

C L I F F O R D

C H A N C E



**ARBITRATION TRENDS  
FOR FINANCIAL  
INVESTORS**



**— THOUGHT LEADERSHIP**

FEBRUARY 2023



## ARBITRATION TRENDS FOR FINANCIAL INVESTORS

We expect to see an uptick in private equity M&A activity in a number of regions in 2023. This is due to the likely loosening of credit markets as global inflation begins to ease, and the pent-up demand for PE investment and also, in APAC in particular, due to China's easing of COVID-19 restrictions which will drive activity within the region. Against this backdrop, we also expect that ongoing macroeconomic and geopolitical challenges across the globe will lead to an increase in disputes involving financial investors, particularly in the energy, TMT and healthcare sectors.

### Telecoms

Bolstered by an increased demand for data and accelerated connectivity fuelled by the rollout of 5G, we have seen deal activity in the telecoms sector boom in recent years. Against the background of recent economic volatility and geopolitical challenges, we expect to see an increase in the number of disputes within this sector over the coming year involving private equity firms and other financial investors, including disputes between commercial parties and investor-State treaty disputes:

#### Disputes involving other commercial parties

There will likely be an increased number of commercial disputes which arise following private equity M&A activity, including claims for breach of warranty and claims under indemnities (including under warranty and indemnity insurance policies), failure to comply with closing mechanics or conditions, breach of post-closing obligations, misrepresentation, or the occurrence of a material adverse change as a result of sudden geopolitical events or where investments have been made in volatile jurisdictions.

#### Investor-State disputes

Many long-term telecoms licence agreements were entered into between States and investors decades ago, when the domestic telecoms sector was in its infancy and the regulatory landscape was less sophisticated. Given the financial lucrativeness of this sector, we have seen, and expect to see, States take steps arguably in contravention of investment treaties in order to expropriate telecom investments or diminish the value

of those investments. This, in turn, will likely give rise to an increase in investment treaty arbitrations between financial investors and States.

### Data centres

Recently, we have seen more financial investors move into the operations and business services area around infrastructure such as fibre networks and data centres. We expect to see financial investors continue to increase their engagement in both greenfield and brownfield infrastructure operations and business services opportunities. Buy-and-build strategies are emerging in what is currently a fragmented market across various regions. As a consequence, we are seeing dispute pressure points arise from data centre acquisitions and investments, including issues concerning land rights and/or commercial leases, loss of material customer contracts, availability of connectivity through third-party infrastructure, regulatory changes and national security and data protection compliance.

### ESG-related disputes

Following a series of high-profile court decisions involving climate change issues, we expect to see an increased number of ESG-related claims escalate to formal disputes. Heightened investor attention on ESG initiatives has given rise to the emergence of new ESG-related contractual provisions, including warranties and indemnities relating to climate change, net-zero goals, responsible business commitments, renewable energy, sustainability commitments, human rights, anti-discrimination commitments and

environmental incidents. Many of these provisions are novel and untested and will lead to commercial disputes concerning questions of interpretation, enforceability and how to measure and enforce compliance with ESG-related provisions. In addition, we expect to see allegations of non-compliance with local environmental and ESG-related regulations or obligations being raised: (i) in post-transaction disputes between co-venturers; and (ii) by States in counterclaims against commercial parties in investor-State arbitrations.

## Exit disputes

In line with the broader M&A market, private equity deal activity slowed in 2022 and exits from investments have become more challenging. This is due to a decline in leveraged buyouts owing to higher interest rates and increased difficulty in obtaining secured financing and a broader slowdown in IPOs, volatility in stock and cryptocurrency markets as well as disruptions to the real estate and energy markets. We are already seeing a number of these macroeconomic factors

causing minority shareholders to become unable or unwilling to meet capital call requirements. Consequently, differing opinions have arisen between minority and majority shareholders over corporate strategy and management, which we expect to lead to an increase in shareholder and exit-related disputes. These disputes commonly involve:

- Exercise of put options: Shareholder agreements commonly give the investor a right to exit by selling their shareholding at a stipulated price if certain conditions are not fulfilled. The outcome of these cases will turn on questions of: (i) whether the contractual put option mechanism was triggered; (ii) whether the mechanics are enforceable; and (iii) disputes / ambiguity over the calculation of fair market price payable to the investor.
- Forced exit: Where a minority investor is forced or squeezed out, for example through the exercise of drag-along rights or through share dilution. Actions taken in this context could give rise to claims of minority oppression.



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