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# International Arbitration 2023

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**Introduction**

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# INTRODUCTION

**Contributed by:** Gary Born and Matteo Angelini, **Wilmer Cutler Pickering Hale and Dorr LLP**

**Wilmer Cutler Pickering Hale and Dorr LLP** offers one of the world's largest and most experienced international arbitration and dispute resolution practices. The international arbitration group has been involved in more than 650 proceedings in recent years. Lawyers have successfully represented clients in a number of the largest institutional arbitrations and several of the most significant ad hoc arbitrations to arise in the past decade. The multinational team consists of nearly 70 lawyers, all of whom principally practise international dispute resolution. In addition to representing clients as counsel, many lawyers regularly sit as arbitrators in international arbitrations. The practice covers commercial and investment arbitration under the rules of all leading arbitral institutions and ad hoc arbitrations seated in a wide range of jurisdictions. It has represented individuals, companies, states and state entities. Lawyers have recently handled or are currently handling disputes under a wide range of international arbitration centres, and also have extensive experience with more specialised forms of institutional arbitration and ad hoc arbitrations.

## Contributing Editor

**Gary Born** is chair of the international arbitration group at Wilmer Cutler Pickering Hale and Dorr LLP. He is also president of the Singapore International Arbitration Centre Court of Arbitration and serves in an advisory capacity at other institutions around the world. Gary has served as counsel in more than 650 arbitrations, including several of the largest arbitrations in ICC and ad hoc history, and has sat as arbitrator in more than 225 institutional and ad hoc arbitrations. He is a pre-eminent authority in the field and renowned author, as well as an honorary professor of law at the University of St. Gallen in Switzerland and Tsinghua University in Beijing. Gary teaches widely at law schools in Europe, Asia, and North and South America.

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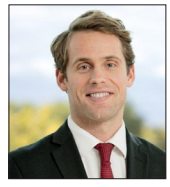

**Matteo Angelini** is a senior associate in the international arbitration practice group at Wilmer Cutler Pickering Hale and Dorr LLP. He is an English barrister. Matteo has experience in arbitrations under a variety of institutional rules (including the ICC, LCIA, LMAA and ICSID rules) involving both common law and civil law disputes. He has particular experience in construction, technology, engineering, energy, M&A and joint venture disputes, and regularly advises government and private sector clients on international law issues.

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### Global Overview – International Arbitration 2023

In 2023, the international arbitration landscape is dominated by macroeconomic factors. The inflationary pressures combined with price volatility and the use of sanctions by governments following Russia's invasion of Ukraine have caused serious difficulties for businesses across the globe. This is leading to a proliferation of disputes across a wide range of sectors as businesses seek to recoup some of their pandemic losses through arbitration. The areas that are seeing the most disputes are construction, the energy sector and transport and commodities. Against this backdrop, it is unsurprising that most leading arbitral institutions reported a record – or close-to-record – caseload over the past year.

### Russian Invasion of Ukraine

As the world began to emerge from the pandemic, the Russian invasion of Ukraine on 24 February 2022 triggered another large-scale humanitarian crisis. The ongoing war in Ukraine, which has continued into 2023, has caused a massive upheaval in people's lives and businesses across the globe. The economic and financial sanctions imposed against Russia combined with the worldwide supply chain crisis will transform the way the global economy operates.

Russia is among the top five producers of oil, natural gas, steel, nickel and aluminium, as well as being the largest exporter of wheat in the world. The sanctions against Russia, therefore, have pushed global commodity prices up and intensified the threat of long-lasting inflation.

The effect of Russia's invasion of Ukraine on the arbitration landscape has changed. Initially, there was a sharp decline in the number of Russia-related arbitrations as reported by the LCIA. The ensuing disruptions caused by economic sanctions, however, has triggered a number of new disputes, especially in the mining and commodities and energy sectors. Russia is a key supplier of a range of metals including steel, aluminium and nickel. Disputes have arisen from foreign investors who were forced to abandon their operations in Russia at short notice. Russia is a party to over 60 bilateral investment treaties, and it is expected that investors will increasingly seek to rely on the protections offered by those treaties.

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### Technology and AI

Investment in technology and AI continues to boom. This is having two obvious effects on the arbitration landscape in 2023. The first is a proliferation of a new type of dispute involving digital assets, blockchain and fintech. A number of new, technology-related disputes have also been pursued by investors. The International Centre for Settlement of Disputes (ICSID) has reported an increase in information and communication-related technology disputes. China telecoms giant Huawai has pursued a treaty claim against the Government of Sweden over its exclusion from the 5G network. Investor-state technology disputes are likely to raise a host of new and topical issues including whether digital assets, blockchain, AI or decentralised assets qualify as investments.

The second effect is on the arbitral process. The increasing use of technology and the virtual hearing format has allowed for more diversified and widespread participation in international arbitration. It has helped make arbitration more widely accessible. The ICC launched a new report on leveraging technology in international arbitration proceedings. It concluded that the arbitration sector has embraced virtual hearings and hybrid hearings. It also found that most believe that there should be no presumption in favour of physical hearings over virtual hearings. Instead, the Tribunal should determine this based on the circumstances of the case. For procedural conferences or small hearings, a virtual hearing is now the norm rather than an exception.

### Caseload of Arbitral Institutions

Arbitration continues to remain a preferred method of dispute resolution for many international businesses. A number of arbitral institutions recorded high numbers of new case filings. SIAC recorded 357 new case filings, with a total sum in dispute of USD5.61 billion. Other institutions also recorded sizeable numbers with 333 new cases for the LCIA and 515 for HKIAC. The five most preferred arbitral institutions are the ICC, SIAC, HKIAC, LCIA and CIETAC. Each of these institutions also continues to dominate the 2022 Queen Mary University of London and White & Case International Arbitration Survey, a recurring feature of the arbitration landscape that the industry has now grown used to seeing as a periodic barometer of its progress. In this year's roundup, the most preferred arbitral seat was London, with users citing the stability of its commercial law. Singapore was the second most popular seat, with users noting that it is receiving a larger share of Asian disputes due to changing perceptions about Hong Kong as an international arbitral seat.

### The Reform of the Arbitration Act (England and Wales)

In the UK, the process of reform of the Arbitration Act 1996 has continued to gather momentum. In September 2022, the Law Commission published its first consultation paper proposing reforms to the Arbitration Act 1996 focusing on confidentiality, independence of arbitration, discrimination, powers of arbitrators to adopt summary dismissal procedures and arbitrator immunity. In March 2023, the Law Commission published a further paper focusing on overturning the effects of Enka v Chubb, a Supreme Court decision of October 2020 that determined the vexed question of how to determine the law applicable to an arbitration agreement. In Enka v Chubb, the Supreme Court held that the default choice is the law of the contract. The Law Commission's report highlights complications arising from Enka and advocates a new statutory rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement

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is the law of the seat. It remains to be seen if this proposal will be adopted.

### New Arbitral Rules

In January 2023, the Arbitration Institute of the Stockholm Chamber of Commerce approved a new set out of rules. Several features of these rules are noteworthy for the practical guidance they provide. The revised rules provide guidance on what information should be included by parties in their submissions. In particular, a pleading must identify the "factual and other circumstances" on which the party relies. The new rules also give arbitrators the discretion to determine whether a hearing should be conducted in person or remotely and additional powers to the Tribunal to terminate arbitral proceedings by way of an order rather than having to issue an award.

The Saudi Center for Commercial Arbitration issued a new set of updated rules in 2023. Importantly, the 2023 Rules provide for the establishment of an SCCA Court to perform an administrative role to support arbitrations that are administrated under the SCCA rules. The SCCA also provides for an Online Dispute Resolution system for the resolution of low-value disputes as well as an electronic filing system. The 2023 Rules are some of the most advanced rules in terms of embracing the use of modern technology to improve the efficiency of the dispute resolution process.

### The Development of Arbitral Jurisprudence

National apex courts delivered several judgments that had a meaningful impact on the development of arbitral jurisprudence. Perhaps the most prominent of these that captivated the attention of the arbitration community were rendered by the US Supreme Court.

#### *ZF Automotive US, Inc v Luxshare, Ltd (United States)*

The US Supreme Court restricted the scope of discovery available in international arbitration. The Supreme Court unanimously ruled that US discovery cannot be ordered under 28 USC Section 1782 in aid of international commercial arbitration and investor-state arbitration. This is a seminal decision for the global arbitration community. Prior to this decision, there was a circuit split over whether such discovery was allowed, which foreign parties frequently exploited to seek discovery in support of arbitral proceedings. The decision confirms that foreign parties and arbitral tribunals cannot rely any longer on 28 USC Section 1782 to seek discovery in support of foreign arbitrations, thereby restricting the information available in global arbitration disputes.

#### *Morgan v Sundance (United States)*

The US Supreme Court in Morgan v Sundance addressed the important question of the standard for determining whether a party has waived its right to arbitrate a dispute by first engaging in litigation. Overruling decisions in nine circuits, the Supreme Court unanimously held that there is no requirement for an adverse party to show that it suffered prejudice as a result of the litigation proceedings for a waiver of a right to arbitrate to arise. The decision is important, and may have wider ramifications because the Supreme Court reasoned that arbitration-specific procedural rules – such as a prejudice requirement – are incompatible with the Federal Arbitration Act (FAA), even when those rules purport to support the pro-arbitration policies underlying the FAA.

### "Green Arbitration" Initiatives

The carbon footprint that international arbitration carries is well documented. However, the past year has seen a remarkable and positive

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increase in support for "green arbitration" initiatives. This movement has no doubt been propelled by the realisation due to the COVID-19 pandemic that arbitration can (in most cases) be successfully managed virtually, whether by remote hearings, filings or conferences. While the Queen Mary Survey suggests that the environment was not the original reason for parties opting for remote hearings, it now seems to be an increasingly important consideration for parties when negotiating an appropriate arbitral procedure and format.

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