

International Investment Arbitration in Europe: Year in Review 2015

International investment arbitration – also known as investment treaty arbitration or investor-State arbitration – is a procedure whereby foreign investors may seek a binding adjudication of claims against host States that have either violated investment protection treaty obligations or, in some circumstances, breached their contractual commitments or their national foreign investment law. The countries of Europe are party to numerous bilateral and multilateral investment treaties which are intended to promote investment by ensuring fair treatment of foreign investors and which permit arbitration of investor claims before the International Centre for Settlement of Investment Disputes (ICSID) or similar fora.

The European economy entered its fourth year of recovery in 2015. Growth in the Eurozone picked up by 0.5 percent in the first quarter of 2015 compared with the last quarter of 2014. Since then, growth continued at a moderate rate despite the fall in energy prices and quantitative easing conducted by the European Central Bank. Growth in 2016 is expected to continue as GDP is forecast to expand by 1.7 percent (slightly above the 1.6 percent increase in 2015).

The number of new investment arbitrations involving the region filed in 2015 increased compared with 2014. Disputes are concentrated in the electric power and other energy industry. Of the numerous cases brought against Spain under the Energy Charter Treaty in the photovoltaic (solar) sector, a first award was awaited at the close of 2015 and rendered on January 22, 2016 in which Spain prevailed on the merits (*Charanne and Construction Investments v Kingdom of Spain*, SCC). Other industries that have given rise to significant numbers of disputes in the region include oil, gas and mining, and finance.

Roughly a third of new disputes filed in 2015 were intra-European cases, which is higher than 2014 (where a quarter of new claims were intra-European). Four of these new disputes were brought pursuant to the Energy Charter Treaty and the rest on the basis of bilateral investment treaties.

European States have concluded 1,770 investment treaties currently in force (including bilateral investment treaties, free trade agreements and other treaties containing investment-related provisions), two of which entered into force during the year. No new investment treaties were signed in 2015.

For purposes of this review, Europe includes the countries of Western, Central and Eastern Europe. We do not include Russia or other countries of the Commonwealth of Independent States (CIS), which are addressed in our separate review of investment arbitration in that region.

For questions about international investment arbitration, please contact a member of our International Arbitration Team, or the authors of this review:

Authors:

Emma Lindsay

Counsel, New York

+1 212 541 2121

emma.lindsay@bryancave.com

François-Xavier Mirza

Associate, Paris

+33 (0) 1 44 17 77 38

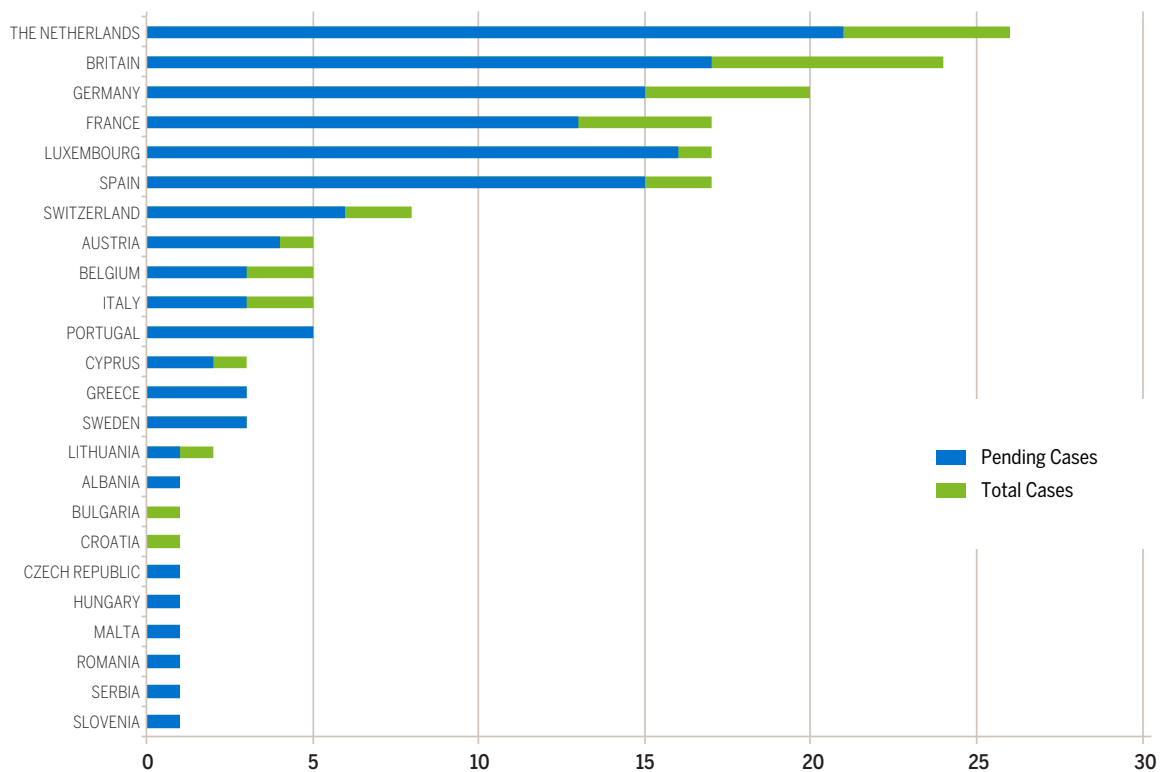
francoisxavier.mirza@bryancave.com

Investment Arbitration in the Region¹

More than 300 ICSID cases have involved parties from European countries as claimant investors, respondent States or both, with the first arbitration brought by an investor in the region – by Swiss and United States investors against Morocco – filed in 1972, and the first arbitration brought against a State in the region – by Swiss and Icelandic investors against Iceland – filed in 1983. Of those more than 300 cases, 160 were pending in 2015.

Of investment arbitrations involving European countries pending in 2015, investors from the Netherlands, Britain and Germany have brought the greatest number of claims. Claims brought by investors from these three countries alone account for more than 40 percent of all pending European cases. Historically, Italy and Switzerland also featured among the most frequently represented home countries of investors in European cases.

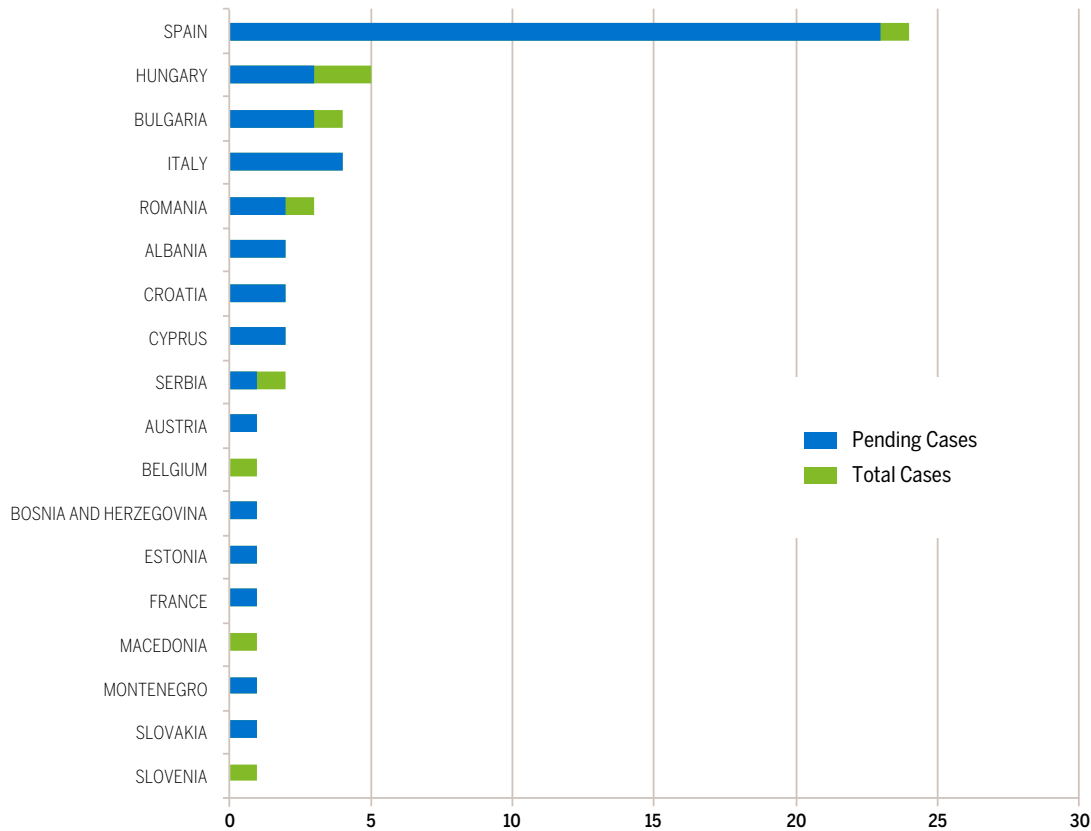
Top Nationalities of Investors with ICSID Arbitrations in Europe



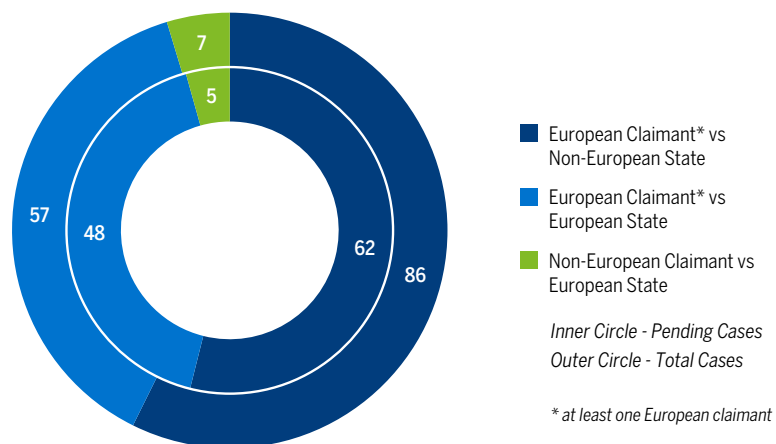
¹ This review considers only investment arbitrations brought under the auspices of ICSID, which constitute the majority of investment arbitrations in the region.

Spain has faced by far the most investment claims in Europe (24), followed by Hungary (5), Bulgaria (4) and Italy (4). All but one of the arbitrations brought against Spain were pending as of the end of 2015. The number of arbitrations against Spain pending in 2015 was equal to that of Hungary, Bulgaria, Italy, Romania, Albania, Croatia, Cyprus, Austria, Estonia, France, Montenegro and Serbia combined.

European Countries Facing Investment Claims



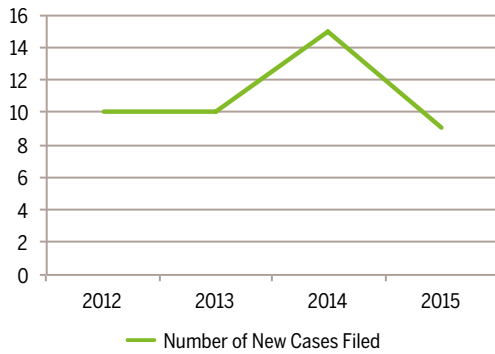
The majority of European claims (57 percent) have been brought by European investors against non-European States. About a third of cases (38 percent) have been brought by European investors against European States. It is comparatively rare for claims to have been brought by investors from outside the region against European States (less than 5 percent).



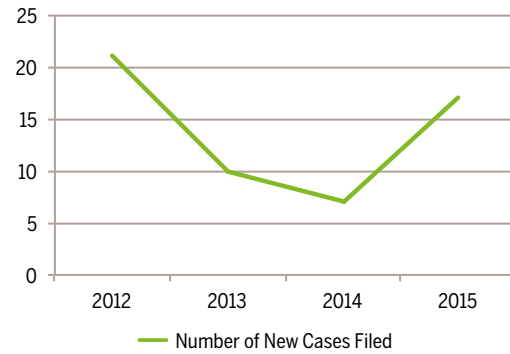
In 2015, 40 percent fewer intraregional cases – i.e., cases brought by European investors against European States – were initiated than in the previous year. In previous years, claims were more commonly brought by European investors against non-European States. Almost three times as many cases were brought against non-European States in 2015 compared with 2014.

Cases Initiated Per Year

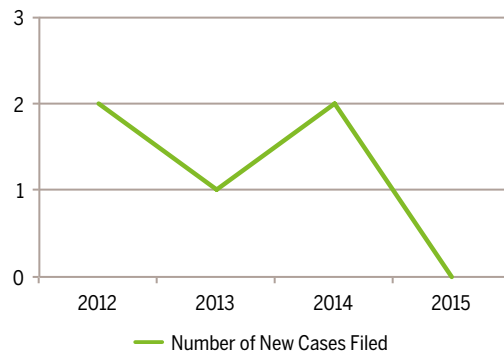
European Claimant* vs European Respondent



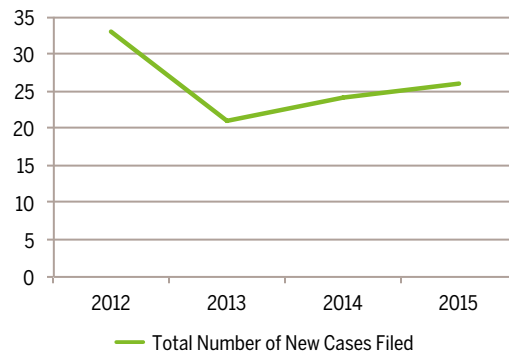
European Claimant* vs Non-European Respondent



Non-European Claimant vs European Respondent/State



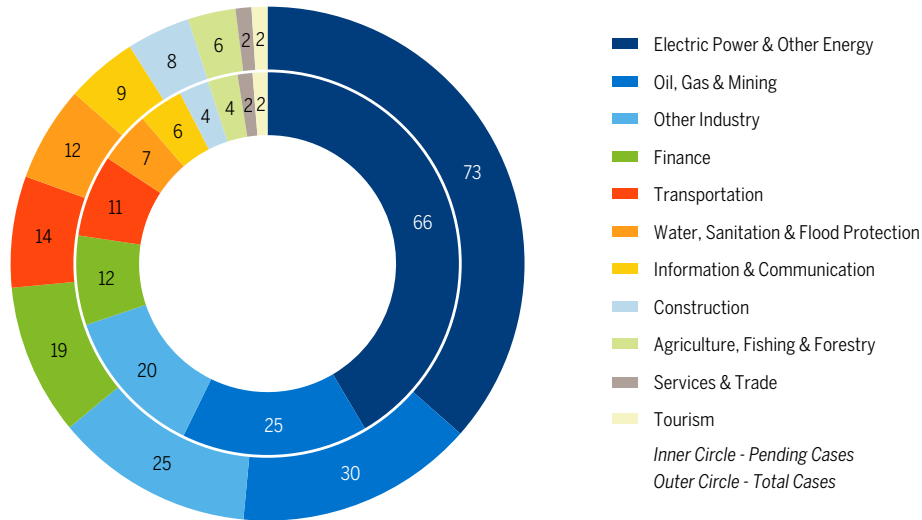
Total Number of New Cases Filed



* at least one European claimant

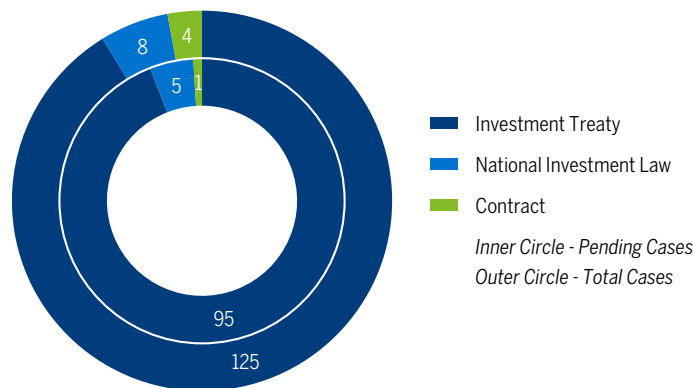
Historically, investment disputes against European States have arisen most frequently in the electric power and other energy, oil, gas and mining, and finance industries. Of the claims pending in 2015, disputes in the electric power and other energy industry outnumbered disputes in the nearest contender industry (oil, gas and mining) by almost three to one.

Investment Cases by Industry



The basis for arbitral jurisdiction in most cases against European States (91 percent) has been an investment treaty (typically a bilateral investment treaty). National investment laws and investment contracts have been invoked as the basis for arbitral jurisdiction in very few cases (6 percent and 3 percent of cases respectively).

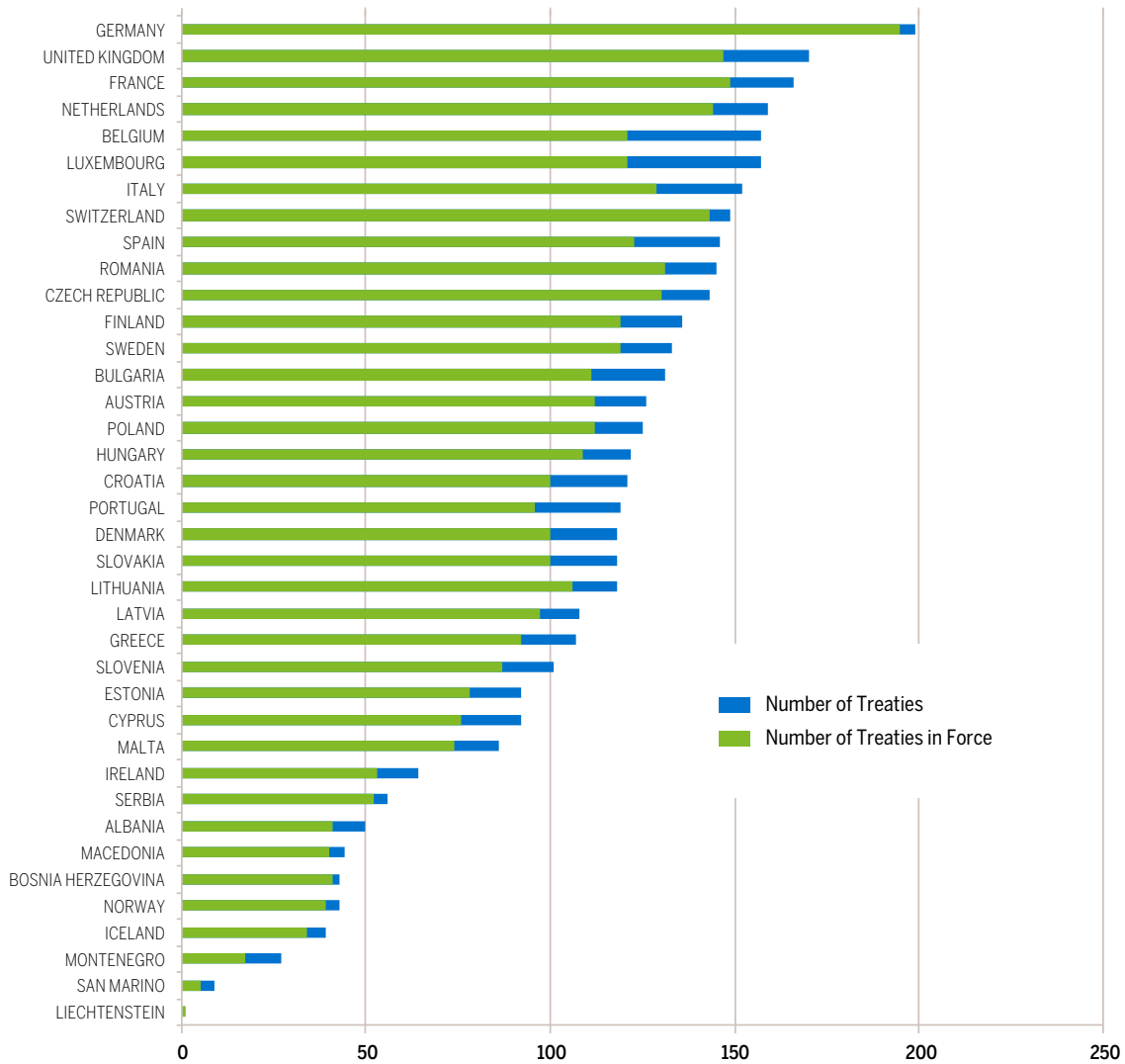
Instrument Invoked to Establish ICSID Jurisdiction



35 arbitrations were concluded in 2015, six of which (16 percent) involved annulment proceedings (a further annulment proceeding was commenced in 2015 in respect of an earlier concluded arbitration). Additionally, 12 out of these 35 cases (32 percent) were settled or discontinued.

Investment Treaties Involving European States

More than 54 percent of the just over 3,500 investment treaties currently in existence worldwide involve European States. Germany has signed the most investment treaties, followed by France, the United Kingdom and the Netherlands.



Of the 1,555 bilateral investment treaties signed by European States currently in force, 325 are treaties signed between or among only European States. No investment treaties involving the region were signed in 2015.

Two bilateral investment treaties (between Canada and Serbia, and between Georgia and Switzerland) entered into force in 2015. These treaties both provide for investor-State arbitration.

Other Developments in 2015

- ▶ The controversy over treaty-based claims brought by EU investors against EU States continues. In March 2015, the European Commission ruled that the US\$250 million ICSID award in *Micula v. Romania* (ICSID Case No. ARB/05/20) was in breach of EU State aid rules, and has formally instructed Romania not to comply with the award. The award was rendered under the Sweden-Romania bilateral investment treaty in compensation for Romania's withdrawal of economic incentives following its accession to the EU in 2004. On February 4, 2016, the European Commission filed an amicus brief urging a United States appeal court to overturn a lower court judgment issued in April 2015 confirming the award.
- ▶ The Republic of San Marino joined ICSID. The ICSID Convention entered into force for San Marino on May 18, 2015.
- ▶ The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, which was signed in September 2014, has not yet entered into force. The consolidated CETA text is currently undergoing legal-linguistic review before the approval and ratification processes may begin. CETA will ultimately replace the eight existing bilateral investment agreements between individual EU Member States and Canada.
- ▶ Negotiations for the Transatlantic Trade and Investment Partnership (TTIP) involving the EU and the United States continued through 2015. In November 2015, the EU presented to the United States a proposal for a changed approach to investment protection and a new system for resolving disputes between investors and States: the Investment Court System, a court-like structure with sitting judges and an appeal mechanism. The proposal sparked intense debates.
- ▶ In December 2015, the EU and Vietnam concluded talks for a free trade agreement, marking the end of the negotiating process. Vietnam agreed to accept the EU's new approach to investment protection – in particular, the Investment Court System mentioned above. The approval and ratification processes are pending.

Critical Times to Consult Counsel

INVESTORS:

- ▶ At the outset – when structuring an investment and negotiating project contracts
- ▶ As soon as difficulties arise – when facing operational, regulatory or other issues in the host country
- ▶ In discussions with the host country – when trying to resolve difficulties amicably
- ▶ Before commencing a claim – when deciding whether and how to make a claim against the host country
- ▶ In post-award proceedings – when seeking to collect on an award or reach a settlement with the host country
- ▶ In getting the business relationship back on track – when moving forward in the wake of a dispute

STATES:

- ▶ At the outset – when negotiating and drafting investment treaties and national investment laws
- ▶ In the pre-investment process – when inviting and accepting foreign investment
- ▶ In the investment phase – when negotiating project contracts
- ▶ As soon as notice of a dispute is given – when consulting with an investor about a potential investment arbitration claim
- ▶ Upon receipt of a claim – when formulating an arbitral strategy in the initial stages of a dispute
- ▶ In implementing or challenging an award – when considering next steps after the arbitration concludes

About Our Team

Bryan Cave's **International Arbitration Team** provides a comprehensive service to clients around the world embracing all aspects of international dispute resolution. With offices in the most popular seats of arbitration, including London, Paris, Hong Kong, Singapore and New York, we handle a broad range of matters, including international commercial and investment arbitration, public international law and complex commercial litigation, for a wide variety of business, financial, institutional and individual clients, including publicly-held multinational corporations, large and mid-sized privately-held companies, partnerships and emerging enterprises. We also advise sovereign clients with regard to their particular complex legal, regulatory and commercial challenges.

Recognized by *Global Arbitration Review* in its GAR 100, our team features many practitioners who serve as both counsel and arbitrator and draws on the full range of subject-matter and industry experience across the firm, including in construction, energy, finance, manufacturing, mining and natural resources, pharmaceuticals, technology, telecommunications, tourism, transportation and many other sectors. Combining the common law and civil law traditions, members of our team are admitted to practice in many jurisdictions across the globe and speak a variety of languages. In addition, we work with an established network of local counsel in places where we do not have a direct presence, ensuring our strong market knowledge and quality of service on matters worldwide.

This Review is published for the clients and friends of Bryan Cave LLP for informational purposes only and to provide a general understanding of the laws in different jurisdictions. The statements made in this publication are for general educational purposes only. Information contained herein is not to be considered as legal advice. You are urged to seek the advice of your legal counsel if you have any specific questions as to the application of the law. The receipt of this publication does not create any attorney-client relationship between you and Bryan Cave LLP. Bryan Cave is not necessarily licensed to practice in the jurisdiction or jurisdictions referred to in the Review. However, Bryan Cave works regularly with local counsel in relevant jurisdictions to arrange advice for clients on specific issues. A list of jurisdictions in which Bryan Cave has offices are as follows: America: Atlanta, Boulder, Charlotte, Chicago, Colorado Springs, Dallas, Denver, Irvine, Jefferson City, Kansas City, Los Angeles, Miami, New York, Phoenix, San Francisco, St. Louis, Washington, D.C. Europe: Frankfurt, Hamburg, London, Paris, Milan (Affiliated Firm). Asia: Hong Kong, Shanghai, Singapore. Under the ethics rules of certain bar associations, this review may be construed as an advertisement or solicitation. © 2016 Bryan Cave LLP. All Rights Reserved.

Authors

Emma Lindsay

Counsel, New York
+1 212 541 2121
emma.lindsay@bryancave.com

François-Xavier Mirza

Associate, Paris
+33 (0) 1 44 17 77 38
francoisxavier.mirza@bryancave.com

Research support and data collection assistance provided by **Camille Boucault**, Legal Trainee, Paris

Additional Contacts

Pedro J. Martinez-Fraga

Partner, Miami
+1 786 322 7373
pedro.martinezfraga@bryancave.com
Co-Leader of the International Arbitration Team

Mathew Rea

Partner, London
+44 (0)20 3207 1203
mathew.rea@bryancave.com
Co-Leader of the International Arbitration Team

Constantin Achillas

Partner, Paris
+33 (0) 1 44 17 77 34
constantin.achillas@bryancave.com

Nigel Binnersley

Partner, Hong Kong
+852 3588 9110
nigel.binnersley@bryancave.com

Rodney Page

Partner, Washington, D.C.
+1 202 508 6002
rodney.page@bryancave.com