2023
Volume 5, Issue 1

Institute for Transnational Arbitration
ITA IN REVIEW

ITA IN REVIEW

The Journal of the Institute for Transnational Arbitration

ITA IN REVIEW

VOL. 5 **2023** **NO. 1**

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ITA IN REVIEW

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ITA in Review is

a Publication of the
Institute for Transnational Arbitration
a Division of the
Center for American and International Law

5201 Democracy Drive
Plano, TX 75024-3561

WHAT TOPICS WILL DOMINATE INTERNATIONAL ARBITRATION IN 2023?

by Todd Carney

I. INTRODUCTION

This past January, the Institute for Transnational Arbitration (ITA) hosted an event in London through their young professional division, Young ITA.[1] The event featured a panel of five up and coming international arbitration attorneys.[2] The chair and vice-chair of Young ITA's division, Katrina Limond and Robert Bradshaw, moderated the panel.[3] The overall topic of the panel was looking ahead for what issues in international arbitration were likely to dominate 2023.[4] Each panelist chose a topic and went into detail about how they thought the issue would develop in the upcoming year.[5]

II. REFORMING THE ARBITRATION ACT 1996

London is a major hub for international arbitration.[6] A UK law, known as the Arbitration Act 1996 (the "Act"), set the stage for this development by creating the framework for arbitration out of London.[7] The Act gives arbitrators around the world a reliable and consistent forum in London.[8]

September 2022 marked the 25-year anniversary of the Act going into effect, so the UK's Law Commission released their recommendations for updating the Act to

[1] *#YoungITATalks–2023: The Year Ahead in Arbitration*, INSTITUTE FOR TRANSNATIONAL ARBITRATION https://www.cailaw.org/Institute-for-Transnational-Arbitration/Events/2023/youngita-year-ahead-arbitration.html.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *See Despite Brexit, London Retains its Appeal As a Leading Global Disputes Hub*, BURFORD CAPITAL, 2021, https://www.burfordcapital.com/insights/insights-container/burford-quarterly-2021-london-brexit-arbitration/.

[7] Lisa Dubot, Raid Abu-Manneh, and Rachael O'Grady, *Modernising The Arbitration Act 1996: A Critique of the Law Commission's Proposed Reforms*, KLUWER ARB. BLOG, Nov. 21, 2022, https://arbitrationblog.kluwerarbitration.com/2022/11/21/modernising-the-arbitration-act-1996-a-critique-of-the-law-commissions-proposed-reforms/#:~:text=The%20Arbitration%20Act%201996%20.

[8] *Id.*

tackle the challenges that have developed in international arbitration since then.[9] The Commission invited attorneys to opine on the recommendations. In response to the sought-out input, the Law Commission will release a final report this year.[10]

Aashna Agarwal, an associate from Allen & Overy, chose the potential reforms of the Act as her topic for the panel.[11] The Law Commission's report was 159 pages, so Ms. Agarwal could not address all of them.[12] One particularly interesting proposal that Ms. Agarwal covered was the Law Commission's idea to change Section 67.[13] Currently, under this section, a decision can only be challenged based on lack of jurisdiction through a rehearing, which some feel takes too much time and money.[14] As a result, the proposal would allow for parties to a dispute to appeal the decision in the situation where the party took part in the proceedings and filed an objection to the jurisdiction of the tribunal, and when the tribunal has issued a ruling on the jurisdiction.[15]

This reform makes sense. The report noted that people from all aspects of the legal field have raised as point of concern the waste of time and money from these rehearings because of the unnecessary added length to the proceedings.[16] A full rehearing involves going through motions that parties agree on. The amount of time to go through these steps inevitably costs more money.[17] Additionally, a losing party could raise a jurisdictional challenge to get another try at the whole proceeding.[18] At the new proceeding, the losing party can further develop arguments and introduce

[9] *Id.*

[10] *Id.*

[11] Aashna Agarwal, Address at #YoungITATalks–2023: The Year Ahead in Arbitration, Remarks on Zoom (Jan. 26, 2023).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

new evidence to give them a better shot at winning.[19] All legal jurisdictions typically limit the evidence that can be introduced on appeal, so it makes sense to limit this for appeals.[20]

Those opposing the change argue that section 67 rehearings are only a small percentage of cases, so this will not have some major reform.[21] But section 67 is just one of the many reforms proposed. The recommendations seem to combine a series of reforms to save time and money. It should not matter that a specific reform only has a small impact on an area. Another argument against this reform was brought up by Ms. Agarwal, that courts can limit what can go on at a rehearing, so this reform could be too far reaching.[22] Critics maintain that this reform would eliminate necessary cases for rehearing, just to eliminate unnecessary ones that a judge could have limited anyways. In theory this is true, but as noted before, many people have shown evidence that the current situation is creating unnecessary time and money.[23] Even if a judge can control the ultimate proceedings, they will still have to listen to arguments and the other party will have to respond to those arguments, which all results in at least some unnecessary time and money.

The report noted that major arbitration jurisdictions have varying rules regarding jurisdictional challenges.[24] The US allows for rehearings.[25] Singapore and Switzerland have some limits, but not to the degree of the proposal.[26] Firms in these jurisdictions typically have a London office, so they are certain to opine on this proposal. It will be interesting to see how the Law Commission responds to the input.

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[19] *Id.*

[20] *Id.*

[21] Dubot, et al., *supra* note 7.

[22] Review of the Arbitration Act 1996: A Consultation Paper, THE UNITED KINGDOM LAW COMMISSION (Sept. 2022), *available at* https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/09/Arbitration-Consultation-Paper.pdf.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

III. GOING GREEN IN INTERNATIONAL ARBITRATION

The second topic came from Stela Negran, an associate at LALIVE.[27] Ms. Negran discussed how the need to pursue green policies will continue to become apparent in international arbitration.[28] There are a variety of ways that the field of international arbitration can pursue more green policies.[29] There are practical steps like using less paper and traveling less for arbitration.[30] This might seem simple, but ultimately arbitration tribunals often control whether submissions can be done electronically and if hearings can take place remotely.[31]

There are elements of carbon footprints that might not be seen in the lead up to arbitration. For example, if an associate writes a draft of something for a partner internally during arbitration, the partner might prefer to edit it on paper. Additionally, some demanding clients might want lawyers to be in person for meetings leading up to the arbitration. This is where "cultural" campaigns can make a difference. Many firms have picked up the ideology of "environmental, social, and corporate governance," as have corporations.[32] There is also a campaign known as the "campaign for greener arbitrations." These can hopefully influence how firms change in terms of practices.

Looking at cultural pressure for change, there are mixed results. For example, most firms like to brag about their pro bono projects.[33] At the same time, reports have shown that on average, an individual attorney does not do as much pro bono

[27] Stela Negran, Address at #YoungITATalks–2023: The Year Ahead in Arbitration, Remarks on Zoom (Jan. 26, 2023).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See* Natalie Runyon, *Law Firms' ESG Practice Continues to Drive Economic Growth and Better Alignment with Clients*, REUTERS (Dec. 14, 2022), https://www.reuters.com/legal/legalindustry/law-firms-esg-practice-continues-drive-economic-growth-better-alignment-with-2022-12-14/; *Global Survey Finds Businesses Increasing ESG Commitments, Spending*, NAVEX INC. (Feb. 23, 2021) https://www.navex.com/blog/article/environmental-social-governance-esg-global-survey-findings/.

[33] Steve Kennedy, *Pro Bono Is Broken*, BALLS AND STRIKES (May 16, 2022) https://ballsandstrikes.org/legal-culture/biglaw-pro-bono-is-broken/.

work as the American Bar Association suggests.[34] Firms are businesses, and they are going to be responsive to money. While trying to go green can be great marketing, if a less green initiative produces better results for their clients, firms will prefer that option. That does not mean that people should throw up their hands and do nothing, but it is important to adjust expectations for the effectiveness of this self-governance.

Another factor in making arbitration greener is how the arbitration agreements are written. This could give firms more influence, since they are the ones ultimately writing the agreements. It is still up to the clients to decide how much they want to value engaging in environmentally friendly practices. Again, values matter, so the best to hope for is that influence of ESG and various campaigns can make all parties want to be greener.

Ms. Negran touched on a challenge here that the ease of expanding environmentally friendly practices could vary by location.[35] The environmental views of Singapore, Paris, Hong Kong, New York, Washington DC, and London, among other places, all vary. So certain jurisdictions might be more receptive to going green than others. Still, any improvement in a jurisdiction helps. But if firms and clients remain committed to going green, they could prioritize jurisdictions that are greener, which could pressure all jurisdictions to have more environmentally friendly policies. Locality can also impact the behavior of each office. Countries and cities have different incentives and penalties regarding behavior that impacts the environment, so some offices might act greener.

IV. UPDATING THE ENERGY CHARTER TREATY

Sophie Freelove, an associate with Vinson & Elkins, discussed modernizing the Energy Charter Treaty (ECT).[36] In 1994, nations primarily from Europe and Central Asia came together to establish the ECT to protect both sides when outside

[34] *Hours Worked*, AMERICAN BAR ASSOCIATION (2022) https://www.abalegalprofile.com/pro-bono.php.

[35] Negran, *supra* note 27.

[36] Sophie Freelove, Address at #YoungITATalks–2023: The Year Ahead in Arbitration, Remarks on Zoom (Jan. 26, 2023).

investments are made in energy.[37] At the time, the ECT largely concerned oil and gas.[38] About three decades later, a lot has changed in terms of how the world views those sectors. Considering the obligations of the Paris Agreement, many of the parties to the ECT felt a need to update the treaty.[39] In November 2022, the Energy Charter Conference agreed to final provisions of an updated framework.[40]

Some countries and legal actors have criticized these updates. The most controversial provision was the fact that the ECT would still allow for agreements that protect investments in fossil fuels.[41] It does provide a provision that allows signatories to not protect future investments in fossil fuels, and to phase out existing ones.[42] Critics argue that instead, states should not have the option to protect fossil fuels.[43] The idea is that by not providing special protections to fossil fuels, states and companies will be more inclined to invest in renewable energy, since there will be added protection to make them more attractive.[44]

Similarly, critics are upset that the framework protects investment in activities like hydrogen, synthetic fuels, carbon capture, and other practices that are technically not fossil fuels directly but utilize fossil fuel.[45] Many in the energy field have argued that focus on these initiatives takes away from investment in renewable

[37] Bart-Jaap Verbeek, *The Modernization of the Energy Charter Treaty: Fulfilled or Broken Promises?*, BUS. HUM. RTS. J. 1, 1 (2023), https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/modernization-of-the-energy-charter-treaty-fulfilled-or-broken-promises/AFD3E4B53C019FD6DA0915B493987DDE.

[38] *Id.*

[39] *Id.* at 2.

[40] *Id.* at 1.

[41] *Id.* at 4.

[42] *Id.*

[43] *Id.* at 5.

[44] *Id.*; *See also* Fiona Harvey, *No New Oil, Gas or Coal Development If World is to Reach Net Zero by 2050, Says World Energy Body*, GUARDIAN (May 18, 2021) https://www.theguardian.com/environment/2021/may/18/no-new-investment-in-fossil-fuels-demands-top-energy-economist.

[45] Verbeek, *supra* note 37, at 4; *Why 'Blue Hydrogen' is Fossil Fuel Industry Greenwash and Won't Fix the Climate*, GLOBAL WITNESS (Oct. 28, 2020) https://www.globalwitness.org/en/blog/why-blue-hydrogen-is-fossil-fuel-industry-greenwash-and-wont-fix-the-climate/.

energy.[46]

One's view on these protections likely depends on their beliefs on the best way to bring about environmental changes. The concept of "nudging" changes the situation for people to encourage them to make better choices, but to not forbid them from making certain choices.[47] Some have said this should apply to pursuing better environmental practices in international arbitration.[48] Currently, fossil fuels make firms a lot of money and consist of clients to whom firms are deeply loyal.[49] Radically changing the framework to harm those clients could bring a negative reaction that would cause firms or even countries not to want to operate under the ECT. Instead, updating the ECT to better protect emerging renewable energy investment, coupled with the general positive press that comes with working in renewable energy, and the promise of financial gains from renewable energy, could be the best way to create more environmentally friendly energy practices.

There is also a practical aspect to the debate. If the world could only rely on renewable energy and eliminate the use of fossil fuels, much of the world would have done it already. But the technology is not there yet.[50] Products like electric vehicles may be free of fossil fuels, but they are more damaging to the environment and put more strain on grids.[51] Massachusetts tried to go free of fossil fuels and ended up having to use even more environmentally damaging fuel oil when winter came.[52] It

[46] Verbeek, *supra* note 37, at 4.

[47] Lucy Greenwood & Leonor Díaz-Córdova, *Nudging Towards a Greener Future in Arbitration*, CIARB (Nov. 29, 2021) https://www.ciarb.org/resources/features/nudging-towards-a-greener-future-in-arbitration/.

[48] *Id.*

[49] *See* Lea Di Salvatore, *Investor–State Disputes in the Fossil Fuel Industry*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Dec. 31, 2021) https://www.iisd.org/publications/report/investor-state-disputes-fossil-fuel-industry.

[50] Angela Macdonald-Smith, *Renewables Break Records But Still Lag 2030 Target*, FINANCIAL REVIEW (Jan. 3, 2023) https://www.afr.com/companies/energy/renewables-break-records-but-still-lag-2030-target-20230103-p5ca0m.

[51] Nina Lakhani, *Revealed: How US transition to Electric Cars Threatens Environmental Havoc*, THE GUARDIAN (Jan. 24, 2023) https://www.theguardian.com/us-news/2023/jan/24/us-electric-vehicles-lithium-consequences-research.

[52] Gerson Freitas Jr & Naureen S Malik, *New England Power Plants Burn Most Oil Since 2011 as Gas Soars*,

will likely be a long time until it is economically feasible to not use fossil fuels, so it makes sense to protect them as it does to protect any other major economic player. Similarly, while the world looks for workable alternatives to fossil fuels, it is worth investing in all solutions, including ones like hydrogen, that have shown a lot of promise.[53]

The main answer to these arguments is that climate change is such a grave threat, that it requires aggressive measures. This inclination is understandable, but again there is a question of practicality. Often people panic and try extreme actions to get out of a bad situation but end up making things worse. Massachusetts is an example of that. So, if time is limited in terms of rescuing the environment, it is best to make good use of this time.

Another argument in favor of becoming more aggressive is the fact that some European countries are threatening to withdraw from the treaty because it does not comply with the Paris Agreement.[54] If this happens, the ECT could fall apart and leaves all energy industries worse off. As a result, even skeptics of more aggressive measures should compromise to protect the treaty long-term. This is a strong argument, but Europe is only one player on the global scale of energy. Asia, the Middle East, Latin America, and the United States all have strong energy markets. The collapse of the treaty could lead to further investments in these regions. Even though some countries in these regions are members of the ECT, they do not necessarily agree with the European objectors, so they might be willing to set up individual protections for fossil fuels that mirror what is in the ECT.

V. THE UNCITRAL WORKING GROUP III

Nina Melzer, an associate with LALIVE, spoke about the investor-state dispute settlement reform proposals of the United Nations Commission on International

BLOOMBERG (Feb. 22, 2022) https://www.bloomberg.com/news/articles/2022-02-22/new-england-power-plants-burn-most-oil-since-2011-as-gas-soars?leadSource=uverify%20wall.

[53] Michael Kobina Kane & Stephanie Gil, *Green Hydrogen: A Key Investment for the Energy Transition*, WORLD BANK BLOG (June 23, 2022) https://blogs.worldbank.org/ppps/green-hydrogen-key-investment-energy-transition.

[54] Verbeek, *supra* note 37, at 5.

Trade Law's (UNCITRAL) Working Group III. The UNCITRAL started working on reforms in 2017.[55] The UNCITRAL consists of government, international, and NGO representatives.[56] Since 2017, they have worked to address issues in the current procedure of dispute settlement, and whether it is worth creating reforms to act on these concerns.[57] Now they are focused on coming up with precise solutions to these issues.[58]

The UNCITRAL meets two to three times a year.[59] The most recent meeting was in January 2023.[60] The working group always focuses on multiple issues, but a recurring one has been the establishment of a multilateral investment court.[61] This is an issue because the absence of consistent rules on investment can make the outcome of cases dependent on forums.[62]

This issue has been discussed for a while. In 2020, the European Union (EU) raised this idea at a meeting.[63] The EU argued for a system that would oversee multilateral issues in investment arbitration.[64] It would only allow for appeals when there are errors in law.[65] The body would consist of judges who would not have any conflicts of interest by working on the court full time.[66] They would serve only one term and must meet strict qualifications.[67] The jurisdiction of the body would consist of states

[55] Nina Melzer, Address at #YoungITATalks - 2023: The Year Ahead in Arbitration, Remarks on Zoom (Jan. 26, 2023).

[56] Andreea Nica, *UNCITRAL Working Group III: One Step Closer to a Multilateral Investment Court?* KLUWER ARB. BLOG (Mar. 24, 2020) https://arbitrationblog.kluwerarbitration.com/2020/03/24/uncitral-working-group-iii-one-step-closer-to-a-multilateral-investment-court/.

[57] Melzer, *supra* note 55.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] Nica, *supra* note 56.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

deciding whether they want to join the court.[68]

In theory this sounds workable, but as Ms. Melzer pointed out, many questions emerge for any type of joint body like this.[69] How would nominations to the court work? Would each member state nominate someone? If so, there could be situations where the body does not want to accept any of the people nominated by the state, as seen with the European Court of Human Rights.[70] If each state does nominate someone, there could be the risk of certain states like the UK or the US dominating the decisions because they may have more people "qualified" for the court, since they have prominent people in the field. Some from these states might argue this makes sense since so much arbitration does take place in their states, that the make-up of the court should be based on where arbitration takes place. Alternatively, states that feel they are often manipulated by international arbitration might argue that they should have a greater representation on the court because they are the responding party in most investment disputes.[71]

Going off these points, it could be difficult to get enough states to agree to the jurisdiction of a court. The US has opted out of the International Criminal Court.[72] The UK has raised leaving the European Court of Human Rights (ECtHR).[73] Many states have refused to give the ECtHR expanded jurisdiction.[74] If states feel that the set up for the court is wrong, they might not agree to its jurisdiction. Additionally,

[68] *Id.*

[69] Melzer, *supra* note 55.

[70] Cengiz Aktar, *Ankara Unwilling to Name a Judge to European Court*, AHVAL (Oct. 17, 2018) https://ahvalnews.com/echr/ankara-unwilling-name-judge-european-court.

[71] *Facts on Investor-State Arbitrations in 2021: With a Special Focus on Tax-Related ISDS Cases*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (Jul. 2022), *available at* https://unctad.org/system/files/official-document/diaepcbinf2022d4_en.pdf.

[72] Michel Martin, *The U.S. Does Not Recognize the Jurisdiction of the International Criminal Court*, NATIONAL PUBLIC RADIO (Apr. 16, 2022) https://www.npr.org/2022/04/16/1093212495/the-u-s-does-not-recognize-the-jurisdiction-of-the-international-criminal-court.

[73] Jessica Elgot, *Tory MPs to Push for UK Exit from European Convention on Human Rights*, GUARDIAN (Feb. 5, 2023) https://www.theguardian.com/politics/2023/feb/05/tory-mps-to-push-for-uk-exit-from-european-convention-of-human-rights.

[74] *See* András Csúri, *Entry into Force of Protocol No. 16 to the ECHR*, EUCRIM (Oct. 20, 2018) https://eucrim.eu/news/entry-force-protocol-no-16-echr/.

arbitrators try different forums for a reason, so if they feel they are better off continuing to have the option of multiple jurisdictions, then they might refuse to join the court.

A big question in terms of actual jurisdiction is what role would international investment agreements play in it? Would the court only have jurisdiction if an arbitration treaty decides that will be the forum? Or would the court have jurisdiction over all multi-state investment arbitrations from member states? If the latter, what happens when only one member state in a treaty is a member? The most palpable solution would likely be for it to be dependent on arbitration treaty. Going this route could gradually build pressure for more powerful states to use this system. They will not feel locked in the court, but as they negotiate for agreements, the other side could keep pushing for using this forum, gradually building pressure.

VI. CHALLENGES TO ARBITRATION

The final topic of the panel came from Lucy Preston, an associate at Orrick.[75] Ms. Preston noted that unsuccessful challenges to arbitrations are increasing.[76] She explained that the fact that they are unsuccessful could be a good or bad thing.[77] If the challenges are without merit, it is good to quickly dispatch them.[78] But there is always the concern that some of the challenges could fail due to various biases in arbitration bodies.[79]

This is a long-standing issue, and many have pushed to fix it. For gender, a report from 2020, found that women comprised 23.4 percent of International Chamber of Commerce (ICC) arbitration tribunals.[80] This represented a steady increase, but it is

[75] Lucy Preston, Address at #YoungITATalks–2023: The Year Ahead in Arbitration, Remarks on Zoom (Jan. 26, 2023).

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Guest Blog: Gender Diversity in Arbitral Tribunals–The Challenges Ahead*, INTERNATIONAL CHAMBER OF COMMERCE (Dec. 9, 2021) https://iccwbo.org/media-wall/news-speeches/guest-blog-gender-diversity-in-arbitral-tribunals-the-challenges-ahead/.

well below the percentage of women in the population.[81] Many might be concerned that the shortage of females could bring institutional biases against female practitioners or when an issue concerns gender.[82] There is not much data on ethnic diversity in terms of ethnicity.[83] On a similar note, there is a concern regarding regional diversity.[84] Given that international arbitration is often accused of unfairly taking advantage of certain states, it is understandable that if states are underrepresented, they might feel there are institutional biases against this.[85]

The main solution seen so far to diversity is to get international bodies pledging to do better. The ICC has vowed to appoint more women and people from different countries.[86] The ICC argues that this is working because they are hitting new records. As noted above, the ICC has steadily increased the number of women.[87] It is again more difficult to find concrete numbers on progress in ethnic diversity. In 2019, the ICC noted it had 972 arbitrators from 89 countries.[88] But there is not a further breakdown of those numbers. If they appoint one person for each of the 72 countries, and then disperse the other 900 slots to just 17 countries, they are not achieving diversity.

Some would argue that the arbitration bodies are limited because the field of international arbitration is not that diverse. The numbers of female partners in

[81] *Id.*

[82] *Id.*

[83] *See* Are *We Getting There?* BERWIN LEIGHTON PAISNER, *available at* https://www.bclplaw.com/a/web/150194/FINAL-Arbitration_Survey_Report.pdf.

[84] Andrea K. Bjorklund, Daniel Behn, Susan Franck, Chiara Giorgetti, Won Kidane, Arnaud de Nanteuil, Emilia Onyema, *The Diversity Deficit in International Investment Arbitration*, ACADEMIC FORUM ON ISDS CONCEPT PAPER (Jan. 21, 2020) https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/5-diversity.pdf.

[85] *Taking States to International Arbitration*, MIND THE GAP (Jul. 7, 2020) https://www.mindthegap.ngo/harmful-strategies/avoiding-liability-through-judicial-strategies/taking-states-to-international-arbitration/.

[86] *Gender Diversity in Arbitral Tribunals – The Challenges Ahead*, *supra* note 80; *Key Moments in ICC Dispute Resolution in 2019*, INTERNATIONAL CHAMBER OF COMMERCE (2020) https://library.iccwbo.org/content/dr/STATISTICAL_REPORTS/SR_0042.htm?l1=Statistical+Reports.

[87] *Gender Diversity in Arbitral Tribunals – The Challenges Ahead*, *supra* note 80.

[88] *Key Moments in ICC Dispute Resolution in 2019*, *supra* note 86.

international arbitration mirror the statistics for women at the ICC.[89] So, defenders of the ICC would argue that the legal field needs to increase diversity. This is a fair point. Firms have tried to increase diversity, as have law schools.[90] While law school classes and starting associates are more diverse today, it is going to take time until law students and starting associates are at the skill level to be appointed as arbitrators, as it would for any law student or starting associate.

Another solution Ms. Preston suggested was for international arbitration bodies to increase transparency.[91] Even if an arbitration proceeding is not biased against someone, without sufficient insight on the decision, people might assume that there was a bias. While parties are typically privy to much of this information, outside spectators are not. Different bodies and working groups have come up with different solutions.[92] For example, the ICC has created a database of cases that provides information such as the name of the arbitrator, their nationality, how they got the appointment, and where the case is in the proceedings.[93]

The UNCITRAL says that the public must have access to "written submissions, transcripts of hearings, a list of exhibits of documents, expert reports, witness statements presented in the proceedings, and awards to be made available to the public."[94] The International Centre for Settlement of Investment Disputes (ICSID) only permits such disclosure if both parties agree to it.[95]

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[89] *Gender Diversity in Arbitral Tribunals – The Challenges Ahead*, *supra* note 80.

[90] Karen Sloan, *Law Student Diversity Hits New High as Schools Await Affirmative Action Ruling*, REUTERS (DEC. 21, 2022) https://www.reuters.com/legal/government/law-student-diversity-hits-new-high-schools-await-affirmative-action-ruling-2022-12-21/#:~:text=Nearly%2037%25%20of%20U.S.%20first,represented%20an%20all%2Dtime%20high; Karen Sloan, *Law Firm Associate Diversity Deepened in 2022 as Partners Saw Slower Change*, REUTERS (Jan. 12, 2023) https://www.reuters.com/legal/legalindustry/law-firm-associate-diversity-deepened-2022-partners-saw-slower-change-2023-01-12/.

[91] Preston, *supra* note 75.

[92] Sonia Anwar-Ahmed Martinez, *Transparency Rules in Investment Arbitration: Institutional Differences and Prospects of Standardisation*, KLUWER ARB. BLOG (Apr. 8, 2021) https://arbitrationblog.kluwerarbitration.com/2021/04/08/transparency-rules-in-investment-arbitration-institutional-differences-and-prospects-of-standardisation/.

[93] *Id.*

[94] *Id.*

[95] *Id.*

The main argument for protection of information is to protect clients. There may be important business issues that they do not want shared. Additionally, they might fear that they could be targeted for harassment due to certain cases. But ultimately disclosure fosters greater discussion and that is a good thing. Having outside parties look at information can help to independently evaluate if there was a bias, provide additional perspectives, and even fact check the proceedings.

Bringing transparency can be challenging. So long as there are forums like ICSID that are not fully transparent, parties with something to hide could prioritize those forums. It is best to work within all forums to ensure that there is broad transparency.

VII. CONCLUSION

These topics are just a few of the wide array of ones that will impact international arbitration in 2023. International arbitration is a fast-changing topic. Interestingly, many of these topics intersect with each other. Changes to the ECT are relevant to the push to go green in arbitration. The efficiency standards concerning the UK's Law Commission have been raised in terms of how to best make a multilateral investment court workable. The concerns of diversity and bias at challenges to arbitrations are at stake in the establishment of a multilateral investment court.

While it is possible that the specific topics discussed in this panel could have some resolution by the end of this year, the overarching issues of diversity, efficiency, fairness, cooperation, environmentalism, and pragmatism will remain in international arbitration for a long time through a variety of ways. People should keep overarching issues like these in mind when dealing with any given topic in the field.

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INSTITUTE FOR TRANSNATIONAL ARBITRATION
OF
THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

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