International Arbitration Focus

Sector-Specific Arbitration Insight

ReedSmith

Contents

Welcome

Five years ago, in our opening newsletter of 2021 that was dedicated to construction disputes, my predecessor at that time, José Astigarraga, pointed out that Reed Smith’s international arbitration practice is premised on three strands: specific industries such as energy and natural resources, certain “specialisms” (specific types of arbitrations regardless of industry, such as investor-state arbitration), and specific geographic regions in which our lawyers are especially well suited to advise our clients.

That description of our practice still stands today. In this edition of our newsletter, we focus on sector specialisms, with articles from authors across our offices around the world.

These contributions offer valuable perspectives on the issues shaping arbitration across these sectors. I hope you enjoy them.

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Editorial

In 1956, in his treatise "The Dilemma of Specialization," Friedrich Hayek asserted that "Nobody can be a good economist who is only an economist." In 1928, with respect to lawyers, this proposition had been colorfully encapsulated by the great American jurist Benjamin N. Cardozo when he wrote: "The lawyer who qualifies as a pure legalist is a legal monstrosity." In this way, economics and law are similar. It is the combination of specialism in law with other attributes that makes for a good legal practitioner.

In this edition of our newsletter, we endeavor to showcase the specialist sector experience of Reed Smith where that experience touches and intersects with arbitration. We know the law – but not just the law. We hope thereby to avoid the Hayek dilemma for our clients.

For some sectors, such as shipping and trade, arbitration has long been the familiar and preferred route of choice for dispute resolution. In England, the roots go back to medieval times with mercantile reference to maritime disputes in arbitration. From the end of the seventeenth century, statutory backing came with the Arbitration Act 1697 directed to "Merchants and Traders and others desiring to end any Controversie Suit or Quarrel…by Arbitration." In London, Reed Smith (formerly known as Richards Butler) had been engaged in maritime matters for over 100 years, counting among its earliest founding clients a leading maritime entity still using the firm today for arbitral and other matters. The contribution on shipping in this newsletter brings readers up to date in this field, with particular perspective from England and Asia.

In insurance, arbitration has a history – but not in the same way as shipping and trade. The type of insurance has historically made a difference, with maritime insurers having been users of arbitration before other insurers. This field is covered by contributors from our London and U.S. offices.

In the financial sector, arbitration has gained popularity only in recent times. Banking and finance arbitration emerged only in the late twentieth century and gained serious momentum following the 2008 financial crisis. The contribution from Hong Kong covering this sector reflects this emergence.

In the mining sector, the contribution from our New York and Houston offices takes a close look at the critical minerals landscape and arbitration's place within that landscape. Modern international mining arbitration emerged from state concessions in the early twentieth century and expanded substantially through the International Centre for Settlement of Investment Disputes (ICSID) and investment treaties from the late twentieth century onward. Our contributors conclude that today, the critical minerals race is increasingly leading to international arbitration, driven by states revising mining frameworks, expanding state participation at the expense of already acquired private investment, and sometimes by expropriation. The combination of nascent legal frameworks, high-value strategic resources, and competing national interests creates conditions in which arbitration will increasingly become the forum of choice for resolving disputes.

The area of oil and gas has a history similar to mining, with the development of investor state and transnational arbitration emerging in the course of the twentieth century, following the granting of petroleum concessions in foreign lands during the first half of the twentieth century. As our contributors from Singapore and London explain, arbitration is now *de rigueur* in this sector.

In the construction sector, to which we previously dedicated an entire newsletter (spring 2021), arbitration (or other out-of-court processes) has long been established for the resolution of disputes. Construction has one of England's oldest continuous specialist arbitration practices, second only to shipping and trade. Perhaps given this, our contributors from Paris do not dwell on the arbitral aspects so much as the specificities of construction disputes. It is a rewarding and insightful read.

Given unlimited time and resources, we could have included other sectors where Reed Smith can offer insight and where arbitration has in recent times grown in prominence. A good example of this is the life sciences sector, another area to which we previously dedicated an entire newsletter (winter 2021).

We hope you enjoy this issue of our international arbitration newsletter.

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Arbitration in the shipping sector: Complexity, practicality, and evolving trends – English and Chinese perspectives

Arbitration is deeply embedded in the shipping industry and remains the default dispute resolution mechanism across a wide range of maritime transactions. Whether arising from charterparties, shipbuilding contracts, or sale and purchase agreements for secondhand vessels, disputes in the sector are almost invariably subject to arbitration. This preference is driven by both practical and legal considerations. The global nature of shipping – combined with the need for neutrality, technical expertise, and enforceability – makes arbitration particularly well suited to maritime disputes. At the same time, the sector presents a number of distinctive features that differentiate shipping arbitration from arbitration in other industries.

This article – drawing on both English and Chinese perspectives – highlights those distinctive features, explains why arbitration continues to be attractive for shipping clients, and identifies key practical considerations.

1. Arbitration as the industry norm

In the shipping sector, arbitration is not merely an alternative dispute resolution mechanism; it is the norm. Standard form contracts – including charterparty forms, ship management agreements, shipbuilding contracts, and vessel sale and purchase contracts – almost universally incorporate arbitration clauses. This industry-wide preference is underpinned by two key factors.

1.1 Global enforceability

Most major maritime jurisdictions are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As a result, foreign arbitral awards are generally recognized and enforceable across jurisdictions where shipping counterparties are active. This is a critical advantage in a sector where parties, assets, and operations are internationally dispersed.

1.2 Neutrality and predictability

Shipping transactions frequently involve parties from different jurisdictions. Arbitration provides a neutral forum, avoiding the risks associated with litigating in a counterparty's home courts. The process offers a high degree of predictability due to the widespread use of familiar governing laws – most prominently English law and, increasingly, Hong Kong law – for disputes with Chinese nexus.

English law is the governing law of choice in the majority of international shipping contracts. This dominance is attributable to the significant depth and longevity of English maritime case law. The predictability and consistency of the English Commercial Court is another factor that draws the shipping industry to English law. For international parties with no connection to England, English law functions as a neutral choice, offering certainty and a well-documented body of precedent. Lawyers can advise their clients of the likely outcome of a case based on precedent.

2. Key arbitration centers and frameworks

2.1 London and Hong Kong as leading seats

London remains the world's leading center for maritime arbitration, with over 2,000 new maritime arbitrations commenced in London in 2025, a 25% increase from 2024 according to the London Maritime Arbitrator Association (LMAA). The city's dominance reflects a combination of legal infrastructure, procedural flexibility, and the unrivaled depth of English maritime law.

London's influence is further supported by a broader shipping industry infrastructure: specialist shipping law firms, the specialist Admiralty Court, the majority of the International Group P&I Clubs, the Baltic Exchange, and Lloyd's.

A defining characteristic of London arbitration is the supervisory jurisdiction of the English courts under Part I of the Arbitration Act 1996. Three provisions are of particular importance:

- Section 69 permits appeals on points of law arising out of an award. This right is unusual among major arbitration seats. Hong Kong and Singapore do not offer an equivalent. Section 69 appeals have been instrumental in developing a coherent body of English maritime law;
- Section 68 allows challenges for serious irregularity affecting the tribunal, the proceedings, or the award, provided the irregularity has caused or will cause substantial injustice;
- Section 67 permits challenges on the ground that the tribunal lacked substantive jurisdiction.

The availability of Section 69 in particular reflects a deliberate balance between finality and legal certainty. In a specialist sector where consistent application of legal principle is commercially valuable, the ability to correct errors of law enhances public confidence in the arbitral process.

For Chinese parties in particular, the most commonly selected forums are London arbitration under LMAA Terms and Hong Kong arbitration under Hong Kong Maritime Arbitration Group (HKMAG) Terms (ad hoc) or administered by the Hong Kong International Arbitration Centre (HKIAC). The procedural rules of the LMAA and HKMAG are notably similar, reflecting shared market practices.

Chinese parties are generally familiar with English law principles governing maritime disputes and London arbitration practices and procedures.

2.2 Institutional versus ad hoc arbitration

Shipping arbitration is distinctive in its continued reliance on ad hoc arbitration, particularly under the LMAA and HKMAG frameworks. This contrasts with many other sectors that favor institutional arbitration.

The LMAA is not an administering institution, and unlike other arbitral bodies, the LMAA does not manage cases or charge administrative fees. Parties simply appoint arbitrators from the LMAA panel, and proceedings are conducted under LMAA Terms, giving parties substantial autonomy over procedure.

The LMAA operates a distinctive tiered procedural framework: Full Terms for larger, more complex disputes; the Intermediate Claims Procedure for claims up to US$400,000; and the Small Claims Procedure for claims up to US$100,000.

Nevertheless, institutional arbitration also plays an important role, especially in Hong Kong through HKIAC-administered proceedings.

Over the past decade, the Transport and Commodities sector has consistently accounted for at least 25% of all cases administered by the London Court of International Arbitration (LCIA), a share that has grown steadily in recent years, establishing it as the institution's leading sector by caseload. Similarly, in International Chamber of Commerce (ICC) arbitration, the transport sector, while trailing behind the traditionally dominant construction and energy sectors, has on occasion ranked as the third most represented industry.

2.3 Emerging developments in Mainland China

Recent developments in Mainland China – particularly the introduction of ad hoc arbitration concepts in the amended Arbitration Law (draft reforms) – may impact the landscape. Historically, Mainland China has recognized only institutional arbitration. The potential acceptance of ad hoc arbitration could lead to increased use of Mainland China-seated arbitration in shipping disputes where Chinese entities are involved, with English law or Hong Kong law serving as the substantive applicable law.

This development has the potential to reshape regional arbitration dynamics, particularly for disputes involving Chinese parties.

2.4 The UK Arbitration Act 2025 amendments

The Arbitration Act 2025, which came into force on August 1, 2025, represents the most significant reform to the English arbitration framework in nearly 30 years. Key amendments relevant to maritime arbitration include:

- A new statutory rule stating that the arbitration agreement is governed by the law of the seat of arbitration (e.g., English law for London-seated arbitrations), unless the parties expressly agree otherwise;
- A new duty of disclosure for arbitrators regarding circumstances that might give rise to justifiable doubts as to their impartiality;
- A power for tribunals to make awards on a summary basis, disposing of issues with no real prospect of success;
- A revised framework for jurisdictional challenges under Section 67, limiting the scope for full rehearings before the court;

These reforms are designed to ensure the Arbitration Act 1996 remains fit for purpose and to maintain London's competitiveness against rival seats.

3. The complexity of shipping arbitration

Shipping disputes are often legally and factually complex. Even a seemingly straightforward charterparty dispute may involve multiple overlapping claims and legal issues, including underperformance claims, early redelivery disputes, off-hire claims, illegitimacy of last voyage orders, demurrage and detention, and general average. Many leading English law cases, frequently referred to by vessel names, illustrate the depth and evolution of legal principles in this area.

3.1 Multi-layered legal issues

In addition to traditional contractual claims, modern shipping disputes increasingly involve:

- *Force majeure* and frustration arising from geopolitical disruptions;
- Sanctions-related risks and compliance issues;
- Environmental and decarbonization obligations, including energy efficiency requirements.

The evolving geopolitical landscape and regulatory environment have introduced new layers of uncertainty, significantly expanding the scope of issues that may arise in arbitration.

3.2 Multi-jurisdictional nature

Ships operate globally, and disputes often involve multiple jurisdictions. This creates challenges, such as conflicts of laws, parallel proceedings in different jurisdictions, and asset tracing and enforcement across borders. Shipping arbitration frequently requires coordination across legal systems.

3.3 Urgency, court assistance, and security

Shipping disputes often involve urgent commercial pressures, requiring prompt legal action. Even where arbitration is the agreed dispute resolution mechanism, parties frequently seek court assistance for interim injunctions, preservation of assets, vessel arrests (where applicable), and security for claims.

The English Admiralty Court plays a critical role in providing security. A claimant may commence proceedings *in rem* to arrest a vessel within the jurisdiction, obtaining security for the arbitration claim. In practice, most arrests are either avoided or swiftly released through the provision of an International Group P&I Club letter of undertaking (LOU). A LOU is a written promise from the shipowner's P&I Club to pay any final award up to a specified sum; it is widely accepted across maritime jurisdictions because of the financial strength of International P&I Group Clubs. LOUs are also commonly subject to English law.

The English court also has power under Section 44 of the Arbitration Act 1996 to grant freezing injunctions in support of arbitration, restraining the dissipation of assets pending the outcome of the proceedings.

This interplay between arbitration and court proceedings is a distinctive feature of the shipping sector and requires careful strategic coordination.

3.4 The central role of expert evidence

A defining feature of shipping arbitration is the heavy reliance on expert evidence. Given the technical nature of maritime disputes, tribunals often require input from multiple types of experts, including:

- Nautical and navigation experts;
- Naval architects and structural engineers;
- Metallurgical experts;
- Weather routing and meteorological experts;
- Market and quantum experts.

For cargo claims, the range of experts depends on the nature of the goods involved (e.g., oil, grain, metals, chemicals). In complex cases, expert evidence can be extensive.

By way of illustration, Reed Smith was involved in an eight-year shipping arbitration relating to an unsafe port claim that involved seven experts and simulation exercises (e.g.. navigational modeling).

4. Costs, efficiency, and access to justice

A significant advantage of ad hoc arbitration is the absence of institutional administration fees. This reduces the overall cost burden on parties.

4.1 Under the LMAA rules

In LMAA arbitration, a further practical advantage is the speed and simplicity with which it can be commenced. A reference is initiated simply by one party serving a written notice of arbitration on the other and appointing an arbitrator. This is particularly important in shipping disputes where contractual time bars are often short (for example, where claims may be subject to a 12-month limitation period), and the ability to commence proceedings cheaply, swiftly and without institutional formality can be critical.

Documents-only determination (i.e., without oral hearing) is the default in the vast majority of LMAA arbitration cases. Approximately 85% of LMAA arbitrations are resolved on a documents-only basis, reflecting the sector's emphasis on speed and proportionality.

LMAA tribunals have the power to order security for costs where appropriate, and the allocation of costs in the award remains at the tribunal's discretion, typically following the general principle that costs follow the event.

Critically, the LMAA Small Claims and Intermediate Claims Procedures provide proportionate, cost-effective resolution for lower-value disputes. This is a distinctive feature in a sector characterized by high volumes of relatively modest claims alongside headline disputes of considerable value.

4.2 Under the Hong Kong Maritime Arbitration Group Terms

Under the HKMAG framework, similar considerations of cost, efficiency, and access to justice arise, albeit with certain distinctive features reflecting Hong Kong's position as a leading international arbitration hub in the Asia-Pacific region.

HKMAG arbitration likewise offers parties a cost-effective alternative to institutional arbitration. The HKMAG Terms provide for a streamlined procedural framework with modest administrative costs, and where parties elect to proceed on an ad hoc basis under the HKMAG Terms, the absence of substantial institutional fees reduces the overall cost burden in a manner comparable to LMAA arbitration.

The commencement of HKMAG proceedings is similarly straightforward. Under the HKMAG Terms, arbitration is initiated by the service of a written notice of arbitration on the opposing party, together with the appointment of an arbitrator. This simplicity is of particular practical significance in maritime disputes in the Asia-Pacific region where parties may face tight contractual time bars and require the ability to commence proceedings promptly and without undue formality. Hong Kong's arbitration-friendly legislative framework under the Arbitration Ordinance (Cap. 609) further supports the efficient initiation and conduct of proceedings.

HKMAG arbitration also accommodates documents-only determination, enabling disputes to be resolved on the papers without the need for an oral hearing. This is especially suited to lower-value shipping claims where the costs of a full hearing would be disproportionate to the sums in dispute, and it reflects the same emphasis on proportionality and expedition that characterizes LMAA practice.

With regard to costs, HKMAG tribunals retain broad discretion in relation to the allocation of costs in the award, consistent with the general principles applicable under Hong Kong arbitration law. The tribunal may also order security for costs where appropriate, providing a safeguard against the risk of unrecoverable costs in the event of a successful defense.

Notably, the HKMAG Small Claims Procedure offers a proportionate and accessible mechanism for the resolution of lower-value maritime disputes. This procedure is designed to provide a simplified, cost-contained process with expedited timescales, ensuring that parties with modest claims are not deterred from pursuing arbitration by the prospect of disproportionate costs. This mirrors the philosophy underlying the LMAA Small Claims and Intermediate Claims Procedures and reflects the practical reality that a significant proportion of maritime disputes in the region involve relatively modest sums.

Conclusion

Shipping arbitration reflects the realities of a highly globalized, technical, and commercially driven industry. Its distinctive features – including reliance on ad hoc procedures, the central role of expert evidence, and frequent interaction with court processes – set it apart from arbitration in other sectors.

At the same time, evolving factors such as geopolitical tensions, environmental regulation, and legal reform in key jurisdictions (including in England and Mainland China) are reshaping the landscape.

For parties operating in the shipping industry, arbitration remains a highly effective dispute resolution mechanism, but one that requires careful planning, technical expertise, and a sophisticated, multi-jurisdictional approach.

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Arbitration in the insurance sector

Insurance policies are, at their core, contracts. In line with the usual principles of contractual freedom, the parties to an insurance or reinsurance contract are free to agree upon any governing law and dispute resolution mechanisms they wish. This autonomy extends to the selection of arbitration as the preferred forum for resolving disputes, and indeed, arbitration is favored by many participants in the insurance and reinsurance markets.

Businesses buying insurance and reinsurance in established markets such as London, the United States, and Europe may be able to negotiate their preferred governing law and jurisdiction. Equally, as insurance is a regulated industry, in certain jurisdictions, local law requirements may limit what the parties are able to agree on – for example, requiring an organization to place its insurance with a locally licensed insurer, subject to local law and jurisdiction The specific regulatory constraints applicable in individual jurisdictions are beyond the scope of this article. Typically, such locally placed risks are then reinsured into an international market, such as London, where the reinsurance contract is likely to be governed by English law and subject to arbitration or court jurisdiction in England.

This article focuses on the arbitration of insurance and reinsurance disputes, including disputes arising under Bermuda Form, and evaluates the relative merits of arbitration as against litigation in an insurance context.

English law arbitration framework

Arbitration clauses in contracts of insurance and reinsurance are often silent as to the application of any institutional rules.

In such circumstances, where the governing law is English law, any arbitration proceedings will be subject to the Arbitration Act 1996 (as amended by the Arbitration Act 2025) (the 1996 Act). The 1996 Act (which, for those who are unfamiliar with the history, was strongly influenced, in terms of its scope and structure, by the UNCITRAL Model Law on International Commercial Arbitration) provides a flexible framework within which the parties enjoy considerable autonomy to agree on the procedure to be followed. In practice, however, most insurance arbitrations in London follow a procedure broadly modeled on English civil litigation, with pleadings, disclosure, witness statements, expert reports (where appropriate), and a final hearing with oral submissions and cross-examination of fact and expert witnesses.

The arbitration process in England benefits from a high degree of certainty and predictability. Assuming the choice of London in the arbitration clause as the "seat" of any arbitration, the resulting supervisory jurisdiction of the English courts provides a supportive framework intended to respect the parties' choice of arbitrating any disputes, including the power to grant interim relief, to enforce peremptory orders of the tribunal, and to determine challenges to jurisdiction or serious irregularity.

Importantly for organizations accustomed to the "fact" phase of litigation or domestic arbitration in the United States, English arbitration procedure does not include the taking of depositions. The taking of evidence is conducted through written witness statements exchanged in advance of the hearing, with witnesses then being cross-examined at the final hearing.

The expedited and emergency procedures provided for in the English arbitration framework are typically less concerning in insurance disputes where dissipation of assets is less pressing; insurers operating in the UK and EU have regulatory capital requirements – meaning that they should have assets to meet any ultimate award.

U.S. institutional rules

In the United States, insurance policies may provide for arbitration conducted under the rules of specialist institutions. Specialist institutions include (i) the American Arbitration Association (AAA), which administers insurance arbitrations under its Commercial Arbitration Rules or its Insurance Mediation and Arbitration Rules and (ii) Judicial Arbitration and Mediation Services (JAMS), which administers insurance arbitrations under its Comprehensive Arbitration Rules & Procedures. The Associate in Insurance Data Analytics (AIDA) Reinsurance and Insurance Arbitration Society (ARIAS-U.S.) also administers arbitrations – primarily disputes in the reinsurance sector – under its procedural rules.

The procedural culture of U.S. insurance arbitration can differ materially from that of English arbitration. Depending on the applicable rules and the tribunal's directions, U.S. arbitrations may incorporate features more closely aligned with U.S. litigation practice, including broader discovery rights such as interrogatories, requests for admission, document requests and, in some cases, depositions. There may also be substantive briefing on discovery issues followed by separate dispositive motions prior to any hearing on the merits. The composition of the tribunal may also differ. Both ARIAS-U.S. rules and AAA rules have traditionally permitting party-appointed arbitrators who may not be required to be fully independent in the manner expected under English law. Moreover, these rules in some instances may permit substantive *ex parte* communications with party-appointed arbitrators extending up until the submission of substantive briefing.

International institutional rules

Specialist industry sectors may provide for insurance disputes to be resolved by specific institutional bodies. For instance, disputes involving marine cargo and commodities may involve arbitration pursuant to Stockholm Chamber of Commerce (SCC) rules. Similarly, insurance coverage in the commodities sector may provide for disputes to be resolved by arbitration under the rules of GAFTA or FOSFA trade bodies.

It is less common to see the rules of international commercial arbitration institutions such as the London Court of International Arbitration (LCIA) or the International Chamber of Commerce (ICC) incorporated into (re)insurance policies.

While these institutions are frequently used for international commercial disputes more generally, the insurance and reinsurance markets have historically preferred ad hoc arbitration clauses, particularly in the London market. This reflects the industry's preference for flexibility, the bespoke nature of many insurance arbitration clauses, and the parties' desire to select arbitrators with specific insurance market expertise.

The choice of rules remains a matter of contractual negotiation, and parties should give careful consideration to the procedural implications of their choice.

Bermuda Form arbitration

The Bermuda Form is a distinctive type of high-excess liability insurance policy that emerged in the mid-1980s, developed by insurers in Bermuda – principally ACE (now Chubb) and XL (now AXA XL) – to provide casualty coverage to major U.S. corporations for long-tail risks such as environmental pollution, asbestos-related bodily injury, and product liability.

The policies are written using bespoke manuscript wordings and are notable for their unique hybrid legal structure, combining a modified form of New York substantive law with English arbitration procedure. Typical coverage disputes concern the allocation of long-tail liabilities across multiple policy years, the scope of exclusions, the trigger of coverage, the application of self-insured retentions, and the insurer's obligation to advance defense costs. Given the high-excess nature of the coverage, individual disputes frequently involve very substantial sums.

The governing law element of Bermuda Form policies is beyond the scope of this article, but more information can be found in this guide.

The dispute resolution mechanism requires disputes to be resolved by arbitration seated in London (or Bermuda or Toronto). Arbitrations seated in London are to be conducted in accordance with English arbitration law and procedure, meaning the procedural framework described above applies equally. The designation of an English seat ensures that English courts exercise supervisory jurisdiction and that the limited grounds for challenge of an award under English law apply.

The combination of New York substantive law and English procedural law requires arbitrators and counsel to be acquainted with both legal traditions. Tribunals are typically composed of three arbitrators – often English barristers or former judges – but it is also common to have a mixture of English and U.S. legal backgrounds. In practice, hearings are conducted in London, but the legal arguments draw heavily on New York case law and statutory materials, creating a unique forensic environment that differs from both a purely English and a purely U.S. arbitration.

Litigation versus arbitration: risks and benefits in an insurance context

Time and cost

The relative cost and speed of arbitration as compared to litigation is a source of perennial debate, and the (re)insurance sector is no exception. In principle, arbitration offers a more streamlined procedure, with fewer interlocutory applications and a shorter period from commencement to final hearing. In practice, however, the time and cost associated with insurance arbitrations (not least in relation to the selection of the tribunal) can be substantial, particularly in complex coverage disputes involving multiple policy years, large volumes of documentation, and contested expert evidence.

One advantage of arbitration is the ability of the parties to agree on a timetable suited to the complexity of the dispute without being subject to the constraints of court listing and the competing demands of the courts' general caseload. Equally, however, the absence of a court-imposed timetable can sometimes lead to delay, particularly where one party has little incentive to move the matter along expeditiously.

A disadvantage of arbitration in an insurance matter is that it is designed as a private forum for disputes between two parties. In circumstances where a policyholder has a complex tower of primary and excess (re)insurance layers, a number of whom have declined coverage, then absent agreement from each (re)insurer that the dispute under each respective insurance policy be heard together, a policyholder seeking indemnity from multiple non-paying (re)insurers will be required to commence separate, private arbitrations against each individual (re)insurer, at significant additional time and cost. By contrast, in the insurance recovery context, litigation typically permits a party to commence a single set of proceedings against multiple insurer defendants.

Confidentiality

Confidentiality is frequently cited as a principal advantage of arbitration over litigation. In the insurance context, this benefit must be assessed with some nuance. Arbitral proceedings and awards are private and confidential as a matter of English law, subject to certain well-established exceptions. This is in contrast to litigation in the English Commercial Court, where hearings are conducted in public and judgments are published. In the United States, while arbitral proceedings and awards are private and the arbitrators must keep materials confidential, confidentiality is not automatic as to the parties themselves. Further, if a party needs to file material on the docket for confirmation of an arbitration award, those filings may become public. Confidentiality concerns are usually dealt with by separate agreement and protective order among the parties.

The choice between arbitration and litigation involves a careful evaluation of competing considerations. The confidentiality of arbitration protects commercially sensitive information, but it also removes the pressure that a public hearing can bring to bear on an insurer. A policyholder may decide that the publicity of court proceedings – and the risk of adverse press coverage – provides a powerful incentive for an insurer to settle or to adopt a reasonable position. Conversely, a policyholder with its own concerns about commercial privacy may prefer the discretion that arbitration affords.

Impartiality and industry ties

A further consideration relates to the composition of the tribunal. In both London and U.S. insurance arbitration markets, the pool of experienced arbitrators is relatively small and specialized, with many being former market practitioners who have long-standing relationships with insurers. Insurers, as repeat participants, appoint arbitrators frequently and develop familiarity with the available candidates, whereas policyholders may only rarely have occasion to do so. While this imbalance does not imply any absence of fairness, policyholders should be aware of the potential for unconscious familiarity on the part of arbitrators who are regularly appointed by insurers. As noted above, certain U.S. institutional rules may not adopt the same strict approach to impartiality and independence as applies under English law.

In England and Wales, the requirements are robust. The 1996 Act (as amended by the Arbitration Act 2025) imposes a duty of disclosure on arbitrators, and any arbitrator who fails to disclose a material connection or whose conduct gives rise to justifiable doubts as to impartiality may be removed by the court. Policyholders can take a degree of comfort from this supervisory jurisdiction but should nonetheless approach the appointment process with care – obtaining informed recommendations when selecting their party-appointed arbitrator and instructing external counsel with specific expertise in navigating insurance arbitrations.

Disclosure and discovery

The scope of disclosure is a significant procedural difference between arbitration and litigation, particularly for U.S. policyholders accustomed to the broad discovery rights available in U.S. federal and state courts. In English arbitration, disclosure is typically ordered on a basis equivalent to standard disclosure in English civil litigation – that is, each party discloses the documents on which it relies and those which adversely affect its own case or support the case of the other party. This is considerably narrower than the discovery available in U.S. litigation, and it is narrower still than the disclosure that may be ordered in U.S.-seated insurance arbitrations under ARIAS or AAA rules.

For many policyholders, the more limited disclosure regime in the context of an English arbitration is a significant advantage: It may reduce cost and minimize the burden of document review and production. In both arbitration and litigation, there is often an imbalance, with the burden to produce documents typically lying with the policyholder, who is often perceived as the party in possession of the material relevant to the underlying claim, loss, or damage. For those who think the insurer might hold critical documents that would support the coverage claim, an English tribunal retains the discretion to order specific disclosure of identified categories of documents where such an order is necessary and proportionate.

Enforcement

One of the key advantages of arbitration for international commercial disputes is often the ability to enforce in multiple jurisdictions under the New York Convention. Again, these arguments apply with less force in the insurance and reinsurance context.

Insurers and reinsurers operating in the London market and at Lloyd’s are expected to pay awards promptly and without the need for enforcement proceedings. An insurer that fails to honor an arbitral award would suffer reputational damage and could face regulatory consequences or restrictions on its ability to continue to write business in the market. This market discipline provides a powerful incentive for compliance that is not always present in other commercial sectors.

Conclusion

Arbitration commonly features as a dispute resolution process for insurance and reinsurance disputes. Its procedural flexibility and confidentiality and the parties’ ability to appoint arbitrators with specialist market expertise make it well suited to the resolution of complex coverage disputes.

Policyholders should nonetheless approach the arbitration process with a clear understanding of the procedural framework, the practical dynamics of the arbitration market, and the relative advantages and disadvantages of arbitration as compared to litigation in their particular circumstances.

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Arbitration in financial disputes: trends, innovations, and the road ahead

For decades, the financial services industry remained one of the last holdouts against international arbitration. While sectors such as construction, energy, and commodities embraced arbitration as their primary dispute resolution mechanism, banks and financial institutions traditionally preferred litigation before national courts.

Litigation's perceived comparative advantages include: a binding system of precedent to limit inconsistent decisions; more robust adjudicators less inclined to "split the baby"; and expedited processes, such as summary judgment, to speedily dispense with unmeritorious claims.

However, recent data suggest the picture is now changing. In its 2024 Annual Casework Report, the London Court of International Arbitration (LCIA) reported that banking and finance accounted for 17% of all cases commenced that year, making it the second-largest sector after Transport and Commodities.[1] At the Hong Kong International Arbitration Centre (HKIAC), financial disputes comprised 7.7% of registered cases in 2025.[2] The Singapore International Arbitration Centre (SIAC) handled 886 new cases in 2025, with banking and financial services being part of a closely trailing volume of cases beyond its core caseload of trade and commercial disputes.[3] The ICC's 2025 statistics confirm that finance continues to feature prominently among its global caseload, with 4.6% of cases falling in the financing and insurance category.[4]

Taken together, these figures suggest that finance disputes comprise a modest but growing share of institutional caseloads. The arbitration of financial disputes is no longer a niche phenomenon but is instead a firmly embedded feature of the international dispute resolution landscape.

Characteristics of financial disputes

Financial disputes can have distinctive characteristics that set them apart from other types of disputes commonly referred to international commercial arbitration.

The first characteristic is technical complexity. Disputes concerning derivatives, structured finance, securitization, or algorithmic trading require decision-makers who understand not merely the contractual documentation but also the market context in which those instruments operate. Understanding how financial markets work and the applicable legal rules is indispensable for those determining such disputes. A tribunal composed of arbitrators with sector-specific expertise – whether former derivatives traders, banking regulators, or specialist finance lawyers – may in principle engage with the substance of a dispute in ways that a generalist court may struggle to achieve.

The second characteristic is regulatory overlay. Financial institutions operate within some of the most heavily regulated environments in the world. Regulatory compliance may need to be considered when determining potential breaches of contract. This might include, for example, where a bank's conduct was mandated or constrained by prudential or other regulation. Statutory duties of secrecy may prevent financial institutions from disclosing customer information, creating challenges for evidence-gathering that arbitration's confidential procedures are uniquely suited to accommodate. Furthermore, minimum capital requirements and asset ring-fencing on local bank branches may present distinct enforcement challenges.

The third characteristic is the cross-border, multi-jurisdictional dimension. Financial transactions frequently involve parties, assets, and obligations spread across multiple jurisdictions. Disputes may therefore engage several legal systems simultaneously, raising complex questions of applicable law, jurisdictional priority, and coordination among courts and regulators.

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1 See LCIA's 2024 Annual Casework Report (dated July 3, 2025), https://www.lcia.org/News/lcias-2024-annual-casework-report.aspx.
2 See HKIAC 2025 Statistics, https://hkiac.org/about-us/statistics.
3 See SIAC 2025 Annual Report, pp. 4, 32, available at https://siac.org.sg.
4 See ICC 2025 Dispute Resolution Statistics, available at https://iccwbo.org/dispute-resolution/resources/icc-dispute-resolution-statistics.

Advantages of arbitration

Arbitration has key advantages for financial institutions seeking to resolve their cross-border disputes. First and foremost is enforceability. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) provides a mechanism for enforcement across 172 contracting states. This is a reach unmatched by any regime for court judgments. For financial institutions – which have in recent years increasingly looked to expand into emerging jurisdictions – this is a decisive advantage of international arbitration over litigation as there exists no comparable multilateral enforcement of court judgments in Asia or Africa.

A second advantage is confidentiality. Reputational risk is felt keenly in the financial services industry. Businesses naturally consider that the public ventilation of a dispute, particularly one involving alleged misconduct or default, may trigger market reactions and, in extreme cases, bank runs. Arbitration offers the prospect of confidential procedures allowing such institutions to resolve disputes without public disclosure, protecting both commercial relationships and market confidence. This aligns naturally with the statutory duties of secrecy under which many financial institutions operate.

Arbitration also offers the prospect of adjudicators who have genuine sector-specific expertise. The parties are free to appoint arbitrators with deep financial markets expertise, a significant advantage of arbitration. A tribunal comprising such experts might engage with complex financial instruments at a level of sophistication that generalist courts cannot consistently provide. The Panel of Recognised International Market Experts in Finance (P.R.I.M.E. Finance), based in The Hague, offers specialist arbitration and mediation services for complex financial disputes, drawing on a panel of experts with deep market knowledge.[5] HKIAC established a dedicated Panel of Arbitrators for Financial Services Disputes in 2018.

Finally, arbitration provides for procedural flexibility. It allows in principle for procedures to be tailored to the specific needs of financial disputes, whether that means expedited timelines for time-sensitive matters, bespoke document disclosure protocols, or expert-led procedures for technically complex valuation issues. The finality of arbitral awards, with limited grounds for challenge, also appeals to institutions seeking certainty and prompt resolution.

5 *See* https://primefinancedisputes.org/.

Early determination

One concern among banks and other financial institutions is a belief that arbitration does not offer any expedited processes, such as summary judgment, by which simpler or unmeritorious claims can be dealt with quickly. Therefore, perhaps the most significant recent development in making arbitration "finance friendly" is the widespread adoption of early determination and summary dismissal procedures. The Queen Mary/White & Case 2018 International Arbitration Survey identified "expedited procedures for claims" and "summary determination procedures" as the most favored improvements for the banking and finance industry.[6]

Financial institutions frequently approach claims on the basis of clear counterparty liability. A default under a loan agreement or a failure to pay under a derivative is typically not a genuine dispute in the traditional sense. What financial institutions need is the power to dismiss unmeritorious defenses and bring proceedings to an early conclusion. This is arguably even more significant than the ability to dismiss meritless claims. In recent years, numerous international arbitration institutions have adopted early determination rules. This institutional consensus signals that the arbitration community has heard the financial sector's concerns and has responded.

Expedited procedures

International arbitration institutions have increasingly introduced expedited procedural tracks designed to resolve disputes within compressed timelines. Several arbitration institutions have introduced expedited procedures by which the tribunal is typically required to issue an award within six months of receiving the arbitration file. The principle has been further extended by "expedited" procedures. For example the 2025 SIAC Rules introduced a three-month "Streamlined Procedure," an enhanced "Expedited Procedure" with shorter timeframes, and a lower financial threshold for application. These mechanisms are of particular relevance to financial institutions for whom delay in resolving disputes can have significant consequences for balance sheet provisioning, regulatory reporting, and counterparty risk management.

Unilateral and option clauses

Unilateral or asymmetric dispute resolution clauses, which grant one party the option to elect between arbitration and litigation, are a common feature of financial documentation. These clauses are particularly prevalent in loan agreements, facility agreements, and International Swaps and Derivatives Association (ISDA) Master Agreements, where the lender or creditor typically retains the right to choose the forum most advantageous for enforcement in any given case. For financial institutions operating across multiple jurisdictions, such clauses can offer valuable strategic flexibility. The institution may elect arbitration where the counterparty's assets are located in a New York Convention state and litigation where a local court offers a more direct route to enforcement. The enforceability of such clauses varies across jurisdictions. While they have generally been upheld in England and in major arbitral seats such as Singapore and Hong Kong, courts in certain civil law jurisdictions have taken a more restrictive approach, raising concerns over procedural equality and mutuality. Financial institutions should therefore consider the enforceability of asymmetric clauses under the governing law and in the likely seat and place of enforcement when drafting their dispute resolution provisions.

Conclusion

International arbitration is no longer a peripheral option for resolving disputes in the financial services sector. The industry is increasingly recognizing the benefits of global enforceability, confidentiality, specialist expertise, and, increasingly, access to expedited and early determination procedures allowing parties to resolve disputes quickly and simply. As financial markets continue to globalize, digitalize, and face new categories of cross-border risk, arbitration's role in resolving financial disputes will only grow.

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6 See https://www.qmul.ac.uk/arbitration/research/2018/ (Chart 33, at page 31).

International arbitration and the critical minerals race

Critical minerals are a geopolitical currency, yielding a new global resource race. Yet critical minerals are a derivative of the broader mining sector. This sector historically demands heavy capital investment, currently standing at over US$1.5 trillion and expected to double in the next decade because of critical minerals investments. Given the stakes and the complexity of the issues the sector encounters, the largest volume of investor-state international arbitrations have historically related to extractives. This article examines whether disputes relating to traditional mining provide meaningful lessons for critical minerals investments or whether a new approach is developing to account for their relevance in private, as well as in national and geopolitical contexts.

What is a critical mineral?

Despite their frequent mention in legislative and commercial contexts, the legal definition of critical minerals remains elusive. They are generally understood to be materials that, due to vulnerable supply chains, are vital to economic or national security such that their disruption would present serious consequences to green energy enterprises.

The concept of critical minerals varies by jurisdiction. In the United States, the Energy Act of 2020 defines "critical mineral" as any mineral, element, substance, or material designated as critical by the Secretary of Interior, acting through the director of the U.S. Geological Survey.[1]

The European Union considers raw materials to be "crucial to Europe's economy," forming a "strong industrial base, producing a broad range of goods and applications used in everyday life and modern technologies."[2] The EU issued Regulation EU 2024/1252, known as the "Critical Raw Materials Act."[3]

Because the transition to clean energy – including wind, solar, and electric vehicles – has exploded, demand for these minerals is projected to surge. The International Energy Agency (IEA) noted that "a typical electric car requires six times the mineral inputs of a conventional car, and an onshore wind plant requires nine times more mineral resources than a gas-fired plant."[4] According to mining consultancy Wood Mackenzie, by 2050, nickel demand could triple, copper demand could more than double, and demand for lithium chemicals could grow by 700%.[5]

Legal issues affecting critical minerals investments

Geographic concentration of critical mineral reserves creates significant supply chain vulnerabilities. For example, the Democratic Republic of Congo produces approximately 70% of the world's cobalt, while China controls roughly 60% of rare earth element production and dominates the processing of lithium, cobalt, and other battery metals.[6] Chile and Australia together account for over 75% of global lithium production, and South Africa holds approximately 70% of known platinum group metal reserves.[7] Indonesia emerged as the dominant supplier of nickel, controlling around 40% of global production.[8]

A key consideration in assessing the future trajectory of critical minerals disputes is the nascent legislative context governing these materials globally. Unlike traditional mining, which operates within established legal frameworks and regulatory structures, the rules on critical minerals are still being written. The EU's Critical Raw Materials Act (2024), the U.S. Inflation Reduction Act provisions on critical minerals sourcing, and similar initiatives in Australia, Canada, and elsewhere

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1 U.S. Department of Energy. *What Are Critical Minerals and Materials?*, https://www.energy.gov/cmm/what-are-critical-minerals-and-materials (accessed July 1, 2026).

2 European Commission, Internal Market, Industry, Entrepreneurship and SMEs. Critical Raw Materials, https://single-market-economy.ec.europa.eu/sectors/raw-materials/areas-specific-interest/critical-raw-materials_en (accessed July 1, 2026).

3 European Union, EUR-Lex. Document 32024R1252, Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2025 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No. 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L_202401252 (accessed July 1, 2026).

4 IEA. *The Role of Critical Minerals in Clean Energy Transitions*, Section 1.0, Executive summary, https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions (PDF) (accessed July 1, 2026).

5 Markus Burgstaller & Scott Macpherson. *How Investment Protection in Relation to Mining Projects Can Assist in Contributing to the Energy Transition*, ITA in Review 8, no. 1 (2024), https://itainreview.org/articles/2024/vol6/issue1/inv-protection-assist-the-mining-industry.html.

6 IEA. Energy Technology Perspectives 2023, *Clean energy supply chains vulnerabilities*, https://www.iea.org/reports/energy-technology-perspectives-2023/clean-energy-supply-chains-vulnerabilities (accessed July 3, 2026).

7 Id.

8 Id.

represent the first generation of dedicated critical minerals legislation. In the immediate term, countries are updating their mining codes and policies to foster domestic mining and recycling and to secure trade alliances, but stopping short of outlining an independent basis of regulation and profit sharing relating to critical minerals.

Where rules are evolving or inconsistent, disputes over legitimate expectations of investors become inevitable. Investors who commit capital based on one regulatory framework may find themselves facing materially different rules within project timelines. Similarly, stabilization clauses may prove difficult to enforce where the underlying regulatory architecture remains unsettled.

Certain flavors of disputes could be anticipated. First, **ownership and title disputes**, particularly where legacy mining concessions are reinterpreted to include newly designated critical minerals or where states seek to assert enhanced sovereignty over strategic resources. Second, **ecological and environmental parameters**, which reflect supply-side demands against increasingly protective environmental and community protections. This tension is particularly acute for critical minerals, where the environmental justification for extraction (enabling the energy transition) may conflict with the environmental costs of extraction itself, and where the extraction methods themselves may have a heavy environmental impact, e.g., water use. Third, **joint venture and partnership disputes**, where participation and equity allocations could generate conflict. Fourth, **export controls and trade restrictions**, as states deploy critical minerals as instruments of economic statecraft, a phenomenon already visible in China's rare earth export policies and Indonesia's nickel processing requirements. Fifth, **taxation and royalty frameworks**, where fiscal measures targeting high-value minerals may shift, depending on industry growth.

Will the critical minerals race lead to more arbitrations?

Geopolitical disruption, energy transition, sanctions, tariffs, AI, trade controls, and critical minerals are emerging as major sources of new arbitration disputes. Tariffs and export controls for critical minerals are linked to disputes over price adjustment, force majeure, and hardship.[9-10]

As mining investors move into new territories in pursuit of critical minerals, the scope of investment protection will receive attention. States are reassessing legal frameworks for mining, in pursuit of an appropriate and politically supported beneficiation formula.

The mining industry has been a significant participant in international arbitrations, yet investors are often reluctant to commence claims, preferring negotiated or other amicable outcomes that preserve the underlying concession and allow the mining asset to continue to operate. Given the rarity of critical minerals, it is expected that international claims will increase as investors seek to protect those assets.

Geographic spread

The geographic spread of critical minerals is highly concentrated with extraction hotspots located in South America with respect to lithium, and Central Africa with respect to cobalt. China dominates in rare earth elements, in both extraction and global processing of critical minerals. Traditional mining actors, hailing from Australia, Canada, and Europe, continue to proliferate as investors in critical minerals concessions.

Arbitration as the favored forum for mining cases

In general, mining projects are complex, remote, infrastructure-heavy, capital-intensive, and exposed to regulatory, political, community, logistics, ESG, and supply chain risks. Mining disputes arise across the project life cycle, including construction, transportation, mine operation, joint ventures, mine closures, reclamation, investment/license agreements, expropriation, royalties, fiscal measures, and legal-regime changes. The state itself or a state-owned entity may have a direct stake in the mine under an investment agreement, license agreement, or other instrument.
Due to the long-term nature of mining investments, it is common for the legal framework in existence at the outset of the investment to be stabilized in agreements to avoid dramatic changes in law that may undermine the basis for the investment. Arbitration is often the preferred mode of dispute resolution because of its neutrality, party selection of expert arbitrators, global enforceability under the New York Convention, privacy, tailoring of procedure, and limited appeal rights. Neutrality concerns inevitably arise in legal proceedings before local courts – the higher the stakes, the greater the risk that local courts may be driven into a politically minded determination. The perception of political interference in the judiciary, corruption, and under-resourced courts in mineral-rich regions create risks for mining investors litigating locally.

The seat of arbitration matters because a host-state seat may expose the arbitration to local court intervention, local procedural law, and set-aside risk, potentially undermining the neutrality that motivated arbitration in the first place. Multi-tiered dispute resolution or "escalation" clauses are

9 41-6 Mealey's Intl. Arb. Rep. 20 (2026).
10 Alison FitzGerald. *International Commercial Arbitration Practice* § 26.01. LexisNexis.

common in mining industry contracts. These typically include good faith negotiations at a senior executive level, mediation, and then arbitration. Some contracts contain carveouts for technical disputes that allow disputes to be referred to expert determination or a dispute adjudication board.

Arbitration tribunals may scrutinize whether asserted environmental defenses are genuine or whether they are justifications for protectionist measures by the state. For instance, in Gold Reserve Inc. v. Venezuela, the tribunal acknowledged that "a State has a responsibility to preserve the environment and protect local populations living in the area where mining activities are conducted," but found that this responsibility "does not exempt a State from complying with its commitments to international investors".[11] Similarly, in Crystallex International Corp. v. Venezuela, the tribunal found that Venezuela's raising of environmental concerns to justify denying an environmental permit was a "clear example of arbitrary and unfair conduct".[12] In Bear Creek Mining Corp. v. Peru, the tribunal considered that, prior to issuing a decree revoking the claimant's concession, the Peruvian authorities had considered the project lawful, supported it, and publicly declared that social unrest was not sufficient reason for revocation.13 These cases demonstrate that tribunals may reject insufficiently evidenced environmental justifications for state action affecting mining investments.

Interim measures in mining and critical minerals disputes

Interim measures – meaning provisional relief ordered by tribunals pending final resolution of a dispute – assume heightened importance in mining and critical minerals cases. The unique characteristics of these disputes, including the asset's physical nature, the risk of irreparable harm through continued extraction or asset dissipation, and the strategic value of the resources at stake, make interim relief a critical procedural tool for both investors and states.

Tribunals constituted under the ICSID Convention, UNCITRAL Arbitration Rules, and major institutional rules possess broad authority to order provisional measures. Under ICSID Arbitration Rule 47, tribunals may recommend provisional measures to preserve the respective rights of either party. The 2022 amendments to the ICSID Rules strengthened this framework, and tribunals have increasingly treated such recommendations as having binding effect. Under the UNCITRAL Arbitration Rules (Article 26) and ICC Rules (Article 28), tribunals may order interim measures, and many modern investment treaties expressly confirm this authority.

In mining disputes, interim measures are sought and granted in several recurring contexts:

1. **Preservation of the status quo:** Tribunals may order parties to refrain from actions that would alter the factual or legal situation pending resolution, such as ordering a state not to transfer mining rights to third parties or to proceed with nationalization measures.
2. **Access and inspection rights:** Investors may seek orders permitting access to mine sites for inspection, valuation, or evidence preservation, particularly where the state has excluded the investor from the concession area.
3. **Asset preservation:** Where there is risk that continued extraction will deplete the resource or that the state will dissipate assets that might satisfy an eventual award, tribunals may order measures to prevent irreparable harm.
4. **Non-aggravation of the dispute:** Tribunals routinely order parties to refrain from action that might aggravate or extend the dispute.

The standard for granting interim measures in investment arbitration typically requires the applicant to demonstrate: (1) prima facie jurisdiction over the dispute; (2) prima facie establishment of claimed rights; (3) urgency, meaning that measures are needed before the tribunal can render a final award; (4) necessity, meaning that measures are required to prevent irreparable harm that cannot be adequately compensated by damages; and (5) proportionality, meaning that measures do not impose disproportionate burdens on the respondent. Tribunals have applied these criteria with varying degrees of rigor, and the threshold for "irreparable harm" remains contested.

Critical minerals disputes may present distinctive considerations for interim measures analysis. The strategic importance of these resources to national security and energy transition may influence how tribunals assess proportionality. States may argue that interim measures restricting their control over critical minerals impose disproportionate burdens on essential national interests. The supply chain concentration and irreplaceability of certain critical minerals may strengthen investor arguments for preservation measures: If a lithium deposit is transferred to a competitor or a cobalt mine is depleted pending arbitration, the investor may suffer harm that no damages award can adequately remedy. The geopolitical dimension of critical minerals, including their role in great-power competition, may also

11 *Gold Reserve Inc v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014.
12 *Crystallex Int'l Corp. v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016.
13 *Bear Creek Mining Corp. v. Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017.

affect tribunal willingness to order measures that could be perceived as interfering with state sovereignty over strategic resources.

The *AVZ Minerals v. DRC* case illustrates these dynamics (see further below). The tribunal's procedural order requiring the DRC to reinstate AVZ as majority owner of the Manono lithium project represents a significant interim intervention in a critical minerals dispute. The DRC's subsequent announcement of a competing deal with KoBold Metals, which AVZ claims violates the tribunal's order, highlights both the power and the limitations of interim measures. Tribunals can order preservation of rights, but enforcement depends on state compliance and, ultimately, the mechanisms available to compel adherence to provisional orders.

Investors should consider seeking interim measures early in critical minerals disputes, where there is risk of asset transfer, resource depletion, or exclusion from the concession. Requests should be tailored to the specific characteristics of the resource, emphasizing irreplaceability, supply chain significance, and inadequacy of monetary compensation where appropriate. States defending against interim measures requests may invoke national security, essential interests, and the public importance of critical minerals to energy transition as grounds for denying or limiting provisional relief. Evolving jurisprudence will further test these trends.

Recent case highlights: Are critical minerals disputes emerging as a distinct category?

- In *Westwater Resources v. Türkiye* (ICSID Case No. ARB/18/46, Award, Mar. 3, 2023): Turkey cancelled certain uranium mining licenses held by Adur, a subsidiary of U.S. company Westwater, in June 2018. The tribunal found: (1) the licenses were valid and cancellation wrongful, as the Mining Act of 1985 represented a change of government policy toward the private mining of uranium that was not reversed by subsequent amendments; (2) the cancellation constituted indirect expropriation of Westwater's investment because when Adur lost its licenses, Westwater's shares lost all value; (3) Turkey violated fair and equitable treatment by creating legitimate expectations through more than 10 years of treating the licenses as valid, collecting hundreds of thousands of dollars in license fees, and working closely with Adur on the project, and then repudiating those expectations; and (4) Turkey denied due process by failing to provide prompt, adequate compensation. The tribunal rejected Turkey's argument that the licenses were void ab initio. Westwater was awarded US$1.283 million in investment costs (not lost profits), plus legal fees and expenses. The tribunal rejected Westwater's DCF-based claim for lost profits because Westwater failed to prove the project would have become operational "but for" the breach, as the project had been mothballed since 2016 due to low uranium prices and lacked adequate financing or a marketable pre-feasibility study.

Westwater was a case concerning uranium, a mineral now considered critical under U.S. definitions, but the tribunal's analysis tracks conventional mining investment arbitration jurisprudence. The legitimate expectations analysis, expropriation finding, and causation limitations mirror approaches seen in non-critical-mineral mining cases. The case illustrates an **ownership and title** dispute (cancellation of valid licenses) resolved through standard treaty analysis. This suggests that since 2023, tribunals were not yet recognizing critical minerals disputes as categorically different from traditional mining disputes, though whether this reflects the absence of critical-minerals-specific arguments or a deliberate doctrinal choice remains unclear.

- In *Odyssey Marine v. Mexico* (ICSID Case No. UNCT/20/1, Award, Sept, 17, 2024),[14] Mexico was ordered to pay US$37.1 million (plus interest) for breaching NAFTA obligations after SEMARNAT unlawfully denied an environmental permit for Odyssey's seabed mineral exploration project. The project concerned one of the world's largest seabed phosphate deposits, located off the coast of Baja California Sur. The ruling validated Odyssey's position that SEMARNAT wrongfully denied the permit based not on Mexico's regulations or scientific support, but on a politician's directive. Mexico's highest federal administrative court, the Tribunal Federal de Justicia Administrativa, had unanimously ruled in favor of Odyssey's subsidiary in 2018, stating that SEMARNAT had unlawfully rejected the permit. The case illustrates the tension between critical minerals needed for decarbonization and marine ecosystem protection.

  The award is notable for its framing of seabed mineral extraction as a "new frontier" driven by the green-energy transition. This language suggests recognition that the demand dynamics for critical minerals (here, phosphate) differ from traditional mining contexts. The tribunal found that SEMARNAT's permit denial was based on political directive rather than regulations or scientific support, illustrating how environmental justifications for state action will be scrutinized in critical minerals contexts. However, the tribunal's legal analysis applied conventional NAFTA fair and equitable treatment standards without developing any critical-minerals-specific doctrine. Thus, the case's factual framing acknowledges the distinctive context of critical minerals and energy transition, but its legal reasoning does not translate that recognition into differentiated doctrine. This gap between factual acknowledgment and doctrinal development may characterize the current transitional moment in critical minerals arbitration.

- In *AVZ Minerals v. DR Congo* (ICSID Case No. ARB/23/20):[15] AVZ Minerals, an Australian company, initiated ICSID arbitration against the DRC concerning its interests in the Manono Lithium and Tin Project, believed to contain one of the world's largest undeveloped deposits of lithium, a crucial component of many types of batteries. The case involves critical mineral supply chain considerations in the context of U.S.-brokered peace and security discussions between the DRC and Rwanda. In January 2024, the tribunal issued a procedural order requiring the DRC to reinstate AVZ as the majority owner of the project. However, in July 2025, the DRC announced a deal with California-based KoBold Metals to develop part of the project, which AVZ has claimed violates the tribunal's order. ICSID proceedings were suspended until February 2026 to allow for settlement discussions and funding arrangements. A parallel ICC commercial arbitration has confirmed that AVZ owns at least 70% of the project's legal titleholder.

  AVZ Minerals pragmatically approaches a classic ownership and joint venture dispute in the critical minerals context. The underlying resource, one of the world's largest undeveloped lithium deposits, is explicitly positioned within global critical mineral supply chains, and the dispute's intertwining with U.S.-brokered regional peace negotiations reflects the geopolitical dimension that may increasingly distinguish critical minerals from traditional mining disputes. While the substantive award remains pending, the case's profile indicates that tribunals may increasingly be asked to navigate disputes where critical mineral supply chain considerations intersect with sovereignty, security, and development policy. Whether this will prompt approaches beyond standard mining investment jurisprudence – potentially including enhanced deference to national security justifications or, conversely, heightened scrutiny of pretextual state action – remains to be seen. AVZ Minerals may prove to be a bellwether case for whether critical minerals disputes will be treated as a distinct category.

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14 Liz Shows. *Odyssey Marine Exploration Reports Win in NAFTA Arbitration Case* (Sept. 17, 2024), ir.odysseymarine.com/news/news-details/2024/Odyssey-Marine-Exploration-Reports-Win-in-NAFTA-Arbitration-Case/default.aspx (accessed July 1, 2026).

15 AVZ Minerals Limited. Announcement – Corporate and Arbitration Update (Nov. 19, 2025), https://static1.squarespace.com/static/5934d2ae6b8f5beeb5ba23f3/t/691d794665c9651876b8f05f/1763539270952/20251119+AVZ+announcement+-+Corporate+and+Arbitration+Update+%28final%29.pdf (accessed July 1, 2026).

The path forward

Currently, arbitration tribunals have not developed a distinct doctrinal approach to critical minerals disputes. The cases analyzed apply conventional investment arbitration principles (legitimate expectations, expropriation, fair and equitable treatment) without articulating critical-minerals-specific standards or applicable defenses. None of the tribunals examined have treated critical minerals as requiring differentiated legal analysis, even where the factual context (as in *Odyssey*) explicitly invoked energy transition imperatives.

However, the factual contexts increasingly reflect the unique characteristics of critical minerals: supply chain concentration, geopolitical competition, energy transition imperatives, and nascent regulatory frameworks. As the caseload grows, tribunals may encounter disputes where traditional mining jurisprudence may prove insufficient. For example, where national security defenses are raised against critical mineral export controls, where environmental justifications intersect with decarbonization objectives, or where legacy concession terms are reinterpreted to encompass newly designated critical minerals. In such cases, it is likely that differentiated analysis will arise examining the role of these minerals in the needs of states and, accordingly, the defenses that are invoked when curtailing the protections of private investment in critical minerals. Counsel representing investors in critical minerals disputes, for example, may deploy arguments that emphasize the distinctive characteristics of these resources (their policy-driven designation, supply chain concentration, and strategic significance) even where conventional treaty analysis may suffice. Practitioners may thus see a need to frame new arguments around established doctrines.

Takeaways for mining investors

Mining investors should structure investments to obtain treaty protection – including through entities incorporated in treaty-protected jurisdictions – before a dispute has commenced or become foreseeable. Many investment treaties cover indirect shareholders, and unless indirect shareholdings are specifically excluded from the definition of "investment," they will generally be covered.[16] In the event of a dispute with a state, investment treaties often require a mandatory period following notification of a dispute for the parties to seek to engage in negotiations, and the availability of treaty protections may be a valuable negotiating tool.[17]

Claimants must prove causation – specifically that the host-state's breaches caused the claimed losses – in order to recover lost profits using DCF methodology. Even where expropriation is found, compensation may be limited to investment costs if the project would not have become operational "but for" the breach, as demonstrated in *Westwater v. Turkey*.[18] Long enforcement tails and sanctions may affect award collection. Evidence preservation, ESG/community diligence, and careful seat/rules selection are critical because critical minerals disputes are likely to involve both public-law and private-law claims.[19]

The seat of arbitration remains important. A host-state seat may expose the arbitration to local court intervention, local procedural law, and set-aside risk, potentially undermining the neutrality that motivated arbitration in the first place.[20] Where a state or state-owned entity is party to a mining sector agreement, it is critical for the parties to address sovereign immunity and to include a clause in which the state waives sovereign immunity with respect to service, jurisdiction, and enforcement.[21]

16 Markus Burgstaller & Scott Macpherson. *How Investment Protection in Relation to Mining Projects can Assist in Contributing to the Energy Transition*, ITA in Review 8, no. 1 (2024), https://itainreview.org/articles/2024/vol6/issue1/inv-protection-assist-the-mining-industry.

17 *Id.*

18 ICSID Case No. ARB/18/46, Award, Mar. 3, 2023.

19 *Id.*

20 Alison FitzGerald et al. "International Commercial Arbitration Practice in the Mining Sector," in *International Commercial Arbitration Practice: 21st Century Perspectives* Ch. 26 (Matthew Bender Elite Products/LexisNexis, 2021).

21 *Id.*

Conclusion

The critical minerals race is increasingly leading to international arbitration, driven by states revising mining frameworks, expanding state participation at the expense of already-acquired private investment, and sometimes by expropriation. It is through investment protection that foreign investors may gain confidence to commit to the significant, costly, and long-term investments required of mining projects.[22] Investors should combine treaty structuring, strong state-contract protections, ESG/community diligence, evidence preservation, and careful seat/rules selection. Although it is too early to declare a flood of critical minerals arbitrations, the trajectory points toward increased disputes as regulatory frameworks mature and geopolitical competition intensifies. The combination of nascent legal frameworks, high-value strategic resources, and competing national interests creates conditions in which arbitration will increasingly become the forum of choice for resolving these disputes.

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22 Burgstaller & Macpherson, *supra* note 22.

Oil and gas disputes: why the energy industry turns to arbitration

When a dispute erupts over a billion-dollar gas contract or the seizure of an offshore license, the parties rarely turn to a local court. Cross-border oil and gas transactions involve multiple jurisdictions, vast capital commitments, and operations in politically volatile regions. National courts may not have the necessary sophistication to deal with high-value and complex transactions, or they might be perceived (rightly or wrongly) as biased toward the state parties or state-owned enterprises that are often parties to large oil and gas arbitrations. International arbitration has therefore become the dominant mechanism for resolving disputes in the industry, offering a neutral, confidential, and enforceable alternative.

Common disputes

Oil and gas arbitrations span a wide spectrum of subject matter. The following categories represent the most significant and recurring types of dispute.

Production sharing contracts and concession disputes

Disputes between international oil companies and host-state entities under production sharing contracts (PSCs) and concession agreements frequently concern cost recovery, profit oil and gas splits, the application of rebalancing or stabilization clauses, and the impact of changes in law or fiscal terms. The issues are familiar: (i) cost recovery, in particular, which categories of expenditure qualify as recoverable costs, whether ring-fencing provisions limit cost recovery to the specific contract area in which the expenditure was incurred, and the order of priority in which costs may be recovered; (ii) profit splits, such as how sliding-scale mechanisms or R-factor calculations divide production; and (iii) stabilization clauses, for example, whether a host state's new fiscal measures upset the original financial and legal equilibrium of an investment. At their sharpest, these disputes involve the outright revocation of licenses, the imposition of export restrictions, or the forced renegotiation of fiscal terms.

Joint operating agreements

Joint operating agreements govern relationships between co-venturers in upstream projects. Disputes commonly arise when an operator is accused of acting beyond its authority or in its own interest, or when a partner defaults on a cash call, potentially triggering forfeiture of its stake. Other frequent flashpoints include sole-risk operations, preemption rights on transfers of interest, and disagreements over how joint venture costs are allocated.

Gas price reviews

Long-term gas sales agreements typically contain price review or reopener clauses allowing either party to request a price adjustment when market conditions shift. The sums at stake can run into billions of dollars. Disputes typically center on whether the conditions to trigger a review have been met, the choice of pricing benchmark (particularly whether oil-indexed pricing remains appropriate in markets that have moved to hub-based references), the effective date for the price revision, and the methodology for setting a new price.

LNG disputes

The LNG market has its own distinctive disputes. Destination clause disputes, typically involving a buyer seeking to divert or resell cargoes to a more profitable market, have intensified as competition authorities question the legality of territorial restrictions. Take-or-pay claims arise when buyers fail to lift minimum volumes. And price indexation disputes mirror those in the pipeline gas market, revolving around whether oil-linked formulae remain fit for purpose. Additional common LNG disputes relate to scheduling and delivery window issues, the allocation of shipping risk, quality specification disagreements (including disputes over heating value or Wobbe Index tolerances), and *force majeure* claims arising from upstream supply disruptions or downstream regasification constraints.

Construction disputes

Major infrastructure projects – platforms, pipelines, LNG trains, floating production storage and offloading (FPSO) units – are prone to delay and cost-overrun claims in which contractors typically seek extensions of time while employers typically counterclaim for liquidated damages as a result of late completion. Concurrent delay, where fault lies on both sides, raises particularly thorny causation and apportionment questions. Cost-overrun disputes often arise where the contractor contends that the scope of work has been expanded through variation orders. Defects disputes concern whether completed works meet the required performance guarantees or fitness-for-purpose standards, the proper interpretation of defects liability and warranty provisions, and

the cost of remedial works. In multi-contract projects, interface disputes between different contractors working on the same facility are common, as are claims arising from the knock-on effects of one contractor's delay on another's program. Claims under performance bonds and parent company guarantees, as well as disputes over the proper operation of milestone payment mechanisms and retention provisions, also arise with considerable frequency.

Decommissioning disputes

As oil and gas projects mature worldwide, decommissioning is generating a growing volume of disputes. The core questions are essentially who pays and how much. Disagreements over decommissioning security agreements – including the triggers for calling on security and whether changed circumstances entitle a party to demand more – are increasingly common. So too are disputes about whether installations must be fully removed or can be left partially in place, and how liability is apportioned when assets have changed hands multiple times over the life of a field. The allocation of liability between successive interest holders – particularly where assets have changed hands multiple times over the life of a field – can give rise to disputes about the proper construction of indemnities and the extent to which selling parties retain residual exposure.

Investor-state disputes

Oil and gas companies have long used bilateral investment treaties and the Energy Charter Treaty to bring claims against host states – for example, for outright expropriation, for regulatory measures that strip value from an investment without formally seizing it, or for breaching the fair and equitable treatment, fair protection and security, or non-discrimination standards. The wave of cases against Spain, Italy, and the Czech Republic over retroactive cuts to renewable energy subsidies illustrates the pattern.

The landscape has grown more complex. Several EU member states have withdrawn from the Energy Charter Treaty, and the CJEU's *Achmea and Komstroy* decisions have restricted intra-EU investor-state arbitration – creating real uncertainty about whether treaty-based protections remain available for energy investments within the bloc.

Oil and gas disputes: why the energy industry turns to arbitration

Why arbitration?

Arbitration's dominance in the sector rests on a handful of well-understood advantages.

Neutrality

Large oil and gas contracts frequently involve state parties. Their counterparties will almost always prefer a forum removed from the host state's courts. Parties can agree on an impartial seat – London, Paris, Singapore, Geneva – and even select a neutral governing law better suited to complex commercial matters.

Enforcement

The New York Convention enables the winning party to enforce an award in over 170 countries. For investor-state disputes, the ICSID Convention provides its own self-contained enforcement mechanism that bypasses domestic court review entirely.

Confidentiality

Unlike court proceedings, arbitration is generally private. In an industry where commercial sensitivity is paramount – particularly in gas price reviews – parties rarely wish their commercial arrangements to be made public.

Expertise

Parties can appoint specialist decision-makers with deep experience of the technical, commercial, and legal dimensions of an oil and gas dispute – for example, complex engineering evidence, petroleum economics, or specialized regulatory frameworks. Depending on the jurisdiction, such specialism and experience may not be available in the national court systems.

Flexibility

The parties and the tribunal can tailor the procedure to the complexity of the case, whether that means document-intensive proceedings for a gas price review or expedited procedures for an urgent interim measure affecting operations

What's next

The energy transition

As the global energy mix shifts, disputes are emerging from regulatory changes affecting renewable energy investments (the Spanish solar cases under the ECT being a prominent example), from carbon pricing mechanisms, and from the tension between legacy fossil-fuel contracts and net-zero commitments. An increase in claims relating to stranded assets (i.e., reserves that can no longer be economically developed under tightening climate regulation) is widely anticipated. Beyond stranded assets, disputes are likely to arise from the renegotiation or early termination of long-term supply contracts that no longer align with a party's decarbonization commitments, and from disagreements over whether *force majeure* or hardship clauses can be invoked in response to climate-driven regulation. Meanwhile, the renewable energy sector is generating its own disputes: claims under power purchase agreements; disputes over grid connection delays; and disputes concerning the performance of wind and solar assets against warranted output levels. Carbon credit disputes – over the validity, ownership, and transferability of offsets – represent yet another frontier.

Sanctions and geopolitics

The extensive sanctions regimes imposed since 2022, particularly in relation to Russia, have triggered a wave of disputes over contract performance, *force majeure*, hardship, and termination in energy supply contract chains. Novel questions abound: Does a sanctions regime constitute force majeure? Is a party genuinely prevented from performing or from merely choosing the most convenient interpretation? And can an award against a sanctioned entity actually be enforced without itself violating the sanctions? Procedural headaches – such as restricted access to counsel and the inability to pay arbitration costs – compound the difficulties. The geographic reach extends well beyond Russia, as secondary sanctions and compliance-driven terminations ripple through the Middle East and Central Asia.

Transparency pressures

There is growing tension between arbitration's traditional confidentiality and demands for greater openness, particularly in investor-state cases and disputes with a public interest dimension. In commercial arbitration, confidentiality remains the norm, but it is not absolute; the degree of protection varies by seat and institutional rules. Oil and gas companies involved in disputes touching on matters of public concern, such as environmental contamination, the management of state resources, or the impact of regulatory decisions on consumers, may face pressure to accept greater transparency. The practical lesson: confidentiality provisions deserve careful attention at the drafting stage.

The bottom line

International arbitration remains the mechanism of choice for resolving cross-border oil and gas disputes. It offers the neutrality, enforceability, expertise, and flexibility the sector demands. But the disputes landscape is shifting. The energy transition, geopolitical sanctions, evolving treaty frameworks, and new transparency expectations are reshaping the risks that oil and gas companies face.

Companies that invest in well-drafted dispute resolution clauses, stay alert to emerging risks, and engage experienced counsel early in the process will be best placed to protect their interests in this complex and fast-moving environment.

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The specificities of construction arbitration

Construction arbitration occupies a distinctive place within international commercial arbitration. It follows familiar arbitral procedures, but the disputes themselves are shaped by complex contract suites, multi-party project structures, dense contemporaneous records, technical delay and quantum questions, and urgent ancillary proceedings. Those features make construction cases uniquely demanding for parties, counsel, experts, and tribunals.

Five features are particularly important: the contractual architecture of the project; the documentary record generated over its life cycle; the discipline of delay analysis; the valuation of construction claims; and the urgent issues that arise when performance bonds are called. In each area, legal analysis must be integrated with technical, programming, and cost evidence.

1. Complex contracts and multi-party risk

A construction contract is rarely a single instrument. Standard forms, such as FIDIC, NEC, and JCT, as well as bespoke contracts, typically operate through a suite of documents: conditions of contract, employer's requirements, specifications, drawings, schedules, bills of quantities, programs, and appendices. The contract must therefore be read as an integrated whole, even though its parts may have been prepared by different teams at different stages and for different purposes.

That structure creates interpretive risk. A drawing may conflict with a specification; a schedule of rates may assume a different scope from the employer's requirements; or particular conditions may alter the effect of standard terms. Order-of-precedence clauses are useful, but they do not resolve all inconsistencies, particularly where the conflict sits within documents of the same rank. Design responsibility is a recurring example; many projects fall between employer-designed and design-and-build models, leaving tribunals to determine where the employer's concept design ends and the contractor's obligation to develop or correct the design begins.

The same complexity arises from the number of project participants. Interfaces between work packages may be physical, temporal, or informational, and the contract may not clearly allocate the risk of interface failure. Lenders, insurers, end clients, joint venture partners, and subcontractors may also influence the dispute. Direct agreements can give lenders consent or step-in rights; pass-through arrangements may involve an end client; and consortium agreements may determine internal responsibility among entities that appear externally as a single contractor.

This affects strategy from the outset. A main contractor may face claims from the employer while holding rights against subcontractors and must consider merits, recoverability, limitation, and the procedural consequences of related proceedings. Confidentiality and sequencing also matter: settlements with one project participant may become relevant in a later arbitration against another.

2. Documentary evidence and case organization

Construction projects generate an evidentiary record of unusual scale. A single project may run for three to seven years before completion, and longer once the defects period is included. During that time, the parties generate formal correspondence, meeting minutes, progress reports, payment applications, program updates, site diaries, inspection records, variation records, and revised drawings. Across multiple contracts, the documentary universe can easily reach hundreds of thousands of documents.

Those records often have legal significance. Standard construction forms impose strict notice requirements. Under FIDIC 2017, for example, a contractor must notify a claim within 28 days of becoming aware of the relevant event, followed by a fully detailed claim within an additional 84 days. The notice trail must therefore be reconstructed with precision. Programs and progress records are equally important: baseline and updated programs, meeting minutes, and progress reports often provide the contemporaneous evidence against which delay, variation, and responsibility are assessed.

The document production phase is consequently central to many construction arbitrations. Records may sit in site files, document management platforms, personal email accounts, and the systems of subcontractors or consultants. Redfern Schedules, technology-assisted review, and AI tools can help identify notices, variation instructions, extension of time (EOT) requests, and chronology documents, but technology is not a substitute for case theory. The challenge is to turn the record into a coherent narrative supported by chronologies, Scott Schedules, and demonstrative materials that the tribunal can use.

3. Delay analysis: critical path, disruption, and extensions of time

Delay analysis is among the most technically demanding aspects of construction arbitration. The questions – why was the project late, and who is responsible – require more than legal characterization. They require programming logic, a reliable factual record, and an analytical methodology capable of connecting delay events to the project's completion date.

The critical path remains central. It is the sequence of dependent activities that determines the minimum duration of the project; delay to a critical activity delays completion unless the delay can be recovered elsewhere. Non-critical activities may have float and therefore may not affect completion until that float is consumed. Because the critical path can shift as work progresses, updated programs are often highly probative evidence of what the parties understood at the time.

The choice of delay methodology can be outcome-critical. Impacted as-planned analysis tests the theoretical effect of delay events on the baseline but may say little about what actually happened. Time impact analysis uses the program update that is current at the time of each event and is often treated as a rigorous way to assess causation, provided the project records support it. As-planned versus as-built and collapsed as-built analyses may be useful, but both are vulnerable to criticism if they do not adequately prove causation.

Concurrent delay and disruption frequently complicate the analysis. Employer, contractor, and neutral events may overlap, and different legal systems and contracts allocate the consequences differently. Under English law, a true concurrent delay involving an employer risk event and a contractor risk event will generally entitle the contractor to an extension of time but not prolongation costs. Disruption is different: it concerns loss of productivity rather than late completion and is commonly proved through project-specific comparisons – such as measured mile analysis – where the evidence allows.

Extensions of time and liquidated damages bring delay analysis back to the contract. The EOT mechanism adjusts the completion date for employer-caused or neutral delay, while liquidated damages provide a pre-agreed remedy for late completion and often cap exposure. Expert evidence is usually decisive: delay analysts must apply an appropriate methodology to reliable program records, and concurrent expert evidence can help to narrow the issues for the tribunal.

4. Quantum analysis: valuation, causation, and proof

Quantum in construction arbitration is rarely a straightforward damages exercise. Claims may include prolongation costs, disruption costs, variations, acceleration, loss of profit, financing charges, head office overheads, and site preliminaries. Each head of claim has its own methodology and evidentiary requirements, and the financial case must be tied closely to the factual and delay evidence.

Prolongation costs illustrate the point. They are the additional time-related costs incurred because the project extended beyond the planned completion date, including site staff, facilities, plant, insurance, and bond costs. The core questions are whether the costs are truly additional and whether they correspond to periods of compensable delay. The answers to those questions require close alignment between the delay expert's conclusions and the cost records relied upon by the quantum expert.

Variations, acceleration, and overhead claims raise similar proof issues. Variations are usually valued by applying contract rates where the work is comparable or by reasonable cost plus margin where it is not. Acceleration claims require records of additional shifts, labor, equipment, expedited procurement, or other measures taken to recover time. Head office overhead claims – whether assessed by formulae such as Hudson, Emden, or Eichleay or by other evidence – are increasingly tested against proof that the contractor actually suffered a loss of overhead recovery.

Causation and double recovery are recurring battlegrounds. The tribunal must separate costs caused by employer-risk events from costs attributable to the contractor or to neutral causes, particularly where several events overlap. It must also ensure that the same cost is not recovered twice under different labels, such as prolongation, disruption, and variation claims. Quantum experts play a key role in testing records, methodology, arithmetic, and reconciliation, and joint expert statements can narrow the financial issues materially.

5. Performance bonds and urgent ancillary proceedings

The critical distinction is between on-demand and conditional bonds. On-demand bonds are payable against a compliant demand, without the bank or surety deciding the merits of the underlying dispute. Conditional bonds require proof of default. Because international construction projects overwhelmingly use on-demand instruments, the contractor's practical remedy is usually to seek urgent relief restraining the call, a remedy that is difficult to obtain in most jurisdictions.

The threshold for restraining an on-demand bond call is high. Common law courts generally require fraud, and some jurisdictions also recognize unconscionability; civil law systems may refer to abuse of right or manifest bad faith. The policy reason is commercial: an on-demand bond is intended to operate as reliable security that can be converted into cash without first proving the underlying claim. Courts and tribunals are therefore cautious about undermining that function.

Speed is essential. Banks or sureties may pay within days, sometimes hours, of a compliant demand. The contractor must decide quickly whether to apply to a court, an emergency arbitrator, or both – depending on the contract, the bond, and the applicable rules. The usual interim relief requirements – prima facie case, urgency, irreparable harm, and balance of convenience – remain difficult to satisfy, especially where the respondent says the harm is purely financial and compensable in damages.

Bond calls also create tactical and cross-border issues. An employer may use a call to apply financial pressure, but calling too early may invite allegations of fraud, bad faith, or abuse; calling too late may risk expiry of the security. The contractor must consider injunction strategy, the relationship with its bank or surety, and any obligation to replenish security. Where the issuing bank is in another jurisdiction, enforceability of court orders or emergency arbitrator relief must be considered in advance.

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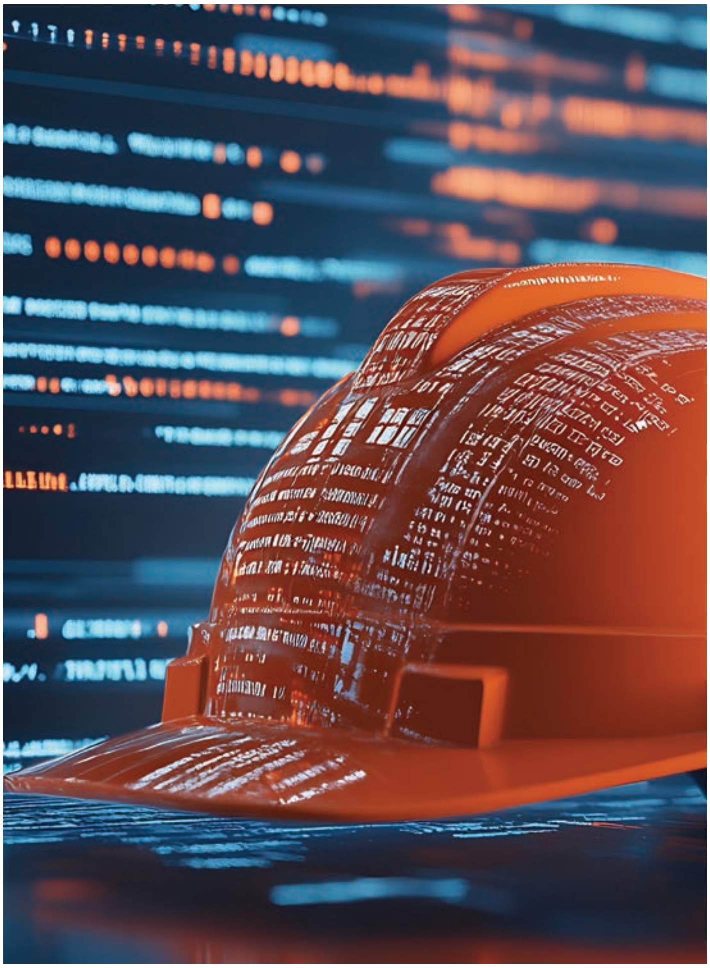

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