

Illuminating the top trends

International arbitration in 2022



Freshfields Bruckhaus Deringer

Introduction

Welcome to our annual review of the top trends in international arbitration for 2022.

This time last year, we hoped that 2021 would see the beginning of the end of the COVID-19 pandemic and the start of a global economic recovery. At the beginning of 2022, despite widespread vaccination programmes, the pandemic and resulting economic disruption continue to interfere with many fundamental aspects of life and business across the globe.

In this edition of our top trends publication, we explore some of the key themes that we predict will influence the arbitration landscape during the year ahead. The 10 trends covered in this year's report have been identified by international arbitration specialists from across our global network.

In addition to the pandemic, there are a myriad of other political, economic and social factors impacting the world that our clients operate in, which are having knock-on effects on the substance and practice of arbitration. We have identified some of these general themes below, which are considered further in the individual trends.

- Growing environmental, social and governance (ESG) expectations of business and the implementation of broader climate change goals are expected to lead to an increase in ESG-related disputes being referred to arbitration ([ESG and arbitration](#)), not least in the energy and construction sectors as companies strive to implement net zero and global energy transition programmes over the coming years ([Construction arbitration in the face of energy transition and climate change](#)).
- The continuation of the global economic downturn is expected to lead to a further increase in the number of disputes across many sectors. Arbitral institutions reported a record number of cases for 2020 and this trend is likely to continue as businesses try to recoup some of their pandemic losses, exacerbated by the expiration of government protection schemes and agreements to defer or reschedule performance of debt ([COVID-19 and the arbitration landscape](#)). The effects of the pandemic are likely to catalyse interest in and use of third-party funding as companies adopt new strategies for liquidity and risk management ([Developments in third-party funding](#)).
- In the EU, the European Court of Justice (ECJ) has sought to further curtail investment protection. The ECJ has extended the historic decision in *Achmea*, which had declared arbitration clauses in intra-EU BITs incompatible with EU law, to intra-EU ECT arbitration and ad hoc arbitration clauses. We consider what steps investors can take to protect themselves going forward ([Investment arbitration in the European Union](#)).
- Mirroring increasing societal expectations on business mentioned above, the arbitration community has seen a marked increase in initiatives designed to improve professional, ethical and environmental standards in arbitration conduct and procedure, including those aimed at increasing the diversity and civility of arbitration ([Emerging standards in international arbitration](#)).
- Continued scepticism of ISDS has led to renewed efforts at pushing reform. The long-awaited revised ICSID Rules are due to be launched in 2022 with novel features such as a new fast-track arbitration procedure designed for investor-State disputes. Reform in the ISDS sphere follows extensive procedural reforms of rules aimed at making commercial arbitration more efficient and cost-effective over recent years ([Drives towards greater efficiency](#)).



- Accelerated digital transformation and innovation will continue to impact the disputes landscape over the year ahead with the rapid growth and globalisation of the tech sector. New product areas, such as cryptocurrency, blockchain and AI, for example, will inevitably give rise to new types of commercial disputes, while increased government action to regulate the big tech companies may also lead to an increasing number of tech-related investor-State disputes ([Arbitration and the tech sector](#)).
- Government involvement in the economy and interference with business is on the increase in other sectors too, including finance. Financial institutions are increasingly alive to the protections available under investment treaties in the event of government action that adversely affects their investments. We also explore recent developments in commercial arbitral procedure designed to make arbitration more attractive to the banking community ([Financial institutions and arbitration](#)).
- A rare example of government interference in arbitration procedure towards the end of last year concerned Dubai Decree 34 of 2021, which had the effect of making the Dubai International Arbitration Centre the only Dubai arbitral institution with authority to administer cases. We look at the resulting impact on arbitration in the region ([Consolidating arbitration centres in the Middle East](#)).

Read on to explore these trends in more detail.

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 during the year ahead.

Meet the team:



Nigel Blackaby QC

Global Co-Head of International Arbitration and Co-Head of Latin America Practice



Boris Kasolowsky

Global Co-Head of International Arbitration and Partner, Disputes, Litigation and Arbitration



Ashley Jones

Senior Knowledge Lawyer, Disputes, Litigation and Arbitration



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01. The rising significance of ESG and the role of international arbitration



Jack Terceño
Partner, Tokyo



Will Thomas QC
Partner, London



Amanda Neil
Special Counsel, Vienna

Environmental, social and governance (ESG) issues continued to dominate legal, political and business agendas in 2021. Some of the most notable developments that will affect how companies address ESG issues in 2022 and beyond include:

- The groundbreaking Shell decision by the Hague District Court, which represents the first time a court has imposed a legal obligation on a company to reduce its CO₂ emissions.
- The European Commission's much-awaited 'Fit for 55%' legislative package, which aims to achieve a 55 per cent reduction in carbon emissions by 2030 and net zero by 2050, along with the expected publication in early 2022 of its proposed Supply Chain Directive, which will impose human rights due diligence obligations on companies operating in the EU.
- COP26, which made significant progress in achieving the goals of the Paris Agreement, including by establishing the [Glasgow Financial Alliance for Net Zero](#), a forum for leading financial institutions to accelerate the energy transition, and a new International Sustainability Standards Board to develop ESG disclosure standards for companies.

These developments make it clear that courts, governments and investors expect companies to facilitate the energy transition and safeguard workers' human rights, two ESG pillars seen as central to building back better in the wake of the COVID-19 pandemic. Companies will need to rethink the ways they do business to respond to these changes, which, in turn, will result in ESG-related disputes. Given that international arbitration is the preferred dispute resolution mechanism of many companies for cross-border disputes, its role in resolving ESG-related disputes will only increase.

Commercial arbitration

Legal and commercial pressures on companies to move to net zero and protect workers' human rights have created additional risks, which require overhauling not only

internal policies and practices, but contractual relationships as well. As a result, ESG clauses are increasingly finding their way into commercial contracts.

A company subject to supply chain regulation, for example, would be well advised to take all possible steps to protect itself from the risks that arise from its suppliers' businesses, and indeed those of its suppliers' suppliers. It should ensure that contracts with suppliers contain appropriate protections, for example, in the form of representations, warranties and indemnities. Similarly, any potential purchaser of, investor in, or lender to the company should take steps to protect itself from the same risks using similar contractual mechanisms. The risks arising from supply chain regulation can be far-reaching and need to be managed not only by the company targeted by the regulation, but by the entities that interact with it as well.

ESG clauses are novel, complex, and largely untested, factors that are likely to give rise to disputes about how they should be interpreted and applied. To the extent a dispute does arise and the underlying contract contains an arbitration clause, the dispute will be determined by arbitration.

Several features of arbitration make it particularly well suited for use in exactly these cases. Arbitration allows the parties to choose specialist arbitrators who have the requisite knowledge and experience. These may be lawyers with expertise in human rights law in cases concerning supply chain regulation, or they may be engineers or other experts who understand the technology at issue in cases concerning the energy transition. Arbitration also provides a neutral forum and flexible procedures, so the parties can design a dispute resolution process that accommodates their needs and the nature of the dispute. For example, expert evidence may be given prominence and be tested more thoroughly by other experts. Finally, the almost universal enforceability of awards through the New York Convention provides peace of mind that the dispute will be resolved fully and finally through an enforceable award, thus providing commercial certainty.



That arbitration is essentially a private dispute resolution mechanism does pose challenges in cases where questions of public interest are concerned, such as those involving the environment and human rights. However, these concerns can be addressed by adding features to arbitration such as allowing the publication of awards and permitting third-party interventions. Such steps can ensure that arbitration remains an effective way to resolve commercial disputes going forward, including in the ESG context.

Investment arbitration

Two trends we noted in our [2019](#) and [2020 top trends reports](#) developed further in 2021. First, investment arbitration cases continue to arise as a result of domestic ESG regulation enacted primarily in response to the energy transition. Some investors are arguing that regulations, and the manner in which they have been introduced, have significantly impaired the value of their assets and are claiming compensation. The high-profile cases relating to the phase-out of coal in the Netherlands and the ongoing wave of cases concerning the rollback of renewable energy subsidies in Spain and Italy fall into this category.

Second, States are continuing to include ESG provisions in trade and investment treaties and are using these treaties as tools to advance their sustainability objectives. Indeed, 2021 saw the birth of a new breed of investment agreement – the sustainable investment agreement – putting ESG issues at the heart of trade and investment policy.

The European Commission kicked off negotiations for a Sustainable Investment Facilitation Agreement with Angola, which will focus on promoting sustainable development and responsible investment, improving economic diversification and resilience, and supporting the energy transition. The agreement is expected to be the first in a series of sustainable investment agreements between the EU and African nations. In a similar vein, Singapore and Australia commenced negotiations for a Green Economy Agreement, which is intended to be a world-first agreement that combines trade, economic and environmental objectives.

Also interesting is the model Sustainable Investment Facilitation and Cooperation Agreement developed for The Gambia to assist in its treaty negotiations with other nations. The model agreement draws heavily on the UN Guiding Principles on Business and Human Rights and includes a number of innovative elements, in particular relating to investment arbitration. Not only does it expressly

allow the host State to bring counterclaims, but it also permits third-party natural persons to bring claims against investors relating to human rights matters arising out of the investment. The model agreement also requires investor conduct to be considered in determining any compensation, requires the investor to pay the necessary deposits, and allows use of the Hague Rules on Business and Human Rights Arbitration as an alternative to the ICSID Rules.

This new form of investment agreement illustrates that while States continue to see trade and investment treaties as essential to achieving their economic objectives, they are increasingly looking to them to achieve their ESG objectives as well. Although the exact form of these treaties and the dispute resolution mechanisms they will contain remains to be seen, it appears likely that the legal regimes relating to trade and investment, the environment and human rights will continue to converge. Companies wishing to invest abroad should keep abreast of these developments to ensure that they can take advantage of the opportunities these treaties provide and protect themselves against relevant risks.

‘The COVID-19 pandemic has brought ESG issues into sharp focus for companies. The environment, human rights, health and safety, taxation, data protection and corruption are likely to be some of the major ESG themes in coming years. ESG issues are already familiar in the investment arbitration context, where disputes concerning the energy transition and human rights frequently arise. ESG-related disputes will also increasingly arise in the commercial arbitration context, as companies adapt their businesses to comply with new laws and regulations, and to respond to commercial pressures.’



Amanda Neil
Special Counsel,
Vienna



02. How COVID-19 has shaped and will continue to shape the arbitration landscape



John Choong
Partner, Hong Kong



Lluís Paradell
Counsel, Rome



Alexandra van der Meulen
Counsel, Paris



Olivier André
Client Relationship Advisor,
New York

In 2021, COVID-19 continued to affect almost every facet of life across the globe, including arbitration. The pandemic has given and is likely to continue to give rise to new disputes, ranging from the consequences of business interruption across a wide range of sectors to the impact of COVID-19-related measures implemented by States on investors.

Force majeure, frustration and impossibility

The world economy contracted by 3.5 per cent in 2020 and business interruption continues to be felt across the globe, notably in the travel, retail and energy sectors. While many corporate entities have sought to adopt a conciliatory approach towards counterparties' obligations (eg by reaching agreement on deferred contractual performance and/or payment), many will be increasingly unable to avoid submitting their disputes to formal dispute resolution, including arbitration, as government support schemes are lifted, and agreements to defer or reschedule performance or debt expire.

Where disputes have been submitted to arbitration, COVID-19 has continued to be invoked as part of *force majeure*, frustration and economic impossibility arguments. Of note, however, is that the threshold to rely on these defences is becoming increasingly high with courts and arbitral tribunals taking the view that the second and subsequent waves of COVID-19 (and the attendant recurring lockdowns and restrictions) are not sufficiently 'unforeseeable'.

Insolvency

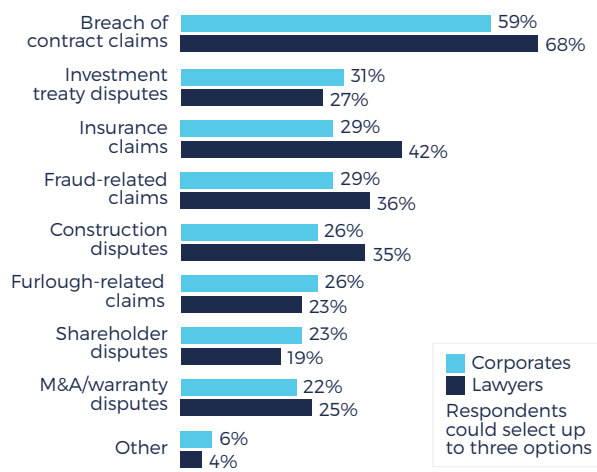
Business interruption and liquidity problems have not yet translated into consistently higher insolvency rates, in part due to extensive State subsidies. However, there is significant distress in certain markets, and the gradual withdrawal of subsidies is likely to lead to a sharp increase in corporate insolvencies, making it important to consider both insolvency-related arbitrations and the effects of insolvency on arbitration. Insolvency affects every phase of an arbitration, from a party's ability to participate in

arbitration proceedings through to the pursuit of arbitral proceedings and ultimately enforcement. The high levels of debt across Africa and Asia are particularly noteworthy, due in part to the slowing of the Chinese economy and the resulting reduction in Chinese foreign direct investment abroad, as well as COVID-19's impact on the Belt and Road Initiative.

Sector-specific commercial disputes

In the insurance sector, we expect the extent and scope of insurance policies' coverage of COVID-19 to feature with increasing frequency in commercial arbitration proceedings.

Type of disputes arisen or anticipated to arise because of disruption caused by the COVID-19 pandemic



Source: https://www.ey.com/en_uk/assurance/how-covid-19-impacts-the-claims-and-disputes-landscape (April 2021)

While 2021 was a record year for M&A transactions, a number of high-profile deals were stalled during the pandemic, giving rise to disputes. Examples include the cancelled takeover of Victoria's Secret as well as LVMH's delayed acquisition of Tiffany & Co. In a recent decision,



an ICC tribunal held that EssilorLuxottica could back out of a €5.5bn takeover. Further, COVID-19 uncertainty has led to an increased use of ‘earn-out’ clauses, adding a variable amount to the fixed price depending on the performance of the target, with the associated litigation risk of such inherently complex clauses.

A growing number of construction and projects disputes are also expected in the medium to long term, as the impact of lockdowns on procurement and execution as well as financial and supply sustainability issues crystallises, and the lockdowns’ effect on development timelines becomes clear.

Investor-State disputes

Government emergency measures adopted during the pandemic are likely to lead to an increase in the number of COVID-19-related investor-State disputes. Proceedings have already been commenced in the air travel sector, including arising out of Chile’s alleged failure to provide relief to an airport’s concession; Moldova’s claimed use of COVID-19 as justification for terminating a concession; and Cabo Verde’s nationalisation of an airline. They have also been threatened in relation to energy reforms prompted by COVID-19 and pension fund withdrawal measures.

Further disputes are expected, particularly in the healthcare sector, in relation to intellectual property rights and export bans. These cases, which are likely to continue, will test the boundaries of the meaning of ‘reasonableness and proportionality’ in State action, of ‘necessity’ and of treaty exceptions such as public health measures.

A further issue is how COVID-19 may impact the way damages are assessed in investment arbitration cases. In particular, it may influence how future cash flows are evaluated in discounted cash flow analyses, perhaps prompting the valuation date to shift towards the date of the award to take into account the impact of COVID-19.

Virtual hearings

On the procedural front, the main question is whether remote hearings that have flourished during the pandemic will remain a more permanent fixture of the arbitration landscape in 2022 and beyond.

The arbitration community quickly shifted to remote hearings as an alternative to in-person hearings, thus limiting the time and cost consequences of delays due to the pandemic. Institutions have continued to adapt their rules and best practices to address remaining due process concerns. Arbitrators and practitioners have gained more experience with the technology and the logistics of organising virtual hearings.

Still, virtual hearings continue to present challenges, such as the difficulty in accommodating disparate time zones, in efficiently advocating or presenting evidence, or in teams of counsel or tribunals being able to confer during hearing sessions. Long virtual hearings can also lead to screen fatigue, concentration issues and mental health issues. At the same time, virtual hearings can be more cost-efficient and offer greater procedural and logistical flexibility: they are easier to schedule, enable greater mobilisation of stakeholders, and have a positive impact on diversity and inclusion as well as the training of junior lawyers. Overall, virtual hearings have worked well, while aligning with the ESG goals of companies and law firms. Some companies have even started to adopt policies requiring virtual hearings by default and law firms, such as Freshfields, have committed to further limit their carbon footprint by reducing travel and paper usage.

For these reasons, and due to persistent volatile travel and health restrictions, the trend towards remote hearings will likely continue in 2022 and outlast the pandemic. Remote procedural hearings will become the norm, with the cost of travelling for smaller hearings becoming increasingly harder to justify. Remote merits hearings will also likely gain momentum for a wide range of cases as we continue to adapt to new skills and techniques and become more comfortable with the virtual environment. We also expect to see an increase of ‘hybrid’ hearings combining elements of in-person and virtual hearings in cases where parties are not comfortable with purely virtual hearings.



03. Third-party funding: easing into the mainstream



Noiana Marigo
Partner, New York



Caroline Richard
Partner, Washington DC



Noah Rubins QC
Partner, Paris



Samantha Tan
Senior Associate, Singapore

Arbitration funding is benefiting from a convergence of favourable conditions. As foreshadowed in our [2019 trends report](#), the last three years have brought incremental clarity on the costs impact and disclosure requirements of third-party funding in arbitration. For some businesses involved in disputes, the COVID-19 pandemic and ensuing fiscal challenges have prompted a reassessment of their capital allocation and liquidity management – questions to which third-party funding can offer a neat answer.

Arbitral case law developments confirm that the existence of third-party funding alone is not enough to justify an order for security for costs. Since the *García Armas v Venezuela* case in 2018 (flagged in our 2019 report, it does not appear that any funded claimant in investment arbitration has been required to post security for costs. One such order against a funded claimant was rescinded in June 2020 when it was shown that the administrator of the insolvent claimant had been unable to procure the required security (*Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex v Turkmenistan*). Meanwhile, at least four security for costs applications against funded claimants in investment arbitration were recently rejected.

More arbitral tribunals may be awarding successful claimants their costs of procuring third-party funding. The English High Court has, for a second time, confirmed that arbitral tribunals have the power to award the reasonable cost of third-party funding to a successful claimant. In a December 2021 decision in *Tenke Fungurume v Katanga* [2021] EWHC 3301 (Comm), the Court rejected the proposition that the arbitral tribunal had exceeded its powers by awarding the claimant the costs that it had incurred in obtaining funding. This was consistent with the 2016 High Court decision in *Essar Oilfields Services Limited v Norscot Rig Management PVT Limited* [2016] EWHC 2361 (Comm). These decisions may encourage other tribunals similarly to allow recovery of funding costs.

There is still no consensus as to whether parties to arbitration must disclose third-party funding. If anything, the trend appears to be away from mandatory disclosure, at least for commercial arbitration proceedings.

- The ICC – still the most preferred arbitral institution globally according to a 2021 survey – adopted new arbitration rules in 2021 mandating the disclosure of the existence of third-party funding and the identity of the funder. However, the LCIA's 2020 rules remain silent on disclosure of third-party funding. Kuala Lumpur's AIAC similarly declined, in its 2021 rules, to require disclosure of third-party funding, stipulating only that the arbitral tribunal has the power to make necessary orders in that regard.
- The proposed amendments to the ICSID Arbitration and Conciliation Rules, to be presented to member States for approval in early 2022, require disclosure of the identity of third-party funders, including their owners. They also expressly empower arbitral tribunals to order disclosure of further information regarding the funding agreement and the funder. The SIAC's 2017 specialised rules for investment arbitration move slightly towards disclosure of third-party funding. They do not require disclosure but empower the arbitral tribunal to order necessary disclosures. They also allow arbitrators to take into account third-party funding arrangements in apportioning the costs of the arbitration and in ordering one party to pay the other's legal or other costs (reminiscent of *Essar v Norscot*).

'What is key is that today, with third-party funding, companies struggling with the prolonged effects of the pandemic can still bring arbitration claims without impacting their liquidity.'



Noiana Marigo
Partner,
New York



Arbitration rules on disclosure of third-party funding

Required	In tribunal's discretion	Silent
ICC (2021)	AIAC (2021)	JCAA (2021)
ICSID (2021 proposed amendments)	ICDR-AAA (2021)	LCIA (2020)
Delos (2021)	SIAC Investment Arbitration Rules (2017)	SCC (2017) (but with policy encouraging disclosure)
HKIAC (2018)		SIAC (2016) (but with practice note on arbitrator conduct in cases involving external funding)
		KCAB (2016)
		UNCITRAL (2013)

The effects of the pandemic are likely to catalyse interest in third-party funding.

Market surveys suggest that companies are still constrained by their internal resources in deciding whether to pursue or forgo legal claims. But this model may have to change as businesses continue to weather the prolonged economic impact of the pandemic on supply chains and retail demand.

Liquidity management continues to be a central focus in companies' strategies for resilience against the pandemic. This focus is coming into sharper relief as companies prepare for rising interest rates and the impending withdrawal of government stimulus programmes.

One key tool for liquidity management is capital allocation strategy, and third-party funding of legal claims appears complementary to this strategy. Users cite the freeing up of working capital, taking cost liability off the balance sheet, and risk management as the top three key benefits of litigation funding. There is now even a growing market for the sale and purchase of arbitration awards, through which claimants can monetise awards in their favour without incurring the risk and cost of enforcement.

Consistent with the outlook for the funding market, Freshfields has a growing portfolio of funded cases and strong relationships with funders around the world. Freshfields is currently working on 15 third-party-funded international arbitrations, up from 12 cases in 2018.



04. Investment protection within the European Union



Nathalie Colin
Partner, Brussels



Carsten Wendler
Partner, Frankfurt



Gregorio Pettazzi
Associate, Frankfurt



Alice Lindemann
Legal Consultant, Brussels

2021 saw the European Court of Justice (ECJ) trying to put a nail in the coffin for intra-EU investment arbitration. What is next for investors?

After the extensively discussed 2018 decision by the ECJ in *Slovakia v Achmea*, which declared arbitration clauses in intra-EU bilateral investment treaties (BITs) incompatible with EU law, the same court issued two further landmark decisions in 2021. In *Moldova v Komstroy*, it held that the Energy Charter Treaty (ECT) arbitration clause, when applied intra-EU, is affected by the same incompatibility with EU law. A few weeks later, in *Poland v PL Holdings*, the ECJ extended the same finding to ad hoc arbitration agreements between EU investors and EU Member States.

In principle, these decisions should have no bearing on intra-EU arbitration proceedings (and resulting arbitral awards) conducted under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), given that ICSID constitutes a self-contained regime under international law and is independent from the EU and national legal orders.

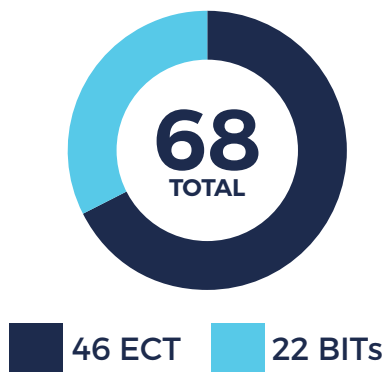
It is, however, expected that these two decisions will have a major impact on those ECT intra-EU arbitrations that are *not* brought under the ICSID Convention and are seated within the EU. These arbitrations, unlike ICSID ones, are grounded on the domestic jurisdiction of their seat and thus subject to EU law and the decisions of the ECJ. National courts at the seat of arbitration within the EU will most likely find themselves bound to apply EU law and the ECJ's finding of incompatibility. In practice, investors will thus wherever possible avoid commencing proceedings seated in an EU Member State. In turn, this will mean that hardly any non-ICSID arbitration proceedings will be commenced in an intra-EU context.

What's cooking in investment protection in the EU?

In early December 2021, the European Commission launched infringement proceedings against seven EU Member States, in addition to those initiated in 2020 against Finland and the UK, for their failure to remove intra-EU BITs from their respective legal orders. It will be interesting to see if they will be referred to the ECJ since, although some EU Member States have simply not yet completed the ratification process of the agreement for the termination of intra-EU BITs (Termination Agreement) (Belgium, Italy, Luxembourg, Portugal and Romania), Austria and Sweden did not sign the Termination Agreement at all.

Moreover, further to a public consultation conducted in 2020, the European Commission is expected to shortly adopt a legislative proposal for an intra-EU Investment Protection and Facilitation Framework aimed at 'better protecting and facilitating cross-border investments' in light of the 'momentum created by the termination of intra-EU [BITs]'. This will also give the EU the opportunity to ensure that this new investment protection legal framework is aligned with the EU's commitments related to climate change and digitalisation. If ultimately passed as legislation, this proposal could prove to be a game-changer for EU investors.

Known pending intra-EU investor-State arbitrations



In parallel, the European Commission is one of the driving forces behind the modernisation process of the ECT. In this context, the European Commission has been advocating both for the establishment of a multilateral investment court that would replace the current arbitration system – also in light of the ECJ judgments discussed above – as well as for the ECT’s alignment with the Paris Agreement with respect to sustainability goals.

‘Given the blatant necessity of green investment to secure a sustainable future, it is essential for States, and the EU in particular, to recognise that ISDS can help tackle the challenges arising from climate change, notably with respect to the clean energy transition.’



Nathalie Colin
Partner,
Brussels

What do investors need to consider when investing in the EU?

Against the backdrop of the new developments, intra-EU investors should carefully take into account a number of factors when making their investment decisions to protect against unlawful sovereign intervention:

- **Considering possible future adverse measures and regulatory changes:** governmental measures with detrimental impact on investments as well as changes to the regulatory and legal framework that were the basis of the investments may be implemented anywhere. EU Member States with high investment-protection standards and good track records in terms of compliance with the rule of law, such as Austria, Belgium, Denmark, France, Germany, Italy, the Netherlands and Spain, have all in the past adopted measures that gave rise to investment disputes.
- **Structuring the investment properly:** investors should carefully evaluate how to structure 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 State in which the investment is to be made. This is particularly important in countries that are not parties to the ICSID Convention, for example Poland.

Similarly, when deciding to initiate an intra-EU investment treaty claim, investors must equally bear in mind the following:

- **Choosing the appropriate forum:** it is of utmost importance not to underestimate the relevance of the different forums available to resolve investment disputes. For the reasons discussed above, bringing arbitrations under the auspices of ICSID may be the preferable option.

‘What appears at first sight to be a conflict of legal norms may be better described as a clash of different perspectives. In pursuit of its objective of strengthening the EU legal order, the EU Commission will most certainly continue to interfere with intra-EU investment arbitrations. We have so far observed that this may span from initiating legal actions before domestic courts to attempting to force claimant-investors to drop their investment claims or opening State aid investigations. Investors should therefore be prepared to pursue their legal rights in different forums.’



Carsten Wendler
Partner,
Frankfurt

- **Tracing assets early on:** given the hurdles to be overcome to enforce any intra-EU investor-State awards within the EU, intra-EU investors should consider enforcement outside the EU. Investors should therefore develop effective enforcement strategies from the outset of an investment dispute and identify extra-EU jurisdictions where respondent States hold sufficient enforceable assets. Australia, the UK and the US appear so far to be the preferred options for extra-EU enforcement.
- **Keeping the settlement option open:** both the effective enforcement mechanism of arbitration awards as well as the potential reputational damage of adverse awards (eg when issuing government bonds) make settlement negotiations still attractive for respondent States. Recently, Germany agreed to pay €1.4bn to Swedish Vattenfall to settle its nuclear energy dispute brought under the ECT. It has also been reported that the Republic of Croatia settled its disputes with four European banks over the forced conversion into euro of Swiss franc-indexed loans.



05. Emerging standards for the conduct of international arbitration



Sylvia Noury
Partner, London



Lee Rovinescu
Partner, New York



Mariia Puchyna
Senior Associate, Paris



Stephanie Mbonu
Global IAG Project and
Hearing Manager

‘While it is uncontroversial to say that the procedural architecture of a legal system is among the most pivotal elements that determine its ability to deliver justice, we have tended not to accord procedural issues and reforms the attention that is commensurate with their significance.’

The Honourable Chief Justice Sundaresh Menon’s opening words at the 36th Annual Freshfields-SIA Lecture in November 2021

The past few years have seen a marked increase in initiatives and cross-border protocols seeking to regulate the procedure and conduct of various aspects of international arbitration, many of which are worthy of attention. Here, we focus on notable initiatives relating to (i) standards of practice; (ii) diversity; and (iii) greener arbitrations and virtual hearings.

Standards of practice

In June 2021, ICCA introduced its *Guidelines on Standards of Practice in International Arbitration* (the Guidelines), an amalgamation of professional standards and ethical rules reflecting the melting pot of cultures and legal traditions germane to the international arbitration community. Seeking to encourage ‘civility’ and diversity but also to guarantee cost-efficiency, privacy and confidentiality, ICCA’s Guidelines are not intended to be mandatory, yet are designed to enable their incorporation by reference into arbitration agreements or procedural orders. The Guidelines contain guidance for various stakeholders across the arbitration community, including party representatives (eg refraining from disrupting or delaying the process), arbitrators (eg acting ‘efficiently’) as well as other participants.

While the aim of achieving greater ‘civility’ in our practice is undoubtedly a laudable one, cross-border cultural differences may make convergence in some areas challenging. The Guidelines themselves acknowledge that ‘[w]hether a particular course of action is offensive... may vary depending on... personal, cultural and/or religious background[s]’. To take a practical example, while the first guideline provides that ‘[a]ll participants’ are to ‘act with integrity’, there are legitimate differences

across jurisdictions as to the extent to which counsel may prepare fact and expert witnesses ahead of their testimony. Practices in some jurisdictions may give rise to integrity concerns in others. While such differences will endure, the Guidelines nevertheless successfully record basic rules of civility and ethical standards that can be universally referred to and ought not to be controversial for any participant in an international arbitration.

In September 2021, the third version of the *Code of Conduct for Adjudicators in International Investment Disputes* (IID) (the Code) was published by ICSID and UNCITRAL following an extensive consultation period during which State delegates and other stakeholders were invited to provide their input. The Code seeks to increase the efficiency and transparency of investment dispute proceedings and enhance confidence in the independence and impartiality of investment dispute tribunals, as well as to give effect to important policy considerations, such as fostering diversity. Two developments bear mentioning.

Firstly, the third version of the Code contains a more nuanced provision governing the permissibility of sitting arbitrators concurrently playing other roles, such as counsel, in other proceedings (so-called ‘double hatting’), providing the parties with greater autonomy to consent to or prohibit the practice (Article 4). The prior iteration of the Code was less permissive and the drafters observed that a more permissive structure would create fewer barriers to entry, with a view to fostering an environment that will promote diversity of arbitrators as much as possible. Relatedly, the Code provides that arbitrators shall disclose all investment disputes ‘in which the Candidate or



Adjudicator has been involved in the past [five/ten] years or is currently involved in as a legal representative, expert witness, or Adjudicator’ (Article 10), equipping the parties with the information necessary to raise any ‘double hatting’ concerns at the outset.

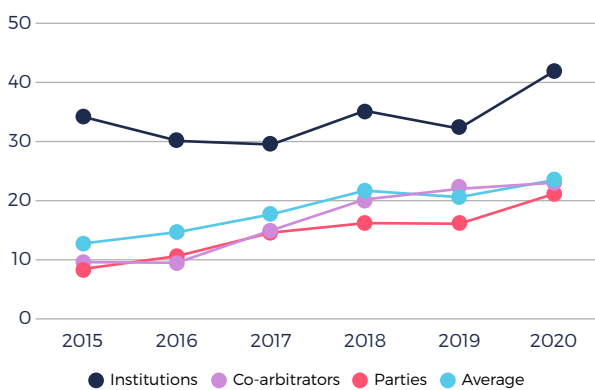
Secondly, the initial draft of the revised Code suggested specific limitations on the number of cases investment dispute arbitrators could handle concurrently. While controversial, that provision would have helped to solve two problems that continue to plague the community: an insufficiently diverse pool of arbitrators appointed to hear cases and overly subscribed arbitrators that cause delays in the resolution of disputes. The third version of the Code omits any specific limitation but maintains the previously existing provision that arbitrators shall not accept appointments if they do not have the ‘availability to fulfil their duties’ (Article 6.2). If adhered to properly, that rule would also foster diversity.

Diversity

On diversity of arbitrators, while the trend remains positive, more progress is needed.

In relation to gender diversity, real progress has been made over the last few years thanks to initiatives like the Equal Representation in Arbitration (ERA) Pledge and ArbitralWomen. The average percentage of women arbitrators being appointed in cases reported by the main arbitral institutions has doubled from around 12 per cent in 2015 to nearly 24 per cent in 2020.

Women as a percentage of total arbitral appointments 2015–2020



Source: Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings (2021 Update), the ICCA Reports No. 8 (due to be published imminently)

Although party appointments of women still lag significantly behind appointments by arbitral institutions (some of which, including the LCIA, DIS, VIAC and SCC, have achieved gender parity in their recent statistics), the statistics for 2020 show improvement, with women arbitrators appointed in over 21 per cent of appointments by parties, compared to only 8.5 per cent in 2015.

The ERA Pledge (founded and co-chaired by Partner Sylvia Noury) will continue to focus on improving party appointments, including through its Corporate Subcommittee, focusing not only on ensuring the visibility of more qualified women candidates, but also on moving women candidates off lists and on to tribunals. The Pledge’s extensive network of subcommittees will continue to address diversity issues in specific regions. 2021 saw the launch of its Middle East and USA Subcommittees and a new Asia-Pacific Subcommittee is in the pipeline for 2022.

There has also been a recent increase of initiatives focusing on other forms of diversity in arbitration, including notably Racial Equality for Arbitration Lawyers (REAL), launched in early 2021, with the main aim of progressing racial equality and the representation of unrepresented groups in international arbitration. The ‘Africa Promise’, Katherine Simpson’s list of Arbitrators of African Descent with a US Nexus, and the African Arbitration Academy, an initiative focused on improving the expertise of African arbitration practitioners by equipping them with the right set of skills to succeed within the international arbitration community, are examples of other initiatives aimed at promoting African arbitrators that have emerged over the past few years.

Greener arbitrations and virtual hearings

There has also been an emergence of greener arbitration initiatives, led by the Campaign for Greener Arbitrations (CGA), which won the GAR Award for Best Development in 2020. The CGA is an initiative to reduce the environmental impact of international arbitrations through a variety of measures. It launched in 2019 with a Green Pledge pursuant to which signatories undertake to adhere to a set of guiding principles. CGA reached a milestone in its work on Earth Day this past year, 22 April 2021, when it launched its landmark six Green Protocols. The Green Protocols provide practical guidance to all arbitration stakeholders on how they can reduce their carbon footprint. A unique Protocol exists for each of: arbitral proceedings generally, law firms and legal service providers, arbitrators, arbitral institutions, arbitration



conferences and arbitration hearing venues. The Protocols include guidance on the elimination of paper copies, minimisation of travel, use of clean forms of energy and use of virtual hearings, among other things.

The CGA's work has, naturally, coincided with the global pandemic, which has caused the arbitration community to adopt by necessity many of the carbon-reducing measures that CGA recommends. If 2020 was the year that virtual hearings came to the fore, 2021 was the year in which the arbitration community perfected (for the most part) the art of the virtual hearing. And, depending on the state of the pandemic, 2022 may be the year when virtual hearings continue to take place by choice rather than by necessity. In that regard, coinciding with CGA's work has been a confluence of efforts by a variety of different arbitration stakeholders in the development of protocols and procedures for the effective conduct of a virtual hearing. Most institutions now have either a set of guidelines or a model procedural order for the efficient conduct of virtual hearings. Although the arbitration community is perhaps not yet ready for arbitration hearings in the metaverse (and that no doubt will come), virtual hearings in their current form will be a consequence of the pandemic that is here to stay.

It is clear that the recent and growing initiatives addressing standards of practice, diversity, environmental and pandemic-related issues in arbitration are already having a positive impact on the conduct of international arbitration and the behaviour of its participants. In order for arbitration to remain attractive to its users, it is important that the arbitration community continues not only to produce new standards and guidance on 'best practice', but also to implement those standards to effect real and lasting change. Only time will tell which codes, protocols and guidelines achieve the ubiquity of one of the earliest and most successful efforts at harmonising arbitral practice: the IBA Rules on the Taking of Evidence. Stay tuned in 2022.



06. Drives towards greater efficiency in international arbitration



Nicholas Lingard
Partner, Singapore/Tokyo



Patrick Schroeder
Partner, Hamburg



Hinda Rabkin
Senior Associate, New York



Ketevan Betaneli
Senior Knowledge Lawyer,
Paris

Making international arbitration cheaper and faster for its users has been a key goal for years and is driving recent reforms to arbitral procedure. Arbitral institutions as well as UNCITRAL have introduced (or are planning to introduce) provisions in rules governing arbitrations to improve efficiency. A recent reform that considerably improves efficiency for certain disputes is the introduction of expedited proceedings. This and other procedural tools are discussed further below, in the context of both investor-State arbitration and international commercial arbitration.

'As these new provisions come into force and are used by parties, we hope to see arbitral disputes being resolved more quickly for a lower cost. However, given the sensitivity involved in resolving investor-State disputes, which entail issues of State sovereignty, it remains to be seen whether States will opt in to using the new expedited provisions and whether they will be widely adopted.'



Hinda Rabkin
Senior Associate,
New York

Expedited proceedings under various international arbitration rules

	UNCITRAL	ICSID (draft rules)	ICC	SCC	SIAC	HKIAC
Arbitrators	Sole arbitrator	Sole arbitrator or three-member tribunal (if parties do not notify that they want three-member tribunal, sole arbitrator applies by default)	Sole arbitrator	Sole arbitrator	Sole arbitrator, unless SIAC determines otherwise	Sole arbitrator, unless agreement for three
Monetary threshold	N/A	N/A	Yes, US\$3m	No	Yes, S\$6m	Yes, HK\$25m (over US\$3m)
Application	Opt-in	Opt-in	Opt-out	Opt-in	Opt-in	Opt-in
Deadline for award	Six months	120 days after the hearing	Six months from case management conference	Three months from case referral	Six months from tribunal constitution	Six months from case referral



Investor-State arbitration

This past year has seen the introduction (or proposal) of rules that provide for expedited proceedings that can be used in investor-State arbitration.

In September 2021, the UNCITRAL Expedited Arbitration Rules (UNCITRAL EA Rules) took effect. These rules do not apply automatically. The parties must expressly agree to use them. Although these rules were not specifically designed for investor-State arbitration, in practice the UNCITRAL rules are often used in such proceedings and there may well be opportunities to use them in investor-State disputes.

The main features of the UNCITRAL EA Rules are:

(i) a sole arbitrator is the default; (ii) hearings are optional; (iii) the tribunal can decide to forgo the document production phase; and (iv) an accelerated timeline for the conclusion of the arbitration, with the award to be issued within six months of the date of the constitution of the tribunal.

In November 2021, ICSID released its Working Paper #6, which marked the culmination of a five-year process on updating the ICSID Rules for arbitration. ICSID Working Paper #6 addresses topics that States and the broader public had raised on the previous iteration of the proposed amendments to the ICSID Rules and sets out the complete set of amended rules. These rules include a fast-track procedure. ICSID said that it plans to table the amendments for a vote of approval by member States in early 2022.

The ICSID expedited procedure is opt-in. Its main features are: (i) no bifurcation, so jurisdiction, merits and quantum issues would be considered in a single phase of the arbitration; (ii) quicker timelines, with an award to be issued within 120 days of the hearing; (iii) limited length of written submissions; (iv) limited procedural applications; and (v) expedited annulment proceedings.

In addition to amending rules governing proceedings, States are also including certain procedural features that would apply in investor-State arbitration in newly issued bilateral or multilateral investment treaties. These include treaties recently concluded with the EU as well as Canada's Foreign Investments Promotion and Protection Agreement Model 2021 (Canadian Model FIPA). Thus, for example, the Canadian Model FIPA provides that where damages claimed by an investor are less than CA\$10m, an expedited procedure applies. This procedure entails a sole arbitrator, a compressed procedural schedule and a virtual hearing.

Commercial arbitration

In commercial arbitration, the following procedures have been playing an important role in improving efficiency in recent years and it is expected that they will continue to do so in the coming years:

- The use of *expedited rules* continues to increase. According to the ICC's 2020 statistics, 261 cases have been conducted under its expedited rules since the procedure was introduced in March 2017. The success of the expedited rules has led the ICC to widen the scope of their automatic application from disputes valued at US\$2m to US\$3m. This mechanism is also popular in SCC proceedings: 31 per cent of cases registered in 2020 were registered under its expedited rules.
- A comparison of the length of proceedings under the expedited rules versus those under the standard ICC Rules shows a clear time benefit. The ICC Statistics for 2020 reported that 67 per cent of final awards rendered under the Expedited Procedure Provisions were delivered on or around the six-month time limit. The average duration of proceedings in cases that reached a final award in 2020 was 26 months.

'Expedited rules need to be handled with care, especially when they contain a time limit for the arbitral tribunal to render the award. There are issues for the respondent in presenting their case in a very short time frame, and there is a latent risk that exceeding the time limit may be considered a relevant procedural error in a jurisdiction of enforcement.'



Nicholas Lingard
Partner,
Singapore

- Many of the leading arbitration rules (LCIA, SCC, SIAC, HKIAC, etc) have introduced *summary dismissal procedures*, which are being used with increasing frequency. This procedural tool empowers arbitral tribunals to render prompt decisions on discrete claims, allowing the tribunal to dispose of frivolous claims.
- Most leading arbitration rules contain provisions on *joinder and consolidation* (ICC, SCC, SIAC, HKIAC, etc). The 2021 version of the ICC Rules allows for joinder of a party after the arbitrator's appointment or confirmation. It also allows for consolidation of proceedings under multiple agreements with compatible arbitration clauses.



Simplified procedures that allow for joinder and consolidation reduce parallel proceedings and, potentially, the inefficiencies that such proceedings entail.

- The potential benefits of *electronic filings* and *virtual hearings* became evident during the COVID-19 pandemic. As the international arbitration community has grown further accustomed to them, electronic filings and virtual hearings are expected to continue to be widely used. Similarly, new *online platforms* (such as the recently launched HKIAC Case Connect or the existing SCC, ICC and other electronic case management platforms) make document sharing and case organisation more efficient.
- Institutions have begun incentivising the *timely rendering of awards*. Certain arbitral rules (such as the SCC's) provide time limits for rendering an award but do not penalise non-compliance. The ICC, however, reduces the arbitrators' fees if an award is delayed in the absence of a valid reason, which has proven to be an effective tool. The ICC Statistics for 2020 reported that the number of instances of delays of three to six months in final awards has halved since this new practice was implemented in 2016.
- The number of *emergency arbitrations* has increased. Emergency arbitrators usually render a decision within two weeks (five days under the SCC Rules and 14 days under the SIAC, LCIA, HKIAC and ICC Rules) that may later be revisited by the tribunal once constituted. This procedure was initially used for construction and engineering disputes but is now being used by parties operating in other industries.

'Technology and digitalisation of proceedings will change the way arbitrators and counsel work. Efficiency gains will result in faster and more cost-effective proceedings. Virtual hearings are just the beginning. Expect artificial intelligence to help with legal research, dealing with data, the analysis of evidence, etc, both on the arbitrator bench and at the counsel table.'



Patrick Schroeder
Partner,
Hamburg



07.

The future of arbitration in the tech space



Elliot Friedman
Partner, New York



Sofia Klot
Senior Associate, New York



Annie Pan
Senior Associate, London

Tech companies are innovators and disruptors. But they have largely been traditionalists in the disputes space: habitual users of litigation and underrepresented in methods of alternative dispute resolution like arbitration. That is changing. Tech companies are becoming more aware of investment treaty protection and are also turning to arbitration for disputes involving cryptocurrency, blockchain and artificial intelligence (AI).

The rise of tech-related investor-State disputes

The energy and industrial sectors have long relied on the power of investment treaties to protect investments against interference by foreign governments. The tech sector is now increasingly making use of investment treaties to protect itself from or push back against adverse government action, including in response to concession cancellations, unfair and discriminatory data laws, and the protectionist use of tax, antitrust and foreign investment regulation.

A high-profile example is Uber's January 2020 threat to bring a claim against Colombia under the US–Colombia Trade Promotion Agreement. In response to a complaint filed by a local competitor, the Colombian competition authority imposed a nationwide ban on Uber's ride-hailing app. The ban was overturned shortly after Uber threatened to commence investment treaty arbitration against Colombia. Even more recently, Canadian and US investors filed claims against Mexico under NAFTA and USMCA following Mexico City's cancellation of a concession to replace all analogue taximeters with digital ones and develop an accompanying ride-hailing app.

A number of recent investment treaty cases also implicate countries' attempts to regulate data, security and cyber security. For instance, a Chinese company filed an arbitration against Ukraine following the blocking of a takeover of an aerospace company that allegedly owns sensitive technology, and Huawei notified a dispute against Sweden under the Sweden–China BIT after being banned from the country's 5G rollout amid allegations of spying. Investment treaty

protections are also being considered in relation to new rules around the world concerning the localisation of data.

We expect more of these disputes in the coming years, as tech companies increasingly become aware of the availability and power of investment treaties, and governments expand the regulation of the tech sector. These cases are also set to raise interesting questions relating to how investment treaties protect purely digital or delocalised platform investments, since treaties typically protect investments 'in the territory' of the host State, a question we explored in a recent [podcast](#). And as we discussed in our Freshfields [blog](#), with regulation poised to continue to ramp up, tech companies can and should structure their foreign investments to make sure that they are protected by investment treaties.

Commercial arbitration in the tech space – moving beyond M&A disputes

M&A and financing disputes involving tech companies have been on the rise, as the pandemic has unleashed a flurry of deal-making activity in the sector. But beyond instances of deals gone sour, other types of technology disputes are emerging.

Recent years have seen a proliferation of new products and services based on blockchain, complex AI (such as machine learning and neural networks) and augmented reality technologies, with many contracts for the development, sale or licensing of these novel technologies containing arbitration clauses. This is hardly surprising, as the benefits of arbitration for these increasingly borderless technologies are obvious: they allow the parties to select subject matter experts with relevant technical expertise to resolve their dispute in a confidential setting and obtain a readily enforceable award in any of the almost 170 countries that have ratified the New York Convention. We expect to see an increase in international arbitrations involving blockchain, AI and augmented or virtual reality as these technologies become more mainstream.



‘International arbitration often makes good sense in this sector: disputes can be resolved by expert decision makers, the confidentiality of the process means that proprietary or sensitive information can be kept out of the public eye, and the resulting award can be enforced easily around the world.’



Elliot Friedman

Partner,
New York

Cryptocurrency disputes are already in the spotlight, driven by the meteoric popularity of crypto exchanges that trade billions of dollars a day. One noteworthy example is the impending ‘class action’ arbitration reportedly involving thousands of individual claimants against Binance, the world’s largest crypto exchange, before the HKIAC. The dispute arose out of an hour-long shutdown of parts of the Binance online trading platform on 19 May 2021, a day that saw one of the largest historical drops in the value of bitcoin, which is said to have caused huge losses to users who were unable to access their accounts and trade. In a second ICC arbitration against Binance, a European investor is reportedly seeking US\$140m in damages on the basis that his funds were allegedly unjustly liquidated by the exchange’s automated liquidation system.

The continued growth and popularity of crypto exchanges sets the stage for future arbitrations brought by traders under the platforms’ terms of service, many of which include arbitration clauses. Crypto exchanges would be well advised to review their arbitration clauses, and in particular their treatment of mass claims.



08. Financial institutions and arbitration



Oliver Marsden
Partner, London



Thomas Walsh
Special Counsel, New York



Ruth Montiel
Associate, New York

Financial institutions have traditionally favoured court litigation as a means of resolving their contractual disputes. However, there are situations in which financial institutions may want to consider opting for arbitration for certain types of deals, especially in light of recent developments in arbitral procedure designed to make arbitration more attractive to the banking community. In addition, financial institutions are increasingly alive to the protections available under investment treaties in the event of government action that adversely affects their investments. We take a closer look at both of these trends below.

Arbitration for contractual disputes in finance deals: recent developments

For contractual disputes, deciding whether to opt for arbitration or litigation involves weighing a variety of factors and will depend on the specific circumstances of each individual transaction. As mentioned above, financial institutions have traditionally favoured litigation for many of their contractual disputes, particularly in the London and New York courts. These jurisdictions have judges who are especially familiar with the complexities of financial transactions and have an established track record of rendering sound decisions, as well as well-established summary dismissal procedures for claims and defences that manifestly lack merit. Where financial institutions opt for arbitration over litigation, it is often because a deal involves a counterparty based in a jurisdiction where arbitral awards are more readily enforceable than court judgments, or the institution anticipates that it may benefit from the increased confidentiality protection and/or narrower disclosure requirements of arbitration as compared to litigation.

To make arbitration more attractive to financial institutions and other businesses, in recent years many of the major arbitral institutions have amended their rules to introduce or clarify certain procedural tools aimed at making arbitration more efficient and cost-effective. These changes include new rules on summary dismissal,

emergency arbitrator procedures for urgent interim relief before the arbitral tribunal is constituted, and expedited procedures (see [trend 6](#) for a more detailed analysis of these tools).

For financial institutions in particular, two recent developments are worth highlighting in more detail:

- 1. Summary dismissal.** Until recently, there has been uncertainty as to whether an arbitral tribunal can dismiss a claim or defence that is manifestly without merit on a summary basis (ie dispensing with a full evidentiary process). In contrast, summary dismissal procedures are readily available in litigation, particularly in the English and New York courts. That divergence has increasingly fallen away: over the past few years, the major arbitral institutions, and now P.R.I.M.E. Finance (an arbitral institution dedicated to arbitrations in the finance sector), have either amended their rules to expressly confer on the tribunal a power of summary dismissal or (in the case of the ICC) published guidance notes confirming that tribunals have such a power. Provided that parties arbitrate under the rules of one of those arbitral institutions and seat their arbitration in a jurisdiction such as London or New York where there is now helpful case law confirming that awards rendered pursuant to summary procedures are valid and enforceable, they can be comfortable that such procedures will be available and can be confidently deployed by the tribunal.

‘An arbitral tribunal’s power to make an order summarily dismissing a meritless claim or defence is now written into the procedural rules and guidance notes of the major arbitral institutions. That is an important step forward for the use of arbitration in the financial institutions community.’



Oliver Marsden
Partner,
London



2. Revised P.R.I.M.E. Finance Arbitration Rules 2022.

As an alternative to adopting the procedural rules of the traditional arbitral institutions, financial institutions can choose to arbitrate their disputes under the P.R.I.M.E. Finance Arbitration Rules, the latest version of which came into force on 1 January 2022. The P.R.I.M.E. Finance Arbitration Rules are specifically designed for the arbitration of finance disputes, including under complex financial products such as derivatives and in emerging areas such as fintech and sustainable finance. The 2022 revisions seek to address feedback from financial institutions on earlier versions of the rules, including by introducing an emergency arbitrator procedure, making better provision for consolidation in multi-party and multi-contract situations, incorporating a new expedited procedure and (as noted above) providing for summary dismissal of meritless claims and defences. P.R.I.M.E. Finance's offering also includes the option to select arbitrators from its expert panel of around 250 international arbitrators with specialist knowledge and experience in the finance sector.

It remains to be seen whether these recent developments will lead to more financial institutions opting for arbitration in future finance deals, but the framework now exists for arbitration to better meet the needs of financial institutions.

Using investment treaty protection as a risk-mitigation tool for cross-border investments

Financial institutions are increasingly structuring (or restructuring) their cross-border investments to take advantage of one or more of the thousands of investment treaties that protect investors from adverse government action affecting their foreign investments. Many institutions are now conducting 'investment treaty planning' simultaneously with tax planning.

Most treaties guarantee foreign investors a basic set of rights such as: the right to be treated fairly and in a non-arbitrary manner; the right to compensation for any expropriation; protections against discriminatory treatment favouring domestic competitors or competitors from other foreign countries; and the right to transfer funds and returns outside the host country. Critically, most investment treaties permit investors to bring a damage claim directly against the host government through arbitration in circumstances in which their treaty rights are violated. This is a powerful tool, and

the threat of such a claim may provide a financial institution with leverage to negotiate with the government and secure a favourable resolution.

A significant percentage of the investment treaty claims referred to arbitration each year are brought by financial institutions. For example, in 2021, HSBC brought a claim against El Salvador alleging that El Salvador violated its BIT with the UK (*HSBC Latin American Holdings (UK) Limited v Republic of El Salvador* (ICSID Case No. ARB/21/46)). Alpene Limited also brought a claim against Malta in 2021 on behalf of its wholly owned entity, Pilatus Bank, for alleged violations of Malta's BIT with the People's Republic of China.

We expect this trend to continue as states grapple with the COVID-19 pandemic and disruption in global supply chains by changing regulations affecting financial institutions, for example by suspending or limiting their ability to collect on debt, including mortgages, or prohibiting the collection of fees on public projects, with a detrimental impact on the project financing for those projects.

'Financial institutions are increasingly attuned to the value of investment treaties as a tool to protect themselves against the risk of future adverse government measures that impact their cross-border investments.'



Thomas Walsh
Special Counsel,
New York



09. Construction arbitration in the face of energy transition and climate change



Tom Hutchison
Counsel, London



Samantha Lord Hill
Counsel, Dubai



Jon Gilbert
Knowledge Lawyer,
London

Trend 1 above outlined some of the key developments that have accelerated the pace of global energy transition, notably the commitments made at COP26, the groundbreaking decision in the Shell case by the Hague District Court and the European Commission's 'Fit for 55%' legislative package. In this trend, we evaluate the likely impact of the proliferation of planned renewable and low-carbon energy projects on construction arbitration and consider the related risks of increasingly extreme weather events on ongoing major projects.

Energy transition – new project risks

The size, scope and ambition of renewable and low-carbon projects are on the increase. Rapidly developing new technology, new entrants to the market and developing government policies (such as subsidies) will create new risk profiles for 'green' energy projects across the globe. We anticipate that this will translate into a rise in new, novel and ultimately high-stakes disputes being taken to arbitration as these projects progress from planning through to construction and operation. The key reasons for this include:

- **Reliance on new technology:** many (but not all) energy transition projects rely on relatively new technology. Even tried-and-tested technology such as solar and wind continues to evolve – think molten salt solar and floating offshore wind. Where novel technology fails to operate as intended, or is more expensive or complex to construct, there may be serious consequences for all project participants. Delays to completion, failure to achieve commissioning standards or, ultimately, lower than anticipated output may lead to complex and high-value claims. This may be particularly acute against a backdrop of time-limited State subsidies or finance commitments. Moreover, new technology can also take longer to achieve regulatory and planning approvals if it is necessary to prove the safety case and/or the regulator is unfamiliar with the technology, a common issue in recent nuclear new-build projects.

- **Lack of developed industry standards** may lead to warranty or fitness for purpose claims against contractors. Even where specifications are available, issues can arise – in the widely reported UK Supreme Court case of *MT Højgaard v E.On* [2017] UKSC 59, the foundations for an offshore wind farm failed less than a year after completion even though the contractor had complied with the relevant industry specification.
- **Lack of industry standard forms or settled interpretation of existing standard forms**, such as FIDIC in the context of new project structures (with different risk interfaces to traditional energy projects), may result in a greater number of claims where the parties differ in their understanding of their contractual rights in relation to a novel project. A common feature of many energy transition projects is that the owner takes on interface risk, largely due to the uncertainties involved. Uncertainties can be difficult to manage and price, and the potential for disputes arising is increased, especially where novel scope is undertaken on a fixed-price or EPC basis.

Global investment in the
energy transition:
\$501.3bn
in 2020

Source: BloombergNEF

Energy transition – arbitration procedure

Arbitration is likely to continue to be the preferred method of dispute resolution for large-scale energy projects, particularly where parties from across the globe are involved. In 2019, the ICC Commission on Arbitration and ADR and the ICC Commission on Environment and Energy



issued a joint report on the ‘Arbitration of Climate Change Related Disputes’, outlining the benefits of arbitration in resolving disputes arising out of existing traditional energy projects as a result of climate change regulation and a changing market towards renewables and low-carbon, and those arising out of the challenges and complexities of new projects themselves. Among the top benefits were access to arbitrators with appropriate climate change-related expertise, availability of expedited procedures, the ability to join parties or consolidate multiple arbitral proceedings, and enforceability of awards.

Time will tell whether any arbitral institutions go further to position themselves as being particularly suited to resolving disputes arising from energy transition projects, as we have seen the ICC, HKIAC and others do in respect of Belt and Road disputes, but we anticipate some market pressure to do so.

For example, there is likely to be a desire for an expedited arbitration procedure to obtain a final and binding award on a technical issue, especially where there are multiple identical assets being constructed (eg wind turbines or solar panels). This might enable the parties to move on with the project with the certainty and enforceability of an arbitral award and thus without the uncertainty of a critical decision being re-opened at a later stage when it is very difficult or expensive to carry out remedial works.

‘Delay, disruption, defects and disputes - all are set to be on the rise as significant investment pours in and construction gets under way on new renewables and low-carbon projects across the globe. For many, these projects mark a journey into uncharted waters as new technologies are developed at pace, new regulatory frameworks are set and the ability of familiar contractual mechanisms to manage project risks is tested. The certainty: international arbitration will no doubt be the go-to for dispute resolution over the coming years.’



Samantha Lord Hill
Counsel,
Dubai

More broadly, the need to commence operation of assets on time to ensure financial viability is particularly acute for renewables projects. We anticipate that owners/operators will increasingly focus on means to avoid lengthy delays caused by disputes on live projects.

Well-established mechanisms, including expert determination and dispute boards, may assist, but expedited or fast-track arbitration is likely to become increasingly important, whether to resolve a technical point or more broadly to ensure continued progress.

Finally, we expect to see the continued growth of investor-State arbitration if States resile from the subsidies and incentives to invest in green energy projects made as part of wider commitments to net zero and emissions targets.

Extreme weather

Turning to the current effects of climate change, extreme weather events have the potential to significantly delay and/or disrupt existing construction projects and will test the resilience of assets like never before. This will, in turn, test the contractual risk allocation, in particular whether such events were foreseeable.

Examples of delay or disruption events include extreme temperatures reducing working hours, strong winds disrupting power supplies, or flooding delaying the transportation of materials. Construction contracts normally set out who is to bear the risk of extreme weather events – for example, whether the contractor is entitled to an extension of time. However, it is not always clear what actually constitutes a qualifying weather event under a given contract (even where a standard form contract is used), and it could fall to a tribunal to determine this crucial point.

Many contracts include a requirement that the weather event must have been unforeseeable. However, climate change might pose some difficulties here: (i) the threshold of what is unforeseeable will shift (and in some regions has already shifted) as extreme weather events become more commonplace; and (ii) some contracts assess foreseeability by reference to historical data, assuming weather patterns are constant, which is no longer the case.

As for asset resilience, extreme weather events risk causing or worsening defects that might not otherwise have arisen and/or been uncovered. They may also impact the operability of assets and/or reduce expected outputs, thereby impacting the ability of the owner to recover capital expenditure costs.

Such outcomes are likely to result in an increase in claims being brought against contractors and construction professionals relating to the design parameters and tolerances. We may also witness more claims based on alleged negligence or breach of the standard of care, for failing to account for the effects of climate change in design and construction.



10. Consolidating arbitration centres in the Middle East



Sami Tannous
Partner, Dubai



Amani Khalifa
Counsel, Dubai

In a development that surprised many, including the LCIA, on 14 September 2021 the DIFC-LCIA arbitration centre was effectively abolished by Dubai Decree 34 of 2021 concerning the Dubai International Arbitration Centre (the Decree). Prior to the Decree, the DIFC-LCIA arbitration centre did not have an independent legal presence in Dubai and operated through a joint venture between the DIFC Arbitration Institute (DAI) and the LCIA. The Decree abolished the DAI and transferred ownership of its property and employees to the Dubai International Arbitration Centre (DIAC). The Decree also abolished the Emirates Maritime Arbitration Centre, which was the region's only specialised maritime arbitration centre (although to our knowledge, unlike the DIFC-LCIA, it did not have an active caseload).

The Decree has created some uncertainty, especially in relation to pending arbitration cases and the administrative aspects of the DIFC-LCIA's presence and operations. To ease the transition of cases to DIAC, the Decree provides for a six-month period for DIAC to 'coordinate' with 'all concerned entities' to help them to bring themselves into compliance with the Decree.

In addition to these important changes, the Decree includes the new DIAC statute (the Statute), which provides for a comprehensive restructuring, as a result of which DIAC now has a board of directors, an arbitration court and an administrative body. The Decree also provides for DIAC to have headquarters in 'onshore' Dubai and a branch in the DIFC. Several members of the board and the chairman of the DIAC have since been appointed.

The changes to DIAC's corporate structure and the abolition of the other arbitration centres was seen by some as a helpful move to consolidate arbitration centres in this important regional arbitration seat. Other practitioners have expressed the view that the lack of choice in 'local' Dubai arbitration institutions and the sudden change in policy may harm Dubai's reputation as a hub for disputes.

Irrespective of these opposing viewpoints, it is important for Dubai's future role as a regional arbitration hub for any uncertainty arising out of the Decree to be resolved as soon as possible.

DIFC and LCIA stances

On 7 October 2021, the DIFC issued a press release indicating that existing cases would continue to be administered by the LCIA and the DIFC-LCIA casework team on a secondment basis. The statement fell short of providing any details of the terms of the proposed secondment.

Separately, the LCIA made an official statement on the same day clarifying its position in relation to the Decree. The LCIA did not address the proposal for secondment of DIFC-LCIA employees, but noted that there were several outstanding questions, including the status of the casework team, that needed to be resolved urgently. As at the date of writing, there remains considerable uncertainty regarding the transitional arrangements, although in practice existing DIFC-LCIA arbitrations are continuing to be administered by the former DIFC-LCIA case management team, albeit now under employment by DIAC.

Transition of pending cases

With respect to cases currently being heard under the DIFC-LCIA arbitration rules, the Decree provides that the rules of the abolished centres will continue to apply to the extent they do not conflict with the provisions of the Decree until DIAC issues its new rules. There is therefore a risk that Dubai Courts may find that tribunals continuing to apply the DIFC-LCIA arbitration rules beyond this date are acting unlawfully, which could, in turn, put arbitration awards seated in onshore Dubai at risk of annulment.

The Decree clarifies that arbitration clauses in existing agreements referring to the abolished centres where the tribunal is not yet constituted will remain valid, and that DIAC will replace the abolished centres in the



administration and supervision of such disputes. While this would suggest that DIAC will continue to apply the abolished centres' rules to pending arbitration proceedings, it is unclear how this will be implemented in practice and whether this is expected to change when DIAC issues its new arbitration rules.

The future of DIFC as a seat

The Statute provides that where no seat or place of arbitration is agreed upon by the parties to a DIAC arbitration, DIFC will be the default seat. This is likely to increase the volume of cases heard in the DIFC Courts, which will, in turn, lead to more published judgments and greater certainty regarding the application and interpretation of the DIFC Arbitration Law.

The Decree confirms that Dubai Courts and DIFC Courts will continue to exercise their jurisdiction to consider and determine claims relating to awards issued by the abolished centres.

The way forward

The Decree does not impact the position of the DIFC as a seat of arbitration. On the contrary, the DIFC's position as a seat of arbitration has been strengthened by the Decree providing it to be the default seat for DIAC arbitrations.

Nevertheless, parties should no longer include DIFC-LCIA or EMAC arbitration clauses in their contracts and, given the continuing uncertainty with regard to transitional arrangements, would be well advised to renegotiate existing clauses before a dispute arises. Parties wishing to arbitrate in the Middle East can still choose from any of the well-known institutional arbitration rules and may opt to seat their arbitrations in the DIFC, the ADGM (Abu Dhabi Global Market) or any other seat that is recognised as being supportive of arbitration.



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