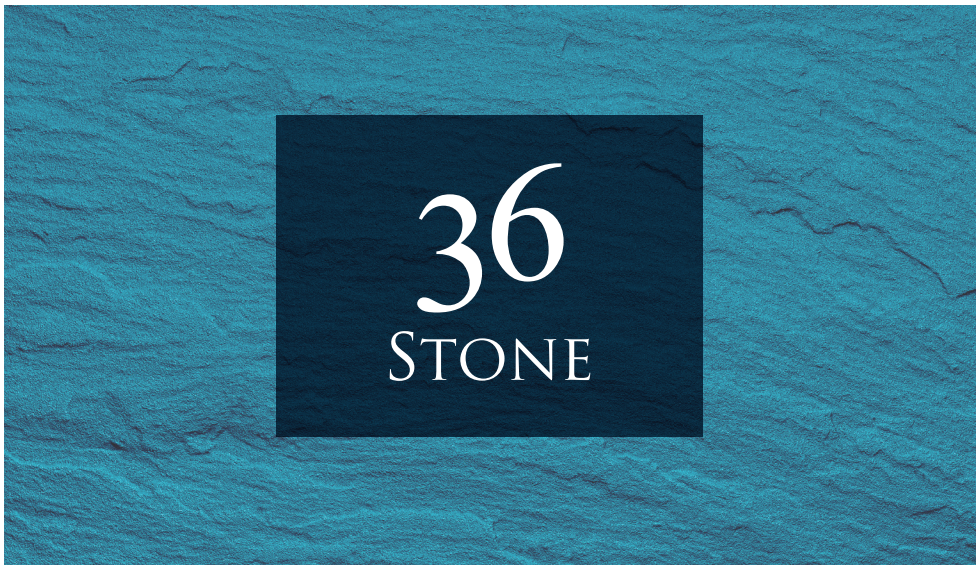
Views from the Bridge at 36 Stone

November 2021



Welcome to the 13th edition of Views from the Bridge at 36 Stone. It was great to see 36 Stone's monthly newsletter celebrate its first birthday last month as it continues to deliver so much positive and fruitful material for you all to enjoy.

As the cold weather hits and the festive season approaches, I am delighted to bring you an insightful Q&A from Ravi Aswani where he discusses the new world of virtual working, his goals for 2022 as well as sharing tips on a career at the Bar. Ravi's Q&A is following by a piece from dual-qualified member, Jamsheed Peeroo, following his participation at the first ever Turkey Arbitration week at the beginning of November 2021. Jamsheed discusses the event and he has hand-picked a few interesting points which were raised during his speaking session on the topic of 'Damages in International Arbitration'. Jamsheed was joined on the panel by Sherina Petit, Partner – Norton Rose Fulbright, who contributes to this month's Views from the Bridge with comments on Turkey Arbitration Week. Thank you Sherina!

I hope you all enjoy the penultimate edition for 2021.

All the best,

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Q&A
with Ravi Aswani

Firstly, how have you been and how has your practice developed over the last couple of years, especially during the pandemic?
I am doing great! Different people have had markedly different experiences of living and working through lockdown. During the earlier lockdowns, I found it a real struggle to keep on top of work and also help my children with schoolwork. That said, from the perspective of spending more time with them, those earlier lockdowns were a fantastic time for family bonding. I really feel for those who had to survive lockdown alone and entirely without physical companionship. The later lockdowns were very different given that the children were physically back at school by then. Things are somewhat back to normal now. I am spending three to five days a week in Chambers as of November, but with a full hardware setup (desktop computer and two screens) at home so that if I want or need to work from home, there is no difficulty in doing so.

As I am a relatively senior junior now, it is unusual for me to be led and many of my cases involve me acting alone against a QC opponent. I find this a fun challenge to navigate in practice, though of course it takes a lot of hard work. My practice has organically developed to a point where about 50% of my work in any year is shipping / commodities related and the remaining 50% is non-maritime international arbitration work. My work as counsel has in recent years taken me all over the world (virtually rather than physically in the immediate past though). A considerable part of the international arbitration work I do now is seated other than in England and involves contracts governed by a law other than English law. I am also now receiving nominations / appointments as arbitrator.

What has been the main positive for you during lockdown?
I have developed a much better work / life balance as a result of having fundamentally to reassess my working routine. I had, without really ever stopping to consider it before, managed to get myself an unhealthy routine of seeing my children on Sunday then not seeing them again until Friday night (because I would leave the house before they were awake and would return home after they had gone to bed). The quality of my relationship with them has improved markedly as a result of spending so much time together during lockdown, and I am taking care not to default to bad old habits now that working patterns are getting back to something like they were before. I still periodically work from home, and on some of the days when I am commuting in I come in after rush hour so that we can have breakfast together as a family.

When I first started at the Bar, there was very much a culture of presenteeism. This had been gradually diminishing over the past twenty years, but I think the pandemic has destroyed it completely and for good. That, frankly, is something we should all welcome. Having said that, I still think it is important for those in the formative starting years of their career at the Bar to spend a reasonable proportion of their time physically in Chambers because so much of what you learn at that stage is unscripted and spontaneous such as listening to unexpected calls, interacting with other members of Chambers, or just having colleagues within the building to go and speak to about a problem or issue if the need arises. That in turn requires people of my generation, who had the benefit of such opportunities when we were starting out, to make sure we pay it forward and try to provide a similar environment for future members of the profession to flourish in.

Thankfully, my workload remained high in 2020 and 2021, though virtual hearings and doing a lot of conferences virtually took some getting used to. I think most people have been surprised at how easy it is to work remotely with modern technology.

Q&A
with Ravi Aswani

What has been your main challenge during lockdown?
The main challenge has been trying to stay physically active whilst working from home. During the earlier lockdowns, I found that overnight my lifestyle became very sedentary, whereas normally I achieve more than 10,000 steps a day just in the course of ordinary commuting. It is all too easy to forget about exercise when the office is only a few steps away from the bedroom! My wife and I bought a Peloton bike (which to be fair she has used more than me) and some other exercise equipment early in the first lockdown which I am trying to be disciplined about using.

The other challenge I have found is that it has taken much more discipline and planning to make sure I do not lose touch with colleagues both within Chambers and more generally. Modern technology is wonderful, but as it stands today a virtual meeting is still not quite the same as an in person interaction (this is likely to change in the next five years). Nevertheless, during lockdown, I found Zoom and Teams to be extremely useful tools to ensure I stayed in touch with people when physical meetings were not possible. Now that I am regularly back in Chambers I am trying to ensure I have at least two physical meetings a week with people I have in some cases not physically met since 2019.

What will you change about your working practice after this period?
As already mentioned, I have already started a routine whereby I work from home periodically, and on the days I am commuting in I now sometimes come in after rather than before rush hour. I deliberately avoid rush hour as I am concerned by how many people are no longer wearing face masks on public transport.

I had already begun a move towards using soft copies of documents instead of hard copies, and this has been accelerated by the pandemic. For some years before lockdown, people had stopped sending hard copy documents and almost everything was either by way of PDF attachments to an email or (where lengthy documents were concerned) a link to a space somewhere in the cloud from which the documents could be downloaded. I had since about 2015 started saving documents to the cloud rather than the local computer I happened to be using (T: drive instead of C: drive), and started cutting down on the number of things I asked for in hard copy or printed myself. This meant I found it relatively easy to adapt to remote working. I can for example when I need or want to do so work on a document in Chambers all day, get home in time to have dinner with my family, and seamlessly resume working from exactly where I left off on the same document from a different computer at home at night. My general rule going forward is going to be (and now has been for some time) to request specifically not to receive hard copy documents or hearing bundles. Hopefully this will also keep me firmly in the good books with my clerks as I envisage never asking them to arrange for anything to be printed for me ever again! Having become accustomed to making notes on PDF writing software, I have managed to overcome my initial hesitancy about this and cannot foresee other than in an unusual case ever asking for hard copies again. Similarly, I have over time been cutting down the number of hard copy books I purchase in favour of database subscriptions which can be accessed from anywhere, and the pandemic has accelerated this trend. There is additionally an important climate change angle to such steps, which also requires that other practices be rethought as regards their fitness for purpose in the 21st century, such as cutting down on air travel and being more mindful of energy consumption and waste generally (see for example the excellent work of the Campaign for Greener Arbitrations and Greener Litigation).

Q&A
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Having seen inertia on green initiatives for many years, I really believe their time has come and they are now irreversibly mainstream agenda items thanks to the pandemic. It is not just counsel work which will be impacted; arbitrator work will be as well. I think we are very close to reaching a position where arbitral institutions, as part of their seeking statements of independence and impartiality, seek positive confirmation that if appointed the arbitrator will work from soft copy documents only. Old fashioned arbitrators not prepared to make the necessary changes to their working practices will before long find themselves swimming against the tide, out of step with modern thinking, and (perhaps more significantly) losing out on appointments to those arbitrators who do update their practices. For the same underlying reasons, I expect similar changes in working practices will be required of arbitrators doing ad hoc arbitration, such as under LMAA terms.

Do virtual hearings work and are they successful?
Yes, virtual hearings work very well indeed. I think many practitioners have been surprised just how well they work. One of the biggest concerns expressed at the beginning of the first lockdown was in relation to how judges and arbitrators would be able to assess credibility of a witness when not being to form a complete view about demeanour due to not observing the witness in person. Putting aside the question about whether demeanour is an accurate guide as to credibility (which is not free from controversy), one thing which practitioners noticed was that in a remote hearing context, it is actually possible to stare quite intently at a witness on screen and really get a "feel" for their evidence and its delivery, in a way which would be awkward in an in person format if the witness caught the eye of the person staring at them.

However, virtual hearings are not without their difficulties. First, they can be tiring! I had a 10 day virtual hearing in June 2020 and it was physically a very draining experience. Luckily, I was part of a large team in that case and we divided the work between us in such a way that nobody was overwhelmed, but it still took me a good week doing relatively little work to recover from the experience. Scientists have investigated this phenomenon and have found that the physical act of concentrating on screens for hours on end rather than being in a traditional in person environment requires much more effort. Those findings certainly tally with my experience. Second, whilst modern technology is reasonably good nowadays, it is still not straightforward to replicate the ease and spontaneity of scribbling something down on a post it note and passing it to another team member. WhatsApp groups and emails help, but as things stand today it is not quite the same. For similar reasons, interacting with other team members in a virtual breakout room is not yet quite as easy as doing this in person. However, these observations are a snapshot in time as at 2021. Technology is evolving all the time. Five years from now, I expect the technology to have developed to such an extent that these difficulties will be minimised if not eliminated. If technology geared towards making asynchronous hearings easier comes onto the market and is available at a reasonable price, that will be a game changer. It will mean the potential elimination of time zone issues, which as things stand today still present one particularly good reason to hold an in person hearing in one place where all parties and their representatives can physically attend and work to the same hours.

In person hearings will never disappear completely, and will remain the most appropriate course in some cases, but I firmly believe that virtual hearings are here to stay. They will not disappear just because in person hearings are now possible again. If anything, I expect documents only proceedings to be an unforeseen casualty of the success of virtual hearings in many marginal cases where previously the cost of an in person hearing would have been thought disproportionate.

Q&A
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What are your goals for 2022?
First, I want to be disciplined in ensuring that the better work / life balance I have achieved as a result of the pandemic remains a permanent change to my working patterns. Second, I have begun November on a real high by making sure I devote some time each week to catching up with people in person in London over breakfast, coffee, lunch or a drink. There is a real buzz in London as people are making a return, and the all-round relief at being able to have in person meetings again is palpable. I am going to try to keep this up going forwards for the foreseeable future. Third, I obviously want my career to develop along the same trajectory it has over the past few years and keep busy with a variety of interesting commercial disputes.

What is it you enjoy most about being a barrister and what would your advice be for anyone who is looking to pursue a career at the Bar?
The freedom that comes from being self-employed is absolutely brilliant, though of course requires discipline. I think the dynamic is slightly different at the employed bar or as a solicitor at a law firm or in house. I am very enthusiastic about conducting oral advocacy, although in international arbitration in particular it is not necessary to practice at the self-employed bar in order to have a practice involving substantial oral advocacy. The privilege of being entrusted to present a client's case before arbitrators or a judge is one which I still strongly feel with every new instruction even twenty years in to my career, and one which still gives me a buzz of excitement in every single case.

I did a podcast earlier this year in which amongst other things I suggested some tips for those starting out in their careers which can be found here: Ravi Aswani on LinkedIn: #legalgenie.

Consequential loss in breach of contract

Introduction

The First Turkey Arbitration Week was recently organised by the Energy Disputes Arbitration Centre ("EDAC") from 1 to 5 November 2021, during which 36 Stone contributed a session on the topic of "Damages in International Arbitration". It began with enlightening opening remarks by Sherina Petit who provided a useful overview of the legal and practical issues that arise in common law and civil law countries, followed by an interesting discussion with Mrinal Jain, Andreas Schregenberger and Jamsheed Peeroo. The session was skilfully moderated by Alveen Shirinyans.

Below are some of Alveen's questions and the points discussed by Jamsheed.

Alveen: What is the starting point in your view when a party approaches you for recovering damages?

Jamsheed: The starting point must be to find the applicable law and the corresponding cause of action available under that law. Are we talking about commercial law, private law or investment law under a treaty? If it is commercial law, are we dealing with civil law or the common law?

These questions will help us to identify whether the claim should be based on a breach of contract, tort or civil responsibility, unjust enrichment, and so on as far as commercial law is concerned.

Normally, the law applicable to the dispute, that is, the law that provides the cause of action, will also be the law that will apply to the type of damages that may be recovered and their quantum.

I should add that that does not mean that only that applicable law will be used in quantifying damages. For instance, let's say that under the law applicable to the merits and quantum of damages in country X, the damages that are recoverable correspond to the value of 40% of the shares in a subsidiary company registered in country Y.

In order to assess the fair market value of 40% shareholding within that company, the expert will also need to take into consideration any legal or regulatory factors that affect the market value of those shares.
For instance, there may be restrictions as to who can buy those shares, thus limiting the demand for the shares. Such restrictions could seriously undermine one's ability to freely dispose of the shares. This may arise in cases of public procurement where a national preference has been applied through the involvement of local participation to grant a concession to a Joint-Venture, and no other local entity can step in the shoes of the local operator. Hence, the legal and regulatory factors of country Y will come into play and specific advice may be needed on that local law.

The question of the applicable law might be more straight forward when it comes to an action under a Bilateral Investment Treaty or Investment Promotion and Protection Agreement, but one would still have to identify the actual cause of action, i.e., which obligation under the treaty has been breached – is it an unlawful expropriation or has the company been discriminated against and been given unfair or inequitable treatment? And the assessment of damages is likely to differ depending on whether it is an expropriation or a breach of another duty.

Alveen: In your experience at what stage would you involve experts like Mrinal?

Jamsheed: In my view, a common mistake is to file a case too quickly, sometimes under pressure from a client, and to postpone the issue of quantum for consideration at a later stage. This is a risky approach, and one may well end up with an unexpected surprise when the case unfold itself. Quantum should, at least on a preliminary basis, be assessed at an early stage.

Knowing the quantum often helps in taking a decision on the action to be brought. For instance, from a foreign investor's perspective, damages assessed under private law as a result of breach of a concession agreement by a State enterprise are likely to be different from damages assessed under a claim for expropriation under a BIT against that State.

In such a situation, quantum is an important factor, if not the most important one, to be weighed in deciding whether to go to commercial arbitration or investment arbitration.
Another situation where I would reach out to a quantum expert at a very early stage would be where third-party funding is required. The stronger your memo, the better your chances of saving time by not having to chase funder after funder.

If you are approaching two funders, you want both to express interest in funding, so that your client can then choose the better deal. For obvious reasons, it reassures funders and investors when they see figures prepared by an expert. Inserting an expert's preliminary valuation in a memo addressed to funders is extremely useful.

Alveen: You mentioned earlier that the starting point is the applicable law. What if the parties have chosen "transnational principles of commercial law" or "lex mercatoria"?

Jamsheed: Before answering the question, I should point out that this must be a permissible, valid and legally binding choice – for instance where the law of the seat allows parties to choose, or an arbitrator to apply, "rules" or "rules of law", rather than to mandatorily have to apply the "laws of a country". Otherwise, the tribunal will have to apply conflict of laws principles to determine the law applicable to the dispute, and which conflict of laws principles to apply is yet another whole new topic.

To answer your question, where such a choice is valid, surely one would not expect the party claiming or the tribunal to guess what those general principles of commercial law are, or what lex mercatoria consists of. Worse, one would not expect them to have to compare all laws of all countries to find what are the common transnational principles. Rather, one could look at principles drawn by scholars from various countries, such as the UNIDROIT principles.

The UNIDROIT principles contain specific rules relating to the quantification of loss. For instance, Art. 7.4.2 of the UNIDROIT Principles providing that the aggrieved party is entitled to full compensation. This includes lost profit, consequential damages or expectation loss as may be referred to in different legal systems. Applying such rules should in many cases make the award valid and enforceable, depending on the facts of the case, the law of the seat, and the law of the courts before which the award is sought to be enforced.

Jamsheed Peeroo

Turkey Arbitration Week (TAW) comprises of a series of different events, related to international investment law and arbitration and brings together arbitration advocates, neutrals and academics from all over the world. The first edition of TAW was held this year between November 1st and 5th of 2021 and ran as hybrid sessions, where participants were able to join virtually from around the world.
The week was organised by the Energy Disputes Arbitration Center (EDAC), the first and only international arbitration center with its head office in Ankara, established with the aim of solving the disputes between companies in Central Asia, Europe, Balkans, Middle East and Africa regions regarding Energy and Infrastructure Law. The EDAC is home to board members, consultants and arbitrators from different nationalities and legal systems, who are experts in the energy sector and international law. The EDAC organised TAW with the aim of bolstering Turkey's position as an energy hub in the long-term.

In particular, a session was held in relation to the topic of the "Assessment of Damages, Claims and Losses (involving complex legal, economic, financial and valuation issues) in Commercial Disputes, International Arbitration and Investment Treaty Arbitration".

I was delighted to be given the opportunity to open the session, after which various thought provoking questions were asked by the moderator Alveen Shirinyans, co chair of the young EDAC to the speaker panel, which was comprised of Jamsheed Peeroo from 36 Stone, Andreas Schregenberger from Gabriel Arbitraiton, and Mrinal Jain from Secretariat.

During the session, Jamsheed discussed the cross-border elements of damages claims, and what impact the governing law, jurisdiction and country of incorporation of the parties may have on the principles of damages that apply. He went on to explore the differences in valuation between treaty cases and contract cases, and finally considered what principles of damages were deemed to be globally accepted.

Andreas' focus was on Swiss Law, in particular what the requirements are for a success claim for Loss of Profits and what approach would be taken to a liability clause incliuding consequential damages. He also provided advice on limitation of liability clauses in general under Swiss Law, and considered the potential pitfalls experts face in drafting their expert reports.

Mrinal explored the Fair Market Value standard and how much it is relied on in international arbitration, and how it differs from the principle of Full Reparation. He went on to discuss the different categories of damages that might be available, and the various approaches to valuation that can be taken. Finally, he discussed how to build a compelling but-for scenario in the context of investment treaty arbitrations.

This session was hugely insightful for arbitrators, practitioners and experts alike, and addressed some of the most contentious aspects of damages in international arbitration in addition to providing useful guidance on how to navigate cross-border issues.

Sherina Petit
Partner – Norton Rose Fulbright

Closing remarks
from the Head of 36 Stone

Dear All,

Difficult times may be on the horizon again due to the new Omicron variant. This seems at first sight to take us back several steps backward when we had thought we were on the threshold of a truly New year. Despondence won't cut it, though: the helpful observation is that we have been here before, that before the jabs came on the scene, it did seem as though there would be no turning back to a healthy future – and yet we now know there was! Just looking around our Chambers at 4 Field Court, it really is energising to see people back in, with radiant smiles appearing just above and around masks, amid a real buzz around the place! People are happy to be back – and we are all starting to see old friends and making new ones in person. Long may this continue – and all the very best from all of us at 36 Stone.

Charles

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