

International arbitration in 2024

Welcome to our annual review of the top trends we expect to shape the international arbitration landscape over the coming year and beyond.

Our international arbitration specialists from across our global network have identified 11 key trends that we predict will influence the field of international arbitration in 2024.

Several overarching themes drive these trends. Geopolitical and economic instability is a catalyst for disputes across many sectors, especially when combined with the pursuit by many companies of ambitious tech-related, energy transition and net zero goals.

Environmental, social and governance (ESG) issues continue to loom large for businesses in transition, so ESG features prominently in several of the trends. Global macroeconomic factors, such as inflation and the increased cost of capital, are driving disputes across multiple sectors. Sanctions-related issues are increasingly prevalent for parties navigating the fallout of the Russia-Ukraine conflict and other conflicts as well.

Our report also investigates the risks and opportunities presented by recent developments in the practice of international arbitration. How will artificial intelligence affect arbitration? How should recent arbitration-related court decisions inform disputes strategies? What are the implications of reform of the UK Arbitration Act? How can investors navigate the EU's continued efforts to block intra-EU investment arbitration?

Our team not only monitors these developments closely but also plays an active role in shaping thought-leadership in the international arbitration community. We play a leading role in promoting diversity with the [Equal Representation in Arbitration Pledge](#), and greener arbitrations, with our support of the [Campaign for Greener Arbitrations](#).



This is an exciting time for international arbitration. Numerous disruptive events are transforming the process and expanding its scope of application further and further.

Boris Kasolowsky

Partner and Global Co-head
of the International Arbitration Group.



We hope these first-hand insights will help you plan your disputes strategies in 2024 and beyond. We look forward to overcoming any obstacles and maximizing your opportunities in this rapidly evolving landscape.

Noiana Marigo

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If you would like to discuss any of the topics covered in the report, please reach out to us, the authors of the trends or your usual Freshfields contact.



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AI is already used in many parts of arbitration practice, including in managing and reviewing large batches of documents and preparing chronologies. The rapid development of more advanced forms of AI, such as [generative AI](#) (GenAI) and large language models (LLMs), presents new opportunities and risks in the arbitration space.

The use of artificial intelligence (AI) in legal services is [not new](#). According to the [2023 Wolters Kluwer Future Ready Lawyer Survey Report](#), 73 percent of surveyed legal professionals expect to integrate GenAI into their legal work in 2024. Similarly, many companies are [expanding their use of GenAI](#) in their operations and legal departments.

How can AI benefit international arbitration?

AI is already being used in international arbitration in several key areas.

- **Dispute prevention:** AI is being used for contract management and execution, mapping out potential risks, and even flagging contract breaches. In the [construction industry](#), for example, AI is being used to automate the design process, optimize schedule management and cost estimation, and anticipate delays and risks, which can help parties avoid or mitigate delay and disruption claims.
- **Arbitrator selection:** Existing AI tools can assist parties with arbitrator selection by synthesizing data relating to past decisions, tendencies, and expertise. We anticipate that new tools will soon be developed that will dig even deeper into these and other factors, with the arbitrator selection process becoming less subjective and word-of-mouth-based and more objective and, hopefully, diverse.
- **Management of arbitration proceedings:** Arbitral institutions such as the [ICC](#) and the [AAA/ICDR](#) are either already using or are considering using AI to improve internal processes, save time and costs, and enhance procedural efficiency in the management of arbitration proceedings.

- Drafting of awards: Several judges in different jurisdictions, including in [the UK](#), [Colombia](#), [Brazil](#), [India](#) and [Taiwan](#), have reportedly used GenAI when drafting decisions, or are developing AI tools to assist with judgment drafting. There have not yet been any public reports of arbitrators relying on GenAI, but we expect that to change soon. The potential efficiency gains are obvious, but there are risks associated with decision-makers relying on AI, some of which we discuss below.
- Privacy and confidentiality: Publicly available AI tools may raise confidentiality concerns where they store confidential data inputted by the user. Additionally, other [legal and reputational risks](#) may be associated with AI's use, which could result in disputes related to [copyright or personal data infringements, or negligence or liability claims](#).
- Integrity of proceedings and evidence: Advancements in AI could heighten the risks of [manipulated or false evidence](#), such as “deepfakes”, being submitted into the record of arbitration proceedings.
- Due process issues: If arbitrators delegate their decision-making function (or part of it) to an AI tool, and do so in an undisclosed way, this could raise due process issues and, at an extreme, possibly give rise to annulment or vacatur arguments.

Risks of AI in international arbitration

As with all innovative technologies, the use of AI also presents [new risks](#).

- Biases: As AI tools have been developed by humans, it is important to implement safeguards to mitigate the potential biases of their creators and of the underlying data set on which they have been trained. Furthermore, since most commercial awards are not public, the data on which AI tools rely may be incomplete.
- Risks of “hallucinations”: This is a risk where outputs generated by an AI model become untethered from the source materials, including, for example, user’s prompts and input reference texts. There has, however, been continued effort and technical breakthroughs across the AI and academic communities to detect, measure and mitigate such risks. Within the context of dispute resolution, two New York attorneys were [sanctioned](#) in 2023 after filing a legal brief in federal court that referred to non-existent case law supplied by ChatGPT. In response, some courts in the [US](#) and [Canada](#) now require parties to disclose the use of AI or to certify that either no GenAI tool was used in drafting or that all content created by GenAI was reviewed and verified by a human. Other courts, such as those in [New Zealand](#), consider it unnecessary to disclose the careful use of AI. As noted below, at least one arbitration body is developing guidelines addressing the use of AI in arbitration proceedings.



AI will find its way into international arbitration practice, like most other places. AI has great capacity to reduce costs and increase accuracy and efficiency, but it also comes with risks – as two New York lawyers recently experienced when the AI-generated case law in their brief turned out not to exist. Like in many other areas, it will pay to approach AI's role in international arbitration cautiously and with an open mind.

Elliot Friedman

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AI regulation in arbitration

Recognizing these and other concerns, legislators and governments are considering how to regulate AI. A key development is the EU's "[AI Act](#)", which will regulate the use of AI in EU Member States. The Act – which is expected to apply from mid-2026 – aims to protect fundamental rights by putting limits on high-risk AI systems and provides for transparency requirements for general-purpose AI systems.

The most notable public initiative addressing the use of AI in arbitration is at present found in the [Guidelines on the use of AI in Arbitration](#), drafted by a taskforce of the Silicon Valley Arbitration and Mediation Center and published in August 2023. These guidelines seek to reflect best practices and highlight risks associated with the use of AI in arbitration proceedings.

The draft is still undergoing a public consultation process, and its final version, expected to be released in 2024, will incorporate feedback from the arbitral community and institutions on certain controversial issues, including if, and to what extent, parties and arbitrators should have a general obligation to disclose the use of AI in arbitration proceedings.



While AI presents incredible opportunities for innovation and efficiency for legal practice, its deployment must be measured and thoughtful in order to mitigate risks that are rapidly emerging, including to maintain accuracy and credibility before tribunals, and preserve privacy rights and the confidentiality of sensitive information.

Tim Howard

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Practical considerations for the use of AI in arbitration

In addition to general considerations to keep in mind when using AI (see our insights on top actions general counsel should take and GenAI considerations for lawyers), parties involved in arbitration proceedings should consider using AI to help prevent disputes. Investing in appropriate AI tools can help minimize, manage and monitor contract risks, and can assist with implementing strategies to mitigate them.

Addressing how AI is used in an arbitration proceeding from an early stage will be important. Parties and arbitrators should consider agreeing on the principles governing AI's use during proceedings and incorporating those principles in the first procedural order. This will promote the transparency and legitimacy of the arbitration process, establish appropriate guardrails, and avoid costly and lengthy procedural battles.

Perhaps most importantly, before using AI tools in arbitration proceedings, companies and counsel should all understand how the tools work, the data they rely on, and the risks involved in their use.

02.

Arbitration in times of crisis: conflict, sanctions, climate



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In 2024, we expect more disputes related to geopolitical crises, global warming, economic strife, and the regulatory and economic measures States take in response.

Companies will seek damages using investor-State claims, advance claims under political risk insurance policies and face climate change-related disputes. Sanctions and countersanctions are likely to add further complications, creating complex layers of parallel proceedings, requiring parties to consider risk and liability mitigation strategies.

Exit claims against Russia

During 2023, the regulatory framework for foreign investors in Russia continued to deteriorate. The government introduced further restrictions on the ability of investors from “unfriendly States” to exit Russia by selling local operations. Western companies have experienced difficulties in obtaining the necessary “exit permits” from the Russian government, forcing them to accept massive reductions in sale price and significant delays in payment. Worse, some foreign investors, such as [Danone](#) and [Carlsberg](#), have seen their Russian assets seized outright.

We explained in our [2023 Trends Report](#) that Russia’s conduct could give rise to claims in investor-State arbitration under bilateral investment treaties (BITs) between Russia and the “unfriendly States” whose nationals are the subject of Russia’s countersanctions. Increased activity from foreign investors in this area throughout 2023 suggests they have concluded the Russian business environment is unlikely to improve, and their assets in Russia could be lost altogether. A few investors have sent dispute notices in 2023, and it seems likely that the first claims arising out of Russian countersanctions will be filed in 2024.

The first rulings on jurisdiction in these disputes will be important. Many Russian BITs restrict the scope of arbitration to “the amount or mode of compensation for expropriation”. Previous decisions have left unsettled whether this limitation is to be construed narrowly or permissively.

Political risk insurance claims

Political risk insurance grows in importance in times of crisis. Investors purchase policies from private insurers or their home States under a foreign direct investment incentive scheme. Coverage can provide compensation for the loss of assets, income or property due to political events or government actions. These contracts can de-risk investments in countries where government interference is a concern.

Many foreign investors in Russia acquired such insurance. In 2024 these policyholders are expected to battle their insurers in arbitration, having submitted claims in 2022 and 2023 that are now in dispute. A focus of these disputes will be whether Russian countersanctions have caused a loss, considering licensing procedures that can (in theory) liberate assets in Russia, subject to the discretion of Russian authorities.

China presents a similar trend in political risk insurance. As well as specific challenges associated with investing in and out of China, the increasing complexity of the global investment climate is an influencing factor.



Political risk insurance provides investors with simplified access to recovery for losses in high-risk jurisdictions, alleviating the need to trace State assets or deal with enforcement procedures for awards against a State.

Noah Rubins KC
Freshfields Partner

Climate change-related disputes

Activist organizations and individuals have been using legal systems around the world to regulate through litigation for years. This trend continued in 2023 and is likely to persist in 2024.

Climate-related claims take a variety of forms, from damages claims against companies in carbon-intensive industries, to personal liability claims against directors, challenges to carbon-intensive projects in the pipeline, and claims against regulators or governments. The range of such claims has grown, including actions before the European Court of Human Rights, the International Criminal Court and UN bodies.

Such claims pressure States to introduce regulatory reforms on global warming. These changes may in turn affect foreign investors, giving rise to investor-State arbitration. A notable example is [RWE v the Netherlands](#), an arbitration relating to the Dutch government’s decision to phase out coal. Although this claim was subsequently withdrawn following the German Federal Court of Justice’s ruling that the intra-EU ECT case was inadmissible, similar claims may follow as the regulatory framework evolves.

The diversity of such disputes is likely to develop further with potential conciliation and arbitration proceedings under treaties such as the [United Nations Framework Convention on Climate Change \(UNFCCC\)](#) and the [Paris Agreement](#). Both contain dispute resolution provisions that provide for arbitration. Only a handful of States have opted into the dispute resolution system so far. But governments may feel pressure to join to show they are taking action on climate change, potentially leading to a new era of State-to-State climate change arbitration.

Sanctions-related disputes

The sanctions landscape is constantly evolving, with new sanctions and countersanctions emerging in response to new crises. These affect a wide range of commercial contracts where performance becomes difficult or impossible, due to the contractual partner's sanctions designation, or because of an export ban on certain goods or services. However, parties affected by sanctions may not accept the restrictions and seek to enforce contractual provisions by all means.

Russian parties have been empowered by a 2020 modification in the Arbitrazh (State Commercial) Procedure Code granting exclusive jurisdiction to Russian courts over disputes involving a Russian party affected by sanctions, even if contractual dispute resolution clauses refer to foreign courts or arbitration. Russian parties frequently used these provisions in 2023 to avoid proceedings abroad and we expect this trend to intensify in 2024.

This litigation tactic creates exposure for foreign companies concerning assets in Russia and in “neutral” jurisdictions where courts could be convinced to give effect to Russian judgments issued in violation of contractual dispute resolution clauses.

The risk appears particularly acute in China, which signed a treaty obliging it to enforce Russian judgments, subject only to limited exceptions.

In response, many Western companies will likely commence proceedings under the contractual dispute resolution clause and seek anti-suit injunctions from foreign courts to prevent the Russian party from litigating in Russia. This could strengthen their defense against attempts to enforce the Russian judgment outside Russia. But the pursuit of proceedings abroad can expose the foreign party to a Russian anti-suit injunction, backed by fines up to the amount in dispute in the contractual forum.

Western parties will face additional complexity, being forced to deal with parallel proceedings, the risk of liability in Russia, as well as unpredictable outcomes in parallel tracks. International businesses will need to carefully balance the risk of competing jurisdictions in defense of their assets and interests, and would benefit from an international strategy that maximizes their chances of success across jurisdictions.

China is another jurisdiction where foreign investment and trade are heavily affected by sanctions and export controls. In response, China has been building up its anti-sanctions regime, including allowing sanctioned Chinese parties to seek remedies in Chinese courts. To date, there has been no surge of sanctions-related disputes in China, but this may be in store for 2024 if geopolitical tensions continue.

Adaptation in the arbitration community

The imposition of sanctions profoundly impacts the logistics and legal considerations of arbitral proceedings. Lawyers, arbitrators and arbitration institutions must comply with applicable sanctions laws while ensuring justice is served. Leading arbitral institutions have responded by enhancing procedural flexibility, providing guidance on compliance, utilizing technology to avoid disruptions caused by travel restrictions, and maintaining a strong emphasis on neutrality, integrity and due process in the face of political and economic pressures.

In the meantime, arbitration users are increasingly seeking to “delocalize” their disputes to mitigate the effects of sanctions, which can complicate or even prevent the resolution of disputes when they involve sanctioned States, entities, or individuals. Such attempt is reflected in their choice of legal regimes, arbitral institutions and arbitrators. For example, there is increased popularity of common law Asian jurisdictions (i.e., Singapore and Hong Kong) and the arbitral institutions located there in Russia-related contracts.



The challenges that sanctions pose to international commerce and law will continue to test the adaptability, efficacy and neutrality of arbitration proceedings in a sanctions-laden global landscape in 2024.

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03.

Energy transition: critical minerals industry challenges



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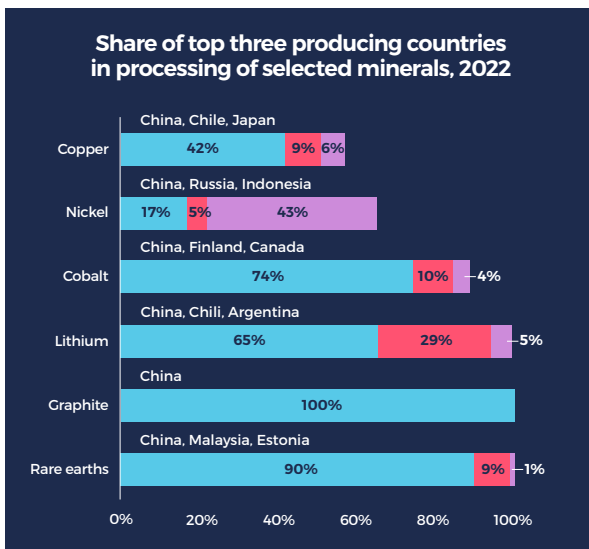
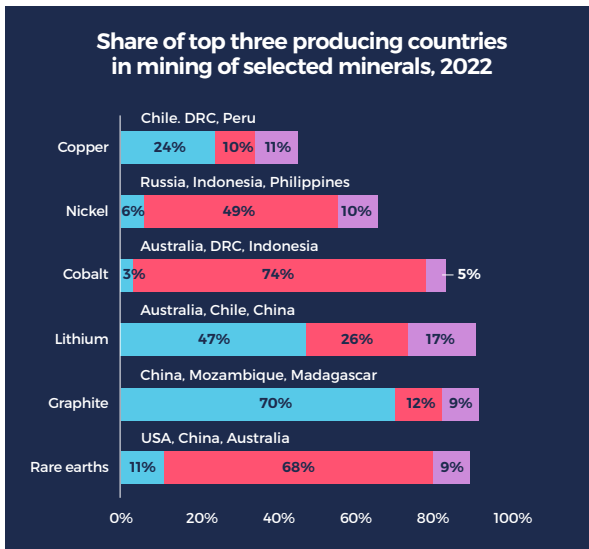
Soaring demand for minerals key to the energy transition will increasingly generate political, environmental and social challenges, potentially presenting an obstacle to the investments necessary to realize the energy transition. Considering energy and mining disputes are commonly settled by arbitration, many new cases in 2024 will likely focus on ESG concerns.

Countries and companies across the world are increasing spending on and diversifying into clean-energy or low-carbon energy sources. Renewables are expected to be the world's top [electricity source in 2025](#) and by 2030 [one in four new cars](#) sold worldwide is expected to be electric. (Some countries plan to completely ban combustion engine cars by 2030.)

The accelerating energy transition is [fueling the demand for, and investment in](#), critical minerals needed to manufacture electric goods – notably, lithium, copper, cobalt, nickel and other rare earth elements. Rising demand and high prices doubled the market size of key energy transition minerals [in the past five years, reaching \\$320bn in 2022](#). Demand for critical minerals is predicted to increase up to [500 percent](#) in the next ten years.

Geographic concentration

However, this rapidly growing market is concentrated geographically. The most important minerals are currently found in [only a few countries](#), mostly in [Latin America, Asia and Africa](#). [Chinese companies](#) control most of the global market for processing and refining several critical minerals.



Source: International Energy Agency, Share of top three producing countries in mining of selected minerals 2022 and [Share of top three producing countries in processing of selected minerals 2022](#).

Against this background, we believe that investors in the critical minerals extraction and supply chain will likely face three main types of challenges and opportunities in 2024 and beyond.

Increasing State control

First, governments where critical minerals are located may further increase State control of the industry or up their share of economic benefits. For instance, both [Mexico](#) and [Chile](#) have already fundamentally changed the legal regime for lithium mining, granting the State more control over lithium resources.

In Africa and Asia, several countries (including Indonesia, Namibia and Zimbabwe) have decided to restrict or prohibit exports of critical raw minerals. Similarly, [Malaysia announced](#) that it will ban the export of rare earth raw materials to boost its domestic industry. Additional producing States are likely to follow in these footsteps in 2024.

Regulation and subsidies

Second, we expect the critical minerals sector to become both more regulated and more heavily subsidized as a result of national security concerns, particularly in Western countries.

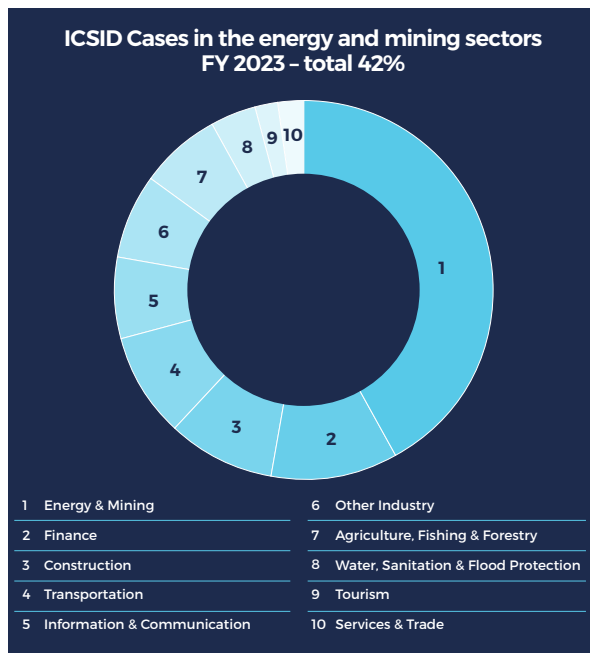
For example, both the [United States](#) and the [European Union](#) are updating their regulations and investing in expanding their domestic critical minerals supply chain. Notably, the [European Union's Critical Raw Materials Act expects to reduce](#) the administrative burden and simplify the permitting procedures for critical raw materials projects in the EU. However, EU Member States will have to increase their efforts to mitigate any adverse impacts with respect to labor rights, human rights and environmental protection.

In turn, Canada announced it would [limit foreign State-owned companies' participation](#) and investment in the critical minerals industry. However, as shown by Canada's ultimate backtracking from its efforts to force Chinese investors to divest from its three large mining companies, there may be limits to the intrusiveness of such government interventions.

ESG challenges to mining

Third, the mining of critical minerals will probably continue to face challenges from an ESG perspective, particularly related to the risk of environmental and social impact of the projects. For example, [one study has shown](#) that, of 120 mining projects located in Argentina and Chile, half are facing some type of community opposition. And a [survey of professionals engaged in mining arbitrations predicts](#) that environmental issues will be the main source of disputes in the near future. Mining projects across the world will continue to encounter community opposition related to water usage, biodiversity loss and the potential displacement of local communities.

We expect this increase in energy- and mining-related disputes to be commonly settled by arbitration (including investment arbitration). Indeed, [more than two in five cases ICSID cases](#) registered in 2023 were related to the energy and mining sectors.



Source: [ICSID, Annual Report 2023, page 29](#)

Whether using arbitration or not, effective dispute resolution and prevention mechanisms will be key to mitigating risks.



Ideally, investors should consider carefully all potential risks to try to prevent disputes, for example by developing strong compliance programs, conducting due diligence to address ESG considerations, and engaging with relevant stakeholders well before starting a project or investing in one.

Natalia Zibibbo
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Both investors and States should consider that failing to maintain the regulatory regimes specifically deployed by countries to incentivize investment, or introducing significant regulatory changes to those regimes, may breach protections granted to investors under international investment treaties and free trade agreements. Investors may, therefore, have access to remedies against host States' measures limiting the investors' return or enjoyment of their investment.



Investors in the critical minerals industry should consider structuring their investments through a jurisdiction that has in place a treaty with the host state protecting the investment. However, there are important differences between treaties and investors should carefully consider the different options.

Caroline Richard
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04. Arbitration Act 1996 reforms: ensuring London remains a leading seat for international arbitration



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An Arbitration Bill containing key reforms to the UK's Arbitration Act 1996 is expected to make its way onto the statute books in 2024.

The [Arbitration Bill](#) is the culmination of a two-year consultation by the Law Commission of England and Wales, in which Freshfields participated.

London has long been a preferred seat of arbitration for parties arbitrating under cross-border contracts, principally due to the robust legal framework for London-seated arbitrations found in the 1996 Act and the approach of the English courts to arbitration-related matters, which was [recently encapsulated](#) by the then Lord Chief Justice, Lord Thomas, as follows: “Maximum Support. Minimum Interference.” A [2021 survey](#) ranked London as the most popular seat, alongside Singapore.

In November 2021, the Law Commission initiated its consultation on possible reforms to the 1996 Act to ensure that London maintains that top spot. The consultation has led to a number of recommendations which are reflected in the Arbitration Bill. We summarize four key recommended reforms below.



The Law Commission has conducted a thorough and thoughtful consultation on the Arbitration Act 1996 and has made some very welcome recommendations for reform which, if enacted, should further enhance London's popularity as a seat of arbitration.

Oliver Marsden
Freshfields Partner and
Head of International Arbitration – London

The law governing an arbitration agreement

The law governing an arbitration agreement will typically apply to determine important matters such as the validity and scope of the arbitration agreement. Following the Supreme Court's decision in [Enka v Chubb](#), the current position under English law is that, absent an express choice of law for the arbitration agreement, the law governing the arbitration agreement will usually be the same as the law governing the parties' wider contract.

The Arbitration Bill proposes to change this: absent an express choice of law for the arbitration agreement, the law governing the arbitration agreement will be the law of the *seat of the arbitration*.

New tribunal powers to summarily dismiss meritless claims and defenses

The Arbitration Bill introduces a new provision empowering a London-seated tribunal to issue an award dismissing a claim or defense on a summary basis in circumstances where the relevant party has “no real prospect of success”. This is the same as the threshold test for “summary judgment” applied by the English courts.

This new provision (from which parties will be able to “opt out” if they wish) will remove any residual uncertainty relating to a tribunal’s power to dispose of a claim or defense by way of a summary procedure under English law. That power will now be set out expressly in the new Act.

Parties (and tribunals) should, therefore, feel more comfortable applying for (and adopting) summary procedures in London-seated arbitrations without fear of a party subsequently seeking to challenge or resist enforcement of the award on that basis.



We anticipate that these reforms to the UK’s arbitration law will be of great interest to parties entering into international commercial contracts, especially the new express power to summarily dismiss meritless claims and defenses.

Joaquin Terceño
Freshfields Partner

Interim relief: enhanced court powers to support the arbitral process

In some cases, a party may need to apply for interim relief from the English courts in support of a London-seated arbitration rather than seeking such relief from a tribunal or an “emergency arbitrator”, because a tribunal or emergency arbitrator cannot provide effective relief in the circumstances.

One example is a situation where a party requires an order against a third party, because a third party will fall outside the jurisdiction of a tribunal or emergency arbitrator. However, for several years there has been uncertainty in the English case law regarding the extent of the courts’ powers to issue orders against third parties in support of arbitration proceedings. The Arbitration Bill amends the 1996 Act to clarify that, unless otherwise agreed by the parties, the courts have the same powers to order relief against third parties in an arbitration context as they have in court proceedings.

The Bill also contains a provision which assists parties seeking urgent relief from an emergency arbitrator by confirming that they can go to the English courts to convert a peremptory order from an emergency arbitrator into an order of the court. This will facilitate enforcement of such orders in the UK and is also likely to place parties on better footing to enforce internationally. This is helpful since interim relief obtained from an emergency arbitrator can be difficult to enforce, in particular where the emergency arbitrator issues his or her decision in the form of an “order” rather than an award, as there may not be any available framework under a treaty or local law for enforcement of such an order.

More limited scope of review of jurisdictional awards by English courts in certain circumstances

At present, a jurisdictional challenge to a tribunal’s award under section 67 of the 1996 Act involves a full *de novo* review by the English courts on the issue of jurisdiction, in all circumstances.

The Bill provides for amendments to the 1996 Act and relevant court rules to make separate provision for circumstances where a section 67 application:

- relates to a jurisdictional objection on which the tribunal has already ruled; and
- is made by a party that took part in the arbitration proceedings.

In such circumstances, it is envisaged that the following rules will apply:

- a ground for the objection that was not raised before the tribunal should not be raised before the court unless it could not have been discovered with reasonable diligence at the time of the arbitration;
- new evidence that was not heard by the tribunal must not be heard by the court unless it could not with reasonable diligence have been submitted to the tribunal; and
- evidence that was heard by the tribunal must not be re-heard by the court except where the court considers this necessary in the interests of justice.

This represents an important change to the current approach of the English courts, and creates a point of difference between arbitrations seated in London and arbitrations seated in Singapore. (As noted above, Singapore has rivalled London in recent years as a preferred arbitral seat for international parties). The Singaporean courts still conduct a full *de novo* review on jurisdiction (at least for the time being; similar reforms could follow in Singapore). Our [recent blog](#) discusses how the post-reform 1996 Act compares with Singapore’s arbitration laws

05.

The EU's campaign to end intra-EU investor-State arbitration: pushing investor creativity



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All intra-EU bilateral investment treaties have now been terminated, which, combined with EU withdrawal from the Energy Charter Treaty (ECT), could have significant implications for arbitration in 2024.

Declaring arbitration clauses in intra-EU bilateral investment treaties (BITs) incompatible with EU law, the European Court of Justice's (ECJ) landmark 2018 *Achmea* decision marked the beginning of a sweeping change.

In the following years – under increasing pressure from the European Commission (EC) – Member States have terminated all intra-EU BITs, through either a multilateral treaty between most of the Member States (Termination Agreement) or ordinary bilateral instruments.

Intra-EU BIT sunset clauses

Intra-EU BITs included so-called sunset clauses, which extend treaty protection for investments made prior to termination for, depending on the treaty, five, ten or 20 years. The Termination Agreement attempts to prevent the operation of sunset clauses by repealing them from the relevant BITs upon termination. The legal validity of this simultaneous termination of investment treaties and their sunset clauses is yet to be tested. In this respect, the arbitral tribunal in *Adria Group v Croatia* held that investment treaties confer rights directly upon investors at the time when they make their investments. Investors could thus not be retroactively deprived of such rights, including that to have recourse to international arbitration. Under this approach, any attempt to invalidate the operation of sunset clauses would not have any effects on investments already made.

Recently, the Amsterdam Court of Appeal [refused to prevent a Dutch investor from pursuing an arbitration procedure](#) brought under the Netherlands-Poland BIT and seated in London. This was despite the fact that the relevant treaty was terminated in 2019 and both the Netherlands and Poland sought to neutralize its sunset clause by means of the Termination Agreement. According to the Dutch court, the incompatibility of the arbitration clause of the BIT with EU law is not sufficient to conclude that the initiation of arbitration proceedings based on such a clause outside the EU was unlawful or abusive.

Similarly, in October 2023 a Bulgarian insurance group [threatened to bring arbitration](#) against Romania relying on the Bulgaria-Romania BIT's sunset clause, whose operation has also purportedly been barred by the Termination Agreement. The outcome of these attempts remains to be seen. But success may revive investment treaty protection within EU borders.

Coordinated withdrawal from the ECT

Given its multilateral nature, the EU could not deal with the [ECT](#) so easily.

While the ECT Secretariat was trying to find consensus to modernize the ECT (especially by carving out fossil fuels from treaty protection), in July 2023 the EC proposed a joint withdrawal of the EU and its Member States. One of the main purposes of a coordinated withdrawal strategy – like the one adopted with the Termination Agreement for intra-EU BITs – was, again, to attempt to invalidate the operation of the ECT's 20-year sunset clause.

Yet Member States appear to be acting disjointedly. France, Germany, Luxembourg, and Poland have already denounced the ECT. As of June 2024, all these withdrawals will have taken legal effect. Denmark, Ireland, the Netherlands, Portugal, Slovenia, and Spain

have already publicly announced their intention to denounce the ECT. They are expected to do so formally soon. Other Member States – like Cyprus, Greece, Hungary, and Slovakia – remain reluctant to exit the ECT. We will see whether their position will shift as the EC's political pressure increases. Without the necessary support from the EU and its Member States, the future of the ECT's modernization process (if any), which requires unanimity among Contracting Parties, is uncertain.

The legal effects of a coordinated withdrawal are equally unsettled under international law. It will be left for domestic courts and arbitral tribunals to determine whether the ECT's sunset clause applies with respect to prior investments. Energy investments already made by EU investors in other Member States may, therefore, still be granted treaty protection under the ECT for long after the various withdrawals, whether coordinated or not.

Pending withdrawals, Member States involved in intra-EU ECT arbitration proceedings are increasingly seeking assistance from EU domestic courts. Germany and the Netherlands have recently done so, asking German courts to declare the ECT arbitration clause invalid in intra-EU relations. These cases went all the way up to the German Federal Court of Justice, [which in July 2023 found in favor of the Germany and the Netherlands](#). While the legal relevance of these domestic judgments under international law is limited, it creates an additional hurdle that EU investors should be prepared to face.



Against this backdrop, it is unsurprising that EU companies are considering restructuring their investments in the EU by channeling them through their subsidiaries outside the EU, especially those incorporated in Switzerland and the UK. EU investors should keep in mind that corporate restructuring to secure investment treaty protection is generally allowed if done early enough.

Nathalie Colin
Freshfields Partner

Enforcement strategies and alternative legal avenues

Since the ECJ's decision in *Achmea*, it has been clear that intra-EU awards stand very little chance of being enforced within EU borders. The [ECJ recently confirmed that this option is indeed off the table](#) in its decision *Romatsa and others*.

Nevertheless, some investors appear to be successfully enforcing their awards outside EU borders. In England, Spain's creditors have managed to attach real estate assets and bank accounts held by State-owned entities. Australian courts have also allowed the enforcement of intra-EU investment treaty awards.

But the most popular jurisdiction for these purposes, which presents one of the highest concentrations of Member States' assets outside the EU, is the US. Following a consistent, positive trend of judicial decisions confirming the enforceability of intra-EU awards, investors experienced a setback in the US.

In March 2023 – for the first time – a US judge refused to enforce an ECT award in favor of EU investors against Spain. The issue is now before the US Court of Appeals for the District of Columbia Circuit. A decision is expected this year.

Market participants thus remain rather optimistic. Notably, investment funds continue to acquire intra-EU awards on the secondary market (albeit at a discount), reflecting a belief that they will be able to enforce them.



Further legal avenues may be explored when it comes to enforcement of legal rights. For example, we expect a gradual increase in the number of investors resorting to the protection offered by human rights instruments, both in relation to investment disputes with host States and with respect to the enforcement of awards.

Gregorio Pettazzi
Freshfields Principal Associate

It is also worth remembering that an unreasonable refusal to enforce a valid arbitral award may in fact constitute a violation of the right to property, as recently confirmed by the European Court of Human Rights in *BTS v Slovakia*. An EU court's refusal to enforce intra-EU awards in violation of that State's obligations under the New York Convention and the ICSID Convention could potentially trigger the State's responsibility under the European Convention of Human Rights. The viability of this legal avenue will undoubtedly be tested soon.

06.

India: a new era for international arbitration?



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India Disputes Lead,
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Vasuda Sinha

Counsel,
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Stuti Gadodia

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Some recent court decisions offer reason for cautious optimism regarding India's arbitration ecosystem. Yet, as the landscape continues to evolve, investors should continue to plan strategically in respect of the dispute resolution avenues applicable to new investments.

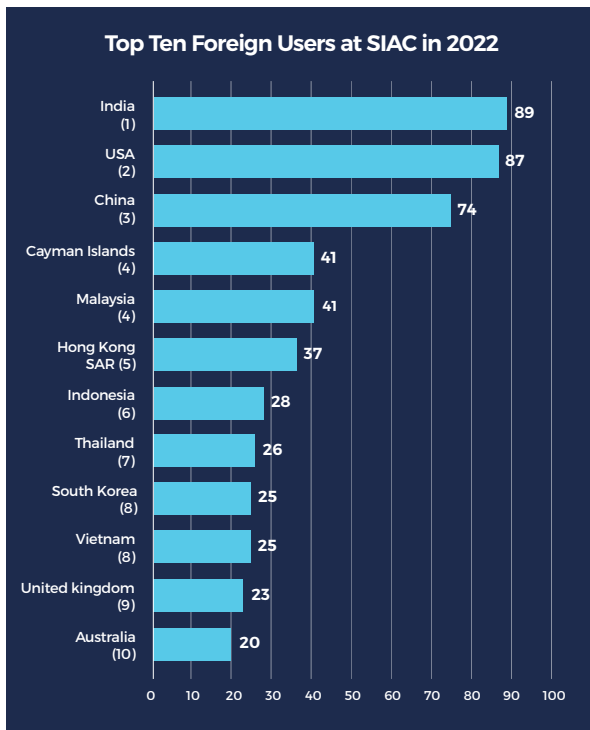
Currently the [world's fifth largest economy](#), India is set to become the [third largest by 2030](#). With its immense and growing population, consumer market and young labor force, India continues to be a priority for foreign investors.

Financial sponsors, technology leaders, energy majors, and automobile companies alike have bet heavily on India. India-related international disputes will increase in line with this economic activity.

India's rise in arbitration

Arbitrations involving Indian parties are increasing in number, value and profile, such as [Amazon's challenge of the sale of an Indian retail business to Reliance](#).

India has topped [SIAC's list of foreign users](#) for four years in a row and the past two years saw nearly 300 Indian parties at SIAC. Indian parties also appear among the top ten users of ICC arbitration. Singapore remains the preferred seat for India-related arbitrations, while London and Dubai are also popular choices. We expect this trend to continue in 2024 and beyond.



Source: [SIAC Annual Report 2022](#), page 24

Arbitration-friendly developments in India?

The increased use of and focus on arbitration means India is becoming more friendly to, and stable for, arbitration.

Historically, Indian courts have been known for interference in arbitral awards, often resulting in unpredictable results out-of-step with international norms. Amid a gradual shift, several pro-arbitration judgments from India’s Supreme Court and some key High Courts have:

- advocated for minimal interference in arbitral awards delivered by India-seated tribunals;
- recognized the need for swift enforcement and execution of foreign arbitral awards;

- confirmed that emergency arbitral awards in India-seated arbitrations are locally enforceable; and
- confirmed the role and legitimacy of third-party funding in arbitration.

Amendments to the [Indian Arbitration and Conciliation Act](#) complement this evolution in the judiciary’s approach. In June 2023, India appointed a high-level committee of experts to explore gaps in the regulation of arbitration in India. (This committee is expected to submit its report in Q1 of 2024.) While the committee has a general mandate, it is expected to address issues such as guidelines for third-party funding and arbitrator fees, and the need to clarify the power of the courts to remand arbitral awards or modify their damages components (which has been done in some cases).

Local arbitral institutions are leading an improvement in India’s arbitration ecosystem. The Mumbai Centre for International Arbitration (MCIA), the Delhi International Arbitration Centre and the more recent Institution of Arbitration, Mediation and Conciliation, Hyderabad (IAMC), are examples of new institutions seeking to compete against more established international institutions for India-related disputes. The [MCIA saw a 20 percent increase](#) in its caseload in 2022 and is now administering disputes with a total value of over \$1bn.

While SIAC and the ICC will continue to lead in the near future, these Indian institutions are likely to gain a stronger foothold in coming years, especially in domestic India-seated arbitrations, a majority of which are currently *ad hoc*.

Changes in India's treaty landscape

Although international commercial arbitration is on the rise, the number of investor-State disputes against India is likely to continue to decrease. Following India's termination of most of its bilateral investment treaties (BITs) starting in 2017, investors have not been quick to start treaty claims under the sunset clauses of the terminated BITs, with only five known treaty cases arising in the intervening period.

Only a handful of BITs remain in force. Investor protection may also be available through a small number of trade or economic partnership agreements still in force that contain investor-State dispute resolution provisions; these include agreements with Japan, Singapore and South Korea.

India is actively seeking to leverage its global position in negotiating new investment treaties and trade agreements. On the BIT front, negotiations have been based on India's 2016 Model BIT. However, this has been resisted by most of India's major trading partners due to the narrow protection and recourse it offers to foreign investors.

India's negotiation strategy has enjoyed limited success, with only Belarus, Kyrgyzstan and Taiwan (executed not by the States themselves, but by the India Taipei Association in Taipei and the Taipei Economic and Cultural Center in India) agreeing to BITs based on the 2016 Model BIT. India has also executed Joint Interpretative Statements with Colombia and Bangladesh, aligning the existing BITs with the 2016 Model BIT. In 2022, India and Mauritius executed a Joint Interpretative Statement regarding the terminated India-Mauritius BIT (which several investors have used for claims against India, including a recent [case by an investor in the satellite space](#)).

New free trade agreements (FTAs) feature heavily in India's push to increase and diversify international trade. India is currently negotiating FTAs with important trading partners including the UK, EU, Israel and Canada. Notably, India's recently concluded FTAs with UAE and Australia do not contain investor-State dispute resolution provisions, although it is unclear how the FTA with the UAE will interact with the newly concluded India-UAE BIT or what dispute resolution provisions the latter includes. But investors can expect the India-UK BIT (proposed to be finalized along with the FTAs) to contain balanced provisions concerning investment protection and dispute resolution. A key question is thus whether (and to what extent) India will make concessions to depart from the 2016 Model BIT given the UK's strategic position as one of India's closest economic allies.

Similarly, the EU, India's third-largest trading partner, has [proposed a draft Investment Protection Agreement](#) containing broad provisions for investor protection; the draft agreement, like other investment treaties recently executed by the EU, provides for the establishment of a 15-member permanent tribunal for the resolution of investor-State disputes.

Investor protections and related dispute-resolution mechanisms continue to evolve alongside India's treaty landscape. While things remain in flux, investors looking for more certainty regarding the scope of obligations and the dispute-resolution fora applicable to specific investments may benefit from seeking to negotiate the inclusion of specific commitments in investment contracts directly with the State or relevant State bodies.



India is actively negotiating new investment treaties and trade agreements. Investors are advised to keep a close eye on the scope of investor-State dispute settlement – if any – provided by these agreements. Beyond thinking carefully about treaty structuring, investors should consider the role of bespoke agreements in providing the stability and predictability for which they might otherwise rely on BITs.

Vasuda Sinha

Freshfields Counsel

Cautious optimism on arbitration in India

In 2024 we expect India to remain an exciting jurisdiction for investors and arbitration stakeholders to watch.

On balance, the environment appears to be stabilizing in an “arbitration-friendly” direction. Nevertheless, investors should remember that India’s vastness and diversity is manifested in its court system: risks around unduly long enforcement or interim relief proceedings where local courts are involved will remain. Commercial parties seeking greater certainty or predictability should think carefully before designating India as the seat in arbitration agreements.

Additionally, as BIT and FTA negotiations progress, investors looking to preserve the possibility of recourse under international law must consider treaty structuring when planning investments in India.



India is a priority for foreign investors, and as India continues to grow, we are likely to see more disputes. Despite making significant efforts to improve its arbitration ecosystem, there remains the risk of undue delay in the Indian courts. Foreign parties looking for greater certainty should continue to designate a seat outside India.

Rohit Bhat

Freshfields India Disputes Lead

07.

The evolving landscape of arbitrator conflicts and disclosure requirements



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With the 2023 adoption by UNCITRAL of a Code of Conduct for Arbitrators in International Investment Dispute Resolution providing for increased scrutiny of arbitrator disclosures and impartiality, and the revised IBA guidelines on conflicts of interest due to be published in 2024, these issues will continue to play a crucial role in arbitral proceedings over the year ahead.

One of the key benefits of arbitration is the parties' ability to select their own adjudicators. This benefit is, however, subject to the fundamental condition that arbitrators be independent from the parties and impartial regarding the issues in dispute. Recent developments underscore the need for continued heightened attention to these matters and the importance of careful arbitrator selection to ensure the integrity of arbitral proceedings.

Social media and apprehension of bias

2023 brought some interesting decisions on conflicts of interest due to an arbitrator's public statements made online or on TV.

At the start of 2023, the Paris Court of Appeal [set aside an award](#) due to the undisclosed close relationship between the chairman of the arbitral tribunal, Thomas Clay, and the claimant's counsel, the late Emmanuel Gaillard. The closeness of their relationship emerged from Clay's written eulogy for Gaillard that had been posted online in which Clay noted, among other things, that he and Gaillard had developed a "more personal" friendship and that he consulted Gaillard "before making any important decision".

Also in 2023, the ICC upheld a challenge by a Middle Eastern party against an arbitrator based on alleged anti-Muslim comments made during a television broadcast. The challenging party relied on the [2021 Swiss decision in the Sun Yang case](#), in which a CAS award against a Chinese swimmer was overturned because of an arbitrator's derogatory tweets about Chinese nationals.

These are unlikely to remain isolated decisions. The ubiquity of social media and ease of publication of video and audio recordings, combined with the rise in public expressions of personal convictions, create greater potential for arbitrator challenges and annulment proceedings owing to apprehension of bias. Arbitrators' tweets and online posts, and perhaps even likes or reposts suggesting endorsement of certain views, may all trigger challenge attempts.

The revised IBA guidelines on conflicts of interest in international arbitration [due in 2024](#) may include further guidance on the potential conflicts posed by arbitrator public statements, including those made on social media.

Disclosures in investment arbitration

The extent of an arbitrator's disclosure obligation depends on the relevant arbitral rules and the law of the seat of the arbitration (if applicable).

Detailed disclosure obligations are set out in Article 11 of the [Code of Conduct for Arbitrators in International Investment Dispute Resolution](#), adopted by UNCITRAL in July 2023 (the Code). In December 2023, the United Nations General Assembly adopted a resolution recommending the use of the Code by arbitrators, parties, institutions and States negotiating investment instruments. The year ahead will reveal how the Code is put into practice in investment arbitration. We are already starting to see investor-State parties referencing the Code in orders that govern the arbitration procedure, either as a mandatory or soft law instrument.

As a result, parties can expect increasingly robust disclosures from arbitrators in investment arbitration in the year to come. This does not necessarily mean that the disclosed information poses a conflict of interest or would justify a challenge. Thus far, increased disclosures by arbitrators do not appear to have caused an uptick in challenges against the disclosing arbitrator.



The past few years have seen a marked shift towards broader disclosures in investment arbitration which is expected to continue in the year to come. However, broader disclosure on its own does not mean there is a greater risk of conflict of interest.

Hinda Rabkin

Freshfields Senior Associate

“Double hatting” and “issue conflict” in investment arbitration

These matters will continue to be hotly debated when assessing conflicts of interest in investment arbitration this year. Given that investment disputes tend to raise a number of relatively limited and recurrent legal issues, an arbitrator's prior or concurrent involvement as an arbitrator or counsel in other disputes may be regarded as impinging on his or her impartiality. But challenges on these bases have rarely been successful.



Broader disclosure coupled with the new restrictions on double-hatting may lead to a widening and diversifying of the pool of arbitrators over the longer term, especially those sitting in investment treaty arbitrations, as some of the commonly appointed arbitrators may be prevented from taking on certain cases.

Lluís Paradell Trius

Freshfields Counsel

On issue conflict, challenges have been rejected primarily on the basis that an arbitrator's open mind should be presumed, even if the same arbitrator has decided similar issues in prior cases. This presumption has been rebutted in rare cases, such as when the arbitrator has decided a legal issue in various cases in the same way and has also expressed his or her views on the issue in academic writing (as was the case for the party-appointed arbitrator Professor Francisco Orrego Vicuña in *Devas v India*, [although this decision has been criticized](#)). The Code does not address issue conflict directly.

Challenges to arbitrators for double-hatting have also required specific circumstances to be successful. In 2022, a successful challenge was made against an arbitrator in an Energy Charter Treaty case because she had been instructed as counsel by investors more than 20 times to bring claims under the same treaty, including in several pending cases.

Had it been applicable, the new Code would have prevented the challenged arbitrator in the above case from accepting the appointment. Article 4 of the Code limits double-hatting by requiring an arbitrator to refrain from acting as counsel or expert in a case involving either the same measure, related parties or involving the same treaty, concurrently and for a certain period after the conclusion of the proceeding (between one and three years).

At this time, the Code can be applied by party consent or included in the arbitration agreement. ICSID is consulting with its membership on its application in ICSID proceedings. It remains to be seen how the Code will influence the selection and conduct of arbitrators in investment arbitration.

08. Construction and environmental disputes from oil and gas decommissioning



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Sarah-Jane Fick

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As oil and gas assets reach the end of their lifecycles and the energy transition continues apace, a wave of decommissioning-related disputes seems inevitable, testing substantive issues of construction and environmental law, as well as existing dispute resolution mechanisms in standard forms of contracts.

Governments are under scrutiny to achieve net zero commitments. Despite initiatives seeking to decarbonize oil and gas activities (such as the [Oil and Gas Decarbonization Charter](#)), an international commitment to “[phase down](#)” global oil, gas and coal use was agreed at COP28.

Aside from some investment shifting from fossil fuels to renewable energy sources, a deluge of oil and gas wellheads, rigs, pipelines and processing plants are due to reach the end of their lifecycle within the next decade. A significant number of oil and gas assets will require decommissioning. The emerging decommissioning industry is set to boom.

\$24.3bn

market for decommissioning
deepwater structures in the
Gulf of Mexico, according to the
[US Bureau of Safety and
Environmental Enforcement](#)

\$30bn to \$100bn by 2030

market for decommissioning 200
south east Asian offshore fields,
according to the [International
Association of Oil and Gas Producers](#)

**more than
£20bn**

opportunity worth of decommissioning in North Sea energy installations over the next decade, according to [Offshore Energies UK](#). Investment into decommissioning will overtake capital expenditure in the North Sea by 2030, the [International Association of Oil and Gas Producers](#) estimates

Oil and gas decommissioning legal framework

Decommissioning poses complex environmental, legal, financial, social and logistical challenges. Decommissioning obligations can be found in specific contractual arrangements (including through PSCs, JOAs, concession agreements or similar arrangements), national laws and international conventions.

Older contracts often do not address decommissioning explicitly, albeit decommissioning activities may be impacted indirectly through environmental obligations, stabilization clauses or choice-of-law clauses. More recently, however, in an effort to standardize contractual arrangements for

decommissioning activities, two standard forms of contract have been developed by the industry, namely the LOGIC General Conditions of Contract for Offshore Decommissioning (LOGIC Form) and the BIMCO DISMANTLECON Dismantling, Removal and Marine Services Agreement (BIMCO Form).

On a national level, countries coastal to the North Sea, the Gulf of Mexico and many in the Pacific Rim have developed detailed regimes for decommissioning oil and gas assets, usually overseen by national regulators, some authorized to impose hefty fines for non-compliance. Many of these regimes involve onerous liability and funding requirements. For instance, in Australia, historic owners of assets may retain liability for decommissioning long after they have passed on their interest. In New Zealand, all asset licensors are required to contribute to a sinking fund so that the costs of decommissioning are ring-fenced throughout an asset's life cycle.

But many jurisdictions with sizable domestic oil and gas markets currently have limited (or no) legislation applicable to decommissioning activities. For example, neither Qatar nor the United Arab Emirates have specific legislation addressing the allocation of risk for decommissioning. We expect this will change in the coming decade as greater national legislation is adopted, either specifically targeting how decommissioning is to be carried out or in relation to environmental protections more generally.

Internationally, there is currently no overarching regulatory regime on decommissioning oil and gas assets, other than for installations located offshore: Article 60(3) of the [1982 UN Convention on the Law of the Sea](#) provides that structures that are abandoned or disused within a signatory State's exclusive economic

zone (i.e., within 200 nautical miles beyond a State's territorial sea) should be removed for the sake of safe navigation, and [the International Maritime Organization has issued non-binding guidelines](#) on the removal of offshore installations.

Some regional seas conventions may also impact the execution of decommissioning works, mostly focused on the movement of hazardous waste and general environmental protections (e.g., the 1978 Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, the 1987 Convention for the Protection of Natural Resources and Environment of the South Pacific Region, or the 1995 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean).

Rising decommissioning disputes

Decommissioning projects are fraught with risk. Not only is every asset unique, but many oil and gas assets are in places that are remote or dangerous for workers. The execution of decommissioning oil and gas facilities can give rise to the classic construction legal risks: delays, cost overruns, skills scarcity, health and safety, etc.



As decommissioning work increases, skills shortages and a crunch across the value chain for decommissioning services and products is inevitable. Delay is therefore likely to be a hallmark feature of disputes concerning the execution of decommissioning work.

Sarah-Jane Fick
Freshfields Senior Associate

Increased public scrutiny of environmental breaches and fast-evolving environmental protection regimes means environmental compliance issues will likely be another key feature of near-term decommissioning disputes. Indeed, changes to the regulatory regimes are likely to impose new (and more onerous) environmental obligations that impact existing decommissioning obligations. In some circumstances, international law may provide protection from retroactive legislation under bilateral or multilateral investment treaties.

To add a further layer of complexity, the quality of the decommissioning work itself (whether covering a wellhead or dismantling infrastructure) is usually assessed against environmental criteria. Environmental breaches can trigger reporting obligations to a national regulator, public scrutiny and even, in some jurisdictions, personal accountability for corporate directors.

The potential for reputational damage to decommissioning project stakeholders is much higher than in a usual construction context. Additionally, commercial solutions are developing to maximize the repurposing of spent asset materials and parts. Requirements for the preservation of materials and parts adds further pressure on the quality delivery of decommissioning work. All these factors typically increase the risk of disputes.

Arbitration and decommissioning disputes

Given the sheer volume of decommissioning work necessary in the coming decade, we anticipate that companies will likely be confronted with the prospect of associated disputes including disputes among business partners on issues of responsibility for meeting those decommissioning requirements; disputes with contractors retained to implement decommissioning plans; and disagreements with governments on the scope and implementation of decommissioning requirements.

Decommissioning-related disputes have been determined either through arbitration (for instance, where issues have arisen out of legal instruments containing an arbitration clause) or local court proceedings (particularly where issues have arisen from domestic regulatory regimes). We expect this to remain the case. Both the LOGIC Form and the BIMCO Form provide for arbitration as the final dispute resolution mechanism (albeit the LOGIC Form, designed for use in the UK North Sea, provides for litigation as an alternative option).



Disputes will play out in a variety of fora arising out of a web of contractual arrangements with multi-tiered dispute resolution provisions and complex interplay between contractual obligations, national regulations and international undertakings by host States.

Matei Purice

Freshfields Counsel and Head of Global Projects Disputes Continental Europe

In the longer term, decommissioning disputes are unlikely to abate with the transition to renewable energy. Green energy infrastructure has a natural lifespan much like fossil fuel assets: the industry standard asset life of a wind turbine is estimated at 20-25 years, solar farms 30-40 years and a hydropower plant at 50-100 years. As a significant number of such assets near the end of their asset life, more disputes about decommissioning green energy assets are expected.

Energy project stakeholders should stay abreast of regulatory developments impacting local decommissioning requirements, allocation of liability and environmental liability trends generally. To mitigate against exposure to liability, parties involved in decommissioning projects should consider:

- adopting a standard form of contract developed in the industry for decommissioning projects;
- tailoring dispute resolution mechanisms to suit the specifics of particular decommissioning projects;
- structuring their participation in decommissioning projects to benefit from international law protection under international investment protection treaties; and
- ensuring appropriate insurance is in place.



Oil and gas disputes are likely to be only the first chapter in an energy decommissioning saga that may last for decades.

Kate Gough

Freshfields Partner

09.

Public international law's growing relevance for businesses



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Amidst continuing global economic uncertainty, supply chain disruption and tensions between major economic powers, public international law will be increasingly relevant in: transactions involving State-owned entities; boundary disputes affecting natural resources; corporate human rights claims; and the development of ESG standards, particularly for supply chain risks.

The challenges States and businesses experienced during 2023 are likely to persist in 2024. Businesses involved in foreign investment will continue to have a wide range of options to protect their investments, engage constructively with host-State governments in the event of a dispute and, where necessary, obtain binding resolution of their disputes. In this context, public international law, while existing primarily on a State-to-State plane, will also be of increasing relevance for private businesses.



Despite the challenges that 2024 may bring for multinational companies operating across the globe, public international law will continue to be an important lens through which businesses can engage constructively with governments in various contexts – from M&A transactions involving sovereign wealth funds, to the extraction of natural resources in areas subject to boundary disputes, to ESG supply chain risks.

Will Thomas KC
Freshfields Partner and
Head of Public International Law

Transactions involving State-owned entities

Over the last few years, State-owned entities (SOEs), and particularly sovereign wealth funds, have provided much-needed capital for leveraged dealmaking. The trend of State-backed funding for acquisitions looks set to continue through 2024 as dealmakers look for alternative routes to obtain returns.

One of the higher-risk issues that can arise when transacting with a SOE or State is the law of State immunity, which permits a State to claim immunity from suit, or enforcement of a judgment, subject to certain exceptions. As SOEs and States increasingly become involved in significant transactions, public international law will play an important role in the management of SOE-specific risks, such as State immunity – and the ability of businesses to seek and obtain waivers of State immunity. In this regard, we expect incremental development of:

- the “commercial transaction” exception to State immunity (which generally precludes a State from relying on State immunity in respect of a commercial transaction);
- the circumstances in which SOEs are permitted to rely on State immunity; and
- new exceptions to State immunity in light of emerging State practice.

Boundary disputes and natural resources

Control over (increasingly rare) natural resources will remain a key underlying factor for inter-State disputes over international boundaries on land and at sea ([see trend on critical raw materials](#)). Several disputes are likely to come to a head in 2024, including the longstanding dispute between Guyana and Venezuela regarding the oil-rich Essequibo region (ahead of Venezuela’s 2024 presidential elections), and the maritime delimitation dispute between Kenya and Somalia.

For businesses holding State-granted licenses or concessions to explore, develop and produce natural resources in contested areas, public international law will play an essential role in calibrating what steps license holders can or cannot take pending a resolution.

Public international law will also inform the analysis on how best to allocate risk through contracts governed by international law (such as petroleum agreements), as well as how to most effectively implement co-operative inter-State agreements (such as joint development agreements which can be facilitated by the private sector). Failing any prospect of a constructive solution, affected businesses will also be looking to public international law for routes to resolution, whether via inter-State proceedings and/or investor-State arbitration.

Corporate human rights claims

Although international human rights law is frequently perceived as only providing protections for natural persons, in many contexts businesses can invoke human rights protections against States. One of the clearest examples is the protections available to corporate entities under the European Convention on Human Rights (ECHR).

Given the current proposals for legislation and policy objectives of the European Union and many European States, 2024 is likely to see businesses increasingly relying on the ECHR – both in domestic courts and before the European Court of Human Rights itself – to bring claims in relation to violations of, among other things, their property rights, and their rights to a fair trial, free expression and freedom of association.

Factors driving this trend may include the termination of intra-EU investment treaties, limiting access to investor-State arbitration for many investors ([see our trend on intra-EU investor-State arbitration](#)). Claims may also arise as a result of measures taken by European States (particularly in States with elections looming) resulting in unlawful restrictions on freedom of expression.

ESG and supply chains

On the flip side, businesses are increasingly likely to find themselves subject to international law obligations being reflected by States in their national legislation – for example, human rights-focused norms, via ESG standards and their implementation in domestic laws.

In some jurisdictions, international law has already become a crucial element of compliance and risk assessment. For example, the [German Supply Chain Act](#) and the [French Duty of Vigilance Law](#) require companies to take measures to prevent human rights violations and environmental harm throughout their supply chains. Both existing and future projects, including energy transition projects, are therefore under increased scrutiny concerning their impact on human rights and the environment.

This has already led to companies facing inquiries from regulators concerning compliance with international legal norms such as the right to self-determination and the free, prior and informed consent (FPIC) of indigenous peoples. ESG standards are likely to gain further importance if the proposed EU-wide Supply Chain Act is adopted, which will build on pre-existing supply chain laws.



As States continue to codify ESG standards into domestic laws, businesses are increasingly likely to find themselves subject to international law obligations, including human rights-focused duties.

Carsten Wendler
Freshfields Partner

10.

Clarity or confusion?

The implications of domestic court rulings for arbitration



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Decisions in 2023 from national courts across Europe and the US underline the important role played by domestic courts in both protecting and legitimizing arbitration, their decisions are critical of awards.

In particular, decisions on anti-suit injunctions, challenges to awards, corruption and sovereign immunity around enforcement against State assets have important implications that will shape dispute resolution strategies of our clients in these areas in the year ahead and beyond.

Anti-suit injunctions in support of foreign arbitrations

In a series of decisions, the English courts have issued anti-suit injunctions in support of arbitrations without an English seat provided there is a connection to England.

In three cases, including two in the English Court of Appeal (the most recent being [UniCredit v RusChemAlliance](#)), the courts found that, although the seat of the arbitrations was Paris, the governing law of the arbitration agreements was English law, which provided a sufficient connection to England. Those decisions relied upon evidence that, although a French court does not have the ability to grant an anti-suit injunction, it may recognize one issued by a foreign court.

As a result, parties arbitrating outside of England may be more inclined to seek assistance from the English courts. However, in all three decisions, the jurisdictional gateway to the English courts was on the basis that the choice of English law as the governing law of the arbitration agreement could be inferred from the choice of English law as the governing law of the contract (following the Supreme Court's decision in [Enka v Chubb](#)). That gateway is unlikely to remain intact when [the revised Arbitration Act](#) comes into force at which point the presumption will be that the law of the seat is the governing law of the arbitration agreement absent the parties' express agreement otherwise.

Award Challenges: high thresholds

In France, several arbitration-related court decisions reaffirmed a pro-arbitration stance and underlined the existence of a high threshold for setting aside or refusing to enforce an award.

The [French Court of Cassation overturned the decision of the Court of Appeal to set aside the award in *Oschadbank v Russia*](#), which had determined that the tribunal lacked jurisdiction *ratione temporis* as the investment had been made before the time limit provided for in the Ukraine-Russia BIT. The Court of Cassation held that the time limit was a substantive rule rather than a jurisdictional condition (contrasting the position adopted by the Swiss Federal Tribunal in decisions 4A_396/2017 and 4A_398/2017, analyzing the same provision). The characterization of the legal issue under review is of crucial importance in annulment proceedings because the French courts generally have limited powers to review a tribunal's findings, except for when the review concerns a tribunal's jurisdiction, which they can review *de novo*. By concluding that the time limit in the applicable BIT was a rule of substance, the Court of Cassation restricted the court's power on this point.

In another case, the Paris Court of Appeal set aside the award in *Agarwal v Uruguay*, [finding that the tribunal had wrongly declined jurisdiction](#). The claimants, three British nationals, were the discretionary beneficiaries of a Cayman trust through which the iron ore mining investment had been made. The claimants remained discretionary beneficiaries until a few months before the commencement of the arbitration but after the dispute already arose, at which point the discretionary trust was converted into a fixed trust. According to the tribunal, the discretionary beneficiary interests were not a protected investment under the BIT because the

claimants' interests were subject to the decisions of third parties and they did not possess any direct right over the trust's assets. The tribunal consequently declined jurisdiction because there was no qualifying investment at the time the dispute arose. The Paris Court of Appeal determined that by requiring the investment to predate the dispute, [the tribunal had imposed a temporal restriction which could not be found in the treaty](#) (the only temporal limitation contained in the BIT was that the dispute had to arise after its entry into force); on the other hand, all conditions to the tribunal's jurisdiction had been met. The court thus set aside the award.



The decisions rendered by the French courts in 2023 reaffirm an overall pro-arbitration stance and underline the existence of a high threshold for setting aside or refusing to enforce an award in France.

Christophe Seraglini

Freshfields Partner and
Head of International Arbitration

Scrutiny of awards where corruption is alleged

While the English and French courts are generally deferential to arbitral awards, the trend does not apply to cases involving allegations of corruption, where the awards are scrutinized more carefully.

In England, the high-profile case of *Nigeria v PS&ID* is a clear example. An \$11bn award was set aside in October 2023 because the award had been procured through fraud and in a manner contrary to public policy, which the judge described as the “most severe

abuses of the arbitral process”. In criticizing the tribunal for overlooking red flags during the arbitration, Knowles J highlighted the risks of confidentiality in arbitrations involving States and queried whether tribunals should be more interventionist in circumstances where relevant internal and external representatives of the State are failing to adequately represent it in the arbitration.

In 2017, the [Paris Court of Appeal](#) clarified that an award can be set aside or refused enforcement where there are “serious, precise and consistent” indications – or, in other words, red flags – of corruption (the French court’s unlimited powers to scrutinize an award when suspicions of corruption or illegality exist was further affirmed by the [Court of Cassation](#) in 2022). This principle has since been used by other courts, notably by [a court in Versailles in the context of enforcing an ICC award against Alstom](#) in March 2023 (although in the circumstances the court concluded that there was insufficient evidence for the alleged bribery).



2023 demonstrated the English courts’ ongoing commitment to protecting parties’ rights to arbitrate their disputes. At the same time, the courts’ support for arbitration is neither limitless nor unconditional particularly when issues of illegality or fraud arise.

Guy MacInnes-Manby
Freshfields Senior Associate

Sovereign immunity and enforcement against State assets

Decisions in the Netherlands, Sweden and the US in 2023 have further shaped the question of what constitutes State assets subject to enforcement. This will be relevant for investors looking to enforce arbitral awards against States and guide enforcement strategies.

The claimants in [Stati et al v Kazakhstan](#) sought enforcement of their award through assets owned by Kazakhstan’s sovereign wealth fund in the Netherlands and Sweden. In November 2021, the [Swedish Supreme Court](#) upheld the Appeal Court’s ruling that the sovereign wealth fund assets were not protected by sovereign immunity (and in [June 2023](#) it let the decision to allow enforcement stand), while in September 2023 the [Dutch Supreme Court](#) held the opposite. In both jurisdictions, the burden to establish that a seized property is not subject to sovereign immunity from execution lies with a claimant. The analysis in both jurisdictions concerns whether assets were intended for a public purpose or used in the exercise of governmental functions, a standard derived from the UN Convention on Jurisdictional Immunities of States and their Property. Sweden found no such public purpose while the Dutch courts did.

In the US, the Court of Appeals for the Third Circuit recently upheld the Delaware District Court’s ruling that assets held by Venezuela’s national oil company, Petróleos de Venezuela, [were not protected by sovereign immunity](#).

The support of national courts continues to be important to the success and viability of arbitration. We expect many more arbitration-related court decisions in 2024, and there is no indication the courts’ role in arbitration will diminish in importance in the years to come.

11.

Is your life sciences contract susceptible to renegotiation or termination if the economics of the deal changes?



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Disputes in the life sciences sector are evolving. Whereas many 2020-21 arbitrations arose from COVID-related supply chain disruptions, in 2022-23, inflation and increased costs of capital are driving continued high numbers of life sciences arbitrations.

Global macroeconomic factors are causing this shift in the nature of life sciences disputes, creating significant challenges for companies in the sector. High capital costs and ongoing inflation in the prices of materials and labor continue to put pressure on the economics of both products that are in development and products that have already been commercialized.

160%

Some life science raw material costs have increased by between 50% and 160% due to shortages, the conflict in Ukraine and inflation, according to resilinc

70%

The cost of active pharmaceutical ingredients has increased by up 70% since 2018, according to IBM

For products on the market, these increased costs often cannot be fully passed on to consumers, eroding margins and profitability. Companies attempting to develop and commercialize new products, in turn, are finding themselves in precarious financial situations as these market dynamics erode their budgets and cash balance. Indeed, in August 2023, the number of companies in the pharma industry reporting workforce reductions [had already reached the total for 2022](#).

Increased costs and the resulting drop in prospective profits have caused a marked increase in the number of companies seeking to exit or renegotiate collaborations, supply agreements, and other contractual relationships that have become uneconomic in current market conditions. In many cases, these efforts precipitate arbitrations based on alleged breaches of the underlying contracts.

These market dynamics were a significant contributor to the rise in life sciences arbitrations in 2022-23, and we expect that they will continue to give rise to disputes in 2024. As we noted in [last year's report](#), most major arbitral institutions have reported significant growth in the number of life sciences cases they administer. These institutions continued to register high numbers in 2023.



Upheaval in the market, particularly around higher costs of capital, and inflation affecting raw materials and labor, has thrown many once-economic contractual relationships into jeopardy. We are seeing a marked rise in disputes in the life sciences space as companies reconsider the economics of collaborations, manufacture and supply agreements, and other agreements that were negotiated on cost assumptions that are no longer realistic.

Thomas W. Walsh
Freshfields Partner

Termination rights and dispute resolution

Implicated in many of these arbitrations are contractual provisions relating to termination rights and dispute resolution. These provisions often receive limited attention when the contract is negotiated, frequently due to the positive market outlook for the venture at that time. However, when a party is seeking to exit or renegotiate an unprofitable contract, these terms pose critical questions for both sides.

- Are there circumstances in which a party is permitted to terminate the agreement absent a material breach by the counterparty?
- Must the parties continue to perform while a dispute is resolved?
- Does the contract provide an efficient and predictable dispute resolution process?
- Will a dispute be confidential?
- Can a party claim lost profits if its counterparty breaches?

The answers to these questions will determine what kinds of losses a party can expect if it terminates or, in the inverse, what kinds of leverage the non-terminating party has to compel performance or obtain damages, including whether it is cost-effective for a party to initiate an arbitration to enforce contract terms.

Contract performance while an arbitration is pending

The framing of the contractual provisions that bear on these questions range widely, and companies should be cautious in thinking through their repercussions at all stages of the contractual relationship. For example, some contracts require parties to continue to perform while an arbitration is pending, through language such as: “The parties agree that, in the event of a dispute regarding performance under this contract, neither party may terminate this contract until final resolution of the dispute.”

While this type of provision may offer advantages in some situations, companies should be aware of the potential financial and opportunity costs of including these clauses in their contracts. For example, in the context of a supply contract, the party that wants to continue receiving and selling the supplied product will benefit from such a clause, and may consider it essential where shifting production to an alternative supplier could require months or years to obtain regulatory approvals. The party that does not want to supply, in contrast, could face substantial losses as the parties complete what can be a lengthy arbitration process.

Limitations of liability in life sciences

Limitations of liability clauses can likewise take center stage when a dispute emerges. Many contracts limit remedies, but the forms of these clauses range widely. A typical limitation of liability clause might limit consequential damages. Others explicitly prohibit recovery of lost profits. For example: “Neither party shall be liable for any indirect, incidental, special, punitive, or consequential damages, or any loss of profits.”

Such clauses are enforceable in many jurisdictions in most circumstances, including New York and Spain, and courts often interpret the phrase “or any loss of profits” to bar recovery of lost profits under the contract. Parties should think carefully before including such language in a contract. The exclusion of lost profits can significantly reduce the damages available under a contract and make it much less costly for a party to breach and exit a contract.

Hardship and change in circumstances

Contractual provisions regarding hardship and change in circumstances are also crucial in today’s volatile market. But in many cases, it is not only the phrasing of these provisions in the contract itself that will affect the parties’ ability to invoke them in order to exit or renegotiate. The choice of the contract’s governing law can also have a major impact on the enforceability of these provisions, as well as potential extra-contractual avenues for relief. For example, in some jurisdictions, such as Saudi Arabia, parties are expressly not permitted to contract around the right to rebalance a contract in the event of a dramatic change in circumstances. In other jurisdictions, such as New York or Spain, parties have more room to waive that right in their contracts.

To the extent possible, companies should consider these issues when drafting their contracts, rather than waiting until the market has shifted and/or a dispute has emerged. As market dynamics change, these choices can have significant repercussions whether a party is seeking to exit or renegotiate uneconomic contracts or hold its counterparty to their bargain.



It's easy to look past termination and remedies clauses during negotiations, but companies should think carefully about these terms before entering into a contract. If a dispute does arise, these clauses can be decisive, materially affecting the parties' leverage to either renegotiate, exit or enforce the contract. Companies should consider how best to position themselves in the event of a dispute, even at the early drafting stage.

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