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International Arbitration: What You Need to Know for 2025

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As 2025 gets underway, Womble Bond Dickinson has been taking stock of the major international arbitration developments from last year that are likely to affect our clients with international business.

In 2024, we saw significant developments in international arbitration law and policy in the U.S. and elsewhere. The impact will vary depending on the nature of your business and where you conduct it. Some of the developments are positive—especially for companies seeking to enforce their arbitration agreements and awards in the U.S. federal courts. Other changes—including, for example, in the European Union and Mexico—require companies to be especially vigilant about their international arbitration agreements and how their operations and investments in those jurisdictions are structured.

We have selected five developments from 2024 that will significantly impact international arbitration in the United States and elsewhere:

1. U.S. Supreme Court blocks immediate appeals of decisions to compel arbitration while arbitration is ongoing
2. Bipartisan consensus possibly emerges in the United States against international arbitration of foreign investment disputes
3. The Energy Charter Treaty “modernization” will restrict the international arbitration of many energy investment disputes in Europe
4. D.C. Circuit decides that district courts have jurisdiction to enforce investor-state arbitral awards from disputes within the European Union
5. Mexican court reform bolsters the need for international arbitration when doing business in Mexico

Last Year’s Key Developments for International Arbitration

1. U.S. Supreme Court Blocks Immediate Appeals of Decisions to Compel Arbitration While Arbitration is Ongoing

Last year, the U.S. Supreme Court once again confirmed the long-standing commitment of the U.S. federal courts to ensure that agreements to arbitrate are enforced. In May 2024, the Court held in *Smith v. Spizzirri* that, when a district court compels arbitration pursuant to the Federal Arbitration Act, it must *stay*—not *dismiss*—the lawsuit upon the request of a party.

Before *Smith*, some federal courts entered a final order of dismissal, allowing the losing party to immediately appeal the final order—which often resulted in appellate litigation parallel to arbitration. The major practical upshot of *Smith* is that no appeal will be immediately available against a district court's decision to compel arbitration.

Thus, even if a contractual counterparty seeks to circumvent an arbitration agreement by filing suit in the United States, the federal courts will enforce the arbitration agreement without burdening the other party with additional appellate court battles as the arbitration proceeds.

By contrast, if the motion to compel arbitration is denied, the party seeking arbitration is entitled to an immediate interlocutory appeal pursuant to the [Federal Arbitration Act]. In other words, the party who has filed a motion to compel arbitration—but loses—has the right to an immediate interlocutory appeal. The party who opposes the motion to compel arbitration—and loses— does not have the right to an immediate appeal. Instead, the litigation is stayed while the arbitration proceeds.

Smith provides a strong affirmation in favor of enforcing agreements to arbitrate, as it largely precludes parallel appellate court proceedings, and enables the arbitration to proceed without the burden of such additional proceedings.

While the Supreme Court decided *Smith* under Chapter 1 of the Federal Arbitration Act—which primarily applies to domestic arbitration—the decision will likely apply to international arbitration as well. In the United States, most international arbitration is governed by Chapter 2 of the [Federal Arbitration Act] (implementing the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards). However, the Federal Arbitration Act provides that Chapter 1 also applies to international arbitration to the extent it is not inconsistent either with Chapter 2 or with the New York Convention.

Womble Bond Dickinson previously published a [Client Alert] on this development.

2. Is There an Emerging Bipartisan Consensus in the United States Against International Arbitration of Foreign Investment Disputes?

We will be paying close attention to shifts in U.S. policy on the protection of foreign investment, including the availability of investor-State arbitration to resolve disputes with foreign governments. Under many U.S. trade and investment treaties, an investor from the United States can bring arbitration for alleged treaty violations directly against a foreign State that has ratified the treaty—and *vice versa*. The idea is to encourage foreign investment by providing various protections to foreign investors—including a neutral arbitration forum where the investor can assert claims for violations of the treaty directly against the State that is "hosting" the investment.

But apparent bipartisan opposition to investor-State arbitration could have a significant impact on both current and future U.S. treaties that offer this key form of protection to U.S. companies with foreign investments and operations.

Although the new Trump administration has not yet expressed a clear position on investment protection and investor-State arbitration, we currently expect that it will not be supportive. During the first Trump administration, U.S. Trade Representative Robert Lighthizer expressed deep skepticism about such protections—as they encourage investment abroad and, according to Lighthizer, intrude on U.S. sovereignty at home. Under Lighthizer's stewardship, the first Trump administration curtailed the investment protections on offer in the USMCA. The nominee for U.S. Trade Representative in the second Trump Administration, Jamieson Greer, served as chief of staff to Lighthizer in the last Trump administration.

Opposition to investor-State arbitration also has support among various democratic members of Congress. In recent years, democratic senators and representatives have sent repeated letters that express strong criticisms of investor-State arbitration and call for the reduction or elimination of this mechanism in U.S. treaties. In a recent letter from December 19, 2024, 37 democrats called upon the Biden administration "to eliminate or drastically reduce the ability of multinational corporations to use ISDS [investor-state dispute settlement] tribunals as a tool to attack legitimate government actions and extract unlimited sums from countries' taxpayers."

This opposition translated into some action in the closing days of the Biden administration. Despite skepticism from some senators regarding the secrecy of negotiations, on January 15, 2024, the United States and Colombia concluded a decision to re-interpret the investment protections in the Colombia-USA Trade Promotion Agreement. It was rumored that the United States Trade Representative was also negotiating with Mexico to similar ends.

As we move into the Trump administration, we will continue to monitor these developments and alternative means of investment protection for U.S. investors abroad.

3. The Energy Charter Treaty "Modernization" Will Restrict the International Arbitration of Many Energy Investment Disputes in Europe

We expect a flurry of investor-State arbitration activity in the European energy sector through September 2025. The parties to the Energy Charter Treaty (ECT)—which protects energy investments in Europe and surrounding areas—adopted a "modernization" of the treaty on December 3, 2025 after years of debate and false starts. The modernization significantly curtails investment protections overall, but it is not applicable to investor-State arbitrations commenced before the changes take provisional effect on September 3, 2025.

While this development will impact many European energy businesses, the modernization is also relevant to non-Europeans—such as United States companies. These businesses may currently enjoy ECT protection for their subsidiaries, operations, or investments in Europe or surrounding areas. They should assess how the ECT modernization may affect their investment protections in and around Europe.

The full set of changes to the ECT is extensive and detailed. However, some of the changes with the most significant impact on foreign investors include the following:

- The ECT will no longer apply to most new hydrocarbon investments made after 3 September 2025 (Annex NI, Section B). Even most existing hydrocarbon investments will lose protection after a ten-year period (Annex NI, Section C). Investors in the hydrocarbon sector in Europe will, in many cases, need to start looking elsewhere for investment protection, such as other investment treaties.
- The ECT will contain language that may block the application of its dispute resolution provisions to so-called intra-EU investor-State disputes—i.e., disputes between a company from one EU member state and another EU member State (Art. 24(3)). The highest court in the EU, the Court of Justice of the European Union, has already held that EU law prohibits intra-EU investor-State arbitration, but many international arbitration tribunals have disagreed with the court's ruling and have allowed the arbitrations to proceed. The new language will

make the prohibition explicit.

- Businesses that are currently protected by the ECT through their presence in the EU—because either their parent company or a subsidiary is established in an EU Member State—should plan accordingly for future investment protection.
- The ECT will add detailed guidelines for the application of key investment protections and for the conduct of investor-State arbitration. These guidelines may, in some cases, expand the scope of protection but, in many other cases, will restrict or reduce it.
- The ECT will expressly reflect governments' concerns about their freedom to adopt climate change mitigation and adaptation measures. The modernization adds provisions addressing the right to regulate (new Art. 16), providing exceptions to the treaty for certain necessary environmental measures (Art. 24), and containing commitments to implementing climate change agreements (Art. 19bis).

All energy-sector businesses should consider carefully the specific consequences of the ECT modernization for their investments or operations in and around Europe. A more comprehensive summary of the changes is available here. Womble Bond Dickinson's International Arbitration practice can also advise on the specific impact for your business.

4. D.C. Circuit Decides that District Courts Have Jurisdiction to Enforce Investor-State Arbitral Awards from Disputes within the European Union

We are closely following key litigation in the United States over the enforceability of investor-State arbitral awards rendered between an EU company and an EU member state. The EU has campaigned for over a decade to eliminate so-called intra-EU investor-State arbitration. As noted above, the Court of Justice of the European Union, the highest EU court, has opined that EU law invalidates arbitration clauses permitting such arbitration.

Various investors that have obtained favorable awards in such intra-EU arbitrations have sought to enforce them outside of the EU, including in the United States, the United Kingdom, and Australia. Arbitral tribunals have generally concluded that EU law does not affect their jurisdiction to resolve intra-EU disputes. However, the EU and the respondent states have opposed enforcement of the resulting arbitral awards, arguing that the arbitrations were not permitted under EU law.

On August 16, 2024, the D.C. Circuit clarified the U.S. position on the matter in its *NextEra v. Spain* decision. It held that the U.S. district courts have jurisdiction to enforce these awards under the arbitration exception to the state immunities afforded by the Foreign Sovereign Immunities Act (FSIA). The *NextEra* decision is a significant step toward definitively establishing that intra-EU investor-State awards are indeed enforceable in the United States.

Spain, which has numerous unpaid awards in favor of EU investors, argued in *NextEra* that the FSIA blocked the enforcement actions against it. It argued that it had no arbitration agreements allowing for intra-EU arbitration, since such agreements are not permitted by EU law. The DC Circuit rejected this line of argument. It concluded that the Energy Charter Treaty—the basis for the relevant arbitrations—contains a relevant arbitration agreement and therefore that the U.S. district courts have enforcement jurisdiction over intra-EU awards.

Following the DC Circuit's decision, the district courts will still need to decide upon the merits of each enforcement action. However, the Federal Arbitration Act and the federal law regarding ICSID awards as well as the ICSID Convention and New York Conventions (two international treaties governing the enforcement of arbitral awards) leave few or no grounds for the courts to deny enforcement.

As of this writing, Spain has petitioned to challenge the D.C. Circuit's *NextEra* decision before the U.S. Supreme Court. However, the Supreme Court has not yet agreed to review the decision. Businesses that are potentially affected should follow future developments in this key litigation.

5. Mexican Court Reform Bolsters the Need for International Arbitration When Doing Business in Mexico

We noted last year that Mexico had adopted a major judicial reform in September 2024, the effects of which will begin to be felt this year. This judicial reform will require popular elections for judges at all levels of the Mexican court system. It underscores the importance of access to international arbitration for all foreign companies doing business in Mexico, as international arbitration provides insulation and protection from an increasingly unpredictable domestic court system.

Various observers have voiced concerns that the reform threatens to politicize and destabilize the judiciary and undermine judicial independence. As the U.S. Ambassador to Mexico emphasized in a public statement, the reform "will threaten the historic trade relationship we have built, which relies on investors' confidence in Mexico's legal framework" and "[d]irect elections would also make it easier for cartels and other bad actors to take advantage of politically motivated and inexperienced judges."

The Mexican judicial reform includes the following significant changes:

- Judges will be elected by popular vote to the Mexican Supreme Court, Circuit Courts, and District Courts, as well as others. The initial election will take place in 2025 for about half of judges, including all Supreme Court justices, with a further election in 2027 for the remaining judges.
- All judges will be subject to disciplinary proceedings before a popularly elected Tribunal of Judicial Discipline, which will have the power to impose sanctions on judges up to and including removal from office. The decisions of the Tribunal of Judicial Discipline are not subject to appeal.
- The Mexican judiciary will be prohibited from issuing general injunctions against laws and regulations in response to challenges to their constitutionality.
- The number of justices on the Mexican Supreme Court will be reduced to nine—from the current 11 justices.

The good news is that, with careful advanced planning, foreign businesses can avoid the Mexican courts in many circumstances. They can seek to have any contractual disputes with Mexican business partners submitted to international arbitration instead. They may also be able to arrange for access to international arbitration to resolve any disputes with the Mexican government itself.

Womble Bond Dickinson previously published a Client Alert addressing Mexico's judicial reform and options for foreign businesses that may be impacted.

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