

Top trends in a changing world

International arbitration in 2023

Welcome to our annual top trends in international arbitration review for 2023.

2022 was another challenging year for many of our clients and the global economy more generally. From the disruption and fallout caused by the Russian invasion of Ukraine to soaring energy prices and inflation, businesses around the world are facing significant new hurdles and complex legal challenges, many of which are driving new trends in international arbitration.

In this report, we explore the following key themes that we predict will influence the arbitration landscape in the year ahead. These have been identified by international arbitration specialists from across our global network to help clients and arbitration users plan for the coming months.

- The legal and economic repercussions from Russia's invasion of Ukraine have significantly impacted businesses across a wide range of sectors worldwide and the number of Russia-related arbitrations – both investment treaty and commercial – is expected to rise. To maximise the prospects of successful enforcement, strategic and creative planning will be key. ([Arbitration arising out of Russia's invasion of Ukraine](#))
- Significant supply chain disruption will continue to cause difficulties for major global projects. We expect an increase in disputes over the operation of key contractual provisions, such as price escalation, currency fluctuation and nominated supplier clauses, as well as parties invoking legal concepts of frustration, force majeure and/or change in circumstances. ([The global supply chain crisis and construction arbitration](#))

- In the LNG sector, the wider energy market volatility is expected to give rise to increasing gas pricing disputes and other contractual disputes, as buyers and sellers try to navigate the severe market fluctuations and supply issues facing the industry, as well as the effects of sanctions and other political issues. ([LNG disputes gather on the horizon amid market volatility](#))
- The energy crisis is also impacting the pace and progress of energy transition plans. We consider the challenges and opportunities presented by energy transition in Latin America, which are expected to give rise to growing numbers of energy-related disputes in the region during the coming year. ([Energy transition: the current landscape in Latin America and what to expect in 2023](#))
- The future of the Energy Charter Treaty (ECT) looks uncertain in light of the number of states that have announced their intention to withdraw from the treaty. Prudent energy investors will want to consider alternative options to protect their investments against unlawful government intervention. ([Withdrawal from the ECT: one step forward, two steps back?](#))
- The drive towards transparency in international arbitration is expected to continue with more arbitral institutions amending their rules to provide for greater public access to information about arbitral proceedings, including the existence of any third-party funding. ([Drive towards greater transparency](#))
- Diversity remains a key theme in 2023 as efforts are increasingly being made to address broader diversity goals beyond gender. Two important developments pave the way for further progress: the requirement to take diversity into account when appointing arbitrators has been codified, for the first time, into the arbitration rules of two institutions; and the launch of the Equal Representation for Experts Pledge to address diversity in the appointment of expert witnesses. ([Progress towards diversity continues to gather pace](#))
- The eagerly awaited reform of the Arbitration Act 1996 is another key development to watch for in 2023. The outcome of the Law Commission's public consultation, expected to be published in the first half of the year, will reveal which of the initial proposals are likely to be enacted. The provisions relating to summary judgment and jurisdictional challenges will be of most interest to commercial parties. ([Reform of the Arbitration Act 1996](#))
- Following the US Supreme Court's clarification that section 1782 discovery is not available in commercial arbitration, there remains uncertainty with respect to investment arbitrations. We expect many more decisions on this issue in the coming year as the lower courts grapple with the question of whether an investment arbitration tribunal is sufficiently governmental to qualify for 1782 discovery. ([Section 1782 discovery: some answers, but more questions](#))

- The number of life sciences disputes being referred to arbitration is on the rise – partly due to the growth in the life sciences industry generally, but also the realisation within the industry that many of the features of international arbitration are well-suited to resolving sectoral disputes. ([International arbitration in the life sciences sector](#))
- Considerations of cybersecurity and data protection are continuing to gain importance in international arbitration. We expect parties to increasingly adopt cybersecurity and data protection measures in their individual proceedings and institutions to continue to encourage their adoption through their rules or policies. ([Data protection and cybersecurity in international arbitration remain in the spotlight](#))
- Our final trend relates to the increasing number of international tax disputes being resolved by arbitration. With the global economy facing challenges, we expect there to be more examples of aggressive taxation by financially distressed governments in the coming year and therefore more foreign investors reconsidering their tax risks and options for dispute resolution. ([Increasing ‘internationalisation’ of tax disputes](#))

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.

We look forward to navigating the challenges and opportunities presented by these developments with our clients in the year ahead.



Boris Kasolowsky

Global Co-Head of International Arbitration Group



Noiana Marigo

Global Co-Head of International Arbitration Group & Co-Head of Latin America Practice



Ashley Jones

Senior Knowledge Lawyer

Contents

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

01.

Arbitration arising out of Russia's invasion of Ukraine



Eric Leikin
Partner,
Vienna



Alexander Monro
Principal Associate,
Frankfurt



Mariia Puchyna
Senior Associate,
Paris

Russia's invasion of Ukraine in February 2022 prompted an unprecedented legal, regulatory and economic response from the international community and, in turn, a raft of Russian countersanctions against so-called unfriendly States. As a result, many businesses were forced to take quick but far-reaching and commercially difficult decisions in a rapidly changing landscape. Initially, affected entities focused on finding (often temporary) commercial solutions. However, with little promise that the war in Ukraine or the broad sanctions enacted against (and by) Russia will end in the near term, we expect that a growing number of Russia- or Ukraine-related disputes will be referred to arbitration in 2023.

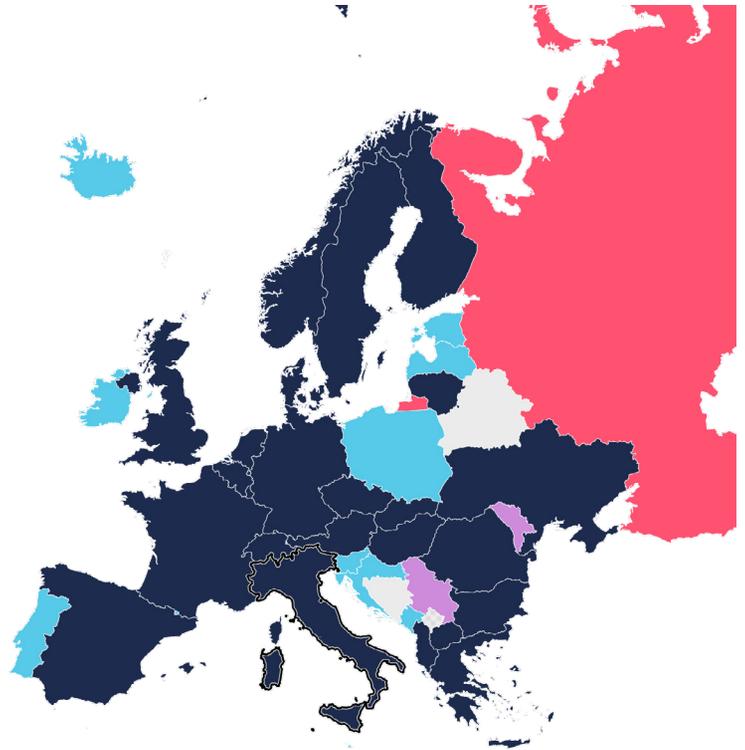
Investor-state claims

Many major global companies have decided, or were forced, to abandon their operations in Russia. However, the Russian government is ensuring that withdrawing from the country is far from straightforward – implementing severe limitations on the ability of foreign investors from 'unfriendly States' to sell their shares in Russian subsidiaries and to lawfully repatriate the proceeds. Companies that continue to operate in Russia are faced with ever-increasing restrictions, often causing a stark reduction in the value of their businesses. Moreover, as a result of Russia's actions, companies with operations in Ukraine are also seeing their facilities destroyed or requisitioned, their workforce depleted, their operations impaired, and the value of their assets significantly diminished.

On its face, much of Russia's conduct may be considered to violate well-established standards of international investment protection. It bears noting, therefore, that Russia is a party to 63 in-force bilateral investment treaties (BITs), under which affected investors – including investors from 28 of the 49 States deemed 'unfriendly' by Russia – may seek recourse. However, with a few notable exceptions (eg the BITs with Italy and France), the majority of Russian BITs seek to limit the scope of claims that may be referred to arbitration. It is therefore important for affected investors to understand the extent of BIT protection that may be available for them in light of their corporate structure.

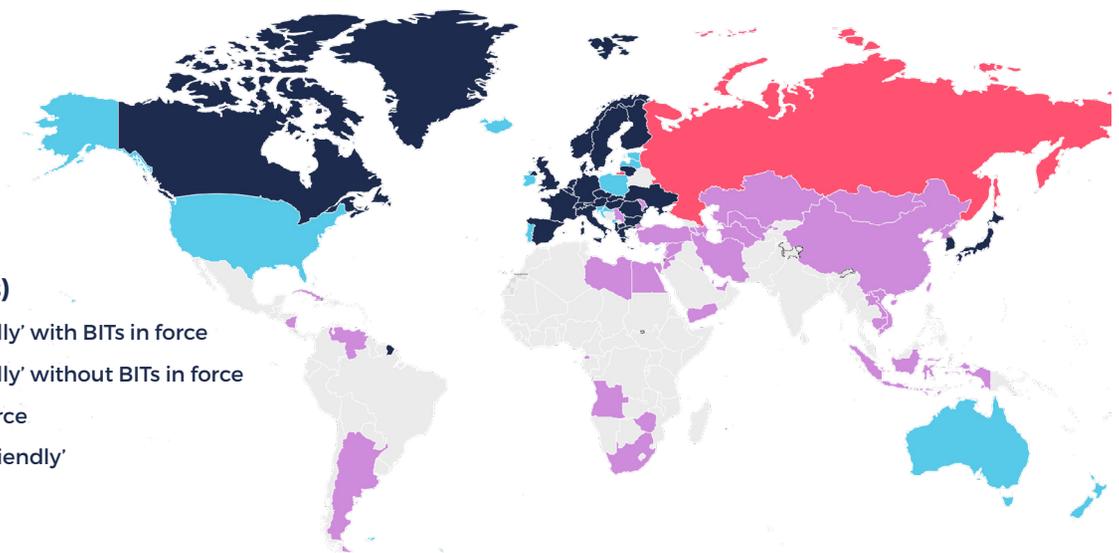
Russia's European Bilateral Investment Treaties (BITs)

- States considered 'unfriendly' with BITs in force
- States considered 'unfriendly' without BITs in force
- Other states with BITs in force
- States not considered 'unfriendly' and without BITs in force
- Russia



Russia's Global Bilateral Investment Treaties (BITs)

- States considered 'unfriendly' with BITs in force
- States considered 'unfriendly' without BITs in force
- Other states with BITs in force
- States not considered 'unfriendly' and without BITs in force
- Russia



Investors in the energy sector may also be able to pursue claims against Russia under the Energy Charter Treaty (ECT). Several arbitral tribunals and courts – primarily in the context of the Yukos disputes – have held that Russia is bound by a provisional application of the ECT. Russia announced its intention to withdraw from the ECT in 2009, but the ECT's 'sunset clause' means that for investments made prior to that date, the treaty's protections will apply until 2029.

At least 10 arbitrations to date were initiated by investors impacted by Russia's 2014 seizure of Crimea, with a number of claimants already receiving substantial damage awards. No new investor-State arbitration claims against Russia have yet been publicly recorded in relation either to Russia's 2022 invasion of Ukraine or the counter-sanctions it has implemented in the invasion's wake. We expect that to change in 2023. While such arbitration claims are unlikely to be straightforward (particularly in relation to questions of causation and quantum), they still present the best available option for businesses facing significant damages and little realistic prospect of obtaining justice in Russia's domestic legal system.



On its face, much of Russia's conduct may be considered to violate well-established standards of international investment protection. While such arbitration claims are unlikely to be straightforward, they may present the best available option for businesses facing significant damages and little realistic prospect of obtaining justice in Russia's domestic legal system.

Eric Leikin
Partner

Commercial disputes

Russia's invasion of Ukraine has made the performance of existing commercial contracts much more difficult or, in some cases, legally or practically impossible. This has resulted in numerous contracts being suspended or terminated under contractual force majeure, frustration, and/or sanctions and export control clauses, as well as on equivalent statutory bases.

Many of the resulting disputes relate to the effects of various sanctions on the relevant companies, industry, or products – and the extent to which these have been avoided or mitigated by subsequent changes in ownership structure or operating model. Beyond the interpretation of the relevant contractual and statutory provisions, these disputes are likely to turn on their individual facts, including the conduct of the parties in the run-up to the formal dispute process. This heightens the importance of document production orders, which potentially enable one party to prove facts (eg details of ownership structure) currently known only to the opposing party.

The unique legal landscape in which these disputes must be resolved also highlights the importance of taking strategic decisions to safeguard the jurisdiction of an appropriate tribunal and the enforceability of any award issued. Russian legislation confers exclusive jurisdiction on Russian courts over disputes with persons targeted by sanctions, even authorising courts to issue anti-suit injunctions to prevent litigation or arbitration proceedings abroad from being started or continued against sanctioned persons.

As the effects of Russia's invasion of Ukraine persist, businesses will therefore need to carefully analyse and manage the risks associated with termination and/or non-performance of Russia-related contracts.

Looking one year ahead... enforcement

Both claimants in investor-State arbitrations against Russia and parties involved in commercial arbitrations against Russian businesses are likely to face challenges enforcing any awards rendered in their favour.

To put it bluntly, pending a regime change in Moscow, any award issued against Russia (or State-aligned) entities, or in reliance on the effect of Western sanctions, will be extremely difficult to enforce within Russia – but, as experience shows, enforcement of such awards can be achieved through more creative, cross-jurisdictional strategies.

A key space to watch will therefore be the development of interlocking domestic and international mechanisms to utilise the huge number – currently estimated to be at least US\$330bn – of Russia-related assets that have been frozen abroad. If 2023 turns out to be, as we expect, the year of Russia-related arbitration claims, 2024 may be the year of Russia-related enforcement actions. Stay tuned.

02.

The global supply chain crisis and construction arbitration



Tom Hutchison
Counsel,
London



Matei Purice
Continental Europe
Head of Global
Projects Disputes,
Paris



Jon Gilbert
Knowledge Lawyer,
London

Major construction projects rely on complex supply chains that can span numerous jurisdictions on multiple continents, and supply chain disruption can have a significant, and often costly, impact on project execution. With increasing focus on supply chains from owners/operators and contractors alike, it is becoming an ever-more-prevalent cause of disputes in global projects, a trend we expect will only increase throughout 2023.

Key factors contributing to the global supply chain crisis

Since its outbreak, the COVID-19 pandemic severely disrupted the procurement and execution of construction projects, as well as their financial and supply chain sustainability. While the shock impact of the pandemic has largely, but not completely, abated, global events in 2022 further deepened the crisis in this sector. In particular, Russia's invasion of Ukraine and associated international sanctions, leading to rising global energy and commodity prices and soaring inflation, have had a marked impact on the sector. Coupled with cost pressures arising from global currency fluctuations, they have compounded an already challenging global supply chain situation.



With no immediate resolution in sight, we expect factors arising from the Russian invasion of Ukraine to continue to strain supply chains throughout 2023, leading to increased project execution risks and potential disputes.

Tom Hutchison
Counsel



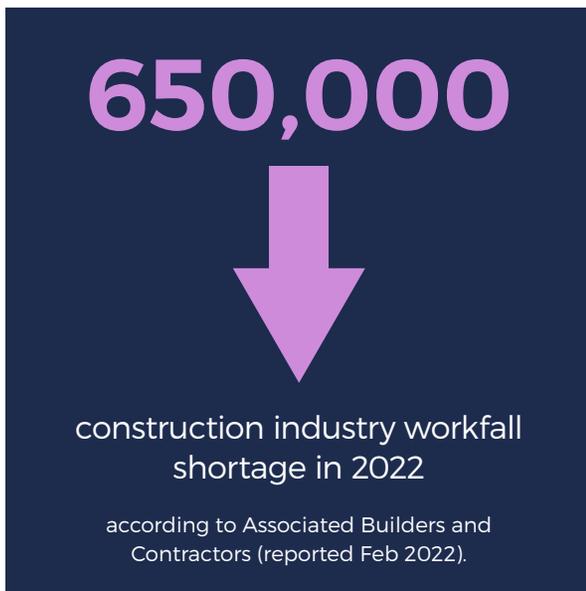
The increased scrutiny on supply chains in relation to disclosure and reporting requirements, particularly in relation to ESG, may also have an impact (at least in the short to medium term) as owners, contractors and suppliers take time to adjust to new compliance criteria being introduced in various forms globally. An example is the German Supply Chain Duty of Care Act, which obliges companies to comply with human rights and certain international environmental standards within their operations and supply chains (see our blog [here](#)) – similar legislation has been proposed by the EU in the form of the Corporate Sustainability Due Diligence Directive (see our blog [here](#)). In addition, increased consumer demand for greener solutions will put pressure on supply chains as they transition to accommodate such demands.

What does supply chain disruption mean in practice?

Supply chain disruption has the potential to delay the progress of works and ultimately the completion of a project, eg because required materials or components are no longer available, the lead-in times are increased or delivery will take longer. It can also increase costs, as materials or components have to be sourced at a higher price than originally envisaged, or it may even be necessary to source an alternative, more expensive material or component for the project.

Steel, copper and timber are examples of building materials the supply of which has been disrupted in recent times. In relation to components, notable examples include turbines required for offshore wind projects and silica battery storage required for solar projects. The supply of specialist equipment, power, oil and other fuels and logistics can also be impacted. The price and availability of labour can also be affected by many of the factors that cause supply chain disruption.





The above pressures can also increase the risk of insolvency in the supply chain, with key suppliers and subcontractors potentially going under, a trend that we commented on in our [2021 Trends Report](#), but which remains an equally great, if not greater, risk in the current climate.

Historically, contractors entering into fixed-price construction contracts were often able and willing to shoulder the risk of small increases in cost and/or minor delays caused by supply chain disruption – in effect, the risk would have already been priced in or built into the schedule. However, as became apparent during the COVID-19 pandemic, this is only commercially viable up to a certain point.

The impact on arbitration: an increase in claims

Given the severity of the ongoing supply chain disruption, we expect disputes to arise including in connection with the ability of contractors to claim schedule relief and/or reimbursement of additional costs under the terms of their contracts.



We anticipate increased reliance on (and disputes in relation to the operation of) provisions relating to the following.

- **Price escalation:** Historically such clauses have not been a point of real focus in construction contracts, but in light of the current economic realities, their use (and therefore the need to include them in contracts) is once again key (see our blog [here](#)).
- **Currency fluctuation:** Such clauses can be helpful where the cost of materials and labour is in a different currency to the contract price.
- **Variations:** An employer might seek to mitigate the effects of disruption by varying contractual terms, eg amending the specification to permit the use of a different component.
- **Nominated supplier:** A clause requiring the contractor to use a specified supplier (or to select from a limited number of specified suppliers) can impact the contractor's ability to mitigate the impact of supply chain disruption.



We have seen increased focus in the past year on the inclusion and operation of price escalation, currency fluctuation and nominated subcontractors/supplier provisions – a trend that we expect to see continue in 2023.

Matei Purice

Continental Europe Head of Global
Projects Disputes

Legal concepts such as frustration, force majeure, imprevision or change in circumstances may also gain more attention in an effort to avoid the consequences of delayed (or lack of) performance arising from disrupted supply chains. Change in law clauses are also likely to be tested in light of both sanctions and ESG obligations (including relating to supply chain monitoring and climate change) where there is a material impact on the ability to use particular or chosen suppliers. That said, we expect their successful use to remain limited to specific exceptional cases.

Looking forward: potential solutions to limiting the risks generated by supply chain disruption

Practical steps that parties can take to reduce the impact of global supply chain disruption include the following.

- Reshore, near shore or diversify the supply base. An example is the 'China plus one' strategy, ie establishing an additional supplier outside China. Onshoring requirements are frequently imposed on State-backed energy transition projects, to ensure domestic economic benefits.

- Make use of new technology, for example digital supply networks (DSNs), which provide live data on the availability and movement of materials. These can alert parties to potential problems in the supply chain at an early stage, therefore buying more time to respond.
- Consider alternative contracting structures. Project stakeholders should consider adopting alternative structures such as partnering and alliancing contracts that may help balance some of the risks arising from the global supply chain crisis (see our blog [here](#)).



Ensuring resiliency of supply chains will continue to be a business imperative for the foreseeable future. Parties will need to be thoughtful about addressing various pressures from inflation to insolvency and preparing for further geopolitical instability. The recent continual crisis context will be shaping disputes for years to come.

Erin Miller Rankin

Partner

03.

LNG disputes gather on the horizon amid market volatility



Joaquin Terceño
Partner,
Tokyo



Yuri Mantilla
Senior Associate,
Paris



Shannon O'Neill
Senior Associate,
London

The past three years have seen changes and uncertainty in almost every aspect of people's lives, as the COVID-19 pandemic and political strife have caused havoc for markets across the globe.

One of the hardest-hit areas has been energy, in particular gas, where prices have fluctuated wildly worldwide over the last three years. The COVID-19 pandemic saw drastic lows as demand dropped during lockdowns, then prices surged in 2021 as increasing demand suddenly led to supply shortages, and prices rose again in 2022 as Russia's invasion of Ukraine triggered a steep decline in Russian gas deliveries, while key markets experienced higher gas burn amid lower electricity output from other sources like nuclear and hydro.

As buyers around the world rushed to secure alternative gas sources, the price of liquefied natural gas (LNG) skyrocketed. The International Energy Agency reported that in Q3 2022, the cost of LNG had reached its highest level since 2008 in the US and was at an all-time high in Europe and Asia. Indeed, between early 2020 and mid-2022, LNG prices rose more than 40-fold and 20-fold in Europe and Asia, respectively. Although prices have decreased since their peak in mid-2022, they remain high and are expected to remain volatile due to projected supply and demand fluctuations.

These circumstances have led to an increase in disputes arising from LNG contracts, which typically include arbitration clauses, thus bringing arbitration to the fore. In particular, the past few years have seen an increase in arbitrations relating to price reviews and supply obligations, a trend that looks set to continue.

Price review clauses in LNG supply contracts are included to give parties flexibility to adjust their agreements based on market fluctuations, with the procedural and substantive requirements of such a review dictated by the contract. While Europe is no stranger to gas price arbitrations, which it saw

triggered first by EU deregulation of the gas market in 1998 and then by reduced European demand and US oversupply after the 2008 global financial crisis, the volatility of the market in the past few years has seen an increase in price review arbitrations in Asia-Pacific in particular, where they were previously rare.

High LNG prices mean that sellers will be turning to price review clauses to seek upward price reviews under long-term contracts, while buyers will be under pressure to keep costs low and resist any price rise. With such diametrically opposed positions and uncertainty in gas market development, the chances of amicably agreeing on price increases appear slim, and so we expect the number of price review arbitrations to increase globally.

The severe market fluctuations and supply uncertainties are also feeding into the desire to break or renegotiate existing LNG supply contracts to profit from higher market prices and secure alternative sources of supply, while supply shortages are making delivery obligations difficult to meet. Increasingly, sellers are failing to deliver all or even part of their LNG commitments under long-term contracts, often citing operational and logistical issues (such as lack of, or issues with, infrastructure), force majeure, hardship and/or sanctions as the justification. This further exacerbates the supply crunch as buyers seek to obtain replacement LNG to fulfil their own obligations to downstream consumers. Disputes arise as the parties seek to assign blame and argue about who bears the contractual risk.

Sellers are also seeking to divert LNG cargoes from existing buyers under long-term contracts to new buyers who are willing to pay more. Given they are typically subject to duties to maximise shareholder profit, sellers may consider it necessary to seek more lucrative deals to supply third parties under agreements negotiated in the more favourable market conditions now existing and accept the consequences of a breach of contract rather than comply with their existing long-term commitments. This gives rise to

further disputes, including whether a right to sell to other buyers exists in the contract and, if so, who should be afforded priority.

These disputes will likely lead to buyers seeking to enforce contractual obligations and/or recover damages for the shortfall beyond liquidated damages or other contractual limitations (particularly if the seller refused delivery to achieve opportunistic gains). Where contractually available, claims may also arise from sellers' violation of buyers' rights to upward flexibility (ie entitlement to increased quantities for a particular period) and to divert cargo, as buyers would have an incentive to receive the additional quantities for the lower contractual price to store and/or resell elsewhere for the higher market price. As noted above, sellers may invoke force majeure and hardship clauses to justify delivery failures.

Arbitration, with its emphasis on confidentiality and the ability to select tribunal members with relevant industry expertise, is well placed to hear disputes arising from the 'perfect storm' of drastic fluctuations in prices, supply shocks and bottlenecks, inadequate infrastructure, and sanctions. The rise in disputes we are seeing acts not only as a warning to those parties not yet facing such disputes, but also as a reminder of arbitration's unique position – private, tailored and internationally enforceable – to resolve such differences.



The energy market volatility and political instability in the world today are upending contractual relationships for LNG sales, and we expect to see disputes arising out of this disruption in almost every corner of the globe as buyers and sellers seek creative ways to improve their positions.

Joaquín Terceño
Partner

04.

Energy transition: the current landscape in Latin America and what to expect in 2023



Nigel Blackaby KC
Partner,
Washington, DC



Caroline Richard
Partner,
Washington, DC



Natalia Zibibbo
Counsel,
New York

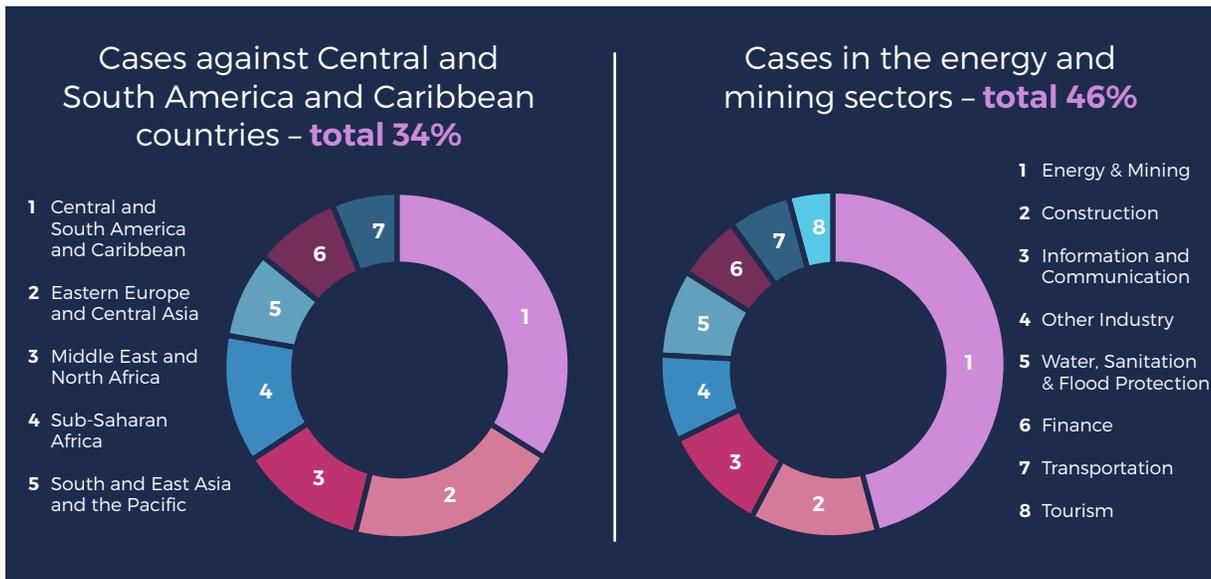


Juan Pomes
Senior Associate,
Washington, DC

As we leave behind the global crisis created by the pandemic, governments and civil society are refocusing on achieving climate and sustainable development goals, for which the energy transition is key.

In Latin America, the transition presents both opportunities and challenges, which are likely to increase the number of energy-related

disputes in the region in 2023. Disputes in the sector are commonly settled by arbitration, including investment arbitration. According to the latest ICSID report, almost half of the ICSID cases in 2022 were related to energy and mining sectors, and one out of three cases registered involved Central or South America or the Caribbean countries.



Efforts to incentivise investment in clean energy generation in Latin America in the past decade yielded positive results. Between 2015 and 2020, Latin American countries increased their renewable capacity by 33 per cent. For example, Costa Rica and Uruguay are already almost entirely self-sufficient in energy through the development of renewables. Moreover, 15 countries in the region have committed to source 70 per cent of their electricity demand from renewable sources by 2030. These countries are part of the Renewables in Latin America and the Caribbean (RELAC) initiative, which was created at the end of 2019, within the framework of the United Nations Climate Action Summit. Its members are Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru and Uruguay. In this context, Latin American governments have established specific regulatory regimes to attract foreign investments into the sector. Failing to maintain such regimes, or introducing significant regulatory changes to those regimes, may breach protections granted to investors under international investment treaties and free trade agreements.

This transition will be impacted by recent events that have disrupted international energy markets, including the COVID-19 pandemic and the Russian invasion of Ukraine, which have caused fossil fuel prices to spike. Several Latin American countries have seized on the opportunity by investing in their oil and gas (O&G) industry in an effort to reactivate their economies. This may motivate governments to put green energy policies on hold, potentially leading to new disputes.

For example, the Mexican government under the leadership of President López Obrador is backtracking on its policies to develop private investment in renewable energy in order to re-impose domination of State-owned companies such as Pemex (oil and gas) and CFE (electricity) in the energy sector. Since these State-owned entities are largely dominated by fossil fuel development and (in the case of CFE) thermal power plants, the transition to cleaner energy has effectively stalled. Regulatory changes to the renewables sector may put Mexico in a position similar to that of Spain and Italy, which faced multiple investment treaty claims after revoking incentives given to the renewable energy sector.

Recently re-elected Brazilian President Lula has indicated a tendency similar to that of Mexico and wants Petrobras (the State-owned O&G company) to regain its market-leading position in the industry, especially in downstream operations. The sector can expect an increase in government investment. A more aggressive Petrobras and the current volatility in oil prices will likely lead to commercial disputes. Brazilian energy companies have largely preferred to resolve their disputes through arbitration, and so we can expect to see an increase in Brazil-seated energy arbitrations.

Other tensions are arising as a consequence of political changes. For example, Colombia is one of the world's biggest coal exporters and is currently exporting coal at record levels. Similarly, it is a new exporter of oil and gas through State-controlled energy company Ecopetrol. However, newly elected President Petro has openly declared his fierce opposition to the O&G and mining industries with commitments not to grant new exploration licenses and not to develop fracking, which would have a severe impact on State revenues. This is being partially offset by a major tax reform that has increased the tax take from natural resources (eg by rendering royalties non-deductible for tax purposes).

In contrast to Colombia's position, Argentina has embraced fracking and is seeking to increase production of O&G at its mega-deposit, Vaca Muerta, which holds the world's second-largest shale gas reserves and the world's fourth-largest shale oil deposits. Environmental concerns over shale exploitation may lead to disputes. Argentina has also sought, along with Bolivia and Chile, to expand the mining of lithium – lithium is key to energy transition and will certainly be in the spotlight in 2023. Given the environmental impacts associated with shale exploitation and lithium mining, as well as the element's strategic importance (eg Mexico recently nationalised lithium), the region is likely to see lithium-related disputes in the near future.

Finally, the global thirst for energy may have a potential upside for investors in Venezuela. The current geopolitical situation that has cut off Russian oil from international markets has allowed Venezuela to resume its diplomatic relations with certain countries, including Colombia and Spain. Approvals have been granted to European oil companies to deal in Venezuelan oil. If the US decides to ease sanctions further, Venezuela may be seeking a new inflow of foreign investment into the sector.

In summary, Latin America is at a crossroads. As a region where many countries' wealth depends on exploiting natural resources (including large-scale mining of coal and development of oil and gas), the energy transition presents a unique challenge. Some countries such as Mexico and Brazil seem to be doubling down on their historic reliance on fossil fuels, whereas others, such as Colombia, have apparently embraced the need for a transition despite the likely cost. Considering that disputes flourish in times of transition as well as Latin America's preference for resolving disputes through arbitration, we expect the region to generate many new cases in 2023.

05.

Withdrawal from the ECT: one step forward, two steps back?



Carsten Wendler
Partner,
Frankfurt



Marta Garcia Bel
Senior Associate,
Milan



Gregorio Pettazzi
Principal Associate,
Frankfurt

In 2022 several EU Member States announced their intention to abandon the ECT. This came at a time when the ECT modernisation process that was started in 2017 had just been concluded – with the vote on the adoption of its modernised text being the only outstanding issue. Given the announced withdrawals, the vote was postponed to April 2023. Where do investors stand?

With a view to aligning their ECT obligations with their new energy transition and climate change strategy, the 53 ECT Contracting Parties reached an agreement in principle to modernise the treaty. The proposal includes (i) a revised list of protected energy investments, (ii) the exclusion of intra-EU arbitrations, in line with the case law of the European Court of Justice, and (iii) an opt-out mechanism allowing States to exclude new fossil fuel investments from treaty protection.

The proposal also reaffirmed the States' right to adopt measures for environmental protection and boost the energy transition. However, several EU Member States now seem to have taken the position that these achievements are not enough.

Why are EU States exiting the ECT?

Calls for modernising the ECT came after a slew of investment claims targeting environmental measures and climate policies. In 2012, Swedish Vattenfall sued Germany over the phaseout of nuclear energy in the aftermath of the Fukushima incident.

The Netherlands faced a similar fate when deciding to implement its coal-exit policy, planning to phase out

all coal-fired power plants by 2029. Relying on the ECT, the German companies RWE and Uniper are reportedly seeking approximately €2.5bn in damages from the Dutch State. More recently, an arbitral tribunal ordered Italy to pay €190m plus interest to the English-incorporated oil and gas company Rockhopper for banning exploration and exploitation of oil concessions in the Adriatic coast due to environmental concerns.

Yet the ECT does not only protect conventional investments. The vast majority of claims against EU Member States have been brought by renewable energy investors. Since 2010, Spain, Italy, Czech Republic, Germany and France – amongst others – faced more than 60 investment arbitration cases worth more than €10bn after cutting or reviewing incentives to renewable energy producers.

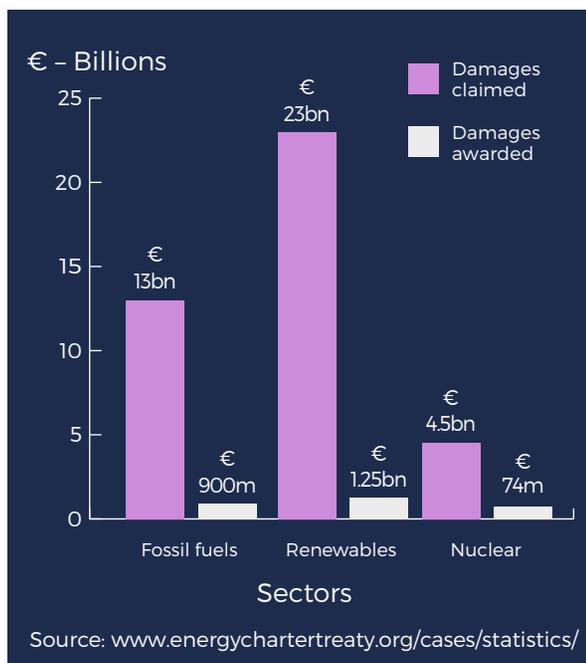
This wave of investment claims raised the issue of the balance between investment protection and States’ right to regulate to pursue their policy goals, especially those concerning energy transition and climate change. Redefining this balance was one of the very objectives of the ECT modernisation process.

However, some EU Member States seem to be dissatisfied with the outcome reached. They considered the proposed reform insufficient. Against this background, last year Belgium, France, Germany, Luxembourg, the Netherlands, Poland, Portugal, Slovenia and Spain announced their intention to withdraw from the ECT. Shortly thereafter, the European Parliament even called for a coordinated withdrawal of all EU Member States.

What is next for the ECT and where do investors stand?

Withdrawals from the ECT trigger the application of the so-called sunset clause. The ECT sunset clause extends the protection of existing investments (including those in conventional energy sources) for a period of 20 years following the withdrawal.

This is why the EU is seeking a coordinated withdrawal of EU Member States from the ECT in an attempt to neutralise the operation of the ECT sunset clause. However, the legal effects of such a coordinated withdrawal are far from certain under international law. It will be left to arbitral tribunals to determine whether – after a coordinated withdrawal of EU Member States – the ECT sunset clause applies or not with respect to prior investments made in such EU Member States.



Against the backdrop of this potential significant shift in the European energy investment landscape, investors in the EU energy sector should carefully consider a number of factors to ensure protection of their investments against unlawful government intervention.

- **Investment structuring to ensure optimal legal protection:** Investors should carefully evaluate how to structure and/or restructure their investments in the EU. It may be advisable to invest from an entity located in a jurisdiction outside the EU (eg Switzerland or the UK) with good investment protection treaties in force with the EU Member State in which the investment is made.
- **Assessing alternative instruments to protect their rights:** Investors should consider the possibility of concluding or amending investment contracts with the relevant EU Member State – or one of its agencies – in order to include arbitration clauses and substantive protections in these instruments. It is paramount that the seat of arbitration is located outside the EU. Moreover, investors should carefully assess the specific alternative legal protections available to their investments – under national law, EU law, other investment protection treaties or the European Convention on Human Rights.
- **Leveraging their position for negotiations:** The cost of arbitration proceedings as well as the risk of reputational damages may incentivise States to settle their disputes with investors. The Vattenfall arbitration against Germany is a good example of that, in which the parties managed to reach an agreement worth over €1.4bn in lieu of a decision of the tribunal. Investors should therefore always be prepared to leverage their position in negotiations with States and State entities in order to mitigate litigation risk.



Energy investors must prepare themselves in light of the announced withdrawal of several EU Member States from the ECT. The risk of being left without proper legal protection from government intervention – especially in certain countries – is too high. The specific situation of each investment must be carefully assessed with a view to ensure optimal legal protection and mitigate risks as much as possible.

Carsten Wendler
Partner

06.

Drive towards greater transparency



**Noah
Rubins KC**

Partner,
Paris



**Rohit
Bhat**

Dispute Resolution
Lead – India Disputes,
Singapore



**Ezequiel
Vetulli**

Senior Associate,
New York

One of the hallmarks of arbitration is the confidentiality of its process. But in the recent past, we have seen a push towards greater transparency in both investor-State and commercial arbitrations, and 2022 saw some leading arbitral institutions amend their rules to provide for greater public access to information about arbitral proceedings.

These changes indicate a move towards a new default rule of publication of awards, procedural orders and even written submissions, with parties having to opt out to impose the level of confidentiality that has until now been routine. The amendments also continue the trend of requiring the disclosure of some aspects of third-party funding arrangements.

We expect the drive towards greater transparency to gain speed in 2023, with more arbitral institutions following suit.

Publication of awards

Demands for transparency are at the centre of debate in the investment arbitration space, and in recent years, the arbitration community has made efforts to answer these demands. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration reflect that trend.

- **ICSID:** In 2022, ICSID amended its arbitration rules and introduced a chapter dedicated to transparency. The key change, Rule 62, now provides that ‘awards, supplementary decisions on an award, and rectification, interpretation, and revision of an award, and decisions on annulment’ are to be published automatically unless a party objects in writing within 60 days. This is the opposite of the previous position, which required all parties to give consent for the publication of awards and decisions. In addition, Rules 63 and 64 provide for default publication of procedural orders, party submissions and supporting documents. New Rule 65 also includes a presumption that hearings will be open to the public, unless a party objects.

- **ICDR:** The 2021 ICDR Arbitration Rules also introduced changes to the ICDR's confidentiality regime. Less robust than the ICSID Rules, Rule 40(3) of the ICDR Rules now provides that ICDR 'may' publish the full text of an award if it obtains the consent of the parties. Rule 40(4) enables the ICDR to publish anonymised versions of awards, orders, decisions and rulings unless a party objects within six months.
- **ICC:** In January 2021, the ICC published a note to parties highlighting its effort to achieve greater transparency, with all final awards made on or after 1 January 2019 presumptively subject to publication. In April 2021, ICC collaborated with *Jus Mundi* – a leading legal research tool – to provide full public access to all publishable ICC awards. In 2022, the ICC and *Jus Mundi* expanded their partnership with the ICC, giving *Jus Mundi* access to the ICC dispute resolution library with over 7,500 documents, including arbitral awards.

This shift is likely to have a positive impact on the legitimacy of the arbitral process. In particular, access to more precedents will help consistency and predictability, will make stakeholders more accountable, and will improve the arbitrator selection process and reduce risks of conflict of interest. Importantly, parties retain the ability to prevent publication where confidentiality is important, preserving an important advantage of arbitration for many businesses.

Third-party funding

As arbitration funding becomes increasingly common, arbitral institutions are considering amendments to address related issues. We noted in our [2022 Trends Report](#) that even though various rules such as those of the ICC, Delos and HKIAC have put in place regimes for disclosure of third-party funding, there is still no consensus on the topic. Since then, a few more arbitral institutions have implemented rules requiring disclosure of third-party funding.

Rule 14 of the 2022 ICSID Rules requires the ongoing disclosure of the existence of third-party funding arrangements, including the disclosure of the identity of the funder and its ultimate beneficial owners. The 2021 ICDR Rules similarly require parties to disclose the identity and nature of any third-party funder, including 'any non-party that has an economic interest in the outcome of the arbitration', which could include, for example insurers, parent companies or ultimate beneficial owners.

Other new rules that require disclosure of third-party funding arrangements include the 2022 PRIME Finance Arbitration Rules, which now require parties to disclose 'the identity of any third party with a significant interest in the outcome of the dispute' and the 'nature' of this interest, and the 2021 Australian Centre for International Commercial Arbitration Arbitration Rules, which introduced new provisions obligating parties to disclose the existence and identity of any third-party funders.

With these amendments, some degree of consensus appears to be emerging over the requirement to disclose the existence of funding, although not the funding agreement itself. This is because the primary concern in relation to such arrangements is the avoidance of undisclosed relationships between arbitrators and funding institutions, which could undermine the enforceability of awards later on.

Will other arbitral institutions catch up?

Though 2022 saw some major changes to the transparency regime in international arbitration, there is still no consensus on the subject. Major arbitral institutions such as the LCIA, SIAC, HKIAC, DIAC and SCC continue to have the default position that arbitration awards and other documents are to be kept confidential unless the parties agree to their publication. The LCIA, SIAC and the SCC are also silent on rules for disclosure of third-party funding. However, most of these rules have not been updated in the past three to five years, and it is likely that newer iterations of the rules will reflect the trend towards transparency.

07.

Progress towards diversity continues to gather pace



**Sylvia
Noury KC**
Partner,
London



**Noiana
Marigo**
Partner,
New York



**Guy
MacInnes-Manby**
Associate,
London



**Ashley
Jones**
Senior Knowledge
Lawyer, London

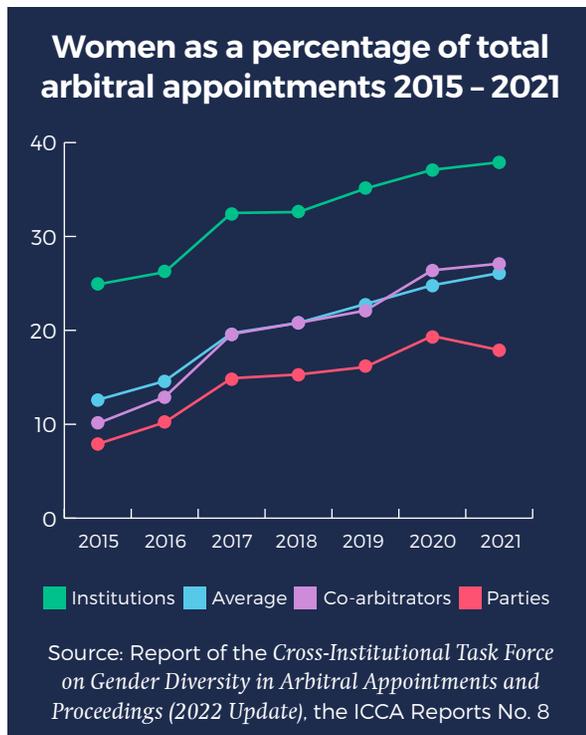
The Cambridge Dictionary offers two definitions of the word 'trend'; the first, 'a general development or change in a situation or in the way that people are behaving', and the second, simply, 'a fashion'.

All too often, commitments to diversity have been motivated by the latter definition; diversity initiatives are supported because it is *trendy* to do so. Support on that basis tends to be short-term and ineffectual at leading to real change. Conversely, procuring a general development or change in people's behaviour takes a sustained commitment. Such a change from a diversity perspective is undoubtedly worthwhile both as an end in itself and because of the benefits to the arbitration community as a whole.

We can (finally) state that there has been 'a general development or change in a situation or in the way that people are behaving' with respect to the promotion and development of diversity in arbitration. Our expectation is that, with the excellent groundwork established in the last few years, this trending change in the arbitration community will continue to gather pace in 2023, shining a spotlight on and promoting an increasing number of underrepresented groups.

Progress has undoubtedly been made with respect to gender diversity; the last few years have seen a steady improvement of female arbitrators appointed across the main arbitral institutions – thanks to initiatives like the [Equal Representation in Arbitration \(ERA\) Pledge](#), [ArbitralWomen](#), [WWA Latam](#), and many others.

While there remains more work to be done, especially with respect to party appointments of female arbitrators, the statistics demonstrate that real change is taking place. As the chart shows, the proportion of women appointed as arbitrators more than doubled from 12.6 per cent in 2015 to 26.1 per cent in 2021.



Increasingly, steps are also being taken within the arbitration community to address broader diversity goals. [Racial Equality for Arbitration Lawyers \(REAL\)](#) and [The African Promise](#) continue to promote racial equality for lawyers through their active networks of lawyers and partners. The ERA Pledge has subcommittees focused on promoting female arbitrators from different racial and ethnic backgrounds, including Africa, Asia, MENA and Latin America. And in 2022, the GAR Pledge Award was expanded to recognise and celebrate initiatives promoting broader diversity rather than just gender.

The arbitral institutions continue to lead the charge in pushing for progress.

The 2022 Scottish Arbitration Centre’s Rules of Arbitration, were the first of their kind to enshrine the need for those appointing arbitrators to have regard to the concrete diversity commitments of both the ERA Pledge and REAL.

Since then, the Belgian Centre for Arbitration and Mediation introduced into its rules an express requirement for its arbitrator appointment committee and president to take into account ‘considerations of diversity and inclusion’, as well as creating a new diversity and inclusion (D&I) standing committee to promote and monitor D&I within the institution.

A further example of innovative action by an arbitral institution is the German Arbitration Institute’s [DIS-ERA Pledge Gender Champion Initiative](#), aimed at encouraging counsel involved in arbitrator selection to consider diversity through statistical self-monitoring.

The ICC has also taken significant steps in recent years to address issues across a broad spectrum of diversity. In July 2021, it announced the [creation of the ICC's LGBTQIA network](#), which seeks to support the personal and professional development of LGBTQIA members of the ICC Court. A few months later, the ICC confirmed the creation of its [Task Force on Disability Inclusion and International Arbitration](#). This marks the first such effort by an arbitral institution to make dispute resolution more inclusive for people with disabilities. These initiatives recognise that individuals in that community may face barriers based on their specific personal characteristics and seek to acknowledge and ultimately remove those barriers.

Arbitration organisations like International Council of Commercial Arbitration (ICCA), the Arbitration Committee of the International Bar Association (IBA) and the Institute for Transnational Arbitration are also playing an important role.

For example, ICCA's D&I Committee announced at the 2022 Congress in Edinburgh sweeping changes to its governing board, including an increase in the last decade from 7 per cent to 47 per cent female membership, as well as a shift in regional membership. ICCA has also effected significant changes relating to diversity at its congresses, with a majority of female speakers for the first time ever at the 2022 Congress (compared with a cast of all-male speakers at the first ICCA Congress in 1961). Important joint initiatives being progressed with other arbitral organisations include the following.

- The [2022 update](#) by the ICCA Cross-Institutional Task Force on Gender Diversity of its 2020 report on Gender Diversity in Arbitral Appointments and Proceedings.

- ICCA's hosting of the [ERA Pledge's female arbitrator Search Tool](#), a bespoke tool run by members of arbitral institutions who sit on the ERA Pledge's Search Committee and can help find the right female arbitrator for any arbitration.
- A collaboration between the Arbitration Committee of the IBA and ICCA to draft guidelines on the promotion of all forms of diversity at arbitration conferences, to serve as a model for all.

Additionally, there are many diversity initiatives led by individuals or groups aimed at improving all forms of diversity with respect to the appointment of arbitrators. For example, in December 2022, Mute Off Thursdays (in partnership with GAR and Burford Capital) launched the first edition of its [Compendium of Unicorns – A Global Guide to Women Arbitrators](#), profiling 176 diverse women arbitrators from different legal, cultural and ethnic backgrounds.



International arbitration lawyers also have an important role to play in advancing diversity more generally through their global reach and resources. Freshfields is part of a cross-firm initiative to support the International Centre for Transitional Justice in a comparative research project titled [Racial Truth, Reconciliation and Redress in America](#) that seeks to examine case studies of countries that have confronted historical oppression of ethnic minorities through truth and reconciliation commissions. Initiatives like this are a rare, but welcome, area where dispute lawyers can be united by a common end rather than facing each other at a hearing.

Noiana Marigo
Partner

Diversity of Expert Witnesses

Following the success of the ERA Pledge, which now has more than 5,200 signatories and will celebrate its seventh anniversary in May this year, 2022 saw the launch of a sister pledge – the [Equal Representation for Expert Witnesses \(ERE\) Pledge](#) – to address the issue of gender diversity in the appointment of expert witnesses in dispute resolution procedures worldwide. Co-founders of the ERE Pledge, Kathryn Britten and Isabel Kunsman, set up the ERE Pledge after a survey in 2020 discovered that 56 per cent of arbitrators and counsel had seen no females in expert roles in the past three years and only 1 per cent had seen four or more women experts in action in the same period.

The ERE Pledge has got off to a strong start, attracting more than 830 signatories worldwide, including 100 organisations. The global steering committee includes members from around the world and a range of professions and institutions, including Freshfields partners Sylvia Noury KC, Noiana Marigo and Ali Kirby Harris. Launch parties have taken place in London and New York and are soon to take place in Paris, Dubai and Singapore.

In 2023, the ERE Pledge has plans to expand into new jurisdictions and form new subcommittees, including an active Young Practitioners Group. One of the biggest challenges facing the ERE Pledge team will be finding ways to measure progress, since information on the number of women being appointed as experts is not currently tracked or reported in any systematic way.

The arbitration community should sustain its efforts towards diversity for a myriad of reasons, but we will offer two specific ones by way of conclusion. First, arbitration practitioners love to describe themselves as part of a truly global community, and yet all too often we also lament that the same arbitrators get appointed again and again. The trend towards more diverse tribunals can only improve that issue. Second, because of its global reach, arbitration can be a leading light in jurisdictions where the legal, social or cultural context can be hostile towards underrepresented or minority individuals. Our actions, whether in the selection of arbitrators, the organisation of conferences or the recruitment of talent, can help to drive that change.

08.

Reform of the Arbitration Act 1996



**Oliver
Marsden**
Partner,
London



**Ella
Davies**
Senior Lawyer,
London

One of the most significant developments to watch for this year for parties who regularly arbitrate in London will be the outcome of the Law Commission of England & Wales's public consultation on potential reforms to the Arbitration Act 1996 (the Act).

Last September, the Law Commission (an independent UK statutory body tasked with reviewing the law) published its initial proposals for reform of the Act, the law governing arbitration proceedings seated in England, Wales and Northern Ireland for the past 25 years.

The consultation closed in December 2022, and the first half of this year will reveal which of these proposals will move one step closer to being enacted into law.

The Law Commission's consultation paper

In its September 2022 consultation paper, the Law Commission concluded that the Act is working well and that 'root and branch reform' is unnecessary. Instead, the consultation aims to ensure that English arbitration legislation remains 'state of the art', both for domestic arbitrations and to promote London as a world-leading choice of seat for international commercial arbitrations.

The Law Commission focused on reviewing eight aspects of the law:

- **Confidentiality:** The Law Commission proposed that the principles governing the confidentiality of London-seated arbitrations should continue to be developed by the courts under the common law on a case-by-case basis and should not be codified in statute.
- **Independence of arbitrators:** The Law Commission proposed that the Act should include a statutory duty for arbitrators to disclose any circumstances that might reasonably give rise to justifiable doubts as to their impartiality on an ongoing basis but should not introduce a new duty of independence.
- **Discrimination:** The Law Commission suggested a ‘world-leading’ amendment to bar challenges to arbitrator appointments based on discriminatory terms in arbitration agreements, by incorporating concepts found in UK equality law. The new provision would make an agreement between parties in relation to an arbitrator’s ‘protected characteristics’ unenforceable in the context of an arbitrator challenge, unless in the context of the arbitration, requiring the arbitrator to have that characteristic is a ‘proportionate means of achieving a legitimate aim’. The protected characteristics would be those set out in section 4 of the Equality Act 2010, namely, age, disability, race (including nationality), religion or belief, sex, sexual orientation, gender reassignment, marriage and civil partnership, and pregnancy and maternity.
- **Summary disposal of claims:** the The Law Commission proposed a new statutory provision empowering arbitrators to adopt summary dismissal procedures upon application by a party (unless the parties have opted out). The Law Commission provisionally suggested that the standard applied by the tribunal could be the same as in summary judgment proceedings before the English courts (‘no real prospect of success’ and ‘no other compelling reason to proceed to a full hearing’).
- **Interim relief and emergency arbitrators:** The Law Commission considered that the current law does not need extensive reform. However, it suggested some limited amendments to the Act to take account of the emergency arbitrator procedures that are now available under the rules of many arbitral institutions, including with respect to court assistance to enforce orders made by emergency arbitrators.
- **Arbitrator immunity:** The Law Commission proposed that arbitrator immunity should be further strengthened by reversing existing case law holding arbitrators liable for the costs of court proceedings arising out of an arbitration in certain circumstances.
- **Jurisdictional challenges:** Perhaps most controversially, the Law Commission proposed that, specifically in circumstances where a party has already participated in an arbitration and subsequently challenges the tribunal’s award for lack of jurisdiction before the English courts under section 67 of the Act, that challenge should not involve a full rehearing on jurisdiction (as it does at present) but should instead take the more limited form of an appeal.
- **Appeals on a point of law:** The Law Commission proposed that section 69 of the Act, which allows parties to appeal awards to the court on a point of law (unless that right is excluded by agreement of the parties), should be retained in the Act and not repealed.

We anticipate that commercial parties will be particularly interested in the outcome of the consultation on two issues: summary dismissal of unmeritorious claims or defences and jurisdictional challenges to awards, discussed further below.

Summary disposal of unmeritorious claims or defences

This is a matter on which the Act (like most national arbitration laws) is currently silent. A new statutory power to this effect would remove any residual uncertainty in the existing law and may embolden arbitrators to adopt summary procedures (if requested) where this would result in clear procedural efficiencies. For this reason, we anticipate that the Law Commission's proposal will find widespread support amongst users of commercial arbitration.

It will be interesting to see whether the consultation leads to adoption of the summary judgment threshold test used by the English courts, as currently proposed by the Law Commission, rather than the 'manifestly without merit' test commonly found in the rules of arbitral institutions.

Jurisdictional challenges to an award

As noted above, one of the most controversial proposals made by the Law Commission relates to the nature of the review undertaken by the courts where awards are challenged for lack of jurisdiction (limited to circumstances where the party disputing jurisdiction participated in the arbitration).

Supporters of this proposal say that it will address the current issue whereby a party who has raised an unsuccessful jurisdictional objection before the tribunal has a 'second bite of the cherry', pursuing a costly and time-consuming rerun of its jurisdictional arguments before the English courts, including all relevant evidence, in many cases with the same result. Statistics published by the Commercial Court show that only 11 per cent of jurisdictional challenges to awards filed in 2019–2020 succeeded (see bar chart).

On the other hand, opponents of this proposal argue that the right to a full de novo rehearing on jurisdiction (rather than merely an appeal of the tribunal's decision) is an important safeguard for parties who contend that they are not subject to the tribunal's jurisdiction, and parties should be able to pursue a jurisdictional challenge before the tribunal without prejudicing their right to a full review by the courts in any subsequent jurisdictional challenge under section 67 of the Act. It will be interesting to see where the Law Commission lands on this important issue in 2023.



09.

Section 1782 discovery: some answers, but more questions



**Elliot
Friedman**
Partner,
New York



**David
Livshiz**
Partner,
New York

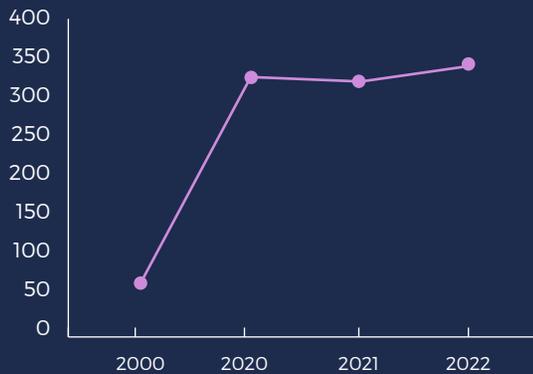


**Paige
von Mehren**
Senior Associate,
New York

'US-style discovery' is a phrase that, for some, has no place in international arbitration. It conjures images of invasive depositions, lengthy interrogatories and expensive document review. It is also far from the norm in many international arbitration proceedings, a difference that (at least partially) accounts for international arbitration's reputation for being more efficient and less expensive than litigation in US courts.

Nevertheless, for many years it was possible to obtain US-style discovery for use in some international arbitration proceedings. The hook was section 1782 of Title 28 of the US Code, which permits US federal courts to order discovery for use in a proceeding before a 'foreign or international tribunal'. The only other requirements are that the discovery target is subject to the US court's jurisdiction, and that the requesting party is an 'interested person' in the foreign or international proceeding (such as a counterparty). Once those statutory criteria are met, the court has discretion to order the requested discovery in whole or in part, subject to a set of guidelines articulated by the US Supreme Court in *Intel Corp. v Advanced Micro Devices, Inc.*, a 2004 case that was (until recently) the Court's only case about section 1782. Section 1782 discovery is often used as a way to obtain discovery from parties and non-parties to a foreign or international proceeding and has exploded in popularity in recent years.

Number of Section 1782 applications in recent years



In 2022, the Supreme Court heard two consolidated cases about section 1782: *ZF Automotive US, Inc. v Luxshare, Ltd.* and *AlixPartners, LLP v Fund for Protection of Investors' Rights in Foreign States*. Both asked whether international arbitration tribunals were 'foreign or international tribunals' that were eligible for section 1782 discovery. *ZF Automotive* concerned a commercial arbitration tribunal under the DIS Rules, while *AlixPartners* concerned an investment arbitration tribunal under the Russia–Lithuania bilateral investment treaty and the UNCITRAL Rules. Leading up to this case, there was a deep split in the lower US courts as to whether section 1782 discovery was available for commercial arbitration. The picture was clearer in respect of investment arbitrations: the lower US courts agreed that section 1782 discovery was available in that context. Courts often justified this distinction by pointing to the greater government involvement in investment arbitration tribunals, reasoning that those tribunals were therefore closer in nature to foreign courts (which are the archetypal 'foreign or international tribunal') – even though investment arbitration tribunals are often functionally indistinguishable from their commercial counterparts.

In June 2022, the Supreme Court issued a consolidated opinion in the two cases. It ruled unanimously that only tribunals that were imbued with governmental authority by one country or by multiple countries

qualified for section 1782 discovery. Thus, in *ZF Automotive*, the Supreme Court held that most (if not all) private commercial arbitration tribunals do not qualify for section 1782 discovery.

The Supreme Court was less clear with respect to investment tribunals, addressed in *AlixPartners*. While applications for section 1782 discovery in aid of investment arbitrations previously cleared the 'foreign or international tribunal' hurdle as a matter of course, lower courts now must ask themselves whether a particular investment tribunal is sufficiently 'governmental' to qualify under the Supreme Court's opinion. The Supreme Court provided very little guidance on how to make this determination, meaning that lower courts will be left to chart a way forward in 2023 and beyond. The lower courts have already started to grapple with this question, but we expect many more decisions on the issue in the coming year.

The Supreme Court's decision is welcome news for potential targets of section 1782 discovery requests – including US companies with affiliates that are or may be involved in international arbitration proceedings – who no longer need to worry about being on the receiving end of a discovery application in aid of commercial arbitration and have a new tool to defend against applications in aid of investment arbitrations. Those who would have otherwise sought to use section 1782, however – such as non-US parties arbitrating against US companies or their affiliates – should carefully consider their strategy and how they can use the disclosure procedures within their arbitration to assemble the evidence needed for their case.



After years of confusion in the lower courts, the Supreme Court's decision provided welcome clarity for international commercial arbitration. But it remains to be seen whether, in resolving one circuit split, the Supreme Court has lain the foundation for another split over section 1782 in investment arbitration.

Paige von Mehren
Senior Associate

10.

International arbitration in the life sciences sector



Tom Walsh
Partner,
New York



Alexandra van der Meulen
Counsel,
Paris



Tim Chen
Associate,
New York

The life sciences sector is booming. In the US alone, life sciences venture capital deal volume increased by 500 per cent within the past 10 years. This is accompanied by significant growth in B2B disputes between life sciences companies. The unique features of the life sciences industry are particularly well-suited to arbitration, and companies in the industry are increasingly resorting to international arbitration to resolve their contractual disputes.

Growth of the life sciences sector and related disputes

The life sciences sector has been experiencing impressive growth since before the COVID-19 pandemic. In 2003, the market value of the global pharmaceutical industry was approximately US\$462bn. By 2015, it had more than doubled to US\$951bn. The pandemic has further accelerated this growth: annual investment in biotech companies reached an all-time high of US\$105bn in 2021.

The rapid growth in investment in the life sciences sector is accompanied by a corresponding growth of related disputes, many of which are resolved in arbitration. This increase in life sciences arbitrations has been augmented by a general trend of eliminating 'carve-outs' in arbitration clauses for disputes relating to IP rights.

Most major arbitral institutions have reported significant growth in the number of life sciences cases. For example, in July 2022, the International Chamber of Commerce reported a 50 per cent increase in the life sciences arbitrations it administers. The London Court of International Arbitration reported that healthcare and pharmaceuticals represented the eighth most common type of dispute by industry sector of its caseload in 2021. In 2020, there was a 34 per cent

increase in the number of healthcare-related and life sciences cases filed with the American Arbitration Association-International Centre for Dispute Resolution, following a 40 per cent increase in the number of life sciences cases filed with the institution in 2019.

Life sciences disputes are well-suited to arbitration

The key features of the life sciences sector make disputes between life sciences companies well-suited to international arbitration. These features typically include the following.

- Cross-border, multi-year joint ventures or collaborations between various types of businesses (such as biotech companies, pharmaceutical companies, manufacturers and distributors).
- Confidential and valuable know-how and IP rights, and contract terms.
- Inherently risky, expensive and time-consuming research and development to bring products to market.
- Potentially enormous payouts for successful products.

Arbitration has at least four key advantages when it comes to resolving life sciences and biotech disputes.

- **Confidentiality.** Due to the often-confidential nature of the IP and know-how at issue and/or the contractual and economic terms governing the license, collaboration or other contractual arrangement in dispute, life sciences companies may have a strong interest in keeping confidential the details and even the existence of a dispute. Unlike judicial proceedings in most jurisdictions, private arbitral proceedings and the evidence exchanged therein can be kept confidential.

- **Decisionmakers with industry expertise.** While judges in domestic litigation usually are randomly assigned to cases and may not always possess specialised knowledge of a particular industry and its customs, parties to an arbitration can choose the arbitrators who will decide the outcome of their dispute. Thus, life sciences and biotech companies can select arbitrators with specific scientific and industry expertise who understand the nature and context of the disputes and can more easily navigate the evidence put forward by the parties to a dispute.
- **Narrower scope of evidence collection.** Typically, the scope of evidence collection is significantly narrower in arbitration than in litigation. In most arbitrations there will be a lower risk of expansive document production, and company executives are less likely to be subject to discovery devices that exist in some jurisdictions, such as depositions in the US.
- **Limited scope for appeal and facilitated cross-border enforcement of awards.** Arbitration awards are subject to limited judicial review and can be more easily enforced abroad than a court judgment. The New York Convention provides for enforcement of arbitration awards in more than 160 signatory States. For life sciences companies that have cross-border commercial arrangements with counterparties around the world, international arbitration provides an effective mechanism to obtain enforceable awards.

We expect this trend to continue as the life sciences sector maintains its key role in the global economy amidst new developments in the prevention and treatment of illnesses, disruptions in global supply chains, and macroeconomic tensions. Given the real risk of disputes, life sciences companies should pay special attention to including efficient dispute resolution clauses in new contracts to ensure that their needs will be served should disputes arise.

11.

Data protection and cybersecurity in international arbitration remain in the spotlight



John Choong
Partner,
Hong Kong



Vasuda Sinha
Counsel,
Paris



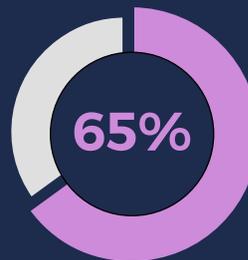
Sofia Klot
Senior Associate,
New York



Olivier André
Client Relationship
Advisor, New York

As we reported in our [2019](#) and [2020](#) Trends Reports, data protection and cybersecurity are becoming focal points in international arbitration. The politically and commercially sensitive nature of arbitration disputes, which are often confidential, makes them an attractive target for hackers. The prevalence of online hearings and electronic records in the wake of COVID-19 has brought renewed awareness of cybersecurity and data protection risks, a trend that will continue into 2023 and beyond.

A 2022 ICC survey on the use of technology in arbitration demonstrated that most arbitration users now support adopting specific measures, such as encryption, to safeguard the privacy and security of electronically stored information.



of those surveyed (counsel, arbitrators in-house counsel and corporate representatives) were **likely** to adopt specific measures to **safeguard the privacy and security** of electronically stored information, such as encryption

Source: Source: ICC Commission on Arbitration and ADR, 'Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings', International Chamber of Commerce (ICC), February 2022, page 43



Data breaches may pose a real risk to the integrity of arbitration as a dispute resolution mechanism. In 2015, hackers attacked the PCA's website. Malware planted on the section of the PCA's website devoted to the China–Philippines maritime boundary dispute posed a potential risk to visitors, causing the PCA's website to go off-line for a week. That same year, in *Caratube v Kazakhstan*, confidential information was leaked from the Kazakh government's IT system and the claimant eventually obtained some of the leaked documents. Although the information was derived from hacking, the tribunal permitted the claimant to adduce non-privileged documents obtained from that leak, as no rule or guideline prohibited the tribunal from exercising its discretion to admit evidence obtained through such questionable means. Anecdotal information also suggests that there have been arbitrations where the case database was leaked or hacked into, which may have been preventable if appropriate safeguards had been put in place.

These risks highlight the importance of giving thought to how to protect data in an arbitration proceeding. Fortunately, parties and arbitrators now have an array of instruments available to guide them.

- The ICCA-NYC Bar-CPR [Protocol](#) on Cybersecurity in International Arbitration, originally launched in 2019 and updated in 2022, provides a framework for participants to agree on reasonable cybersecurity measures for their dispute (eg access controls, encryption and security incident management). The protocol provides sample language to address information security issues that can be incorporated into arbitration agreements, agendas for case management conferences, procedural orders and post-arbitration dispute resolution clauses, as well as a procedure to notify and deal with data breaches based on the GDPR.
- Arbitral institutions have also taken steps to tackle cybersecurity risks.
 - the HKIAC, LCIA, CAM-CCBC, DIFC-LCIA, CPR, DIS and the Swiss Arbitration Centre, for instance, now either require or encourage tribunals to consider appropriate measures or issue binding directions to enhance information security and protect personal data at an early stage in the proceedings (typically before or during the first procedural conference);
 - a growing number of institutions, including the SCC, the AAA-ICDR, the Thai Arbitration Institute and the ICC have launched bespoke case management platforms, such as the ICC's recently launched '[Case Connect](#)', to securely centralise file sharing, thereby eliminating risks associated with the use of email;

- yet a third group of institutions has introduced additional measures – the AAA-ICDR, for example, requires arbitrators on its panel to complete mandatory cybersecurity training, and CPR offers parties access to an encrypted email service; and
- finally, while ICSID’s recently released 2022 Arbitration Rules do not mention cybersecurity or data protection explicitly, amended Rule 29 now requires tribunals to seek views from the parties on ‘the treatment of confidential or protected information’ before the first session.

Beyond the importance of protecting data for its own sake, parties and counsel should be aware that various mandatory data protection regulations may arise at different stages of an arbitration or affect certain participants but not others. Personal data transfers can trigger a complex web of different legal regimes with strict rules on when and how data can be transferred internationally. For example, a party’s evidence may include emails between persons based in the EU and that contain personal, protected data under the GDPR. To transfer such data to an arbitrator in a third-party country, the party may be required to put in place appropriate safeguards to protect those emails. In some cases, personal data will need to be redacted before it can be transferred. Regulators are augmenting the costs of noncompliance, with fines for breaches of the GDPR reaching up to the higher of €20m or 4 per cent of the entity’s total worldwide turnover for the preceding financial year.

Given the complexity of this regulatory universe, in 2022, the ICCA and the IBA launched the [ICCA-IBA Roadmap to Data Protection in International Arbitration](#) as a tool to assist arbitration professionals in applying data protection and privacy laws during international arbitration proceedings. It offers a primer on data compliance and includes sample

data privacy notices for institutions, arbitrators and counsel to adopt for arbitration-related activities; sample provisions for data protection directions for the first procedural order or terms of reference; and checklists of relevant issues that arbitration participants should consider (See our [blog here](#)).

Law firms are also focusing resources on developing innovative tools to assist clients with data breach issues. One example is the Freshfields [Data Breach Notification Platform](#), which provides an instant assessment of which authorities to notify and what information to provide in case of a data breach.

As concern over data protection increases, so are disputes surrounding breaches of data protection obligations. These kinds of disputes may in fact end up being arbitrated (*see re StockX Customer Data Sec Breach Litigation*).



The arbitration community has now developed a set of helpful tools for parties who want to effectively manage cyber and data protection risks. In addition to incorporating these best practices, the onus is on parties to select arbitrators, institutions and service providers that understand the importance of, and are competent in, protecting data in international arbitrations.

John Choong
Partner

In 2023, we expect parties to increasingly adopt cybersecurity and data protection measures in their individual proceedings, and institutions to continue to encourage their adoption through their rules or policies. Parties are advised to select arbitrators, institutions and service providers that understand the importance of, and are competent in, protecting data in international arbitrations. It also falls on counsel to guide participants in the arbitration process, such as clients, witnesses and experts, to comply with best practices as they develop. While there is a growing consensus over the importance of these issues, clients should consider building cybersecurity requirements into their arbitration clauses (drawing from model clauses such as those included in the Protocol) and using internal checklists of essential steps to be taken before, during and after the arbitration, such as those we provided in our [2020 Trends Report](#).

12.

Increasing 'internationalisation' of tax disputes



**Will
Thomas KC**
Partner,
London/Paris



**Helen
Buchanan**
Tax, Partner,
London



**Joshua
Kelly**
Senior Associate,
London

Many economists are predicting a global recession in 2023 with public and private finances under strain. Foreign investors are in the firing line, as governments under intense economic and political pressure, with high costs of borrowing and inflation, look to 'big business' to plug revenue gaps in their budgets. Aggressive tax policies and enforcement action may also result in more tax-related post-M&A disputes, as unwary buyers find themselves saddled with significant tax liabilities post-sale.

Over the next 12 to 24 months, we therefore expect to see an increase in high-value investor-State and commercial tax disputes – with a focus in particular on corporate income tax, windfall taxes, retroactive taxation, and novel taxes on the energy, telecoms and technology sectors.

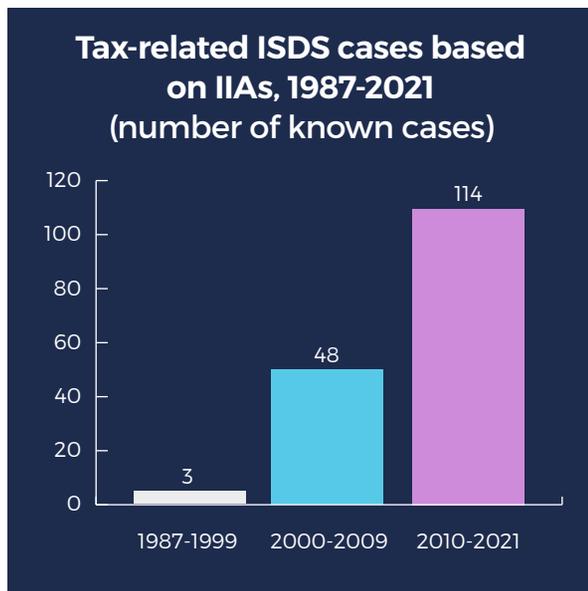
Alongside traditional domestic dispute resolution processes in the local tribunals and courts, contract and treaty-based arbitration – and other forms of alternative dispute resolution – will play an important role in 'internationalising' the large-scale tax disputes, enabling parties to find constructive and mutually beneficial solutions through an independent and neutral forum.

Options for dispute resolution – and the use of arbitration

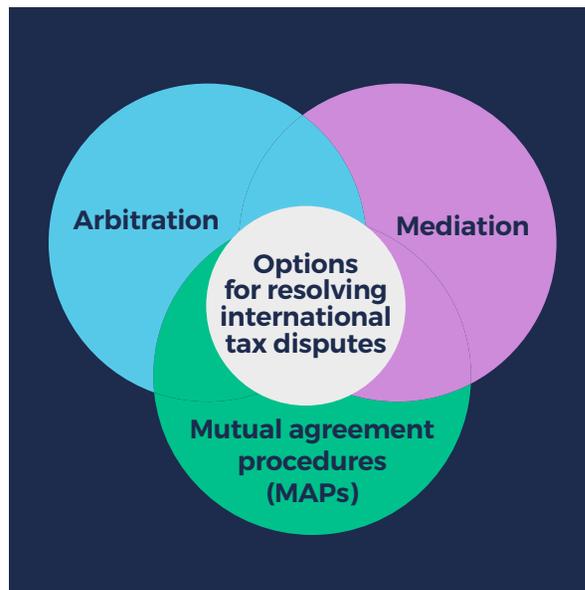
It is, of course, natural for States to reconsider their tax policies in light of economic conditions, and that may involve recalibrating the State's economic relationships with foreign investors. However, issues arise where States overstep the mark – for example, via unlawful tax assessments or rushed-through 'windfall taxes' that (at their most extreme) could amount to 'resource nationalism'.

While the use of aggressive taxation against foreign investors is hardly new (indeed, we highlighted the increasing trend of 'internationalised' tax disputes in our [2018 Trends Report](#)) what *has* changed over the past

five years is that States and investors have become more sophisticated in their willingness to explore 'internationalised' options – such as arbitration – to resolve tax disputes. Similarly, alternative dispute resolution methods such as investor-State mediation and mutual agreement procedures (where a taxpayer's 'home' State can engage with the taxing State via a formal treaty-based process) are on the rise, as investors and States look for alternative routes to constructive solutions.



Foreign investors in any jurisdiction will of course need to be strategic in deciding which cards to play and whether and how to submit to a local dispute resolution process. But by taking tax disputes – whether commercial or investor-State – out of highly charged domestic settings, the parties can work together to achieve a better understanding of the boundaries of lawful and unlawful taxation and best practices, with the benefit of specialist expertise from a 'bespoke' tribunal.



A clear illustration of the benefits of arbitration in a tax disputes context can be seen in India's approach to a significant number of disputes with foreign investors arising out of a controversial 2012 retroactive tax law. That law (which retroactively levied capital gains tax on companies in an attempt to overturn Vodafone's successful litigation in the Indian Supreme Court) came under scrutiny both within India and internationally. A combination of domestic litigation, investor-State arbitration and a highly structured dispute resolution process has allowed India and the relevant taxpayers to bring these disputes to an end, in turn buoying investor confidence in India.

Assessing the risks

As developments in the global economy take shape over the coming year, foreign investors should be (re) considering their tax risks and taking stock of their options for dispute resolution.

- For businesses maintaining operations in jurisdictions where the risk of aggressive taxation is likely to increase, the key is anticipation. It is often possible to predict which risks are most likely to arise – and what steps can be taken – having regard to sources of income and asset footprints, expert advice on recent trends in taxation, and the 'bigger picture' driving the political or tax authority agenda. Understanding and testing the local risks and knowing which advisers are available to help if the risk materialises is far better than having to react in a hurry.
- Similarly, new investors can anticipate their tax risks by reference to the very same factors – while also considering what types of tax protections are available to give all parties certainty as to their tax positions over the longer term (eg via an investor-State contract with provisions that 'stabilise' the applicable tax regime or applicable guarantees under bilateral or multilateral investment treaties). When structuring investments, it is also worth keeping in mind that certain types of investment treaties may only provide qualified protection in relation to tax measures or may exclude taxation measures from being subject to investor-State arbitration altogether.
- For investors who are looking to get out, divestments will give rise to their own tax issues, making the contractual allocation of tax risk with any potential buyer and the resolution of historic disputes even more important. Tax insurance may also be a useful tool in some cases, with insurers increasingly willing to insure certain types of high-value specific tax risks.

freshfields.com

This material is provided by the international law firm Freshfields Bruckhaus Deringer LLP (a limited liability partnership organised under the laws of England and Wales authorised and regulated by the Solicitors Regulation Authority (SRA no. 484861)) and associated entities and undertakings carrying on business under, or including, the name Freshfields Bruckhaus Deringer in a number of jurisdictions, together referred to in the material as 'Freshfields'. For further regulatory information please refer to www.freshfields.com/support/legal-notice.

Freshfields Bruckhaus Deringer has offices in Austria, Bahrain, Belgium, China, England, France, Germany, Hong Kong, Italy, Japan, the Netherlands, Singapore, Spain, the United Arab Emirates, the United States of America and Vietnam.

This material is for general information only and is not intended to provide legal advice.