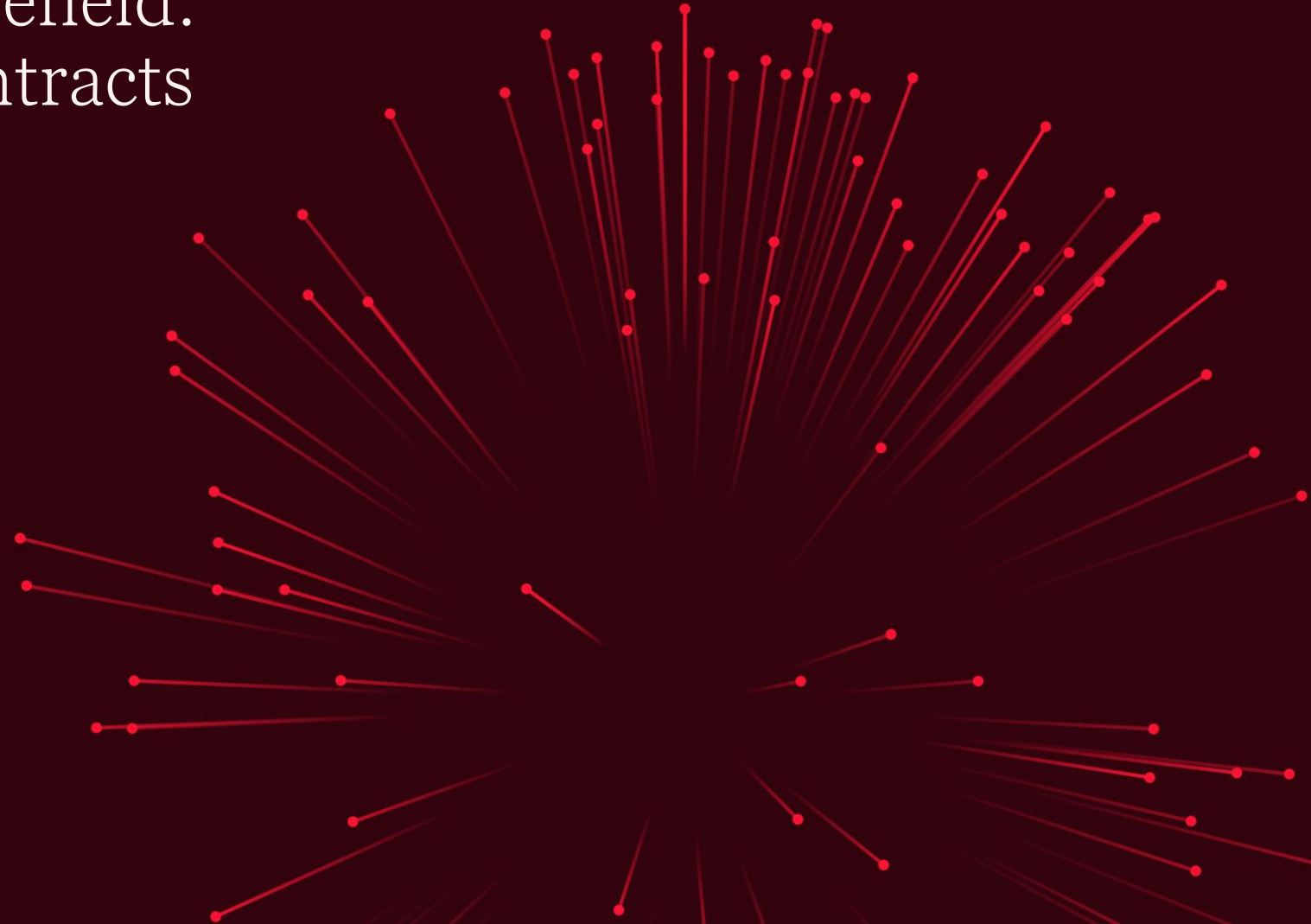


Navigating the Litigation/Arbitration Minefield: Drafting Cross-Border Contracts to Minimise Risk

December 2025



Attorney advertisement

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Introduction



Presenters



Charlie Lightfoot
Partner, London

clightfoot@cooley.com

+44 20 7556 8100



Rachel Thorn
Of Counsel, New York

rthorn@cooley.com

+1 212 479 6465

Contracting Across Borders

Issues that commonly arise

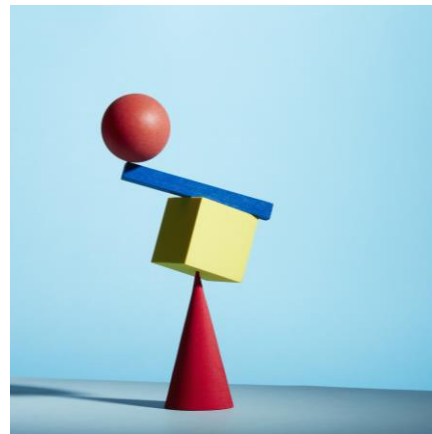
- Different legal cultures
 - Common law v civil law
- The need for compromise
 - Neither party may want to give the other home court advantage; or give on the governing law
- Lower visibility
- Added counterparty risk
 - Access to information, witnesses
 - Location of assets
 - Ability to obtain injunctive relief



Key Questions

Points to consider at the outset

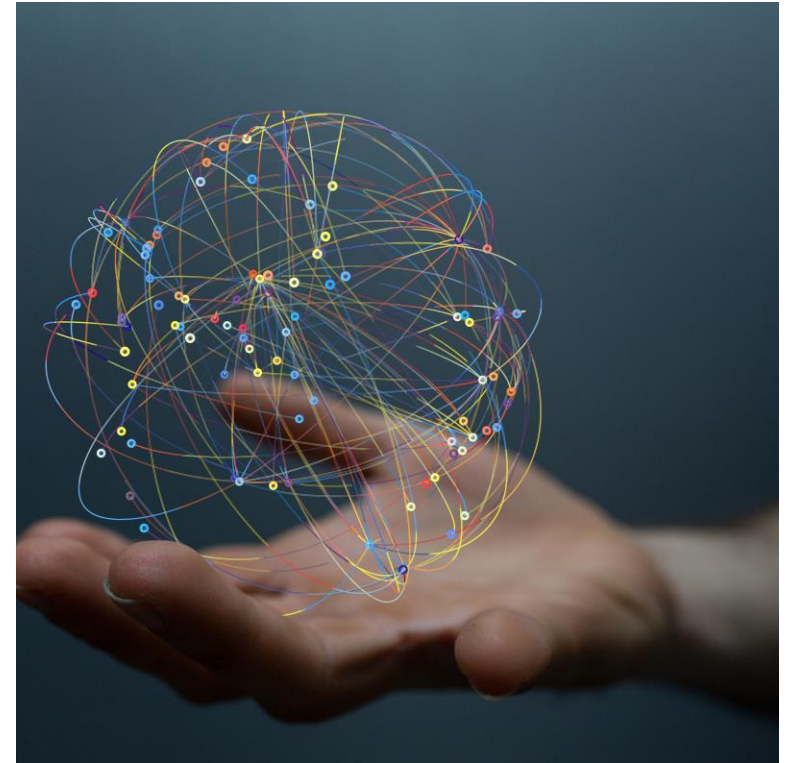
- Which law should govern?
- Where is my counterparty incorporated?
- Where do they have assets?
- What risks do I need to allocate/mitigate?
- How am I going to resolve disputes?
- Can I obtain third-party protection?
- Can I structure the investment for added protection?



Contractual Protections

Strengthening the contractual regime

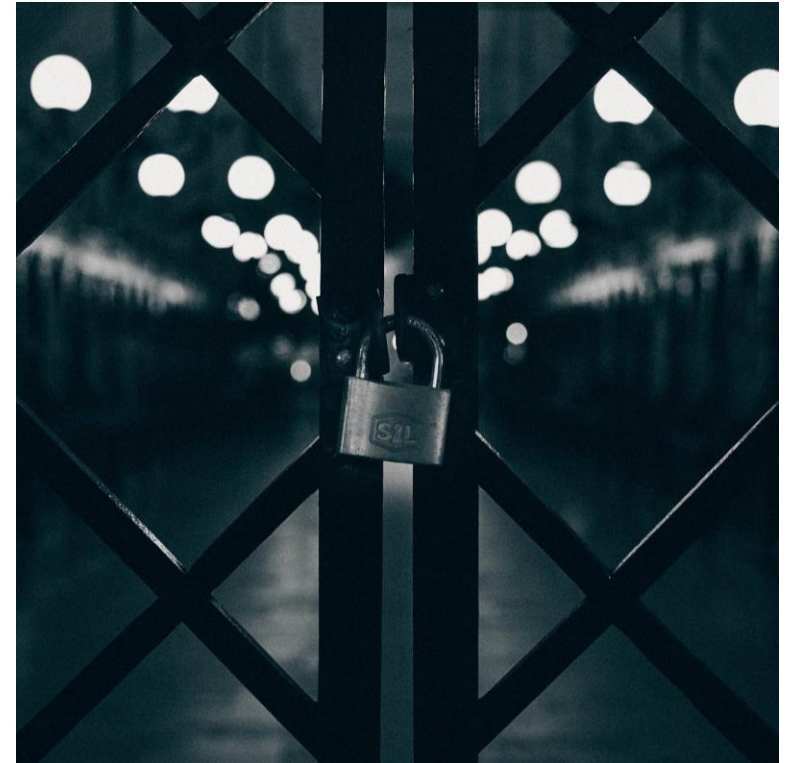
- Reps and Warranties (W&I Insurance)
- Indemnities and Guarantees
- Liquidated Damages
 - Enforceability
 - Different from penalty clauses
- Termination
 - Rights
 - Ability to cure
 - What happens if disputed
 - Post-termination obligations



Contractual Protections

Strengthening the contractual regime

- Force Majeure
 - Regulatory changes (foreseeability)
 - Duration
 - Consequences – suspension, suspension plus contract extension, termination, renegotiation
- Material Adverse Change
- Price escalation
 - Triggers
 - Rights to adjust
- Hardship
 - Impracticability
 - Triggers
 - Consequences if parties can't agree



Litigation or Arbitration

The case for international arbitration - Enforcement

- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
- Emphasis on reciprocal recognition and enforcement – makes international arbitration awards “portable” and enforceable anywhere in over 170 countries around the world
- Limited grounds for challenge of awards
- Important for “seat of arbitration” to be in a N.Y. Convention country



Litigation or Arbitration

The case for international arbitration - Process

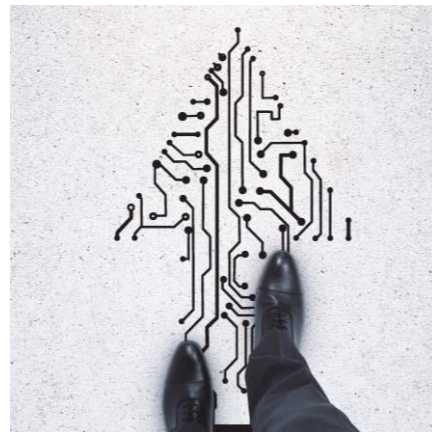
- Neutrality
 - Location or seat – no home court advantage
 - Impartial decisionmakers
- Privacy/Confidentiality
 - No public proceedings or filings
 - Duty not to disclose and to maintain confidentiality
- Finality – no appeal
- Input into the tribunal
- Bespoke process



Litigation or Arbitration

The case for litigation

- Courts' powers of compulsion and sanction
- Ability to bring in third-parties
- Robust procedural decision-making
- More certain path for dispositive motions – motions to dismiss and for summary disposition
- Broader discovery rights
 - Arbitration is typically limited to document disclosure from parties
- Rights of appeal
- The risk of badly drafted clauses



International Arbitration Clauses

The clause is crucial

- Clear and broad reference of disputes to arbitration
- Arbitral institution
 - International: LCIA, ICC, ICDR, SIAC, SCC, HKIAC
 - Ad Hoc: UNCITRAL or silent
- Number of arbitrators (one or three)
- Seat of arbitration
- Language of arbitration



International Arbitration Clauses

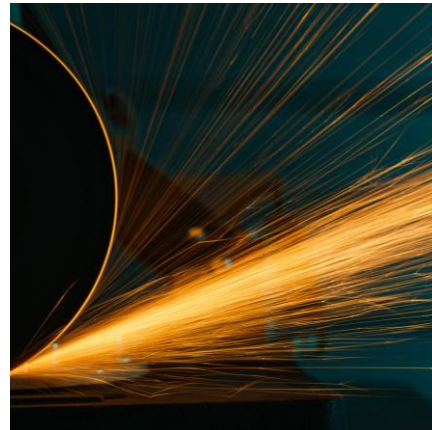
Optional Extras

- Expedited procedure
- Tiered dispute resolution clauses
- Arbitrator qualifications
- Time limits
- Disclosure rules



Governing Law

- Commercial certainty
 - England & Wales
 - New York
 - Singapore/Hong Kong
- Different governing laws?
 - the contract
 - the arbitration agreement
 - the forum/legal seat
- Don't leave it to the last minute...



Investment Treaty Protection

Structuring an investment for added protection

- Around 2,500 international investment treaties or trade treaties with investment protection
 - Legal rights under international law
 - Directly enforceable against host state
 - International arbitration
 - No privity of contract
- Standards of protection
 - Prompt, adequate and effective compensation for expropriation
 - Minimum standards of treatment
 - Full protection and security
 - National treatment



Investment Treaty Protection

Structuring an investment for added protection

- Investment broadly defined
 - Any kind of asset
 - Shares, stock
 - Debts, bonds, claims to money
 - Property rights
 - Intangible rights and IP
- Investor
 - Nationality of state that has treaty in force with host state
 - Usually incorporation, but sometimes physical presence or substantial activity
 - Before dispute arises or is foreseeable



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Thank you.

