



# CRA Insights

## International Arbitration

CRA Charles River  
Associates

January 2023

## The year in review

### Updates and trends

Dear Clients and Friends,

In 2022, we witnessed intense activity in matters related to supply chain issues, the energy transition, oil & gas, post-M&A disputes, licensing issues, breaches of distribution contracts and increasingly arbitrations deriving from geopolitical issues in Europe and Asia and from commodity price volatility in the extractive industries.

This update reflects our experiences across practices and geographies. The sample of recent work displayed here encompasses arbitrations in industries such as oil & gas, mining, renewable energy, distribution, healthcare, manufacturing, and agribusiness, and increasingly sectors like life sciences, media, and financial services.

We also share with you updates on especially timely topics. For example, the discontinuation of LIBOR demands examining its replacements and creates an opportunity to revisit the concept of a commercially reasonable interest rate on arbitral awards. In another article, we show that changes to gas contract indexation in Europe – primarily driven by competition concerns – increased Gazprom’s market power in European gas.

We hope you find it useful and that you continue to trust us with your important matters.

Best regards,

Tiago Duarte-Silva

## Energy

Evolving policy landscapes from the energy transition could have a domino effect on investment and disputes. In [Climate policies and investment: Implications for disputes](#), Christopher Russo, Laura Sochat, and Rebecca Rowden show that a growing proportion of claims will be initiated by third parties, and there may be constitutional objections where governments are accused of failing to take sufficient action. Although international arbitration has been a preferred dispute resolution method for states and investors providing flexibility and specific expertise, its inherent lack of transparency could be problematic.

The “Energy Transition in the UK, Europe and Beyond – horizon scanning for potential disputes” was discussed by Laura Sochat as a panelist at in July. At December’s GAR Live: Women in Arbitration, Laura also moderated the discussion on “GAR Live: Question Time – Energy transition and what it may mean for arbitration.”

In [Gas Contract Indexation and Market Power](#), Seabron Adamson examined the changes to gas contract indexation in Europe – primarily driven by competition concerns – and found that they had the unintended consequence of increasing the market power of Gazprom in the European gas market. His paper shows that moving contract pricing to TTF and other short-term indices gave Gazprom additional incentive to withhold gas supplies to increase spot and contract prices, even before the war in Ukraine. The paper has implications for a range of gas pricing and other disputes in Europe.

Investment in renewable energy in Latin America continues to be robust, driven primarily by capacity additions in Brazil and other countries. While past energy arbitrations have primarily focused on changes in subsidy regimes, renewable disputes may increasingly center on changes in market and transmission rules. High energy prices across the region should drive increasing investment in solar and wind generation, but, in the short-term, equipment and other supply chain issues may impact projects. These topics are covered by Seabron Adamson in [Regulatory changes present new sources of renewable energy disputes](#).

**Alleged breach of solar panel delivery contract:** In an ICC arbitration adverse to the owners and operators of one of the largest solar energy facilities in the world, Tiago Duarte-Silva was retained to provide rebuttal damages analysis and testimony on behalf of one of the largest Chinese solar panel / photovoltaic (PV) manufacturing companies. He assessed claimed damages allegedly caused by PV panel delivery delays and an alleged breach of the approximately \$200 million contract. He opined on damages estimates, including lost profits based on forward and spot electricity market price assumptions and the impact of polysilicon and PV glass prices on solar panel prices. He was supported by Nikolai Caswell.

## Metals & Materials

Seabed mining was discussed by Jim Burrows at Washington Arbitration Week in December. He was recommended as an Expert in Mining by *Who’s Who Legal* rankings. Tiago Duarte-Silva was selected by corporate counsel as the best US mining expert in Lexology’s Client Choice Awards.

**Expertise on party obligations under long-term supply agreement:** David Persampieri advised on an ICC arbitration regarding a long-term supply agreement for DR-grade iron ore

pellets to address liability in the first phase of this dispute. He prepared and submitted an expert report that addressed the issues of the obligations of the respondent associated with the long-term supply agreement.

**Pricing dispute:** We acted for a purchaser in a long-term offtake agreement with a state-owned mine in an African country. Tiago Duarte-Silva opined on the economic validity of the reasons for the respondent's breach and on the appropriateness of the contracted benchmark.

**Long-term contract for the supply of iron ore pellets:** David Persampieri provided an expert report and testimony in a SIAC arbitration regarding a long-term contract for the supply of iron ore pellets. He prepared and submitted our initial expert report to assess both liability and damages issues in this case.

**Tax assessments associated with streaming agreement:** Tiago Duarte-Silva opined in an arbitration based on claims that tax reassessments on a streaming agreement have prevented the investor from carrying on with normal business operations and that those tax reassessments will lead its investment to insolvency. He is supported by Aaron Dolgoff and Michelle Sandoval Siman.

## Life Sciences/Pharma

The pandemic's race to develop and test vaccines and therapeutics, the extent of state support for research and procurement, and the global competition for access to limited supplies of personal protective equipment, diagnostics, treatments and then vaccines has highlighted the interconnected nature of the industry and the significance of government policy and regulation. In [Investment treaty disputes in the life sciences Industry](#), Greg Bell, Andrew Tepperman, and Justin Ho project an increasing number of investment treaty arbitrations involving life sciences and cover the industry's unique considerations for treaty arbitrations.

Peter Rankin discussed this same topic at "The Next Variant of International Arbitration: Life Sciences" during Washington Arbitration Week in December. Greg Bell, Practice Leader of the Life Sciences Practice, was again named a Global Leader in Arbitration Expert Witnesses by *Who's Who Legal*.

**Resolving royalty obligations following termination of a collaboration agreement:** We advised the respondent in an arbitration concerning the interpretation of a clause in the termination provision of a collaboration agreement. At issue was whether the respondent was required to continue paying royalties to the claimant following the termination of the collaboration agreement. CRA consultants concluded that the claimant's interpretation was inconsistent with both accepted accounting principles and the claimant's own financial statements and associated disclosures.

**Assessing breach of therapeutic distribution in Asia:** We advised the claimant in an arbitration concerning the alleged breach of a non-compete clause in an agreement to distribute a prescription women's health product in a country in Asia. CRA consultants provided an expert report regarding the quantum of lost profits, based on the timing of market entry and product sales absent the alleged breach and the incremental profit per unit sold.

**Evaluating commercially reasonable efforts to commercialize a novel medical dermatology product:** Greg Bell testified at an arbitral hearing concerning the alleged breach of an agreement to commercialize a medical dermatology product, namely whether the respondent, a major pharmaceutical company, had used commercially reasonable efforts in its launch and commercialization of the product and its eventual decision to divest the product to another company. Dr. Bell considered the respondent's promotional efforts and other actions against several relevant benchmarks, concluding that commercially reasonable efforts were exercised.

## Quantum, shareholder disputes, post-M&A arbitrations

Pre-award interest has added approximately 50% on average to awarded damages across ICSID awards since 2000. If all these cases awarded interest at LIBOR+2%, interest would have added 43% on average to awarded damages, but only 22% if used US T-Bill rates. [The importance of interest in arbitral awards](#) by Tiago Duarte-Silva and Swati Kanoria also shows that, since 2015, tribunals' most common choice of pre-award interest rate has been LIBOR plus an increment and that 2% is the most popular increment on LIBOR.

When awarding interest, tribunals are often guided by the notion of a commercial rate. In [Pre-award interest: Is LIBOR+2% a reasonable commercial rate?](#), Aaron Dolgoff, Tiago Duarte-Silva, and Julian DiPersio cover whether LIBOR+2% is the most appropriate "commercially reasonable rate" applicable to each case. They show that, because interest rates vary with the likelihood of default/ the probability of losses and different companies and their debts will have different likelihoods of default, LIBOR+2% is a middle ground that does not capture the variety of risk in real world commercial rates.

LIBOR has been discontinued for most currencies and USD LIBOR is set to be discontinued in 2023. In [The end of LIBOR: Which benchmark rate for pre-award interest?](#), Aaron Dolgoff, Tiago Duarte-Silva, and Julian DiPersio examine what will replace LIBOR as the new benchmark rate in awards of interest. SOFR (Secured Overnight Financing Rate) has emerged as a leading benchmark in financial markets. SOFR shares have considerable similarities with LIBOR. It is based on the rates that large financial institutions pay to one another for overnight loans. Because LIBOR was an unsecured rate and SOFR is secured, SOFR is associated with lower risk than LIBOR.

Olga Ukhaneva discussed country risk as a panelist at World Arbitration Update in December. Tiago Duarte-Silva presented at a panel on "Damages in Shareholders Disputes & Arbitration" during the Quinn Emanuel / CIESP Arbitration Talks II: Shareholders Disputes & Arbitration in São Paulo in October. He also presented about post-M&A arbitrations as part of São Paulo Arbitration Week. Tiago Duarte-Silva was named a Thought Leader in Arbitration Expert Witnesses by *Who's Who Legal*.

**Post-M&A arbitration: Equitable remedies to economic imbalance:** In an ICC arbitration, We assisted a client by analyzing the impact of the COVID-19 pandemic on the operations of a European shopping mall and the payment of earnouts which had been expected to be in excess of € 100 million at the time the mall had been sold for over € 250 million. Tiago Duarte-Silva submitted two expert reports and testified at an arbitral hearing about the economic interpretation of the earnout payments and the value of the mall at various points before and during the COVID-19 pandemic, and he identified equitable remedies for the client. He was supported by Allison Wiese and Isabel Serrano Alas.

## Investor-state arbitrations: Sample engagements

**Treaty arbitration on stock-for-stock merger and value of conglomerates:** Tiago Duarte-Silva testified on behalf of the Claimant in *Mason Capital and Mason Management LLC v. Republic of Korea* (PCA Case No. 2018-55). He assessed losses to the claimant's investment in one of the merger parties pursuant to a high-profile merger. In reports and hearing testimony, he opined on the fair market value of the claimant's investment based on sum-of-the-parts valuations of the merging multi-industry conglomerates. He was supported by Nikolai Caswell and Zawadi Lemayian.

**Treaty arbitration in the broadcast industry:** In a matter before the PCA, James Donohue was retained on behalf of a television broadcast company regarding a breach of investor-state treaty. He evaluated fair market value after performing an analysis of comparable companies and transactions. The report also addressed the calculation of pre-award interest.

**Treaty arbitration in the agribusiness industry:** Tiago Duarte-Silva provided testimony on causation and damages in *Díaz Gaspar v. Republic of Costa Rica* (ICSID Case No. ARB/19/13), an arbitration with approximately US\$100 million in claimed damages. The claims in the case arose from allegations that the actions of Costa Rica's health agencies led to the closure of the Claimant's food processing facilities and consequent complete loss of the value of the Claimant's company. The Tribunal awarded no damages.

**Infrastructure financing and delays:** Ozgur Kan submitted expert reports on behalf of the respondent in a treaty arbitration about a Public-Private Partnership (PPP/P3) public transport concession. He examined the financial damages associated with the impact of the construction delays on infrastructure bonds and loans from commercial banks and supra-national institutions.

## Commercial arbitrations: Sample engagements

**Arbitration between global oil company and its largest franchisee:** Kristofer Swanson helped resolve a business dispute between a global oil company and its largest franchisee of automotive maintenance. Mr. Swanson investigated a variety of allegations, including the franchisee's alleged failure to meet contractual operating and credit performance requirements, and the oil company's allegations of damages arising from the closure of certain stores as the franchisee rebalanced its geographic footprint in response to changes in the market. Mr. Swanson issued three expert reports and testified at the hearing. He was supported by Jordan Kraner and Rachel Ott.

**Alleged breach of contract in healthcare industry:** James Donohue was retained on behalf of a healthcare group in a breach of contract dispute. His report and testimony addressed material flaws in a series of adjustments applied to the respondent's calculation of earnings before interest, taxes, depreciation, and amortization. He also identified flaws in the damages analysis of respondent's expert including the reliance on transactions that were not comparable.

**Fees charged by financial services firm:** Kenneth Mathieu helped resolve a FINRA-arbitrated dispute between a major financial services firm and a significant customer, regarding the fees charged on a multi-million-dollar investment portfolio. The CRA team

analyzed the investment activity, including investment and advisory fees, and reviewed the underlying account documentation, including account opening documents, investment fee disclosures, and fee change notices, to recompute the fees in dispute. Mr. Mathieu provided damages testimony. The arbitration panel relied upon Mr. Mathieu's testimony in its ruling and awarded an amount consistent with the opinions expressed. He was supported by John Rademacher, Abby Williams, and Ben Womac.

**Joint venture dispute in manufacturing:** Kristofer Swanson helped two joint venture partners resolve a series of unusually complex disputes arising from the fracture of a multi-billion dollar, three-decade long manufacturing and marketing relationship covering all of North, Central, and South America. His analyses contributed to a successful resolution of the dispute by the business, including a payment of approximately \$300 million in exchange for the acquisition of certain factories and the execution of intellectual property licensing and supply agreements. He was supported by Jordan Kraner, Amanda Kight, Rebecca Marchioni, and Jamie Fishman.

**Alleged breach of trademark licenses and nonpayment of royalties in the beverage industry:** James Donohue was retained on behalf of the owner of a beverage brand claiming breach of certain trademark license agreements and nonpayment of royalties. He calculated the amount of license fees due to the trademark owner and submitted a reply report addressing the opposing expert's analysis.

## About CRA's International Arbitration Group

CRA's International Arbitration Group combines finance and quantum expertise with industry expertise from energy, oil and gas, metals and materials, 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. We have been engaged in some of the most complex and high-profile disputes of recent years. To learn more, visit [www.crai.com/ia](http://www.crai.com/ia).

## CRA experts in this update

Seabron Adamson  
Greg Bell  
Jim Burrows  
Nikolai Caswell  
Julian DiPersio  
Aaron Dolgoff  
James Donohue  
Tiago Duarte-Silva  
Jamie Fishman  
Justin Ho  
Amanda Kight

Ozgur Kan  
Swati Kanoria  
Jordan Kraner  
Zawadi Lemayian  
Rebecca Marchioni  
Kenneth Mathieu  
Rachel Ott  
David Persampieri  
John Rademacher  
Peter Rankin  
Rebecca Rowden

Christopher Russo  
Michelle Sandoval Siman  
Isabel Serrano Alas  
Laura Sochat  
Kristofer Swanson  
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