



Energy and Finance Sectors Drive Growing International Arbitration Caseloads

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International arbitration case filings are surging and show no signs of letting up, according to recent reports from the world's leading international arbitration institutions. The latest statistics released by prominent international arbitration administrators worldwide show consistent annual growth in international arbitration matters, including a continued uptick in energy/resources- and banking/finance-related claims.

This is due to a confluence of factors, the primary ones being that international dealings in those sectors remain prevalent and those deals utilize international arbitration provisions to resolve disputes arising from those agreements. International arbitration is preferred over national courts because, among other reasons, it provides a neutral forum for international disputes and multiple options for enforcing and collecting on awards rendered in almost 160 countries.

Rise of International Commercial Arbitration Matters

The steady growth of international commercial arbitration filings and the diversity of parties and sectors involved show that international arbitration remains the preferred dispute resolution option for international dealings across a wide range of industries. Here are some of the more notable developments related by administrators of mostly international commercial arbitrations:

- The International Chamber of Commerce (ICC) reported 810 new cases in 2017, bringing the total since 2016 to 1,766 new cases.¹
- The Singapore International Arbitration Centre (SIAC), which has emerged as a go-to forum for Asia-related disputes, jumped from 343 filings in 2016 to 452 in 2017.² New case filings have increased more than *fivefold* in the last decade.³
- The International Centre for Dispute Resolution, which is the international arm of the American Arbitration Association, reported 1,026 filings in 2017, for a total of 3,139 cases in 2015-2017.
- The London Court of International Arbitration (LCIA) registered more than 300 new cases in 2016.⁴
- The Stockholm Chamber of Commerce (SCC) reported 96 new international cases in 2017, raising its three-year total to 302 new filings.⁵

Many of the commercial arbitrations reported by these institutions involve the energy and financial services sectors. For example, approximately 25 percent of ICC cases were energy or finance claims. Those sectors also made up almost half of LCIA cases. Energy and banking/finance made up

¹ "ICC announces 2017 figures confirming global reach and leading position for complex, high-value disputes," ICC Website (March 3, 2018), available at <https://iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes/> (last visited 5 April 2018).

² Singapore International Arbitration Centre, Statistics, available at <http://siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics> (last visited 5 April 2018).

³ http://siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2017.pdf (last visited 9 April 2018).

⁴ The London Court of International Arbitration, Facts and Figures, 2016: A Robust Caseload.

⁵ Arbitration Institute of the Stockholm Chamber of Commerce, SCC Statistics 2017, available at <http://sccinstitute.com/statistics/> (last visited 5 April 2018).

approximately 33 percent of the Hong Kong International Arbitration Center's filings.⁶ The Financial Industry Regulatory Authority (FINRA), which operates the largest securities dispute resolution forum in the U.S., also saw new cases rise 63 percent.⁷ Construction disputes remain constant while technology-related claims are on the rise.

Energy and Finance Claims Trigger Surge of Investor-State Arbitrations

Disputes between foreign investors and governments (investor-state arbitrations) continued to grow. These disputes usually arise from international investment agreements such as bilateral investment treaties and free trade agreements, such as NAFTA and the Energy Charter Treaty. The U.S. is a party to more than 100 such international investment agreements, including almost 50 bilateral investment agreements worldwide, the majority of which include investor-state arbitration provisions for disputes arising from those agreements.⁸ The following are among the more notable reports from administrators of investor-state arbitrations:

- The International Centre for the Settlement of Investment Disputes (ICSID) registered a record 53 new arbitrations in 2017, raising the total to 231 since 2013. The majority of ICSID's claims in 2017 involved the energy sector, with finance and construction also comprising a large percentage of the caseload. Most of ICSID's 2017 new filings involved claims against governments in Eastern Europe and Central Asia (26 percent), Africa (26 percent) and South America (23 percent).⁹
- The Permanent Court of Arbitration (PCA), another administrator of government-related claims, administered 160 cases in 2017 and more than 300 since 2011.¹⁰ Among the PCA's more notable arbitrations are the South China Sea arbitration between the Philippines and China, and the multibillion-dollar *Yukos Shareholders v. Russia* arbitration, which is the largest ever recorded international arbitration.
- The SCC also has seen a steadily high number of investment treaty disputes in the past four years, and 2017 was no exception.¹¹
- The ICC saw a 15.4 percent rise in cases filed in 2017 with a state, a parastatal or public entity.¹²

Neutral Setting, Worldwide Enforcement Options, Confidentiality Are Key

The trend toward international arbitration in energy and finance disputes is consistent with the reality that those disputes often involve foreign investment (sometimes with foreign government entities) and may entail collecting on assets in foreign jurisdictions. The ability for an investor to resolve disputes in a neutral setting in lieu of the local courts of a foreign state is appealing for several obvious reasons,

⁶ Hong Kong International Arbitration Centre, 2016 Case Statistics, available at <http://hkciac.org/about-us/statistics> (last visited 5 April 2018).

⁷ <https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics> (last visited 9 April 2018).

⁸ See United Nations Conference on Trade and Development, Investment Policy Hub, International Investment Agreements Navigator, United States of America, available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/223#iiaInnerMenu> (last visited 5 April 2018).

⁹ International Centre for Settlement of Investment Disputes, The ICSID Caseload – Statistics (Issue 2018-1).

¹⁰ Permanent Court of Arbitration, Annual Report, 2017.

¹¹ <http://www.sccinstitute.com/statistics/investment-disputes-2017/> (last visited 9 April 2018).

¹² <https://www.flickr.com/photos/international-chamber-of-commerce/sets/72157694229086035/> (last visited 9 April 2018).

including, for example, when the claim is against an arm of a foreign government. For this reason, major energy companies doing business worldwide, as well as the banks supporting such dealings, insist on resolving disputes through international arbitration.

The ability to enforce awards rendered against a foreign private party or government is crucial. Reciprocity agreements between U.S. and foreign courts to enforce court judgments pale in comparison to the broad enforcement options available for arbitration awards through treaties, primarily the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)¹³ and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).¹⁴ Courts in the 159 signatory states of the New York Convention are obligated (subject to limited exceptions) to enforce arbitration awards rendered in other signatory states as if they were decisions of their own courts.¹⁵ In other words, a U.S. energy company or bank with an arbitration award against a foreign party can enforce that award against the foreign party's assets in any of the 159 jurisdictions as long as the award was rendered in any signatory state. The foreign party does not have to be from a New York Convention country; the only requirement is that the arbitration award be rendered in a signatory country.

The same applies to the 162 signatory countries to the ICSID Convention, the difference being that the government signatories consent to international arbitration for claims brought by foreign investors.¹⁶ For financial institutions, confidentiality of proceedings has made international arbitration a more attractive option than local court proceedings. The sector's confidence in international arbitration has led to an increase in the number of industry-specific arbitration initiatives.¹⁷

For these reasons, international arbitration will likely remain the primary dispute resolution mechanism in the international energy and finance sectors.

McGuireWoods will provide updates discussing international arbitration-related developments that may be of interest to clients. For further information, please contact either of the authors of this article, Richard Deutsch and Felicity Potter, or any other member of the McGuireWoods international arbitration team.

¹³ The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. III, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. (effective for the United States on Dec. 29, 1970), reprinted in 9 U.S.C.A. in conjunction with §§ et seq.

¹⁴ Convention on the Settlement of Investment Disputes between States and Nationals of other States, Entry into Force Oct. 14, 1966 (hereinafter "ICSID Convention"), <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>, (last visited 4 April 2018).

¹⁵ New York Convention, art. III.

¹⁶ See ICSID Convention, art. 54. See also List of Contracting States and Other Signatories of the Convention (as of 5 April 2018), at <https://icsid.worldbank.org/en/Pages/about/Member-States.aspx> (last visited 5 April 2018).

¹⁷ See ICC Commission Report, "Financial Institutions and International Arbitration," Commission on Arbitration and ADR (ICC 2016).