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International arbitration report

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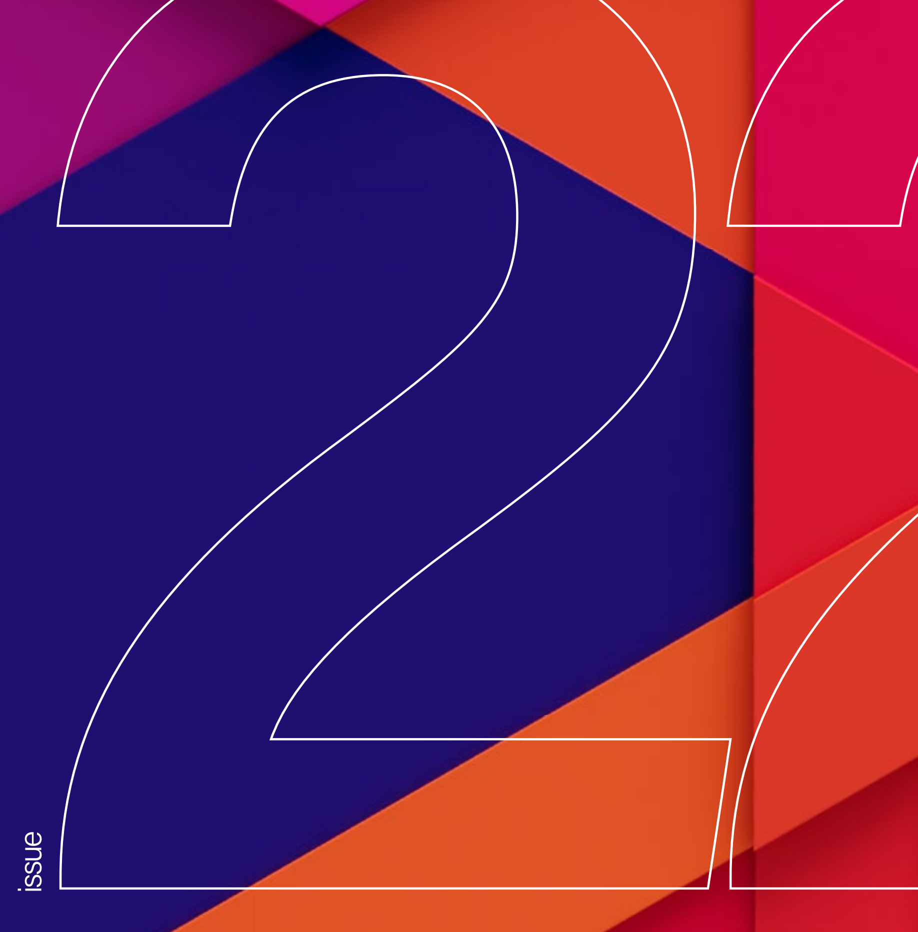
Fair and equitable treatment in present and future investments: What to expect in times of climate change?



issue 22

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International arbitration report
Published by Norton Rose Fulbright – Issue 22 – October 2024

Editor: Paul Stothard, London

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Editorial

Welcome to Issue 22 of our International Arbitration Report, in which our team of specialists provide a truly global perspective on developments in their regions and jurisdictions.

This issue has a particular focus on two of the hottest topics impacting the global economy – the energy transition and the emergence of artificial intelligence.

In relation to the energy transition, we look at the impact of policies adopted by states to meet their obligations under global climate change agreements, and how this can create tension with those states other obligations to foreign investors under investment treaties, including the obligation to provide regulatory stability and predictability. We look at the United States strategy for securing the supply of key minerals identified as necessary for the technology associated with the energy transition and the commitment to reach net zero carbon emissions, and the impact that this strategy has both on the states supplying those minerals and those seeking to secure a supply chain for themselves. We consider the emergence of the voluntary carbon markets that are expected to play a major role in decarbonization, but which are currently relatively unregulated and appear fertile ground for disputes between stakeholders. We also have a focused look at the potential sources of energy and natural resources disputes in Africa.

This issue also provides two different and original perspectives on artificial intelligence in arbitration proceedings focussing on the case for regulating the use of AI and the lessons to be drawn from the use and misuse of AI before the national courts, particularly in relation to issues such as arbitrator selection, document production and evidence processes and challenges to arbitral awards.

As always, this issue contains insight drawn from the firm's practitioners based in our global dispute resolution hubs. Our lawyers in the Middle East provide a comparative analysis of the regime for enforcement of arbitral awards, particularly focused on the United Arab Emirates and in Saudi Arabia.

We also analyse Indonesia's new arbitration law and examine how it represents a progressive step towards international best practice. We also provide an analysis of the important decision in Sian Participation Corp v Halimeda International, which signals a new approach to the interaction between insolvency proceeding and international arbitration in common law jurisdictions. Finally, our teams in Australia and the United Kingdom consider how commercial arbitration has emerged as the preferred method of resolving disputes for the satellite industry.

I hope that you find this information and guidance interesting and, if you would like to know more about any of the these topics or their authors, please check out our firm's social media posts that accompany the release of this edition.

Finally, on a personal note, I would like to congratulate my successors, Kevin O'Gorman, and Ruth Cowley, as they take the helm to steer our firm's international arbitration practice. It has been 31 years since I co-founded this practice at then Fulbright & Jaworski. The IAR was a huge part of our client outreach then and it remains so today. Clients have always appreciated the practical perspective from lawyers actually doing what we write about. The IAR under Paul Stothard's stewardship, is similarly in good hands. It has been an incredible 40 year run and I thank my colleagues for helping to build out a truly world class boots on the ground international arbitration practice. After a brief sabbatical, I look forward to seeing everyone in my new position as a full-time independent arbitrator.

C Mark Baker

C. Mark Baker
Norton Rose Fulbright

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New frontiers: Regulating artificial intelligence in international arbitration

By Tamlyn Mills and Mrithula Shanker

With the proliferation of artificial intelligence (AI) tools and their increasingly widespread use, there is a compelling case for specific frameworks to regulate AI in international arbitration. The development of such frameworks remains at a nascent stage. This article will consider the guiding principles which should inform the development of appropriate frameworks, examine the innovative approach in the Silicon Valley Arbitration & Mediation Centre (SVAMC) Guidelines on the Use of Artificial Intelligence in Arbitration (Guidelines) and draw lessons from national courts' responses to the use of AI in litigation.

Use of AI tools in international arbitration

The increasing availability of generative, evaluative or discriminative AI tools presents new opportunities and challenges for international arbitration practitioners and other stakeholders. These innovations can be used to promote efficiency without compromising the integrity and quality of international arbitration as a dispute resolution process. The ability to automate routine tasks such as document review, evidence management, translation and summarizing complex documents can offer cost efficiency and free up lawyers to undertake more complex tasks.

At the same time, AI tools raise concerns about transparency, bias, accuracy, confidentiality and due process. For example, AI tools are trained using historical data, which risks perpetuating biases or inaccurate results. Real-life examples have demonstrated results produced by AI can be manifestly wrong, generating non-existent case citations and quotes (for example, *Mata v. Avianca, Inc*. 22-cv-1461 (PKC) (S.D.N.Y. Jun. 22, 2023) and *Darlene Smith v Matthew Farwell* & Ors 2282CV01197 (Mass. Sup. Ct. Feb. 12, 2024)).

Application of existing arbitral rules to the use of AI

Arbitral tribunals have broad discretionary powers to manage the procedure in arbitral proceedings. This discretion arises both in national laws applicable to arbitration and in the rules adopted in the proceedings. For example, Article 17(1) of the UNCITRAL Arbitration Rules provides:

> "…the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute." (emphasis added)

This discretion is usually broad enough to include the use of technology including AI. However, reliance on broad tribunal discretion over the management of procedure does not necessarily:

- deal with disclosure of what, when and how AI is used;
- help those involved in arbitral proceedings to understand the acceptable use cases for AI; or
- provide parties, counsel or tribunal members with clarity about how they can expect AI to be managed throughout the arbitral process.

Without specific frameworks to regulate the use of AI in international arbitration, there is a risk of inconsistent approaches or a devolution to the various different national laws (to the extent that they deal with AI) and any applicable professional standards. Several professional organizations have published guidelines for practitioners on the responsible use of artificial intelligence, for example, the New South Wales Law Society Responsible AI Guide and the American Bar Association Ethics Opinion. Like the response to virtual hearings during the COVID pandemic, specific frameworks dealing with technological innovations can offer greater transparency, predictability and consistency.

Guiding principles

International arbitration is founded on the principle of party autonomy. As such, fairness, accountability and transparency are fundamental to maintain trust and confidence. The use of AI in international arbitration should therefore be guided by the following core principles:

- The need for appropriate human oversight and responsibility;
- Transparency; and
- Confidentiality.

The need for human oversight and responsibility

Arbitral proceedings commonly involve complex legal and factual issues and require lawyers to provide strategic advice to their clients. Human experience and expertise are crucial to test results, understand context and draw appropriate inferences. There remain many elements of human judgement and persuasion that machines cannot replicate. AI tools should be utilized as a technological aid for lawyers, rather than a substitute for their expertise.

Human oversight is therefore necessary to examine the results produced by AI tools to identify errors or biases and account for cultural and emotional nuance. As AI tools are developed by using past data, human involvement ensures consideration of circumstances and exceptions that may depart from previous practice and which would not otherwise be captured by algorithms based purely on precedent.

As AI systems become increasingly sophisticated and autonomous, it is crucial to have clear accountability for decision-making. Responsibility for incorrect, biased and flawed outputs should not be delegated to an algorithm.

Transparency

Some AI tools operate as 'black boxes,' meaning that, while results are the product of data having been processed, the manner in which the decision has been reached is not known. Where the results generated by AI tools may be relied upon to make decisions, practitioners must educate themselves on how these tools work and their limitations.

The need for transparency and accountability may also require that in appropriate cases, practitioners (including arbitrators) disclose when and how AI tools have been used.

Confidentiality

The use of AI tools in international arbitration may require practitioners to input client confidential data into third-party systems. It is crucial that such systems have adequate data protection and confidentiality standards.

SVAMC Guidelines

The SVAMC published guidelines on April 30, 2024 on the use of artificial intelligence in arbitration. The Guidelines are the first to offer an international standard on the use of AI in international arbitration. SVAMC says the Guidelines *"offer a set of best practices for the use of AI in international arbitration"* and *"seek to address both current and future applications of artificial intelligence from a principled framework, while also bearing in mind that the technology will continue to evolve rapidly."*

The stated aim of the Guidelines is to empower parties to benefit from AI tools while mitigating risks to the integrity and fairness of proceedings. The Guidelines set out principles that are divided into three categories:

- guidelines for all participants;
- guidelines for parties and their representatives; and
- guidelines for arbitrators.

The Guidelines adopt a human-centric approach to the use of AI in arbitral proceedings aimed at promoting fairness, efficiency and transparency:

- Guidelines 1, 4 and 6 provide for human responsibility for decision-making: This makes participants who use AI tools responsible for understanding how they work (at least at a basic level) and their intended uses, including relevant limitations, biases and risks and, to the extent possible, how to mitigate those risks. Equipped with this knowledge, practitioners are able to adapt their use accordingly. The parties and their representatives bear ultimate responsibility for errors or inaccuracies in output produced by an AI tool and should review that output to verify its factual and legal accuracy. Likewise, arbitrators may not delegate any part of their personal mandate to any AI tool, particularly the decision-making process. The use of AI tools by arbitrators shall not replace their independent analysis of the facts, law and evidence.
- Guideline 2 and confidentiality: This highlights the need to ensure that use of AI tools is consistent with confidentiality

obligations and reminds participants that they should not submit confidential information to any AI tool without appropriate vetting and authorization, including of data use and retention policies.

- Guidelines 3, 5 and 7 address transparency: Interestingly, these preserve the discretion of parties regarding disclosure of AI tools. Unlike the practice that appears to be emerging in national courts, which tend to *require* parties to disclose the use of AI tools, the Guidelines provide that disclosure is *"not necessary as a general matter"* and decisions should be made on a case-by-case basis. Where disclosure is made, Guideline 3 states that information about the name, version and relevant settings of the tool used, a short description of how the tool was used and the complete prompt may help reproduce and evaluate the output of an AI tool. Guideline 5 operates as a safeguard, preventing parties, their representatives and experts from using AI in ways that affect the integrity of the arbitration or otherwise disrupt the conduct of the proceedings as well as obvious prohibitions on falsifying evidence or misleading the tribunal and opposing party. At the decision-making end, Guideline 7 prevents arbitrators from relying on AI-generated information outside the record without prior disclosure.

The Guidelines are not intended to replace or override local laws or regulations but to serve as a supplementary international standard that provides a common denominator for AI's ethical and effective use in international arbitration. They include a model clause or order that can be included in an arbitration agreement or procedural order for the purpose of adopting the Guidelines in arbitral proceedings:

> "The Tribunal and the parties agree that the Silicon Valley Arbitration & Mediation Center Guidelines on the Use of Artificial Intelligence in Arbitration (SVAMC AI Guidelines) shall apply as guiding principles to all participants in this arbitration proceeding."

Court approaches

National courts are also grappling with the use of AI in domestic legal proceedings. Regulation in domestic civil procedure remains piecemeal but courts in certain jurisdictions have issued rules and guidelines that provide a useful point of comparison for international arbitration.

For example, the Supreme Court of Victoria, Australia has recently published guidelines on the use of AI tools by litigants, and the UK and New Zealand courts have published guidelines on the use of AI tools by judicial officeholders and their support staff.

These guidelines emphasize similar themes to the SVAMC Guidelines: awareness of the limitations of AI tools, confidentiality and accountability for research and decision-making. For judicial officers and their staff, the use of AI tools for tasks such as summarizing information, planning speeches and straightforward legal research is identified as potentially helpful but use for legal analysis is not recommended.

Notably, the guidelines diverge on the issue of disclosure. The UK and NZ guidelines for judicial officeholders do not require the use of AI by judges to be disclosed, whereas the Victorian guidelines for litigants do recommend that parties and their practitioners should ordinarily "disclose to each other the assistance provided by AI" to the legal task undertaken and, where appropriate, "the use of AI should also be disclosed to other parties and the court."

This concern with transparency can also be seen in a standing order made by the New York State Supreme Court and a practice direction issued by the Court of King's Bench of Manitoba, Canada, which require disclosure of the use of AI tools to prepare materials filed with the court.

Conclusion

Given their impact on efficiency, it is inevitable that AI tools will continue to proliferate in international arbitration. Appropriate regulation of the use of AI tools in international arbitration is likely to be regarded as ever more important to ensure fairness, accountability and transparency.

The SVAMC Guidelines are a principled, human-centric approach to governing the use of AI and provide a useful initial framework for all participants in international arbitration. In appropriate circumstances, parties can also consider a bespoke agreement on the use of AI in their disputes, either as part of the arbitration agreement or in procedural orders once an arbitration has commenced.

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AI use in IA: Potential use and misuse

By Ruth Cowley and Andrew Judkins

The potential applications of generative artificial intelligence (AI) in disputes has attracted the interest of stakeholders across the legal sector. The conduct of international arbitration, with its focus on party autonomy and procedural flexibility, will increasingly need to grapple with the use (and misuse) of generative AI. In this article, we examine three areas that are likely to be impacted.

Arbitrator selection

Arbitrator selection is a critical issue for parties and institutions. The search process usually involves preparing a shortlist of candidates from pre-existing databases and contacts/recommendations. There is a natural tendency for the focus to be on the more experienced and high-profile candidates.

Generative AI tools are likely to add another dimension to the arbitrator selection process. In particular, machine learning tools can be used to conduct analysis of potential candidates and their inclinations toward certain legal theories in greater depth, at a lower cost and more efficiently. For example, AI could be used to create reports both from existing arbitrator databases and 'unstructured' data sources which can currently only be analyzed through manual review by experienced lawyers. This would include biographical information on the internet, academic articles and (in the case of judges) judicial decisions.

International arbitration has established networks which often may influence the visibility and ultimate appointment of arbitrators. The use of AI tools in the arbitrator selection process may also be helpful in expanding and diversifying the pool of candidate arbitrators, by highlighting candidates who may not be favored by a selection process driven by existing databases, experience and word of mouth.

However, any use of generative AI in arbitrator selection underlines the need for it to be done in a way which is impactful and accurate. It is critical that source data is up to date and of sufficient quality and size. It is also important that machine learning algorithms are trained with an appropriate selection system, due to the risk of potential bias resulting from the way AI is programmed. Indeed, if the algorithm is not programmed with potential bias in mind, it risks reinforcing existing tendencies in arbitrator selection, exacerbating underrepresentation and wrongly maintaining or even exacerbating the existing high barriers to entry for prospective arbitrators.

Document production and the evidence process

Generative AI is likely to have a significant impact on evidence and disclosure.

Document production in international arbitration has become increasingly complex and contentious over recent decades; it is often the most expensive and intrusive step in the proceedings. This, along with it being common to adopt witness statement/expert report processes akin to common law litigation, has significantly contributed to the perception that the time and cost of arbitration can be disproportionate and wasteful. Generative AI tools have the potential to ease some of the pressures and potentially allow for a more efficient process.

In relation to production requests, this could include AI-powered assistance in preparing requests (such as by reference to analysis of the pleadings), the possible grounds for objections and also helping the Tribunal resolve disputes, particularly for long and complex schedules of requests to produce. AI could also help bridge the gap between requests and the processes employed to search for, identify and filter documents. For example, next generation e-disclosure tools can conduct searches based on 'natural language' queries (that is, more akin to actual document requests, rather than the keyword searches and Boolean operators usually used to construct searches in document review databases).

There are many potential AI uses in relation to witness statements, expert reports and the hearing bundle. For example, preparing chronologies from the parties' written submissions, summarizing witness statements and expert reports, identifying avenues for cross-examination and easing the process of creating the hearing bundle.

Translation is another key area given the multilingual nature of international arbitration and its impact on time and cost, both in relation to translation of documents and AI-assisted live translation of witness testimony.

While there is great potential for use of generative AI in document production and evidence, there are also reasons to be cautious, which include:

- The current lack of procedural definition around the acceptable use of generative AI. Few arbitral rules currently address the use of AI (and the IBA Rules on the Taking of Evidence in International Arbitration do not currently address it).
- The implications for arbitral confidentiality – a key advantage of arbitration for most parties – need to be properly understood and safeguards need to be instituted.
- The risk of sophisticated AI forgeries, particularly given tribunals' information gathering powers tend to be narrower than courts. *Nigeria v P&ID* shows the significant challenges that can arise for tribunals to identify traditional forgeries, let alone AI-generated 'deep fakes.' This may mean tribunals requires a greater degree of technical assistance in relation to evidence.
- Loss of human oversight. In a post-COVID world, virtual arbitration hearings are becoming more common. An overreliance on AI may continue to erode the human element of arbitration. While AI could improve efficiencies, arbitration needs to remain flexible and responsive to the parties' needs, and not become mechanical.

Generative AI is likely to have a significant impact on evidence and disclosure"

Challenges to arbitral decisions

A key differentiator between litigation and arbitration is that arbitral decisions generally cannot be appealed on the merits. However, arbitration is no different to litigation in the sense that large sums of money turn on the outcome of decisions and therefore the potential upside to challenging decisions is considerable. At least two issues potentially arise in relation to AI.

First, the possibility of broadening the grounds to challenge an award. Failure to follow due process is one of the most common grounds to challenge arbitral decisions in national courts. By definition, where parties consent to the use of AI in the proceedings, it should be difficult to successfully challenge an award based on procedural irregularity arising from its use. However, for the party keen to delay or avoid an award, in this nascent stage of the use of AI, finding instances of non-compliant use of AI could be easy – for example, AI being used in a manner outside the scope of a procedural order, in a way that was not disclosed, in a way that generated some inaccuracy hitherto unidentified, and other scenarios. Parties could potentially mount public policy arguments too – for example, the use of AI that is not permitted under relevant national law or even arguments based on technological disparities.

Second, there is a possibility of more frequent challenges to awards. For the losing party in an arbitration, attempting to challenge an award is often not attractive on the grounds of cost – that is, throwing good money after bad. However, to the extent that generative AI can lower the barriers to challenging an award, namely by employing AI tools that can sift through the award, hearing transcripts and generate arguments at relatively low cost, then it could result in a higher number of challenges to awards – resulting in delays to the finality of disputes.

Conclusion

The potential use of generative AI in international arbitration is wide-ranging and has the potential for increasing efficiencies in arbitration. Parties, tribunals and institutions will be increasingly grappling with these issues over the coming years.

The authors would like to thank Mariana Plaza Cardenas for her assistance in the preparation of this article.

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Insolvency and arbitration: A landmark judgment in *Sian Participation Corp v Halimeda International Ltd* [2024] UKPC 16

By Tamlyn Mills, Victoria Thomson, Kevin Hong, Karman Leung, Jasmine Chan, Kent Phillips, Lukas Lim, Yan Yee Wong, Edward Low, Edward Low, Bea Byrne Hill and Ben Mellett

The Privy Council has considered an appeal from the Court of Appeal of the Eastern Caribbean Supreme Court, originating from the courts of the British Virgin Islands (BVI), and delivered a landmark judgment in *Sian Participation Corporation (In Liquidation) v Halimeda International Ltd* [2024] UKPC 16. This decision engages the competing public policy considerations of (a) ensuring insolvency proceedings can progress without undue delay; and (b) upholding parties' agreement to arbitrate disputes.

The Privy Council has decided that a debt must be the subject of a genuine dispute on substantial grounds for the court to stay or dismiss a creditor's winding up petition in favor of arbitration. It is not enough for a respondent to the petition to raise an insubstantial dispute and require the creditor to go through arbitration as a prelude to seeking a liquidation.

This article provides analysis on the judgment in *Sian Participation*, which now represents the law in England and Wales, and compares that approach with that adopted by the courts in other common law jurisdictions, namely Australia, Hong Kong, Malaysia and Singapore.

England and Wales perspective

Following the decision in *Sian Participation*, the position under English law is that a creditor's petition will only be dismissed or stayed in favor of arbitration where the debt (which is the subject of the petition) is disputed on genuine and substantial grounds.

The Privy Council directed (through a *Willers v Joyce* direction) that its decision in *Sian Participation* now represents the law of England and Wales, having held that the previous English authority from the Court of Appeal case of *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575 was wrongly decided.

In *Salford Estates*, it was held that where a debt is not admitted and is subject to an arbitration agreement, the court should exercise its discretion (pursuant to Section 122(1) of the 1986 Insolvency Act) to stay or dismiss a creditor's winding up petition in favor of arbitration save in wholly exceptional circumstances.

In *Sian Participation*, the Privy Council commented that Salford Estates set a very low prima facie threshold – all that was necessary was for the debt not to be admitted. It need not be denied, nor need any (or even any substantial) grounds for disputing the debt. The practical effect of this low threshold was to grant virtually a mandatory stay of such winding up petitions. It meant debtors which had agreed to arbitration were often in a better position to resist winding up petitions than those which had not.

In overturning *Salford Estates*, the Privy Council held that the debt needed to be disputed on genuine and substantial grounds (that is, a triable issue threshold) for the winding up petition to be stayed or dismissed in favor of arbitration.

The Privy Council presents this as an arbitration-friendly decision on the basis that requiring a creditor to go through an arbitration where there is no genuine or substantial dispute adds needless delay, inconvenience and expense. Moreover, the Privy Council considers a party is much more likely to agree to arbitration if it does not impede a liquidation where there is no genuine or substantial dispute about the debt.

The Privy Council also addressed the issue as to whether the

Court, in applying this threshold test, is in effect conducting a summary judgment of the dispute. The Privy Council concluded that this is not anomalous to a summary judgment – rather, hearing a creditor's petition involves a light touch process in which the Companies Court does not resolve the dispute one way or another and no executable judgment results from the process.

Moreover, the Privy Council considers a party is much more likely to agree to arbitration if it does not impede a liquidation where there is no genuine or substantial dispute about the debt."

The judgment raises three additional interesting points which are worth setting out briefly:

- A different approach is required where the winding up petition is based on the just and equitable ground. Unlike a creditor's petition on the insolvency ground, a petition on the just and equitable ground will require the resolution of a dispute that usually concerns alleged inequitable conduct by other shareholders. In those circumstances, the winding up proceedings will be stayed whilst the disputes are resolved in arbitration through a declaratory award.
- The underlying policy as regards arbitration agreements applies equally to exclusive jurisdiction clauses.
- The triable issues threshold test to be applied pursuant to *Sian Participation* applies to generally worded arbitration agreements or exclusive jurisdiction clauses. It is open to parties to include express terms in their arbitration agreements or exclusive jurisdiction clauses to specifically address the procedure in the event of a creditor's winding up petition.

Singapore perspective

Sian Participation has not yet been considered in Singapore, but the Singapore Court of Appeal reached a different conclusion in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 *(AnAn Group)*, ultimately deciding that the prima facie threshold in *Salford Estates* rather than the triable issue threshold should apply when considering applications to stay winding up proceedings in favor of arbitration. In reaching this conclusion, the Court of Appeal took the following view:

- There should be coherence in the law concerning stay applications (whether in winding up or general civil proceedings) to prevent abuse of winding up proceedings and there is no principled basis for a different standard depending solely on the creditor's arbitrary or tactical choice to pursue winding up or a general claim in damages.
- The *prima facie* standard also ensures the draconian threat of liquidation is not abused, particularly as a winding up petition "may adversely affect the reputation and the business of the company and may also set in motion a process that may create cross-defaults or cut the company off from further sources of financing, thereby exacerbating its financial condition."
- The triable issue standard offends the principle of party autonomy because it requires the court to "critically consider the merits of the company's defences" contrary to parties' agreement to arbitrate. It also results in uncertainty and incurs significant and overlapping costs.

The underlying policy as regards arbitration agreements applies equally to exclusive jurisdiction clauses."

Anticipating that some parties may attempt to abuse the arbitration process when faced with winding up proceedings, the Court of Appeal cautioned that the *prima facie* standard did not equate to an automatic stay or dismissal but would depend on the specific facts of each case. Further, even after a stay of the winding-up petition is granted, the creditor can still apply to the Singapore Court to recommence winding up if it can be shown that the debtor has no genuine desire to arbitrate or is actively stifling arbitration.

Malaysian perspective

The Malaysian Courts have acknowledged in cases such as *Awangsa Bina Sdn Bhd v Mayland Avenue Sdn Bhd* [2019] MLJU 1365 and *NFC Labuan Shipleasing I Ltd v Semua Chemical Shipping Sdn Bhd* [2017] 1 LNS 943 that a creditor has a statutory right to a winding up petition independent of any contractual right to arbitrate a disputed debt.

Nonetheless, in consistently upholding the prima facie threshold applied in *Salford Estates* and *AnAn Group*, the Malaysian Courts have taken the position that a debtor's contractual right to arbitrate a disputed debt ultimately prevails over the creditor's statutory right to seek the winding-up of an insolvent debtor. For instance, in *V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co* [2023] 7 MLJ 155, the Malaysian High Court held that winding up proceedings should be stayed if the debtor can

demonstrate that "there is a prima facie dispute over the debt which is governed by an arbitration agreement."

As to what constitutes a *prima facie* dispute over a debt, the Malaysian High Court held in *V Medical Services* that it is enough that the debtor disputes or denies the debt, "irrespective of the substantive merits of any defence." Instead of determining whether the debt is bona fide disputed on substantial grounds, the rationale is that the Malaysian Courts should instead "hold the parties to their bargain to resolve their dispute over the debt by their chosen method of dispute resolution to arbitrate the matter." It was also observed, citing the *AnAn Group* decision, that the *prima facie* threshold test "is consonant with the Malaysian Court's policy underpinning minimal curial intervention when parties have chosen arbitration over litigation."

Hong Kong perspective

The decision in *Sian Participation* also represents a divergence from recent Hong Kong decisions, which have generally adopted the approach taken in *Salford Estates*, such that a disputed debt arising under a contract that contains an arbitration clause or an exclusive jurisdiction clause should generally be dismissed save in exceptional circumstances.

The landmark decision on this area was laid down by the Hong Kong Court of Final Appeal last year ("CFA") in *Re Guy Kwok-Hung Lam v. Tor Asia Credit Master Fund LP* [2023] HKCFA 9, which confirmed the approach to dismiss insolvency proceedings in favor of the parties' agreed exclusive jurisdiction clause unless there are countervailing factors such as the risk of insolvency affecting third parties and a dispute that borders on the frivolous or abuse of process. The CFA held that the "established approach" for staying or dismissing a petition only if the debtor shows a bona fide dispute on substantial grounds is not appropriate when an exclusive jurisdiction clause is involved.

Anticipating that some parties may attempt to abuse the arbitration process when faced with winding up proceedings, the Court of Appeal cautioned that the prima facie standard did not equate to an automatic stay or dismissal but would depend on the specific facts of each case."

The Hong Kong Court of Appeal, in its recent judgments of *Re Shandong Chenming Paper Holdings Ltd* [2024] HKCA 352 *(Re Chenming)* and *Re Simplicity & Vogue Retailing (HK) Co Ltd* [2024] HKCA 299 *(Re Simplicity)*, has endorsed and extended the approach in *Re Guy Lam* to apply to disputed debt or a cross-claim subject to an arbitration clause. The CA in *Re Simplicity* considered that the alternative would be even less appropriate in the case of an arbitration clause, having regard to the public policy underpinning the pro-arbitration statutory framework in Hong Kong in addition to the public policy interest in holding parties to their contract bargains.

Now that exclusive jurisdiction clauses and arbitration clauses are treated alike by Hong Kong courts in winding up proceedings."

Notwithstanding the apparent divergent findings in *Sian Participation* from the line of Hong Kong authorities above, the Hong Kong CFA and CA in *Re Guy*, *Re Chenming and Re Simplicity* have pointed out that the exercise of the Court's discretion to decline jurisdiction to determine whether the debtor shows a *bona fide* dispute on substantial grounds involves a "multi-factorial" approach. As such, where the grounds for disputing the debt are obviously insubstantial or "borders on the frivolous or abuse of process," the Hong Kong courts retain a discretion to grant the winding-up / bankruptcy order despite the presence of an arbitration clause or exclusive jurisdiction clause. While the Privy Council's decision in *Sian Participation* is not strictly speaking binding in Hong Kong, the decision might further tilt the balance of Hong Kong courts towards a greater emphasis on determining "*bona fides*" and "substance of a dispute" for a petition debt under the "multi-factorial" approach. Further, the condition laid down in *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd* [2018] HKCFI 426 (*Lasmos*), which requires a company opposing a winding up petition to have taken requisite steps under the arbitration clause to commence the arbitration process, was also upheld in *Re Simplicity*. As such, an opposing debtor would need to demonstrate a genuine intention to arbitrate and cannot merely raise the arbitration clause as a tactical device.

Now that exclusive jurisdiction clauses and arbitration clauses are treated alike by Hong Kong courts in winding up proceedings, Hong Kong has become one of the first common law jurisdictions to have a harmonized approach in favor of parties' choice of dispute resolution in exercising its insolvency jurisdiction.

Australian perspective

There has been no formal consideration of *Salford Estates* or the relevant decisions in Singapore, Malaysia, and Hong Kong in Australia. However, comments in several decisions concerning the setting aside of statutory demands suggests that the Australian approach is more likely to follow that set out in *Sian Participation*.

There has been no formal consideration of Salford Estates or the relevant decisions in Singapore, Malaysia, and Hong Kong in Australia."

In *SMEC International Pty Ltd v C.E.M.S. Engineering Inc* (2001) 162 FLR 383 one of the grounds asserted for setting aside a statutory demand was that the contract pursuant to which the statutory demand was made contained provisions requiring that any dispute be referred to arbitration. The Court held that at [36]: *"it is unlikely that a court would set aside a statutory demand on the bare ground that the service of the demand or the commencement of winding up proceedings in consequence of it, violated an arbitration clause. The question is a little artificial, because the application of the arbitration clause is likely to arise for consideration only if there is a dispute between the parties, and once there is a genuine dispute the Court will set aside the statutory demand on that ground."*

This non-binding comment was considered in *Arris Investments Pty Ltd v Fahd & Anor* [2010] NSWSC 309. The Court agreed that the "existence of a mediation or arbitration clause in an agreement between parties will not automatically preclude one of them from serving a Statutory Demand on the other" because the Court retains its discretion about the "significance to attach to such a contractual term in the circumstances of the case," The Court may "see the position taken by one of the disputants is so transparently untenable that it can conclude… that party is invoking the arbitration clause in bad faith" or "where a plaintiff seeking to set aside the Statutory Demand has continually frustrated the endeavours of the defendant to have the dispute resolved in accordance with the arbitration clause." However, where a dispute "is not resolvable by the Court virtually at a glance because the position taken by one of them is transparently untenable, or where there is no conduct making it unconscionable for one party to invoke an arbitration clause, then an express agreement that the parties' disputes must be determined by arbitration rather than by any other form of litigious proceeding should carry great discretionary weight in considering whether a Statutory Demand should be set aside." The Court recognized the commercial reasons for parties to agree to arbitration and that the Court "should not lightly permit one party to ignore the clause and precipitate legal proceedings by the issue of a Statutory Demand," which would be to "encourage parties to breach their contracts,"

The Court also considered *Palmer Petroleum Pty Ltd v BGP Geoexplorer Pte Ltd* [2016] QSC 33, where the applicant argued that an arbitration clause provided "some other reason" to set aside the statutory demand because there was a dispute about the amount claimed. The Court concluded there was no genuine dispute and observed:

> "Similarly, the presence of an arbitration clause…does not provide "some other reason" for this Court to set aside the statutory demand. If the arbitration clause is to be properly engaged, there must be shown to exist a dispute between the parties in relation to a matter properly the subject of that arbitration clause. As was observed by Palmer J in *Arris*, s 459J provides a discretion to prevent abuses of process and to ensure the statutory demand process is not itself improperly used by parties to an agreement to escape an arbitration clause. There is no basis to form such a conclusion in the present case. The applicant has not established there is a dispute between the parties that should properly be the subject of arbitration in accordance with the clause. The applicant has sought to grasp onto the arbitration clause in an effort to avoid the effects of the statutory demand, in circumstances where the material supports a conclusion that the applicant's failure to comply with the statutory demand is due to the applicant's inability to do so financially. The applicant has not established there is "some other reason" the statutory demand ought to be set aside."

Similarly, the presence of an arbitration clause…does not provide "some other reason" for this Court to set aside the statutory demand."

In summary, the point remains untested but some judicial support can be discerned for the *Sian Participation* approach of requiring a genuine and substantial dispute.

Conclusion

When considering a creditor's petition based on a disputed debt arising under a contract that contains an arbitration clause (or indeed an exclusive jurisdiction clause), the question of public policy pulls in opposite directions. On the one hand, the court must consider the preservation of the parties' autonomy and choice to arbitrate. On the other, courts will be conscious of the interests of the creditors and the risks of insolvency affecting the debtor and third parties.

On the one hand, the court must consider the preservation of the parties' autonomy and choice to arbitrate."

In *Salford Estates*, the English Court of Appeal set a low *prima facie* threshold – namely, all that was necessary was for the debt to be not admitted. Therefore, the recent divergence away from *Salford Estates* as a matter of English law is significant. Following *Sian Participation*, the debt must be the subject of a genuine dispute on substantial grounds for the court to stay or dismiss a creditor's petition in favor of arbitration.

To date, the issue remains untested in Australian courts, but the Malaysian and Singaporean courts have partially followed suit, especially so in Malaysia, where it is clear that the *Salford Estates prima facie* standard will apply and therefore, the debtor's contractual right to arbitrate a disputed debt ultimately prevails over a creditor's statutory right to seek the winding up of an insolvent debtor. While Singapore does offer creditors some comfort through a potential grant of a stay when (*inter alia*) the triable issue threshold is met, the protection afforded is not quite as substantive in comparison to *Sian Participation*, and the emphasis on preventing abuse of the winding up process (as opposed to abuse of arbitration procedure) is evident in recent case law. The courts of Hong Kong have inched closer to the meritorious considerations taken in *Sian Participation*, as the courts there will at least consider whether the grounds for disputing the debt are obviously insubstantial or border on the frivolous or abuse of process.

When considering a creditor's petition based on a disputed debt arising under a contract that contains an arbitration clause (or indeed an exclusive jurisdiction clause), the question of public policy pulls in opposite directions."

However, as *Sian Participation* is yet to be considered outside of the English courts, the practical effect of the Privy Council decision remains to be seen in jurisdictions like Singapore and Hong Kong which have only recently confirmed their alignment with *Salford Estates*. While *Sian Participation* demonstrates clear doctrinal differences in approach, the resulting difference of how these approaches will play out on a practical level may not be so fundamental. The *Sian Participation* approach may not be as arbitration-unfriendly as it may first seem. Certainly, lenders may now be more willing to use arbitration if it no longer places them at a disadvantage compared to litigation when it comes to availability of insolvency remedies.

With thanks to Bea Byrne Hill and Victoria Thomson.

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Critical minerals: Ripple effects from the US to Australia to Asia

By Mevelyn Ong, Kevin Hong and Kevin O'Gorman

In December 2023, at the United Nations Climate Change Conference (COP28), nearly 200 countries committed to transition away from fossil fuels, to triple renewable energy capacity by 2030 and to achieve net-zero carbon emissions by 2050. To achieve these goals, they must manufacture more semiconductors, electrical vehicles (EVs), wind turbines and solar panels, and encourage innovation in other energy efficient decarbonization technologies. Central to these efforts will be the extraction and production of the so-called group of elements known as "critical minerals," including lithium, cobalt, nickel, graphite and rare earths.

Reserves of critical minerals are located across all continents of the world, with Australia possessing the world's second largest reserves of lithium, cobalt, copper, and nickel. The US is also home to some of the world's most significant reserves of critical minerals, and North American investors control the highest number of overseas operational mines containing critical minerals as a primary commodity. In the last five decades, China has established itself as the world's leading refiner of critical minerals. The International Energy Agency has estimated that the transition towards net-zero will triple the demand for critical minerals by 2030.

The pledge to transition to net-zero has seen countries racing to secure their critical minerals supply chains in myriad ways. This article will provide an overview of the United States' critical minerals strategy, how it has influenced Australia's strategy and the ripple effects that these developments have had on political-economic decisions being taken across the Asia-Pacific region. This article will then note the areas where potential disputes may arise, and highlight some key considerations for companies investing, or seeking to invest, in critical minerals.

The US critical minerals strategy

In 2017, the Trump administration released a "Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals," calling for interagency cooperation to reduce US reliance on imports of critical minerals. The following year, the US Government published an initial list of 35 critical minerals and overhauled the US foreign investment framework from a largely voluntary notification system to one imposing mandatory screening for certain inbound transactions. Under the *Foreign Investment Risk Review Modernization Act* (2018) (FIRRMA), investment proposals that involve certain foreign investors acquiring, relevantly, interests in "critical technologies" or "critical infrastructure" businesses in the US, must be notified to the Committee on Foreign Investment in the United States (CFIUS), the regulatory body that administers the US' foreign investment framework. In determining whether a proposed transaction threatens US national security interests, CFIUS may consider, among other things, the "potential effects of the cumulative control of…any one type of critical infrastructure, energy asset, critical material or critical technology by a foreign government or person." FIRRMA also maintained CFIUS' power to initiate retroactive reviews of any covered transaction.

In 2022, the US Government passed the *Chips and Science Act* (Chips Act) and the *Inflation Reduction Act* (IRA). Both Acts envisaged the implementation of various production tax credits and subsidy programs to jumpstart nascent domestic capabilities in critical minerals processing and chips and renewable technologies manufacturing. Under the Chips Act, the US has awarded US$8.5 billion in grants to Intel, US$6.4 billion in

grants to Samsung and US$6.6 billion to Taiwan Semiconductor Manufacturing Company (TSMC) to build out their respective semiconductor productions in the US.

Under the IRA, subsidies will be granted to EVs that contain a certain percentage of critical minerals "extracted or processed in the United States or in a country with which the United States has a free trade agreement." Australian mining companies have reportedly benefited from US$13 billion in IRA-related deals with US car manufacturers. By contrast, EVs that contain battery components manufactured by a "foreign entity of concern" or with batteries containing any critical minerals "extracted, processed or recycled by a foreign entity of concern" will not be eligible for subsidies. A "foreign entity of concern" has been defined to include (i) all entities incorporated, headquartered in or performing the relevant activities in a "covered nation" (further defined to mean China, Russia, Iran and North Korea); or (ii) all entities where 25% of the "voting rights, board seats or equity interests" are directly or indirectly held by a government of a covered nation, including such government's agencies or instrumentalities.

Since the promulgation of the Chips Act and the IRA, the US has imposed sanctions on certain Chinese entities and steeper tariffs on Chinese-made semiconductors, EVs, batteries and critical mineral imports. The US Congress is considering draft legislation to establish a screening process for outbound investment flows into certain "sensitive technologies" businesses operating in "countries of concern."

Australia's critical minerals strategy

In response to the US mobilization in the critical mineral space, in June 2023, the Australian Government released its *Critical Minerals Strategy 2023-2030*. The Strategy envisioned Australia transforming into a "renewable energy superpower," namely through collaborations with "international partners" – specifically, the US, the UK, Japan, Korea, India and the EU – to secure supply chains through entering into offtake and equity investment agreements, and by facilitating foreign investment in downstream processing and greenfield critical minerals operations.

Similar to the US approach, in May 2024, the Australian Government announced a plan to grant production tax credits and other incentives to support domestic projects processing critical minerals and domestic manufacturing of solar photovoltaic components and batteries. At the time of writing, Australia's Resources Minister has expressed that it is "up in the air" as to whether companies with Chinese investors may qualify for production tax credits. It is unclear how the policy will be implemented in practice.

The Australian Treasurer has also announced that it would be increasing scrutiny on inbound foreign "[i]nvestments in critical infrastructure, critical minerals, critical technology" to "protect our national interests." Australia's foreign investment regime is governed by the *Foreign Acquisitions and Takeovers Act* 1975 (Cth). Like the US, the regime requires foreign investors, in certain circumstances, to notify the Treasurer of proposed foreign investments, and for the Treasurer to decide whether such proposed investment can proceed (including on a conditional basis). For up to a decade after the initial investment decision, the Treasurer maintains the discretion to "call in" certain actions and potentially impose new conditions on the foreign investor or require divestment. Although the underlying legislation has not been amended, the Treasurer has expressed that the discretionary "call in power" will be "more robustly applied and enforced," including allowing the Government to "go back into those deals, if that's necessary."

Ripple effects in the Asia-Pacific region

The US critical minerals strategy has had ripple effects across the Asia-Pacific region.

In Northeast Asia, Japan and South Korea have joined the US-led *Minerals Security Partnership*, along with Australia, nine other countries and the EU, represented by the European Commission. The Partnership has already seen, for example, an Australian nickel company securing debt financing commitments from Canadian and German entities, and offtake agreements for nickel and cobalt sales for the life of the project with companies in the US and South Korea. Japan and South Korea have also entered into a separate trilateral mechanism with the US to build "resilient semiconductor supply chains" and to increase the "availability of critical minerals and resilience of the supply chains, including through enhanced processing and refining capabilities."

On the bilateral front, Japan has signed a Critical Minerals Partnership agreement with Australia and joined Australia and the US at the Darwin Dialogue to discuss critical mineral production and supply chain security. It also entered into a Critical Minerals Agreement with the US, allowing it to be considered a US Free Trade Agreement (FTA) partner under the IRA so that its companies would be eligible for the EV tax credits offered by the IRA. South Korea has assumed the chair position of the Minerals Security Partnership, entered into a Memorandum of Understanding with Australia in respect of cooperating on critical mineral supply chains, and continues to seek partnerships with Australian-based critical minerals mining companies to ensure an "IRA-compliant" supply of critical minerals. Like China, Korea is investing heavily in critical minerals in Central Asia and Africa as part of a "K-Silk Road" initiative.

The US critical minerals strategy has had ripple effects across the Asia-Pacific region.”

Ripple effects are also being felt in Southeast Asia. Both Indonesia and the Philippines, with substantial nickel reserves, are reportedly seeking bilateral critical minerals trade and investment agreements with the US. Indonesia has already entered into a Memorandum of Understanding with Australia with respect to EV battery manufacturing. Following the example of Indonesia's export ban on raw nickel ore which triggered significant foreign investment inflows, Malaysia and Vietnam have also declared intentions to ban exports of raw rare earths and to instead require domestic processing before export.

Mitigating against future dispute risks

a. Risks arising from increasing resource nationalism

The race for critical minerals has given rise to increasing resource nationalism, and with that comes the increasing risk that a contemplated investment in critical minerals may be barred or existing investments expropriated. Chile and Mexico have already sought to nationalize their respective lithium industries. In response, a Chinese mining group has initiated an ICSID arbitration against Mexico, while other foreign investors with affected operations are pursuing talks with the Mexican government. China has also declared that from October 2024, its domestic rare earth reserves will be considered state property, and that "no organization or individual may encroach upon or destroy rare earth resources."

Mitigating against risks arising from resource nationalism should ideally start from the outset of a contemplated critical minerals investment, well before a threat of expropriation. It will necessitate consideration of how an investment should be structured under a relevant investment treaty or agreement, and the extent to which emergency relief may be available in the face of threatened expropriation. In some cases, it may also involve an evaluation of the advantages and disadvantages of partnering with certain entities, such as state-owned entities, and an exploration of the availability of political risk insurance. In the event of expropriation, even though some tribunals have recognized that states may reassert control over "strategic assets," the requirement under international investment law to compensate the foreign investor for such loss is not obviated.

A more novel development in recent times is the threat of forcible divestment. Instead of outright seizure, some countries have ordered, or threatened to order, foreign investors to divest from their existing critical mineral investments. For example, in 2022, citing national security reasons, Canada ordered three Chinese companies to divest their investments in three Canadian critical minerals companies. China characterized the order as breaking "international commerce and market rules" and asked Canada to afford Chinese-domiciled companies a "fair, impartial and non-discriminatory business environment." Canada subsequently clarified that it would not order other Chinese investors to divest stakes in its largest mining companies, conceding that it would "create all kinds of uncertainty." In June 2024, the Australian Treasurer ordered a Chinese investor to reduce or divest its stakes in an Australian rare earths company on "national interest" grounds. As noted earlier, both US and Australian foreign investment law similarly empower their relevant regulatory body to withdraw its approval of a foreign investment years after approval is given, and to order divestment.

Companies at risk of encountering threats of forcible divestment need to consider the potential avenues of recourse under domestic administrative law and any applicable investment treaty or other investment protection. States too need to ensure that they comply with domestic and international law. In some circumstances, a forcible divestment order may amount to a compensable breach of domestic or investment law. Most international investment treaties guarantee that investors will be afforded fair and equitable treatment and standards of treatment including protection against discrimination. Other treaties carve out investment regulatory decisions (such as an order of forcible divestment) or provide for essential security exception clause that a state could potentially invoke to defend its divestment order. The invocation of such provisions does not necessarily, however, obviate the obligation of the state to compensate the foreign investor for loss suffered as a consequence of any forcible divestment.

b. Risks arising from commodity price volatility and persisting inflationary environments

After reaching peaks in 2022-2023, the prices of many critical minerals and rare earth elements have plummeted dramatically. Coupled with persisting inflation worldwide, it may be challenging to obtain finance for contemplated critical minerals investments or to continue to operate existing critical minerals projects. Lithium, nickel and cobalt mines have, for example, been particularly hard hit and are at increased risks of closure.

Given such volatility, companies may want to understand the circumstances in which contractual renegotiation or termination

can occur, and the extent to which compensation is payable upon such termination. For contracts that are still being negotiated, parties should carefully consider how future risks of continued price volatility in critical minerals can be addressed and allocated. These considerations can potentially be reflected in contractual clauses related to, among other things, breach, force majeure/ material adverse change, limitation of liability, potential price review or adaptation mechanisms and dispute resolution.

c. Risks arising from complex supply chain arrangements

The critical minerals supply chain is highly complex. In a nutshell, it encompasses the extraction of raw ore, the processing of that ore followed by the manufacture of clean energy technology components. Each of these phases is interwoven with project financing and supply chain and procurement agreements. The complexity of such intra-party relationships means that disputes can impact on a number of contracts cascading down the chain with the risk of parallel proceedings occurring in different forums. With that risk, conflicting decisions concerning the same dispute may eventuate.

For participants in a critical minerals supply chain, dispute resolution clauses cannot be a mere afterthought. Boilerplate clauses will often be insufficient in addressing dispute risks arising from complex multi-party/multi-contract situations. If the parties decide that arbitration is a preferred platform upon which to resolve future disputes, the parties should carefully consider the extent to which they may agree to consolidate parallel proceedings or permit the joinder of related claims or parties to an arbitral proceeding. The various arbitral institutional rules available offer varying levels of procedural flexibility in this respect and ensuring compatibility across the arbitration clauses in each agreement will be critical to properly reflect the parties' intent, and to prevent the risk of conflicting decisions being rendered over the same set of factual circumstances.

d. Risks arising from adverse impacts on environment and human rights

An irony associated with the transition to net-zero is that it cannot occur without the extraction and processing of critical minerals, which entails a highly energy-intensive process that produces significant toxic waste products. If not properly managed, this may have consequences for the surrounding environment and for nearby local communities.

At the domestic level, investment regulatory authorities of certain countries have announced plans to subject contemplated critical minerals investments to closer scrutiny, not only with respect to issues of foreign ownership, but also with respect to potential environmental and social impacts. This is for example, envisaged by *Australia's Critical Minerals Strategy*, which anticipates that Australia's investment regulatory authorities will "apply the highest ESG standards and practices" to guide investment decisions. As a consequence, foreign investors seeking to invest into critical minerals may need to factor in potentially longer deal timelines while waiting for regulatory approval.

Ensuring compliance with domestic ESG standards and practices does not end at the acquisition phase but may continue throughout the investment itself. Companies with existing critical minerals investments may need to comply with a growing body of legislation requiring identification and reporting of potential human rights and environmental risks. Some countries, such as the US and Australia, focus on financial reporting disclosure, whereas others like the EU have embedded more onerous due diligence requirements.

Companies with existing critical minerals investments will additionally need to stay abreast of developing standards of corporate responsibility at the international law level. Negotiations on an international treaty regulating the conduct of companies with respect to human rights are ongoing, and in April 2024, the UN Secretary General appointed a Panel on *Critical Energy Transition Minerals* that will discuss "globally agreed guidance to safeguard environmental and social standards across the entire critical minerals value chain." The Panel comprises 24 countries including Australia, China, and the US, as well as 14 international organizations, such as the World Bank, the Organisation for Economic Co-operation and Development (OECD) and the International Energy Agency.

Non-compliance with domestic ESG regulations and other standards may run the risk of civil and/or criminal liabilities, depending on the relevant legislation. The exposure of parent companies to liabilities arising from adverse human rights or environmental impacts caused by subsidiaries operating abroad will also need to be considered in some jurisdictions. At the international law level, failing to comply with host state law at the time of investment acquisition or failing to obtain (or maintain) a "social license to operate" in the host state during the life of an investment may respectively, preclude a foreign investor from bringing a claim against a state, or reduce the damages that such foreign investor may otherwise have been awarded.

Conclusion

Just 25 years remain before the COP28 2050 deadline to achieve net-zero. As that deadline approaches, the battle for critical minerals will only intensify.

In striving toward net-zero, states which attempt to bolster their domestic critical minerals mining, processing and manufacturing capabilities will need to ensure that they still comply with their obligations under international investment and trade law to ensure transparent and non-discriminatory treatment of foreign investors and goods. They must ensure that measures taken in competition with each other do not unduly stymie the foreign investment inflows essential to gross domestic product (GDP) growth, nor undermine net-zero goals. There are already reports warning of delayed net-zero targets amidst slowing investment flows and slowing demand for critical minerals and EVs in Europe and the US.

Companies seeking to invest in critical minerals will have to navigate – at the outset of the contemplated investment through the life of that investment – myriad dispute risks arising from escalating global and regional geopolitical tensions, continued economic volatility, complex supply chain arrangements and from various regulatory developments occurring at the place of their corporate domicile, in the country within which they are investing, and also under international law itself.

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Energy arbitration in Africa: Potential sources of energy and natural resources disputes

By Marc Robert, Philippe Hameau and Joseph Bentley

Phillipe Hameau, a partner in our Paris office, discusses the likely sources of arbitration in Africa over the coming years with two counsels in our international arbitration practice:

- **Marc Robert in Paris, who frequently advises clients on disputes in Africa, particularly in the OHADA region; and**
- **Joseph Bentley in London, who represents clients in the energy and power sectors in arbitrations throughout the African continent.**

Phillippe: Marc, let's discuss climate change and how African states' recent commitments are likely to influence their energy policies?

Marc: Thanks, Phillippe. Climate change is a crucial issue for Africa. At COP28 in December 2023, participants reached a landmark agreement to transition away from fossil fuels in a just, orderly and equitable manner, aiming for net-zero emissions by 2050. States have to submit their next round of climate action plans, known as nationally determined contributions (NDCs) by 2025, in time for COP30, and they must be aligned with the 1.5°C temperature limit set under the 2015 Paris Climate Agreement.

These ambitious targets are particularly challenging for African states who, despite being some of the most vulnerable to climate change, are dependent on fossil fuels and need to weigh up the benefits against more immediate energy poverty concerns.

Nonetheless, several African countries have initiated efforts to meet the COP28 objectives. Twelve states, including Burkina Faso, Chad, Ivory Coast, Ethiopia, Ghana, Kenya and Morocco, have joined the Coalition for High Ambition Multilevel Partnerships (CHAMP) for Climate Action, which aims to enhance the planning, financing and implementation of climate strategies to limit temperature increases to 1.5°C.

The difficulty, as highlighted by the International Energy Agency (IEA), is that, to achieve the Sustainable Africa Scenario, energy investment must double to over US$200 billion a year by 2030. Moreover, the UN Environment Programme's Adaptation Gap Report indicates a significant shortfall in financing for developing countries to reach these goals, and the funds allocated to the loss and damage fund, a major achievement of COP28, are insufficient to cover Africa's needs.

This is likely to cause major changes in African states' energy policies, potentially including renewables incentives and stricter environmental impact assessments, taxation and reporting obligations. Changes to the political, regulatory and fiscal environment are likely to fuel disputes between investors and governments.

Phillippe: I understand that the investor-state landscape in Africa is also changing?

Marc: Recent developments, such as the Pan-African Investment Code (PAIC) and the Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (POI), may impact future investor-state disputes.

The PAIC, adopted by the African Union in 2016, aims to promote and protect investments fostering sustainable development. Notably, the PAIC omits the fair and equitable treatment standard, imposing direct obligations on investors concerning corporate governance, sociopolitical responsibilities, natural resource use, business ethics, and human rights – for example, to *"not exploit or use local natural resources to the detriment of the rights and interests of the host State."*

The POI, adopted on February 19, 2023, follows the PAIC by imposing direct obligations on investors. It prohibits new bilateral

investment treaties (BITs) and aims to replace existing BITs between AfCFTA member states within five years. The POI obligates investors to *"support actions to mitigate greenhouse gas emissions and measures to adapt to the negative impacts of climate change"* to ensure a fair and just energy transition, focusing on renewable and low-carbon sectors.

Incorporation of direct obligations on investors regarding climate change and broader ESG concerns represent a significant development. As well as broadening the range of disputes that may arise, it may lead to an increase in state counterclaims against investors.

Not exploit or use local natural resources to the detriment of the rights and interests of the host State."

We will see how arbitral tribunals deal with these developments, bearing in mind that new investor obligations should, in principle, only be enforceable prospectively. The extent to which these new obligations are compatible with existing investment agreements and contracts will require careful assessment as governments in Africa navigate the tension between treaty obligations and enacting the regulations required to combat climate change.

Phillippe: Thanks, Marc. I'd like to turn to resource nationalism. Joseph, perhaps you could begin by explaining what it is?

Joseph: Thanks, Phillipe. Resource nationalism is an important, albeit often controversial, issue. It is usually defined as a state's assertion of control over the resources found within its sovereign territory.

While outright expropriation is one manifestation, it is more often indirect, and might include post-investment changes to the legislative, fiscal or regulatory environment, non-renewal of existing contracts or the introduction of local content and participation requirements. It is by no means exclusive to Africa, nor is it a new phenomenon, but there are signs of a growing trend towards this type of intervention in Africa.

Phillippe: Why do you think that is?

Joseph: The reasons are complex and specific to each state, but the following factors are likely to contribute:

- Political instability and civil unrest;
- The impacts of COVID-19 and Russia's invasion of Ukraine;
- Inflation, commodity price volatility, global supply chain disruption and food insecurity;
- Competition for mineral resources, indirectly caused by net-zero commitments – for example, so-called 'battery metals' such as cobalt, graphite and lithium; and
- Domestic constraints on public funding and demands for increased value from local resources.

It is probably a combination. Growing demand – driven by the green transition and energy security concerns – causes price volatility, incentivizing resource-rich countries to adopt measures aimed at bolstering public finances and domestic political goodwill.

While the reaction is understandable, the incentive is perverse. If mismanaged, conflict with multinationals becomes inevitable, foreign investment may be discouraged and economic conditions deteriorate, provoking a vicious cycle.

Phillippe: Why the recent attention on critical minerals?

Joseph: The energy transition, together with development of energy storage technologies, is driving an increased need for critical minerals. According to the IEA, mineral requirements are likely to double by 2040 and quadruple if we are to reach the Paris Agreement's goals within that timeframe.

The consequence is a race for resources, exacerbating a tendency for mineral-rich countries to introduce protectionist measures when prices surge and the market is captive. Inevitably, as it holds around 30 percent of the world's mineral reserves, that leads to Africa.

Recent examples such as the DRC's forfeiture of mining rights in August 2023, Mali's new mining legislation in September 2023, and the prohibition of raw mineral ore exports in Zimbabwe, Namibia and Ghana suggest resource nationalism in Africa is on the rise and likely to manifest in increasingly diverse ways in the coming years.

Phillippe: What is that likely to mean for arbitration in Africa?

Joseph: The mere threat of protectionism impacts investment conditions, particularly as a decision to invest involves upfront cost and long-term commitment. This makes these investments prone to contentious renegotiation. While the capital expenditure often makes investors more pragmatic, the more incentive to intervene, the more interests diverge and the more disputes (invariably decided by arbitration) arise.

Support actions to mitigate greenhouse gas emissions and measures to adapt to the negative impacts of climate change"

The obvious protections on which investors can rely, aside from contractual and political risk insurance, are the nearly 1,000 BITs with African state parties. Changes to regulatory regimes, fiscal measures, amendments to ownership requirements and expropriation are a mainstay of treaty claims. It is likely, if resource competition continues its upwards trend, that commercial arbitrations and treaty claims involving African states will follow a similar pattern.

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Navigating arbitrator conflicts: The IBA Guidelines and the UNCITRAL Code

By Taylor LeMay, Courtney Hikawa and Kevin O'Gorman

Identifying and avoiding arbitrator conflicts of interest remains a key concern for parties to arbitrations. Conflicts can impair the integrity of the proceeding or give rise to setting aside an award, yet arbitral institution rules and applicable domestic laws often lack clear disclosure requirements or robust guidance regarding arbitrator conflicts.

In the absence of such guidance, two sets of non-binding guidelines have emerged to help bridge the gap between different jurisdictions' practices and create global best practices as to conflicts of interest. The first is the IBA Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines), which were first issued in 2004, revised in 2014, and most recently updated in early 2024 to reflect the modern arbitration landscape.

The second is the UNCITRAL Code of Conduct for Arbitration in International Investment Disputes (the UNCITRAL Code), the final version of which was published earlier this year. First proposed in 2015 and in development by UNCITRAL's Working Group III since 2017, the UNCITRAL Code seeks to address critiques of a perceived lack of independence and impartiality of ISDS participants. The UNCITRAL Code, which reflects many of the same principals as the IBA Guidelines, marks a first-of-its-kind development focused purely on international investment disputes.

Together, these texts exhibit a robust approach to mitigating conflicts of interest. This article highlights some of the key aspects of the recently published versions of both the IBA Guidelines and the UNCITRAL Code.

The 2024 IBA Guidelines

The IBA Guidelines are divided into two sections: (i) General Standards (and explanatory commentary); and (ii) the Practical Application of the General Standards, which categorizes various situations into non-exhaustive lists of potential conflicts color-coded in green, orange, waivable red and non-waivable red. The 2024 IBA Guidelines retain the same structure and core principals as in earlier versions, but make some notable changes.

The IBA Guidelines are divided into two sections: (i) General Standards (and explanatory commentary); and (ii) the Practical Application of the General Standards"

Conflicts of Interest

General Standard 2 retains the UNCITRAL Model Law's objective "reasonable third person" test for determining whether there are justifiable doubts as to an arbitrator's independence and impartiality; where such doubts exist, so does a conflict. The Non-Waivable Red List sets out circumstances where a conflict exists and mandates that an arbitrator decline or resign an appointment.

The Waivable Red List circumstances are also conflicts, but instead require disclosure and can be waived. The 2024 Guidelines' Red Lists are mostly unchanged, except that now non-waivable legal representation of a party must be either 1) in the arbitration itself, or 2) current/regular and a source of "significant financial income" for the arbitrator or their employer – otherwise, it is waivable.

Disclosure

General Standard 3, Disclosure by the Arbitrator, converts two comments from the 2014 commentary into provisions of the standard itself: The first new provision instructs arbitrators to decline or resign an appointment if they determine that a disclosure would violate secrecy or confidentiality rules.

The second instructs that a failure to disclose does not per se mean that a conflict exists. As the commentary explains, this is because the arbitrator must apply a subjective standard in determining what to disclose (that is, what the parties may consider a conflict), but General Standard 2 requires an objective determination (the reasonable third person test) of whether a conflict indeed exists.

The first new provision instructs arbitrators to decline or resign an appointment if they determine that a disclosure would violate secrecy or confidentiality rules."

In the 2024 IBA Guidelines, the Orange List of potential conflicts that require disclosure is significantly expanded to include:

- assisting a party with mock-trials or hearing preparation on two or more occasions, or assisting a lawyer or firm in the same manner on three or more occasions, in a three-year period;
- serving as an expert in an unrelated matter for a party, or on three or more occasions with the same lawyer or firm, in a three-year period;
- current service on another tribunal alongside a fellow arbitrator or counsel for a party;
- association with an expert in a professional capacity, such as employee or partner, or currently instructing an expert in another arbitration as counsel;
- advocating for a position on the case in online spaces.

Notably, an arbitrator's firm having acted for or against a party in an unrelated matter was removed from the list, although unrelated and current/regular representation by an arbitrator or their firm may trigger disclosure if it creates a significant commercial relationship.

Reasonable Inquiry

The 2024 Guidelines now require arbitrators to conduct a reasonable inquiry into potential conflicts for the purposes of disclosure. Further, General Standard 4 requires the parties to do the same to avoid waiving the right to challenge an arbitrator on the basis of facts that they would have learned in the course of such an inquiry.

The 2024 Guidelines now require arbitrators to conduct a reasonable inquiry into potential conflicts for the purposes of disclosure."

General Standard 6 has been broadened to include conflicts arising from arbitrators' non-firm employers, and details what entities, affiliates, and structures may give rise to a conflict – including the circumstances described in the color-coded lists. Similarly, General Standard 7 now requires the parties to disclose any person or entity over which they have a controlling influence, and in-line with General Standard 4's revisions, mandates that the parties undertake a "reasonable enquir[y]" and disclose " all relevant information."

The UNCITRAL Code, published in February 2024, is a set of rules primarily for arbitrators in investor-state cases."

The UNCITRAL Code of Conduct

The UNCITRAL Code, published in February 2024, is a set of rules primarily for arbitrators in investor-state cases. It references the previous 2014 IBA Guidelines as "useful guidance" and, like the IBA Guidelines, includes, inter alia, obligations to disclose potential and actual conflicts of interest and obligations to refuse or resign an appointment in certain circumstances. It also incorporates the UNCITRAL Model Law's requirement that an arbitrator should be independent and impartial.

The UNCITRAL Code, like the IBA Guidelines, mandates that arbitrators disclose circumstances that are "likely to give rise to justifiable doubts." This ongoing disclosure obligation includes:

1. relationships with any party, counsel, arbitrators, experts, or interested parties, including third-party funders;
2. interests in the proceeding's outcome;
3. appointments as counsel, arbitrator, or expert for the past 5 years that relate to international investments or involve a party or their counsel;
4. prospective parallel counsel or expert appointments in other international investment disputes or related proceedings.

The UNCITRAL Code notably limits so-called "double hatting" by barring arbitrators' participation as counsel or expert in parallel proceedings involving the same measures, parties, or agreement provisions. It also bars participation as counsel or expert in subsequent proceedings involving the same parties or measures for three years, and those involving the same provision of the instrument of consent for one year. These provisions reflect a compromise between the drafters after much debate, as earlier drafts controversially prohibited double-hatting altogether.

The UNCITRAL Code applies where parties consent to its application or it is required by their instrument of consent – therefore, the impact of these guidelines is unlikely to be felt until a new wave of treaties or instruments emerges. Notably, however, the UNCITRAL Code lacks any sanctions or means of enforcement and does not provide any independent basis for disqualifying an arbitrator.

Conclusion

Understanding and managing conflicts of interest requires careful review of the laws and guidelines applicable to a particular arbitral proceeding. Such diligence empowers parties to ensure independence and impartiality of their Tribunals and challenge unfair proceedings. It is therefore important that clients and counsel stay abreast of the evolution of these texts and other applicable rules that pertain to conflicts of interest.

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Pro-enforcement predilection: A comparison of the enforceability of awards for interim measures in the UAE, KSA, England and Australia

By Nick Sharratt, Dylan McKimmie, Nasser Almulhim, Alexander Field and Kate Andersson

A major area of innovation in arbitration in recent years has been the promulgation of rules by arbitral institutions that allow for interim measures. Interim measures are orders made by the tribunal before disposing of the merits of the proceedings. They can include orders to preserve assets and evidence and grant security for one party's costs. Interim measures are a useful tool for both the parties and the tribunal to preserve the integrity of proceedings. However, there have long been concerns whether awards in relation to interim measures are enforceable, given uncertainty as to whether they could be classified as a final "award" for the purposes of the New York Convention and local arbitration laws.

This article considers the enforceability of awards for interim measures in the United Arab Emirates (UAE), across its three major jurisdictions, as well as the Kingdom of Saudi Arabia (KSA), Australia, and England and Wales; the conclusion is that jurisdictions across the Middle East are increasingly receptive towards enforcing interim and partial awards, both through legislative developments and emerging case law. This position aligns with the jurisprudence across more established common law jurisdictions.

The UAE

The UAE is a federated civil law system, with each emirate being able to pass their own civil laws. However, the UAE also has common-law-influenced free zones that have English language common law courts and are substantially different legal systems from the rest of the UAE. These jurisdictions are colloquially described as "offshore" jurisdictions, while the rest of the UAE is referred to as "onshore." The main financial free zones are the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM). Different arbitration laws apply onshore and in both offshore jurisdictions.

DIFC

The DIFC is a major regional arbitration hub and is home to the Dubai International Arbitration Centre. The DIFC's Arbitration Law (DIFC Law No. 1 of 2008) is based on the UNCITRAL Model Law with some amendments.

Over the years, the DIFC has demonstrated itself to be a pro-enforcement jurisdiction, with the DIFC Courts regularly upholding and enforcing arbitral awards. However, due to the terms of the DIFC Arbitration Law, there had, until recently, remained an open question as to whether the DIFC Courts will enforce interim arbitral awards relating to interim measures, especially when the Tribunal is seated outside of the DIFC. This stemmed from the fact that the recognition and enforcement provisions of the DIFC Arbitration Law (Articles 42 to 44) referred to the enforceability of "arbitral awards" but did not specifically refer to interim measures, whereas separate parts of the Law (specifically, Article 24(2)), did refer to "interim measures," leading to the question as to whether an "interim measure" was an "award" for the purposes of the Law.

However, in two judgments in late 2023 and early 2024, the DIFC Courts have confirmed that they will enforce such awards irrespective of the seat of the arbitration.

In 2023, in *Muhallam v Muhaf* (ARB 021/2022), the DIFC Court of First Instance recognized a provisional award rendered by a tribunal seated in London in accordance with English law and the LCIA Rules. The Defendant argued that the provisional award was not an "arbitral award" for the purposes of the Articles 42 and 43 of the DIFC Arbitration Law and was therefore not enforceable by DIFC Courts. The Court of First Instance disagreed with this view

and confirmed that "arbitral award" for the purposes of Articles 42 and 43 was broad enough to encompass both interim awards and final awards. The Court of First Instance also confirmed that Article 24(2) provided a summary procedure for the enforcement of interim awards for arbitrations only when seated locally in the DIFC.

This decision was appealed, and the DIFC Court of Appeal rendered its decision in the case of *Neal v Nadir* [2024] DIFC CA 001/2024. In *Neal v Nadir*, the Court of Appeal agreed with the Court of First Instance and confirmed that for the purposes of the DIFC Arbitration Law, an "award" would include interim, partial and final awards and there was no public policy justification to support an alternative conclusion.

The DIFC Courts will therefore enforce both interim and final awards, irrespective of the seat of the arbitration. These decisions also affirm the DIFC as an arbitration-friendly jurisdiction. However, practitioners and arbitrators should still remain vigilant. Given the emphasis on enforcement being linked to the "awards," parties should ensure that any procedural or interim directions are made as "awards" and not mere procedural orders.

ADGM

The other major offshore jurisdiction in the UAE is the ADGM in Abu Dhabi. The ADGM has its own arbitration centre, being the Abu Dhabi International Arbitration Centre (**ADIAC**), and is another common law jurisdiction in the UAE.

Unlike the DIFC Arbitration Law, the enforcement provisions of the ADGM Arbitration Regulations 2015 specifically provide for the enforcement of both interim awards and orders. Article 30 of the ADGM Arbitration Regulations states that an interim measure issued by a tribunal shall be recognized and enforceable, whether those awards are issued by tribunals seated in the ADGM or internationally. Article 30 states:

> **30. Recognition and enforcement of interim measures by the Court** *(1) Subject to subsection (4), an interim measure issued by an arbitral tribunal shall be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the Court or any competent court (in either case, the "recognising court"), irrespective of the country in which it was issued, provided such application is made on notice to all parties to the proceedings…*

For parties wishing to run their ADGM-seated arbitrations through ADIAC, ADIAC helpfully confirms that its Arbitration Guidelines may be used "*by arbitral tribunals as guidance for the purposes of effective case management, including in particular for the purposes of issuing procedural orders*" (page 2).

Given the explicit wording of this provision, there has been no jurisprudence from the ADGM Courts regarding the issue of enforcing interim awards. In view of this clear wording, and the ADGM Courts' pro-arbitration stance, the ADGM Courts can be expected to enforce awards for interim measures for arbitrations seated in the ADGM.

Onshore UAE

As set out above, the rest of the UAE may be characterized as "onshore." Given that most business takes place onshore, it is an important jurisdiction for the enforcement of awards. Such enforcement issues are handled by the onshore courts, which are civil law courts, and which enforce arbitral awards in accordance with the UAE Federal Arbitration Law (Federal Law No. 6 of 2018).

The UAE Federal Arbitration Law appears to bridge an arbitration gap for parties in the UAE. Article 39(1) of the Law provides that tribunals may issue interim awards or partial awards. Article 55 of the Federal Arbitration Law provides that onshore courts will recognize an arbitral award, but does not distinguish between interim, partial or final awards. Hence, we consider that onshore courts will give consideration to the enforcement of interim measures made by way of an "award." In respect of "orders," Article 18 confirms that, upon referral to a local, competent court by parties or by a tribunal, courts may order provisional or precautionary measures. The enforcement by courts of interim measures made by tribunals is also possible pursuant to Article 21(4).

Parties and practitioners should take care to specify the form in which any interim measure should be made, where they may need to enforce such a measure in onshore UAE.

Kingdom of Saudi Arabia (KSA)

As a part of the Kingdom's race towards its Vision 2030 goals of economic, cultural and social diversification, the KSA has moved to position itself as a leader globally and a jurisdiction of choice for parties wanting to settle disputes. Foreign arbitral awards are enforceable under the KSA Arbitration Law (Royal Decree No. M34/1433).

Pursuant to Articles 22 and 23 of the KSA Arbitration Law, arbitral tribunals are permitted to order interim measures. Subject to any requests made by the parties or the arbitral tribunals, competent courts are able to make interim or preventative orders to this effect.

A competent court for the purposes of enforcing interim measures or awards would be the Execution Enforcement Court. The Enforcement Court in the KSA adopts a different approach to the UAE onshore courts. Five factors that the Enforcement Court will consider when determining whether to enforce a foreign arbitral award are that the award does not contravene Sharia principles, it is final, the award debtor was properly notified, awards from the issuing country are enforceable in the KSA and finally, the award is not in conflict with a judgment or decision issued by a court, committee, or commission having jurisdiction to decide the dispute in the KSA.

It is unclear whether this requirement for "finality" refers to substance or to the title of the award, excluding interim, partial and provisional awards/orders. Given the powers under Articles 22 and 23 above under the Saudi Arbitration Law, it is likely that finality will be a matter of substance, as is the case in other common law jurisdictions discussed below.

England and Wales

When considering the enforceability of interim measures, English courts focus on the substance and "finality" of interim measures or partial awards.

For example, the general position is that partial or interim orders, awards or decisions will only be enforceable if they are "awards" for the purposes of Sections 66 and 100(1) of the Arbitration Act 1996. But what makes something an "award?"

If a partial.. award finally disposes of some of the issues in dispute, it can be enforced as an award under Section 66 as that partial award is *final and binding* in respect of discrete issues. However, if a tribunal issues a provisional order that is subject to further review, or issues a procedural order, a party may not be able to enforce it as an "award" under Section 66.

The Court of Appeal observed in *Rotenberg v Sucafina SA* [2012] 2 Lloyd's Rep 54 that when considering the enforceability of a partial or interim award, courts will look to the substance of the award and whether it was intended to dispose of issues finally, as opposed to the award's label. Additionally in the context of partial awards on jurisdiction, courts may refuse to recognize and enforce awards if the award is not final as to its subject matter, with awards on jurisdiction always being subject to review by local courts (*Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46).

Australia

The position in England and Wales above is similar to that adopted by other common law jurisdictions, such as Australia. As a country that has ratified the UNCITRAL Model Law at national and state levels, courts in Australia will recognize and enforce a partial or interim award only if it determines a substantive right, claim or defense in the arbitration (in accordance with Articles 17H and 17I of the Model Law).

Australia's interpretation of the Model Law doctrines may evolve due to an ongoing dispute before the High Court, which is set to decide whether arbitral tribunals can re-decide matters that were disposed of in interim awards or whether interim awards are "final" (and enforceable) in this regard. Read more about this matter here.

When examining English and Australian enforcement, it becomes clear that "finality" is a core component for enforceability in these jurisdictions. This is something that both offshore and onshore courts in the UAE may grapple with in the future.

Conclusion

For parties looking to resolve complex commercial disputes in the Middle East, recent developments in the DIFC are bringing the UAE in line with other common law jurisdictions which have historically been preferred jurisdictions for recognition and enforcement. Noting that some enforcement provisions of arbitration laws in the region remain untested, parties should mitigate risk by ensuring that any interim or partial measures that they wish to have enforced in the Middle East are labeled as "awards" and are sufficiently "final" in substance.

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Clarifying Indonesia's Arbitration Law: A step in the right direction

By Erie Tobring, Tamlyn Mills, Daniel Allman and Dandi Hamid

Indonesia-seated arbitrations are governed by Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (Arbitration Law). On October 17, 2023, the Supreme Court of the Republic of Indonesia passed Regulation No. 3 of 2023 on the Appointment of Arbitrators by Courts, Challenges to Arbitrator Appointments, Arbitral Awards (SCR 3/2023). SCR3/2023 is derivate regulation that clarifies the Arbitration Law whilst addressing some of its gaps. It has been praised as a progressive step towards arbitration reform. In this article, we examine how SCR 3/2023 will change the arbitration landscape in Indonesia and consider the implications for parties involved in Indonesia-seated arbitrations.

Indonesia ratified the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention) in 1981. However, Indonesia is not a Model Law jurisdiction, and the Arbitration Law departs from the UNCITRAL Model Law in several key respects. Indonesia has set ambitious targets for economic growth and trade and has recognized the importance of a transparent, efficient and consistent dispute resolution system to improving economic competitiveness and encouraging foreign investment. Against this background there have been increasing calls to reform and modernize the Arbitration Law (which has been largely unchanged in 24 years) to bring it in line with international best practice and to align Indonesia with leading arbitral seats in the region.

SCR 3/2023 forms part of a broader effort by the Supreme Court and the central government to improve Indonesia's business and investment climate. In a recent speech, Justice I Gusti Agung Sumanatha, Chair of the Civil Chamber of the Supreme Court, emphasised that SCR 3/2023 aims to:

> *"[F]urther strengthen the implementation of the arbitration mechanism in Indonesia, and increase trust and confidence [sic] business actors regarding the use of Indonesian arbitration as a mechanism for resolving cross-border disputes..."*

The changes

SCR 3/2023 introduces six key changes to the operation of the Arbitration Law:

- **It streamlines the process for appointment of arbitrators**. Under the Arbitration Law, parties can petition the District Court to appoint an arbitrator or arbitral tribunal if they are unable to reach agreement, but the Arbitration Law does not stipulate the procedure for making such a request. Under SCR 3/2023, a request is made by parties to the District Court, where the Chairman will, via determination, make an appointment within 14 days. There are also procedures for parties to object to appointments in circumstances where there are sufficient reasons or credible evidence raising doubts as to whether the arbitrator will perform their duties objectively and will be independent and impartial.
- **It outlines a clear procedure for registration and enforcement of national and international arbitral awards**. Under SCR 3/2023, the tribunal must apply online for registration of an arbitral award by the Registrar of the Court. SCR 3/2023 removes the 30-day deadline for applying to register an international arbitral award in Indonesia (although that deadline remains for national awards). The Registrar must then carry out registration of an award within three days in the case of a national award and within 14 days in the case of an international award. An application for registration of an international award must be accompanied by the arbitration agreement in the Indonesian language and a statement from the diplomatic representative of Indonesia in the country where the award was rendered, stating that the country is bound by an agreement with Indonesia regarding the recognition and implementation of arbitral awards. Finally, SCR 3/2023 allows institution-appointed arbitrators to register the award by the institution or by proxy, resolving an ambiguity in the Arbitration Law. If a registered award is not complied with voluntarily, a party can make an online application for enforcement which must be determined within 30 days (for both national and international arbitration awards). An application for enforcement must meet the requirements set out in the Arbitration Law and must be assessed as not contrary to decency and/or public order. There are special provisions for international awards where Indonesia is a party.

- **It clarifies the procedure for applications to annul arbitral awards**. Under SCR 3/2023, parties must submit an application for annulment to the Court within 30 days of the award being registered. An award will only be annulled where there is evidence of forgery, deliberate concealment of documents or deceit. SCR 3/2023 allows for annulment rulings to be appealed to the Supreme Court and requires that applications for appeal be filed within 14 days from the decision on annulment. The Supreme Court has 30 days to consider and decide on the appeal.
- **It introduces a procedural guideline for the enforcement of arbitral security seizure**. Following the issue of the arbitral order, the arbitrator(s) must register the order with the court, and subsequently may file an enforcement request. SCR 3/2023 obliges the court to provide notification to the tribunal within two days of enforcement. All costs arising from the security seizure are charged to the applicant. It is not yet clear whether these provisions apply only to domestic arbitral orders or also extend to orders made in international arbitrations.
- **It introduces a definition of 'public order'** for purposes of refusing enforcement of an award on the basis it would be contrary to public order. Uncertainty about the meaning of 'public order' has been an issue for parties seeking to enforce or resist enforcement of an international arbitral award (see, for example, *Astro Nusantara BV et al v. PT Ayunda Prima Mitra et al; Bankers Trust International v. PT Mayora Indah* (Supreme Court Decision No. 01/K/Ex'r/Arb.Int/Pdt/2000) and *E.D & F. Man (Sugar) Ltd v. Yani Haryanto* (Supreme Court Decision No. 1205 K/Pdt/1990)). However, SCR 3/2023 defines 'public order' under the Arbitration Law as "*anything which constitutes the foundations required for the implementation of the legal, economic and socio-cultural system of the Indonesian society and nation*." This definition is broad and contains no threshold or clear test by which to determine whether something is or is not contrary to public order. The definition therefore still affords courts considerable discretion to resist enforcement on the basis of opaque public order imperatives.
- Finally, SCR 3/2023 **distinguishes between a conventional arbitration**, and a Sharia arbitration. Jurisdiction for registration and enforcement of arbitral awards issued by Sharia arbitration centres is vested in the Religious Court of Central Jakarta (in the case of an international Sharia arbitration award), or in the religious court having jurisdiction over the respondent (in the case of a national Sharia arbitration award).

Implications

SCR 3/2023 is a move in the right direction and introduces some helpful improvements to the Arbitration Law.

In particular, SCR 3/2023 will:

- alleviate delay for parties by introducing deadlines for the registration and enforcement of arbitral awards by a court;
- clarify the role of institutions in applying for registration of an award;
- facilitate enforcement of awards in international arbitrations by abrogating the 30-day deadline for registration of an international arbitral award; and
- promote certainty by introducing a practical guideline for the enforcement of arbitral security seizure orders.

Conclusion

While SCR 3/2023 is not a panacea for all of the problematic aspects of the Arbitration Law, it represents significant improvement. Perhaps more importantly, it signals an appetite for reform of Indonesia's arbitration laws with a view to facilitating the effective and efficient resolution of cross-border disputes within Indonesia and to more closely align with international standards. Efforts to streamline and improve dispute resolution mechanisms should help to promote foreign investment and enhance Indonesia's appeal as an attractive arbitration jurisdiction.

With assistance from Eibhlin Murrant.

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Disputes in orbit: Commercial arbitration for the satellite industry

By Daniel Allman, Jo Feldman, Paul Stothard and Ananya Mitra

The private sector's enhanced role in manufacturing, launching and operating satellites has seen an uptick in actual and potential disputes. These disputes tend to be cross-border in nature, technically complex, and commercially sensitive. This makes international arbitration a natural choice for settlement of satellite sector disputes – it can be tailored to the particularities of a given case and offers a confidential, binding process to obtain relief that is enforceable in more than 170 jurisdictions.

Who are the key players?

- Satellite system operators provide mobile satellite services for telecommunications and outer space activities. Most satellite system operators are private parties, operating in a highly competitive market.
- Manufacturers of satellites and other spacecraft machinery are limited in number, given this is a specialized field involving high costs where equipment must withstand extreme conditions.
- Launch service providers, like manufacturers, offer a high-cost service that requires deep technical expertise.
- Satellite insurance carriers provide pre-launch, launch and in-orbit insurance, which can continue for the lifespan of the satellite.

What are their contractual relationships?

Disputes in the satellite sector arise from a variety of commercial contracts. For example:

- Procurement contracts between system operators and manufacturers govern the design and construction of satellites. The process of design and construction can take several years, and procurement contracts typically specify a detailed timeline for delivery, including interim milestones. The protection of confidential information and intellectual property is critical. Disputes commonly arise from operational faults, involving either a latent manufacturing flaw or an operating error, and parties can mitigate that risk through incentive schemes whereby manufacturers earn "incentive payments" that accrue over a satellite's operational life to the extent it continues to perform as required.
- Launch agreements between launch service providers and system operators govern the launch of spacecraft into orbit. If a procurement contract provides that a satellite is to be delivered mid-orbit, then the launch agreement usually involves a launch service provider and a manufacturer.
- Insurance contracts play a key role in managing the risk associated with outer space activities, allowing parties to protect against possible losses that can occur during a satellite's construction, launch or operational phases.
- Service agreements by which business (for example, telecoms operators) lease the use of satellites.

Additionally, many countries have assigned through legislation the tortious and other liability for damages caused by space debris. Although some developments have been made particularly at a domestic level, space debris remains largely without uniform regulation.[1]

How do disputes arise?

Manufacturing delays have given rise to several high-profile satellite sector disputes. By way of example, in 2012 a satellite system operator commenced arbitration under the American Arbitration Association rules against a satellite manufacturer in relation to alleged manufacturing delays.

Disagreements over orbital positioning can also arise. For example, a 2012 arbitration was commenced between two satellite operators under the International Chamber of Commerce (ICC) rules over the right to an orbital position that would allow the occupier to transmit television and radio signals. The matter required consideration of various coordination agreements, as well as licenses held by the parties, to determine their respective rights to operate in that position.

Cancellation of operation rights granted by a state or state-owned entity can give rise to commercial disputes, as well as investment treaty arbitration in the case of a foreign investor. Intellectual property rights, too, assume particular importance in space commerce, where advanced infrastructure is required and the proprietary rights to specialized technology are highly valuable.

Changes of domestic law more generally can be a source of conflict. In 2013, for example, ICC arbitration was commenced between a satellite manufacturer and a satellite communications provider more than two years after the satellite had been provided, following a ministerial order declaring the relevant purchase agreement null and void for failure to obtain an export permit.

The costly and risky nature of satellite ventures creates a market for insurance policies covering discrete aspects of pre-launch, launch, and operational activities. The risk of loss during a faulty launch or an in-orbit operational failure can generate complex claims involving insurance carriers, launch service providers, and satellite system operators.

Financing disputes, too, are a common feature given the web of capital associated with highly innovative projects. Increasingly, the space sector is an attractive target for venture capital.

Why is arbitration well suited?

Arbitration is well established as the preferred dispute resolution mechanism for complex, cross-border disputes, including in specialized areas such as aviation and banking. Arbitration is neutral, voluntary and offers an adaptable procedure. Importantly, it results in a final and binding award that can be enforced in 172 countries that are signatories to the New York Convention.

Arbitration can equally be tailored to space-related disputes. The Permanent Court of Arbitration's Optional Rules for Arbitration of Disputes Relating to Outer Space Activities, 2011 address some particularities of those disputes by providing that:

- the agreement to the rules constitutes a waiver of any right of immunity from jurisdiction (Article 1(2));
- the PCA Secretary-General will maintain a Specialized Panel of Arbitrators with relevant subject-matter expertise on space matters (comprising both lawyers and non-lawyers) to assist the parties in appointing arbitrators (Article 10(4));
- the parties can seek special measures to preserve confidentiality, by which the tribunal can determine an appropriate confidentiality regime including requiring undertakings (Article 17(6)-(7));
- the tribunal can appoint a confidentiality advisor as an expert to report to it on confidential information, without disclosing the information itself to the other party or to the tribunal (Articles 17(8), 29); and
- the tribunal can request the parties to jointly or separately produce non-technical documents explaining the relevant scientific and technical background to aid its understanding of the matters in dispute (Article 27(4)).

Other arbitral institutions have not established dedicated rules for the space or satellite sectors. However, parties can agree to incorporate several of the features above into their arbitration clause (for example, a detailed confidentiality regime for handling technical and scientific data) or by adopting a specific framework after the dispute arises. While most types of space disputes can be resolved through commercial arbitration, one potential limitation is the contractual and consensual nature of the arbitral process. This means, for example, that collisions between satellites owned by private parties without a contractual relationship cannot be referred (without subsequent agreement or more targeted regulation) to an arbitral setting.

With thanks to Eibhlin Murrant.

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1 See <https://www.nortonrosefulbright.com/en-au/knowledge/publications/1266988f/who-is-going-to-clean-up-all-this-space-junk>.

The role of international arbitration in voluntary carbon market disputes

By Holly Stebbing and India Furse

Voluntary carbon markets (VCMs) could play a major role in the energy transition by helping difficult-to-decarbonize industries meet their net-zero ambitions through investing in carbon credits. However, as a relatively new, rapidly expanding and largely unregulated market, there is the risk of disputes arising across the VCM value chain as the industry tackles issues of carbon accounting consistency and integrity, evolving regulation and competing interests between public and private sector participants.

What are VCMs?

Carbon credits or offsets are transferable instruments certified by internationally recognized independent registries. Each credit is verified as representing a reduction of one metric tonne of CO2 emissions or the equivalent amount of other greenhouse gases (GHGs). VCMs allow carbon emitters to buy carbon credits or carbon offsets from projects that remove or reduce GHG emissions, and then use those credits or offsets to compensate for their own emissions.

Who are the key market players?

Sellers of carbon credits are typically the developers or owners of projects involving the conservation or planting of forests, clean cooking projects or the replacement of fossil fuel with renewable energy generation. Once a project has been developed, the developer applies to the applicable independent registry or standards body whose role is to examine the project and information supplied, and issue carbon credits based on their estimate of the project's greenhouse gas reductions and then act as a registry to store and process credits over the project's lifecycle.

Initial buyers of carbon credits may be brokers, retailers or institutional investors who wish to profit by reselling the offset in the secondary market. Alternatively it may be brought by an "end user," who will take credit for the GHG reduction the offset represents by using or "retiring" it with the registry so that it cannot be used again. These end users are often large corporates in high emitting industries seeking to achieve net-zero.

What types of disputes will be arbitrated?

In the context of international arbitration, VCM disputes are likely to fall into two categories:

1. Disputes between commercial parties

As with other commercial disputes, international arbitration will be an attractive dispute resolution mechanism for commercial entities operating in VCMs to include in their contracts. The issues arising in VCMs are specialized and relatively new, which invite the appointment of arbitrators with relevant market and technical expertise. The majority of cases will also be cross-jurisdictional, meaning that international arbitration will be the preferred choice for enforcement purposes due to the wide reach of the New York Convention.

2. Investor-state disputes

In the absence of any contractual arrangement, investors in international carbon projects will need to rely on investment treaties to bring claims against a State or State-owned entity. The dispute resolution mechanism in the majority of these treaties will be International Centre for Settlement of Investment Disputes (ICSID) arbitration.

Value disputes

We see the potential for arbitration to play a particular role in disputes relating to credit "value." The standards bodies responsible for issuing carbon credits and offsets are largely unregulated. There is also a lack of consensus in carbon accounting due to the existence of multiple voluntary programs, the absence of

standardized rules or documentation, and mixed views on what, in fact, makes a quality carbon credit. Disputes can therefore arise as to the "value" of a carbon credit, misselling and "carbon fraud."

For example, the value of a carbon credit will depend on its "additionality." Introduced in Article 6 of the Paris Agreement, this concept qualifies GHG reductions as "additional" if those reductions would not have occurred "but for" the offset project. The less likely it is that a project would have been pursued even without the prospect of the sale of carbon offset credits, the lower the quality of the credit. Assessing "additionality" is complex and highly technical, with a range of different environmental, societal and political factors requiring assessment.

Projects aimed at reducing deforestation in one area, for example by preventing agricultural activities, could lead to an increase in those activities elsewhere (known as "displacement"), which may also affect a carbon credit's true "value."

In 2023, an investigative report alleged that at least 90 percent of rainforest offset credits verified by Verra, a world-leading forest carbon offset certifier, do not represent "real" emissions reductions. The report alleged that only a handful of Verra's rainforest projects showed evidence of deforestation reductions and that the threat to forests had been overstated for Verra projects. Similar criticisms have been made in relation to other standard bodies and carbon projects in recent years and these stories are making international headlines.

Regardless of whether these criticisms are valid, questions over the level of emissions reductions represented by carbon credits or offsets issued by a standard body will have an onward impact on their value in the market. Until there is an internationally recognized standard method for carbon accounting, there will be market uncertainty and in turn, litigation risk. There is the risk of claims by initial and/or final purchasers against project developers or owners arising out of the diminution in value of those credits or offsets, for example, for breach of contract, misrepresentation or fraud.

Like other "commodities," carbon credits can be sold via long-term offtake agreements. These will often take the form of forward purchase agreements with the seller and purchaser contracting for carbon credits that are yet to be produced. When dealing in such an uncertain market, there is potential for significant fluctuations in the value of the carbon credits between the point of sale and the point of delivery. Pricing disputes, particularly if the contract includes a price review mechanism, may arise.

Disputes may also arise if there are delays in the issuance of carbon credits due to delays with project development and/or verification by the relevant standards bodies (over whom a project developer may have very little control/influence in terms of the timeline for verification).

Investor-state claims

As VCMs continue to grow, states may seek to bring in regulations which affect investors in international VCM projects. We have already seen the ICSID case of K*och Industries v Canada* which concerned a claim of over US$30 million arising from the withdrawal of Ontario's "Cap and Trade" program. The program had allowed market participants to buy and sell emission allowances and was linked with equivalent programs in California and Québec, allowing for cross-border trading. The case was dismissed on jurisdictional grounds but highlights the potential for further investor-state arbitrations, including in VCMs.

Litigation risk in VCMs should not be overstated – the industry remains in its infancy and as it matures, it should evolve to meet some of the challenges it currently faces. For participants in the VCMs, selecting arbitration for the resolution of disputes offers technical expertise, independence and international enforcement.

With thanks to Lamar Mukundi.

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Fair and equitable treatment in present and future investments: What to expect in times of climate change?

By Katie Chung, Paul Stothard, Besma Grifat-Spackman and Claire Martin

Action taken by states to address climate change may bring them into conflict with foreign investors who have invested in the host state. Many states have obligations to protect foreign investments under International Investment Agreements (IIAs). Numerous IIAs, which include bilateral investment treaties (BITs) or multilateral investment treaties, exist to promote and protect investments and ensure the flow of capital, technology and know-how between state parties. Whilst the contents of IIAs vary, most contain an obligation for host states to provide "fair and equitable treatment" (FET), which essentially guarantees a stable and predictable legal environment to foreign investors and their investments, failing which investors may commence arbitral proceedings against host states under the investor state dispute settlement (ISDS) clause contained in the IIAs.

In circumstances where states are required to comply with global climate change agreements, including by amending their domestic legislation, this article considers:

- **The tension between states' obligation to maintain and provide foreign investors with regulatory stability and predictability, and their obligation to regulate to combat climate change;**
- **Whether foreign investors can argue that changes in legislation breach the FET provision of an IIA;**
- **Even if such a breach is found to exist, whether there are any challenges a foreign investor may face when attempting to recover any resulting losses; and**
- **What foreign investors can expect in the future.**

International efforts to address climate change

The global effort to arrest and reverse adverse climate change has accelerated since the early 1990s. A number of global agreements have been concluded, setting out objectives for states, including specific emissions targets, to address the issue.

The United Nations Framework Convention on Climate Change (1992) (**UNFCCC**), the first major global agreement in relation to climate change, set out principles and basic state commitments and objectives, and provided a framework for subsequent negotiation to address the issue. The Protocol to the UNFCCC, known as the Kyoto Protocol, was signed a few years later in 1997. It set binding obligations on developed nations, subject to penalties for non-compliance, including requiring them by 2012 to reduce their greenhouse gas (**GHG**) emissions by an average of 5 percent below recorded emissions levels as of 1990.

The Paris Agreement of December 12, 2015 superseded the Kyoto Protocol and built upon existing obligations to reduce climate change by capping global warming to a maximum of 1.5 to 2°C beyond pre-industrial levels. The Paris Agreement sets out commitments for almost all states obliging them to publish a climate change action plan (known as Nationally Determined Contributions) every five years. Unlike the Kyoto Protocol, non-compliance with the Paris Agreement does not give rise to penalties for the non-compliant party.

The conflict between a state's right and/or duty to regulate to protect the environment and its obligation to provide foreign investors with a stable and predictable legal environment

There is inherent tension between a host state's right to regulate to protect the environment, including in compliance with its international commitments, and an investor's right to expect that state to comply with its obligations under an IIA to not harm its investment.

The right for states to prescribe and amend their domestic legislation to protect public interests, including the environment, is recognized under public international law. The right for states to regulate to protect the environment has also been acknowledged in some IIAs, such as the Energy Charter Treaty (**ECT**) (Articles 19 and 24(2)(i)).

Separately, the right for foreign investors to operate in a "transparent, stable and equitable legal framework" and the obligation for states to provide such environment is included in most IIAs. An "*investment can only be economically viable and flourish in the long run if States create and maintain a climate favorable to the operation of enterprises and to the flow of investments" (Silver Ridge Power BV v Italian Republic*, ICSID Case No. ARB/15/37, Award of February 26, 2021, para 399).

There is inherent tension between a host state's right to regulate to protect the environment, and an investor's right to expect that state to comply with its obligations under an IIA to not harm its investment."

The tension between states' climate-focused regulations and investors' right to FET is undeniable. For example:

- The adoption of legislation to phase out high-carbon industries, for instance through the cancellation of fossil fuel projects, has given rise to FET breach claims (see for example, *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands*, ICSID Case No. ARB/21/4, where investors commenced proceedings against The Netherlands on the basis that its 2019 Coal Act mandated the phase out of the production of energy from coal by 2030).
- The amendment or roll-back of climate-related measures, such as incentive schemes to promote investments in renewable energy, particularly because of policy changes in reaction to the 2008 financial crisis, has resulted in a multitude of treaty claims under the ECT filed against European countries.
- A host state may fail to implement climate change-related obligations under international agreements, adversely impacting foreign investors by failing to meet their legitimate expectations, and this may result in FET breach claims.

The tension between states' climate-focused regulations and investors' right to FET is undeniable."

How the tension between environmental regulation and protection of foreign investors is resolved in proceedings commenced by an investor against a host state for breach of the FET protection is determined on a case-by-case basis.

What to expect in times of climate change: Test for an FET breach

The test for an FET breach can be uncertain and appears to turn on the facts of each case, but arbitral tribunals, including in climate-related arbitrations, are likely to consider various key factors, including the following:

- Whether the regulatory change by a host state is unfair, unequitable or unreasonable.

  In *PSEG v Turkey*, ICSID Case No. ARB/02/5, Award, June 4, 2004, para 240), the arbitral tribunal held that "[I]*nconsistent State action, arbitrary modification of the regulatory framework or endless normative changes to the detriment of the investor's business and the need to secure a predictable and stable and legal environment*" may constitute unfair measures. Similarly, regulation, or its underlying aim, should be legitimate, rational and in the public interest, and not "entirely lacking in justification or wholly disproportionate" (***Philip Morris v Uruguay***, ICSID Case No. ARB/10/7, Award, July 8, 2016, para 419). "[U]*npredictable radical transformations in the conditions of the investments*" does not create a stable environment for the foreign investor (***RREEF v Spain***, ICSID Case No. ARB/13/30, Decision on Responsibility and Principles of Quantum, November 30, 2018, para 315). In all circumstances, an arbitral tribunal should give "*great deference*" to the "*discretionary exercise of sovereign power, not made irrationally*" (*Philip Morris v Uruguay*, para 399). In *Eiser v Spain*, where a

wholly different regulatory approach was in place, the arbitral tribunal found that the "*new system was profoundly unfair and inequitable as applied to* [the investors'] *existing investment, stripping* [them] *of virtually all of the value of their investment*" (ICSID Case No. ARB/13/36, Award, May 4, 2017, para 365 (the award was subsequently annulled but resubmission proceedings are pending)). When investing in industries that may be severely affected by climate change regulations, such as the oil and gas or mining industries, the test to establish legitimate expectations will be more difficult to meet. Material and adverse changes to regulatory frameworks are to be expected unless the host state made specific assurances that there would not be any regulatory changes or if there is a stabilization clause

- Whether the investor held legitimate expectations at the time of its investment.

  An investor must establish that representations or assurances that the legislation will remain the same were made by the host state personally to the investor. Representations or assurances are often specific or express, and made through contractual arrangements, public statements, government decisions, general conduct or promises. Specific commitments may take the form of a stabilization clause. Legitimate expectations can also arise from a legal framework put in place by the host state with the specific aim "*to induce investments*," which "*cannot be radically altered*" (*Antin v Spain*, ICSID Case No. ARB/13/31, Award, June 15, 2018, para 532).

  The host state's representation or assurance must have formed the basis of the investor's expectations, and must have been relied on by the investor at the time of investing in the host state, on the "*date of actual investment or irrevocable commitment to invest*" (*Cavalum v. Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, August 31, 2020, para 451).

  To be legitimate, the investor's expectations at the time of investment must be reasonable, "*not* [] *frivolous or unrealistic and must be grounded in reality*" (*Belenergia v Italy*, ICSID Case No. ARB/15/40, Award, August 6, 2019, para 571). The political and socioeconomic context must be considered when investing (*Duke v Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, para 340). Investors cannot reasonably expect circumstances not to change in the future (*Saluka v Check Republic*, PCA Case No. 2001-04, Partial Award, March 17, 2006, paras 304-305), particularly in times of crisis. Diligent investors are also expected to maintain their awareness throughout their investment, such as following parliamentary debates regarding changes to an environmental law (*Plama v Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, para 221).

- Whether the unfair, unequitable or unreasonable regulation violated the investor's legitimate expectations.

  "[O]*nly measures taken in clear violation of the FET will be declared unlawful and entail the responsibility of the State*" (*RREEF v Spain*, para 262). *Bona fide* changes by a host state to its regulatory regime, even when adversely impairing an investment, may not result in a finding by an arbitral tribunal of a violation of an FET provision.

  An arbitral tribunal may consider whether the regulatory change had a disproportionate effect on the investment, creating an excessive burden on an investor's rights (*Muszynianka v Slovakia*, PCA Case No. 2017-08, Award, October 7, 2020, paras 566, 574). The arbitral tribunal may also consider whether the regulatory change outweighs the public interest disproportionately, in the sense of "*imposing burdens on foreign investment that* [go] *far beyond what* [is] *reasonably necessary to achieve good faith public interest goals*" (***Eskosol v Italy***, ICSID Case No. ARB/15/50, September 4, 2020, para 410). In cases where particularly strong public interests such as the environment or public health are concerned, this factor will guide the assessment of what is "*far beyond what was reasonably necessary*", or whether the state measure is "*wholly disproportionate*"(*Philip Morris v Uruguay*, para 419), or "obviously disproportionate to the need being addressed" (*LG&E v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, para 195).

Retroactive or retrospective regulatory changes are "more likely to violate legitimate expectations" as disproportionate."

Another relevant consideration for the arbitral tribunal is whether the regulatory change was abrupt or if the investor had been given sufficient time to adjust to the new regulatory regime, through for instance, announcements or the implementation of transition periods. Retroactive or retrospective regulatory changes are "*more likely to violate legitimate expectations*" as disproportionate (*Renergy v Spain*, ICSID Case No. ARB/14/18, Award, May 6, 2022, para 681(iii)).

Where an FET claim is made in relation to a climate-focused regulatory change, an arbitral tribunal is likely to consider whether there is a provision protective of the environment in the applicable IIA, and whether that provision takes precedence over the FET clause. For example, the ECT, Article 24(2)(b)(i), provides that states may adopt or enforce any measure "*necessary to protect human, animal or plant life or health*" as an exception to the provisions contained in the ECT. However, Part III ECT, which includes the FET protection at Article 10(1), appears to be excluded from the exception (see however, in *RWE Innogy v Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues on Quantum, December 30, 2019, para 447: "*Article 24(2) ECT militates against any expansive concept of [the] FET standard under Article 10(1)*"; see further, at para 446: the arbitral tribunal noted that where protection of human life is regulated, this regulation would not be "*regarded as unfair and inequitable unless it was arbitrary or discriminatory or in some other way contrary to customary international law.*")

Investors should expect increased importance being given to the protection of the environment (which may be extended to the protection of human life), over an investor's right to a stable and predictable legal environment. This normative tension was recognized in 1997 by the International Court of Justice (ICJ), which noted the "*need to reconcile economic development with protection of the environment*" (Case Concerning the *Gabcikovo-Nagymaros Project* (Advisory Opinion, Hungary/Slovakia), Judgment, ICJ, September 25, 1997, page 78). ISDS tribunals have held that "*an investor cannot pretend to have legitimate expectations of stability of environmental regulations in a State* […] *where concern for the protection of the environment and of sustainable development are high*" (*El Paso Energy International Company v Argentina*, ICSID Case No. ARB/03/15. Award, October 31, 2011, para 361).

Investors should expect increased importance being given to the protection of the environment over an investor's right to a stable and predictable legal environment."

In the event that a finding of an FET breach is made by an arbitral tribunal, this will not necessarily result in the award of full damages and compensation.

Damages and compensation in climate-related arbitrations

States found to be in breach of their FET obligation must make full reparation for any injury caused (Draft articles on Responsibility of States for Internationally Wrongful Acts (2001), Article 31; see also, the *Factory at Chorzów* case, Permanent Court of International Justice, September 13, 1928).

However, where radical policy changes relate to the implementation of climate-related obligations and objectives, the question of whether the host state should consistently bear the financial burden suffered by an investor may arise. States may argue that the costs for climate change mitigation and prevention should be borne by the polluter (the Polluter Pays Principle) (see *Trail Smelter*, Awards, April 16, 1938 and March 11, 1941). The Rio Declaration provides: "[n]*ational authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment*" (Principle 16, see also Article 19 ECT). An arbitral tribunal may consider this principle where a state's regulatory change aims at reducing GHG emissions. It may be difficult, however, to assess the actual damage caused to the environment by an investor and determine whether such damage would prevent an investor from recovering its losses.

Where radical policy changes relate to the implementation of climate-related obligations and objectives, the question of whether the host state should consistently bear the financial burden suffered by an investor may arise."

Investors may also bear part of their losses on account of contributory fault. In ISDS cases, arbitral tribunals have "*reduced damages by a percentage reflecting the investor's role in the events leading to a loss*" (for example, *Stati v Kazakhstan*, SCC Arbitration Case No. V 116/2010, Award, December 19, 2013, para 1331).

Is there a future for the FET protection in disputes arising out of radical climate focused regulations?

There are calls from sections of the international community to amend existing IIAs to facilitate climate-focused state regulation and remove the risk of states' exposure to FET claims. Various measures have been taken by states in the past in this regard, and similar measures may be expected to be taken in the future:

- Revising or removing FET clauses (see for example: India-Singapore CECA);
- Including protections for environmental regulations or incentives for climate-friendly investments (for example: Article 24 ECT);
- Including narrower climate-specific exceptions for certain types of regulatory activities (for example, exceptions for '*legitimate public policies*' in the Canada-Chile FTA (1996) (Article G-01, clause 3), or see the United States-Singapore FTA (2003), Article 15.10); and
- Including language in the preamble to show that the state parties intend to promote sustainable investment through the incorporation of the goals and objectives of the UNFCCC and the Paris Agreement (for example: the Netherlands model BIT (2019), Article 6(6)).

The tension between affording protection to investors whilst freely regulating over foreign investments to protect the environment and address global warming, is likely to remain for many years to come."

Some of the above measures, such as removing the FET protection for investors, may result in a reduction of the flow of foreign investments, which may not be a desirable outcome for states.

A recent decision by the European Court of Human Rights found that states have a positive obligation to adopt legislation in compliance with the objectives of the UNFCCC and the Paris Agreement (*Verien Klima Serniorinnen v Switzerland*, European Court of Human Rights, Application No. 53600/20, April 9, 2024, paras 544-548), paving the path for more similar decisions to come and potentially giving rise to a public international law principle of protection of the environment that will prevail over an investor's FET protection.

The tension between affording protection to investors whilst freely regulating over foreign investments to protect the environment and address global warming, is likely to remain for many years to come. In the meantime, unless a simultaneous global effort is conducted to remove FET protection, foreign investors will mostly be able to make use of that protection (whether successfully or not).

Conclusion

Investors should expect an era of regulatory instability as states increase their efforts to address climate change and meet their international commitments. Regulatory change will continue to occur and should be foreseeable for a diligent and reasonable investor. Unless the investor obtains specific and clear assurances from a host state that the regulatory framework in place at the time of investment will remain the same, including by way of a contractual commitment in this regard, an investor may find it increasingly difficult to establish that legitimate climate-focused regulatory changes violate its legitimate expectations and give rise to an FET breach.

Unless the investor obtains specific and clear assurances from a host state that the regulatory framework in place at the time of investment will remain the same, an investor may find it increasingly difficult to establish an FET breach."

Striking the right balance between regulatory risks faced by investors and the litigation risk faced by host states will depend on each market. Larger markets can have a greater degree of regulatory risk and still attract foreign investors. In contrast, smaller, less economically attractive markets may need to strike a balance that reduces regulatory risk to attract foreign investment. Investors may also perceive a greater degree of risk when deciding whether to invest in climate-affected industries, and this may result in a reduction in foreign investment flows at an international level.

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GLO_56493 – 01/24