CLIFFORD CHANCE

GLOBAL ARBITRATION TRENDS 2023

— THOUGHT LEADERSHIP

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Global factors including economic recovery from the COVID-19 pandemic, protectionism and an increasing focus on ESG, all give rise to dispute risks across jurisdictions and sectors. Arbitration remains the established norm for the resolution of disputes in cross-border business and investment, due principally to the enforceability of arbitral awards internationally.

We highlight key trends for global disputes and international arbitration across the construction, energy, financial investor, mining and commodities and tech sectors, in 2023 and beyond.

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TECH

As investment in the tech sector continues to boom, and potentially transformative technologies gain momentum, disputes will arise both between commercial parties and between investors and States seeking to navigate new ground such as crypto assets and the metaverse.

Investor-State tech disputes: The number of tech-related disputes being brought by investors against States under investment treaties has steadily grown. Investor-State tech arbitrations brought under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) have almost doubled over the last few years and now represent around 10% of ICSID's caseload. Governments are moving to regulate tech, and foreign tech investors, in a variety of ways such that investments have a high degree of sensitivity to the State's actions or omissions. For example, European States, Canada and Australia are banning Huawei from participating in 5G networks over national security allegations, the US FCC commissioner has called on Google and Apple to ban TikTok due to privacy and security concerns and Uber has exited certain markets due to unfavourable regulatory conditions. There are also signs that crypto exchanges have started to exit jurisdictions in which the regulatory burden has grown beyond what they are willing to tolerate (for example, Nexo leaving the US). This has led, and will continue to lead, companies to turn to investor-State dispute settlement to seek redress. Notably, Huawei has filed ICSID claims against Sweden over its 5G ban. There will be interesting times ahead as these complex cases will require tribunals to consider issues at the intersection between tech and policy issues such as security and privacy.

Arbitrating crypto disputes: An interesting feature of the proliferation of digital assets, smart contracts, blockchain and fintech is that many businesses in this sector use arbitration in their online user agreements. This means that a wide variety of disputes between crypto investors and exchanges, wallet providers and token-issuing DAOs are required to be arbitrated. Cases that have become public include claims by users against platforms in relation to outages causing them trading losses, exchanges against users arising from failure to make payment and misrepresentation claims by investors against platforms concerning the represented risks of investment. Larger commercial claims are also emerging (for example, Genesis seeking to recover a $2.4 billion loan to 3AC in ICDR arbitration). There have been recent attempts to craft arbitration rules specifically for digital disputes (JAMS and DDRR). This trend has generated (and will continue to generate) its fair share of challenges. Arbitration agreements are being challenged under consumer protection legislation in the US and the UK and those cases are now reaching appellate levels. Enforcement also remains an issue; 2022 saw a handful of attempts to enforce arbitral awards denominated in cryptocurrencies, which failed on public policy grounds. For more, see our briefing, Arbitration for Cryptoassets and Smart Contract Disputes.

Metaverse-related arbitration: The metaverse is currently in its infancy but may, over time, become more widely accepted, at which point we will inevitably see an increase in arbitrations between well-known brands that are building a presence in the metaverse, suppliers, coders and perhaps other metaverse users. As with crypto businesses, centralised metaverse platforms appear to have a preference for including arbitration agreements in their user agreements. In the decentralised context, the rise of metaverse-related disputes will undoubtedly give rise to interesting issues of law. For example, which forum will have jurisdiction over virtual disputes? Do digital assets fall within the scope of an "investment" for the purposes of a bilateral investment treaty? Intra-user disputes, which may touch on a wide variety of issues, depending on the nature of the metaverse, give rise to the intriguing possibility of arbitration-type processes being embedded into the metaverse combined with enforcement mechanisms that operate within the metaverse. On a more practical level, virtual reality may also fundamentally change the way in which arbitration and legal proceedings across countries are managed and run.

Commercial tech collaborations: Increasingly, companies across a range of sectors are collaborating with tech outfits to develop innovative solutions and products – a prime example being the automotive industry, in which growing numbers of suppliers are working together with software providers, battery producers and start-ups to develop solutions for self-driving and electric vehicles. Such commercial tech collaborations are fundamentally commercial relationships and typically are entered into for a longer term, with the parties sharing a common goal of ensuring that the collaboration succeeds. These collaborations give rise to unique challenges, however. For example:

- issues over the manner and ways in which parties contribute to the project and how they ought to be compensated for their contribution (including how that contribution is to be quantified);
- how to deal with subsequent changes after the establishment of the collaboration, particularly where new technology, market demand, competitor activity, the regulatory framework or force majeure events cause disruption.

In these circumstances, the nature of the collaboration comes under stress, and disputes will arise.

MINING AND COMMODITIES

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Disruptions caused by the Russia-Ukraine war, the ensuing economic sanctions on Russia and retaliation measures will continue to severely affect the global mining and commodities markets in 2023. These issues are likely to trigger new disputes, including those related to investor protection or to the terms of companies' withdrawals of their businesses from Russia. More generally, disputes are likely to arise from continuing pressure on mining companies – including supply and demand disruptions worldwide, price volatility, and increasing environmental and emissions regulations.

Russian mining and metals sector: Russia is a key supplier of metals such as palladium, nickel, aluminium and steel, all of which are indispensable to the supply chains of modern manufacturing production. Russia is also a major supplier of coal. Compliance with import bans imposed by the European Commission at the end of 2022 and any other measures that may follow from the US and elsewhere, together with sanctions, will remain a priority for companies operating in the mining and metals sector in 2023. However, navigating through a jungle of new legislation at a global level will bring challenges.

The Russia-Ukraine war has also caused many foreign investors to withdraw their businesses from the Russian Federation. Considering barriers implemented by the Russian government, we expect to see a rise in investor-State disputes, as well as commercial disputes related to the terms of such withdrawals. International arbitration is considered the most appropriate forum for many of the legal battles that will inevitably flow from these disruptions.

Battery metals: Battery metals, such as cobalt and nickel, are facing supply chain constraints driven mainly by the electrification of transport – in particular, electronic vehicles (EV) – and infrastructure. The global energy crisis and the Russia-Ukraine war have seen the prices of nickel and lithium surge in recent months, Russia being a key nickel producer. As demand for EVs has accelerated in recent years, so too has aggregate demand for lithium, with lithium miners being unable to keep up with this surge in demand. It is expected that price volatility, often combined with unstable political and economic environments in relevant countries (such as in Africa), will continue, increasing the risks of supply and demand disruptions as well as major pricing disputes in the sector.

Although market demand for battery metals is increasing, the ability of mining companies to exploit new resources is being affected by a range of non-commercial factors, including, in certain countries, overt government restrictions on foreign investment and/or more subtle measures against foreign-owned technology metals projects.

The challenge of expanding supplies is further complicated by the need to limit environmental damage and ensure sustainable extraction and production methods. Those items will remain high on governments' agendas. Consequently, the operating environment will become increasingly difficult for mining companies trying to balance their costs with meeting these government requirements and we may see an increase in associated commercial or investor-State disputes.

High gold prices: The price of gold, traditionally a safe haven, surged in 2022, a trend which may is expected to continue in 2023. In the third-quarter of 2022, according to data compiled by the World Gold Council, central banks bought nearly 400 tons of gold. This was 300% higher than the third-quarter of 2021, and amounted to the largest quarterly increase in central bank gold reserves since the World Gold Council started keeping records in 2000.

It is expected that investors will continue to buy gold as a hedge against inflation and economic disruptions, which, in turn, is likely to spur demand considerably and may increase prices. At the national level, this may see gold producers come under pressure to pay higher royalties or special taxes on their profits, as occurred at the peak of the last commodity price cycle. Experience shows that the ability of individual gold producers to navigate such changes depends heavily on the strength of the legal protections available to them (particularly whether they have access to international arbitration against the host government, through either contract or treaty).

Impact of operational improvements: The mining and metals industry is undergoing major changes as mining companies continue to adopt automation and other technologies to increase efficiency, decrease costs and improve safety. These new technologies include data analytics, autonomous vehicles, wireless communications, digital sensors, or human-machine interfaces. Mining companies are also increasing investments in operational intelligence to optimise their production at the lowest cost possible, while decreasing their environmental impact.

Further, pressure from governments and other stakeholders on mining companies to "go green" will continue in 2023 and beyond. The challenges for industry participants will include making sure that their operational and other improvements do not undermine their off-take obligations, volume commitments, or relationships with suppliers and customers, compliance with the ever-growing spread of environmental regulations and, more generally, their reputations in respect of carbon footprints. As the wave of innovation continues, mining companies will need to take steps to ensure that their intellectual property is properly protected (learning from the experiences of major international oil companies in the 20th century).

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ENERGY

The fallout from Russia's invasion of Ukraine, as well as energy transition issues such as decommissioning and regulatory change, all present significant challenges for energy sector participants. As governments and commercial parties alike seek to adapt to these developments, we expect to see a continued rise in certain types of disputes.

Investment treaty claims relating to renewables/carbon phase-out: The investment treaty regime is in a state of flux. With the investment treaty landscape having been conceptualised before the emergence of the climate crisis, most treaties are silent on environmental issues. At the same time, States are under pressure to regulate in order to mitigate the effects of climate change and comply with new international obligations assumed under, inter alia, the Paris Agreement.

As States transition away from fossil fuels (particularly coal) to renewables, a wave of investment treaty claims has followed. Investors are most commonly seeking to rely on investment treaty protections accorded to (i) long-term fossil fuel investments made in reliance on guarantees from the State, which the State now wishes to rethink due to the climate emergency, and (ii) renewables investments made in reliance on subsidies and other investment incentive schemes that have been subsequently amended or eliminated altogether.

Decommissioning: Decommissioning is recognised as an integral part of the energy transition journey from fossil fuels to renewable forms of energy. It is invariably a costly and hazardous activity often undertaken in hostile environments. As major players look to decarbonise their operations by transitioning from fossil fuels to renewables, ageing oil and gas assets are often transferred from major oil and gas operators to new, often smaller (sometimes under-resourced) operators. This operator-transitioning is a critical point in the asset's lifecycle, and comes with many challenges and complexities for both outgoing and incoming operators, including of a technical, economic, operational, regulatory and environmental nature. Some challenges faced by incoming operators in the short to medium term include ESG sensitivities while continuing the production of fossil fuels to meet market demands, maintaining or improving sustainable performance of ageing assets, and decommissioning risks, while maintaining value chains and maximising value in their newly-acquired assets. One significant challenge faced by outgoing operators in many jurisdictions in the medium to long term is exposure to ongoing trailing liabilities for decommissioning of the asset and operations, which can apply long after their divesture of the asset, and can expose outgoing operators to significant financial, regulatory and reputational risk, litigation and liabilities. These challenges call for advanced planning and investment by both incoming and outgoing operators in a bid to manage and mitigate those risks.

A robust decommissioning strategy and a detailed implementation plan are critical to energy transition. The ultimate objectives of decommissioning are an efficient, safe and environmentally sustainable outcome. To achieve those objectives, some factors that any credible decommissioning strategy must take into account (irrespective of the sector involved – be it oil and gas, mining, nuclear, onshore or offshore) include: (a) the need for early planning from the nascent stage of a project throughout its entire lifecycle; (b) the multifaceted and multidisciplinary nature of decommissioning, involving the relevant regulatory framework, safety and environmental issues, mitigation strategies, financing and corporate considerations; (c) evolving technologies; (d) the expense involved, with no readily discernible financial returns for stakeholders; and (e) the relevant liability regime and risk exposure, to name a few. We will necessarily see an increase in arbitral disputes regarding decommissioning as we see significant fossil fuel projects approach cessation of production globally, and as operators and States grapple with the need to complete decommissioning in a comprehensive and efficient manner.

Long-term contracts: Energy transition-related policy changes and the Russian-Ukraine war have caused a number of parties to long-term energy contracts – for example, in relation to power, gas or coal – to invoke their rights under contractual frameworks in the past year. In light of developments such as the German nuclear phase-out, issues with French nuclear power plants, gas price spikes in Asian markets, coal phase-out plans across Europe as well as the share of renewable energy increasing fast, to name just a few, this trend will likely continue. Significant developments in markets and regulatory changes are also causing disruptions to long-term relationships. The significant value of long-term contracts in the energy market means that the coming years will certainly see last year's trend continuing, with perhaps an even broader reorganisation of the energy sector causing the death or restructuring of many formerly stable long-term relationships between stakeholders.

Regulatory change: As States regulate to address the climate crisis, the ensuing regulatory changes can collide with investor protections under investment treaties. With treaties such as the Energy Charter Treaty (ECT) "blind" as to whether a protected investment is fossil fuel or "clean" in nature, investment treaty cases such as Rockhopper v Italy, in which the investor was awarded substantial damages after Italy banned coastal oil exploration, have made headlines.

In order to reduce protections for fossil fuel investments, States have moved in two directions. First, agreement in principle on reform of the ECT has been reached, pursuant to which fossil fuels may be carved out from the treaty's scope of protection, while at the same time, further forms of renewable energies may be brought within its scope. Second, several States have announced plans to withdraw from the ECT outright, arguing that it does not go far enough to address their climate change obligations.

As we move forward, States may seek to further refine their treaty obligations beyond those under the ECT so as to provide themselves with broader freedoms to legislate away from fossil fuels and towards renewables, as well as protection from claims perceived as challenging their climate policies. Meanwhile, investors in the energy sector are likely to continue to litigate in order to protect their interests in the energy transition but may also seek to refocus their activities more on renewables. Despite the uncertainty regarding the future of the ECT and its scope of protection, investment treaty arbitration, particularly under the ECT, continues to be a widely used form of dispute settlement between States and foreign investors.

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FINANCIAL INVESTORS

We expect to see an uptick in private equity M&A activity in a number of regions in 2023. This is due to the likely loosening of credit markets as global inflation begins to ease, and the pent-up demand for PE investment and also, in APAC in particular, due to China's easing of COVID-19 restrictions which will drive activity within the region. Against this backdrop, we also expect that ongoing macroeconomic and geopolitical challenges across the globe will lead to an increase in disputes involving financial investors, particularly in the energy, TMT and healthcare sectors.

Telecoms: Bolstered by an increased demand for data and accelerated connectivity fuelled by the rollout of 5G, we have seen deal activity in the telecoms sector boom in recent years. Against the background of recent economic volatility and geopolitical challenges, we expect to see an increase in the number of disputes within this sector over the coming year involving private equity firms and other financial investors, including disputes between commercial parties and investor-State treaty disputes:

- **Disputes involving other commercial parties:** There will likely be an increased number of commercial disputes which arise following private equity M&A activity, including claims for breach of warranty and claims under indemnities (including under warranty and indemnity insurance policies), failure to comply with closing mechanics or conditions, breach of post-closing obligations, misrepresentation, or the occurrence of a material adverse change as a result of sudden geopolitical events or where investments have been made in volatile jurisdictions.
- **Investor-State disputes:** Many long-term telecoms licence agreements were entered into between States and investors decades ago, when the domestic telecoms sector was in its infancy and the regulatory landscape was less sophisticated. Given the financial lucrativeness of this sector, we have seen, and expect to see, States take steps arguably in contravention of investment treaties in order to expropriate telecom investments or diminish the value of those investments. This, in turn, will likely give rise to an increase in investment treaty arbitrations between financial investors and States.

Data centres: Recently, we have seen more financial investors move into the operations and business services area around infrastructure such as fibre networks and data centres. We expect to see financial investors continue to increase their engagement in both greenfield and brownfield infrastructure operations and business services opportunities. Buy-and-build strategies are emerging in what is currently a fragmented market across various regions. As a consequence, we are seeing dispute pressure points arise from data centre acquisitions and investments, including issues concerning land rights and/or commercial leases, loss of material customer contracts, availability of connectivity through third-party infrastructure, regulatory changes and national security and data protection compliance.

ESG-related disputes: Following a series of high-profile court decisions involving climate change issues, we expect to see an increased number of ESG-related claims escalate to formal disputes. Heightened investor attention on ESG initiatives has given rise to the emergence of new ESG-related contractual provisions, including warranties and indemnities relating to climate change, net-zero goals, responsible business commitments, renewal energy, sustainability commitments, human rights, anti-discrimination commitments and environmental incidents. Many of these provisions are novel and untested and will lead to commercial disputes concerning questions of interpretation, enforceability and how to measure and enforce compliance with ESG-related provisions. In addition, we expect to see allegations of non-compliance with local environmental and ESG-related regulations or obligations being raised: (i) in post-transaction disputes between co-venturers; and (ii) by States in counterclaims against commercial parties in investor-State arbitrations.

Exit disputes: In line with the broader M&A market, private equity deal activity slowed in 2022 and exits from investments have become more challenging. This is due to a decline in leveraged buyouts owing to higher interest rates and increased difficulty in obtaining secured financing and a broader slowdown in IPOs, volatility in stock and cryptocurrency markets as well as disruptions to the real estate and energy markets. We are already seeing a number of these macroeconomic factors causing minority shareholders to become unable or unwilling to meet capital call requirements. Consequently, differing opinions have arisen between minority and majority shareholders over corporate strategy and management, which we expect to lead to an increase in shareholder and exit-related disputes. These disputes commonly involve:

- **Exercise of put options:** Shareholder agreements commonly give the investor a right to exit by selling their shareholding at a stipulated price if certain conditions are not fulfilled. The outcome of these cases will turn on questions of: (i) whether the contractual put option mechanism was triggered; (ii) whether the mechanics are enforceable; and (iii) disputes / ambiguity over the calculation of fair market price payable to the investor.
- **Forced exit:** Where a minority investor is forced or squeezed out, for example through the exercise of drag-along rights or through share dilution. Actions taken in this context could give rise to claims of minority oppression.

CONSTRUCTION

5

As the construction sector emerges from COVID-19, we have seen activity rebounding to pre-pandemic levels. Now the sector faces a new set of challenges – shortages in critical commodities and inflationary pressures. While every construction dispute is unique and dependent on local conditions, outlined below are some of the global trends.

Recovering from COVID-19? As government temporary relief packages for businesses adversely affected by COVID-19 have now largely concluded, disruption from the pandemic is still being felt. We will continue to see an increase in disputes activity as the knock-on effects of delays play out. Along with the continued aftermath of the pandemic, economic turbulence and geopolitical fallout from Russia's invasion of Ukraine has placed significant pressure on global supply chains, and many large economies are on the brink of recession. That said, investment in construction remains high, for instance through stimulus funds provided by programmes such as the landmark US Infrastructure and Jobs Act. We anticipate that continued investment in the sector, combined with economic challenges, will feed an increase in global construction disputes, which are likely to remain high-value and complex.

Inflation: Inflationary pressures and the rise in prices of materials, labour and energy are leading to delays in construction projects. Following on from challenges faced during the pandemic, higher costs and tighter credit are causing supply chain challenges which are, in turn, creating difficult conditions for contractors. The situation is especially challenging for contractors involved in long-term projects with fixed or lump-sum pricing, or price adjustment mechanisms which were not designed to cope with the actual levels of inflation. Owners and contractors negotiating contracts in the current environment may seek to share the burden of inflation and price escalation by negotiating inflation-linked or index-based pricing mechanisms. However, in the case of participants in existing projects, we are likely to see an increase in disputes in connection with the value of change, cost of delays and interpretation of price escalation clauses. As ever, poorly drafted or unclear clauses and inadequate project administration will continue to be a common source of disputes. While some project participants recognise the need for compromise, international arbitration will continue to be the preferred forum for resolving disputes which are not resolved amicably.

Zero carbon and ESG: The building and construction sector is responsible for 37% of energy-related carbon emissions. The construction industry is therefore at the centre of the drive towards sustainability and meeting climate change targets, along with the increasing focus on ESG which has been accelerated by the pandemic. Disputes will continue to arise around claims in the areas of renewables and sustainable construction, which will require increasing amounts of technical expertise. We also anticipate that ESG will increasingly be an arena for disputes, as project participants come under increasing pressure to deliver "net zero" and ESG targets, in addition to dealing with pricing pressure in the market. Accountability for practical decarbonisation and issues around standards of energy performance disclosure could be potential sources of disputes.

Technology: As a sector with traditionally low levels of automation, the construction industry has been moving steadily towards the adoption of digital solutions and new technologies, a process which has been accelerated by COVID-19. The full scope and application of these new technologies is vast, but some notable examples include:

- automated systems and tracking technologies designed to enable faster completion, increased security and better monitoring of resources on site;
- digital twin technology to create simulations, which (among other things) can be utilised to improve energy efficiency and sustainability;
- augmented reality technologies, which can assist with project presentation, work in difficult or hazardous locations and improving safety standards;
- contracts and blockchain technology, which will likely find application in, for instance, procurement, contract administration, valuation and interim payments.

The scale of these developments will have an impact on the types of disputes we see in the market:

- There will be a variety of new challenges in relation to intellectual property issues and IP disputes; for example, ownership of intellectual property rights in the images and data generated by new technologies, managing trade secrets, data privacy and cybersecurity risks associated with information collected by these technologies. These issues have been raised in a number of recent cases and it is expected that these trends will continue as the construction industry continues its digital transformation journey.
- While industry and contractual standards in relation to new technologies will develop in due course, their use and application will form an additional component of construction disputes. Some practical concerns may relate to standards of transparency and security in how new technologies are implemented.

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