



Queen Mary
University of London



Pinsent Masons

Future of International
Energy Arbitration
Survey Report

2022



CONTENTS

Foreword	03
Executive summary	05
Market trends	08
Causes of international energy disputes in the last five years	08
The Main Drivers of Global Energy Disputes	09
Climate Change and the Environment	11
Energy Transition and Renewables	15
Energy Infrastructure	20
Nuclear Projects	21
The Challenge and Impact of International Trade and Financial Sanctions	23
Arbitration of international energy disputes: is the process fit for purpose?	28
Regions and Seats	28
Features of Arbitration: What Works, What Changes are Required?	30
Investor-State dispute settlement of international energy disputes: is there a way forward?	39
Advantages of Investor-State arbitration	39
Issues in Resolving Climate Change Disputes	41
An Uncertain Future for Investor-State Arbitration	42
Appendix 1 – Methodology and demographics	44
Appendix 2 – Dispute resolution matrix	46
Appendix 3 – School of International Arbitration, Queen Mary University London	47
Appendix 4 – About Pinsent Masons	48
Appendix 5 – Acknowledgements	49
Endnotes	49



The survey is the first arbitration survey by QMUL to focus on the energy sector in nearly a decade and could not be more timely given current geopolitical events set against the background of the energy transition.

Foreword

This survey examines two main themes which have come into sharp focus as a result of the present volatility of the international energy markets: the prevailing drivers of disputes in the short to medium term which have developed over the last 12 months, and how international arbitration can adapt to this environment to best serve the needs of the energy sector.

The survey is the first arbitration survey by QMUL to focus on the energy sector in nearly a decade and could not be more timely given current geopolitical events set against the background of the energy transition agenda.

The survey considers what the pivot from fossil fuels to cleaner energy will mean for key players in the sector, what the progenitors of current and future disputes in the sector will be and how international arbitration may be deployed (both at the commercial and investor-State level) to resolve them. It examines the vulnerability of the sector to the impact of fluctuations in oil, coal and gas prices and what this means for the types of disputes we can expect to see being referred to arbitration. The survey also considers whether arbitration is the likely forum to resolve disputes concerning the economic impacts on projects and transactions arising out of climate change. Finally, the survey asks how arbitration is positioned to handle the challenges presented by the dynamic and rapid evolution of international energy disputes.

Over 900 respondents took part in the survey from across a wide and diverse range of common and civil law jurisdictions. Respondents comprised a mix of end users, leading practitioners, arbitrators, experts, intermediaries, arbitral institutions, and academia. The level of responses we received is impressive and informative, and is representative of the sub-sectors in the industry. Follow-up interviews were also conducted with over 50 respondents which added further context to these responses.

It is no surprise in the present economic circumstances that respondents identified the price volatility of raw materials and energy as the leading cause of disputes and also cited the construction of energy infrastructure and government policy changes as major factors. They considered that Russian sanctions will cause the acceleration of renewable and nuclear energy projects, increased global LNG production, and result in a shift towards an increase in production in Africa, the Middle East and Asia.

As the data shows, there remain very good reasons why parties choose international arbitration above any other dispute resolution mechanisms as the means to resolve their energy-related disputes: neutrality and enforcement, along with the facility to choose who will determine their dispute, are paramount factors that continue to influence their selection of arbitration.

Some of the main themes are set out in the Executive Summary below. Understanding the sector's concerns is essential to considering what steps might be taken to optimise the arbitral process. For cross-border disputes in the energy sector, there is a clear desire for stronger case management by arbitrators at the initial stages of the referral as well as a greater drive for efficiency by deploying the latest technology and innovation, some of which is driven by concerns around reducing the environmental impact of arbitration. Importantly, the survey also tested respondents' attitudes towards alternative dispute resolution processes such as dispute boards, mediation, expert determination and hybrid processes.

It would be all too easy to link calls for innovation and the drive for greater efficiency in the arbitration process with the suggestion that the underlying process is itself deficient. The survey reinforces that this is not the case. Often, international arbitration is the only viable or commercially acceptable route for parties to resolve their disputes. It is, generally speaking, supported and respected as a process around the world. The demands for innovation and efficiency are calls to improve a fundamentally sound and very widely supported process.

Pinsent Masons is very proud to have continued its relationship with Queen Mary University of London and once again to sponsor a major international arbitration survey, this time on the future of international energy disputes. We would like to thank Loukas Mistelis and Jason Czerwiec for their dedication to the project and also all of the survey respondents and other individuals and institutions who have contributed to the success of this publication.



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Foreword

It is my great pleasure to introduce the 2022 International Energy Disputes Survey. It is the thirteenth survey released by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London, the third survey prepared with the generous and unconditional support of Pinsent Masons, and the first to focus on energy disputes and the future of energy arbitration.

It will come as no surprise that we focused on energy disputes and attempted to gaze into the future by obtaining the views of a wide range of actors within the dispute resolution community that provide invaluable insights into stakeholders' experiences and perceptions of international arbitration and other pre-arbitral processes. The volatility of energy markets, the spike in energy prices, energy supply security and transition to green energy have been on the agenda for quite some time. Such debates have been accentuated by the "military operations of Russia in Ukraine", a widespread use of sanctions by the UN, EU, and individual States as well as a range of regulatory measures introduced to control energy prices and secure energy supply. It is, hence, reassuring to see that most respondents see a significant and continuing role for international arbitration. Given that disputes in a cross-border and cross-cultural context are inevitable, even when it comes to globalised market sectors, including energy, having a well-defined but flexible policy relating to dispute resolution and becoming dispute-savvy is critical for businesses. Exploring the views of users of dispute resolution from all over the world, whether energy practitioners or specialist dispute resolution practitioners, will give readers of the survey a well-rounded and impartial picture of the current state of affairs in international dispute resolution in the energy sector.

When we designed the survey, there was much that we wanted to know: current and future causes of disputes, the impact of measures taken to control climate change, the transition to green energy and gradual decommissioning of fossil fuel, is arbitration fit for purpose, can ADR methods successfully resolve energy disputes? Also, why are certain dispute settlement mechanisms preferred and how can they be improved? The survey provides answers to many of these questions and sheds light on how businesses and stakeholders approach major energy disputes – something which until now has rarely been explored at an empirical level.

We hope that it will help people in the energy sector to identify weaknesses and strengths, and to use the range of dispute resolution mechanisms that are available more effectively. In short, to improve the way they approach arbitration and other methods of dispute resolution and contribute to the design and development of an efficient dispute resolution system, fit for purpose. One would also expect that dispute resolution service providers might have to adapt their rules and procedures to better meet the needs of the significant energy sector and to improve overall the dispute resolution experience businesses have.

Thank you for taking the time to read this survey report. I hope that you will find it useful and thought-provoking.



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Executive summary

Causes of Energy Disputes – both past and future

The results of the survey mirror to a large extent the geopolitical picture at the time of publication. This has influenced respondents' views on the most likely causes of energy disputes, with the biggest change in the short to medium term expected to be a significant increase in disputes caused by the price volatility of raw materials and energy. In this regard, while only 14% of respondents saw it as the main cause over the past five years, 28% of respondents see price volatility as being the most likely cause of energy disputes over the next five years. The main issue facing the energy sector is the fluctuating cost of the necessary inputs (raw material costs and energy unit prices) to develop, operate and maintain energy projects, leading to commercial uncertainty and more disputes.

Issues arising from the construction of energy assets will continue to be a significant source of disputes in the sector. However, while 36% of respondents saw this as the main cause over the last five years, only 20% see it as the main cause over the next five years, which seems a remarkable change in perspective.

When respondents were asked to focus solely on energy infrastructure disputes, 48% selected procurement and supply chain issues as the most likely cause of disputes over the next five years. This was followed by changes to regulatory frameworks (44%), oil and gas – supply and demand (38%) and changes in technology (35%).

Almost three quarters of respondents (73%) chose Europe as a region most likely to see an acceleration in energy disputes. 36%, 29% and 27% of respondents selected Asia, the Middle East and Africa respectively.

Impact of the energy transition

The transition to cleaner sources of energy is also at the forefront of respondents' agendas. Disputes relating to the energy transition are anticipated to arise significantly in the short to medium term. This may translate into forcing counterparties to grapple with the design and delivery of new technologies, with new players potentially entering the energy market, making it difficult for parties properly to allocate contractual risk, thereby increasing the likelihood of disputes occurring. When focusing on the strategic imperatives brought on by the energy transition, 84% of respondents indicated that they would be "reviewing contracts" (e.g., hardship clauses, force majeure, risk allocation, dispute resolution processes), while 69% of respondents stated that they would be "strengthening contract management/ supply chain scrutiny".

Security of energy supply is seen as an increasing concern

Respondents also noted that energy supply and security issues triggered by Russia's invasion of Ukraine may likely set back the timeframe for the global energy transition, leading to the re-start of previously abandoned fossil fuel projects and postponing the onset of energy transition disputes into the longer term. Changes to the investment environment and regulatory framework aimed at alleviating this in the short term may also lead to disputes between foreign investors and host States in the longer term when these policies are reversed in favour of cleaner energy.

This is reflected in the survey findings. When identifying changes brought on by the energy transition that will likely give rise to disputes, infrastructure (including construction) (51%) and price volatility (39%) scored relatively highly, but the highest percentage was captured by regulatory changes (including States' implementation of treaties, notably the Paris Agreement (60%)).

The International Atomic Energy Association has forecasted growth in the installed capacity of nuclear projects in the period up to 2040. It is therefore unsurprising, particularly in the current geopolitical environment, that nuclear projects are likely to increase in number. The vast cost and complexity of these projects provides fertile ground for disputes to arise, which is consistent in the survey's finding where 47% of respondents singled out the cost of nuclear projects as the factor most likely to lead to disputes.

When considering security of energy supply, 47% of respondents chose supply chain risk as most likely leading to disputes. What stands out is that the logistical hurdles and supply chain risk brought on by COVID-19 have been sharply exacerbated by the current geopolitical environment. Many respondents noted that global supply chain issues have been exacerbated by international sanctions with follow-up interviews revealing that one of the most pressing issues caused by sanctions was the inability to get parts and raw materials at a commercially sensible price.

Sanctions having a significant impact on contractual performance

We asked about the impact of the Russia / Ukraine crisis on the global energy supply mix. One counsel/arbitrator respondent noted that: "*[i]t is already having a profound impact on the European energy markets, with the [European] Commission pushing for a faster independence from Russian-supplied energy sources. With Europe seeking LNG from abroad, this will invariably impact other markets where that gas was traditionally supplied (e.g., Asia). Further, alternative fuels - including coal - will be utilised*".

Most respondents (67%) thought that the impact of international sanctions on the ability to perform pre-existing contracts would cause a rise in *force majeure* and hardship claims. An equally high number (67%) noted that suspensions and terminations have been and will continue to be on the increase due to sanctions. One surprise was that only 21% of respondents identified an increase in bond calls as a result of the sanctions. This appears strange given that bond calls are a natural corollary to suspensions and terminations, although the effect of sanctions on the ability of banks to comply with bond calls and restrictions on access for Russian financial institutions to international payment systems may have led respondents to consider this a lower risk. However, despite this seemingly low percentage, interviews revealed that bond calls have been a major source of conflict in Russian-related projects.

Arbitration is seen as the most suitable forum for resolving energy disputes with London and Singapore the most popular seats of choice

From an end user's perspective, arbitration is clearly seen as being very suitable for resolving energy disputes. 72% of respondents gave arbitration a score of at least 4 / 5 in terms of suitability. Only 4% of end users gave arbitration a score of less than 3 / 5, thereby deeming it less suitable. One in-house counsel noted: "*[t]he only thing that keeps me from awarding a 5 is the prevalence of old school approach of one-size-fits all for all disputes, i.e., the tribunal will start from the same PO and timetable that the chair used in her or his last dozen arbitrations. Institutions, especially case management teams, can and should help nudge arbitrators away from old habits like this*".

When asked to rank their preferred dispute resolution method by sub-sector, arbitration scored highest in every instance. 40% of respondents saw arbitration as being their preferred choice for resolving energy infrastructure disputes. Arbitration is perceived as being least suitable to climate change disputes compared to the other sub-sectors, although even in this case arbitration was seen by the largest proportion of respondents (26%) as the most suitable forum for resolving disputes and was ahead of litigation (16%). Respondents noted the reason why arbitration scored comparatively low in this area as being due to the public interest element of holding corporates to account for so called 'greenwashing' which made climate change disputes more suitable for resolution by high level negotiation and court proceedings in the public domain.

Interestingly, dispute boards are relatively unpopular in the energy sector. This is notwithstanding their popularity in certain forms of engineering and construction contract. The nuclear sub-sector appears to be somewhat more receptive to using dispute boards than other energy sub-sectors because of the complexity, size, cost and duration of those projects, and the perceived inevitability that disputes will arise on them.

49% of respondents selected London as their first choice of arbitral seat. Reasons included "*the stability of its commercial law*". In Europe, Paris and Geneva also scored well.

Singapore was the second most popular seat, receiving first place votes from 14% of respondents. Interviews shone light on the fact that Singapore is receiving a larger share of Asian disputes due to changing perceptions about Hong Kong as an international arbitral seat. Singapore also continues to be popular for parties resolving disputes related to the Indian subcontinent. The perception among respondents was that Singapore will be a leading seat for international energy arbitrations going forward, not least also because parties based in Australia, China, and SE Asia are all feeding their international disputes into Singapore.

Energy users like arbitration because they see it as neutral, enforceable and benefitting from the technical expertise of arbitrators, but they want to see innovation driving more efficiency and early decision-making

The features of arbitration considered to be the most important to the energy sector were neutrality (63%), choice of arbitrators / technical expertise (60%), and the enforceability of arbitral awards (60%). The opportunity to avoid a domestic court system is therefore of paramount importance in most cases. One respondent remarked that the majority of international energy disputes are not just technical but require a degree of legal and political finesse alongside technical specialism for which many domestic courts are simply unsuited.

After an arbitration has been commenced, respondents identified the most important procedural elements as being the technical expertise of the arbitrators (76%). Technical expertise in that context was understood by respondents broadly, to cover both an understanding of the underlying legal and technical facets of the case, and experience in shaping the dispute resolution process to the commercial needs of the parties.

Half of all respondents (and 66% of end users) selected expedited procedures (including faster constitution of arbitral tribunals and time limits for awards). This is consistent with a theme seen on a day-to-day basis by many of our international arbitration practitioners that all stakeholders of the arbitral process would like to see it become more efficient. Most respondents considered that the responsibility for expediting the process falls on arbitrators and they wanted to see arbitrators empowered to dispose of claims at an early stage.

The main improvement sought by respondents relates to strengthening case management in the initial stages of the formal dispute process, e.g., by preventing *mala fide* delay tactics, encouraging narrow tailoring of arguments and providing avenues for summary disposal of claims. Other feedback focused on the perception that arbitration was overly legalistic and unnecessarily confrontational, and that practitioners and arbitrators are not making use of the flexibility afforded to them, resulting in a lack of commerciality. A desire for arbitral institutions to offer a package of dispute resolution tools on an equal footing with arbitration was also mentioned.

Although arbitrations are becoming 'greener', green credentials have only minimal influence on the choice of participants

According to respondents, the widespread adoption of virtual hearings and meetings brought on by the COVID-19 pandemic has changed the nature of international arbitration practice for the foreseeable future, and arguably allows for more diversified and global participation in international arbitration. It also shows consistent (and encouraging) support for innovation in making international arbitration more economical, efficient, and accessible.

Respondents' priorities vis-à-vis green arbitration are the use of videoconferencing for meetings and hearings (81%), avoiding unnecessary travel, particularly flights (69%), and greater use of electronic bundles at hearings (66%).

52% of respondents said that green arbitration credentials would not impact their choice of arbitral service providers, considering the service itself to be the priority, although nearly all noted that, subject to all other things being equal, a provider with green credentials would be preferred.

The importance of third party funding is likely to increase

84% of respondents indicated they believe there will be an increase in third party funding of international energy disputes, citing large amounts in dispute, increasing turmoil in energy markets leading to parties needing funds/cashflow, and the lucrative nature of these disputes.

61% of respondents believe that energy infrastructure and 46% consider that investor-State disputes will have the highest reliance on third party funding. Some funders are also considering climate change disputes as a potential growth area, as these claims become more readily quantifiable.

ISDS is seen as an evolving landscape given the modernisation of the ECT and the EU proposals on the creation of a multilateral investment court

The fast-changing landscape of Investor-State Dispute Settlement (ISDS) reforms and the wider discussion about the legitimacy of investor-State arbitration form the backdrop to respondents' answers. Many end users noted that they would only consider investor-State arbitration as a last resort or as part of a larger strategy to exit business operations in the host country in question. Nevertheless, 80% of respondents saw the fact that arbitration allows investors to avoid disputes being resolved by the local courts as a main benefit of investor-State arbitration and 70% cited the enforceability of awards as a main benefit, despite the continuing debate as to enforceability in intra-EU disputes in the wake of the *Achmea* and *Komstroy* decisions. Investor-State arbitration outside the EU does not appear to be subject to the same concerns about enforceability.

ISDS faces challenges for resolving climate change related disputes: 41% of respondents and 50% of end user respondents said that arbitrator bias and issue conflicts would present a major challenge. A majority of respondents indicated they saw the modernisation of the ECT as the major development most likely to influence their view on the suitability of investor-State arbitration for energy disputes and the proposals by the EU to the UNCITRAL Working Group III on the creation of a multilateral investment court was the next most popular choice.

Market trends

International arbitration continues to be the preferred mechanism for resolving cross-border disputes in the energy sector.¹ In 2021, 46% of cases registered by ICSID concerned energy-related disputes.² In 2020, the ICC registered 167 energy-related cases³ and in 2021, energy and resources was one of the top three industry sectors of the LCIA's caseload, with 25% of its cases in that sector.⁴

The range of disputes considered by this survey is broad, covering international disputes "arising out of transactions, projects and operations in or related to the energy sector".⁵

The survey set out as one of its primary goals to understand the main drivers of energy disputes over the last five years given the dynamic shifts in the global energy market and looking forward over the short to medium term (i.e., the next two to five years). Given those continuing shifts, any forward-looking analysis is necessarily limited to this relatively short period. We particularly sought to capture the impact on cross-border projects, transactions, and operations of the various macroeconomic factors in play including the COVID-19 pandemic, Russia's invasion of Ukraine and the subsequent imposition of global sanctions on Russia, and the global push to develop cleaner energy to meet international commitments to reduce carbon emissions.

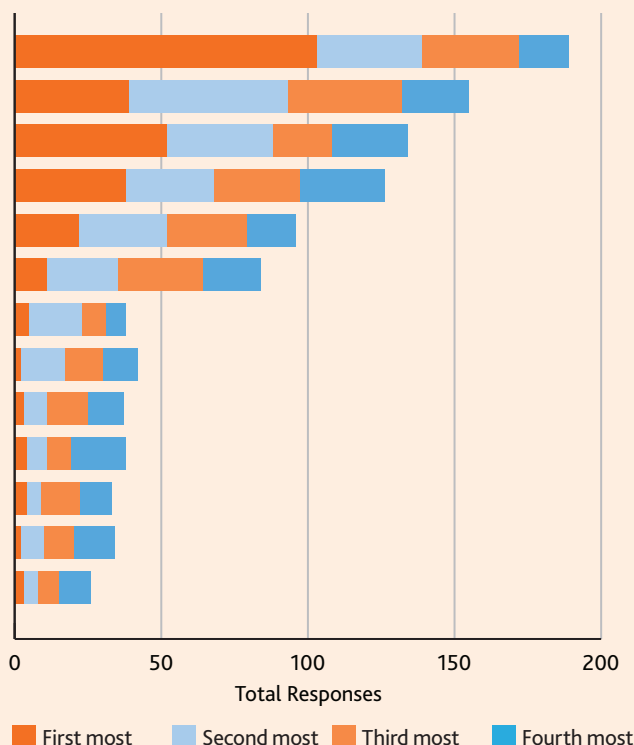
Causes of international energy disputes in the last five years

QUESTION 11: What has caused the most international energy disputes?

Respondents were asked to select from a group of thirteen causes of disputes in the preceding five years, ranking their top four choices in order. These rankings were then converted into scores by allocating points to each of the ranks.⁶ These selections are a benchmark against which the answers to the forward-looking questions on causation below can be understood.

The data shows that "construction of energy infrastructure and provision of equipment (including supply chain)" has traditionally been the most common cause of disputes in the energy sector (36% of all first-place votes). The second-highest ranked cause was "upstream, midstream, and downstream oil and gas activities" (18% of all first-place votes). Thirdly, "price volatility of raw materials and energy supply (oil and gas; other)" took 14% of all first-place votes.

- Construction of energy infrastructure and provision of equipment (including supply chain)
- Price volatility of raw materials and energy supply (oil and gas; other)
- Upstream, midstream and downstream oil and gas activities
- Government policy changes
- Investment
- Funding/financing
- Maritime activities
- Development and use of new technologies
- Security of energy supply
- Climate change and environment
- Sanctions
- Ageing assets, stranded assets, and decommissioning
- Energy transition

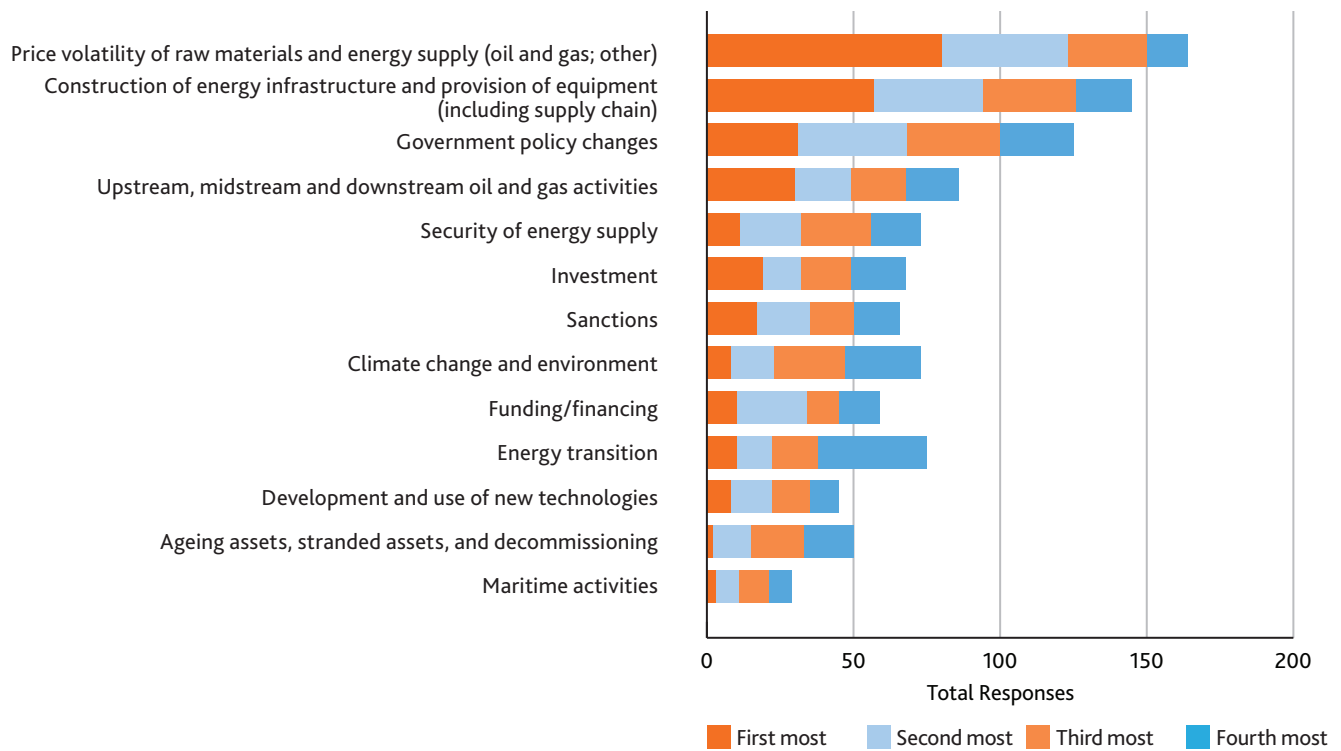


The Main Drivers of Global Energy Disputes

QUESTION 12: What will cause the most international energy disputes in the short to medium term?

Question 12 asked respondents to select and rank (with ranking then converted to points) from the same categories presented in Question 11, but to consider what the main causes of disputes *will be* in the short to medium term. The wide range of choices available to respondents highlighted the severity of the impact of certain market

factors such as price fluctuations and supply chain issues. While the root causes of these macroeconomic trends are multifactorial, we were able to isolate some key concerns through our individual interview process.



Price Volatility: leading cause of future disputes

The leading cause of disputes selected in Question 12, and by far the category with the largest increase in selections from Question 11 to 12 was “*price volatility of raw materials and energy supply (oil and gas; other)*”. In fact, the share of first-place votes captured by this category more than doubled, from 14% in Question 11 to 28% in Question 12. This forward-looking trend was even more apparent from respondents based in Europe with 34% selecting price volatility as their first choice, perhaps reflecting concerns relating to the impact of the Russia / Ukraine crisis on security of supply, sanctions, and consequent price volatility.

Most respondents thought of “*price volatility*” as a blanket concept driving contractual instability. One general counsel at a large energy multinational noted that, in the current price environment, some customers are refusing to make payment and arguing that their contracts allow for non-payment in circumstances of price volatility. Another respondent active in Europe and Africa noted that the number of disputes arising from the transportation of LNG cargo has skyrocketed. She sees most of them as a pretext used by parties who wish to exit contracts because their arrangement no longer makes commercial sense.

In interviews, respondents shared their perspective on the role of energy unit price as a fundamental driver of energy project investment. The viability of a project, and the partnerships making up a project, always hinge on the prevailing unit price of energy at the outset of a project. Therefore, current market price volatility is likely to change the commercial assumptions on which many energy projects were executed, leading to more disputes.

In conclusion, it is apparent that the main issues now facing the sector are the fluctuating cost of the necessary raw material inputs to develop, operate, and maintain energy projects and the energy unit prices which the projects are able to attain once complete. According to respondents, these price volatility issues are creating impacts at all points in the energy revenue stream, leading to a disconnect between the cost of generating energy and the unit pricing of that energy.

Construction

The “*construction of energy infrastructure and provision of equipment (including supply chain)*” which featured as the leading cause of energy disputes over the last five years (see Question 11 above) was selected in Question 12 as the second most likely cause of disputes going forward. The construction of energy infrastructure will continue to be a substantial source of energy disputes in the short to medium term.

One respondent noted that their company would continue to face disputes on major construction projects over the next few years because oil and gas prices are increasing, and more investments in developing upstream infrastructure will create more disputes. Several respondents also noted that the energy transition will force market participants to grapple with the design and construction of new technologies, with potentially new entrants into the energy market, which will make it difficult for parties properly to allocate contractual risk and therefore lead to disputes.

Energy Security and Transition: A slower pace of change⁷

The perceived downward trend of upstream, midstream, and downstream oil and gas activities as a cause of energy disputes and the anticipated uptick of the energy transition as a dispute catalyst have been borne out by the results of the survey. When respondents’ rankings were converted into scores, the “*energy transition*” scored 52 points in respect of Question 11 whereas it received 145 points in respect of the forward-looking Question 12. “*Oil and gas activities*” received 382 points in response to Question 11, but only 233 points in response to Question 12.

However, despite the topicality of the transition to cleaner energy sources, respondents were relatively ambivalent about choosing it as a significant cause of dispute in the short to medium term. The pace of change towards disputes arising from the energy transition may appear to be less than anticipated given the significant public and private sector activity in the pursuit of cleaner energy and the technological and other challenges this encompasses. In interviews, this was explained by reference to the time periods covered by the survey. The majority of respondents noted that they thought the impact of the energy transition was unlikely to lead to disputes until towards the end of the decade.

Respondents considered that energy security issues in the wake of the Russia / Ukraine crisis would likely further set back the timeframe for the global energy transition, and lead to a return to previously shuttered fossil fuel projects. One respondent practicing in Europe and Africa suggested: “[w]e won’t hang up our boots as oil and gas lawyers just yet”. This perspective is borne out by the questionnaire responses as well. Despite “*security of energy supply*” only scoring 76 points in Question 11, it registered 172 points in Question 12 – 27 points more than the ostensibly broader category of “*energy transition*”.

Government Policy Instability

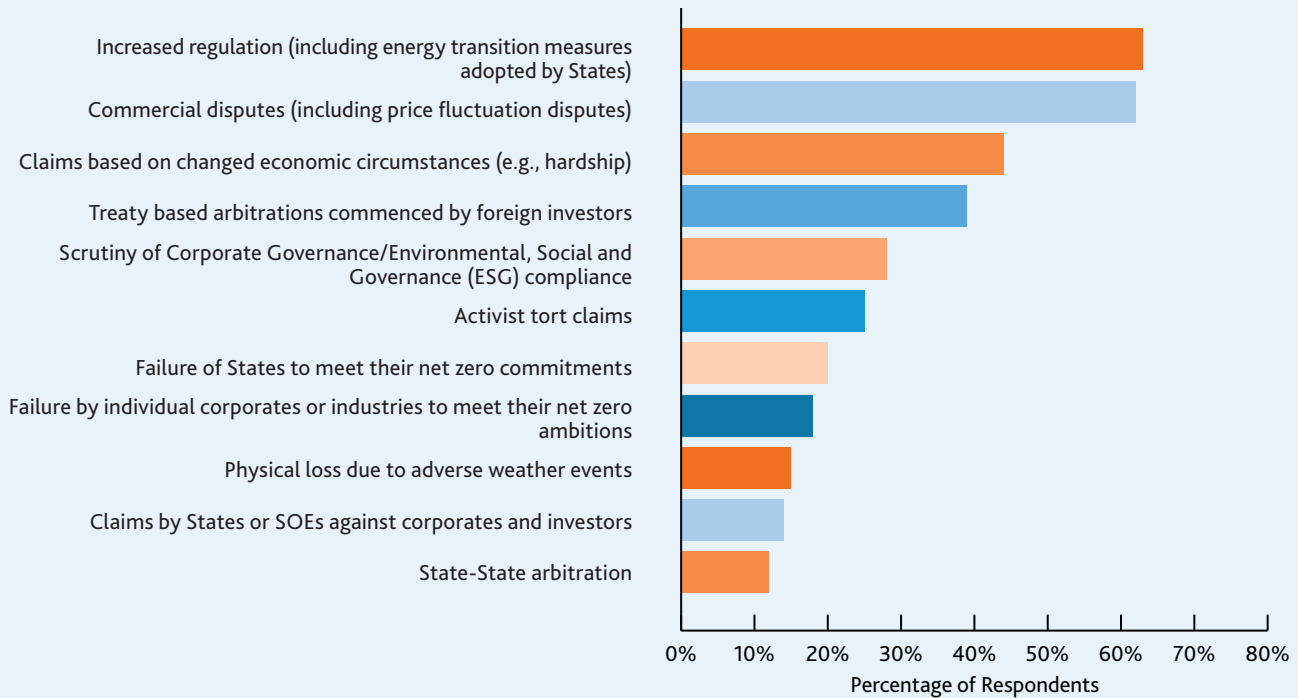
A significant number of respondents also selected “*government policy changes*” as a leading cause of disputes going forward. However, respondents did not consider that this issue is likely to give rise to more disputes in the future than it has in the past, as the proportion of respondents selecting this remained the same for both Question 11 and Question 12. Nevertheless, a theme that emerged in several interviews is the threat of political opportunity on the horizon in the form of taxes on windfall profits, which are likely to affect not only investment decisions but also the profitability of existing projects. When it comes to the windfall profits that many energy companies are currently experiencing as a result of high energy unit prices, respondents cautioned that it was important to contextualize these profits with the losses energy companies took across the board from 2020-2021.

Ultimately, “*government policy changes*” received 324 points in Question 12, compared with 517 points for price volatility and 422 points for construction.⁸ Government policy changes have always been a driver of disputes in the energy sector, and will continue to be so. However, the types of policy decisions that are impacting investments are changing, particularly in connection with climate change and environmental concerns, which are addressed below.



Climate Change and the Environment

QUESTION 13: Which of the following types of energy disputes will most increase due to climate change?



Regulation

63% of all respondents indicated that disputes caused by “increased regulation (including energy transition measures adopted by States)” would most likely increase due to climate change.

Over the past years, regulatory changes in response to climate change have been introduced at an unprecedented rate. This “regulatory inflation” is only expected to accelerate in the short to medium term.

Going forward, as governments tighten their economic belts regarding carbon emissions, seek to introduce new measures to meet their environmental commitments (including mechanisms to enforce net-zero and similar commitments) and seek to allocate the financial costs of dealing with climate change, it will be important to see how this plays out in relation to new fossil fuel developments, decommissioning of assets, carbon pricing, and other policy prerogatives.

In the context of pre-existing investments, the changes which are expected to be introduced to the investment environment and regulatory framework will likely lead to disputes, in particular between foreign investors and host States. Many respondents referred, by way of illustration, to the number of claims that were brought against Spain under the Energy Charter Treaty following the reforms it had adopted in the renewable energy sector.

This rapidly changing regulatory environment will also likely give rise to tensions between project partners, whether as a result of disagreements over the correct interpretation of the new regulations and/or as an inevitable result of developers and operators navigating through and implementing an ever-changing regulatory framework.

Commercial Disputes

“Commercial disputes (including price fluctuation disputes)” also scored highly in this question, with 62% of respondents selecting this answer. While this figure does not necessarily demonstrate a causal link between climate change and price volatility disputes, it does suggest that price volatility is working its way into almost every category of energy dispute, which further demonstrates its popularity in Question 12.

These “commercial disputes” are expected to extend to claims for additional time and compensation because of delays to the supply chain as well as delays to construction contracts due to inclement weather. One respondent (in-house counsel based in Europe) noted that “[m]ost of the renewable players are impacted by price volatility, issues with raw materials and supply contracts”.

QUESTION 14: On a scale of 1-5, how will your activity be impacted by climate change and environmental considerations (with long-term impact being more significant)

Climate change and environmental considerations are only expected to have a moderate impact on business activity and the provision of legal services in the sector over the short to medium term. Nearly 40% of respondents elected to take the median route with this question, and slightly more chose a 1 or 2 (minimal impact) rather than a 4 or 5 (significant impact).⁹ This election appeared to have been impacted mostly by the period of time the question focused on.

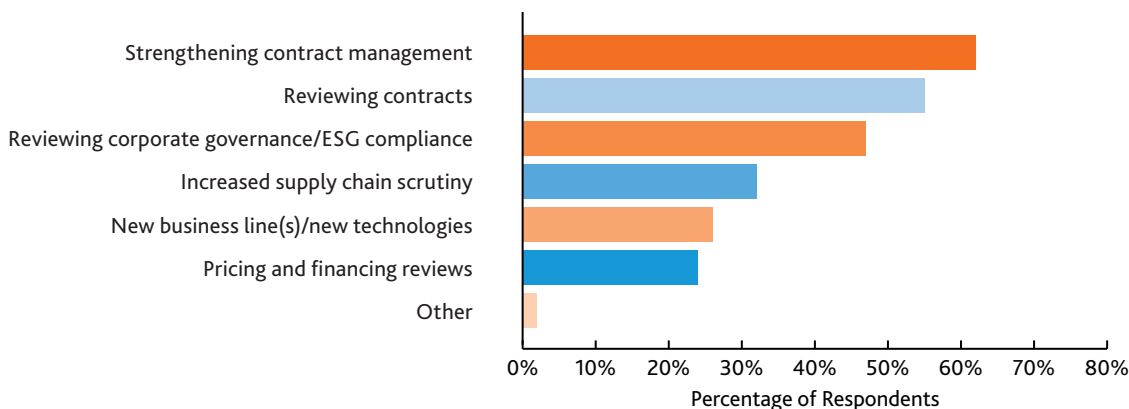
the vast majority considered that climate change and environmental considerations would have a significant impact, with nearly three times as many respondents in this category choosing 4 or 5 than 1 or 2.

When asked to elaborate on their choice, many respondents noted that they would have chosen a higher number had the question been focused on the 10 to 15-year long term. One respondent stated: “[t]he time frame here is the dispositive factor. In the next 2-3 years, the impact is about 2/5 or 3/5, in the next 10-15 years, it is a 5/5”. Another stated that it would be “at least 10 years before we see ‘serious’ renewables infrastructure as part of the global energy mix”.

Commenting on the impact of climate change on the construction of energy projects, one respondent stated that “climate change for energy construction companies is both an opportunity and a threat” with another commenting that “[c]limate change will cause delays to projects, leading to more projects and disputes. Not a major impact but will increase the number of disputes”. The former perspective is intrinsically linked to the latter – both are likely to bring into sharp focus aspects such as the allocation of risk in construction contracts. That said, this issue will not be limited to energy projects and any number of projects would be impacted. Many opportunities exist in the form of bridging the gap in developing energy-related infrastructure in emerging countries. Yet threats exist in the form of costly projects which are unable to properly contemplate or deal with climate change related risks such as adverse weather conditions, resulting in more disputes.

Interestingly, when the views of those respondents identifying as corporates and in-house counsel are analysed in isolation,

QUESTION 15: If you are an end user of arbitration, how are you adapting your activities to mitigate risks and challenges arising from climate change and environmental considerations?



This question was designed to track the perspectives of end users of arbitration, i.e., in-house counsel for businesses, commercial executives, State and government representatives, and in-house counsel for States and State-Owned Enterprises.

A significant number of these respondents indicated that their attention was on "reviewing contracts" (55%) and "strengthening contract management" (62%). The popularity of these responses signals a serious concern about the potential economic impacts arising from climate change – as mentioned above, risk allocation will likely be a significant feature in the supply chain. Certainly, both of these factors are important for effective dispute avoidance.

A number of respondents confirmed an effort towards incorporating detailed environmental commitments in their commercial contracts in order to protect themselves. These commitments are likely to range from specific representations and warranties to ensure their business partner/supplier complies with the applicable environmental regulations, to the inclusion of specific due diligence obligations.

A number of in-house counsel operating in the sector confirmed that supply chain scrutiny, detailed contract reviews, and compliance with ESG obligations and objectives are mitigation tools that have shifted into greater focus. One respondent noted that their parent company has directed a major focus on protecting against supply chain risks and the instability that comes with that, when drafting contracts. Another in-house counsel respondent noted that in many instances, contractors are allocated environmental risks, and as a result, in reviewing those contracts, sufficient consideration needs to be given by both parties to aspects such as compliance with ESG obligations and objectives.

Resolution of Climate Change Disputes – does international arbitration have a role?

According to the dispute resolution matrix in Question 34 (see Appendix 2), arbitration was seen as relatively less suited to resolving disputes involving "climate change and the environment" compared to other categories of dispute. Arbitration garnered 26% of the votes for this category of dispute, closely followed by "negotiation" (20%) and "litigation" (16%).

When questioned on why arbitration was seen as relatively less popular for climate change / environmental disputes, many respondents noted that the public interest element of holding corporates to account for so called 'greenwashing' made them more suitable for resolution by high level negotiation and litigation.

On the other hand, the ability to appoint arbitrators who are specialists in these issues, procedural flexibility, confidentiality and/or the ability to enforce arbitral awards worldwide under the relevant conventions remain beneficial features of the arbitration process (as already highlighted by the ICC Task Force on Arbitration in Climate Change Related Disputes).¹⁰ This may explain why those 26% of the respondents pointed to arbitration as being well-suited to resolving climate change disputes, particularly in the context of contract-based disputes arising out of the energy transition (see the detailed section on ISDS at page 39).



Valuing damages claims in Climate Change Disputes

Climate impact has long been a risk metric on the minds of global energy firms, but in recent years it has been shifting from a soft law concept into a more concrete legal issue. In the wake of cases like *Saúl v. RWE*,¹¹ there is obviously greater room for this element of risk analysis to be factored into company valuations.

While interviewing several experts on valuation issues, we asked whether there were any unique points presented by the valuation of damages in climate change disputes.

While most respondents expect the traditional approaches to quantum to remain the primary approaches, some suggested that certain specific features of climate change disputes may lead to more innovative approaches in some cases.

One expert stated that the increased scrutiny placed on companies' carbon footprints and environmental impact by governments and shareholders alike cannot be ignored and has to weigh into any valuation of a company where relevant for the purpose of an investment or commercial arbitration. Further, as some industries become more important in the context of the energy transition (e.g., battery and energy storage firms), experts must find a way to factor this reality into price evaluations as well.

Issues relating to causation are likely to be particularly sensitive in the context of climate change disputes. A number of respondents referred to "a huge gap" in the current understanding of causation when it comes to valuing climate damages.

One expert stated that the main issues in valuing climate change related damages are: (1) trying to balance all "myriad risks" of climate change and how they feed into market impacts (to cover physical/traditional risks plus wider market/economic risks); and (2) understanding cause or attribution. Attribution is a large, open question. How one links company failings on an individual level proportionally to the overall impacts of climate change can prove extremely difficult.

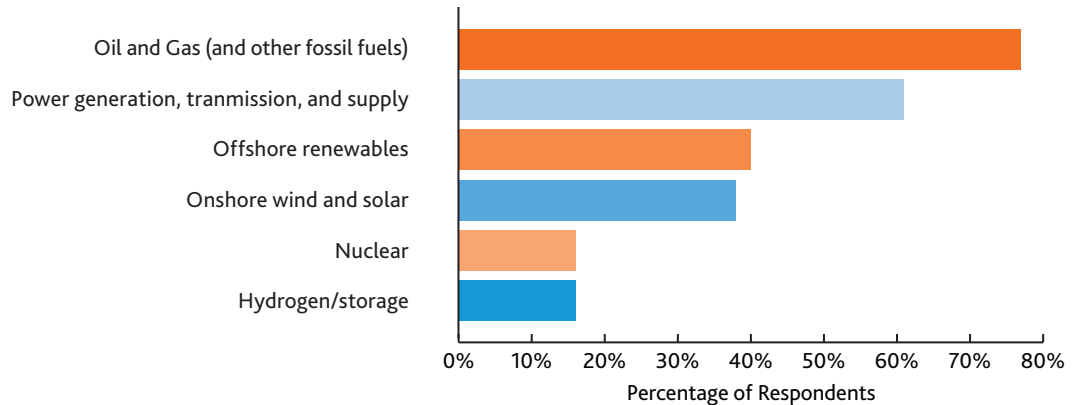
Issues relating to foreseeability and mitigation are also likely to be particularly acute. Significant debates are likely to arise as to which approach should be adopted when assessing whether the climate risks were reasonably foreseeable (in particular, whether considering broader climate risks or only asset-specific risks) and/or whether mitigation options were reasonably available.

Energy Transition and Renewables

QUESTIONS 16 AND 17: Energy Transition Disputes by Sector and Cause

The transition away from fossil fuel assets

Question 16: In which sectors do you expect the most energy transition disputes will arise?



“The main challenge of the energy transition is in scaling up renewables and phasing out fossil fuels. How do you do that while ensuring everything you need from an energy system, e.g., reliability, viable cost, remains good? Because of this dilemma, some investors will get left in the dust.”

As noted above, most respondents who addressed the questions on the energy transition considered that the shift to cleaner energy sources is a long-term issue and would only begin to emerge as a significant cause for disputes at the end of the decade.

Question 16 asks respondents in which sub-sectors they anticipate most energy transition disputes will arise.

Perhaps unsurprisingly, a significant majority (76%) included “oil and gas (and other fossil fuels)” in their answer selection. However, over half (61%) also selected “power generation, transmission, and supply” as a sub-sector where they expect disputes to occur.

The decommissioning of oil and gas infrastructure assets was identified as a significant source of disputes. The issues arising from “retiring” or “re-purposing” connected oil and gas assets will encompass a broad range of potentially contentious issues in the oil and gas space.

For example, one respondent identified the integration of many oil and gas fields through shared infrastructure with multiple owners and operators as a recipe for disputes in a period of transition. In these circumstances, the decommissioning and withdrawal by some owners and operators will have consequences on others operating in close proximity. One expert consultant described the “daisy-chain” effect coming from the decommissioning of large fields (in the North Sea for example), where the taking offline of the infrastructure supporting some projects will strand other assets when larger fields are decommissioned. This phenomenon, he believes, will lead to a variety of commercial disputes.

We spoke with one in-house counsel at an energy major which is pivoting sharply towards renewables as part of the energy transition. He noted that he had dealt with at least six decommissioning disputes in the past sixteen months. He also observed that the market shift meant that long-term existing relationships are coming under scrutiny. Sometimes this required a strategic exit from a project often involving a business decision to breach the contract and re-negotiate terms.

When it comes to operational decommissioning disputes, it may be easy to predict which institutions will handle these cases by looking to the forms of contract commonly used in the industry. We spoke with an arbitrator who analogized the situation to that of the decommissioning of coal projects in the early-mid 2000’s. There, the LCIA was the institution of choice in coal project contracts. When a wave of projects went offline, there was a corresponding spike in LCIA arbitrations. DismantleCON is a new contract developed for decommissioning projects, and it includes the LMAA as the default arbitral institution for dispute resolution.¹² There may well be a glut of disputes headed for the LMAA, especially in the North Sea region as a result. Alternatively, the IADC in the US has a form contract for drilling operations, under which some decommissioning disputes may fall, which provides for litigation as the forum for the resolution of disputes.

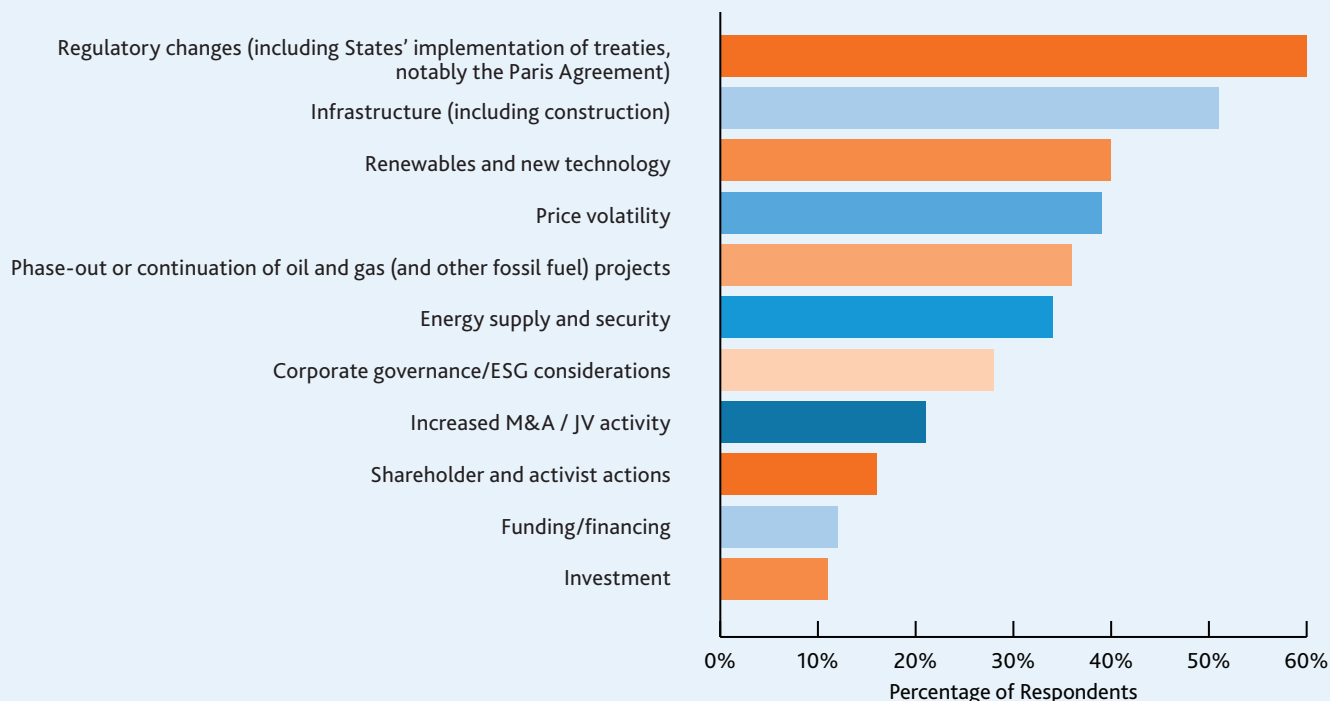
“The main challenge of the energy transition is in scaling up renewables and phasing out fossil fuels. How do you do that while ensuring everything you need from an energy system, e.g., reliability, viable cost, remains good? Because of this dilemma, some investors will get left in the dust.”

A few respondents identified the wind, solar and hydrogen sub-sectors as having the potential for energy transition disputes. However, the defining theme throughout was that of the development and deployment of new technology and the associated risks as being most likely to be the progenitor of disputes in these sub-sectors.

A reoccurring commentary from those we spoke to concerns the increased prominence of regulatory issues in all sub-sectors arising from the desire of governments to address the impact of climate change and the corresponding drive towards cleaner energy.

Regulatory Instability and Uncertainty in the Long Run

QUESTION 17: What changes arising from the energy transition are likely to give rise to disputes?



The desire and resulting encouragement to transition the energy sector from fossil dependency to renewable energy will require fundamental changes in almost all aspects of the sector, which will inevitably lead to a significant number of disputes across a wide variety of issues.

One of the most significant risks associated with the transition to clean generation is the adoption of new technology. The pace of change and the government incentive schemes driving many projects are creating a focus on project delivery and completion. Contractors are often being required to deliver projects at ever-accelerated rates to satisfy incentive schemes' requirements and there are concerns that new technology could render projects obsolete.

This problem is compounded by the fact that smaller-scale investors are entering into the clean energy space. A number of respondents indicated that with the advent of smaller, less experienced investors (such as private equity firms) entering the market, there is a growing proliferation of disputes. These 'new' investors have less familiarity with government regulation and do not have established relationships with energy businesses. Consequently, and given the shorter-term investment horizons, they are often driven to escalate disputes more readily than traditional players in the global energy market.

Question 17 asks respondents to identify the changes brought on by the energy transition that will likely give rise to disputes. As with Question 12, "infrastructure (including construction)" (51%) and "price volatility" (39%) scored relatively high.

One respondent noted: *"Most of the renewable players are impacted by price volatility, issues with raw materials and supply contracts. The ones who survive will possibly have learnt and going forward you will see the price escalation clauses as more normal, perhaps."*

However, the highest percentage was captured by "regulatory changes (including States' implementation of treaties, notably the Paris Agreement" (60%).

As the energy transition ramps up, there is a clear sense from respondents that energy businesses are facing increasing pressure to comply with changing regulations that require them to comply with evolving international standards on climate change. This is especially relevant for public companies that need to make their ESG reports public, to demonstrate that they are 'good corporate citizens' and stewards of the environment.

There is a general sense among respondents that most of the major changes flowing from the energy transition will take several years, if not decades, to materialise. However, the risk of disputes manifesting themselves in the future as a consequence of ill-prepared and ill-considered planning and investment decisions is already apparent. The dash for clean projects and the imperative from incentives and regulation mean that the causes of disputes are often baked into a project from its early inception and design. Many States are trying to roll out projects, without considering basic issues – one respondent cited the example of Japan's rollout of offshore wind, without having considered the impact the farms would have on the flight paths of birds.

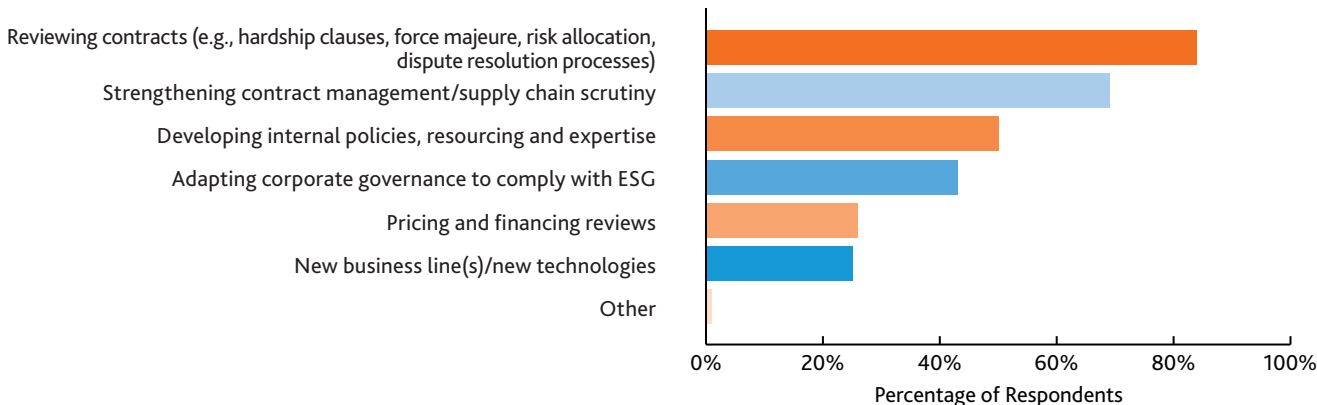
Some observed that investors are beginning to base their investment decisions on ESG considerations. Even so, the data gathered from Question 17 suggests that while shareholder actions are on the increase, for respondents they are not yet a primary concern in the context of the energy transition.

A number of respondents did identify shareholder activism as a potential flashpoint for litigation in the future. These types of disputes would not be resolved by arbitration but instead through the courts. Nonetheless, the risk for businesses with respect to their ESG policies and agendas is real and potent. One respondent pointed to a series of claims brought against companies for so-called "greenwashing" and predicted that these types of litigation, commenced with the intention of bringing about policy and strategic change within businesses, was likely to increase.



One of the most significant risks associated with the transition to clean generation is the adoption of new technology. The pace of change and the government incentive schemes driving many projects are creating a focus on project delivery and completion. Contractors are often being required to deliver projects at ever-accelerated rates to satisfy incentive schemes' requirements and there are concerns that new technology could render projects obsolete.

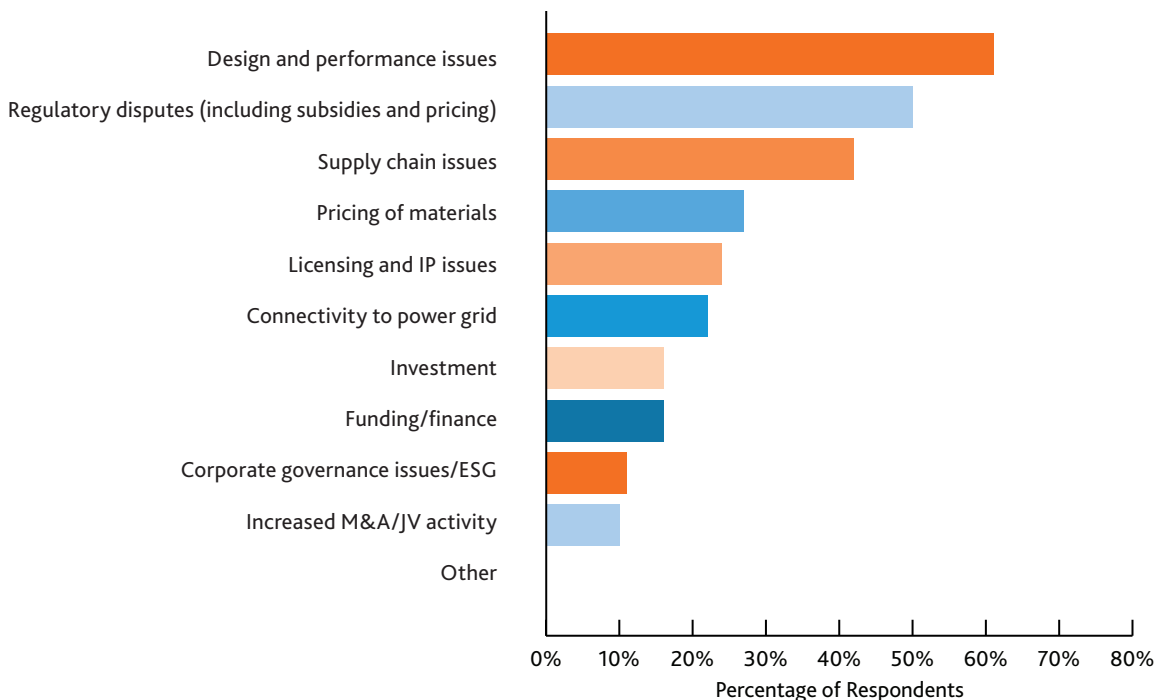
QUESTION 18: If you are an end user of arbitration, what steps are you and your contracting partners taking to mitigate the risk of disputes resulting from the energy transition?



Again, with our second end user focused question, we saw contract review and management taking centre stage as the priority for users of arbitration in the energy industry moving forward. When focusing on the strategic imperatives brought on by the energy transition, 84% of respondents indicated that they would be “reviewing contracts” (e.g., hardship clauses, force majeure, risk allocation, dispute resolution processes), while 69% of respondents further stated that they would be “strengthening contract management/supply chain scrutiny”.

One respondent commented: “So you’d expect someone like me sitting here telling you we have tons of contracts, and we make tons of money because everyone invests in in renewables and it’s exactly the opposite. [...] It’s not a viable market at the moment.”

QUESTIONS 19 AND 22: What are likely to be the causes of renewables disputes?



Design and Performance Issues

Energy transition disputes and renewables disputes are inextricably linked, with several respondents noting that they viewed the latter as a subcategory of the former.

Within the category of renewables projects, “*design and performance issues*” emerged as the main driver of disputes going forwards, with 61% of respondents selecting it as a leading cause of renewables disputes. These issues relate to both defects in the construction of energy projects, and also delay and timing issues around bringing them online and operating them at the capacity required by the contracts underlying the project.

There are myriad ways in which design and performance issues might crop up across different types of renewables products. One arbitrator noted that the construction of offshore wind facilities and construction of vessels to install and operate these facilities is accelerating worldwide. An increasing number of floating turbines are also being constructed. Each of these projects presents different profiles for risk and an increase in the prevalence of disputes.

Subsidies and Power Pricing

Electricity pricing is highly regulated in most jurisdictions, and this fact helps explain why so many respondents selected “*power generation, transmission, and supply*” as an answer to Question 16. For Question 19 as well, 50% of respondents selected “*regulatory disputes (including subsidies and pricing)*” as a leading cause of renewables disputes. One general counsel in the renewables arena remarked:

“For us, the energy price is everything. We are no longer selling products in Brazil, because the energy price does not make commercial sense for us to operate there any longer.”

When it comes to renewables disputes, because the profit from these projects is a direct result of the price for which developers can sell the electricity they generate, there will always be a significant link between price volatility issues and regulatory issues.

Supply Chain Risk and Sanctions: the negative feedback loop

Supply chain issues were the third most cited cause for future renewables disputes with 42% of respondents indicating that they thought these issues would lead to a significant number of disputes going forward. With renewables technology, there are a variety of unique supply chain risks at play.

One respondent noted that geopolitical tensions may slow progress in the renewables sector, because some countries are dominant in the production of the raw materials that go into electronic components necessary to construct renewables infrastructure, such as China.

Arbitration’s Suitability in Resolving Energy Transition Disputes

According to our dispute resolution matrix in Question 34, respondents thought arbitration is most suited to energy transition disputes, with 33% selecting it for this category. Given the breadth of issues at play in energy transition disputes, it is not surprising that responses to the matrix for this category were mixed. The next most-selected choices were ADR processes, namely “*negotiation*” (19%) and “*mediation*” (16%).

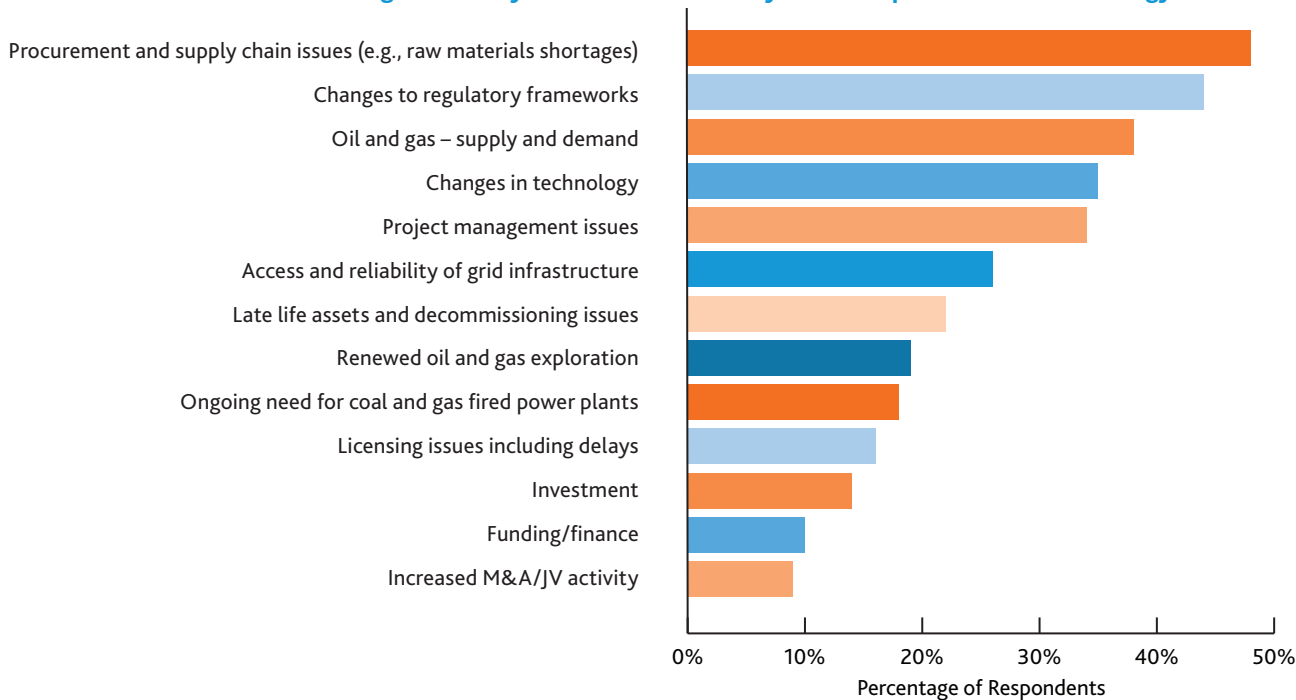


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Energy Infrastructure

“Construction is counter cyclical in the sense that when more money is poured into construction, more disputes tend to pop up.”

QUESTION 20: Which of the following factors do you think will most likely lead to disputes in relation to energy infrastructure?



The respondents selected “*procurement and supply chain issues*” (e.g., raw materials shortages) as the factor most likely to lead to disputes in relation to energy infrastructure (48%). “*Changes to regulatory frameworks*” (44%), “*oil and gas – supply and demand*” (38%) and “*changes in technology*” (35%) were the second, third and fourth most selected choices.

Procurement and supply chain issues

Energy infrastructure projects depend upon complex networks of global supply chains, and the results of the survey reflect the reality that supply chains are under strain due to the impact of COVID-19 and wider geopolitical events such as the Russia / Ukraine crisis.

One respondent, a general counsel for a US-based construction contractor that specialises in energy projects, explained that COVID-19 had a huge impact on the energy infrastructure sector, particularly in the commodities and fabrication market. At present, all of his disputes are COVID-19 and/or commodity price related. He remarked that costs have increased to an extreme level that no one could have expected, for example, shipping freight costs for his business have increased by 350%.

Risk allocation

Coupled with this, many contractors that we spoke to noted that they are seeing many new owner-developers who are financing through banks and venture capital firms and do not want to carry risk.

Contractors are wrestling with how much pain they can take to get work and noted that the allocation of risk to contractors has become

more onerous. This pressure can cause contractors to take on risks that are not commercially sensible in order to win bids. As a result, many contractors believe this will lead to more disputes: “[w]hen the contracted risk is unequally divided, you end up in a dispute. When the parties are equally at risk, that is key”.

Regulatory frameworks

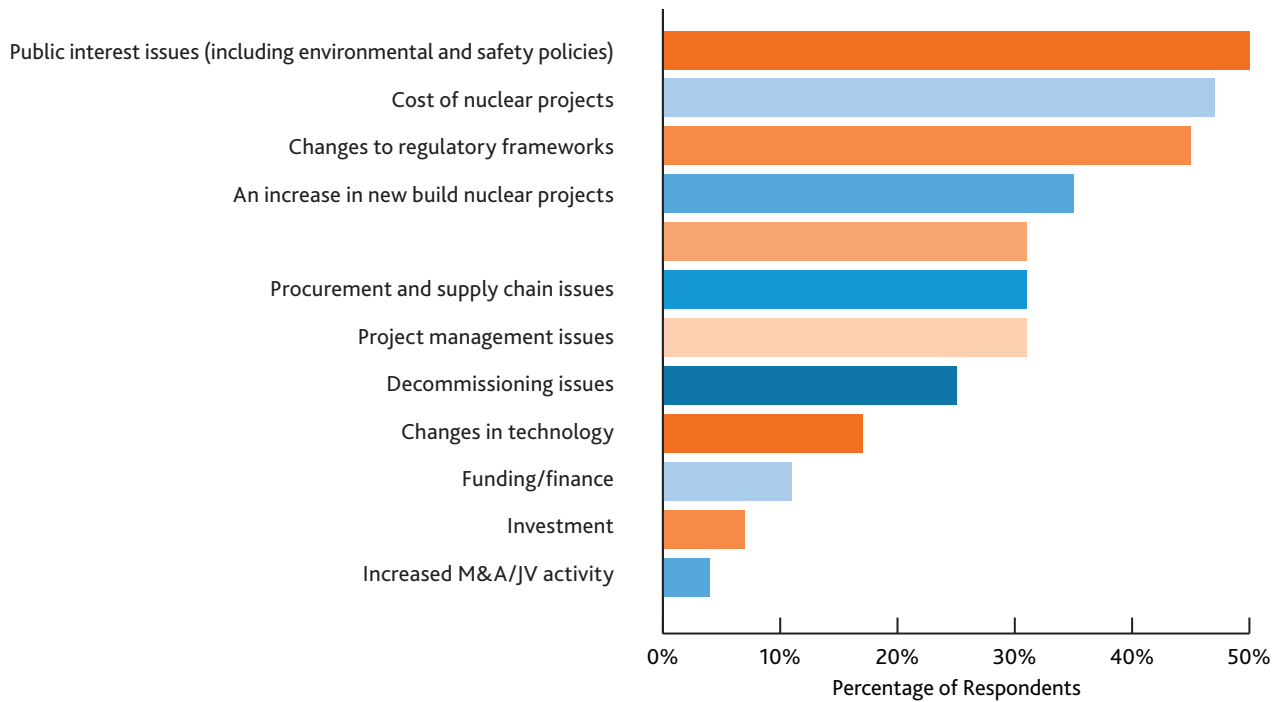
The selection of “*changes to regulatory frameworks*” as the factor second most likely to lead to energy infrastructure disputes reflects the expectation that changes to domestic regulatory frameworks resulting from climate change initiatives, together with the modernisation of the Energy Charter Treaty, will present challenges to parties across the energy infrastructure sector.

Arbitration’s Suitability in Resolving Energy Infrastructure Disputes

Contracts for the construction of energy infrastructure typically include multi-tiered dispute resolution clauses, which escalate disputes through other mechanisms of dispute resolution (such as senior management negotiation and dispute boards) before referring them for final and binding resolution by arbitration. Our dispute resolution matrix confirmed that respondents consider arbitration to be essential as a means of finally resolving disputes in energy infrastructure, and that it will continue to play a significant role in the process: arbitration comprised the largest portion of selections (40%) in the “*energy infrastructure*” category (see Appendix 2), both as against other forms of dispute resolution for this category and as against all other categories of disputes.

Nuclear Projects

QUESTION 21: Which of the following factors do you think will cause disputes in nuclear projects?



Public Law Issues Predominate: Public Interest and Regulatory Hurdles

The nuclear sector is the most highly regulated energy sector and nuclear projects typically involve the construction and/or decommissioning of complex infrastructure to strict international standards. There is understandably an enhanced focus on the safety and security of operations in this sector. Licensing approvals from local regulators in particular can cause significant delays to projects due to their political sensitivity. Licences are required to develop a new plant, construct it, transport nuclear fuel to plant for commissioning and operation, and for the plant to commence commercial operation. Against this background it is perhaps unsurprising that 50% of respondents chose “public interest issues (including environmental and safety policies)” as the factor most likely to cause disputes on nuclear projects, with 45% of respondents choosing “changes to regulatory frameworks” in relation to nuclear projects.

The extent of Russian involvement in nuclear projects

Nuclear energy projects typically involve a highly specialised group of professionals from international backgrounds, including from Russia. The direct impact of the invasion of Ukraine and sanctions are considered in Questions 23-25 below. Several respondents noted the impact of these issues specifically in relation to nuclear projects because of the imposition of sanctions on entities related to the Russian State.¹³

Cost and the predicted increase in new build nuclear projects

Nuclear power projects are notoriously expensive and time-consuming. Even in developed countries with an established nuclear fleet and regulatory framework, the design, planning and construction of a new nuclear power plant on an existing site can extend beyond a decade and cost tens of billions of dollars. The cost and timescales of nuclear projects means that they are inevitably funded by State entities rather than the private sector. The vast cost of nuclear projects provides fertile ground for disputes and this was reflected in our survey. 47% of respondents chose “cost of nuclear projects” as the factor most likely to cause disputes on nuclear projects.

35% of respondents identified “an increase in new build nuclear projects” as the most likely causative factor. On its face, this suggests that respondents consider disputes to be an inherent part of nuclear energy projects and that an expansion in nuclear projects will see an increase in disputes in the nuclear sector. It will be interesting to see if this prediction is borne out against a background of increasing global power generation from nuclear power plants¹⁴ with the International Energy Agency forecasting growth in the installed capacity of nuclear power generation in developing countries, predominantly Asia, in the period up to 2040.



The Use of Dispute Boards in Resolving Nuclear Disputes

Although dispute boards were a relatively unpopular answer choice for respondents in general in our Question 34 dispute resolution matrix (see Appendix 2), respondents selected dispute boards as the most effective forum for resolving disputes most frequently in the context of the nuclear sub-sector (12%) following “*arbitration*” and “*negotiation*”. The size and cost of nuclear projects, the inevitability that disputes will arise, and the complexity of the design and construction process, along with the very lengthy project construction phase, may help explain why respondents were more comfortable using dispute boards for nuclear disputes.

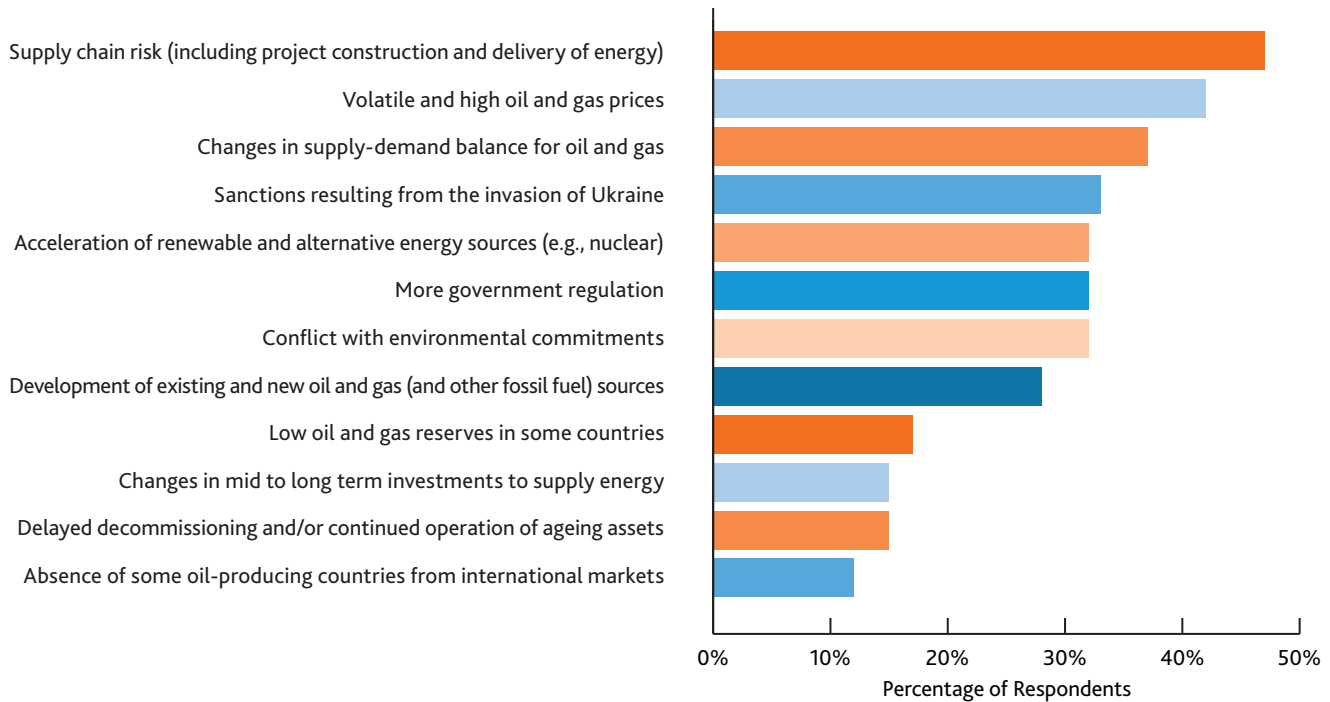
Arbitration’s Suitability in Resolving Nuclear Disputes

Arbitration was the most popular process, as against other forms of dispute resolution, for resolving nuclear disputes, garnering 34% of the votes for this category in our Question 34 dispute resolution matrix. ADR processes (“*negotiation*” (15%) and “*dispute boards*” (12%)) were the next most-selected choices. One respondent said that nuclear disputes were “*too big*” for the conventional arbitration process. That perhaps reflects the practical difficulties of either storing up all of the disputes until the end of the project – which may take some very considerable time - or potentially having several arbitrations running concurrently with the ongoing execution of the project. Such considerations would also support the greater acceptance of dispute boards in a nuclear context, as they often provide for the efficient resolution of disputes shortly after they arise, whilst standing dispute boards can also serve a dispute avoidance role. Other respondents indicated that for reasons of public policy nuclear disputes should be resolved in a public forum.

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The Challenge and Impact of International Trade and Financial Sanctions

QUESTION 22: Which of the following do you think will cause disputes relating to security of energy supply?



Supply Shocks, Price volatility and Sanctions

As was apparent from the data in Questions 11 and 12 and from interviews with respondents, security of supply issues, such as price volatility, are some of the most pressing short to medium-term challenges on the minds of those active in the energy industry. The current geopolitical climate has fostered a series of new frictions in the global energy sector. The downward pressure that these geopolitical headwinds are causing is being felt across the energy sector and at all points in the energy supply chain. Question 22 sought to understand security of supply issues in terms of those most likely to cause disputes over this timeframe. The answers provided were consistent with the themes highlighted in response to Question 12.

“Volatile oil and gas prices” and “changes in supply-demand balance for oil and gas” scored highly as causes of security of supply disputes, with 42% and 37% of respondents choosing these categories respectively. “Sanctions resulting from the invasion of Ukraine” was selected by 33% of respondents. These three interconnected categories reflect the cause-and-effect chain that the sector is currently experiencing.

Central and Eastern Europe are actively trying to increase storage capacity in order to reduce reliance on Russian gas supplies which have been restricted both by measures adopted by the EU against Russia, and steps taken by Russia to dramatically reduce the flow of gas into Europe. More LNG projects and new supply routes for gas are also being developed to deal with this supply issue. The restrictions which have been incrementally introduced since February 2022 are a significant escalation to the sanctions that were introduced in 2014 following Russia’s annexation of Crimea, which at the time were

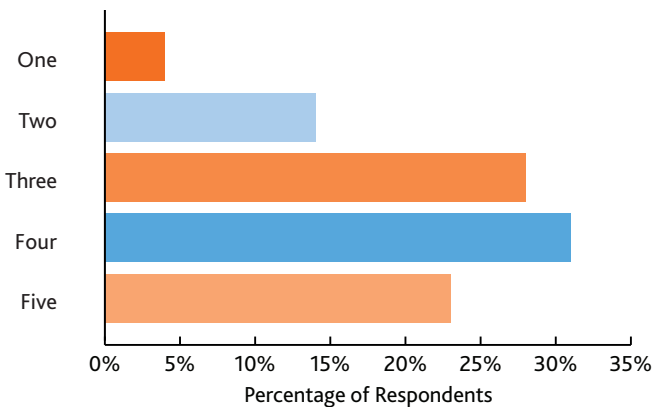
focused on restricting the supply of goods and technologies suited to use in oil exploration. One expert active in Europe noted that a critical aspect with gas price volatility is storage capacity. He also noted that he has been involved in LNG plant arbitrations in Finland and India, and that Scandinavian countries appeared to be better prepared for gas supply shortages than other EU counterparts.

Supply chain chaos

Some 47% of respondents chose “supply chain risk (including project construction and delivery of energy)” as a response to Question 22. What stands out from the data and interviews here is that the logistical hurdles and supply chain risk brought on by COVID-19 have been sharply exacerbated by the current geopolitical environment.

Interviews with respondents further clarified that one of the most pressing issues with regard to international sanctions was the inability to get parts and raw materials at a commercially sensible price. Multiple respondents noted that global supply chain issues are exacerbated by sanctions. With suppliers no longer able to import raw materials and other goods from Russia, companies are likely to turn to other major producers. It is recognised that some of the countries being approached for supplies are themselves at risk of future sanctions due to Western concerns about national security, territorial sovereignty, and also the rise of thematic sanctions which target cyber activity, anti-corruption and human rights as areas of concern which justify the imposition of sanctions. In addition, major energy contracts in Russia and elsewhere are being suspended or terminated as a result of financial and sectoral sanctions which, in turn, leads to claims downwards through the contractual supply chain.

QUESTION 24: On a scale of 1-5 (low-high impact), how will sanctions impact major projects and transactions in the energy sector?



Moderate to Severe Impact

While most respondents were somewhat pragmatic about the impact of sanctions generally in the energy sector, with 59% of respondents selecting either 3 or 4, there was a notable number (23%) who believed sanctions would have a severe impact (5). 18% of respondents thought that sanctions would have a minimal impact (1 or 2).

The impact of the Russia / Ukraine crisis and the resultant sanctions has clearly and quickly spread to global markets. The most severe impacts are being felt in Europe at present as the EU’s sanctions regime is the most extensive targeting Russia, and effectively prohibits European entities from continued involvement in Russian energy projects. The far-reaching effect of sanctions is increasingly becoming a feature of energy disputes with one expert noting that sanctions issues already affect a third of the disputes on which he is currently instructed.

Responses in interviews also indicated that some business impacts from sanctions stretch beyond the short to medium term. Going forward, sanctions will likely influence project decisions even where they are not directly applicable, because the political risk associated with sanctions weighs heavily on long-term investment decisions, and these sorts of decisions are critical to success in almost all energy sub-sectors. There are some outlier markets where the effect of sanctions is much less pronounced. One respondent active in the Indian power market noted that sanctions on Russia were having a very limited impact on his jurisdiction and energy sector.

Greater reliance on fossil fuels in the short to medium term / Regulatory instability and the investment planning nightmare

Answers to Questions 23, 24 and 25, along with information gathered in interviews, indicate that the majority of respondents believe that a consequence of Russian-targeted sanctions will be the acceleration of projects to develop renewable energy sources, and an increase in nuclear energy. The EU’s push to fill the energy gap created by the loss of gas supply from Russia was cited as being likely to have an impact on global LNG production and the development of LNG infrastructure as a short-term alternative for countries such as Germany which were heavily reliant upon Russian gas supplies. Respondents also anticipated a shift in Africa, the Middle East, and Asia back to traditional sources of fossil fuels, perhaps reflecting the fact that the long lead-in times for renewable energy projects means that they will not be able to plug any anticipated short-term deficit caused by geopolitical tensions, which is explored below.

QUESTION 23: What will be the impact of the invasion of Ukraine on the global energy supply mix?

This was one of the survey questionnaire’s few, but important, open-ended questions. This fostered a number of responses, the essence of which was that there may be greater reliance on and hence investment in fossil fuels including coal (as well as a diversification of LNG supply) to plug the energy gap, which may have some impact on the energy transition agenda in the short to medium term.

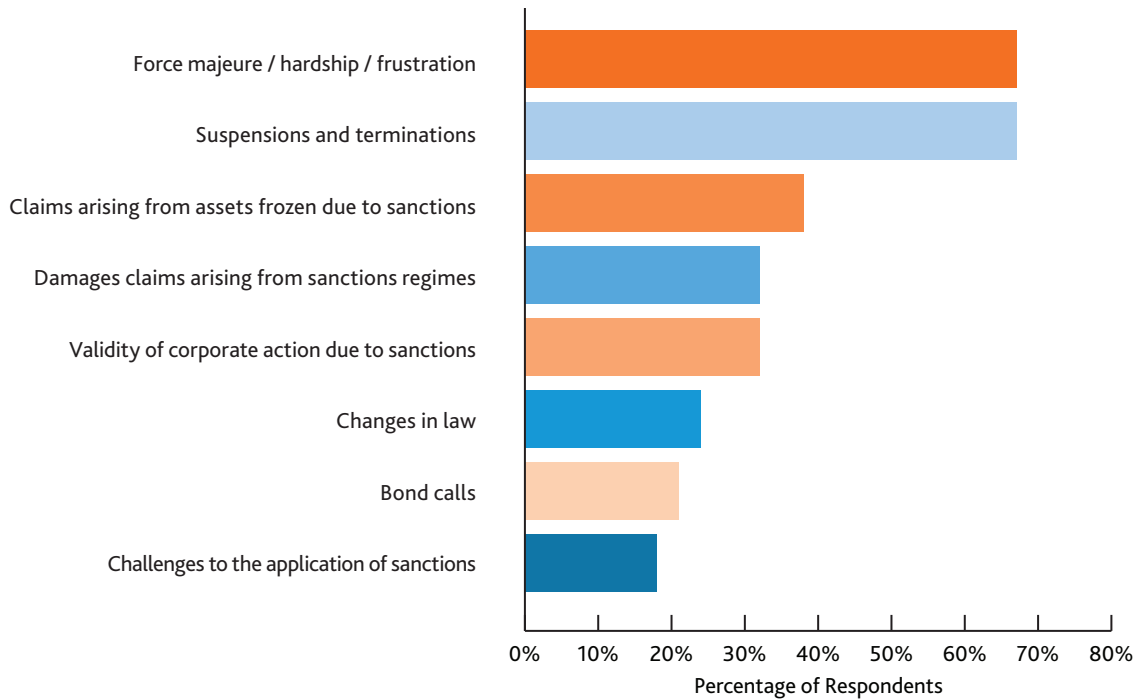
Respondents’ comments include: *“It is already having a profound impact on the European energy markets, with the Commission pushing for a faster independence from Russian-supplied energy sources. With Europe seeking LNG from abroad, this will invariably impact other markets where that gas was traditionally supplied (e.g., Asia). Further, alternative fuels - including coal - will be utilised.”*

“The outcome depends on the final resolution of the conflict. Europe will be hard-pressed to expand its energy transition in the near-term future. The energy shortage [which] the unavailability of Russian gas imposes can be covered in the long term; however, it will take years and compromises on energy sources will need to be made.”

“It has increased the stampede for LNG in particular from the US, to replace unstable Russian gas supplies, and has refocused minds on security of supply and the risk of blackouts, in tension with clean agenda goals.”

“This is the famous trilemma of energy security / sustainability and affordability! Sustainability was the focus since 2015, followed by a focus on affordability with the 2021 energy crunch and no doubt the invasion of Ukraine moved the focus to security of energy supply. Re the global energy mix, the new focus on security will potentially keep fossil energy in the energy mix for longer.”

QUESTION 25: What types of claims are arising as a consequence of sanctions?



At the outset, and as noted above, the sanctions imposed on Russia since its invasion of Ukraine are only the latest in a series of sanctions packages which have been imposed by the EU, USA, UK and wider allies since Russia’s annexation of Crimea in 2014. Consequently, anecdotal evidence indicates that parties to contracts for large-scale infrastructure and energy projects executed since 2014 have included more detailed sanctions provisions which are intended to better define the parties’ responsibilities when new sanctions are introduced. Notwithstanding these factors, and irrespective of how clear the contractual mechanism may be, as is evident from the results of the survey set out below, the far-reaching impact of sanctions has and will continue to give rise to significant disputes.

Force Majeure, Hardship, and Frustration

Most respondents (67%) noted that “*Force majeure / hardship / frustration*” claims have been and will continue to be on the rise due to the impact of international sanctions on the ability to perform pre-existing contracts. A key issue in these cases is whether these claims are legitimate insofar as they are based on sanctions which actually have the effect of preventing a project from moving forward.

In this regard, respondents noted that there is a lack of understanding from Russian counterparts as to the scope of sanctions, which had been caused in part by the fact that the language of the implementing legislation is sometimes vague and contradicted by guidance. A significant issue is the territorial jurisdiction of international sanctions. In some cases, a contractor may not itself have a legal duty to comply with US, UK or EU sanctions, however, many of their

suppliers may be caught by the sanctions applicable to them but to varying and inconsistent extents. In addition, *force majeure* clauses usually require reasonable endeavours to mitigate or overcome the circumstances of *force majeure*. The uncertainty about the extent of the application of sanctions and the availability of alternative non-sanctioned source of supply is likely to be fertile ground for disputes in view of the competing objectives of Russian parties seeking to minimise disruption on their projects, and non-Russian parties who may be required to act in accordance with the sanctions.

One respondent commented: “*The world is currently trying to prevent Russia from getting access to hard currency. When a project terminates due to sanctions, not everyone is willing to accept that as the baseline reason. What ensues is a very heavily fact-oriented argument to determine the true intent of terminating a project. There is therefore a heavy need for sanctions experts on these cases.*”

Suspensions and Terminations

An equally high number of respondents (67%) noted that “*suspensions and terminations*” have been and will continue to be on the rise due to sanctions. One respondent emphasised that the sanctions have indirectly impacted projects with Russian entities which are not subject to sanctions themselves. For example, it was noted that some projects in the Nordic countries which tend to have Russian EPCs or Russian equipment suppliers are being terminated for reputational reasons, i.e., because it is no longer acceptable to engage in business with Russian (State-owned or sanctioned) entities, and financial institutions are unwilling to process payments with a strong Russian nexus due to their limited risk appetite.

For disputes emanating from Russian projects, the scenario may often be complicated by the involvement of a Russian company (or Russian-linked company), as part of a typical joint venture arrangement, whose operations may not be subject to any sanctions regime. This situation could give rise to disputes both as between the JV members and between the JV and Owner which arise because of the effect of the sanctioned JV member’s suspension or termination of the contract in circumstances where the Russian JV member’s activities remain unsanctioned.

One respondent commented that the need “not to get caught out twice” informed his view as to why sanctions will likely be the big issue going forward with new energy projects in countries where there is geopolitical tension with the US/EU/UK.

Bond Calls

One surprise from the questionnaire was the relatively low score for “bond calls”, with only 21% of respondents noting a rise in these types of claims as a result of sanctions, especially since these sorts of claims are a natural corollary to suspensions and terminations.

In interviews, there was a clear indication from several respondents that bond calls were a major source of conflict, especially with projects involving Russian contractors.

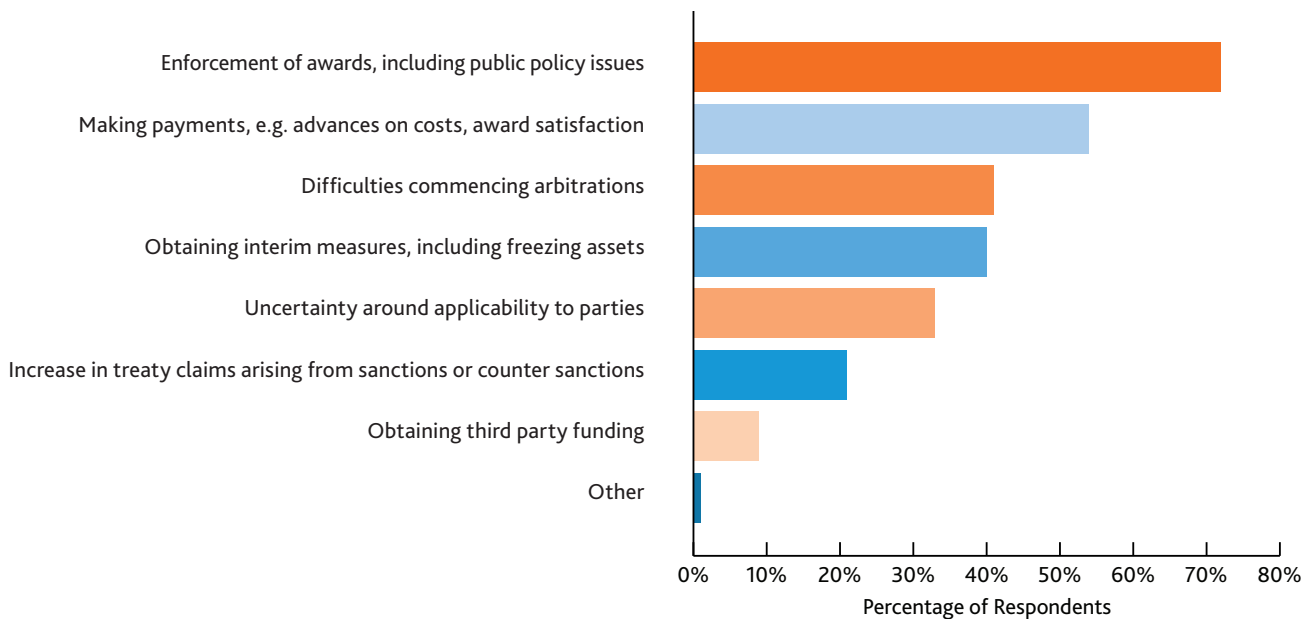
One interviewee (a general counsel for a large firm active in the energy projects arena) noted that her firm had instituted a corporate policy of terminating all business relations with Russian entities in the wake of Ukraine-related sanctions, whether the entity is listed as a sanctioned entity specifically or not. As a result, Russian EPC contracts that are terminated have resulted in *en masse* calls on performance bonds, presenting a significant headache for her team.

The issue in most jurisdictions is that an on-demand bond is treated as cash-in-hand unless it can be shown that the subject matter is substantially affected by the sanctions – otherwise there are no grounds on which payment can be resisted which has potentially significant impacts upon both the project and the wider business. In practice, and whilst the legal basis for injuncting a bond call is very limited, the recent sanctions have impacted the mechanisms which are required to give effect to the demand on the bond – such as lack of access to the SWIFT banking system and a number of Russian banks themselves being sanctioned. Anecdotal evidence indicates that banks have been reluctant to give effect to bond calls which involve money moving to Russia and there is also some protection within certain sanctions for banks who refuse to meet a demand. Both factors might explain the relatively limited number of respondents who identified this type of claim.

QUESTIONS 26 AND 27: Arbitration’s Suitability in Resolving Sanctions-related Disputes

Issues presented by sanctions for arbitral process

What risks and challenges may arise in the arbitral process as a result of sanctions?



Perhaps unsurprisingly the most common response considered that “enforcement of awards, including public policy issues” (72%) was the main challenge that arises in the arbitral process as a result of sanctions. In this regard it is relevant to note that it is a common feature of sanctions regimes that no claims in connection with contracts / transactions impacted by sanctions restrictions can be enforced, or damages awarded, in the countries / territories which have imposed the sanctions. This may provide legal protection for US, EU, UK, etc., entities in respect of actions taken by, for example, Russian entities.

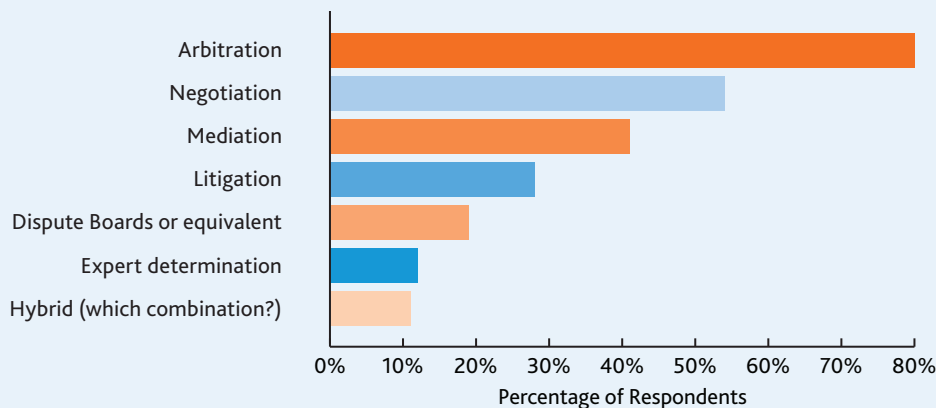
Of opposite effect, and as noted by one respondent, Russia previously introduced legislation in June 2020 following the imposition of sanctions in the wake of its annexation of Crimea which undermined the arbitral process against sanctioned entities. The law granted exclusive jurisdiction to the Russian commercial courts over disputes between sanctioned Russian entities and foreign parties, notwithstanding the existence of arbitration agreements or exclusive jurisdiction clauses providing for dispute resolution elsewhere. This is a significant impediment to the enforcement of arbitral awards against Russian counterparties, as the Russian courts are unlikely to enforce foreign arbitral awards if the Russian party has commenced parallel proceedings in Russia.

Another problematic issue with sanctions and the arbitral process centres around the financial friction they create on cross-border payments. Many respondents perceived there being problems in making payments, such as advancing costs for arbitral proceedings and making payment to satisfy awards (54%). In October of 2022, the UK Office of Financial Sanctions Implementation granted the LCIA a licence to allow sanctioned parties and their representatives to pay funds to the LCIA to cover arbitration costs.¹⁵ Consistent with this point, the EU’s prohibition on ‘legal advisory services’ to bodies established in Russia and the Government of Russia has been designed so as to preserve access to justice and the right of defence. Explicitly excluded from the restriction is the provision of services that are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in an EU Member State.

Despite these carve outs, a funder remarked that if there is any element of a claim that touches and concerns Russia or Russian parties, they will not fund the claim. She explained that it is simply too difficult to collect on any potential award in the current environment, with Russian assets swiftly emigrating back to Russia and its sphere of influence, such that it is not worthwhile pursuing even the most meritorious of claims.

Arbitration still highly favoured for resolving sanctions-related disputes as against other forms of dispute resolution.

What mechanism will be the most suitable for resolving sanctions-related disputes?



80% of respondents who answered Question 26 indicated that arbitration was a suitable method for resolving sanctions-related disputes, demonstrating respondents’ confidence in the mechanism despite the myriad complications involved in sanctions-related disputes. The large number of comments received in relation to this question further confirmed the continued vitality of arbitration as a method of sanctions-related dispute resolution, even though many qualified their answers by noting that public policy, enforcement, and regulatory concerns would likely impact the suitability / efficacy of arbitration for some sanctions-related disputes.

Still, the issue with sanctions is more nuanced than the above graph alone can demonstrate. As one respondent noted in their commentary on Question 26:

“There is going to be a lot of money at stake, and cooler heads are not always going to prevail. At some point parties (after realising they won’t be able to pursue most potential debtors in local courts) will have to initiate arbitrations -- but many of them will probably be settled in the midst given the backdrop of the unpredictable nature and impact of the war and the parties’ desire to focus on the commercial benefits they originally imagined.”

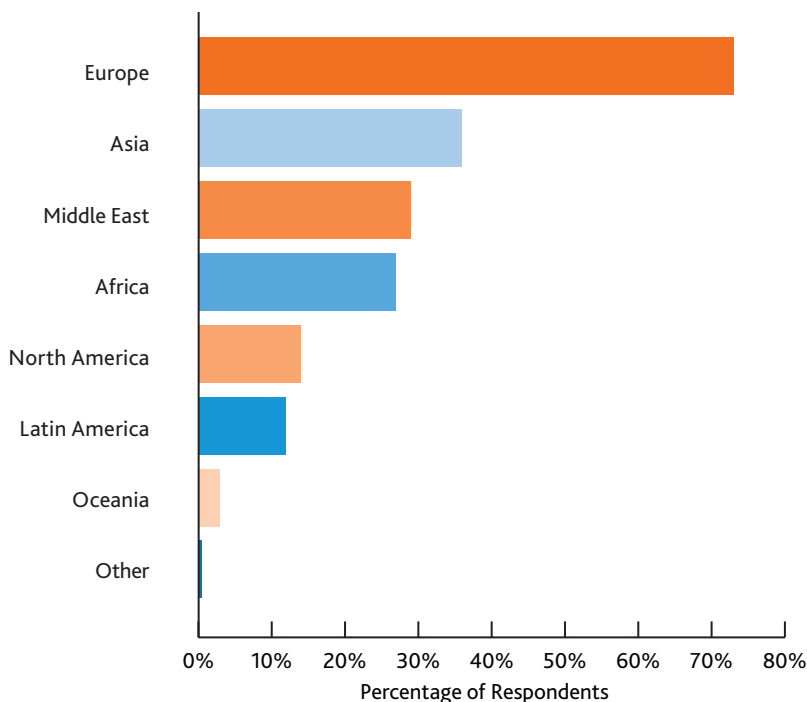
Arbitration of international energy disputes: is the process fit for purpose?

The core task of the survey was to understand how arbitration, as a means of international dispute resolution, is positioned to handle the challenges presented by the dynamic and rapid evolution of international energy disputes. In order to accomplish this, we set out to understand a variety of factors. First, we wanted to uncover where disputes were arising and where they were being submitted to arbitration. Second, we looked at the key features of international

arbitration, and how well they are attuned to meeting the aims of the parties involved in international energy disputes compared to other forms of dispute resolution. Third, we considered the role that third-party funding might play in the future of international energy disputes. Finally, we assessed how ISDS would factor into the mix of global energy disputes.

Regions and Seats

QUESTION 28: Which regions will see the greatest increase in energy-related disputes?



Europe

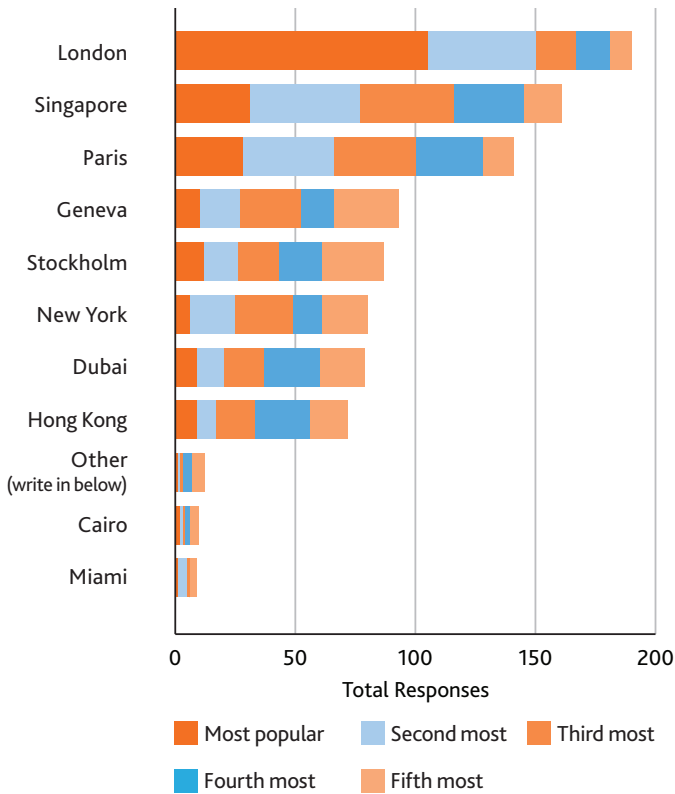
At the time of publication of this report, and as is evident from the analysis in the earlier sections, Europe stands at the crossroads of an energy crisis. The Russia/Ukraine conflict was the most-cited reason for Europe being selected as the region likely to have the greatest increase in energy-related disputes with a significant majority of respondents (73%) choosing Europe as a region that will see a stark acceleration in energy-related disputes. Naturally, respondents from each jurisdiction may have been inclined to select their own geographic location as an answer choice, as their experience of disputes in their home jurisdictions will likely have informed their view and filtering the data by respondent location allowed us to understand the impact of this tendency. However, even when

responses from European respondents were filtered out of the data, Europe remained, by a wide margin, the leading geography for this question in every jurisdiction specific data set by a wide margin.¹⁶

Asia, Middle East and Africa

36%, 29% and 27% of respondents selected Asia, the Middle East and Africa respectively for Question 28. One respondent believes that Africa will see a major increase in disputes as political and economic tension with Russia will lead to a search for fossil fuels elsewhere, especially in Algeria and Nigeria. It was thought that this would precipitate the revival of fossil fuel field developments that were previously slated for decommissioning, which in turn would lead to disputes in respect of decommissioning activities.

QUESTION 29: Which arbitral seat(s) will be the most popular for energy-related disputes?



observed for a long time that counterparties who do not educate themselves as to the forum options available to them tend to not make the most intelligent choices. Her perception was that civil law seated arbitrations tend to involve more proactive arbitrators and a more tailored and efficient process than those in common law jurisdictions. This view may be more aspirational of the international arbitration process (which in reality is a blend of the two systems) rather than describing features of a civil law system *per se*.

Singapore on the rise: maritime energy disputes

Singapore was the second most popular seat, receiving first place votes from 14% of respondents. Overall, Singapore scored 530 points. Among respondents from Asia, Singapore was significantly more popular, scoring a response weight-adjusted 696 points. Interviews shone light on the reasons why Singapore is receiving a larger share of Asian disputes with respondents citing changing perceptions about Hong Kong, another regional arbitral hub, as an international arbitral seat. Singapore also continues to be popular for parties resolving disputes located on the Indian subcontinent.

One arbitrator estimated that Singapore would be the most popular arbitral seat going forward in terms of number of cases, because it is a significant anchoring point for trade and shipping. The welcoming attitude of Singapore’s court system towards international arbitration certainly has contributed to the perception among respondents that Singapore will be a leading seat for international energy arbitrations going forward, not least also because Australia, China, and SE Asia are all feeding their international disputes into Singapore as an arbitral seat.

London’s Staying Power

With respondents being asked to rank their top five out of 11 choices, 49% selected London as their first choice of arbitral seat. Overall, when the rankings were allocated a weighted score, London scored 793 points, compared with an average of 293 points.¹⁷

There do not appear to have been any new factors driving London’s popularity. As one respondent noted: *“London is likely to retain its position as the foremost arbitral seat given the stability of its commercial law.”*

In Europe, Paris and Geneva also scored a significant number of points (463 and 248 respectively). One respondent working in-house at an energy multinational said that those in her organisation have

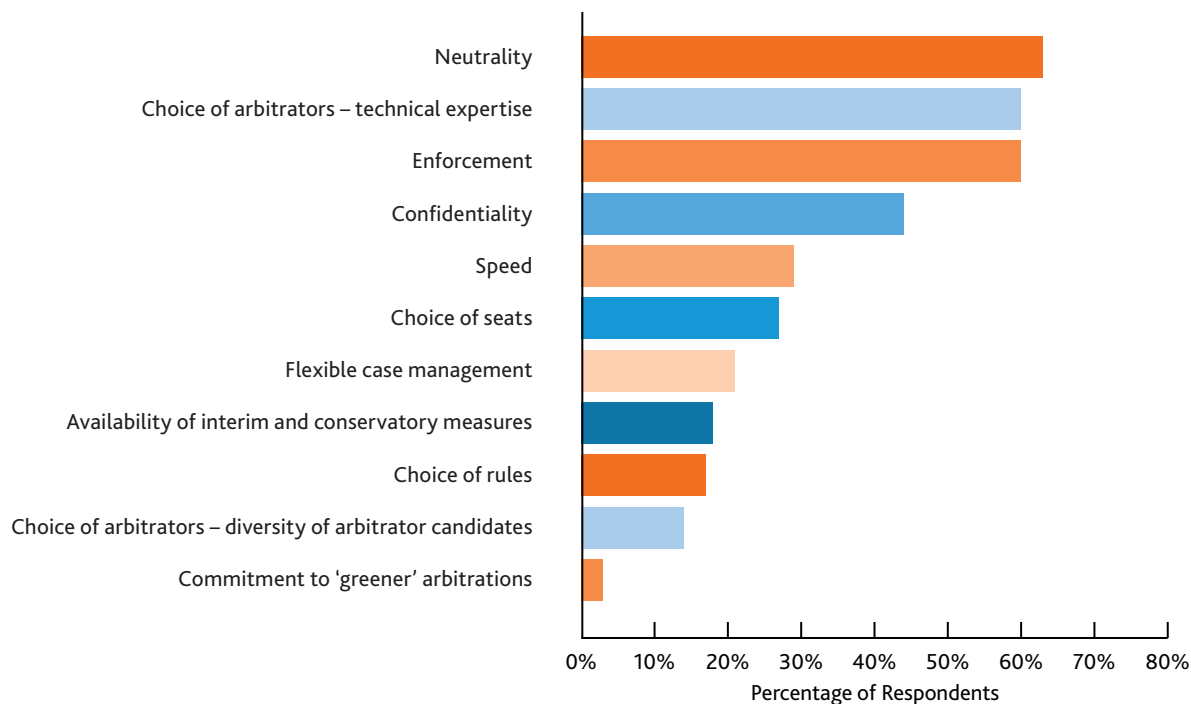
Referrals to Stockholm by Russian parties

Despite the prevalence of disputes in Europe involving Russian entities and the traditional preference amongst Russian parties for Stockholm as a seat, Stockholm scored surprisingly low in Question 29 (229 points). However, it did have the fourth highest share of first place votes. As an in-house counsel at a power generation multinational explained: *“Russian sanctions will lead to a sharp increase in gas pricing disputes with Russian entities, which will likely make their way to the SCC in Stockholm.”* However, it may be the case that restrictions on Russians travelling into the EU will result in Russian-related disputes being referred elsewhere.



Features of Arbitration: What Works, What Changes are Required?

QUESTION 30: Which features of international arbitration are most important for resolving energy-related disputes?



Neutrality

We learned from the quantitative data and from interviews that the most important feature of arbitration for resolving international energy disputes was “*neutrality*” (63%), which most respondents understood as the opportunity to avoid their counterparties’ or host State’s domestic court system.

For respondents in Asia, the process can sometimes feel dominated by foreign lawyers and foreign legal concepts. One Chinese in-house counsel explained that all arbitrations that he has engaged in have been with foreign (non-Chinese) arbitrators and with foreign technical experts. Still, he was willing to compromise on this element of dispute resolution because he was satisfied that the ICC and other similarly situated institutions offered a sufficiently neutral forum. This plays into a perception that institutional arbitration affords more neutrality than ad hoc arbitration. However, in reality, the issue of whether neutrality is affected by it being either institutional or ad hoc is open to question, as in most cases the curial law at the seat of the arbitration will impose

obligations of impartiality on arbitrators and stipulate minimum standards of fairness and justice in the proceedings.

When it comes to more public (interest) disputes, energy can often be a highly politicised issue. This is why, for many respondents, local courts are simply not suitable for resolving these kinds of disputes. One respondent remarked that the majority of international energy disputes are not just technical but require a degree of legal and political finesse and technical specialism for which many domestic courts are simply unsuited. Another respondent confirmed that it was key for them to ensure that the decision maker had a suitable track record and extensive experience in the energy disputes arena which, unlike litigation, arbitration often affords the parties through the ability to choose arbitrators, as addressed below.

“The main driver of arbitration is the need to have a proper, functioning forum where you can enforce your contractual rights.”

Choice of Arbitrators

Party autonomy and the choice of arbitrator was another key feature of arbitration for respondents. 60% of respondents selected “*choice of arbitrators – technical expertise*” as one of the most important features of arbitration for resolving international energy disputes. From interviews with respondents, it became apparent that this technical expertise was understood broadly to mean: an understanding of legal issues in play, along with relevant arbitration laws and rules (i.e., the ability to run an arbitration effectively); technical knowledge of the commercial, engineering, and other relevant factual aspects of a given case; and even mediation and conciliation skills relevant in bringing the parties to an amicable resolution of their dispute, without the need for prolonged enforcement of an eventual award. There were contrasting views from respondents on how specialised / experienced the arbitrators had to be around the technical aspects of the dispute, although respondents’ views were more united concerning the need for arbitrators to be flexible around procedural aspects to ensure efficiency.

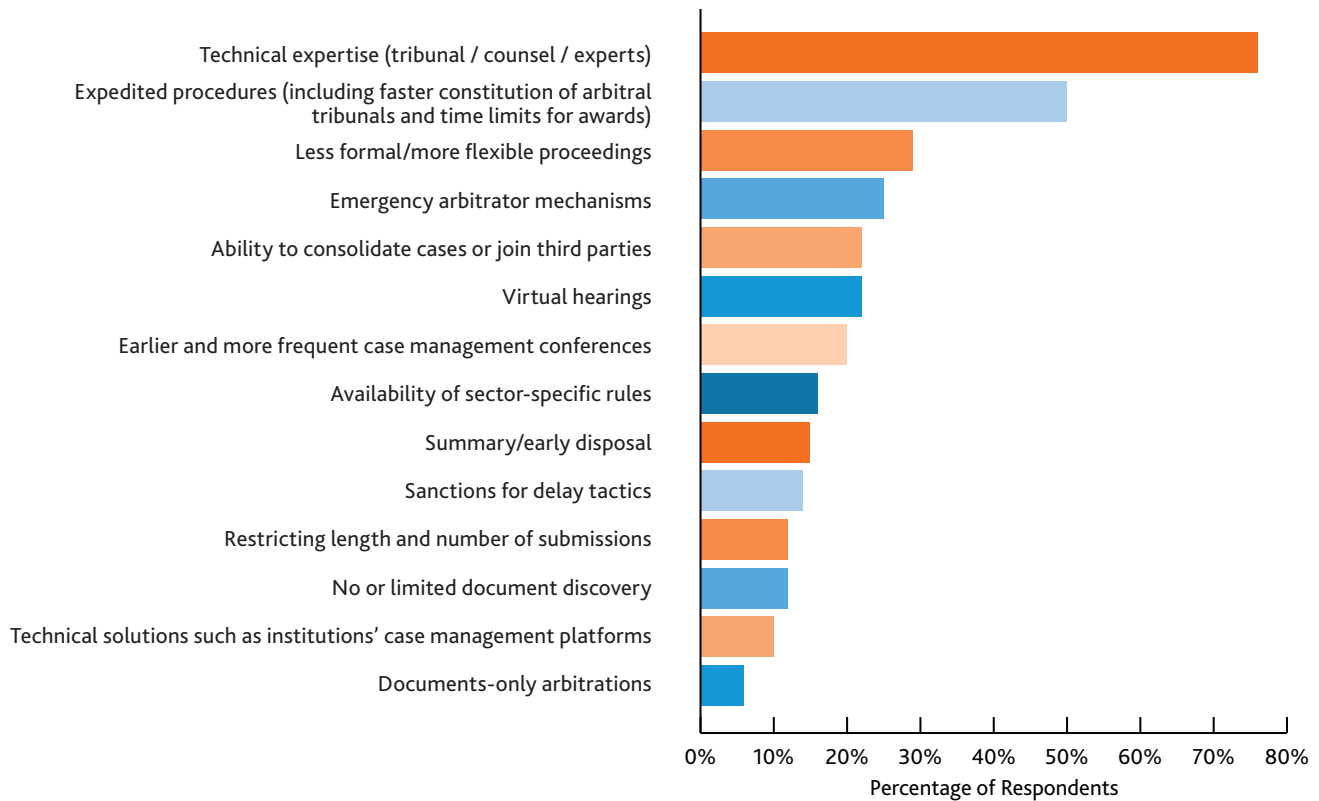
Respondents noted: “*Flexibility gives the participant more control of the process as well as the cost. Speed is related to cost and related to the outcome.*”

“*At the end of the day, if you have a good arbitrator, they don’t need to be an expert, [they] just need to have the ability to understand what the expert has explained to them ... what makes the actual process tailored towards these types of disputes, or any specific or technical disputes, is that in organising the procedure, [it] can be very heavily weighted in time and effort and money spent towards the experts.*”

Enforceability

The final factor that stood out was the importance of enforceability of arbitral awards. In an industry with many high-value claims and multinational parties, global energy disputes often require the ability to identify assets and enforce awards in multiple jurisdictions. Many respondents felt that the existence of the New York and ICSID Conventions, along with strong pro-arbitration legal frameworks in many countries around the world made arbitration a natural choice for resolving high value, complex, and multi-jurisdictional energy disputes. 60% of respondents thus selected “*enforcement*” as one of the most important features of international arbitration for resolving energy-related disputes.

QUESTION 31: Which procedural elements are most important for energy-related arbitrations?



Technical Expertise

Once an arbitration has been initiated, the technical expertise of the tribunal, counsel, and experts are viewed as paramount. 76% of respondents selected “technical expertise (tribunal/counsel/experts)” as an answer choice for Question 31.

Technical expertise in the context of this question was understood by respondents broadly, to cover both an understanding of the underlying legal and engineering facets of the case, and experience in shaping the dispute resolution process to the commercial needs of clients. This is consistent with the findings in response to Question 29. Taken together, these responses illustrate the importance to the parties of the technical expertise and characteristics of arbitrators and their importance in deciding the dispute.

One respondent noted: *“If you have a technical problem, you need a technical solution – if they can’t speak to a technical solution, what’s the point? That’s why they [arbitrators] are the last resort.”*

Expediting the Process

Exactly half of all respondents selected “*expedited procedures (including faster constitution of arbitral tribunals and time limits for awards)*” as being amongst the most important factors. This tracks with the consensus of responses to Question 32 concerning desired innovation in arbitration, detailed below. All parties to the arbitral process would like to see it become more efficient. This is especially true of the end users of arbitration, 66% of whom selected this answer to Question 31.

“ One question that arises out of this issue is whether the various arbitral rules sufficiently empower arbitrators to make decisions at an early stage, or whether it is the arbitrators who are reluctant to utilise the powers that have been given to them (due, for example, to what has been termed ‘procedural paranoia’). ”

Most respondents agreed that the largest share of responsibility to expedite the process falls on arbitrators. Many energy disputes that come across the desks of general counsel only have one or two meaningful issues that are truly in dispute. By and large, end users of arbitration want more mechanisms available to arbitrators to dispose of unmeritorious claims or parts of claims at an early stage. Some institutions are adding these and are broadening the reasons available for arbitrators to summarily dismiss claims. The recent consultation undertaken by the Law Commission of England and Wales on the Arbitration Act 1996 sought views on whether the Act should be amended to include express powers of summary disposal for tribunals.

Respondents called for earlier and more effective case management conferences which are not repetitive.¹⁸

One question that arises out of this issue is whether the various arbitral rules sufficiently empower arbitrators to make decisions at an early stage, or whether it is the arbitrators who are reluctant to utilise the powers that have been given to them (due, for example, to what has been termed ‘procedural paranoia’). In this regard, we note that the major institutional rules (as well as the UNCITRAL Model Law and the UNCITRAL Arbitration Rules) empower arbitrators to run the arbitration as they see fit, and this would conventionally include the power to make early and dispositive decisions affecting the case. Another issue to consider is whether and to what extent practitioners advise their clients to pursue early decisions of this nature. Both of these factors are likely to influence the efficiency of the arbitration process as it relates to energy disputes. The feedback to the survey may suggest that party representatives and arbitrators are not making the most of the flexibility afforded to them by the process but are instead mirroring domestic litigation structures and processes.

One respondent noted: *“Arbitrators should not run the arbitral process like a judge running a courtroom.”*

QUESTION 32: "What innovation(s) would you like to see to make international arbitration more economic, accessible, and efficient?"

Consistent with the responses to the previous question, many respondents, as well as several interviewees, noted a desire to strengthen case management at the initial stages of the formal dispute process. Most respondents who were asked for follow-up on this point indicated they believed arbitrators to be in the best position to "hold parties' feet to the fire" to prevent mala fide delay tactics, to encourage the narrow tailoring of arguments, and to provide avenues for summary disposal of claims. Virtual hearings and improvements and the provision by institutions of online case management platforms were another popular response to this question. One respondent, with several years of experience as a general counsel in a major global energy firm and several more as an arbitrator, noted that he is seeing a trend towards early (sometimes summary) disposition of the 'easier' elements of disputes by arbitrators, without the need for full hearings or witness testimony. He notes that in his experience this proactive approach is almost universally what the parties want when it comes to arbitration of large-scale international energy disputes.

Other feedback focused on the perception that arbitration was overly legalistic and unnecessarily confrontational, and that practitioners and arbitrators are not making use of the flexibility afforded to them, resulting in a lack of commerciality. *"Nothing has really changed in the past thirty years; the process is too confrontational to be all that efficient."*

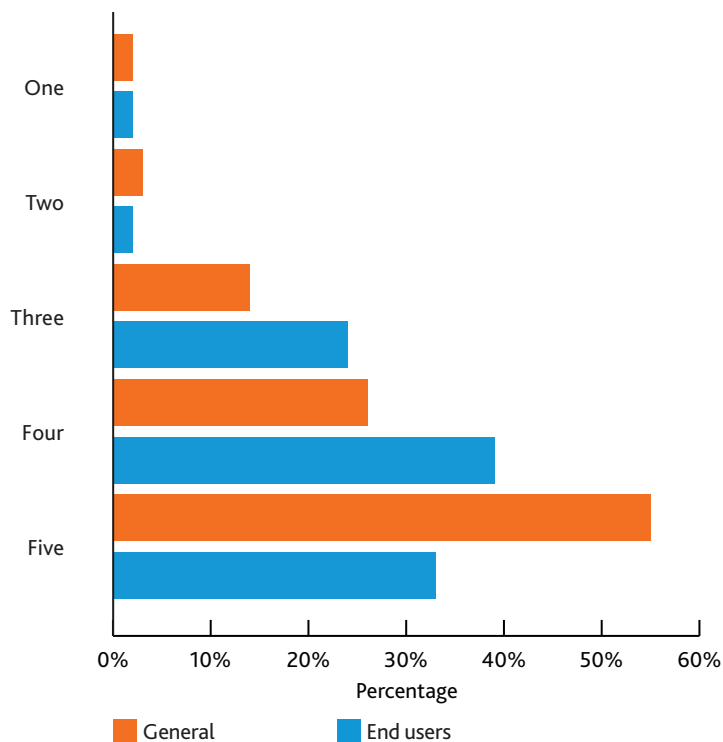
"Most of the time, we have been able to reach settlement with the other side once you have clarity. Everyone's trying to find a solution, sometimes you need a third party who knows what they are saying to say this is what I think is the problem, then parties sit down and try to find a workaround. This is a difference between engineers and lawyers – lawyers want an outcome, who's right and who's wrong – engineers want to fix the problem."

"A lot of useful tools and techniques are available. What is needed are bold arbitrators who are not afraid to render procedural decisions and who are willing to structure the proceedings in an early stage in a suitable manner for the concrete case."

"Non-lawyer focused education. Obviously, it's important to make sure lawyers are informed and aware about arbitration -- but so too, is it important for our commercial colleagues to understand the process. The more they understand it, they more they are comfortable to trust and rely upon it -- and what is more, to speak candidly on how to improve it. In particular, figuring out easy to follow ways to accurately estimate the cost of proceedings, experts, arbitrators (and even counsel) is a bit opaque."

"Arbitral institutions need to have a broader perspective in terms of mirroring what clients are looking for: dispute resolution services. Look at other tools like mediation, expert determination, etc. and offer them on an equal footing with arbitration. Conflict resolution needs to be more of the focus, less so the legal expertise."

QUESTION 33: On a scale of 1-5, how suitable is international arbitration for resolving energy disputes?



Respondents on the whole strongly believe in the suitability of arbitration as a means of resolving international energy disputes. 55% of respondents chose the highest rating of 5, 26% chose a 4, 14% chose a 3 and only 5% chose a 2 or a 1. Most respondents noted that enforceability was key to arbitration’s suitability to resolving energy disputes.

One criticism that has been levied at Queen Mary University’s past arbitration surveys is that the results are skewed by a pro-arbitration bias from the participation of practitioners who rely on arbitration for their livelihood. Taking this critique on board, we made sure that the results of this year’s survey could be disaggregated so that the views of the end users of arbitration could be ascertained. The results of this are shown in the graph above.

Though we see that the enthusiasm for arbitration is somewhat less pronounced among the end user subset, 72% of respondents in this group still indicated a strong belief in the suitability of arbitration for resolving international energy disputes by choosing either a 4 or 5. Additionally, only 4% of end users were unsatisfied with arbitration’s suitability in resolving energy disputes, selecting either a 2 or a 1 to voice their displeasure. This suggests that arbitration is very much the preferred dispute resolution method, even when we discount the practitioner group.

One in-house counsel commented as follows:

“The only thing that keeps me from awarding a 5 is the prevalence of old school approach of one-size-fits all for all disputes, i.e., the tribunal will start from the same PO and Timetable that the chair used in her or his last dozen arbitrations. Institutions, especially case management teams, can and should help nudge arbitrators away from old habits like this.”

Despite some justifiable criticism being levied against arbitration by end users in the energy sector, it appears that arbitration still has a primary role to play in the resolution of international energy disputes. As one in-house counsel put it in an interview, *“users vote with their feet”*; the continued prevalence of energy sector disputes in the annual figures produced by arbitral institutions demonstrates its continued popularity. As things stand, end users show little inclination to move away from arbitration in favour of other dispute resolution mechanisms.

Support for arbitration was high among end users in our dispute resolution matrix in Question 34. One notable trend was that when results were filtered to only include end users, *“negotiation”* scored higher by about 7-8% points for each category of dispute. From this, it appears that despite the generally positive view of arbitration among end users, they nevertheless prefer (understandably) dispute avoidance over dispute resolution.

QUESTION 35: What are your key considerations if you use dispute boards as a means of dispute resolution?

"Most outside counsel tend to grossly underestimate the desire of companies to avoid disputes."

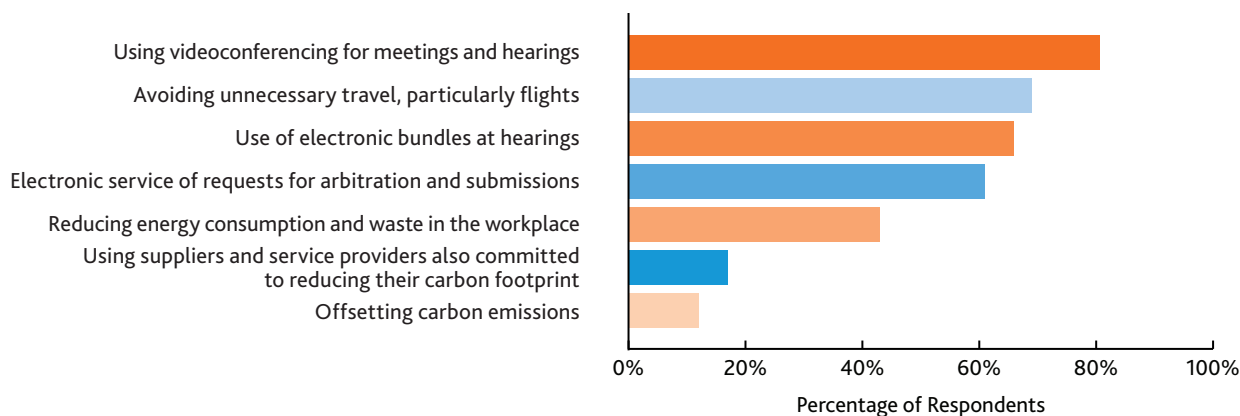
Out of the respondents who indicated a familiarity with the use of dispute boards for resolving energy disputes, 53% listed the "prevention of dispute escalation" and 21% listed "quicker decisions" as their most important consideration. Only "technical expertise of board members" (18%) and "finality of decisions" (9%) received any statistically significant support from this group of respondents. Several respondents even indicated that they did not want final and binding decisions issued by dispute boards, as the process does not generally go far enough into the detail regarding the issues in dispute.

Contractors (entities building / delivering energy assets) generally like dispute boards. This may be due to the fact that certain standard forms of construction contract (e.g., FIDIC) contain a dispute adjudication board mechanism and they are commonly deployed

on World Bank funded projects. One such respondent stressed that he would first seek to refer any claim to a dispute board before arbitration. He stated that every time he has used a dispute board, they have avoided unfairness, even where the contract at issue heavily weighted risks in favor of the employer. One may reasonably infer from this that contractors may perceive dispute boards to be more sympathetic to their position in circumstances where the contractual conditions are not entirely in their favour. Also, the tendency for dispute boards to give both parties something in the context of an ongoing project combined with the more limited time and resource to interrogate the claims referred to them has the consequence that, from the contractor's perspective, weaker claims can sometimes achieve more favourable outcomes than would otherwise be the case if they were the subject to the scrutiny involved in the arbitral process. This may to some extent explain why owners / employers are reluctant to agree final and binding resolution via this mechanism.

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QUESTION 36: The Campaign for Greener Arbitrations has focused on areas in which the arbitration community can commit to reducing its carbon emissions. What are your priorities?



For respondents, the most popular items on the Campaign for Greener Arbitrations' agenda in reducing carbon emissions were *"using videoconferencing for meetings and hearings"* (81%), and *"avoiding unnecessary travel, particularly flights"* (69%). Another important and practical priority was that of the *"use of electronic bundles at hearings"* which accounted for 66% of the respondents' priorities.

According to respondents, the widespread adoption of virtual hearings and meetings brought on by the COVID-19 pandemic has changed the nature of international arbitral practice for the foreseeable future, and arguably allows for more diversified and global participation in international arbitration. It also shows consistent (and encouraging) support for innovation in making international arbitration more

economical, efficient, and accessible (as is canvassed by the responses to Question 32, above). Many respondents also noted that the efficiency gains and cost reductions allowed for by the normalisation of virtual hearings go hand in hand with environmental considerations. This was a common refrain for those few respondents who were adamant in Question 37, which findings are set out below, that green credentials would impact their choice of arbitral service provider. For these respondents, there was no separating waste and carbon reduction in the arbitral process from increased efficiency, which together help to considerably reduce the marginal costs of resolving international disputes.

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QUESTION 37: The Campaign for Greener Arbitrations - does green arbitration practice have an impact on end user choice?

We asked respondents whether 'green' arbitration credentials would impact their choice of arbitral service providers. While 52% of respondents indicated that they would not, the sizeable minority of 48% said that they would.

When pressed to elaborate on their choice, nearly all respondents (including those who answered 'yes') noted that while it may make some impact on their selection of law firm, expert, institution, or arbitrator, green credentials were at or near the bottom of their list of priorities in making such a choice. The message from the majority echoes these views, with a respondent noting that *"The overriding focus remains on the service. 'Green' considerations are, of course, 'good' and even 'expected' at this point, but not likely to influence the overall decision."* In comparison, another respondent noted that *"This is a corporate priority for us, and if we can choose between one who has these credentials and one who doesn't (all other things being equal) we're for sure probably going to go green."*¹⁹

This finding is consistent with the priorities respondents were asked to consider at Question 36, where *"using suppliers and service providers also committed to reducing their carbon footprint"* was not essential (17%), with the emphasis being placed on other factors, such as client needs, the quality of service and advice, and expertise.

However, feedback from respondents who elaborated on their answer seems to suggest that a consideration of these green credentials has a wider application, with certain respondents noting that there is going to be a need for significant buy-in from institutions and organisations in the future – an issue that is becoming more and more prevalent – with one respondent noting that it will become a *"licence to operate"*.

Interestingly, a higher proportion of respondents from the Americas (54%), Asia (50%), Middle East (65%) and Africa (50%) considered that green arbitration credentials would influence their choice of arbitral service providers compared with respondents from Europe (43%).

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Third Party Funding

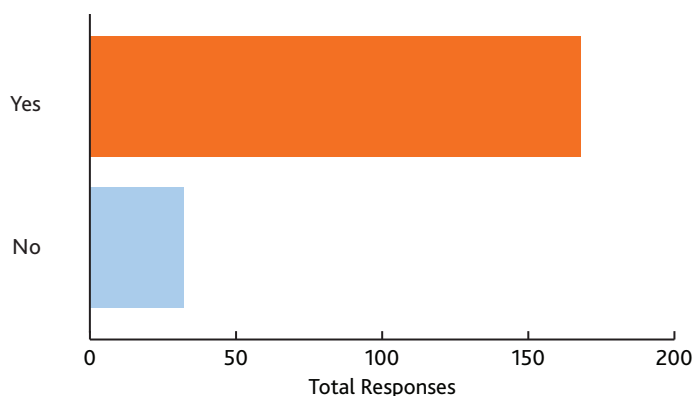
QUESTION 38: Do you think we will see an increase in third party funding of energy-related disputes?

A very significant majority of respondents (84%) indicated they believed there would be an increase in third party funding of energy-related disputes. Most respondents cited: large amounts in dispute, increasing turmoil in energy markets leading to parties needing funds/cashflow, and the lucrative nature of these disputes as the reason for their answer choice. Some activist funders are also targeting corporations as prospects for climate change disputes, as many are not taking environmental obligations seriously enough. As these claims become more readily quantifiable in the future,²⁰ this is a development to keep an eye on.

One respondent noted: *“Clients are becoming more risk adverse and feel that arbitrations are less of a “sure thing” to recover their claims. [Third party funding] will help them offset the risk of the cost of experts and counsel.”*

In contrast, one interviewee among the minority that did not anticipate an increase in third party funding of energy-related disputes opined that parties to the types of disputes in which the interviewee was active

(M&A / JV disputes driven by the energy transition) would generally have strong claims and would not need assistance in funding the disputes. They also remarked that, in their experience, the end user would go through the process of obtaining third party funding but would tend to *“back out when it comes time to sign away a portion of their claimed damages on the dotted line”*.



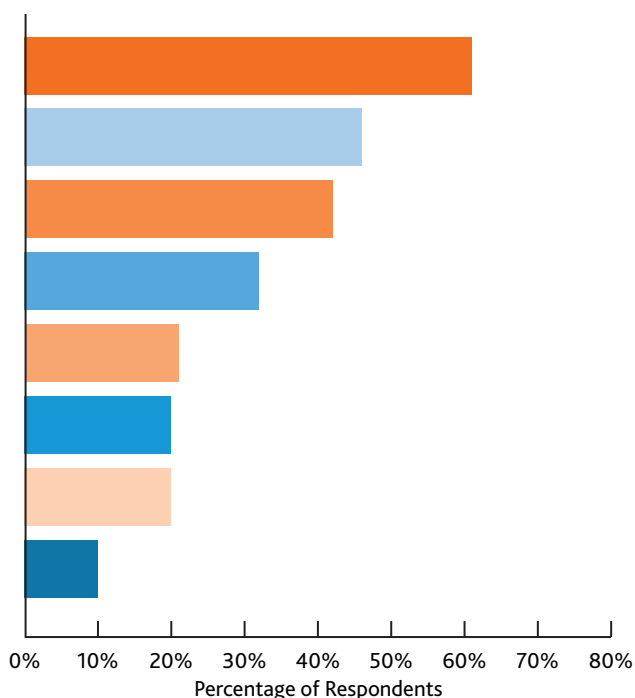
QUESTION 39: For what types of energy disputes do you think third party funding will most be utilised?

Most respondents believe that *“energy infrastructure”* (61%) and *“investment”* (46%) will be the dispute types with the highest reliance on third party funding going forward. One interviewee who leads a major litigation and arbitration finance company echoed that the

majority of cases in her portfolio are in these two types of disputes, mainly because they tend to involve the largest sums in dispute and generally have the most predictable outcomes of any form of international energy dispute.

Energy infrastructure and equipment (including construction procurement and supply chain, ageing assets, stranded assets, and decommissioning)

- Investment
- Energy transition/new technologies
- Climate change and environment
- Security of energy supply
- Funding/financing
- Price volatility
- Sanctions



Investor-State dispute settlement of international energy disputes: is there a way forward?

The survey concluded by asking a series of questions aimed at understanding respondents’ perceptions of investor-State arbitration as a mechanism to resolve energy disputes, both present and future. The ISDS landscape is experiencing dynamic and fast-changing reforms at present which form the backdrop to the respondents’ answers. These include the recent entry into force of the revised ICSID Arbitration Rules, the significant decisions of *Achmea*²¹ and *Komstroy*²² regarding the permissibility of intra-EU investment arbitrations, the proposed reforms of the Energy Charter Treaty (ECT) and a wider discussion as to the legitimacy of investor-State dispute settlement and the potential creation of a multilateral investment court.

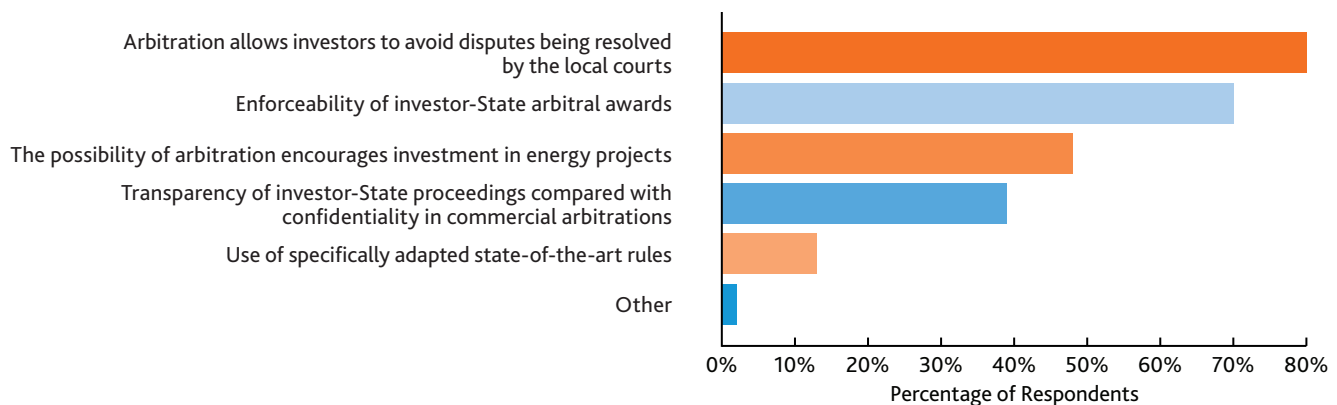
It is worth noting that the survey period concluded at a time when signatories of the ECT were preparing to vote on the adoption of an amendment for the purpose of modernising the ECT, including provisions allowing States to remove protection of fossil fuel investments over a progressive timescale.

Since the conclusion of the survey period, a number of ECT member States (including Spain, the Netherlands, France, Poland, Slovenia, Germany and Luxembourg) have all announced their intention to withdraw from the ECT, and the vote on the modernisation amendment has been deferred for the spring of 2023. The European Parliament has called for the EU to exit the ECT, on the basis that even the modernised text of the ECT is not aligned with the Paris Agreement, EU climate law, or the objectives of the European Green Deal.

In this unsettled context, it is unsurprising that many end users of arbitration noted that they would only consider investment arbitration as a last resort or as part of a larger strategy to completely exit business operations in the host country in question.

Advantages of Investor-State arbitration

QUESTION 40: What are the advantages of investor-State arbitration as a mechanism to resolve energy disputes?



Avoidance of Host-State Court Systems

While the responses to Question 30 revealed that neutrality was the most important feature of arbitration for resolving commercial international energy disputes, respondents who had experience with investor-State dispute resolution noted similar views regarding investment arbitration. 80% of respondents saw the fact that “*arbitration allows investors to avoid disputes being resolved by the local courts*” as a main benefit of investor-State arbitration. It is this neutrality or depoliticisation of investment disputes that drove the growth of investor-State arbitration in the recent decades and continues to be its main perceived advantage.

One respondent commented that “*[t]he oil is where it is; it’s not like technology where you can choose where it is located*”. Such answers revealed the view by respondents that energy sources and supplies – particularly fossil fuels (and increasingly minerals crucial to the development of renewable energy sources) may not be located in host States whose local courts afford foreign investors a reassuring or realistic forum for dispute resolution.

Enforceability of Awards

The enforceability of awards rendered by tribunals in investor-State cases came out as a main benefit for 70% of respondents. While academic debate persists in the wake of *Achmea* and *Komstroy* as to the continued availability of intra-EU ISDS and the enforceability of awards rendered in intra-EU treaty disputes (including those under the ECT), the majority of respondents appear not to have been discouraged from investor-State arbitration by these developments. Interventions by the European Commission have become par for the course in intra-EU cases following the findings in *Achmea* and *Komstroy*. Nevertheless, the continued confidence in intra-EU arbitration may reflect the fact that to date, tribunals have largely not been dissuaded from exercising jurisdiction in intra-EU cases. Still, investor-State arbitration outside the EU does not appear to be subject to similar concerns and hence the enforceability of such awards is highly regarded.

Issues in Resolving Climate Change Disputes

QUESTION 41: What challenges does investor-State arbitration face as a process for resolving climate change related disputes?

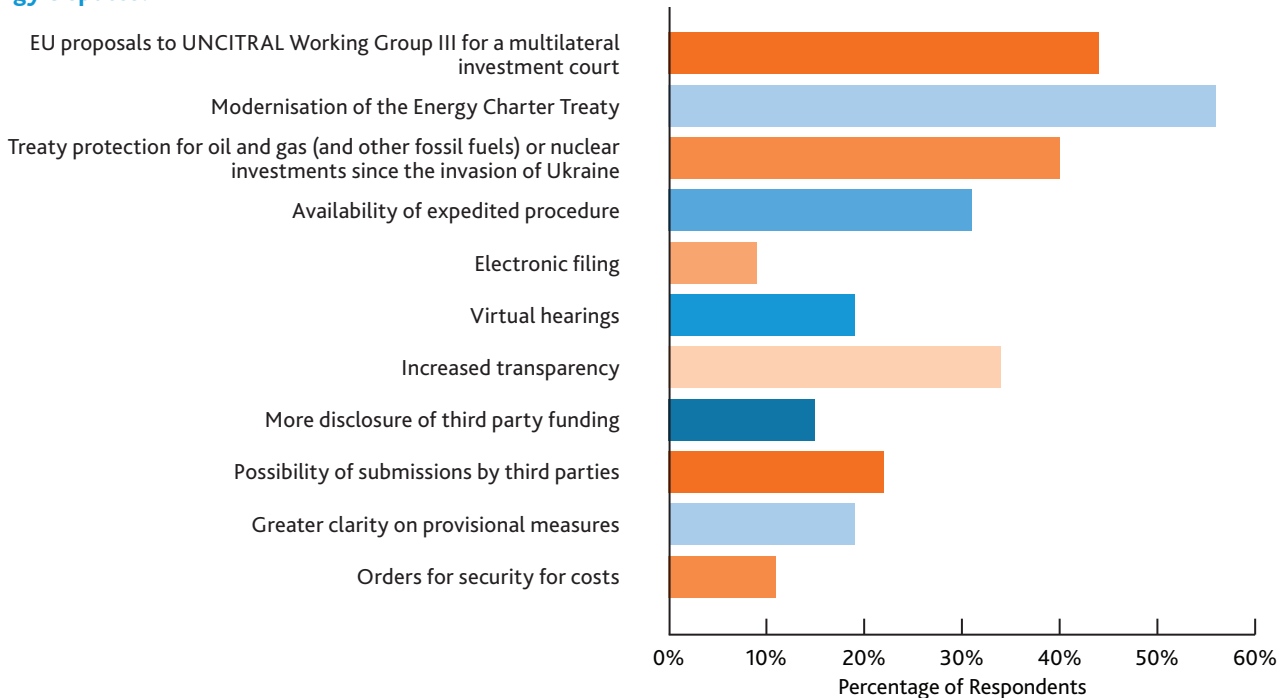


Responses to Question 41 were less conclusive, with no one category receiving a majority of respondents' support. The takeaway appears to be that investor-State arbitration, both generally and in the specific context of climate change related disputes, faces a number of very real challenges. At present, climate change disputes remain a largely untested area, and few respondents felt confident to comment on what factors would present the greatest challenges in the short to medium term.

That said, a few factors stood out. 41% of respondents as a whole and 50% of end users of arbitration said that "*arbitrator bias and issue conflicts*" would present a major challenge for the resolution of international climate change disputes by way of investment arbitration. There was also a geographic component that was noticeable in the data. For example, from the general global population of respondents, only 38% thought that the "*termination of intra-EU bilateral investment treaties*" would present a major challenge, whereas 54% of European respondents selected this answer choice as one of their primary concerns.

An Uncertain Future for Investor-State Arbitration

QUESTION 42: What major developments in investor-State arbitration will most influence its suitability for resolving energy disputes?



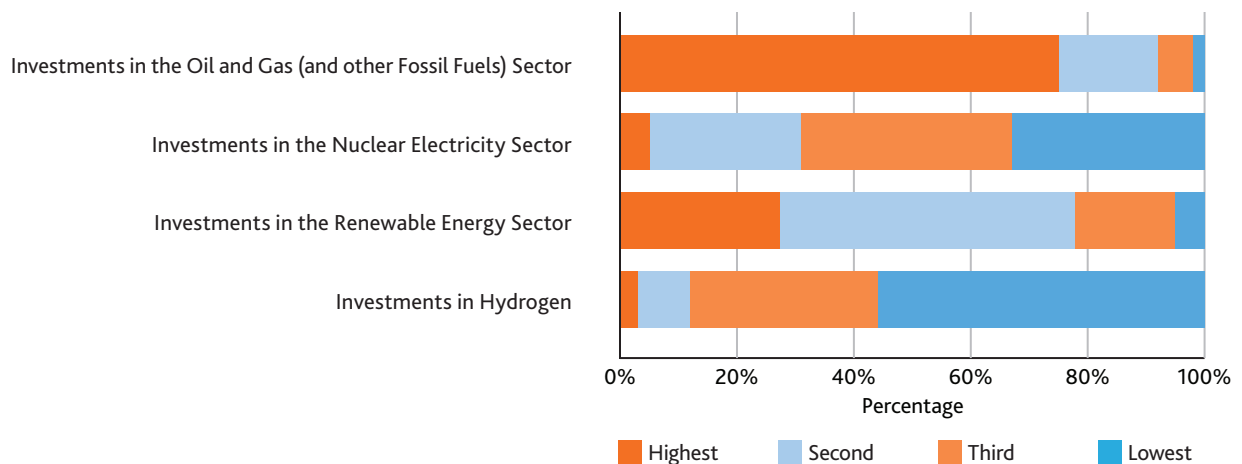
Unsurprisingly given the prominent public coverage of the debate regarding the ECT modernisation proposals at the time of the survey, a majority of respondents indicated they saw this as the major development most likely to influence their view on the suitability of investor-State arbitration to resolve energy disputes. The proposals by the EU to the UNCITRAL Working Group III on the creation of a multilateral investment court was the next most popular choice, indicating that amongst survey respondents at least, there is appetite to explore the possibility of such a court as an alternative to the status quo. One interviewee whose involvement in ISDS is primarily investor-sided indicated that the views on the suitability of investor-State arbitration as a dispute resolution mechanism would likely differ depending on the party’s approach: while States might identify significant transformations such as ECT modernisation, multilateral investment courts and increased transparency as factors influencing

suitability, investors were likely to be more interested in pragmatic factors such as increased use of electronic filing and virtual hearings. In fact, the broader consensus is rather wait-and-see. A previous (2020) QMUL survey on users’ views on ISDS reforms²³ concluded that, where possible, investors would opt for contract-based arbitration, although concerns were expressed as to the ability to improve efficiency in arbitrations involving States.

One respondent noted: “... arbitrators want States to get the fullest possible opportunity to get their case across, and States tend to be much less well organized than private parties. There is a tendency to give them too much time and opportunity to make submissions [...] making the process almost impossible to streamline”.

“ The proposals by the EU to the UNCITRAL Working Group III on the creation of a multilateral investment court was the next most popular choice, indicating that amongst survey respondents at least, there is appetite to explore the possibility of such a court as an alternative to the status quo. ”

QUESTION 43: What proportion of the investment arbitrations you are involved in concern...



"The oil is where it is, it's not like technology where you can choose where it is located."

Question 43 asked respondents to identify the proportion of the investment arbitrations they were involved in that related to specific energy sources.

Oil and Gas investments continue to make up the largest proportion of investment arbitrations seen by survey respondents. While the majority of respondents are not yet seeing renewable, nuclear and/or hydrogen disputes resolved at investor-State level at the same rate as disputes relating to fossil fuels, ECT statistics reveal that most cases under the ECT now relate to renewable energy sources, and the latest ICSID caseload statistics show that renewables disputes are outpacing those related to fossil fuels. As a matter of fact, at the time of drafting this report, only one ECT case relates to fossil fuel and another to nuclear energy. The responses to this question suggest that most respondents have had disputes resolved outside ICSID or not under the auspices of the ECT.

QUESTION 44: How many oil and gas disputes you have been involved in concern measures taken by host States in order to reduce greenhouse gas emissions or otherwise combat climate change?

For those respondents who had experience of oil and gas disputes resolved by investor-State arbitration, most indicated that only a very small number of those disputes related to measures taken by host States to reduce greenhouse gas emissions or otherwise combat climate change.

One respondent with significant experience of funding investor-State arbitrations relating to oil and gas disputes estimated that at least seven of the cases they had dealt with related to the reduction of greenhouse gas emissions or measures to otherwise combat climate change. However, it was noted that some investors or States may retroactively seek to describe disputes as relating to emissions reductions or combatting climate change

QUESTION 45: If you have been involved in cases arising under the Energy Charter Treaty, how many involve intra-EU investment protection claims?

A lower-than-average proportion of respondents answered Question 45, indicating that amongst the overall pool of respondents to the survey, fewer than a third had experience of energy disputes under the ECT.

Of those who did answer the question, a majority indicated that a small number of the ECT cases of which they had experience related to intra-EU disputes, with one respondent commenting that as the intra-EU dynamic (i.e., the EU policy, expressed in a number of cases before the Court of Justice of the European Union, for abolition of intra-EU investment claims and the related termination of intra-EU BITs) is a "comparatively new development in the ISDS space [so] we will see more in the future".

Again, respondents with experience of arbitrating intra-EU disputes under the ECT indicated that in the majority of those cases, the EU Commission has intervened in an attempt to persuade the arbitral tribunal to abide by the *Achmea* and *Komstroy* decisions.

Appendix 1 – Methodology and demographics

The research for this study was conducted from May to October 2022 by Jason Czerwec, J.D. and LL.M., Pinsent Masons Research Fellow in International Arbitration at the School of International Arbitration, Queen Mary University of London, together with Professor Loukas Mistelis, Clive M Schmitthoff Professor of Transnational Commercial Law and Arbitration, Director of the QMUL-UNIDROIT Institute of Transnational Commercial Law. They were assisted by Norah Gallagher, Director of the School of International Arbitration, Queen Mary University of London and Giammarco Rao, Ilse Schmitthoff Research Fellow in International Arbitration.

An external focus group comprised of senior in-house counsel, private practitioners, arbitrators, technical experts, representatives from arbitral institutions, academics, and third party funders provided valuable

feedback on the draft questionnaire. The research was conducted in two phases: the first quantitative and the second qualitative.

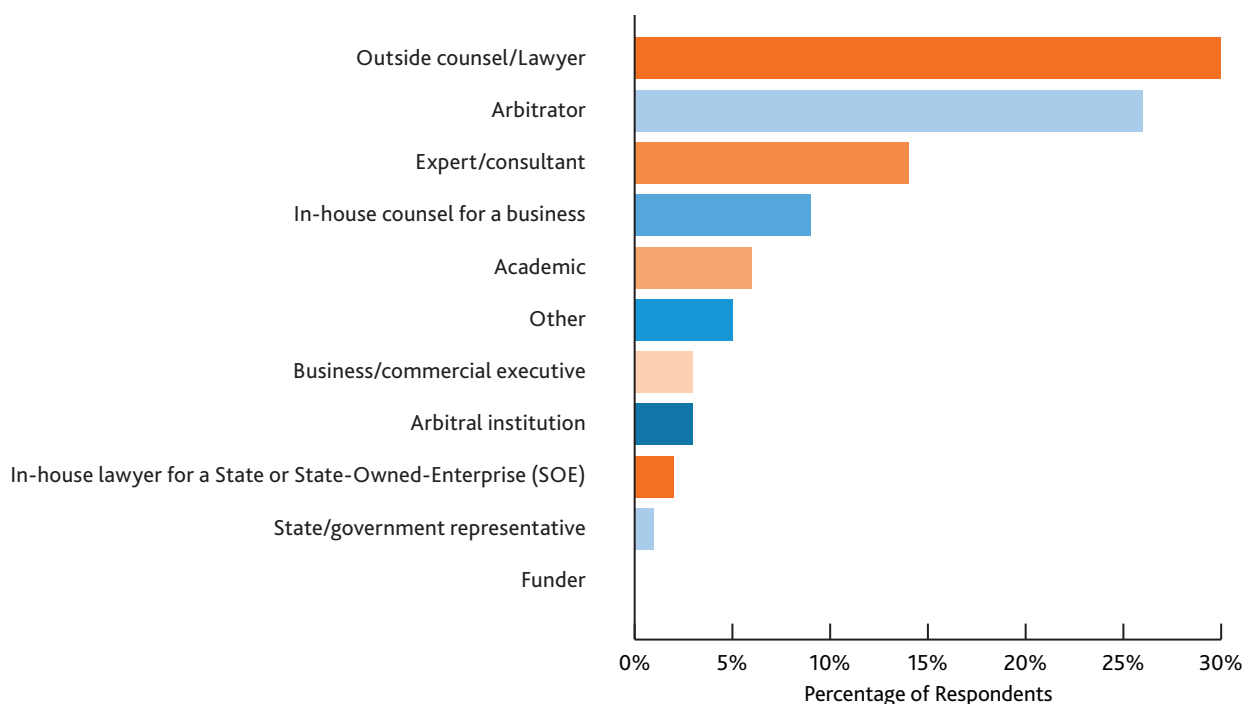
In Phase 1 an online questionnaire of up to 45 questions (the number of questions varied depending on respondents' roles and sectors) was accessed by more than 900 respondents. The survey aimed to capture a broad representation of those engaged in international energy transactions and projects and categorised the diversity of its respondents by their: (i) role in the arbitral process; (ii) location; (iii) energy subsector focus; and (iv) length of experience along with number of energy arbitrations conducted within the past five years. In Phase 2 we conducted extended interviews with over 50 individuals from a wide cross-section of these categories.

QUESTION 6: Role in the arbitral process

Respondents were asked to specify their role in the arbitral process and were able to select multiple entries to account for instances in which one respondent might play multiple roles.

There was a broad spread of responses received: outside counsel (30%), arbitrator (26%), expert or consultant (14%), in-house counsel (16%) (either for a private business (including as an executive, 3%)

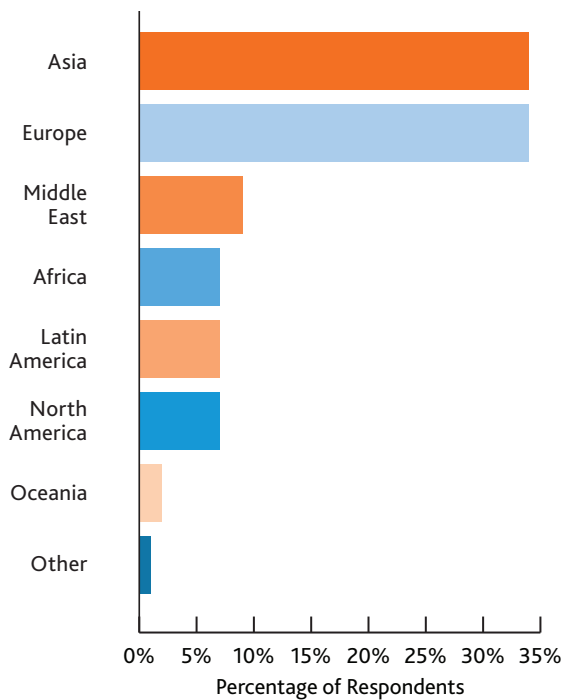
or a State (including as a State representative (1%) or State-Owned Enterprise (2%)), and representatives of arbitral institutions (3%). The remainder (roughly 11%) were Funders (<1%), Academics (6%) and other roles (5%). Of those who clarified their role in the "Other" category, popular answers included: "Mediator", "Arbitral Secretary", and "Consultant".



QUESTION 7: Location

Respondents were asked to specify the location of their business or legal practice. Again, in order to account for persons working across jurisdictions, respondents were able to select multiple answers to this question.

The spread of respondents was Asia (34%), UK (21%), Europe (13%) (UK and Europe combined as the whole of Europe was 34%), Middle East (9%), Africa (7%), North America and Latin America (14%) and Oceania (2%). As a result, there was good representation from both civil and common law jurisdictions.



QUESTION 8: Energy subsector focus

Respondents were asked to specify the energy subsector(s) on which they focus. Again, respondents were given the opportunity to select multiple answer choices and here, there was a great deal of overlap.

Of the responses received, experience ranged from “Oil and Gas (and other fossil fuels)” (32%), “renewable energy” (27%) and “power (generation, transmission, and supply)” (25%). A comprehensive review of the responses revealed a considerable overlap between these three categories, for those outside counsel, arbitrators, and experts and consultants working in the energy field. Both “nuclear” (6%) and “hydrogen” (5%) represented more specialised groups.

QUESTION 9: Experience with energy sector (number of years) and Question 10 - Number of energy-related arbitrations involved in within the past five years

Respondents were asked to state the length and depth of their experience in the energy sector and with energy arbitrations.

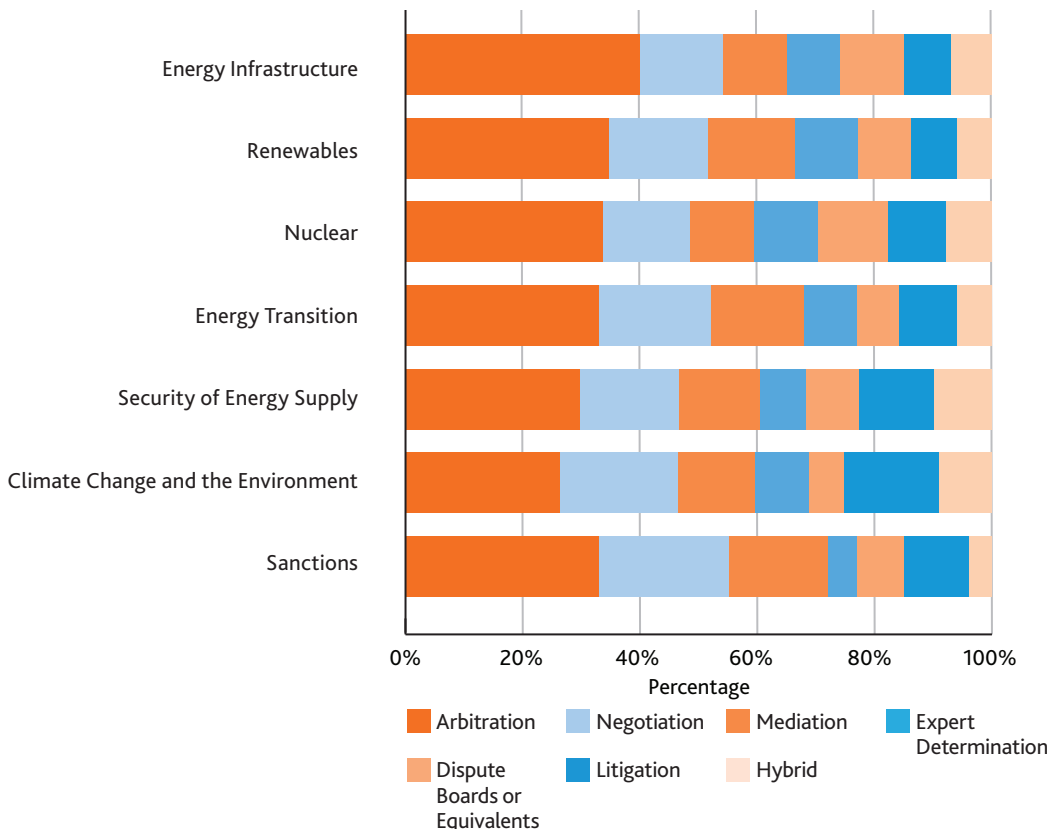
The responses received revealed a wealth of experience: in the past five years 45% of respondents had been involved in four or more and 15% had been involved in more than ten energy-related arbitrations. The majority of respondents had over ten years of experience in the energy sector (54%), and the next-highest group had over twenty years of experience (30%).

“ The spread of respondents was Asia (34%), UK (21%), Europe (13%) (UK and Europe combined as the whole of Europe was 34%), Middle East (9%), Africa (7%), North America and Latin America (14%) and Oceania (2%). As a result, there was good representation from both civil and common law jurisdictions.



Appendix 2 – Dispute resolution matrix

QUESTIONS 26 AND 34: which mechanisms will be suitable for resolving different types of energy disputes?



We used a polling matrix to understand how respondents would choose to resolve each of the main categories of dispute which we laid out in the survey. Out of all the categories of disputes polled, “*arbitration*” (901/2723) was a clear favourite, nearly doubling up the next highest answer choice of “*negotiation*” (489/2723) and more than doubling up “*litigation*” (295/2723) and “*mediation*” (379/2723).

Respondents who selected litigation as their preferred mechanism for resolving certain types of disputes (the most significant being climate change, nuclear and security of supply disputes) did so because of their

public interest nature, rendering them more suitable for a more public form of dispute resolution. Dispute boards were relatively unpopular with respondents, except for disputes relating to “*energy infrastructure*” (11%) and “*nuclear*” disputes (12%). In these latter categories, it is very likely at the outset of a project that disputes will arise. Therefore, the more proactive form of dispute resolution offered by dispute boards made sense to respondents who had experience with them.

“ Respondents who selected litigation as their preferred mechanism for resolving certain types of disputes (the most significant being climate change, nuclear and security of supply disputes) did so because of their public interest nature, rendering them more suitable for a more public form of dispute resolution. Dispute boards were relatively unpopular with respondents, except for disputes relating to “energy infrastructure” (11%) and “nuclear” disputes (12%).

Appendix 3 – School of International Arbitration, Queen Mary University London

The School of International Arbitration (the "School") was established in 1985 under the auspices of the Centre for Commercial Law Studies at Queen Mary University of London and it was the first international arbitration university institute in the world.

Its aim was, and still is today, to promote advanced teaching and produce excellent research in the area of international arbitration and international dispute resolution generally. To achieve these objectives, the School offers a wide range of international arbitration courses including specialist LLM modules, postgraduate diplomas, an online LLM, professional training, executive education and one of the largest specialist PhD programmes in the world. Today, the School is widely acknowledged as the world's leading postgraduate teaching and research centre on international arbitration.

Since its establishment, more than 3,000 students from more than 100 countries have graduated from the School and more than 40 PhD students have successfully completed their doctoral studies. Many of our graduates are now successfully practising arbitration around the world as advocates, in-house counsel, academics and arbitrators. Others serve governments, international organisations, including UNCITRAL and the World Bank, or work for major arbitration institutions.

From one academic member at the outset, the School now has a range of full-time professors, readers and senior lecturers, a strong network of part-time and visiting academic members, and campuses in London and Paris. Although the School is physically located in the centre of legal London, our faculty delivers courses all over the world and we offer distance learning programmes in international dispute resolution, in addition to our London-based flagship programmes. Apart from its academic staff, the School involves several high-profile practitioners in its teaching programmes. This adds crucial practical experience to academic knowledge and analysis.

Further, the School has close links with major arbitration institutions and international organisations working in the area of arbitration. It also offers tailored consulting services and advice to governments and non-governmental agencies that wish to develop their knowledge of arbitration, as well as training for lawyers in private practice, in-house counsel, judges, arbitrators and mediators.

The strength of the School lies in the quality and diversity of its students and the desire of the School's staff to shape our students' academic and professional development. However, the work of the School extends well beyond the classroom and plays a leading role in the evolution of arbitration as an academic subject. Arbitration is a dynamic and adaptable process and so is the School in its profile and outlook.

For further information, please visit the School's website: www.arbitration.qmul.ac.uk

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Appendix 4 – About Pinsent Masons

Pinsent Masons is a purpose-led, professional services business with law at the core. Headquartered in London, Pinsent Masons provides a network of 28 locations across the globe in Europe, Africa, the Middle East and Asia Pacific.

The firm is highly regarded for its focus on innovation and commitment to diversity. We were named 'Law Firm of the Year', at the Legal Business Awards 2021 recognising our achievements, from continuing to be a market leader across our five focus sectors, to expanding our revenue streams outside of traditional legal services through a range of innovative new law products.

We are a full-service firm, that advises clients with international operations that extend right across the globe. We recognise that giving a first-class legal service goes beyond pure legal guidance; a solid understanding of cultural and local commercial issues underpins all of our advice.

We take pride in the work we do with our clients to think differently. Innovation sits at the heart of our strategy. For us, it's about more than finding ways to make an old model fit a new world. Innovation is about fundamentally changing how high-quality legal advice is formulated and excellent service is delivered. We are partnering with our clients to lead through innovation, rather than be disrupted by it.

A leading global international arbitration practice

We pride ourselves on our deep sector knowledge and our world-class reputation in successfully representing our clients on high-value and technically complex arbitrations, often in the context of high profile and politically sensitive projects and transactions. We represent clients in international arbitrations arising out of major energy projects and investments and the procurement of some of the world's most iconic capital projects in the infrastructure space. They include up and downstream oil and gas facilities, such as refinery, pipeline and process engineering facilities, all aspects of power generation including renewables, nuclear and nuclear decommissioning, and major capital schemes such as airports, rail, tunnels, bridges, ports, roads, sports stadia, water and waste management.

Typically, at any one time, we are instructed on over 100 international arbitrations, with a portfolio of cases that exceeds USD 12bn in dispute. Our team of more than 200 dedicated arbitration practitioners is regularly ranked among the top 100 arbitration practices worldwide by the Global Arbitration Review.

Energy team leading new thinking

Sector insight is absolutely central to the way we work. The firm supports clients by providing a full range of legal services across a wide range of sectors globally, one of which is Energy. We have a market-leading practice combining a wealth of transactional and contentious experience and one of the largest dedicated energy teams of any international law firm.


The energy sector is used to dealing with changing political priorities, liberalisation of markets, regulatory uncertainty and geopolitical sensitivities. There has also been an increase in technological innovation and ever-increasing demand. Few other sectors face challenges on this scale. Whether businesses are inventing new means of harnessing energy or finding cleaner ways to use existing resources, we help our clients embrace future change in the way they do business.

Supporting clients across the whole energy sector

We operate globally across the energy spectrum, from upstream and downstream oil and gas, nuclear, power generation, energy management, electricity and gas transmission to renewables, low carbon solutions, carbon capture and storage, gas storage projects and asset decommissioning. Clients include major multinationals, FTSE/ AIM-listed companies, utilities, and ambitious independents.

Leading the way in innovation for energy clients

Our multidisciplinary teams help us share insights gained from strong industry connections with government, regulatory bodies and the wider financial community. We are leading new thinking alongside our clients in areas such as unconventional hydrocarbon extraction, asset decommissioning and the application of "smart" technologies.

 **The firm is highly regarded for its focus on innovation and commitment to diversity. We were named 'Law Firm of the Year', at the Legal Business Awards 2021 recognising our achievements, from continuing to be a market leader across our five focus sectors, to expanding our revenue streams outside of traditional legal services through a range of innovative new law products.**

Appendix 5 – Acknowledgements

The School of International Arbitration would like to thank Pinsent Masons LLP for its financial support and substantive assistance, in particular, Jason Hambury, who led the project on behalf of Pinsent Masons along with Nicholas Turner in Hong Kong and Gillian Carmichael Lemaire in London. They were assisted, in particular, by Mitchell Abbott, Richard Ashmore, Clea Bigelow-Nuttall, Charles Blamire-Brown, Charlie Chetwood, Michael Cottrell, Adrian Elliott, Daniel Gardiner, Alexander Grant, Melanie Grimmitt, Mark Harris, Chloe de Jager, Stacy Keen, Jean-François Le Gal, Dr Dean Lewis, Mark Raymont, Gurmukh Riyat and Tom Stocker.

We are also grateful for the support of the Pinsent Masons Business Development Team (Emma Higgins and Vicki Clark), Social Media Manager Jo Waggitt, and the design team (Nicky Harris, David Pegg and Nerys James).

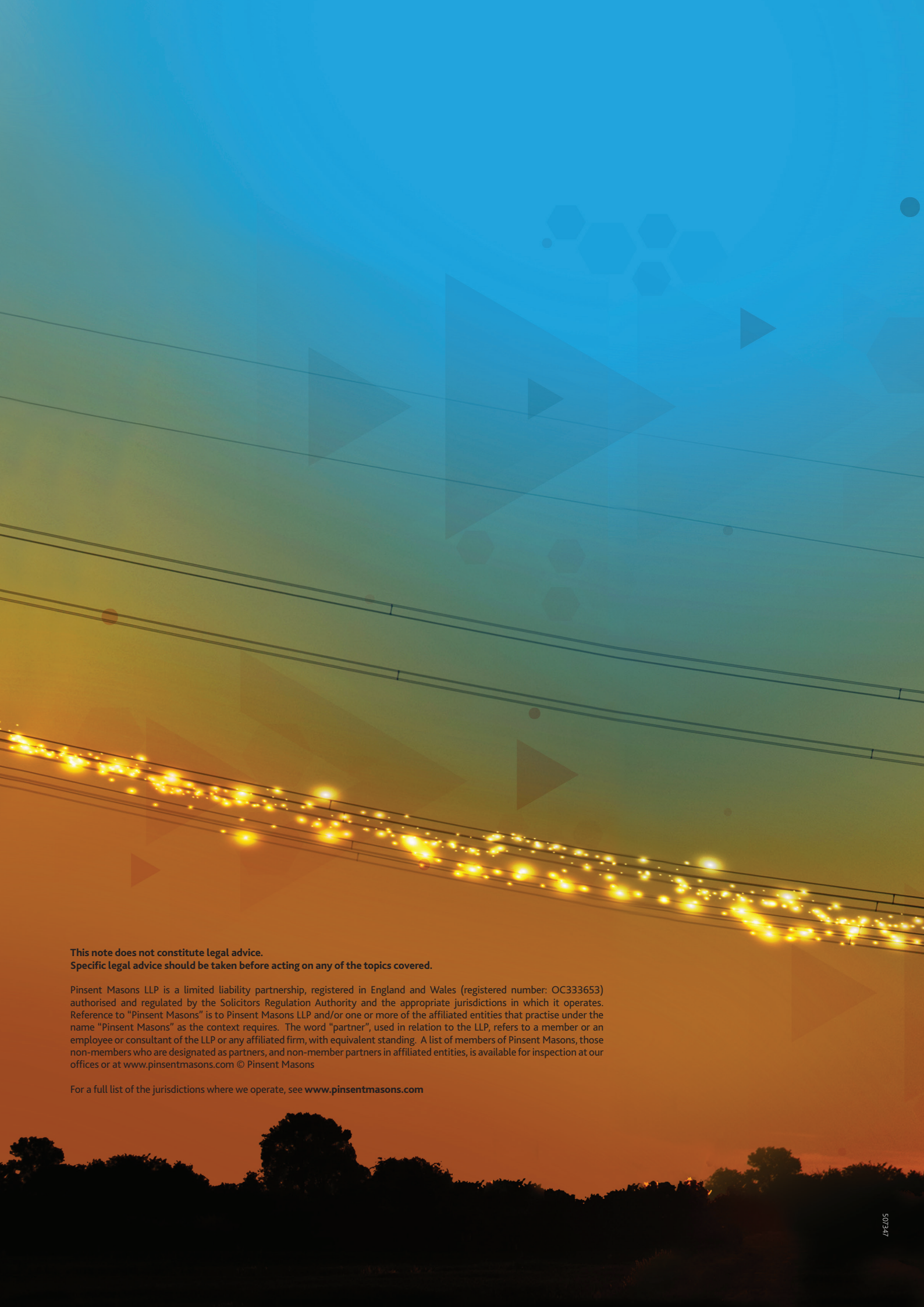
We would also like to thank our external focus group for feedback on the questionnaire and methodology, including: Christian P. Alberti, Stuart Amor, Ignacio Ateaga, Professor Peter Cameron, Alejandro Carballo Leyda, Adam Constable KC, Graham Coop, Brendan Cronin, Khaled Elgarhe, the Rt. Hon. Dame Elizabeth Gloster DBE, PC | OEC, Robert Hanna, Kaj Hober, Dr Dalia Hussein, Colin Johnson, Kai-Uwe Karl, Pablo López Garde, Wendy Miles KC, Sophie Nappert, Victor Orellana Martinelli, Alison Pearsall, Rekha Rangachari and Jennifer Shafer.

We also indebted to TDM/OGEMID, Global Arbitration Review and Tales of the Tribunal, as well as AAA/ICDR, ArbitralWomen, BAC/BIAC, CAM-CCBC, CAM Santiago, CI Arb, CPR, CRCICA, DIS, EDAC, Energy Arbitration Club, HKIAC, ICC, JCAA, LCIA, LMAA, Mute Off Thursdays, NAI, NYIAC, SCC, SCCA SIAC and VIAC, for promoting the questionnaire amongst their members and subscribers.

Last but not least, we would like to thank all the private practitioners, arbitrators, in-house counsel, technical experts, academics, third party funders, and other respondents who generously gave their time in completing the questionnaire and being interviewed.

Endnotes

- ¹ GAR, *The Guide to Energy Arbitrations* (5th ed., 2022), JW Rowley KC, D Bishop and GE Kaiser (eds.), p.1.
- ² The ICSID Caseload — Statistics: Issue 2022-2, p. 25.
- ³ International Chamber of Commerce (ICC) - Dispute Resolution 2020 Statistics, p. 17. As this survey report went to press, the final ICC statistics for 2021 had not been published.
- ⁴ LCIA 2021 Annual Casework Report, p.8-9.
- ⁵ See, Survey Questionnaire introduction, *definitions*.
- ⁶ The score has been calculated by taking account of the weighting of the four ranks. This has been done on a points basis and the points are calculated by the following equation: (n1st place votes x 4) + (n2nd place votes x 3) + (n3rd place votes x 2) + (n4th place votes).
- ⁷ “Energy transition” refers to the movement of investment away from ‘traditional’ sources of power generation, use and storage to non-carbon based alternatives, such as renewables and hydrogen.
- ⁸ For context, the average point score between all 13 categories was 103.75.
- ⁹ For corporates and in-house counsel, this trend was flipped, with nearly three times as many selecting a 4 or 5 as selecting a 1 or 2.
- ¹⁰ ICC Commission Report, Resolving Climate Change Related Disputes through Arbitration and ADR, November 2019, [iccwbo.org/climate-change-disputes-report](https://www.iccwbo.org/climate-change-disputes-report), ICC Publication 999 ENG, ISBN 978-92-842-0554-7.
- ¹¹ Rechtsanwältin Günther, lawsuit from 24 November 2015 (Saúl Ananías Luciano Lliuya./ RWE AG, Landgericht Essen, Az.: 2 O 285/15).
- ¹² See, DismantleCON form contract, Clause 25(b), available here: <https://www.bimco.org/contracts-and-clauses/bimco-contracts/dismantlecon>.
- ¹³ The World Nuclear Report 2022, published in October 2022, indicated that of the 53 nuclear reactors under construction as of 1 July 2022, 20 involved Russia as a vendor country.
- ¹⁴ 2.4% growth in 2018. Source: World Nuclear Industry Status Report 2019.
- ¹⁵ S. Perry, *LCIA gets exemption from Russia and Belarus sanctions*, GAR (17 October 2022), available at <https://globalarbitrationreview.com/article/lcia-gets-exemption-russia-and-belarus-sanctions>
- ¹⁶ 68% of respondents located in the Middle East, 72% of respondents located in Asia; 70% of respondents located in the Americas, and 71% of respondents located in Africa selected Europe in Question 28.
- ¹⁷ Points were calculated by the following formula: (n1 x 5 + n2 x 4 + n3 x 3 + n4 x 2 + n5).
- ¹⁸ One expert noted that he had been involved in nine case management conferences in a single two-year arbitration.
- ¹⁹ [emphasis added].
- ²⁰ Observations of experts in response to Question 15.
- ²¹ Judgment of 6 March 2018, *Slovak Republic v. Achmea B.V.*, Case C-284/16; ECLI:EU:C:2018:158.
- ²² Judgment of 2 September 2021, *Republic of Moldova v. Komstroy*, Case C-741/19; ECLI:EU:C:2021:655.
- ²³ 2020 QMUL-CCIAG Survey: Investors’ Perceptions of ISDS, May 2020.



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Specific legal advice should be taken before acting on any of the topics covered.**

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