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ALERT MEMORANDUM

# International Arbitration Trends and Topics for 2025

*January 6, 2025*

There were many topics that captured the international arbitration community's interest in 2024. Arbitrator conflicts of interest and disclosure issues dominated discussions, particularly following issuance of the International Bar Association's revised Guidelines on Conflicts of Interest in International Arbitration, while the Russia-Ukraine war and other geopolitical events continued to have far-reaching impacts on disputes, from increasing tensions within the energy industry amidst rising prices to creating uncertainty in light of a proliferating sanctions regime. We expect that 2025 similarly will herald a number of interesting developments in international arbitration.

This article summarizes what are likely to be key trends and emerging topics in international arbitration in 2025, including: (1) policy reforms caused by political changes and new administrations in key arbitration jurisdictions like the United States, the United Kingdom, and Mexico; (2) the impact of, and potential challenges associated with, the use of artificial intelligence in arbitration proceedings; (3) the post-issuance modification of arbitral awards, which can have an impact on the enforceability of those awards; (4) the complications that sanctions can pose at all stages of an arbitration proceeding; (5) the regulation and potential pitfalls of third-party funding arrangements in arbitration cases; and (6) an uptick in disputes over sustainability or environmental impact concerns in the energy and construction industries, as well as in new and emerging sectors.

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# Political Changes And Policy Reforms Likely To Impact The Disputes Landscape

Recent elections in key arbitration jurisdictions are likely to have an impact on disputes in the United States, Mexico, and the United Kingdom starting in 2025.

## The United States

### *International Trade Disputes*

International trade was a top agenda item for President-elect Donald Trump's first presidency, during which he withdrew the United States from the Trans-Pacific Partnership and renegotiated the North American Free Trade Agreement ("NAFTA") to its current form as the United States-Mexico-Canada Agreement ("USMCA"). Considering some of President-elect Trump's most recent campaign pledges and post-election statements, international trade is likely to continue to be a focal point in his second term.

President-elect Trump has signaled a desire to further renegotiate USMCA,[1] and has also stated that his administration would apply blanket tariffs of 25% to goods from Mexico and Canada,[2] an additional tariff of up to 60% for goods imported from China, and suggested that Chinese imports of essential goods – including in the pharmaceuticals, electronics, and steel industries – should be phased out over the next four years.[3] Given China's heavy investment in Latin America, and in particular in industries like lithium mining and construction of large-scale infrastructure projects, the Trump administration's implementation of certain trade policies could lead to unaligned economic incentives or other difficulties in complying with contractual obligations.

### *Energy Sector Disputes*

Changes in the energy sector may also give rise to disputes. President-elect Trump has promised to "unleash American energy."[4] In this pursuit of U.S. energy dominance, the Trump administration could seek to expand domestic fossil fuel production (including through industry tax credits) or roll back subsidies for renewable energy. President-elect Trump has also promised to lift the outgoing administration's moratorium on new liquefied natural gas ("LNG") export permits to non-free-trade-agreement countries.[5] These regulatory changes could negatively impact renewables or sustainability-focused companies, leading to disputes.

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[1] Jason Douglas, Anthony Harrup & José de Córdoba, *Trump Fires Salvo on North American Trade Pact*, The Wall Street Journal (Nov. 26, 2024), https://www.wsj.com/economy/trade/trump-fires-salvo-on-north-american-trade-pact-eded4fca.

[2] Jessica Murphy & Nadine Yousif, *Trump Tariff Threat Puts a Strain on Canada-Mexico Ties*, B.B.C. News (Dec. 5, 2024), https://www.bbc.com/news/articles/ce3lznerryqo.

[3] *See, e.g.*, American Association of Exporters & Importers, *Donald Trump Trade Policy Positions*, https://aaei.org/wp-content/uploads/2024/11/Trump-Trade-Policies_v2.pdf.

[4] Jennifer A. Dlouhy & Ari Natter, *From Oil to EVs, Here's How Trump's Victory Affects Energy*, BNN Bloomberg (Nov. 6, 2024), https://www.bnnbloomberg.ca/investing/commodities/2024/11/06/from-oil-to-evs-heres-what-a-trump-victory-means-for-energy/.

[5] Timothy Gardner, *Biden Administration Releases LNG Export Study, Urging Caution on New Permits*, Reuters (Dec. 17, 2024), https://www.reuters.com/business/energy/biden-administration-releases-lng-export-study-urging-caution-new-permits-2024-12-17/.

### *Technology and M&A Disputes*

Changes in leadership at the Federal Trade Commission and the Securities Exchange Commission may also be accompanied by a shift in agency focus away from the enforcement of certain business sectors, which could lead to increased dealmaking activity.[6] At the same time that the second Trump administration plans to deregulate certain elements of the U.S. economy, the administration may place a greater focus on developing U.S. capabilities in artificial intelligence and other emerging technologies, in order to strengthen U.S. competitiveness, particularly against China. These changes could similarly spur legal challenges and business-to-business disputes amid shifting market conditions.

## Mexico

The election of President Claudia Sheinbaum – Mexico's first female president, who was sworn in on October 2, 2024 – has led to various political changes.

For example, certain constitutional reforms were enacted to "return[] energy sovereignty to the country"[7] and reverse changes made in 2013, which opened Mexico's energy sector to private investment.[8] The 2024 reform "reinforces public control and oversight over the energy sector" and emphasizes the role of "Mexico's two largest energy companies, Petróleos Mexicanos (PEMEX) and Comisión Federal de Electricidad (CFE), . . . in serving the 'public interest.'"[9] Since Mexico has already been named as Respondent in a number of investor-state disputes,[10] further reforms to the energy sector may usher in more proceedings by private investors.

Moreover, in an effort to reduce corruption, Mexico has introduced a reform to replace its politically-appointed judiciary with elected judges,[11] which some critics have said will cast doubt on the independence of the judiciary.[12] With this change, more companies may be inclined to include arbitration as the forum for dispute resolution in their commercial transactions, or may otherwise opt to have disputes resolved in other venues outside of Mexican courts. Such changes could increase arbitration disputes involving Mexican companies, while changes to the judiciary could also impact the enforceability of arbitral awards in Mexico.[13]

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[6] Lawrence Delevingne & Douglas Gillison, *Trump Picks Former SEC Commissioner Paul Atkins to Run Agency*, Reuters (Dec. 4, 2024), https://www.reuters.com/world/us/trump-picks-former-sec-commissioner-paul-atkins-run-agency-2024-12-04/; Jody Godoy, *Trump Picks Andrew Ferguson to Chair FTC* (Dec. 10, 2024), https://www.reuters.com/world/us/trump-picks-andrew-ferguson-chair-ftc-2024-12-10/.

[7] Mexico News Daily, *Mexican Senate Approves Energy Sector Reform Bill* (Oct. 17, 2024), https://mexiconewsdaily.com/politics/mexico-energy-reform-bill/.

[8] Alberto Quiroz & Carlos Ramírez Fuentes, *Mexico's Risky New Energy Reform*, Americas Quarterly (Nov. 4, 2024), https://www.americasquarterly.org/article/mexicos-risky-new-energy-reform/.

[9] *Id.*

[10] Mexico has been a party in 52 investor-state disputes to date. Center for the Advancement of the Rule of Law in the Americas at Georgetown Law, *Investor-State Dispute Settlement in Latin America and the Caribbean*, https://isdslac.georgetown.edu/.

[11] Diego Oré, *Hailing the End of Graft in Mexico, Lawmakers Advance Judicial Overhaul*, Reuters (Oct. 14, 2024), https://www.reuters.com/world/americas/mexican-lower-house-passes-legislation-implement-judicial-reform-2024-10-14/.

[12] Andrew Mizner, *IBA Mexico: Judicial Changes Fuel Arbitration but Raise New Concerns*, Commercial Dispute Resolution (Sept. 18, 2024), https://www.cdr-news.com/categories/arbitration-and-adr/21499-iba-mexico-judicial-changes-fuel-arbitration-but-raise-new-concerns.

[13] *Id.*

### The United Kingdom

In the United Kingdom, Keir Starmer's new Labour government – the first in 14 years – is positioning itself as business-friendly in order to offer a much-needed boost to the post-Brexit economy. Promoting arbitration has featured on the agenda for the new government, with the Arbitration Bill (intended to reform the existing Arbitration Act 1996) re-introduced after being set aside before the snap July election.[14] With the previous Conservative government claiming that arbitration is worth more than $3.2 billion (£2.5 billion) to the UK economy, the pro-business Labour government will likely aim to maximize London's draw as an international arbitration hub.[15] The new proposed Arbitration Bill is expected to strengthen arbitrators' power to make awards on a summary basis thus lessening a key perceived benefit of English courts over arbitration. This may lead to a further rise in English-seated arbitrations. Further reforms may be introduced in the UK to better facilitate litigation (and arbitration) funding in the wake of a UK Supreme Court decision that declared many existing funding agreements basing a funder's recovery on a share of the damages won to be unenforceable.[16] Funding access may bolster dispute volume in all forms, including international arbitration.

[14] Law Commission, *Arbitration Bill Re-introduced to Parliament* (July 18, 2024), https://lawcom.gov.uk/arbitration-bill-re-introduced-to-parliament/.

[15] Joanne Faulkner, *What Labour's Win Means For UK Commercial Courts*, Law360 (July 5, 2024), https://www.law360.com/articles/1855228/what-labour-s-win-means-for-uk-commercial-courts.

[16] The Litigation Funding Agreement (Enforceability) Bill was introduced by the previous Conservative government following the UK Supreme Court's decision in R *(PACCAR Inc) v. Competition Appeal Tribunal* [2023] UKSC 28, which found that litigation funding agreements entitling funders to payments based on the amount of damages recovered are Damages-Based Agreements, which are subject to a separate regulatory regime and was unenforceable in the context of the case. The draft legislation has yet to be revived by the new government, however.

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## AI In International Arbitration: New Tools, Changing Rules, And Potential Challenges

Artificial intelligence ("AI") has the potential to significantly transform dispute resolution by reshaping how cases are managed and resolved. The rise of generative AI and large language models will likely influence key aspects of arbitration, including arbitral procedure, the drafting of arbitration clauses, and the rules and guidelines of arbitral institutions. However, practitioners should be mindful of the risks associated with adopting AI in their day-to-day work, and consider its potential impact on privacy and confidentiality for clients, as institutions and parties alike continue to adopt new AI tools and provide guidance as to its usage in 2025.

### Applications of Innovative Technology in Arbitration

While tools powered by natural language processing and machine learning algorithms have been used to streamline document review and e-discovery

processes and reduce associated costs,[17] generative AI tools that can rapidly search, analyze, and summarize data from large datasets are also being increasingly employed for other uses and at other stages of an arbitration, performing tasks such as indexing exhibits to locate certain facts, extracting key facts by sifting through transcripts, summarizing key information from lengthy legal briefs, and visualizing complex information sets.[18]

While such tools are used in arbitration websites such as JusMundi for summarizing awards and other arbitration documents, arbitration institutions are also determining other uses for these AI tools. For example, in 2024, the AAA introduced ClauseBuilder AI, a tool that uses a database of clauses and provides arbitration clause building services. In October 2024, the AAA also launched the AAAi Panelist Search tool to enhance panelist selection through generative AI, with the intention of using the tool to "mine the comprehensive AAA-ICDR Roster to identify the most suitable matches for arbitration and mediation cases."[19]

## Rules and Guidelines of Arbitral Institutions

As AI tools become more commonplace, it is increasingly important to have guidelines and rules concerning their use in arbitration proceedings.

In April 2024, JAMS was the first institution to develop a specific set of rules for disputes in which the subject of the dispute is an AI system, releasing its Rules Governing Disputes Involving Artificial Intelligence Systems (the "JAMS AI Rules").[20] The JAMS AI Rules provide safeguards for parties, limiting access (1) of "AI systems and related material" to experts mutually agreed upon by the parties or designated by the arbitrator(s), and (2) to sensitive and confidential trade or commercial information to another party's attorneys.[21]

In October 2024, the Stockholm Chamber of Commerce ("SCC") Arbitration Institute adopted a non-binding guide to the use of artificial intelligence in cases administered under the SCC rules.[22] The guide encourages arbitral tribunals and other participants using AI systems to bear in mind (1) confidentiality, (2) quality, (3) integrity, and (4) non-delegation of the decision-making mandate.[23]

Additionally, in August 2023, the Silicon Valley Arbitration & Mediation Center ("SVAMC") released draft guidelines, which remain under review as part of a public consultation process. The SVAMC guidelines seek to provide best practices for integrating AI into arbitration while preserving fairness and confidentiality.[24]

Other arbitral institutions have so far refrained from providing formal rules or guidelines on AI,

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[17] Layan Al Fatayri, *AI in International Arbitration: What Is the Big Deal?*, The American Review of International Arbitration (Oct. 22, 2024), https://aria.law.columbia.edu/ai-in-international-arbitration-what-is-the-big-deal/.

[18] American Arbitration Association, *How Arbitrators Are Harnessing Artificial Intelligence* (Feb. 20, 2024), https://www.wsj.com/economy/trade/trump-fires-salvo-on-north-american-trade-pact-eded4fca.

[19] AAA, *AAA-ICDR Launches New AAAi Panelist Search to Enhance Panelist Selection with AI Technology* (Oct. 10, 2024), https://shorturl.at/PHnX8.

[20] White & Case LLP, *JAMS Unveils New Arbitration Rules for Artificial Intelligence Disputes* (May 3, 2024), https://www.whitecase.com/insight-our-thinking/jams-unveils-new-arbitration-rules-artificial-intelligence-disputes.

[21] *Id.*; JAMS Rules Governing Disputes Involving Artificial Intelligence Systems, Rule 16.1.

[22] SCC Arbitration Institute, *Guide to the use of artificial intelligence in cases administered under the SCC rules* (Oct. 16, 2024), https://sccarbitrationinstitute.se/sites/default/files/2024-10/scc_guide_to_the_use_of_artificial_intelligence_in_cases_administered_under_the_scc_rules-1.pdf.

[23] *Id.*

[24] *See* Silicon Valley Arbitration & Mediation Center, Guidelines on the Use of Artificial Intelligence in Arbitration (2024), https://tinyurl.com/msjvwhpf.

including on AI's use and regulation within the practice of international arbitration, but have issued information regarding AI more generally. The ICC, for example, published an overarching "four-pillar narrative" on business considerations for the trustworthy, responsible and ethical development of AI in September 2024.[25]

### AI Challenges and Pitfalls

Despite the many positive impacts that AI technologies can have on arbitration practice, there are also potential drawbacks associated with AI, as evidenced by well-known cases of AI "hallucinations" – when AI-generated outputs become untethered from source materials or fabricate source material, including non-existent case law – as has occurred in some publicized cases before U.S. courts.[26] While AI developers are working to detect and prevent such risks, practitioners should learn to identify and verify AI outputs as they use them to inform their work, especially when dealing with citations to case law or authorities.[27]

Practitioners should also consider AI's implications on confidentiality in international arbitration. Disputes often involve sensitive data and confidential information, and many parties opt into arbitration because of its ability to provide parties with a confidential forum for resolving their disputes. The significant amounts of information required to train AI systems, however, increases the potential for confidentiality leaks. As a result, parties and the arbitrators should carefully evaluate what information is shared with AI tools during the arbitration and ensure robust security measures are in place to protect client data confidentiality.[28]

Given the potential benefits of AI, and the proliferation of specific AI-powered tools and guidelines to regulate their use, AI's role in international arbitrations is likely to continue to increase in 2025.

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[25] ICC, *Overarching Narrative on Artificial Intelligence*, https://iccwbo.org/global-insights/digital-economy/icc-overarching-narrative-on-artificial-intelligence/#block-accordion-5.

[26] Brendan Pierson, *New York Lawyers Sanctioned for Using Fake ChatGPT Cases in Legal Brief*, Reuters (June 22, 2023), https://www.reuters.com/legal/new-york-lawyers-sanctioned-using-fake-chatgpt-cases-legal-brief-2023-06-22/.

[27] For example, in reaction to issues involving "hallucinations," some U.S. courts have issued standing orders or proposed local rules requiring certifications that generative AI has not been used in preparing court filings or that a human has verified any AI-generated content. Alexandra Desmedt, *A Closer Look at the New SVAMC Guidelines for AI in International Arbitration*, The American Review of International Arbitration (May 23, 2024), https://aria.law.columbia.edu/a-closer-look-at-the-new-svamc-guidelines-for-ai-in-international-arbitration/.

[28] *Id.*; A&O Shearman, *Artificial Intelligence in Arbitration: Evidentiary Issues and Prospects*, https://www.aoshearman.com/en/insights/artificial-intelligence-in-arbitration-evidentiary-issues-and-prospects.

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# Review Of Tribunals' Modification Of Arbitral Awards

This coming year may see the expansion of party efforts to alter arbitral awards after their issuance in ways that may be characterized as substantive in changing the outcome to some degree, rather than corrective of computational or typographical errors.

The *functus officio* doctrine, which provides that an arbitrator loses authority over the proceeding after the issuance of a final award, has long been of interest to the international arbitration community.[29] International arbitration institutions have consequently provided for some limited ability for arbitrators to review their awards in order, for example, to "correct a clerical, computational or typographical error, or any errors of similar nature."[30]

In the United States, although the Federal Arbitration Act ("FAA") is silent with regard to the *functus officio* doctrine, U.S. courts have long recognized the principle that a tribunal loses the authority to grant further requests for relief after its final award save for some common law exceptions.[31] Moreover, recent U.S. court decisions have demonstrated how an arbitrator's ability to modify or correct final arbitration awards can have an impact on the enforceability of the award.

In *RSM Prod. Corp. v. Gaz du Cameroun, S.A.*, the U.S. District Court for the Southern District of Texas invoked the doctrine of *functus officio* and vacated the portion of an ICC award that reduced claimant's damages.[32] The claimant sought to vacate the award after the arbitral tribunal issued a revised award in which the tribunal, citing its authority to correct "computational errors," reduced the damages awarded by $4 million, because – according to claimant – the revised award constituted an impermissible "do-over[ ] of [the tribunal's] relief or reasoning,"[33] reflecting issues that could have been raised earlier in the proceedings. The district court concluded that the "[t]ribunal [had] committed a textbook case of reversing course on a substantive legal issue it previously decided" and that in doing so, the tribunal had exceeded its authority by modifying the award.[34] On appeal, however, the United States Court of Appeals for the Fifth Circuit reversed and remanded with instructions to confirm the

[29] *See, e.g.*, N.Y. City Bar Association Arbitration Committee, *The Functus Officio Problem in Modern Arbitration and a Proposed Solution* (Apr. 7, 2021), https://www.nycbar.org/reports/the-functus-officio-problem-in-modern-arbitration-and-a-proposed-solution/.

[30] 2021 ICC Rules, Art. 36. The LCIA Rules provide that the tribunal may correct "any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature." 2020 LCIA Arbitration Rules, Art. 27. The ICDR Rules provide that the tribunal may "correct any clerical, typographical, or computational errors *or make an additional award as to claims presented but omitted from the award*." 2021 ICDR Arbitration Rules, Art. 36 (emphasis added).

[31] *See, e.g.*, *Gen. Re Life Corp. v. Lincoln Nat'l Life Ins. Co.*, 909 F.3d 544, 548 (2d Cir. 2018) (confirming award after holding that arbitrator did not exceed its power in clarifying a final award).

[32] *See generally RSM Prod. Corp. v. Gaz du Cameroun, S.A.*, 701 F. Supp. 3d 600 (S.D. Tex. 2023), *rev'd and remanded*, 117 F.4th 707 (5th Cir. 2024).

[33] *Id.* at 603.

[34] *Id.* at 606-10.

award.[35] Without discussing the principle of *functus officio*, the Fifth Circuit held that "the [t] ribunal not only had the contractual authority to correct computational errors, but it also had the authority to determine what constituted a computational error in the first instance."[36] In support of the tribunal's contractual authority, the Fifth Circuit relied on Rule 36 of the ICC Rules which "provides arbitrators the authority to 'correct and interpret' the award, including any 'clerical, computational or typographical error.'"[37] The court also found that the tribunal had authority to interpret this provision of the ICC Rules, which were incorporated into the relevant agreement to arbitrate, thereby making the tribunal's understanding of those Rules a matter of contractual interpretation for which courts will defer to the tribunal.[38]

In another recent case, the United States District Court for the Southern District of New York dealt with the propriety of remanding an award to the arbitrator and its interplay with the *functus officio* doctrine. In *Eletson Holdings Inc. v. Levona Holdings Ltd.*, the court granted a motion to vacate a final JAMS arbitration award in part relating to compensatory and punitive damages that had been awarded due to the conduct of affiliates of the respondent-defendant, who were nor parties to the arbitration agreement and did not participate in the arbitration itself.[39] The court remanded to the tribunal the questions of whether it would have awarded punitive damages but for the conduct of the non-party affiliates, and whether the tribunal would have conducted a different calculation of the punitive damage if there was no finding of a violation of an injunction by the affiliates.[40] The respondent-defendant sought reconsideration of the court's opinion, arguing, *inter alia*, that the *functus officio* doctrine and controlling Second Circuit precedent prevented remand in these circumstances, because such a remand would not merely clarify the award but instead substantively modify it.[41] In June 2024, the court rejected these arguments, but clarified that remand to the Tribunal was not intended to elicit "new reasoning" for the award, which would "violate the *functus officio* doctrine or require the Arbitrator to substantively modify the Award," but instead was limited to specifying which "portion of the lump-sum punitive damages award" was based on the conduct of the affiliates, so that this part of the award could be vacated as in excess of the tribunal's authority.[42] The court noted that the remand was not inconsistent with the JAMS Rules, because the Rules provided for an opportunity to ask corrections by the arbitrator.[43]

Both of these decisions highlight uncertainties surrounding the arbitrators' authority to correct claimed errors in their final awards, and in particular may embolden dissatisfied parties to seek to alter the outcome by relying on applications to "correct" the award under existing arbitral institution rules. In light of these

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[35] *RSM Prod. Corp. v. Gaz du Cameroun, S.A.*, 117 F.4th 707 (5th Cir. 2024).

[36] *Id.* at 714.

[37] *Id.*

[38] *Id.* ("As to this threshold scope-of-authority question, the Tribunal had both the authority to correct 'computational' errors and the more foundational authority to determine, based on its reading of ICC Rule 36, what counted as one in the first place."). *See also id.* at 715.

[39] *See generally Eletson Holdings, Inc. v. Levona Holdings Ltd.*, No. 23-cv-7331 (LJL), 2024 WL 1702397 (S.D.N.Y. Apr. 19, 2024).

[40] *Id.* at *2.

[41] *Id.* at *2-3.

[42] *Eletson Holdings, Inc. v. Lenova Holdings, Ltd.*, No. 23-cv-7331 (LJL), 2024 WL 2963719, at *4 (S.D.N.Y. June 12, 2024).

[43] *Id.* (citing Rule 24(j) of the JAMS Comprehensive Arbitration Rules and Procedures ("2021 JAMS Rules")).

court decisions, arbitral institutions may need to consider providing additional guidance to the parties and arbitrators on the circumstances under which arguably substantive corrections to arbitral awards may be made, including to account for the possibility that an award may be remanded to the arbitrator by the enforcing courts.[44]

[44] For example, whereas the ICC Rules expressly provide for the possibility that a court may remit an award to the tribunal, the ICDR and JAMS rules do not. *Compare* 2021 ICC Rules, Art. 36; *with* 2021 ICDR Arbitration Rules, Art. 36; 2021 JAMS Rules, Art. 24(j).

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## Sanctions Issues Continue To Arise In Every Stage Of An Arbitration

Sanctions will continue to be a hot topic in 2025. The uptick in economic sanctions over the last few years, particularly in response to Russia's invasion of Ukraine in February 2022, and in response to the growing military and economic competition with China, have had a meaningful impact on every aspect of the international arbitration lifecycle.

While the presence of sanctions often form the basis for the dispute by resulting in one party's inability to perform the contract, sanctions can also have an impact on the following issues at different stages of an arbitration:

- **Arbitrability of a dispute**, such as where a dispute involving a sanctioned party or sanctioned subject-matter is found to be non-arbitrable under the law governing the arbitration agreement, the law of the seat of arbitration, or the governing law on the merits based on public policy;
- **Choice of legal representation**, such as where parties are prevented from instructing legal representatives qualified in states that are sanctioned;
- **Constitution of an arbitral tribunal**, such as where arbitrator candidates are subject to sanctions or would be hampered in their ability to be objective in deciding on the merits because of their nationality or residence, especially where a sanctioned party is involved as well as related practical questions such as where the arbitral institutions are subject to sanctions or need to obtain a license to process payments from sanctioned parties;[45]

[45] To assuage some of these concerns, the LCIA obtained a general license from the UK's sanctions agency in October 2022 to process payments from sanctioned parties, but English law prohibits the enforcement of an award in favor of a sanctioned party. *See* LCIA, *LCIA Procures a Comprehensive, LCIA Specific, General Licence Regarding the Belarus And Russia (Sanctions) (EU Exit) Regulations* (Oct. 17, 2022), https://www.lcia.org/News/lcia-procures-a-comprehensive-lcia-specific-general-licence-re.aspx. Similarly, in November 2023, the New York City Bar Association, along with several U.S. business and arbitration institutions, sought a general license from the U.S. Office of Foreign Assets Control ("OFAC") that would allow U.S. persons, subject to certain conditions, to perform services related to commercial arbitration proceedings that involve parties with blocked property interests. N.Y. City Bar, *Proposal for General License Authorizing Private Commercial Arbitration Proceedings Involving Blocked Persons* (Nov. 15, 2023), https://www.nycbar.org/reports/proposal-for-general-license-authorizing-private-commercial-arbitration-proceedings-involving-blocked-persons/.

- **Choice of experts**, such as where an expert might be subject to sanctions that may affect their ability to offer an objective opinion on the applicability of sanctions in the dispute (where that expert weighs in on legal issues) or where an expert is prevented from providing certain information because the subject matter of the dispute concerns goods or services that are subject to sanctions or export controls.

- **Substance of an award**, such as where the tribunal must consider the effect of sanctions on the parties' performance and the extent of their liability (*e.g.*, whether a contract was validly suspended or terminated due to sanctions), and related practical questions of whether sanctions prohibit a party, witness or expert from attending the hearing; and

- **Enforcement and recognition of an award**, such as where courts resist enforcement involving sanctions on the basis of non-arbitrability, public policy, or irregularities in the constitution of the arbitral tribunal, or there are practical challenges such as where enforcement of an award is made impossible because a sanctioned party's assets are frozen due to sanctions.[46]

Sanctions have raised thorny jurisdictional questions, especially in the Russian context, where courts have been increasingly relying on recent changes to Russia's Arbitrazh Code of Procedure to assert exclusive jurisdiction over disputes involving sanctioned parties. For instance, in ongoing disputes between Gazprom joint venture RusChemAlliance LLC ("RCA") and German multinational company Linde plc ("Linde"), a Russian court refused to enforce a HKIAC arbitration clause in the parties' contracts and in April 2024 ordered Linde to stop arbitrating or litigating the dispute elsewhere.[47] In 2024, the Russian court also ordered Linde to pay close to €2 billion in connection with contracts involving a gas processing plant and an LNG plant in Russia because of the suspension of its performance due to sanctions.[48] Meanwhile, Linde launched proceedings with the HKIAC in March 2023 pursuant to the contracts' arbitration clause and obtained "awards on exclusive jurisdiction" in those proceedings as well as a permanent anti-suit injunction in a Hong Kong court in January 2024 to restrain RCA from pursuing litigation in Russia.[49]

Seemingly contradictory jurisdictional decisions are by no means an anomaly. In May 2024, for instance, a Russian court allowed RCA to seize over €700 million in assets held by three European banks said to recover sums under English-law contracts containing Paris-seated International Chamber of Commerce ("ICC") arbitration clauses in direct contravention of an English court decision enforcing the arbitration clauses.[50] At least one of the banks is nonetheless pursuing an ICC arbitration against RCA.[51] Nonetheless, parties may think twice about arbitrating against a Russian sanctioned party where that party has no assets outside of Russia.

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[46] *See, e.g.*, Gordon Blanke, *Economic Sanctions and How to Deal with Them: The Arbitrator's Perspective*, XI Indian Journal of Arbitration Law, International Journal of Arab Arbitration; Centre for Advanced Research and Training in Arbitration Law, National Law University Issue 2, at 9 (2023); *Bank Sepah v. Overseas Financial Limited*, CJEU Case C-340/20 (Nov. 11, 2021) (ruling that EU sanctions law prevented creditors from attaching frozen funds).

[47] *See* Jack Ballantyne & Toby Fisher, *Russian Court Restrains HKIAC Claim Against Gazprom Venture*, Global Arbitration Review (Apr. 19, 2024), https://globalarbitrationreview.com/article/russian-court-restrains-hkiac-claim-against-gazprom-venture.

[48] *See id.*; Sebastian Perry & Jack Ballantyne, *Russian Court Issues Billion-Euro Judgment Despite HKIAC Clause*, Global Arbitration Review (Nov. 4, 2024), https://globalarbitrationreview.com/article/russian-court-issues-billion-euro-judgment-in-spite-of-hkiac-clause.

[49] *Id.*

[50] *See* Jack Ballantyne, *Russian Court Seizes Assets of European Banks*, Global Arbitration Review (May 20, 2024), https://globalarbitrationreview.com/article/russian-court-seizes-assets-of-european-banks.

[51] *Id.*

Setting aside jurisdictional questions, the increasing complexity of sanctions considerations in arbitration – owing in part to the rising number of sanctions imposed by authorities worldwide, the multitude of authorities enforcing these sanctions within a given jurisdiction, the various and often overlapping types of sanctions (*e.g.*, individual sanctions, financial measures, or economic measures), the extraterritorial effect of some of the sanctions regimes,[52] and the often ambiguously phrased rules and regulations – all contribute to an ever growing compliance burden that parties, arbitrators, and tribunals alike have to contend with. As a result, parties in 2025 and beyond will need to consider the applicability of sanctions, not only as to their effect on the merits of an arbitration, but also to the arbitral proceedings themselves and how and where enforcement is possible.

[52] For instance, the extraterritorial reach of U.S. sanctions means that they can impact arbitration proceedings even when neither the parties are American nor is the seat of the arbitration in the United States.

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## Third-Party Funding Considerations Are Subject To Debate And Increasing Regulation

Third-party funding, which is an increasingly common aspect of international arbitration, has been the subject of energetic debate in recent years. Recent calls to reform the practice of third-party funding in the context of litigation proceedings, including with the introduction of the proposed Litigation Transparency Act of 2024 in the United States, which would require the disclosure of third-party litigation funding agreements in federal civil litigation,[53] have reverberated throughout the arbitration community.

In 2024, the debate surrounding the use of third-party funding in arbitration was primarily focused on reforms to the investor-state dispute settlement ("ISDS") framework, and how the disclosure of third-party funding arrangements may impact other aspects of the arbitration process. For example, as the United Nations Commission on International Trade Law's ("UNCITRAL") Working Group III continued its mandate of reviewing and proposing potential ISDS reforms, considerations of third-party funding have dominated discussions. Following the publication of its report on "Possible reform of investor-State dispute settlement (ISDS): Draft provisions on procedural reform" in late 2022, UNCITRAL Working Group III has proposed solutions and accepted public comment on potential reform efforts, including various models for regulating third-party funding, such as a general prohibition on third-party funding, requiring the other party's consent prior to obtaining funding, or permitting funding only where it is necessary for the claimant to bring it claim or when the investment is in

[53] *See* Rep. Darrell Issa, *Press Release* (Oct. 7, 2024), https://issa.house.gov/media/press-releases/issa-introduces-legislation-reforming-third-party-financed-civil-litigation.

compliance with sustainable development requirements.[54]

Moreover, the May 2024 update to the International Bar Association's Guidelines on the Conflict of Interests in International Arbitration (the "IBA Guidelines") provided additional guidance on the need to disclose the identity of third-party funding arrangements, particularly during the arbitrator disclosure process, in order to permit parties and arbitrators to identify any potential conflicts of interest early on in a case. While third-party funders (together with insurers) were previously mentioned in the explanation to General Standard 6 on "Relationships" of the 2014 IBA Guidelines, the 2024 IBA Guidelines were amended to establish that third-party funders (and insurers) may be considered to have the same identity of a party for the purposes of assessing the arbitrator's independence when the third-party funder (or insurer) exercises a "controlling influence" over the party or has influence over the conduct of proceedings, including the selection of arbitrators.[55]

The increased desire to regulate third-party funding – or at least require the disclosure of third-party funding arrangements – has been visible in recent proposed changes to domestic legislation and arbitration institution rules. In addition to the reform efforts targeting civil litigation in the United States, the new Labour Government in the United Kingdom may reintroduce the Litigation Funding Agreements (Enforceability) Bill to Parliament in a 2025 session, which could have the effect of reversing the UK Supreme Court's *PACCAR* decision discussed above and loosening the rules surrounding enforceability of certain funding arrangements that pay the funder a percentage of damages received.[56] While some commentators have suggested that some of the concerns that can arise when there is funding of civil litigation claims do not give rise to the same issues in arbitration, as a largely private dispute resolution mechanism created by consent, arbitration institutions have similarly sought to regulate the disclosure of third funding relationships in recent years. The ICC Rules now require, "[i]n order to assist prospective arbitrators and arbitrators in complying with their duties" of disclosure, that "each party must promptly inform the Secretariat, the arbitral tribunal and the other parties [] of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration."[57] Other arbitration institution rules – like the 2020 Rules of the LCIA – remain silent on the topic of disclosure of third-party funding arrangements.

The failure to disclose third-party funding arrangements and other concerns arising from third-party funding relationships can lead to disputes. For example, a Toronto-based mining company, Silver Bull Resources, unsuccessfully attempted to disqualify Philippe Sands KC from acting as arbitrator in a $408 million claim initiated against Mexico under the NAFTA sunset provision, based on statements by Mr. Sands that he had "serious concerns" about

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[54] *See* UNCITRAL, *Initial Draft on the Regulation of Third-Party Funding*, https://uncitral.un.org/en/thirdpartyfunding.

[55] Cleary Gottlieb Alert Memorandum, *International Bar Association Publishes Revisions to Guidelines on Conflicts of Interest in International Arbitration* (Mar. 8, 2024), https://www.clearygottlieb.com/news-and-insights/publication-listing/international-bar-association-publishes-revisions-to-guidelines-on-conflicts-of-interest-in-international-arbitration.

[56] *See supra* at n.16.

[57] 2021 ICC Rules, Art. 11(7). The 2022 ICSID Arbitration Rules similarly require a party to disclose any other party from which it "has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding," whether "directly or indirectly." 2022 ICSID Arbitration Rules, Rule 14.

third-party funding in investment arbitration.[58] According to the October 2024 decision, Silver Bull Resources – which has accepted up to $9.5 million from Bench Walk Advisors to pursue its case against Mexico – had sought to disqualify Mr. Sands following his comments in an unrelated arbitration on the "real risk" that the purpose of investment arbitration will be "subverted" if claims are "controlled" by a third-party funder with no prior relationship to the purported investment or host State.[59] The panel ultimately concluded that Mr. Sands' comments were directed at "certain risks" posed by third-party funding and did not indicate that he had pre-judged or had a preconceived bias against claimants with third-party funding arrangements.[60]

The continued proliferation of third-party funding in international arbitration disputes, as well as recent efforts to regulate third-party funders' involvement in cases, particularly through disclosure, will likely continue to be a topic of discussion in 2025. As third-party funding becomes increasingly common, so too will related disputes. While purportedly inadequate disclosures regarding the existence of third-party funding, or an arbitrator's past or currently pending cases involving a third-party funder, have been subject to scrutiny in some cases, substantive disputes between third-party funders and the parties whose claims or defenses they have a financial stake in will likely also continue to arise, particularly as the law and regulation surrounding third-party funders' roles and their ability to control case strategy and settlement remains unsettled.

[58] Toby Fisher, *Sands Survives Challenge Over Alleged Bias Against Third-Party Funding*, Global Arbitration Review (Nov. 7, 2024), https://globalarbitrationreview.com/article/sands-survives-challenge-over-alleged-bias-against-third-party-funding.

[59] *Id.*

[60] *Id.*

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## Increase In Sustainability-Related Disputes Across The Energy And Construction Industries

As states and private actors continue to focus on sustainability and the environment, the global energy transition is likely to continue generating technological and operational challenges impacting investor-state arbitration and international commercial arbitration in 2025.

The Conference of the Parties ("COP") to the United Nations Framework Convention on Climate Change ("UNFCCC") held in November 2024 ("COP29") heralded significant progress. State parties agreed on, among other things, a goal to triple finance to developing countries, from the previous goal of $100 billion annually, to $300 billion annually by 2035, with

a parallel goal to scale up public and private investment to $1.3 trillion per year in the same timeframe.[61]

The increase in investments and active projects around the world – approaching almost $2 trillion each year[62] – continues to fuel disputes both in traditional sectors, such as those concerning liquefied natural gas ("LNG") and the construction of new energy facilities, as well as in new areas, such as the decommissioning of existing oil and gas platforms, seabed mining, and carbon dioxide stockage.

### LNG Disputes

With LNG export capacity steadily increasing in the last few years,[63] parties to long-term LNG supply contracts have resorted to arbitration to resolve disputes regarding the repurposing of LNG facilities.

In September 2024, a New York state court declined to review a breach of contract claim on the basis of *res judicata* following a 2018 arbitration award.[64] The underlying ICDR arbitration was initiated in 2016 when ENI SpA ("ENI") brought claims against Gulf LNG Energy, LLC ("Gulf"), the operator of a Mississippi LNG import and regasification terminal, with which it had entered into a 20-year Terminal Use Agreement ("TUA").[65] Although the facility had been initially designed to receive, store, and re-gasify LNG imported from Angola and other locations, the shale revolution in the United States allegedly led ENI, which was obligated to pay monthly fees to Gulf even when it was not utilizing the facility, to terminate the TUA.

In 2018, the arbitral tribunal relieved ENI of its obligation to pay $1.2 billion in prospective fees after finding that the shale revolution had frustrated the essential purpose of the agreement.[66] The tribunal declined to rule on ENI's breach of contract claim that Gulf's efforts to repurpose the facility into an export facility breached the TUA and ordered ENI to pay Gulf more than $462 million in damages to compensate Gulf for the decommissioning of the LNG terminal and for Gulf's partial performance under the TUA.[67] After paying the award, ENI subsequently asserted its breach of contract claim again in a lawsuit in New York state court, which was dismissed as barred by the 2018 award under *res judicata* principles.[68]

### Construction Disputes

The increased scrutiny over the environmental impact of new facilities continues to lead to disputes, particularly in the construction sector. For example, the Turkish engineering group Enka Renewables ("Enka") recently won a $383 million ICC award against Georgia after Enka reportedly terminated

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[61] United Nations Climate Change, *COP29 UN Climate Conference Agrees to Triple Finance to Developing Countries, Protecting Lives and Livelihoods* (Nov. 24, 2024), https://unfccc.int/news/cop29-un-climate-conference-agrees-to-triple-finance-to-developing-countries-protecting-lives-and.

[62] International Energy Agency, *World Energy Outlook* (2024), https://tinyurl.com/su4kf6un.

[63] *Id.* at 50.

[64] *See generally Gulf LNG Energy, LLC v. Eni S.p.A.*, 219 N.Y.S.3d 17, 20 (1st Dep't 2024).

[65] *See id.*

[66] *See id.* at 20-21.

[67] *Id.* at 21.

[68] *Id.* at 21-26.

a contract to construct and manage a hydropower plant in the wake of environmental protests.[69]

In another case involving a failed hydroelectric plant in Guatemala, the United States Court of Appeals for the Eleventh Circuit in October 2024 confirmed an arbitral award ordering a contractor to return unearned advance payments to the owner of the failed plant. This award came after the contractor terminated an agreement to build the hydroelectric plant, following sustained opposition by indigenous community groups, who blocked access to the construction site and threatened those working on it.[70]

These cases demonstrate the tension between the increased investment in so-called green energy initiatives, which require the development of new technologies and construction of new facilities, and the communities that such initiatives seek to benefit.

### New Sectors

The ongoing energy transition will likely give rise to arbitration disputes in emerging industries as new operational and technological challenges arise in 2025.

The expected decommissioning of existing oil and gas platforms, rigs, and pipelines, which will reach the end of their life cycles in the coming years, poses significant operational challenges. As these facilities are often located in remote and dangerous locations, such as the deep seas, their safe removal is particularly complex and expensive. For example, the deepwater U.S. Gulf of Mexico decommissioning market is estimated at about $24.3 billion.[71] These challenges will increase the resort to arbitration as a mechanism to determine how liability should be apportioned.

Mining will be another booming area for environmental disputes in 2025 and beyond, as the race to identify and supply critical and rare materials (such as lithium, a crucial component for electronic batteries) will surge and move to a new and largely unmapped location: the seabed. The recently concluded ICSID case *Odyssey Marine Exploration Inc. v. United Mexican States* may foreshadow what is to come, although the award – which was issued in September 2024 – is not yet publicly available. The dispute was initiated in 2019 when U.S. company Odyssey Marine Exploration Inc. ("Odyssey") brought a $2.36 billion claim against Mexico under NAFTA alleging that Mexico unlawfully blocked its project to develop an underwater phosphate deposit, crucial to developing North America's fertilizer needs, in the Gulf of Ulloa in Baja California. Mexico defended its decision to withdraw the permits based on environmental concerns, as the project would have disrupted the delicate ecosystem of the area. In September 2024, the tribunal issued its final award in favor of Odyssey and ordering Mexico to pay $37.1 million for breaching its obligations under NAFTA.[72]

Another potential hotbed for disputes in 2025 is the Carbon Capture Use and Storage ("CCUS") sector, which aims to capture the carbon dioxide ("CO2") produced by power-plants and inject it into underground sites for permanent storage (such as exhausted gas wells). In September

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[69] Susannah Moody, *Turkish Group Wins Award Against Georgia Over Hydro Project*, Global Arbitration Review (Dec. 4, 2024), https://globalarbitrationreview.com/article/turkish-group-wins-award-against-georgia-over-hydro-project.

[70] *Hidroelectrica Santa Rita S.A. v. Corporacion AIC, SA,* No. 23-12519, 2024 WL 4500962, at *2-3 (11th Cir. Oct. 16, 2024).

[71] Mark Kaiser, *US Deepwater Decommissioning Market Estimated at About $23.3 Billion*, Offshore (Oct. 31, 2023), https://tinyurl.com/4jbn4xra.

[72] Business Wire, *Odyssey Marine Exploration Reports Win in NAFTA Arbitration Case* (Sept. 17, 2024), https://www.businesswire.com/news/home/20240917082379/en/Odyssey-Marine-Exploration-Reports-Win-in-NAFTA-Arbitration-Case.

2024, the Northern Lights Project in Norway (owned by TotalEnergies, Equinor and Shell in the context of the larger $1.8 billion Longship Project) became operational and started to store CO2 at approximately 2,600 meters below the seabed of the North Sea.[73] That same month, a similar project by ENI became operational in Italy, with the aim to become the largest CO2 storage hub in the Mediterranean.[74]

In light of the growing number of projects in development, the new technological challenges they pose, and the environmentally sensitive zones where they operate, disputes will likely arise in this sector during 2025 and beyond.

[73] Saptakee S., *The 'Northern Lights' Shines: Shell, Equinor, and TotalEnergies JV Powers the Norway CCS Project*, Carbon Credits (Sept. 27, 2024), https://carboncredits.com/the-northern-lights-shines-shell-equinor-and-totalenergies-jv-powers-the-norway-ccs-project/.

[74] ENI, *Eni e Snam Avviano Ravenna CCS, Primo Progetto di Cattura e Stoccaggio Della CO2 in Italia* (Sept. 3, 2024), https://www.eni.com/it-IT/media/comunicati-stampa/2024/09/eni-snam-avviano-ravenna-css-primo-progetto-cattura-stoccaggio-co2-italia.html.

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24-1129.01_010525