

International arbitration:

10

trends in 2016



how, where, what & who

As we move into the year 2016, the Freshfields global arbitration team has been reflecting on the key trends and developments over the past year in the field of international arbitration. We have compiled the results into a brief report on the ‘top ten’ trends that look set to have the greatest continuing impact on the ‘how’, ‘where’, ‘what’ and ‘who’ of arbitrating international disputes into 2016 and beyond.

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1

Bang for the buck (pound, euro, yen...)

In the 2015 Queen Mary survey, arbitration users cited ‘cost’ and ‘lack of speed’ as the worst features of international arbitration. These problems were blamed on ‘lack of insight into arbitrators’ efficiency’, ‘lack of effective sanctions during the arbitral process’ and even ‘due process paranoia’ on the part of tribunals.

Arbitral institutions responded in 2015: expedited proceedings and/or emergency arbitrator mechanisms are now offered in many institutional rules, along with menus of case management techniques and a flurry of statistics about time and cost.

In a decision taken in December 2015 but announced on 5 January 2016, the ICC upped the ante by announcing that, for arbitrations registered after 1 January 2016, arbitrators will be expected to submit awards to the ICC Court for scrutiny within

three months of the final substantive submission, on pain of a financial penalty in the form of a discount to the *ad valorem* fees, to be paid to the arbitrators unless the delay can be justified. Regrettably, in our experience such speed is the exception rather than the rule, so if this policy is robustly enforced it would signal a step change in the pace of awards being rendered in ICC arbitrations – and we will be watching developments at other institutions closely to see whether and how they follow suit.

2

The challenge from the East

The trend towards the emergence of Asian jurisdictions as favoured arbitral seats intensified in 2015, with Hong Kong and Singapore winning accolades from users both as popular seats and as ‘most improved’ jurisdictions in which to conduct arbitrations. What does this mean for ‘traditional’ arbitration venues? And where will we see growth next?

In our view (and as is borne out by the statistics), confidence in traditional seats such as London, Paris, Geneva and New York remains strong. The rise of Asia is therefore a story about the growth of international arbitration globally and emulation of successful existing models, rather than a case of displacement or decline.

In terms of growth, we expect Asia to continue to flourish, although we will be looking out for whether political developments affect the

status of Hong Kong as a seat. Certainly to date, parties’ confidence in choosing Hong Kong has been wholly justified, and the HKIAC remains one of the most innovative of the major international arbitration institutions. While on the topic of Asia, we note the rise of Asian claimants in investor-state arbitration. The first ICSID claim by a Japanese investor came in 2015, and we are currently advising a number of Asian claimants on such mandates.

We also expect growth in the Americas. Arbitration is, of course, already a huge business in the US, and for 2016 we anticipate continued strong growth in arbitrations in Latin America. And Africa is a region we continue to watch closely, in particular to see whether Mauritius (host of the 2016 ICCA Congress) will emerge as a regional seat of choice.

3

What next for the 'alphabet soup'?

Engagement by opponents and proponents of investor-state dispute settlement (ISDS) continued in 2015 in the debate over a veritable 'alphabet soup' of proposed free trade and investment agreements, with CETA signed, TPP poised for signature and TTIP still being negotiated.

[Click here for access to Freshfields' TPP Portal.](#)

The debate about the pros and cons of ISDS in its current form and the size and shape of any system that might replace it will no doubt continue. And so, we expect, will a system for neutral, international adjudication of investor claims.

Disputes that implicate private commercial interests will continue to be generated, not least by volatile geopolitical developments. And in an increasingly globalised and

privatised world economy – and a political economy in which states increasingly (at least ostensibly) submit to the rule of law – these developments will give rise to legal claims. We expect the debate over what the system will look like to continue throughout 2016 and beyond, but the case for ensuring that there will be an effective, neutral process for resolving such claims is open-and-shut.

4

The rise of third-party funding

Alternative funding is here to stay, and not just for small or cash-strapped claimants. Already this year we have seen news of an arrangement to provide litigation funding to a FTSE 20 company. This reflects our own experience of handling funded claims – even large corporations are looking to third-party funding as a form of cash flow management. In 2016 we expect third-party funding to continue to move into the mainstream.

Regulations that restrict third-party funding are under review in Hong Kong, and 2015 saw some signs of movement away from the traditional hostility to litigation funding in Singapore – we continue to watch those jurisdictions closely for further developments on the funding front.

To our ears, the concern sometimes expressed that funding breathes life into unmeritorious claims rings false. On the contrary, the

involvement of a funder adds an additional layer of diligence at an early stage of the process, leading to greater rigour in risk- and cost-benefit assessments. In fact, it is not uncommon for one firm to advise the funder on the merits of the case and another to run the claim. This brings with it greater objectivity that would, if anything, tend to weed out less meritorious cases.

5

Reform: cleaning up their acts

Arbitration legislation was reformed in 2015 in a number of jurisdictions historically considered challenging forums for arbitration, with new legislation in jurisdictions ranging from Brazil and Russia to Bahrain and India.

[Click here for analysis of the reforms in Russia.](#)

India's reform, the Arbitration and Conciliation (Amendment) Ordinance 2015, which came into effect on 23 October 2015, is perhaps the most hotly anticipated. Cornering the market on disputes involving one of the world's most dynamic economies would be a huge prize, although a legacy of judicial interference with arbitration has presented a huge image problem for Indian arbitration. And effective implementation, in 2016 and beyond, will of course be key to meaningful reform in India and elsewhere.

6

Who's sitting? Promoting diversity

Available statistics about who sits as arbitrator are compelling, if disappointing: the practice of international arbitration at the highest level is not anywhere close to being fully representative of either the parties or counsel participating in the system. There is a notable absence of female, younger, and racial, ethnic and other minority arbitrators. And 2015 saw a welcome groundswell of calls to action on increasing the diversity of people sitting as arbitrators in international arbitration.

In response to the issue of gender diversity, in a series of dinners – inaugurated in London in April 2015 and followed up in New York in September 2015, Berlin in November 2016 and Hong Kong and Dubai in January 2016 – Freshfields' arbitration group joined with other leaders in the arbitration community to engage in an ongoing, global conversation that we hope will deliver change.

7

The law of large numbers

Headline figures for claims submitted to arbitration and arbitral awards increased in 2015. This run of cases with eye-watering amounts in dispute confirms that companies still trust some of their largest and most significant disputes to international arbitration.

If 2015 was the year of the multibillion-dollar claim, 2016 looks set to be a year of multibillion-dollar enforcements. If recent mega-awards (yes, we're thinking of the Yukos saga, but also numerous awards against Venezuela and Egypt) are not voluntarily complied with, 2016 may well see the New York Convention framework for enforcing arbitral awards really put through its paces.

We expect these cases also to reinvigorate debate over the status of an award that has been set aside at the place it was made. The US courts are poised to consider this question again in the *COMMISA/PEMEX* case pending

in the Second Circuit, and in November 2015 an English court allowed enforcement of an award against the Nigerian National Petroleum Corporation pending protracted set-aside proceedings in the courts of the seat.

[Click here for more information.](#)

It's a case of 'watch this space' for further developments on this long-debated 'academic' issue.

8

The challenge from the courts

Arbitration remains the method of choice for resolving international disputes for many of our clients, but 2015 saw increasing competition from the courts, both globally and locally.

Globally, the Hague Convention on Choice of Court Agreements entered into force in October 2015, albeit to date with ratifications only by the EU and Mexico (and signature by the US and Singapore). Locally, as but two examples, January 2015 saw the launch of the Singapore International Commercial Court, and October 2015 saw Abu Dhabi's answer to the Dubai International Financial Centre, the Abu Dhabi Global Market, declared 'open for business'.

We welcome this healthy competition among forums for the resolution of international commercial disputes. For 2016 and beyond, proponents of arbitration must not rest on the laurels of arbitration's 'golden age' and

rely on arbitration being the only realistic option for certainty and finality in resolving international disputes but instead continually innovate to meet new challenges.

9

Who's sitting? Strategic challenges

Strategic challenges to arbitrators are on the rise, especially in cases involving states or state entities. As has been widely reported, one North American arbitrator has been unsuccessfully challenged no fewer than four times in a single case involving Venezuela, with the latest challenge being rejected in January 2016.

In addition to the obvious cost and delay impacts of these tactics, these challenges highlight the importance of the choice of arbitrator and the need for a thorough vetting process. Recent clarification of ethical standards (including around the hot-button issue of multiple appointments) and moves by institutions (including as of October 2015 the ICC) to publish information about their resolution of arbitrator challenges should help bring greater certainty. Whether parties will forgo the perceived tactical benefits of arbitrator challenges remains to be seen.

10

Clearing the way for transparency

Investors demand transparency from host states, and critics demand transparency from ISDS. In response, 2015 saw the first implementation of the UNCITRAL transparency regime in an investor-state arbitration and the incorporation of the UNCITRAL transparency rules in CETA.

The trend towards greater transparency in ISDS is unlikely to be reversed and offers some collateral benefits. Transparency defuses one of the more pointed critiques of ISDS, and the current decentralised system of ISDS relies on publicity of awards to ensure any kind of consistency of approach on similar issues. That said, based on our extensive experience of cases in which third-party *amici* participate, we do not underestimate either the substantive and case-management challenges that can arise or the predictable impact on the complexity, cost and duration of such cases.

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