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# International Arbitration After the Pandemic

Economic fundamentals will continue to drive the growth  
and geographic diversification of international arbitration



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## Approach

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This article uses macroeconomic data to evidence the extraordinary growth in cross-border trade and investment over the last 20 years, and surveys the concurrent very strong growth in international arbitration activity both in traditional centres of dispute resolution and in emerging centres, using data from arbitration institutions and the authors' own experience. The authors then survey major industries and regions for past and future trends in international arbitration activity, based on the collective experience of FTI Consulting's global and industry-leading team of expert witnesses active in the field.

# Executive summary<sup>1</sup>

By Mark Bezant and James Nicholson<sup>2</sup>  
March 2022

Cross-border economic activity — trade and investment — has grown at a truly remarkable pace in the last 20 years, driving the development of the world economy. This has led to an inevitable consequence to rapid growth in international disputes and hence international dispute resolution mechanisms, including international arbitration.

From 2000 to 2020, the value of international trade nearly doubled, and global inward foreign direct investment (“FDI”) stock quadrupled in real terms. Developing countries’ share of global exports increased from one-third to nearly half, while the value of developing countries’ inward FDI quintupled. However, the COVID-19 crisis disrupted these trends in 2020 and 2021, with a 35 percent fall in global FDI flows in 2020. The decline was greater in developed economies, where FDI inflows fell by 58 percent in 2020. We expect the pre-COVID-19 trends to re-establish themselves as the world recovers from the social and economic shock of the pandemic.

FTI Consulting estimates, based on reported figures from international arbitration institutions, that international arbitration filings worldwide have grown steadily at more than 3 percent a year from 2010 to 2019 and increased 9.9 percent in 2020.

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Asian arbitration centres, led by Singapore and Hong Kong, have gained prominence, relative to the traditional powerhouses of Europe — this trend is in line with the global economic catch-up by developing economies. Case filings at Asian arbitral institutions grew rapidly from 2010 to 2019, at close to 9 percent a year. Meanwhile in Europe, arbitration centres report a steady increase in international case filings at close to 3 percent a year over the same period, slightly lower than the global average.

Looking ahead, COVID-19 disruptions, the energy transition and financial distress are likely to lead to a wave of disputes, particularly in the financial, energy and construction sectors.

Another major development in dispute resolution is reform of Investor State Dispute Settlement (“ISDS”), with the European Union (“EU”) paving the way to establishing a permanent multilateral investment court that will process all the investment disputes of the EU and its member states, starting with its most recently concluded trade agreements. Disputes under the Energy Charter Treaty (“ECT”) may also eventually be resolved by this investment court, pending the outcome of ECT reforms. With a healthy projected economic recovery beyond the COVID-19 pandemic driving growth in cross-border economic activity, we expect the strong increases in international commercial arbitration of the last two decades to continue, together with a continued rebalancing of arbitration activity towards Asian centres. We similarly expect the number of potential bilateral investment treaty (“BIT”) disputes to continue increasing, although changes to the ISDS system may reduce the rate at which such disputes translate into traditional BIT arbitration.

<sup>1</sup> Sources for the cited figures can be found in the main body of this article.

<sup>2</sup> The authors are Senior Managing Directors at FTI Consulting’s International Arbitration practice and would welcome discussion of this article. Mark Bezant is based in London, mark.bezant@fticonsulting.com; and James Nicholson is based in Singapore, james.nicholson@fticonsulting.com. This article builds on research conducted for articles authored in 2020 (“Dispute Resolution in the Global Economy”, *FTI Journal*, February 2015) and 2015 (“Trends in international arbitration in the new world order”). See the end of this article for a Glossary of acronyms used below.

# Introduction

The COVID-19 pandemic has presented the kind of challenge to the global economic and financial system that arises only every few decades, causing mounting disruptions to businesses and implications for investors in multiple sectors of the economy. Companies' abilities to meet their contractual or regulatory obligations are increasingly being disrupted, with the potential to trigger disputes across a wide range of industries and sectors.

This COVID-19 effect overlays the astonishing and often underappreciated growth in cross-border investment and trade flows over the last two decades, which itself has underpinned sustained growth in international arbitration activity. Trends in this cross-border activity explain much of the pattern of growth of international arbitration, and help us anticipate future trends in international arbitration.

In the short term, although the global economy is set to grow 4.9 percent in 2022, progress towards recovery from the pandemic remains uneven.<sup>3</sup> Access to vaccines was predicted to be a key differentiator in the uneven economic recovery; this was observed in October 2021, by when advanced economies had achieved a full (and rising) vaccination rate of 58 percent, and had generally loosened restrictions over time, while the percentage of fully vaccinated populations in the rest of the world stood at 36 percent or lower.<sup>4</sup> Two developments may threaten recovery: first is the emergence of new variants of COVID-19, such as omicron, which could be

more infectious; and second, vaccine hesitancy even in advanced economies, as was the experience of some European countries in late 2021.<sup>5</sup> The long-term effects of COVID-19 on the global economy remain to be seen.

Our own experience as expert witnesses on loss quantification is that although undoubtedly many contracts and investments are under severe stress, parties had been somewhat hesitant to launch the kinds of resulting large commercial arbitrations (and litigations) that typically lead them to call on our loss quantification and related services. In the last part of 2021, we began to see an uptick in dispute cases that require our expertise.

Taking a longer view, over the last decade, the global economy has experienced other events that have caused extreme stress, including the European sovereign debt crisis that ended in 2012, the 2014-2016 collapse in oil prices and the U.S.-China trade war that began in 2018. These events have slowed but did not halt the growth in cross-border economic activity. Barring major geopolitical disruption, we expect a resumption of past trends once the most significant effects of the pandemic are in the past.

In this article, we consider the impact of COVID-19 and its effects on international arbitration activity. We will also review the growing global economy and shifting global economic balance more generally, and discuss future possible directions for international arbitration.

<sup>3</sup> *IMF World Economic Outlook*, October 2021, pages xiii and 1.

<sup>4</sup> *IMF World Economic Outlook*, October 2021, page 1.

<sup>5</sup> "Covid Omicron — European nations reinstate restrictions", *BBC News*, 22 December 2021; "Eastern Europe, facing covid surge, also battles vaccine hesitancy", *The Washington Post*, 11 November 2021.

# Shifting global balance of trade flows and investments

International arbitration activity is linked to the state of the global economy, particularly the level of investment and trade flows. This section looks at the macroeconomic indicators that map the ebbs and flows of the global economy, as well as the changing dynamic between economic actors in the last 20 years, for insight into past and future trends in the field of international arbitration.

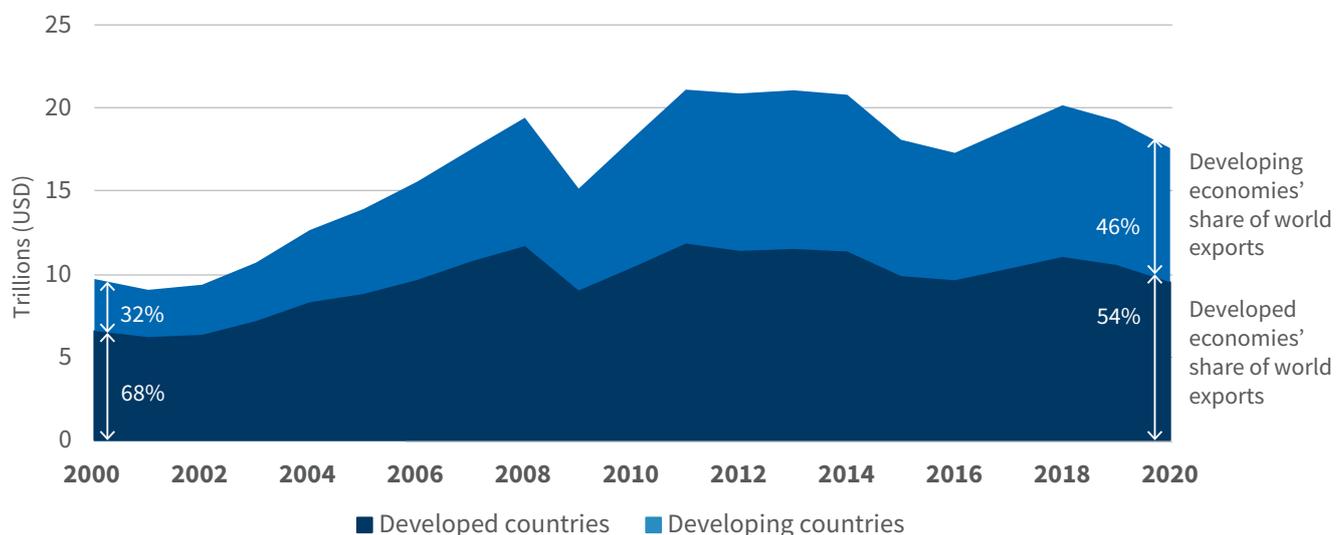
In the decade up to 2019, global gross domestic product (“GDP”) grew at c. 3.0 percent annually in real terms (that is, after stripping out the effects of general price inflation). The International Monetary Fund (“IMF”) estimates that the onset of COVID-19 and the resulting containment measures caused a global economic contraction in 2020 of 3.3 percent.<sup>6</sup> IMF data shows that the cross-border trade of goods has sharply rebounded since the second half of 2020 and is expected to

grow nearly 7 percent in 2022, and economic growth is projected to reach up to 4.9 percent in 2022.<sup>7</sup>

The World Bank estimates that world trade volumes contracted 9.5 percent in 2020, though this is forecast to have grown 8.3 percent in 2021, and will grow 6.3 percent in 2022.<sup>8</sup> Figure 1 below shows the evolution of export volumes, expressed in real terms as 2020 prices, split between developed and developing economies.

As the chart below shows, developing economies’ proportion of total export volume has been growing in the past decade, from 32 percent of world exports in 2000 to a record high of 46 percent in 2020, despite the effect of COVID-19, which saw global exports decline.<sup>9</sup> While the decline of trade in 2015 and 2016 disproportionately affected developing economies, developing economies also experienced a stronger rebound.<sup>10</sup>

FIGURE 1 - VOLUME AND SHARE OF EXPORTS BY ECONOMY TYPE, 2000 TO 2020 (CONSTANT 2020 PRICES)



Source: Export volume by region (1948-2020), United Nations Conference on Trade and Development (“UNCTAD”) STAT, retrieved 16 April 2021; IMF World Economic Outlook Database, April 2021.

<sup>6</sup> IMF World Economic Outlook, April 2021, page xvi.

<sup>7</sup> IMF World Economic Outlook, April 2021, Figure 1.6; IMF World Economic Outlook, October 2021, pages 1 and 13.

<sup>8</sup> World Bank Global Economic Prospects, January 2021, page 10; World Bank Global Economic Prospects, June 2021, page 16.

<sup>9</sup> “Export volume by region (1948-2020)”, UNCTAD STAT, retrieved 16 April 2021.

<sup>10</sup> Key Statistics and Trends in International Trade — 2020, UNCTAD, page 9.

Turning from trade to investment, the global stock of FDI<sup>11</sup> grew from USD 11.1 trillion in 2000 to USD 41.4 trillion in 2020, in 2020 constant prices, more than tripling over this period.<sup>12</sup>

The developing and transition economies quintupled their stock of inward FDI from USD 2.4 trillion to USD 12.7 trillion, again in real terms, which represents an increase in their share of global stock inward FDI from 21.7 percent to 30.6 percent.<sup>13</sup>

The developing and transition economies are at the same time becoming much more active contributors to FDI. Their share of global “outward” FDI stock — that is, investments sourced from these countries — expressed in 2020 constant prices grew from 9.6 percent (USD 1.1 trillion) in 2000 to 23.2 percent (USD 9.1 trillion) in 2020.<sup>14</sup>

COVID-19, however, caused a dramatic fall in FDI flows in 2020. Global FDI dropped by 35 percent to USD 1 trillion from USD 1.5 trillion in 2019. This represents “the lowest

level since 2005 and almost 20 per cent lower than the 2009 trough after the global financial crisis.” The decline in 2020 was heavily skewed towards developed economies, where FDI inflows fell by 58 percent in 2020. Developing economies saw a more moderate decrease of 8 percent in 2020.<sup>15</sup>

UNCTAD expects global FDI flows to bottom out in 2021 and recover by 10 percent to 15 percent relative with 2020 levels. UNCTAD forecasts a further increase in global FDI flows in 2022, which could bring FDI levels back to USD 1.5 trillion, as seen in 2019.<sup>16</sup>

*“The developing and transition economies quintupled their stock of inward FDI from USD 2.4 trillion to USD 12.7 trillion, again in real terms, which represents an increase in their share of global stock inward FDI from 21.7 percent to 30.6 percent.”*



11 Defined as “an investment reflecting a lasting interest and control by a foreign direct investor, resident in one economy, [and] an enterprise resident in another economy.” UNCTAD Handbook of Statistics 2020, page 52.

12 Values adjusted using the U.S. inflation rates from the IMF World Economic Outlook Database, April 2021.

13 UNCTAD classifies former Soviet Union and Eastern Bloc countries under “transition economies.” Source: UNCTAD Handbook of Statistics 2020, pages 2-3 and 98.

14 IMF World Economic Outlook Database, April 2021; “FDI outward stock by region (1948-2019)”, UNCTAD STAT, retrieved 15 April 2021; World Investment Report 2021, Investing in Sustainable Recovery, UNCTAD, pages 252-255.

15 World Investment Report 2021: Investing in Sustainable Recovery, UNCTAD, page 2.

16 World Investment Report 2021: Investing in Sustainable Recovery, UNCTAD, page 16.

# Volume of international arbitration filings

The FDI statistics are an indicator of potential cross-border disputes under both investment treaties and commercial arbitration:

- Investments made in developing countries face risks of expropriation by governments and unexpected revisions to regulatory, fiscal or tariff regimes — and resource nationalism, in particular, is a growing risk amid the challenging political and economic climate.
- Cross-border investments also risk creating commercial disputes, as with all commercial activity, perhaps with the added difficulties of doing business across borders increasing the possibility of a dispute compared with domestic investments.

We therefore expect the macroeconomic trends above have led to, and will continue to lead to, increased international arbitration activity. Disputes arising from COVID-19 have only begun to surface, and will likely continue to impact the international arbitration space for years to come.

Table 1 below shows the development of new case filings year by year both for historical centres such as the Permanent Court of Arbitration (“PCA”), the International Chamber of Commerce (“ICC”) and the International Centre for Settlement of Investment Disputes (“ICSID”), and for newer centres such as the Singapore International Arbitration Centre (“SIAC”) and the Dubai International Arbitration Centre (“DIAC”).

TABLE 1 - NEW ARBITRATION CASE FILINGS, 2007 TO 2020

INSTITUTION	COUNTRY	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
<b>Institutions reporting international cases</b>															
ICSID		37	21	25	26	38	50	40	38	52	48	53	56	39	58
PCA	Netherlands			13	14	11	17	21	21	24	23	25	33	31	35
<b>Total investor-states cases</b>		<b>37</b>	<b>21</b>	<b>38</b>	<b>40</b>	<b>49</b>	<b>67</b>	<b>61</b>	<b>59</b>	<b>76</b>	<b>71</b>	<b>78</b>	<b>89</b>	<b>70</b>	<b>93</b>
AAA-ICDR	U.S.	621	703	800	888	994	996	1,165	1,015	1,064	1,050	1,026	993	882	704
BAC	China	37	59	72	32	38	26	44	41	52	69	77	88	163	215
CIETAC	China	429	548	559	418	470	331	375	387	437	483	476	522	617	739
DIS <sup>(3)</sup>	Germany	22	41	45	43	55	30	41	38	34	47	55	50	50	65
ICC	France	599	663	817	793	796	759	767	791	801	966	810	842	869	946
KCAB	South Korea	59	47	78	52	77	85	77	87	74	62	78	62	70	69
LCIA	UK	137	215	272	246	224	265	290	296	326	303	285	317	395	440
SCC	Sweden	87	85	96	91	96	92	86	94	103	103	96	76	88	105
SIAC <sup>(2)</sup>	Singapore	55	71	114	37	150	188	223	180	228	274	375	337	416	612
SAC	Switzerland		52	79	71	66	69	50	72	64	52		51	63	61
<b>[A] Total international cases (including investor-state)</b>		<b>2,083</b>	<b>2,505</b>	<b>2,970</b>	<b>2,711</b>	<b>3,016</b>	<b>2,908</b>	<b>3,178</b>	<b>3,060</b>	<b>3,258</b>	<b>3,480</b>	<b>3,356</b>	<b>3,428</b>	<b>3,683</b>	<b>4,049</b>
<b>Institutions reporting domestic and international cases<sup>(3)</sup></b>															
DIAC	UAE	77	100	292	431	440	379	310	174	177	207	201	161	208	230
VIAC	Austria			60	68	75	70	56	56	40	60	43	64	45	40
HKIAC	China	448	602	332	291	275	293	260	252	271	262	297	265	308	318
<b>[B] Total domestic and international cases</b>		<b>525</b>	<b>702</b>	<b>684</b>	<b>790</b>	<b>790</b>	<b>742</b>	<b>626</b>	<b>482</b>	<b>488</b>	<b>529</b>	<b>541</b>	<b>490</b>	<b>561</b>	<b>588</b>
<b>[A+B] Total</b>		<b>2,608</b>	<b>3,207</b>	<b>3,654</b>	<b>3,501</b>	<b>3,806</b>	<b>3,650</b>	<b>3,804</b>	<b>3,542</b>	<b>3,746</b>	<b>4,009</b>	<b>3,897</b>	<b>3,918</b>	<b>4,244</b>	<b>4,637</b>

Notes: (1) All statistics are for the year ending 31 December. (2) SIAC reported 1,018 new international cases in 2020, which includes two sets of related cases, one involving 261 cases and the other 145 cases. We have excluded the two sets of related cases from SIAC’s total caseload for 2020. (3) DIAC, VIAC and HKIAC figures do not distinguish between international and domestic cases. Source: Institutions’ websites; and Vijayan K.C. 2021, “International arbitration to grow but challenges ahead”, *The Straits Times*, 28 June 2021.

The institutions' changes in case filings in 2020 as well as a comparison between their 2020 case filings and five-year average filings are shown in Table 2 below.

**TABLE 2 - ARBITRATION CASE FILINGS CHANGES AND TRENDS, 2020**

INSTITUTION	COUNTRY	Δ 2019-20	2020 VS. 5-YEAR AVERAGE <sup>(1)</sup>
ICSID		49%	17%
PCA	Netherlands	15%	30%
AAA-ICDR	U.S.	(20%)	(30%)
BAC	China	32%	139%
CIETAC	China	20%	46%
DIS	Germany	30%	38%
ICC	France	9%	10%
KCAB	South Korea	(1%)	(0%)
LCIA	UK	11%	35%
SCC	Sweden	19%	13%
SIAC	Singapore	47%	88%
SAC	Switzerland	(4%)	6%
DIAC	UAE	11%	21%
VIAC	Austria	(11%)	(21%)
HKIAC	China	3%	13%
<b>Total/Weighted average</b>		<b>9%</b>	<b>17%</b>

Note: (1) New case filings in 2020 compared with the average new case filings during 2015 to 2019. Source: Institutions' websites.

The data above is difficult to interpret, as a number of factors may mask underlying trends. The long lead times between disputed events and the filing of international arbitration claims may be at play amid the ongoing COVID-19 crisis in many countries as companies focus on operational challenges and short-term cash flow. Moreover, filings in any one period may relate to claims following changes in government, policy or industry-specific developments. For instance, the U.S. shale gas revolution dislocated the global energy industry and generated widespread disputes.

The overall data suggests that at a global level and across commercial and investment treaty disputes:<sup>17</sup>

- following the credit crunch of 2008 there was a spike in new filings across most arbitration centres, from 3,207 new cases in 2008 to 3,654 new cases in 2009;
- the growth in total filings up to 2019 remains steady, with an average annual growth rate of more than 3 percent since 2010;<sup>18</sup> and
- the overall number of claims filed in 2020 has increased substantially from 4,244 new cases in 2019 to 4,637 new cases in 2020. This represents a c. 9 percent increase.

The growth in cross-border investment and trade, particularly involving parties from developing countries, dovetails with our observation that disputes are increasingly resolved outside traditional arbitration centres such as the International Centre for Dispute Resolution ("ICDR") (based in New York) and ICC (based in Paris). Based on Table 1 above, ICDR and ICC in 2010 represented 62 percent of total international arbitration filings, while by 2020, this figure had dropped to 41 percent. On the other hand, newer arbitration centres such as SIAC have seen an increase in the proportion of new international filings administered, from an estimated 1.4 percent in 2010 to 15.1 percent in 2020. Nonetheless, arbitration centres in Europe report a steady increase in international case filings at 3 percent a year over the same period.<sup>19</sup>

The spread of COVID-19 has posed unprecedented challenges for businesses. While the number of resulting claims cannot be predicted at the time of writing, arbitral institutions saw increased caseload numbers in 2020. For example, ICSID reported a record 58 new ICSID Convention and Additional Facility arbitrations in 2020, up from 39 in 2019, while SIAC international case filings for 2020 reached a record of 612, which represents a 47 percent increase from 2019.<sup>20</sup>

It is almost certain that disputes will continue to rise as businesses remain affected by the pandemic. We expect an increase in investor-state claims arising from government measures taken in response to COVID-19 and an increase in cross-border commercial disputes concerning disruptions in international supply chains, delayed or cancelled construction and energy projects, and volatile commodity prices.

We also expect a time lag before the increase in international arbitration claims materialises as businesses and investors will likely continue to prioritise their resources on maintaining their operations and preserving short-term cash flows amid the turbulent business environment.

As COVID-19 subsides and more economies begin to recover from its effects, we anticipate a fresh influx of disputes will arise from the continuing economic effects of the pandemic. For example, parties that have benefitted from the suspension or reduction of their contractual obligations due to the pandemic may seek to renegotiate contractual terms.

<sup>17</sup> Source: Table 1.

<sup>18</sup>  $3\% = ((3,683 / 2,711) \wedge 9) - 1$ .

<sup>19</sup> Based on filings from PCA, DIS, ICC, LCIA, SCC and SAC in Table 1.

<sup>20</sup> We have excluded the two sets of related cases, involving a total of 406 cases, from SIAC's total international caseload of 1,018 for 2020.

# The size of disputes

Headlines of awards such as the USD 8.7 billion award to ConocoPhillips (against Venezuela) and the USD 5.9 billion award to Tethyan Copper Company (against Pakistan) — both by ICSID tribunals in 2019 — seem to reinforce the notion that the size of disputes has been increasing over time.<sup>21</sup>

Historically, few arbitration centres reported statistics on the size of claims filed; however, there is now a trend towards greater transparency and reporting of these figures. The availability of these statistics may serve to attract parties to particular institutions at a time when competition appears to be intensifying between arbitration centres.

Available statistics reported by the ICC, the London Court of International Arbitration (“LCIA”) and the Vienna International Arbitral Centre (“VIAC”) show the average size of disputes in international arbitration cases is decreasing:

- ICC — the average value of cases filed in 2020 was USD 54 million, as compared with USD 63 million in 2014 and USD 84 million in 2015. Even though the ICC recorded the second-largest number of newly registered cases in 2020, 31 percent of the cases involved an amount in dispute not exceeding USD 2 million — the threshold amount in dispute for the automatic application of the Expedited Procedure Provisions (“EPP”) applicable to arbitration agreements concluded between 1 March 2017 and 31 December 2020.<sup>22</sup>

- LCIA — there was a considerable increase in the number of low-value cases in LCIA in the past decade. The proportion of LCIA claims quantified below USD 1 million stood at 34 percent in 2020 as compared with an average of 29 percent for the five-year period 2015 to 2019. Claims more than USD 50 million maintained their c. 18 percent share of total claims from 2016 to 2018, while their share fell to c. 10 percent in 2019-20.<sup>23</sup>
- VIAC — the average amount in dispute in VIAC has also fallen from EUR 23.3 million (USD 25.8 million) in 2016 to EUR 10.5 million (USD 12 million) in 2020.<sup>24</sup>

Meanwhile, centres that have seen an increase in the average value of claims include:

- the German Arbitration Institute (“DIS”) — the average value of claims filed increased from EUR 3.8 million (USD 4.2 million) in 2016 to EUR 13.9 million (USD 15.9 million) in 2020;<sup>25</sup> and
- the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”) — between 2016 and 2020, the average amount in dispute in new cases increased from EUR 8.0 million (USD 8.2 million) to EUR 9.4 million (USD 10.0 million), with a record year in 2018 when the average amount in dispute rose to EUR 87.5 million (USD 89.5 million) despite a reduction in the number of cases.<sup>26</sup>

21 *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1.

22 ICC’s 2021 arbitration rules raised the threshold for EPP from USD 2 million to USD 3 million for arbitration agreements concluded on or after 1 January 2021. Source: 2021 ICC Arbitration Rules Article 1.

23 *LCIA Annual Casework Report, 2010-2019*.

24 *VIAC Statistics, 2016-2020*.

25 *DIS Statistics, 2016-2020*.

26 *SCC Statistics, 2016-2020*.

There is no clear trend in the average value of claims filed with SIAC since 2015. The average value of claims ranges from a low of SGD 19.3 million (USD 14.0 million) in 2017 to a high of SGD 55.6 million (USD 40.3 million) in 2016, which reflected the effect of the highest sum in dispute for a SIAC case amounting to SGD 5.0 billion (USD 3.6 billion). Table 3 below shows the average value of claims filed a year with SIAC.

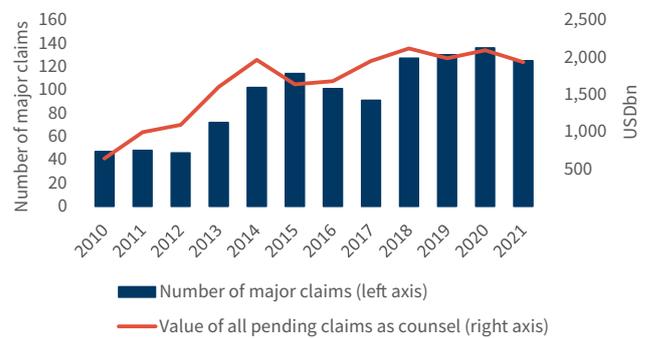
**TABLE 3 - AVERAGE VALUE OF CLAIMS FILED WITH THE SIAC, 2015 TO 2020**

YEAR	AMOUNT (SGD MILLION)	AMOUNT (USD MILLION)
2015	23.0	16.7
2016	55.6	40.3
2017	19.3	14.0
2018	32.8	23.8
2019	41.8	31.0
2020	25.5	19.3

Source: SIAC Annual Reports 2015 to 2020; Capital IQ.

Global Arbitration Review's ("GAR") annual examination of the cases being handled by leading international arbitration law firms (the GAR 30) provides further insights, as summarised in Figure 2.

**FIGURE 2 - NUMBER OF MAJOR CLAIMS AND AGGREGATE VALUE OF TOTAL CLAIMS IN THE GAR 30 FROM 2010 TO 2021**



Note: GAR classified claims as "bet-the-company-hearings", which we have termed "major claims" in this table, if they exceeded USD 900 million (2010-12) or USD 1 billion (2013-21). Source: GAR 30, 2010-2021; The GAR 30 Commentary and Analysis, 2012 and 2013.

The number of major claims in the GAR 30 has increased, from 91 claims in 2017 to 125 claims in 2021. In addition, the total value of claims handled by the GAR 30 has significantly increased since 2010, from USD 643 billion to USD 1.9 trillion in 2021.

However, the GAR 30 statistics are self-reported, and can reflect the same case more than once. The statistics can also be distorted by the occasional "mega-claim".



## Nationality of parties<sup>27</sup>

Case statistics typically show the jurisdictions through which parties' investments pass, rather than their true origin, although a closer reading can reveal underlying trends in disputes. For instance, the British Virgin Islands and Cyprus are frequently used by Russian investors.

Similarly, there are broad patterns in the choice of venues by various nationalities for the arbitration of disputes. For example, many Indian entities have favoured Singapore,<sup>28</sup> while parties from Eastern Europe and the former Soviet Union have favoured Sweden.<sup>29</sup>

Table 4 below shows the geographic origin of parties to claims, as reflected in the most recent filings at the seven arbitration centres in our sample that have reported such statistics.

**TABLE 4 - NATIONALITY OF PARTIES INVOLVED IN ARBITRATION CASES, LATEST REPORTED YEAR, REPORTING INSTITUTIONS ONLY**

INSTITUTION	ASIA				
	AFRICA	PACIFIC	AMERICAS	EUROPE	OTHERS <sup>(3)</sup>
ICSID <sup>(1)</sup>	27%	7%	32%	34%	0%
ICC	7%	26%	27%	40%	0%
LCIA	12%	20%	15%	54%	0%
SCC	0%	3%	3%	94%	0%
SIAC <sup>(2)</sup>	2%	87%	6%	5%	0%
SAC <sup>(2,3)</sup>	0%	14%	6%	69%	11%
VIAC <sup>(2)</sup>	1%	6%	0%	93%	0%
<b>Weighted average<sup>(4)</sup></b>	<b>6%</b>	<b>37%</b>	<b>17%</b>	<b>41%</b>	<b>0%</b>

Notes: (1) "Eastern Europe and Central Asia" is included as Europe for the purpose of this table. (2) SIAC and Swiss Arbitration Centre ("SAC") figures cover the year 2019. (3) "Others" refers to South America, Africa and Oceania at SAC. (4) FTI Consulting's calculation of each region's weighted average share of total parties. Source: Institutions' websites.

Parties from Europe represented the majority of parties in all forums except for SIAC, which unsurprisingly has a very high proportion of parties from Asia. European parties represent

the largest group of users by weighted average (41 percent of all parties) among these seven institutions, followed closely by Asia (37 percent) and the Americas (17 percent).

Table 5 below examines the changing composition of the parties over the period from 2010 to the latest reported year for the same seven arbitration centres.

**TABLE 5 - CHANGES IN THE NATIONALITY OF PARTIES FROM 2010 TO THE LATEST REPORT YEAR, PERCENTAGE POINTS**

INSTITUTION	ASIA				
	AFRICA	PACIFIC	AMERICAS	EUROPE	OTHERS
ICSID <sup>(1)</sup>	0%	(1%)	(6%)	7%	0%
ICC	1%	6%	3%	(10%)	0%
LCIA	8%	1%	(7%)	(1%)	0%
SCC	(1%)	(2%)	(2%)	4%	0%
SIAC <sup>(2)</sup>	0%	6%	(3%)	(3%)	0%
SAC <sup>(2)</sup>	0%	1%	3%	(6%)	2%
VIAC <sup>(3)</sup>	1%	2%	(4%)	0%	0%
<b>Weighted average<sup>(4)</sup></b>	<b>1%</b>	<b>13%</b>	<b>(3%)</b>	<b>(11%)</b>	<b>0%</b>

Notes: (1) We include "Eastern Europe and Central Asia" as Europe for the purpose of this table. (2) SIAC and SAC latest figures at the time of writing cover the year 2019. (3) The base year of comparison for VIAC is 2011, as there are no data in 2010. (4) FTI Consulting's calculation of each region's change in weighted average share of total parties. (5) Green and red highlighted cells represent a 5 percent or more increase or decrease across the period. Source: Institutions' websites.

The table above shows a material relative decline in parties from the Americas in ICSID and LCIA disputes, a relative decrease in parties from Europe and a relative increase in parties from Asia and the Pacific in the ICC and SIAC. In aggregate, the most material changes are a 13 percentage point increase in Asian parties and a decrease in European parties of 11 percentage points between 2010 and the latest report year.

In this way, continued faster economic growth in the Asia Pacific region compared with Europe and the Americas is reflected in the rise in the share of parties from that region participating in international arbitration disputes.

<sup>27</sup> The statistics on nationality of parties presented in this section do not distinguish between domestic and international arbitration cases. Nonetheless, except for SCC and VIAC, the arbitral institutions we review mainly oversee international cases.

<sup>28</sup> Indian parties have been the largest group of users represented at SIAC in nine out of the most recent 11 years. Source: *SIAC Annual Reports, 2010-2020*.

<sup>29</sup> The total number of parties from these states comes second to the number of Swedish parties at the SCC for all years we have data for. Source: *SCC Statistics, 2010 and 2012-2020*.

# Prospects of investor-state dispute settlement

ISDS has come under increasing scrutiny over recent years. Perceived issues with the ISDS system include a lack of transparency in investment disputes, a lack of consistency and predictability of decisions, the role and degree of independence of the arbitrators, and the high administrative costs.<sup>30</sup> Reform efforts are under way to establish a permanent investment court system to resolve investment disputes, in place of international arbitration tribunals, which seeks to address these perceived issues.<sup>31</sup>

According to the 2020 Queen Mary University survey on investors' perceptions of ISDS, more than 75 percent of investors agreed that ISDS could be reformed for higher efficiency and consistency, though more than 70 percent of respondents said they were in fact satisfied with existing arbitration mechanisms.<sup>32</sup> That said, among the 17 new international investment agreements concluded in 2020, only two (Hungary-Kyrgyzstan, Japan-Morocco) directly provided for arbitration in investor-state disputes, while the rest do not at present.<sup>33</sup>

In Europe, the EU continues to push for the establishment of a multilateral investment court ("MIC") that will replace bilateral investment court systems ("ICS"), the current procedural mechanism stipulated by investment and trade agreements with Canada, Mexico, Singapore and Vietnam.<sup>34</sup> Both the EU-Canada Comprehensive Economic and Trade Agreement ("CETA") and the EU-Vietnam Free Trade Agreement ("EVFTA") include provisions for the eventual transition from ICS to the MIC. Under the MIC system, disputes will be referred to permanent tribunals and parties in dispute may choose their arbitrators from a roster of full-time appointees.<sup>35</sup>

On 5 May 2020, 23 member states of the EU signed an agreement for the termination of intra-EU BITs (the "Termination Agreement"). According to the European Commission, "the termination agreement implements the March 2018 European Court of Justice judgment (*Achmea case*), where the Court found that investor-State arbitration clauses in intra-EU bilateral investment treaties ('intra-EU BITs') are incompatible with the EU Treaties."<sup>36</sup> The *Achmea* judgment implies that European investors cannot claim damages against EU member states in cases that involve expropriation, or unfair or discriminatory treatment.<sup>37</sup> Upon entering into force, the Termination Agreement affects intra-EU BITs in the relevant EU member states and extinguishes any sunset clauses contained in those BITs, such that treaty protections do not extend beyond the date of termination.<sup>38</sup> The *Achmea* judgment has played a role in ECT reforms, which may provide for ECT disputes to be resolved at the MIC.<sup>39</sup> More recently, in September 2021, the European Court of Justice issued a landmark ruling that said intra-EU investment disputes were not covered by the investor-state arbitration clause of the ECT.<sup>40</sup>

Post-Brexit, the new EU-UK Trade and Cooperation Agreement set out limited legal protections for investors and does not contain an investor-state enforcement mechanism. Instead, investors must rely on the UK or EU to take on their case in a state-to-state arbitration.<sup>41</sup>

30 "The Multilateral Investment Court Project: The "Judicialization" of Arbitration?"; Garrigues, 24 July 2019.

31 *Multilateral Investment Court*, European Parliamentary Research Service, January 2020, page 1.

32 *2020 QMUL-CCIAG Survey — Investors' Perceptions of ISDS*, May 2020, pages 7 and 10.

33 *International Arbitration in 2021*, Freshfields Bruckhaus Deringer LLP, page 20.

34 "Commission presents procedural proposals for the Investment Court System in CETA", European Commission, 11 October 2019.

35 *Multilateral Investment Court*, European Parliamentary Research Service, January 2020, pages 2 and 3.

36 "EU member states sign an agreement for the termination of intra-EU bilateral investment treaties", European Commission, 5 May 2020.

37 Lavranos, N., "The EU Plurilateral Draft Termination Agreement for All Intra-EU BITs: An End of the Post-Achmea Saga and the Beginning of a New One", *Kluwer Arbitration Blog*, 1 December 2019.

38 "Termination of Intra-EU Bilateral Investment Treaties What's Next for Investor Claims?" *Sidley Austin*, 12 May 2020; *Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union*, 29 May 2020.

39 Schacherer, S., "The uncertain future of the Energy Charter Treaty: Belgium asks the European Court of Justice to rule on the compatibility of the modernized ECT with EU law", *International Institute for Sustainable Development Investment Treaty News*, 23 March 2021.

40 Sanderson, C., "ECJ says ECT doesn't cover intra-EU disputes", *Global Arbitration Review*, 2 September 2021.

41 Schwedt et al., "Investment Protection in the EU-UK Trade and Cooperation Agreement", *Kluwer Arbitration Blog*, 9 January 2021.

# Trends in international arbitration across geographies

In this section, we review key themes and developments by region.

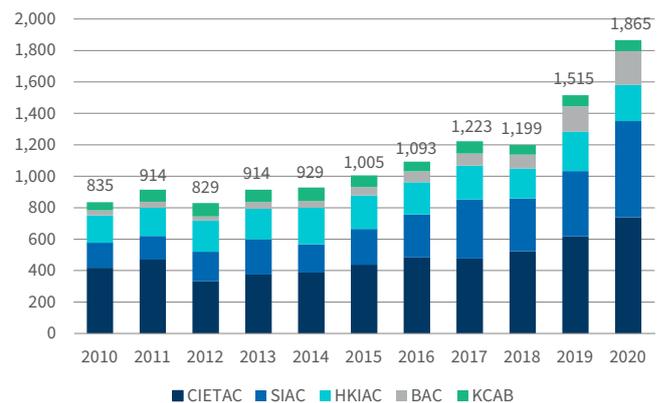
## Growth in Asia

Since 2008, Asia has taken an increasing share of booming worldwide FDI, with its FDI inward stock representing 20 percent of global FDI in 2008 and 25 percent in 2020.<sup>42</sup> In November 2020, 15 Asia Pacific states entered into the Regional Comprehensive Economic Partnership (“RCEP”) — the largest trade agreement to date worldwide.<sup>43</sup> The relevance of Asia’s arbitral institutions on the world stage has moved in lockstep with the growth of economic activity and cross-border trade and investment in the region.

In Figure 3, we analyse the number of new international cases filed at arbitral institutions in Asia, including the China International Economic and Trade Arbitration Commission (“CIETAC”), SIAC, the Hong Kong International Arbitration Centre (“HKIAC”), the Beijing Arbitration Commission (“BAC”) and the Korean Commercial Arbitration Board (“KCAB”). The figures reveal a general increase in the number of filings from 835 cases in 2010 to 1,515 in 2019, representing an annual growth rate of 7 percent. In 2020, we observed 1,865 cases, a 23 percent increase in the number of filings compared with 2019.

*“The relevance of Asia’s arbitral institutions on the world stage has moved in lockstep with the growth of economic activity and cross-border trade and investment in the region.”*

**FIGURE 3 - INTERNATIONAL CASES FILED IN ASIAN ARBITRAL INSTITUTIONS FROM 2010 TO 2020**



Note: We estimate SIAC’s 2020 international caseload at 612, after excluding 406 cases from two sets of related cases from SIAC’s reported international caseload of 1,018. Source: Institutions’ websites; and Vijayan, K.C. 2021, “International arbitration to grow but challenges ahead”, *The Straits Times*, 28 June 2021.

SIAC appears to have gained a considerable advantage over its regional arbitration institution competitors. Between 2010 and 2019, SIAC saw a ~260 percent increase in the number of international cases filed, from 158 cases in 2010 to 416 cases in 2019, and from 19 percent to 27 percent of total new international cases in Asia.<sup>44</sup> In 2020, SIAC witnessed a record-breaking number of international case filings of 612, a 47 percent increase on 2019, after excluding 406 cases from two sets of related cases.<sup>45</sup>

<sup>42</sup> *World Investment Report 2021: Investing in Sustainable Recovery*, UNCTAD, Annex table 2; UNCTAD STAT.

<sup>43</sup> Petri, P.A. and Plummer, M., “RCEP: A new trade agreement that will shape global economics and politics”, *Brookings*, 16 November 2020.

<sup>44</sup> *SIAC Annual Reports*, 2019 and 2020. The market shares of SIAC in Asia are estimated based on the total number of international cases filed at CIETAC, SIAC, HKIAC, BAC and KCAB.

<sup>45</sup> Vijayan, K.C. 2021, “International arbitration to grow but challenges ahead”, *The Straits Times*, 28 June 2021.



Indian parties have been the largest group of users represented at SIAC in nine out of the most recent 11 years, demonstrating SIAC as a preferred choice for Indian parties. At 31 percent, Indian parties topped the user rankings for SIAC arbitration in 2019.<sup>46</sup>

The increase in filings appears to be at least partly a result of SIAC's efforts to promote Singapore as a venue for arbitration, with the opening of its third representative office in New York in 2020 after its first two in India (Mumbai in 2013, Gujarat in 2017).<sup>47,48</sup> In December 2020, the government of Singapore introduced two amendments to the International Arbitration Act that had been subject to public consultation in 2019, which some commentators see as enhancing Singapore's appeal as a leading arbitral seat.<sup>49</sup> The amendments relate to (i) powers to enforce confidentiality obligations, and (ii) the introduction of a default mode of appointment of arbitrators in multiparty cases.<sup>50</sup>

*“Furthermore, a 2021 international arbitration survey, by Queen Mary University of London and law firm White & Case, ranked Singapore for the first time jointly with London as the top seat of arbitration in the world.”*

Furthermore, a 2021 international arbitration survey, by Queen Mary University of London and law firm White & Case, ranked Singapore for the first time jointly with London as the top seat of arbitration in the world. SIAC was additionally rated the most preferred arbitral institution in Asia Pacific and the second most preferred arbitral institution globally.<sup>51</sup>

HKIAC's international arbitration caseload over the past decade has remained largely constant at around 200 cases a year, and its market share in Asia decreased from 21 percent in 2010 to 16 percent in 2019. Recent political developments in and involving Hong Kong, such as the introduction of the National Security Law in mid-2020 in response to social unrest in 2019, U.S.-China trade tensions and the recent G7 Summit, which presented a more united front against China's trade practices and human rights record, may affect the city's position as one of the world's leading arbitration centres.<sup>52</sup> For instance, in 2020, a major contributor to SIAC's caseload was U.S. parties that may (whether or not with reason) prefer to avoid the potential difficulties in Hong Kong, especially for cases without a clear link to China.<sup>53</sup>

46 SIAC Annual Reports, 2010-2020; SIAC Annual Report, 2019, page 16.

47 “SIAC India Representative Offices”, SIAC, accessed 28 October 2021.

48 “SIAC Opens Office in New York and Announces New Record Caseload”, SIAC, 3 December 2020.

49 “Amendments to the Singapore International Arbitration Act come into force”, Allen & Overy, 7 December 2020.

50 International Arbitration (Amendment) Act 2020.

51 2021 International Arbitration Survey: Adapting arbitration to a changing world, White & Case, page 9.

52 “Timeline of events — The national security law's impact on Hong Kong”, The Straits Times, 12 November 2020; “Hong Kong losing to Singapore as venue for arbitration”, The Straits Times, 23 July 2020; Wingrove, J., Jacobs, J. and Sink, J., “G-7 Haggles over Strong US Push to Counter China's Clout”, Bloomberg, 12 June 2021.

53 There was a significant increase in the numbers of parties from the U.S. from 65 in 2019 to 545 in 2020. SIAC Annual Report, 2020, page 4; and Palma, S., Ruehl, M. and Kinder, T., “Singapore reports record number of arbitration cases”, Financial Times, 2 April 2021.

However, the total value in dispute in HKIAC's cases in 2020 was slightly higher than in those of SIAC at USD 8.8 billion, representing a 180 percent increase from 2019 and a record high since 2011. Moreover, Hong Kong was behind only Singapore and London as a preferred seat for international arbitration worldwide.<sup>54</sup>

On 1 October 2019, an agreement known as the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of Hong Kong Special Administrative Region (the "Arrangement") entered operation. For arbitrations seated in Hong Kong and administered by qualified institutions such as the ICC, HKIAC and CIETAC Hong Kong Arbitration Centre, the Arrangement allows parties to obtain interim measures from Chinese courts that will be enforceable in Mainland China.<sup>55</sup> Several amendments designed to enhance the Arrangement were enacted in the Arbitration (Amendment) Ordinance 2021 and came into effect on 19 May 2021.<sup>56</sup> The Arrangement will enhance Hong Kong's position as a preferred seat for any arbitration clause in a contract involving a Chinese party, including those in connection with the Belt and Road Initiative.<sup>57</sup>

BAC has also seen a strong increase in the number of international cases, from 32 cases in 2010 to 215 cases in 2020, representing 4 percent and 12 percent of total new cases in Asia in 2010 and 2020, respectively.<sup>58</sup> With

the intention of boosting its competitiveness, the BAC released an amended arbitration and fee schedule in September 2019. The amendments aim to increase the efficiency of the arbitration process, address issues raised by stakeholders and revise its fee structure to align Chinese arbitral practice with international standards.<sup>59</sup>



**James Nicholson**, who leads FTI Consulting's valuation-oriented disputes practice in Asia, observes: *"Asia has been the main engine of global economic growth for the last 20 years, and both China and India, among others, have greatly internationalised their cross-border investment and trading activity. This has driven cross-border dispute activity in the region and underpinned the rapid expansion of the regions' vibrant and world-class dispute resolution capabilities in terms of institutions and legal practitioners. However the current tensions over Hong Kong play out, we expect post-COVID-19 Asia to continue its rapid development in absolute terms and in relation to Europe and North America."*

<sup>54</sup> 2021 International Arbitration Survey: Adapting arbitration to a changing world, White & Case, page 9.

<sup>55</sup> "Landmark Arrangement on Interim Relief Protection in China for Hong Kong Arbitrations", Baker McKenzie, 27 September 2019; "Interim Measures in Aid of Arbitration: One year anniversary of the Mainland China-Hong Kong Interim Measures Arrangement and how it is working in practice", Clifford Chance, 9 December 2020.

<sup>56</sup> "Arbitration (Amendment) Ordinance 2021 comes into effect 19 May 2021", Deacons, 8 April 2021.

<sup>57</sup> "Landmark Arrangement on Interim Relief Protection in China for Hong Kong Arbitrations", Baker McKenzie, 27 September 2019.

<sup>58</sup> Table 1.

<sup>59</sup> "A brief Introduction to the BAC Arbitration Rules 2019 and Annexes concerning Schedules of Fees", BAC, 29 August 2019.

Mumbai Centre for International Arbitration (“MCIA”) was established in 2016 with the aim of becoming India’s premier forum for commercial dispute resolution. Within the first five years of its formation, MCIA has reported an increase in the number of international cases since its first case in 2018 to four cases in 2020.<sup>60</sup> The total value in dispute in MCIA’s arbitration cases in 2020 alone was more than USD 180 million.<sup>61</sup> In 2020, the Indian courts set important precedents to recognise institutional arbitration in India, referring three new ad hoc arbitrations to be administered by the MCIA under its rules.<sup>62</sup> The popularity and growth of the MCIA are further evidenced through its expansion of two new secretariats in other cities in India (Delhi in the north and Bengaluru in the south), in addition to its headquarters in Mumbai.<sup>63</sup> To advance India’s journey in the field of global arbitration further, the Arbitration and Conciliation (Amendment) Act 2021 was notified in the *Gazette of India* in March 2021. This act limits the provision of unconditional stays of enforcement for arbitral awards, with the intent of improving efficiency and promoting India as a hub of international commercial arbitration.<sup>64</sup>

*“India has been a strong contributor to Asia and global growth and will remain one of the fastest-growing economies for the foreseeable future.”*



**Karthik Balisagar**, who leads FTI Consulting’s Economic and Financial Consulting practice in India, shares his thoughts on

disputes in the country: *“India has been a strong contributor to Asia and global growth and will remain one of the fastest-growing economies for the foreseeable future. This is enabled by strong domestic investment and consumption, continuous investments by global businesses in India and almost simultaneously increasing investments by Indian business in other geographies. Such developments have contributed to increases in cross-border and domestic dispute activity (also visible from the increasing SIAC and ICC cases involving Indian parties), which is now supported by a progressive judiciary, growth in dispute resolution capabilities (including in the form of arbitral institutions and adoption of technology), adoption of global best practices and highly qualified legal practitioners. While India — like all other major jurisdictions — was adversely affected by COVID-19 (including the massive toll on human life), we expect consumer confidence, growth and investments to return to pre-pandemic levels quickly and wider disputes infrastructure to continue to develop. It also appears the earlier conversations around the liberalisation of the legal market are back on the table, which will only further help in the rapid development of the legal profession in India. We expect to see increased activity in the renewables sector as India is committed to the clean energy transition, evidenced by its pledges at COP26.”*

60 Mumbai, S.S., “Arbitration centre in city pushes to be among global best”, *The Hindu*, 5 August 2019; *MCIA Annual Report*, 2020, page 3.

61 *MCIA Annual Report*, 2020, page 4.

62 Ray, A., “Interviews with Our Editors: Mapping India’s Institutional Arbitration Journey with Mumbai Centre for International Arbitration (MCIA)”, *Kluwer Arbitration Blog*, 19 February 2021.

63 MCIA’s website.

64 Kumar, A. 2021, “Making India a global hub for arbitration”, *The Hindu BusinessLine*, 24 March 2021.

## Renewal in the Middle East

In March 2018, the UAE's Federal National Council approved a new federal law on arbitration based on the UNCITRAL Model Law. Arbitration in the UAE had been hindered by the lack of a stand-alone federal arbitration law, particularly relating to uneven application by courts and lengthy enforcement proceedings.<sup>65</sup> The harmonised law bolstered confidence in the UAE's arbitration regime and addressed the ambiguities and risks that were endemic to the absence of a modern arbitration framework.<sup>66</sup>

In the meantime, in the Middle East, in 2019, the DIAC experienced a 29 percent increase to 208 cases filed from 161 cases in 2018. In the same period, the Dubai International Financial Centre ("DIFC")-LCIA reportedly oversaw an 18 percent rise in cases. In September 2021, plans to consolidate the DIFC-LCIA and the Emirates Maritime Arbitration Centre within a "revamped" DIAC were announced.<sup>67</sup> At the time of publication, we understand that these arrangements are being implemented.

In Abu Dhabi, the Abu Dhabi Commercial Conciliation and Arbitration Centre reputedly continues to see increasing case numbers, and in 2021, the ICC opened a case management office located at Abu Dhabi Global Market.<sup>68</sup> This is the fifth such ICC office globally, the others being located in Hong Kong, New York, São Paulo and Singapore. The office will cater to ICC arbitration users in the Gulf Cooperation Council ("GCC") and wider region, and reflects that in 2018 and 2019 the UAE ranked in the top 10 most frequent nationalities among parties involved in ICC-administered arbitrations.



**Steve Harris**, a Senior Managing Director in the International Arbitration practice who founded FTI Consulting's expert witness

valuation and damages practice in Dubai, comments as follows: *"Over the past 12 months we have seen a broad range of disputes pertaining to different industries, seated in Dubai and elsewhere in the region. This is the continuation of a trend that has been evident in recent years, and reflects the diversification of the economic environment across the Gulf Cooperation Council, as well as the evolution of the infrastructure for resolving commercial disputes through international arbitration. Having said that, disputes involving energy assets, real estate assets and construction projects continue to be prevalent, and probably account for the majority of high-value mandates that we see in the region. Also over the past 12 months we have seen disputes arise in the GCC due to economic pressures and other factors introduced by COVID-19. These cases introduce interesting new issues to grapple with from a damages perspective."*

<sup>65</sup> "The widely anticipated UAE law on arbitration — an end in sight?" *White & Case*, 8 August 2017; "The Year Ahead: Developments in Global Litigation and Arbitration in 2018", *Baker McKenzie*, page 15.

<sup>66</sup> Al Mulla, H. and Mackenzie, A., "UAE Approves New Federal Law on Arbitration", *Global Arbitration News*, 19 March 2018.

<sup>67</sup> Rigby, B., "Dubai arbitration cases jump to fresh record as construction disputes predominate", *The Global Legal Post*, 22 November 2020; "Dubai Abolishes DIFC-LCIA Arbitration Centre and Moves to Revamp DIAC Arbitration", *Linklaters*, 24 September 2021.

<sup>68</sup> "ICC Court to open 5th overseas case management office in ADGM", *ICC*, 21 December 2020.

## Rise in Africa

In recent years, arbitration has gained a foothold in Africa as there has been continued growth in the acceptance of arbitration as a viable option for settling disputes. “The number of arbitral centres across the African continent is growing rapidly, and African lawyers are developing specialist arbitration skills to service this growth”, according to one set of observers.<sup>69</sup>

Foreign investment in many African states is bound by BITs, most of which provide for arbitration as the dispute resolution mechanism between investors and states.<sup>70</sup> Some 49 African states are ICSID contracting states.<sup>71</sup>

Based on ICSID’s 2020 caseload statistics, approximately 27 percent of registered cases under the ICSID Convention and Additional Facility Rules involved an African state party.<sup>72</sup> According to the ICC’s 2020 statistics, parties from African states represented approximately 6.8 percent of all parties to ICC Arbitration.<sup>73</sup>



69 Ostrove, M., Sanderson, B. and Veronelli, A.L., “Developments in African Arbitration”, *Global Arbitration Review*, 10 May 2018.

70 Hartwell, M. “Arbitration in Africa: A review of recent regional activities”, *Norton Rose Fulbright International Arbitration Report*, September 2019.

71 *Id.*

72 *The ICSID Caseload — Statistics: Issue 2021-1*, page 12.

73 *ICC Dispute Resolution Statistics, 2020*, page 10.

## Front-running in Europe

On 31 December 2020, the UK formally departed the EU. Currently, the Hague Choice of Court Agreements Convention is the only treaty framework for enforcing court judgments between the UK and EU, but this is limited in scope — it only applies to exclusive jurisdiction clauses entered into after the convention came or comes into force in the state chosen in the choice of court clause.<sup>74</sup> As such, parties may consider opting for arbitration instead of litigation, with the potential effect of boosting London’s popularity as a seat for international arbitration. As the UK is still establishing new trading relationships, it remains to be seen whether these trade agreements will contain provisions for ISDS; investors may still rely on the UK’s BITs for protection.<sup>75</sup>

Historical and well-established centres throughout Western Europe have faced new competition from centres in Asia and elsewhere during the last decade. Arbitration centres such as the ICC, LCIA and SCC continue to maintain their leading position despite this competition. The 1,352 international cases administered by these three institutions represented approximately 37 percent of all commercial claims filed globally in 2019, an increase in overall cases (1,130) but a slight fall in percentage terms (42 percent) from 2010.<sup>76</sup> Since October 2020, both LCIA and ICC have updated their arbitral rules; the latter specifically requires the disclosure of the identity of third-party funders for avoidance of conflicts of interest.<sup>77</sup> Innovations such as the appointment of emergency arbitrators were introduced to the ICC in 2012 and to the LCIA in 2014, as well as expedited procedures to LCIA in 2014 on an opt-in basis and to the ICC in 2017 (EPP).<sup>78</sup>

Most of the major European institutions broke their own caseload records during the last three years. For example,

*“Most of the major European institutions broke their own caseload records during the last three years.”*

the ICC recorded a total of 946 cases in 2020, which marks a record year in its almost 100-year history.<sup>79</sup> The LCIA has also reported a record number of new cases, with a total of 440 arbitration referrals received in 2020. This represents an increase of 11 percent on 2019’s figures, and nearly 39 percent on 2018’s figures.<sup>80</sup>



**Mark Bezzant**, Head of FTI Consulting’s Economic and Financial Consulting practice in EMEA and Asia Pacific, comments

as follows: *“Parties continue to bring their disputes to established forums in Europe such as the ICC and LCIA, as the recent surge in caseloads indicates. As reported by others, COVID-19-related claims are beginning to emerge, although many practitioners are already looking beyond COVID-19 to assess the possibilities for Environmental, Social and Corporate Governance (“ESG”)-related disputes — as regards both investor-state and commercial arbitrations, with the energy sector and climate change being the primary interests. The structures for resolution of UK-related trade and other disputes post-Brexit are still taking shape, but there remains much to keep legal advisors and experts active in the interim.”*

<sup>74</sup> *International Arbitration in 2021*, Freshfields Bruckhaus Deringer LLP, page 16; Carter et al. “Brexit: Choice of Law, Jurisdiction, Enforcement, and Service”, *Lexology*, 27 November 2020.

<sup>75</sup> *International Arbitration in 2021*, Freshfields Bruckhaus Deringer LLP, page 17.

<sup>76</sup> Table 1.

<sup>77</sup> Commission, J. and Lee, M., “2021 Trends in International Arbitration”, *Burford Capital*, 10 February 2021.

<sup>78</sup> “Seven years since ‘emergency’ was declared by ICC — do we know what a real emergency is?”, *Allen & Overy*, 2 April 2019; LCIA Notes on Emergency Procedures, 29 June 2015; “2017 ICC Dispute Resolution Statistics show steady growth”, *Herbert Smith Freehills*, 14 March 2018.

<sup>79</sup> The figure is slightly lower than the 966 cases filed in 2016, which included 135 related small-claim cases arising from a collective dispute. “ICC celebrates case milestone, announces record figures for 2019”, *ICC*, 9 January 2020; and *ICC Dispute Resolution Statistics*, 2018.

<sup>80</sup> *LCIA Annual Casework Report*, 2019 and 2020.



### North American international trade agreements and investor-state dispute settlement

In the U.S., a new United States-Mexico-Canada Agreement (“USMCA”) entered into force on 1 July 2020. The USMCA replaced the North American Free Trade Agreement (“NAFTA”), which had been in effect since 1994.<sup>81</sup> NAFTA had enabled a free trade zone between the economies of the U.S., Canada and Mexico. However, NAFTA’s Chapter 11, which sets forth an ISDS mechanism with protections comparable to those in 1990s-era BITs, had unintended consequences of parties asserting claims against their own governments.<sup>82</sup>

Under the new USMCA, ISDS is very limited for covered sectors and unavailable between the U.S. and Canada. The USMCA also offers a more restricted scope of investment protections between Mexico and the U.S., which are less favourable for foreign investors than those under NAFTA. For instance, investors from Mexico to the U.S., and vice versa, are only granted the minimum standard of treatment under international law, making

them less able to claim a breach of the minimum standard — historically the broadest protection available to investors.<sup>83</sup> U.S. and Mexican investors are required to litigate claims in their domestic courts first, and may only commence ISDS proceedings following a final decision of a court of last resort or 30 months after the initiation of domestic litigation.<sup>84</sup>



**Randal Heeb**, a Senior Managing Director at FTI Consulting who is based in Washington, DC and leads the North American

Litigation and Dispute Resolution practice, comments as follows: *“COVID-19 has affected disputes in many unexpected ways. Remote hearings were quickly adopted and surprisingly seamless, with many considering it a viable option in the post-pandemic world. Save perhaps for majeure-related issues, the expected spike in COVID-19-related disputes is yet to materialise, perhaps due to parties renegotiating contracts or others adopting a ‘wait and see’ approach. We have seen and expect an increase in post-acquisition and other disputes, and continued activity in the resources sector.”*

*“COVID-19 has affected disputes in many unexpected ways. Remote hearings were quickly adopted and surprisingly seamless, with many considering it a viable option in the post-pandemic world.”*

81 “United States-Mexico-Canada Agreement”, *U.S. Trade Representative*, accessed 16 April 2021.

82 Mann, H. and van Moltke, K., “NAFTA’s Chapter 11 and the Environment — Addressing the Impacts of the Investor-State Process on the Environment”, *International Institute for Sustainable Development*, 1999, page 5; Valasek, M.J., Fitzgerald, A.G. and de Jong, J.A., “Major changes for investor-state dispute settlement in new United States-Mexico-Canada Agreement”, *Norton Rose Fulbright*, October 2018.

83 “The United States-Mexico-Canada Agreement: Reduced Investment Protection in Mexico, the United States and Canada”, *Kirkland & Ellis*, 18 October 2018.

84 H. Dubovoy et al., “USMCA Restricts Access to International Arbitration”, *Baker McKenzie*, 14 February 2020.

## Decisive time in Latin America

Latin America has recently been known for its scepticism towards ISDS, as marked by the denunciation of several BIT treaties and the ICSID Convention by Bolivia (2005), Ecuador (2009) and Venezuela (2012), and the fact that Brazil — the largest economy in the region — has only two BITs in force.<sup>85</sup> However, this has not caused a decrease in the number of arbitration claims against states, as many of the denounced treaties have sunset clauses that remain effective for years.

Latin American states have been gradually deploying international arbitration to settle trade and investment disputes. Based on the statistics released by the ICC for 2020, parties originating from countries in Latin America and the Caribbean represented 15.8 percent of all ICC parties in 2020. Among Latin American and Caribbean parties, Brazil was the most represented nationality, ranking second worldwide with a total of 150 parties participating in ICC cases in 2020.<sup>86</sup>

To meet the growing demand for dispute settlement in the region, arbitral institutions have increased their presence in Latin America. In May 2017, the ICC Court established an office and a case management team, and in 2018, a hearing centre in São Paulo.<sup>87</sup> In October 2019, the PCA opened its third overseas office, in Buenos Aires.<sup>88</sup>

In April 2020, the EU and Mexico agreed to finalise details of the revised EU-Mexico free trade agreement. The agreement will increase investor protections, containing a provision for dispute resolution via an investment arbitration court system with a pre-selected pool of arbitrators. This system will not only increase the transparency of arbitrations, but also allow parties to appeal tribunal decisions.<sup>89</sup>

In February 2021, Mexico's lower house of Congress of the Union passed an electricity bill that aims to overhaul the country's electricity market and may trigger further investor-state disputes.<sup>90</sup>



**Leonardo Florencio**, a Senior Managing Director at FTI Consulting based in São Paulo, comments as follows: “*In the*

*past 10 years, a steady increase in FDI, backed by complex long-term contracts, resulted in capital flowing into resource-rich regions of Latin America. Such long-term contracts have increasingly resulted in disputes that have often been resolved by international arbitration proceedings. Cases in local arbitration chambers have also increased remarkably, given the burden of a high volume of cases in the local courts and the increased capabilities of lawyers, arbitrators and experts.*”



**Karthik Balisagar**, a Senior Managing Director at FTI Consulting with extensive experience in Latin America,

added: “*Investor-state disputes in the region could rise following regulatory changes and potential resource nationalisation as a consequence of social pressures and weak fiscal position of Latin American countries. The effects of COVID-19 on infrastructure concessions and commercial contracts may also lead to an increased number of arbitrations in the region.*”

<sup>85</sup> Although 27 BITs have been signed, only two have been approved by the Brazilian National Congress. Source: “Venezuela follows Bolivia and Ecuador with plans to denounce ICSID Convention”, *Herbert Smith Freehills*, 19 January 2012; “Investment Policy Hub — Brazil BITs”, *UNCTAD*, accessed 17 June 2021.

<sup>86</sup> *ICC Dispute Resolution Statistics*, 2020, page 10.

<sup>87</sup> Ross, A. 2018, “ICC opens hearing centre in São Paulo”, *Global Arbitration Review*, 16 March 2018.

<sup>88</sup> “Permanent Court of Arbitration to set up office in Buenos Aires”, *Permanent Court of Arbitration Press Release*, 21 October 2019.

<sup>89</sup> “EU and Mexico Announce the Finalization of an Updated Free Trade Agreement”, *Akin Gump Strauss Hauer & Feld LLP*, 29 April 2020.

<sup>90</sup> Sanderson, C., “Mexico power bill draws warning of treaty claims”, *Global Arbitration Review*, 3 February 2021; Stillman, A., “Mexico’s Lower House Passes Nationalist Electricity Bill”, *Bloomberg*, 24 February 2021.

# Trends in international arbitration across industries

At FTI Consulting, our professionals also see the following developments at an industry level across energy, construction, natural resources, financial markets and intellectual property (“IP”) — some of the areas for which we have specialists.

## Energy disputes

The energy sector remains one of the main sources of international arbitration disputes. In 2020, the energy sector represented 41 percent of new cases brought to ICSID.<sup>91</sup> Energy and resources disputes constituted 26 percent of LCIA’s caseload in 2020.<sup>92</sup>

Energy markets have rapidly moved from a pandemic induced demand shock to a war induced supply shock. Energy prices saw “exceptional movements” in 2020 and 2021, reflecting the uncertainty arising from COVID-19.<sup>93</sup> Travel restrictions and government-imposed lockdowns led to lower energy demand.<sup>94</sup> In March 2020, the price of natural gas declined to its lowest in 30 years, and in April 2020, the price of oil fell to a 20-year low.<sup>95</sup>

Russia’s invasion of Ukraine has led western countries and corporates to shun Russian petroleum products where they can easily do so. This has led to energy prices rebounding strongly as it has coincided with the reopening of many economies (China excluded). From USD 9 per barrel on 21 April 2020, Brent crude oil prices reached USD 133 per barrel on 8 March 2022 and still trade well above USD 100 per barrel.<sup>96</sup> Meanwhile, natural gas prices in Europe increased more than 280 percent during 2021 and these high prices have increased further in 2022.<sup>97</sup> The Dutch TTF Gas Futures increased from

EUR 18.5 per megawatt-hour in January 2021 to a peak of around EUR 180.0 per megawatt-hour in December 2021. TTF gas futures were priced around EUR 117.0 per megawatt-hour on 23 March 2022.<sup>98</sup>

These energy price fluctuations are expected to lead to contractual and investment disputes. These are not just due to events and potential breaches that occurred as a result of the pandemic, such as the invocation of force majeure clauses in contracts, but also due to contributing factors from broader developments in the wholesale market, such as an accelerated energy transition in Europe, coal-to-gas switching in China, war in Ukraine and high geopolitical tensions between Russia and the West.<sup>99</sup>

The global energy industry is seeing an important transition from fossil fuels to renewable energy sources as governments and businesses put in place policies to address climate change risks.<sup>100</sup> Factors such as regulatory and technological uncertainty, the investment required to adapt existing distribution networks and high initial costs of alternatives continue to be challenges to the energy transition.<sup>101</sup> Nonetheless, the pandemic and Russia’s invasion of Ukraine have accelerated the transition, and the make-up of global primary energy is forecast to change dramatically. The share of hydrocarbons in primary energy could decrease from around 85 percent in 2018 to between 20 percent and 70 percent by 2050, depending on government energy policies and shifts in social preferences. Renewable energy, which currently makes up a small share of global primary energy, could grow to between 20 percent and 60 percent of the world’s primary energy by 2050.<sup>102</sup> The energy transition may lead

91 Includes cases in the “Oil, gas & mining” sector and “Electrical power & energy sector.” Source: *The ICSID Caseload — Statistics: Issue 2021-1*, page 25.

92 *LCIA Annual Casework Report*, 2020, page 11.

93 *Global Energy Perspective 2021*, McKinsey & Company, January 2021, page 2.

94 “COVID-19 Impact: Energy Sector Year in Review 2020”, *Oxford Business Group*, 10 December 2020, page 1.

95 *Global Energy Perspective 2021*, McKinsey & Company, January 2021, page 2; “COVID-19 Impact: Energy Sector Year in Review 2020”, *Oxford Business Group*, 10 December 2020, page 1.

96 “Europe Brent Spot Price FOB (Dollars per Barrel)”, *U.S. Energy Information Administration*.

97 “Natural gas prices are skyrocketing around the world. Here’s why the US may not suffer as much”, *CNBC*, 8 October 2021; “Gas prices surge in Europe over tight Russian supplies”, *Reuters*, 4 January 2022.

98 “Dutch TTF Gas Futures – month-ahead”, *Capital IQ*.

99 Hébréard, P., “COVID-19 is shaking up the Energy Sector, with Disputes on the Horizon”, *FTI Consulting*, 15 May 2020, page 6; “China’s shift from coal helped push natural gas prices to a peak — Eurasia Group”, *CNBC*, 19 January 2021; “On the cusp of Europe’s winter season, gas storage hits 10-yr low”, *Reuters*, 23 September 2021; “Gas prices surge in Europe over tight Russian supplies”, *Reuters*, 4 January 2022; “How does the war in Ukraine affect oil prices?”, *World Economic Forum*, 4 March 2022.

100 “What is Energy Transition?”, *S&P Global*, page 1.

101 *The Energy Transition — Key challenges for incumbent players in the global energy system*, *The Oxford Institute for Energy Studies*, September 2021, pages 9-11 and 13.

102 *Energy Outlook 2020*, *BP*, pages 6 and 15.

to an increase in disputes due to issues such as stranded assets; increased needs of energy market participants, such as clean technology operators now exposed to merchant risks, to manage commodity price volatility; and the possible failure of new technologies.



**Stuart Amor**, an FTI Consulting expert recognised as one of the most eminent in energy disputes, notes:

*“The pandemic has accelerated the energy transition by focussing attention on high-impact risks such as climate change. Governments committed to a further tightening of environmental policies at the recent COP26, and these could lead over time to more volatile oil and gas prices and potentially stranded petroleum assets. Russia’s invasion of Ukraine has shone a spotlight on energy security in Europe, which will lead to acceleration of Europe’s planned move away from fossil fuels. In the short term, the size of the sector means it will continue to make up an important share of international disputes.”*

As of Q2 2021, construction output was rising in all regions.<sup>106</sup> Despite the uncertainty throughout 2020, the industry outlook and business conditions appear to be recovering steadily, although there is fresh concern over rising material costs due to supply chain bottlenecks.<sup>107</sup>



**Paul Ficca**, an FTI Consulting expert in the global Construction, Environmental and Government Contracts practice, notes:

*“We are already seeing a resurgence of construction activity, and we anticipate this activity will increase in the coming months as COVID-19 begins to run its course. We are seeing some of the largest economies making commitments to significant infrastructure spending as part of their COVID-19-era economic stimulus strategies and overall economic development plans. We also see continued robust activity by international contractors working on cross-border construction projects. As a result, we will inevitably see a rise in construction-related international arbitrations where we have been active in providing quantum and delay expertise.”*

## Construction disputes

Construction activity fell steeply in 2020 before rebounding, with the RICS Global Construction Activity Index, a measure of current and expected construction market conditions among construction professionals, registering at negative 24 in Q2 of 2020, then rising to (plus) 18 in Q3 of 2021.<sup>103</sup> Legislative changes including border closures and social distancing contributed to persisting additional material costs and shortages in the construction and infrastructure sectors, squeezing profit margins, and uncertainty around the economic recovery has added to the difficulty of obtaining financing.<sup>104</sup>

As a result of the ongoing financial distress throughout the construction and infrastructure sectors from 2020, issues such as stalled projects, reneged commitments and missed payment obligations are all expected to lead to an increased number of arbitrations related to this sector.<sup>105</sup>

## Natural resource disputes

Due to the economic effects of COVID-19, 34 countries worldwide saw an increase in resource nationalism in 2020, as indicated by Verisk Maplecroft’s 2020 Resource Nationalism Index. COVID-19 has aggravated a surge in government intervention in the natural resource sector. The study identified 18 states as mineral- and hydrocarbon-dependent, and projects resource nationalism to increase over the next two years. Mining jurisdictions in Africa and Latin America, including some of the major producers of copper and iron ore, face the highest risk of resource nationalism.<sup>108</sup> Therefore, we expect an increase in BIT disputes due to direct expropriation resulting from politically motivated resource nationalism.

<sup>103</sup> “Are signs of stability emerging in construction markets?”, *RICS*, 5 November 2020, page 1; *Global Construction Monitor Q3 2021*, *RICS*, page 1; *Global Construction Monitor Q4 2020*, *RICS*, page 1.

<sup>104</sup> *Global Construction Monitor Q1 2021*, *RICS*, pages 1 and 2; *Global Construction Monitor Q3 2021*, *RICS*, page 1; “Construction and infrastructure sector woes”, *Freshfields Bruckhaus Deringer LLP*, page 1.

<sup>105</sup> “Continuing economic woes for the construction and infrastructure sectors”, *Freshfields Bruckhaus Deringer LLP*, pages 1 and 2.

<sup>106</sup> *Global Construction Monitor Q2 2021*, *RICS*, page 1.

<sup>107</sup> *Global Construction Monitor Q4 2020*, *RICS*, page 1; *Global Construction Monitor Q2 2021*, *RICS*, page 2; “Global construction industry set to grow by 5.2 percent in 2021, according to GlobalData”, *GlobalData*, 9 April 2021.

<sup>108</sup> Blanco, J. and Machado, M.P., “Resource Nationalism Surges in 2020, COVID-19 Worsens Outlook”, *Verisk Maplecroft*, 4 March 2021.

Moving forward, the increasing focus on environmental, social and corporate governance (“ESG”), the energy transition, and geopolitics are expected to affect supply chains and security in the mining industry, presenting new possibilities for disputes to arise. Growing ESG concerns would affect the supply chain as end-product consumers are increasingly holding manufacturers accountable for the choice and origin of raw materials; mining companies may need to adapt, and face divestment from less sustainable assets such as thermal coal.<sup>109</sup> The energy transition is seeing a growing demand for metals required to generate, distribute and store electricity, potentially leading to shortages and a focus on the security of supply.<sup>110</sup> Further, geopolitical competition may intensify the competition for key strategic minerals in the future.<sup>111</sup>



**Dawna Wright**, leader of the Dispute Advisory practice in Australia and an FTI Consulting expert with particular experience

in natural resource disputes, comments: *“The existing drivers of natural resource disputes are expected to persist, such as decisions about investments in major infrastructure projects, the imbalance of power between miners and mining services providers, COVID-19-related operational changes in supply chains, the long-term nature and complexity of offtake agreements, and complex joint venture or consortium structures. Disputes also arise as the relationships and practices that are governed by agreements struck many years ago are revisited in the context of higher standards and increasing scrutiny of ESG and human rights. These drivers are subject to uncertainty, which adds to the difficulty in settling the quantum and valuations in disputes.”*



**Andrew Bantock**, an Australian-based mining industry expert for FTI Consulting, adds: *“For example, COVID-19 stimulus*

*measures have first led to a rise in iron ore and other metal prices, then to a surge of mining capital raisings and related investments; China’s trade penalties on Australia in the wake of COVID-19 have disrupted Australian coal exports and the supply chain downstream. Resource nationalism is expected to continue, with some African nations seeking to appropriate mining assets and even the Australian government strengthening foreign investment controls via its Foreign Investment Review Board (“FIRB”) process. This has significant implications for equity and joint venture stakeholders, as well as counterparties to M&A agreements, and raises the risk of disputes in the natural resource sector.”*

## Financial markets disputes

Although international arbitration has not traditionally been a popular forum for financial institutions, increasingly, financial institutions and their counsel are contemplating arbitration over traditional methods of filing claims in national courts of major financial capitals. According to ICDR, commercial cases from the financial services sector increased by 78 percent in 2018, increased by 58 percent in 2019 and fell 9 percent in 2020.<sup>112</sup> The number of cases from the banking and finance sector administered under LCIA arbitration rules also grew from 29 percent in 2018 to 32 percent in 2019.<sup>113</sup> In November 2021, the Panel of Recognised International Market Experts in Finance published a revised set of arbitration rules for 2022 — P.R.I.M.E. Finance’s Arbitration Rules — which seek to address some of the financial industry’s reservations (such as transparency; interim measures, emergency process or early determination; multiparty or contract arbitrations; efficiency; and cost-effectiveness).<sup>114</sup>

109 *Resourcing the Energy Transition: Making the World Go Round*, KPMG International, March 2021, pages 3 and 12.

110 “From OPEC to OMEC: mined metals can enable energy transition”, *KPMG Australia*, 3 May 2021.

111 *Resourcing the Energy Transition: Making the World Go Round*, KPMG International, March 2021, page 6.

112 *AAA-ICDR B2B Dispute Resolution Infographic*, 2018-2020.

113 Berger, K.P. “Arbitration in International Banking and Finance”, *University of Cologne*, page 4.

114 “Prime time for updated arbitration rules for financial disputes? A review of the P.R.I.M.E. Finance Arbitration Rules 2022”, *Mayer Brown*, 5 January 2022.

Key factors driving the use of arbitration in financial market disputes include confidentiality, speed and availability of highly specialised arbitrators. All these factors make international arbitration increasingly attractive in light of the complex nature of cases requiring niche expertise in complex financial products (such as derivatives), asset management, private and investment banking, alternative investments, trade executions intermediaries, FinTech, sustainable finance, etc. Arbitration clauses have also become increasingly common in financial transaction documents. In December 2018, the International Swaps and Derivatives Association (“ISDA”) expanded its arbitration guide to include arbitration clauses for use with a larger number of arbitration institutions and seats globally.<sup>115</sup>

In the current economic context, factors such as Brexit, the discontinuation of London Interbank Offered Rate (“LIBOR”) interest rates after the COVID-19 pandemic and the rise of ESG investments are likely to accelerate the direction of travel and cause financial market participants to increasingly rely on arbitration.

## IP disputes

International arbitration is becoming an increasingly relevant forum for the resolution of IP disputes due to the multi-state nature of such disputes and the heightened focus of businesses on defending IP rights given they are often a company’s most valuable assets. While the implementation of IP can be global, the protection of IP rights varies by jurisdiction as IP rights tend to be governed by a series of national frameworks, and different IP rights (such as patents, utility models, trademarks, copyright and design rights) demand separate frameworks.

IP disputes are supported by initiatives such as the development of the Alternative Dispute Resolution Guidelines by the World Intellectual Property Organisation (“WIPO”) and the Max Planck Institute for Innovation and Competition, an initiative to which FTI Consulting experts have contributed. The number of filings for WIPO Mediation, Arbitration, Expert Determination and Good Offices Requests was sustained despite COVID-19, rising from 179 cases in 2019 to 182 cases in 2020.<sup>116</sup>



**Bruno Campana**, an FTI Consulting expert who acts in disputes relating to complex financial instruments, comments:

*“International arbitration forums have adapted to the needs of financial market participants in terms of procedures and expertise and are now better organised to handle a variety of sizeable, and increasingly complex, financial services and banking matters. International arbitration clauses are now included in the governing documentation of various types of financial instruments such as money markets, shares, loans, bonds, funds, structured or securitised products, derivatives and capital markets transactions (such as securities lending or borrowing). International arbitration cannot be ruled out as a strategic alternative forum for financial institutions and their clients or counterparties.”*



**Andrew Wynn**, who specialises in IP disputes at FTI Consulting, notes: “We continue to see an increase in IP disputes resolved

*through arbitration. These disputes can vary hugely in size from small disputes in respect of domain names through to multi-billion licence fee disputes in relation to the use of standard-essential patents. Another area that makes for interesting and engaging case work for our experts is contractual disputes where damages are determined on a negotiating damages basis (formerly referred to as “Wrotham Park” damages). In these cases, damages are determined based on the hypothetical release fee that would have been agreed between willing parties to release the contract breaker from the breached clause. Despite the clarifications provided in the UK Supreme Court case, Morris-Garner v. One Step, this still appears to be an area of law that is open to considerable interpretation, which makes the expert work in this area interesting and challenging.”*

115 Zambelli, M., “LIDW 2019: The Rise of Arbitration in Financial Services Disputes”, *Kluwer Arbitration Blog*, 7 May 2019.

116 WIPO Caseload Summary 2011-2020, page 1.

## Looking to the future

The COVID-19 pandemic has caused mounting political, economic and social effects that will have an impact on international arbitration in the years to come. Businesses are facing unprecedented levels of instability and disruptions to their supply chains. Many construction and manufacturing projects have been delayed or cancelled, and global transportation networks have been severely affected. Coupled with strained financial markets, currency fluctuation and lower levels of business activity, some businesses have become unable or unwilling to meet their contractual obligations. Therefore, we expect international commercial disputes to be on the rise. Investor-state disputes will also increase as a result of government measures taken in response to the crisis.

International arbitration has long been a preferred method to resolve cross-border disputes as parties value tribunals' ability to reach decisions relatively swiftly, and due to its inherent flexibility. This is evident from how counsel, arbitrators and arbitral institutions have transitioned quickly and effectively to deploy remote technology to minimise disruption from the restrictions imposed due to the pandemic. The use of remote hearings during this time has demonstrated that they can be an efficient and cost-saving option when in-person hearings are deemed unsafe.<sup>117</sup> Once in-person hearings return as an option, remote technology is likely to continue to facilitate the arbitral process. As more economies shift towards a period of recovery with the continuing widespread roll-out of vaccine programmes around the world, we expect cross-border economic activity to recover, which in turn will drive the growth of international arbitration disputes.

*“As more economies shift towards a period of recovery with the continuing widespread roll-out of vaccine programmes around the world, we expect cross-border economic activity to recover, which in turn will drive the growth of international arbitration disputes.”*

Notwithstanding the impact of COVID-19, globalisation has advanced at a remarkable pace over the past two decades. The number of disputes addressed through international arbitration has similarly exploded over this time frame; in our view, this is driven primarily by the internationalisation and increased complexity of economic activity. This trend is already evident in the growing role Asian arbitral institutions play in dispute resolution. We would expect to see more African involvement in arbitrations as the region catches up to Asia in output, trade flows and investments; the latest statistics from arbitration centres show that African parties are currently underrepresented. The G7's recent shift of stance to counter China on trade, evident in its planned infrastructure development to rival the Belt and Road Initiative, could have large ramifications for investment and trade disputes in the years to come. Finally, the way investor-state disputes are settled is in flux, and any developments in this area will be watched closely.

<sup>117</sup> “International Arbitration in 2021”, *Freshfields Bruckhaus Deringer LLP*, page 2.

# Glossary

<b>AAA-ICDR</b>	International Centre for Dispute Resolution, the international branch of the American Arbitration Association.
<b>Arrangement</b>	Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region.
<b>BAC</b>	Beijing Arbitration Commission.
<b>BIT</b>	Bilateral Investment Treaty.
<b>CETA</b>	Comprehensive Economic and Trade Agreement.
<b>CIETAC</b>	China International Economic and Trade Arbitration Commission.
<b>DIAC</b>	The Dubai International Arbitration Centre.
<b>DIFC</b>	Dubai International Financial Centre.
<b>DIS</b>	The German Arbitration Institute (Deutschen Institution für Schiedsgerichtsbarkeit)
<b>ECT</b>	The Energy Charter Treaty.
<b>EPP</b>	Expedited Procedure Provisions of the ICC.
<b>ESG</b>	Environmental, social and corporate governance.
<b>EU</b>	The European Union.
<b>EVFTA</b>	The European Union-Vietnam Free Trade Agreement.
<b>FDI</b>	Foreign Direct Investment.
<b>GAR</b>	Global Arbitration Review.
<b>GCC</b>	Gulf Cooperation Council.
<b>GDP</b>	Gross Domestic Product.
<b>HKIAC</b>	Hong Kong International Arbitration Centre.
<b>ICC</b>	International Chamber of Commerce.
<b>ICDR</b>	International Centre for Dispute Resolution.
<b>ICS</b>	Investment Court System.
<b>ICSID</b>	International Centre for Settlement of Investment Disputes.
<b>IMF</b>	International Monetary Fund.
<b>IP</b>	Intellectual property.
<b>ISDS</b>	Investor-state dispute settlement.
<b>ISDA</b>	International Swaps and Derivatives Association
<b>KCAB</b>	Korean Commercial Arbitration Board.
<b>LCIA</b>	London Court of International Arbitration.
<b>LIBOR</b>	London Interbank Offered Rate
<b>MIC</b>	Multilateral Investment Court.
<b>NAFTA</b>	The North American Free Trade Agreement.
<b>OPEC</b>	The Organization of the Petroleum Exporting Countries.
<b>PCA</b>	The Permanent Court of Arbitration.
<b>RCEP</b>	Regional Comprehensive Economic Partnership.
<b>SAC</b>	Swiss Arbitration Centre.
<b>SCC</b>	Stockholm Chamber of Commerce.
<b>SGD</b>	Singapore Dollars.
<b>SIAC</b>	Singapore International Arbitration Centre.
<b>Termination Agreement</b>	Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union.
<b>UNCTAD</b>	United Nations Conference on Trade and Development.
<b>UK</b>	United Kingdom.
<b>USD</b>	United States Dollars.
<b>USMCA</b>	The United States-Mexico-Canada Agreement.
<b>VIAC</b>	Vienna International Arbitral Centre.
<b>WIPO</b>	The World Intellectual Property Organization.

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