

ALERT MEMORANDUM

Five International Arbitration Trends and Topics for 2024

January 4, 2024

There were many topics that captured the international arbitration community's interest in 2023. For example, the shift of production and manufacturing markets in the aftermath of the COVID-19 pandemic – known as “nearshoring” – and related disputes dominated discussions. The viability of intra-EU investor-state arbitration also proved to be a hot topic for debate, particularly in light of states' continued exodus from the Energy Charter Treaty and a recent decision from Germany's Federal Court of Justice finding that parties could request a German court to declare an intra-EU ICSID arbitration incompatible with EU law before proceedings even commenced. We expect that 2024 similarly will herald a number of interesting developments in international arbitration.

This article summarizes what are likely to be key trends and topics in international arbitration in 2024, including: (1) an influx of new arbitrations in the energy industry, including in the evolving LNG, lithium, and hydrogen sectors; (2) a renewed focus on arbitrator disclosures, which has resulted in disqualification attempts and challenges to awards as a result of alleged arbitrator bias; (3) different jurisdictions' varying approaches with respect to allegations of corruption in post-award enforcement challenges; (4) new interest in the use of summary disposition procedures and bifurcation measures; and (5) upcoming reforms to national arbitration laws in important arbitration jurisdictions.

1

Increase In Disputes Among Key Energy Industries: LNG, Lithium, And Hydrogen

While arbitration has historically been the preferred dispute resolution mechanism in the oil and gas industry, 2023 saw a sharp uptick in arbitrations being initiated in developing energy sectors, including the LNG, lithium, and hydrogen industries. Increased investment coupled with new and changing regulatory oversight is likely to lead to more energy disputes in 2024.

LNG

The number of LNG-related disputes are expected to increase this year in light of the substantial pressure on the global energy market caused by the Russian invasion of Ukraine, resulting in serious disruption and price volatility in the LNG industry. Some commentators have speculated that the increase in LNG spot prices since 2022 has led LNG producers to consider whether it is more profitable to terminate or refuse to perform on long term supply agreements and instead sell LNG on the spot market, and a number of disputes have arisen this past year highlighting that potential incentive.¹

For example, in May 2023, Edison SpA (“Edison”) launched proceedings against U.S.-based Venture Global LNG (“Venture Global”) for failure to deliver LNG at the Calcasieu Pass facility in Cameron Parish, Louisiana pursuant to a long-term supply agreement entered into in 2017, in connection with which no shipments have yet been made.² According to allegations made by Edison and other customers (including BP, Repsol, and Shell) that have since initiated separate arbitrations against Venture Global, Venture Global failed to supply LNG under its pre-existing long-term agreements, instead opting to sell to different customers at higher prices through spot contracts.³ In response, Venture Global has argued that formal commercial operation of the plant has been delayed due to “extensive repair” to the power supply facility.⁴ In an unprecedented call for action, in November 2023, BP and Shell wrote to the EU-US Task Force on Energy Security to intervene in the dispute, alleging that Venture Global’s “opportunistic” conduct is “exacerbating an energy crisis affecting the lives of European citizens.”⁵ Repsol is also pursuing a claim against Venture Global before the U.S. Federal Energy Regulatory Commission, and earlier this year attempted (unsuccessfully) to obtain documents

¹ See Jeremy Richmond KC & William Mitchell, *Long-term LNG agreements and short-term volatility: buyers beware?*, Global Arbitration Review (Apr. 12, 2023), <https://globalarbitrationreview.com/article/long-term-lng-agreements-and-short-term-volatility-buyers-beware>. For example, Pakistan reportedly initiated an LCIA arbitration against an undisclosed company over an alleged failure to supply contracted amounts of LNG, contending that the company had diverted its LNG cargoes to wealthier nations willing to pay a higher price for the LNG. Tom Jones, *Pakistan defeats claim over Saudi steel project*, Global Arbitration Review (Dec. 20, 2023), <https://globalarbitrationreview.com/article/pakistan-defeats-claim-over-saudi-steel-project>.

² Jack Ballantyne, *Edison brings claim against LNG supplier*, Global Arbitration Review (June 12, 2023), <https://globalarbitrationreview.com/article/edison-brings-claim-against-lng-supplier>.

³ Ed Hirs, *Did Venture Global LNG Break Contracts with Shell, Edison, And BP?*, Forbes (Sept. 6, 2023), <https://www.forbes.com/sites/edhirs/2023/09/06/did-venture-global-lng-break-contracts-with-shell-edison-and-bp/?sh=675a411525ca>.

⁴ *Id.*

⁵ Jamie Smyth & Myles McCormick, *Oil majors call on Washington and Brussels to intervene in LNG dispute*, Financial Times (Nov. 11, 2023), <https://www.ft.com/content/90891fb9-9bb9-4777-8b10-5e071514ea09>.

relating to operations at the Calcasieu Pass facility through regulatory proceeding mechanisms.⁶ BP also announced that it filed a similar request.⁷

The rising price of LNG has also had a significant impact on domestic regulatory policies. The increase in prices has, for example, led Australian producers to export larger quantities of LNG, which in turn resulted in the Australia Government proposing reforms to the Domestic Gas Security Mechanism (“ADGSM”) in April 2023 that would allow government control of the export of LNG so as to meet domestic demand. If Australia is successful in implementing this mechanism in 2024, it may have further effects on LNG supply and prices worldwide, as well as consequences for Australia’s trading partners and foreign investors, potentially leading to new arbitration proceedings initiated under investment instruments or contractual arrangements.

Finally, one important area for potential LNG disputes in 2024 relates to environmental impacts. Although LNG has been heralded as an important tool in counterbalancing natural gas shortages across Europe, it has also come under scrutiny for its alleged climate change impact. For example, in March 2023, a United States investor brought a North America Free Trade Agreement (“NAFTA”) legacy claim against Canada arising from a 2021 decision by the Province of Quebec to terminate construction of an LNG pipeline project allegedly worth US \$14 billion⁸ on the basis that the project

was expected to have significant negative environmental effects.⁹ It will be interesting to see if environment-related LNG disputes lead to commercial or investment arbitrations in 2024.

Lithium

Large-scale lithium projects continue to expand worldwide, driven by global clean energy projects – including the increased demand for electric vehicle batteries – which rely on lithium to meet their sustainability goals.¹⁰ This demand has led to an influx of disputes in the lithium industry, which are expected to continue in 2024.

Indeed, the growing number of lithium-related commercial and investment arbitrations initiated in 2023 demonstrate parties’ increased reliance on arbitration to resolve these issues.

As it relates to commercial arbitration cases, given the long-term, capital-intensive nature of lithium mining projects – including the many private parties and contracts involved – there are likely to be a number of disputes that, when initiated, involve complicated questions of consolidation and multi-party joinder, and have project consequences that can lead to a proliferation of other disputes throughout a value chain.¹¹

This trend of new cases from the lithium sector has impacted investment treaty cases as well.

⁶ See FERC, *Order Denying Late-Filed Motion for Leave to Intervene out of Time* (Nov. 14, 2023), <https://www.energy.gov/sites/default/files/2023-11/VG%20Calcasieu%20Pass%20-%20Order%20Denying%20Repsol%20Motion%20to%20Intervene.pdf>.

⁷ BP, *Press Release* (Dec. 11, 2023), https://www.bp.com/en_us/united-states/home/news/press-releases/bp-statement-on-its-ferc-complaint-against-venture-global.html.

⁸ Toby Fisher, *Mexico faces NAFTA legacy claims as deadline looms*, *Global Arbitration Review* (March 3, 2023), <https://globalarbitrationreview.com/article/mexico-faces-nafta-legacy-claims-deadline-looms>.

⁹ Government of Canada Releases the Final Decision on the Énergie Saguenay Project, *News Release* (Feb. 7, 2022), <https://www.canada.ca/en/impact-assessment-agency/news/2022/02/government-of-canada-releases-the-final-decision-on-the-energie-saguenay-project.html>.

¹⁰ See Cleary Gottlieb Alert Memorandum, *The Lithium Triangle: Challenges and Opportunities for Latin America*, Cleary Gottlieb (Sept. 25, 2023) <https://www.clearygottlieb.com/news-and-insights/publication-listing/the-lithium-triangle-challenges-and-opportunities-for-latin-america>.

¹¹ *See id.*

Many of the cases in this space are likely to be the result of the tension between lithium mining companies attempting to secure and maintain rights to exploit lithium in key geographic regions – like the so-called “Lithium Triangle” comprised of Argentina, Chile, and Bolivia – and states that are enacting new regulations on this burgeoning industry. For example, Simco, a Chilean-Taiwanese mining joint venture, announced that it may bring an investment treaty claim against Chile – which has one of the world’s largest reserves of lithium – in response to Chile’s announcement that it will provide exclusive mining rights in the Maricunga salt flats to Codelco, a state owned entity.¹² Similarly, in November 2023, Australian mining company African Mining and Energy (“AME”) filed a notice of dispute pursuant to the Netherlands-Ethiopia Bilateral Investment Treaty, following the cancellation by the Ethiopian federal ministry of mines and petroleum of the exploitation license held by AME’s local joint venture, Kenticha Mining.¹³

It will be interesting to monitor these and similar cases in 2024, as lithium becomes an increasingly important strategic resource for states and private companies alike.

Hydrogen

Another energy resource where we expect to see further disputes is hydrogen. Recent government and international environmental initiatives have been focused on bolstering the use of clean hydrogen, which is produced using renewable, nuclear, or other clean methods. Switching to clean hydrogen could contribute to decarbonization of certain key industries, and more broadly facilitate COP 28’s global agreement to transition away from traditional fossil fuels this decade and reach zero emissions by 2050.

These regulatory efforts will likely have significant implications on the hydrogen industry, as production and supply expand to meet demand, investments are made in new production facilities and pipelines, and further regulatory measures are enacted globally. These changes are in turn expected to impact more broadly private actors in the energy space who may for, example, benefit from investment treaty or other contractual protections. As the industry continues to expand, so too will disputes.

¹² Toby Fisher, *Lithium miner threatens treaty claim against Chile*, Global Arbitration Review (Nov. 25, 2022), <https://globalarbitrationreview.com/article/lithium-miner-threatens-treaty-claim-against-chile>.

¹³ African Mining & Energy, *Press Release* (Nov. 17, 2023), <https://files.lbr.cloud/public/2023-11/20231117%20Dispute%20Notice%20-%20AME%20Press%20Release.pdf?VersionId=F43LE2vGcmHyDw6uFbMo.nIlyq.WOr2G>.

Arbitrators Under Scrutiny: Renewed Focus On Conflicts Of Interest And Arbitrator Disclosure

Arbitrator independence and impartiality was a topic of much debate in the arbitration community in 2023, beginning with former ICC Court President Alexis Mourre calling for “urgent reform” and a universal standard for disclosures of potential conflicts of interest.¹⁴ Mr. Mourre’s comments in February 2023 were prescient, as the remainder of the year was replete with arbitrator challenges, both in the context of disqualifications sought during arbitration proceedings, and also at the post-award enforcement stage where parties sought to vacate awards based on alleged arbitrator bias.

The number of high-profile and highly-publicized disqualification attempts in 2023 may indicate that parties are increasingly scrutinizing their opponents’ appointed arbitrators, and parties may be especially sensitive to any actual or perceived conflicts. For example, a British company unsuccessfully attempted to disqualify an arbitrator from hearing an ICSID claim against Venezuela over repeated state appointments,¹⁵ and an arbitrator voluntarily stepped down from a tribunal handling a shareholder claim against

Petrobras following a conflict of interest challenge by the state-owned company.¹⁶

In the context of enforcement proceedings, U.S. courts continued to grapple with how to apply the “evident partiality” standard under the Federal Arbitration Act (“FAA”) when determining whether arbitrator bias warrants vacatur of an award.¹⁷ The Circuit courts encompassing two of the most important arbitration seats in the United States – New York and Miami – have found themselves on different sides of the debate, with the Second Circuit holding that the FAA requires “actual bias” (that is, “a reasonable person would have to conclude that an arbitrator was partial”) for an award to be vacated,¹⁸ and the Eleventh Circuit applying the “appearance of bias” test that requires that the circumstances be sufficient to raise a reasonable doubt regarding the arbitrator’s bias.¹⁹

The Circuit split has become further entrenched with two recent decisions. In *Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama*, the Eleventh Circuit held that arbitrators’ failures to disclose that they had served on panels with one

¹⁴ Tom Jones, *Mourre calls for universal standard of disclosure*, Global Arbitration Review (Feb. 20, 2023), <https://globalarbitrationreview.com/article/mourre-calls-universal-standard-of-disclosure>.

¹⁵ Toby Fisher, *Argentine arbitrator survives challenge over Venezuela appointments*, Global Arbitration Review (June 2, 2023), <https://globalarbitrationreview.com/article/argentine-arbitrator-survives-challenge-over-venezuela-appointments>.

¹⁶ Jack Ballantyne, *Brazilian arbitrator resigns after Petrobras challenge*, Global Arbitration Review (July 26, 2023), <https://globalarbitrationreview.com/article/brazilian-arbitrator-resigns-after-petrobras-challenge>. Some scholars suggest that the increase in arbitrator challenges is related to the increased number of arbitration cases, and does not indicate any recently-increased mistrust by parties in the system. See Louise Nicholson, *Arbitrator challenges: a practical guide*, Global Arbitration News (Dec. 3, 2020), <https://www.globalarbitrationnews.com/2020/12/03/arbitrator-challenges-a-practical-guide/>.

¹⁷ 9 U.S.C. § 10(a)(2).

¹⁸ See *Morelite Constr. Corp. (Div. of Morelite Elec. Serv., Inc.) v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984). See also *JCI Commc’ns, Inc. v. Int’l Bhd. of Elec. Workers, Local 103*, 324 F.3d 42 (1st Cir. 2003); *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 530 (4th Cir. 2007); *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278 (5th Cir. 2007); *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 306 (6th Cir. 2008).

¹⁹ *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1338 (11th Cir. 2002).

party's counsel were not "reasonably indicative of possible bias."²⁰ In a highly-anticipated decision from the Second Circuit, *Andes Petroleum Ecuador Ltd. v. Occidental Exploration & Production Co.*, the court applied a slightly different standard to reach the same result, finding that awards should be vacated based on failure to disclose a relationship only where a "reasonable person, considering all the circumstances, would have to conclude that an arbitrator was partial to one side," and declining to vacate an award based on an arbitrator's failure to disclose appointment to a separate tribunal alongside one party's counsel.²¹ Both cases are currently pending *certiorari* review before the U.S. Supreme Court, which, if it decides to hear this issue, will have the opportunity to provide considerable clarity to the circumstances in which arbitration awards may be vacated following allegations of arbitrator bias.

Additional clarity may come from the International Bar Association ("IBA"), which is planning to publish revisions to its Guidelines on Conflicts of Interest in International Arbitration by the end of 2024, following a public comment period soliciting feedback from the international arbitration community which concluded in late 2023.²² While the IBA Guidelines on Conflicts of Interest in International Arbitration remain non-binding soft law guidance that often helps parties and arbitrators navigate disclosure issues, countries are also considering legal reform to clarify and codify an arbitrator's duty of disclosure. For example, the United Kingdom Law Commission's published recommendations for reform to the UK's 1996 Arbitration Act (further discussed below in Section 5) include a codification of arbitrator's duties of disclosure. Whether this reform in a key arbitration jurisdiction is implemented, and how U.S. courts continue to consider arbitrator bias as grounds for challenging an arbitration award, will be an important area of focus for the international arbitration community in 2024.

²⁰ *Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Pan.*, 78 F.4th 1252, 1262 (11th Cir. 2023), *cert. petition pending*, No. 23-660.

²¹ *Andes Petrol. Ecuador Ltd. v. Occidental Expl. & Prod. Co.*, No. 21-3039-CV, 2023 WL 4004686 at *2 (2d Cir. June 15, 2023) (emphasis in original), *cert. petition pending*, No. 23-506.

²² Susannah Moody, *IBA task force to review conflict guidelines*, *Global Arbitration Review* (Apr. 13, 2023), <https://globalarbitrationreview.com/article/iba-task-force-review-conflict-guidelines>.

3

Courts Continue To Grapple With Corruption Allegations At The Enforcement Stage

Corruption has been as a hot topic in investor-state and commercial arbitrations alike, and is likely to continue to make headlines in 2024, as parties increasingly invoke corruption-related defenses during pending cases²³ and also seek to use allegations of corruption as a mechanism to avoid the enforcement of arbitration awards.²⁴

In an October 2023 decision in *Nigeria v. Process & Industrial Developments Ltd.*, England’s High Court of Justice vacated a US \$11 billion arbitration award issued against Nigeria, finding that the award had been procured by fraud and “severe abuses of the arbitral process,” including bribes to Nigerian officials and the review of certain privileged materials that had been obtained during the arbitration.²⁵ The decision marks a significant victory for Nigeria given the large amount in dispute, and stands out as a decision where evidence of corruption obtained after the conclusion of the arbitration convinced the court to review the record of the case and find sufficient grounds for vacatur.

A case currently before the U.S. District Court for the District of Columbia in Washington, D.C.

– derived from a highly-publicized series of arbitrations, investigations, and criminal proceedings in Peru – has a similar procedural posture, but is likely to result in a different outcome. In a December 6, 2023 hearing in *Metropolitan Municipality of Lima v. Rutas de Lima*, Judge Ana Reyes stated that she was “99.99%” likely to confirm two ICC arbitration awards, totaling approximately US \$181 million and US \$9 million, respectively, that had been issued against the Metropolitan Municipality of Lima in Peru.²⁶ There, Lima sought to vacate the awards pursuant to Section 10 of the FAA, which permits vacatur of an award on the basis of “corruption, fraud or undue means” or “where the arbitrators were guilty of misconduct . . . in refusing evidence pertinent and material to the controversy,”²⁷ among other grounds, contending that the arbitral tribunal refused to consider evidence relating to the criminal indictment of a former mayor of Lima and others for corruption that only became known during the pendency of one of the arbitrations at issue and following the conclusion of the other.²⁸ In addition to expressing her intention to confirm the two arbitration awards at the December 6, 2023 hearing, Judge Reyes requested additional briefing on

²³ In recognition of the rise of corruption-related issues in arbitration proceeding, institutions have sought to provide guidance to parties and tribunals. Most recently, in December 2023, the ICC announced the publication of the 2023 edition of the ICC Rules on Combating Corruption, developed under the leadership of the ICC Global Anti-corruption and Corporate Responsibility Commission. See ICC, *ICC Rules on Combatting Corruption (2023)*, <https://iccwbo.org/news-publications/policies-reports/icc-rules-on-combating-corruption/#:-:text=The%20new%202023%20edition%20of,in%20uncovering%20and%20detering%20wrongdoing>.

²⁴ See, e.g., A. MacKinnon, *et al.*, “Arbitration of Corruption Issues in Latin American Disputes,” *Latin Lawyer & Global Arbitration Review* (2d ed. 2023).

²⁵ See *Nigeria v. Process & Industrial Developments Ltd.*, [2023] EWHC (Comm) 2638 [516] (Eng.).

²⁶ Ali Sullivan, *Confirmation of Arbitration Awards Against Lima Nears*, Law360 (Dec. 6, 2023), https://www.law360.com/internationalarbitration/articles/1773716?nl_pk=c2e39081-8896-4443-93ba-c8e92514a708&utm_source=newsletter&utm_medium=email&utm_campaign=internationalarbitration&utm_content=2023-12-07&read_main=1&nlsid=0&nlsid=1.

²⁷ 9 U.S.C. § 10(1), (3).

²⁸ See Pet. to Vacate (D.I. 1) at 2, *Metropolitan Municipality of Lima v. Rutas de Lima S.A.C.*, No. 23-00680-ACR (D.D.C. Mar. 14, 2023).

whether the district court had authority to impose sanctions on Lima for a recent criminal action the city initiated against the arbitrators, who are currently adjudicating a third arbitration between Lima and Rutas de Lima S.A.C.²⁹

Metropolitan Municipality of Lima v. Rutas de Lima and Nigeria v. Process & Industrial Developments Ltd.

reflect an increasing willingness of parties to challenge the enforcement of arbitration awards on the basis of purported corruption. Particularly in light of Nigeria's success in vacating an arbitration award on the basis of corruption, parties in 2024 may be more inclined to challenge significant arbitration awards where there is a colorable claim that the award was the result of corruption.³⁰

²⁹ See Hr'g Tr. (D.I. 35), *Metropolitan Municipality of Lima v. Rutas de Lima S.A.C.*, No. 23-00680-ACR (D.D.C. Dec. 6, 2023).

³⁰ Caroline Simson, *Nigeria Case Could Force Issue of Arb. Intervention to Fore*, Law360 (Oct. 24, 2023), https://www.law360.com/internationalarbitration/articles/1736461?nl_pk=c2e39081-8896-4443-93ba-c8e92514a708&utm_source=newsletter&utm_medium=email&utm_campaign=internationalarbitration&utm_content=2023-10-25&read_main=1&nlsidx=0&nlaidx=0.

4

New Interest In Summary Disposition And Bifurcation

In recent years, there has been an increasing interest from parties in the use of summary disposition and bifurcation proceedings in arbitration in an effort to reduce the time and cost of proceedings.³¹

The possibility for arbitral proceedings to be bifurcated, particularly in relation to jurisdiction, has existed for some time, either as expressly provided for in the rules of arbitral institutions, or generally accepted as part of the tribunal's

discretion.³² Today, more institutional rules expressly provide for parties to make requests for bifurcation, thus providing more certainty.³³ In contrast, the possibility for summary disposition of proceedings has been included only more recently in most of the major arbitral institutions' rules.³⁴ The standard to summarily dispose of a proceeding is generally one where claims are "manifestly without merit," inadmissible, or outside the tribunal's jurisdiction.

³¹ Francis Hornyold-Strickland & Duncan Speller, *Preliminary Determinations – Path to Efficiency OR Treacherous Shortcut?*, Kluwer Arbitration Blog (Apr. 21, 2016), <https://arbitrationblog.kluwerarbitration.com/2016/04/21/preliminary-determinations-path-to-efficiency-or-treacherous-shortcut/#:~:text=The%20aim%20of%20a%20preliminary,the%20arbitration%20in%20its%20entirety>. Summary disposition allows parties to seek the early determination of all or certain of the issues in dispute, which would either dispose of the proceedings entirely or streamline the issues to be finally determined by the tribunal. Bifurcation can occur in various forms, as a party may request an arbitration be bifurcated to first include submissions on jurisdiction before merits, or that the merits portion of the arbitration be bifurcated from any consideration of damages, which would come after the merits were decided. In each case, the goal is efficiency: to reduce the need for unnecessary time and costs to be incurred on matters that are contingent on the tribunal's decision on the threshold issue.

³² See, e.g., G.A. Res. 31/98, UNCITRAL Arbitration Rules (Dec. 15, 1976), Art. 21(4), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf>; *Glamis Gold Ltd. v. The United States of America*, Procedural Order No. 2 (Revised), May 31, 2005, <https://www.italaw.com/sites/default/files/case-documents/ita0362.pdf>.

³³ See 2022 ICSID Rules, Rule 42; 2020 LCIA Rules, Art. 23(4).

³⁴ See 2016 SIAC Rules, Art. 29(1); 2018 HKIAC Rules, Art. 43(1); 2020 LCIA Rules, Art. 22(viii); 2017 ICC Rules, Art. 22; Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration ¶ 60, <https://www.iccwbo.be/wp-content/uploads/2017/10/20171031-ICC-Note-to-Parties-and-Arbitral-Tribunals-on-the-Conduct-of-Arbitration.pdf>.

With each new iteration of their respective arbitration rules, arbitral institutions are increasingly promoting the use of summary disposition or early determination. For example, the 2018 HKIAC Rules allow for an early determination procedure by which a tribunal has the power to decide one or more points of fact or law, which is to be made within 30 days of the request of a party and after the tribunal consults with all other parties as to the request.³⁵ Similarly, the new 2023 SIAC Rules include various provisions that are aimed at making arbitrations more efficient. This includes an early dismissal procedure that requires a tribunal to issue a decision within 45 days of the filing of an application for early dismissal (reduced from 60 days in the 2016 SIAC Rules), as well as the new provision in the rules that allows a party to seek a preliminary determination of any issue in the arbitration, so long as the parties have agreed or the party requesting it can demonstrate that such determination is likely to contribute to time or costs savings.³⁶ The 2020 IBA Rules on the Taking of Evidence and the 2021 ICDR International Rules also both make reference to a tribunal's authority to decide preliminary issues, such as evidentiary issues, or to grant a request for bifurcation, although neither set of rules lays out as express of a timeline as the HKIAC and the SIAC Rules.³⁷

The new additions to the SIAC Rules were received positively by many in the arbitration community, as the updates to the early dismissal procedure and the creation of the preliminary determination procedure are seen as way to make arbitration faster and more efficient. Among arbitral institutions, SIAC and HKIAC tend to be among the most expeditious in resolving cases, something that may be attributable to the reforms of their rules that allow for more cases to be decided during earlier phases of the process.³⁸ The inclusion of this preliminary determination procedure in the SIAC Rules was seen by many as encouraging tribunals to make preliminary determinations, something they have been wary of in the past due to due process concerns, or the concern that issuing a preliminary determination on an issue may give further ammunition to parties to seek judicial challenge.³⁹

Beyond the institutions that have amended their rules in order to promote the potential efficiencies in summary disposition or bifurcation, certain states have similarly considered reforms to their national laws (as further discussed below) to allow similar procedures. For example, in the United Kingdom, if a recently proposed bill to amend the English Arbitration Act is passed, an arbitration could be summarily disposed if it has “no real prospect of success,” mirroring the English civil litigation standard, rather than the “manifestly without merit” test that has been applied in arbitration.⁴⁰

³⁵ HKIAC Rules, Art. 43.

³⁶ Anjali Anchayil & Aiman Singh Kler, *The 2023 SIAC Draft Rules: Raising the Bar for Efficiency*, Kluwer Arbitration Blog (Oct. 26, 2023), <https://arbitrationblog.kluwerarbitration.com/2023/10/26/the-2023-siac-draft-rules-raising-the-bar-for-efficiency/#:~:text=The%20Draft%20Rules%20have%20introduced,costs%20savings%20and%20a%20more>.

³⁷ 2020 IBA Rules on the Taking of Evidence in International Arbitration, Arts. 2(3)(b), 3(14), 8(4)(e); 2021 ICDR International Dispute Resolution Procedures, Art. 22(4).

³⁸ *The Duration of Arbitration*, Aceris Law LLC (Aug. 31, 2022), <https://www.acerislaw.com/the-duration-of-arbitration/>.

³⁹ Hornyold-Strickland & Speller, *supra* n.31.

⁴⁰ *Review of the Arbitration Act 1996: Final Report and Bill*, Law Commission (Sept. 5, 2023), <https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2023/09/Arbitration-final-report-with-cover.pdf>.

In light of these potential reforms in both institutional rules and national laws alike, as well as the increased discussions over the potential procedural efficiencies and cost savings that well-administered summary disposition and

bifurcated proceedings can provide, it is likely that parties and tribunals will explore the use of summary disposition and bifurcation provisions even more in 2024.

5

Upcoming Reforms To Modernize Arbitration Laws

In the ever-evolving landscape of international arbitration, there are a number of changes anticipated in 2024 to national arbitration laws in jurisdictions that are often selected as arbitral seats, as previewed in the preceding sections. Jurisdictions such as the United Kingdom and Germany have taken initial steps to amend their arbitration laws, while others, such as Nigeria, have already enacted changes to their arbitration laws. Countries that are in the process of reforming, or have recently reformed, their arbitration laws have demonstrated a desire to impose the efficiency and effectiveness of arbitration within their borders, and also to ensure that they maintain or enhance their reputation as a preferred seat for international arbitration.

In early 2023, Germany experienced its first attempt to reform its arbitration law in 25 years when the German Federal Ministry of Justice

published a White Paper on the Modernization of German Arbitration Law (the “White Paper”).⁴¹ Setting the reform’s objective as an increase in the efficiency of commercial arbitration in Germany and the further strengthening of Germany’s attractiveness as a seat for arbitration,⁴² the White Paper proposed 12 key areas of reform.⁴³ For example, the White Paper recommends that parties be allowed to submit English-language documents to German courts in proceedings concerning arbitrations without a German translation,⁴⁴ a long standing request of the German arbitration community.⁴⁵ It also proposes measures that would allow German courts to enforce interim arbitral awards more quickly.⁴⁶ Relatedly, the German legislature recently proposed a bill to strengthen Germany as a forum for international litigation by, *inter alia*, creating commercial courts before which parties may conduct arbitration-related proceedings

⁴¹ German Federal Ministry of Justice, *White Paper on the Modernization of German Arbitration Law* (Apr. 18, 2023), unofficial translation prepared by the German Arbitration Institute (DIS) (“Germany White Paper”) at 1, https://www.disarb.org/fileadmin/user_upload/Veranstaltung/2023/Annex_1_Modernization_of_German_Arbitration_Law-White_Paper_BMJ.pdf.

⁴² *Id.*

⁴³ See Reinmar Wolff, *Modernization of German Arbitration Law: The White Paper of the Federal Ministry of Justice*, Kluwer Arbitration Blog (July 5, 2023), <https://arbitrationblog.kluwerarbitration.com/2023/07/05/modernization-of-german-arbitration-law-the-white-paper-of-the-federal-ministry-of-justice/>.

⁴⁴ Germany White Paper, *supra* n.41 at Section II.

⁴⁵ Wolff, *supra* n.43.

⁴⁶ Germany White Paper, *supra* n.41 at Section III.

(e.g., the setting aside of awards or removal of arbitrators) in English.⁴⁷ The White Paper marks the beginning of a possible reform of German arbitration law, with further progress expected in 2024, when a bill may be introduced to revise the existing law and possibly culminate in the enactment of a new arbitration law.⁴⁸

In the United Kingdom, the Law Commission published in late 2023 its recommendations for reform to the UK's 1996 Arbitration Act.⁴⁹ The recommendations include, for example, codifying the common law duty of arbitrators to disclose circumstances that could raise doubts over their impartiality and the introduction of a default rule that the arbitration agreement is governed by the law of the seat unless the parties expressly agree otherwise.⁵⁰ Other proposed changes are aimed at improving the efficiency of the arbitral process, including giving arbitrators the power to summarily dismiss claims that have no real prospect of success and simplifying the procedure for challenging arbitral awards on jurisdictional grounds.⁵¹ The revised law is expected to be formally enacted in 2024.⁵²

Separate from the contemplated reforms in countries like Germany and England, Nigeria has made notable changes to its national arbitration law in the last year, signaling its commitment to becoming a preferred destination for dispute resolution in Africa. The amendments prioritize the expeditious resolution of arbitral disputes, including by regulating the power of national courts to order, recognize, and enforce interim measures.⁵³ Other countries that passed laws to modernize their arbitration law in 2023 include Luxembourg⁵⁴ and the United Arab Emirates.⁵⁵ Whether these changes will have a measurable impact on arbitrations in these jurisdictions in 2024 remains to be seen.

Taken together, these recent changes highlight the global trend toward adapting arbitration frameworks to contemporary needs. It will be interesting to see whether the currently planned reforms in Germany and England and Wales are enacted, in current or different form, in 2024, and what impact these changes – as well as changes implemented in 2023 that may only be tested in the coming months – will have on the international and domestic arbitration practice.

⁴⁷ See Cleary Gottlieb Alert Memorandum, *Draft Government Bill Aims to Strengthen Germany as a Seat for Litigation* (Sept. 18, 2023), <https://www.clearygottlieb.com/-/media/files/alert-memos-2023/draft-government-bill-aims-to-strengthen-germany-as-a-seat-for-litigation.pdf>.

⁴⁸ The new arbitration law, like the current law, would be included in Book 10 of the Code of Civil Procedure (*Zivilprozessordnung*, or “ZPO”).

⁴⁹ Susannah Moody, *Draft bill published for reform of UK arbitration law*, Global Arbitration Review (Sept. 6, 2023), <https://globalarbitrationreview.com/article/draft-bill-published-reform-of-uk-arbitration-law>.

⁵⁰ *Id.* See also Vanessa Naish & Elizabeth Kantor, *The Law Commission's Recommendations on Jurisdictional Challenges: Playing Your Cards Right*, Kluwer Arbitration Blog (Oct. 24, 2023), <https://arbitrationblog.kluwerarbitration.com/2023/10/24/the-law-commissions-recommendations-on-jurisdictional-challenges-playing-your-cards-right/>.

⁵¹ Susannah Moody, *UK parliament to vote on new arbitration law*, Global Arbitration Review (Nov. 6, 2023), <https://globalarbitrationreview.com/article/uk-parliament-vote-new-arbitration-law>.

⁵² Thomas Brown, *HL Bill 7 of 2023–24 Arbitration Bill [HL]*, House of Lords Library Briefing (Dec. 5, 2023), [https://researchbriefings.files.parliament.uk/documents/LLN-2023-0047/2023-0047-Arbitration-Bill-\[HL\]-LARGE.pdf](https://researchbriefings.files.parliament.uk/documents/LLN-2023-0047/2023-0047-Arbitration-Bill-[HL]-LARGE.pdf) (explaining that the bill has already had its first reading and “the House of Lords has agreed to commit the bill to a second reading committee, which is expected to debate the bill on 19 December 2023. The bill may then be committed to a special public bill committee for further scrutiny.”).

⁵³ *A closer look at Nigeria's arbitration law reform*, Global Arbitration Review (June 23, 2023), <https://globalarbitrationreview.com/article/closer-look-nigerias-arbitration-law-reform>.

⁵⁴ See Susannah Moody, *Luxembourg reforms arbitration law*, Global Arbitration Review (May 5, 2023), <https://globalarbitrationreview.com/article/luxembourg-reforms-arbitration-law>.

⁵⁵ See Susannah Moody, *UAE reforms arbitration law*, Global Arbitration Review (Oct. 3, 2023), <https://globalarbitrationreview.com/article/uae-reforms-arbitration-law>.

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