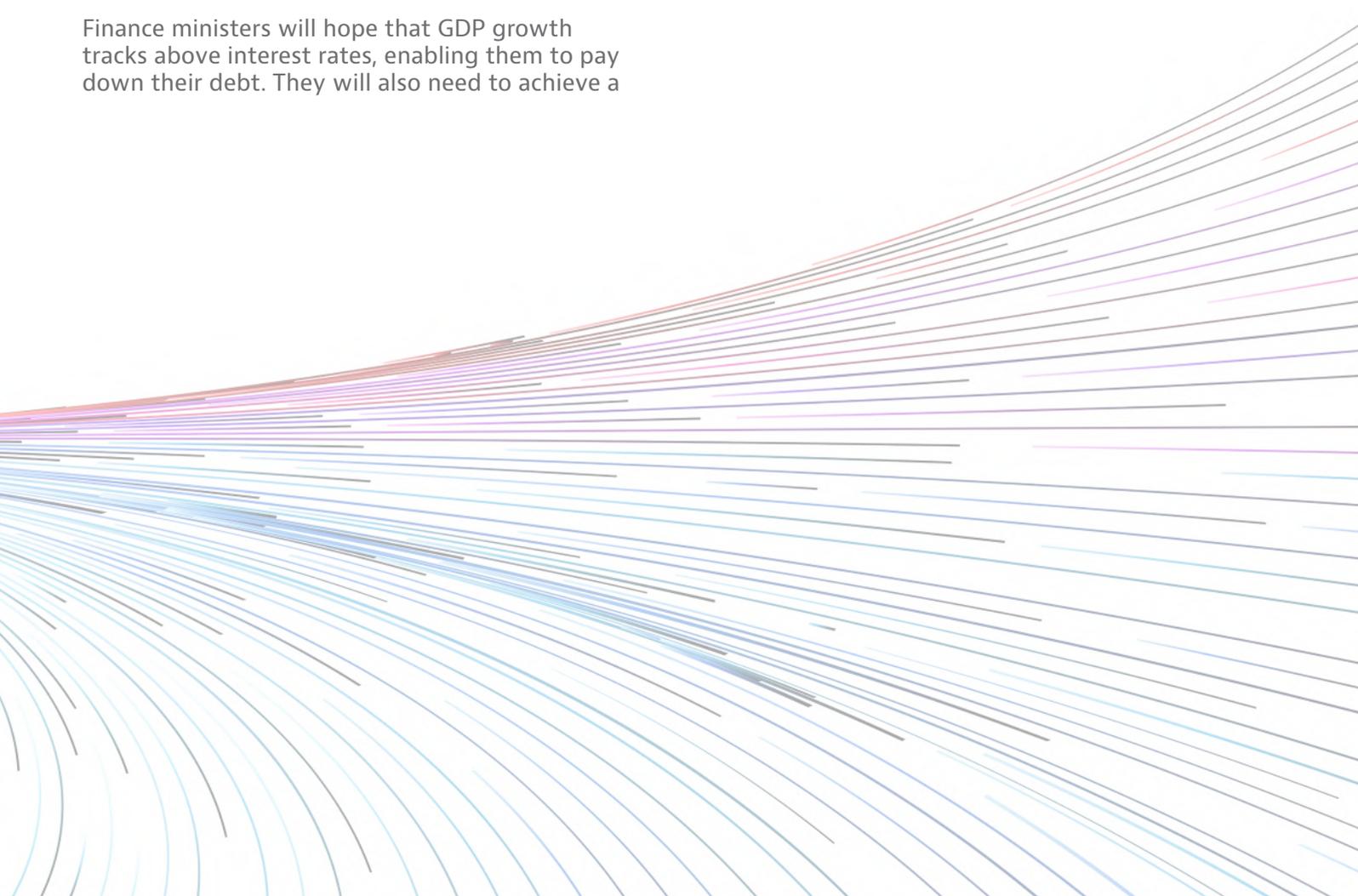
So despite the hope of a vaccine becoming widely available in 2021, the world will not be getting back to normal any time soon. Life will be freer, travel will be easier, and we may even see our offices again.

But whether or not we contracted coronavirus, we will all suffer from "long Covid" for the foreseeable future.



Robert Willock

Director MENA, The Economist Corporate Network
The Economist Intelligence Unit





Common Challenges

COVID

The Covid pandemic is already triggering many disputes. For example, in the US, Federal District Court case filings are running two to three times higher than in the same period last year. Many commentators have predicted increasing settlement rates, as organizations try to work through Covid issues. There is some evidence for this, for example in the London Commercial Court where settlement rates increased from around 60% to nearer 75% by the middle of last year.

Companies of all types are bringing or defending **contractual claims for non-performance or non-payment**, often involving force majeure, frustration, material adverse change, or similar concepts. At the start of the pandemic these were commonly seen around canceled events, and are now broadening in scope. In response to the crisis, governments have loosened insolvency laws and reduced creditor rights, making some claims more difficult to enforce.

Employers are **facing negligence actions from employees** and unions for failure to protect them from infection, as seen following the SARS pandemic. However, the relatively long gestation period of Covid may make causation difficult to prove. Claims in relation to **whistleblowing** arising from allegations around employer negligence are also a key risk that employers will need to mitigate.

Employees may also bring **privacy claims** regarding the handling of Covid diagnoses. We are also seeing **employment disputes** around mandated unpaid leave, sick pay, redundancies and unlawful dismissals, and alleged discrimination arising from

such measures. As redundancies increase, employers will have to field growing numbers of claims completely unrelated to Covid from employees with grievances.

Many companies have experienced failed transactions due to Covid, as proposed acquisitions and partnerships are shelved due to the crisis. Equally, recently-completed deals may be delivering significantly below expectations, leading to **post-M&A disputes**. This was one of the major types of claim arising from the financial crisis in 2008, and we have seen them emerge once more.

Publicly-traded companies may also face **investor claims** due to misleading or inaccurate statements made during the crisis. These types of claim can be very high value, and spread across multiple jurisdictions.

We have seen recent **constitutional or public law challenges** to Covid lockdowns in places such as the US, UK and Australia. Others will likely follow. A successful challenge would raise the possibility of damages awards for affected organizations and individuals. Public procurement contracts awarded in the "first wave" will also be disputed. Many of these contracts were implemented in haste, without following due process.

The IMF estimates that more than USD 11 trillion in fiscal support has been provided globally by governments to support national economies. In the longer term we will see **recovery actions by government agencies** against companies in all sectors who have made inaccurate or fraudulent applications for bailouts.

As an example: after the financial crisis in 2008, the US made USD 700 billion available to support the US economy through the TARP program. Recovery actions are still continuing today, with USD 11 billion repaid and hundreds of successful criminal prosecutions. Unsurprisingly, there have been recent examples of companies quietly returning bailout cash to which they were not entitled.

In the coming years, **tax disputes** are likely to rise as revenue authorities come under government pressure to raise cash, and encounter companies who are trying to preserve and rebuild balance sheets. The longer-term economic effects of Covid will play out in disputes for years to come.

BEYOND COVID

According to a survey of global corporate counsel and compliance officers conducted by AlixPartners in February last year, **data breaches and cyberattacks** were viewed as the most likely cause of litigation over the next twelve months. With increased use of remote working technology and online services during the pandemic, the risks have only increased.

Other surveys bear out this view. A recent poll of private practice lawyers released by *The Lawyer* in August last year found that 79% of respondents strongly agreed that data abuse and cybersecurity litigation will be a significant growth area in the next three years.

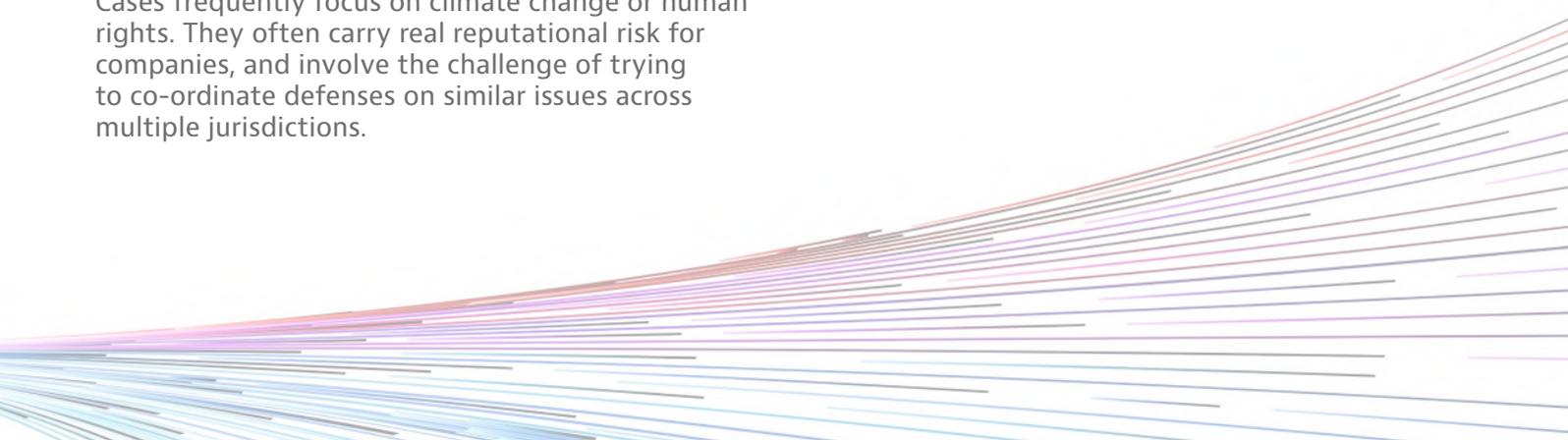
Nor are lawyers immune from being victims. Many arbitration lawyers are aware of the risks through well-publicized security breaches in a Permanent Court of Arbitration case in 2015, and through last year's ICCA-NYCB-CPR Cybersecurity Protocol for International Arbitration. But litigators are also implementing enhanced protections and counter-surveillance measures where the case requires.

Another existing trend is the transition in many jurisdictions from voluntary environmental, social and governance reporting to mandatory standards. This has been accompanied by a **rise in ESG disputes**, as NGOs and activist shareholders bring litigation aimed at changing corporate behavior. Cases frequently focus on climate change or human rights. They often carry real reputational risk for companies, and involve the challenge of trying to co-ordinate defenses on similar issues across multiple jurisdictions.

Here too, Covid has added to the risks. A BCG survey in July last year found that in the wake of the pandemic people are significantly more concerned about addressing environmental challenges. A striking 87% said that companies should integrate environmental concerns into their products, services, and operations to a greater extent than they have in the past.

Finally, the growth of **criminal and regulatory enforcement activity** has been a consistent theme of recent years, which we expect to accelerate. In the area of corporate crime, economic downturns can encourage wrongdoing and make it harder to cover up. Prosecutors and regulators will also be keen to avoid accusations - leveled at some following the Global Financial Crisis - of being slow to act. Since the Covid pandemic, boards have tended to be more focused on risk, which may lead to more internal investigations.

Learn more about the post-pandemic environment for compliance teams in our **Connected Compliance Dialogues.**





Consumer Goods & Retail

COVID

Brick-and-mortar retailers may encounter **lease disputes** over unpaid rent, or how turnover rent is calculated with reduced foot fall. Any company which operates premises open to the public may face **"failure to protect" claims** from customers, as well as employees. Shops in some jurisdictions are asking customers to sign waivers. Companies' prevention measures will be scrutinized, but the highest practical risk is likely to be where companies have failed to take swift action following a known infection or outbreak.

We will continue to see claims by retailers against suppliers and manufacturers for **interrupted or failed supply chains**, although in many cases the value of ongoing relationships is leading to negotiated solutions. Retailers are also likely to bring actions against governments regarding **business closure orders**. A common issue seen so far is around the definition – however expressed – of an "essential service".

There have been actions by both consumers and regulators for **price gouging**, which is illegal in many jurisdictions. Several class actions are underway in the US. Some national regulators have announced new investigations or special scrutiny of this area, and regulators have already taken action in South Africa and Greece. Complaints concern a diverse range of products beyond medicines and healthcare. Some of these product markets are not traditionally high-risk areas for price gouging and companies' compliance policies may not adequately address this risk.

BEYOND COVID

This sector faces particular risks from **environmental, social and governance disputes**. Consumers are demanding ethical and sustainable products and are holding brands to account over claims they make. There is also increasing legislation and regulation in this area, such as the EU proposal for companies to conduct mandatory human rights and environmental due diligence in their supply chains. Companies must also navigate new laws on specific issues such as modern slavery, conflict minerals and minimizing waste.

Risks relating to **product quality** are also increasing. Failure to handle a product defect correctly can lead to global reputational damage, class action liability, and regulatory action. And whilst manufacturers battle to protect their **intellectual property** in the global market, new measures such as the proposed Shop Safe Act in the US aim to make online retailers liable for sales of fake goods.



Energy, Mining and Infrastructure

COVID

The oil and gas industry was already facing disruption prior to Covid, and then had to cope with the lowest crude oil prices since the 1990s. Although markets are recovering, a growing wave of **energy bankruptcies** has started to build. D&O insurance premiums in the sector are increasing, partly to reflect the risk of claimants pursuing directors directly.

The construction industry has come through the first months of Covid better than most industries: many governments have excluded construction projects from lockdowns due to lower risks to workers.

However, construction is particularly dependent on international supply chains: materials shortages have occurred and costs have increased. Planning and inspection timetables have been delayed. New workforce safety measures have been introduced. We will see **disputes around costs and delay**. However, these are common in normal times, and the industry's experience in finding quick, practical solutions to disputes will be useful.

Commercial landlords face particular challenges. For example, only 18% of commercial rents in the UK were collected by landlords for the first quarter after Covid hit. Besides the commercial challenges, tenants have felt able to withhold payments due to new legislation temporarily protecting them from eviction. This stores up enforcement actions for the future. This situation is mirrored in many other jurisdictions. **Landlord and tenant disputes** were a common feature in countries affected by SARS in 2003.

BEYOND COVID

Disputes will continue to arise from the **transition to renewables**, as new business and regulatory structures are implemented. **Regulators and law enforcement agencies** will maintain their focus on this sector, particularly on operators in the extractive industries. And nationalization risk is increasingly prevalent in this sector, even in some developed countries.

Energy and mining companies face the growing risk of **climate change disputes**. The impact has moved beyond reputational risk into operational issues. In the recent *Rocky Hill* case in Australia, an application for a major new coal mine was defeated on climate change grounds. A few months later, the Dutch Supreme Court held that a country's inadequate action on climate change can violate human rights, and went on to impose a legally binding target and deadline for the Dutch government to reduce greenhouse gas emissions.

A large number of climate change cases are underway in locations such as the US, Canada, Europe and Australia, which will continue to present challenges for companies.



Financial Institutions

COVID

Banks will face claims arising from their lending exposure through **non-performing loans and guarantees**. As economic conditions worsen, defaults will become more common and disputes are inevitable, for example over drawdown conditions and breach of financial covenants. We can expect a rise in claims over bank guarantees issued to third parties.

“The financial sector has spent over a decade restructuring and being subject to stress testing to ensure resilience to economic volatility. So while there will of course be some short-term casualties, the immediate concerns for most financial institutions are not existential ones”.

» Jonathan Peddie,
Global Chair, Baker McKenzie Financial
Institutions Industry Group.

Banks are already facing litigation around their role in providing **access to government relief**, such as under the Paycheck Protection Program in the US.

Banks must also deal with **new procedures** introduced since the crisis around loan repayments, debt collection and insolvency. Financial institutions face one of the most complex compliance regimes of any industry, and Covid will heighten the challenges.

Private equity can be more exposed through portfolio companies than banks, which are more constrained in their lending by regulation. We can

expect an increased incidence of litigation involving private equity and credit funds, with disputes arising out of company restructurings where new finance is provided.

Fraud claims tend to rise in times of economic downturn, as dishonest arrangements become harder to hide, and corporate and individual pressures mount. For example, according to the KPMG Fraud Barometer, in the first six months of 2008, the number of major financial fraud cases before the UK courts rose by nearly 50%. Much of this increase was driven by frauds against banks. In addition, digital fraud will become more sophisticated as technology develops.

Many **insurance companies** learned the lessons from SARS and introduced epidemic exemptions to policies. Nevertheless, many are already involved in litigation around denied claims, especially for business interruption or event cancellation. There have been a number of early rulings going against insurers, such as the *Maison Rostang* case in France and *ID&T* in the Netherlands.

In the UK, the financial conduct regulator has sought declarations in the courts over the meanings of selected terms in business interruption policies with a view to more quickly resolving ambiguities. In the US, hundreds of lawsuits have been filed on this issue and close attention is being paid to the UK proceedings, as many policies use similar wordings or raise factual issues. However, it is still early days.

We are also seeing **health insurance claims** for failure to cover Covid treatments. Lloyd's of London has predicted that the current pandemic could be the most expensive insurance event ever because of the range of exposures. Insurance companies must also **navigate new regulations** on Covid claims

handling, and threatened retrospective legislation declaring Covid to be within pre-existing coverage.

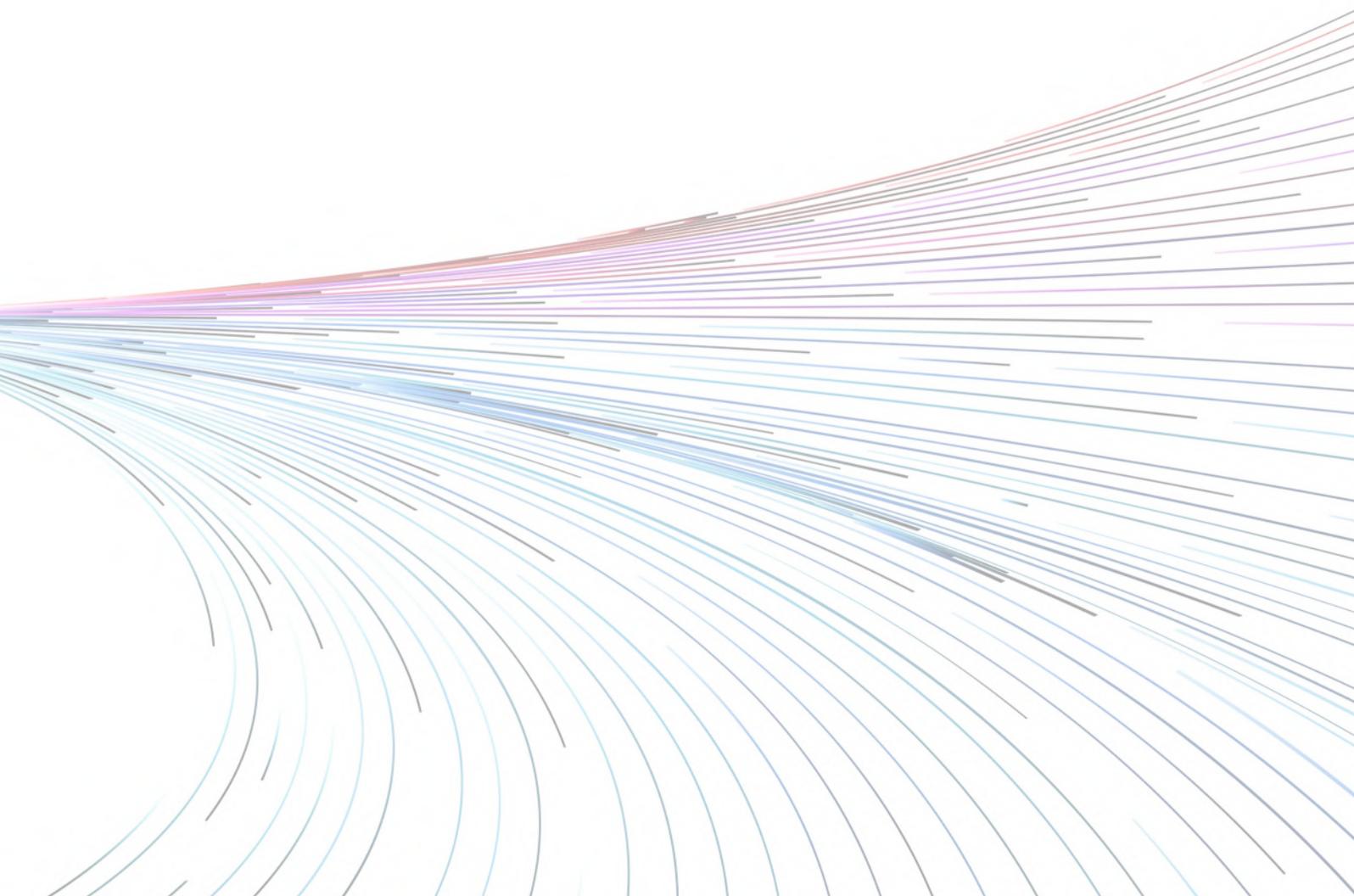
BEYOND COVID

Discontinuation of LIBOR at the end of this year, and transition of other inter-bank offered rates, may lead to uncertain contractual positions, financial and accounting implications and regulatory risks. We will see disputes and in some cases enforcement activity. Market surveys suggest that financial services legal teams are not yet fully prepared for the phase out.

Financial **regulators and law enforcement agencies** will continue to scrutinize this sector, with closer co-operation between agencies and more measures on individual accountability. Financial institutions will respond by further de-risking their customer bases, products and jurisdictional exposure. Meanwhile, Covid has made normal compliance control more difficult, as resourcing comes under pressure and staff work from home.

Sanctions compliance is a particular issue, as government sanctions policy becomes a weapon in global trade wars, and Covid shifts usual patterns of trade.

Read more about the post-pandemic environment for financial institutions in our report Finding Balance: **The Post-COVID Landscape for Financial Institutions.**





Healthcare and Life Sciences

COVID

Healthcare is at the center of the current crisis and will be central to many disputes and investigations. Supply chain issues and other challenges presented by the pandemic are sure to lead to a number of breach of contract and business tort disputes.

At least 80 countries introduced **export bans or restrictions** in response to the crisis, many of which focused on drugs, medical devices and medical equipment. For example, export bans of medical equipment have been seen in many major economies including the US, China, South Korea, Russia, France, Germany, and India. We can expect to see claims against governments in due course.

Disputes over **intellectual property rights** are inevitable: some countries have issued compulsory licenses over patented drugs and devices, or taken legislative steps to facilitate this if required. These include Germany, Canada and Israel. Other governments have temporarily nationalized private hospitals, such as Spain and Italy. Governments have also provided funding to healthcare companies around R&D, testing and production of Covid vaccines and therapeutics, which may constitute unlawful state aid.

Many of these issues will lead to **investor-state disputes** under investment treaties and go to arbitration. In turn, these cases will test the boundaries of existing international law defenses, such as necessity.

Healthcare and pharmaceutical manufacturers may also see actions by patients or regulators for false advertising. Several lawsuits have already been launched in US courts against manufacturers of

hand sanitizers which made the claim “kills 99.99% of germs”, allegedly without supporting evidence. The US Federal Trade Commission has sent almost 300 warning letters to date. There are also securities actions against vaccine manufacturers regarding false claims to the market.

Operators of **care facilities** face heightened risks. In countries where the virus has caused high numbers of deaths in long-term care facilities, there is increasing public anger. This is likely to result in private litigation by victims’ families, and public actions and investigations by regulators and prosecutors. Examples already exist in the US and Canada. Actions may extend to criminal prosecutions: at least one Italian nursing home is under investigation for manslaughter. The debate in the press centers on who is to blame: operators, the government or some combination of both. This debate will be repeated in the courts.

As with other industry sectors, the issues are complicated by the legal goalposts moving during the pandemic. Several jurisdictions have adopted laws giving some degree of **legal immunity** to medical professionals and operators of medical facilities for acts or wrongdoing during the crisis, including the UK and several US states.

The US has arguably instituted the most sweeping protections for goods and services that qualify as a “covered countermeasure” for Covid, especially where the product manufacturer obtains “Emergency Use Authorization” through the US Food & Drug Administration. Meanwhile, other jurisdictions have relaxed standard authorization processes for products, such as in the EU around disinfectants.

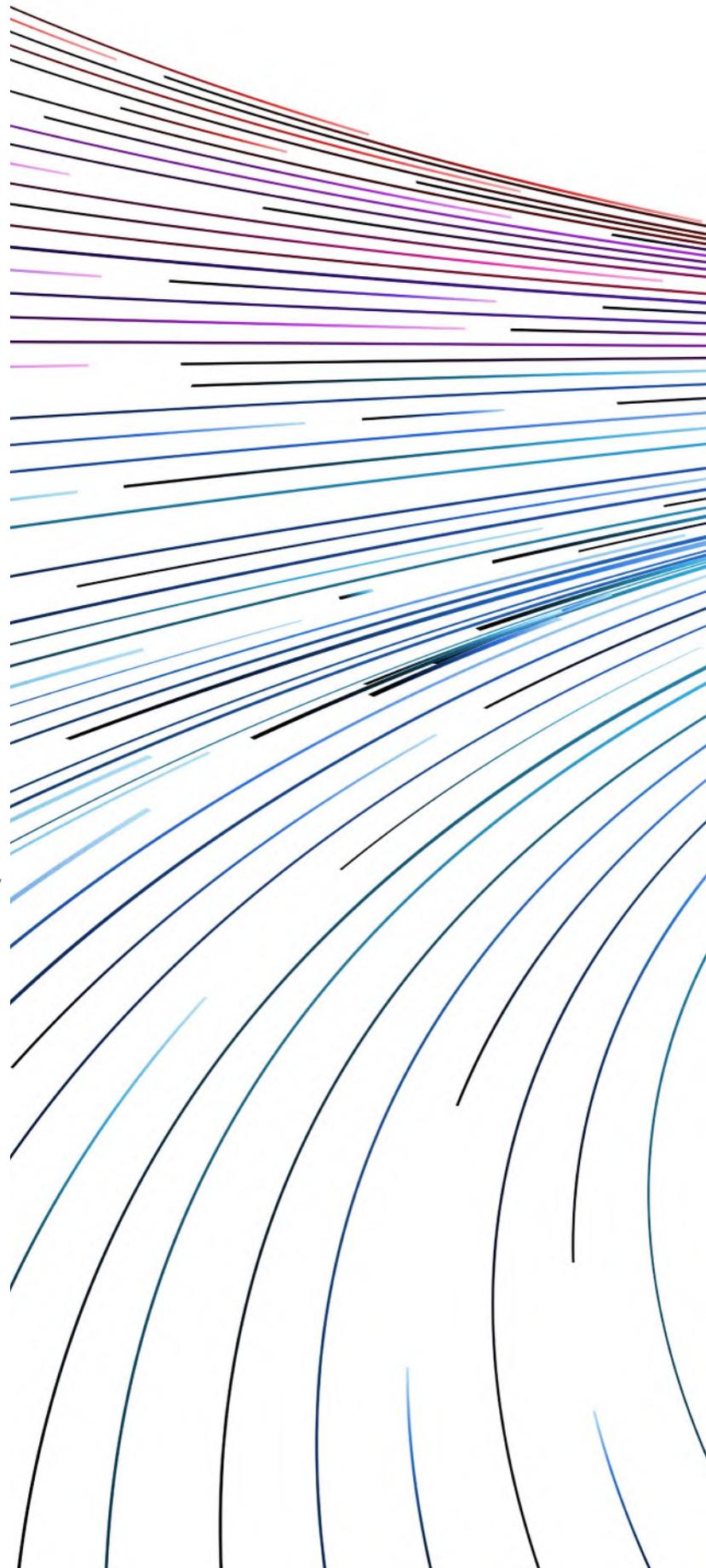
Finally, the roll-out of **Covid vaccines** and other pharmaceuticals will give rise to legal disputes related to their approvals, supply and administration. As just one example, the release of clinical trial data on potential Covid vaccines and the attendant rise in a company's stock price may lead to scrutiny by securities exchanges and lawsuits by disgruntled shareholders. It is too early to forecast all potential claims, but it is a virtual certainty that where there is intense economic activity involving government, industry and healthcare consumers, litigation will follow.

BEYOND COVID

The usual healthcare and life sciences disputes continue. **Class actions** and mass tort litigation remain a growing challenge for drug and device manufacturers, such as the prescription opiate litigation in the US. Claims commonly center on faulty products, false marketing and failure to warn patients about side effects.

Strategic partnerships are a strong feature of this sector, well demonstrated by high profile tie-ups between industry giants and smaller players to produce Covid vaccines. Whilst this can drive growth, these partnerships increase the risk of disputes, typically around M&A, licensing, joint ventures or other collaborations. This risk increases when such deals are put together quickly without the customary diligence process and robust documentation of the deal terms.

New innovations in the industry, particularly around healthcare tech, involve handling individuals' most sensitive personal data. This requires care around privacy, consent and ownership, with mistakes potentially leading to **data disputes** and regulatory action. Examples appear in the US on an almost monthly basis. They have also been seen in other jurisdictions including Canada and Singapore.





Industrials, Manufacturing and Transportation

COVID

Industrial and manufacturing companies are facing many of the same issues as companies in other sectors, particularly around employment disputes, supply chain disruption and force majeure. Employees working in factories may institute complaints against their employers for failure to comply with mandated Covid protection measures within the workplace. Claims for breach of contract due to delays in the manufacture or delivery of products will continue.

Manufacturers may also face false advertising claims, such as those seen around disinfectant products, or infringement of their intellectual property rights by counterfeiters seeking to exploit increased demand, such as around medical products.

Transport companies, where passengers often travel in close proximity, are at particular risk of negligence claims from customers for failure to protect from infection. Logistics companies may experience similar charges for failure to provide proper disinfection measures to assure safe delivery. We have also begun to see companies in this sector bringing claims against governments for financial damage caused by travel bans and quarantine policies.

There has been much publicity around the alleged failure of transport companies, particularly airlines, to give prompt **refunds** to customers affected by Covid. There is already plenty of litigation on this issue, including class actions in the US and Canada. The Spanish Ministry of Consumer Affairs is bringing an action against at least 17 airlines over alleged misinformation regarding refunds and flight vouchers.

However, with airlines globally estimated to be losing close to a quarter of a billion dollars per day, this is the least of the industry's concerns. Litigation is likely to result from airlines' urgent attempts to **raise cash and shed costs**, although the so-called "hell or high water" payment obligations in aircraft lease agreements make force majeure or similar arguments more difficult.

BEYOND COVID

Prior to Covid, escalating trade wars were already forcing companies to rethink their **manufacturing operations** and supply chains. Some companies were moving investments into low-risk jurisdictions, or establishing manufacturing facilities in multiple locations, triggering disputes with existing partners. This trend has accelerated.

Companies must also adapt to new technologies such as **commercial drones and autonomous vehicles**, which bring new litigation and regulatory risks. Although accidents involving autonomous vehicles are comparatively rare, there have been several lawsuits in the US over fatal accidents involving passengers and pedestrians. These cases involve complex legal issues of tort/delict, product liability and consumer protection, overlaid with heavy technical facts.

Last year brought several natural calamities in different parts of the world. Environmental and human rights groups have been advocating for changes not only in the public but also private sector. We anticipate increased **environmental, social and governance litigation** against industrial or manufacturing companies, particularly around climate change.



Technology, Media and Telecoms

COVID

There has been a global spike in remote working, video communication, online education and online shopping. Increased use of technology platforms will involve increased scrutiny of their capabilities. Video conferencing platforms are in the spotlight, with two major platforms facing legal action in the US for alleged security flaws and for **misleading statements on privacy and data sharing**.

Greater reliance on technology and remote work brings with it an increase in the use of contingent workers such as freelancers, consultants and independent contractors. This brings risks, as well as benefits, for employers. Legal frameworks continue to evolve in order to define and recognize the rights of such workers and we will continue to see **misclassification claims** from contingent workers in places where the law remains unclear about the extent of their rights.

Increased use of technology, often by inexperienced users, provides new opportunities for **cybercriminals**. Internet security firms reported a 600% increase in malicious emails during the first months of the current crisis. Litigation is likely to arise from the resulting data breaches.

As technology infrastructure has been tested, some existing systems have **failed to cope with increased demand**. We have also seen high profile failures of new technology targeted at the pandemic, such as contact tracing apps. We are likely to see disputes around these failures.

News outlets also face fallout from the political dynamics of the crisis, with their coverage under scrutiny. Fox News successfully defended an action for allegedly broadcasting inaccurate information about Covid and causing increased risk to the public.

However, there will also be outbound litigation over the next few years, particularly around **right to information laws**, as the world's media scrutinizes governments' responses to the crisis. Over 20 jurisdictions are reported to have suspended or altered right to information obligations since the pandemic began.

BEYOND COVID

Technology and intellectual property lie at the heart of the US-China trade war. The trade deal agreed between the two nations in January last year contained renewed commitments on technology transfers and IP, but tensions remain high and litigation continues to emerge. We expect an uptick in trade secrets disputes as a result of aggressive poaching of key R&D staff by companies in the battery technology and electric car sectors.

More broadly, we continue to see disputes around **the roll-out of 5G**, which have included claims of false advertising, and fall-outs over ongoing government auctions of spectrum. The well-established platforms of the major tech companies have also become targets for antitrust litigation brought by both law enforcement agencies and private entities. Whilst private **antitrust litigation** has long been a feature of the US market, it is steadily becoming a feature in Europe too.

This sector faces particular challenges from **data disputes**. We reported last year on the perfect storm of multiple factors coming together: growing volumes of data; increasing commercialization of data; growing frequency of cyberattacks; strengthening data protection and trade secrets laws; regulators becoming more active; and fines increasing. A number of jurisdictions are seeing class actions following data breaches for the first time. It is no surprise to see data disputes appearing at the top of litigation risk surveys.



Hot Topics

VIRTUAL HEARINGS

In a survey of disputes lawyers carried out by Baker McKenzie and KPMG in October last year, 71% of respondents had experience of participating in a virtual hearing since the start of the Covid crisis. Less than 5% of respondents reported an overall negative experience. Cost savings and ease of scheduling were cited as the main advantages, with concerns over IT and handling witnesses as the main challenges.

A survey of arbitration practitioners undertaken last year by Gary Born, Anneliese Day and Hafez Virjee found that the prevalence of fully remote hearings in the second quarter of 2020 was over ten times greater than at any time previously. Those with experience of remote hearings reported a greater willingness to propose them in the future.

It is likely that virtual hearings will remain a feature of litigation and arbitration after the crisis has passed, particularly for shorter or interim hearings. In the common law world, there is a divergence of views on whether virtual hearings make cross-examination less effective. Some lawyers are concerned over the impact and immediacy of witness evidence, or of successful cross-examination. Many suggest that full observation of a witness' demeanor and body language is critical to a judge's ability to detect truthfulness.

The latter point may be overstated. Academic studies of witnesses who wear full or partial face coverings to give evidence - such as a hijab or niqab - suggest that not only is a decision maker's ability to detect deception unimpaired, but actually slightly

improves. Some non-legal studies find a similar effect: observing demeanor can actually diminish a credibility judgment. But at the moment, there is no compelling evidence either way on the issue of virtual cross-examination.

Litigation lawyers do seem to have reached a broad consensus on one point: virtual trials involving juries are difficult. What happens if one juror's connection drops for a short period and they miss a key point? How can jurors be supervised to ensure they are not subject to outside influence?

But even here, progress is being made. Some jurisdictions are proceeding with virtual jury trials, albeit subject to extensive procedural safeguards. Others have introduced hybrid models with jurors in a physical "jury hub" and other participants on remote connections. And some technology support companies now offer remote jury monitoring through a 360-degree camera in the juror's room.

FASTER AND MORE EFFICIENT DISPUTE RESOLUTION

Even prior to the pandemic, there was a growing focus on making dispute resolution procedures faster and more efficient. Previous editions of this report have identified procedural reforms in many national courts and arbitral institutions. There are also over-arching initiatives such as UNCITRAL Working Group II, considering the issue of expedited arbitration.

The Standing International Forum of Commercial Courts (SIFoCC) - a grouping of senior international judges - has also been active in this area. In May

last year it published a guide on “International Best Practice in Case Management”, covering a number of practical measures aimed at “the effective, efficient and expeditious resolution of disputes”.

The Covid crisis has seen case backlogs increase due to temporary court closures, compounded by an increase in filings in many jurisdictions. The need for fast, efficient dispute resolution is more pressing than ever. We can expect to see continued procedural reform.

There has been renewed interest in mediation, and new initiatives such as the expedited mediation process launched by the Singapore International Mediation Centre last year. Judicial encouragement of mediation is likely to increase, and we may see more jurisdictions adopting compulsory mediation.

“Regarding Covid, the ADR industry has switched to being almost exclusively online. Mediations have continued in increasing numbers with settlement and satisfaction rates undiminished”.

» Matthew Rushton, Director, JAMS.

Prior to the pandemic, a number of courts and arbitral institutions had launched electronic case management systems. These include the Stockholm Chamber of Commerce, Qatar International Court and the Abu Dhabi Global Market Courts. Other institutions have introduced virtual platforms during the pandemic. More will follow. A number of other technologies, such as electronic bundling, have proved their worth in the pandemic and are here to stay.

USE OF AI FOR LAWYERS AND COURTS

These pressures on court systems worldwide create opportunities for more advanced legal technologies to demonstrate their value. In Brazil, there is now an estimated backlog of almost 80 million lawsuits waiting for a final decision. The Brazilian Supreme Court now uses VICTOR, an AI system, to automate some aspects of its work. VICTOR is reported to take only five seconds to identify if a case has *repercussão geral* (“general repercussion”), a procedural requirement that used to take civil servants around 40 minutes to assess.

The Brazilian example is also a good illustration of the flipside of AI. There is growing concern over black-box algorithms that cannot explain their reasoning. Some aspects of VICTOR’s work are

expected to contravene the new Brazilian Data Protection Law, due in force in May 2021, which provides that automated decision-making should be fair, transparent, and informed.

There has always been a balance to be struck with this type of AI, between efficiency and transparency. As AI systems become more widely-used, the trend is towards improving transparency. This is seen from legislatures not just in Brazil but in many other parts of the world, including the US and the EU.

Machine learning and AI has already proven its worth in disputes. It has been used in document reviews for more than a decade. Tools such as automated courtroom transcription and translation are available now, albeit not yet perfect.

The potential is still greater. The application of AI to judicial decision-making is still in its infancy. It can enable judges to be faster and more consistent. It can allow lawyers to construct more effective arguments, and help to drive settlement. It enables litigation funders to make better investments. But the greatest challenge may lie not in designing effective tools but in developing the ethical framework that surrounds them.

Learn more about the implications of technology and AI for compliance teams in our latest report on **Connected Compliance**.

LITIGATION FUNDING

The economic impact of Covid will provide opportunities for funders. Pressures on costs will lead to companies shifting litigation costs off their books and onto funders. As insolvencies begin to rise, funders will also seek out insolvency practitioners with good claims and no cash to pursue them.

“Commercial legal finance grew out of the ashes of the last recession, but it has never been more needed than it is now”

» Burford 2020 Legal Finance Report.

An emerging feature of the market is tie-ups between funders and analytics companies, such as the deal announced last year between Therium Capital and Solomon. In the coming year we can also expect to see analytics companies launch their own funds. These will be the first disputes “quant funds”, where investment decisions are driven largely by predictive analytics tools, rather than panels of human advisers.

CLASS ACTIONS

Prior to Covid, class actions were already growing strongly both in the US and beyond, particularly in shareholder and antitrust cases. New class action risks were also emerging around data security and ESG. All of those issues continue, now to be joined by new Covid-related class actions. These are often focused on employment and consumer claims, extending to insurance and data misuse.

Litigation funders continue to drive class action activity. This has partly been responsible for increasing regulation of funders in places such as Australia. Governments continue to seek a balance between encouraging class actions as a way to promote access to justice and tackle corporate wrongdoing, whilst avoiding abusive lawsuits and over-promotion of litigation.

This balancing exercise is not easy, as can be attested by the lawmakers who have spent over two years finalizing the text of the EU Collective Redress Directive. The text of this measure has now been agreed, leading to a harmonized system of consumer representative actions in the EU, but is not expected to take effect until 2023. Jurisdictions including the UK, Italy and the Netherlands have, however, already introduced opt out class actions regimes and others including France have also announced an intention to act in the near term.

Class actions forum shopping has long been a feature of the US market, as plaintiffs seek to file in preferred state courts. This has now become a worldwide phenomenon, with locations such as the US, Australia, the UK and the Netherlands picking up cases originating in other jurisdictions.

INTERNATIONAL COURTS

In an attempt to win international disputes work, many countries have launched new international courts, or specialist divisions of existing courts. These courts usually hear matters in English, and often have a panel of judges drawn from across the civil and common law world.

The attractions are clear. To take the Singapore International Commercial Court as an example, litigants benefit from many of the advantages of arbitration - such as a flexible procedure and the ability to nominate one judge or a panel of three - whilst keeping many of the advantages of litigation - such as the administration of multi-party and multi-contract proceedings.

After a proliferation of new court launches in 2018, the pace has now slowed. Belgium has postponed plans to launch a court, originally scheduled to start last year. Many of these courts continue to have low caseloads. However, they remain an important long term feature of the litigation landscape.

New international courts	
Location	Year established
Dubai	2006
Qatar	2009
Singapore	2015
Abu Dhabi	2016
Frankfurt	2018
Paris	2018
Astana	2018
Xian and Shenzhen	2018
Frankfurt	2018
Netherlands	2019

“The new courts have had an effect on the litigation landscape, though it would go too far to say that they have redrawn it.”

» Sir William Blair¹

INITIATIVES IN CROSS-BORDER ENFORCEMENT

We are witnessing a period of transformational change in cross-border enforcement. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards continues to gain signatories, with only a handful of jurisdictions now outside its scope. The Hague Convention on Choice of Court Agreements, which allows judgments of one jurisdiction to be enforced in another, provided

¹ Former judge in charge of the London Commercial Court, judge in the Qatar International Court, Deputy Judge of the High Court of Hong Kong, Member of International Commercial Expert Committee of the Supreme People’s Court of China.

a choice of court clause exists, has become the main enforcement mechanism between the EU and the UK in the absence of a specific post-Brexit agreement.

The more ambitious Hague Judgments Convention, which allows for cross-border recognition of judgments in specified situations, even without a choice of court clause, was concluded in July 2019, after 27 years in development, and now has its first signatories. The Singapore Mediation Convention, which aims to ensure cross-border enforceability of settlement agreements arising from mediation, entered into force in September last year and has been ratified by several jurisdictions.

These multilateral agreements overlay a complex and growing patchwork of bilateral agreements. China alone has reciprocal enforcement agreements with 37 other jurisdictions.

Whilst these arrangements make cross-border enforcement simpler and more effective, they are often caught in the political crossfire. Trade wars and political disputes will continue to affect policy in this area. But the overall trend is one of increasing co-operation.

Learn more about enforcement across 44 jurisdictions in our **Cross-Border Enforcement Center**.



Regional Developments

Asia - Pacific



CHINA

Development of virtual hearing procedures

Throughout 2020, many PRC courts and arbitral institutions (including CIETAC, BIAC and CMAC) explored virtual hearing procedures to mitigate the impact of Covid and its corresponding restrictions (e.g. travel bans and quarantine policies). Some institutions have issued online hearing rules although certain challenges are yet to be resolved, particularly concerning witness testimony. Given the unpredictability of the pandemic, judicial departments, academia and legal practitioners are endeavoring to resolve these challenges with a plan to implement more detailed online hearing rules. We foresee these developments taking place in 2021 and expect an uptick in virtual hearings, especially in cross-border disputes.



HONG KONG

Paperless filing set to be introduced under technology reforms

Hong Kong is expected to implement a bill aimed at establishing an integrated case management system and streamlining electronic court processes. The Court Proceedings (Electronic Technology) Bill permits electronic filing and service (by consent), and the use of digital signatures which will make conducting court business more convenient and sustainable. Although the desire for these reforms existed before Covid, the effects of the pandemic on the courts, and in particular, the inability of parties to file documents for several weeks, brought the need for change into sharp focus. The Bill passed in the summer of 2020 but requires implementing legislation and guidance, which is expected this year.



INDONESIA

Government considering bankruptcy, civil procedure, and private international law reform

In September 2020, the President of Indonesia issued the government's working plan for 2021. As one of the priorities of the government is to increase legal certainty and transform public service, the government is considering amending the existing bankruptcy law, enacting a new civil procedural law to replace the civil procedural code from the Dutch era, and enacting a private international law. These reforms aim to optimize dispute resolution and accelerate recovery time in case of a dispute. If any of these reforms are implemented this year, it will likely change how civil cases are handled and litigated in Indonesia.



AUSTRALIA

Government considering corporate criminal responsibility reforms

Reforms to Australia's corporate criminal responsibility regime were tabled in Parliament this year, which were based on the Australian Law Reform Commission's report published last year on the existing regime. The report was commissioned to review the effectiveness of Australia's criminal procedure laws and mechanisms for attributing criminal responsibility to corporations that engage in illegal conduct. The report made several recommendations intended to simplify Australia's corporate criminal regime whilst also introducing new offenses of failing to prevent overseas misconduct and criminalizing conduct that results in multiple contraventions of civil penalty provisions. The reforms, if implemented, would result in amendments to Australia's corporate criminal regime.

Asia - Pacific

**JAPAN****Amendments to Arbitration Act expected**

Japan is expected to amend its Arbitration Act this year. After building a new international dispute resolution hub by establishing the Kyoto International Mediation Center and the Japan International Dispute Resolution Center, and relaxing practical restrictions over foreign attorney representation international arbitration cases during the last few years, an overhaul of the underlying legislation is seen as the likely next step in Japan's arbitration reforms. The legislative advisory council of the Ministry of Justice has been commissioned to develop a draft bill by August 2021, which will reflect the 2006 amendments to UNCITRAL Model Law and embrace the global trend of emergency arbitrations.

**MALAYSIA****Growing trend for remote hearings and trials**

Given the prevailing Covid pandemic, remote hearings and trials are expected to be the new normal for most court and arbitration proceedings in 2021. A Remote Hearing Protocol setting out the proposed practice and procedures for conducting virtual hearings is expected to be adopted substantially for most court proceedings in the future. Current measures include online case management and the ability of parties to apply for an online hearing of civil matters in some cases. These are likely to extend to trials and more contested applications emergency arbitrations.

**PHILIPPINES****Office for Alternative Dispute Resolution to finalize Advisory Council**

The Philippines' Office for Alternative Dispute Resolution is expected to finalize the constitution of its Advisory Council. Among the matters to be prioritized by the Advisory Council upon its constitution are the amendments to the Philippines' ADR Act. Earlier proposals for amendments expected to be taken up by the Advisory Council include adopting the 2006 version of the UNCITRAL Model Law, amendments to the provisions on interim measures of protection, and the creation of special courts to handle recourse against arbitral awards. The OADR is expected to finalize proposed amendments to the ADR Act in 2021.

Asia - Pacific



TAIWAN

New Intellectual Property and Commercial Court

Taiwan's Intellectual Property Court is set to be reorganized as Intellectual Property and Commercial Court. The new court, which is scheduled to become effective on 1 July 2021, will continue to handle IP cases, but will also now deal with civil commercial cases, comprising certain commercial claims, mostly exceeding TWD 100 million (approximately USD 3.45 million) and certain non-litigious commercial matters. To expedite the resolution of commercial cases, new mechanisms include mandatory counsel representation, the introduction of commercial investigation officers and expert witnesses, information requests and protective orders. The goal is to achieve the resolution of commercial cases expeditiously and professionally.



SINGAPORE

Changes to the insolvency framework in Singapore

Singapore has introduced a bill to amend the Insolvency, Restructuring and Dissolution Act 2018 (IRDA) that will establish temporary measures in which qualifying micro and small companies can benefit from simplified debt restructuring and winding up programs. The IRDA consolidates Singapore's personal insolvency, corporate insolvency and debt restructuring laws into a single piece of legislation, providing enhanced processes to balance the interests of debtors, creditors and stakeholders. The Simplified Insolvency Program will complement the enhanced processes in the IRDA with simpler, faster and lower-cost proceedings for eligible companies. These amendments are expected to come into effect this year.



VIETNAM

Growing use of pre-litigation mediation

A rise in the use of pre-litigation mediation (i.e. court-assisted mediation after the filing of a court petition, but before the court's official receipt of the case) is expected this year after the new Law on Mediation and Dialogue at Courts takes effect from 1 January 2021. This law formalizes the emerging procedures for mediation and recognition of mediation results, which had been implemented in local courts in 16 provinces since 2018 under a pilot program with notable successes. The LMDC introduces clearer and more detailed procedures to make dispute resolution proceedings in Vietnam more flexible and effective.

Europe, Middle East and Africa

**ENGLAND & WALES****Disclosure pilot extended through 2021**

The two-year pilot of England's new disclosure regime has been extended for a further year, and will now run until the end of 2021. The pilot scheme is intended to create a culture shift towards cooperation, leading to reduced scale, costs and complexity of the disclosure process. Notably, the scheme provides for "initial disclosure" at the outset of a case, with an option to seek the court's approval for "extended disclosure" later in the case. The effectiveness of the pilot is being monitored by a working group. Changes are also due to be implemented to the content and preparation of witness statements. The detail of these changes is pending with the Civil Procedure Rules Committee.

**BELGIUM****Modernization of the Belgian Civil Code with new rules on evidence**

The modernization of the Civil Code continues with the introduction of a new set of evidentiary rules. A key point concerns the extended application of the "free evidence" principle that allows proof to be provided by all legal means (including witnesses and suspicions) between and against all enterprises. Between private individuals, the "free evidence" principle applies to matters with a value below EUR 3,500 (approximately USD 4,100). Any action with a value of EUR 3,500 or more still requires evidence in writing. Digital evidence, such as emails and text messages, will also qualify as valid evidence, and the validity of electronic signatures is recognized more generally.

**AUSTRIA****Termination of intra-EU BITs**

Parties to ISDS proceedings are hoping for greater clarity regarding the future of ISDS in light of the termination of intra-EU BITs by the EU. Austrian investors are currently involved in twelve pending ISDS proceedings, eight of which constitute intra-EU investment disputes, apparently not subdued by the CJEU's ruling in *Achmea*. This is why Austria, alongside Finland, Sweden, Ireland and the UK did not sign up for the EU's joint Termination Agreement, which is bringing all BITs currently in force between the Member States to an immediate end. Instead, Austria has committed to terminate its BITs bilaterally, although it is unclear when, in what order, and under what conditions. With the EU Commission likely to push for swift termination, the year ahead will show how this uncertainty will affect investors' continued appetite to resort to ISDS.

**GERMANY****Likely changes to the provisions regarding the Model Declaratory Proceedings**

Due to the anticipated enactment of the EU directive on the introduction of representative collective claims for consumers, the regulation of the German Model Declaratory Proceedings will be subject to some changes in the coming year. Despite some consistencies, the implementation of the EU directive into German law will – most importantly – result in a move away from declaratory judgments to performance judgments. The German legislature will therefore have to decide whether merely to adopt the existing regulations or to allow both types of proceedings to co-exist.

Europe, Middle East and Africa

**NETHERLANDS****The Dutch Scheme of Arrangement**

The Netherlands is likely to consider the introduction of a powerful new restructuring tool this year. Under the proposal, a court could sanction a debtor's composition plan if it is supported by at least a two-thirds majority of voting debt of (only) one class of creditors, binding all creditors. This is a very competitive voting threshold in the global restructuring arena and, if successful, is expected to attract large global restructurings to the Netherlands. Some of the Dutch Scheme's most powerful features are that a court can set aside *ipso facto* clauses and can sanction unilateral termination (or re-setting of the contract terms) of burdensome contracts.

**LUXEMBOURG****Plan to modernize arbitration rules**

Luxembourg's government is considering a major overhaul of the country's arbitration rules. A draft of the law was published in September 2020 and is currently under discussion at the Chamber of Deputies. It aims to consolidate French procedural laws with UNCITRAL Model Law. Notably, the Draft Law expressly excludes from arbitration matters likely to undermine the protection to which certain categories of litigants can claim. The draft bill does not recognize a distinction between domestic arbitration and international arbitration, unlike under French law, as the authors considered this distinction inappropriate given that arbitration in Luxembourg is often international and certain sensitive matters are already excluded from arbitration.

**HUNGARY****Limited system of precedent to be implemented**

A limited system of precedent is expected to be implemented this year. This includes a completely new remedy available against the judgments of the Hungarian Supreme Court, known as the Curia. This new remedy, essentially a fourth level of the litigation, can be brought on grounds that the Curia deviated from its own practice on points of law, and will be decided by special, nine-member panels of the Curia, led by the President or Vice President of the Curia. The system will certainly require new skills from lawyers, identifying *stare decisis* and the art of distinguishing, but it remains to be seen whether it will be capable of bringing the promised benefits in the uniform application of the law.

**ITALY****Expanded class actions law to be tested**

The first cases to be brought under Italy's new class action regime are expected to be heard this year. The new law, which will enter into force in May this year, will greatly increase the scope of class actions, which are no longer limited to consumers, but are now open to anyone holding "individual homogeneous rights". Under the previous regime, most attempted class actions were rejected by the courts. It is anticipated that the new law will cause more class actions to be filed and increase the likelihood of these succeeding.

Europe, Middle East and Africa

**RUSSIA****Constitutional Court to review enforceability of foreign judgments and awards**

The Russian Constitutional Court will begin reviewing and ruling on the enforceability of foreign or international court judgments or arbitral awards that impose obligations on Russia (either directly or via federal authorities or state-owned organizations) to ensure that those do not contradict Russian public policy. The provisions authorizing the Court to perform the review were enacted at the end of last year, but the first applications are expected to be heard in 2021. It remains to be seen how broadly the Court will interpret the notion of “state-owned organizations,” and whether commercial arbitration with companies where the Russian government is only one of many shareholders will be impacted by this new law.

**UNITED KINGDOM****Changes to private international law provisions as Brexit transition ends**

On 1 January 2021, the UK’s Transition Period with the EU following Brexit ended. This also terminated a number of arrangements relating to cross-border litigation including the Recast Brussels Regulation on recognition and enforcement of judgments, the EU Service Regulation, and the EU Taking of Evidence Regulation. The UK has acceded to similar international regimes including the Hague Convention on Choice of Court Agreements, the Hague Service Convention and the Hague Evidence Convention, although questions remain over scope and transitional application.

**SAUDI ARABIA****Interpretation and implementation of commercial court reforms**

On the heels of major reforms to Saudi Arabia’s judicial system, 2021 will see the first major commercial judgments under the new Commercial Courts Law and its implementing regulations. Foreign investors in Saudi Arabia will watch closely as these highly-anticipated judgments will chart the course for how Saudi commercial courts will interpret and implement major amendments including the introduction of remote litigation, a statute of limitations, notification procedures, the recognition of foreign evidentiary procedures, and the initiation of new expedited procedures that will adjudicate urgent requests within three business days.

Europe, Middle East and Africa



SWEDEN

Swedish Appeal Court to decide on the validity of arbitration clause in ECT

The Svea Court of Appeal is scheduled to hear an appeal of an approximately USD 62.5 million SCC award. The arbitration, between Spain and Novenergia II, was brought under the arbitration provisions of the Energy Charter Treaty. Spain has argued that the CJEU's *Achmea* ruling is not only relevant to bilateral investment treaties but also multilateral treaties, such as the ECT when a tribunal is to interpret EU law. Spain has twice asked the Appeal Court to request a preliminary ruling from the CJEU, without success. The European Commission has intervened as an *amicus curiae* and the outcome of the case is expected to be of great judicial and political interest. The main hearing is scheduled for May 2021.



SOUTH AFRICA

New AFSA international arbitration rules to come into effect

The Arbitration Foundation of Southern Africa, the leading arbitral institution in the region, is expected to implement new international arbitration rules. Changes include the introduction of an expedited procedure, as well as provision for remote hearings and for the early dismissal of claims or defenses that clearly lack legal merit or which are manifestly outside the jurisdiction of the tribunal. The new rules, which were released in draft form last year, are intended to facilitate the continued growth of international arbitration in South Africa. The new rules represent the first revision of the rules since South Africa adopted its new International Arbitration Act in 2017, which is based on UNCITRAL Model Law.



TURKEY

Regional Court of Appeal to decide whether UberXL and Uber services constitute unfair competition

The Istanbul Regional Court of Appeal is expected to issue a decision this year in the *United Taxi Drivers Association v. Uber Turkey and Uber B.V.* case. The case was brought by the city's taxi drivers' association against Uber, alleging the ride-sharing giant was engaging in unfair competition. The first instance court agreed, ruling that the UberXL service and Uber mobile application constitute unfair competition for the plaintiffs, and banned access to these services.

Americas

**MEXICO****Creation of a National Code of Civil Procedure**

Mexico is expected to enact a National Code of Civil Procedure during 2021. The Constitution was modified in 2017 to grant Congress the authority to issue this unique code. However, the process only began in June 2020, when the House of Representatives received the bill. This national code would substitute the codes of each State, providing a uniform regulation across the country for civil proceedings. This new code would also migrate from a written to an oral trial system and would incorporate the use of technology tools to conduct hearings through videoconferences.

**CANADA****Supreme Court to decide who bears losses stemming from fraudulent electronic funds transfer**

The Supreme Court's decision in *Co-operators General Insurance Company v. Sollio Groupe Coopératif* is expected this year. The Court will hear oral arguments regarding whether a bank or its customer must bear losses resulting from a fraudulent third party electronic funds transfer. The customer was a victim of internet fraud resulting in the disclosure of confidential information via electronic messages (phishing). The phishing related to a payment order that appeared to come from an institutional body or a trustworthy third party. The case will also address the customer's possible insurance coverage for fraud.

**CHILE****Congress considers reform of the judicial system for 2021**

Chile will consider reforms to its justice system this year. These are likely to include the uniformity of judicial terms, the elimination of witness restrictions, the extension of videoconferencing, and the introduction of remote mediation before the initiation of trials. The appetite for change arose as a result of Covid - the government's measures to control the spread of the virus had serious consequences for Chile's judicial processes, leading to delays and cancellations. The reforms aim to help reduce court backlogs and ensure the judicial system is modern and efficient.

**BRAZIL****Proposed changes in recovery and bankruptcy rules**

Changes to Brazilian judicial and bankruptcy proceedings are expected to be enacted in 2021. These changes are likely to coincide with an increase in the volume of recovery and bankruptcy filings due to the economic impact of Covid. The proposed changes (i) incorporate consolidated jurisprudence; (ii) cover loopholes by regulating transnational insolvency and extension of loans to the debtor in the course of recovery proceedings and (iii) allow creditors to present a recovery plan, in addition to encouraging mediation. The proposed law has already been approved by the House of Representatives and is expected to be approved by the Senate early this year.

Americas

**UNITED STATES****Supreme Court case relating to arbitration agreements**

The United States Supreme Court will offer further guidance on when questions of arbitrability are delegable. In the 2019 case of *Henry Schein v. Archer and White Sales*, the Supreme Court held that it is for arbitrators, not courts, to decide whether an arbitration agreement applies to a dispute where the agreement delegates the power to make that decision to the arbitrators. The Supreme Court will once again review the case, to consider a question raised when it was remanded to the appeals court - whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator. A ruling is likely in the first half of 2021.

Proposed settlement agreement database to be considered

Legislation requiring executive agencies to submit information regarding settlement agreements to a public database may be considered by Congress this year. Under the proposed legislation, the Settlement Agreement Information Database Act, an agency would be required to submit information regarding any settlement agreement (including a consent decree) entered into by the agency related to an alleged violation of federal law. If an agency determines that information regarding an agreement must remain confidential to protect the public interest, the agency would be required to publish an explanation justifying any confidential requirements. Similar legislation was passed by the House of Representatives in 2019 but failed to advance in the Senate, despite bipartisan support.

Disclosure of third-party funding may become mandatory

Congress may consider a bill requiring disclosure of third-party litigation financing agreements in civil lawsuits. Under such agreements, lenders finance civil litigation in return for a portion of any recovery. However, the existence and terms of these agreements are rarely disclosed to the court or opposing parties, which is considered by some to create the potential for conflicts of interest. The proposed legislation, known as the Litigation Funding Transparency Act, would require disclosure at the outset of any class-action lawsuit filed in federal courts, or in any claim that is aggregated into federal multi-district litigation proceedings, of any agreement between a party and a third-party commercial enterprise that has a contingent interest in the outcome of the case.

Global



Expedited arbitration reforms to be considered by UNCITRAL Working Group

UNCITRAL's Working Group II, which considers reforms relating to arbitration and conciliation, is expected to meet again in February. They last met in Vienna at the end of September to consider a revised draft of the expedited arbitration provisions, which examined the scope of application of the rules; the consequences of non-application after commencement; designating and appointing authorities; appointing arbitrators; consultation with parties; taking evidence; hearings; and making the award. In light of views expressed by the delegates, the Secretariat is preparing a revised draft for consideration when the working group meets in New York in February.

UNCITRAL to consider further reforms to investor-state dispute settlement

UNCITRAL's Working Group III, which is considering reform of investor-state dispute settlement, is expected to meet again in April. The working group released two papers for consultation at the end of last year, which considered possible reforms relating to the selection and appointment of ISDS tribunal

members, as well as the appeals mechanism and enforcement issues. These issues, and the public response to them, will be discussed at the next meeting, which is due to be held in New York.

Revised ICC Arbitration Rules

The International Chamber of Commerce has introduced a new set of Arbitration Rules, which came into effect on 1 January 2021. The revised rules address recent developments in arbitration practice by increasing efficiency, flexibility and transparency. Facilitating the ICC's position as a forum for multi-party and multi-contract dispute resolution, the new Arbitration Rules create more flexibility for joinders of additional parties during the proceedings and consolidation of cases involving more than one arbitration agreement. Other changes include the obligation for parties to disclose third-party funding and the tribunal's authority to organize remote hearings.

Revision of SIAC rules expected

The Singapore International Arbitration Centre is expected to revise its arbitration rules this year. The rules, which were last updated in

2016, are amongst the most widely used in international arbitration. SIAC has stated its intention to "take into account recent developments in arbitration practice and procedure," and has created committees to consider reforms to its provisions on consolidation and joinder, emergency arbitrators and expedited procedures, and investment arbitration. It is anticipated that the updated rules will be released in the third quarter of 2021.

ICSID set to revise rules

The International Centre for Settlement of Investment Disputes is planning to revise and modernize its rules governing disputes between states and foreign investors. The proposals include measures to increase transparency, such as an arbitrators' code of conduct, the disclosure of corporate structures and third-party funding, the publication of awards, orders and other documents associated with the proceedings, as well as provisions for expedited arbitration. The amendments are expected to be voted on by the ICSID members early this year, and if adopted, should be in force before the end of the year.



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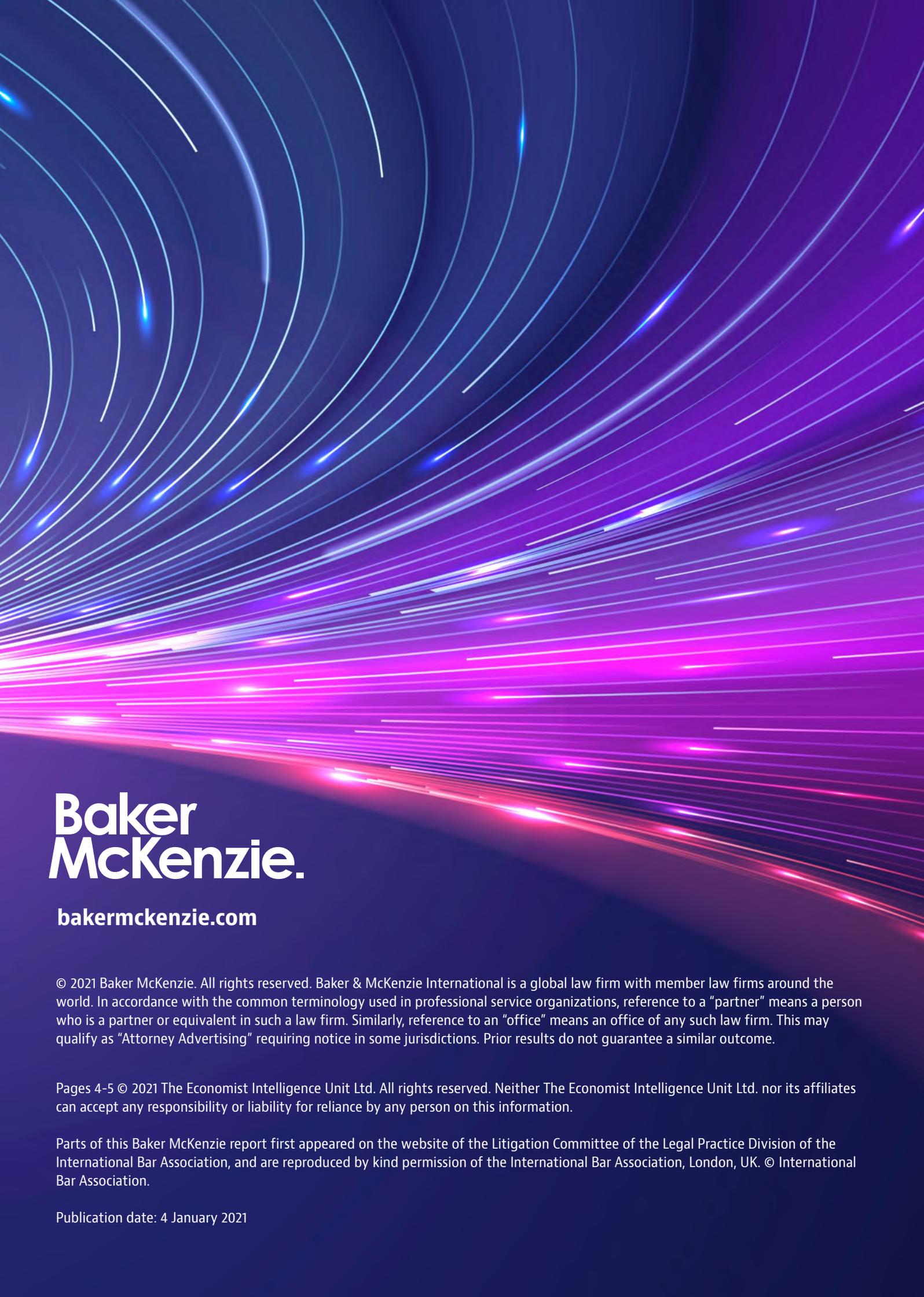
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