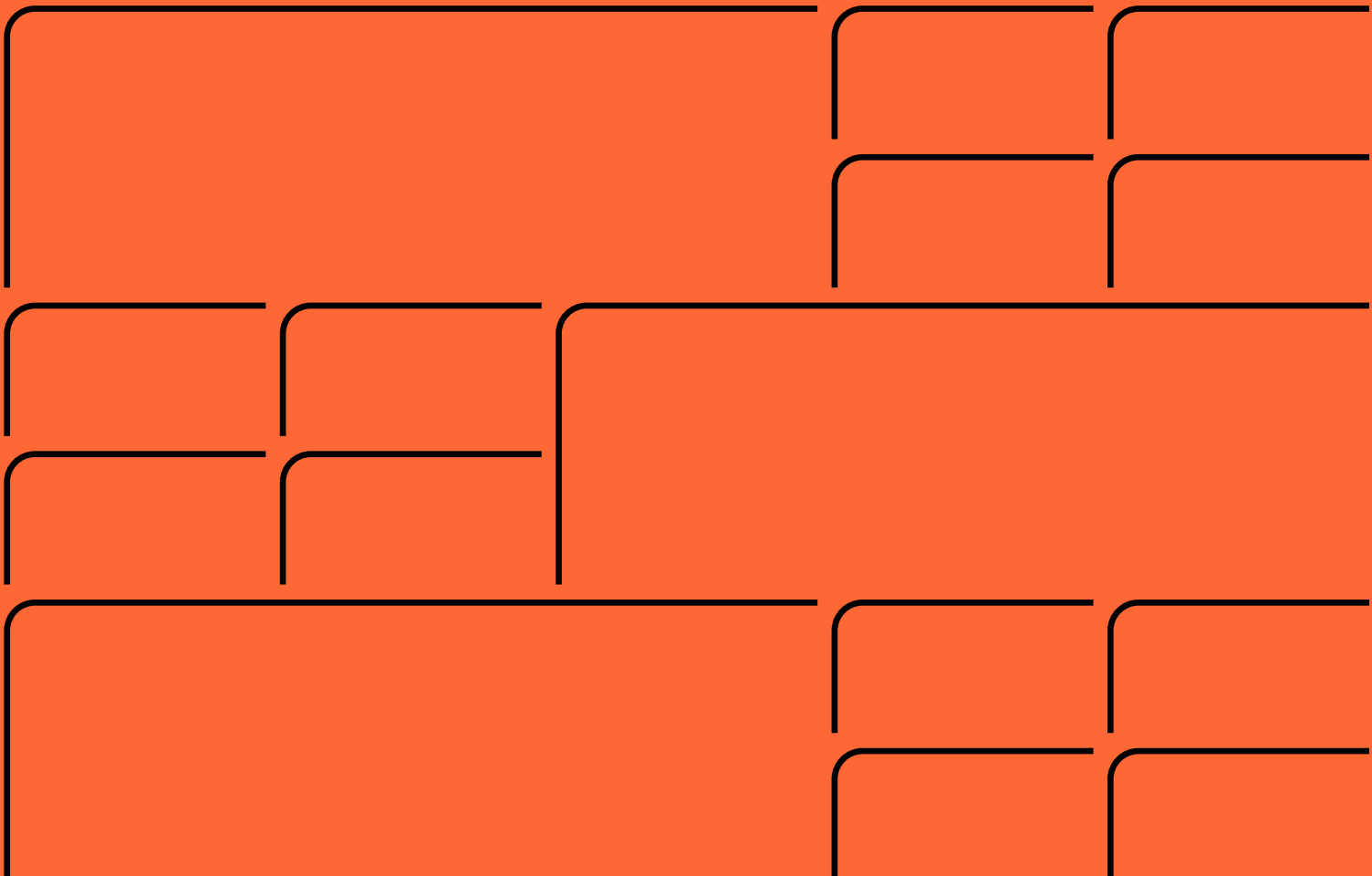


FRESHFIELDS

ARBITRATION TRENDS 2025

Shifting grounds:

the trends reshaping
international arbitration



Shifting grounds: the trends reshaping international arbitration

In an era defined by geopolitical turbulence, technological breakthroughs, and escalating ESG demands, the arbitration landscape is evolving rapidly.

In our annual review, we explore 12 trends that we expect will have a major impact in the field of arbitration in 2025. These insights, drawn from our global team of specialists, go beyond observation to deliver actionable foresight for clients navigating an increasingly complex environment.

Anticipate, adapt, thrive

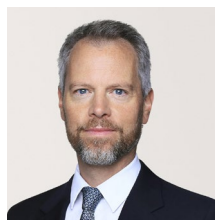
In a world where geopolitical uncertainties collide with technological innovation and regulatory priorities, companies that embrace strategic agility will be the ones to thrive. Understanding how arbitration intersects with global dynamics – whether through the lens of ESG priorities, regional disruptions, or cutting-edge technologies – has never been more critical.



Our report empowers businesses to stay ahead of the curve. By anticipating challenges, refining strategies, and aligning operations with emerging trends, companies can mitigate risks, resolve disputes faster, and capitalize on opportunities in a competitive global landscape.

Boris Kasolowsky, Noiana Marigo and Ashley Jones

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



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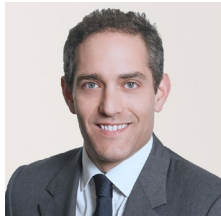
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Contents

1.

AI in international
arbitration:
a fast-evolving
landscape

AI in international arbitration: a fast-evolving landscape



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In brief

Generative artificial intelligence (AI) is revolutionizing industries worldwide. International arbitration is no exception. Significant AI breakthroughs in 2024 have expanded its adoption among arbitrators and advocates. But growing concerns over security and transparency have prompted calls for heightened oversight.

AI's growing role in arbitration proceedings

The legal industry is no stranger to AI technologies and technology-assisted document review (aka predictive coding). However, the next wave of innovation promises even more specialized solutions tailored for legal professionals.

Some of the key opportunities include:

- **Legal research:** AI can streamline legal research by analyzing vast datasets to uncover relevant insights. Platforms equipped with built-in databases, including arbitration-specific resources, enhance practitioners' ability to prepare efficiently and comprehensively for cases.
- **Document review:** technology-assisted review has been available for many years, with "active learning" algorithms continuously refining models as they process new documents, improving accuracy over time. In 2025 and beyond, next-generation AI is expected to elevate this capability, responding to complex queries across extensive document sets. For example, emerging review tools can identify a witness's involvement in specific events or aspects of a case, digest interview memoranda, and compare witness statements for inconsistencies.

AI in international arbitration: a fast-evolving landscape

- **Drafting and summarizing documents:** AI-powered tools can assist in the initial stages of drafting legal documents, including arbitral awards, pleadings, briefs, and contracts, by analyzing precedents and generating new content based on templates and user input. While practitioners must carefully review the outputs, the thoroughness of AI-generated drafts often surprises users. These tools also excel at summarizing lengthy documents, helping practitioners quickly identify key points and focus on critical aspects of a case.
- **Comparing arguments and predictive analysis:** AI can compare arguments across different document sets, helping practitioners identify strengths and weaknesses in their cases. Predictive analysis tools can leverage historical data in an attempt to forecast a likely range of arbitration outcomes, enabling practitioners to make more informed decisions and develop effective strategies.
- **Case management and transcription services:** AI-powered tools can manage entire cases, tracking deadlines, managing communications and organizing documents, allowing practitioners to focus on more strategic tasks. Furthermore, AI can facilitate virtual hearings by providing real-time transcription, enhancing accessibility and creating clear records of proceedings.

Oversight of AI use: addressing risks and ensuring integrity

While AI presents transformative opportunities for international arbitration, it also introduces critical challenges. Safeguarding data privacy and security is essential when handling confidential pleadings, privileged or commercially sensitive documents, and attorney work product. Ethical design and use of AI algorithms are crucial to prevent bias and discrimination. Despite its automation capabilities, AI requires careful oversight by practitioners to ensure nuanced legal analysis and sound decision-making. Practitioners must remain vigilant to avoid pitfalls such as a [recent high-profile case](#) in which AI “hallucinated” legal precedent by generating nonexistent case citations and quotes.

At present, there are no binding rules governing the use of AI in arbitration proceedings (subject to any jurisdiction-specific norms). However, 2024 saw the publication of several important guidelines and rules.

- The Silicon Valley Arbitration and Mediation Center released its [Guidelines on the Use of AI in Arbitration](#), providing a [principle-based framework for integrating AI tools into arbitration processes](#). They emphasize understanding the capabilities and limitations of AI, safeguarding confidentiality, and ensuring transparency and fairness in the use of AI.
- Similarly, the Stockholm Chamber of Commerce (SCC) issued a [Guide to the Use of AI in Cases Administered under the SCC Rules](#), outlining best practices for incorporating AI into arbitration including: maintaining confidentiality, ensuring quality and integrity, and preventing the delegation of decision-making to AI tools.
- JAMS established [comprehensive rules for handling disputes related to AI technologies](#).

Looking ahead, more arbitral institutions are likely to consider implementing rules governing the use of AI as its adoption expands. For instance, the International Chamber of Commerce (ICC) plans to launch a task force on AI in international dispute resolution. These efforts are essential to addressing concerns about security and confidentiality.

The regulatory landscape of AI is rapidly evolving, with varying approaches in different jurisdictions (for relevant updates, visit the Freshfields [Technology quotient blog](#)). For instance, the EU enacted the [first comprehensive legal framework on AI](#), modeled on existing product safety laws. It includes a broad definition of AI and assigns various responsibilities to providers, deployers, and other stakeholders, with certain AI systems facing prohibition or strict regulation based on risk levels. US states such as California and Colorado have also been enacting their own AI regulations, the contours of which can [vary significantly](#). Meanwhile, new AI laws have also been enacted in China, and proposed in key international arbitration hubs such as Brazil and Canada.

AI in international arbitration: a fast-evolving landscape

National legal organizations are also issuing guidance on AI use. Notably, the American Bar Association (ABA) released a [formal opinion addressing the use of generative AI](#), emphasizing ethical obligations for lawyers and law firms. These include ensuring competent legal representation, safeguarding client information, and ensuring clear communication with clients and reasonable fee structures consistent with time spent using AI. Similar guidance is anticipated from other national bar associations.



New AI-powered platforms are emerging that may revolutionize legal workflows: conducting research across built-in databases, summarizing awards and pleadings, comparing arguments, assisting with drafting, and streamlining document review using ever more sophisticated models. When used carefully, these tools can significantly improve efficiency in arbitration proceedings, offering time and cost-saving benefits that both arbitrators and advocates are eager to leverage.

Natalia Zibibbo
Counsel

Looking ahead

In 2025, the integration of AI into international arbitration is poised to bring about significant changes. The ongoing development of AI tools designed for the legal industry promises to enhance efficiency and effectiveness in arbitral proceedings. At the same time, the introduction of new guidelines and regulations by arbitral institutions and governments will, we hope, ensure that AI is used responsibly and securely. These advancements have the potential to shape the future of international arbitration, driving greater efficiency, transparency, and accessibility.

Freshfields actively contributes to the development and regulation of AI tools. We are available to share insights, exchange ideas, and provide guidance to those looking to optimize AI tools or navigate upcoming regulatory changes. Please get in touch if you would like to discuss further.

2.

Geopolitical shifts: new political agendas driving investment treaty claims

Geopolitical shifts: new political agendas driving investment treaty claims



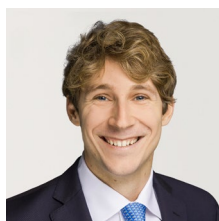
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In brief

In 2025, investment claims are likely to be shaped by major geopolitical shifts that have developed in recent years. Most noteworthy are the new administrations in Mexico and the US, the fate of the war in Ukraine and China's trade and foreign investment policies. Investors who may be exposed to adverse action in connection with these developments should review their corporate structures and take necessary action to ensure that their investments are protected by investment treaties.

LatAm: the wave of investment claims against Mexico expected during AMLO's administration might finally arrive in the Sheinbaum administration

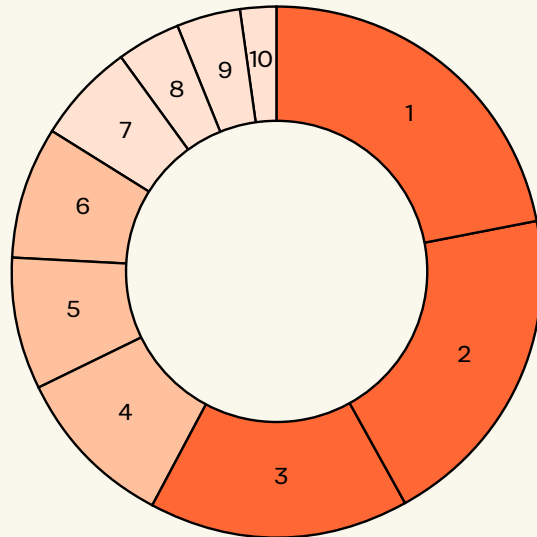
Last year, Mexico saw record levels of foreign investment, mainly due to its position as the best nearshoring option in the region. Investors appear to have been comforted by checks and balances in the Mexican legal system that prevented former President Andrés Manuel López Obrador (AMLO) from taking sweeping action against foreign investment that had been anticipated earlier in his administration. While the nearshoring trend is likely here to stay, the country's investment climate has become more complicated due to a series of controversial reforms introduced by Mexico's new President, Claudia Sheinbaum, along with the Trump administration's increasingly aggressive stance towards Mexico, including the recent imposition of a 25 percent tariff on Mexican imports.

At the forefront of the Sheinbaum administration's reforms is the overhaul of the Mexican judiciary, imposing popular elections for all federal judges, including Supreme Court justices. In addition, a number of independent regulators have been abolished. Experts see these reforms as a threat to the rule of law and an attempt to concentrate power in the executive branch. Sheinbaum has targeted key productive industries, such as the energy sector, increasing the dominance of state-owned players, and the mining sector, seeking to ban open-pit mining.

Geopolitical shifts: new political agendas driving investment treaty claims

All known ISDS cases against Mexico by economic sector

1	Mining/Quarrying/Oil and Gas	22%
2	Transportation	20%
3	Water Supply/Waste Management	16%
4	Food/Agriculture	10%
5	Finance/Insurance	8%
6	Real Estate	8%
7	Telecommunications	6%
8	Hospitality	4%
9	Gaming/Gambling	4%
10	Services	2%



2025 is shaping up to be a pivotal year for Mexico, especially in light of the new reforms sponsored by the Sheinbaum administration. Moreover, the next few months will be crucial in shaping the future of trade relations between Mexico, Canada, and the US.

Noiana Marigo
Partner

These structural changes are likely to be a significant driver of future investment claims against Mexico. In this context, investor-state dispute settlement (ISDS) remains the safest mechanism to protect foreign investments in the country, especially given the increased uncertainty of the effectiveness of domestic remedies following the judicial reform. Historically, Mexico has a reassuring track record when it comes to compliance with adverse investment treaty awards.

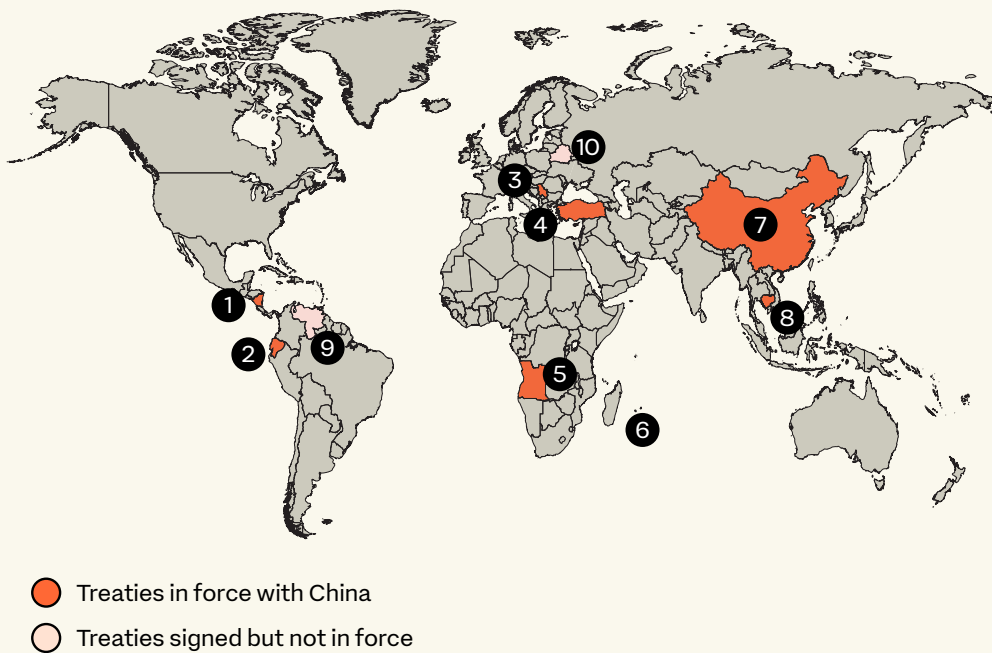
Europe: the war in Ukraine remains front and center

Since 2022, the war in Ukraine has shaped Russia’s relationship with the international community. The severe sanctions imposed on Russia – as well as Russia’s countermeasures against companies from “unfriendly” countries – have prompted many investors to reconsider their business dealings in the region. Although a wave of treaty claims arising from this conflict has been long anticipated, only a few investors have so far announced their intention to pursue treaty claims against Russia, including Finnish Fortum, Danish Carlsberg and German Uniper.

Several factors may explain this hesitation. Investors might have been reluctant to sever ties with Russia, having hoped for a swift end to the conflict and a chance to resume normal business operations. Additionally, enforcement of large awards against Russia, such as the US\$50bn Yukos award, remain pending. This, coupled with Russia’s track record of aggressively challenging any adverse award rendered against it may act as a deterrent for new claims. That said, in many instances, ISDS remains the only viable option for foreign investors who saw their investments in Russia impaired or destroyed.

Geopolitical shifts: new political agendas driving investment treaty claims

China's recent investment treaty practice 2020-2024



Treaties in force

1	Nicaragua FTA	1 Jan 2024
2	Ecuador FTA	10 May 2023
3	Serbia FTA	1 Jul 2023
4	Turkey BIT	11 Nov 2020
5	Angola BIT	29 Jun 2024
6	Mauritius FTA	1 Jan 2021
7	RCEP - ASEAN	11 Nov 2020
8	Cambodia FTA	1 Jan 2022

Treaties signed but not in force

9	Venezuela BIT	25 May 2024
10	Belarus ASTI	1 Jul 2023

President Trump and President Putin have both stated that they are open to a ceasefire deal, but uncertainties remain.

Investors who exited Russia should carefully consider whether they are entitled to compensation under applicable BITs. Those who are still operating there should consider investment treaty protection when implementing their risk mitigation strategies.

Asia: China begins a new era of outbound investment amid escalating geopolitical tensions

Following a period of deceleration, Chinese companies are once again ramping up their outbound investments, prioritizing emerging markets over G7 economies. China also continues to intensify its treaty engagements, with a further increase in BITs and FTAs since 2023.

The Chinese investment landscape is increasingly challenged by rising tensions with major developed economies. Investors are wary of a potential “US-China trade war 2.0”, already started with President Trump’s imposition of an additional 10 percent levy on Chinese imports. Heightened geopolitical tensions have led to stricter investment reviews and national security measures targeting Chinese companies in the US, EU, and other G7 nations, prompting China to retaliate with investigations into major US and EU companies.

Regulatory alignment efforts among leading economies may provoke further restrictions against Chinese investments elsewhere. In 2024, for example, mounting pressure over Chinese investments in Mexico culminated in President Biden imposing a 100 percent duty on electric vehicles made there. Concurrently, Mexico enacted tariffs on Chinese textile imports, reflecting calls for regulatory coordination among USMCA countries.

Geopolitical shifts: new political agendas driving investment treaty claims



Chinese outbound investments are increasingly moving towards emerging markets in Southeast Asia, Africa, Latin America, and the Middle East. The economic and political instability in some of these regions constitutes a significant risk. Yet, Chinese investors can enhance treaty protection through the expanding network of Chinese BITs and effective investment structuring.

Xin Liu

Partner

In response to this challenging environment, China is redirecting its outbound investments toward emerging markets in Southeast Asia, Africa, Latin America, and the Middle East, particularly in countries participating in the Belt and Road Initiative. However, economic and political instability in these regions raises the risk of BIT disputes. Notably, in 2024, Chinese miners encountered illegal extraction issues and blockades in Colombia, while the Democratic Republic of Congo expressed intentions to diversify its investor base to mitigate China's dominance in the mining sector.

As a result, investors must brace for increased state interventions and strategically structure their investments to secure access to international dispute resolution mechanisms. Case law, particularly from NAFTA disputes, demonstrates that ISDS can offer effective remedies for investors entangled in trade conflicts.

Looking ahead: practical takeaways

We anticipate a highly volatile investment landscape due to these significant geopolitical shifts. We recommend any investor operating in these regions to consider the following practical steps:

- **Assess investment protection frameworks:** carefully evaluate the applicable investment protection treaties available in the jurisdiction in which your investments are located to ensure that they are adequately safeguarded.
- **Evaluate if restructuring is necessary:** if current protections are insufficient, take swift action to restructure investments to ensure access to ISDS mechanisms. Proper structuring before a dispute arises is crucial for securing ISDS protection.
- **Monitor legal developments:** closely monitor any legal developments and investor-related measures, as aggressive actions may be taken quickly with little to no warning in the current geopolitical climate. Timely challenges to these measures can be critical in an eventual dispute.

Our team of global ISDS specialists brings expertise across these regions, helping businesses navigate and safeguard their interests in today's increasingly complex geopolitical landscape.

If you'd like to discuss any of these topics in more detail, or anything else, your Freshfields contact would be glad to assist.

3.

Russian disputes and
anti-suit injunctions:
arbitration and state
courts – allies, adversaries,
or both?

Russian disputes and anti-suit injunctions: arbitration and state courts – allies, adversaries, or both?



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In brief

In 2024, national court intervention in arbitration continued to intensify, particularly in relation to disputes with sanctioned Russian companies. The UK, Hong Kong and Germany saw an increase in anti-suit injunctions and declaratory relief supporting arbitration. Simultaneously, Russian courts litigated disputes subject to foreign arbitration with unprecedented frequency, issuing anti-arbitration and anti-anti-suit injunctions. This trend is expected to continue into 2025.

Russian courts' anti-arbitration stance: no change in sight

Russian courts show no signs of softening their anti-arbitration approach when it comes to disputes with Russian sanctioned parties. Under Articles 248.1 and 248.2 of the Russian Arbitrazh Procedure Code (introduced in 2020), local courts can claim exclusive jurisdiction over disputes involving sanctioned parties if sanctions are deemed to impede access to justice in the contractual forum. Worse still, court practice is simply to assume that sanctions will prevent Russian companies from getting a fair decision in arbitration abroad. Article 248.2 enables the Russian courts to grant anti-suit and anti-arbitration injunctions prohibiting foreign partners from pursuing claims outside Russia. Such injunctions can be backed by draconian fines as much as the amount in dispute. The largest reported fine to date amounts to €14.3bn.

In 2024, Russian courts invoked Article 248 over 200 times to assume exclusive jurisdiction or issue anti-arbitration injunctions.

Russian disputes and anti-suit injunctions: arbitration and state courts – allies, adversaries, or both?

The common law response: anti-suit injunctions in aid of arbitration

English courts

An anti-suit (and anti-anti-suit) injunction is a court order prohibiting a party from initiating or continuing foreign legal proceedings in breach of an arbitration agreement and requiring those proceedings to be discontinued.

Several prominent international banks, including UniCredit, Deutsche Bank, and Commerzbank obtained anti-suit injunctions against RusChemAlliance, a subsidiary of Gazprom, prohibiting it from pursuing claims in Russia in aid of Paris-seated ICC arbitrations. Traditionally, English courts would only issue anti-suit injunctions in aid of arbitration seated in England. However, in this case, the courts held that the arbitration agreement was governed by English law, the governing law of the underlying bonds, satisfying the jurisdictional gateway for that relief (read [our overview of the UK Supreme Court judgment in the UniCredit case](#)). Upcoming amendments to the Arbitration Act 1996 are expected to change this position, likely stipulating that, in absence of an express choice of law, the law governing the arbitration agreement will be the law of the seat.

Other notable examples of English courts issuing anti-suit injunctions against Russian proceedings include [Barclays Bank PLC v VEB.RF \[2024\] EWHC 1074 \(Comm\)](#) and [Ziyavudin Magomedov & Ors v PJSC Transneft & Ors \[2024\] EWHC 1176 \(Comm\)](#).

English anti-suit injunctions can be a valuable tool to resist the enforcement in other countries of adverse Russian judgments secured in violation of an arbitration agreement. While recognition of Russian judgments varies by jurisdiction, with some – like China – simplifying enforcement through bilateral treaties, an arbitral decision affirming the validity and enforceability of the arbitration agreement can be an even more powerful anti-enforcement measure.

Other common law jurisdictions

Like their UK counterparts, the Hong Kong courts routinely award anti-suit injunctions. However, China's "neutral" stance toward Russia and concerns about judicial independence left uncertainty about how Hong Kong courts would handle cases involving Russian counter-sanctions. Nevertheless, the Hong Kong courts have now rendered at least two decisions in aid of arbitrations seated in Hong Kong in the face of Russian litigation under Article 248 ([Linde GmbH and Linde Plc v RCA \[2023\] HKCFI 2409](#) and [Bank A v Bank B \[2024\] HKCFI 2529](#)). The Singapore and the US courts can also issue anti-suit/anti-enforcement injunctions where there is sufficient nexus.

The civil law response: Declaratory anti-suit relief in aid of arbitration and/or non-enforcement of anti-arbitration decisions

German courts

Like most civil law jurisdictions, the German courts do not award enforceable anti-suit injunctions in aid of arbitration but do offer declaratory anti-suit relief. In 2024, the Düsseldorf Higher Regional Court dismissed an application for an anti-suit injunction against a Russian sanctioned entity that had sought an anti-arbitration injunction in Russia breaching the arbitration agreement (Case No I-26 W 7/24). Conversely, the Berlin Higher Regional Court awarded declaratory anti-suit relief against a sanctioned Russian entity in aid of a Swiss-seated, Swiss law-governed arbitration, affirming arbitration as the sole proper forum, excluding Russian courts (read our previous analysis on these cases: [Case No 12 SchH 2/24](#) and [Case No 12 SchH 5/22](#)).

German courts can, in principle, extend their extra-territorial reach to support arbitrations seated outside Germany if a minimum territorial connection exists. The Berlin Higher Regional Court has so far adopted an expansive approach, recognizing that neither a German arbitral seat nor the choice of German law is required. A minimum territorial connection exists if the petitioner is German and there is a risk of domestic enforcement. Future cases are likely to further test the extra-territorial reach of the anti-suit relief mechanism.

Russian disputes and anti-suit injunctions: arbitration and state courts – allies, adversaries, or both?

Other important civil law arbitral seats: France and Switzerland

French and Swiss courts are not equipped to issue anti-suit injunctions or German-style declaratory anti-suit relief in support of arbitration agreements. In France, courts have recognized anti-suit injunctions issued abroad but do not grant such injunctions domestically. Similarly, while the Swiss Federal Supreme Court has not definitively ruled out the possibility of granting injunctions prohibiting foreign litigation, the prevailing view is that such measures are generally unavailable.

However, in most European countries, a Russian judgment secured in violation of a valid arbitration agreement is unlikely to be enforceable. Beyond traditional grounds for refusing recognition of foreign judgments – such as public policy or absence of jurisdiction of the issuing court – the [15th EU sanctions package](#) (adopted in December 2024) specifically prohibits Member States from enforcing judgments and injunctions issued on the basis of Articles 248.1 and 248.2 of the Russian Arbitrazh Procedure Code. Notably, this restriction is not directly applicable to Switzerland.



In an era of heightened court involvement, understanding your opponent's global assets is essential. Where the opposing party conducts business outside Russia, European counterparties may increasingly consider offensive steps to pressure parties breaching the arbitration agreement.

Noah Rubins KC
Partner

Looking ahead

Court intervention is expected to remain a prominent trend in 2025. As a result, certain points should be kept in mind. When drafting arbitration agreements, it is crucial to consider that the arbitration seat typically determines the competent supervisory courts. This choice influences the availability of anti-suit and anti-enforcement relief, among other factors. While some courts will award extra-territorial relief in aid of arbitrations seated abroad, this remains largely untested.

Jurisdictions where both parties hold assets continue to be a critical factor in shaping strategy. For instance, if the Russian party has no assets outside Russia and its counterparty has sufficient assets to satisfy the adverse Russian judgment issued in breach of the arbitration clause, pursuing substantive claims or commencing contempt proceedings in England in response to the Russian litigation may offer limited practical benefits. Conversely, if the Russian party conducts business outside Russia or its non-Russian counterparty has assets in jurisdictions considered to be neutral or friendly to Russia, a combination of defensive and offensive steps can mitigate the risk of international enforcement of an adverse Russian judgment.

Our team has deep expertise in navigating complex Russia-related disputes. Please get in touch if you would like to discuss strategies for your business.

4.

Investor-state mediation:
a bridge over troubled
waters?

Investor-state mediation: a bridge over troubled waters?



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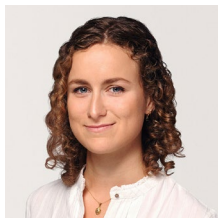
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In brief

Mediation, as a third-party facilitated negotiation controlled by the parties, has the potential to reinvigorate investor-state dispute resolution in the years ahead. With mounting criticisms of investor-state arbitration – including high costs, lengthy proceedings and entrenched binary positions – mediation is increasingly emerging as a compelling alternative.

New institutional rules, mediation-friendly investment treaty provisions, and enforcement mechanisms like the Singapore Convention (see link below) now provide a framework positioning mediation as a viable method of resolving investor-state disputes amicably and more efficiently. States and investors alike should be aware of these developments and how best to benefit from them.

A new era in investor-state disputes

New international arbitration has traditionally been the primary method of resolving investor-state disputes, its lengthy timelines (averaging four years), high costs (averaging more than US\$6m per party—and often vastly more), and binary outcomes are prompting both investors and states to seek more efficient, mutually beneficial solutions. Against this backdrop, investor-state mediation is gaining traction as a viable alternative.

As early as 2012, the IBA issued [Rules on Investor-State Mediation](#), followed by the Energy Charter Treaty (ECT) Secretariat's 2016 [Guide on Investment Mediation](#), which aimed at facilitating recourse to mediation to settle disputes under the ECT. In turn, the Centre for Effective Dispute Resolution (CEDR) issued an [Investor-State Mediation Guide](#) in 2019 and, in 2022, the International Centre for the Settlement of Investment Disputes (ICSID) introduced the [ICSID Mediation Rules](#) specifically designed for investment-related disputes. Meanwhile, the UNCITRAL Working Group III, which was specifically tasked with reforming current investor-state dispute resolution mechanisms, [adopted, in 2023](#), draft provisions on the use of mediation in ISDS (including draft model provisions to include in investment treaties) and guidelines for investment mediation.

Investor-state mediation: a bridge over troubled waters?

Investment treaties themselves are also evolving in this direction. References to amicable settlement through “non-binding third party procedures”—or mediation—are increasingly frequent in new investment treaties. A [recent study](#) shows a steady rise in mediation references in investment agreements, from 0.83 percent in 2004 to 17.4 percent in 2018. Agreements like the Netherlands Model BIT and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership explicitly encourage (or even require) mediation as part of their dispute resolution provisions. Another key driver of this trend is the adoption of the [Singapore Convention on Mediation](#), which ensures the global enforceability of settlement agreements, giving parties greater confidence in the mediation process. The ICSID Mediation Rules have been drafted to ensure compliance of mediated settlements with the Singapore Convention.

These developments establish a robust framework for investor-state mediation, the appeal of which will continue to grow in the coming years.

A tailored solution for investment disputes

Mediation’s particular features make it an attractive mechanism for resolving foreign investment disputes.

- **Fostering a forward-looking alignment of interests:** mediation enables parties to exchange confidential information through a neutral mediator, creating a safe space to discuss the full range of issues impacting the investment relationship. This allows parties to develop innovative and creative solutions that go beyond legal considerations, focusing on a forward-looking alignment of interests, including non-financial value for both parties. This flexibility can present a key advantage in investor-state disputes, balancing investors’ commercial priorities – such as new investments – against states’ public interests - including job creation, local content and capacity building.
- **Efficiency:** mediation can be both cost-effective and time-efficient compared to other dispute resolution methods. Arbitrations often impose significant financial and time burdens on both investors and states. In contrast, complex mediations typically conclude within six to nine months,

according to CEDR’s experience with international commercial mediation (as reported in the CEDR [Investor-State Mediation Guide](#)). However, it is important to recognize that formal proceedings, such as arbitration, may need to progress before states are realistically ready to mediate.

- **Preservation of relationships:** mediation enables parties to reach amicable settlements while preserving their ongoing relationship. By channeling discussions through a neutral mediator, mediation minimizes the risk of escalating the dispute or damaging the relationship.
- **Flexibility:** mediation is flexible both in process and outcomes, enabling customisation to suit the parties’ particular needs and interests. Parties can mediate all or individual issues in dispute, retaining control over the scope of the resolution of their dispute. Mediation can also occur at any stage, either as a standalone process or alongside arbitration or other adjudicatory proceedings. In the investor-state context, mediation could potentially be conducted during “cooling-off periods,” a common pre-condition to arbitration in many investment treaties. It can also – sometimes more effectively, given the complexities of investor-state cases and the need for states to align multiple stakeholders – be pursued later in the proceedings, once the parties have made their position clear, or even after liability or quantum has been determined by an arbitral tribunal.



With the guidance of a skilled mediator, longstanding opponents can find themselves engaging in confidential exchanges of information that reveal an unexpected alignment of interests, thereby breaking through previously intractable disputes.

Will Thomas KC

Partner (accredited CEDR mediator)

Investor-state mediation: a bridge over troubled waters?

Navigating challenges

Despite these advantages, investor-state mediation is not without challenges, particularly in four key areas.

- **Confidentiality v. transparency:** confidentiality is crucial in mediation, enabling participants to express their positions freely and facilitating mutually satisfactory solutions. However, in the ISDS context, confidentiality clashes with growing demands for transparency. Excessive confidentiality can hinder public accountability and elevate perceived corruption risks. In our experience, this challenge can be mitigated through robust formal processes that build public trust and address perceived corruption concerns. For instance, the ECT Secretariat's *Investor-State Mediation Guide* suggests setting up "internal state monitoring mechanisms" to ensure regular reports on the mediation and strengthen its legitimacy. Similarly, some recent treaties, like the Netherlands Model BIT, balance confidentiality and transparency by requiring the publication of settlements while allowing the parties to designate and protect specific confidential information.
- **Authority to mediate:** ensuring that government representatives have authority to negotiate and approve settlements – often involving significant compromises – is a critical challenge in investor-state mediation. This authority must be given and received free from fears of repercussions or corruption concerns. Historically, successful settlements have often depended on political will at the highest levels of government. For mediation to become a more common tool in resolving investment disputes, states should implement clear frameworks to establish authority and streamline approval mechanisms. This would ensure that government representatives can negotiate settlements effectively and confidently. The ICSID Mediation Rules address this challenge by requiring parties, at the first session, to "identify a person or entity authorized to negotiate and settle the issues being mediated".
- **Lack of compulsion:** mediation depends on the voluntary participation of both parties. This may be challenging in the ISDS context, where investors often fear inherent power imbalances with the state; meanwhile, states may hesitate to participate, in light of the potential perception by investors or the public of weakness. To address this issue, some recent investment treaties have mandated the recourse to mediation (or conciliation), often at the state's discretion. For example, the Mauritius-UAE BIT and the Australia-Indonesia CEPA include provisions mandating mediation at the option of the state party.
- **Enforcement:** settlement agreements resulting from successful mediations can generally only be enforced through breach of contract claims before the competent court or tribunal under the agreement. The Singapore Convention aims to address this issue by enabling the international recognition and enforcement of written mediated settlements before the courts of all state parties. However, since 2019, only 58 states have signed the Convention, and just 14 have ratified it. Additionally, States can reserve the right to exclude the Convention's application to settlements involving the state or its agencies. Therefore, the Singapore Convention's effectiveness in enhancing confidence in ISDS mediation remains uncertain.



We have seen successful examples of seemingly intractable investor-state disputes being resolved by mediation and similar mechanisms – but only where both investor and state work strategically to adopt a bespoke process that does not blindly copy practices that work in the mediation of commercial disputes. Some formality of process is often required, to recognise that investor-state disputes involve issues of public policy and public funds.

Nicholas Lingard
Partner

Investor-state mediation: a bridge over troubled waters?

Looking ahead

Arbitration will remain central to resolving investor-state disputes, but the growing interest in mediation marks a significant and meaningful evolution in the ISDS framework. Mediation is poised to play a more prominent role in 2025 and beyond, as states continue to promote – or even mandate – its use.

Of course, mediation is not a universal solution and may be unsuitable in cases where the investor has been expelled from the country, such as through expropriation, or the investor-state relationship has otherwise irretrievably broken down.

Nevertheless, mediation should be viewed as a valuable tool for investors and states, to be deployed when appropriate. At the onset of a dispute, the parties should proactively assess whether mediation could be the most suitable resolution mechanism. Tools like the [mediation decision trees](#) developed by the Inter-Pacific Bar Association can support this evaluation. This approach may allow investors and states to seize optimal windows for mediation – whether before the commencement of an arbitration or during the proceedings – facilitating faster, cost-effective, and relationship-preserving settlements.

Martina Polasek, the new ICSID Secretary General, [recently commented](#) on the potential for greater use of mediation in ISDS, given the high settlement rate in ICSID arbitration, noting that “ICSID involvement [under the new ICSID Mediation Rules] has helped parties to put amicable settlement negotiations on new footing. I am optimistic that this is a trend that will continue”.

If you are exploring mediation as a solution for investor-state disputes, we invite you to connect with us to discuss how our expertise can help navigate the process effectively and achieve constructive outcomes.



Critics of the legitimacy of investor-state arbitration should consider the advantages of mediation. In a mediation, it is the parties – not a third party – who decide the outcome of the dispute. This process allows the host state to shape a resolution that balances the investor’s commercial interests with the state’s geopolitical and public priorities.

Sylvia Noury KC

Partner (accredited CEDR mediator)

5.

Human rights and social issues in investment treaty arbitration: a growing trend

Human rights and social issues in investment treaty arbitration: a growing trend



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In brief

Human rights and social issues are becoming more central to investment treaty arbitration. Natural resource, energy and infrastructure projects are often located in proximity to local and indigenous communities. As a result, the interaction between these projects and communities is increasingly at issue in investor-state disputes. At the same time, some newer generation treaties are seeking to expressly address these social and human rights issues. We expect to see this trend to continue.

Human rights in the context of major projects

International treaties, such as the [International Covenant on Civil and Political Rights](#), the [American Convention on Human Rights](#), the [African Charter on Human and Peoples' Rights](#) and the [Indigenous and Tribal Peoples Convention](#), require states to protect human rights. Additionally, international business and human rights standards, such as the [UN Guiding Principles on Business and Human Rights](#) and the [OECD Guidelines for Multinational Enterprises](#), call upon investors to respect human rights and to exercise due diligence to safeguard human rights. Against this backdrop, multinational corporations develop their own policy commitments, codes of conduct and sustainability policies reflecting these standards.

Alongside international requirements, there has been a proliferation of domestic regulation to protect human rights, including legislation relating to supply chains as well as the protection of indigenous rights. Such developments can arise from new legislation, as seen in [Canada](#), but often stem from court rulings, as in [South Africa](#) and [Ecuador](#).

[Financial institutions](#), including the [International Finance Corporation](#), may also condition the provision of project finance on compliance with human rights-related requirements.

This growing mix of hard- and soft-law requirements are a key consideration when developing projects. Mining companies, for example, rank community impact and indigenous trust among their top five considerations and risk factors in [2025](#).

Human rights and social issues in investment treaty arbitration: a growing trend

States have invoked community consultation requirements to annul or terminate concessions and land titles. For instance, citing non-compliance with consultation requirements, Mexico [terminated a contract](#) for a major wind farm and [revoked gold and silver mining concessions](#). Similarly, in [Kenya](#), courts invalidated land titles for wind farm projects.

Investors and states must navigate these international and domestic frameworks in the context of operating and overseeing major projects. Increasingly, human rights and social issues are being raised in the context of investment disputes.

New generation treaties: addressing social issues in investment

The growing importance of social issues in connection with major investments is reshaping investment treaty practice.

Some treaties, such as the [2023 Investment Protocol to the Agreement establishing the African Continental Free Trade Area](#) (which is not yet in force), expressly require investors to comply with laws, policies and standards aimed at protecting human rights and indigenous peoples. More commonly, investment treaties affirm the state parties' resolve to encourage investors to voluntarily adhere to corporate social responsibility (CSR) standards. An example of this is the [2024 Australia-UAE bilateral investment treaty](#) which specifically states that the state parties should encourage investors to incorporate within their internal policies internationally recognized human rights standards and CSR principles.



Even projects that are integral to achieving sustainability goals can lead to apparent conflicts with local communities and indigenous groups. Investors should be aware of evolving international and domestic regulations and – where necessary – incorporate meaningful engagement with communities into the design and implementation of their projects.

[Carsten Wendler](#)
Partner

More generally, new generation investment treaties increasingly reference the states' freedom to pursue legitimate policy objectives. In some cases, this is achieved through "right to regulate" provisions, which reaffirm the states' right to adopt measures in the public interest, including those that protect social interests. The [2023 Canada-Ukraine modernized free trade agreement](#), for instance, highlights that protecting indigenous peoples' rights falls within the state's right to regulate. Some investment treaties rely on "exceptions" clarifying that their investment obligations do not prevent the adoption of measures necessary to safeguard certain social interests. Notably, the [Agreement between the US, Mexico and Canada](#) includes an exception referring to the protection of indigenous peoples' rights.

Social and human rights issues in the context of investment treaty arbitration

The evolving international discourse on human rights is reshaping the investment arbitration landscape. Human rights and social issues are increasingly being invoked in disputes and influencing the analysis of several admissibility and merits issues that arise in investment arbitration proceedings.

- States have sought to have claims declared inadmissible based on human rights issues. For instance, in the [Copper Mesa v. Ecuador](#) case, Ecuador argued that the investor's claim was not admissible under the "clean hands doctrine" on the basis of alleged human rights violations. That argument was rejected, amongst other reasons, because the government had not previously made any complaints about the investor's conduct, which had taken place in Ecuador, openly and in view of government authorities. The tribunal considered that, given the state's obligation of good faith, it was precluded from raising the admissibility objection.
- States have attempted to justify their adverse measures impairing foreign investment based on community protests. For instance, in the pending case [Lupaka v. Peru](#), the investor claims that Peru breached its international obligation to protect its investment by failing to address blockades and protests that halted operations in Lupaka's gold, silver and copper mine in the Andes. Peru argues in defense that the company allegedly failed to obtain a social license from the local communities. In [Bear Creek v. Peru](#), similar arguments were rejected by the majority of the tribunal. After careful consideration and

Human rights and social issues in investment treaty arbitration: a growing trend

balancing of the conflicting interests, the tribunal found that the investor's mining operations did not lack a "social license" and that Peru's actions were not necessary to protect public well-being.

- States have argued that social issues affecting investments should lead to a reduction in damages. Such arguments have so far been unsuccessful. For instance, in *Abengoa v. Mexico*, the investor brought claims against the State for preventing their operation of a waste disposal plant. Mexico countered that the investor's failure to communicate with the community and address social opposition constituted "contributory fault," which should reduce the damages. Having analysed Abengoa's community outreach, the tribunal found that it had complied with all federal, provincial and municipal requirements to obtain approvals and, therefore, damages should not be reduced. A similar defense was also rejected by the majority of the tribunal in *Bear Creek v. Peru*.
- States are also filing counterclaims based on alleged violation of environmental and human rights by investors. Such counterclaims based on alleged international obligations of investors have thus far been unsuccessful. For instance, in *Urbaser v. Argentina*, Argentina brought a counterclaim arguing that the investor's mismanagement of its water concession violated the international human right to water. The tribunal acknowledged that such a counterclaim was admissible under the Spain-Argentina BIT, but ultimately rejected the counterclaim because Argentina conflated the concessionaire's provision of water and sewage services with a human rights obligation to provide water – a positive obligation of the state.



Increasingly, we're seeing social and human rights issues – such as the concept of "social license to operate" or prior consultation rights – being raised in investment treaty disputes. As investors navigate more stringent, domestic regulatory landscapes as well as evolving international "soft law", they must consider the implications of social issues under investment protection regimes.

Caroline Richard

Partner

Looking ahead

Social and human rights issues are increasingly at issue in investment treaty disputes. Social issues are often the catalyst for state measures leading to investment treaty claims. They are also increasingly being raised by states both as a shield and a sword in investment treaty arbitration, i.e. as defences to investment claims or even as a basis for counterclaims. Separately, newer treaties are expressly referring to human rights norms. We expect this area to continue to develop over the coming years, as more tribunals are faced with such issues and interpret new treaties. Our team has vast experience in successfully navigating these new challenges.

6.

Arbitration as a tool for
private capital disputes

Arbitration as a tool for private capital disputes



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In brief

We anticipate an increase in disputes arising from deals in the private capital space. The significant backlog of failed exits from deals signed in recent years is driving more investors to arbitration to resolve exit-related disputes. Additionally, the growth of “secondaries” as alternatives to traditional M&A and IPO exits is leading to a new class of disputes. Arbitration remains the preferred tool for private capital institutions to resolve post-M&A disputes. Private capital investors are also increasingly leveraging arbitration against state governments under investment treaties to address adverse legislative, regulatory or other actions taken by host governments.

Increased deal-making: optimism meets uncertainty

The macroeconomic outlook for 2025 is cautiously optimistic for dealmakers, tempered by ongoing uncertainty and volatility. With inflation largely coming under control and interest rates trending downwards, market sentiment is increasingly positive, fueling greater interest in deal-making. Financial sponsors, holding trillions of US dollars in dry powder and under pressure to strike deals, along with high US-listed public asset valuations, are expected to drive continued interest in alternative assets from institutional and sovereign wealth funds. As Freshfields’ Co-Head of US Corporate and M&A, Ethan Klingsberg, observes in his [M&A Predictions and Guidance for 2025](#), fund-level transactions in expanding secondary markets are here to stay in 2025. Private credit is also not going away, as investors seek additional avenues to enhance returns in a lower interest rate environment. Of course, it remains to be seen how the tide may turn with the new administration in the US.

Arbitration as a tool for private capital disputes

Key 2024 trends in financial sponsors

Source: Mergermarket, data correct as of 16 December 2024

Buyouts up 34% vs 2023's US\$468bn

2024 (US\$)
↗ 626 bn

Buyouts count increases compared to 2023

2024
↗ 5.3%

Tech bias up 32%

2024 (US\$)
↗ 201.5 bn

Optimistic exits rise 25% in exit volume in 2024

2024 (US\$)
↗ 418.1 bn

Trade sales on rise, more exits involve sale to strategic

2024
↗ 58%

IPO exits in 4Q24, highest seen since 1Q22

2024 (Q4)
↗ 9 IPO

Disputes between signing and closing

Disputes continue to arise between signing and closing transactions due to failures to fulfill conditions precedent to closing such as necessary regulatory clearances from antitrust or foreign investment authorities. These disputes often stem from delays caused by the authorities or from onerous requests made during the clearance process. In some cases, buyers responsible for obtaining regulatory clearance but facing post-signing remorse – due to shifting interest rates or other changes in market or business conditions – may attempt to engineer a failure to obtain regulatory clearance by a long-stop date (i.e. to time-out the condition precedent) so that they may abort the transaction. In these situations, the seller may have a claim for breach of the buyer's efforts-related obligation (e.g. to use "commercially reasonable endeavors") to fulfill the relevant condition precedent.

Deal-related disputes

In 2024, we saw an increase in claims based on alleged breaches of representations and warranties, either brought against the sellers directly or under W&I insurance (also known as RWI) policies. Other disputes arose from fundamental issues with the target company, which had either been overlooked during the due diligence process or surfaced post-acquisition. This trend is expected to persist in 2025. The growth of "secondaries" – transactions in which one investor divests an interest in a fund or sells a portfolio company or other asset to another investor – is also leading to more disputes arising from those transactions.

The growing use of earn-outs to bridge valuation gaps between buyers and sellers will remain a key source of disputes. Earn-outs are inherently contentious mechanisms. Valuation issues and the time gap between signing and earn-out triggers naturally carry

Arbitration as a tool for private capital disputes

the risk of disagreement between the parties. Disputes typically arise over the interpretation and construction of bespoke earn-out clauses, especially when sudden market or business changes occur. Disagreements often center on whether the criteria triggering the earn-out were genuinely met or artificially achieved. As we have analyzed in the past, this underscores the need to establish clear and objective criteria, and careful consideration of how targets may be manipulated when structuring such provisions.

Other pricing mechanisms, such as locked-box arrangements and closing accounts adjustments, which often include covenants and indemnities, have also led to similar disputes .

In many cases, parties pursue post-closing claims through arbitration to leverage a settlement that effectively adjusts the purchase price to reflect the impact of the underlying issue.

Exit disputes

Stretched valuations and portfolio company underperformance – particularly in deals predicated on lower interest rates or different business models, such as those seen during COVID-19 – as well

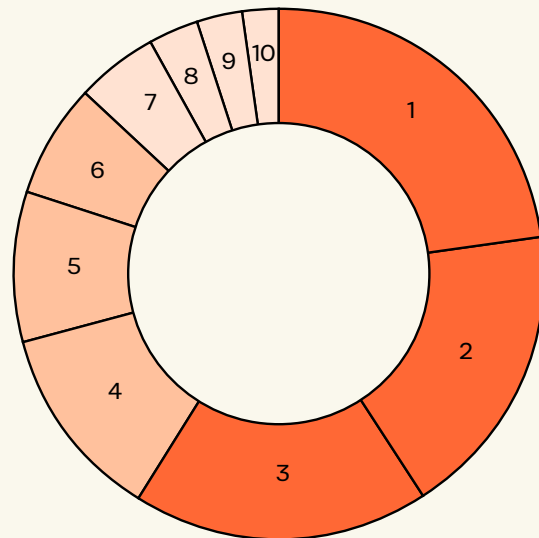
as broader market headwinds, have made it difficult to achieve liquidity events at target prices. Currently, a significant exit backlog remains, with sponsors estimated to hold globally over US\$3tn of unsold assets in their portfolios at the end of 2024. This prolonged holding period has led private capital institutions to become involved in a greater number of legal proceedings with their portfolio companies and their commercial counterparties.

Additionally, we have seen a notable increase in JV disputes, particularly in minority investments, driven by failed exit rights, such as put options or conversion or redemption rights. Investors are facing difficult decisions about the viability of exercising these rights, especially when portfolio companies and their founders have insufficient funds to meet their obligations.

Other exit-rights disputes have turned more heavily on factual matters, including allegations of mutual breach, collateral agreements, waivers, and lack of regulatory approvals, such as those related to cross-border currency controls. In some cases, these arguments are aimed at engineering a restructuring of the deal or a reduction in the previously agreed exit price.

Distribution of ICSID cases registered in FY2023, by economic sector

1	Oil, Gas & Mining	23%
2	Construction	18%
3	Transportation	18%
4	Electric Power & Other Energy	12%
5	Other Industry	9%
6	Finance	7%
7	Water, Sanitation & Flood Protection	5%
8	Agriculture, Fishing & Forestry	3%
9	Tourism	3%
10	Information & Communication	2%



Arbitration as a tool for private capital disputes

Investment treaties as leverage

Private capital investors are increasingly looking to arbitration under investment treaties as a response to adverse government actions and regulations. These treaties, between the country of incorporation of the foreign investor's investment vehicle and the country in which their investment is made, offer significant leverage to foreign investors. In some cases, governments have rolled back legislation following investor-state arbitration claims threatened or actually brought by foreign investors. A widely cited example is India's decision to scrap the retrospective imposition of capital gains tax on transactions involving the indirect transfer of Indian assets, following billion-dollar arbitration claims by foreign investors like Vodafone and Cairn Energy.

While traditional and renewable energy companies, mining and infrastructure companies, are frequent users of investment treaty arbitration, we are also seeing private capital investors in sectors like real estate, telecommunications, transportation and finance take an interest in investment treaty protections. The World Bank's *ICSID Caseload Statistics* highlight the diverse sectors in which investment treaty arbitrations have arisen under the auspices of ICSID.

Private capital investors across multiple sectors have increasingly turned to investment treaty arbitration to protect their investments. Examples include reduction of feed-in tariffs for wind and solar energy investors; plans to enact more restrictive regulations in the pharmaceutical sector; and allegations of governmental corruption influencing a pension fund's vote on a public M&A transaction.

As governmental actions adversely affecting major corporations continue to rise, ICSID registered its second-highest number of new cases in FY2024. Private capital investors should consider investment treaty arbitration as a key tool in their legal arsenal for 2025 and beyond.

Looking ahead

Arbitration remains a leading dispute resolution forum for private capital disputes. Arbitrations are frequently subject to terms of confidentiality, which minimizes the risk of negative publicity from disputes. Party autonomy in arbitration also affords greater control over procedure and timelines compared to court proceedings in many jurisdictions and the lack of appeal rights on the merits in arbitration enables parties to get to a final resolution more quickly, which is crucial for funds with short exit timeframes. Investors also value arbitration's ability to allow them to select decision-makers with relevant expertise.

Many private capital disputes are highly fact-sensitive. Therefore, from the outset of any potentially contentious matter, it is crucial for parties to handle written documents carefully, ensuring that a proper paper trail is put in place to support their factual position in future proceedings.

When structuring new transactions, investors should consider the availability of investment treaty protections based on the investment vehicle's country of incorporation and the host country of the target company. These protections can offer an additional layer of security, depending on the region, nature of the investment, and industry sector.

Additionally, investors should seek to ensure that they have effective recourse for any claim, either through security (e.g., a tranching payment structure for the purchase consideration, or using an escrow mechanism), or available assets for enforcement in countries party to the New York Convention (the convention governing the cross-border enforcement of arbitral awards).

Our arbitration specialists have extensive experience in advising private capital clients on their disputes all over the world. Reach out to us to discuss the latest trends and their potential impact on your business.

7.

Arbitration of space
disputes: time for take-off

Arbitration of space disputes: time for take-off



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In brief

The space industry is set to accelerate in 2025, with a surge in satellite launches and the roll-out of cutting-edge satellite-based services. As the industry expands, a parallel rise in disputes will occur, especially as government regulations and international agreements struggle to keep pace with private-sector advancements. In this rapidly evolving sector, arbitration is taking center stage as the go-to mechanism for resolving space-related disputes.

2025 is set to be another growth year for the space industry, with more than 200 satellites scheduled to be launched, and heightened deal-making activity among satellite operators and direct-to-device service providers looking to consolidate their market positions. Assuming the space economy maintains its current trajectory, the World Economic Forum [projects](#) its value could soar to US\$1.8tn by 2035.

However, domestic and international legal frameworks have struggled to keep pace with the rapid growth of private-sector activity. As private sector growth outpaces regulatory advancements, businesses and states alike face an increase in potential risks and disputes.

The space economy in 2025

Three main themes are likely to dominate the space industry in 2025:

- **More satellites, more services:** with launch costs continuing to decrease, satellite operators are scaling their networks, delivering a new wave of satellite-based services to consumers, businesses, and governments. These include low-earth orbit broadband for applications like high-speed in-flight internet and Earth observation (“remote sensing”) services, which can monitor fire risks or environmental damage via satellite imagery.

Arbitration of space disputes: time for take-off

- **Demand for support services:** increased activity from satellite operators is driving demand for support services, such as satellite maintenance and in-orbit refueling. SpaceX's plans to test Starship-Starship refueling in 2025 will be closely watched, as a potential industry game-changer.
- **Changing regulations:** as space activities expand, governments will doubtless be reassessing existing domestic and international regulatory frameworks. Central to this will be finding the right balance between fostering commercial innovation and safeguarding safety and security on both the national and global level.



For some time now, regulation of the space industry has fallen behind the boom in private sector activity. Governments now face the challenge of catching up, both domestically and internationally, to put in place more modern regulations.

Alexandra van der Meulen
Partner

In that context, we expect to see an increase in disputes in three main areas.

1. A rise in space-related commercial disputes

Historically, commercial disputes in the space industry have been relatively infrequent, reflecting limited private sector involvement. However, with the expansion of private players and heightened financial stakes, we anticipate an increase in disputes as parties seek to assert their rights.

This shift is likely to drive a rise in contractual disputes across four key areas:

- the supply of services by satellite operators to the telecoms and defense sectors;
- breach of contract disputes concerning launch, refueling and maintenance services;
- joint venture disputes between state-owned entities and private-sector operators; and
- insurance coverage disputes, particularly in relation to orbital damage.

2. Regulatory change and the potential for investor-state disputes

Increasing private-sector investment in space-related activities may also result in future investor-state disputes. States will need to balance their interest in promoting private-sector investment in commercial space activity against national and international interests relating to security and safety, as illustrated by the EU's proposed [Space Law](#).

The Devas cases against India illustrate this potential. Those cases stemmed from the Indian government's cancellation of an agreement with a private entity (Devas) for the lease of satellite transponder capacity and associated spectrum. India claimed that it cancelled the agreement on grounds of national security, due to the Indian military need for the S-band spectrum. Devas, by contrast, claimed that India did so because the spectrum had simply been sold at too low a price. The dispute culminated in two investment treaty awards and an International Chamber of Commerce award against India and its state-owned entity. Similar disputes may well arise in the future as private investment competes with the public sector for limited resources in the form of spectrum licenses and orbital slots.

Arbitration of space disputes: time for take-off

3. Evolving international law for a new space age

Growing private-sector activity in space is set to escalate inter-state disputes, exposing critical gaps in the international law framework for the use of space. As states interact more frequently over the global commons of space, – questions will arise about whether the existing mechanisms for dispute resolution are inadequate. – In practice, the allocation of finite orbital slots and the challenge of managing space debris are generally limited to discussions through diplomatic channels, rather than any existing dispute resolution mechanisms. Existing dispute resolution mechanisms in the 1972 Space Convention, designed to address property damage from satellite collisions or debris, are thus widely seen as outdated and rarely used. Alternative proposals are gaining traction, such as a new treaty addressing liability for damage caused by satellite collisions or debris, or the establishment of a specialist international tribunal.

Looking ahead

As the risk of disputes grows, players in the space industry would be well advised to consider what dispute resolution mechanisms will best suit their needs. To that end:

- Businesses should review the dispute resolution provisions in their contracts and consider whether they are fit for purpose. Arbitration, valued for its confidentiality, neutrality, and flexibility in addressing complex technical disputes, is emerging as the favored approach for both commercial and investor-state space-related disputes.
- Investors will need to consider whether they have adequate protection at the international law level, in the event of a dispute with a state.

Given the likely developments to the international law framework for space activity in the coming years, we can help businesses actively monitor upcoming reforms and identify strategic steps to address both emerging opportunities and potential risks.

Please get in touch if you would like to discuss further.

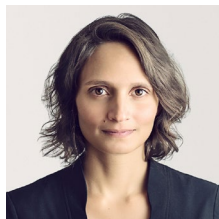
8.

Game-changing sports
disputes: a new normal

Game-changing disputes: a new normal



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In brief

The sports industry is undergoing rapid transformation, with tech companies competing with legacy broadcasters for lucrative media rights, while institutional investors are acquiring stakes in leagues and teams. Alongside this increased commercialisation of sports there has been a notable increase in high-value and complex disputes. Recent decisions of arbitral tribunals and courts have highlighted the growing role of competition law in sports, while issues around financial fair play, breakaway competitions and effective sports governance also continue to attract significant attention.

The evolving sports ecosystem

In July 2024, the National Basketball Association (NBA), the most popular basketball league in the world, announced new media rights deals with Disney, NBCUniversal and Amazon. The agreements are reportedly worth around \$76bn over 11 years and highlight two wider trends which have transformed the sports industry in recent years:

- first, the significant increase in the value of media rights of premier sports competitions, with the NBA reportedly securing an increase of around US\$4bn a year compared to its existing deals with Disney and Warner Bros Discovery; and
- second, the evolving competitive landscape, as new, on-demand streaming platforms challenge the position of legacy broadcasters. For instance, the NBA deals saw the arrival of Amazon's Prime Video, and the departure of Warner Bros Discovery, home of TNT Sports.

The transformation of the media rights landscape across the industry, alongside specific features of sports, such as fan loyalty, has caught the attention of new and sophisticated investors.

Game-changing disputes: a new normal

Private equity and sovereign wealth funds in particular have made significant investments in sports over the last few years. As a sign of the times, the National Football League (NFL) was the last major US league to change its ownership rules in August 2024 to allow a group of pre-approved private equity funds to acquire minority stakes in NFL teams. Some of the whitelisted funds – such as Arctos, Ares, CVC and Sixth Street – already hold significant interests across a number of other sports, including European football, basketball, baseball, tennis, rugby, cricket and ice hockey. Amid this flurry of activity Goldman Sachs has posed the question: “is sports the next trillion-dollar market?”

Although sports leagues, teams and their fans have generally welcomed the arrival of institutional investors – recall the celebrations on the streets of Newcastle following the announcement that a consortium backed by Saudi Arabia’s Public Investment Fund had acquired Newcastle Football Club – there remain clear differences in approach across sports and regions. For example:

- The English Premier League (EPL), the most popular football league in the world, does not prohibit or limit investment by institutional investors, provided they comply with certain fitness and suitability criteria.
- The NFL, on the other hand, allows for limited private equity investment, as noted above, but currently prohibits direct investment by sovereign wealth and pension funds.

The top divisions of German football, the Bundesliga and 2. Bundesliga, stand out as exceptions to the trend. Following fan protests, the Deutsche Fußball Liga (DFL), which organises the competitions, announced in February 2024 that it had shelved plans to sell a stake in its media rights to a private equity fund for around €1bn. Whether the DFL can afford to buck the trend remains to be seen; notably, the French and Spanish football leagues have recently entered into similar investment deals.

Playing fair

Alongside this increased commercialisation of sport there has been a marked rise in high-value and complex disputes involving governing bodies, leagues, teams, agents, broadcasters and other stakeholders.

Given the typical structure of sports governance – where governing bodies or leagues often exercise significant control over both the organisation of competitions and the economic activities of participants – it is unsurprising that disputes increasingly raise competition law issues. In September 2024, Manchester City successfully argued before an English arbitral tribunal that certain EPL rules violate UK competition law. The decision in this case, in which Freshfields acted for Manchester City, aligns with a growing trend of arbitral tribunals and courts identifying competition law infringements by governing bodies and leagues.

Other notable examples include:

- the decision by an English arbitral tribunal in November 2023 that the imposition of a cap on football agent fees and certain related restrictions breached UK competition law;
- the decision of the European Court of Justice (ECJ) in December 2023 that the rules of the International Skating Union regarding the participation of athletes in unauthorized competitions breached EU competition law. Notably, the ECJ found that the requirement to refer disputes under the rules to the Court of Arbitration for Sport (CAS) in Lausanne, a common feature in the rules of governing bodies, reinforced the competition law infringement, as CAS awards cannot be reviewed by EU courts;
- the grant of a preliminary injunction by a US federal district court in February 2024 restraining the National Collegiate Athletic Association (NCAA) from enforcing a ban on negotiations between prospective college athletes and third parties regarding the compensation for name, image and likeness rights, on the basis that the NCAA’s prohibition likely violates US competition law;
- the decision of a Spanish court in May 2024, following a reference to the ECJ, that the UEFA’s rules regarding the authorization of breakaway competitions – which UEFA sought to invoke to prevent the European Super League project in 2021—breached EU competition law; and
- the decision of a German arbitral tribunal in September 2024 ordering the DFL to re-auction the Bundesliga’s domestic broadcasting rights following a complaint by DAZN about the lawfulness of the original auction. Although the reasons for the decision have not been made public, it has been reported that competition law issues were central to the complaint.

Game-changing disputes: a new normal

We anticipate that competition law issues will continue to feature prominently in sports disputes in the UK, EU and US, with a long line of pending cases before arbitral tribunals, national courts, and the ECJ.



Traditionally, governing bodies and leagues have enjoyed some latitude when it comes to their obligations under competition law due to the specific characteristics of sports. However, it is clear from the recent decisions in this area that arbitral tribunals and courts will intervene decisively where competition is distorted.

Felix Schaaf
Senior Associate

Financial fair play (FFP) disputes in European football will also continue to attract significant attention. Recent months have seen an unprecedented number of FFP decisions in the EPL, resulting in points deductions for some (Everton, Nottingham Forest) and exoneration for others (Leicester). In Europe, UEFA fined Barcelona for an intentional FFP breach, with the CAS subsequently rejecting Barcelona's appeal against the decision.

Should I stay or should I go?

The transformation of the sports industry has led some stakeholders to explore alternative competition structures. Following the ECJ judgment in the European Super League case, there has been a renewed interest in recent months on proposals for breakaway leagues and competitions across sports. For example:

- In November 2024, it was reported that a promoter was in the process of recruiting leading rugby players to a new "global franchise league" with a start date in 2026.
- In December 2024, it was announced that the promoter of the European Super League project has requested UEFA and FIFA to approve new European football competitions, the "Unify League", which would involve 96 men's and 32 women's teams

playing midweek throughout the season. One striking feature of the proposal is that all matches would be streamed for free to fans through the "Unify platform".

- In January 2025, a new promoter in professional snooker has filed a claim in the UK Competition Appeals Tribunal against the existing promoter of the World Snooker Tour and the world governing body for snooker and billiards. The new promoter alleges that it has been prevented from running competitions involving professional snooker players in breach of UK competition law.

We anticipate that new proposals for breakaway leagues and competitions, as well as related legal disputes, will continue to be an important theme in 2025 and beyond.

A new referee?

Another much anticipated development in the UK concerns the establishment of a new regulator for English football, created by Parliament. The proposal stems from a government review that highlighted "the inability of the existing regulatory structure to address the new and complex structural challenges created by the scale of modern professional men's football."

The draft legislation for the new regulator is currently making its way through Parliament and is expected to be enacted later this year.

Notably, the draft legislation envisages that appeals against decisions by the new regulator will be referred to the UK Competition Appeals Tribunal where proceedings are generally conducted in public. By contrast, governing bodies in the UK and elsewhere usually provide that regulatory appeals are referred to confidential arbitration in the final instance, although some arbitration rules, such as the rules of CAS and Sport Resolutions, provide for the publication of an appeal award unless both parties agree to keep the award confidential. The increased transparency regarding the actions of the new regulator will be welcomed by some, but not all, stakeholders.

Our sports disputes practice has the expertise to help businesses navigate this changing landscape. Please reach out to us if you would like to discuss.

9.

Privilege in arbitration –
should one set of rules
apply?

Privilege in arbitration – should one set of rules apply?



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Katherine Khan
Vienna

In brief

International arbitration offers a neutral forum for resolving disputes between parties from different jurisdictions. It is common for parties, their counsel, and the tribunal to come from different jurisdictions, with the seat of the arbitration often differing from the substantive law governing the dispute.

While the international nature of arbitration is a key advantage, it also introduces complex challenges. One common challenge arises during document production: whose rules of privilege should apply?.

Why is privilege relevant?

Privilege issues typically emerge during the document production phase. The applicable privilege rules can be key to how the document production exercise is undertaken. Privilege protects documents that a party would otherwise have to disclose. Incorrect application of privilege by arbitral tribunals may jeopardize the integrity of the award.

Various jurisdictions can take very different approaches to what constitutes privileged information. A common example is the treatment of communications involving in-house lawyers. In common law jurisdictions like England & Wales and New York, and certain civil law jurisdictions like Brazil and Spain, privilege extends to these communications. Conversely, civil law jurisdictions like France and Germany do not recognize such privilege.



With arbitrations arising out of increasingly complex contracts and transactions involving parties, lawyers and arbitrators coming from across the globe, legal privilege can lead to lengthy debates at key phases in the proceedings. Acknowledging the existence of conflicting rules and addressing them early can only help to save time and money and ensure the smooth running of an arbitration for all of those involved.

Christophe Seraglini
Partner

Privilege in arbitration – should one set of rules apply?

Most arbitration rules are silent on the issue of privilege, with notable exception, perhaps unsurprisingly, of the International Centre for Dispute Resolution (ICDR) Rules, the international arm of the American Arbitration Association. The parties can agree at the outset on which rules of privilege will apply, but this rarely happens in practice. As a result, privilege issues may give rise to extensive procedural debates during the arbitration. Such disputes can disrupt the proceedings and increase costs, requiring the tribunal to intervene and resolve the matter.

How to determine which rules of privilege apply?

There is little express guidance as to how arbitrators should decide on which privilege rules should apply. Several approaches are commonly considered:

Approaches commonly considered by arbitral tribunal

The substantive law of the dispute

The law of the seat of the arbitration

The law of the jurisdiction in which the lawyer providing the advice in the relevant communication is registered

The law of the main place of business of the party asserting privilege

The “closest connection” test (applying the law of the jurisdiction to which the document or communication has the closest link)

The “deference” approach (deferring to claims of privilege made in good faith)

The “most-favored-nation” approach (applying the most protective standard to all parties)

The “least-favored-nation” approach (applying the least protective standard to all parties)

The lack of a consistent approach leads to uncertainty, which can be detrimental. For example, it can disrupt attorney-client communications as parties may be unsure of whether such communications will be protected by privilege.

Additionally, multiple privilege rules could apply simultaneously, depending on the approach adopted. This can lead to unequal footing between the parties. For example, applying the law of a party’s principal place of business might compel one party to disclose documents prepared by in-house counsel, while allowing the other to assert privilege and withhold similar documents.

The IBA Task Force on Privilege recommends uniform guidelines

In 2021, the International Bar Association (IBA) Arbitration Committee launched a task force to assess the desirability and feasibility of uniform privilege rules. The IBA task force published its [report](#) in 2024.

The task force concluded that it was desirable to establish uniform guidelines on privilege to bolster consistency and predictability. Such guidelines would also improve efficiency by reducing the time spent by parties arguing over applicable privilege rules.

The task force looked at six categories of privilege to decide whether uniform guidelines could be established:

- legal advice
- litigation privilege
- national security
- settlement privilege
- common interest privilege
- privilege against self-incrimination

After canvassing many jurisdictions, the task force found it feasible to establish uniform guidelines for three categories: (i) legal advice, (ii) litigation privilege, and (iii) settlement privilege. These three categories of privilege are widely recognized across jurisdictions as deserving of protection, despite some differences. The other categories were treated too disparately across the jurisdictions to allow for any uniformity.

Privilege in arbitration – should one set of rules apply?

The IBA task force recommended that the IBA Arbitration Committee prepare and adopt uniform guidelines for the three feasible privilege categories. It also recommended adopting choice-of-law guidelines for privilege categories not covered by the uniform rules. These recommendations are currently being considered by the IBA Arbitration Committee.

Uniformity in privilege: the road ahead for international arbitration

Adopting new guidelines on privilege will enhance certainty for parties in arbitration. Parties may expressly adopt these guidelines at the outset of arbitration or use them as a soft law reference. Existing IBA Guidelines, such as those on [arbitrator conflicts](#) and [the taking of evidence in arbitration](#), are frequently used by parties in arbitrations in these ways, fostering a more uniform approach to this issue.

Developing new guidelines on privilege will take several years, after which counsel will need to carefully evaluate them before agreeing to their application. These guidelines are unlikely to resolve all issues relating to privilege, since requirements under national jurisdictions – such as ethical obligations to withhold privileged documents – will continue to apply.

Looking ahead

Until the IBA guidelines on privilege are published, varying approaches to privilege will continue to be debated and applied in international arbitration. Tribunals may resort to the current IBA Rules on the Taking of Evidence, though their guidance on privilege is limited. Parties should recognize that privilege in international arbitration may differ significantly from their expectations, in particular if parties are used to common law practices. In some cases, privilege may be significantly different or almost non-existent.

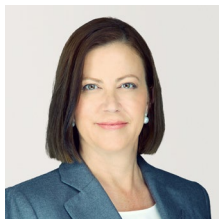
To enhance certainty, parties and tribunals could consider addressing privilege issues early in the proceedings (for example, in Procedural Order No. 1) to prevent disputes from arising during the document production phase.

Our global arbitration network is uniquely positioned to advise on privilege across diverse jurisdictions. We can assist proactively, helping you identify which communications will be protected by privilege.

10.

The shift from EPC to
EPCM: a recipe for
more complex arbitrations?

The shift from EPC to EPCM: a recipe for more complex arbitrations?



Erin Miller Rankin



Matei Purice
Paris



Robert Colvin
London

In brief

As EPCM contract structures gain popularity in global projects, related disputes will become increasingly complex. Key areas of contention will likely include costs recovery and delay provisions, as well as difficulties posed by a more complex allocation of liability inherent in EPCM structures.

The global construction industry faces rising material costs, increasing project complexity from untested energy transition technologies, supply chain disruption and a persistent shortage of skilled labor. These challenges have cooled contractors' risk appetite and prompted project owners to rethink their strategies for project delivery.

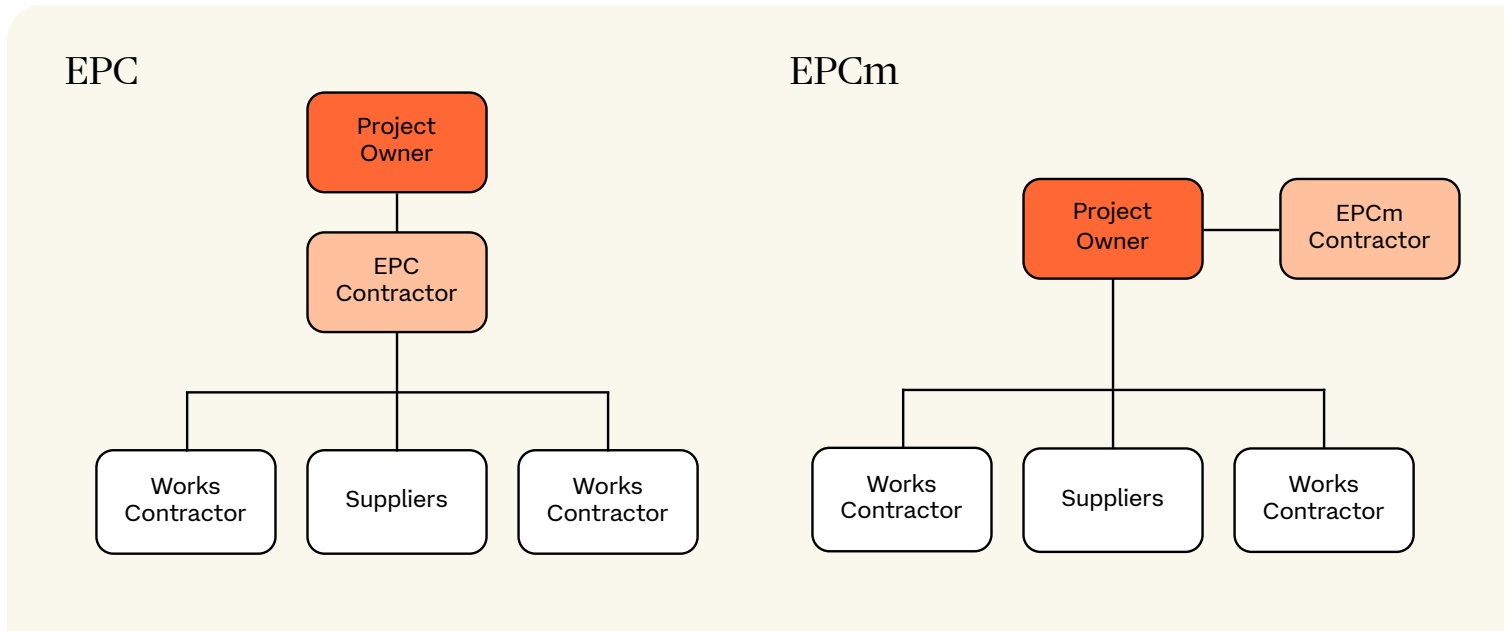
Contractors and owners alike are moving away from the traditional lump sum Engineering, Procurement and Construction (EPC) model in favour of EPCM (or Engineering, Procurement and Construction Management). This shift is driven by EPCM's distinct risk profile for contractors and its perceived lower costs for project owners. The introduction of IChemE's "Blue Book" in 2023, the first standard form EPCM contract, underscores this trend. While it remains the only standard form EPCM contract to date, FIDIC is expected to release its own version.

Explainer: EPC v. EPCM

EPC contracts, sometimes referred to as "turnkey" contracts, have long been prevalent in privately funded major projects and publicly funded infrastructure developments. EPC contractors are tasked with delivering a completed asset to the project owner, meeting guaranteed performance standards by a fixed date and cost.

Under an EPC contract, the contractor assumes responsibility for all project elements – Engineering, Procurement, and Construction – along with the associated completion and performance risks. Typically, the project owner (or employer) is responsible for the specification of the facility, providing the site, making payments, and addressing delays it causes to the contractor. The contractor assumes responsibility for all other aspects, subject to a specified liability cap.

The shift from EPC to EPCM: A recipe for more complex arbitrations?



In contrast, EPCM contracts are (at their core) not construction contracts; they are services agreements where the EPCM contractor typically takes responsibility for project design, manages procurement of contractors and suppliers, and coordinates their work through to completion. Unlike the EPC model, where the contractor instructs and has contractual recourse to subcontractors and suppliers, the EPCM contractor is not party to the various works or supply contracts. Instead, these agreements are entered into directly by the owner. EPCM contractors do not assume turnkey risk or act as the single point of responsibility. The owner assumes greater completion and financial risk if the project exceeds budget or is delivered late. Under an EPCM structure, liability for the works will be allocated throughout the various work packages to distinct contractors/suppliers; while design, management, and coordination risks rest with the EPCM contractor.

EPCM contracts are increasingly adopted in industries and/or for projects where EPC contractors are unwilling to assume significant risks or where owners seek greater control over project

delivery – sometimes at a premium. Historically common in mining and oil & gas, EPCM contracts are now increasingly applied to a broader range of infrastructure and industrial projects.

EPCM structures may initially seem cost-effective for project owners, but cost savings often diminish during execution as owners encounter (i) greater in-house costs for contract management and coordination; (ii) potentially uncapped fees from the EPCM contractor; (iii) the cost of resolving programme delays; and (iv) the possible costs associated with managing multiple, concurrent disputes with the various counterparties. The risk of escalating costs increases when owners lack sufficient in-house resources or systems to manage on-site outcomes and coordinate multiple counterparties – each with varying levels of experience and capability.

We are seeing an increasing number of complex construction arbitrations arising out of EPCM structures.

The shift from EPC to EPCM: A recipe for more complex arbitrations?

Multi-party disputes: challenges in EPCM arbitrations

A key complexity in EPCM-related disputes, particularly arbitrations, lies in the number of potential parties involved.

In a typical EPC delay claim, experts analyze the causes of delay and their impact on the critical path. In contrast, EPCM structures introduce additional complexity due to the involvement of multiple contractors and works packages across different project components. In an EPCM structure, owners must first investigate the causes of delays to determine which contractors or suppliers – if any – bear responsibility. In some cases, responsibility may be shared among multiple parties. Owners must also evaluate potential recourse under the various contracts with counterparties, noting that each agreement may include differing and inconsistent risk allocation provisions.

Delays or performance breaches involving multiple counterparties – such as defects at the interface between works packages – can result in concurrent, overlapping disputes.

For example, the IchemE's Blue Book limits the EPCM contractor's liability to that which is reasonable for the EPCM contractor to pay, having regard to the contractual responsibility that other project participants might bear for the loss. This framework is likely to raise complex questions of allocation of responsibility and increase the risk of inconsistent outcomes in a multi-party or multi-dispute scenario. We anticipate disputes arising over the interpretation of these provisions particularly where the governing law does not robustly address net contribution liability allocations or apportionment approaches.

The Blue Book specifies a multi-tiered dispute resolution mechanism for disputes only between the owner and EPCM contractor, involving negotiation, optional mediation, and arbitration. However, it lacks joinder or consolidation provisions, posing challenges when liability is shared among multiple parties. In major projects with multiple works contracts, overlapping

disputes often arise. The Blue Book recommends including express provisions for third parties to join arbitrations between the owner and EPCM contractor and for consolidating proceedings. To avoid procedural conflicts, all project parties should align their dispute resolution provisions in respective EPCM and works contracts or establish an overarching dispute resolution umbrella agreement.

We expect to see an increase in:

- concurrent arbitrations: owners initiating simultaneous proceedings against the EPCM contractor and works contractors or suppliers, raising the risk of conflicting awards;
- multi-party arbitrations: increased use of joinder or consolidation of proceedings, resulting in more complex multi-party disputes; and
- liability disputes: arbitrations about the apportionment of liability for costs, often arising from unclear risk allocation across multi-party suites of contracts.



To pre-empt the risk of concurrent arbitrations, parties should consider adopting arbitral rules with robust consolidation and joinder provisions or including bespoke terms during contract negotiations.

Matei Purice

Counsel

The shift from EPC to EPCM: A recipe for more complex arbitrations?

Risk allocation and incentives

EPCM (and indeed any costs plus structure) shifts much of the costs risk away from the contractor onto the project owner.



Project owners must take steps from the outset to ensure that their EPCM arrangements adequately allocate and ‘flow down’ risk in the face of the challenges posed by its multi-party contracting structure and cost recovery issues.

Erin Miller Rankin
Partner

Project owners face the dual challenge of (a) ensuring EPCM contractors are incentivized to control costs and minimize delays, and (b) auditing the EPCM contract to verify that time charges are reasonable, proportionate, and necessary.

Cost recovery disputes often arise when owners argue that EPCM contractors should bear the risk for works contractors’ failures, or when EPCM contractors seek compensation for inefficient time use or rework. Recent key decisions in EPC cases may have significant implications for the scope and method of cost recovery in EPCM disputes. (See *CBI Constructors Pty Ltd. And Kentz Pty Ltd. V. Chevron Australia Pty Ltd.*, Judgment of the Supreme Court of Western Australia [2021] WASC 323, 28 September 2021; and *Refinería de Cartagena S.A.S. v. Chicago Bridge & Iron Company NV, CB&I UK Limited and CB&I Colombiana SA*, ICC Case No. 21747/RD/MK/PDP, Final Award, 2 June 2023).

Looking ahead

In EPCM contract structures:

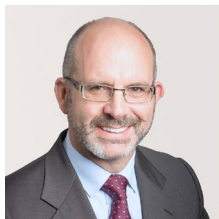
- all parties should ensure contract documents, including technical specifications, adequately clarify the parameters of the interfacing works packages;
- ensure the dispute resolution mechanisms across the project contract suite talk to each other and/or have all parties agree to a dispute resolution umbrella agreement; and
- adopt arbitral rules with clear and well-worn consolidation and joinder provisions.

Our team has the relevant expertise to help businesses navigate this emerging area. Please contact us if you would like to explore this topic further in the context of your project or potential project.

11.

The internationalization
of arbitration in Brazil:
a rising trend

The internationalization of arbitration in Brazil: a rising trend



Nigel Blackaby KC
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In brief

São Paulo is emerging as a new contender among the traditionally preferred international arbitration seats of Paris, London, Geneva, New York and Singapore particularly where large Brazilian corporates are involved. With its pro-arbitration legal framework, and local offices of leading international institutions such as the ICC, São Paulo is increasingly being selected over those traditional seats for international cases with a Brazilian angle. This trend has multiple implications, with the most notable being the increasing internationalization of arbitrations seated in Brazil. itration landscape.

Looking ahead, this trend is expected to drive greater participation by foreign actors and international practices in Brazil's arbitration procedures, fostering growth and enhancing the sophistication of the Brazilian arbitration landscape.

Internationalization of arbitrations in Brazil: evidence and drivers

Brazil consistently ranks among the top countries for arbitration in ICC statistics, with São Paulo leading as the preferred seat domestically. This prominence has been historically driven by a significant volume of domestic arbitrations, but this trend is shifting.

Between 2017 and 2022, ICC statistics revealed that the total number of arbitrations administered in Brazil (approximately 30 annually) were comparable to those ICC cases solely involving Brazilian parties. These figures were still lower than the number of all ICC cases globally involving at least one Brazilian party (around 50 annually) or those applying Brazilian law (approximately 40 annually), which suggests that many international cases connected to Brazil were still being seated elsewhere.

The internationalization of arbitration in Brazil: a rising trend

The landscape shifted in 2023, with ICC statistics showing that arbitrations seated in Brazil (34) outnumbered those applying Brazilian law (29) and those involving only Brazilian parties (21). Also in 2023, the number of Brazilian nationals appointed as arbitrators dropped (from 90–130 in prior years to 60), reflecting a growing demand for foreign arbitrators in Brazil-seated arbitrations.

This shift towards internationalization is echoed by other statistics and developments. The CAM-CCBC, a leading Brazilian arbitration institution, reported an increase of foreign party participation in its 2023 cases (although Brazilian entities continue to represent the vast majority of parties). Further, a 2024 study of arbitrations administered by major Brazilian institutions revealed an increase of approximately 20 percent in cases arising from international contracts between 2022 and 2023. And in January 2025, Brazil put in force an agreement to host a branch of the Permanent Court of Arbitration. This move further solidifies Brazil's growing prominence as a key venue for international arbitration.

This internationalization of Brazil-seated arbitration shows no signs of slowing, mostly driven by two key factors. Firstly, in the wake of post-pandemic economic constraints, the Brazilian government has revitalized infrastructure development through the Novo PAC, a program targeting BRL 1.7tn (US\$320bn) in key infrastructure and energy projects over the coming years. This initiative, along with the current landscape of the Brazilian economy, is expected to attract substantial foreign investment in sectors like construction and M&A, which heavily rely on arbitration.



By embracing internationalization, Brazil's arbitration landscape benefits from diverse perspectives and global standards. This enhances procedural quality and cements Brazil's role as a key player in the international dispute resolution community.

Yuri Mantilla
Senior Associate

Second, Brazil continues to foster an arbitration-friendly legal environment, supported by skilled practitioners who often team up with leading international firms to provide the best defense for their clients. This environment is exemplified by a recent Brazilian Superior Court ruling affirming arbitration autonomy by holding that, unless explicitly agreed by the parties, the Brazilian Civil Procedure Code does not apply to arbitrations seated in Brazil. This decision reinforces the foreseeability of arbitration proceedings in Brazil, strengthening its appeal to international parties seeking efficient and reliable dispute resolution.

Looking ahead: the impact on arbitral practice

In our experience, the internationalization of arbitration in Brazil has driven key changes in the following areas:

Language of the procedure: in cross-border negotiation and disputes involving parties from countries with different languages, such as Chinese and Portuguese, English is overwhelmingly selected as the default common language. This preference is increasingly prominent in international arbitrations, including those seated in Brazil, as foreign parties seek neutral linguistic ground. As Brazil attracts more international players in arbitration, the use of English in these proceedings is expected to rise further. Our team participated in a major international arbitration this year under Brazilian law with a São Paulo seat where the proceedings were conducted in English and two of the three arbitrators (including the chair) were non-Brazilian.

Arbitrator selection: a hallmark of international arbitrations is the diversity of arbitrators' nationalities. In cross-border disputes, parties often prioritize diversity when selecting arbitrators, considering factors such as cultural and legal backgrounds and experience in handling international cases. In arbitrations under Brazilian law, foreign parties often prioritize arbitrators' nationality and international experience, valuing familiarity with diverse legal traditions and cross-border complexities over detailed knowledge of Brazilian law. This preference, coupled with an already-stretched pool of available local arbitrators, has increased the number of tribunals seated in Brazil featuring arbitrators of diverse nationalities, bringing broader perspectives and expertise. Additionally, institutions like the ICC and CAM-CCBC, active in Brazil, include rules that promote the appointment of sole arbitrators and tribunal presidents

The internationalization of arbitration in Brazil: a rising trend

who do not share the parties' nationalities, further encouraging the selection of foreign arbitrators. This emphasis on diverse nationalities is increasingly evident in arbitrations seated in Brazil, highlighting the country's rising prominence in international arbitration and integrating global perspectives and practices into its dispute resolution framework.

Procedural rules: one of the most notable impacts of arbitration's internationalization in Brazil is the evolution of procedural rules towards international standards. Given that international arbitration has evolved largely within a common law framework, its procedures often differ significantly from those of Brazil's civil law system. The growing involvement of foreign parties, arbitrators, experts, and counsel in Brazilian arbitrations has driven a notable shift towards international practices previously uncommon in Brazil. This shift is reflected in the increasing use of written witness statements, the adoption of broader document discovery procedures, and the application of privilege rules different from those traditionally applied to Brazilian counsel. Although specific procedural rules vary based on party agreements and the tribunal's discretion, this convergence towards international rules is likely to enhance Brazil's appeal as a venue for resolving cross-border disputes.



We've seen a notable shift towards international practices previously uncommon in Brazil, such as the use of written witness statements and the adoption of broader document discovery procedures. That brings new features to legal representation and case strategy in Brazilian-seated cases.

Matheus Bastos Oliveira
Senior Associate

Experts and counsel: the internationalization of arbitration in Brazil has also fueled an increased demand for specialized expertise. While Brazilian practitioners are undoubtedly skilled and experienced in handling complex international disputes, the unique challenges of high-stakes cross-border proceedings often necessitate a multi-faceted approach.

Parties have increasingly engaged international experts and counsel in addition to their local counsel. This international perspective can add valuable insights and experience with diverse legal systems, procedural norms and customary international standards, and may be more familiar with arbitrators from varied cultural and legal backgrounds.



The internationalization of arbitration in Brazil has fuelled a demand for specialized expertise, leading to increased collaboration between Brazilian and international firms, with parties engaging diverse counsel and experts to navigate the complexities of high-stakes cross-border proceedings.

Nigel Blackaby KC
Partner

This increasing collaboration between leading Brazilian and international law firms generates synergies that foster a deeper understanding of the nuances of both Brazilian and international practices, ultimately enhancing the quality of legal representation and facilitating the effective resolution of complex cross-border disputes. This trend underscores the growing connection of the global arbitration community and highlights the value of cross-border collaboration in navigating Brazil's internationalized arbitration landscape. Unlike some other jurisdictions, the sophistication of the Brazilian arbitration bar usually results in a true partnership of equals where each firm focuses on areas where they add most value and both firms are involved in designing overall case strategy.

Our team has significant expertise resolving disputes in Brazil. Please reach out to us if you would like to discuss in the context of your business.

12.

Shifting sands: the Middle East's evolution into an arbitration hub

Shifting sands: the Middle East's evolution into an arbitration hub



Sami Tannous
Dubai



Amani Khalifa
Riyadh



Noha Elgendy
Dubai



Amr Omran
Dubai

In brief

Arbitration has a complicated legacy in the Middle East. Investors have historically been suspicious of arbitration in the region due to perceived judicial hostility to alternative dispute resolution, especially when a state-owned entity is involved. As international arbitration remains a preferred method for resolving disputes in multi-jurisdictional projects, being perceived as arbitration-friendly is critical for any country seeking to attract foreign direct investment. With the United Arab Emirates (UAE) and the Kingdom of Saudi Arabia (KSA) competing to attract foreign direct investment and establish themselves as the region's key commercial hub, both jurisdictions are now increasingly focused on cultivating an arbitration-friendly reputation.

While the Middle East has historically produced certain unfavorable decisions, a recent spate of positive and well-reasoned decisions, particularly in the UAE and KSA, suggest that courts are now embracing a more pro-arbitration stance.

In this trend, we look at key developments in each of those jurisdictions and set out our predictions for the future of arbitration in the region.

Modernization of arbitral institutions

Following the dissolution of the DIFC-LCIA in late 2021 pursuant to Dubai Decree No. 34 of 2021 (Decree 34), DIAC made significant changes to its corporate and administrative structure and took over a large caseload. Changes to DIAC's administrative structure included forming a new arbitration court and overhauling its case management team. In 2022, DIAC rolled out new arbitration rules emphasizing the use of technology to reduce arbitration's carbon footprint and including provisions on consolidation, joinder and third-party funding as well as mechanisms for expedited proceedings. The rules designate the Dubai International Financial Centre (DIFC) as the default seat of arbitration. DIAC's *2023 Annual Report*, published in October 2024, shows an increasing caseload and improved gender diversity, with women accounting for 54 percent of the appointments made by the DIAC Arbitration Court in the first half of 2024.

Shifting sands: the Middle East's evolution into an arbitration hub

As part of its strategy to strengthen the UAE's position as an arbitration hub, the Abu Dhabi International Arbitration Centre (arbitrateAD) was launched in early 2024, replacing the Abu Dhabi Commercial Conciliation and Arbitration Centre. ArbitrateAD's new rules promote green practices, regulate joinder and consolidation and allow for early dismissal of claims, expedited procedures and emergency arbitrations. They provide that the Abu Dhabi Global Market (ADGM) is the default seat, giving users certainty in a supportive judicial environment.

In KSA, the Saudi Center for Commercial Arbitration (SCCA) is key to the Kingdom's efforts to position itself as another arbitration-friendly jurisdiction. In 2023, the SCCA also adopted new arbitration rules aimed at enhancing transparency and efficiency. The new rules encourage the use of technology for document filing and case management and allow parties to select Online Dispute Resolution Procedure Rules (ODR) for low-value disputes.

Decisions following the abolition of the DIFC-LCIA

The abolition of the DIFC-LCIA has sparked legal challenges regarding the enforceability of arbitration agreements referencing the DIFC-LCIA Rules and awards rendered under such agreements. Some of these challenges were heard outside the UAE, such as the proceedings in *Baker Hughes Saudi Arabia Co. Ltd v Dynamic Industries* before the District Court of New Orleans, Louisiana and *DFL vs DFM [2024] SGHC 71* before the Singapore High Court. Both cases made headlines for refusing to give effect to Decree 34. However, in the past few days, the US Court of Appeals for the Fifth Circuit quashed the decision of the District Court of New Orleans and remanded the case back to the lower court for reconsideration. This suggests the controversy surrounding enforcement of DIFC-LCIA arbitration agreements is far from over.

Unsurprisingly, courts in the UAE have adopted a different view and enforced legacy DIFC-LCIA arbitration agreements. Thus, in the UAE, the abolition of the DIFC-LCIA should have limited impact on the enforceability of arbitration agreements that refer to DIFC-LCIA arbitration.

UAE courts are becoming increasingly arbitration-friendly

UAE courts are reassessing long-standing challenges for arbitration users. Recent decisions in Dubai and Abu Dhabi affirm arbitration as the primary method for resolving international commercial disputes. These rulings signify a major shift from the traditional UAE judicial perspective, which for decades viewed arbitration as an "exceptional" means of dispute resolution. This shift is significant as the traditional view informed many decisions that unreasonably restricted the interpretation of arbitration agreements and expanded the scope for setting aside awards.

In Case No. 1514/2022 (Commercial) the Dubai Court of Cassation distinguished, for the first time, between questions of jurisdiction and admissibility. It held that whether pre-conditions to arbitration have been satisfied is a question of admissibility not jurisdiction. This distinction implies that courts should not interfere with an arbitral tribunal's assessment of admissibility, which falls within the tribunal's authority to rule on the merits – except in cases involving potential infringements of public policy or due process.

Finally, the Dubai courts have shown openness to international standards in recent cases challenging arbitral awards on grounds of arbitrator independence or impartiality. In those decisions (for example, in Case No. 606/2024 (Commercial)), the Dubai Court of Cassation cited the *IBA Guidelines on Conflicts of Interest in International Arbitration* to determine whether the impugned conduct constituted sufficient grounds to set aside the arbitrator's award.

These and other decisions reflect a more sophisticated approach by the Dubai courts, aligning their outlook on arbitration with international best practice.



UAE courts are reassessing long-standing challenges for arbitration users. Recent decisions in Dubai and Abu Dhabi affirm arbitration as the primary method for resolving international commercial disputes.

Sami Tannous
Partner

Shifting sands: the Middle East's evolution into an arbitration hub

Caution must still be exercised with sole option clauses

Nevertheless, a recent decision from the Dubai Court of Cassation highlights the need for caution with 'sole option' or 'unilateral arbitration' clauses. Common in finance documents, these clauses grant one party the sole discretion to select the forum. In Case No. 735/2024 (Commercial), the court accepted jurisdiction and refused to apply a sole option clause in favor of arbitration, holding that the clause does not constitute a valid arbitration agreement under the laws of the UAE.

The court acknowledged that there are varied approaches to sole option clauses but found that the clause at issue was not a binding arbitration agreement. It remains uncertain whether this decision will have broader application, but the Court of Cassation's scepticism toward such clauses is evident. This contrasts with the approach of the ADGM and DIFC courts, which have both recognized the validity of sole option clauses.

KSA courts maintain their pro-arbitration stance

According to the latest SCCA statistics, 92 percent of motions to set aside arbitral awards in 2022 were unsuccessful. This positive trend continued in 2024, solidifying the Saudi courts' reputation for being pro-enforcement. Two cases exemplify the progressive stance of Saudi courts:

- In Case No. 4531064951 of 1445H, the Riyadh Commercial Court upheld an arbitration agreement despite a challenge regarding an alleged unauthorized signatory. The plaintiff sought to circumvent the arbitration agreement and argued that it was unenforceable because its own signatory was not authorized to bind the company to arbitration. The court rejected this argument, holding that the plaintiff was estopped from benefiting from its own or its employees' wrongdoing. The approach of the Saudi courts is noteworthy because arbitration agreements are often successfully challenged in Middle Eastern courts for reasons relating to the authority of the signatory.

- In another judgment from the Damman Court of Appeal in Case No. 4530620517 of 1445H, an agreement referring disputes to a final and binding determination by a third party chosen by the parties was held to be a valid agreement to arbitrate. Although the agreement did not explicitly mention "arbitration," the court deduced the parties' intent to arbitrate based on their autonomy in selecting the third party and the absence of a need for explicit agreement on the binding nature of court determinations, which is otherwise the default.



Commercial parties that have historically been reluctant to consider arbitration seated in the UAE or in KSA should take into account the reduced enforcement risk and enhanced legal certainty when evaluating opportunities to engage with new and unique projects in the region.

Amani Khalifa
Partner

These decisions reflect an increasingly consistent pro-enforcement approach by the Saudi courts, reinforcing the Kingdom's pro-arbitration agenda. Saudi Arabia's pro-arbitration stance is also reflected in the Minister of Finance's approval of several unified government contracts incorporating the SCCA's model clause as the default dispute resolution mechanism. Additionally, the Ministry of Commerce has also issued several model contracts that include the SCCA's model clause.

Looking ahead

The Middle East continues to optimise the arbitration ecosystem and to promote foreign direct investment. Our team of specialists across the MENA region are available to discuss the opportunities and challenges this creates for your business

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February 2025, 498429