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International arbitration report

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International arbitration report
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Message from the Editor

This edition of International Arbitration Report (IAR) explores the evolving landscape of international arbitration, with a particular focus on legislative reform, procedural innovation, and jurisdictional developments. From South Africa's emergence as a credible arbitration seat to the implications of the UK's new Arbitration Act 2025, this issue captures the dynamic interplay between legal modernization and enduring challenges in arbitral practice.

Legislative reform and jurisdictional evolution

The UK's long-awaited Arbitration Act 2025 received Royal Assent on February 24, 2025 introducing significant reforms, including a default rule on the governing law of arbitration agreements, codification of arbitrator disclosure duties, and a clarified framework for jurisdictional challenges. While largely evolutionary, the Act has sparked debate over missed opportunities, particularly regarding confidentiality, third-party funding, and arbitrator independence.

South African growing stature as a regional arbitration hub is under the spotlight, with the International Arbitration Act 2017 aligning South Africa with UNCITRAL standards and the proactive role of AFSA, the jurisdiction is increasingly seen as a viable seat for cross-border disputes, particularly within the SADC region.

Institutional and procedural developments

DIFC-LCIA arbitration agreements address the legal uncertainty following the dissolution of the DIFC-LCIA Arbitration Centre. Through a comparative review of decisions from the US, Singapore, Abu Dhabi, and the DIFC, we explore a growing judicial consensus favoring the enforceability of legacy agreements, provided the parties' intent to arbitrate is clear.

The shifting role of arbitral tribunals in facilitating amicable resolution is examined. With institutional rules increasingly encouraging tribunals to support settlement efforts, the article outlines practical techniques—such as Kaplan hearings and preliminary views—while cautioning against risks to impartiality.

Enforcement and remedies

The complexities of enforcement are explored in two articles, focusing on the unique challenges posed by declaratory and injunctive relief, including issues of ambiguity, court supervision, and utility.

Meanwhile, "Security for Claims in International Arbitration" revisits a rarely used but potentially powerful provisional measure. The article analyzes the legal basis, institutional rules, and practical hurdles associated with securing claims, urging greater awareness and strategic use of this underutilized tool.

Integrity and accountability in arbitration

The ICC's "Red Flags" methodology for identifying corruption in arbitration is the focus of another timely contribution. Outlining the ICC's three-step framework—identify, validate, assess—we discuss the broader implications for arbitrators' duties, evidentiary standards, and procedural fairness. This initiative reflects a growing emphasis on transparency and ethical vigilance in arbitral proceedings.

Treaty trends and investor-state arbitration

Finally, we examine the India / UAE Bilateral Investment Treaty (BIT), reflecting India's evolving approach towards investment treaty protection which is characterized by narrowing existing protections and introducing novel safeguards, while providing strategic and selective concessions to a key trading partner such as the UAE.

The international arbitration landscape is undergoing transformation, shaped by geopolitical shifts, innovation and evolving regulatory priorities, requiring practitioners to be more agile and forward thinking than ever before.

Paul Stothard, London
Co-Head, International Arbitration – Europe

Message from the Global Leadership Heads

Thank you to our partner and editor in chief Paul Stothard and our arbitration colleagues around the world for producing another timely and incisive edition of the International Arbitration Report. We're excited to welcome Duncan Bagshaw to our international team, who brings exceptional experience in complex, high-stakes disputes, particularly in the energy and natural resources sectors across emerging markets, with a strong focus on Africa.

Finally, we are also pleased to share that our arbitration colleagues based in Australia were named the Arbitration Practice Group of the Year by the Australian Disputes Centre. We are delighted to be a part of our globally integrated growing team of over 150 lawyers and welcome your feedback on the report.

Ruth Cowley, London
Global Co-Head of International Arbitration

Kevin O'Gorman, Houston
Global Co-Head of International Arbitration

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The new Arbitration Act 2025: Necessary modernization or missed opportunity?

By Holly Stebbing and Majde Hajjar

The Arbitration Act 2025 (the 2025 Act) received Royal Assent on February 24, 2025. The date it will come into force has not been confirmed, but the government has indicated it will be "*as soon as practicable*." The 2025 Act makes several important amendments to the Arbitration Act 1996 (the 1996 Act) with the aim of ensuring the UK's arbitration legislation remains "state of the art" and enhancing London's status as a leading international forum for dispute resolution.

This article examines the 2025 Act's key reforms and considers whether this was a missed opportunity to introduce some of the other proposals considered by the Law Commission.

Background

The UK has long stood at the forefront of international arbitration. It was home to one of the first arbitration statutes in the world, John Locke's Arbitration Act 1698, with the Arbitration Act 1996 being instrumental in securing London's status as a leading seat for international arbitration. Indeed, in the 2025 International Arbitration Survey, London was ranked as the top choice seat for respondents, arbitrators and counsel. The 1996 Act is considered one of the leading statutory frameworks for international arbitration and, following a wide-ranging Law Commission consultation, the 2025 Act is intended to build on its success.

Key Reforms to the 2025 Act

1. Default rule for governing law of arbitration agreement

Section 1 of the 2025 Act (which creates Section 6A of the 1996 Act) introduces a new default rule: if an arbitration agreement does not expressly specify the law which governs it, it will be governed by the law of the seat, not the law governing the main contract. This brings English law into concord with a number of other major arbitration centers including France and Sweden, and marks a departure from the Supreme Court's approach in *Enka v Chubb* [2020] UKSC 38 which (in effect) established a default rule that the governing law of the main contract, not the seat, applies to the arbitration agreement if the arbitration agreement is otherwise silent.

This reform has generated the most discussion, with practitioners putting forward various suggestions, including adopting the *Enka v Chubb* approach espoused by the Supreme Court and limiting the default rule only to arbitrations seated in England and Wales.

The clarity introduced by Section 6A is to be welcomed after years of debate and expensive litigation. There are, however, some uncertainties as to what an "express" choice of governing law for the arbitration agreement means and therefore when the new default rule will apply in practice:

- In *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, the UK Supreme Court – in a case concerning the governing law of an arbitration agreement – found that a term derived from implication is itself an express choice because it reflects the parties' choice. Applying this reasoning, it is conceivable that a Court could find that, whilst there is no governing law clause included in the arbitration agreement, the parties have nonetheless by implication made a choice of governing law and that consequently the default rule does not apply.
- In *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30, another arbitration case which reached the UK Supreme Court, it was found that the words "non-contractual and other obligations" (which are commonly found in governing law provisions) may be sufficient to encompass an arbitration agreement and thereby constitute an express choice of law governing the arbitration agreement. This is another situation where it is possible that the default rule will not apply even though there is no "written" governing law clause.

Although the Law Commission only considered these uncertainties in passing, it appears to envisage that the default rule should apply to both the above scenarios. The Courts will need to clarify whether this is the case. From a practical perspective, it continues to be good practice to avoid all uncertainty by including an express clause setting out the choice of governing law of the arbitration agreement (particularly where this differs from the law of the seat).

2. New power of summary dismissal

Section 7 of the 2025 Act (which creates Section 39A of the 1996 Act) confirms the power of a tribunal to issue awards on a summary basis upon an application made by a party (a point that had previously been the subject of some debate) unless the parties agree otherwise. This power can be used if – after giving each party a reasonable opportunity to put forward its case – the tribunal considers that a party has "*no real prospect of success*" on a relevant issue. This standard reflects that applied in English civil procedure and aligns with the rules of many leading institutional rules (such as the LCIA and ICC rules).

The Law Commission's aims are twofold: (1) to prevent parties with weak cases from abusing the arbitral process, and (2) to give arbitrators clear reassurance that making a summary award will not breach their duty to give each party a reasonable opportunity to present their case or give rise to a ground for challenging the award. This clarification addresses one of the perceived pitfalls of arbitration, that is, that tribunals do not have the toolkit to deal efficiently with meritless claims.

3. Revised framework for jurisdiction challenges under Section 67

Section 11 of the 2025 Act (which amends Section 67 of the 1996 Act) introduces a new framework for when a party challenges an award for lack of substantive jurisdiction.

Under the reforms:

- A party cannot raise a ground for objection before the Court unless it raised it before the tribunal (save where the party did not know and could not with reasonable diligence have discovered the ground during the arbitration).
- A party cannot rely on evidence before the Court unless it was put before the tribunal (save where the party could not, with reasonable diligence, have done so).
- *"Evidence that was heard by the tribunal must not be re-heard by the court"*.

This amendment limits the Court's ability to rehear evidence already presented to the tribunal and restricts parties from introducing new grounds or evidence at the award stage. It is a material change to the 1996 Act, which provided that jurisdictional challenges under Section 67 were effectively a de novo review by the Court and often included new arguments and evidence as well as a rehearsal of those points determined by the tribunal.

The aim of this reform is to promote finality and efficiency in English law arbitrations by reducing costs and avoiding unnecessary delays. It will ensure procedural fairness by preventing parties – who have already had their case examined during the arbitration phase – from attempting to refine or reargue their position in Court. The consequence is that the number of Section 67 challenges – already rare – should be reduced.

4. Clarification of Court powers in support of emergency arbitrators

Section 8 of the 2025 Act (which creates Section 41A of the 1996 Act) makes express provision for the appointment of emergency arbitrators where the parties have agreed to arbitration rules that provide for such appointments. It also grants emergency arbitrators the authority to issue peremptory orders, ensuring that these orders can be enforced by the Courts in the same way as those issued by non-emergency arbitrators. The 1996 Act was silent on emergency arbitration, as the concept only emerged after its enactment. Consequently, there was uncertainty about the enforceability of emergency orders and this reform provides useful legal clarity. It reassures parties that pre-emptory orders issued in urgent situations are enforceable and reinforces England and Wales as a reliable and effective seat for resolving time-sensitive disputes.

5. Codification of arbitrators' duty of disclosure

Section 2 of the 2025 Act (which creates Section 23A of the 1996 Act) introduces a statutory duty requiring arbitrators to disclose any circumstances that could reasonably give rise to justifiable doubts about their impartiality, viewed through the eyes of the parties. Common examples of circumstances that require disclosure include prior involvement or a financial interest in the dispute, or relationships with parties, their representatives or their witnesses.

This reform effectively codifies the disclosure rule formulated by the UK Supreme Court in *Halliburton v Chubb* [2020] UKSC 48 and aligns with international best practice (for example, the UNCITRAL Model Law, the ICC Rules, the LCIA Rules and the IBA Rules on Conflicts of Interest). The 2025 Act does, however, go

further insofar as it requires an arbitrator to disclose any relevant circumstances of which they "*ought reasonably to be aware*," and therefore imposes an obligation on arbitrators to conduct diligent enquires into the existence of relevant circumstances before and after accepting appointments.

It is unlikely that Section 2 will lead to a material change in established good practice. Arbitrators already typically make relevant disclosures in a timely way (particularly if there are institutions administering their appointment and the arbitrations). However, its addition to the Act highlights the importance of making adequate disclosures and gives arbitrators a clear statutory framework to follow.

6. Arbitrator immunity

Sections 3 and 4 of the 2025 Act (which amend Sections 24, 25 and 29 of the 1996 Act) enhance protections for arbitrators against liability arising from removal or resignation, reversing a string of decisions suggesting that arbitrators could be liable for costs associated with their removal. In summary:

- Section 3 of the 2025 Act clarifies that an arbitrator will only be liable for costs associated with their removal where it can be shown that they acted or omitted to act in bad faith.
- Section 4 of the 2025 Act provides that an arbitrator will only be liable for costs associated with their resignation in circumstances where their resignation was, in all the circumstances, unreasonable.

The Law Commission proposed these reforms to ensure arbitrators can make decisions without fear of accruing personal liability. Notably, the 2025 Act draws a clear distinction between the resignation and removal of arbitrators. The introduction of a higher threshold for liability in cases of removal (that is, it needs to be shown that the arbitrator acted in bad faith compared to the "reasonableness" test for resignations) is a proportionate safeguard, given the potential for such claims to undermine confidence in the arbitral process.

Proposed reforms not adopted in the Act

Broadly speaking, the 2025 Act makes only modest changes to the 1996 Act and, even then, not all the recommendations made by the Law Commission and the arbitration community have been adopted in the Act.

Duty of confidentiality

The 1996 Act has been criticized for not providing a clear statutory duty of confidentiality, particularly given the uncertainty that remains over its source, scope and extent in English arbitration law.

In practice, London-seated arbitrations are deemed to be private and confidential, with the duty of confidentiality arising by virtue of a term implied by operation of law (unless there are express provisions addressing the point). Some institutional rules, for example, Article 30 of the LCIA Rules, address confidentiality directly by codifying the English common law position that is, in effect, that all materials created for the arbitration are to be kept confidential unless disclosure is required by law. The Tribunal may also deal with confidentiality in its procedural orders.

The 2025 Act was an opportunity to introduce a consistent framework for confidentiality in arbitrations seated in England and Wales. However, in its report, the Law Commission concluded that a statutory "one-size-fits-all" approach to confidentiality would not be appropriate. Instead, it endorsed the current, arguably more flexible position – under which parties can choose from a range of confidentiality mechanisms – as better suited to the diversity of arbitral proceedings. This approach allows the parties to retain greater control over the conduct of their dispute and may also promote more transparency in arbitration – a principle for which there is growing support in some areas of the arbitral community. The counterargument, of course, is that parties generally expect arbitrations to be confidential – it is often touted as a key benefit of the process – and the current position is something of patchwork that leaves parties wondering what information they can disclose about ongoing arbitrations to, for example, their auditors or the market and what must be kept confidential.

The Law Commission acknowledged that the "*balance between confidentiality and transparency is still a matter of debate*" and that debate will continue.

Third-party funding

Third-party funding (TPF) – where a third-party covers a party's legal costs in exchange for reimbursement and a share of any recovered sums – is increasingly common in international arbitration. Concerns have emerged around issues including disclosure and conflicts of interest, particularly where arbitrators may have ties to funders.

In England and Wales, further complications have arisen from the Supreme Court's 2023 decision in *R (on the application of PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28.

The Supreme Court held that, where a TPF seeks a percentage of any damages recovered, the funding agreement qualifies as a damages-based agreement (DBA) under the Courts and Legal Services Act 1990 (CLSA *1990*). DBAs are unenforceable unless they comply with the Damages-Based Agreements Regulation 2013. While this ruling was made in the context of litigation, it cast uncertainty over arbitration funding. The ambiguous wording of the CLSA 1990 raises the possibility that Courts could find similar TPF arrangements in arbitration, particularly those governed by English law, unenforceable.

The Law Commission did not address these issues in its report, nor did it consider TPF more broadly. To some extent, this omission is surprising. Introducing a statutory requirement to disclose the existence of TPF would have aligned English law with the position in Hong Kong and Singapore, leading institutional rules (such as the SIAC, HKIAC and ICC Rules) and the IBA Guidelines on Conflicts of Interest.

That said, the Civil Justice Council's (CJC) report on TPF is expected in the summer of 2025. This may lead to legislation to clarify the extent of any obligation to disclose funding arrangements and the enforceability of funding agreements in the context of arbitration.

Regulation of technology

The 1996 Act does not explicitly address the use of technology and modern working practices in commercial arbitration. Under Section 34 of the 1996 Act, arbitral tribunals have broad discretion to determine all procedural matters (subject to party agreement). In light of this, the Law Commission concluded that no reform is needed to address technology in arbitration as Section 34 is sufficiently flexible to allow arbitrators to adopt modern technology.

Some institutional rules have been more prescriptive, introducing provisions that govern the use of technology including the remote examination of witnesses, remote hearings and electronic documentation. As artificial intelligence and other technological innovations become more commonplace in arbitration, a more formal regulatory framework may be required to ensure consistency, fairness, and efficiency across proceedings.

Arbitrator independence

The Law Commission chose not to introduce an express statutory duty of independence for arbitrators. Had such a duty been adopted, it would have required arbitrators to have no prior connection to the arbitrating parties or the dispute – going beyond the existing requirement of impartiality, which focuses on neutrality and a lack of bias. Although similar duties exist in the UNCITRAL Model law and the ICC Rules, and in other jurisdictions, for example, Paris, Singapore and Hong Kong, the Law Commission concluded that impartiality – and the appearance of impartiality – is a more appropriate standard in the context of English arbitration. It considered that focusing on actual and perceived bias offers a more practical and meaningful safeguard than a more rigid and objective independence requirement.

The Law Commission also highlighted the difficulty of achieving full independence in practice, especially in specialized industries where the pool of suitably qualified arbitrators is small. In these sectors, arbitrators often have prior professional relationships with parties, counsel or other arbitrators – indeed, this is why they will have been appointed – and freedom of choice of arbitrator is often seen as a key advantage of arbitration over the Courts. Imposing a strict independence rule could limit party autonomy and complicate appointments in niche markets.

Discrimination

In its report on the 2025 Act, the Law Commission did not recommend any reform to the 1996 Act to explicitly address discrimination. The Commission noted that the arbitrator's duty to act fairly and impartially already encompasses an obligation to avoid discriminatory conduct. Where concerns arise over an arbitrator's impartiality – including any stemming from discriminatory behavior – there are mechanisms for removal. Aspects of the arbitral process are also already subject to anti-discrimination protections under the Equality Act 2010. That said, the Commission identified a gap in the current position: arbitration agreements can, in some cases, include discriminatory criteria for appointing arbitrators – for example, requiring that an arbitrator be of a specific nationality. While acknowledging this as an area of concern, the Commission concluded that banning such clauses could give rise to complex enforcement issues and lead to satellite litigation and decided not to recommend reform on this point.

Although the 2025 Act does not introduce any explicit prohibition on discrimination in arbitration, there are various initiatives in the sector to promote greater diversity within the field.

Impact of the 2025 Act

The 1996 Act required some degree of modernization, particularly because competitor seats, for example, Singapore, Switzerland and Germany, have recently taken steps to modernize their arbitration laws.

However, the fact that the 2025 Act's amendments are largely incremental or clarificatory is a testament to the success of the 1996 Act and the strength of London's international arbitration market, comprising 5,000 arbitrations annually and said to contribute over £2.5 billion to the UK's economy. The 2025 Act has rightly been described as evolution, not revolution. While a case can be made that the 2025 Act, being the first reform in nearly 30 years, could have been more ambitious, the changes it introduces are progressive while retaining the essence of what made the 1996 Act so effective.

The authors would like to thank Max Sharp for his assistance in the preparation of this article.

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Trends in International Arbitration: US Supreme Court Decisions 2015 to 2025

By Katie Connolly, Courtney Hikawa, and Taylor LeMay

Over the past decade, the US Supreme Court has decided cases that have changed how international arbitration practitioners in the United States and around the world advise and represent their clients. These decisions generally fall into eight categories: scope of the federal arbitration act, compelling arbitration, sovereign immunity, award enforcement, class arbitrations, arbitrator disqualification, delegation of arbitrability and discovery. The Supreme Court will also soon decide several cases which will further shape the practice of international arbitration.

Scope of the Federal Arbitration Act

The Supreme Court decided several cases in the last decade that clarified the scope of the Federal Arbitration Act ("FAA"). In particular, the Supreme Court stated several times that arbitration agreements should be on equal footing with other contracts.

In *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022), the Supreme Court unanimously held that the FAA's policy favoring arbitration does not permit courts to condition a waiver of the right to arbitrate on a showing of prejudice to the opposing party. In *Morgan*, a party waited eight months into litigation to enforce an arbitration agreement, and the counterparty argued that the movant had waived its right to arbitrate. The party opposing arbitration also argued they would be prejudiced by enforcement of the agreement given the stage of litigation.

The Supreme Court reversed the court of appeals' decision, which was based on a finding of prejudice, reasoning that no showing of prejudice was required because whether someone intentionally relinquishes a right to arbitration is determined by their actions, not any effect on the opposing party. The Court also clarified that "[t]he federal policy is about treating arbitration contracts like all others, not about fostering arbitration."

Earlier, in *Kindred Nursing Centers LP v. Clark*, 581 U.S. 246 (2017), the Supreme Court held that a Kentucky state doctrine that required a power of attorney to contain a clear statement in order to allow an agent to commit its principal to an arbitration agreement was preempted by the FAA since it put arbitration agreements on a different footing from other contracts.

Similarly, in *Epic Systems Corp. v. Lewis*, 584 U.S. 497 (2018), the Court resolved a trio of cases[1] where employees sought to litigate Fair Labor Standards Act claims through class actions, despite having employment contracts requiring individualized arbitration. The employees argued that Section 2 of the FAA, also known as the "savings clause," which states that an arbitration agreement is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract" permits courts to invalidate an arbitration agreement if it violates another federal law, and that interpreting the arbitration agreements as requiring individual actions violates the National Labor Relations Act ("NLRA"), which empowers employees to take collective action against employers.

The Court rejected this argument, holding that the FAA requires enforcement of the arbitration agreement's terms and that, because the NLRA did not explicitly mention class action lawsuits, it could not be read as displacing the FAA. As it had emphasized in other recent FAA cases, the Court focused on harmonizing the FAA with other laws, but from the starting point of strict adherence to the FAA's mandate that federal courts enforce arbitration agreements.

Compelling arbitration

The Supreme Court also decided several cases that clarified when and how courts might compel arbitration.

In *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. 432 (2020), the Supreme Court unanimously upheld the use of state law equitable estoppel doctrines to compel agreement non-signatories to arbitration because the FAA is silent on non-signatory enforcement of arbitration agreements based on domestic doctrines, so there is no conflict or preemption.

1 Vaned Engineering GMBH v Reem Hospital (Abu Dhabi Court of First Instance and Court of Appeal Case No. 1046-2023).

Justice Clarence Thomas wrote, "[T]he Convention requires courts to rely on domestic law to fill the gaps; it does not set out a comprehensive regime that displaces domestic law." In this closely-watched case, Outokumpu's predecessor had entered into a series of contracts with F.L. Industries, each of which contained an arbitration agreement requiring arbitration in Germany, subject to German law. F.L. Industries subcontracted with GE Energy as a parts supplier, and when those parts allegedly failed, Outokumpu filed suit. GE Energy, who was not a signatory to the contracts with the arbitration agreements, nonetheless moved to compel arbitration, which was granted and upheld by the Supreme Court.

In *Badgerow v. Walters*, 596 U.S. 1 (2022), the Supreme Court clarified that the "look-through" rule that is applied to deciding jurisdiction over motions to compel arbitration brought under the FAA does not apply in actions to confirm or vacate an award. Previously, the Supreme Court had held that a federal court should determine its jurisdiction over a motion to compel arbitration by looking to the underlying controversy, that is, "looking-through" the case.

In *Badgerow*, the Court held that this rule does not apply to motions to confirm or vacate. In *Badgerow*, two citizens of the same state filed cross-applications for confirmation/vacatur that raised no federal issues, meaning there was no basis for federal jurisdiction. Even so, the court of appeals had affirmed a finding of federal jurisdiction based on the application of federal law in the underlying dispute decided in the arbitration. The Supreme Court reversed and remanded on the basis that there was no basis for any "look-through" to establish jurisdiction in such cases.

Finally, in 2023, the Supreme Court held in *Coinbase, Inc. v. Bielski ("Coinbase I")*, 599 U.S. 736 (2023) that an interlocutory appeal of a denial of a motion to compel arbitration under the FAA automatically stays the entire underlying litigation. Then, a year later in 2024, the Supreme Court held unanimously in *Smith v. Spizzirri*, 144 S. Ct. 680 (2024) that, when a dispute is compelled to arbitration, the FAA mandates a stay of litigation during arbitration (if requested) and does not permit courts to dismiss the case. In part, the Court reasoned that allowing dismissals upon granting a motion to compel would effectively create an end-run around the FAA, which authorizes an immediate interlocutory appeal from an order *denying* arbitration, but not from an order *compelling* arbitration, by turning an order compelling arbitration into a final appealable order.

Award enforcement

While most of the Supreme Court's enforcement-related cases dealt with sovereign immunity questions as discussed below, in *Yegiazaryan v. Smagin*, 599 U.S. 533 (2023), the Supreme Court confirmed that in certain circumstances, creditors could use the US Racketeer Influenced and Corrupt Organizations Act ("RICO") as part of their effort to enforce foreign arbitral awards. The decision used a balancing test to hold that Smagin, a foreign national, was eligible to recover RICO damages (which can allow treble compensatory damages) because Yegiazaryan, also a foreign national, had engaged in racketeering activity in or directed from California, aimed at frustrating Smagin's recovery efforts. The Court agreed with the United States Court of Appeals for the Ninth Circuit that this caused Smagin a domestic injury by impairing his ability to enforce his California judgment, which arose out of an arbitral award issued in London.

Sovereign immunity

The interpretation and application of the Foreign Sovereign Immunity Act ("FSIA") was a popular topic at the Supreme Court in the last decade. In *Republic of Hungary v. Simon*, 145 S. Ct. 480 (2025), the Supreme Court held that Hungary's assets were immune from enforcement efforts pursued by Holocaust survivors and their heirs to recover from Hungary property confiscated during World War II.

The plaintiffs invoked the expropriation exception, arguing that the property at issue was expropriated in violation of international law and that Hungary had commingled the profits from the sale of the confiscated property with its general funds, which it later used for commercial activities in the US, such as issuing bonds and purchasing military equipment. The Court rejected the plaintiffs' arguments, instead holding that there must be more "commingling," and that the FSIA's expropriation exception does not apply unless plaintiffs plausibly trace the confiscated property or its proceeds to specific commercial activities in the US.

Most recently, in an opinion that was handed down in June 2025, *CC/Devas (Mauritius) Ltd. v. Antrix Corp.*, 221 L.Ed.2d 867 (2025), the Supreme Court held that the FSIA's arbitration exception does not impose a "minimum contacts" requirements, that is, that a defendant must have some level of contacts with the jurisdiction into which it is being forced. Devas Multimedia, a Mauritius-based company, obtained a $500 million arbitral award against Antrix Corp., an Indian state-owned entity, after Antrix terminated a satellite contract. Devas sought to enforce the award in the US under the FSIA's arbitration exception but was initially denied by

the Ninth Circuit for lack of contacts with Washington state.

Another case expected to be decided in 2025 is *Wye Oak Technology, Inc. v. Republic of Iraq*. A defense contractor, is asking the Court to determine whether in a breach of contract case under the FSIA's third clause it is sufficient to prove "direct effect" using traditional causation principles, or if courts must also find that the contract at issue established or necessarily contemplated the US as a place of performance. The third clause provides an exception to sovereign immunity if the action is based on an act outside the US in connection with the sovereign's commercial activity that causes a "direct effect in the United States."

The Court is also asked to determine whether, in actions under the second clause, which requires an act performed within the US, that "act" must be by the sovereign.

Class arbitrations

Class arbitrations have become more common in the last decade and thus have become a more popular topic at the Supreme Court. Consistent with its decisions interpreting the scope of the FAA, as discussed above, the Supreme Court has repeatedly emphasized that arbitration agreements under the FAA are to be interpreted on equal footing with other contracts.

In 2011, the Supreme Court held in *AT&T Mobility LLC v. Concepcion* that the FAA preempted California case law that found agreements barring class arbitration were unconscionable and therefore invalidated. In *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015), DIRECTV and its customers entered into service agreements that included an arbitration agreement, a class action waiver, and an agreement that the entire arbitration agreement was unenforceable if the law of the customer's state made class action waivers unenforceable.

A California court, relying on the state's pre-*Concepcion* case law, found that the entire arbitration agreement was invalid. The Supreme Court reversed, extending its previous holding that Section 2 of the FAA embodies a national policy placing arbitration agreements on equal footing with other contracts. The Court found that the California court's reasoning would not have been applied the same way in a non-arbitration context and therefore violated the FAA.

Then, in *Lamps Plus, Inc. v. Varela*, 587 U.S. 176 (2019), relying on its previous holdings that class arbitrations are inherently different from bilateral arbitrations (see, *for example, Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 622 (2010)), the Supreme Court held that an arbitration agreement that was ambiguous as to the availability of class arbitrations lacked the consent required by the FAA to subject the parties to arbitration. The Court overturned a California court's holding that applied California case law to interpret an ambiguous provision against the drafter, who here sought to avoid arbitration, again finding that the doctrine was preempted by the FAA as it treated arbitration agreements differently than other contracts.

Live *Nation Entertainment, Inc. v. Heckman* is a case that is expected to be decided by the Supreme Court this year. It concerns whether the FAA applies to all arbitration agreements – including those with mass arbitration procedures – or only traditional bilateral arbitration agreements that were specifically envisioned when the FAA was originally enacted in 1925. Live Nation seeks to overturn the Ninth Circuit's holding that the New Era ADR Arbitration Rules and Procedures, including its mass arbitration rules, are unconscionable.

Arbitrator disqualification

The Supreme Court denied review of two closely watched cases involving arbitrator disqualification, thereby implicitly affirming the underlying decisions. In *Monster Energy Co. v. City Beverages, LLC*, 141 S. Ct. 164 (2020), the Supreme Court affirmed the Ninth Circuit's vacatur of an arbitral award on the basis that an arbitrator had failed to disclose that, as an owner of JAMS, he had a right to a portion of profits from all arbitrations rather than just those in which he participated. Since JAMS had administered 97 arbitrations for Monster in the foregoing five years, the facts and failure to disclose created a reasonable impression of partiality.

In *Grupo Unidos Por el Canal SA et al. v. Autoridad del Canal de Panamá*, 144 S. Ct. 1096 (2024), the Supreme Court implicitly affirmed an Eleventh Circuit Court of Appeal's decision holding that late disclosures regarding the arbitrator's and counsel's involvement in other cases did not arise to the standard of evident partiality because the alleged partiality was "remote, uncertain and speculative" and not "direct [and] definite."

Delegation of arbitrability

In its arbitrability-related decisions of the past decade, the Supreme Court reinforced that courts must respect parties' delegation of arbitrability to arbitrators, but must first determine if the FAA applies and which arbitration agreement controls before compelling the parties to arbitration.

In *Henry Schein Inc. v. Archer & White Sales Inc*., 586 U.S. 63 (2019), the Court unanimously rejected certain courts of appeals' attempts to circumvent parties' delegations of questions of arbitrability to arbitrators under Sections 3 and 4 of the FAA by weighing the merits of the arbitrability question themselves. In particular, the Court struck down the Fifth Circuit's "wholly groundless" exception, in which it could deny sending a dispute to arbitration – even if there was a delegation clause – if the court found the request for arbitration to be "wholly groundless" to the delegation of arbitrability as a violation of the FAA.

Then, in *New Prime Inc. v. Oliveira*, 586 U.S. 105 (2019), just days after the *Henry Schein* opinion, the Supreme Court unanimously held that federal courts must first determine whether the FAA applies to an agreement before compelling it to arbitration, even if it contains a delegation clause enforceable under Section 3 and 4. In *New Prime*, the Court determined that an independent contractor's employment agreement was a "contract of employment" that fell within the exceptions to the FAA and thus could not be compelled to arbitration under the FAA.

Finally, in *Coinbase, Inc. v. Suski* ("Coinbase II"), 602 U.S. 143 (2024), the Supreme Court unanimously held that a court must decide which dispute resolution provision controls when there are multiple contracts with differing dispute resolution provisions at issue. In *Coinbase II*, the plaintiffs agreed to a contract with a delegation clause when they signed up for Coinbase's cryptocurrency exchange platform but later participated in a sweepstakes, which had a different contract without an arbitration provision. The lower courts denied a motion to compel arbitration on that basis that the sweepstakes contract controlled. The Supreme Court ruled that, while the issue of arbitrability can be delegated to an arbitrator, where there are multiple (subsequent) contracts with different dispute resolution provisions, then it falls the courts to decide arbitrability.

Discovery

In 2022, the Supreme Court effectively eliminated the use of 28 U.S.C. § 1782 to obtain discovery in the US for use in most commercial, private international arbitrations.

In *ZF Automotive US, Inc. v. Luxshare, Ltd*., 596 U.S. 619 (2022), the Supreme Court unanimously held that "only a governmental or intergovernmental adjudicative constitutes a 'foreign or international tribunal' under 28 U.S.C. §1782," a statute that permits parties to obtain discovery in the United States in aid of non-U.S. legal proceedings.

This decision curtailed the broader application of Section 1782 that had followed the Court's earlier decision in *Intel Corp v. Advanced Micro Devices, Inc*. recognizing the European Commission's Directorate-General for Competition as a "tribunal" under the statute because it acted as a first-instance decision-maker. In *ZF Automotive*, the Supreme Court expressed its concern that extending Section 1782 would cause "significant tension with the FAA," as Section 1782 "permits much broader discovery" than the FAA, creating "a notable mismatch between foreign and domestic arbitration."

International arbitration has consistently featured in the Supreme Court's decisions in the last decade. These cases are just a sample of those that have been decided, which have shaped the practice of international arbitration in the United States and abroad. From the application of sovereign immunity to the ability to obtain discovery in the US, for use in proceedings abroad to compelling non-signatories to participate in arbitration, the decisions have touched on a wide-range of topics. As practitioners and the Court continue to grapple with a rapidly changing global order, the Supreme Court will continue to play a role in how arbitration practitioners advise and represent their clients.

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Facilitating settlement during arbitration: Is it time for the tribunal to get involved?

By Daniel Allman, Paul Stothard, Claire Martint

Arbitral tribunals increasingly take steps to facilitate settlement between the parties. This reverses the traditional view that a tribunal had no role in settlement efforts, considering that an arbitrator's only function was to determine the dispute and so promoting settlement would compromise their neutrality.

Competing legal cultures

It is a fundamental tenet of international arbitration that tribunals are independent, impartial and neutral. Out of concern to preserve tribunals' neutrality, the traditional approach at least in common law jurisdictions was that a tribunal had no role in promoting settlement of a dispute. Instead, settlement considerations were left entirely to the parties and a tribunal would limit its role to determining the dispute in an enforceable award.

That said, civil law arbitrators historically have been more willing to encourage the parties to engage in settlement talks. That approach reflected the more inquisitorial nature of domestic court proceedings in many civil law jurisdictions.

Today, despite the traditional view in common law jurisdictions, tribunals are increasingly comfortable in guiding the parties towards considering settlement options. Procedural rules at some of the key arbitral institutions now reflect this change in perspective, and in 2023, the ICC Commission on Arbitration and ADR published guidance on the steps arbitrators can take to facilitate settlement.

Relevant rules of key arbitral institutions

The rules of several institutions expressly permit the arbitrator to raise settlement during the arbitration. None of them, however, adopt mandatory language or dictate which techniques a tribunal should use to facilitate settlement efforts.

- *ICC Arbitration Rules (2021)*: The ICC Rules empower the arbitrator to "[encourage] the parties to consider settlement of all or part of the dispute" (Appendix IV, (i)).
- *ACICA Arbitration Rules (2021)*: The ACICA Rules provide that "[a]s soon as practicable after being constituted," the tribunal must hold a preliminary meeting at which it must "raise for discussion with the parties the possibility of using other techniques to facilitate the settlement of the dispute," including mediation (Rule 25.3).
- *HKIAC Arbitration Rules (2024)*: The HKIAC Rules state expressly that the tribunal may suspend the arbitration where the parties wish to "pursue other means of settling their dispute" (Art 13.11).
- *SIAC Arbitration Rules (2025)*: The SIAC Rules provide that at the first case management conference the tribunal may consult with the parties on "the potential for the settlement of all or part of the dispute, including through the adoption of amicable dispute resolution methods" such as mediation (Rule 32.4(a)). More generally, the SIAC Rules empower the tribunal "to make any necessary directions, including a suspension of proceedings, for the parties to adopt any amicable dispute resolution methods" (Rule 50.2(l)).

By contrast, the *LCIA Arbitration Rules (2020)* do not include any specific provision empowering the tribunal to play an active role in relation to settlement.

Techniques for facilitating settlement in arbitration

There are various techniques available to a tribunal that wishes to accommodate or encourage settlement talks. Each of the five techniques summarized below has its own advantages and potential drawbacks.

1. *Using the first case management conference*. The first case management conference is a useful opportunity to draw the parties' attention to settlement considerations, and to develop a procedural timetable that accommodates appropriate case management techniques. It is for this reason that the ACICA Rules and the SIAC Rules refer specifically to the role a tribunal can play in that setting to facilitate settlement efforts. From the

users' perspective, some parties (particularly respondents) may not have a detailed understanding of their prospects at this early stage, and so may be unwilling to engage meaningfully with settlement proposals. On the other hand, the ICC Commission reports that some in-house counsel would be concerned that arbitrators who raise settlement issues later in the proceeding may lack neutrality ('Facilitating Settlement in International Arbitration' (2023), page 6).

2. *Scheduling mid-stream conferences*. Subsequent procedural meetings provide an opportunity for the tribunal to confirm whether parties' early positions have changed, and to offer guidance on the issues for determination in a way that causes parties to reassess their expectations. If done effectively, this type of mid-stream conference can cause parties to revisit the possibility of amicable resolution. For example, a so-called "Kaplan hearing," developed by arbitrator Neil Kaplan, is one such form of mid-stream conference – held after the first round of written submissions, but before the merits hearing – at which the tribunal hears both sides open their cases and present skeleton arguments. This can help the tribunal to craft more focused procedural orders and the parties to give more focused submissions during the balance of the arbitration.
3. *Incorporating mediation into the arbitral process*. The tribunal can include a window for mediation within the procedural timetable, ensuring that the parties will have a dedicated opportunity to explore amicable resolution at a moment when the dispute should be ripe for settlement. However, tribunals are generally reluctant to set down a mediation window unless both parties agree. If the timetable is to include a mediation window, then the tribunal and the parties should give consideration not just to the timing but also to the duration of that window, as well as the question of whether other procedural steps should be paused while mediation occurs. (Separate considerations arise which are beyond the scope of this article in cases where the neutral proposes to switch between arbitrator and mediator roles, in a procedure commonly known as "arb-med" or "med-arb.")
4. *Giving preliminary views*. Tribunals wishing to play a more active role in encouraging settlement can give their "preliminary views" to the parties. A preliminary assessment of the issues in dispute would be non-binding, and can help the parties to realistically assess their prospects. Given the importance of maintaining impartiality, the tribunal should only offer its preliminary views with the parties' express consent. Best practices also include (a) giving preliminary views only after reviewing enough information to adequately understand the issues, (b) caveating that the views are preliminary and non-binding, and (c) giving views orally and without a transcript.
5. *Chairing settlement conferences*. At their most involved, an arbitrator who has given preliminary views may be asked to chair a settlement conference between the parties. Any such conference should be subject to "settlement privilege," which means the tribunal could not refer to or rely on those discussions when making an award (in the event the conference does not resolve the dispute). Again, this step should only be taken with the parties' express consent, given that it carries the risk that a subsequent award could be challenged at the seat or in the context of enforcement proceedings.

Conclusion

Looking ahead, we expect that some arbitral institutions will establish more detailed parameters related to settlement efforts during the proceeding. For now, several institutions have adopted rules that give tribunals a broad, non-mandatory discretion to encourage the parties to consider settlement. Even under those rules, however, party consent still sits at the heart of the relevant techniques.

For arbitration to remain the preferred method for resolving cross-border business disputes, active case management by tribunals including in relation to settlement is essential. At the same time, concerns over arbitrator impartiality remain and tribunals must be sensitive to user expectations around, for example, communicating with any party on a one-on-one basis.

** The co-authors are grateful to Samuel Gorman, graduate, for his assistance in relation to this article.*

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It's not always about the money! Issues in the enforcement of non-monetary awards

By Tamlyn Mills and Claire Martin

Introduction

The ability to enforce arbitral awards in jurisdictions where an award debtor has assets is key to the efficacy of international arbitration and one of the reasons why it is the preferred method of dispute resolution for cross-border disputes.

The enforcement of monetary awards is common and typically takes the form of entry of judgment in the amount of the award. More novel and complex questions can arise when seeking to enforce non-monetary awards, such as declarations, injunctions and orders for specific performance. As noted in *Sterling v Rand* [2019] EWHC 2560 at [66]:

> While monetary awards will not automatically raise an investigation as to whether they are properly to be enforced, the enforcement of an award in the form of a declaration or a mandatory injunction is more likely to generate specific consideration. These are always regarded as discretionary remedies whenever granted, and the court's order in similar terms will only be granted if appropriate.

This article will discuss some of the issues that can arise in the enforcement of non-monetary awards that both clients and practitioners should consider, including when formulating claims for relief at the outset of an arbitration.

Issues in the enforcement of non-monetary awards

The main treaties governing the cross-border enforcement of investment and commercial awards are the 1966 ICSID Convention and the 1958 New York Convention. Under Article 54 of the ICSID Convention, non-monetary orders cannot be enforced under the ICSID Convention.

There is no equivalent limitation in the New York Convention, and it is widely accepted that non-monetary awards are capable of enforcement. However, practical issues can arise. As enforcement of non-monetary awards is less common, these issues have received limited judicial consideration. The issues include:

1. Time for performance

When seeking to enforce a non-monetary award requiring a party to take particular action (such as sell shares or participate in a prescribed valuation process), a question may arise about whether the time for performance has arrived and, if not, whether enforcement is premature. Depending on how the award is drafted, it may not be clear when the parties are required to take or to have completed certain steps. A party resisting enforcement might insist that there be evidence of actual non-compliance, while a party with the benefit of an award might want to seek enforcement proactively as a mechanism to ensure or compel compliance.

2. Ongoing court supervision

Enforcing courts typically exercise a limited "one-off" role to assimilate an award into the domestic legal system and give it the same status as any other judgment of the court. When enforcing a non-monetary order, such as a mandatory injunction or order for specific performance, the court may be asked to take on a broader supervisory role, possibly extending to ongoing monitoring of compliance with orders and coercive measures over parties. Just as courts may decline to exercise their discretion to make a non-monetary order if it would call for expansive or protracted court monitoring, they may also be reluctant to enforce awards which would then require extensive judicial supervision. In *Hardy Exploration & Production India*, Inc. v Government of India (D.D.C., 7 June 2018), the Government of India argued that an award ordering specific performance could not be enforced because it would "be too complicated for the Court to oversee" (p. 26). While the Court did not accept the argument, it did not explain its reasoning as the case was decided on other grounds.

3. Ambiguity in the award

Unlike a straightforward order for payment of a liquidated sum, non-monetary orders can be more difficult to frame and even carefully drafted awards are susceptible to ambiguity when it comes to putting them into effect. A party resisting enforcement may argue that the court should not enforce an award by making an order that lacks sufficient clarity and precision or leaves them uncertain about how to comply. An enforcing court may also be asked to make orders additional to or different from the terms of

the award in order to resolve ambiguity, giving rise to questions about the scope of an enforcing court's jurisdiction to modify an award. For example, in *Tianjin Jishengtai Investment Consulting Partnership Enterprise v Huang* [2020] FCA 767, the Federal Court of Australia accepted that an award requiring the respondent to pay the applicant for the transfer of shares was "akin to an order for specific performance" and was enforceable but considered that it was also necessary to make a consequential order requiring the transfer of the shares.

4. Enforcement of declarations

Courts have refused to enforce declarations on the basis that there is no utility in asking a court to make the same declaration between the same parties as made by the tribunal in an award. In *Tridon Australia Pty Ltd v ACD Tridon Inc (Incorporated in Ontario)* (2004) 20 BCL 413, enforcement of a declaratory award was refused because the court found that restating the declaration provided no real benefit and that the purpose of enforcement is to facilitate "a victorious party in an arbitration [to obtain] the material benefit of the award in its favor..." (at [11]). Similarly, in *West Tankers Inc v Allianz SpA* [2011] EWHC 829 (Comm), the court found that a judgment on a declaratory award will only be made where it makes a positive contribution to securing the benefit of the award (at [28]-[32]).

Recently, in *Roadpost Inc. v Beam Communications Pty Ltd* [2025] FCA 120, the court directed the parties to remove the words "and declare" from an order characterized as specific performance because "the making of a declaration in the terms of an award is not 'enforcement' of the award and not an appropriate or proper order to make under a statutory provision... which provides that an award may be 'enforced' by the Court" (at [8]).

Given this line of authority, a party seeking enforcement of a declaration by entry of judgment needs to be able to identify some tangible benefit from the entry of judgment over and above mere recognition of the declaration as binding.

5. Utility

Enforcing courts have also considered utility when deciding whether to enforce an award. In *EBJ21 and Another v EBO21 and Another* [2021] FCA 1406, the court refused to make a declaration recognizing a monetary award that had already been paid finding that the declaration was not appropriate because "[t]he Court's declaration [would] produce no foreseeable or meaningful consequences for the parties" ([54]). While that case did not concern a non-monetary award, utility arguments may have greater force in the context of such awards given the issues already identified.

Conclusion

None of the issues raised in this article fit neatly into a recognized ground for refusing enforcement of an award under Art V of the New York Convention. However, the enforcement of non-monetary awards arguably invokes the exercise of the enforcing court's discretion in ways that do not arise in relation to straightforward money awards. The existence and scope of an enforcing court's discretion under the New York Convention framework is an issue that has yet to be grappled with in a principled way and is one that arises most acutely in the context of non-monetary awards. In the face of this uncertainty, parties seeking non-monetary relief should carefully consider the enforceability of resulting awards and try to ensure that non-monetary awards are crafted carefully to reduce hurdles to enforcement.

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Risky business: Key features of the ICC's corruption "red flags" methodology

By Tamlyn Mills and Ananya Mitra

In the February 2024 edition, we offered strategies for tackling the interplay between arbitration and anti-corruption legislation and analyzed the judgment of the English High Court in *Nigeria v Process and Industrial Developments Ltd [2023] EWHC 2638 (Comm)*, setting aside a US$11 billion dollar arbitral award on the basis that it was obtained by fraud and conduct contrary to public policy. We now analyze the 'Red Flags or Other Indicators of Corruption in International Arbitration' document published by the ICC in November 2024. This document proposes a methodology for evaluating and responding to corruption 'red flags' in international arbitration and considers the legal duties of arbitrators in such cases. This guidance is an important step in developing a rigorous but balanced approach to identifying and responding to indicators of corruption in international arbitration.

Background

The decision of the English High Court in Nigeria v Process and Industrial Developments Ltd [2023] EWHC 2638 (Comm) (Nigeria v P&ID) was a notable example of an award infected by fraud and corruption being set aside. While an extreme example, corrupt practices have the potential to damage the reputation of international arbitration as an impartial dispute resolution process. Tribunals also need to tread carefully when alerted to allegations of corruption in the factual matrix of an arbitration. If these allegations are not dealt with properly, the integrity of the arbitral process may be damaged.

In the context of the increasing frequency of allegations of corruption and the inherent difficulty in substantiating such allegations, the ICC Task Force on Corruption released 'Red Flags or Other Indicators of Corruption in International Arbitration' (the Red Flags Document) in November 2024 (link). The Red Flags Document proposes a first-of-its kind framework for analyzing a corruption 'red flag' to assist tribunals, judges and institutions to examine red flags when allegations of corruption are raised by the parties or when the tribunal independently develops concerns about possible corruption. The Red Flags Document also recommends steps that tribunals can take to discharge their duties when corruption "red flags" are alleged or arise.

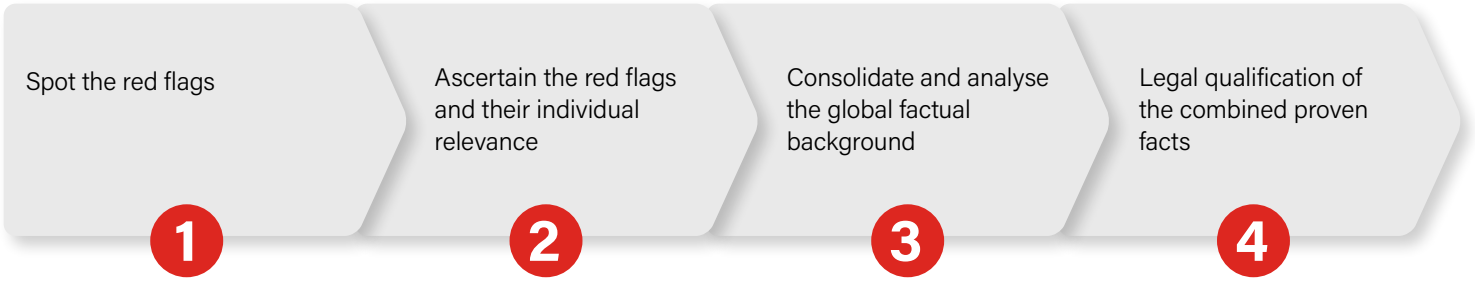
Definition of a red flag

The Red Flags Document defines a red flag as "*any fact or circumstance that indicates a potential risk that a corrupt practice, most often bribery involving a public official has occurred.*" Tribunals have relied on red flag analysis to establish corruption in several instances. In Metal-Tech v Uzbekistan, ICSID Case No. ARB/10/3, for example, the underlying investment was found to have been procured through bribery in light of numerous red flags, including:

- The investor engaged the prime minister's brother and a former government official as consultants.
- The investor made several payments to these individuals.
- The investor failed to justify such payments.

Overview of methodology

The Red Flags Document proposes a three-step methodology:



Step 1: Identify

When an allegation of corruption is raised by a party or suspected by a tribunal, the first step is to identify the fact(s) that, if made in the context of the case, may indicate a risk of corruption. These are the relevant "red flags."

Red flags are divided into two categories:

- General red flags related to the circumstances of the particular country, government administration or business sector – for instance, lists of red flags have been developed for the natural resources sector which is seen as being particularly susceptible to corrupt practices.
- Specific red flags related to the facts or circumstances relating to the counterparty, or their relationship, or specific to the transaction at issue such as unexplained, large payments to third parties.

The Task Force sets out examples of each type of red flag and the sources from which they can be identified. However, without further analysis, red flags are not themselves probative of corrupt conduct, they are merely facts that strike "…the chords of the legal elements of the relevant corrupt practice, thereby commanding further delving into the facts through the rules of evidence, to ascertain based on the evidence ultimately adduced whether corruption in the specific form it is alleged or suspected to have taken place has occurred" (pg. 43).

Step 2: Validate

Once red flags have been identified, each red flag should be critically examined or validated based on contemporaneous evidence. Validation will fail, for instance, where the source lacks credibility or the particular action can be justified in the relevant factual and temporal context.

The Task Force illustrates the lines of inquiry and considerations that should inform the validation process. For example, when a third-party intermediary apparently lacks the required qualifications to undertake the relevant work, consideration should be given to how specific those qualification requirements are, the pool of available personnel in the relevant country to undertake that task, or whether the third party has been hired mainly for their influence with government.

Once a red flag has been validated, it becomes an indicator of a likely corrupt practice absent contravening facts or circumstances. The relevant corrupt practice is probable but, importantly, red flags still lack "*probative force*."

Step 3: Assess

At this final step, a 'big picture' analysis must be undertaken to ascertain the collective import of validated red flags in evidentiary terms. Red flags must be assessed by being weighed up against each other in

addition to being considered concurrently. Even if validated, red flags are not all of equal significance.

The existence of specific red flags would generally carry greater weight (inferring a higher likelihood of the alleged conduct) as opposed to the existence of general red flags. Possible mitigating circumstances, such as the presence of a robust corporate compliance policy (green flags), neutral facts (black flags) as well as alternative scenarios must also be considered at this stage, together with any gaps or inconsistencies. This may lead to factual findings and, ultimately, a legal determination on whether a specific corrupt practice has occurred.

The Task Force usefully identifies several tools that the tribunal can use in making its factual assessment, including:

- Drawing adverse inferences

- Using expert opinion on the meaning of certain red flags, reasonable compliance expectations and other relevant issues
- Pursuing lines of inquiry with the parties, using their inherent authority over the proceedings, even where corruption issues are not raised by the parties
- Relying on publicly available findings of regulatory authorities and other tribunals
- Invoking the principles of estoppel and waiver to influence factual findings, or using admissions of peripheral facts to establish corruption
- Potentially leveraging the data mapping and predictive functions of artificial intelligence in the assessment of red flags.

Broader issues

The Red Flags Document goes on to discuss the following broader issues:

- The procedural effects of red flags in the arbitration and in set-aside and enforcement proceedings, such as admissibility of new corruption allegations and evidence, where the burden of proof should lie and the proper standard of proof.
- The role and responsibilities of the tribunal in relation to red flags.
- New and emerging issues, such as the growing role of corporate compliance measures and the role of artificial intelligence.

A detailed examination of these issues is beyond the scope of this article but the Red Flags Document provides a synthesis of material and offers valuable guidance to arbitrators.

Conclusion

The Red Flags Document meaningfully responds to growing concerns around corruption in international arbitration, offering a methodological framework approach for tribunals. The Task Force's forthcoming comprehensive report on corruption in international arbitration will include guidance on other related matters such as burden of proof and parallel proceedings.

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Challenges and appeals to arbitral awards: Volume increases but English Courts remain steadfast

By Paul Stothard, Joseph Bentley, India Furse

To paraphrase a well-known English adage, you can wait for months for a successful challenge to an arbitral award on grounds of procedural irregularity under Section 68 of the Arbitration Act 1996 of England and Wales (the "Act") to arrive and then three come along at once. Do these recent judgment signal a shift in the English court's traditional approach of avoiding interfering with arbitral awards and the arrival of a new era of judicial intervention?

From a quick glance at the 2023-2024 Commercial Court Report, you might be forgiven for thinking that this might be the case. The number of Section 68 challenges has risen 34 percent, from 27 in 2022-2023, to 37 in 2023-2024.[1] However, that is apt to mislead: of those 37 applications, none succeeded. The position is similar for jurisdiction challenges under Section 67 and appeals on a point of law under Section 69. While the number of applications is rising – 242 percent for Section 67 challenges and 40 percent for Section 69 appeals in 2023-2024 – there was only one successful s67 challenge and one successful s68 appeal over that period. It follows that parties with London-seated arbitration agreements can be confident that these examples are aberrations, England remains an arbitration-friendly jurisdiction with minimal scope for judicial and the likelihood of a successful challenge or appeal is very low. It is just that unsuccessful parties in arbitrations cannot help themselves in challenging awards despite formidable odds against doing so successfully.

In this article, we examine each of the three grounds for challenging or appealing arbitral awards under the Act by reference to recent decisions and developments.

Challenges to Jurisdiction under Section 67 of the Act

The Commercial Court Report shows a notable increase in Section 67 challenges based on the tribunal's lack of substantive jurisdiction: 242 percent up since last year.

It is perhaps unlikely that 2025 will see similar levels because, under the new UK Arbitration Act 2025 (the "2025 Act"), parties cannot raise an objection or rely on evidence in a s67 challenge that was not before the tribunal in the arbitration. As the amendments alter the previous position, in which Section 67 challenges were effectively a fresh review by the Court of all jurisdiction issues determined by the tribunal including new evidence and arguments, the tactical merit of pursuing a unmeritorious Section 67 application is now questionable. In principle, therefore, the volume of such challenges should fall.

You can read our deep dive into the Arbitration Act 2025 amendments in this issue.

Challenges on the basis of a serious procedural irregularity under 68 of the Act

A "serious irregularity" is an irregularity that: (i) falls within the prescribed categories in s68(2) – for example, failure by the tribunal to conduct the proceedings in accordance with the agreed procedure; (ii) affects the tribunal, the proceedings or the award; and (iii) has caused or will cause "substantial injustice" to the applicant.

Three recent successful challenges demonstrate that the English courts will intervene if there is a threat to arbitration's fundamental principles, namely, that each party is given a fair opportunity to present its case and address its opponent's and the tribunal considers all the issues put to it.

1. *Djanogly v Djanogly & Ors* [2025] EWHC 61

This case concerns a hard-fought family dispute referred to ad hoc arbitration seated in London and governed by Jewish law. The parties agreed to appoint the Golders Green Beth Din of the Union of Orthodox Hebrew Congregations as the tribunal. The losing party challenged the award under Sections 67, 68 and 69 of the Act. The Section 68 challenge was brought on the basis that the tribunal had failed to address a limitation defense because it concluded that there is no limitation period for money claims under Jewish law.

1 To address demand, as more than 20% of claims in the Commercial Court are arbitration claims, the London Circuit Commercial Court is introducing a new "Arbitration Claims List" from 1 July 2025. Intended to improve efficiency, the List will categorise claims into three groups based on their complexity and the type of judge required, and hearings will then be scheduled during specific windows each year.

Although the Court dismissed the other challenges, it upheld the limitation challenge because: (i) the arbitration was seated in London so the Act governs its procedure; (ii) under Section 13 of the Act – a mandatory provision – England and Wales' Limitation Acts[2] applied; (iii) Jewish law is not the law of "*any other country*" under the Limitation Acts so the relevant law on limitation was English; and (iv) the tribunal failed to apply English law and, if it had done so, the claims would have been statute-barred, meaning that there was substantial injustice.

2. *Mare Nova Inc v Zhangjiagang Jiushun Ship Engineering Co Ltd* [2025] EWHC 223 (Comm)

This case concerned a dispute over ship repair works performed on a vessel pursuant to a contract incorporating certain general conditions. Having discovered damage following the repair, the claimant commenced an arbitration claiming damages for breach of contract and negligence, and a sum under a contractual guarantee to remedy the defective works. The respondent did not participate in the proceedings other than to object to the tribunal's jurisdiction. The tribunal dismissed the claimant's claims on the basis that the respondent's liability was discharged by the operation of certain provisions and awarded a reduced sum under the guarantee.

The claimant challenged the award under Section 68 and, alternatively, appealed on points of law under s69. The basis of the Section 68 challenge was that the respondent had not argued that it ought to be discharged of its liability in the arbitration. The Court held that the tribunal's ruling on an issue not raised in the arbitration was a "serious irregularity" causing "substantial injustice" under s68(2)(a). The tribunal had failed to comply with its duty under s33 of the Act, which includes acting "*fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.*" The claimant had had no opportunity to address the argument before the tribunal found it determinative. The award was then remitted back to the tribunal for reconsideration.

The alternative Section 69 challenge was brought on the grounds that the tribunal's discharge of liability issue was wrong in law. The Court agreed that the tribunal's interpretation was obviously wrong in law because there was no way to interpret the provisions in question as having the effect determined by the tribunal. However, because the claimant had succeeded in its primary s68 challenge, the Court dismissed the s69 appeal and directed the tribunal to reconsider the law when reconsidering its award.

3. *Republic of Kazakhstan v. World Wide Minerals and Paul Carroll QC* [2025] EWHC 452 (Comm)

In this case, Kazakhstan challenged an investment treaty award relating to a uranium processing facility. The substantive claim in this case was brought by World Wide Minerals (a Canadian mining company) ("WWM") and its CEO under the 1989 Canada-USSR Bilateral Investment Treaty in relation to a uranium processing facility managed and operated by WWM in 1996 to 1997. Kazakhstan challenged the award on the basis that the tribunal had failed to address its key argument in respect of causation. Unusually, this was the second successful challenge made by Kazakhstan in this case. The Commercial Court had already set aside the original decision on damages and remitted the award back to the tribunal to reconsider the issue of causation and loss in 2020 and found that it had failed to do so again in relation to causation.

The English courts will not intervene in all cases where a tribunal has not dealt with arguments raised by a party in the arbitration. *K and others v P and others* provides insight into the threshold – there will be grounds for challenge under s.68(2)(d) if an argument is sufficiently important to constitute an "issue" which ought to have been dealt with by the tribunal. In that case, the applicants argued that the tribunal had failed to deal with two arguments. For one, the Court found that "*although it may be said that the Tribunal did not specifically determine each and every argument put forward, it cannot, in my judgement, be said that it failed to deal with an issue in the sense of an essential matter which had to be determined in order for the Tribunal properly to reach its conclusion.*" By contrast, for the other, the tribunal's failure to deal with the argument was a serious irregularity causing substantial injustice because, had the tribunal determined the issue, its decision on liability might have been different.

The remedy in all these successful Section 68 challenges was for the award to be remitted back to the tribunal. The other available remedies are for the Court to set the award aside or to declare it to be of no effect, in whole or in part. The Court will however generally remit the award to the tribunal unless satisfied that it would be inappropriate to do so (s68(3)). Importantly, while this gives the parties another opportunity to be heard, it does not necessarily lead to a different result; the court's focus in invariably on the fairness of the procedure adopted to make the decision. It is important to keep this point in mind if considering a Section 68 challenge: there should be scope for the tribunal to make a different decision if, for example, it is presented with new arguments or evidence not previously considered.

2 The Limitation Act 1980 and the Foreign Limitation Periods Act 1984.

Section 69 challenges for errors in law

Surprisingly, despite its non-mandatory nature and the standard waiver of rights to appeal in the ICC and LCIA rules, Section 69 appeals are the most frequent challenges to awards in the English courts.

Last year, the UK Supreme Court provided guidance on the limits of such appeals in *Sharp Corp Ltd v Viterra BV (previously known as Glencore Agriculture BV)* [2024] UKSC 14. This case concerned an appeal on a point of law relating to the interpretation of a default clause. See our full update on the case here. The principles relevant to the appeal were:

- A party may appeal on "*a question of law arising out of an award*" (s69(1)).
- The question must be one which "*the tribunal was asked to determine*" (s69(3)(b)).
- The first step is application for permission to appeal which must "identify the question of law to be determined" (s69(4)).
- At this stage, the Court must be satisfied (amongst other things) that "*on the basis of the findings of fact in the award*" (in other words, there should be no new evidence), the decision of the tribunal is "*obviously wrong*" or "*the question is one of general public importance and the decision of the tribunal is at least open to serious doubt*" (s69(3)(c)).

> **Surprisingly, despite its non-mandatory nature and the standard waiver of rights to appeal in the ICC and LCIA rules, Section 69 appeals are the most frequent challenges to awards in the English courts.**

The Supreme Court held that:

- Amendments to questions of law under s69 are permissible, provided that "*the substance of the question of law remains the same*" and is tied to the relevant facts in the tribunal's award.
- The Court of Appeal had acted beyond these limits by introducing and deciding a question of law that the tribunal had not been asked to address.
- The Court of Appeal had also exceeded its authority in making additional findings of fact.

This decision reinforces the safeguards that the English courts apply to s69, borne out by the limited number of successful s69 challenges (one in 2023-24).

Early dismissal

Given the English courts' robust approach to challenges and appeals, party with awards in their favor facing challenges under Sections 67 or 68 should consider whether to apply for early dismissal without a hearing. The Commercial Court Guide indicates that the Court will be astute to dismissing a challenge where its nature or the evidence in support leads it to consider that there is no real prospect of success. The defendant can trigger the early dismissal process by filing a notice confirming its view that the Court should dismiss the claim on the papers within 21 days of service.[3] It is clear from the Commercial Court Report that parties are choosing to use this process more frequently – 15 s67 and s68 applications were dismissed on the papers, and it often proves to be a useful way to filter unmeritorious challenges or refine the issues in dispute prior to a hearing.

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Security for claims in international commercial arbitration: Underutilized or obsolete?

By Annabelle Wheeler, Lilit Nagapetyan and Serene Allen

Introduction

Security for claims is a form of provisional measure that can be described as an anticipatory enforcement designed to guarantee that a future award will be honored. This remedy is distinct to conservatory interim measures, which are aimed at preserving evidence or the *status quo* pending a decision on the merits, and to regulatory interim measures, which organize the relationship between the parties up to the decision on the merits.

Arbitral tribunals have generally been reluctant to grant provisional measures securing the underlying claim. Even in the most recent commercial arbitration awards, tribunals often characterize this measure as 'extremely rare' and 'exceptional.' However, the potential utility of this tool remains underexplored by participants in the arbitration process, especially where factual circumstances of the case call for an urgent remedy against the foreseeable risk during proceedings of the debtor's inability to pay its debts.

Article 25 of the LCIA Arbitration Rules (most recently updated in 2020), which according to the latest 2025 International Arbitration Survey remains among the five most preferred arbitral rules worldwide, provides for the powers of the Tribunal in respect of interim and conservatory measures. These powers, such as the provision of security for claims or costs and preservation orders, are aimed at ensuring that a claimant's claim is not frustrated, the status quo is maintained, or the dissipation of assets or evidence is prevented, pending a final award in the arbitration.

However, despite the availability of these powers to the tribunal on a party's application, few applicants apply, and even fewer applications are successful. According to the LCIA's Annual Casework Report 2023, only 58 applications were made under Article 25 in 43 arbitrations, out of 327 LCIA arbitration referrals in 2023. Of the 58 applications, 21 were rejected, 18 were superseded or pending at the time of the report, 14 were granted and 5 were partially granted. The numbers are even more scant when looking at applications for security for claims under Article 25.1(i) (as opposed to other applications like for security for costs) where only 11 applications were made in 2023, of which 2 were granted, 2 were partially granted, 2 were superseded or pending at the time of the report and 5 were rejected.

Security for claims – the power of arbitrators under different rules

Other rules, including the UNCITRAL Rules that are most frequently used to govern ad hoc arbitrations, and many institutional rules, confer on tribunals the power to grant provisional or interim measures. These are often couched in general terms. For example:

- Article 26 of the UNCITRAL Rules 2021 provides that "*[t]he arbitral tribunal may, at the request of a party, grant interim measures.*"
- Article 28(1) of the ICC Rules of Arbitration 2021 provides that "*the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate.*"
- Article 27(1) of the ICDR International Arbitration Rules 2021 provides that "*at the request of any party, the arbitral tribunal may order or award any interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.*"
- Article 37.1 of the SCC Arbitration Rules 2023 provides that *"[t]he Arbitral Tribunal may, at the request of a party, grant any interim measures it deems appropriate.*"

Some institutional rules include lists of example interim measures that the tribunal can order. For example, Article 23(3) of the HKIAC Administered Arbitration Rules 2024 provides a non-exhaustive list of interim measures including that a party should:

- Maintain or restore the status quo pending determination of the dispute.
- Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent hard or prejudice to the arbitral process itself.
- Provide a means of preserving assets out of which a subsequent award may be satisfied.
- Preserve evidence that may be relevant and material to the resolution of the dispute.

While security for claims is not explicitly mentioned in any of these formulations, the relevant tribunals enjoy broad discretion when considering an application for interim measures, that could be argued extend to providing security for the claim itself.

Article 25.1(i) of the LCIA Rules is therefore distinct in affording the tribunal an express power upon the application of any party, after giving all other parties a reasonable opportunity to respond to that application, and upon whatever terms as the tribunal considers to be appropriate in the circumstances to "*order any respondent party to a claim, counterclaim or cross-claim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner.*"

The rationale for this power is that an applicant (whether claimant in the arbitration, or a respondent bringing a counter- or cross-claim) can mitigate against the risk of expending time, costs and resources in successfully pursuing the respondent in arbitration only for the respondent to frustrate enforcement of an award. This could be, for example, by dissipating assets during proceedings. One drawback (in contrast to, for instance, injunctive relief available in some national courts) is that any application must be made on notice, giving the respondent the chance to respond before any order is made.

Although Article 25.1(i) refers to such security as being by way of deposit or bank guarantee, it is open to the tribunal to order that security should be provided by way of other methods. What is appropriate will be specific to the facts of the case and parties' positions.

In addition to the power of the tribunal to order security for a claim, Article 25.3 also provides that a competent state court or other legal authority has the power to make such an order, but only before the tribunal is constituted, or afterwards in exceptional cases and with the tribunal's authorization.

The procedural law of the place of arbitration may provide further useful guidance for granting interim measures. The English Arbitration Act 1996, unlike certain other jurisdictions (for example, Sweden) does not expressly vest tribunals with the power to order security for claims as an interim measure. The express wording in Article 25 of the LCIA Rules is, therefore, a helpful tool on which the parties can rely to seek the interim measure directly from the arbitral tribunal as opposed to referring to the supporting role of the curial courts. It also eliminates the uncertainty as to whether the tribunal in question has the power to grant such orders unlike other institutional rules which adopt much wider wording on interim measures broadening the arbitral discretion.

Contrast with litigation

Before turning to how applications for security for claims in arbitration are assessed, it is useful to consider how similar powers are exercized by the English courts in litigation.

Litigation in the English courts is conducted in accordance with the Civil Procedure Rules 1998 as amended from time to time (CPR). Under CPR Part 25, parties can apply for interim injunctions such as freezing injunctions, and a wide range of interim orders, usually aimed at preserving the status quo, not dissimilar to the interim and conservatory measures in arbitration.

Applications by a defendant for security for costs under CPR Part 25 are widely known and commonly made in litigation. These applications protect a defendant from successfully defending a claim and being awarded costs, but then not being able to enforce that costs order against the claimant.

Security for costs applications are distinct from providing security for claims, the latter of which guards against the risk of not being able to enforce the final amount awarded, rather than being limited to the award of costs as in security for costs applications.

There is however scope for an English court to make an order for an interim payment on account on the application of a claimant. The statutory power arises under Section 32 of the Senior Courts Act 1981 and Section 50 of the County Courts Act 1984, both of which refer to the CPR as making provision for interim payments. Under CPR 25.1(1)(l) (prior to 6 April 2025, CPR 25.1(1)(k)), a court has a discretionary power to make an order for a payment by a defendant on account of any damages, debt or other sum (except costs) which the court may hold the defendant liable to pay. CPR Part 25.23 (prior to 6 April 2025, CPR Part 25.7) sets out the conditions, any one of which must be met for a court to consider making an order for an interim payment. These conditions include:

- Where the defendant has admitted liability to pay a sum of money to the claimant.
- The claimant has obtained judgment for a monetary amount.
- That the court must be satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant (whether or not there are other defendants to the claim).

The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment, taking into account contributory negligence and any relevant set-off or counterclaim.

CPR Part 25 does not refer to the power to order an interim payment as being limited to certain types of claims. However, such applications have tended to be made in the context of personal injury and clinical negligence cases rather than in commercial disputes, and may be seen as interim payments on account, rather than security for the claim. English litigation thus offers a narrower scope than arbitration proceedings offer in principle, to award security on the substantive sum in dispute.

Security for claims – conditions

Why is security for claims rarely applied for and even less commonly obtained? The answer may lie in the fact that unlike in English litigation where the CPR sets out the conditions that an application for an interim measure, like an interim payment, must fulfil, the LCIA Rules provide no conditions or guidance as to what a claimant must establish to bring and succeed in an application for security for its claim.

Further, considering the few known examples of security for claims applications in international commercial arbitration, the available arbitral jurisprudence does not provide either a clearly defined or consistent framework of the conditions that need to be satisfied to warrant a security for claims order. It may be, therefore, that parties are reluctant to embark on a process where the applicable test is uncertain and there is limited guidance from publicly available precedent.

In the absence of express criteria set by the applicable instruments, the starting point for a party who is prepared to pursue an application is that it will need to demonstrate that the general conditions for granting a provisional measure are satisfied, such as:

- *Prima facie* jurisdiction to decide on the requested interim measures.
- *Prima facie* establishment of the merits (based on the documentary evidence provided with the Notice of Arbitration, whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the tribunal to render an award in favor of the claimant).
- Urgency – the decision on interim measures cannot wait for the award, for example, the considerable and real risk of the party dissipating assets.
- Necessity – a risk of damage that is difficult to repair in monetary terms.
- Proportionality of the requested measure – that is, if the respondent will suffer significant harm as a result of the measure which would substantially outweigh any harm that the applicant may suffer, (for example, if the money is unavailable to be used for respondent's business needs and activities affecting its going concern or the cost of security would be very significant, if not altogether impossible).
- The absence of prejudice to the merits of the case – for example, if the respondent has brought counterclaims which might be wholly or partially successful, granting an application might prejudice the case on the merits.

A review of the publicly available cases shows that the following additional criteria have been considered by arbitral tribunals as applicable to security for claims applications:

- The chances of success on the merits must be relatively high – This is a distinct requirement for security for claims applications, as this imposes a higher threshold than prima facie establishment of the merits, which is a general condition applicable to other applications for provisional measures. This may present a substantial and indeed uncertain hurdle for the applicants to overcome considering that at the early stage of the proceedings (especially before the evidentiary stage), the tribunal may not be able to conclude that there is a sufficient chance of success. As a result, in practice, the tribunal may feel reluctant to grant this interim relief because of the fear of being perceived as prejudging the merits of the matter opening up the risk that any award could be challenged for a party not having sufficient opportunity to put forward its case.
- The measure must be necessary to ensure the enforcement of the award, that is, it is necessary to demonstrate the risk of non-enforcement of a favorable award with the requisite probability. Here, the financial situation and conduct of the respondent are relevant considerations; however, it is not sufficient simply to argue that the respondent has financial difficulties or simply that it has failed to comply with past arbitral awards or other pecuniary commitments. The applicant must demonstrate with the requisite degree of probability that the respondent will not be able to pay the amount awarded or that there is a substantial risk that it will refuse to comply with it. At the same time, tribunals' decisions indicate an acceptance that the applicant may be able to procure only limited evidence of the respondent's financial condition and the probability that it will deteriorate during the course of the arbitration.

The above criteria are cumulative and hence need to be addressed to avoid the risk of the tribunal rejecting the application. However, the facts on which these conditions depend need not be proven at the time of the application but only demonstrated to be plausible.

The burden of proof lies on the party requesting the security for the claimed amount. However, the tribunal may be entitled to shift the burden to the other party if it is in the better position to produce evidence in relation to the factors identified above. For example, where the alleged impecuniosity of the respondent to the application is one of the reasons for bringing the security for claims application and that respondent unreasonably refuses to disclose evidence of its financial position, the tribunal may decide that the burden of proof should fall on the respondent and that it is entitled to infer that the respondent party is indeed impecunious even in the absence of evidence.

The standard of proof is the general civil standard applied in international arbitration denominated as 'balance of convenience,' 'preponderance of evidence,' or 'sufficient likelihood.' However, the parties need to stay cognizant of the fact that security for claims is an extraordinary remedy, which, in practice, often creates the perception of an elevated standard of proof for measures (similar to the famous Lord Hoffmann's paradigm that where some things are inherently more likely than others, it takes more cogent evidence to satisfy the standard of proof of the less likely scenario, even where the standard itself remains the same).

In practical terms, this might mean that the applicant will need to show a real risk of dissipation of assets based on persuasive evidence which will often not be publicly available and can be opposed by the respondent for the reasons of commercial sensitivity. Here, the applicant can benefit from the arbitral confidentiality and request that the tribunal orders production of evidence (such as bank or financial statements) which would otherwise not be subject to document production in the proceedings in strictest confidence either for the tribunal's review or limited to confidentiality club members.

Key points

While applications for security for claims are rare in international arbitration, the measure is a tool that practitioners and users of the LCIA (in particular) should be aware is available, especially where there are concerns about future enforcement of an award.

Practical considerations include the following:

- Consider the financial position of the respondent from the outset of a potential dispute and think about what evidence exists and whether that will be sufficient to support an application for security for the claim.
- Consider any other difficulties that there may be with future enforcement (for example, location of assets) or any risks of dissipation of assets that there may be before the end of proceedings.
- Present the applicant's underlying case on the merits with as much evidence as possible to meet the high threshold regarding success on the merits.
- If there is a particular event that triggers concern about the respondent's ability to satisfy a future award, do not delay in making an application, as the tribunal will consider the urgency of the situation. Any unreasonable delay in making the application may indicate to the Tribunal that there is insufficient urgency.
- Any decision to make an application for security for costs should weigh up the risk of non-enforcement against the risk for the applicant, as it can be held liable for consequential costs and damages incurred by the respondent as a result of the ordered measures. Indeed, the applicant may well have to bear the costs of its application itself.

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A spotlight on arbitration in South Africa

By Sa'ood Lahri and Lara Thorn

As international arbitration continues to evolve as a vital mechanism for resolving cross-border commercial disputes, there is increasing interest in jurisdictions within developing regions that provide parties with a credible choice of seat. South Africa, with its strong legal framework and supportive judiciary, has emerged as an attractive arbitration seat in the expanding global arbitration map. To provide a high-level overview of South Africa's international arbitration landscape, we have spoken with Duncan Turner SC, an expert in the field and a senior counsel with an international arbitration practice at the Johannesburg Bar. Mr. Turner is also involved in the management structures of the Arbitration Foundation of Southern Africa (AFSA). We report our findings here.

The International Arbitration Act, 2017: A watershed moment

A central feature of South Africa's development as a credible and attractive arbitration seat was the promulgation of the *International Arbitration Act, 2017* (IAA), which came into effect from December 20, 2017.

Mr. Turner explained that before the IAA was enacted, foreign firms may have been uncertain over how international arbitrations might be treated in South Africa and the Sub-Saharan African region generally. Consequently, many international firms and businesses (including those based in Africa) defaulted to European seats for arbitration. The promulgation of the IAA was a watershed moment for South Africa, providing local and international businesspeople and legal practitioners with confidence that a robust framework exists for the determination of their disputes in South Africa and a level of certainty as to how international arbitrations will be undertaken in South Africa. This is good for investor confidence.

The IAA explicitly incorporates the UNCITRAL Model Law on International Commercial Arbitration (Model Law) into South African law, creating alignment with global standards in arbitration.

In doing so, South Africa has met its obligations as party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The South African courts have applied the New York Convention and show a willingness to enforce foreign arbitral awards within the jurisdiction.

Prior to the IAA, most arbitrations conducted in South Africa were domestic in nature, governed by the domestic *Arbitration Act, 1965*. While effective for local disputes, the old law did not align with evolving international standards for the resolution of international disputes. The IAA creates a dual arbitration regime, distinguishing between domestic and international arbitration. Domestic arbitration continues to be governed by the 1965 Act, while the IAA provides a specialized framework for international commercial arbitration. Under the IAA, an arbitration is 'international' if, for example, the parties to an arbitration agreement have, at the time of conclusion of that agreement, their 'places of business' in different states; or if the seat of the arbitration is situated outside the state(s) in which the parties have 'their places of business.'

International arbitration practitioners acquainted with the Model Law will find the South African system familiar, but Mr. Turner highlights the following distinctions of which to be aware:

1. Disputes involving public bodies and the South African government will not follow the typical Model Law provisions – for example, proceedings may be required to be held in public, and there is no automatic recourse to investor-state (ISDS) mechanisms.
2. Disputes involving issues of status, criminal matters, family matters and administrative review proceedings involving public procurement remain matters exclusively to be determined by the courts.

Judicial support for arbitration

Prior to the promulgation of the IAA, the South African courts had developed the South African common law on arbitration in line with international principles. The courts continue to apply recognized principles of international arbitration, such as the 'kompetenz-kompetenz' doctrine (that is, the jurisdiction for tribunals to rule on their own jurisdiction). South Africa's Constitutional Court (the highest court) has confirmed the importance of party autonomy in selecting arbitration as a dispute resolution process, recognizing that the constitutional right of access to courts includes access to an independent tribunal agreed to by the parties for the determination of their disputes.

The Supreme Court of Appeal (SCA) (the second highest court) has continued to emphasize that parties are free to agree that disputes about the validity or enforceability of an agreement (including an arbitration agreement) must be determined by way of arbitration. In *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co*, the SCA expressly recognized and applied the doctrine of severability to an arbitration agreement in a disputed main contract (a 2014 decision predating the IAA). In *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Hattingh NO* (a 2021 decision post-IAA), the SCA expressly recognized the 'kompetenz-kompetenz principle' as part of South African law, permitting the courts to apply this principle in appropriate cases. Zhongji provides clear authority on how South African courts will interpret and apply arbitration clauses, upholding and following approaches adopted in other more established international arbitration jurisdictions.

More recently, the SCA in *Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd and Others*, reiterated that litigation in court should be stayed in favor of arbitration where an arbitration agreement exists. The Courts have an overriding discretion, but generally unless an arbitration agreement is null and void, inoperable or incapable of being performed, South African courts will stay court proceedings pending referral to arbitration. This reinforces the judiciary's approach to upholding the autonomy of parties and arbitration agreements. This principle is applied whether the arbitration seat is in South Africa or in a foreign country.

It is noteworthy that the IAA, for the first time, expressly empowers South African courts in an international arbitration seated in South Africa to grant interim relief in support of arbitration, even if the arbitration is yet to be commenced.

Norton Rose Fulbright South Africa Inc. and Norton Rose Fulbright LLP acted for the successful applicants in the matter of *Vedanta Resources v ZCCM Investments* (Gauteng Division, Johannesburg ZAGPJHC 250 (23 June 2019)). In this seminal and first of its kind matter in South Africa, brought under the Model Law, the applicants successfully obtained an urgent interim 'anti-suit injunction' against the Zambian-based respondents on the basis that the respondents had breached the relevant shareholders' agreement (and arbitration clause contained therein) by pursuing winding-up proceedings against Vedanta in Zambia. The High Court held that it had supervisory jurisdiction in the matter as the foreign parties had chosen Johannesburg as the seat of the arbitration (the jurisdictional linking factor entitling the Court to assume jurisdiction), and the subject matter of the winding-up proceedings were in fact arbitrable disputes. The High Court, relying on various articles under the Model Law, and following a line of English authorities, held that it is empowered to order an 'anti-suit injunction' to restrain foreign litigation proceedings brought in violation of an arbitration agreement where the seat is South Africa, including in circumstances where an arbitration is intended, but yet to be commenced. This was the first 'anti-suit injunction' case brought under the Model Law in South Africa and illustrates the South African judiciary's willingness to embrace international arbitration principles, bolstering South Africa's pro-arbitration stance.

The role of AFSA and international collaboration

AFSA is the leading arbitration institution in South Africa. It is an independent, self-funded organization established by business and professional firms and institutions and has administered arbitrations and mediations since the mid-1990s. AFSA is a member of the International Federation of Commercial Arbitration Institutions (IFCAI) and collaborates with multiple international bodies to share best practices and align with global standards.

Mr. Turner explained that after the promulgation of the IAA, AFSA established the AFSA International Court and published its AFSA International Arbitration Rules (for both administered and unadministered arbitrations). The AFSA Court and International Arbitration Rules provide a world-class mechanism for the resolution of international disputes, having been developed with input from leading international specialists in arbitration law and practice. The Rules allow for the efficient and effective implementation of the Model Law and the IAA. They have been crafted to address the complexities of global commerce; to incorporate the latest developments in international arbitration;

to ensure fair, efficient, and transparent dispute resolution. Designed to be adaptable, these rules provide procedural flexibility to accommodate the diverse needs of international parties and include elements directed at avoiding unnecessary disputes and delays over matters which otherwise can disrupt arbitral proceedings such as selection of arbitrators; addressing requirements for preliminary or interim relief; and creating mechanisms for emergency arbitrations.

Mr. Turner highlighted that the available statistics show that AFSA has attracted a large number of international arbitrations since the promulgation of the IAA, exceeding 50 per year in some years – with about a third of its international matters involving parties from the Southern African Development Community (SADC) member countries outside of South Africa. Increasingly, these arbitrations relate to projects and disputes arising in the broader Sub-Saharan African region.

Mr. Turner explained that AFSA is engaged in two major initiatives to promote international arbitration as a preferred method of dispute resolution in Sub-Saharan Africa with an aim to ensuring parties achieve independent and enforceable results.

The first initiative relates to Chinese and African joint commerce and dispute resolution. The China-Africa Joint Arbitration Centre was established to provide an arbitral body recognized in China for disputes involving Chinese parties on the African Continent. The second initiative is the establishment of AFSA's SADC Alliance Charter and SADC division. With the support of government and practitioners in most of the 16 SADC member countries, the intention is to create a regional arbitration framework with the aim of providing certainty and consistency in cross-border dispute resolution. The AFSA-SADC Alliance MOU sets out several objectives to achieve this purpose, including projects aimed at standardizing rules for arbitration and mediation across the SADC member countries; providing an administrative secretariat for case handling; offering training facilities for arbitrators and mediators; and holding and participating in conferences and seminars to promote the initiative. The AFSA-SADC Alliance Charter was signed at the Johannesburg Arbitration Week in April 2024, marking a significant step in transforming arbitration practice in the SADC region.

South Africa as a credible and attractive choice of seat

South Africa's legal framework, together with its growing institutional infrastructure, expertise of local arbitrators and practitioners, and a judiciary that has reaffirmed its commitment to party autonomy and support of international arbitration through a generally non-interventionist approach and an overarching willingness to enforce foreign arbitral awards in South Africa, make it a credible and attractive choice of seat for international arbitration, particularly in a Sub-Saharan African context.

The country's alignment with global standards, as evidenced by the incorporation of the UNCITRAL Model Law and the New York Convention, should provide parties with comfort and certainty in arbitration proceedings and the enforcement of awards. Mr. Turner concludes that the country's commitment to aligning with international best practice and fostering a supportive arbitration environment will go a long way to enhance South Africa's standing in the global arbitration community.

This article was authored by Mr Sa'ood Lahri (director) and Ms Lara Thom (associate) of Norton Rose Fulbright South Africa Inc. with input from Mr Duncan Turner SC (a senior counsel at the Johannesburg Bar with a broad commercial practice, including an international arbitration practice, and a division chair at the Arbitration Foundation of Southern Africa).

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The India / UAE Bilateral Investment Treaty: Novel features in the next generation of BITs

By Shabnam Karim, Paul Stothard and Ananya Mitra

The 2024 India-UAE bilateral investment treaty is a significant development given the close economic ties between the two countries. We consider the key changes for investors and how the treaty reflects India's developing approach to the balancing of its regulatory rights against those of private investors.

Background

In 2016, after facing a record number of investor-state dispute settlement (ISDS) claims, India decided to rebalance its investment treaty regime to better protect its perceived interests. It unilaterally terminated most of its legacy bilateral investment treaties (BITs) and developed a Model BIT (the 2016 Model BIT) (link) as a basis for a new generation of BITs. The India-UAE BIT, which came into force on August 31, 2024 (the 2024 BIT) (link) and replaced the 2013 India-UAE Bilateral Investment Promotion and Protection Agreement (the 2013 BIT) (link) is the latest articulation of India's refreshed investment treaty policy. With US$83.6 billion in cross-border trade between the two countries in FY2023-2024 alone, the 2024 BIT will impact significantly on existing and prospective investments

Key features

Covered investments: The 2024 BIT restricts "investment" to specified categories of portfolio and asset-based investments provided that they have the following characteristics: (a) commitment of capital or resources, (b) expectation of gain or profit and (c) assumption of risk. This represents a middle ground between the 2013 BIT which defined assets broadly and did not provide for any specific investment characteristics, and the 2016 Model BIT which specifically excludes portfolio assts and imposes additional requirements – long-term commitment and contribution to host state development. By defining assets in this way, India is embracing a definition of investment akin to that adopted by tribunals in investment disputes under the International Convention for the Settlement of Investment Disputes 1966 (ICSID Convention).

Covered investors: Any natural or juridical person can be an investor under the 2024 BIT. Further, and unlike both the 2013 BIT and the 2016 Model BIT, the 2024 BIT expressly includes any entity controlled directly or indirectly by the relevant government or sub-national government in the definition of investor.

Standards of protection: The 2024 BIT maintains some of the familiar standards of protection commonly found in investment treaties (albeit subject to the carve-outs set out below) but omits others. Investments and investors under the 2024 BIT are:

- Protected against denial of justice in judicial or administrative proceedings, fundamental breaches of due process, targeted discrimination on manifestly unjustified grounds, or manifestly abusive or arbitrary treatment, with a carve-out for measures taken for "legitimate public policy objectives".
- Guaranteed full protection and security limited to the physical security of the investment.
- Guaranteed national treatment with a carve-out for discrimination between national and foreign investors/ investments for legitimate regulatory purposes.
- Protected against direct and indirect expropriation with specific stipulations as to the standard of compensation to which the investor would be entitled, factors to be considered in determining an indirect expropriation, with carve outs for non-discriminatory regulatory measures or judicial awards that are designed and applied to protect legitimate public interest or public policy objectives.
- Guaranteed free transfer of investment-related funds, with carve-outs for transfers being restricted in the event of serious balance-of -payment difficulties, macroeconomic management.

The 2024 BIT omits two key standards of protection commonly found in many other investment treaties: fair and equitable treatment and most-favored nation. Thus, it provides a narrower suite of protection than the 2013 BIT. However, it offers clarity and broader protection as compared to the 2016 Model BIT. For instance, the latter stipulates that denial of justice and full protection and security provisions can only be triggered when the impugned conduct constitutes the violation of customary international law. The 2024 BIT omits this requirement.

Carve outs:

In line with the 2016 Model BIT, the 2024 BIT introduces several new general carve-outs, thus narrowing the scope of state measures that can be challenged by an investor. These include:

- Regulations in pursuit of legitimate public policy objectives.
- Taxation, notably, if the host state decides that an alleged breach of the treaty is a taxation matter, that decision cannot be reviewed by an arbitral tribunal.
- Non-discriminatory measures relating to public morals, human, animal/plant life or health.
- Measures taken to protect "essential security interests," which the host state can assert either before or after the start of the relevant arbitration proceedings and are not open to review by an arbitral tribunal.

Investor obligations: The 2024 BIT also imposes a series of new obligations on investors aligned with the 2016 Model BIT, including an explicit obligation to:

- Refrain from engaging in bribery or related offenses (effectively codifying an obligation that exists under customary international law).
- Provide information required by the relevant laws.
- Incorporate internationally recognized corporate social responsibility standards in their operations.

ISDS mechanism:

Exhaustion of local remedies: The 2024 BIT introduces a precondition to exhaust local remedies for a period of three years before initiating investment arbitration. While there was no such requirement in the 2013 BIT, it is less onerous than the 2016 Model BIT which imposed a five-year local remedies period.

Priority to domestic anti-bribery proceedings: Submission of a claim relating to any investments that has been finally judicially determined to have been made through fraud, corruption, money laundering, roundtripping or conduct amounting to an abuse or process is prohibited. A tribunal is required to suspend the arbitration if a judicial decision is either pending or proceedings are initiated in respect of such allegations in relation to the investment. This provision, which is unique to the 2024 BIT, could be problematic as the host state could effectively stall the arbitration by invoking anti-bribery proceedings in its domestic courts even if such a claim lacks merit.

> **"The 2024 BIT omits two key standards of protection commonly found in many other investment treaties: fair and equitable treatment and most-favored nation. Thus, it provides a narrower suite of protection than the 2013 BIT.**

Coordination of proceedings: When claims under the 2024 BIT and another international agreement have the potential of overlapping in terms of compensation or merits, the relevant tribunal is required to stay the proceedings until those under the other international agreement have come to an end.

Third-party funding: Third-party funding of arbitration claims is prohibited under the 2024 BIT. This is stricter than the 2016 Model BIT but is consistent with UAE's treaty practice reflected, for instance, in the UAE-Argentina BIT (2018).

Seat: Arbitrations must be seated in a country that is party to the New York Convention (NYC).

Enforcement: Awards made under the 2024 BIT shall be considered to be commercial for purposes of Article 1 of the NYC – this addresses the reservation made by India as to the enforcement of foreign-seated NYC awards. Further, each party is required to provide for the enforcement of an award made under the 2024 BIT under its domestic laws – this overcomes the fact that the UAE is not currently notified by the Indian government as a reciprocating NYC territory, which is a precondition for enforcement of NYC awards in India.

Appeals facility: Provisions are made for the parties mutually establishing an appellate body or similar mechanism to review awards made under the 2024 BIT.

Joint interpretations: The 2024 BIT incorporates a general provision stipulating that arbitral tribunals will be bound by the parties' joint interpretations as to the provisions of the treaty and their application. It omits a provision in the 2016 Model BIT for Tribunals to request such joint interpretations on the subject matter in dispute on their own account, or upon the request of the relevant host state.

Other procedural issues: In line with the 2016 Model BIT, the 2024 BIT also introduces several detailed provisions covering matters such as:

- Qualifications of arbitrators
- Conflicts of interest and arbitrator challenges
- Document production – notably, arbitrators are not permitted to compel the production of documents that the host state claims are protected from disclosure under applicable law
- Frivolous claims: tribunals are required to decide, as a preliminary matter, any objections to jurisdiction or claims that are manifestly without legal merit or unfounded as a matter of law
- Apportionment of costs – stipulating that each party shall bear its own legal costs.

> **The 2024 BIT reflects India's evolving approach towards investment treaty protection which is characterized by narrowing and particularizing existing protections and introducing novel safeguards, while providing strategic and selective concessions to a key trading partner such as the UAE.**

Substantive law: While the substantive law provisions in the 2024 BIT are broadly similar to those in the 2016 Model BIT, a point of departure is that the 2024 BIT omits a stipulation that the treaty "shall be interpreted in the context of the high level of deference international law accords to States with regard to their development and implementation of domestic policies," which is included in the 2016 Model BIT.

Compensation and recoverable loss: In line with the 2016 Model BIT, the 2024 BIT specifies that a tribunal can only award monetary compensation which is limited to actual loss, and then goes further by expressly excluding incidental and consequential damages including future losses. It also requires (similar to the 2016 Model BIT) that damages shall be reduced by accounting for mitigating factors including unremediated harm to the environment or local community or other relevant considerations regarding the need to balance public interest and the interests of the investor.

Conclusion

The 2024 BIT reflects India's evolving approach towards investment treaty protection which is characterized by narrowing and particularizing existing protections and introducing novel safeguards, while providing strategic and selective concessions to a key trading partner such as the UAE.

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An evolving landscape toward greater certainty for DIFC-LCIA Arbitration Agreements

By Nick Sharratt, Ben Mellett and Alex Field

In September 2021, the government of Dubai issued Decree 34 of 2021 (Decree 34), which resulted in the well-publicized abolition of the DIFC-LCIA Arbitration Centre and decreed that future disputes would be resolved by the Dubai International Arbitration Centre (DIAC). This caused uncertainty as to the enforceability of legacy DIFC-LCIA arbitration agreements and how disputes arising from them should be handled. Since then, some important decisions by national courts have considered the enforceability of DIFC-LCIA arbitration agreements.

Among the earliest of such decisions was a November 2021 decision from a US Federal District Court in Louisiana in *Baker Hughes v Dynamic Industries*, which held that parties to a DIFC-LCIA arbitration agreement could not be compelled to arbitrate before DIAC due to the doctrine of *forum non-conveniens*. In January 2025, the United States Court of Appeals for the Fifth Circuit quashed that decision, holding that parties to a DIFC-LCIA arbitration agreement could be compelled to arbitrate.

The decision from the Fifth Circuit has been explored and commented upon by courts in Singapore, in Abu Dhabi (onshore) and in the DIFC.

This note considers these developments and what they mean for clients faced with disputes arising from a contract with a DIFC-LCIA arbitration clause.

The US Fifth Circuit: Forum selection

We have previously considered the first instance decision of *Baker Hughes v Dynamic Industries* here. In short, the dispute involves a subcontract by which Baker Hughes agreed to supply materials, products and services to Dynamic in relation to a construction project in the Kingdom of Saudi Arabia. The subcontract provided for a unilateral option for Dynamic to arbitrate any dispute in Saudi Arabia (Section 20 DR Clause), and provided that if it did not exercise that option, then "*the dispute shall be referred by either Party to and finally resolved by arbitration under the Arbitration Rules of the DIFC LCIA*" (Schedule 3 DR Clause).

A dispute arose between the Parties following the dissolution of the DIFC-LCIA, and Baker Hughes, instead of commencing arbitration proceedings, issued court proceedings against Dynamic in Louisiana.

At first instance, the District Court held that Decree 34 had abolished the DIFC-LCIA, rendering the Schedule 3 DR Clause inoperative, invalid and unenforceable. The District Court characterized the Schedule 3 DR Clause as a forum selection clause, and refused to dismiss the case on the basis that it was proper to order arbitration. That decision was appealed.

The Fifth Circuit Court of Appeals[1] disagreed with the District Court, quashed the decision and remanded it to the District Court for renewed consideration. Key to its decision was the fact that the Court of Appeals considered that the subcontract, including the references to arbitrating disputes in the Section 20 DR Clause and the Schedule 3 DR Clause evidence that the Parties' "*dominant purpose was to arbitrate generally*."

The Court of Appeals rejected the District Court's characterization of the Schedule 3 DR Clause as a forum selection clause, holding that the Parties had not selected the DIFC-LCIA as the exclusive forum for dispute resolution given that, among other things, the Section 20 DR Clause anticipated that disputes could be resolved before other fora (of Baker Hughes' choosing).

Indeed, based on the wording of Schedule 3 DR Clause, the Court of Appeals held that the Parties' intention appeared to be that they only intended that the wording of the DIFC-LCIA Arbitration Rules should govern their dispute (not that DIFC-LCIA itself should administer all such disputes). The Court of Appeals held that if the Parties had intended the DIFC-LCIA to be the exclusive forum, then it would have been easy for the Parties to clearly specify this in the Schedule 3 DR Clause. On the Court of Appeals' construction of the contract, the Parties had not done so.

On the Fifth Circuit Court of Appeals' holding, this left open the possibility for another arbitral institution (such as the LCIA or DIAC) to administer the Parties' dispute in accordance with the provisions of the DIFC-LCIA Arbitration Rules (as they were in force when the Parties had executed the subcontract).

1 https://www.ca5.uscourts.gov/opinions/pub/23/23-30827-CV0.pdf

The Fifth Circuit Court of Appeals considered that the District Court was entitled to compel arbitration consistent with the Parties' intent to arbitrate. Accordingly, the Fifth Circuit remanded and instructed the District Court to consider whether the DIFC-LCIA Arbitration Rules could be applied by any other arbitral institute, such as the LCIA or DIAC, and compel arbitration before that forum.

Accordingly, while the DIFC-LCIA may no longer exist, the Fifth Circuit held that arbitration could nonetheless be compelled.

The Singaporean High Court: Submission to jurisdiction

In 2024, the Singaporean High Court considered an enforcement application of an interim injunction, made by way of a provisional award.[2] That provisional award was made by a DIAC tribunal, sitting pursuant to a DIFC-LCIA arbitration agreement following Decree 34.

In the course of the arbitration which resulted in the provisional award, the defendant, DFM, had filed a statement of defense and in that pleading had challenged the tribunal's jurisdiction on the basis that the parties had agreed to DIFC-LCIA arbitration in the arbitration agreement and that forum no longer existed. However, at no stage in the course of the interim application had DFM challenged the tribunal's jurisdiction in respect of that application. In the event, the tribunal found in the claimant's favor on the application and made the provisional award.

In the Singaporean High Court, DFM contested enforcement of the provisional award on the basis that the contract had provided for DIFC-LCIA arbitration, and therefore the tribunal did not properly have jurisdiction against DFM.

The High Court cited *Baker Hughes* for the proposition that parties cannot be compelled to arbitrate under rules to which they did not agree. However, it considered that despite this, by not contesting the tribunal's jurisdiction in respect of the interim application, DFM had submitted to the tribunal's jurisdiction for the purposes of that application, and hence the resulting provisional award.

As a result, the High Court found that the provisional award could be enforced.

The High Court's ruling highlights the need for parties contesting jurisdiction to ensure that such protests are raised at every point in the proceedings. It is not enough for a party to simply reserve its position on a matter. The decision does, however, signal that jurisdictional objections in respect of DIFC-LCIA arbitration being administered by DIAC may be entertained during enforcement proceedings in Singapore.

> **In the Singaporean High Court, DFM contested enforcement of the provisional award on the basis that the contract had provided for DIFC-LCIA arbitration, and therefore the tribunal did not properly have jurisdiction against DFM.**

The Abu Dhabi Courts: A commitment to promote arbitration

In *Vaned v Reem Hospital*,[3] the Abu Dhabi Court of First Instance (upheld on appeal) considered whether a DIFC-LCIA arbitration agreement could be enforced after Decree 34. After analyzing the contract and the arbitration agreement, the Court held that the parties had expressed a clear intention to resolve their disputes by way of arbitration (which was demonstrated by the presence of an arbitration agreement drafted in comprehensive terms).

The Court considered that while the DIFC-LCIA was abolished, the institutional choice was only one element of the arbitration agreement, and the abolition of that institution was insufficient to make the arbitration agreement a nullity, especially where that abolition was out of the parties' control.

The Court drew an analogy to the changing of an arbitral institutional rules, which occur relatively routinely, but do not override submission to an institution, nor nullify an arbitration agreement referring to that institution.

Accordingly, the Court held that the abolition of the DIFC-LCIA, without more, did not render the arbitration agreement null and void, inoperative, or incapable of being performed. Hence, the arbitration agreement could be enforced with another institution (other than the DIFC-LCIA) administering this.

In coming to this holding, the Court remarked that the UAE's Federal Arbitration Law "*embodies a commitment to promote arbitration and establishes [the UAE's] role as an arbitration center*

2 *DFL v DFM* [2024] SGHC 71.

3 Vaned Engineering GMBH v Reem Hospital (Abu Dhabi Court of First Instance and Court of Appeal Case No. 1046-2023).

in the region." The Court considered *Baker Hughes v Dynamic*, and held that it did not reflect the state of UAE law, and particularly the aspirations set out in the Federal Arbitration Law to hold parties to their bargain to arbitrate.

The DIFC Courts: Forum selection v Institutional rules

Following the Abu Dhabi decision in *Vaned v Reem Hospital*, in July 2024, the DIFC Courts were faced with the question of the validity of a DIFC-LCIA arbitration agreement in a construction contract in the case of *Narcisso v Nash*.[4]

In considering whether the arbitration agreement could be enforced, the Court considered both *Baker Hughes v Dynamic and Vaned v Reem Hospital*.

The DIFC Court adopted the reasoning on *Vaned v Reem Hospital*, and considered that the arbitration agreement was valid as a matter of either DIFC law or UAE law. The DIFC Court noted the distinction between "forums" for dispute resolution and procedural or institutional rules. Where parties agree to arbitrate, the forum is "international arbitration" subject to whatever procedural rules are agreed. If those rules are amended or the center abolished altogether, that does not necessarily abrogate the agreed forum of international arbitration.

The DIFC Courts distinguished *Baker Hughes v Dynamic*, noting that it is a decision of US law, subject to its own constraints regarding precedent and procedure, and did not reflect the position in either the DIFC or the UAE more broadly.

Conclusion

The above cases demonstrate, that despite initial uncertainties regarding the enforceability of DIFC-LCIA arbitration clauses, Courts have been generally amenable to enforce the parties' bargain, especially where the parties demonstrate (through their contractual language) a clear intent to arbitrate disputes, or whether they have otherwise submitted to jurisdiction.

While there is a divergence of approach between US Federal Courts (as demonstrated by the Fifth Circuit's reasoning) and the Abu Dhabi (onshore) and DIFC Courts, we respectfully consider that the DIFC Courts' approach is to be preferred. Parties that agree to arbitrate, choose arbitration as the forum, and institutional changes or rule changes should not abrogate that agreement.

We anticipate that the above developments will bring welcome comfort to parties and practitioners in the Middle East region, particularly the Abu Dhabi court's comment that the Federal Arbitration Law embodies a commitment to promote arbitration), and provide clarity regarding the status of DIFC-LCIA arbitration agreements. However, our advice to clients remains consistent: in order for greatest business certainty, clients should audit their contracts to ensure that no contracts refer to DIFC-LCIA arbitration, and if any do, clients should consider amending them to refer to another institution.

Should you have any concerns about your business's contracts, please contact Head of Dispute Resolution for the Middle East Nicholas Sharratt, Counsel Ben Mellett, or Senior Associate Alexander Field.

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4 Narciso v Nash ARB 009/2024. https://www.difccourts.ae/rules-decisions/judgments-orders/arbitration/arb-0092024-narciso-v-nash

Unlocking the potential of arbitration in cross-border insolvency disputes: SIAC's proposal

By Daniel Allman, Katie Chung, Kent Phillips and Ananya Mitra

In the February 2024 edition of the International Arbitration Review, we identified arbitration as an effective means of resolving cross-border insolvency disputes which are becoming increasingly frequent in an interconnected and volatile global economy. Noting Singapore's reputation as both a popular seat for international arbitration and for having a robust insolvency framework, we foreshadowed arbitral institutions such as the Singapore International Arbitration Centre (SIAC) developing insolvency-specific arbitration rules. In this update, we consider the key elements of SIAC's draft Insolvency Arbitration Protocol (SIAC Draft Protocol), which was released in December 2024 and is the first for an international arbitration institution.

Background

Arbitration offers a neutral, efficient, and specialized dispute resolution method for several categories of insolvency-related disputes. These include:

- Disputed debts
- Disputes between subsidiaries of the debtor company
- Restructuring of debt (known as an informal or "out-of-court" workout) preceding the launch of formal insolvency proceedings before a court

The last category gives rise to particular difficulties in a cross-border scenario because domestic insolvency laws can vary across jurisdictions, with some regimes being more robust than others.

The well-known advantages of arbitration – speed, efficiency, flexibility and enforceability – are especially useful in the context of insolvency disputes, because timely restructuring through an informal workout may enable the distressed company to continue operating as a going concern rather than being wound up.

In December 2024, SIAC released its draft Insolvency Arbitration Protocol which aims to provide for efficient and timely arbitration of insolvency-related disputes. This is a welcome first step towards enhancing the use of arbitration in this field to resolve creditor/debtor disputes, and facilitate commercial negotiations on debt restructuring.

Breaking down the SIAC Draft Protocol

As suggested in our prior update, tailored arbitral rules should be adopted as a matter of course in an insolvency-related arbitration. SIAC's Draft Protocol adapts the SIAC Rules with modifications for use in the insolvency context, and contains several key elements mentioned in our prior update, including:

- *The seat of the arbitration*: unless otherwise agreed by the parties, the seat of arbitration is Singapore (Paragraph 7.1)
- *Applicable procedural rules*: the SIAC Rules as modified by the Draft Protocol (Paragraph 3)
- *Law governing the arbitration agreement*: unless otherwise agreed, the laws of Singapore (Paragraph 7.2)
- *Arbitrator powers*: the powers are based on those in the SIAC Rules, but with the Draft Protocol going further to facilitate mediation by:
  - giving the arbitrator the power to stay arbitration for up to three weeks (which can be extended) so that the parties can participate in mediation (Paragraphs 17-19).
  - providing for any settlement resulting from mediation to be recorded as a consent award at the parties' request, with an express obligation on the arbitral tribunal to ensure that such matters fall within the scope of the arbitration agreement as well as the tribunal's jurisdiction, and is not contrary to any applicable law or public policy (Paragraph 20).

- *Confidentiality terms*: the confidentiality provisions under the SIAC Rules apply, with the Draft Protocol allowing for anonymised or redacted versions of awards or updates of the arbitration to be disclosed in related court proceedings (Paragraph 28).

Other notable features include:

- Broad application of the Protocol so that parties can submit their disputes to arbitration before, in parallel with, and after insolvency proceedings have commenced before a court (Paragraphs 1-2).
- A sole arbitrator to be appointed by default, although three arbitrators can be appointed in certain circumstances (Paragraph 8).
- Development of a SIAC Specialist Disputes Panel, from which parties can nominate their arbitrator/s (Paragraph 12), which is important given the specialization required to resolve many insolvency-related disputes.
- Shortening of timelines, for example, the respondent has 7 days to file a response to the notice of the arbitration (Paragraph 6), a sole arbitrator is to be appointed within 14 days of the commencement of arbitration (Paragraph 9), and the final award is to be rendered within 6 months of the constitution of the arbitral tribunal (Paragraph 24).
- Provisions for disclosure of the progress of arbitration and Tribunal rulings (with suitable redactions) in any relevant insolvency proceedings (Paragraph 28).

Some limitations

The foundation of arbitration is party consent, which means that parties who are not signatories to an arbitration agreement can usually not be compelled to join an arbitration, nor will they be bound by the resulting award which might include an agreed workout plan recorded in a consent award. The agreement to arbitrate under the SIAC Draft Protocol would also supersede any existing arbitration agreement or jurisdiction clause in contracts between creditors and debtors. Additionally, whilst the SIAC Draft Protocol requires the arbitral tribunal to seek the parties' views on the joinder of third parties at the outset of the arbitration (Paragraph 21.2), without consent no such joinder can occur. Indeed, some commentators have suggested including "deemed" arbitral consent in insolvency legislation in order to overcome this difficulty. (link)

Moreover and in any event, agreements to arbitrate insolvency disputes, insolvency-related arbitrations, and resulting arbitral awards (including consent awards) need to be carefully evaluated from a legal perspective to ensure that the disputes referred to arbitration are actually arbitrable, and not at odds with public policy and applicable insolvency laws. The SIAC Draft Protocol alludes to this issue, by requiring arbitral tribunals to ensure that any consent award falls within their remit and is not contrary to local law or public policy.

Some limitations

The SIAC Draft Protocol is a welcome development and represents a first step towards facilitating the use of institutional arbitration in cross-border insolvency disputes. The regime proposed by the Draft Protocol would provide for efficient and timely resolution of insolvency disputes. This was recognized by the Singapore Court of Appeal in Sapura Fabrication Sdn Bhd and others v GAS and anor appeal [2025] SGCA 13.

In a postscript to its March 2025 judgment, the Court noted that the truncated timelines proposed in the SIAC Draft Protocol, once it comes into effect and is adopted, may mitigate the concern that permitting arbitration of insolvency-related claims could cause undue delay and expense, and distract from the insolvency proceedings. This in turn would likely encourage courts to be more permissive in exercising their discretion to carve out arbitration claims from the global moratorium that ordinarily applies when insolvency proceedings are initiated.

The consultation period for the Draft Protocol ended in January 2025, and we expect SIAC to issue the document in final form over the coming months.

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The Chartered Institute of Arbitrators' new Guideline on the Use of AI in Arbitration

By Amy Joan Armitage, Sam Bamford and Courtney Rodda

The emergence of artificial intelligence (AI) has set the legal profession on a search for an appropriate regulatory framework. Whilst arbitral tribunals have broad discretionary powers under national laws and institutional rules to manage procedure in arbitral proceedings that would extend to the parties' use of AI, there are no specific rules governing the use of AI. The Chartered Institute of Arbitrators (CIArb) has published new guidelines (the Guidelines) to guide parties on the use of AI in arbitral proceedings.

Global efforts to regulate the use of AI in legal proceedings

There has been some effort to regulate the use of AI in legal proceedings. The European Union recently enacted the Artificial Intelligence Act (Regulation (EU) 2024/1689), being the first comprehensive horizontal legal framework for the regulation of AI systems across the EU. The Act classifies AI according to its risk level, places obligations on providers and users of high-risk AI systems and specifies requirements with which General Purpose AI model providers must comply. AI systems that are intended to be used by a judicial authority, or to assist judicial authorities, are considered high-risk AI systems and therefore, providers and users of these systems must comply with the Act. Various judiciaries including the UK Courts and Tribunals Judiciary, Colombia (which adopted UNESCO's Guidelines for AI Use in Judicial Systems) and the Californian courts have developed guidance for practitioners on the use of AI systems in courts and tribunals. Professional organizations including the Silicon Valley Arbitration & Mediation Center, the Law Society of New South Wales and the American Bar Association have also published guidelines for practitioners on the responsible use of AI in dispute resolution proceedings.

Alongside the above, CIArb's practical guidelines on the use of AI in arbitral proceedings seek to "*give guidance on the use of AI in a manner that allows dispute resolvers, parties, their representatives, and other participants to take advantage of the benefits of AI, while supporting practical efforts to mitigate some of the risk to the integrity of the process, any party's procedural rights, and the enforceability of any ensuing award or settlement agreement*." The Guidelines are an important resource for practitioners and arbitrators despite their non-binding nature and parties may choose to incorporate these Guidelines or the template agreements provided into the arbitration by agreement.

The Guidelines on the use of AI in arbitration

The key principles can be summarized as follows:

- **Arbitrators' powers to give directions and make procedural rulings on the use of AI**: The use of AI falls within the general power of arbitrators to conduct proceedings, including giving directions and making procedural rulings. Tribunals are encouraged to record decisions around AI and address any contentious use of AI in their awards.
- **Party autonomy**: Where the Parties (1) have not raised the issue in their initial communications with the institution or the arbitrators or (2) the arbitration agreement is silent or unclear on the use of AI, arbitrators are encouraged to invite the Parties to express their views on the use of AI in the proceedings at the appropriate time.
- **Ruling on use of AI and admissibility of AI-generated material in the arbitration record**: Arbitrators may make a ruling on the use of AI in arbitral proceedings or admissibility of evidence where there is disagreement between the Parties or where the use (or non-use) of AI by one or more party jeopardizes the integrity of the arbitral proceedings. In making a ruling on the use of AI, arbitrators are encouraged to take into consideration any benefits, and consider the nature and specific features of the AI tool.
- **Disclosure**: Disclosure may be required where use of an AI tool has an impact on (1) the evidence, (2) the outcome of the arbitration or (3) otherwise involves a delegation of an express duty toward the arbitrators or any other party.

- **Discretion over use of AI by arbitrators**: Arbitrators may consider using AI tools in the context of their mandate to enhance the arbitral process including its efficiency and the quality of decision-making.
- **Transparency over use of AI by arbitrators**: Arbitrators are encouraged to consult with the parties on the use of any AI tool used by the arbitrators.
- **Template AI Agreement**: Appendix A is a template Agreement to regulate the use of AI to arbitration proceedings. In particular, this extends the scope of the agreement to the parties, their representatives and their experts.
- **Template Procedural Order**: Appendix B is a template Procedural Order on the use of AI in proceedings. This places additional duties on the Tribunal to ensure that the integrity of the proceedings and enforceability of the award are preserved against cost concerns and allows specific guidelines to be put into place for 'High Risk AI Tools.'

Practical perspective: The application of AI tools in arbitration

The Guidelines consider the benefits and risks of using AI tools for improving legal research, expediting data analysis, streamlining the collection of evidence and generating hearing transcripts against the risks of the use of AI tools in arbitral proceedings.

Some of the potential risks of the use of AI in arbitral proceedings include loss of confidentiality, data integrity, cybersecurity, algorithmic bias and broadening the grounds to challenge an award, including failure to follow due process (for example, by using AI in a matter outside the scope of the procedural order) which could potentially increase the frequency of challenges to award.

The Guidelines also have the potential to cause the parties to incur additional costs by introducing an additional arena for the parties to do battle in, as parties explore the extent to which AI can be used in arbitral proceedings. While these Guidelines may result in more careful and considered use of AI tools, as well as potential cost savings using AI itself, the Guidelines may to lead to additional costs should differences arise about how AI tools should be used.

Experience of AI tools in dispute proceedings

The Guidelines highlight the need to rely on legal providers who are experienced in extracting value from AI tools, while at the same time maintaining appropriate safeguards in the conduct of arbitral proceedings. This firm has successfully used AI in appropriate circumstances to enhance the delivery of legal services for clients in a variety of scenarios:

1. Using business intelligence tools and machine learning in a dispute over uncollected VAT.
2. Using a combination of defined terms, machine learning and predictive coding through a dedicated document review platform in a high-value and complex dispute where our client had to consider disclosure in respect of over 400,000 documents.

The firm has developed guidelines on the responsible use of AI which acknowledge the ethical, legal and social challenges but embrace the opportunities presented by AI to deliver high-quality, innovative and client-focused legal services.

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