ICC Dispute Resolution Services

ICC Dispute Resolution Bulletin

2025 | ISSUE 2

ICC Dispute Resolution Bulletin | 2025 | Issue 2

E-journal of the International Chamber of Commerce (ICC)
Périodique numérique de la Chambre de commerce internationale

ICC DRS Publications

Stéphanie Torkomyan, Publications Manager

Articles for publication should be sent to the Editors-in-Chief, members of the Editorial Board, or to the Publications Manager (**ICCbulletin@iccwbo.org**). Suggestions for book reviews are also welcome.

ICC Publication No. @25BUL1
ISBN: 978-92-842-0723-7
ISSN: 2520-6052
publications@iccwbo.org

Price | Prix
Per issue | par numéro : 49 euros (excl. VAT | hors TVA)
https://2go.iccwbo.org/

ICC Dispute Resolution Library
https://jusmundi.com/en/icc-dispute-resolution-library

Publication date | Date de parution
October 2025 | Octobre 2025

Published by ICC | Édité par ICC

Président, directeur de la publication : John Denton

Head Office
33-43 avenue du Président Wilson
75116 Paris, France

Directeur général, directeur adjoint de la publication : Emmanuel Jolivet

Contents

Message from the President

Claudia Salomon
President, ICC International Court of Arbitration

The ICC Dispute Resolution Statistics for 2024 have been released,[1] and I want to focus on one element – the place (or seat) of arbitration.

In 2024, ICC arbitrations were seated in 107 cities across 62 countries or independent territories.

In the majority of cases, the place of arbitration is chosen by the parties, and the ICC International Court of Arbitration ("ICC Court") only fixes the place of arbitration where parties fail to agree. In 2024, the ICC Court exercised this function in just 7% of the cases.

The most frequently selected places of arbitration were cities in the United Kingdom (96 cases), France (91), Switzerland (83), and the United States (72), followed by the United Arab Emirates (38) entering the top five for the first time, in turn followed by Spain (33), Brazil and Mexico (30 each), Singapore (28), and Germany (20).

The place of arbitration: convenience, neutrality, or reflective of bargaining power?

The place of arbitration is most often talked about as a "neutral" location, not located in the country of any of the parties. For example, a Brazilian company entering into a contract with a Chinese company does not want to be in Chinese courts, and the Chinese company likewise does not want to be in Brazilian courts, so they pick a neutral location – a compromise – not connected to any of the parties.

The most frequently selected seats of arbitration are indeed neutral seats. For example, there are many more ICC cases seated in London than UK parties using ICC Arbitration. This is also true for Paris, Singapore, New York, Geneva, and Zurich, among others.

However, for most countries in the world, the number of parties from those countries far exceeds the number of cases that are seated in those countries. In fact, more ICC cases are seated in the country of one of the parties than in a neutral location, not connected to any of the parties.[2]

This means that the parties have not chosen a neutral seat – but instead, one of the parties had the bargaining power to insist on arbitration seated in their country.

The selection of a seat in the jurisdiction of one of the parties frequently arises in contracts (and disputes) involving states and state entities, which may insist on a local governing law and seat. But many cases arising from contracts involving all private companies are also seated in the jurisdiction of one of the parties.

For example, as I noted in my keynote speech during the Congress of the *Club Español e Iberoamericano del Arbitraje*,[3] there were 100 ICC cases seated in Spain in the last five years, but:

- only seven out of those 100 cases did not involve any Spanish parties;
- of the seven, most involved projects in Spain or involved a subsidiary of a Spanish company or Spanish law; and
- there were only two neutral cases where the governing law was not Spanish law – but may have involved a subsidiary of a Spanish company.

ICC cases are seated in all of the major cities in Africa and Latin America, but in almost all of those cases, one of the parties was from the same jurisdiction as the seat. If a case is seated in Bogota, it almost always involves at least one Colombian party. If a case is seated in Lima, it almost always involves at least one Peruvian party.

1 https://iccwbo.org/news-publications/news/icc-dispute-resolution-statistics-2024/

2 As reflected from the data, the place of arbitration was a neutral location in 44% of the cases submitted to the ICC Court in 2024 and in 47% of the cases submitted in 2023. In the majority of cases, the place of arbitration was identical to the nationality of a party.

3 XIX Congreso Internacional del Club Español e Iberoamericano del Arbitraje (CEIA) held in Madrid on 1-3 June 2025.

What are the key take aways?

The choice of seat boils down to two words – bargaining power. If a party has the bargaining power to insist on the seat in their jurisdiction, they are using it. For many places that have improved their arbitration ecosystem to a certain extent, foreign investors are more comfortable and are therefore willing to accept arbitration seated in the same jurisdiction as their counterparty when dealing with a state or state entity.

On the flip side, the party without the bargaining power may agree to that seat in the jurisdiction of their counter-party, provided the dispute will be resolved by ICC Arbitration – a truly independent arbitral institution and a trusted and fair process.

Cities aspiring to be a preferred arbitral seat. Where parties having no connection to a jurisdiction opt to have their arbitration seated in that location, a long-term vision is required. I see a real opportunity for a city or constellation of cities in Latin America and Africa to rise as a preferred, neutral hub for intra-regional disputes. Intra-regional trade is expected to rise in Africa under the African Continental Free Trade Agreement, and in Latin America, and consequently, the number of intra-regional disputes are expected to increase, but today no city in those regions stands out as a seat for intra-regional disputes.[4]

Beyond a sound legal infrastructure, a city striving to be a preferred arbitral seat must address the procedural hurdles and uncertainty to ensure that parties have confidence and trust in the court system.[5] It must create a vibrant and business-friendly environment that is conducive to resolving arbitration disputes. Equally important, arbitral seats can only succeed when strengthening the arbitration ecosystem occurs simultaneously with making a genuine commitment to the rule of law.[6]

4 See e.g. Asia's Economic Growth Is Weathering Tariffs and Uncertainty (https://www.imf.org/, 16 Oct. 2025):"To sustain strong and durable growth, [Asia] must now rebalance more toward domestic demand and deepen regional integration". See also Chamber Pulse: Global markets, local landscapes (ICC, Sep. 2025), at pp. 10-11, figures 5, 6: "Amid heightened trade tensions, businesses adapt their strategies and prioritise market diversification. (…) According to chambers, the diversification of clients and suppliers mainly occurs at the regional level, with East Asia and Pacific decoupling from North America and fostering trade alliances elsewhere in Asia (for example, with the Association of Southeast Asian Nations, India and China) to diversify exports or imports. European and Central Asian businesses diversify their trade within Europe and across Asia (for example, India, China). Businesses in Latin America and the Caribbean direct their efforts in the Americas beyond the United States (for example, Canada, Mexico and Chile) and strengthen trade ties with China and the European Union (for example, Spain, Germany). In the Middle East and North Africa, businesses increasingly consider African and European countries as key partners for market diversification. Canada and the European Union stand out as key alternatives for businesses in North America looking to diversify trade".

5 See e.g. the White & Case/QMUL 2025 International Arbitration Survey at p. 7: "The factors influencing preference for seats, as confirmed by interviewees, were consistent with those singled out by respondents to our previous surveys. These include support for arbitration by local courts, neutrality and impartiality of the local legal system and national arbitration law and a strong enforcement track record".

6 See D. Neuberger, History of Rule of Law and International Arbitration, *ICC Dispute Resolution Bulletin*, 2023-3, a keynote address at the ICC UK Annual Arbitration and ADR Conference "Promoting the Rule of Law" celebrating 100 years of ICC Arbitration. See also the ICC Court Centenary Declaration (2023) recommitting to the purpose of the ICC Court to promote access to justice and the rule of law.

Welcome from the Editors-in-Chief

Sara Nadeau-Seguin and Rafael Rincón

Dear Colleagues,

As the global dispute resolution community continues to evolve amid new procedural, technological and geopolitical challenges, we are delighted to introduce the second issue of the *ICC Dispute Resolution Bulletin* for 2025.

Issue 2025-2 begins with an *In Memoriam* dedicated to Professor Antonio Crivellaro (1942–2025), who sadly passed earlier this year. The tributes collected honour not only his scholarly contributions, longstanding service to the ICC Institute of World Business Law, and many accomplishments as both as advocate and an arbitrator, but also the generosity, humanity, and kindness for which he was and will continue to be admired.

The **Global Developments** section offers a panoramic view of recent legislative and judicial trends. From *Latin America*, Elina Mereminskaya examines Chile's dualist legal system of arbitration, and brings to our attention two recent decisions from the Supreme Court addressing the applicability of the legal framework governing international commercial arbitration.

From *Asia*, Sylvia Tee and Kun Ou provide a comprehensive analysis of China's long-awaited 2025 Amendments to the PRC arbitration law – reforms that mark an important step forward, despite notable elements of conservatism. From India, two complementary pieces illuminate significant jurisprudential trends. Shaneen Parikh and Rahul Mantri reflect on the Indian Supreme Court's recent judgment in *Gayatri Balasamy v. ISG Novasoft Technologies Limited*, which recognises a limited judicial power to modify arbitral awards, and Srikanth Navale explores the decision in the case *BGM v. Eastern Coalfields Ltd*, which brings into focus how Indian courts approach jurisdictional consent when arbitration clauses use non-mandatory language.

Turning to *Europe*, Anne-Karin Nesdam and Marie Nesvik analyse recent case law in Norway that clarifies the standards for review when the lack of impartiality of an arbitrator is invoked as a ground for setting aside the arbitral award. Carmen Gimeno Vilarrasa and Sofía Vicente Mazzuz also explore how the Spanish courts are approaching the public policy exception in setting aside proceedings, particularly in view of the external review standard imposed by the Constitutional Court. Finally, Olexander Droug and Alina Bahan report that the Supreme Court of Ukraine clarified that national rules governing exclusive jurisdiction only apply to litigation and do not affect the arbitrability of disputes, reiterating its support for arbitration.

For the *Middle East*, Nayiri Boghossian discusses a judgement of the Dubai Court of Cassation that (re)examined three arbitration-related questions: the extension of an arbitration agreement to third parties, the jurisdiction of ADGM Courts in arbitrations governed by the ICC Rules and arbitral tribunal's authority to award legal costs.

In the **Commentary** section, Ahmed Habib focuses on a 2022 decision of the Court of Appeal of Qatar that set aside a procedural order granting an interim measure in relation to a bank guarantee, and Erdem Küçüker provides an overview of the points to consider regarding the one-year time limit within which arbitral tribunals must render their final awards under Turkish law.

On **Practice and Procedure**, Myfanwy Wood and Aled McNeile examine the rapidly evolving field of space law and dispute resolution amid growing commercial and governmental activity in outer space.

"From the ICC Institute" – dedicated to the activities of ICC Institute of World Business Law – shares highlights from the "Advanced Training on Interest in International Arbitration" held in Paris on 9 April 2025 during Paris Arbitration Week as reported by Francisco Trebucq.

In our **ICC DRS Activities** section, which features ICC Dispute Resolution Services events worldwide, Tat Lim reports on the ICC Mediation Roundtable on the occasion of the 20th ICC Mediation Competition last February, which particularly addressed the role of counsel in mediation.

Finally, the **Book Reviews** section features two notable contributions. Anzhela Torosyan reviews *Predictability in Oil and Gas Investment Agreements*: *Balancing Interests for a Stable Investment Environment* by Stanislava Nedeva, analysing how contractual and treaty frameworks in the energy sector can be structured to enhance legal certainty in volatile geopolitical environments. Sarah Reynolds reviews *U.S. Supreme Court Precedents on Arbitration: Shaping the American Arbitration Law and Practice* by Kabir Duggal, Yasmine Lahlou, Carlos Alberto Carmona and Gustavo Favero Vaughn, highlighting how seminal U.S. decisions have shaped global perceptions of arbitration's autonomy and enforceability.

As co-editors-in-chief, we are continually inspired by the generosity of the Bulletin's authors, reviewers and readers. Their contributions ensure that this publication remains a forum for an informed debate that bridges theory and practice and connects practitioners across continents and generations. We are grateful to the members of the Editorial Board for their work in curating balanced, insightful and forward-looking content.

Looking ahead, our next issue will be a special edition celebrating the 35th anniversary of the *ICC Dispute Resolution Bulletin*, featuring reflections from past editors, archival highlights, and new perspectives on how the ICC has shaped – and continues to shape – the global landscape of dispute resolution. We look forward to sharing this milestone with our readers and contributors worldwide.

In Memoriam Antonio Crivellaro (1942–2025)

Eduardo Silva Romero

Chair, ICC Institute of World Business Law; Founding Partner, Wordstone, Paris

It is with profound sadness that we announce the passing of our dear friend and esteemed colleague, Antonio Crivellaro, aged 82.

He joined the ICC Institute Council[1] in October 1998. After many years of dedication he became an ICC Institute Emeritus Council member in October 2022. His commitment to the ICC Institute was unwavering, and his contributions to the field of international business law and international arbitration were extraordinary and unparalleled. He always shared his vast knowledge with enthusiasm, enriching our discussions and guiding our initiatives. His impact on our community will be felt for years to come.

Throughout his distinguished mandate, he played a key role in developing significant projects, including the prestigious ICC Institute Prize.[2] His dedication was evident in the countless hours he devoted to reviewing submissions and serving on the jury for many editions.[3] His contributions to ICC and his numerous publications in the ICC Institute Dossiers[4] series also reflect his commitment to advancing our field. We fondly remember him for his leadership as co-chair of the 39th ICC Institute Annual Conference, as well as for his work as editor of the related Dossier XVIII on "Explaining Why You Lost – Reasoning in Arbitration".[5]

A trailblazer in international arbitration, Antonio served as counsel and arbitrator in seminal construction and investor-state disputes in Italy. His expertise and insights were highly regarded, and he was renowned for his profound grasp of intricate legal matters.

Antonio's legacy will continue to inspire us, and he will be dearly missed by all who knew him. Our thoughts and deepest condolences go out to his family and all those who were touched by his warmth and wisdom. Let us honour his memory by carrying forward the values he championed, and reflect on his remarkable contributions.

• • •

Having had the privilege of knowing Antonio for decades, I can attest to his exceptional qualities both as counsel and arbitrator. He was an outstanding professional, but more importantly, he was a remarkably gentle and lovable person. Antonio was cherished and respected by everyone who had the good fortune to know him, always available and willing to lend a helping hand. There is no doubt that Antonio will be missed by all.

Teresa Giovannini
Emeritus Council Member, ICC Institute of World Business Law; Senior Counsel, Lalive, Switzerland

Humanity, kindness and finesse come to mind for characterising Antonio among the big players of our milieu. I miss our talks on arbitration and beyond, and recall my frustration when 'obliged' to refrain from engaging in conversations and smoking with him during hearing breaks for years in a saga arbitration case.

Antonias Dimolitsa
Emeritus Council Member, ICC Institute of World Business Law; Founding Partner, Antonia Dimolitsa & Associates, Greece

---

1 More information about the ICC Institute of World Business Law ("ICC Institute"), ICC Institute Council and Activities at www.iccwbo.org/icc-institute.

2 The ICC Institute Prize encourages focused research into legal issues affecting international business. The prize is open to anyone aged 40 or under.

3 See A. Crivellaro's review, with Prof. Dr. E. Erdem, of the 2017 ICC Institute Prize winning thesis *Judicial Acts and Investment Treaty Arbitration* by B. Demirkol.

4 Balancing the Contract Terms and Governing Law in the Decision-Making Process Dispute Boards (Dossier XV, 2017); Third-party funding and "mass" claims in investment arbitrations (Dossier X, 2013); Consolidation of Arbitral and Court Proceedings in Investment Disputes (Dossier III, 2005); Introduction – How Well Reasoned Must an Award Be to Satisfy Non-waivable Legitimacy Requirements? (Dossier XVIII, 2020); The Interpretative Law-Making of Investment Tribunals – How Identical Rules of Law May Lead to Opposite Results (Dossier XI, 2014); Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence (Dossier I, 2003).

5 Explaining Why You Lost – Reasoning in Arbitration | ICC Knowledge 2 Go - International Chamber of Commerce

Antonio was a man of great generosity of heart and spirit. I will always remember the moments we shared during our meetings at the ICC Institute, where he consistently contributed innovative ideas to the Colloquium, as well as his service as a member of the jury of the ICC Prize, where his wisdom and discernment were deeply valued. Antonio will continue to inspire us, and his memory will remain a source of guidance and strength for all who had the privilege of knowing him.

Nayla Comair-Obeid
Emeritus Council Member, ICC Institute of World Business Law; Founding Partner, Obeid & Partners, Lebanon

Antonio Crivellaro shaped the landscape of international arbitration in Italy alongside a few other giants. Antonio's boldness could challenge conventional approaches with an elegance sustained by meticulous case preparation. One characteristic that always struck me was his extraordinary command of case law. Within the Italian arbitration community, we are dwarfs standing on such giant's shoulders.

Cristina Martinetti
Council Member, ICC Institute of World Business Law; Partner, Elexi, Italy

Antonio and I first came to know each other almost 30 years ago as opposing counsel in what was a hotly-contested international construction arbitration. He was by then already well-known internationally for his expertise in international construction disputes and was a formidable and highly-skilled opponent. But while we crossed swords then (figuratively speaking), it is for his warmth, generosity and endless intellectual curiosity over many years as a colleague within the Council of the ICC Institute that I will always remember and miss him.

Eric A. Schwartz
Emeritus Council Member, ICC Institute of World Business Law; Independent Arbitrator, USA

LATIN AMERICA

Chile

The Challenges of Dualism in the Regulation of Arbitration

Elina Mereminskaya
Independent Arbitrator, Member of Arbitra International, FCIArb, Ph.D., LL.M, Santiago de Chile.

Domestic arbitration in Chile has a well-established history, originating with the Organic Code of Courts enacted in 1875. In 2004, Law No. 19.971 concerning International Commercial Arbitration (LACI) came into force, grounded in the UNCITRAL Model Law on Arbitration. The enactment of LACI did not alter the existing domestic arbitration regulations, thereby resulting in a dualist regulatory framework. This analysis examines two recent decisions from the Supreme Court, both addressing the applicability of the legal framework governing international commercial arbitration.

Introduction

According to the Organic Code of Courts ("COT") enacted in 1943:

- Domestic arbitrators are subject to the same regime as members of the state system of administration of justice (Art. 222).
- Certain matters are subject to compulsory arbitration (Art. 227), while others are subject to semi-mandatory arbitration, i.e. when arbitration applies in the absence of an agreement by the parties to resort to ordinary courts (e.g. Art. 125 of Law 18.046 on Corporations).
- Domestic arbitral awards are subject to all remedies before the ordinary courts, unless the parties waive them or agree on a second-instance arbitral tribunal (Art. 239 COT). In the vast majority of cases, the parties waive all remedies.

Non-waivable remedies include annulment for *ultra petita* (Art. 768, No. 4 Code or Civil Procedure "CPC") and lack of jurisdiction of the arbitral tribunal (Art. 768, No. 1 CPC). Likewise, the complaint appeal ("*recurso de queja*") before the respective Court of Appeals is non-waivable when based on a serious fault or abuse committed in rendering the award (Art. 545 COT). (The complaint appeal only applies when no other ordinary or extraordinary remedies are available.)

Paragraph 1 of Article 1 of Law No. 19.971 on International Commercial Arbitration (LACI) provides:[1]

> "This law shall apply to international commercial arbitration, without prejudice to any multilateral or bilateral treaties in force in Chile."

In other words, the application of this law is automatic, provided that the arbitration meets the requirements of internationality and commerciality, which are defined in paragraph 3 of Article 1[2] and Article 2(g),[3] respectively.

In some cases, the international nature of the arbitration has become the main contentious issue, since this determines whether or not remedies are available.[4]

1 Author's translation. The following quotations are made from the English version of the UNCITRAL Model Law.

2 Art. 1(3): "An arbitration is international if: (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country."

3 Art. 2(g): "The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road."

4 On the repercussion of the Chilean dualistic system, see E. Mereminskaya, "Recent Dismissal of a 'Recourse of Complaint' against an Arbitrator Acting in an ICC Arbitration", *ICC Dispute Resolution Bulletin*, 2017, Issue 3, pp. 24-26. On practical implications of a dual regime in other countries, see M. Hauser-Morel: ICC YAF, "What makes a great arbitration law?", *ICC Dispute Resolution Bulletin*, 2021, Issue 1, pp. 99-101.

1. *Sociedad Generadora Austral S.A. v. Cerro Dominador Spain Development SLU:* The exclusion of the foreign party does not preclude the international nature of the arbitration

The first case involves two Chilean parties – Sociedad Generadora Austral S.A. ("SGA") and Likana Solar SpA ("Likana") – along with the latter's parent company, Cerro Dominador Spain Development SLU ("Cerro Dominador" or "CD Spain"), a company based in Madrid, Spain.

Cerro Dominador requested the application of the LACI in the arbitration proceedings, arguing that the requirements for its application had been met and that its application was therefore mandatory. Cerro Dominador also challenged the jurisdiction of the arbitral tribunal, asserting that no valid and binding arbitration agreement existed between itself and SGA. Although Cerro Dominador was present at the signing of an amendment to the contract between SGA and Likana, it had not expressly consented to be bound by arbitration with SGA.

The arbitration agreement applied to the "Parties" to the contract, which excluded Cerro Dominador who merely acted as guarantor and joint and several debtor for Likana, without expressly adhering to the arbitration clause in the contract between SGA and Likana. The arbitral tribunal dismissed the objection to jurisdiction raised by Cerro Dominador.

Cerro Dominador filed a special application before the President of the Santiago Court of Appeals, as provided in Article 16(3) of the LACI, seeking a declaration that the arbitral tribunal lacked jurisdiction to hear the claims brought against it.[5]

Special application before the President of the Santiago Court of Appeals for a lack of jurisdiction against the non-signatory party

The President of the Court admitted the jurisdictional challenge by declaring that:

> "the objection to jurisdiction submitted under Article 16(3) of Law No. 19.971 on International Commercial Arbitration is hereby admitted";

thus recognising that the LACI was applicable.

First, this decision emphasised the "predominantly contractual nature of arbitration",[6] noting that:

> "The jurisdiction of the arbitral tribunal extends solely to those parties who have signed the contract and who have explicitly or unequivocally agreed to submit to the decision of private justice."[7]

Second, it held that:

> "The establishment of a guarantee and joint and several liability is not sufficient to subject 'CD Spain' to arbitration proceedings (or, as the Supreme Court would phrase it, to be 'dragged' into arbitration). Indeed, the inherent purpose of such a guarantee, as its name indicates, is to secure the fulfillment of obligations undertaken by a third party, providing surety and personal security with respect to the obligations set forth in the underlying (power supply) contract. However, this in itself does not constitute an expression of will to waive the right to be judged by the courts that the Constitution and the law primarily entrust with the administration of justice. For that purpose, more is required than a mere statement of being bound 'under the same terms and conditions as Likana'. Rather, a declaration by 'CD Spain' expressly agreeing to adhere to or adopt the arbitration clause, or some additional evidence demonstrating its consent to arbitration, would have been necessary."[8]

5 Santiago Court of Appeals, *Sociedad Generadora Austral S.A. v. Cerro Dominador Spain Development SLU*, 22.1.2025, Civil Case No. 17.411-2024.

6 Presidente de la Corte de Santiago, *Sociedad Generadora Austral S.A. v. Cerro Dominador Spain Development SLU*, 22.1.2025, Rol 17.411-2024, Considerando 8.

7 Id. Considerando 9.

8 Id. Considerando 9.

Third, it stated that belonging to the same corporate group is not sufficient to warrant the broad application of the arbitration agreement, in the absence of any allegation of fraud or misuse of legal personality.[9]

Finally, the special application was upheld, and it was declared that the arbitral tribunal lacked jurisdiction over Cerro Dominador.

Complaint appeal before the Supreme Court

SGA filed a recourse of cassation that was declared inadmissible.[10] SGA then filed a complaint appeal, which is a disciplinary recourse, before the Supreme Court that was likewise declared inadmissible by the Supreme Court.[11]

First, although the President of the Santiago Court of Appeals did not examine the scope of application of the LACI in detail, he admitted and ruled on the special application, thereby accepting Cerro Dominador's argument that the LACI was applicable.

By ruling in this manner, the President also accepted the doctrine of automatic application of the LACI. In particular, he implicitly recognised the distinction between a company's establishment and its postal address. Therefore, designating a postal address in Chile does not nullify the international character of the arbitration under the LACI.[12]

Second, the extension of the arbitration agreement to a non-signatory party is only possible in cases of fraud or abuse of legal personality. In other cases, a third party must expressly consent to arbitration to be considered a party. The criterion applied by the President of the Court was strict, even though there was sufficient room to consider that the Spanish company had expressed its consent to arbitrate.

In this case, the international nature of the arbitration was surprisingly based on the involvement of a party with a place of business situated abroad who was excluded from the arbitration by the decision of the President of the Court of Appeals, who treated this case as if it were international.

2. *Goodgate Productions SpA y otros v. Cristóbal Sotomayor Díaz*: The complaint appeal is admitted in the domestic arbitration

In this case, the international nature of this arbitration had not been established prior or during the arbitration proceedings. When determining the procedural rules, the parties expressly agreed that:

> "The application of Law No. 19.971, on a supplementary basis, will be definitively decided after the statement of claim and the statement of defense have been filed."[13]

Having addressed both the principal claim and the counterclaim, the arbitral tribunal did not rule on the subsidiary application of the LACI, and neither party raised any objection in this regard. It was only in the arbitral award that the arbitral tribunal finally declared that the LACI was applicable.

The Court of Appeal

The Santiago Court of Appeals declared inadmissible a complaint appeal ("*recurso de queja*") against the arbitral award, considering that it was an international award, which cannot be challenged by remedies specific to domestic arbitration, such as the complaint appeal.[14]

The Supreme Court decision

The Supreme Court dismissed the complaint appeal filed against this decision. However, in the context of this latter proceeding, the highest court was not convinced of the international nature of the arbitration and, acting *ex officio*, annulled the decision of the Court of Appeal.

The Supreme Court stated:

> "The determination of the basic procedural rules for conducting the proceedings is a requirement that forms part of due process, as it provides certainty and legal security for the parties appearing before a court. It naturally

9 Id. Considerando 10.

10 Santiago Court of Appeals, Civil Case No. 2.787-2025.

11 Case No. 16.883–2025.

12 Cerro Dominador alleged that the concept of "establishment" or place of business of a party was distinct from a "postal address". In this case, the Spanish company's place of business remained abroad, even though it may have designated a postal address in Chile for contractual purposes.

13 Corte Suprema, *Goodgate Productions SpA y otros v. Cristóbal Sotomayor Díaz*, 6 May 2025, Rol 38.869-2024, Considerando 4.

14 A complaint appeal is a disciplinary remedy based on a serious fault or abuse committed in rendering the award or a judicial decision. The preliminary question was whether this arbitration was national, in which case the complaint appeal applied, or whether it was international, in which case the complaint appeal did not apply.

> conditions the actions they bring, the claims they submit, the defenses and arguments they raise, and ultimately, the behavior of the parties throughout the procedural course in order to clarify and obtain recognition of their respective rights ...."[15]

In the Supreme Court's view, the arbitrator's ruling in the award on the international character of the arbitration should not produce effects in the concluded proceedings:

> "In such a way that this decision cannot have effects in this case, since it would violate the guarantee of due process by seeking to enforce procedural rules that were not established in due time, and by altering those established in accordance with the law, thereby creating a system of appeals not agreed upon by the parties nor applicable on a supplementary basis; circumstances that represent a particular and exceptional situation that cannot be upheld by this Court." [16]

The Supreme Court held:

> "Accordingly, any claim or argument concerning the application of the LACI should have been raised and resolved at the beginning of the arbitration proceedings, at the time the procedural framework was established, or, as the parties expressly agreed in this case, after the statement of defense was submitted – which did not occur. Therefore, in order to resolve the legal issue raised in this case, it is not necessary to discuss or rule on the presence of any element or criterion of internationality that would render the aforementioned legal framework applicable, since this was not done in the proper procedural stage. This is even more evident considering that the case record shows the parties complied with the procedural rules set in the first hearing and participated in every stage of the proceedings, without raising this discussion again at any point."[17]

The Supreme Court then examined the non-waivable nature of the complaint appeal as a disciplinary remedy, and concluded that:

> "It was improper to declare the inadmissibility of the complaint appeal that had been filed, since it was not appropriate to give effect to the LACI, and the waiver referred to in the arbitration clause could not have applied to the complaint appeal, but only to remedies of a judicial nature."[18]

In this case, all three respondents had their domicile outside Chile, thus fulfilling the requirements for the arbitration to be considered international under Article 1.3(a) of the LACI. Nevertheless, in light of the absence of a timely determination on its international nature, the Supreme Court classified the arbitration as domestic in nature, thereby declaring the complaint appeal admissible. In other words, since the arbitration had not been expressly established as international at the outset of the arbitration proceedings, this nature could not be introduced and established in the arbitral award.

Conclusion

The dualist regulatory system distinguishes domestic and international arbitration. This distinction, inherited from the historical regulation of arbitration in the Organic Code of Courts – and only partially modernised with the adoption of the LACI in 2004 – has created overlaps and blind spots. In practice, if the international nature of the arbitration is not expressly established at the beginning of the case, this can leave room for judicial interpretation and procedural uncertainty.

However, a dualist system is not in itself an issue if the distinction between international and domestic arbitration is clear and consistently respected in both arbitral practice and judicial review. Preserving the sphere of international arbitration under the LACI is crucial to (i) safeguard predictability and legal certainty, (ii) uphold the benefits that this law provides to parties in an international arbitration, and (iii) underpin the parties' decision to choose Chile as a seat of arbitration.

The LACI guarantees a regime that minimises judicial intervention, limits recourses, and aligns Chile with international standards based on the UNCITRAL Model Law. As long as Chile maintains a dualist system for the regulation of arbitration, it is essential that parties clearly identify and determine which regime – international or domestic – applies to their case.

15 Id. Considerando 1.
16 Id. Considerando 6.
17 Id. Considerando 5.
18 Id. Considerando 13.

ASIA/PACIFIC

China

The 2025 Amendments to the Arbitration Law – Progress with Conservatism

Sylvia Tee
Partner, Ashurst, Hong Kong/Beijing; Member, ICC Commission on Arbitration and ADR

Kun Ou
Solicitor, Ashurst, Hong Kong

On 12 September 2025, amendments to the PRC arbitration law ("2025 Amendments") were promulgated, following earlier drafts released for public consultation in 2021, 2024 and early 2025. The 2025 Amendments will take effect on 1 March 2026 and bring major reforms to align China's arbitration law with international norms, including formal recognition of online arbitration, promoting international cooperation, reinforcing of the legal significance of the seat of arbitration, and limited acceptance of ad hoc arbitration. However, the 2025 Amendments remain conservative in three respects: they retain the mandatory requirement to designate an arbitration institution, they do not adopt the competence-competence doctrine, and they do not include provisions to empower arbitral tribunals to grant interim measures.

Introduction

In recent years, there have been a number of proposals mooted for the modernisation of the arbitration law of the PRC ("Arbitration Law"), which was first promulgated in 1994 and implemented in 1995, and has not undergone any major amendments since that time. In July 2021, the Ministry of Justice released a consultation draft setting out a set of extensive proposed reforms ("2021 Draft")[1] which had been eagerly anticipated by the international arbitration community. After a few years away from the public eye, the Standing Committee of the 14th National People's Congress ("Standing Committee") released updated drafts for public comment after its first review during its 12th session in November 2024 ("2024 Draft"),[2] and second review during its 15th session in April 2025 ("2025 Draft").[3] Following the two public consultations, the 2025 Amendments[4] were approved at the 17th session of the Standing Committee, promulgated on 12 September 2025, and will take effect on 1 March 2026.

When it was first released, the 2021 Draft had been described by the international arbitration community as engendering the potential beginning of a new era for arbitration in China.[5] Compared to the 2021 Draft, the 2024 Draft adopted a more conservative approach, and both the 2025 Draft and the 2025 Amendments largely align with the 2024 Draft.

This article highlights: (**1.**) some of the key revisions in the 2025 Amendments, and (**2.**) the features that remain unchanged.

1 The Arbitration Law of the People's Republic of China (Amendment) (Public Consultation), issued by the Ministry of Justice on 30 July 2021.

2 The Arbitration Law of the People's Republic of China (Amendment), issued by the Standing Committee, 8 Nov. 2024.

3 The Arbitration Law of the People's Republic of China (Amendment) (Second Draft for Review), issued by the Standing Committee, 30 Apr. 2025.

4 The Arbitration Law of the People's Republic of China, promulgated by the Standing Committee on 12 Sep. 2025. As no official English translation is available, the authors have provided English translations of specific provisions cited in this article.

5 See e.g. K. Fan, The 2021 Proposed Amendments to the Arbitration Law: A New Era of Arbitration? (2021) 3 *ICC Dispute Resolution Bulletin*.

1. What are the key amendments in the 2025 Amendments?

Replacement of "arbitration commission" with "arbitration institution" (Art. 89)

In the 2025 Amendments, the term " arbitration commission" (仲裁委员会) has been globally replaced with "arbitration institution" (仲裁机构),[6] and a new Article 89 has been introduced to define the term.

Article 89 of the 2025 Amendments provides:

> "The term 'arbitration institution' in this Law includes arbitration commissions, arbitration courts, and other institutions legally established."

These amendments are of significant legal and practical importance. Previously, the term "arbitration commission" was undefined and generally understood to refer only to domestic arbitral institutions established within China. This created uncertainty as to whether foreign arbitral institutions could administer arbitrations seated in China, raising concerns that agreements designating such institutions might be considered invalid or unenforceable under Chinese law.[7]

By adopting the broader term "arbitration institution" and providing a clear definition, the 2025 Amendments confirm that both domestic and foreign arbitral institutions legally established may administer arbitrations in China. This reform aligns the Arbitration Law with international practice, strengthens party autonomy in selecting arbitral institutions, and supports China's policy of fostering a more open, market-oriented, and internationally integrated arbitration environment.

Supervisory powers of the State (Arts. 2 and 26)

Articles 2 and 26 of the 2025 Amendments originated in provisions introduced in the 2024 Draft, which empowered Chinese governmental bodies to guide and supervise "arbitration work" (仲裁工作), as well as impose substantial penalties on arbitration institutions that violated the Arbitration Law. There was a concern that these provisions could operate to subject parties and tribunals arbitrating in China to oversight by governmental bodies in the conduct of arbitration proceedings, igniting concerns about the independence and integrity of proceedings.

The updated provisions in the 2025 Amendments appear to be an attempt to address these concerns. The revised language – which includes the replacement of the term "arbitration work" with "arbitration undertakings" (仲裁事业) in Article 2 – suggests that (i) Article 2 pertains to policy-making and promotional activities related to arbitration; and (ii) Article 26 is directed towards the operations of arbitration institutions based in China rather than individual arbitration proceedings.

Article 2 of the 2025 Amendments provide:

> "The development of arbitration undertakings shall implement the guidelines, principles, policies, and decisions of the Communist Party of China and the State, serve the State's high-quality development and high-level opening-up, fosters a market-oriented, law-based, and international business environment, and contribute to the resolution of economic disputes."

Article 26 of the 2025 Amendments provide:

> "The judicial administrative department of the State Council shall, in accordance with the law, guide and supervise arbitration work nationwide, improve the relevant working systems, and coordinate the development of the arbitration undertakings.
>
> The judicial administrative departments of the people's governments of provinces, autonomous regions, and municipalities directly under the Central Government shall, in accordance with the law, guide and supervise arbitration work within their respective administrative areas."

6 See Arts 4, 6, 10, 12–25, 27, 29, 31–33, 35, 36, 39, 40, 43–45, 48, 50, 53, 58, 65, 67, 71, 75, 79, 82, 83, 86, 87, 88, 89, 91, 92, 94 and 95 of the 2025 Amendments.

7 This issue was partially resolved by the Supreme People's Court in the case of *Longlide Packaging Co. Ltd. v. BP Agnati S.R.L.* (2013) MinTa Zi No.13), which upheld the validity of an arbitration clause involving an ICC arbitration with the seat of arbitration in Shanghai, albeit without expressly addressing the question of whether the law allowed foreign arbitral institutions to administer arbitrations in China.

Validity of online arbitration proceedings (Art. 11)

The 2025 Amendments introduces a new provision which expressly confirms the validity of arbitration proceedings conducted online. Online (or at least hybrid) proceedings have become the "norm" in international arbitration post COVID-19,[8] and this provision aligns the Arbitration Law with international practices. Conducting arbitration online can significantly reduce costs associated with travel, accommodation, and venue hire. It also allows for more flexible scheduling, potentially speeding up the resolution process.[9] Notably, under the 2024 and 2025 Drafts, online arbitration required prior consent from the parties, whereas the 2025 Amendments allow arbitration proceedings to be conducted online unless a party expressly objects. This change shifts online arbitration from an opt-in to an opt-out default, which should further enhance the efficiency of proceedings.

Article 11 of the 2025 Amendments provides:

> "Arbitration activities may be conducted online through an information network, except where a party expressly objects.
>
> Arbitration activities conducted online through an information network shall have the same legal effect as offline arbitration activities."

Time limit for setting aside (Art. 72)

The 2025 Amendments shorten the time limit for applications to set aside arbitration awards from six months to three months from the date of receipt of the award, bringing it in line with the time limits under the Model Law.[10] This requires parties to act promptly in respect of any challenge to the arbitral award and will likely accelerate the enforcement process.

Arbitration Law (Art. 59)	2025 Amendments (Art. 72)
"A party that wishes to apply for setting aside the arbitral award shall submit such application within six months from the date of receipt of the award."	"A party that wishes to apply for setting aside the arbitral award shall submit such application within three months from the date of receipt of the award."

Significance of seat (Art. 81)

The requirements applicable to the enforcement of arbitral awards in China differ depending on whether the award in question is regarded as a "foreign" or "domestic" award.[11] The previous version of the Arbitration Law does not expressly recognise the concept of a seat of arbitration, and there has been some ambiguity over how the "nationality" of an arbitral award ought to be determined under PRC law for the purposes of enforcement proceedings, with some Chinese courts determining the nationality of awards based on the location of the arbitral institution administering the case.[12]

The 2025 Amendments addresses this ambiguity by confirming the significance of the parties' choice of the "seat of arbitration" under PRC law, aligning the law with international arbitration practice. The wording also provides that the seat of the arbitration would determine the nationality of the arbitral award, and in turn determine whether the award will be deemed to satisfy the requirement of reciprocity, which is a precondition to enforcement of a foreign award in China.

8 In the Queen Mary University of London 2021 International Arbitration Survey: Adapting Arbitration to a Changing World, 72% of respondents reported sometimes, frequently or always using virtual hearing rooms.

9 This ICC report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings describes features and functionalities that may enhance the arbitral process, including in relation to virtual hearing. The report is available in English and Chinese.

10 UNCITRAL Model Law, Art. 34(3).

11 There are also separate requirements applicable to Hong Kong and Macau awards,

12 E.g. *Duferco S.A. v. Ningbo Arts & Crafts Import and Export Co., Ltd.* (2008) Yong Zhong Jian Zi No. 4.

Article 81 of the 2025 Amendments provides:

> "The parties may agree in writing on the seat of arbitration. The seat of arbitration shall serve as the basis for determining the applicable governing law and the court of jurisdiction for the arbitration proceedings, unless the parties have otherwise agreed on the applicable governing law for the arbitration proceedings. The arbitral award shall be deemed to have been rendered at the seat of arbitration.
>
> If the parties have not agreed on the seat of arbitration, or their agreement is unclear, the seat of arbitration shall be determined in accordance with the arbitration rules agreed upon by the parties; if the arbitration rules do not provide for a place, the arbitral tribunal shall determine the seat of arbitration based on the circumstances of the case and in accordance with the principle of facilitating the resolution of the dispute."

Permitting specific types of *ad hoc* arbitration (Art. 82)

Under the previous version of the Arbitration Law, arbitration proceedings are required to be administered by institutions, except for limited exceptions in certain free trade zones. The 2025 Amendments relax this restriction, by permitting *ad hoc* arbitration in relation to two categories of foreign-related disputes:

1. disputes arising from foreign-related maritime affairs; and
2. disputes involving foreign elements between enterprises registered in pilot free trade zones established by approval of the State Council, the Hainan Free Trade Port or other regions[13] designated by the State.

This provides parties with greater autonomy when arbitrating in China, granting them a greater range of options beyond institutional arbitration. As with the amendments to confirm that the administration of arbitrations by foreign arbitral institutions is permitted in China, these changes reflect a more market-oriented policy towards arbitration.

Article 82 of the 2025 Amendments:

> "For foreign-related maritime disputes or foreign-related disputes between enterprises registered in a free trade pilot zone established upon approval of the State Council or the Hainan Free Trade Port or other regions designated by the State, if the parties have agreed in writing to arbitration, they may choose to have the arbitration conducted by an arbitration institution. Alternatively, they may choose the People's Republic of China as the seat of arbitration, with an arbitral tribunal composed of individuals meeting the conditions stipulated by this Law, and conduct the arbitration in accordance with the agreed arbitration rules. The arbitral tribunal shall, within three working days after its formation, file with the arbitration association the names of the parties, the seat of arbitration, the formation of the arbitral tribunal, and the rules of arbitration.
>
> If a party applies for property preservation, evidence preservation, or requests that the other party be ordered to perform or refrain from performing certain actions, the arbitral tribunal shall submit the application to the People's Court, which must handle the matter in accordance with the law and in a timely manner."

13 The specific regions to be designated under this provision have not yet been clarified, leaving room for future designation by the State as appropriate.

2. What key features remain unchanged in the 2025 Amendments?

Compared to the 2021 Draft, the 2025 Amendments appear to be more conservative. This is demonstrated by three key aspects, as set out below.

Mandatory selection of an arbitration institution

The selection of an arbitration institution remains a mandatory element for an arbitration agreement to be valid. The 2021 Draft proposed to remove this requirement.[14] However, Article 27 of the 2025 Amendments fully retains the provisions of Article 16 of the previous version of the Arbitration Law, which stipulates that an arbitration agreement must meet the following four requirements:

- written form;
- mutual consent for arbitration;
- specification of matters for arbitration; and
- designation of an arbitration institution.

This means that, save in relation to the two limited categories of foreign-related disputes identified in Article 82, the 2025 Amendments continues to require arbitration proceedings seated in China to be administered by arbitral institutions.[15]

Non-recognition of the competence-competence doctrine

The competence-competence doctrine is not recognised in the 2025 Amendments. Under the 2025 Amendments, the power to rule on the jurisdiction of an arbitral tribunal is reserved for the arbitration institution or the court. If one party submits its jurisdictional challenge to the arbitration institution and another applies to the court, the court's decision prevails. The 2021 Draft incorporated the competence-competence doctrine,[16] granting arbitral tribunals the authority to determine their own jurisdiction. However, this amendment was removed from the 2025 Amendments. Arbitral tribunals therefore do not have the power to rule on their own jurisdiction (though they may determine whether the arbitration agreement is valid according to Arts. 27 to 30).

Exclusion of interim measures by arbitral tribunals

The 2025 Amendments do not authorise arbitral tribunals to grant interim measures. Under the 2025 Amendments, an application for interim measures must be submitted by the arbitration institution to the competent court for a decision.[17] The 2021 Draft empowered arbitral tribunals to grant interim measures and introduced the mechanism of emergency arbitration.[18] These changes were removed from the 2025 Amendments.

Conclusion – The likely impact of the 2025 Amendments

Compared to some other jurisdictions, the history of arbitration as an autonomous dispute resolution process – as opposed to an administrative proceeding conducted under tribunals established by executive authorities – is relatively short within China. The enactment of the Arbitration Law in 1994 marked the first time there was legislative recognition of arbitration as a consensual, independent and party-driven process.

Over the past decades – particularly in recent years – PRC legislators and practitioners have made sustained efforts to align the Arbitration Law more closely with international practice. While some commentators view the 2025 Amendments as less progressive than its 2021 predecessor, it nonetheless represents a meaningful effort to bring China's arbitration framework closer in line with international standards in several key respecEts.

14 The Arbitration Law of the People's Republic of China (Amendment) (Public Consultation), issued by the Ministry of Justice on 30 July 2021, Art. 21.

15 There is a further potential internal inconsistency between Art. 82 and Art. 27 in the 2025 Draft as *ad hoc* arbitration under Art. 82 does not require the selection of an arbitration institution. However, this inconsistency may not be critical as Art. 82 should prevail over Art. 27, following the doctrine of *lex specialis* (特别法优于一般法). (See Art. 103, PRC Legislation Law).

16 The Arbitration Law of the People's Republic of China (Amendment) (Public Consultation), issued by the Ministry of Justice on 30 July 2021, Art. 28.

17 The 2025 Amendments, Art. 39.

18 The Arbitration Law of the People's Republic of China (Amendment) (Public Consultation), issued by the Ministry of Justice on 30 July 2021, Arts. 47, 49.

ASIA/PACIFIC

India

The Court's Inherent Power to Modify an Arbitral Award – Thoughts on the Supreme Court's Decision in *Gayatri Balasamy v. ISG Novasoft Technologies Limited*

Shaneen Parikh and Rahul Mantri
Respectively Partner and Head, and Senior Associate, at Cyril Amarchand Mangaldas, Mumbai

To modify or not to modify (an arbitral award) – that is the question. One would assume the answer depends on the relevant arbitral statute – it does, but not solely. Despite concerted efforts to ensure minimal court intervention in arbitration matters, the Supreme Court's recent decision in *Gayatri Balasamy v. ISG Novasoft Technologies Limited* may have turned the needle back, despite its good intentions. If the "guardrails" stay in place, this decision may bring finality to unnecessary litigation.

1. Introduction

India's Arbitration & Conciliation Act, 1996 (the "1996 Act") expressly confers upon a court the power to set aside an award. There is no express power for modification, in contradistinction to the erstwhile Arbitration Act of 1940 (the "1940 Act"). However, by a majority decision, India's Supreme Court read into Section 34 of the 1996 Act (setting aside of arbitral awards) a limited power of a court to modify awards, circumscribed by the condition that this power could solely be exercised:

> "to rectify computational, clerical, or typographical errors, as well as other manifest errors, provided that such modification [did] not necessitate a merits-based evaluation".

The dissenting opinion – with which the authors agree – opined that the 1996 Act did not confer any such power on a court to modify awards, albeit that courts are empowered to correct computational, clerical or typographical errors or any other errors of similar nature without modifying or adding to the original award.

India's erstwhile arbitration regime was overhauled in 1996. Various statutes, including the 1940 Act (which dealt comprehensively with domestic arbitration), were repealed. While the 1940 Act expressly provided the courts with the power to modify or correct an award under specific circumstances,[1] the 1996 Act omitted this provision, reflecting two key points:

1. the 1996 Act is (expressly), based on the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") – which does not include the power to modify awards, and
2. in line with the Model Law, the 1996 Act expressly restricts judicial intervention.[2]

Pursuant to a series of conflicting judicial decisions by Indian courts on the issue, in early 2024, a five-judge bench of the Supreme Court was constituted in *Gayatri Balasamy v. ISG Novasoft Technologies Limited*,[3] to inter alia decide:

> "Whether the powers of the Court under Sections 34 and 37 of the Arbitration and Conciliation Act 1996 will include the power to modify an arbitral award?"

1 Art. 15, 1940 Act: "Power of Court to modify award .-The Court may by order modify or correct an award: (a) where it appears that a part of, the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or (b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission."

2 1996 Act, Section 5 - Extent of judicial intervention: "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part".

3 2025 SCC OnLine SC 986.

Setting the stage

The Supreme Court noted, in its majority judgment, that it was crucial to adopt a balanced approach between the longstanding conflict between equity and justice, on one hand, and the fetters imposed by the court's jurisdictional limits, on the other.[4] By so observing, it paved the way to a conclusion that the inability of a court to modify awards, does not deliver equity and justice.

Going further, it opined that a denial of the power to modify an award – particularly when such denial would impose significant hardships, escalate costs, and lead to unnecessary delays – would defeat the *raison d'être* of arbitration.[5] Such a view sacrifices, to our mind, the benefits of a narrow scope of review of an award, in favour of a potentially speedier final resolution of the dispute.

These preliminary and overarching observations set the stage and the rationale for the eventual decision of the majority, i.e. that a court does have the power (*albeit* limited), under Section 34 of the 1996 Act, to modify an arbitral award.

Such a ruling regresses the Indian position back to the 1940 Act.

2. Power to modify

The Supreme Court reaffirmed the doctrine of severability qua an arbitral award, and the inherent power of a court to shear the offending part (if so severable), upholding only the valid part of the award .[6] From this position, the Court applied the maxim *omne majus continent in se minus* (the greater power includes the lesser) to hold that modification was a more limited and nuanced power compared to setting aside an award, as the latter entailed a more severe consequence of the award being set aside completely.

Adopting "a holistic and purposive interpretation", the Court held that the power of judicial review, and the setting aside of an award, should be read as "inherently including" a limited power to modify the award within the confines of Section 34. It noted further, that:

> "the practical effect of partially setting aside an award [was] the modification of the award".[7]

One wonders whether the power to modify could be construed as a "lesser" power, if one viewed the path to modification as involving deeper scrutiny of the award, requiring an application of the court's mind to its substance (merits), after which, a potential tampering with the award by a variation of the ultimate dispositive. One hopes that the narrow scope of modification permitted (as explained below) will prevent a merits-based review.

The Supreme Court opined that the "silence in the 1996 Act" should not be read as a complete prohibition, denying the courts the authority to modify an award. In our opinion, there is no silence; it is a loud and deliberate omission, given that the erstwhile 1940 Act empowered such modification – something that was deliberately not imported into the 1996 Act. Going further, the 1996 Act expressly minimised the judicial intervention which was rife under the 1940 regime (save where expressly permitted).

Justice KV Viswanathan, delivering the dissenting opinion, disagreed with the majority, noting that the language of Section 34 (including the phrases "set aside" and "only if" read with the word "recourse"), made it clear that the only relief a court could grant in respect of an offending award was to set aside or annul it, on limited and prescribed grounds. The rule of ordinary interpretation as well as express terms of Section 5 (which provides that no judicial authority shall intervene except where so provided), supports this view.

Justice Viswanathan highlighted the contrast between the powers of an appellate court under India's Code of Civil Procedure, 1908 ("CPC"), and the power of a court – which did not sit in appeal over arbitral awards, under Section 34. A court could not, in a set aside application, review the award on merits (unlike an appellate court). It was eminently possible that while considering any potential modification of an award, a court may need to conduct a merits based review, and as such, unless expressly authorised by law, this could not has been intended under Section 34. The authors agree with the minority decision.

4 At para. 25.
5 At para. 41.
6 Section 34(2)(a)(iv), 1996 Act.
7 Footnote 36, at para. 39.

a - The "hardship" justification

Setting the stage, the majority ruling emphasised the benefits of modifying an award, i.e. that it would "reduce costs and delays",[8] as, if an award is set aside, parties are relegated back to arbitrating the dispute afresh. In India this could take several years – through the fresh arbitration and potential challenge process, to achieve finality.

On this basis the Supreme Court ruled:

> "To deny courts the authority to modify an award – particularly when such a denial would impose significant hardships, escalate costs, and lead to unnecessary delays –would defeat the raison d'être of arbitration."

While there are equities in such a rationale (bringing finality to the dispute), let us remember that the Model Law, which was adopted by India, and several other developed jurisdictions, have the rule that a set aside award necessitates a fresh arbitration.

Increased court intervention with an award, because of the delays taken in an award travelling through the Indian court system ought not to be the answer. The answer is to make the process more efficient.[9]

b - Extent of the limited power to modify – Correction of clerica/typographical errors (or the like)

Thankfully, the majority judgment does not open the floodgates completely to permitting a full scale review of the merits of an award. The Supreme Court noted that the scope of the review would "completely depend on the extent of the modification powers recognised by us", which it ruled was an inherent, but "limited power".[10]

This is a welcome clarification, and indeed, several paragraphs in the majority ruling make the point that the power to modify awards is limited and does not include a review of the award on merits. Rather, the power to modify awards, is restricted to:

> "rectify computational, clerical, or typographical errors, as well as other manifest errors, provided that such modification [did] not necessitate a merits-based evaluation".[11]

The Supreme Court further ruled that:

> "the power should not be exercised where the effect of the order passed by the court would be to rewrite the award or modify the award on merits. However, the power can be exercised where it is required and necessary to bring the litigation or dispute to an end. …"[12]

Notably, the 1996 Act already empowers:

1. an arbitral tribunal, to correct any computational/clerical/typographical errors, or the like, in the award;[13] and
2. a court, to remand the matter back to the tribunal to give the arbitral tribunal an opportunity to eliminate the grounds for setting aside the arbitral award.[14]

The dissenting opinion noted the aforesaid provisions of the 1996 Act, which already provided the safety valves for curable errors. Nevertheless, it agreed with the majority that a court could:

> "correct computational errors, clerical or typographical errors or any other errors of similar nature [but] *without modifying, altering or adding to the original award*." (emphasis added)

The devil is, however, in the detail. The scope of rectification of an award that the Supreme Court permits, also includes "other manifest errors" (see above), which may be read widely and not restricted to clerical or typographical errors (the "curable defects" referred to in the dissenting opinion).

One hopes that the express caution that there should not be "a merits-based evaluation", is strictly followed and not widened by an overbroad interpretation and the entreaties of award debtors.

8 At para. 46.
9 At para. 41. The Supreme Court noted that "applications under Section 34 and appeals under Section 37 often [took] years to resolve."
10 At para. 39.
11 At para. 49
12 At para. 84
13 Section 33.
14 Section 34(4).

c – Modification of post-award interest

The Supreme Court also ruled that the power of modification permitted a modification of post-award interest. The rationale was that the future was unpredictable and unknown to the arbitrator at the time of the award, and it would be unreasonable to suggest that the arbitrator could anticipate or predict future events that may have a bearing on the interest awarded with certainty.

The dissenting opinion disagreed with the majority, as do the authors. Post-award interest is necessarily forward looking and is based on the facts and circumstances at hand when the interest rate is fixed. Hindsight is not foresight and that cannot be a justifiable rationale to interfere with the tribunal's considered decision.

3. Enforceability of modified awards

Addressing concerns regarding enforceability of modified awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("NYC"), the Supreme Court noted that the award must be final and binding before it could be enforced under the NYC, for which purpose the law of the seat had supremacy. The Court added that allowing modification under Section 34 would not be at loggerheads with the NYC, as the modified award would be considered as the final and binding award and the modified award would be enforceable.

The dissent opined that in the absence of an express statutory provision for modification of an award, enforcement in a foreign jurisdiction might run into complications as objections would be taken that what was sought to be enforced was not the award but the judgement of a court.

On this aspect, the authors agree with the majority judgement. India being a common law jurisdiction, court made law (in particular, that of the Supreme Court) is binding. Hence, the ruling of the Supreme Court as to the final and binding nature of the modified award ought to suffice for the purposes of enforceability in foreign jurisdictions under the NYC.

4. Powers of the Supreme Court under Art. 142 of the Constitution of India

The majority judgement further affirmed the Indian Supreme Court's supremacy by expressly incorporating its powers under Art. 142 of the Constitution of India into the scope of setting aside applications. Art. 142 empowers the Supreme Court to pass any decree or order "as is necessary for doing complete justice in any cause or matter pending before it". This power has been previously exercised by it in the context of arbitral awards on limited occasions. For example, in *Ssangyong Engineering & Construction Co. Ltd. v. NHAI*,[15] Art. 142 was used to set aside the majority award and substitute it with the minority award, due to the exceptional circumstances, where a fundamental principle of justice was breached which shocked the conscience of the Court. In *McDermott International Inc. v. Burn Standard Co. Ltd. & Ors.*,[16] the Supreme Court emphasised the principle of non-interference with arbitral awards, but invoked Art. 142 to modify the rate of interest.

In this case, while the Supreme Court cautioned that the power under Art. 142 should not be exercised if it would mean rewriting or modifying the awards on merits, this standard is open to interpretation, as it is accompanied by the qualification that:

> "the power can be exercised where it is required and necessary to bring the litigation or dispute to an end".[17]

In our assessment, there was no need for the Supreme Court to deal with Art. 142 at all, since the contours of the power already stood well-defined. By giving express license to use this power in the context of arbitral awards, the Supreme Court effectively encourages parties to seek a modification through a power that ought to be exercised only in extraordinary circumstances and not in a routine manner.

We agree with the dissenting opinion which observed the power under Art. 142 ought not to be exercised if it meant contravening the fundamental and non-derogable principle at the core of the 1996 Act (that of non-intervention). Additionally, exercise of such power ought to be tempered by restraint based on fundamental considerations of public policy.

15 (2019) 15 SCC 131, at para. 77.
16 (2006) 11 SCC 181, at paras. 154-159.
17 At para. 84.

5. Comments

The power to modify awards exists in some jurisdictions (e.g. in the UK, the USA, Singapore and Canada), specified (and circumscribed) by the statute, rather than case law. Given that the 1996 Act did not include this power, the majority judgment has arguably overreached by reading into the 1996 Act a power that was deliberately omitted by the legislature.

While the Supreme Court intended to limit the scope of review of an award, India is home to over 850 district courts and 25 High Courts and many of the lower courts do not have specialised expertise in complex commercial disputes or in arbitration related matters. The guardrails the majority judgement cautions of, are nuanced and subject to differing interpretation (at least until further rulings provide more clarity).

It may well be that courts of the first instance, step outside these unspecified guardrails, and unduly modify an award. No doubt, such rulings will be appealed (to a High Court or division bench), ultimately landing up again before the Supreme Court several years later. If at that time, the Supreme Court decides that the power of modification was unduly exercised, or that the modification was excessive, the award may nevertheless be set aside, relegating parties back to arbitrating afresh. Moreover, the very fear of a somewhat merit-based review could deter foreign parties from choosing an Indian seat of arbitration – defeating the overarching intent of both the executive and the judiciary.

As highlighted in the dissenting opinion, the 1996 Act already permits correction of computational, clerical, or typographical errors in awards.[18] Courts are already empowered to remit matters back to the tribunal for the removal of grounds warranting the setting aside of an award.[19] Given the existence of these provisions, there is no compelling reason to confer upon courts an additional power to modify awards, when it was deliberately excluded from the 1996 Act.

From an international standpoint, it is widely recognised that India's legal system is slow-moving. In this context, judicial intervention in arbitration has been kept to a minimum, as parties having voluntarily signed up to the process, must be bound by their bargain.

We hope that the intent of minimal intervention in terms of a merits-based review by the court, prevails such that the power is not misused or overused. If the guardrails prove to be successful to contain modification requests to typographical, clerical and computations errors, the decision may be welcome. As always, time will tell.

18 Section 33.

19 Section 34(4).

ASIA/PACIFIC

India

When "May" Falls Short: Permissive Arbitration Clauses After *BGM v. Eastern Coalfields*

Srikanth Navale
Independent Arbitrator, FCIArb FSIArb, Singapore and New Delhi

This year, the Supreme Court's decision in *BGM v. Eastern Coalfields Ltd* ("*BGM*") has sparked renewed interest in the enforceability of permissive arbitration clauses, i.e. those using the word "may" rather than "shall". This article examines the Supreme Court's reasoning in *BGM*, its interpretation of earlier precedents, and evaluates the decision from an international comparative framework.

Introduction

The Supreme Court's ruling in *BGM v. Eastern Coalfields Ltd* ("*BGM*")[1] brings into focus how Indian courts approach jurisdictional consent when arbitration clauses use ostensibly non-mandatory language (**1.**), and arguably marks a departure from the prevailing interpretation adopted in leading arbitral jurisdictions such as England, Canada, Singapore, and Hong Kong (**2.**).

1. The Indian Position: *BGM v. Eastern Coalfields Ltd*

In *BGM*, the Indian Supreme Court interpreted Clause 13 of the governing contract, which read:

> "It is incumbent upon the contractor to avoid litigation … In case of parties other than Govt. Agencies, the redressal of the dispute may be sought through Arbitration and Conciliation Act, 1996 as amended by Amendment Act of 2015."

The full grievance procedure envisaged three steps.

(i) Parties would engage senior management of the coalfields company.

(ii) An internal committee would attempt resolution.

(iii) Only after these preceding steps, and only for non-government parties, "may be sought" redressal of the dispute via arbitration under India's arbitration statute.

The Supreme Court held that this clause did not constitute a binding arbitration agreement under Section 7 of the Arbitration and Conciliation Act, 1996. By hinging arbitration on the permissive "may", the Court concluded that the clause amounted to nothing more than a future "agreement to agree", and was not a present consensus to arbitrate. The Supreme Court explained:

> "Use of the words 'may be sought', imply that there is no subsisting agreement between parties that they, or any one of them, would have to seek settlement of dispute(s) through arbitration. It is just an enabling clause whereunder, if parties agree, they could resolve their dispute(s) through arbitration."[2]

The Court declined to refer the dispute to arbitration, citing *Jagdish Chander v. Ramesh Chander*[3] ("*Jagdish Chander*") and *Mahanadi Coalfields Ltd. v. IVRCL AMR Joint Venture*[4] ("*Mahanadi Coalfields*") to support its conclusion that mandatory language is necessary to constitute an arbitration agreement.

1 *BGM* and *M-RPL-JMCT (JV) v. Eastern Coalfields Ltd* [2025] INSC 874.
2 Id. at para 31.
3 (2007) 5 SCC 719.
4 *Mahanadi Coalfields Ltd v. IVRCL AMR Joint Venture* (2022) 20 SCC 636.

Reliance on *Jagdish Chander* and *Mahanadi Coalfields* misplaced?

The Court's reliance on *Jagdish Chander* is open to question. The clause in that case stated:

> "All disputes … shall be referred for arbitration if the parties so determine."

This phrasing clearly contemplated a future agreement to arbitrate, explicitly making any reference to arbitration conditional on mutual post-dispute consent. In contrast, the clause in *BGM* granted either party an optional right to refer disputes to arbitration. Thus, the decision arguably conflates a clause where no determination to arbitrate had yet been made (*Jagdish Chander*) with one where the parties had already agreed that a party may elect to arbitrate (*BGM*).

The Court also drew support from its earlier ruling in *Mahanadi Coalfields*, but the reliance appears somewhat tenuous. In *Mahanadi Coalfields*, the arbitration clause provided that after certain internal steps, resolution of disputes "may be sought in the Court of Law". It is in this context that the Court in *Mahanadi Coalfields* held that the mere presence of the term "Arbitration" in the heading of the clause would not suffice, as the substantive formulation clearly excluded arbitration and affirmed court-based resolution. By contrast, in *BGM*, the clause at issue stated that disputes:

> "…may be sought through the Arbitration and Conciliation Act, 1996…"

Further, the reference is not to some unspecified procedure but to a complete statutory regime offering institutional support for arbitration. Instead of evaluating whether the clause created a workable arbitration pathway, the Court zeroed in on the phrase "may be sought" and summarily concluded "that there is no subsisting agreement".[5] This literal reading appears to somewhat neglect both the broader legislative context and the clause's commercial function, arguably weakening the force of the Court's reasoning.

Respectfully, the Court in *BGM* also appears to overlook the fact that an arbitration clause can validly grant a party the discretion to initiate arbitration proceedings, and that such discretion, once exercised, creates a binding obligation on both parties to arbitrate. The clause in *BGM* was not pathologically vague, but structured to give either party the option of invoking arbitration, which is a feature accepted in other jurisdictions as seen below.

This interpretation is strengthened by the broader contractual context in *BGM*. Notably, the arbitration clause was prefaced by the language:

> "It is incumbent upon the contractor to avoid litigation."

While this point appears not to have been pressed before the Court, it clearly articulates a shared intent to resolve disputes outside the court system. Against this backdrop, the use of the phrase "the redressal of the dispute may be sought through Arbitration and Conciliation Act" takes on a very different hue. It conveys a clear mandate that disputes should, where possible, be resolved by arbitration, and that either party is empowered to initiate that process. Far from signaling an incomplete or inconclusive agreement, the clause reads as a present and operative commitment to arbitrate at the election of a party.

2. Comparative perspectives

England

In *Anzen Ltd v. Hermes One Ltd*[6] ("*Anzen*") an appeal from the Court of Appeal of the British Virgin Islands (BVI), the Privy Council construed an arbitration clause which stated:

> "If a dispute arises out of or relates to this Agreement or its breach (whether contractual or otherwise) and the dispute cannot be settled within twenty (20) business days through negotiation, any Party may submit the dispute to binding arbitration …"

The key issue was whether such permissive language ("may submit") constituted a binding arbitration agreement under the BVI Arbitration Ordinance (based on UNCITRAL Model Law[7]), and whether it could be invoked to stay court proceedings.

5 *BGM*, supra note 1, at para 31.

6 [2016] UKPC 1.

7 It is worth noting that India, akin to Canada, Singapore, and Hong Kong, is also regarded as a Model Law jurisdiction, its arbitration legislation being substantially founded on the UNCITRAL Model Law, albeit with certain modifications and departures reflecting local policy choices

It was held that:

- The clause gave each party a unilateral right to arbitration as the dispute resolution mechanism. Once one party exercised that right, for example, by filing for arbitration or applying for a stay of court proceedings, arbitration became binding on both parties.
- The word "may" did not indicate a need for further agreement. Rather, it reflected an option that, once exercised, became obligatory.
- Thus, the clause amounted to a completed consensus to arbitrate, contingent only upon a party's election to do so.

The Privy Council illustrated this by drawing an analogy to optional dispute resolution clauses upheld in other jurisdictions (including Canada, the United States and Singapore), where once notice of election is given, arbitration becomes binding.

Canada

The decision in Anzen drew from *Canadian National Railway Co v. Lovat Tunnel Equipment Inc*,[8] where the Ontario Court of Appeal interpreted the following clause as empowering either party to compel arbitration:

> "The parties may refer any dispute under this Agreement to arbitration"

Rejecting the "agreement to agree" argument, and by focusing on the effect of a party's election rather than the literal meaning of "may", that court, treated unilateral election as satisfying the requirement for consensus.

English courts have since consistently upheld this principle.[9] This purposive interpretation balances party autonomy with commercial efficiency, ensuring that optional arbitration clauses are neither toothless nor subject to fresh negotiation.

Singapore

Singapore's Courts have similarly focused on the parties' intention and autonomy of the parties over strict textual formality. They recognise that even permissive wording, such as clauses stating that either party "may" submit a dispute to arbitration, can amount to a binding and enforceable arbitration agreement if the clause unambiguously vests a party with the right to elect arbitration.

In *WSG Nimbus v. Board of Control for Cricket* in Sri Lanka[10] (which was also quoted with approval in *Anzen*) the matter involved a clause that stated:

> "...either party may elect to submit such matter to arbitration in Singapore..."

The High Court held that this language did not undermine the clause's enforceability. Once a party elected to arbitrate, the other party was bound. The permissive "may" was interpreted as granting a contractual right of election, with the binding effect triggered upon election. The focus was on the parties' clear intention to provide for arbitration. Even if it was not compulsory until an election was made, it became binding once initiated by one party.

In *Wilson Taylor Asia Pacific Pte Ltd v. Dyna-Jet Pte Ltd*,[11] the Court of Appeal reinforced this stance. The Court clarified that:

> "It was immaterial for this purpose that the Clause: (a) entitled only the Respondent (but not the Appellant) to compel its counterparty to arbitrate a dispute (the "lack of mutuality" characteristic); and (b) made arbitration of a future dispute entirely optional instead of placing parties under an immediate obligation to arbitrate their disputes (the "optionality" characteristic)."[12]

The emphasis is on the practical effect of the clause i.e. does it give a party the unequivocal right, upon election, to require arbitration? If so, the clause constitutes a valid arbitration agreement. Singapore courts have indicated that so long as an agreement demonstrates an intention to arbitrate and provides a sufficiently certain mechanism to do so, the use of "may" will not in itself defeat its validity.

8 *Canadian National Railway Co v. Lovat Tunnel Equipment Inc* (1999) 174 DLR (4th) 385.

9 See *Aiteo v. Shell* [2022] EWHC 2912 (Comm), *JSC CB Privatbank v. Kolomoisky* [2018] EWCA Civ 1708, and The "Xiamen Xinda" [2022] EWHC 988 (Comm). These affirm that permissive or optional arbitration clauses are enforceable. Once a party elects to arbitrate (usually by notice or stay application), the right becomes binding, and litigation is stayed.

10 [2002] SGHC 104.

11 [2017] SGCA 32.

12 Id. at para 13.

Hong Kong

Hong Kong's courts have gradually refined their approach to permissive arbitration clauses, moving towards a more nuanced, pro-arbitration stance while emphasising the importance of clear drafting.

In *The Incorporated Owners of Wing Fai Building, Shui Wo Street v. Golden Rise (HK) Project Company Limited*[13] ("*Wing Fai*"), the Court confronted a clause stating that disputes "may" be referred to arbitration. The defendant sought a stay of proceedings, arguing that the clause either created a binding arbitration agreement or conferred a right to compel arbitration. The Court rejected both arguments, holding that the word "may" alone was insufficient to create a binding obligation. It distinguished this clause from those in cases like *Anzen*, noting that the enforceability of permissive clauses depends on the parties' intention and the precise wording of the agreement.

More recently, in *Kinli Civil Engineering Ltd v. Geotech Engineering Ltd*[14] ("*Kinli*"), the Court of First Instance adopted a more arbitration-friendly reading of permissive language. The clause in question similarly used "may" to describe a party's right to refer disputes to arbitration. The clause (as translated) read:

> "If in the course of executing the Contract, any disputes or controversies arise between (G) and (K) on any question and the parties are unable to reach agreement, both parties may in accordance with the relevant arbitration laws of Hong Kong submit the dispute or controversy to the relevant arbitral institution for resolution, and the arbitral award resulting from arbitration in the HKSAR shall be final and binding on both parties, and unless otherwise agreed by both parties, the aforesaid arbitration shall not be conducted before either the completion of the main contract or the determination of the subcontract."

The Court held that the clause conferred a unilateral option to elect arbitration, and once exercised, arbitration became binding on both parties. In doing so, the Court reaffirmed the presumption in favour of arbitration and underscored that optional clauses could be enforceable when structured to give one party a clear right to initiate arbitration. The Court clarified that the *Wing Fai* decision is distinguishable on facts, and cannot be applied as a general rule to all cases where the arbitration clause in question adopts the word "may".

Taken together, these decisions illustrate how Hong Kong has moved towards a pragmatic approach. While *Wing Fai* cautioned that permissive language alone does not automatically impose an obligation, *Kinli* demonstrates that carefully drafted "may" clauses can create enforceable arbitration rights. This approach is akin to other leading arbitration jurisdictions examined previously, where permissive clauses granting a party the right to elect arbitration are recognised as binding once exercised. The needle has therefore shifted in Hong Kong in favour of giving effect to parties' commercial intentions and preserving arbitration as a viable dispute resolution option, provided the mechanism for election is sufficiently certain.

Concluding remarks

The Supreme Court's decision in *BGM* sacrifices purpose at the altar of form by treating the word "may" as a deal-breaker rather than the flexible drafting tool it often is. By design, permissive clauses give businesses the freedom to switch to arbitration when it suits them, rather than forcing arbitration as the only path. By demanding unequivocal "shall" language, the Court risks driving parties toward litigation when they intended to preserve arbitration as an optional pathway.

BGM marks a clear divergence between India's approach and the relatively pro-arbitration philosophies embraced in England, Canada, Singapore and more recently, Hong Kong. While Indian courts will require explicit, mandatory commitments to arbitrate, their counterparts in other common-law jurisdictions routinely enforce clauses that empower a party to elect arbitration, regardless of whether the language is framed as permissive.

13 [2016] DCCJ 225/2016
14 [2021] HKCFI 2503

All this results in a heightened drafting burden on practitioners operating in India, who must now guard against any hint of permissiveness or risk unenforceability. Arbitration clauses should employ unambiguous "shall" provisions and avoid any suggestion of future or contingent consent. In relatively more arbitration-friendly jurisdictions, drafters can preserve flexibility by using "may" to confer an optional right, confident that courts will uphold the clause when a party chooses to invoke it. Tailoring dispute resolution language to local jurisprudence is essential to ensure that an arbitration clause fulfils its promise of efficiency and enforceability.

Before concluding, it is important to situate *BGM* within the broader trajectory of Indian arbitration law. Over the past decade, India has steadily moved toward a more pragmatic and arbitration-supportive regime, aligning its practices with international standards and addressing long-standing criticisms. Occasional setbacks such as *BGM* serve as reminders that doctrinal rigidity can persist, but they do not negate the overall trend. Rather, they highlight the areas where jurisprudence still needs refinement. In that sense, the decision is less a retreat and more a reflection of the uneven process by which India continues to reconcile its legal traditions with the commercial realities of modern arbitration.

EUROPE

Norway

Arbitrator Impartiality – Supreme Court Guidance from the Decision of 19 May 2025

Anne-Karin Nesdam
Dr. juris; Specialist Counsel, Wikborg Rein, Norway

Marie Nesvik
PhD; Partner, Wikborg Rein, Norway; Member of the ICC International Court of Arbitration

The authors would like to thank associate Kanwarjot Kaur (Wikborg Rein) for her help in reviewing this article.

Challenges to arbitral awards are rare in Norway, with even fewer cases being heard by the Norwegian Supreme Court. On 19 May 2025, the Supreme Court considered a case in which the lack of impartiality of an arbitrator was invoked as a ground for setting aside the arbitral award. The Supreme Court determined that, based on the specific factual circumstances, there were no grounds to disqualify the arbitrator from serving on the tribunal and consequently dismissed the challenge to the award.

1. Introduction – Brief overview of challenges to arbitral awards in Norway

There is no comprehensive database which provides easily accessible information on challenges to arbitral awards in Norway. However, since 2023, four Nordic law firms have been collecting and analysing data on challenges to arbitral awards from their respective jurisdictions, i.e. Denmark, Finland, Norway and Sweden,[1] and publishing the results in annual Surveys.[2]

The 2023 and 2024 Surveys show that only three challenge cases were decided in Norway in each year, none of which were successful.

The Surveys also show that multiple legal grounds were invoked in almost all cases. Based on the available statistics, the most common legal grounds invoked for setting aside an award in Norway can be divided into three categories:

- lack of impartiality, independence, or legal capacity;
- excess of mandate; and
- violation of due process, procedural irregularity.

1 The firms are Punct (Denmark), Castrén & Snellman (Finland), Wikborg Rein (Norway) and Westerberg (Sweden).

2 Challenging Arbitral Awards in the Nordics - 2023 Survey (the "2023 Survey"), and Challenging Arbitral Awards in the Nordics - 2024 Survey (the "2024 Survey").

2. Background to the Supreme Court's decision of 19 May 2025[3]

One of the decisions on challenges mentioned in the 2023 and 2024 Surveys was appealed and admitted to the Supreme Court, which issued its ruling on 19 May 2025.

The arbitral award, rendered in February 2023 in an *ad hoc* arbitration, related to a dispute concerning a capital increase in a private limited company with three shareholders. The arbitral tribunal was constituted in February 2022, with one of the arbitrators, whose impartiality was later called into question, being appointed by the Court of First Instance in accordance with Section 13 of the Norwegian Arbitration Act.[4] In March 2023, the award was challenged, partly on the basis that the arbitrator's law firm, where he had worked for 20 years and in which he was a partner, had assisted one of the parties to the arbitration at the time the arbitrator was appointed and the arbitration proceedings were ongoing.[5] The challenging party had only became aware of these circumstances after the arbitral award was issued.[6]

The parties agreed that the arbitrator's law firm maintained an on-going client relationship with one of the parties to the arbitration over several years, although the arbitrator was not involved in the client relationship.[7] However, the parties disagreed as to the significance of the legal assistance provided by the arbitrator's law firm in terms of scope, timeframe and invoiced amount, and whether, despite the arbitrator not having been involved in the client relationship, the assistance and its scope created legitimate doubts about the arbitrator's impartiality and independence.[8] The Supreme Court based its assessment on the fact that the legal assistance provided by the arbitrator's law firm:

- related to a matter unrelated to the arbitral proceedings;
- pertained to an area of law outside the arbitrator's speciality;
- was provided by colleagues of the arbitrator from a different department within the firm; and
- did not involve any participation of the arbitrator.[9]

It was unclear whether the arbitrator had failed to inform the appointing court of his firm's legal assistance to one of the parties to the arbitration. The Supreme Court noted that the Court of Appeal, based on direct evidence before it, had found that this was the case, and did not find reason to conclude otherwise.[10] The Supreme Court therefore proceeded on the assumption that the arbitrator had not informed the Court of First Instance of his firm's involvement with one of the parties.

3. The Supreme Court's conclusion and the main questions at issue

The Supreme Court concluded that the arbitrator was not disqualified from serving on the tribunal and upheld the arbitral award. The case raised three questions of principle.

i) Whether the threshold for lack of impartiality differs for judges and arbitrators.

Both parties argued that this was the case, albeit in opposite directions. The challenging party submitted that the impartiality requirement in the Arbitration Act[11] is stricter than the impartiality requirement in the Norwegian Courts of Justice Act.[12] The opposing party asserted that the standard under the Arbitration Act is more flexible than that prescribed by the Courts of Justice Act:

3 HR-2025-921-A, see The Supreme Court of Norway - Judgment: HR-2025-921-A - Lovdata (English summary) and Norges Høyesterett - Dom: HR-2025-921-A - Lovdata (Norwegian original, full version).

4 LOV-2004-05-14-25 (Norwegian version) and unofficial English version (not updated as it does not reflect revisions to the Act after June 2005). The Arbitration Act is based on the UNCITRAL Model Law.

5 HR-2025-921-A, supra note 3, para. 8, paras. 64, 66-68.

6 Id. para. 8.

7 Id. paras. 18, 19, 27.

8 Ibid.

9 Id. paras. 67-68.

10 Id. paras. 70-71.

11 The Arbitration Act, supra note 4, section 13 first paragraph and section 14 second paragraph.

12 LOV-1915-08-13-5, Sections 106, 108.

> "Sections 13 and 14 of the Arbitration Act are based on Article 12 of the UNCITRAL model law and its requirement of 'impartiality' and 'independence'. Pursuant to Section 13 ..., the arbitrators shall be *impartial* and *independent* of the parties and be qualified for the position. Section 14 ... establishes that an objection may only be raised against an arbitrator if there are circumstances that give rise to *justified doubts* as to the arbitrator's impartiality or independence, or if the arbitrator is not qualified as agreed by the parties. Where a party has participated in the appointment of the arbitrator, the party can only invoke circumstances that it has become aware of after the appointment.
>
> By contrast, Section 106 of the Court of Justice Act lists specific examples of when a judge cannot adjudicate a case. Section 108 of the Court of Justice Act establishes that a judge cannot adjudicate a case 'when other special circumstances exist that are *likely to weaken confidence* in his impartiality. In particular, this applies when a party for that reason demands that he should give up his seat'."

ii) Client relationship with one of the parties.

How to assess impartiality where a lawyer appointed as arbitrator, or the lawyer's law firm, had a client relationship with one of the parties?

iii) The duty of arbitrators to disclose.

What circumstances can raise doubts about the arbitrators' impartiality or independence, and to whom is this duty owed when the appointment is made by courts – to the parties or the appointing court?

4. The Supreme Court's reasoning

i) The threshold for disqualification

The Supreme Court held that the threshold for disqualifying an arbitrator is the same as that for judges. However, differences in outcome can arise due to the specific features of arbitration and the goal of reaching a uniform international arbitral practice.

The Supreme Court highlighted that while relevant provisions in the Arbitration Act and the Courts of Justice Act differ in terminology (i.e. abstract vs. concrete regulation), their preparatory works show that the impartiality requirements in both texts are intended to be the same.[13] It did not agree that the overarching considerations, which the impartiality requirements intend to safeguard, suggests a different threshold for arbitrators and judges, as the challenging party had argued.[14]

The Supreme Court acknowledged that, for the courts, preserving public confidence is a key consideration, and that, in arbitration, the standard set by General Standard 2(c) of the IBA Guidelines is whether a reasonable and well-informed third party would have grounds to doubt impartiality.

The Supreme Court noted that arbitration also serves to meet society's need for dispute resolution and therefore depends on the trust of both users and the public. Accordingly, it held that a robust and trustworthy arbitration system requires strict enforcement of the impartiality requirement, just as in courts.

ii) Client relationships and assessment of arbitrator impartiality

The Supreme Court stated that the disqualification of an arbitrator on the basis of a client relationship with a party to the arbitration depends on an overall assessment, in which the nature, scope and duration of the relationship in question are decisive.[15] Even when the client relationship only involved other lawyers of the firm, factors such as the size and structure of the firm and the lawyer's in the firm must be taken into account.[16]

The Supreme Court noted that lawyers are identified with their law firm, irrespective of whether they are partners or employees.[17] The Supreme Court noted that

13 HR-2025-921-A, supra note 3, para. 43.
14 Id. paras. 45-47.
15 Id. para. 55.
16 Id. para. 55.
17 Id. para. 56.

this approach is in line with Norwegian case law, General Standard 6(a) and Practical Application 2.3.6 and 3.1.7 of the 2024 version of the IBA Guidelines on Conflicts of Interest in International Arbitration, and prevailing views in the arbitration literature. It then clarified that this presumption can be displaced if the client relationship is limited in scope. The relevant factors being the scope of the assignment and its commercial significance to the firm's overall business.[18] However, disqualification is likely if there are clear connections between the lawyer and the client relationship.[19]

iii) The arbitrator's obligation to disclose

The Supreme Court ruled 4-1 on the question of *who* arbitrators appointed by the Court of First Instance must disclose relevant client relationships to.

Relying primarily on the wording of Section 14, first paragraph, of the Arbitration Act and the appointment regime therein, the majority held that disclosure to the appointing court is sufficient. It is then to the court to relay the information to the parties and seek their views before appointing the arbitrator.[20] While the majority noted that it would be preferable for the arbitrator to also inform the parties directly, it found no obligation to do so.[21] The minority, placing decisive weight on the preparatory works of the Arbitration Act and the purpose of the obligation to disclose, held that arbitrators have an independent obligation to inform the parties.[22]

The Supreme Court unanimously found that a failure to disclose may undermine the parties' trust and that it therefore must be considered when assessing an arbitrator's impartiality. It noted, however, that a failure to disclose would likely only be decisive in cases where it is not immediately clear whether a tribunal member is conflicted.

iv) The concrete assessment

The Supreme Court unanimously concluded that the arbitrator was not disqualified, emphasising that both (a) the scope and character of the assignment and (b) the lack of connecting points between the arbitrator and the client relationship weighed against a lack of impartiality.[23]

The assignment was insignificant in scope compared to the firm's overall activities, was unrelated to the arbitration, concerned a different area of law, and was handled by another department of the firm, without the arbitrator's involvement. In these circumstances, the arbitrator's failure to disclose did not affect the arbitrator's impartiality.[24]

The Supreme Court made two important observations:

(a) **Scope and character of the assignment**. The assignment in question focused on assistance in a specialised area of law rather than strategic advice. The latter, it observed, could create greater ties to the client and insight into the client's situation. This highlights the importance of the assignment's nature when assessing impartiality.

(b) **No connection between the arbitrator and the firm's client relationship**. The arbitrator did not have a connection to the relevant area of law or to the lawyer in charge of the matter during the relevant time period, apart from a collegial relationship. The arbitrator, who was a partner in the firm, had also held directorships and was the managing partner of the firm at the time of the judgment. The Supreme Court did not find that such circumstances outweighed those militating against identifying him with the firm and explicitly observed that the arbitrator had become managing partner after the arbitration assignment. This implies that the identification between arbitrators and their law firm may be stronger if the arbitrator holds, for example, managerial positions within the firm.

5. Concluding remarks

While the number of challenges of arbitral awards has increased globally in recent years, the number of challenges in Norway has remained fairly low. International trends are typically reflected in Norway, although there may be a delay before these developments become fully visible. Norway is an arbitration-friendly jurisdiction, and its courts take a pragmatic approach when deciding challenges – this is reflected in the 19 May 2025 Supreme Court decision that indicates that the threshold for setting aside arbitral awards in Norway is high.[25]

18 Id. para. 57.
19 Ibid.
20 Id. paras. 58-61.
21 Id. para. 62.
22 Id paras. 83-85.
23 Id. paras. 66-68.
24 Id. para. 72.
25 As confirmed by the 2023 and 2024 Surveys, supra note 2.

EUROPE

Spain

Public Policy and Annulment of Arbitral Awards – Further Turmoil or Settled Case Law?

Carmen Gimeno Vilarrasa and Sofía Vicente Mazzuz
Respectively, Managing Associate and Associate, Dispute Resolution, Linklaters, Madrid

In December 2024, the Constitutional Court overturned a ruling by the Madrid High Court of Justice, which had set aside an arbitral award on the ground of a breach of public policy. The Constitutional Court found that the Madrid High Court of Justice had not complied with the standard of "external review" ("*control externo*") imposed by the Constitutional Court, but had instead considered the merits of the dispute and decided the case ex novo, applying European Union (EU) law. The controversy continues as, on 20 March 2025, following the Constitutional Court decision to return the case to the pre-judgment stage – the Madrid High Court of Justice requested a preliminary ruling from the Court of Justice of the European Union (CJEU). This ruling – which is still pending – concerns the validity of the external review standard imposed by the Constitutional Court in cases where a mandatory rule of EU law is applicable and public policy considerations are involved.

1. Background – Defining the scope of public policy

Prior to 2020, Spain witnessed growing judicial interference in decisions in relation to arbitration proceedings. Specifically, parties that were adversely affected by a particular arbitral award often went to court to request its annulment, claiming an alleged violation of public policy when they disagreed with the arbitral tribunal's reasoning and conclusions.

On many occasions, and relying on public policy, courts have opened the door to a full review of the award,[1] by examining the merits of the dispute submitted to arbitration and setting aside the arbitral award. Rulings by the Madrid High Court of Justice – which has jurisdiction to hear most applications for annulment[2] – were particularly unsettling.[3]

Since 2020,[4] to ensure the effectiveness of arbitrations in Spain and prevent public policy from being used as a back door to the judicial review of arbitral awards, the Constitutional Court has issued several judgments analysing and limiting the application of the concept of public policy. The case-law principle established by the Constitutional Court prompted a turnaround in the decisions issued by Spanish courts and ended the courts' indiscriminate intervention in arbitral awards. As a result, the number of awards annulled based on a public policy breach have decreased considerably.

However, despite the limits imposed by the Constitutional Court, some judges have attempted to reinstate the broad interpretation of the notion of public policy. The most striking example can be found in judgment no. 66/2021 rendered on 22 October 2021 by the Madrid High Court of Justice which was overturned by the Constitutional Court Judgement of 2 December 2024 on the grounds that the Madrid High Court of Justice had overstepped the bounds of its external review of the arbitral award, failing to observe the standard established by the Constitutional Court.

1 On the interference of political constitutions in Ibero-American countries, see e.g. 'Interference in the conduct of international arbitration by the political constitutions of ibero-American countries' (*ICC Institute of World Business Law* – Latin American and Iberian Chapter, 2022).

2 In Spain, High Courts of Justice have jurisdiction to hear applications to set aside arbitral awards.

3 Among others, the Madrid High Court of Justice's judgments No. 3/2016, 19 Jan. 2016; No. 16/2018, 12 April 2018; No. 4/2019, 12 Feb. 2019

4 Constitutional Court Judgments No. 46/2020, 15 June 2020; 17/2021, 15 Feb. 2021; 55/2021, 15 March 2021; 65/2021, 15 March 2021; 50/2022, 4 April 2022; 79/2022, 27 June 2022; and 146/2024, 2 Dec. 2024.

2. Judgment No. 66/2021 rendered by the Madrid High Court of Justice[5]

The Madrid High Court of Justice considered an application to set aside an arbitral award on the ground of breach of public policy. The applicant alleged, among other things, that European competition law should have been applied when analysing the validity of the clause instead of Spanish legislation.

The Madrid High Court of Justice granted the application to set aside the arbitral award based on:

- the fact that the reasoning was arbitrary as it considered Spanish competition provisions when it should have applied European competition law. This contravenes public policy and causes a breach of the right to effective judicial protection.[6]
- an analysis of the relevant applicable provisions of European competition law and case law rendered by the CJEU.
- a review of the merits of the dispute, concluding that the contractual clause was fully valid as it did not conflict with European competition law.

To justify its decision to review the merits of the case, in opposition with the standard of external review imposed by the Constitutional Court, the Madrid High Court of Justice stated that, although the proceedings for setting aside awards are not conceived as fresh retrials (*novum iudicium*), in certain cases High Courts of Justice are still entitled to review the assessment of evidence, the merits of the dispute submitted to arbitration and the reasoning in the award (e.g. when it has to determine whether the subject matter was in fact arbitrable or whether the award breaches public policy).

This criterion is even more relevant when it comes to verifying whether the award has failed to apply EU competition law, since Spanish courts must ensure the primacy and correct application of that law.[7]

3. The dissenting opinion in Judgment No. 66/2021 by the Madrid High Court of Justice

The Honourable Judge Celso Rodriguez rendered a dissenting opinion stating that the setting aside procedure should not be used to question whether the arbitral tribunal has correctly applied the law or to carry out a new assessment of the evidence. Instead, it is an exceptional mechanism designed to review arbitral awards with procedural flaws and/or violations of fundamental rights.[8] However, the assessment of a possible contradiction between the arbitral award and public policy by the competent judicial body cannot replace the role of the arbitrator in resolving the dispute.[9]

The Honourable Judge Celso Rodriguez considered that the Madrid High Court of Justice had conducted an improper parallel examination of the merits of the case, placing itself at the level of a court of appeal of ordinary jurisdiction reviewing a first instance tribunal's application of the law. This far exceeds the functions of reviewing awards granted to this court. In addition a review of the reasoning grounded in the concept of public policy, is in clear contradiction with the unequivocal conclusion expressed by the Constitutional Court that the reasoning behind awards has no bearing on public policy.[10]

Finally, the Honourable Judge Celso Rodriguez, by reviewing the substance of the decision – a practice that he had precisely rejected – concluded that, in any event, the Spanish competition provisions applied by the arbitral tribunal were consistent with EU competition law and had therefore been correctly applied.[11]

5 Madrid High Court of Justice Judgment No. 66/2021, 22 Oct. 2021.

6 Id. at p. 20, section B.

7 Judgment No. 65/2021, at p. 20, section B.

8 Id. at pp, 33, 34, section 2.1.

9 Id. at p. 34, section 2.4.

10 Id. at p. 8 (translation by the authors): "Therefore, given that arbitration is based on the autonomy of will and freedom of individuals (Articles 1 and 10 of the Spanish Constitution), the duty to state the reasons for the award is not part of the public policy required by Article 24 of the Spanish Constitution for judicial decisions, but rather is bound by its own parameters, defined in accordance with Article 10 of the Spanish Constitution. These parameters must be established, first and foremost, by the parties themselves who have submitted to arbitration, who are responsible, as agreed in the arbitration rules, for the number of arbitrators, the nature of the arbitration and the rules of evidence, and for agreeing whether the award must be reasoned (Art. 37.4 of the Spanish Arbitration Act) and in what terms. Consequently, the reasoning behind arbitral awards has no bearing on public policy".

11 Id. at p. 37-38, section 4.5.

4. Constitutional Court Judgment No. 146/2024[12]

The 2024 Constitutional Court's Judgement (the "Judgement") stated that public policy comprises a set of legal principles public, private, political, moral and economic spheres that are absolutely obligatory for the preservation of society at a given time. From a procedural point of view, public policy can be defined as the necessary formalities and principles attached to a legal system. Only arbitral awards that contravene one or more of these principles can be set aside for breach of public policy and mandatory rules.[13]

Moreover, the Judgement confirmed the impossibility for a judicial authority to review the merits of a dispute submitted to arbitration, or to replace the arbitrator in its role in resolving the dispute when analysing an alleged violation of public policy.[14] It held that it is not possible to set aside an arbitral award on the basis that the conclusions reached by the arbitral tribunal are considered erroneous or insufficient. On the one hand, the reasoning behind the arbitral award is not, therefore, a matter of public policy. On the other hand, the arbitral award can only be set aside if it lacks any reasoning at all, or if the reasoning is so incoherent and absurd that in practice the award is deemed unreasoned. Thus, the court reviewing the application to set aside the arbitral award must simply verify that the reasoning exists, purely to satisfy the requirement to state reasons set out in the Spanish Arbitration Act.

Considering the above, the Constitutional Court directed that it is only possible to set aside an award on an exceptional basis, i.e. when:[15]

- fundamental procedural guarantees have been breached, such as the right of defence, equality, a hearing process and evidence;
- the award lacks grounds or the grounds are arbitrary, illogical, absurd or irrational;
- mandatory legal rules have been breached; or
- the unassailability of a previous final decision has been violated.

Upon reviewing the merits, the Constitutional Court held that, while the award did consider European competition law, it did not apply to the case in question that was subject to Spanish competition law.

The Constitutional Court set aside judgement No. 66/2021 and returned the proceedings back to the pre-judgment stage, ordering that another ruling be issued in compliance with the standard of external review imposed by the Constitutional Court since 2020.[16]

12 Judgment No. 146/2024, at p. 58 (translation by the authors): "It is settled case law of this court that public policy refers to the set of public, private, political, moral and economic legal principles that are absolutely mandatory for the preservation of society in a given community and at a given time (SSTC 15/1987, of 11 Feb.; 116/1988, of 20 June, and 54/1989, of 23 Feb.), and, from a procedural point of view, public policy is defined as the set of formalities and principles necessary for our system of legal procedure legal, and only arbitration that contradicts one or more of these principles may be declared null and void on the grounds of a violation of public policy".

13 Id. at p. 62, section 5.

14 Id. at pp. 61-62: "Precisely because the concept of public policy is unclear, there is a greater risk that it will become a mere pretext for the court to re-examine the issues discussed in the arbitration proceedings, thereby distorting the institution of arbitration and ultimately violating the autonomy of the parties' will. The court cannot, under the pretext of an alleged violation of public policy, review the merits of a matter submitted to arbitration … The idea must therefore remain firm that the grounds provided for in Article 41(1)(f) of the Spanish Arbitration Act do not allow the criteria reached by the arbitrator to be replaced by the judges hearing the application for annulment of the award".

15 Id. at p. 16, para. 68, p. 63 section 5(b)(ii).

16 Constitutional Court Judgments No. 46/2020, 15 June 2020; 17/2021, 15 Feb. 2021; 55/2021, 15 March 2021; 65/2021, 15 March 2021; 50/2022, 4 April 2022; 79/2022, 27 June 2022; and 146/2024, 2 Dec. 2024, among others.

5. The Madrid High Court of Justice's request for a preliminary ruling from the CJEU[17]

With the post-2020 Constitutional court judgements, Spanish courts have achieved an ideal balance of oversight with regard to the annulment of arbitral awards, by only intervening in those situations set out in Spanish arbitration law (referred to as "LA" in the quote below).[18] Arbitration is strengthened by, on the one hand, courts' intervention where there has been a breach of public policy (in the meaning established by the Constitutional Court), and on the other hand, by the courts' non-intervention in all other situations.

On 20 March 2025, the Madrid High Court of Justice requested a preliminary ruling from the CJEU) on whether the standard of external review imposed by the Constitutional Court is valid when a mandatory rule of EU law should apply and public policy is at stake. More specifically, the Madrid High Court of Justice referred the following questions to the CJEU in said preliminary ruling:

> "Is it compatible with Articles 47(1) and 51(1) of the Charter of Fundamental Rights of the European Union, Article 19(1) of the Treaty on European Union and the principles of primacy, effectiveness and unity of EU law that judicial review of the validity of an arbitral award for infringement of fundamental rules of public policy in the EU (in this case, Article 101 TFEU)
>
> 1. … must be purely external, so that the court with jurisdiction under the Law (Articles 8.5 and 41.1 LA) cannot review, with full jurisdiction and in accordance with the case law of the CJEU, the decision of the arbitrators not to apply the mandatory law of the Union?
> 2. … must be purely external, so that the court with jurisdiction under the Law (Articles 8.5 and 41.1 LA) cannot review, with full jurisdiction, whether the arbitrators have correctly applied mandatory EU law in accordance with the case law of the CJEU?
> 3. … may be limited by the doctrine and criteria established in Constitutional Court Judgment No. 146/2024 of 2 December?"[19]

In the coming months, the CJEU will issue a binding decision in response to the preliminary ruling requested by the Madrid High Court and whether this will affect scope of the courts' review of the arbitration awards.[20]

17 Madrid High Court of Justice Court Order No. 4/2025

18 Art. 41.1, Spanish arbitration law (translation by the authors): "The award may only be set aside if the party applying to set it aside argues and proves that: a) The arbitration agreement does not exist or is invalid. b) It was not duly notified of the appointment of an arbitrator or of the arbitral proceedings or was unable, for any other reason, to assert its rights. c) The arbitrators ruled on matters not submitted to their decision. d) The appointment of the arbitrators or the arbitral procedure did not comply with the agreement between the parties, unless such agreement was contrary to a mandatory rule of this Law, or, in the absence of such agreement, that they did not comply with this Law. e) That the arbitrators ruled on matters not subject to arbitration. f) The award is contrary to public policy".

19 Madrid High Court of Justice Court Order No. 4/2025, p. 14, section "Tercero", translation by the authors.

20 Regarding other EU jurisdictions, *Eco Swiss* (C-126/97, 1 June 1999) presents an important case with regards to the concept of public policy in commercial arbitration. Moreover, in *Achmea* (C-284/16, 6 Mar. 2018), although being centred in the ambit of investment arbitration, the CJEU did also make an important reference to the review of arbitral awards by the courts with regards to the examination of fundamental provisions of EU law in relation to commercial arbitration.

EUROPE

Ukraine

Reassessing Arbitrability – Supreme Court Clarifies the Impact of Exclusive Jurisdiction Rules on Arbitration Agreements

Olexander Droug and Alina Bahan
Respectively Partner and Senior Associate, Sayenko Kharenko, Kyiv

In December 2023, a landmark decision of the Supreme Court marked a significant step towards resolving the issue of inconsistent court practices regarding the interplay of exclusive jurisdiction rules and arbitrability. The decision confirmed that national rules governing exclusive jurisdiction only apply to litigation and do not affect the arbitrability of disputes, which reiterated Ukraine's position in support of arbitration.

1. Introductive remarks – Distinguishing "exclusive jurisdiction" and "arbitrability" under Ukrainian law

For years, Ukrainian courts offered no clarity on whether disputes falling under the exclusive jurisdiction of the courts could be submitted to arbitration. This led to legal uncertainty regarding the enforceability of arbitration agreements, exposing parties to jurisdictional objections and procedural unpredictability.

Before analysing the Supreme Court's decision, a clear distinction must be made between three relevant concepts under Ukrainian law: the Ukrainian courts' international jurisdiction, territorial jurisdiction, and arbitrability.[1]

- **International juridiction** determines whether Ukrainian courts can hear a dispute with a foreign element. International jurisdiction of Ukrainian courts is governed by Articles 75-77 of the Law "On Private International Law" ("PIL").[2] Article 77 of the PIL lists 10 types of disputes which fall under the exclusive jurisdiction of Ukrainian courts, including: (i) disputes over immovable property located in Ukraine; (ii) family disputes; (iii) inheritance disputes; (iv) registration of intellectual property rights; (v) registration of foreign legal entities in Ukraine; (vi) disputes over the validity of entries in state registers in Ukraine; (vii) bankruptcy cases; (viii) disputes over securities issued in Ukraine; (ix) adoption cases; and (x) "in other cases determined by the laws of Ukraine".[3]
- **Territorial jurisdiction** determines which of the local courts in Ukraine should hear a dispute with a foreign element if, (i) the dispute falls within the jurisdiction of Ukrainian courts in the first place, and (ii) no valid arbitration agreement and/or choice-of-court agreement in favor of a foreign court has been concluded between the parties. Territorial jurisdiction of commercial courts is governed by the provisions of Articles 28-31 of the Commercial Procedure Code of Ukraine ("CPC"). Article 30 of the CPC governs "exclusive territorial jurisdiction" (e.g. a case about immovable property located in the city of Kyiv must be brought before Kyiv-based commercial court).

1 See also, *Private International Law: Scientific and Practical Commentary on the Law*, Professor A. Dovhert (ed.) (Odyssey, 2008), at p. 298.

2 This law governs issues arising in the field of private law relations with a foreign element, including the jurisdiction of the courts of Ukraine over the cases with a foreign element. Among other, a foreign element is present if at least one participant in the legal relationship is a citizen of Ukraine residing outside Ukraine, a foreigner, a stateless person or a foreign legal entity (see Art. 1(1)(2) and Art. 2(1)(3), PIL).

3 Art. 77(1), PIL.

- **Arbitrability** determines whether a dispute may be submitted to arbitration. Under Article 8 of the Law "On International Commercial Arbitration" ("ICA Law"), a Ukrainian court must refer a case to arbitration and decline [court] jurisdiction if: (i) the arbitration agreement is valid, and (ii) the dispute falls within its scope and concerns an arbitrable subject matter. Ukrainian courts assess arbitrability, inter alia, by considering whether the subject matter of dispute is barred from arbitration under Ukrainian law.[4]

The exceptions, i.e. categories of disputes that are barred from arbitration and must be resolved by national courts, are defined in Article 1 of the ICA Law, as well as Articles 20 and 22 of the CPC.[5] These provisions set specific boundaries to "arbitrability" and exclude certain categories of disputes from arbitration (e.g. disputes concerning bankruptcy, state registration or recording of rights to immovable property, intellectual property rights, or rights to financial instruments etc.).[6]

Despite a clear distinction between the above three concepts, Ukrainian courts have frequently (mis)applied these concepts, and confused exclusive international jurisdiction (Art. 77 PIL) with exclusive territorial jurisdiction (Art. 30 CPC) or arbitrability (Art. 22 CPC).

This has led to several court decisions disregarding arbitration agreements where disputes fell under the rules of exclusive territorial jurisdiction as per Article 30 of the CPC or the rules of exclusive international jurisdiction under Article 77 of the PIL.

For example,a previous Supreme Court decision stated that:

> "the ability to refer a dispute to arbitration is limited by [Art. 30 CPC and Art. 77 PIL], which define the exclusive jurisdiction of the Ukrainian courts".[7]

Ukrainian courts have consistently held that, in assessing arbitrability, both the subject matter and the parties involved must be considered,[8] which is an approach that reflects internationally accepted standards.[9] That said, in practice, if the subject matter of the case fell within any category of the cases listed in Article 77 of the PIL, Ukrainian courts previously would refuse to recognise and enforce a respective arbitral award.[10] The issue of exclusive jurisdiction of Ukrainian courts was often raised in the context of the recognition and enforcement proceedings, and Ukrainian courts have occasionally applied another provision on jurisdiction – specifically, Article 30 CPC and Article 77 PIL mentioned above, and mistakenly, treated such rules as limiting the arbitrability of disputes under Article V(2)(a) of the 1958 New York Convention.

2. 2023 Supreme Court Decision

A landmark decision of the Supreme Court in case No. 910/8659/23 ("2023 Supreme Court Decision") marks a significant step towards resolving this uncertainty.[11]

The 2023 Supreme Court Decision clarified that;

- Article 30 CPC and Article 77 PIL deal with court's jurisdiction, not arbitrability of disputes submitted to arbitration;
- Such provisions are only relevant in litigation, and not in a situation where a valid arbitration agreement is in place.

4 Resolution of the Supreme Court, 17 March 2020, case No. 907/930/15. Similar conclusion is maintained in the Resolution of the Supreme Court in case No. 824/42/21.

5 It should be noted that this analysis only covers non-arbitrable commercial cases. It does not address the cases that may be referred to foreign courts under Article 23 CPC or Article 22 of the Civil Procedure Code.

6 Notably, as it will be relevant for the 2023 Supreme Court Decision, Art. 22(2)2 CPC, expressly permits the referral to international commercial arbitration of civil-law aspects of disputes arising from the conclusion, modification, termination, and performance of public procurement contracts.

7 E.g. see the Resolution of the Supreme Court, 8 June 2023, case no. 22-3/824/316/2023.

8 Resolution of the Supreme Court, 17 March 2020, case no. 907/930/15. A similar conclusion is contained in the Resolution of the Supreme Court in case No. 824/42/21.

9 Foreign courts determining the consequences of an arbitration agreement generally assess arbitrability based on the nature of the dispute, rather than ancillary or contextual factors. See ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges: "Whether a subject matter of an arbitration is non-arbitrable is a question to be determined under the law of the country where the application for recognition and enforcement is being made. *The non-arbitrability should concern the material part of the claim and not merely an incidental part*" (emphasis added). Furthermore, national courts are expected to interpret arbitrability in a manner that prioritises and promotes the state's pro-arbitration policy over procedural barriers that might otherwise impede the enforcement of arbitration agreements.

10 As per Art. 468(2), CPC.

11 Resolution of the Supreme Court, 19 Dec. 2023, case no. 910/8659/23.

As a result, the Supreme Court clarified that exclusive jurisdiction rules have no impact on the arbitrability of the disputes. Rather, the exclusive jurisdiction rules govern internal allocation of cases within the Ukrainian judicial system. These rules are distinct from, and do not override, the arbitrability rules that determine whether a dispute may be submitted to arbitration under Ukrainian law.

Background of case No. 910/8659/23

In this case, a dispute arose under a defense goods procurement contract between the Ministry of Defense of Ukraine (Ministry of Defense) and a foreign supplier Ahit Solutions (FZC). The contract included an arbitration clause referring disputes to the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC). Despite a minor naming error in the clause, the courts found that the parties' intent to arbitrate was clear and there was, in principle, a valid arbitration agreement.

When Ahit Solutions (FZC) filed a claim with the Ukrainian commercial court instead of submitting it to ICAC arbitration, the Ministry of Defense objected and invoked the arbitration clause requesting the court to dismiss the case under Article 226(1)(7) CPC, which provides that in case of an existence of an arbitration agreement in a contract a commercial court shall leave the case without consideration.

The first instance court honored the arbitration agreement and declined its jurisdiction.[12] The appellate instance court reversed the first instance decision citing Article 30 CPC and holding that the arbitration agreement was "inoperative" because the dispute fell within the exclusive territorial jurisdiction of the Kyiv City Commercial Court, which is designated as an exclusive forum for all disputes involving Ukrainian ministries and other central executive authorities as defendants. Therefore, in the appellate court's view the dispute could not be subject to arbitration.[13]

On 19 December 2023, the Supreme Court overturned the appellate court decision and reinstated the first instance ruling.

Supreme Court's analysis

In its decision, the Supreme Court determined the following:

1. Arbitrability is governed by Article 22 of the CPC and Article 1 of the ICA Law that outline specific types of disputes that may or may not be submitted to arbitration. Since the dispute in question did not fall within any of the exceptions listed in those provisions, i.e. categories of disputes that are non-arbitrable under Ukrainian law, the Supreme Court concluded that the dispute was in fact arbitrable.
2. Article 77 PIL limits the jurisdiction of foreign courts over certain disputes, which may only be decided by competent Ukrainian courts. The Supreme Court did not explicitly confirm that the disputes falling under Article 77 PIL may be submitted to arbitration but instead went on to conclude that the specific dispute in question did not fall under exclusive jurisdiction of Ukrainian courts.
3. Article 30 CPC addresses how cases are allocated among different local Ukrainian courts and does not address the issue of international jurisdiction of Ukrainian courts or whether disputes can be submitted to arbitration. The Supreme Court rejected the appellate court's conclusion that Article 30 of the CPC barred arbitration:

   "Article 30 of the Commercial Procedure Code of Ukraine outlines the rules of exclusive territorial jurisdiction, which cannot be broadly interpreted. Exclusive jurisdiction is a special type of territorial jurisdiction, prohibiting the application of other rules governing territorial jurisdiction as outlined in Articles 27-29 of the Commercial Procedure Code of Ukraine when filing a lawsuit. In other words, Article 30, referenced by the appellate court, specifies the exclusive territorial jurisdiction of the commercial court, *not the exclusive jurisdiction of Ukrainian courts over cases with a foreign element*." (emphasis added)

These conclusions finally put an end to previously inconsistent Ukrainian court practices and confirm that Ukrainian courts must honor arbitration agreements in respect of arbitrable disputes despite Ukrainian jurisdiction rules that assign certain disputes to specific Ukrainian courts.

12 Ruling of the Kyiv City Commercial Court, 4 Sep. 2023, case no. 910/8659/23.

13 Resolution of the Northern Appellate Commercial Court, 24 Oct. 2023, case no. 910/8659/23.

The following proper sequence should therefore be applied by Ukrainian courts:

1. assess whether there is a valid arbitration agreement; and only if there is none;
2. assess whether Ukrainian courts have international jurisdiction under the PIL; and if so
3. allocate jurisdiction to a specific Ukrainian court pursuant to Article 30 CPC.

Accordingly, the exclusive jurisdiction rules of Article 77 PIL and Article 30 CPC cannot override valid arbitration agreements and do not have impact the arbitrability of disputes.[14]

3. Practical implications of the 2023 Supreme Court Decision

The 2023 Supreme Court Decision provides important clarification on the interplay between arbitrability (Art. 22, CPC; Art. 1, ICA Law) and jurisdiction rules under Ukrainian law (Art. 77, PIL; Art. 30, CPC).

Although the Supreme Court's stance does not directly address arbitral award recognition and enforcement, it clarifies how Article V(2)(a) of the 1958 New York Convention is applied, which is one of the grounds for refusal to recognise or enforce an arbitral award examined by Ukrainian courts *ex officio*. In the past, Ukrainian courts often relied on the exclusive jurisdiction rules to assess the arbitrability of disputes. The Supreme Court Decision now entails that recognition and enforcement of an arbitral award cannot be denied under Article V(2)(a) of the 1958 New York Convention solely on the basis that the subject matter of the dispute is governed by Ukrainian exclusive jurisdiction rules.

The 2023 Supreme Court Decision also strengthens confidence in the enforceability of arbitration agreements in contracts governed by Ukrainian law with a Ukrainian nexus. Even when a dispute involves matters that are usually assigned to litigation before Ukrainian courts, this by itself does not automatically exclude the possibility of international arbitration.

That said, to ensure the enforceability of any arbitral award, parties and arbitrators must ensure that:

- the subject matter of the dispute is arbitrable under Ukrainian law; and
- the arbitration agreement is valid.

If these conditions are met, Ukrainian courts are required to recognise the arbitration agreement and enforce any resulting arbitral award, without interference based on Ukrainian jurisdiction rules which, according to the 2023 Supreme Court Decision, apply specifically to litigation cases.

14 Resolution of the Grand Chamber of Supreme Court, 28 April 2020, case no. 910/11287/16.

MIDDLE EAST

United Arab Emirates

Extending the Arbitration Agreement to Third Parties, Jurisdiction of ADGM Courts, and Legal Costs (Re)Examined by the Dubai Court of Cassation

Nayiri Boghossian
Founder, Nayiri Boghossian FZE, UAE

A significant number of arbitration-related cases are being brought before Dubai courts prompting them to address new questions and/or re-examine their earlier positions. In doing so, the courts have occasionally adopted new concepts and reflected international trends and best practices. In this context, the Dubai Court of Cassation, in its judgment rendered on 19 November 2024 in Appeal Nos. 756/2024 and 760/2024 (Commercial), considered three arbitration-related questions: the extension of an arbitration agreement to third parties, the jurisdiction of ADGM Courts in arbitrations governed by the ICC Rules and arbitral tribunal's authority to award legal costs.

1. Summary of the case[1]

In an arbitration conducted under the International Chamber of Commerce Arbitration Rules ("ICC Rules"), an award was issued early 2024 ("Award") in connection with a construction contract. The Respondent filed a request for the annulment of the Award before the Dubai Court of Appeal and obtained a partial annulment of the Award. The annulled portion concerned the legal costs as the Respondent was ordered to pay the Claimant's legal costs of US$1,542,376. Both the Claimant and the Respondent challenged the judgment of the Court of Appeal before the Court of Cassation (the "Court"). The two cases were joined and one judgment was rendered covering both challenges. A variety of arguments were raised by the parties and examined by the Court.

2. Extending the arbitration agreement to third parties

Amongst many arguments, the Respondent argued that it was not a party to the arbitration agreement as the contract was concluded by an entity based in Dubai while the Respondent is an entity based in China. This argument was rejected by the Court on the basis of Article 19 of the Federal Arbitration Law No. 6/2018 ("Arbitration Law"),[2] which allows an arbitral tribunal to decide whether it has jurisdiction. If the tribunal decides that it indeed has jurisdiction, the concerned party can challenge the tribunal's decision before the courts within 15 days. In the current case, it appears that the Respondent had not challenged the decision of the tribunal in line with Article 19, and accordingly, the Court found that the Respondent was no longer entitled to challenge the tribunal's decision on its jurisdiction.

Additionally, the Court provided some insight on the question of extending an arbitration agreement to a third party. It explained that the party bound by an arbitration agreement is not necessarily the signatory of the arbitration agreement, but rather the party who has issued the relevant instructions. Therefore, an arbitration clause may extend from the company which

1 Dubai Court of Cassation, 19 Nov. 2024, in Appeal No. 756/2024 (Commercial). An Arabic version of the judgment can be accessed here (https://www.dc.gov.ae/). This article focuses on points that are purely arbitration related and are worthy of examination.

2 Federal Law No. 6 on Arbitration, issued on 3 May 2018

signed it, if it is a subsidiary,[3] to the parent company and vice-versa depending on which entity had the decisive authority in the formation or performance of the contract.

As the Respondent's challenge was dismissed on the basis of Article 19, the Court's comments on extending an arbitration agreement to a non-signatory should be treated *as dicta*. However, this is very important dicta because it ushers a potential change in the position of the courts. So far, courts have refused the extension of arbitration agreements to third parties and it is, in fact, difficult to imagine such extension in light of the prevailing restrictive approach to arbitration. Courts consistently state that arbitration is an exceptional mechanism to resolve disputes that should be specifically agreed to by the parties, and often require a clear and explicit agreement demonstrating the parties' intention to derogate from the jurisdiction of the courts in favor of arbitration.[4] It is therefore, of particular interest that the Court has introduced the notion of extending the arbitration agreement to third parties. Future decisions will demonstrate if the said concept will be followed and implemented by the courts, and the circumstances in which it will be applied.

3. Jurisdiction of ADGM courts

In its appeal, the Claimant challenged the jurisdiction of the Court of Appeal arguing that the Abu Dhabi Global Market ("ADGM") Courts have jurisdiction over the annulment application filed by the Respondent. The Claimant contented that, according to *jurisprudence constante,* ADGM Courts are the curial courts for arbitrations governed by the ICC Rules, since the ICC office in ADGM should be considered as the seat of the arbitration. The Claimant further asserted that the present arbitration was conducted under the supervision of the ICC office in Abu Dhabi.

The Court dismissed the Claimant's argument providing a relatively elaborate explanation on this question. In its judgment, the Court:

(i) explained the concept of the seat of arbitration and the results that stem from choosing a certain seat, among which the identification of the court having jurisdiction over the set aside proceedings;[5]

(ii) distinguished between the seat and the venue of hearings as a physical location, emphasising that there is no link between arbitration centres and their rules, on the one hand, and the competent annulment court, on the other hand – as such, the location of the arbitration centre has no bearing over determining the court that has jurisdiction over the set aside proceedings;

(iii) turning to the facts of the case, noted that the parties had expressly chosen Dubai as the seat of arbitration during the course of the proceedings – as a result, the Dubai Court of Appeal had jurisdiction over the annulment of the Award, clarifying that there was no link between the ICC Representative Office established in ADGM and the ADGM Arbitration Centre, where the hearings took place;

(iv) concluded that the Claimant's argument that ADGM Courts should have jurisdiction because the arbitration was managed by the ICC in Abu Dhabi was unfounded.

Disassociating the jurisdiction of the ADGM Courts from the presence of the ICC Representative Office in Abu Dhabi is a particularly valuable clarification, as it contrasts with a number of prior decisions issued by the Abu Dhabi Courts that held that ADGM Courts are the supervisory courts in relation to ICC arbitrations seated in Abu Dhabi given the presence of the ICC Representative Office in ADGM.[6] The Court provides a welcome explanation on this point. Although Abu Dhabi Courts are not bound by the decisions of the Dubai Court of Cassation as they are part of another judiciary, one would hope that the Abu Dhabi Courts will reconsider their position.

3 The Court's use of the term "subsidiary" in this context does not necessarily mean it intended it to have the meaning prescribed to it in the Federal Companies Law No. 32/2021 where certain criteria have to be met for a company to be treated as a subsidiary. It is the author's view that it was used loosely.

4 COC Appeal No. 735/2024 (Commercial).

5 The Court of Cassation quotes Art. 1 of the Arbitration Law, which defines competent court as: "The federal or local Court of Appeal agreed upon by the parties or in whose jurisdiction the arbitration is conducted". Art. 18.1 of the Arbitration Law is also relevant in this context as it explains that: "The competent Court shall have jurisdiction to consider arbitration issues referred hereunder in accordance with the procedural laws of the State. The Competent Court shall exercise exclusive jurisdiction until the conclusion of all arbitral proceedings".

6 The first reported case was a decision issued on 19 September 2022, in which Abu Dhabi Courts declared not having jurisdiction to review an application for the annulment of an ICC award issued in an arbitration seated in Abu Dhabi (Abu Dhabi Court of Cassation No. 635/2022 Commercial). They considered that the courts of ADGM have jurisdiction over the matter given the existence of an ICC "branch" in ADGM. For further analysis of this decision, see N. Boghossian, "Jurisdiction of Abu Dhabi Courts v. ADGM Courts", CIArb UAE Branch Newsletter, 2023 Feb. edition.

4. Awarding legal costs

As to the question of legal costs, the Claimant, in its appeal, challenged the Court of Appeal's decision on this point and obtained a reversal of the Court of Appeal judgment. In its reasoning, the Court explained that the arbitration is subject to the 2021 ICC Rules and that the provisions of the Arbitration Law[7] do not apply unless they relate to public policy. The Court then quoted Article 38(1) of the 2021 ICC Rules, in the following manner:

> "The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the legal and other reasonable[8] costs incurred by the parties for the arbitration."

The Court explained that the list of costs set out in this provision was not exhaustive as indicated by the language "and other reasonable costs incurred by the parties for the arbitration". Accordingly, legal costs, which cover attorney fees paid by the parties to their legal representatives, fall under the scope of "reasonable costs", even if Article 38 does not specifically mention the fees of legal representatives. Additionally, the Court relied on the ICC commentary to the 2012 ICC Rules,[9] which states that recoverable costs include the "fees and costs of the parties' lawyers". It also noted that international arbitration practice under the ICC Rules consistently treat lawyers' fees as recoverable costs that may be awarded by an arbitral tribunal.

The Court also found that the parties had agreed to grant the arbitral tribunal the power to award attorney fees, as the Respondent had requested that attorney fees be awarded. The Court explained that such a request is considered an acknowledgment and an empowerment of the arbitral tribunal to determine those costs, especially where the Claimant had not challenged that request. Consequently, the Court reversed the Court of Appeal's judgment annulling the part of the Award related to the legal costs.

There are two observations to be made here:

(i) The Court's reasoning suggests that the term "legal costs" does not refer to attorney fees. In fact, the Court references the Dubai International Arbitration Centre Arbitration Rules that specifically include the term "the fees of the legal representatives" among the costs of arbitration,[10] and contrasts it with the wording of Article 38 in its reasoning. Although it is difficult to accept that legal costs do not cover attorney fees, this decision is still an improvement compared to previous decisions that concluded that the ICC Rules did not allow attorney fees to be awarded.[11]

(ii) Given the Court's interpretation of Article 38 and its clear conclusion that the attorney fees fall within "other reasonable costs" and can hence be awarded, it is unclear why the Court engaged in an analysis of the parties' consent on awarding legal costs. This analysis should not be treated as negating the Court's determination that Article 38 empowers tribunals to award legal costs.

5. Conclusion

The Decision of the Court of Cassation is important not only because it covers three arbitration questions but also because of the positions it reflects. It introduces the concept of extending an arbitration agreement to a third party, thus, creating the possibility for the courts to consider applying the said concept moving forward. It clarifies the ADGM courts' jurisdiction in arbitration cases governed by the ICC Rules. By doing so, it forges the way for a potential reversal of the position of the courts on this question. Lastly, it rectifies prior decisions on tribunals' power to award legal costs under the ICC Rules, which is very commendable and is likely to influence future decisions on this topic.

---

7 Supra note 2.

8 To be noted that in the original English version, Art. 38(1) of the ICC Rules reads "and the reasonable legal and other costs", with the word "reasonable" before the word "legal".

9 This must be the Secretariat's Guide to ICC Arbitration (ICC, 2012), at paras. 3-1489 – 3-1493. On the allocation of legal costs in ICC arbitrations, see also the ICC Report of the ICC Commission on Arbitration and ADR on Decisions on Costs in International Arbitration.

10 See Art. 36.1 of the DIAC Arbitration Rules 2022.

11 Dubai Court of Cassation Appeal No. 821/2023 Commercial. An Arabic version of the prior judgement can be accessed here (https://www.dc.gov.ae/) For further analysis, see S. Dilevka, D. Mednikov, Dubai Courts Drastically Curtail Recoverability of Legal Fees in Arbitration under the ICC Rules (Kluwer Arbitration Blog, 15 Apr. 2024).

Setting Aside of a Procedural Order on Interim Measures in Qatar

Status of Qatar's 2017 Arbitration Law and Comparative Insights

Ahmed Habib

Ahmed Habib, is a member of the Paris and Cairo Bars, practicing in the Paris and Doha offices of DWF. He acts as counsel, arbitrator and legal expert. His experience in Europe, the Middle East and Africa has covered a wide range of industries such as construction, infrastructure, energy, hospitality, automotive, transport, banking & finance, defence & aerospace, commodities and telecommunications. Ahmed was appointed in March 2022 by Egypt's Ministry of Justice as member of the arbitration experts' committee entrusted with the review of the Egyptian arbitration law and advice on its potential reform. He is a member of the ICC Commission on Arbitration and ADR since 2022.

In October 2022, the Court of Appeal of Qatar set aside a procedural order granting an interim measure in relation to bank guarantees. The Court of Appeal ruled that the arbitral tribunal lacked jurisdiction to issue such order. This article examines the case in the context of Qatar's current arbitration legal framework, provides a comparative perspective and addresses current challenges in Qatar's arbitration landscape as well as potential for further development.

1. Introduction – The legal framework under which the judgement was rendered

In 2017, the Emir of Qatar issued the currently applicable Arbitration Law, Law No. 2 of 2017 (the "Arbitration Law") which replaced Articles 190-210 of Law Number 13 of 1990 concerning the Civil and Commercial Procedural Law that previously applied to arbitration in Qatar. The Arbitration Law is inspired by the UNCITRAL Model Law and was adopted with a view to modernising the arbitration law in Qatar and establishing an arbitration friendly framework.[1]

Pursuant to the Arbitration Law, ways to challenge arbitral awards or their enforceability in Qatar are restricted to the applications for setting aside of arbitral awards seated in Qatar and refusal of recognition or enforcement of arbitral awards seated abroad, both of which have limited grounds.[2] Qatar courts' power to reconsider arbitral awards based on the facts has been removed.[3]

Since the issuance of Arbitration Law in 2017 and until 2021, arbitral awards have been rarely set aside. Particularly, there is one setting-aside judgement issued by the Court of Appeal on 11 April 2021 that we are aware of, in which the court held that the respondent, who applied for the setting aside, was not duly notified of the appointment of the arbitrator or of the arbitration proceedings.[4]

While it appears that more awards have been set aside since 2022, the wide majority of applications for setting aside have been rejected by the Qatar courts.[5] That being said, the judgement subject of analysis in this article is one of the cases in which the application for setting aside was granted by Qatar Court of Appeal.

1 W. Frain-Bell, "Enforcement's 'Coming Home' – Remember Qatar? Pre-World Cup Optimism for the Recognition and Enforcement of Arbitral Awards", *The Journal of Enforcement of Arbitration Awards*, Vol. 2 No. 2 (2019), p. 37.

2 Art. 33 of the Arbitration Law provides for the following exhaustive grounds for setting aside of arbitral awards seated in Qatar: (i) invalidity of the arbitration agreement or incapacity of one of the parties; (ii) breach of due process; (iii) ultra-petita; (iv) composition of arbitral tribunal in breach of the parties' agreement or, in the absence of any such agreement, of Arbitration Law; (v) inarbitrability; and (vi) arbitral awards violating public policy in Qatar. Art. 35 of the Arbitration Law provides for a list of exhaustive grounds for rejection of recognition or enforcement of arbitral awards seated abroad, which is similar to the above, in addition to the cases in which an arbitral award has been set aside by the courts of the seat of arbitration.

3 This power existed under Art. 205 of the Procedural Code.

4 Qatar Court of Appeal, case no. 553/2020, 11 April 2021 which set aside the award based on the violation of Art. 33(2)(b) of Arbitration Law. The Court found that the respondent was notified at a post office box address that was not provided for in the contract and which was registered under the name of a third party to which no power of attorney was issued to accept notification on behalf of the respondent. The Court thus held that the respondent was not duly notified of the appointment of the arbitrator and of the arbitration proceedings, which affected the respondent's right of defence and due process. See C. F. El Hage, "Recent Qatari Court Rulings in Applications to Set Aside Arbitration Awards", *International Journal of Arab Arbitration*, 2021, Vol. 13, Issue 2, pp. 25 – 35, particularly "7 Setting aside an arbitration award for violation of the right of defence".

5 We are unable to provide exact numbers and statistics in light of the limited access to Qatari judgments. Nevertheless, experience of practicing lawyers generally reflects that warranting setting aside is rare, and rejections are common.

2. Background of the dispute and the Court of Appeal's judgement

On 6 July 2022, an arbitral tribunal rendered a procedural order upon a request of the respondent for interim measures in an institutional arbitration with case no. ARB 25/2021.

The arbitral tribunal:

- found that it had jurisdiction to examine a request for interim measures in relation to the liquidation of bank guarantees arising from a contract that was subjecting any related dispute between the parties to arbitration;
- rejected the respondent's request to order the claimant to abstain from liquidating the bank guarantees; and
- ordered the parties to retain the amounts of the bank guarantees in an escrow account.

On 4 August 2022, the plaintiff initiated setting aside proceedings before Qatar Court of Appeal (the "Court of Appeal" or "Court") against the procedural order.

The plaintiff notably advanced that the arbitral tribunal lacked jurisdiction to examine requests related to bank guarantees, since the arbitration agreement included in the contract did not extend to bank guarantees. It also advanced that the procedural order was issued in violation of judgements rendered by the Qatar courts in relation to bank guarantees and in violation of the principles of *res judicata*.

On 9 October 2022, the Court of Appeal held that the setting aside application filed against the procedural order relating to the interim measures was procedurally admissible and, on the substance of the application, the Court decided to set aside the procedural order due to the lack of jurisdiction of the arbitral tribunal. [6]

This raises notably two questions, which we analyse in this commentary:

- **A procedural question** – whether decisions on interim measures issued by arbitral tribunals are subject to setting aside.
- **A substantive question** – whether the decision in this case should be set aside.

3. Are arbitral tribunals' decisions on interim measures subject to setting aside proceedings?

Comparative insights

In line with the most common approaches in national arbitration laws across the world, Qatar Arbitration Law does not define arbitral awards. It also does not deal with the question of whether interim measures should be treated/regarded as arbitral awards.

In comparative law, this controversial issue has been determined differently in different jurisdictions. For instance, while an Australian decision rejected the characterisation of interim measures as awards,[7] a judgement of the Paris Court of Appeal has found that an arbitral tribunal's decision ordering interim measures could be granted enforcement as an award.[8]

As it has been rightly noted by a scholar "the classification of an arbitral decision as an award is something of a double-edged sword".[9] It might be tempting to treat decisions on interim measures as awards to benefit from the pro-arbitration regime for the enforcement of arbitral awards in most jurisdictions which is established by the New York Convention and the UNCITRAL Model Law ("Model Law") given that these instruments do not define what an arbitral award is. However, if interim measures were to be treated as arbitral awards, the losing party would be entitled to seek their setting aside before the courts of the seat of arbitration. This possibility puts at risk the efficacy of the challenged measures or, at least, delays their

6 Judgement no. 1568023791425-1, 31 Oct. 2022, Case No. 1715/2022/Appeal/Arbitrators decisions/Plenary.

7 See Supreme Court of Queensland, 29 Oct. 1993, *Resort Condominiums International Inc vs. Bolwell, Yearbook of Commercial Arbitration* 1995, p. 628. This landmark decision stated that "the 'Interim Arbitration Order and Award' ... is not an 'arbitral award' within the meaning of the Convention [of New York] nor a 'foreign award' within the meaning of the Act [that is the Australian Arbitration law]. It does not take on that character simply because it is said to be so".

8 Paris Court of Appeal, 7 Oct. 2004, *Revue de l'arbitrage*, 2005, p. 737, commentary by E. Jeuland.

9 See J. Hill, "Is an Interim Measure of Protection Ordered by an Arbitral Tribunal an Arbitral Award?", *Journal of International Dispute Settlement*, 2018, p. 607.

enforcement – while such measures are often based on urgency – and may affect the progress of the arbitration proceedings.[10]

An important innovation of the 2006 amendments to the Model Law is the establishment of a specific regime of enforcement for interim measures in its Article 17(H) while Article 17(I) specifies the grounds for refusing recognition or enforcement of interim measures.[11] Pursuant to the Model Law, interim measures are to be enforced as such and without the need to be characterised as awards. This innovation has the advantage of clarifying the regime of interim measures' enforcement, including the scope of the courts' review in order to grant or reject enforcement, while preventing from the risk of setting aside proceedings against interim measures at the seat of arbitration.

Article 17 of the Qatar Arbitration Law evinces the footprint of the 2006 version of the Model Law.[12] Article 17(1) provides arbitral tribunals the power to issue interim measures

> "dictated by the nature of the dispute, or for the purpose of preventing irreparable harm",[13]

while Article 17(3) explicitly states that interim measures rendered by arbitral tribunals are enforceable by Qatari courts except if the interim measures contradict

> "the law or public policy".[14]

Aside from the aforementioned provisions governing the *enforcement* and grounds for non-enforcement of interim measures, Qatar Arbitration Law contains no explicit provision on the *setting aside* of interim measures. They would thus be subject to setting aside proceedings *only if* they are considered as arbitral awards.

Since Qatar Arbitration Law provides the framework for enforcing interim measures, there is no reason to consider them as awards to avail of the enforcement regime governing awards. In any event, interim measures do not deal with the substance of the dispute and are temporary by nature. There is thus merit in not considering them as awards that would be subject to setting aside proceedings. Once an arbitral award deciding on the substance of the dispute has been rendered, it will naturally replace any interim measures previously issued and the parties will be entitled to apply for its setting aside.

Presentation of the judgement's reasoning and commentary

In the case at hand, the arbitral tribunal has issued interim measures in the form of a procedural order in circumstances where the measures were of provisional nature.

It is generally for national courts to determine whether an arbitral decision constitutes an arbitral award or a procedural order regardless of the characterisation of the arbitral tribunal.[15]

Since only arbitral awards, as opposed to procedural orders, could be subject to setting aside under the Arbitration Law, one would expect that the characterisation of the decision on interim measures in the case at hand should be a relevant question to the Court. This is notably because the application was against what the arbitral tribunal characterised as "procedural order" and given that the characterisation of interim measures is, at the least, controversial in comparative law. However, the Court of Appeal has not addressed or raised at all the question of characterisation of the arbitral tribunal's decision that was subject to the application for setting aside in the present instance.

The Court of Appeal examined the procedural admissibility of the application for setting aside by reference to an entirely distinct question, i.e. the rules and time limit contained in Article 16 of the Arbitration Law pertaining to applications for setting aside of

10 A. Habib, K. El Chazli, "Interim Measures in International Arbitration: An Arab Perspective", *Yearbook of Private International Law*, Vol. 21 (2019/2020), p. 273.

11 See H. M. Holtzmann, J. Neuhaus, et al., *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, "UNCITRAL Model Law, Chapter IV.A (Articles 17 – 17J) – as amended [Interim measures and preliminary orders]", at p. 165.

12 Id. at p. 265.

13 Qatar Arbitration Law, Art.17(1), English translation by Qatar International Court and Dispute Resolution Centre ("QICDRC").

14 Qatar Arbitration Law, Art. 17(3), English translation by QICDRC. While the condition of non-contradiction with public policy is logical, the condition of non-contradiction with "the law" is obscure and odd: see A. Habib, K. El Chazli, "Interim Measures in International Arbitration: An Arab Perspective", *Yearbook of Private International Law*, Vol. 21 (2019/2020), p. 274.

15 See e.g. G. B. Born, *International Commercial Arbitration* (2nd. ed, Kluwer Law International, 2014), p. 2929, stating: "the label that arbitrators attach to an instrument is not decisive regarding its status as an 'award.' In virtually all cases, courts have not given decisive weight to the labels used by the arbitrators. Instead, courts have considered the substance of the tribunal's decision in determining whether or not it should be treated as an award, and thereby subject to recognition or annulment".

partial awards on jurisdiction.[16] In a short paragraph of three lines in the judgement, the Court of Appeal held that the application for setting aside was procedurally admissible because it was filed within the time limit and in accordance with Article 16 of the Arbitration Law.

Nevertheless, the relevance of the Court's reference to Article 16 only to consider the admissibility of the application for setting aside of a decision on interim measures is questionable in circumstances where the decision challenged before it was not a partial award on jurisdiction in relation to the merits of the case but a decision on interim measures pertaining to bank guarantees which also raised the question of jurisdiction in relation to the interim measures.

Although the judgement provides an *implicit* affirmative answer to the procedural question of whether the arbitral tribunal's decision on interim measures could be subject to setting aside proceedings, it would have been appropriate that the Court expressly addresses the question in its judgement and provides its reasoning thereon.

The aforementioned procedural question having been presented and commented, we turn now to the question of whether the decision on interim measures should be set aside in the present case from a substantive standpoint.

4. The setting aside on the ground that the arbitral tribunal lacked jurisdiction

Arbitral tribunals' jurisdiction to issue interim measures

As mentioned above, Article 17(1) of the Arbitration Law expressly provides arbitral tribunals the power to issue interim measures

> "dictated by the nature of the dispute, or for the purpose of preventing irreparable harm".[17]

This provision then provides four non-exhaustive categories[18] of interim measures that arbitral tribunals may issue. These are to:

(i) maintain or restore *status quo* pending determination of the dispute;

(ii) prevent the occurrence of current or imminent damage or prejudice to the arbitration process itself;

(iii) provide means of preserving assets that would serve for enforcement of subsequent awards; and

(iv) preserve important or material evidence.

The judgement's reasoning pertaining to interim measures in relation to bank guarantees

In its judgement on the application for setting aside, the Court of Appeal expanded in citing extracts of precedents of Court of Cassation defining a bank guarantee. It held that it was a definite commitment issued by a bank and that finding otherwise would undermine the very foundations of the bank guarantee's regime, weakening trust in it and eliminating its intended benefits.

16 The Court referred to Art. 16 of the Arbitration Law without specifying an extract or a relevant part. This provision reads as follows (English translation by QICDRC):

"1. The Arbitral Tribunal may determine pleas related to its lack of jurisdiction, including pleas based on the non-existence of an Arbitration Agreement, its validity, nullity, expiry or its inapplicability to the subject-matter of the dispute. The arbitration clause shall be considered as an agreement independent of the other clauses of the contract. The nullity, recission or termination of the contract shall have no effect on the arbitration clause contained therein, as long as the clause is itself valid.

2. The pleas mentioned in the previous paragraph must be raised no later than the date for submitting the Respondent's statement of defence, as provided in Art. (23) of this Law. A Party is not precluded from raising such a plea by the fact it has appointed or participated in the appointment of an arbitrator. However, a claim that the Arbitral Tribunal has exceeded the scope of its jurisdiction during its hearing of the dispute shall be presented as soon as the issue arises during the arbitral proceedings. In all situations, the Arbitral Tribunal may admit a later plea if it believes that there is a justifiable reason for the delay.

3. The Arbitral Tribunal may determine any of the pleas mentioned in this article, prior to determining the subject-matter of the dispute or in an arbitral award, which is issued on the subject-matter of the dispute. If the Arbitral Tribunal dismisses the plea, the Party whose plea was dismissed may, within thirty days from the date of notification of the dismissal, submit an appeal before the Other Authority or the Competent Court, as the case may be, whose decision shall be final and not subject to any form of appeal. The aforementioned appeal shall not prevent the Arbitral Tribunal from continuing the arbitral proceedings or from issuing its award". Please note that whereas the word "appeal" is mentioned in the aforementioned translation of Art. 16(3), the Arabic original word is rather "challenge" which means to refer to an application for setting aside.

17 Art. 17(1), Arbitration Law, English translation by QICDRC.

18 Art. 17(1), Arbitration Law provides that arbitral tribunals may issue interim measures "including any of the following measures". Therefore, the ones identified in Art. 17(1) are non-exhaustive examples of such measures.

The Court of Appeal then held that the jurisdiction of an arbitral tribunal is:

> "directly based on the agreement of the parties. It is limited to what the parties have agreed to submit to arbitration, whether that agreement pertains to a specific dispute through a separate document or extends to all disputes arising from the performance of a particular contract. Arbitration does not extend to a contract that the parties did not intend to resolve through arbitration".[19]

Based on the aforementioned reasoning, the Court of Appeal held that whereas arbitral tribunals have jurisdiction to examine requests for interim measures in accordance with Article 17 of the Arbitration Law:

> "the bank guarantee legally represents an independent contractual relationship that cannot legally be subject to an interim measure issued by a court or an arbitral tribunal".[20]

The Court therefore decided to set aside the procedural order issued by the arbitral tribunal. The Court's reasoning regarding the arbitral tribunal's lack of jurisdiction to issue the requested interim measures (i.e. the non-liquidation of the bank guarantees) is based on the Court's finding that the bank guarantees are independent of the contract between the parties that provided for arbitration of disputes.

Commentary

It is worth noting that the arbitral tribunal *rejected* the respondent's request to order the claimant to *abstain from liquidating* the bank guarantees and *ordered* the parties instead to *retain the amounts* of the bank guarantees *in an escrow account*.

However, the Court has not found any distinctions between the case in which the arbitral tribunal would have ordered the claimant to abstain from liquidating the bank guarantees and the present case in which the arbitral tribunal merely ordered the parties to retain the amounts of the bank guarantees in an escrow account. The Court still concluded that:

> "the arbitral tribunal lacked jurisdiction to render such measures".[21]

Indeed, the bank guarantees themselves are independent contracts from the contract subject to arbitration. Nevertheless, the *effects* of their liquidation are undoubtedly part of the parties' dispute arising from the contract containing the arbitration clause.

While any decision from the arbitral tribunal ordering the claimant to abstain from liquidating the bank guarantees would have interfered with the bank guarantees themselves and their regime (which the Court determined was outside the scope of the arbitration agreement), the arbitral tribunal's decision did not do so. Instead, it only administered the effect of the liquidation of the guarantees on the dispute subject to arbitration.

In this context, the Court of Appeal could have referred to two of the non-exhaustive four categories provided in Article 17(1) of the Arbitration Law listed above, which allow arbitral tribunals to issue interim measures, i.e.:

(i) to maintain *status quo* pending determination of the dispute; and

(ii) to prevent the occurrence of current or imminent damage or prejudice to the arbitration process itself; these two categories provide sufficient basis for the arbitral tribunal's order.

Therefore, a nuanced approach by the Court of Appeal concerning the order issued by the arbitral tribunal in the present case would have been adequate.

19 Court of Appeal's judgement, at pp 4-5; translation by the author.

20 Id. pp 4-5; translation by the author.

21 Id. p. 6; translation by the author.

5. Concluding remarks – Remaining challenges in the Qatari arbitration landscape and potential for change

In less than a decade, Qatar has made remarkable strides in establishing itself as a modern arbitration-friendly jurisdiction. The legislative framework reflects a clear commitment to aligning with international best practices and fostering a supportive environment for arbitration,[22] and the judgements rendered by Qatar courts have proven to follow suit.[23]

Nonetheless, there remains room for further development, particularly in the judicial treatment of arbitration related matters whether Qatari courts are called upon to support arbitral proceedings – for instance, by appointing arbitrators – or to examine challenges to arbitral awards seated in Doha or challenges to enforcement of arbitral awards seated abroad. In particular, two key challenges continue to hinder Qatar's full potential in this domain:

(i) **The lack of jurisdiction of the Court of Cassation to review decisions of the Court of Appeal in arbitration-related matters.** The Court of Cassation is the guarantor of a consistent jurisprudence in Qatar.[24] Under the Arbitration Law, judgements rendered in arbitration-related matters are "not subject to challenge by any means of challenge"[25] and, thus, in principle, not subject to review by the Court of Cassation. While this was aimed to promote efficiency in arbitration-related matters, it limits the development of consistent jurisprudence. This issue would deserve to be revisited by the legislator since minimal amendments to the current text of the Arbitration Law would resolve this issue. When revisited by the legislator, the Arbitration Law would benefit from a more streamlined and harmonized articulation of the grounds for setting aside arbitral awards seated in Qatar (Art. 33) and the grounds for refusing recognition or enforcement of foreign arbitral awards (Art. 35), to enhance legal certainty and consistency in judicial interpretation.[26]

(ii) **The restricted public access to arbitration-related judgements issued by the Court of Appeal.** Public access to arbitration-related judgements is key to ensure predictability, transparency and lead to the development of consistent jurisprudence. Nevertheless, there is restricted public access to arbitration-related judgements issued by the Court of Appeal in Qatar. This restrictive access is not by the law but is rather a de facto one, notably because access to jurisprudence focuses on access to the Court of Cassation's judgements, which, as indicated above, do not exist in arbitration-related matters. It would thus be helpful if the Qatari judiciary works on identifying judgements rendered by the Court of Appeal in arbitration related matters and publishes those on a regular basis. Otherwise, or in the meantime, the development of arbitration in Qatar would benefit from having practitioners who are involved in arbitration related cases before the Court of Appeal gathering and sharing those judgements.[27]

Undoubtedly, addressing either of the above issues or both would significantly enhance Qatar's position in arbitration in the region and beyond.

22 As mentioned above, the current arbitration legal framework in Qatar has been inspired by the UNCITRAL Model Law and aims at establishing an 'arbitration friendly' framework: see W. Frain-Bell, "Enforcement's 'Coming Home' – Remember Qatar? Pre-World Cup Optimism for the Recognition and Enforcement of Arbitral Awards", *The Journal of Enforcement of Arbitration Awards*, Vol. 2 No. 2 (2019), p. 37.

23 For instance, in respect of interest: in judgements rendered in the Court of Appeal's cases no. 36 of 2019 (30 Sep. 2019) and no. 31/2019 (20 Oct. 2019), the Court rejected applications for setting aside against arbitral awards that were filed based on alleged incompatibility between the interest granted in those awards and Sharia'a law principles and Qatari public policy (see C. F. El Hage, supra note 5, at pp. 25 – 35, particularly "8 Award of interest as compensation for damages"). Also, in the judgement rendered in the Court of Appeal's case no. 2186/2019 (6 July 2020), the Court of Appeal dismissed an application for setting aside of an arbitral award where the applicant challenged the arbitral award on the basis that it was not rendered in the name of His Highness the Emir of Qatar and, hence, would be violating Qatar public policy (see C. F. El Hage, supra note 5, at pp. 25 – 35, particularly "2 Whether the arbitration award must be issued in the name of any authority in the country"). The Court of Appeal held that it was not required that arbitral awards mention that they were rendered in the name of His Highness the Emir of Qatar. This judgement reversed earlier decisions that had set aside arbitral awards on that basis.

24 See e.g. I. Bantekas, A. Al-Ahmed, *The Contract Law of Qatar* (Cambridge University Press, 2023). p. 10, stating: "the judgements of the Qatari Court of Cassation constitute stare decisis (binding precedent) on lower courts. This endows Qatari private law with an aura of consistency and continuity."

25 See Arbitration Law, Arts. 11(7), 13(1), 14(1), 16(3), 33(1) and 33(6).

26 While the grounds set out in Arts. 33 and 35 of the Arbitration Law are broadly aligned with international standards, there remains scope to enhance the clarity of their wording to ensure the intended grounds are more precisely and effectively articulated.

27 In this respect, it should be noted that court judgements are not confidential but public and accessible by law. Art. 133 of the Permanent Constitution of the State of Qatar provides: "Court sessions shall be public save when a court decides, for the interest of public order or morality, to hold them in camera. *In all cases, the pronouncement of judgments shall be made in an open session*" (emphasis added). Additionally, Qatar's participation in the Global Legal Information Network (GLIN) reflects its commitment to transparency and accessibility to legal texts and judicial decisions. GLIN is a network of Member States and international organisations dedicated to making legal decisions and legislation accessible to citizens, officials, and the global community.

Time Limit for Rendering an Arbitral Award under Turkish Law
Ten Key Points to Consider

Erdem Küçüker
Erdem Küçüker is an attorney-at-law registered at the Istanbul Bar Association. He specialises in commercial arbitration, arbitration-related litigation and commercial litigation, and acts as secretary to arbitral tribunals.

Under Turkish law, arbitral tribunals are tasked to render a final award within one year from either the appointment of the sole arbitrator or the minutes of the first meeting of the arbitral tribunal. The time limit requirement ("*tahkim süresi*") has been raised in several recent setting aside procedures. This article provides an overview of the key points to consider under Turkish law as well as the practice of the Turkish judiciary. The article also provides some comparison with the ICC and other institutional rules, where relevant.

1. Introduction – Time limit for arbitral awards

The arbitration procedure under Turkish law is governed by two sets of laws.

1. **Proceedings seated in Türkiye with no foreign element** (governed by Arts 407-444 of the Turkish Code of Civil Procedure ("CCP"), Law n. 6100).[1]
2. **Proceedings seated in Türkiye or where the parties/arbitral tribunal chose the law to be applicable with a foreign element**, e.g. the nationality of the parties, shareholding of the parties or the subject matter of the legal dispute (governed by the Turkish International Arbitration Code ("IAC"), Law n. 4686).[2]

In both sets of law, arbitral tribunals are tasked to render a final award within *one year* either from the appointment of the sole arbitrator or the minutes of the first meeting of the arbitral tribunal (Art. 427, CCP;[3] Art. 10(B), IAC[4]).[5] Similar provisions exist in other national laws[6] (e.g. in French law,[7] Italian Law,[8] Swiss domestic

1 Original version available at https://mevzuat.gov.tr/mevzuatmetin/1.5.6100.pdf. The translations of provisions of the CCP available in the footnotes below are provided by the author.

2 Original version available at https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4686.pdf. The translations of provisions of the IAC available in the footnotes below are provided by the author.

3 Art. 427, CCP: "(1) Unless the parties agree otherwise, the arbitrator or the arbitral tribunal shall render a decision on the merits within one year from the date of the selection of the arbitrator in cases where one arbitrator will act, and within one year from the date of the minutes of the first meeting of the arbitral tribunal in cases where more than one arbitrator will act. (2) The time limit may be extended by the agreement of the parties, or if they cannot agree, by the court upon the application of one of the parties. The court's decision on this matter shall be final".

4 Art. 10(B), IAC: "Unless the parties agree otherwise, the arbitrator or the arbitral tribunal shall render a decision on the merits within one year from the date of the selection of the arbitrator in cases with a single arbitrator or the date of the minutes of the first meeting of the arbitral tribunal in cases with multiple arbitrators. The time limit may be extended by the agreement of the parties; if they cannot agree, it may be extended by the civil court of first instance upon the application of one of the parties. If the application is rejected, the proceedings shall end at the end of the time limit. The decision of the court is final".

5 Z. Akıncı, *Milletlerarası Tahkim,* (Vedat Kitapcılık, 2025), pp. 323-336 and pp. 554-555; H. Pekcanıtez, A. Yeşilırmak, *Pekcanıtez Usul Medeni Usul Hukuku*, Vol. v. (Onikilevha, 2025), pp. 4684-4689, paras. 22.386-22.394 and pp. 4758-4762, paras. 22.583-22.600.

6 The UNCITRAL Model Law on International Commercial Arbitration does not include this concept.

7 Art. 1463, French Code of Civil Procedure, as translated: "If an arbitration agreement does not specify a time limit, the duration of the arbitral tribunal's mandate shall be limited to six months as of the date on which the tribunal is seized of the dispute. The statutory or contractual time limit may be extended by agreement between the parties or, where there is no such agreement, by the judge acting in support of the arbitration".

8 Art. 820, Italian Code of Civil Procedure, as translated: "In the arbitration agreement or by means of an agreement preceding the arbitrators' acceptance, the parties may establish a time limit for the rendering of the award. If no such time limit has been established, the arbitrators shall render the award within the time limit of two hundred and forty days from the acceptance of the appointment. In any case, the time limit may be extended: a) By means of written declarations by all the parties addressed to the arbitrators; b) By the president of the tribunal indicated in article 810, second paragraph, upon a reasoned motion filed by one of the parties or the arbitrators, having heard the other parties; the time-limit may be extended only before it expires. Unless the parties have provided otherwise, the time-limit is extended by a hundred and eighty days in the following cases, and not more than once in each of these cases: a) If evidence must be taken; b) If expert witness evidence has been required by the arbitrators ex officio; c) If an interim or partial award has been rendered; d) If the composition of the arbitral tribunal is modified or the sole arbitrator is replaced. The time-limit for the rendering of the award is suspended during the stay of the proceedings. In any case, after the proceedings resume, the residual time limit, if shorter, is extended to ninety days".

arbitration law[9] and UK law).[10] Institutional arbitration rules also address time limits.[11] For example, the ICC Arbitration Rules provide that an arbitral tribunal shall render its final award within six months from the signature or approval of the Terms of Reference (Art. 31, ICC Arbitration Rules),[12] or within six months from the case management conference for cases subject to the expedited procedure (Art. 4(1), Appendix VI – ICC Expedited Procedure Rules).[13] A similar provision exists under Article 33 of the Istanbul Arbitration Centre ("ISTAC") Arbitration Rules.[14]

Therefore, following its constitution, an arbitral tribunal has jurisdiction during the time limit prescribed by the national law or institutional rules.[15] Once the time limit expires, the arbitral tribunal does not have a jurisdiction to render a final award on the dispute. Thus, the arbitral tribunal shall render its final award within the time limit. These provisions aim that disputes subject to the arbitral proceedings are resolved within a short timeframe and hereby control the length and efficiency of the arbitration proceedings.[16]

The concept of time limit for the rendering a final award, and its application by the Turkish judiciary, should be given due consideration by the parties and arbitral tribunals, as non-compliance with the prescribed time limit may result in the setting aside of the arbitral award. In proceedings subject to the IAC, the parties can even lose their right to recommence arbitration proceedings for the same claims.

This article outlines key considerations relating to the application of the time limit requirement that may impact the validity of the arbitral awards and the efficiency of the proceedings, such as: the interplay between institutional rules and the law applicable to the procedure (**2.**); the commencement of the time limit (**3.**); the determination of the end date of the time limit (**4.**); the circumstances that may suspend the time limit (**5.**); the parties' agreement to extend the time limit (**6.**); the relevant authority to extend the time limit (**7.**); the timing for extension agreements, requests and decisions (**8.**); possible actions of arbitral tribunals upon expiry of the time limit (**9.**); and the consequences of the expiry of the time limit (**10.**).

---

9 Art. 366, Swiss Code of Civil Procedure, as translated: "(1) The parties may limit the term of the arbitral tribunal's mandate in the arbitration agreement or in a subsequent agreement. (2) The time limit within which the arbitral tribunal must render its award may be extended: (a) upon agreement of the parties; (b) upon a decision of the competent state court pursuant to Article 356(2) at the request of a party or the arbitral tribunal". The international arbitration law of Switzerland (Chap. 12, Swiss Private International Law Act) does not include this concept.

10 Section 50, Arbitration Act 1996: "(1) Where the time for making an award is limited by or in pursuance of the arbitration agreement, then, unless otherwise agreed by the parties, the court may in accordance with the following provisions by order extend that time. (2) An application for an order under this section may be made – (a) by the tribunal (upon notice to the parties), or (b) by any party to the proceedings (upon notice to the tribunal and the other parties), but only after exhausting any available arbitral process for obtaining an extension of time. (3) The court shall only make an order if satisfied that a substantial injustice would otherwise be done. (4) The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed (by or under the agreement or by a previous order) has expired. (5) The leave of the court is required for any appeal from a decision of the court under this section".

11 E. Gaillard, J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), pp. 753-760, paras. 1379-1388; J. Lew, L. Mistelis, S. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), pp. 638-639, paras. 24-36–24-40; N. Blackaby, C. Partasides, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2015), pp. 555-557, paras. 9.162-9.168.

12 Art. 31"Time Limit for the Final Award": "31(1) The time limit within which the arbitral tribunal must render its final award is six months. Such time limit shall start to run from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference or, in the case of application of Article 23(3), the date of the notification to the arbitral tribunal by the Secretariat of the approval of the Terms of Reference by the Court. The Court may fix a different time limit based upon the procedural timetable established pursuant to Article 24(2)". "31(2) The Court may extend the time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so". Para. 126 of the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration lists the time limits that arbitrators and parties should comply with under the ICC Rules, which *inter alia* includes the time limit for rendering the final award. In addition, the ICC Model Procedural Timetable aims at satisfying the compliance with the time limit for the final award and lists the different steps of the proceedings, including the rendering of the award. See also J. Fry, S. Greenberg, F. Mazza, The Secretariat's Guide to ICC Arbitration (ICC, 2012), pp. 310-316, paras. 3-1107–3-1131; Th. Webster, M. Bühler, *Handbook of ICC Arbitration* (Sweet & Maxwell, 2021), pp. 557-563, paras. 31-1–31-24; F. Lenggenhager, Chapter 17, Part II 'Commentary on the ICC Rules, Art. 31 [Time limit for the final award]', in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International, 2018), pp. 2446-2448, paras. 1-14; S. Bruna, Control of Time Limits the International Court of Arbitration, *ICC International Court of Arbitration Bulletin*, Vol. 7, No. 2, 1996, pp. 72-75.

13 Art. 4(1), Appendix VI – ICC Expedited Procedure Rules, "Award", "The time limit within which the arbitral tribunal must render its final award is six months from the date of the case management conference.

14 Art. 33, ISTAC Arbitration Rules "Time Limit for the Award" (English version of the Rules). Art. 33(1): "The Sole Arbitrator or Arbitral Tribunal shall render the award on the merits of the dispute, within 6 months from the date upon which the completion of the signatures on the terms of reference or, the date of notification to the Sole Arbitrator or Arbitral Tribunal by the Secretariat of the approval of the terms of reference pursuant to Article 26(4). If the Parties agreed not to draw up terms of reference, the time limit for the award shall begin to run from the date of the submission of the procedural timetable to the Secretariat. The Board, using the procedural timetable as a base, may extend the time limit on its own initiative". Art. 33(2): "The time limit for the award may be extended, upon the agreement of the parties; if the parties fail to agree, the Board may extend the time limit upon the Sole Arbitrator or Arbitral Tribunal's request or in cases where it deems necessary on its own initiative".

15 The question of the interaction of the time limits between the institutional rules (in case of an institutional arbitration) and the law applicable to the procedure, especially where the time limit differs, is addressed in section 2 of this article.

16 To remove any doubt, it is worth noting that the time limit applies to entire proceeding until the final award; partial or interim awards do not meet this requirement. Both the Turkish CCP and the IAC provide that the arbitral tribunal shall render its "award on merits" within the one-year time limit, and the ICC Arbitration Rules (Art. 31) explicitly mention that the six-month time limit applies to the final award.

2. Interplay between institutional rules and the law applicable to the procedure

Turkish arbitration law and institutional arbitration rules both include provisions on the time limit for the arbitral award. Both provisions might provide for different time limits and different competent authorities to extend these. Hence, in case of conflicts between two provisions, it might be questioned which one shall apply.

The answer is that the time limit under the agreed arbitration rules shall take precedence over the law applicable to the procedure. Both articles in the CCP and IAC allow the parties "to agree otherwise". Thus, these provisions under the local law are not mandatory; instead they are default provisions which apply in the absence of a special agreement between the parties.[17] For instance, in ICC Arbitration proceedings governed by the CCP or IAC, Article 31 of the ICC Arbitration Rules shall apply.[18] Therefore, in such case, the arbitral tribunal shall render its award within six months from the Terms of Reference as may be extended by the ICC Court.

This issue was recently addressed by the 11th Civil Chamber of the Turkish Court of Cassation,[19] in a decision related to an ICC Arbitration subject to the CCP. The claimant applied to the state court to extend the time limit to render the award. The state court rejected the request for extension, whereas the ICC Court, which had been simultaneously seized with a similar application, accepted such request. In the setting aside proceedings, claimant (the respondent in the arbitration) argued that the state court's dismissal should be upheld as the arbitral tribunal's duty had ended upon expiry of the time limit. The first instance court ruled in favour of the claimant, finding that the arbitral tribunal no longer had jurisdiction, and as a result, decided to set aside the award. Following appeal, the Court of Cassation quashed the first instance court decision, finding that the ICC Court's extension of the time limit was valid and that the state court's decision to dismiss the request did not have any effect.

3. Commencement of the time limit

Article 31 of the ICC Arbitration Rules mentions that the limit starts to run from the latest signature on the Terms of Reference or in case of a party's failure to sign, from the notification to the arbitral tribunal of the ICC Court's approval of the Terms of Reference.[20] In cases subject to the expedited procedure, the time limit shall start from the Case Management Conference, pursuant to Article 4(1) of Appendix VI of the ICC Arbitration Rules.

Under Turkish law, the following distinction applies:

- **Cases with a sole arbitrator.** The time limit starts to run from the appointment of the arbitrator. The scholars opine that in such cases, the time limit shall commence from the date of the notification to the sole arbitrator of his/her appointment.[21]
- **Cases with an arbitral tribunal formed of more than one arbitrator.** The time limit starts from the minutes of first meeting of the arbitral tribunal. In its judgment, the 11th Civil Chamber of the Court of Cassation confirmed that the co-arbitrators' order on the selection of the presiding arbitrator does not suffice to start the time limit, instead the full arbitral tribunal's minutes of first meeting triggers it.[22]

Under the IAC (Art. 10(E))[23] – and unless otherwise agreed – an arbitral tribunal shall draw up the terms of reference after the submission of the first round of main written pleadings, namely after the statement of claim and the statement of defense, and the terms of reference shall *inter alia* include the time limit for the arbitration and the date of commencement thereof.

17 Z. Akıncı, supra note 5, at p. 332; H. Pekcanıtez, A. Yeşilırmak, supra note 5, at pp. 4686-4687, para. 22.391.

18 Id.

19 11th Civil Chamber, Court of Cassation, 21 Sep. 2022 (E. 2021/4695 K. 2022/6134); Z. Akıncı, Türkiye – Supreme Court Confirms In Favorem Validitatis Approach, *ICC Dispute Resolution Bulletin*, Issue 2023-2, pp. 37-38.

20 J. Fry, S. Greenberg, F. Mazza, supra note 12, at p. 311, para. 3-1109; Th. Webster, M. Bühler, supra note 12, at p. 559, para. 31-5.

21 H. Pekcanıtez, A. Yeşilırmak, supra note 5, at p. 4686, para. 22.390.

22 11th Civil Chamber, Court of Cassation, 20 Jan. 2022 (E. 2020/1284 K. 2022/443).

23 Art. 10(E), IAC: "Unless otherwise agreed by the parties, the arbitrator or the arbitral tribunal shall prepare the terms of reference after the filing of the statement of claim and the statement of defence. The terms of reference shall include the names, titles and capacities of the parties, their valid addresses for notification during the arbitration, a summary of their claims and defences, their requests, a description of the dispute, the names and surnames, titles and addresses of the arbitrators, the place of arbitration, the time limit of the arbitration, the commencement of the time limit, the procedural provisions applicable to the dispute and whether the arbitrators are authorised to act as *amiable compositeur*. The terms of reference shall be signed by the arbitrators and the parties".

4. Determining when the time limit ends

It might be questioned what point in time is decisive for complying with the time limit. The decisive point in time is the date of the arbitral tribunal's final award. In other words, the award should be made on or before the end date of the time limit.

The ICC Arbitration Rules provide that the final award must be submitted to the Secretariat, scrutinised and approved by the Court, and signed by the arbitrator(s) as well as notified to the parties by the time limit.[24]

The practice under Turkish law is similar to that under the ICC Arbitration Rules, except for the requirement that the award should be *notified* within the time limit. A recent decision held that as long as the arbitral tribunal has rendered its award within the time limit, the later notification of the award to the parties following the expiry of the time limit does not invalidate the award.[25] In another judgement, the 15th Civil Chamber of the Court of Cassation, held that the arbitral tribunal's short decision[26] lacks the statutory conditions for an award, and that rendering a short decision does not suffice to comply with the time limit. The Court decided that the reasoned final award should have been made within the time limit.[27]

On a final note, the 6th Civil Chamber of the Court of Cassation confirmed a court of appeal's reasoning which found that a dissenting opinion dated after the time limit does not lead to the conclusion that the award is not made within the time limit.[28]

5. Circumstances that may suspend the time limit

There are limited circumstances which suspend the time limit, as enumerated in the CCP and IAC. Under the CCP, the replacement of the arbitrator suspends the time limit until the arbitrator is replaced (Art. 421(2), CCP).[29]

Under the IAC – applicable to proceedings with a foreign element – the replacement of arbitrators does not stop the time limit (Art. 7(G), IAC[30]). However, the loss by a party of its capacity to be a party to the proceedings suspends the proceedings and the time limit to render the final award (Art. 11(B)(1), IAC).[31]

No further circumstance (including the challenge of arbitrators or other reasons) stops the running of the time limit.[32]

6. Parties' agreement to extend the time limit

In principle, the parties can agree to extend the time limit for the arbitral award.

Both the CCP and the IAC explicitly allow the parties to enter such an agreement (Art. 427(2) of the CCP; Art. 10(B)(2), IAC). In case the parties reach an agreement, the parties can extend the time limit either by mutual e-mails (preferably addressed to the arbitral tribunal) indicating their intention or by signing a joint letter/agreement. The 11th Civil Chamber of the Court of Cassation however held that the parties, in their agreement, should clearly determine the new time limit, failing which the time limit would not be deemed validly extended.[33]

---

24 J. Fry, S. Greenberg, F. Mazza, supra note 12, at p. 311, para. 3-1111.

25 6th Civil Chamber, Court of Cassation, 30 Nov. 2023 (E. 2023/3938 K. 2023/4009).

26 Under Turkish state court practice, the court's short decision on the matter is notified to the parties on the final hearing, which is followed by the notification of the reasoned decision within the prescribed period of time (see Art. 294(4), CCP). Some arbitral tribunals also follow this practice by notifying their short decision on the dispute first and then drafting and notifying the reasoned award.

27 15th Civil Chamber, Court of Cassation, 21 Dec. 2006 (E. 2006/6675 K. 2006/7535).

28 6th Civil Chamber, Court of Cassation, 17 Jan. 2023 (E. 2022/4980 K. 2023/57).

29 Art. 421(2), CCP: "The period for the replacement of one or more arbitrators shall not be counted from the time limit for arbitration".

30 Art. 7(G), IAC: "The running of the time limit for arbitration shall not be suspended by the replacement of one or more arbitrators".

31 Art. 11(B)(1), IAC: "In the event that one of the parties to the arbitration proceedings ceases to be a party, the arbitrator or the arbitral tribunal shall postpone the arbitration proceedings and notify the parties concerned for the continuation of the arbitration proceedings. In this case, the time limit for arbitration shall not run".

32 6th Civil Chamber, Court of Cassation, 19 Sep. 2023 (E. 2022/2560 K. 2023/2839), at paras. 2.19-2.20.

33 11th Civil Chamber, Court of Cassation, 20 May 2019 (E. 2019/1735 K. 2019/3874).

Although Article 31 of the ICC Arbitration Rules is silent on the extension of the time limit by parties' agreement, the author considers that the rules allow the parties to agree on the extension of the time limit subject to the ICC Court's endorsement,[34] given (i) that Article 31 of the ICC Arbitration Rules provides that the ICC Court may fix the time limit to render the final award based on the procedural timetable established by the arbitral tribunal (pursuant to Art. 24(2)), and (ii) the principle of party autonomy.

Article 33(2) of the ISTAC Arbitration Rules allows the parties to agree on the extension of the time limit.

7. Relevant authority to extend the time limit

In practice, it might not always be the case that the parties reach an agreement on the extension of the time limit. In cases where the parties cannot agree on the issue, institutional arbitration rules often authorise their courts of arbitration to determine the time limit to render arbitral awards. These institutional courts can decide on the matter when seized by a reasoned request from the arbitral tribunal or on its own initiative (Art. 31(2), ICC Arbitration Rules; Art. 33(2), ISTAC Arbitration Rules).

In case of an *ad hoc* arbitration (or under arbitration rules without a provision on the time limit) the default provisions under the CCP or the IAC shall apply. These provisions authorise the state courts to extend the time limit. In such case, the requesting party shall commence proceedings against the other party in the form of an adversarial action and request the state court to extend the time limit.[35]

It is worth noting that, as opposed to the ICC Arbitration Rules, the arbitral tribunals are not authorised to request the extension of the time limit under the CCP and the IAC.[36]

In its application to the court, the requesting party shall summarise the arbitration proceedings and explain the necessity for the time extension. The court generally notifies the other party of the request and allow it to file a response within two weeks. Following expiry of the time limit for filing a response, the court should decide on the matter either on a documents-basis or by scheduling a hearing. The decision of the court cannot be appealed, it is final and binding of the parties (Art. 427(2), CCP; Art. 10(B)(2), IAC).

Notably, as opposed to the practice under the ICC Arbitration Rules which informs the arbitral tribunal on the extension,[37] the state courts generally notify the decision only to the parties. Thus, it might be advisable that the parties inform the arbitral tribunal of the state court's decision without delay.

8. Timing for extension agreements, requests and decisions

The timing of the parties' agreement or application for extension and the timing of the decision on the same is also crucial.

In case of an agreement between the parties on the extension, the agreement should be made on or before the time limit. Likewise, in case of an application by the parties, the parties shall file an application before the state court prior to the expiry of the time limit.[38] The same should *mutatis mutandis* apply to the applications of an arbitral tribunal to the institutional court, which is sufficient to comply with the requirements under the Turkish law.

The decision of the state court/arbitral institution, however, in the author's view, does not need to be made before the expiry of the time limit. Once a decision is made, it will have a retroactive effect from the date of the expiry. In cases where the institutional court acts on its own initiative, the author considers that, for good order, the institutional court's decision on an extension should be made and notified to the parties before the expiry of the time limit. Otherwise, the time limit might be deemed lapsed without a valid extension.

34 For a similar view, see e.g. Th. Webster, M. Bühler, supra note 12, at pp. 559-560, para. 31-9; F. Lenggenhager, supra note 9, at p. 2447, para. 9.

35 19th Civil Chamber, Court of Cassation, 3 Oct. 2017 (E. 2016/14025 K. 2017/6530); Z. Akıncı, supra note 5, at p. 330

36 H. Pekcanıtez, A. Yeşilırmak, supra note 5, at p. 4761, para. 22.596. To remove any doubt, under Turkish law, an arbitral tribunal is not competent to extend the time limit itself, see Z. Akıncı, supra note 5, at p. 330.

37 J. Fry, S. Greenberg, F. Mazza, supra note 12, at p. 316, para. 3-1131; Th. Webster, M. Bühler, supra note 12, at p. 563, para. 31-23.

38 Z. Akıncı, supra note 5, at p. 331; see also 6th Civil Chamber, Court of Cassation, 19 Sep. 2023 (E. 2022/2560 K. 2023/2839) at para. 2.18.

9. Possible actions of arbitral tribunals upon expiry of the time limit

If the time limit has expired before the arbitral tribunal renders a final award, the arbitration proceedings shall be deemed concluded. In this situation, scholars recommend that arbitral tribunals declare that the time limit has expired and terminate the proceedings by way of a procedural order.[39] In case of the arbitral tribunal's refusal to issue such order, the parties could also ask the state courts to render a declaratory order stating that the time limit has expired.[40]

10. Consequences of the expiry of the time limit

The arbitral tribunal's award rendered after the passing of the time limit may be subject to set aside. The expiry of the time limit constitutes a ground for setting aside under both the CCP (Art. 439(2)(c)) and the IAC (Art. 15(A)(2)(1)(c)). However, the ground will not be considered by the court *ex officio*; it must instead be argued and proved by the party raising it.[41]

If an award is set aside under the IAC due to the expiry of the time limit for the award and the decision is appealed, the parties cannot resume arbitration proceedings for the same claims unless they have agreed otherwise (Art. 15(A)(8), IAC).[42] In this situation, the parties will need to resort to the relevant state court for these claims. However, the parties can bring forward other claims based on the arbitration agreement or conclude a new arbitration agreement for the claims raised in the award that was set aside.[43]

On the contrary, if proceedings were subject to the CCP and the award was set aside due to the expiry of the time limit for the award, the parties may initiate new arbitration proceedings whether based on the same claims or not (Art. 439(7), CCP)[44]. [45]

Since the expiry of the time limit has serious consequences on the validity of the arbitral award as well as the arbitration agreement, both parties and tribunals should be cautious with such time limit. That being said, the Court of Cassation recently confirmed a court of appeal's finding in a case concerning the setting aside of an award rendered in *ad hoc* arbitration proceedings that in principle, it is the parties (and not the arbitral tribunal) who should follow up on the time limit and request an extension if needed.[46] In the author's view, this however does not lift the arbitral tribunal's duty to conduct the proceedings in an efficient and expeditious manner.

39 H. Pekcanıtez, A. Yeşilırmak, supra note 5, at pp. 4688-4689, para. 22.392.

40 Id. at p. 4689, para. 22.392.

41 Id. at p. 4759, para. 22.586.

42 Art. 15(A)(8), IAC: "In the event that the annulment action is accepted, if the acceptance decision is not appealed, or if it is accepted due to the existence of the circumstances specified in subparagraphs (b), (d), (e), (f), (g) of paragraph 1 and subparagraph (b) of paragraph 2, the parties may reappoint the arbitrators and the time limit, unless otherwise agreed by the parties. The parties may appoint the same arbitrators as before, if they so wish". The said article enumerates circumstances in which arbitration can be recommenced after the setting aside of the arbitral award. As subparagraph (c) of paragraph 1, which relates to setting aside due to expiry of the time limit for an award, is not listed in the article, it can be concluded that arbitration cannot be resumed in the event of setting aside due to expiry of the time limit.

43 Z. Akıncı, supra note 5, at pp. 335, 555.

44 Art. 439(7), CCP: "In the event that the annulment action is accepted, if the acceptance decision is not appealed or if it is accepted due to the existence of the circumstances in subparagraphs (b), (c), (ç), (d), (e) and (f) of the second paragraph, the parties may reappoint the arbitrators and the time limit, unless otherwise agreed by the parties. The parties may appoint the same arbitrators as before, if they so wish". The subparagraph (c) referred to in Art. 439(2) deals with the setting aside due to the expiry of the time limit and is included as a circumstance in which arbitration can be recommenced. The expiry of the time limit was not listed as a circumstance allowing for the recommencement of arbitration in the previous law, but was added by Art. 60 of Law No 7101 dated 28 Feb. 2018 to the list of circumstances permitting the recommencement of arbitration under the Art. 439(7) of the CCP.

45 Previously, Art. 529 of the former CCP provided that in case of the expiry of the time limit, the state courts became competent to decide on the dispute: "The arbitrators are obliged to render a judgement within six months after their first meeting. Otherwise, the actions taken shall be null and void and the dispute shall be settled by the competent court. This period may be extended only with the express and written consent of both parties or by the decision of the head of the court or the judge". Art. 533 of the former CCP further confirmed that in case of the setting aside of the award due to the expiry of the time limit, the arbitration cannot be recommenced: "The award of the arbitrators shall be set aside on appeal only in the following cases 1 - The award is rendered after the expiry of the time limit for the award, 2 - The award is rendered on something that has not been requested, 3 - The arbitrators decide on a matter that is not within their competence, 4 - The arbitrators do not decide on each of the claims of the two parties. If the award is reversed on appeal on one of the last three grounds, the arbitrators and the time limit shall be re-appointed". As setting aside due to the expiry of the time limit for the award is not one of the last three grounds mentioned in the article, it was concluded that the arbitration cannot be recommenced in case of setting aside due to the expiry of the time limit; see 15th Civil Chamber, Court of Cassation, 13 Dec. 2010 (E. 2010/4207 K. 2010/6858), where the decision relied on Arts. 529 and 533 of the former CCP and concluded that in case of setting aside of the award due to the expiry of the time limit, the arbitration agreement would become ineffective and the state courts would become competent to decide on the dispute.

46 11th Civil Chamber, Court of Cassation, 22 Jun. 2022 (E. 2021/8979 K. 2022/5142).

Exploring Disputes in Outer Space – The Final Frontier

Myfanwy Wood

Myfanwy is a Partner in the international arbitration team at Ashurst LLP, London with particular expertise in global energy and resources disputes and experience in technology and financial disputes. She advises in relation to international arbitration, other cross border disputes and public international law. Myfanwy holds a master's degree in International Law from the University of Cambridge where she was a Davis McCaughey scholar and is listed as a Global Elite Thought Leader in Arbitration in the Lexology Index (formally WhosWhoLegal).

Aled McNeile

Aled is an Associate in the international arbitration team at Ashurst LLP, London. His work includes advising on international commercial arbitration, investor state disputes, and disputes arising out of construction projects (including litigation). He is qualified in England and Wales.

The authors would like to thank Charlotte Cattaneo and Freddie Freeman for their assistance with this article.

The exploration and utilisation of outer space has significantly advanced over the past few decades, leading to unprecedented opportunities and challenges. As States and private entities increasingly engage in space activities, the potential for disputes has grown, including over the use of space resources and the environmental impacts of space activities. This article examines how the current legal framework addresses these issues, and the adjustments that will be required to keep pace with the future increase in disputes arising from operations in space.

1. Setting the scene

The commercial space race has well and truly begun, and outer space – once the exclusive domain of States – is increasingly becoming a playground for private actors. Space has never been more accessible: the cost of launches and satellites has decreased, and constant advances in technology make the possibilities of what can be achieved infinite. One only has to follow the news to see the latest foray into space by a new company or billionaire. As opportunities in space increase, so too does the scope for potential disputes.

In this article, we explore the legal framework governing disputes in space, the types of disputes we expect to see in the future, and whether the existing legal framework is sufficient to address those disputes. We also consider what steps parties might take to best protect their positions when drafting agreements for their activities in space.

2. Current legal framework

The foundations of international space law are contained in a series of five United Nations treaties ("UN Treaties"), which were drafted predominantly with the rights and obligations of States in mind.[1] On top of this international framework, there also exists soft law,[2] other multilateral agreements, and domestic laws.

i) United Nations Treaties

Arguably the most significant and widely ratified treaty (currently ratified by 116 States), is the **1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies** (the "Outer Space Treaty").[3] With its foundational principles considered customary international law,[4] the Outer Space Treaty establishes that outer space is "the province of all mankind";[5] that any space activities must be carried out "in accordance

1 See section 4 for more detail.

2 See e.g.: The Principles Relevant to the Use of Nuclear Power Sources in Outer Space UNGA Res 47/68 (14 Dec. 1992) UN Doc A/RES/47/68; The Principles Governing the Use of Artificial Earth Satellites for International Direct Television Broadcasting UNGA Res 37/92 (10 Dec. 1982) UN Doc A/RES/37/92; and the Inter-Agency Space Debris Coordination Committee, "IADC Space Debris Mitigation Guidelines" (3 Feb. 2025) A/AC.105/C.1/2025/CRP.9.

3 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (adopted on 19 Dec. 1966 and entered into force on 10 Oct. 1967) 610 UNTS 205 (Outer Space Treaty).

4 Articles I and II of the Outer Space Treaty. See e.g. Committee on the Peaceful Uses of Outer Space, "Responses to the set of questions provided by the Chair of the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space" (15 Apr. 2024) A/AC.105/C.2/2024/CRP.8.

5 Outer Space Treaty (supra note 3), Art. I.

with international law";[6] the principle of non-appropriation in outer space;[7] and that States agree to bear "international responsibility" for their "national activities" in space.[8] States will also be "internationally liable" for any damage their space activities cause to another State or any "natural or juridical persons" in another State.[9]

Notably, however, no provision is made for how disputes are to be resolved, or how a cause of action might be established between, for example, a State and a private entity.

Also significant is the **1972 Convention on International Liability for Damage Caused by Space Objects** (the "Liability Convention")[10] which is ratified by 100 States. The key principles of this Convention form part of customary international law and set out the liability that a "launching State" owes foreign States or their nationals.[11] The Convention also establishes strict liability for damage caused by a State's space objects on Earth[12] and "fault" based liability where that damage is caused in outer space.[13]

The Liability Convention is, however, far from comprehensive. Despite being the only treaty to make provision for dispute resolution, by way of a Claims Commission, the decisions made by that Commission are not binding unless the parties agree otherwise.[14]

Furthermore, the definition of "damage" is limited[15] and does not appear to include economic harm. The Convention also offers no definition of "fault", which presents inevitable difficulties in the international context where certain jurisdictions approach concepts like fault and negligence differently.

The **1976 Convention on Registration of Objects Launched into Outer Space** (the "Registration Convention")[16] requires "launching States" to register the details of a space object launched into orbit both onto its own register[17] and with the United Nations.[18]

The **1984 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies** (the "Moon Convention")[19] establishes that the Moon (and specifically its natural resources) is the "common heritage of mankind",[20] and not subject to national appropriation.[21]

Finally, the **1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space** (the "Rescue Agreement")[22] addresses the rescue of astronauts in outer space. It is of limited relevance to this article.

---

6 Ibid, Art. III.

7 Ibid, Art. II.

8 Ibid, Art. VI.

9 Ibid, Art. VII.

10 Convention on International Liability for Damage Caused by Space Objects (adopted on 29 March 1972 and entered into force on 1 Sep. 1972), 861 UNTS 187 (Liability Convention).

11 Ibid, Art. II. See also e,g, Committee on the Peaceful Uses of Outer Space (supra note 4). The scope of a "launching State" is drawn broadly to include both States which launch or "procure" the launching of a space object, and States "from whose territory or facility" a space object is launched (Art. I(c)).

12 Ibid, Art. II.

13 Ibid, Art. III.

14 Ibid, Art. XIX.2. Further details of the shortcomings of the Claims Commission were considered in a previous edition of this bulletin: see R O'Grady, "Dispute Resolution in the Commercial Space Age: Are all Space-Farers Adequately Catered For?" (2021) 3 ICC Dispute Resolution Bulletin 54.

15 Ibid, Art. I(a). The definition covers "loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical, or property of international intergovernmental organizations".

16 Convention on Registration of Objects Launched into Outer Space (adopted on 14 Jan. 1975 and entered into force on 15 Sep. 1976), 1023 UNTS 15 (Registration Convention).

17 Ibid, Art. II. The same broad definition of "launching State" is applied as in the Liability Convention, but notably no dispute resolution mechanism exists to decide where registration should ultimately lie when a number of launching States fall within scope (e.g. where an object was manufactured in one State, owned by a company incorporated in another, and eventually launched by a further State). See e.g. J.W. Nelson, "Lost in Space? Gaps in the International Space Object Registration Regime" (*EJIL Talk*, 19 Nov. 2018).

18 Registration Convention (supra note 16), Art. IV.

19 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (adopted on 18 Dec. 1979 and entered into force on 11 July 1984), 1363 UNTS 22 ("Moon Convention"), with the fewest ratifications of just 18 State parties – fewer than the signatories to the Artemis Accords: see e.g. S. M. Wedenig, J.W. Nelson, "The Moon Agreement: Hanging by a Thread?", *McGill SGI Research Papers in Business, Finance, Law and Society*, Research Paper No. 2023-19.

20 Moon Convention, Art. 11(1). It also requires all activities on the Moon (including its exploration and use) to be carried out "in accordance with international law" (Art. 2).

21 Ibid, Art. 11(2). Neither the surface nor the subsurface nor any part of its natural resources shall become property of any State, intergovernmental organisation, or non-governmental organisation (Art. 11(3)).

22 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (adopted on 22 Apr. 1968 and entered into force on 3 Dec. 1968), 672 UNTS 119.

ii) Multilateral agreements

The most significant[23] multilateral agreements are the 2020 Artemis Accords (the "Accords") with 56 State signatories including the USA, the UK, Australia and Canada. The Accords establish a set of principles to regulate activities in space and also support NASA's Artemis programme. The Accords are said to be built on international law, including the Outer Space Treaty, which provides for the principle of non-appropriation.[24] Controversially, however, the Accords have taken a very liberal interpretation of that principle and provide that:

> "The extraction of space resources does not inherently constitute national appropriation".[25]

It is important to note, however, that the Accords are "political commitments"[26] and not binding on signatory nations or on private actors. They also do not make provision for dispute resolution.

iii) Domestic legislation

Several countries have enacted domestic laws and regulations to govern space activities.[27] By way of example, the **Space Industry Act 2018** and associated **Space Industry Regulations** in the United Kingdom impose a licensing regime with strict requirements as to safety,[28] qualifications, and training[29] for those who seek to conduct space activities from the United Kingdom.

Similar requirements are found in other domestic legislation[30] and reflect the growing preference for States to regulate the activities of their space actors to ensure suitable protections (for which the State will ultimately be liable under international law). Similarly, in France the domestic space law regime relating to space operations imposes an obligation to be covered by insurance or have an approved financial guarantee which must cover the risk of having to indemnify any damage caused to third parties.[31]

3. What disputes are we currently seeing?

Currently, space is predominantly being used for telecommunications (primarily via satellites), exploration, energy, science, and tourism. The disputes reported to date reflect this and include contractual disputes concerning, for example, payments due under satellite leasing agreements,[32] and claims for delays and defects in respect of satellite delivery agreements.[33] We have also seen a handful of claims brought against States by foreign investors seeking protection for their space-related investments under investment treaties.[34]

The increase in space launches[35] has also seen disputes arising out of damage caused by space debris, including on Earth.[36] A notable example saw Canada and the Soviet Union negotiate a Memorandum of Understanding to cover the clean-up costs of a nuclear-powered Soviet satellite which crashed in Canadian territory.[37] We also expect further disputes where debris

23 Other examples of multilateral agreements include, for example, the International Space Station Intergovernmental Agreement (adopted on 29 Jan. 1998 and entered into force on 27 Mar. 2001) TIAS 12927 (and signed by Canada, the USA, ESA, Japan, and Russia), and the Convention on the Establishment of a European Space Agency (adopted on 30 May 1975 and entered into force on 30 Oct. 1980) 1297 UNTS 161 (ESA Convention).

24 Outer Space Treaty (supra note 3), Art. II.

25 The Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes (signed 13 Oct. 2020) ("Artemis Accords"), s 10(2).

26 Ibid, s 1.

27 See e.g. the Basic Space Law 2008 (Law No. 43 of 2008) in Japan, and the Space (Launches and Returns) Act 2018 and Space Activities Regulations 2001 (Statutory Rules 2001 No 186) in Australia.

28 Space Industry Regulations 2021, SI 2021/792, in particular Part 8. See also A. Simmonds, "The Space Industry regulations 2021: Another Giant Leap?" (2021) 26(2) *Coventry Law Journal* 69-89.

29 Ibid, Part 7.

30 See e.g. in Luxembourg, Loi du 15 déc. 2020 portant sur les activités spatiales.

31 Loi n° 2008-518 du 3 juin 2008 relative aux opérations spatiales, Art. 6.

32 *Avanti Communications Group PLC v. Ministry of Defence of the Government of Indonesia* (LCIA) Details of the award are not published but its existence has been confirmed by the parties› counsel: see Jones Day, Avanti Communications recovers more than $20 million award against Indonesian MoD (Jones Day, July 2018).

33 *Insurers of Thuraya Satellite Telecommunications v. Boeing Satellite Systems International, Inc.* (2009). Details of the award are not published but its existence has been confirmed by Boeing's tax filings, see Troutman Pepper Locke, Boeing prevails in satellite arbitration (Lexology, 17 Feb. 2009).

34 See section 4(i) below.

35 UNOOSA data shows that as many as 2,849 objects were launched into space in 2024 alone, compared with just 241 a decade earlier: UNOOSA, Annual number of objects launched into space (*Our World in Data*, 2025).

36 See e.g. N. May, SpaceX capsule confirmed as source of space debris that crashed on farm in Australia (*The Guardian*, 4 Aug. 2022); M.A. Garcia, NASA Completes Analysis of Recovered Space Object (NASA, 15 April 2024).

37 Disintegration of COSMOS 954 over Canadian territory in 1978: Protocol between the Government of Canada and the Government of the Union of Soviet Socialist Republics (signed 2 April 1981).

causes damage to other space objects, particularly where the treaties are silent on space debris specifically but impose liability on States where damage is caused by an object which a State launches into outer space.[38]

4. What disputes are likely to arise and are we prepared for them?

In the future, it is not difficult to envisage space being used for many other exploits (e.g. entertainment, the exploitation of natural resources, war, art, medicine – the list is potentially endless). The disputes will no longer be restricted to State vs. State disputes; they will also be State vs. private entities, private entities vs. State, multiple States vs. private entities and vice versa, and private entities vs. private entities. Further, these disputes might not be based on contract or treaty. They could be non-contractual disputes such as tort, criminal liability, regulatory or security breaches, human rights issues and, of course, environmental disputes.

This article does not address all potential scenarios; however, we discuss below a few of the key issues we envisage may arise within the current legal framework.

i) Disputes between private entities and States

An obvious issue with the existing legal framework is the ability of private entities to claim against States in the light of sovereign immunity challenges, and also that the existing international law framework focuses on interstate liability.

The position private entities therefore find themselves in is similar to the situation faced by foreign investors before the rise of bilateral investment treaties ("BITs"), multilateral investment treaties ("MITs") and the advent of the ICSID Convention.[39]

Commentary on the point has suggested that a potential solution to this gap in the space law regime is either:

- to shoehorn such disputes into the existing investor-State dispute framework, or
- to create a framework that is similar to ICSID but that applies to disputes in space, for example a new International Centre for the Settlement of Outer-Space Disputes.[40]

There is merit in both of these suggestions. For example, space-related claims have already been brought against States by private actors under the ICSID Convention. These claims have ultimately, however, been in circumstances where the investor already has a connection with the State (e.g. by way of a qualifying "investment" in that territory on Earth) and where the State's actions have interfered with that investment.[41]

A key issue in shoehorning these disputes into the existing ICSID framework more generally is that not all disputes between private parties and States will qualify as "investment disputes" for the purposes of the existing investment treaty framework. To qualify as an investor-State dispute, the dispute must fall within the jurisdictional scope of the treaty or agreement. Disputes in space, however, might fail to meet the threshold for jurisdiction on a number of grounds, including the nationality of the "investor", the definition of "investment" and, more relevantly to outer space, the territorial jurisdiction of said "investment". As such, although adjudicating these disputes in the existing investment treaty framework might provide a solution in some cases, it is a far from universal solution for all potential disputes in outer space.

The proposal to create a new International Centre for the Settlement of Outer-Space Disputes could, in theory, be a workable solution to these challenges. The difficulty, however, is whether States would sign up to another legal regime that would arguably limit their sovereignty. This is particularly so given the recent trend of States becoming increasingly sceptical of investment treaties, evidenced by, for example, the EU, the UK and others breaking away from the *Energy Charter Treaty*,[42] and numerous other treaty terminations and renegotiations globally.[43]

---

38 See e.g. Outer Space Treaty (supra note 3), Art. VI; Liability Convention (supra note 10), Art. III.

39 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965 and entered into force 14 Oct. 1966), 575 UNTS 159.

40 R. O'Grady, "Star wars: the launch of extranational arbitration?" (2016) 82(4) *CIARb Arbitration Journal*, 380-390.

41 For example, in *Eutelsat S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/17/2, the claim was brought under the Mexico-France BIT and related to a decision by the Mexican government to require a Mexican satellite company to reserve capacity for use by the Mexican government.

42 Council of the EU, Energy Charter Treaty: Council gives final green light to EU's withdrawal (Council of the EU, Press release, 30 May 2024); International Energy Charter, Written notification of withdrawal from the Energy Charter Treaty (28 May 2024).

43 For example, India alone has terminated 77 ratified BITs since 2016: see Investment Treaty Arbitration: India (GAR, 26 Aug. 2025). See also infra note 44.

In 2023, for the third consecutive year, treaty terminations exceeded new international investment agreements and, between 2013 and 2022, 404 international investment agreements had been terminated.[44]

An alternative way in which private parties might be able to raise claims against States within the current framework is by utilising diplomatic avenues through "launching" or "registered" States. The principal UN Treaty addressing liability caused in space is drafted such that States bear ultimate responsibility for damage caused by space objects launched by private parties who use those States as "launching" States,[45] and those States therefore risk facing a claim for compensation for damage caused.[46] It might therefore be argued that the inverse responsibility ought to apply i.e. if a private actor registered in or launched from State A was damaged by a vehicle belonging to State B, that private party might require the government of State A to seek compensation from State B on its behalf.

Again, this solution is far from ideal and to provide comfort to the private entities, some robust domestic legal framework would need to be in place. For example, if it is required that the private entity must have adequate insurance cover (presumably, in part, to cover the scenario where they potentially cause some damage making their "launching" or "registered" State liable),[47] then there might be a reciprocal arrangement in place whereby the "launching" or "registered" State will pursue damages against the State that is liable for any loss or damage suffered by the private entity. The question is then whether a State would voluntarily enact such a requirement. An incentive, however, might be that enacting such requirements would help attract private actors to base their space operations in the State.

ii) Environmental impacts of space activities

Activities in space have the potential to impact Earth, the Earth's atmosphere, and potentially its climate. This impact could potentially be felt by all of humankind, regardless of classes or groups of humans, and regardless of nationality or any other social or political lines.

There are a number of potential issues with prosecuting such cases. It could be difficult to establish the elements of fault and/or causation, or even to establish jurisdiction, if the causative action takes place in outer space. These concerns are potentially similar to those we currently see on Earth in respect of environmental disputes. Parallels could, for example, be drawn with the carbon emissions case brought against Shell in the Netherlands, which recognised that producers of carbon intensive fossil fuels are responsible for reducing their emissions in efforts to achieve the goals of the Paris Agreement on climate change,[48] or with direct challenges by individuals impacted by climate change against producers of carbon emissions.[49] Given the recent ICJ Opinion "Obligations of States in Respect of Climate Change",[50] parties might also choose to base any claim in human rights law.

A potential answer might lie in class action regimes, but the same issues that are mentioned above in relation to disputes between private parties and States are likely to arise here. If the harm is caused by a State, how would a class of individuals file an action against a State with sovereign immunity? Where that harm is caused by a State, or group of States, the State from which the impacted private party is a national, will need to be willing to take up the cause. [51] It is difficult to envisage a State doing so in situations where there are numerous States impacted or where broader political considerations restrict its appetite to do so.

44 UNCTAD, Trends in the Investment Treaty Regime and a Reform Toolbox for the Energy Transition *(Investment Policy Hub*, 2023).

45 Liability Convention (supra note 10) imposes absolute liability on a state for damage caused by its objects on Earth (Art. II), and "fault"-based liability where that damage is caused in space (Art. III).

46 Ibid, Art. VIII.

47 As it is, for example, in France (supra note 31).

48 *Shell plc v. Vereniging Milieudefensie,* case number 200.302.332/01 Gerechtshof Den Haag.

49 See e.g. Luciano Lliuya v. RWE AG case number 5 U 15/17 OLG Hamm.

50 Obligations of States in Respect of Climate Change (Advisory Opinion, 2025), at para. 403.

51 Although the Liability Convention envisages that harm might be caused to a State's "natural or juridical person", ultimate responsibility for any such harm caused rests with the launching State: see Liability Convention (supra note 10) Arts. II and III.

iii) Resource utilisation issues

As the race for precious minerals accelerates on Earth, it is easy to see the race stretch into space. Research has shown that planets, asteroids, and the Moon are rich in various precious metals, minerals, gases, and water,[52] and it is only a matter of time before States and private actors seek to exploit these natural resources. Whilst the Outer Space Treaty protects space as "the province of all mankind",[53] including through its principle of non-appropriation,[54] the 2020 Artemis Accords (see 2(ii) above) have interpreted this broadly as meaning that the exploitation of minerals and natural resources is not prohibited, whilst also maintaining that signatories cannot claim sovereignty over any celestial body or its resources.

The scope for disputes is ripe, particularly given the tensions between the Outer Space Treaty and the Accords. What is more, the Accords make provision for its signatories to designate "deconfliction" safety zones to "avoid harmful interference" with their own activities.[55] The ambiguity this might present for signatories to attempt to assert control over certain areas[56] might present issues with territorial jurisdiction.

iv) Warfare/criminal concerns

Unfortunately, it is also likely that war and crime will continue to creep into space activities. Missiles launched from space, or criminal activity or assault taking place in space, do not feel too far from the the realms of possibility, or at least not to these authors. Although there might not be territorial jurisdiction in space, it is likely that States will be able to assume jurisdiction based on the nationality of any victim or even universal jurisdiction for crimes that breach *Jus Cogens* norms, and therefore any disputes can probably be dealt with using the existing legal infrastructure on Earth.

v) Rogue actors

As space becomes more accessible, a situation in which unregistered and unidentifiable private actors begin operating in space is conceivable. Without territorial jurisdiction in space, or an agreed supranational means to "police" space, it will be difficult to apportion fault or liability. It is likely, however, that in such cases States will have universal jurisdiction to prosecute for misconduct on the basis of law of piracy, for example.[57]

5. The role of arbitration

There are a number of the shortcomings with how the current state of international space law addresses potential disputes and, particularly, its limited provision for dispute resolution mechanisms.[58] However, private actors and States can try to mitigate their exposure to these challenges by providing for arbitration as a dispute resolution mechanism when contracting with each other, or indeed by agreement after a dispute has arisen.

As arbitration is consent-based and flexible, it can be adapted to novel scenarios, cross-border disputes and also disputes between States and private entities – making it an attractive option in the context of space disputes. Parties in arbitration can also choose a neutral seat of arbitration and choose their arbitrators. Importantly, arbitration is also confidential (if the parties so choose) and awards can be enforced in the 173 contracting States that have signed the New York Convention.[59]

Certain actors and inter-governmental bodies have already recognised this approach, with the European Space Agency[60] and Intelsat[61] including provision for arbitration in their standard contracts and constitutional documents. Indeed, the conventions which establish a number of intergovernmental organisations operating in space already provide for mandatory or optional arbitration as a method of dispute resolution.[62]

52 See e.g. Luxembourg Space Agency, Resources in Space (2025).

53 Outer Space Treaty (supra note 3), Art. I.

54 Ibid, Art. II.

55 Artemis Accords, s 11(7).

56 See e.g. J.W. Nelson, "Safety Zones: A Near-Term Legal Issue on the Moon" (2020) 44(2) *Journal of Space Law* 604.

57 Convention on the Law of the Sea (adopted on 10 Dec. 1982 and entered into force on 16 Nov 1994), 1833 UNTS 387, Art. 100.

58 See in particular R. O'Grady (2016) (supra note 40).

59 See status as at 9 Sep. 2025 (https://treaties.un.org). See also O'Grady (2021, supra note 14).

60 See General Clauses and Conditions for ESA Contracts, ESA/REG/002, Rev. 3, Art. 35.2.

61 Agreement relating to the International Telecommunications Satellite Organization (adopted on 20 Aug. 1971 and entered into force on 12 Feb. 1973), 1220 UNTS 21, Art. XVIII (INTELSAT); Operating Agreement relating to the International Telecommunications Satellite Organization (adopted on 20 Aug. 1971 and entered into force on 12 Feb. 1973), 1220 UNTS 149, Art. 20.

62 See e.g. the INTELSAT and ESA Convention (supra notes 60, 61); see also generally R. O'Grady (2016, supra note 40); and R. O'Grady (2021, supra note 14) at 56-57.

Arbitral institutions have also begun to recognise their future role in space disputes. The Permanent Court of Arbitration, for example, has developed the **Optional Rules for Arbitration of Disputes Relating to Outer Space Activities** (the "Space Rules")[63] which are intended to be industry-specific and provide for an automatic waiver of sovereign or other immunity. Similarly, the Dubai International Financial Centre has recently established its Courts of Space in an attempt to establish itself as a hub to resolve space disputes.[64]

As far as we are aware, neither of these have been used but provide useful case studies to watch as the area evolves.

6. Drafting for the space age: What can parties do to anticipate space disputes at the drafting stage?

Despite the challenges that may arise when operating in space, there are factors that parties can consider when setting up their legal relationships.

Parties should be aware of certain risks and may consider the following factors:

(i) the apportionment of liability;

(ii) potential third-party claims or liabilities;

(iii) insurance obligations;

(iv) applicable licensing regimes and domestic laws of any potential launching or registering State;

(v) registration of space objects; and, more importantly,

(vi) which law might be most suitable to apply any agreement – in this respect, and unless the circumstances require otherwise, there is probably merit in selecting a governing law with a sophisticated domestic space law legislation.

Beyond agreeing to arbitrate in the parties' individual contracts, where the parties envisage performing multiple operations in space together, they might also want to consider whether an umbrella dispute resolution agreement should be put in place to apply to a suite of contracts with the same party/parties or provide for the consolidation of related disputes. Careful drafting would obviously require that the umbrella agreement adequately covers the scope of the parties' intended operations, but there is clearly merit in parties with longer-term relationships agreeing an overarching mechanism for the resolution of disputes, particularly in circumstances as novel as those anticipated in space. And crucially, if contracting with a State or a State-owned entity, parties should ensure that issues around sovereign immunity are addressed in writing.

If considering an arbitration clause, parties should also consider carefully the seat of arbitration and also the institutional rules.[65] Particularly if contracting with States or State-owned entities, a good seat in an arbitration friendly jurisdiction is recommended.

7. Concluding remarks

With the rapid advancement of space related activities and in particular, exploitation and exploration from varied actors including from the private sector, the legal community will have to grapple swiftly with the current legal framework, particularly in relation to dispute resolution, in order to ensure the effective and fair management of space related disputes. For the time being, parties should be alive to the shortcomings of the current regime and seek to mitigate their exposure to the extent they can in their contracts and investment structures.

63 Permanent Court of Arbitration, Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (6 Dec. 2011) ("PCA Space Rules").

64 See DIFC Courts, Space Disputes Guide (2nd ed., Feb 2023)

65 Parties might also consider the PCA Space Rules (supra note 63) to govern the dispute, if appropriate.

ICC Institute Advanced Training on Interest in International Arbitration: How to Get It Right – Economic, Legal and Practical Considerations

Paris, 9 April 2025

Francisco J. Trebucq
Counsel, Swiss-Italian case management team, ICC International Court of Arbitration

The views expressed in this article are those of the author only and should not be thought to reflect those of ICC.

During the Paris Arbitration Week, alongside the 9th ICC European Conference on International Arbitration, the ICC Institute of World Business Law ("ICC Institute") held a training on interest in international arbitration – an issue of great practical importance that is sometimes overlooked. The panellists addressed the economic and legal basis for awarding interest and offered guidance to participants on how to navigate and avoid common practical and procedural pitfalls.

1. Interest from an economic perspective

In this first session, **Selma Baccari** (Senior Director, Expert Services, Kroll, France) and **Marion Gady** (Managing Director, FTI Consulting, France) introduced the economic basis and rationale for awarding interest, described the different types of interest and explained the relationship between interest rates and currency, exchange rates, and inflation.

While the interest rate is the most common area of disagreement between experts and counsel, the compounding of interest, the period for which interest runs, and the mere entitlement to interest are also highly debated. The panellists started with an explanation of the key distinction between pre-award and post-award interest and their different purposes:

- **Pre-award interest** compensates the time during which a party was deprived of the use of its money due to the other party's actions.
- **Post-award interest** incentivises the losing party to promptly satisfy the award and compensates any delay in receiving payment.

S. Baccari and M. Gady then explained that the calculation of interest depends on three main components: (i) the applicable interest rate, (ii) whether the interest is simple or compound, and (iii) currency.

(i) The applicable interest rate. The interest rate is meant to compensate for liquidity (i.e. being deprived of money), inflation (i.e. purchase power erosion) and risk (i.e. uncertainty of getting one's money back).

The rate may be fixed, if the same rate applies over the entire duration of the loan or period to be considered (e.g. 5% per year), or variable, if it fluctuates over time because it is based on an underlying benchmark interest rate (like EURIBOR, US prima rate, etc.), which changes periodically. In international arbitration, the most common rates are:

- The risk-free rate, which results from the assumption that absent the breach, funds would have been invested short-term in (almost) risk-free securities. A risk-free rate should take into consideration the inflation rate, the liquidity price and a risk premium.
- The statutory rate, provided for in national laws.
- Other possibilities include the contractual rate, the cost of debt of claimant (i.e. claimant had to borrow money due to the losses suffered), the costs of debt of respondent (i.e. claimant serves as a coerced lender to respondent), and the cost of capital.

The panellists asserted that, using the WACC ("weighted average cost of capital")[1] as a pre-award interest rate is tempting because it reflects the risk associated with cash flow of an investment or project, and helps determine an appropriate discount rate when calculating the present value of future cash flows. However, it is seldom awarded in practice. Typically, it is only awarded if the claimant can prove that a specific opportunity was missed due to insufficient funds and that the rate of return of said opportunity can be established with reasonable certainty.

(ii) Simple or a compound interest. Whether the rate is applied on a simple or a compound basis can significantly impact the calculations. Compound interest may also be calculated with variable periodicity (e.g. the US Prime rate is conventionally capitalised every three months). A shorter compounding period results in quicker accumulation of interest.

The panellists cited the 2023 PwC "International Arbitration Damages Study," which found that arbitral tribunals awarded compound interest in 81% of cases, rising to 90% for cases from 2013–2017.[2] The Study observes that arbitral tribunals award simple interest when this method is agreed by the parties, required under the applicable law, or when compound interest is prohibited by the applicable law. Regarding the periodicity, arbitral tribunals have a clear preference for annual compounding, followed by semi-annual compounding.

(iii) Interest currency. The panellists stressed the importance to use an interest rate that is consistent with the currency in which the claim is expressed, because interest rates vary between currencies due to factors such as inflation expectations, economic growth and country risks.

They added that it is important to consider the effect of inflation to avoid the interest being "eaten" by inflation. The nominal interest rate should account for inflation so that the real interest rate is reflected (e.g. if inflation is 2% and the nominal interest rate applicable to a claim is 5%, the claim would ultimately only generate 3% interest).

The panellists also emphasised the importance of considering interest rate parity, which reflects the relationship between interest rates and exchange rates over time.

2. Legal bases for awarding interest

Ndanga Kamau (Arbitrator, Ndanga Kamau Law, France; Council Member, ICC Institute; former Vice-President, ICC International Court of Arbitration) and **Matthew Secomb** (Partner & Head of International Arbitration Asia Pacific, White & Case, Singapore) opened with a historical perspective going back to the Code of Hammurabi, and stressing that one of the most influential opponents of interest was Aristotle, for whom charging interest on money was immoral. The situation did not change in the Middle Ages, when serious restrictions on interest were applied, as interest was seen as something inherently evil. It was only during the Reformation that there was a slow change of thinking, which would later be consolidated with the rise of international trade.[3]

N. Kamau and M. Secomb identified the following three legal bases for awarding interest: (i) the contract, (ii) a damage claim, and (iii) the applicable law.

(i) Contractual interest. Arbitrators normally respect the parties' agreements on interest, which can be found either in a clause dealing with late payments or in arbitral rules.[4] One debated issue in relation to clauses dealing with interest on specific payments is whether such a clause should also be applied to interest on other amounts claimed.

1 For more information, see e.g. Ch. Jonscher, Determining the Weighted Average Cost of Capital (Global Arbitration Review, 19 Dec. 2022)

2 international_arbitration_damages_study_2023.pdf, at p. 11.

3 For further research on the history of interest, the rate, the calculation method and period, see M. Secomb, *Interest in International Arbitration* (OUP, 2019), reviewed by S. Greenberg, in *ICC Dispute Resolution Bulletin* issue 2020-1.

4 See e.g. Art. 26.4, LCIA Arbitration Rules: "26.4 Unless the parties have agreed otherwise, the Arbitral Tribunal may order that simple or compound interest shall be paid by any party on any sum awarded at such rates as the Arbitral Tribunal decides to be appropriate (without being bound by rates of interest practised by any state court or other legal authority) in respect of any period which the Arbitral Tribunal decides to be appropriate ending not later than the date upon which the award is complied with."

(ii) Interest as damages. National laws, conventions, treaties, uniform laws and customary international laws are legal sources for granting interest as damages. The underlying grounds are the principles of full compensation, unjust enrichment or efficiency or deterrence reasons. The key question to consider when granting interest as damages is to comply with all the applicable requirements, like causation, remoteness, foreseeability, and certainty of the damage.

(iii) Interest awarded pursuant to the applicable law. Many issues can arise in this situation. There can be a potential issue of conflicts of laws, which can be straightforward when laws align and the same law applies to the merits and to the procedure, but can be challenging if they do not. Given that in civil law the issue of interest is governed by substantive law, whereas in common law it is a question of procedural law, both the *lex arbitri* and the law applicable to the merits could potentially claim to govern interest.[5] Furthermore, applicable laws may provide for limits, like caps on interest, or even prohibitions regarding interest, as is the case of Sharia law.[6]

N. Kamau and M. Secomb then explained how the three main components of interest, that is (i) rate, (ii) calculation method, and (iii) period, may be determined on the different legal bases.[7]

(i) Contractual, benchmark, statutory or reasonable rates. The source for the rate can be contractual, even if contracts do not always provide for a specific interest rate and arbitral rules normally grant discretion to arbitrators in this regard. If the source is the damages claim, a rate specifically attached to the party, like WACC, could be used; if not, a commercial rate is normally applied. If interest is granted under an applicable law, such law usually will either provide for a fixed statutory rate or that the arbitrator can determine a reasonable rate.

(ii) Calculation method. Contracts are usually silent as to the calculation method but arbitral rules could be helpful to determine whether simple or compound interest is to be applied. Applicable laws usually provide for simple interest, normally attached to a statutory rate, or grant arbitrators discretion to determine the rate. When the source of interest is damages, a compound interest is almost certainly applied, unless the applicable law prohibits compound interest.

(iii) Determination of the period. Both the date when interest starts running (either date of the breach, loss, demand for payment, institution of legal proceedings or the award) and the date when interest stops running (usually, until full payment) have to be determined. Usually either the applicable law or a contractual provision deal with this.

3. Practical and procedural issues – Tips for counsel and arbitrators

Noiana Marigo (Partner, Global Co-Head of International Arbitration, Freshfields US LLP, New York) and **Philippe Cavalieros** (Partner & Global Co-head of International Arbitration, Simmons & Simmons LLP, Paris; Member, ICC Institute) approached interest from the perspective of what is expected from both counsel and tribunals. They observed that, according to prominent practitioners, interest awards were anarchical, detached from legal and policy reasons or even varied and inconsistent, and certainly difficult to anticipate. The panellists referenced a 2016 PwC survey on 100 awards,[8] which found that in 60% of cases there was no discussion or rationale behind awarded interest.

5 For example, in a dispute seated in London relating to a contract governed by French law, both section 49 of the English Arbitration Act (which grants broad discretion to the arbitrators, including for compounding interest) and article 1231-6 of the French civil code (which provides for default 7.21% simple interest) could potentially apply.

6 See A. Tanielian Fadel, C. Dugué, The Suitability of Arbitration and ADR to Resolve Financial Disputes: Islamic Finance and the Emerging Disputes in the Digitalised Financial Sector, *ICC Dispute Resolution Bulletin*, 2023-3. See also H. Arfazadeh, A Practitioner's Approach to Interest Claims under Sharia Law in International Arbitration; and T.F. Riad, The Issue of Interest in Middle East Laws and Islamic Law in *Interest, Auxiliary and Alternative Remedies in International Arbitration*, F. de Ly, L. Levy (eds.) (Dossier V, ICC Institute of World Business Law, 2008),

7 For an analysis of interest in past ICC Awards, see L. Hammoud, M. Secomb, Interest in ICC Arbitral Awards: Introduction and Commentary, *ICC Dispute Resolution Bulletin*, Vol. 15-1, 2004.

8 Dispute Perspectives - Tribunals' Conflicts on Interest (PwC, 2016).

Issues related to interest frequently arise during the scrutiny of ICC draft awards before the ICC International Court of Arbitration.[9] The panellists provided the five following recommendations for counsel and arbitrators:

1. **Think about the issue early on**. Start with the basics, and analyse whether the contract has a provision for interest. If not, check whether the arbitrators have the power to award interest, what is the legal regime for interest under the applicable law, and whether there are impediments in the law of the seat.
2. **A request at a WACC rate should involve an expert.** In **investment cases**, the theory of coerced loan is a good alternative as it can be argued that the State should pay to the investor the amount it would have paid to a bank. However, this can sometimes be used more as a sanity check since it does not focus on the claimant's damage.
3. **When should a request for interest be presented?** The different qualification of interest in civil law (substantive issue) and common law (procedural issue) is again relevant in this regard, as reserving the right to claim interest later may be prejudicial to the claim in civil law jurisdictions.
4. **If interest is requested but not properly pleaded**. Arbitrators can request the parties' comments at a suitable time, while remembering it is not their role to correct weak arguments from counsel. In any case, arbitrators ensure that the award is not put at risk.
5. **If the proceedings are closed** and the arbitrators realise during their deliberations that an important aspect of the interest claim is missing, it may be appropriate to reopen the debate.

ICC thanks the sponsors of the 9th ICC European Conference on International Arbitration and ICC Institute Advance Training on Interest: Diales, JS Held, Linklaters, Bates White, European Research Council, Jus Mundi. For sponsorship opportunities, see https://iccwbo.org/become-a-member/partnership-and-sponsorship-opportunites/.

This training was developed by the following ICC Institute Council members: Jacob Grierson (Partner, Anima Dispute Resolution, France); José Miguel Júdice (Independent Arbitrator, Portugal); and Ndanga Kamau (Arbitrator, Ndanga Kamau Law, France; former Vice-President, ICC International Court of Arbitration).
For more information on the ICC Institute of World Business Law, its activities and membership, please visit www.iccwbo.org/icc-institute.

9 See "Ten Tips on How to Make an Arbitration Award Work: Lessons from the ICC Scrutiny Process", *ICC Dispute Resolution Bulletin*, issue 2022-2: "Interest – seek clarifications from the parties when appropriate": "Parties often neglect to address in sufficient detail issues pertaining to interest, and instead make a general conclusory request for interest or rely upon a general statement at the end of their submissions requesting from the arbitral tribunal any relief that the arbitral tribunal may deem appropriate. Arbitral tribunals in draft awards also frequently give insufficient attention to requests for interest, especially in cases in which the parties have not provided fulsome submissions on the issue. Issues regarding interest which may need further attention include: (i) whether the party seeks interest on all amounts awarded, including arbitration costs, or only on certain amounts; (ii) the start and end dates for the calculation of interest; (iii) the applicable rate; (iv) whether interest should be simple or compound; and (v) whether post-award interest should run on accumulated pre-award interest in addition to the principal claims, at the same rate, or at a different rate. To avoid the need to seek supplemental submissions on interest at a late stage of the proceedings, arbitral tribunals should ensure that the parties have fully ventilated the issues in their submissions. When drafting the award, the arbitral tribunal can then fully state the reasons for its decision to grant or deny the request for interest, with reference to the parties' submissions, and if interest is awarded, its justifications for the type of interest awarded".

ICC International Mediation Week

12th ICC International Mediation Roundtable: The Role of Counsel in Mediation

Paris, 7 February 2025

Tat Lim

IMI-Certified Mediator and Mediation Advocate; Maxwell Mediators/Aequitas Law LLP, Singapore; Chair, International Mediation Institute; Board Member, International Academy of Mediators, Singapore Mediation Centre; IBA Mediation Committee Advisory Board

During the 20th ICC Mediation Competition – the ICC largest educational event bringing together students from 47 universities from 31 countries – the 120+ professionals and academics acting as judges and/or mediators also shared knowledge and best practices at the ICC International Mediation Roundtable that typically includes interactive workshops, engaging discussions and dynamic plenary sessions. This year's Roundtable addressed the "Role of counsel in mediation. The 21st ICC Mediation Competition will be hosted in Paris on 2-7 February 2026.

Introduction

Alya Ladjimi (ADR Counsel, ICC International Centre for ADR, Paris) welcomed the participants and returning professionals, and opened the 12th Mediation Roundtable, which also marks a significant milestone: the 20th edition of the ICC International Commercial Mediation Competition. This year's session explores the pivotal, but sometimes problematic, role of counsel in mediation "zealous Advocate vs. Facilitator of Settlement".

The panellists comprised **Diego Faleck** (Mediator, Partner, Faleck & Associados, Brazil), **Adeyemi Agbelusi** (Mediator and Arbitrator, United Kingdom), **Olivier Cuperlier** (Lawyer, Mediator and Arbitrator, France) and **Catherine Davidson** (Mediator, Facilitator, Conflict Management Consultant, Australia), and was moderated by **Natascha Tunkel** (Lawyer and Mediator, Partner, Knoetzl, Austria).

1. What do clients and mediators expect from counsel in mediation?

The Roundtable opened with reflections on the varied contributions that lawyers make to the mediation process. Several themes emerged regarding what mediators and clients expect from counsel:

- **Zealous advocacy vs. collaborative support.** While committed representation is valued, overzealousness may be counterproductive. Counsel should provide guidance in a manner that is supportive rather than authoritative, ensuring that clients feel heard and empowered.
- **Understanding roles**. The differing roles that lawyers (such as solicitors, barristers, senior counsel) may have in the mediation process were discussed. In-house counsel were often seen as quasi-parties and should be treated accordingly.
- **Emotional intelligence.** Emotional support from counsel was highlighted as crucial. Lawyers who can provide reassurance and reality checks – particularly regarding litigation risks – help clients navigate mediation more effectively.

While many lawyers act as effective partners – helping clients navigate the emotional and commercial dimensions of conflict – others may unintentionally hinder participation, either by dominating dialogue or advising against mediation altogether. Lawyers should help clients know what mediation is about. This may be difficult in the beginning because of clients' inertia or resistance towards mediation.

The panellists noted that counsel often find it difficult to shift out of adversarial mindsets. Some lawyers are unfamiliar with mediation principles or resist client autonomy. Others, however, demonstrate impressive emotional intelligence – helping clients regulate expectations and frame choices more constructively.

2. Preparation for mediation

Preparation emerged as a recurring theme across jurisdictions and practice styles:

- **Client education.** Lawyers should help clients understand the nature of mediation, including the expectation that clients will actively participate. This is particularly important in jurisdictions where the court process dominates clients' expectations. In such jurisdictions, lawyers may need to educate the clients that they are in mediation not to be adversarial but to cooperate with the other party in order to find a mutually acceptable outcome.
- **Pre-mediation meetings.** Preliminary sessions allow mediators to assess the preparedness of counsel and client, set expectations, and address relational dynamics at the table.
- **Framing and language.** Lawyers were encouraged to frame their language for persuasion and relationship-building, rather than adversarial posturing. Mediators noted the impact of word choices and tone in opening statements and submissions.

Pre-mediation preparation was highlighted as a critical phase. Counsel is encouraged to help clients understand the non-adversarial nature of mediation and to explore not only legal rights, but commercial interests and psychological readiness.

A panellist suggested using the pre-mediation meetings to find out whether clients are prepared for the mediation. Counsel should also work with clients to determine how much autonomy the clients would like to exercise during the mediation process.

3. During the mediation

There was a lively discussion on the role of counsel during the mediation process, particularly on the following themes: (i) managing dynamics; (ii) cross-caucusing; and (iii) ethics and coaching.

i) Managing dynamics

Mediators frequently deal with scenarios in which counsel overshadows client and face the challenge of counsel who speak too much – or too little. While some advocates dominate proceedings, others are silent to a fault. Strategies include inviting clients to speak, structuring joint sessions to include all voices, and creating space for emotional expression. Encouraging balanced contributions, including directly inviting clients to speak or using joint and private sessions strategically, emerged as best practice.

A panellist said that she, as a mediator, welcomed lawyers being open and saying anything they wanted to say. In her mediations, she would invite people in the room to speak openly, and she may provide suggestions when appropriate. A participant raised the concern that if lawyers spoke, the clients would not speak.

Another panellist felt that there was nothing wrong with a lawyer starting with a strong position. If that lawyer maintained that position later in the mediation, he (as a mediator) would sometimes ask if the lawyer was prepared to provide a guarantee that the client would surely win in court, and that would usually put a stop to posturing.

Yet another panellist emphasised that counsel must be aligned with the clients' mission and interest and be the agent of reality to the client.

ii) Cross-caucusing

Widely used and often effective, cross-caucuses were described as essential in certain mediations, especially when lawyers needed to "vent" legal arguments or required support in reframing strategies.

One panellist said that as a mediator, he frequently engages lawyers in cross caucus. Cross-caucusing – especially with lawyers – was widely endorsed as a tool for aligning strategies, managing ego, and enhancing trust. Several mediators described using cross caucuses almost exclusively, finding them particularly effective for venting legal arguments and then shifting toward commercial resolution.

The panellists also discussed the situations that may be tantamount to misbehavior or misconduct by counsel. One panellist referred to Italian legislation that requires lawyers to participate in the mediation process in good faith and fairness. Another panellist said that when she was faced with difficult counsel, she would speak to the lawyers privately to remind them of their duties under the mediation agreement and point out that their conduct should not be incongruent with the spirit of mediation.

Participants also weighed in with their views:

- One participant suggested that mediators are too soft on lawyers. He felt that some lawyers do not approach mediation with the needs and interest of the clients and perceive the ADR process as an "alarming drop of revenue" for their firms. Lawyers' fees are one of the obstacles for mediation to be successful, with the hourly rate being a problem that leads to disproportionate fees.
- Another participant spoke about using the pre-mediation process to set the tone and allow parties to "get things off their chest". In these instances, the mediator can be an audience for the lawyers and emphasise the need to shift the focus during mediation from discussing legal positions to looking for viable business propositions.
- Other participants spoke about the mediator's role in addressing the lawyers' interest and expectations as part of the mediation process, and providing guidance and support to lawyers who are unfamiliar with the mediation process. One participant remarked that mediation is not just about finding a settlement but changing the perception of the disputing parties.

The choice of language was discussed at length. Mediators shared how subtle shifts in tone or phrasing can influence party behaviour. One panellist referenced a Brazilian saying – "If you smoke too much, your mouth gets crooked" – to emphasise how habitual framing can impair communication. Participants agreed that coaching counsel on framing their language can be essential, particularly in high-stakes mediations.

iii) Ethics and coaching

While coaching and relationship-building were praised, ethical boundaries were flagged. For instance, mediators were cautioned about reputational risk when fulfilling unusual requests from counsel or being drawn into tactical theatre.

Several scenarios illustrated the complexity of the mediator-counsel relationship. Some mediators shared experiences of lawyers who orchestrated performative advocacy, asking mediators to "cut them down" in front of clients as a negotiation strategy. These raised ethical questions about the mediator's role and professional boundaries.[1]

A participant raised the question of "coaching" – to what extent does coaching by the mediator become ethically questionable. He highlighted a case involving a lawyer who, with the mediator's agreement, engaged in a pre-orchestrated dialogue and discussion between the lawyer and the mediator on the merits of the clients' case during a private caucus. The episode leaves the client impressed, but is this ethical?

Preparation often involves a dual audience: the client and their lawyer. Mediators discussed their evolving role as informal coaches – not just to clients but to repeat-player counsel. Managing this duality, while remaining neutral and preserving process integrity, was seen as a delicate but vital balancing act.

1 Participants also shared and reflected diverse legal cultures. In Italy, mandatory mediation legislation requires parties and counsel to act in good faith, supported by professional codes of conduct. In California, ethical duties oblige lawyers to explain ADR options to clients – promoting early awareness and informed decision-making.

4. Settlement agreement

The final segment turned to the conclusion of the process, where the final stages of mediation demanded thoughtful counsel participation:

- **Precision and clarity**. Counsel are instrumental in crafting enforceable and comprehensive agreements. Their legal acumen helps safeguard future relationships and resolve residual ambiguities.
- **Mediator involvement post-session.** Continued mediator involvement – through remote conferences or follow-ups – was cited as a key factor in ensuring complex or cross-border settlements were concluded effectively.
- **Fee structures and engagement.** The discussion touched on whether mediators should be compensated through settlement terms and how to maintain involvement if matters become protracted.

Lawyers' expertise is critical in ensuring settlement agreements are enforceable, precise, and forward-looking.[2] Yet, mediators were reminded of their ongoing value even after the main session concludes – whether by drafting, follow-up, or simply remaining a "life jacket" to prevent deals from sinking under complexity.

Closing reflections

The Roundtable concluded with a reflection on the ideal evolution of counsel's role – from gatekeepers to active supporters of the mediation process.

In closing, the moderator observed that the Roundtable had come a full circle – from discussing what mediators and clients need from counsel, to acknowledging that counsel themselves increasingly rely on skilled mediators to keep negotiations moving.

The mediator's role as process architect, confidant, coach, and ethical guardian has never been more vital.

ICC thanks the sponsors Roger Ni (Zenith Law Firm) and Francisco Alcaron (Centro de Mediación Emprasarial "CME"), **and friends of the 20th Mediation Competition** Gary Frederick Birnberg, John James Lag, Liana Gorberg Valdetaro and LGC Resolução de Conflitos Dispute Resolution, Dr. Tomasz P. Antszékek and Gary Webber (The Property Mediators) of the **ICC 20th Mediation Competition**.[3]

A recording of the final session is also available on the ICC Official YouTube channel @ICCWBO1919.

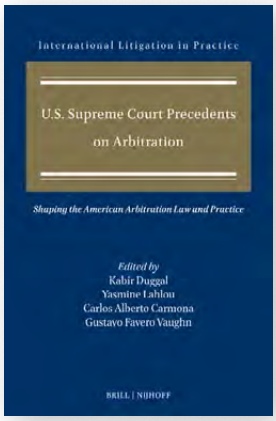
2 A participant shared that, in Uzbekistan, emerging practices where mediators are asked to "seal" pre-agreed settlements to recover court fees – raising red flags about voluntariness and misuse.

3 For sponsorship opportunities, please visit https://iccwbo.org/become-a-member/partnership-and-sponsorship-opportunities/

U.S. Supreme Court Precedents on Arbitration

A Decidedly Pro-arbitration Policy Fashioned over 80 Years

Sarah E. Reynolds
Head of International and Domestic Arbitration, Kaplan & Grady LLP, Chicago



U.S. Supreme Court Precedents on Arbitration: Shaping the American Arbitration Law and Practice

By Kabir Duggal, Yasmine Lahlou, Carlos Alberto Carmona, Gustavo Favero Vaughn (eds.)
Brill/Nijhoff, 2025
470 pages
ISBN: 9789004715813
E-book ISBN: 9789004715820

Introduction

Few subjects in American procedural law have undergone such profound transformation in recent decades as arbitration. Once considered a marginal tool for resolving commercial disputes, arbitration has become an essential feature of the U.S. legal landscape, affecting consumer contracts, employment relationships, and international and transnational disputes. Much of this evolution can be traced directly to the decisions of the United States Supreme Court. It is against this backdrop that U.S. Supreme Court Precedents on Arbitration emerges as both a timely and indispensable volume. The book not only compiles the most consequential opinions of the Court but also situates them within broader doctrinal and policy debates, making it a resource of extraordinary value for practitioners, scholars, and students alike.

Prestige of the authors and contributors[1]

The authority of any work of legal commentary depends on the credibility and expertise of its contributors, and in this respect U.S. Supreme Court Precedents on Arbitration is unimpeachable. The book draws together a roster of leading figures in arbitration law: seasoned arbitrators, prominent academics, and practitioners with extensive experience before both arbitral tribunals and U.S. courts. The contributors are global leaders in this field. Their names alone signal gravitas, but more importantly, their commentary reflects decades of lived experience in arbitration practice and scholarship.

The editors – whose backgrounds span private practice, academia, and judicial service –bring complementary perspectives that ensure both breadth and depth. They not only summarise cases but also contextualise them, weaving together doctrinal strands with real-world implications. This combination of scholarly rigor and practical insight elevates the book above a simple case digest, giving it enduring relevance.

1 Rafael Francisco Alves, Rafael Stefanini Auilo, Zeinab Bailoun, Jessica Beess und Chrostin, Andrew Behrman, Yining Bei, Gary L. Benton, Caetano Berenguer, George A. Bermann, João Lucas Bevilacqua, Preeti Bhagnani, R. Doak Bishop, Jonathan I. Blackman, Michael B. Carlinsky, Peter E. Carzis, Felipe Conrado, Eduardo Damião Gonçalves, Erico Bomfim de Carvalho, Katharine Menéndez de la Cuesta, Marcel Engholm, John Fellas, Michael A. Fernández, Andrew Finn, Peter Fox, Elliot Friedman, James Fullmer, Katie L. Gonzalez, Surya Gopalan, Grant Hanessian, Samaa Haridi, Stephen Hogan-Mitchell, James Hosking, Pedro José Izquierdo, Zachary Kady, Sherman Kahn, Mark Kantor, Lea Haber Kuck, Laura Lambert da Costa, Andre Luis Monteiro, Alex Lupsaiu, Dana MacGrath, Ari D. MacKinnon, Peter J. Messitte†, Rahim Moloo, Boaz S. Morag, Caline Mouawad, Arthur Gonzalez Cronemberger Parente, Laura França Pereira, Rekha Rangachari, Fabiano Robalinho, Cameron Russell, Peter B. Rutledge, Matheus Soubhia Sanches, Ank Santens, Daniel Schimmel, Peter C. Sester, Steven Skulnik, Liz Snodgrass,Rodrigo Tannuri, Shrutih Tewarie, Marcio Vasconcellos, Carlos Mário da Silva Velloso, João Carlos Banhos Velloso, Gretta Walters and Flávio Luiz Yarshell.

Structure and coverage

The book is carefully structured to guide readers from foundational principles to cutting-edge issues. After a nuanced discussion of the Supreme Court's supportive position of arbitration, the book begins with the early interpretation of the Federal Arbitration Act (FAA), explaining how the Supreme Court ("the Court") overcame judicial hostility to arbitration and laid the groundwork for federal preemption of contrary state law. The book further examines:

- Gateway questions like whether a court or arbitrator decides jurisdiction, arbitrability of a claim, or validity of an underlying agreement to arbitrate; how securities and anti-trust claims came to be arbitrable, separability and evident partiality of the arbitrator.
- The Court's efforts to protect arbitration from discriminatory state laws (e.g., NY appeals court's attempt to limit arbitrator's authority to grant punitive damages).
- Class arbitration and collective actions: a particularly dynamic area where the Court's rulings have had sweeping implications for consumer and employment disputes.
- U.S. courts' ability to order discovery under 28 U.S.C. § 1782(a) in a foreign or international tribunal – a section of the law that resulted in mind-bending circuit splits that created uncertainty around these questions for decades.
- International arbitration: the Court's role in interpreting the New York Convention and its interaction with U.S. domestic law.
- The scope for court litigation proceedings to continue while an appeal of a motion to compel arbitration is pending.
- Enforcement and judicial review of awards, including whether "manifest disregard of the law" is a basis for vacatur in the United States, whether non-signatories to an arbitration agreement can be compelled to arbitrate and whether RICO creates civil liability for debtors who make fraudulent efforts to avoid enforcement of arbitration awards in the United States.

The chapters contain concise summaries followed by trenchant commentary. Rather than overwhelming readers with minutiae, the editors distill the essence of each decision and then explain its ripple effects across practice and policy.

The importance of Supreme Court jurisprudence in U.S. arbitration law

The Supreme Court's arbitration jurisprudence has played a central role in shaping the contours of American arbitration law. Beginning with the Court's mid-twentieth century embrace of the FAA as a substantive national policy favoring arbitration, and continuing through modern cases on class action waivers, arbitrability, and federal preemption, the Court has consistently thrust arbitration to the center of legal debate.

U.S. Supreme Court Precedents on Arbitration highlights this trajectory with remarkable clarity. The book demonstrates how the Court's attention to arbitration is not episodic or incidental; rather, it is sustained and deeply influential. Arbitration has become a recurring item on the Court's docket because it implicates fundamental issues of federalism, contractual freedom, and access to justice. For lawyers seeking to understand the present state of dispute resolution in America, the Court's arbitration cases are not a niche subject but a cornerstone.

The book makes plain the Supreme Court overarching project: establishing arbitration not as a marginal alternative, but as a coequal – and in many cases, preferred – mechanism for adjudicating disputes – but not without highlighting nuances in the Court's decisions that contribute to the complexity of the U.S. arbitration legal regime.

The Supreme Court did so by its steadfast adherence to some fundamental principles such as that federal pro-arbitration policy preempts any inconsistent state law, or arbitration agreements must be treated "on an equal footing with other contracts", that are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract", and that any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration interpreted according to their terms.

Significance of the subject

One of the book's most striking contributions is its demonstration of how Supreme Court jurisprudence is indispensable to understanding American arbitration law. Unlike many areas where statutory text or agency regulation supply the primary framework, arbitration law in the U.S. is overwhelmingly case law-driven. The FAA, passed in 1925, is a remarkably short statute, and its text has remained largely unaltered in the intervening 100 years. The richness of arbitration doctrine – whether questions of arbitrability, separability of arbitration agreements, enforceability of arbitral awards, or the preemptive power of the FAA over state law – comes almost entirely from judicial interpretation.

The Supreme Court's role in this process is decisive. The book shows how the Court has repeatedly expanded arbitration's reach, often reading the FAA broadly to preempt state attempts at restriction. Decisions such as *Moses H. Cone Memorial Hospital v. Mercury Construction* (1983), in which the Court emphasised a strong federal policy favoring arbitration and instructed that doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, and *AT&T Mobility v. Concepcion* (2011), where it held that the FAA preempted state laws invalidating class-action waivers in arbitration agreements, illustrate how the Court has fashioned arbitration law less from legislative amendments than from its own interpretive authority. For anyone practicing arbitration in the United States, familiarity with these precedents is foundational.

Insightfulness of the commentary

What sets the book apart is the quality of its commentary. Rather than adopting a purely descriptive posture, the contributors engage with the cases critically, highlighting doctrinal tensions and policy consequences. They point out, for example, how the Court's expansive reading of the FAA has generated criticism for limiting access to class remedies, and how the Court's emphasis on contractual freedom has sometimes clashed with concerns about unequal bargaining power.

At the same time, the commentary is not polemical. The tone is measured, balanced, and aimed at equipping readers to understand rather than to persuade. This is particularly valuable in a field where scholarly writing can sometimes skew toward advocacy. The book offers a clear-eyed appraisal of the Court's jurisprudence while acknowledging its complexity, nuances and significance.

The commentary also excels in connecting Supreme Court cases to broader international trends. Readers are reminded that given that arbitration is a global phenomenon, the U.S. Supreme Court's distinctive jurisprudence has influenced both domestic practice and the way U.S. parties are perceived in international arbitration. This comparative awareness broadens the book's appeal beyond U.S. practitioners, making it valuable for international counsel and arbitrators who encounter U.S. parties or enforcement issues.

Contribution to the literature

While there are many casebooks and treatises on arbitration, few works focus so squarely on the Supreme Court's role. This focus is a strength given the foundational role the court has played in establishing American arbitration law. By distilling the jurisprudence of the nation's highest court, the book becomes an essential companion to broader arbitration texts. It does not attempt to be exhaustive of all arbitration law; instead, it carves out a precise and vital niche. By assembling these cases in one volume, the book provides both a map and a compass. It enables readers to see not only the current terrain but also the doctrinal pathways by which the Court arrived there.

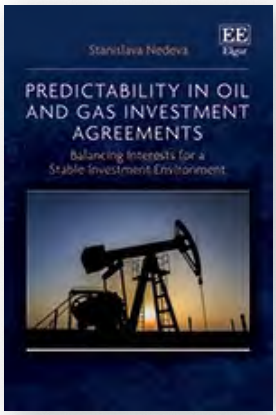
U.S. Supreme Court Precedents on Arbitration is more than a collection of cases – it is a commentary on the transformation of the U.S dispute resolution. By highlighting the prestige of its contributors, the volume assures readers of its reliability; by showcasing the Supreme Court's central role, it underscores arbitration's importance in U.S. law; and by providing insightful commentary, it equips readers to think critically about the path ahead. For law students, it serves as a primer on how to approach arbitration cases, offering clarity in a field often perceived as arcane. For practitioners, it provides an efficient reference, gathering the most significant precedents in one place. For scholars, it provides a framework for analyzing the Court's evolving philosophy of dispute resolution.

In an era when arbitration touches nearly every sector of American life, from the consumer contracts we sign to the international agreements that underpin global commerce, this book is not merely useful but indispensable. It belongs on the shelf of every serious arbitration practitioner, academic, and student, in the U.S. and abroad.

Predictability and Stability in Oil and Gas Contracts
Navigating Investor Protection and State Sovereignty

Anzhela Torosyan

Associate, Teynier Pic, Paris; Doctor of Philosophy; PhD Thesis "Energy security and international law", University Paris-II Panthéon-Assas (2019)



Predictability in Oil and Gas Investment Agreements: Balancing Interests for a Stable Investment Environment

By Stanislava Nedeva
Edward Elgar Publishing, 2024; 288 pages
ISBN: 978-1-03530-829-3

In the field of energy – particularly in the oil and gas sectors – relations between investors (often large oil companies) and host States are frequently marked by tensions and conflicts of interest. Given their strategic importance to host states, investments in the energy sector involve significant State control, especially through the admission, regulation, and supervision of exploration and production activities. This has led to what certain authors and studies refer to as "resource nationalism" or the attempt to restrict the operations of private international oil companies and assert greater national control over natural resources, especially in the oil and gas sector.[1]

The book *Predictability in Oil and Gas Investment Agreements: Balancing Interests for a Stable Investment Environment* – divided in eight chapters – provides insight into the mechanisms that promote legal and commercial stability in the volatile oil and gas sector. One of the book's strengths is its balanced perspective of the need (i) for investor protection and (ii) the sovereignty and public interest responsibilities of host States. Investors seek contractual stability and legal predictability, while States need flexibility to protect public interests. Overall, Dr Stanislava Nedeva (Lecturer in Law, School of Law and Politics, Cardiff University) provides a compelling legal and theoretical exploration of the concepts of certainty and predictability within international oil and gas contracts, offering practical suggestions for their implementation.

Chapter 1 **"Introduction to Predictability in Oil and Gas Investment"** underscores the strategic and economic importance of oil and gas as high-value resources that attract significant foreign investments. The chapter notes the volatility of these resources and their exposure to multiple external factors. It compares the three main industry contract types – concession, production sharing, and risk service agreements – each showing different allocations of risk and control.

The chapter then sets forth the book's central question: how to achieve certainty and predictability to mitigate political risks (especially indirect expropriation) through established legal principles and mechanisms, such as good faith, fair and equitable treatment (FET) standards, stabilisation clauses, and adaptation clauses?

Chapter 2 **"The importance of certainty and predictability in oil and gas investment contracts"** begins with a legal and theoretical discussion on how the concepts of certainty and predictability are defined by academic scholars and applied in English law,[2] ECJ,[3]

1 P. Stevens, "National oil companies and international oil companies in the Middle East: Under the shadow of government and the resource nationalism cycle", *JWELB*, Vol. 1, no 1, 2008, pp. 5-30 ; G. Joffé, "Expropriation of oil and gas investments: Historical, legal and economic perspectives in a new age of resource nationalism", *J. World Energy Law Bus.*, vol. 2, no 1, 2009.

2 See e.g. *Vallejo v. Wheeler* (1774) 1 Cowp 143, 153 (Lord Mansfield), *Patel v. Mirza* UKSC 42; AC 467, 503, *Jindal Iron and Steel Co Ltd. and others v. Islamic Solidarity Shipping Company Jordan Inc* ('The Jordan II') UKHL 49, *Golden Strait Corporation v. Nippon Yusen Kubishka Kaisha* (The Golden Victory) UKHL 12; 2 AC 353, 378 (Lord Bingham).

3 Notably, the case *S.N.U.P.A.T. v. High Authority of the European Coal and Steel Community* (Joined Cases 42/59 and 49/59) establishes that legal certainty is not an absolute virtue but must be balanced with legality and public interest considerations. Other significant references include Case C-181/04 – 183/04 *Elmeke NE v. Ypourgos Oikonomikon, Kühne & Heitz v. Productschap voor Pluimvee en Eieren*, Case 314/85 *Firma Fotofrost v. Hauptzollamt Lübeck-Ost*, and Case C-325/91 *France v. The EC Commission*, which all reinforce the requirement that EU law must be clear, foreseeable, and accessible to those subject to it. The jurisprudence also highlights that predictability and foreseeability are essential components of legal certainty, as seen in Case C-345/06 *Heinrich* and Case C-110/03 *Belgium v. Commission*. Furthermore, the principle of non-retroactivity of the law is affirmed in Case 84/78 *Tomadini v. Amministrazione delle Finanze dello Stato* etc.

and ECHR[4] case law, specifically highlighting the role that certainty and predictability may play in mitigating political risks and securing investment stability.

The author stresses their relevance in contexts where investor-state conflicts are most acute, highlighting two key dimensions:

- **The "clash of norms" or the inherent conflict between**: (i) the State permanent sovereignty over its natural resources[5] (via the ability to take measures to allow or deny entry to foreign investors, to set terms, conditions, and limitations on foreign access to natural resource, or adopt unilateral legislative or regulatory changes); and (ii) the principle of sanctity of contract (*Pacta Sunt Servanda*). The author explains that this inherent conflict is particularly evident in oil and gas contracts, which are long-term and capital-intensive. While such contracts require stability, the host States may seek flexibility to adapt to political, economic, or environmental changes.
- **The fact that investors and States pursue different and conflicting interests**. Investors are profit-oriented and mainly seek to recover and protect their investments against risks. States may pursue other values, such as increasing revenue and reducing financial risk during petroleum operations, developing their energy industry and meeting domestic consumption demands. To achieve this, States encourage foreign investment in the development of their natural resources, while retaining some control over the resources.

The book concludes that a stable investment environment requires acknowledging and addressing these conflicting objectives. The author recommends precise contractual drafting, including stabilisation and renegotiation clauses, to balance investor rights with state sovereignty.[6]

Chapter 3 **"The Pursuit of Good Faith in Oil and Gas Contracts and Arbitrations**" examines the concept of "good faith" across public international law,[7] private international law,[8] and English common law.[9]

As the author explains, the concept of good faith is fundamental to oil and gas agreements. It promotes legal and commercial certainty, encourages collaboration and reduces risk in complex, long-term investments, for example by: reducing political and legal uncertainty; fostering mutual trust, confidence and cooperation; and serving as both a standard of conduct and a mechanism for interpreting and filling contractual gaps.

The chapter discusses how good faith applies differently to investors and host States. It examines the good faith concept in the context of the closely related FET standard, which places particular duties on States, which specifically calls for open and non-arbitrary conduct towards foreign investors. The author highlights that this duty is not absolute and does not preclude States from making any modifications to oil and gas agreements. Indeed, the need for States to legitimately protect the public interest is weighed against the State's duty to act in good faith.

The author also notes that investors are subject to the duty of good faith and must therefore avoid fraud, misrepresentation and abuse of treaty protections. The book cites numerous arbitral decisions in which tribunals have denied investor protection or significantly reduced the damages awarded due to bad faith conduct by the investors – such as providing misleading information or engaging in corrupt practices.[10]

Chapter 4 **"Stabilisation clauses and the pursuit of certainty and predictability"** explores the validity and types of stabilisation clauses of stabilisation clauses in oil and gas contracts. These include freezing clauses, intangibility/inviolability clauses, hybrid and economic equilibrium clauses, which offer different levels of protection and flexibility to investors.

---

4 See e.g. *Sunday Times v. United Kingdom* (1979) 2 EHRR 245; Rekvényi v. Hungary, Application no 25390/94, 20 May 1999; Maestri v. Italy, Series A no 39748/98 (2004); *Korchuganova v. Russia*, No. 75039/01, Judgment, 47 (Eur. Ct. H.R. June 8, 2006) etc.

5 The "right of States and peoples to dispose freely of their natural resources" is rooted in the 1945 *Charter of the United Nations* and was developed through UN General Assembly resolutions. This norm allows States to regulate, control, and even expropriate resources for the public good.

6 M. Maniruzzaman, "The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends", *JWELB*, vol. 1, n° 2, 2008, pp. 119-155.

7 Enshrined in treaties like the Vienna Convention on the Law of Treaties. 23 May 1969 and the UN Charter.

8 UNIDROIT Principles of International Commercial Contracts (2010). .

9 The author explains that English law has traditionally been reluctant to recognise the general principle of good faith. However, the concept is increasingly recognised in specific types of contracts, such as those relating to employment and fiduciary relationships.

10 See e.g. *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award, 2 Aug. 2006; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 Aug. 2008; *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 Oct. 2006; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015.

The chapter explains that the legal validity of stabilisation clauses is debated in both national and international law. While national legal systems, particularly in developing countries, recognise these clauses to attract foreign investment, others do not recognise their validity under the cover of State sovereignty defence. The author suggests that the validity of these clauses could be supported by the "internationalisation" theory in international law as a doctrinal and practical response to the unique nature of investment agreements.[11] Dr Nedeva cites arbitral decisions that have upheld stabilisation clauses, emphasising their binding nature and their role in protecting investor expectations. She also identifies a more cautious approach that limits the reach of internationalisation where tribunals rejected the idea that private contracts could be equated with treaties between sovereign States.[12]

The author then goes on to address the practical effectiveness and limitations of stabilisation clauses, posing the main question as:

> "whether [the stabilisation clauses] indeed fetter the state's legislative sovereignty, thus guaranteeing the project's immutability?".

The author explains that stabilisation clauses:

- are designed to protect investors from unilateral changes by host States – such as legislative or regulatory modifications that could adversely affect the investment, but their ability to fully "fetter" State sovereignty is inherently constrained;
- do not render the project entirely immutable; rather, they serve to qualify the risks associated with State action and provide for predictable consequences, most notably the right to compensation, should a breach occur;
- may strengthen an investor's claim under the FET standard or legitimate expectations but does not guarantee absolute protection against all forms of State interference.

As such, they are best understood as providing framework for managing, rather than eliminating, the risks inherent in international investment. Ultimately, they are best seen as a tool for facilitating dispute resolution and compensation when contractual stability is disrupted.

The chapter advocates for the adoption of more flexible, balanced stabilisation mechanisms – such as economic equilibrium clauses – that can better accommodate the legitimate interests of both investors and host States.

Chapter 5 **"The scope of arbitral powers in adapting contractual terms in oil and gas contracts**" focuses on the extent and limitations of the powers of arbitral tribunals in adapting contractual terms that the author describes as:

> "a process of adjustment or revision of contractual terms, which could occur either through filling gaps of a contract, modification of contract terms, or simply clarifying ambiguities".[13]

The chapter stresses the need for flexibility and adaptation mechanisms in long-term contracts to address unforeseen changes. According to the author, the long-term nature of oil and gas contracts and unpredictable political or economic changes justify the need for adaptation mechanisms. Such changes can disrupt contractual equilibrium, investor expectations and the continuity of investment projects.

The author distinguishes between renegotiation by the parties and third-party adaptation (e.g. arbitrators). Third-party adaptation is controversial due to concerns about infringing party autonomy and sanctity of the contracts, as well as concerns that arbitrators lack the necessary background knowledge of the oil and gas sector and the specifics of oil and gas contracts. The chapter also addresses the legal and procedural challenges of third-party adaptation, such as the requirement of a "legal dispute" to submit the matter to the arbitral tribunal.

---

11 The "internationalisation" theory puts forward the idea that contracts between States and foreign investors can be governed by international law, particularly if they contain stabilisation and arbitration clauses and thus, the States recognise the binding nature of that clause. See e.g. early arbitral awards *Kuwait v. Aminoil* (1982) 21 ILM 976, 1021, 1024, 1051; *TOPCO v. Libya* (1978) 17 ILM 1, 11–12, 17–18, 23–24.

12 Cases such as *Amoco International Finance Corp v. Government of the Islamic Republic of Iran* (1987) 15 Iran-US CT Rep 189; 27 ILM 1314; *AMCO Asia Corporation v. Indonesia* (1985) 24 ILM 1022; and *Saudi Arabia v. Arabian American Oil Company (Aramco)*, 23 Aug. 1958, (1963) 27 ILR 117.

13 The author cited the following cases: (1) *Wintershall AG et al. v. The Government of Qatar (1989) 28 ILM 795*, where the tribunal adapted the contract due to the unexpected discovery of natural gas, emphasising good faith negotiations; (2) *Kuwait v. Aminoil* (1982) 21 *ILM* 976, where the tribunal applied the Abu Dhabi formula to calculate compensation after Kuwait terminated the agreement and nationalised the investor's assets, highlighting the importance of adapting contracts to reflect significant changes; (3) *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic* (1979) 53 *Int'l Law Reports* 297, where the tribunal emphasised the limits of specific performance and the necessity of the parties' willingness to continue the relationship; (4) *Aluminium Company of America (ALCOA) v. Essex Group Inc.*, 499 F. Supp. 53, 79 (W. D. Pa. 1980), where Judge Teitelbaum modified the price term of the contract to reflect the changed circumstances, providing a detailed adaptation technique.

The chapter also examines the doctrine *clausula rebus sic stantibus*, which allows contracts to be modified in the event of fundamental changes. It also reviews arbitration cases to illustrate how this principle has been applied in practice.[14] The author recommends the inclusion of clear adaptation clauses in contracts to empower arbitrators and ensure alignment with the parties' intentions and proposes a series of criteria for determining when and how adaptation should take place.

Chapter 6 **"Model and Signed Oil and Gas Contracts: A Review of Stability Mechanisms in Developing and Transition Economies to Guarantee Certainty and Predictability**" gives an overview of the different models of oil and gas contracts with a focus on developing and transition economies. The chapter examines how these contracts incorporate stability mechanisms, highlighting the importance of good faith as a foundational principle in many model contracts. By way of illustration, the author explores the examples of the Angolan petroleum Activities Law as well as the Iraqi and Kurdistan Region of Iraq model contracts.

The author compares signed contracts with model versions to assess their alignment with stability principles. Based on these examples, the author demonstrates the variety of approaches to drafting stabilisation clauses. While some contracts offer solid guarantees and even allow arbitrators to adapt the terms, others rely solely on renegotiation or offer only minimal protection. Effective stability, the author concludes, depends on balancing rigid and flexible tools – good faith, detailed clauses, and adaptation mechanisms.

Chapter 7 **"Predictability in oil and gas investment agreements – further assessments"** examines the mechanisms designed to ensure predictability and stability in such agreements. One central issue is the tension between the sanctity of contracts (*pacta sunt servanda*) and the sovereign right of States to regulate. The author argues that viewing investor-State relations as a conflict between private contractual rights and public sovereign powers is unproductive. Instead, she advocates for a more balanced approach that recognises these contracts as being of a mixed nature (neither purely private nor entirely public) and focuses on collaboration and continuity.

The chapter then turns to the interplay between stabilisation clauses, the principle of good faith, and the FET standard in investment treaties. It explores how breaches of stabilisation clauses may constitute FET standard and ground the State's international liability towards the investor, noting that not all breaches result in State responsibility under international law.

In its final sections, the chapter draws a parallel between oil and gas investment contracts and the theory of "relational contracts" – as particularly developed in English law[15] as a useful framework for understanding oil and gas agreements. This approach prioritises the maintenance and adaptation of the contractual relationship over time, rather than rigid adherence to the original terms or the pursuit of a win-lose outcome in the event of breach.

Final Chapter 8 **"Conclusion to Predictability in Oil and Gas Investment Agreements"** provides a comprehensive conclusion on how certainty and predictability can be secured in oil and gas investment contract. The conclusion recognises that certainty and predictability are not merely legal ideals but practical necessities for both investors and host states.

Specifically, the author introduces the concept of "certainty of consequences"– a more realistic and practical alternative to absolute legal certainty. The author recognises that:

> "[w]hile there cannot be a total guarantee against host state actions, there can be a guarantee as to the repercussions of these actions, should they occur. This approach comes as a result of respect for state sovereignty, but also a desire to uphold party autonomy."

This pragmatic concept balances legal certainty with the realities of long-term and high-risk projects, preventing injustices from either excessive rigidity or flexibility.

In summary, in her book *Predictability in Oil and Gas Investment Agreements: Balancing Interests for a Stable Investment Environment*, Stanislava Nedeva offers valuable insights to legal scholars, policymakers, and practitioners involved in energy law and international investment arbitration, and seeking a deeper understanding of the mechanisms that can promote legal and commercial stability in the volatile oil and gas sector.

---

14 See e.g. *Hungarian State Enterprise v. Yugoslav Crude Oil Pipeline* (1984) 9 Y. Comm. Arb. 69; LIAMCO v. Libya (1981) 20 ILM 1; *Mobil Oil Iran Inc. and Mobil Sales and Supply Corporation v. Government of the Islamic Republic of Iran and National Iranian Oil Company, Iran-US C.T.R.*, Partial Award, 14 July 1987, No. 311-74/76/81/150-3.

15 Defined, with reference to English law, as "contracts involving a longer-term relationship between the parties which they may make a substantial commitment to".