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International Arbitration Report

International Arbitration Experts Discuss The Major Challenges For Arbitration In 2025

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Commentary

International Arbitration Experts Discuss The Major Challenges For Arbitration In 2025

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Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on what the major challenges for arbitration in 2025 might be. We would like to thank the following individuals for sharing their thoughts on this important issue.

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Mealey's: What do you believe will be the major challenges for arbitration in 2025?

Sherett: 2024 was a challenging year for incumbent governments across the Western world. Opposition parties in the U.S., the U.K., France and Germany either regained power with sweeping victories or incumbent parties were severely weakened. In most cases, electorates expressed deep dissatisfaction with

political leadership on matters such as immigration, the economy, trade, energy, crime and foreign policy. As new governments take power and hit their stride in 2025, significant policy changes are likely to be implemented, with the U.S. taking the lead on making fundamental changes to domestic spending priorities and practices, border enforcement, bilateral and multilateral trade agreements, energy and climate change policy, and defense priorities in Europe, the Middle East and East Asia. On top of this, the AI revolution will continue to grow exponentially, with wide-ranging impacts across every industry.

All of this is likely to give rise to significant challenges and opportunities for the international arbitration community in 2025.

In the investment arbitration space, countries' recent waning commitment to investor protection is likely to accelerate in 2025 as more trade agreements are renegotiated or, in some cases, terminated as part of a new wave of economic nationalism spearheaded by the Trump administration in the U.S. Although the termination of certain trade agreements might lead to decreased long-term demand for investor-state arbitration, the fallout associated with the imposition of potential new tariffs and other tools of economic nationalism should give rise to more disputes under those trade agreements which remain in force.

In the commercial international arbitration space, shifting policy priorities, particularly in connection with the energy transition, are likely to pose risks to new and existing alternative energy projects on the one hand and opportunities for the growth of traditional energy on the other. Given the massive increase in long term energy demand needed to power

AI data centers and EVs, it is likely that the overall volume of new energy projects will increase in key markets. Simultaneously, there is likely to be a greater risk of disputes between counterparties in contractual and financing arrangements in the energy transition space. More broadly, the economics of cross-border transactions and multinational projects will undoubtedly be impacted by the new wave of economic nationalism, which also increases the likelihood of arbitrable disputes.

All told, 2025 promises to be a tumultuous year in international arbitration, with risks and opportunities abounding.

Perez: There are many challenges confronting arbitration in 2025. The first and most significant challenge will be the enforcement of arbitral awards. Parties are spending hundreds of thousands of dollars on legal fees to prosecute an arbitral award, only to be left with an award that has no enforcement mechanism. Many countries are refusing recognition and enforcement of arbitral awards due to political reasons. Enforcement becomes much more difficult if the assets are located in a jurisdiction that will refuse recognition of the award. If this continues to happen, parties will decide against arbitration and opt for a different method of resolving their disputes.

By the same token, bankruptcy can serve as a major disruptor to the enforcement of an arbitral award. This year, we foresee that bankruptcy will serve as a mechanism to invalidate an award. However, we must keep in mind that the award debtor could seek protection under the bankruptcy laws of different jurisdiction, including those of its own domicile.

Another major challenge for international arbitration will be the selection of the proper seat of arbitration. Because most awards have to be challenged or recognized at the seat of the arbitration, the proper selection by the parties can change the entire course of an arbitration. Therefore, the contractual terms allowing for resolution of disputes via arbitration must, from the outset, establish a forum that is favorable and complimentary to arbitration. Emphasis has to be placed on the laws of the jurisdiction that are in consonance with the spirit of the arbitration clause.

Finally, the last challenge we foresee for 2025 is that parties will be more selective about choosing the right arbitrator for a case. Parties are taking more time to research the credentials and past experience of the arbitrators. This should provide greater certainty as to how an arbitrator is inclined to rule. The parties are enquiring more deeply into the arbitrator's previous awards in making their selection.

Morton and Dracoulis: The use of arbitration as an efficient and cost-effective method of dispute resolution continues to grow globally. Growth inevitably brings change. Change is also being brought about by an increasingly complex world, with sanctions, conflicts, AI, elections in key arbitral locations, and changes to global patterns of trade all impacting on both the way companies do business and the way they resolve disputes. The complexity of our world grows exponentially and at unprecedented speed. Adapting and responding to such change in a manner that increases certainty and clarity, but minimises risk, will be a major challenge for international arbitration institutions in 2025.

From a UK perspective, there has been a notable increase in the arbitration caseload over the last few years of the two London based arbitration forums — the London Court of International Arbitration (LCIA) and the London Maritime Arbitrators Association (LMAA) in particular. It remains to be seen, however, whether this will continue, and how the new Labour Government will enact its stated aim to promote arbitration.

In this respect, the Arbitration Bill to reform the existing Arbitration Act 1996 has been re-introduced and is working its way through the parliamentary process. This Bill will, in part, attempt to strengthen arbitrators' powers to make summary awards, codify the arbitrators' duties of disclosure and generally seek to make English-seated arbitrations more attractive to global business. This process is slow, however, and it risks being outdated before it has even been enacted.

A particular difficulty in this respect relates to how to deal with AI. Much has already been written on the challenges and opportunities arising from the rapid development of generative AI. It is likely, as with all such disruptive technologies, mistakes will be made, and AI used in ways which cause unanticipated prob-

lems. Accuracy and privacy are particular concerns. If Arbitral Rules do not adapt and keep up, both Arbitral Institutions and their users may be exposed to considerable risk. It is notable in this respect that both JAMS and the Stockholm Chamber of Commerce introduced rules or guides on the issue in 2024 but, as yet, no rules dealing with the issue have been put forward by the other major institutions. It is likely that they will do so during 2025.

It is essential that any such steps are taken with an eye to the rapidly changing future and not the status-quo. Proactivity from Arbitral Institutions rather than reactivity is vital in order to meet these challenges head on.

Wasinor: As mass arbitration continues to evolve in the US, several key challenges are expected to shape its landscape in 2025. These include adapting to shifting regulatory frameworks and ensuring that any mass arbitration frameworks that are adopted are procedurally fair to claimants and do not create undue delays in administration.

In the US — In recent years, mass arbitration has emerged as a transformative force in consumer dispute resolution in the United States. Mass arbitration leverages streamlined, individualized proceedings to address systemic harms efficiently and effectively in cases where there is an arbitration clause and a class or collective action waiver contained in an employment or consumer contract. Mass arbitration can provide greater efficiency in resolving disputes for both companies and consumers, especially in cases where there are tens or even hundreds of thousands of individual arbitration claims filed challenging a common event or practice. However, as mass arbitration is a growing area of practice, lawyers representing claimants, respondents, arbitrators, arbitration administrators, and courts have been continuing to define the boundaries of mass arbitration on a rapid and evolving basis. This has typically involved significant litigation regarding whether so-called “mass arbitration” procedures are enforceable.

Some of this litigation is taking place within the arbitral forums themselves, in front of process arbitrators or administrators. Process arbitrators are appointed by arbitral tribunals to address administrative issues surrounding large volumes of arbitration claims, as

opposed to merits arbitrators who will decide the underlying substance of the claim and defenses. The largest arbitration administrators, JAMS and AAA, have adopted the process arbitrator in their mass arbitration rules.

For example, frameworks like bellwether provisions—where a small number of claimants are allowed to proceed to merits arbitration while arbitrations brought by other claimants are stayed—have been criticized for causing procedural delays. Courts have held that if these mechanisms create due process concerns, disincentivize individual claims or lead to extraordinary delays in the prosecution of claims, they may be unenforceable. Practitioners should expect to see continued litigation regarding the scope of mass arbitration procedures, the authority of process arbitrators to determine issues, and the ability of either companies or arbitration administrators to change the rules of the arbitration forum and apply them to pending claims. Further, there may be litigation surrounding whether mass arbitration rules comport with the bilateral (two party), individual nature of arbitration such that they are entitled to preemption from state law under the Federal Arbitration Act.

In the UK — The courts in the United Kingdom have seen a recent increase in collective litigation on behalf of and by consumers. This has highlighted the opportunity for alternative case and claim management procedures that can offer the parties additional efficiencies outside of the court system. Because consumer arbitration clauses are presumptively unenforceable in the United Kingdom, companies would need to structure their contracts and their interactions with consumers to promote a voluntary mass arbitration model driven by consumer engagement, fairness, and transparency.

Mass arbitration represents a significant departure from traditional UK legal practices. Educating stakeholders, including consumers, lawyers, and companies, about its advantages and procedures would be critical to its adoption.

Arbitration administrators located in the UK and capable of handling large volumes of claims would need to be established, as well as a roster of arbitrators. Companies looking for strategies to avoid mass arbitrations cannot rely on class-wide settlements

with alternative counsel to release arbitration claims or impose burdensome opt-out requirements on individuals.

To conclude, there is a growing trend in UK courts for parties seeking redress to do so in increasingly larger groups, and the development of an elective mass arbitration model in the UK could provide an alternative adjudication system with similar advantages.

Rosher: Big picture, the two greatest challenges for international arbitration in 2025 will be generative artificial intelligence (“AI”) and geopolitical turbulence.

Like the industries it services worldwide, international arbitration is feeling the transformative potency of generative AI. Arbitrators and advocates are already using it. And for good reason since AI powered tools drive greater efficiency in arbitration proceedings, offering considerable savings in terms of time and costs. As the pace at which AI can perform cognitive tasks in natural language grows exponentially, AI will revolutionise legal workflows and fundamentally impact international arbitration. This will accentuate the major challenges across geographies in relation to the regulatory landscape needed to protect, for example, data privacy and the confidentiality of commercially sensitive or privileged documents or to safeguard the ethical design and implementation of AI algorithms to prevent bias or hallucinations. Voices in the arbitration community globally have been getting louder as to the need for regulated oversight to address such security and transparency concerns.

Where the rubber might hit the road could be in the risk of divergent approaches in different jurisdictions to the regulatory landscape of AI. Rising geopolitical tensions — war in Ukraine, conflict in the Middle East, competition with China, climate change — combined with policy U-turns brought about by recent political changes in key arbitration jurisdictions seriously increase this risk. Geopolitical disruption with respect to the role of free trade, shifts in trade alliances and political moves in favour of deregulation may challenge calls for predictable policy to regulate uniformly the use of AI which could impact its use in international arbitration.

Hard hats and seat belts to the ready — we could be in for a bumpy ride.

Crncevic and Haden: Arbitration—like all systems of dispute resolution—will continue to confront and address a variety of challenges in response to an ever-changing global, national and local framework. Likely such challenges in 2025 include:

Prolonged Recognition and Enforcement. Many arbitral awards—particularly in the private, commercial context—are paid by the losing party without the need to bring formal enforcement or post-judgment proceedings. However, a growing number of awards, particularly those against sovereigns or their instrumentalities, are subject to protracted recognition and enforcement proceedings. Each year, national courts grapple with increasing challenges and questions concerning sovereign immunity as victorious claimants seek to convert their arbitration awards into judgments against sovereigns and seize assets in satisfaction of those judgments. Moreover, locating and tracing assets becomes more difficult by the year as the global financial industry becomes more expansive and as companies and individuals utilize complex structures to store and transfer wealth.

Ever-Rising Costs. Historically, arbitration has been presented as the more efficient and less costly alternative to domestic litigation, particularly in jurisdictions with extensive disclosure processes or procedural impediments. However, the cost of arbitrating has become pricier as arbitration continues to address complex, high-stakes—and lengthy—disputes. Parties’ choices as to: which arbitration institutions will administer their disputes; who serves on arbitral tribunals (and how many members the tribunals will have); where the arbitration proceedings are seated; and the scope of issues agreed to be arbitrated all affect the overall costs and duration of proceedings. Arbitration centers, tribunals and parties will need to continue to strike a balance between efficiency and scope of proceedings.

The Uncertain Role of Artificial Intelligence (AI). As AI continues to develop and expand capabilities, arbitration practitioners and stakeholders will need to consider the proper role (and corresponding limitations on the use) of AI in proceedings. AI permits parties and tribunals to process vast quantities of data at incredible speeds, potentially allowing for quick resolution of procedural, interim or even final issues in arbitration proceedings. However, reliance on AI

may call into question the correctness of factual or legal arguments and determinations, and the accuracy and validity of final awards and decisions. AI may also implicate ethical obligations for counsel and arbitrators alike, depending on the applicable jurisdictions' guidelines concerning the use of AI.

Coriell: To me, the biggest challenge for arbitration in 2025 is for institutions and tribunals to become even better at responding to users' needs. In a complex and fast-based international business environment, parties seeking to use arbitration clauses for relief in their disputes increasingly require more speed and flexibility in decision-making. Although there has been some progress made on this front in recent years, arbitral institutions can still often be cumbersome and bureaucratic in their day-to-day case management, and tribunals can still be fairly slow in issuing awards and other relief. While domestic court systems can feature the same flaws, one of the selling points of arbitration is its user-friendliness, so institutions and tribunals have to exceed court performance

in these areas in order to retain and gain users. Too often, they still don't. Institutional rules have advanced considerably in terms of user-friendliness, with most institutions providing robust procedures for emergency relief, summary disposition in the right context, streamlined procedures for lower-value disputes, and the like. But I think a key challenge in 2025 and going forward is for the practice to catch up with the rules.

One concrete way to help make this happen would be for the IBA or another respected body to develop non-mandatory guidelines on the number of appointments (or chair appointments) that a particular arbitrator should take at any one time. Articulating a set of norms addressing "how much is too much" could go a long way toward not only ensuring that arbitral decision-making is attentive, efficient, and expeditious, but also providing additional opportunities for younger arbitrators to gain the necessary experience to develop into the next generation of high-quality decision-makers. ■

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