



# CRA Insights: International Arbitration

**CRA** Charles River  
Associates

## International Arbitration Update

Clients and Friends,

In this update we are sharing a short summary of CRA's recent engagements, publications, and speaking engagements involving International Arbitration. 2021 was a year when disputes related to the pandemic were prominent, involving force majeure issues, supply chain problems, or various alleged breaches of contract.

Looking forward, we expect to continue to see many matters associated with the pandemic but also an increasing number of cases related to energy transition and ESG concerns. We also expect to continue to assist clients and tribunals in disputes in mining, technology, life sciences, financial services, and other sectors.

Thank you for the trust you place in us. Last year, among expert firms we were recognized at or near the top of rankings of the claims at stake in international arbitration matters. We will continue to work towards earning and justifying your trust and look forward to seeing many of you again, soon and in-person.

Sincerely,

**Tiago Duarte-Silva**

Vice President

## Selected Engagements

CRA's International Arbitration experience combines finance and quantum expertise with industry expertise from energy, oil and gas, metals and materials, mining, pharmaceuticals and life sciences, banking, financial services, and various other industries to offer a one-stop solution for clients in disputes that might otherwise require several firms. Below we highlight several client engagements from 2021.

### Damages and liability in manufacturing JV

**Kristofer Swanson** was retained to help two joint venture partners resolve a series of complex disputes arising from the fracture of a 30-year manufacturing and marketing relationship which had previously covered all of North, Central and South America. In support of an International Chamber of Commerce, International Court of Arbitration tribunal, Mr. Swanson responded to multiple other expert witnesses by investigating a broad variety of damages and liability issues, including economic damages, GAAP accounting, cost allocations, intercompany pricing, failure to supply "fair shares," and unlicensed sales on the grey market. His three expert reports contributed to a very successful resolution of the dispute by the business, which included a one-time payment of approximately \$300 million in exchange for the acquisition of certain factories and the execution of intellectual property licensing and supply agreements.

### Solar project in South Asia

CRA's **Seabron Adamson** successfully provided testimony in an ICC arbitration regarding the development of a utility-scale solar project in South Asia, focusing on the required inputs into the development process (project financing requirements, transmission interconnection and other issues) and the milestones required under the offtake agreement.

### Commerciality of oil discovery

**Christian Jeffery** was engaged by the respondent in a commercial arbitration regarding the commerciality of an oil discovery. We assessed the economic status of possible development of the discovery at the relevant date, combining results of analysis and data provided by other experts acting in the case. Christian submitted expert reports to the tribunal and testified to the court in late 2021.

### Royalty rates and SEPs in mobile phones

In an ICC arbitration, **Dr. Mario Lopez** was retained by a Global 200 law firm working on behalf of a large phone manufacturer to provide an expert opinion on the royalty rates that are consistent with competitive pricing for standard essential patents (SEPs) used in mobile phones. Dr. Lopez and his team at CRA reviewed conceptual issues related to SEPs and competition, such as the hold-up problem, and did empirical analyses of royalty rates based on the strength of companies' patent portfolio and based on the royalty rates in comparable licenses signed by other, similarly situated, market participants. The analyses covered issues including how to account for exchange of value implied in cross-licensing rights, how to determine an appropriate overall royalty rate, and how to correctly account for the widely varying patent portfolio strength the licensor has in different countries when estimating a competitive royalty rate.

## **Assessment of global supply and demand in diagnostics arbitration**

**Dr. Greg Bell**, **Peter Rankin**, **Archan Ruparel**, **Lev Gerlovin**, and **Paul Labys** provided expert reports and hearing testimony on behalf of the respondent in an arbitration arising from an alleged breach of a supply agreement related to diagnostics. The claimant alleged damages relating to completion of a construction agreement and the costs associated with 60 years of alternate sourcing of requirements. CRA's assessment included an evaluation of global demand factors (including changes in technologies) and global supply alternatives (including an assessment of related multinational policy initiatives) to demonstrate that claimant's potential revenue would significantly and irreparably erode within five years, leading to minimal damages.

## **Termination of offshore oil and gas license**

**Christian Jeffery** was engaged by Respondent in ICSID Case No. ARB/17/38. The dispute regarded the termination of offshore oil and gas exploration licenses that had been previously held by the Claimants. Supported by a team of analysts, Christian submitted expert reports critiquing the valuation of these licenses that had been put forward by Claimants' expert and provided alternative valuations. The case settled in late 2020.

## **ICC arbitration over global rights to a diagnostic technology**

In an ICC arbitration, **Dr. Greg Bell** was retained by respondent regarding a dispute involving the exclusive global rights to a diagnostic technology. CRA's report addressed the benefits of exclusivity, evaluated the rationale of an argument for rescission, and identified numerous flaws in the damages analysis of claimant's expert including the failure to use probability-adjustments and market expectations.

## **Damages under supply & exclusive agency agreements in synthetic turf industry**

CRA was retained in an ICDR commercial arbitration over a breach of supply and exclusive agency agreement on behalf of the claimant, a privately-owned leading North American wholesaler and distributor of synthetic turf products. The respondent was a People's Republic of China-based global manufacturer of synthetic turf. **Michal Malkiewicz** and his team were asked to analyze economic harm and to quantify direct, consequential, and lost business opportunity damages as a result of the alleged breach of contract, fraud, and claims brought under Article 2 of the Uniform Commercial Code. Mr. Malkiewicz submitted a written expert report and offered oral testimony at the final evidentiary hearing. In lieu of direct testimony, Mr. Malkiewicz prepared and delivered a presentation summarizing his findings, whereupon he was subject to cross-examination by respondent's counsel and answered questions from the tribunal.

## **ZCC arbitration on behalf of a pharmaceutical manufacturer**

CRA was retained by a pharmaceutical manufacturer claimant to assess damages for breach of a global co-marketing and co-development agreement in a ZCC arbitration, following an initial stage in which liability was determined. The product in question was on the cusp of commercialization, launched in some global markets and in the final approval stages in others. CRA constructed a global launch and market share model that aggregated damages across all countries covered by the breached agreement, then converted the forgone sales into lost profit opportunities for the claimant. CRA's testimony from **Dr. Greg Bell** at the hearing was commended for grounding the analysis in deep industry context and was identified as a significant contributor to the arbitrators' ruling.

## Selected publications

We continued to publish in academic and industry journals and trade publications and to produce CRA Insights pieces. [Click here for the full listing](#) of articles, papers, and newsletters from 2021, and our archive. Below, we highlight several publications.

### Country risk

(*The Guide to Damages in International Arbitration*, February 2021)

Tiago Duarte-Silva

### Damages in life sciences arbitrations

(*The Guide to Damages in International Arbitration*, February 2021)

Greg Bell, Justin Ho, Andrew Tepperman

### Damages in International IP Arbitration

(*The Guide to IP Arbitration*, February 2021)

Greg Bell, Peter Rankin, Andrew Tepperman

### IP Insights: Recent developments in SEP jurisprudence across multiple jurisdictions

Cameron Lindsay

### Renewable energy disputes in the Americas: Potential future developments

(*Global Arbitration Review – The Arbitration Review of the Americas 2022*, August 2021)

Seabron Adamson

### The fundamentals of brand valuation and evaluation – key concepts and issues

Brian Daniel

### Addressing the key challenges facing international arbitration after the COVID-19 pandemic

(*Mealey's International Arbitration Report*, November 2021)

Tiago Duarte-Silva

## Selected speaking engagements and conferences

In January, [Christopher Russo](#) spoke on “Investment Arbitration and the Climate Emergency” at the GAR Interactive: BITs virtual conference.

In March, [Tiago Duarte-Silva](#) co-chaired the inaugural GAR Mining conference. [Jim Burrows](#) was also a panelist during the session titled “The unique aspects of mining disputes.” He offered insights into the different approaches to valuation in mining disputes and how the choice of such methods differs depending on where the asset in question is in its lifecycle.

In May, [Tiago Duarte-Silva](#) was a member of the faculty who spoke at the Sandpiper International Arbitration Conference – Identifying & Solving Key Challenges Due to the Disruption of the Pandemic.

[Laura Sochat](#) was a panelist at #YOUNGITATALKS UK, Asia, and Oceania during the session discussing the economics of the energy transition, investment trends arising from the energy transition and what's on the horizon for climate-change related disputes.

[Tiago Duarte-Silva](#) moderated a 90-minute interactive session, “NYIAC Virtual Talks: Management of ESG Dispute Risks in Mining” which combined in-house and outside counsel perspectives with expert analysis. The panelists delved into critical topics when discussing the interplay of mining and ESG issues in international arbitration.

In June, **Dan McGavock** and **Chris Gerardi** were panelists at the 90-minute virtual program, “The importance of trade secrets and the challenges of enforcing protections internationally,” in association with GAR. They addressed the challenges in developing multinational liability and quantum trade secret misappropriation claims, the substantive technical and damages issues considered by arbitrators in their decisions and identify practice lessons learned with examples of deficiencies and strengths in both liability and quantum cases.

In October, **Tiago Duarte-Silva** was a panelist at World Arbitration Update First Edition, during the session titled “Investment Arbitration and Mining, Challenges and Opportunities Ahead.” **Seabron Adamson** was also a panelist during the session titled “Arbitration in the Caribbean on Renewable Energy and Climate Change.”

In conjunction with Rising Arbitrators Initiative, **Tiago Duarte-Silva**, **Aaron Dolgoff**, and **Swati Kanoria** presented at Rising Arbitrators Initiative: Interest on Awards Webinar. During this webinar workshop, they discussed what interest has been most often awarded, the different approaches to determining the appropriate interest rate, and various practical matters when selecting and applying interest rates in awards.

In November, **Christian Jeffery** spoke at Energy Disputes Arbitration Center's Turkey Arbitration Week during the session titled “Natural Gas Disputes.”

In December, in association with Global Arbitration Review during the webinar titled “The Intersection of Intellectual Property and International Arbitration: Quantum and Valuation (Part 1),” **Chris Gerardi**, **Dan McGavock**, **Jim Donohue**, **Cynthia Catlett**, and **Peter Rankin**, moderated by **Heidi Whitfield**, addressed how and when Intellectual Property Rights (IPRs) become a focal point in investor-state and commercial proceedings; provided an overview of IP value drivers, IPR valuation and damages methods, and significant differences in valuation standards and damages measures by jurisdiction; and, briefly identified current developments and hot topics, such as geopolitics or FRAND/SEP, which may impact IP in IA quantum claims.

**Tiago Duarte-Silva** co-moderated at the 9th Annual Damages in International Arbitration Conference during the session titled “The future of PPP contracts in Latin America: beyond pandemics and broken economic equilibrium.”

[Click here for the full listing](#) of conferences, webinars, and sponsorships from 2021, and our archive.

## About CRA's International Arbitration experience

CRA experts have extensive experience in commercial and investment treaty arbitrations and have provided testimony in all the major international arbitration forums, including ICSID, PCA, ICC, LCIA, SIAC, HKIAC, SCC, and under UNCITRAL rules. With the highest average claim among top-10 expert firms, we have been engaged in some of the most complex and high-profile disputes of recent years. We combine finance and quantum expertise with industry expertise from energy, oil and gas, metals and materials, mining, pharmaceuticals and life sciences, banking, financial services, and various other industries to offer a one-stop solution for clients in disputes that might otherwise require several firms. To learn more, visit [www.crai.com/ia](http://www.crai.com/ia).