

# Streamlining international dispute resolution



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The past decade has witnessed an increase in the number, importance and complexity of international disputes. This increase has resulted from the growth in cross-border trade and investment, as well as more challenging macroeconomic conditions. Disputes involving transactions in emerging, sometimes difficult, markets, such as Russia, China, India and Latin America, and disputes involving new technologies and new financial products have also played a part in fuelling growth in international disputes.

At the same time, international dispute resolution has become increasingly complex. Matters often involve multiple proceedings, in different national and international forums, as well as disputes over the enforceability of judgments and awards or efforts to obtain evidence abroad in aid of local proceedings. International commercial disputes also increasingly give rise to regulatory, administrative or criminal proceedings in one or more national jurisdictions, in addition to purely private litigations or arbitrations. The growing number of bilateral investment treaties and multilateral conventions (for example, the Energy Charter, NAFTA, ICSID) has allowed litigants to seek relief in arbitral proceedings from host governments in what were traditionally considered to be private disputes.

The increased frequency, size, importance and complexity of international disputes has important consequences. These developments have placed a premium on specialist expertise in international dispute resolution – both arbitration and litigation. Clients involved in international disputes recognize that a success in one local forum may be a Pyrrhic victory if it is not integrated into a broader legal and business strategy.

The need for specialist capabilities, as well as the increased complexity and scale of international dispute resolution, has resulted in increases in the costs of international litigation and arbitration. The costs of relevant expertise and requisite manpower in a large international dispute can easily involve millions of euros a year. These costs are a continuing concern for clients, particularly given the risks of long delays, inconsistent judgments, and lack of finality and enforceability that can accompany the final result. In response, international dispute lawyers are looking for ways to improve and streamline the process of international dispute resolution and their clients are increasingly considering other ways of managing their international disputes.

A leading example of an effort to streamline and harmonize the system of international dispute resolution is the Transnational Litigation Rules being developed by UNIDROIT and the American Law Institute, which seek to provide a common set of procedural rules aimed at reducing the incentives for forum shopping and achieving more uniform results in different national forums. Another leading example is the proposed convention on choice of court agreements being drafted by the Hague Conference on Private International Law. It is unclear whether either project will achieve a positive outcome that creates real improvements – it has so far eluded similar undertakings. In contrast, over the past decade, most international arbitral institutions (including the ICC, LCIA, AAA and others) have revised their arbitration rules, with a view towards streamlining the arbitral process.

Clients are also trying to improve the way they manage their international disputes. Companies increasingly seek *dispute avoidance* as opposed to *dispute resolution*, by

instructing their in-house lawyers and outside counsel to manage commercial disagreements from the outset, sometimes even before they are identified as disputes, rather than waiting to become involved only after a claim has been identified. This reflects the reality that, even if a party has a winning claim or defence, recovering the damages owed or being vindicated through international litigation or arbitration proceedings is far from certain and might require a significant investment in time and money. Early and proactive management of commercial disputes can assist in reducing unnecessary proceedings, although in many instances differences in the parties' commercial interests or legal positions make disputes impossible to avoid.

For unavoidable disputes, companies, and even a few national legislatures, are looking for alternatives to litigation proceedings. International arbitration continues to be the most common option for resolving international commercial disputes arising out of contractual relationships and foreign investments, but the arbitral process is sometimes subject to similar criticisms as international litigation regarding costs and delays. Consequently, parties sometimes turn to other options, such as mediation. At the same time, some national legislatures have adopted or strengthened statutory provisions designed to permit mediation, conciliation and similar processes to have maximum efficacy. Again, however, these mechanisms often fail to resolve disputes where significant differences exist between the parties' commercial or legal positions. This is particularly true if disputes involve regulatory, administrative or criminal proceedings, which might make it impossible for parties to compromise their positions.

The growing complexities, uncertainties and costs of international dispute resolution place a premium on expert advice. These factors also underscore the importance of including well-drafted dispute resolution provisions in cross-border agreements to ensure that disputes are resolved in as comprehensive and efficient a fashion as possible. Lastly, it is also essential that steps be taken to reduce the complexities, risks and costs of international dispute resolution. These factors are disincentives to international trade and investment and threaten the reputation and efficacy of international arbitral and litigation processes. Although short-term progress faces serious challenges, it remains essential that efforts to make international dispute resolution simpler, cheaper and quicker continue to be actively pursued.