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# International arbitration report


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AI in IA: Ethics concerns for arbitrators

Mass arbitration in the United States: A new frontier in dispute resolution

Critical minerals: Energy transition or energy security?

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The long arm of American enforcement: Recent judicial decisions fortify the US's status as a premier forum for enforcing arbitral awards against sovereigns

A Journey in Law: In conversation with Duncan Bagshaw, KC



issue 24

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# Message from the Editor

Welcome to the twenty-fourth edition of the International Arbitration Report. Disruption - geopolitical, technological and commercial - is a feature of the landscape in which international arbitration operates. The articles in this issue reflect that reality, examining how conflict, innovation and shifting state priorities are reshaping the disputes we see and the mechanisms available to resolve them.

### Geopolitical headwinds

The conflict in the Middle East continues to place supply chains under pressure and disrupt energy markets raising immediate steps about force majeure, frustration and the allocation of contractual risk. The global competition for critical minerals exposes a deep tension between the energy transition and energy security as states race to secure access to rare earth minerals. The rise of M&A disputes is also partially driven by geopolitical volatility and seismic shifts in global markets and, in this issue, we offer a practical guide to early-stage arbitration strategy, addressing document preservation, privilege and witness management. Then there is the broader question of whether international commercial arbitration can withstand geopolitical headwinds that have destabilised other forms of cross-border dispute resolution (*spoiler: yes, thanks to its inherently resilient nature*).

### The impact of artificial intelligence (AI)

Technological and procedural disruption also features prominently. We look at generative AI's impact on international arbitration and its pressing ethical questions for arbitrators and then consider the challenges posed by price adjustment provisions in long-term technology supply agreements, where uncertain economic conditions are turning once-routine pricing mechanisms into fertile ground for disputes. Meanwhile, mass arbitration has emerged as a new frontier in the United States, turning mandatory individual arbitration clauses, originally designed as a shield against class actions, into a sword capable of generating exposure for corporate respondents before an arbitrator ever sees the case.

### Enforcement

Connected to the issue of disruption is that of enforcement. Two articles examine the enforcement of arbitral awards against sovereigns: the enforcement of ICSID awards across Australia, the United States and the United Kingdom, where courts have converged on the position that ratification of the ICSID Convention constitutes a waiver of sovereign immunity from enforcement proceedings, and the United States' status as the world's premier forum for enforcing arbitral awards against sovereigns, where recent court decisions have fortified America's status as the premier forum for enforcing arbitral awards against sovereigns.

Alongside these themes, we address important procedural and practical questions in key jurisdictions. We examine consolidation in international arbitration, whose successful deployment depends on a patchwork of contractual provisions, institutional rules and domestic law. Then, turning to Australia, we look at how the *kompetenz-kompetenz* doctrine is reaffirmed by the Victorian Court of Appeal, which decided that parties to an arbitration agreement with an Australian seat cannot contract out of an arbitral tribunal's jurisdiction to rule on its own jurisdiction.

Finally, we interview Duncan Bagshaw KC, who joined our London international arbitration team last year – not least to celebrate the recent award of his treasured post-nominals.

The international arbitration landscape is being reshaped by forces that demand agility and foresight from practitioners. Whether the disruption is geopolitical, technological or commercial, a thread running through this issue is that the time to address risk is before it crystallises – at the drafting table, in the boardroom and in the early stages of a dispute. We hope that this edition provides both the analysis and the practical guidance to assist in that task.

**Paul Stothard, London**
**Co-Head, International Arbitration — Europe**

# Message from the Global Leadership Heads

We are pleased to present the 24th Edition of our *International Arbitration Report*. This issue's focus on international arbitration against a background of global disruption could not be more timely. As our clients navigate conflict in the Middle East, the race for critical minerals, shifting trade policies and the rapid advance of AI, they need trusted advisers and counsel who understand not only the legal frameworks but the commercial and geopolitical forces driving disputes. The breadth of contributions in this edition reflects the unique strength and expertise of our truly global platform, with more than 150 arbitration practitioners located across 48 locations.

In terms of celebrations, we congratulate our partner Duncan Bagshaw on his appointment to King's Counsel earlier this year recognising his status as a leading advocate (you can find a profile of Duncan in this edition). We are also delighted that our Australian arbitration team has, for the second consecutive year, been awarded Arbitration Practice Group of the Year in the prestigious Australia Disputes Centre Awards. It is fantastic to see our global team go from strength to strength.

Finally, we are excited to see that the ICC has published an update of its arbitration rules. This happened just after our editorial deadline but you can find our analysis of them published on our website.

Thank you to Paul Stothard and our arbitration colleagues around the world for producing this edition.

As always, we welcome your feedback on this report.

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**Global Co-Head of International Arbitration, Houston**

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# Dealing with disruption: An overview of current issues arising from Middle Eastern conflicts

By Nicholas Sharratt and Alexander Field

**The crisis in the Middle East has created a landscape of uncertainty for businesses with interests in the Gulf States and beyond. Supply chains are under pressure, energy markets are volatile and the continued uncertainty presents challenges to businesses with operations in the region.**

**This disruption will likely give rise to disputes across the region, making it essential for businesses to carefully review their contracts and business practices now to best position themselves to handle future disputes.**

**This article considers some of the ways businesses can protect their interests in the context of the current disruption from an English law, onshore United Arab Emirates (UAE) law, and Kingdom of Saudi Arabia (KSA) law perspective, being some of the common contractual governing laws found in the region.**

## Force majeure

Force majeure is a concept found in English, onshore UAE and KSA law. In general, force majeure may provide a lawful excuse to parties from performing their contracts where intervening events make performance impossible. However, the way the doctrine operates in each of these legal systems differs significantly.

Under English law, force majeure exists only to the extent it is expressly provided for in a contract. As a result, the scope and effect of any force majeure protection depends entirely on the drafting of the relevant clause. This creates an emphasis on contractual interpretation as parties will have to identify whether the current situation falls under a qualifying event (such as "war" or "armed conflict") or if it can fall under general wording such as events "beyond the reasonable control" of parties. How a force majeure notice is to be exercised will also be a matter of contractual interpretation. Therefore, parties with an English law-governed contract should carefully construe the force majeure provisions before invoking them.

Conversely, force majeure is statutorily codified in onshore UAE and Saudi law.

Article 273 of the UAE Civil Code (CC) provides that where a supervening event, which is not the fault of either party, makes the performance of a contractual obligation impossible (not merely more difficult or more expensive), the corresponding obligation is automatically extinguished and the contract is terminated. However, the impossibility of performance must be total; where only part of the obligation becomes impossible, only that part is extinguished, and the counterparty may elect to terminate the remainder or to accept partial performance.

Similarly, under Article 294 of the Saudi Civil Transactions Law (CTL), if a supervening event beyond the parties' control results in the impossibility of performing the contractual obligation, the affected obligation may be terminated, either in whole or in part depending on the nature of the impossibility.

Contracts governed by onshore UAE law or Saudi law may also have contractual force majeure clauses, which may provide additional contractual rights to parties beyond those granted by the force majeure provisions set out in the CC and CTL. As with English law, such provisions should be carefully construed before being relied upon.

## Frustration and exceptional circumstances

While English law does not recognize a standalone concept of force majeure, it does recognize the common law concept of "frustration."

Under this doctrine, contractual performance will be excused if certain narrow tests are met, namely, circumstances that were not contemplated at the time of contracting have made performance impossible, illegal, or radically different from what was envisioned by the parties. These are high bars, and mere hardship, increased expense, or the fact that performance has become more onerous will not suffice. Frustration cannot be demonstrated where a risk has been expressly or impliedly allocated under the terms of the relevant contract.

Where frustration applies, the contract is automatically discharged. Obligations that have already become due will survive, as will certain clauses such as jurisdiction and dispute resolution clauses. The automatic discharge happens without the need for either party to take further steps.

While onshore UAE and Saudi law do not recognize a concept of "frustration," they do distinguish between supervening events that render performance impossible and those that render performance excessively onerous. In this way, onshore UAE and KSA law are more favorable to contractual obligors than English law.

Article 249 of the UAE CC provides that where exceptional and unforeseeable events occur which render performance of a contract excessively onerous such that the obligor is threatened with "grave loss," a court may reduce the onerous obligation to a reasonable level. Crucially, performance does not need to be impossible, only significantly more onerous than the parties could reasonably have contemplated at the time of contracting.

Similarly, Article 97 of the KSA CTL recognizes a doctrine of exceptional circumstances, often described as "hardship." Where extraordinary and unforeseeable events occur that render performance excessively onerous, the court may intervene to rebalance the contract, including by reducing the burden of performance to a reasonable level.

In this regard, the onshore UAE and Saudi positions are significantly different to English law, where mere hardship or increased expense will not relieve a party of its contractual obligations.

The statutory framework of the onshore UAE and KSA legal systems provide a potentially valuable avenue of relief for businesses facing conflict-related or supply chain disruption, whether because performance is impossible or simply because it has become significantly more onerous.

## Business interruption and supply chain disruption

There is already significant disruption to shipping routes, energy supplies and broader supply chains across the region. Businesses that depend on the transit of goods through the Strait of Hormuz or other affected areas face the prospect of delays and interruption to their operations. Where contracts contain liquidated damages or penalty clauses (commonly found in supply or construction contracts), businesses may face significant liability for delays that are ultimately attributable to the conflict.

Under English law, parties are permitted to charge liquidated damages or penalties in order to protect their genuine commercial interests. That is, English law tends to be permissive of parties seeking to enforce a liquidated damages clause and will rarely intervene to strike out the penalty.

Conversely, where contracts governed by onshore UAE law contain liquidated damages clauses, Article 390 of the UAE CC permits a court to vary the rate of compensation, so that it is equal to the actual loss suffered. This may afford significant protection to businesses who may be facing penalties related to supply chain disruption.

Similarly, pursuant to Article 178 of the KSA CTL, while parties are free to agree liquidated damages provisions, the courts may increase or reduce the agreed amount to reflect the actual harm suffered. KSA courts may do so where a debtor can demonstrate that the calculation of liquidated damages was excessive compared to the loss actually suffered, or that the underlying obligation was partially performed.

Article 179(3) of the KSA CTL allows a court to increase the agreed amount in order to match the actual loss suffered by the obligee. However, this right of recourse is limited, as a creditor must show that it was the debtor's breach that caused the harm to exceed the agreed-upon compensation, and that the breach was wilful or grossly negligent.

# Practical steps

In response to the disruption in the region, clients should conduct a comprehensive review of all contracts, paying particular attention to their governing law clauses, and consider how the above issues may affect their obligations under those contracts.

## Comply with contractual obligations

Businesses should ensure that they continue, as best they can, to comply with their contractual obligations, especially notice requirements.

Care is needed when sending any notice asserting force majeure or frustration, as some contracts require notice be given within a certain period after a frustration/force majeure event, and a failure to do so may mean that the ability to rely on the clause is lost.

Further, parties should continue to perform their obligations as best they can and to carefully document these efforts in order to demonstrate that, if performance becomes genuinely impossible or significantly more onerous, they can demonstrate the impact of intervening events that has caused them to terminate the contract, and that a force majeure notice is not simply an attempt to avoid a suddenly unfavorable contract.

Claims of frustration or force majeure or hardship are fact-specific and should be accompanied by proper documentation to demonstrate how it is that a contract has suddenly become more onerous or impossible to perform. If this evidence cannot be furnished, then any claim for relief may fail.

## Gather evidence

When a business' operations look like they are heading to a dispute, parties should do all they can to consolidate as much contemporaneous evidence as possible. In-house counsel should attempt to speak to personnel who have a hand in operations, and who may hold relevant information. Such documentary evidence, including records of disruptions, mitigation efforts and communications with counterparties, should be recovered and stored centrally, as they will be critical to any forthcoming dispute. As best they can, parties should maintain records of operational delays and their causes, as well as their actual losses. Doing so will help parties make force majeure claims or challenge liquidated damages claims.

## Avoiding and preparing for disputes

Businesses should proactively engage with their counterparties; such engagement should be done promptly and with decision-makers at an appropriate level. Discussions and outcomes should be well documented so that there are no disputes as to what has and has not been agreed. Early and constructive engagement can often reduce the risk of prolonged dispute resolution.

Among other things, parties should consider whether contractual variations or standstill agreements may be appropriate to preserve commercial relationships while the situation remains fluid.

Importantly, businesses should consider the governing law of their contract when they are engaging with their counterparties. For example, generic reservations of rights are unlikely to be effective under English law; rather reservations of rights must identify the specific rights or defenses that are reserved and only be in place for a short period. On the other hand, as a matter of onshore UAE and KSA law, there are good faith obligations with which parties must comply when carrying out a contract and when engaging with one another. Businesses should also bear in mind that some legal systems, such as onshore UAE and Saudi law, do not recognize "without prejudice" privilege in principle; therefore care should be exercised when making disclosures in such discussions. Taking legal advice at an early stage can ensure that any risks surrounding business discussions can be mitigated.

Where a dispute seems inevitable, businesses should seek legal advice on the appropriate steps to preserve their position in any forthcoming arbitration or litigation. This includes whether they have complied with any contractual or statutory pre-dispute steps. Failure to do so may lead to time-consuming and costly jurisdictional disputes.

# Conclusion

Delays or inability to transit through the Strait of Hormuz, flow on supply chain issues, and general economic shocks are all likely to cause problems for businesses with operations in the Gulf region. While this will likely cause all businesses some difficulty, those that take immediate steps may position themselves better than others to weather any coming storms.

Businesses that act quickly to review their contracts to ensure they understand their rights and obligations, who collect evidence to back those rights, and who engage proactively with their counterparties will find the wind at their backs once smoother sailing is again possible.



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# AI in IA: Ethics concerns for arbitrators

By Kevin O'Gorman and Taylor LeMay

**Generative AI has changed what arbitrators can do in seconds: summarize a voluminous record, prepare a first draft of the procedural history section of an award, or stress-test legal reasoning. The speed of that change has outpaced ethical frameworks, but the gap may be closing—through institutional guidance, emerging legislation and the first vacatur attempts based on alleged AI outsourcing. This article surveys that landscape and identifies the most pressing ethical concerns for arbitrators.**

## The growing body of guidance: Institutional rules and legal frameworks

Several leading arbitral institutions and professional bodies have issued guidance specifically addressing AI use by arbitrators. The Silicon Valley Arbitration and Mediation Center (SVAMC) was among the first, releasing its Guidelines on the Use of Artificial Intelligence in Arbitration in April 2024. For arbitrators, the SVAMC Guidelines establish two foundational obligations: non-delegation of decision-making and respect for due process.

Several institutions have since issued AI guidance directed at arbitrators, including the American Arbitration Association (AAA)-International Centre for Dispute Resolution (ICDR), the Vienna International Arbitral Centre (VIAC) and the Stockholm Chamber of Commerce (SCC). The Chartered Institute of Arbitrators (CIArb) also published its Guideline on the Use of AI in Arbitration in 2025.

Binding legal frameworks are also emerging. California Senate Bill 574 would codify several ethical obligations from the SVAMC Guidelines, including prohibiting arbitrators from delegating any part of their decision-making to generative AI; prohibiting reliance on AI-generated information outside the record without disclosure to the parties; and requiring arbitrators to assume responsibility for all aspects of an award regardless of AI assistance. The bill also addresses hallucinations, providing that if an AI tool cannot cite independently verifiable sources, an arbitrator shall not assume such sources exist or are accurately characterized.

Recital 61 of the EU AI Act (Regulation (EU) 2024/1689), which entered into force in August 2024, applies to arbitrators using AI tools for "researching and interpreting facts and the law and in applying the law to a concrete set of facts," as "AI tools can support the decision-making… but should not replace it: the final decision-making must remain a human-driven activity." The Act excludes "purely ancillary administrative activities that do not affect the actual administration of justice." ***Id***. It requires tribunals using covered AI tools to take certain steps, including retaining automatically generated logs for at least six months and informing the parties about the use of high-risk systems. Violations can carry fines of up to €15 million.

## Four core ethical obligations

Across these guidelines and legal frameworks, four ethical obligations emerge as most critical for arbitrators using AI.

### 1. Non-delegation of decision-making

The most consistently emphasized obligation is that arbitrators must not delegate their decision-making function to AI. It has long been recognized that arbitrators may not delegate their duties to a third party and must take personal responsibility for their awards. *See, for example*, 2004 AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon V(C); 2017 SCC Rules, Art. 24(2); ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration ¶223 (2021); LCIA, Notes for Arbitrators ¶68 (2017) ("[I]n no circumstances may an Arbitral Tribunal delegate its fundamental decision-making function"). While guidance on this principle traditionally addressed human third parties such as tribunal secretaries (*see, for example*, ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration, ¶¶216-30 (2021)), that guidance naturally extends to AI tools.

SVAMC Guideline 6 states that "an arbitrator shall not delegate any part of their personal mandate to any AI tool," and that AI tools "shall not replace their independent analysis of the facts, the law, and the evidence." The AAA-ICDR similarly advises that

"AI-generated outputs must never substitute for the arbitrator's independent legal and factual analysis." The CIArb Guidance more specifically warns that arbitrators should avoid "delegating any tasks to AI Tools, such as legal analysis, research and interpretation of facts and law, or application of the law to the facts, if such use could influence procedural or substantive decisions."

The risk of inadvertent delegation is real. As the SVAMC cautions, arbitrators should review any AI output to ensure it reflects—and does not replace—their "independent analysis of the issues and evidence at hand." The critical question is not whether AI is used, but whether its use crosses the line from assistance into substitution for the arbitrator's own judgment. This principle is rooted in the foundation of the arbitrator's mandate: parties agreed to submit their dispute to a specific human decision-maker, not to a machine.

That is, of course, unless the parties have specifically consented to an AI arbitrator, such as that recently introduced by the AAA. In this format—currently limited to lower value, document-only, opt-in construction cases—an AI arbitrator drafts a proposed award that is reviewed, finalized and issued by a human arbitrator. The parties may review the AI's summary of their cases before it drafts a proposed award, but the human arbitrator ultimately remains responsible for the content of the final award.

## 2. Safeguarding confidentiality

The second major obligation relates to confidentiality—a cornerstone of arbitration that AI use can readily undermine. When an arbitrator submits case materials to a publicly available AI tool, those materials may be retained, reused for model training or potentially accessed by third parties.

SVAMC Guideline 2 provides that all participants "are responsible for ensuring their use of AI tools is consistent with their obligations to safeguard confidential information" and "should not submit confidential information to any AI tool without appropriate vetting and authorization." CIArb's Guidelines note that inputting confidential data into AI tools raises "concerns about how such data is stored, protected from outside access, used for machine learning purposes and potentially presented to third parties as output from their use of the same AI platform."

The AAA-ICDR prohibits arbitrators from uploading "any confidential or identifying case materials into publicly available AI systems that do not provide contractual assurances against data reuse, model training, or third-party access." The SCC Guidelines note that "the use of some AI tools may have unintended consequences for the confidentiality of an arbitration" and encourage arbitrators to understand how any data input is employed by the AI tool.

Arbitrators should understand the privacy and data retention policies of any AI tools they use and confirm they comply with the arbitrator's confidentiality obligations. Arbitrators should only use closed or enterprise AI tools with contractual assurances against training on inputs and limited data retention (that is, not the free, standard version of ChatGPT); redact or anonymize case-specific information; and treat any public-facing AI tool as categorically unsuitable for identifiable case materials.

## 3. Transparency and disclosure

The third core obligation is transparency. AI hallucinations and bias are well-documented issues, and because AI use can affect the substantive reasoning underlying a decision, parties have a due-process interest in knowing how arbitrators have used AI and in having an opportunity to respond or comment on that usage.

SVAMC Guideline 7 provides that "an arbitrator shall not rely on AI-generated information outside the record without making appropriate disclosures to the parties beforehand and, as far as practical, allowing the parties to comment on it." The VIAC Note provides that arbitrators may inform the parties how they plan to use AI tools, and the parties must have an opportunity to comment; it also suggests addressing AI use in Procedural Order No. 1. CIArb goes further, recommending that unless the parties agree otherwise, arbitrators should consult with the parties on AI tool use and provide an opportunity to comment on, and oppose, such use.

Available guidance typically does not require disclosure of administrative or clerical AI use, such as grammar checking or formatting. Rather, *generative* AI use that risks substantively influencing an arbitrator's reasoning or findings approaches the line of required disclosure. Arbitrators must carefully monitor this line as AI tools become more integrated into their workflow.

### 4. Accuracy, verification, and the hallucination problem

Generative AI can produce incorrect citations, plausible but false factual statements and summary errors that subtly change meaning. Large language models may "hallucinate"—generating fluent, coherent responses based on probabilistic patterns without assessing accuracy. In an arbitral award, an undetected hallucination could be reputationally damaging or legally significant.

This risk is uniformly recognized across institutional guidance. The SCC Guide notes that arbitrators should "ensure effective human oversight" and review AI outputs to ensure it does not impact award quality. SVAMC Guideline 7 provides that arbitrators must not assume an AI tool's cited sources actually exist or are accurately characterized.

Arbitrators should never adopt an AI-generated citation without personally reading the source, should verify every factual finding against record evidence, and should treat AI legal research as a starting point, not a conclusion.

## The risk of award challenges: *LaPaglia v. Valve Corporation*

The abstract risk of an award challenge based on alleged AI use became concrete in *LaPaglia v. Valve Corporation*, filed in the US District Court for the Southern District of California in April 2025. *See* Petition to Vacate Arbitration Award, *LaPaglia v. Valve Corporation*, No. 3:25-cv-833 (S.D. Cal. 2025).

Petitioner LaPaglia sought to vacate a AAA award, alleging that the arbitrator outsourced his adjudicative role to AI, thereby exceeding his powers. *Id.* at 8. LaPaglia relied on the arbitrator's alleged statements about using ChatGPT to save time writing articles, comments about wanting to finish the case before an upcoming vacation, and several factual statements in the award that were not argued by the parties and lacked record citations. *Id.* These passages were also run through ChatGPT, which allegedly identified them as AI-generated. *Id.* at 9. LaPaglia argued that the parties agreed to "a neutral arbitrator" rendering "a written decision" with a "statement of reasons," and that reliance on AI betrayed this expectation and constituted an impermissible delegation of the arbitrator's duties warranting vacatur. *Id.* The court ultimately dismissed the petition for lack of subject matter jurisdiction without reaching the merits.

Despite the procedural dismissal, *LaPaglia* illustrates how an arbitrator's AI use could provide a basis for party to seek vacatur. Whether such a claim could succeed on the merits—or if such evidence would be sufficient to meet the high bar of vacatur—remains to be seen.

## Conclusion

While the promise of increased efficiency, cost reduction and enhanced analytical capability is real, so too are the ethical risks associated with AI's use. The institutional consensus is clear: AI can assist the arbitrator, but it cannot be the arbitrator without consent of all parties, and arbitrators must remain responsible for their awards. As guidance becomes codified into law and awards begin to face challenges on the basis of AI usage, arbitrators must remain vigilant in ensuring their use of AI tools complies with their ethical obligations.



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# Mass arbitration in the United States: A new frontier in dispute resolution

By Katie Connolly and Timothy Tyler

## Introduction

Mass arbitrations—in which dozens or hundreds of legally identical arbitrations are filed against a corporate respondent—can result in multi-million-dollar upfront fees before an arbitrator ever sees the case. This recent development has disrupted US arbitration, and its implications reach any practitioner representing a business client with US-facing contracts, employment relationships or consumer operations.

Mass arbitrations are the most recent development in a 20-year push and pull concerning class actions and arbitration in the United States. The players have been businesses, their employees and their customers. In the first volley, companies used arbitration clauses to stave off high-stakes, expensive class action lawsuits. They achieved this by including arbitration clauses in all contracts, requiring employees and customers to resolve disputes through individual arbitration only, effectively barring many class actions.

Plaintiffs' counsel responded by turning this regime against businesses: if a consumer's or employee's dispute could not proceed as a class, lawyers instead filed mass campaigns of dozens, hundreds, or (on occasion) thousands of individual arbitration claims. As a result, businesses faced sometimes crippling upfront arbitration fees, assessed on a per-claimant basis.

To help guide planning and drafting of appropriate dispute resolution regimes, this article sketches the history of mass arbitrations in US courts, the mechanics that make them uniquely powerful, business and arbitration-institution responses, and the implications for practitioners advising clients with US-facing operations.

## The rise of mass arbitration

The rise of mass arbitrations can be traced back to *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). AT&T's service contract required all disputes to be arbitrated and prohibited class-wide arbitration. Despite this, customers brought a class action lawsuit in California federal court against AT&T. They claimed AT&T's offer of a free phone to new customers was fraudulent because AT&T charged sales tax on the retail value of each free phone.

AT&T moved to compel arbitration based on the arbitration clause. The federal district (first-instance) court denied AT&T's motion because California state law barred class-wide waivers as unconscionable. The appeals court, for the Ninth Circuit, upheld that decision. The Supreme Court reversed, finding that federal law (the Federal Arbitration Act, or FAA) preempts state law that allows enforcement of an arbitration agreement only when class-wide arbitration procedures are available.

Seven years later, in *Epic Systems Corp. v. Lewis*, 584 U.S. 497 (2018), the Supreme Court allowed enforcement of agreements that required employees to resolve disputes with their employer solely through individual arbitration.

These decisions cleared the path for companies to draft arbitration agreements that required disputes to be resolved individually—rather than as a class. The corporate bar embraced this opportunity. Mandatory individual arbitration clauses proliferated across consumer contracts, employment agreements and terms of service nationwide. What followed, however, altered the dispute resolution landscape in ways no one anticipated.

Anti-class action arbitration agreements engendered an unforeseen consequence: law firms representing employees and consumers began to advertise for and collect hundreds or even thousands of claimants. They file these hundreds or thousands of arbitrations, on an individual basis, at one time. As detailed further below, the result for respondent companies is immediately apparent: a coordinated filing effort of hundreds of individual cases generates enormous exposure to filing fees.

This dynamic is largely peculiar to the United States because the FAA preempts state laws that prohibit class action waivers, institutional fee structures require the respondent company to pay initial filing fees in consumer and employment arbitrations, and an active plaintiffs' bar is incentivized by contingency fees.

## Funding mass arbitrations

As noted, a mass arbitration is a coordinated filing of large volumes of substantially identical individual arbitration demands against a single respondent company, usually in the consumer or employment contexts.

Filing fees are the pressure point. Institutional rules require respondent companies to pay significant per-case filing and administrative fees, which at scale can reach tens of millions of dollars before a single hearing takes place. In addition, under some state laws, the deadline to pay these fees can be extremely tight. In California, if fees are not paid within 30 days of a due date, the company has effectively waived its right to enforce its arbitration agreement, opening itself up to potential class actions in court (Cal. Code of Civil Procedure § 1281.98). The speed and financial scale of this exposure can overwhelm even large companies' legal and finance departments.

Plaintiffs' law firms and increasingly, third-party litigation funders, are the critical players. Preparing a mass arbitration is labor-intensive: potential claimants must be funneled to a single law firm (if allowed by that state's bar, potentially through advertising), the claims must be vetted, and hundreds of demands drafted and filed. This process is both administratively burdensome and financially challenging. Often, a plaintiffs' firm works on a contingency fee basis and is paid only upon a successful resolution. In some cases, litigation funders have stepped in to finance these firms through the early administrative phases. The involvement of third-party funders has become an increasingly significant feature of the landscape, providing the capital necessary to sustain plaintiff firms through the resource-intensive pre-hearing phase—but raising significant questions about conflicts of interest, disclosure obligations and control over settlement decisions.

## The institutional response: AAA and JAMS Rules

The AAA and another arbitration provider, JAMS, have already responded to the rise in mass arbitration. In 2023, the AAA published its Mass Arbitration Supplementary Rules, which were amended in 2024, as "intended to provide parties and their representatives with an efficient and economical path toward the resolution of multiple individual disputes." It is the AAA that decides whether or not those rules are to be applied.

The AAA's 10-page supplementary rules provide guidance on filing requirements, serving of documents, notices, and communications, answers, counterclaims, and amended claims, fixing of locale, process arbitrator, appointment of merits arbitrator(s), scheduling, mediation, and administrative fees, compensation and expenses of the arbitrator(s).

Importantly, the AAA has three fee schedules for mass arbitrations:

- Non-Consumer/Non-Employment Mass Arbitration and Mediation Fee Schedule
- Consumer Mass Arbitration and Mediation Fee Schedule
- Employment/Workplace Mass Arbitration and Mediation Fee Schedule

The Consumer Mass Arbitration and Mediation Fee Schedule, for example, sets the per-case initiation fee for the business at $325 for the first 500 cases or $162,500 in total, before a single arbitrator is assigned.

JAMS has likewise implemented mass arbitration procedures, which, in contrast to AAA, require all parties to consent to proceed. The consent requirement meaningfully limits JAMS' mass arbitration rules as a tool for respondents, since plaintiffs' counsel are unlikely to agree to a procedure that reduces their leverage (thus, businesses that want to use JAMS rules have to re-visit their arbitration agreements and act accordingly).

## The response to mass arbitrations

Companies have responded to the increase in mass arbitrations in a number of ways, some effective, some not.

### Refusing to pay initiation fees

Some respondents have purposefully refused to pay the initiation fees altogether.

In California, this is seen as a material breach of the arbitration agreement that carries serious consequences. The most important is waiving the right to compel arbitration under California Code of Civil Procedure Section 1281.97. The California Supreme Court confirmed that the FAA does not preempt Section 1281.97, which thus likely governs arbitration seated there (*Hohenshelt v. Superior Court*, 18 Cal.5th 310 (2025)). In *Hohenshelt*, the court noted that the Legislature enacted these provisions specifically to address "a concerning and troubling trend" in employment cases; companies faced with large numbers of individual arbitration demands "failed to timely pay arbitration fees, thereby frustrating adjudication of employees' claims," (*Hohenshelt*, 18 Cal. 5th, at 329).

The consumer or employee then "may withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction," potentially restoring the ability to pursue collective relief. California law also imposes automatic monetary sanctions on respondents who materially breach arbitration agreements through fee-payment failures, in the form of "reasonable expenses, including attorney's fees and costs, incurred by the employee or consumer as a result of the material breach." Beyond monetary sanctions, courts may impose evidence sanctions prohibiting the drafting party from conducting discovery in subsequent civil actions, unless the respondent "acted with substantial justification or that other circumstances make the imposition of the sanction unjust." These sanctions serve both compensatory and deterrent purposes, as the Legislature intended to prevent companies from "strategically withholding the payment of arbitration fees,"(*Hohenshelt v. Superior Court*, 18 Cal.5th 310 (2025)). "If the failure to pay the initial fees is not willful, grossly negligent, or fraudulent, or is excused by mistake, inadvertence, excusable neglect, impossibility, illegality, or impracticability, then courts may excuse late payment or nonpayment." *Id*.

In other instances, a corporate respondent has refused to pay registration fees to arbitrate, resulting in the arbitral institution terminating the arbitration, thus leaving the claimants free to proceed in court (for example, *Wallrich v. Samsung Elecs. Am., Inc*., 106 F.4th 609 (7th Cir. 2024)).

### Seeking class treatment in court

Others have gone to the courts seeking class treatment to bypass arbitration, but judges have not looked favorably on this approach, given that the companies mandated individual arbitration (*Heckman v. Live Nation Entertainment, Inc*., 120 F.4th 670 (9th Cir. 2024)). Courts have been particularly unsympathetic, viewing this as procedural gamesmanship; companies benefit from individual arbitration agreements when facing isolated claims but seek the very class consolidation they contractually forbade when those agreements generate inconvenient scale.

### Revising the arbitration agreement

Revisions to the arbitration agreement itself may be a more effective option, although they too have faced recent court challenges. Both batch and bellwether provisions adopt the concept of trying either a single case (bellwether) or a small number of cases (batch) before returning to the settlement table.

Results have been mixed. In *Achey v. Cellco Partnership d/b/a Verizon Wireless*, No. MID-L-6360-22 (N.J. Super. Ct., Law Div. 2023), plaintiffs successfully challenged an arbitration agreement as unconscionable because it permitted only 10 claims at a time and no more than 20 per year, which would force some claimants to wait 156 years to be heard. The court's analysis makes clear that while staged proceedings are not per se invalid, provisions that effectively deny claimants any realistic prospect of resolution within a reasonable timeframe will not survive judicial scrutiny. Similarly, in *Rios v. HRB Digital LLC*, 807 F. Supp. 3d 975, 990 (N.D. Cal. 2025), the court held that an agreement limiting the number of arbitrations raising similar claims represented by the same or coordinated counsel to 25 at a time—until every case in the prior round had been resolved—was substantively unconscionable. The court noted that, "Although the mass arbitration provision encourages arbitrators to resolve cases within 120 days, even that idealistic timeline could impose a 13-year timeline to resolve a batch of 2,000 Notices." *Id*. at 990; *see also MacClelland v. Cellco P'ship*, 609 F. Supp. 3d 1024, 1041–42 (N.D. Cal. 2022).

In *Heckman v. Live Nation Entertainment, Inc.*, 120 F.4th 670 (9th Cir. 2024), the reviewing court ruled that certain provisions governing three bellwether cases—the results of which would be applied to all similar cases—had "stacked the deck" with unconscionable terms. *Heckman* is particularly significant because it suggests that bellwether provisions will be scrutinized not merely for their facial structure but for the manner in which they are actually administered—a searching level of review.

In short, the response to mass arbitrations is coalescing. No single defense strategy has proven reliably effective, and the case law is developing rapidly across multiple circuits with no Supreme Court resolution on the horizon.

## Emerging issues and the road ahead

The increasing popularity of mass arbitrations has raised several important questions for US legal practitioners, including those advising multinational companies. Each of the following issues is likely to significantly shape the trajectory of mass arbitration practice in the coming years.

### Can mass arbitration awards be enforced outside the United States under the New York Convention?

A central question for international practitioners is whether mass arbitration awards can be enforced outside the US under the New York Convention. Individual arbitration awards arising from mass proceedings are, in theory, awards like any other, but enforcement courts in civil law jurisdictions may scrutinize the mass nature of the proceedings, the compressed timelines and the limited individualized attention given to each claim.

Practitioners advising foreign companies with US operations should analyze both the enforceability of the arbitration clause in the relevant jurisdiction and the likely receptivity of enforcement courts to awards rendered in US mass arbitration proceedings.

### Will proposals in Congress to limit or reform mandatory arbitration succeed?

Congressional proposals to limit or reform mandatory arbitration have gained renewed attention during the same time frame as the rise of mass arbitration. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which became FAA Chapter 4 in 2022, demonstrated that Congress is willing to carve out specific subject matters from the FAA's reach. Legislation targeting consumer and employment arbitration more broadly has often been proposed in Congress but has not advanced. The outcome of future legislative efforts will depend heavily on the composition of Congress and the political salience of high-profile mass arbitration cases.

### Will the AAA and JAMS adapt their rules further, and could international institutions follow?

Whether the AAA or JAMS will further adapt their rules—and whether international institutions might follow—remains an open question.

The ICC, LCIA, and SIAC have not yet implemented mass arbitration-specific procedures. As multinational companies increasingly incorporate US-style individual arbitration clauses into cross-border agreements, international institutions may face pressure to address the same dynamics that drove the AAA and JAMS to act. Practitioners should monitor rule amendments at both domestic and international institutions closely.

### Will mass arbitration remain limited to US-based parties?

Companies from outside the United States doing business in the US have already faced mass arbitrations and will likely continue to do so. An example makes the point.

Korean electronics giant Samsung faced an AAA mass arbitration in 2022, when consumers complained that Samsung unlawfully collected and stored sensitive biometric data through its devices. Samsung refused to pay the $4 million in registration fees, and the arbitration was terminated, leaving the consumer claimants free to proceed in court. However, instead of suing in court, the plaintiffs sought a court order compelling Samsung to arbitrate and pay the fees. The first-instance court ordered Samsung to do so, but a court of appeals reversed, stating it could not re-examine the AAA's termination of the case because the parties had given the AAA that authority. Samsung avoided paying the fees but would have to face any claims in court (*Wallrich v. Samsung Elecs. Am., Inc.*, 106 F.4th 609 (7th Cir. 2024)).

### What will be the effect of increasing third-party funder involvement?

The increasing involvement of third-party funders in mass arbitration raises significant questions about conflicts of interest, disclosure obligations and control over proceedings. Funders typically have a financial interest in maximizing aggregate recoveries rather than optimizing outcomes for individual claimants, which can create tension with attorneys' professional duties. US courts and arbitral institutions have not yet established uniform disclosure requirements for funder involvement in mass proceedings. This is an area where regulatory or rule-based intervention appears likely.

**What are the practical limits of institutional administration at scale?**
The practical challenges faced by the AAA and JAMS in administering thousands of cases simultaneously are significant and unresolved. Process arbitrators, consolidated case management and administrative staff have all been stretched by large-scale filings. The institutions have thus far borne the burden well. However, if institutional capacity constraints become severe enough, they may generate their own form of undue delay raising due process concerns and potentially providing grounds to challenge the arbitration proceedings themselves.

## Conclusion

Mass arbitration has turned mandatory arbitration clauses—intended as a shield against class actions—into a sword, crippling companies through filing fees. The irony is almost complete: the very agreements designed to eliminate aggregate litigation exposure have, at sufficient scale, recreated it in a forum that offers companies far fewer procedural protections than a federal court.

For international practitioners, understanding the US mass arbitration landscape is no longer optional—it is essential for advising any client with US-facing contracts, employment relationships or consumer operations. The case law is evolving rapidly, institutional rules continue to be updated and Congress has demonstrated a willingness to act on discrete issues.

The most important takeaway for practitioners is proactive: no defense strategy developed after mass arbitration demands have been filed will be as effective as a well-drafted arbitration clause reviewed with mass arbitration exposure specifically in mind. The time to address this risk is at the contract-drafting stage, not at the moment the invoice arrives.



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# Critical minerals: Energy transition or energy security?

By Joseph Bentley and Leone Astolfi

## Introduction

When the Paris Agreement was signed in 2015, its aims were clear: reduce carbon emissions and limit global warming to no more than 1.5°C above pre-industrial levels. Over a decade later, this ambition remains—though sometimes more honored in the breach than in observance. Amid rising geopolitical tensions, a fundamental challenge faced by governments is reconciling net-zero targets with more immediate concerns as to energy security. What "energy security" entails is changing; a complex network of international suppliers is not as reliable as it once was. What energy security demands is also different. As it was put a few years ago, "critical minerals, semiconductors and data are the oil, steel and electricity of the 21st century."

In this article, we focus on the minerals powering the green technologies which the world needs to deploy urgently and at vast scale to have a chance of achieving net-zero, and whose supply Western states are determined to secure. We will examine what makes some minerals critical, why demand for them is increasing, how states in the West are seeking to secure supply, and the implications for the energy transition.

## What makes a mineral critical?

"Critical mineral" is not a term of art—it depends on the perspective and context, and it changes. The definition accepted in the US is that a non-fuel mineral is *critical* if it is essential to economic or national security or the manufacturing of a product that affects economic or national security and its supply is vulnerable to disruption, whether due to production constraints, abrupt growth in demand or geological scarcity.

There are now 50 minerals on the US' List of Critical Minerals, up from 35 in 2018, which shows that what makes a mineral critical is not static. The EU's equivalent began with 14 in 2010 and is now at 34. They range from aluminium, used in virtually all sectors of the economy, to zirconium, used in nuclear reactors and aerospace components due to its corrosion and heat resistance properties.

## Why are they in demand now?

Minerals have long been important to the digital transition. Modern smartphones contain, on average, 42 different types of minerals, used to power their displays, electronics and batteries. As competition among AI technologies intensifies, minerals will be needed to fuel the likely rapid advancement of consumer electronics, in particular advances in components such as screens, high-performance chips and motors.

What has driven more recent demand, however, is green technology—in particular, renewables. Minerals play a vital role in renewable energy, and the focus and great hope of the green transition to date has been expanding renewables capacity. Among the more disconcerting statistics: to meet net-zero targets, renewables capacity needs to triple by 2030; the record-breaking 14 percent increase in 2024 fell far short of the 16.4 percent increase required every year until then. Renewable energy is much more mineral intensive than hydrocarbons. An onshore wind farm needs nine times more minerals than a gas-fired plant. An electric vehicle (EV) requires six times more minerals than a petrol/gas car.

It is not only the quantity of minerals used in renewables, but also the variety—wind farms and EVs use seven types of minerals, whereas a gas plant or a conventional car use just two: copper, plus chromium and manganese, respectively. With minerals required for electrification—EVs, battery storage and grids—demand from EVs alone is expected to grow 30 times by 2040. As a result, the International Energy Agency estimates that demand for critical minerals used to produce clean energy technology could be more than 3.4 times current levels within the same period.

There is another important driver. The response of most states to the war in Ukraine and conflict in the Middle East has been to increase defense spending. Modern advanced weaponry requires vast quantities of minerals—for example, gallium in radar systems, cobalt for radar-deflecting stealth capability and rare earths for magnets and guidance systems. Just one F-35 jet requires over 900 pounds (around 400 kilograms) of rare earth metals.

The factors driving increased demand point to a central issue: energy security. While demand continues to increase, supply remains uncertain. This uncertainty stems from the fact that mineral production is concentrated—and processing even more so—giving a handful of states disproportionate influence over global supply chains. South Africa produces 92 percent of the world's platinum-group metals and the Democratic Republic of Congo (DRC) is responsible for over 70 percent of cobalt production. China is the world's top mineral producer, accounting for around 60 percent of global mining output in 2024. Importantly, China also dominates refining—its share of global refining includes around 44 percent for copper, 70-75 percent of lithium and cobalt, and 90 percent of rare earth elements and battery-grade graphite. Ultimately, this means that, even if not mined in China, minerals are still sent there to be processed, making it the linchpin in global supply chains.

## The response

Concerned by the risk posed by China's virtual hegemony, including recent restrictions as to the export of gallium, graphite, antimony and several rare earth elements, states in the West have started to respond. Now, for the first time in 40 years, there is a shift away from reliance on the free market and the introduction of new industrial and mineral policies. Generally, these policies share the same aims, that is, to shore up supply and reduce dependency on China, but the means differ.

The UK was initially content to rely on international collaboration, likely because, in its own words, it has "limited natural resources" and depends on "relatively concentrated, opaque global supply chains." However, amid criticism that its strategy lacked ambition, targets and funding, the UK launched a new Critical Minerals Strategy in November 2025, with the intention of meeting at least 10 percent of annual demand through domestic extraction and refining, achieving a 20 percent recycling target and a "60% Rule" to prevent over-reliance on any one single country.

The EU aims to achieve mineral independence by 2030. It therefore requires member states to extract at least 10 percent of their annual mineral consumption domestically, process 40 percent or more within EU borders and recycle at least 25 percent. In December 2025, it launched the RESourceEU Action Plan in which it backed its targets with €3 billion in funding and a "matchmaking" platform for buyers and suppliers.

Canada has adopted a different approach, likely influenced by the fact that, unlike the UK or EU, it is mineral-rich. Canada has moved to level the playing field by tightening environmental and labor regulations and restricting foreign investment, aiming to keep resources under its own or its allies' control.

Prior to the current administration, the US had adopted a diversification strategy, as well as subsidies and tariffs aimed at jumpstarting domestic production. The focus was onshoring and "friendshoring"—entry into international partnerships to reorient supply chains—for example, the Minerals Security Partnership (MSP) with Australia, India, Japan, the UK and the EU. Now, however, the US has declared dependence on China a "national emergency," enacting a plan to "Unleash America's Offshore Critical Minerals and Resources", by: (i) removing environmental barriers to accelerate domestic investment; and (ii) creating a US$12 billion minerals stockpile in addition to its national defense stockpile.

## The impact

There is ongoing debate over whether these policies have been or are likely to be effective. There has been some progress; recently, European Investment Bank agreed to provide €250 million in financing for Vulcan Energy's Phase One Lionheart Project in Germany, a €2 billion project to build integrated battery-quality lithium supply chain. This is Europe's first project to combine Direct Lithium Extraction with renewable generation. There are also signs of increased private investment. However, despite these efforts, China's share of both production and processing is going up, not down. Part of the problem is that strategies and policies are just that—however effective on paper or backed by funding, they are insufficient on their own. Mines take an average of 16.5 years from discovery to first production, which makes it difficult to expand supply quickly and, of course, even if domestic production increases, there is precious little processing capacity in the West, and China's position as an indispensable cog in global supply chains is maintained.

Moreover, if mining and refining minerals is not commercially viable, private enterprise will not do it unless there are material economic incentives. Green technology changes quickly, demand fluctuates even more rapidly, and mineral prices are extremely volatile, all of which is unattractive to international mining companies interested in stable long-term investments. The logical next step might be state intervention in the form of tax credits,

subsidies, guaranteed price floors and state participation but that takes time to produce results and can, of course, create problems of its own. There is also an argument that these policies might be counterproductive on their own terms because, even if successful in diversifying supply, they could lead to fragmentation of a distorted, but largely functioning, market.

Some of the debate has focused on recent climate change policy shifts, particularly the withdrawal of tax credits and green subsidies in the US, which has already had a measurable impact on new and existing renewables projects. As renewables are a major driver of critical mineral demand, and new projects have been postponed while others have been cancelled, that might translate into weaker demand for certain minerals used in wind and solar such as nickel, zinc and manganese. If that trend were to continue, it has been suggested that the mineral demand would be overstated and Western states' policy would no longer be as urgent and vital as they are made to seem.

However, that disregards that the US' recent shifts go hand-in-hand with a renewed focused on domestic manufacturing, particularly in the electronics, defense and heavy industry sectors, all of which are mineral-intensive. Critical minerals are often discussed as if they were one homogenous commodity but the reality is that each has its own application and market—indeed, they are distinguished by their different and unique properties—and the main feature they have in common is that they are all important in some way to the economy and prone to supply chain disruption.

## Is the West willing to pay the price?

A big problem for Western states is whether they are prepared to pay the price in terms of the environmental impact of increasing domestic production and processing. The aim of these policies is, explicitly, to counter China's dominance. But that was not always the case. If one goes back just 30 years, the US controlled the rare earth market; its mine, Mountain Pass in California's Mojave Desert, accounted for 50 percent of global production. The reason for China's present dominance is not (or not only) complacency in the West, but the environmental impact. Despite the name, rare earth elements are relatively abundant but they are diffuse and extracting them is both difficult and environmentally hazardous. The question is how can Western states balance a desire for commercially viable domestic mineral production with their strict ESG standards?

It is perhaps one of the most difficult challenges facing policymakers; there is little freedom to legislate. It leads to two potential ironies. First, states may be prevented from producing the minerals required to power the green transition and thereby, from achieving net-zero because of laws introduced to protect the environment. Secondly, by seeking to secure and domesticate the supply of minerals critical to the green transition, states risk causing the very environmental damage that such technologies are intended to prevent.

Western states' complex permitting regimes and the need to coordinate between multiple agencies make it unlikely that production can ramp up as quickly as the policies anticipate or grow to the levels envisaged. Even if, as the US is proposing, key barriers to licensing are removed, local opposition in Western democracies can often delay projects materially, or make them more expensive. The West's current strategy is to level the playing field for overseas investors by imposing strict environmental and other standards that they may not be able to meet. However, while that may bolster the domestic market, it is unlikely to affect markets globally. The West's other focus has been the circular economy—cutting producers out of the supply chain by recycling, reusing and encouraging urban mining.

## Impact around the globe

One of the consequences of the West's efforts to ensure energy security is a likely uptick in resource nationalism. Usually defined as a state's assertion of control over the resources in its sovereign territory, it can take many forms. Expropriation and nationalisation are two obvious examples, but, more commonly, it manifests as export bans, changes to the legislative, fiscal or regulatory environment and enhanced local content and participation requirements. The reasons for it differ country to country but are often: (1) political instability—locally and at a geopolitical level; (2) inflation and price volatility; (3) domestic constraints on funding; and (4) local demand for increased value from indigenous resources.

However, nothing provokes protectionism like interventionism. As importing states compete to shore up supply, mineral-rich countries are incentivized to adopt measures aimed at exerting greater control. There are many recent examples: (1) Chile and Mexico have nationalized their lithium industries; (2) in 2023, the DRC forfeited 29 (mostly cobalt and copper) mining licenses; (3) in 2024, Niger revoked several uranium mining licenses; and (4) in 2025, Guinea canceled several exploration permits and mining licenses. Unsurprisingly then, more than half of new treaty cases in 2024 related to extractive industries, including cases involving critical minerals such as manganese and rare earth elements.

Importantly, however, the push to secure energy supply extends beyond "the usual suspects"—it is happening everywhere. To take just one example, Germany dropped from 154th in 2020 to 32nd in Maplecroft's 2025 Resource Nationalism Index, mostly on account of seizing assets from Russian oil companies and windfall taxes on energy profits. As part of their industrial policies, Western states have introduced foreign investment restrictions, made changes to the regulatory environment and sought to domesticate production at the expense of overseas investors. These measures can come perilously close to resource nationalism. Indeed, in 2022, Canada ordered three Chinese companies to divest their interests in Canadian lithium miners; albeit it then retracted that decision under much criticism—forced divestiture being a hallmark of resource nationalism.

It is not therefore beyond the realms of possibility that we may see an increase in contentious renegotiations involving, and FET-standard treaty claims against, Western states. At the very least, there is a risk that foreign investors will hesitate before investing in states with robust mineral policies which may then frustrate the purpose of those policies, as many require private enterprise to achieve their aims.

## Conclusion

States are increasingly alert to the risk of leaving control of mineral supply chains in the hands of those who may not share their strategic interests. However, the race to secure supply of critical minerals exposes a fundamental tension at the heart of Western energy policy. States cannot achieve the green transition without increasing mineral supply, yet the environmental protections that underpin the transition constrain the West's ability to do so domestically and weakening them risks causing the damage that the green transition aims to prevent.

The consequence of seeking to address the imbalance now is that the resulting race for supply incentivizes producers to tighten their grip by adopting measures to improve their take. That only increases as importing states adopt further measures of their own aimed at securing supply, and there are then the makings of a vicious cycle in which the interests of states and their investors increasingly diverge, the private investment on which these strategies depend is deterred and contractual and other protections are ignored, making commercial and investor-state arbitrations arising out of international mining projects more likely.



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# Who decides who decides? Australian court reaffirms kompetenz-kompetenz principle

By Daniel Allman and Kate Andersson

**The "kompetenz-kompetenz" doctrine provides that an arbitral tribunal has jurisdiction to rule on its own jurisdiction. The competence principle, as it is sometimes known, is enshrined in Article 16 of the UNCITRAL Model Law on International Commercial Arbitration (Model Law) and is given the force of law in Australia by Sections 16(1) and 21 of the *International Arbitration Act 1974* (Cth) (IAA).**

**On February 9, 2026, the Victorian Court of Appeal reaffirmed the competence principle in *Oil Basins Ltd v Esso Australia Resources Pty Ltd* [2026] VSCA 6. The Court of Appeal clarified that parties to an arbitration agreement governed by Australian law cannot contract out of the principle. Arbitration may be a creature of consent, but that consent cannot be wielded to strip arbitrators of the very authority conferred by the curial law.**

## Underlying dispute

This case relates to a long-running royalty dispute concerning the production of hydrocarbons in the Bass Strait, between the Australian mainland and Tasmania. The parties had entered into a settlement agreement in 1994 which established a methodology for calculating royalties in respect of the gross value of hydrocarbons produced. That agreement provided for disputes to be determined by arbitration seated in Melbourne.

A dispute arose concerning the treatment of depreciation and decommissioning costs in the royalty calculation. Oil Basins commenced proceedings in the Supreme Court of Victoria, seeking declarations that issues relating to depreciation and decommissioning costs were not arbitrable under the settlement agreement. Esso and the other producers applied for a stay of those proceedings under Section 7 of the IAA, which was granted by the primary judge. Oil Basins appealed.

## Opposing stay of proceedings

In opposing the stay, Oil Basins invoked the choice-of-law clause in the settlement agreement, which provided that it was to be interpreted and applied in accordance with New York law. Oil Basins adduced expert evidence that, under New York law, parties to an arbitration agreement are presumed to have agreed that a court, not an arbitrator, will decide questions concerning the scope of the agreement, unless there is "clear and unmistakable" evidence to the contrary.

According to Oil Basins, because the settlement agreement contained no such clear evidence to the contrary, the effect of adopting New York law as the governing law was that a court, not an arbitral tribunal, should determine whether issues relating to the depreciation and decommissioning costs fell within the scope of the arbitration agreement. On that basis, Oil Basins argued that the proceeding did not involve a "matter capable of settlement by arbitration" within the meaning of Section 7(2)(b) of the IAA, and so the conditions for a stay had not been satisfied.

For their part, the producers submitted that despite the parties' choice of New York law to govern substantive rights under the settlement agreement, their choice of Melbourne as the seat meant that Australian curial law determines whether arbitrators or the court had primary power to decide the arbitration agreement's scope. The producers also argued that the arbitrator appointment agreement put beyond doubt that the arbitration was governed by the IAA, even if New York law was the proper law of the settlement agreement. Therefore, according to the producers, the parties' choice of seat attracted the mandatory provisions of the Model Law, including Article 16.

## Court of Appeal's decision

The Court of Appeal dismissed the appeal on the merits (but allowed it on a question of indemnity costs). At the heart of its decision was the Court's endorsement of the mandatory nature of the competence principle under Australian law.

The Court held that Article 16(1) of the Model Law, which provides that an arbitral tribunal "may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement," has the force of law in Australia by virtue of Sections 16(1) and 21 of the IAA. The Court further observed that "there is limited provision in the IAA or the Model Law for the parties to an arbitration agreement to opt out of their application, and it does not extend to s 7(2), or to arts 8 or 16" ([82]). Those provisions, the Court emphasized, "have the force of law in Australia and parties who consent to arbitration are bound by these and other laws that govern commercial arbitration" ([82]).

The Court was careful to emphasize that its decision does not undermine consent in arbitration. Rather, in the Court's words, it "identifies the consequence of such consent" ([82]). The Court explained that "the fact that parties to an arbitration agreement cannot exclude the operation of art 16(1) of the Model Law means that, despite the parties having agreed that a court, and not arbitrators, will determine the scope of the arbitrators' jurisdiction, the arbitrators retain that power pursuant to the competence principle" ([83]).

This finding was reinforced by the Court's analysis of the legislative history of Section 21 of the IAA. Prior to 2010, parties could agree to opt out of the Model Law. However, following amendments in 2010 and 2015, Section 21 of the IAA now provides that the Model Law "covers the field" in respect of international commercial arbitrations conducted in Australia, removing the ability to exclude it.

The Court also made two further observations of practical significance:

- The Court addressed the relationship between the parties' choice of New York law and the mandatory operation of Australian arbitration legislation. The seat of arbitration was Melbourne and the curial law was accordingly Australian law. The Court held that, even accepting that the governing law clause applied New York law to the interpretation of the settlement agreement, this did not govern the competence principle which "applies by statute, not any provision of the agreement" ([107]).
- The Court addressed the standard of review for stay applications, endorsing the "light touch" approach articulated by the Federal Court of Australia in *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442. Under that approach, a court need not make a final determination of the scope of an arbitration agreement on a stay application; rather, it is sufficient to form a "general view" as to whether the dispute has the requisite connection with the arbitration agreement. This approach gives appropriate weight to the tribunal's authority and to the competence principle, whilst preserving the court's supervisory role.

## Conclusion

The decision in *Oil Basins* has important implications for drafting and enforcing arbitration agreements with an Australian seat. Most notably, parties cannot circumvent the competence principle by agreement. That doctrine is an unavoidable consequence of agreeing to arbitrate in Australia, not merely a default rule susceptible to contractual override.



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# Consolidation in international arbitration: Avoiding the pitfalls

By Holly Stebbing, India Furse and Eleanor Clotworthy

**Consolidation—the merging of two or more arbitral proceedings into one—is a deceptively simple concept. In principle, it promises efficiency, consistency and cost savings. In practice, however, achieving consolidation depends on a patchwork of contractual provisions, institutional rules and national law that parties may have overlooked until a dispute is already underway. By that stage, the window for consolidation might have closed. This article examines where the key pressure points lie and what practitioners can do, at the drafting stage, to keep the option open.**

## The consent problem

Unlike court litigation, where judges typically have inherent or statutory powers to consolidate related cases, arbitration is rooted in party consent. That distinction shapes everything. A tribunal's authority to consolidate will generally depend on one or both of two sources: the relevant contracts and the relevant applicable law. So far as the contracts are concerned, these may include express consolidation clauses or may incorporate provisions for consolidation by reference to institutional rules. So far as the applicable law is concerned, relevant sources may include the law of the seat of the arbitration and the law governing the arbitration agreement itself. Questions about whether consolidation is permissible in principle, who may order consolidation and when, are matters typically governed by the law of the seat. Questions about the existence, scope or interpretation of a contractual consolidation mechanism will likely engage the law governing the arbitration agreement.

### Express contractual provisions: The strongest foundation

A consolidation clause carefully drafted at the outset is the most reliable route. It provides a clear contractual mandate and reduces the scope for objection based on lack of consent. In multi-contract transactions, where disputes under one agreement may be closely connected to disputes under another, such clauses are particularly valuable. Parties can choose to have compatible arbitration agreements in each contract providing for consolidation or have an "umbrella" dispute resolution agreement which applies to each contract (and can reduce the risk of inconsistency between contracts). A well-drafted clause will specify the circumstances in which arbitrations can be consolidated, the mechanism for determining which tribunal hears the consolidated proceedings and how that tribunal is appointed. Without an express clause, parties may find themselves with limited recourse, especially in ad hoc arbitrations or in jurisdictions where legislation does not confer a default power to consolidate on the tribunal.

### Institutional rules: A varied landscape

The major arbitral institutions now include consolidation provisions in their rules, but practitioners should not assume uniformity. The scope, timing and decision-maker vary significantly across regimes:

1. **ICC**: Article 10 of the ICC Rules 2021 vests the consolidation power in the ICC Court, not the tribunal. This is a significant design choice: it means consolidation can be ordered before any tribunal has been constituted and can help to overcome objections based on the fact that parties to one arbitration may not have participated in the appointment of the tribunal in the arbitration into which it is consolidated. The ICC Court may consolidate where the parties agree, where all claims arise under the same arbitration agreement or agreements, or where claims arise under more than one agreement, provided that the arbitrations are between the same parties, the disputes relate to the same legal relationship, and the arbitration agreements are compatible.
2. **LCIA**: The LCIA Rules 2020 take a different approach enabling consolidation either by the LCIA Court (which absent agreement by the parties can only take place if no arbitral tribunal has been formed) or by the tribunal (with the approval of the LCIA Court). The tribunal (or the LCIA Court, as applicable) may consolidate where all parties agree, or where the arbitrations are conducted under the LCIA Rules and have the same or compatible arbitration agreements and either the

same parties or arise "out of the same transaction or series of related transactions." A further constraint applies where a tribunal in the related proceeding has already been constituted: consolidation in those circumstances is only possible if both tribunals are composed of the same arbitrators (which can be difficult to achieve in practice, given timing, availability and the challenge for arbitrators of accepting multiple appointments for the same party).

3. **HKIAC**: Under Article 28 of the HKIAC Rules 2024, the HKIAC itself exercises the consolidation power on application by a party, mirroring the ICC's institutional model. Three triggers apply: party agreement; all of the claims in the arbitrations being made under the same arbitration agreement; or claims being made under more than one agreement where the arbitrations involve common questions of law or fact, the rights to relief arise out of the same transaction or series of related transactions, and the arbitration agreements are compatible. Proceedings are typically consolidated into the arbitration that was commenced first.
4. **SIAC**: Rule 16 of the SIAC Rules 2025 bears some similarities to the LCIA model. The SIAC Court's power to consolidate arises prior to the constitution of any tribunal, and is without prejudice to any party's right to apply to the tribunal for consolidation. Rule 16.8 provides that a tribunal, once constituted, may order consolidation where all parties have agreed to consolidation, where all claims arise under the same arbitration agreement and the same tribunal has been constituted in each arbitration (or none in the other arbitrations) or where the arbitration agreements are compatible and the same tribunal has been constituted in each arbitration (or none in the other arbitrations).
5. **UNCITRAL**: The UNCITRAL Arbitration Rules contain no consolidation provisions at all—a notable gap, although one that reflects their orientation towards ad hoc arbitration.

The table below summarizes the latest published statistics on consolidation applications, showing that the majority of applications have been granted by the relevant institutions:

| Institution | Applications received | Applications granted |
|---|---|---|
| **LCIA** | 40 | 39 (the other was superseded) |
| **HKIAC** | 14 | 12 |
| **SIAC** | 107 (of which 104 were filed before the tribunal was constituted) | 66 (65 by the SIAC Court and 1 by the relevant tribunal) |

The picture that emerges from this comparison is more nuanced than a simple institutional divide. While the ICC and HKIAC vest the consolidation power exclusively in the institution, both the LCIA and SIAC provide routes to consolidation through the tribunal. Pre-tribunal consolidation is available, in different forms, under all four institutional frameworks. The practical differences therefore lie in the specific triggers, the identity of the decision-maker at each stage of proceedings, and the constraints that apply, such as the LCIA's requirement for identical tribunal composition where a tribunal in the related proceeding has already been formed.

The UNCITRAL gap is worth particular attention. Parties who have adopted these rules and find themselves in related but separate proceedings have no institutional route to consolidation. Their only options are agreement between the parties in the relevant contract(s) or (less likely) when the dispute arises or reliance on the applicable national arbitration legislation which, as discussed below, may not help. For multi-party, multi-contract transactions, if the UNCITRAL Rules are adopted, an express consolidation clause is a necessity.

### The procedural law dimension

Institutional rules do not operate in a vacuum. The procedural law governing the arbitration can expand or constrain the parties' ability to consolidate and must be considered alongside both the rules and the contract. The position under English law illustrates the point well: Section 35 of the Arbitration Act 1996 permits a tribunal to consolidate only where the parties agree. In London-seated cases, therefore, the route to consolidation will depend heavily on whether the parties have agreed a consolidation clause or have, by incorporating institutional rules, conferred the relevant power.

In practice, these three sources of authority—contract, institutional rules and national law—interact in ways that can either support or undermine a consolidation strategy. A well-crafted contractual clause may supplement the institutional rules; institutional rules may fill gaps where the contract is silent, and national legislation sets the outer boundaries of what is permissible. Practitioners who focus on only one leg of this framework risk being caught short when the matter of consolidation actually arises.

## Why consolidate? Efficiency and consistency

The case for consolidation rests on two pillars: consistency and efficiency. Both are well understood but worth restating briefly as they also inform the strength of any application to consolidate:

- When disputes arise from the same transaction or related transactions, the underlying facts often overlap. The same events, documents and witnesses may be relevant to each case. Yet tribunals are not bound by one another's findings. If parallel proceedings run separately before different panels, there is a real risk of contradictory findings on the same factual matrix. Consolidation addresses this directly by placing all related disputes before a single tribunal, ensuring the evidence is weighed together and outcomes are consistent.
- A single consolidated arbitration avoids the obvious costs of duplication: multiple tribunals, overlapping pleadings, repeated document production, and duplicated witness and expert evidence. It also eliminates the procedural drag of managing parallel proceedings on separate timelines with different hearing dates. A single timetable brings clarity and can materially reduce both cost and time.

## The other side: Why consolidation is resisted

If consolidation is so beneficial, why is it so often resisted? Two recurring objections deserve particular attention: the impact on party-appointed tribunals and the consent question. Underlying these objections, and often the real reason for objecting, is the resisting party's overall case strategy.

- The right to nominate an arbitrator is a defining feature of the arbitral process, and parties (and some national laws) guard it closely. Consolidation can disrupt this. When separate proceedings are merged after tribunals have been appointed, one tribunal necessarily loses its mandate, and the parties in that arbitration may find themselves before a panel they neither selected nor had any input in composing. The sense of disenfranchisement is real, even where the consolidated tribunal is otherwise well-qualified, and it remains one of the most frequently invoked objections to consolidation. Including a detailed mechanism for the appointment of the tribunal for consolidated proceedings in the arbitration agreement can help overcome this issue. For example, the mechanism may have different routes for appointment depending on whether one or more tribunals have already been appointed, providing for both the appointment and the recusal of arbitrators as applicable.
- A related objection is consent. Where consolidation is ordered under institutional rules rather than an express contractual clause, a party may argue that it never agreed to have its dispute heard alongside another. While the parties have agreed to incorporate the institutional rules, the relevant decision-maker's power is still discretionary, and it may be more persuaded that express, tailored provisions negotiated between the parties indicate a strong intention to consolidate related disputes.

Beyond these principled objections, consolidation is also resisted for tactical reasons, though these are unlikely to be articulated openly. Examples include:

- **Delay strategies:** A respondent facing claims under multiple contracts may prefer to keep proceedings separate as part of a delay strategy. Parallel arbitrations on different timelines can defer the day of reckoning, buying time before an enforceable award is rendered.

- **Tribunal composition**: A party may wish to preserve a tribunal composition it perceives as favorable in one proceeding, knowing that consolidation would dissolve that panel in favor of another. For example, a black letter law approach may be most suitable for some claims, whilst others may benefit from more commercial or technically minded arbitrators.
- **Document disclosure**: Confidentiality concerns can also be weaponized—a party may resist consolidation to prevent commercially sensitive material from one arbitration being disclosed to parties in a related, but distinct dispute.
- **Divide and conquer**: Keeping claims siloed can prevent an opponent from weaving a cohesive narrative that draws strength from the totality of the parties' dealings, making each claim appear narrower and weaker in isolation.
- **Settlement**: Separate proceedings create separate settlement dynamics. A party may prefer to pick off smaller claims on favorable terms while contesting larger ones. This is a strategy that becomes harder to execute once everything is before a single tribunal.

None of these motivations will feature in a party's formal submissions, but they are a routine part of the tactical calculus and practitioners should be alive to them, whether their clients are pursuing or resisting consolidation.

## Planning ahead: What to include in a consolidation clause

The strongest consolidation strategies are built at the drafting stage, rather than improvised once a dispute has crystallized. Practitioners advising on multi-party, multi-contract transactions should consider three key questions:

1. What does the procedural law permit? Some jurisdictions, such as England, impose significant constraints on consolidation absent party agreement. The procedural law sets the outer boundary of what is achievable.
2. How do the chosen institutional rules approach consolidation? As the comparison above illustrates, the scope and mechanics differ materially. A consolidation clause can supplement or tailor the institutional framework but only if it is drafted with that framework in mind.
3. Are there related contracts? If so, consolidation clauses must be drafted consistently across the suite of agreements or an umbrella agreement used. Inconsistent provisions—different seats, different institutional rules, or conflicting consolidation mechanisms—can fatally undermine the very strategy they are intended to support.

## Conclusion: Consolidation favors the prepared

Parties who assume that consolidation will be readily available for related disputes are likely to be disappointed. Those who invest in clearly drafted consolidation clauses, ensure consistency across related agreements and select institutional rules that support their strategy will be far better positioned when the moment arrives. That said, whether consolidation is worth pursuing will still depend on the degree of connection between the disputes, which is a matter to be determined on a case-by-case basis.

Where consolidation is unavailable or undesirable, alternative mechanisms available under institutional rules can achieve similar objectives. Article 9 of the ICC Rules and Article 29 of the HKIAC Rules 2024 permit claims arising out of or in connection with more than one contract to be made in a single arbitration (subject to certain conditions). Rule 15 of the SIAC Rules 2025 treats a single notice of arbitration issued in respect of more than one arbitration agreement as being an application to consolidate.

Once proceedings are underway, joinder provisions in each of the ICC Rules, the HKIAC Rules, the SIAC Rules, the LCIA Rules and the UNCITRAL Rules (joinder being the only multi-party mechanism available under the UNCITRAL framework) allow additional parties to be brought into an existing arbitration. Some institutions also provide for the concurrent or coordinated conduct of related arbitrations before the same tribunal: Article 30 of the HKIAC Rules, Rule 17 of the SIAC Rules and Article 22A of the LCIA Rules each allow a tribunal to align procedural steps across separate arbitrations. These mechanisms avoid the tribunal-composition and consent objections that consolidation can attract, while still enabling practical efficiencies and reducing the risk of inconsistent outcomes



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# Price adjustment provisions for long-term technology supply agreements in uncertain economic times

By Jonathan Ball, Kerri Gevers and Verity Quartermain

Commercial parties value certainty. Yet certainty can come at a cost: a fixed price or pricing model that is commercially acceptable to both sides at the time of contracting may become financially unsustainable if market conditions change or the customer's use or reliance on the products or services changes over time.

To manage this risk, particularly when the contract at issue concerns software or services that are business-critical, customers are increasingly looking to incorporate price adjustment provisions into their long-term technology supply agreements. However, suppliers will seldom agree to lock-in pricing for more than a few years unless the deal is particularly strategic or their margin or business model can sustain the risk of increased operating costs.

Absent effective price adjustment provisions, customers find themselves in difficult positions come renewal time, particularly if they lack effective bargaining power or there are no arguments that can be made (effectively and without recourse to regulators) in relation to their supplier abusing any sort of dominant position. In this article, we explore issues that may arise in relation to price adjustment mechanisms from an English law perspective and discuss how careful drafting and the option to have recourse to a third-party determination can provide parties with the means to manage pricing risk and avoid lengthy and costly disputes in long-term supply arrangements.

## Price adjustment/repricing provisions in technology contracts: Key challenges

There are many different types of price adjustment mechanisms in commercial contracts, ranging from the relatively simple (for example, an automatic price increase that takes place annually in line with a selected index) to the sophisticated (such as a mechanism by which prices are periodically benchmarked against a basket of similar goods and services, providing that prices ratchet up or down periodically where the requisite delta between current price and benchmarked price is demonstrated).

While these mechanisms are intended to provide predictability, in practice, they are increasingly becoming the sources of disputes, particularly where the language casts doubt on their meaning and enforceability or where they involve more than a simple mathematical calculation relating to undisputed input data. Below are some examples of repricing provisions commonly seen in technology contracts and some of the associated challenges. These challenges are often amplified in cross-border arrangements, where parties can often have different expectations about how such mechanisms should operate and how "binding" they are.

- Index-linked increases: This is the most common form of price adjustment mechanism included in technology contracts. Standard supplier terms of access to cloud-based platforms, associated support and data services typically include unilateral rights for the supplier to adjust pricing on notice, often with effect from the next annual renewal cycle, with the ability for the customer to terminate if they do not accept the new pricing. The same applies to rate cards for professional services provided on a time and materials basis. Customers seeking pricing certainty will attempt to negotiate the following: (a) locking in the original pricing for an initial period; (b) limiting increases by frequency (for example, once annually); and (c) capping the amount of the increase by reference to an agreed index. Suppliers may request an agreed percentage above that index. Some suppliers request an exception to the cap in circumstances of "hyper-inflation" or unexpected conditions resulting in increased operating costs. Unless these exceptions are clearly defined, disputes can arise as to whether they have been triggered. Disputes can also arise if there is a lack of detail as to the repricing mechanism.
- Volume-based adjustments: Tiered pricing models are common, such as those based on the number of subscriptions/licences or transactions processed or on the amount of data storage required. They typically include automatic increases to the next tier where the thresholds are reached. Customers will seek to negotiate pro-rated increases where this happens during a subscription period and the right to downgrade to

a lower tier if applicable. Difficulties arise where a contract includes agreed pricing for the tiers that are relevant at the time of contracting but omits agreed pricing for other tiers which then become relevant later because of changes in the number of subscriptions/licences or transactions processed, or changes in the amount of data storage required.

- Benchmarking: Benchmarking provisions are typically only included in strategic, high-value and complex technology deals. Unless they are comprehensive and specific, they create the potential for disputes, including about the identity of the benchmark, the scope of the comparative suppliers and services and, most importantly, whether a finding that that the agreed prices are above or below the benchmark results in an automatic price adjustment or an obligation to renegotiate pricing.
- Repricing triggers: In strategic deals with fixed pricing models, there may be repricing triggers based on customer uptake not reaching the anticipated volumes on which the supplier based its pricing. These provisions seldom specify the alternative pricing but trigger an obligation to renegotiate pricing (sometimes in good faith) and a right for the supplier to terminate the contract if new pricing is not agreed.

There may also be circumstances where, at the time of contracting, there is an intent to extend the agreement for a longer term, or to cover other product lines or features, but the parties are unable to agree specific pricing for the extended term or scope at the time of contracting. This often leads to the parties simply providing in the contract that the price of the relevant product or service is "to be agreed" after a specified number of years or when the new product line or features are added. The inclusion of bare agreements to agree in a price adjustment mechanism can have serious consequences.

## "Bare agreements to agree" are generally not enforceable under English law

While each case must of course be decided on its own facts, so-called "bare agreements to agree" are generally not enforceable under English law, because they are too uncertain to give rise to binding obligations. Absent there being an objective method or escalation path in place to break a deadlock, simple price adjustment provisions such as these are simply "kicking the can down the road" and therefore often fail. In these circumstances, unless the customer agrees to pay a price that is ultimately acceptable to the supplier (bearing in mind that the customer may, at this point, be entirely dependent on the supplier to operate and/or deliver services to its customers), a clause that was intended to provide certainty can have the unintended consequence of bringing what was meant to be a long-term commercial relationship to an abrupt and sometimes acrimonious end.

## Misplaced reliance on implied duties or the imposition of a "reasonable price"

Contracting parties sometimes assume that a provision indicating that a price is to be re-agreed/re-assessed in the future will not cause any problems because, if there is a deadlock, the courts:

- May imply a duty of good faith, which their counter-party must act in accordance with, and which will therefore ultimately result in a price being agreed.
- May themselves make a finding as to what is a reasonable price.

Such an assumption can be misplaced.

## Obligations of good faith are generally not implied into contracts under English law

Under English law, obligations of good faith are generally not implied into contracts unless specific circumstances are met. Even where parties have agreed to agree or agreed to negotiate, there is no broad safety net of an implied covenant of good faith and fair dealing.

Indeed, obligations of good faith can generally only be implied:

- Where the contract is a so-called "relational contract" (see *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB)).
- It is otherwise necessary for such a term to be implied in fact because it is necessary to do so to give the contract business efficacy (which is a rarity when commercial parties are involved), and only where the imposition of a duty of good faith is not expressly precluded by the language of the contract itself.

While there is no exhaustive list of criteria for determining whether a contract is "relational," such contracts will tend to be long-term and necessarily involve close collaboration, communication and cooperation between the parties.

Even where there is an implied (or even express) obligation of good faith in a contract, how far would a breach of it take the innocent party in practice? While an obligation to negotiate in good faith to agree a future price may, depending on the relationship between the parties, impose enough commercial pressure to have the negotiations carry on amicably to a successful conclusion, the legal remedies for a breach of an obligation to negotiate in good faith may only go so far, and are not likely to result in a price being imposed by a court.

## Statutory reasonable price provisions do not help where parties intended to agree a future price

Under English law, when a contract is silent as to the price of goods or services, there is statutory provision for the implication of a reasonable price (Section 8(2) of the *Sales of Goods Act 1979*, in the case of goods, and Section 15(1) of the *Supply of Goods and Services Act 1982*, in the case of services).

While these provisions seem, and can be, helpful, they do not assist where:

- The parties have expressly addressed pricing in their agreement.
- The drafting shows that at the time of entering into the agreement, the parties intended to agree to a revised price in the future.

(See for example the discussion in *J Aviation Ltd v Pool Aviation Ltd* [2002] EWCA Civ 163).

## Drafting for certainty: How to future-proof price-adjustment mechanisms

To overcome the issues discussed above, parties are turning increasingly "to the maths" and:

- Incorporating objective measures or clear standards into their price adjustment provisions.
- Devising formulas or methods by which the future price is to be set.

While these approaches can and do work, difficulties can arise where:

- Worked examples in contract pricing schedules illustrating how the mechanism will work in practice are left out or are too limited, leading to unanswered questions about how the mechanism will work in particular scenarios.
- It transpires that the formula agreed was not appropriate because it failed to take into account some change in product use or market conditions that the parties did not contemplate at the time.

Parties may therefore consider including in their pricing adjustment provisions the ability for the parties to have recourse to an independent party to determine what the price should be if it cannot be agreed. Drafting in this recourse can:

- Assist a court in determining that the pricing adjustment provision is binding.
- If properly drafted, ensure that, if the parties are unable to agree a price, there is a swift, private and relatively cost-effective way for the price to be determined—one which ultimately takes into consideration the customer's use of the product and service and all relevant market conditions without the costly litigation price tag.

Issues can arise if the third-party determination clause is not properly drafted, or is not drafted to be final and binding, and in this respect, parties should take care to ensure that any agreed determination clause is clear in its scope, fits with the agreement as a whole and does not cut across how the general dispute escalation procedure of the contract operates. Further difficulties can also arise where it is unclear who the relevant third-party should be, or how that third-party is to be agreed or be appointed if the parties cannot agree.

## Key takeaways

Commercial parties wanting certainty and long-term stability in their technology contracts should approach pricing adjustment mechanisms with care. They should:

- Not rely on the vagaries of implied terms.
- Ensure their pricing adjustment mechanisms are both flexible and legally enforceable.
- Anticipate and draft for the resolution of a dispute concerning price adjustments at the outset.

Addressing a potential pricing deadlock at the drafting stage is key. Not only will this approach likely avoid the costly and disruptive consequences of a dispute down the track, but having an agreed mechanism in place to break any deadlock may prove essential in maintaining business-critical supply relationships.



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# The resilience of international commercial arbitration in an era of political upheaval

By Paul Stothard

Businesses are experiencing a period of geopolitical friction. Sanctions regimes and trade restrictions are expanding, supply chains are being regionalised and states are increasingly prepared to prioritise strategic and political interests over legal and institutional consistency. This creates a practical question: when commercial relationships cross borders, political systems and competing legal regimes, how can businesses remain assured of obtaining an effective, neutral and enforceable form of dispute resolution?

This article argues that international commercial arbitration, while not immune to political headwinds, is unusually resilient to the conditions that have destabilised other mechanisms of cross-border dispute resolution. This resilience can be explained in part by commercial arbitration's alignment with state and business incentives, but also by its nature as a system that has developed organically over centuries, adapting incrementally to changing political conditions in a manner that might tentatively be compared to biological evolution - with fitness conferred by incremental adaptation from below. This can be contrasted with the architecture of investment arbitration and World Trade Organisation ("WTO") dispute settlement, both of which are comparatively recent, treaty-based constructions that, for all their sophistication, have yet to develop the same degree of institutional flexibility and political insulation.

## Investment Arbitration: A case study in vulnerability

The last two decades have witnessed a pronounced turn toward economic nationalism, populism and scepticism of multilateral institutions. Developments such as the United Kingdom's departure from the European Union and the United States' move towards a tariff-based trade policy illustrate a broader retreat from multilateralism and the arrival of an environment in which dispute resolution mechanisms perceived as constraining state sovereignty are prone to attack.

Investment treaty arbitration offers a vivid illustration. The investor-state dispute settlement ("ISDS") regime, built upon a network of bilateral and multilateral investment treaties and underpinned by the widely adopted ICSID Convention, was regarded as a success story of international economic governance, promising foreign investors tangible standards of protection and a neutral forum for investment dispute resolution free from domestic court interference.

Yet ISDS has become one of the most politically contested features of the international legal order. Developing states object that it enables corporations to challenge regulatory measures before tribunals that lack political accountability; Bolivia, Ecuador and Venezuela withdrew from the ICSID Convention and the European Union has proposed a permanent multilateral investment court instead of ISDS. In North America, the North American Free Trade Agreement was replaced with the United States-Mexico-Canada Agreement, which scaled back the ISDS provisions between members states. Meanwhile, the withdrawal of multiple contracting parties from the Energy Charter Treaty ("ECT"), driven by the perceived incompatibility between fossil fuel investment protections and climate policy goals, further illustrates how political opposition can impact upon ISDS.

The vulnerability of investment arbitration is, in part, a consequence of its origins. ISDS is the product of a treaty-based system assembled in the latter half of the twentieth century to serve particular geopolitical objectives - mainly to encourage capital flows from developed to developing states. As it involves claims by investors against sovereign states, ISDS inherently engages questions of state regulatory autonomy and creates a tension with domestic political constituencies. ISDS has shown some adaptive capacity: UNCITRAL Working Group III has been engaged since 2017 with proposing reform of the system and ICSID has amended its procedural rules. The system is in transition rather than terminal decline, but the pace and difficulty of these reforms, each requiring the consensus of state parties with divergent interests, illustrates the structural disadvantage of systems designed from the top-down - that they are, in institutional terms, slow to adapt.

The current pressures on ISDS are also visible on the WTO Appellate Body, which, since 1995, has provided binding interpretations of multilateral trade rules. While first instance WTO panels continue to function and issue reports, the Appellate Body is paralysed because, since December 2019, it has lacked the quorum necessary to hear appeals. This is because successive United States administrations have blocked appointments, rendering the appeals process defunct.

The experience of both systems demonstrates that treaty-based dispute resolution requires continued political support from state actors. Neither the WTO mechanism nor ISDS emerged gradually from the practice of disputing parties - both were created at particular historical moments and depend upon continued state consent to function. When any sufficiently powerful actor withdraws that consent, the system's multilateral character becomes its principal weakness.

## International commercial arbitration: Structural resilience

Against these examples, the resilience of international commercial arbitration is striking. Commercial arbitration can be subject to the same geopolitical pressures as other forms of international dispute resolution, but it has not experienced a legitimacy crisis, institutional paralysis or a broad political backlash. This resilience reflects a combination of factors: its historical development, its decentralised structure, its symbiotic relationship with national courts and its broader alignment with commercial and state interests.

International commercial arbitration grew organically from the practices of merchants, traders and guilds over many centuries, from historic merchant communities, through specialist commodity arbitration in the great trading cities, to the sophisticated institutional frameworks of the modern era. It has always been rooted in the needs of the commercial necessity rather than state design. Arbitration survived the rise of the modern state not by resisting sovereign authority but by embracing it. It was adopted into domestic legal frameworks and developed a symbiotic relationship with national courts, which serve both to support the process (e.g. by enforcing awards and conservatory relief) and as a check upon arbitral excess (e.g. by policing the neutrality and impartiality of the tribunal). This co-evolution with the state is perhaps the most important structural difference between commercial arbitration and its treaty-based counterparts: where ISDS and WTO dispute settlement exist in tension with sovereign authority, commercial arbitration has developed to work with and alongside it.

Most fundamentally, international commercial arbitration is grounded in party autonomy, a feature that is itself the product of evolution rather than political fiat. The jurisdiction of a commercial arbitral tribunal derives from the agreement of the disputing parties who have chosen to submit their disputes to arbitration. This consensual foundation insulates commercial arbitration from some of the concerns expressed by those who oppose ISDS and WTO dispute resolution.

Commercial arbitration also benefits from a decentralised institutional architecture. There is no single treaty or institution upon which the entire system depends; instead, it rests upon a mosaic of arbitral institutions (such as the ICC and LCIA) each operating independently and competing for the confidence of users. If there is a single indispensable treaty, it is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) which, with over 170 contracting states, provides a near-universal enforcement framework. The Convention's durability should not, however, be taken for granted: leading commentators argue that it needs modernisation, most notably because of inconsistent national court interpretations of the public policy exception and the absence of provisions addressing modern arbitral practice. In the current political climate, such reform would probably be impossible to achieve because it would require an unlikely consensus among member states. That no state has ever withdrawn from the Convention (in contrast to the ICSID Convention) is nonetheless a powerful testament to the alignment between its enforcement framework and sovereign commercial self-interest.

International commercial arbitration has also shown a notable capacity for institutional adaptation, driven by competition between arbitral institutions which must attract and retain users. Institutions have responded to criticisms of cost, delay and opacity with expedited procedures, emergency arbitrator mechanisms and revised rules on transparency and third-party funding disclosure. States also compete to be seen as suitable seats by adopting supportive arbitration statutes. This pluralism means the system is not hostage to the political decisions of any single institution, state or bloc: if any given jurisdiction becomes less hospitable, parties migrate to alternative seats and the broader system continues to function. This stands in marked contrast to multilateral treaty-based systems, where any change requires the consensus of states with divergent interests.

## The limits of resilience: Qualifications and emerging challenges

Commercial arbitration is not without its own legitimacy challenges. Concerns have been raised about the concentration of arbitrator appointments among a small cohort of practitioners, the lack of diversity in the arbitral community, the opacity of proceedings and the growing influence of third-party funding. These are not trivial objections, and they suggest that commercial arbitration's continued resilience may depend upon its willingness to address internal governance questions with the same adaptive capacity it has shown in other areas.

Moreover, the line between commercial and sovereign disputes is not always clean. States and state-owned enterprises are frequent participants in high-value commercial arbitration, particularly relating to energy, infrastructure and natural resources, and the resulting awards can be politically significant. The distinction lies not in the absence of political stakes but in the framing: disputes are generally presented as matters of contractual performance rather than assessments of the exercise of sovereign power, allowing states to participate as market actors and containing rather than eliminating political sensitivity.

The increasing weaponisation of economic policy has nonetheless created practical obstacles that test the system's limits. The Russian Federation presents a compelling example. Following the imposition of EU sanctions in response to the annexation of Crimea in 2014, Russian courts adopted a broad interpretation of public policy to resist enforcement of foreign arbitral awards. In 2020, the Russian Parliament enacted Federal Law 171-FZ (the "Lugovoy Law"), conferring exclusive jurisdiction on Russian courts over disputes involving sanctioned persons even where a valid arbitration agreement provided for resolution abroad, and empowering sanctioned parties to obtain anti-arbitration injunctions with non-compliance subject to fines of up to the full amount in dispute.

The system's response demonstrates the resilience that organic development confers. English courts granted anti-suit injunctions restraining Russian parties from pursuing proceedings in breach of arbitration agreements, a practice upheld by the UK Supreme Court in UniCredit Bank GmbH v RusChemAlliance LLC [2024] UKSC 30. The European Union prohibited the recognition or enforcement within the EU of any Russian court decision issued under the Lugovoy Law. While a determined sovereign actor can disrupt commercial arbitration within its own borders, the decentralised character of the system allows other nodes in the network to compensate: awards remain enforceable elsewhere, and parties relocate their dispute resolution accordingly.

## Conclusion

The broader trend toward geopolitical fragmentation may in time exert greater pressure on the international commercial arbitration system. Nevertheless, the fundamental features of international commercial arbitration, particularly its deep roots, its consensual basis, its institutional pluralism, its symbiotic relationship with national courts and its alignment with commercial self-interest, all continue to provide a meaningful buffer against the political headwinds that have destabilised other forms of international dispute resolution.

None of this is to suggest that commercial arbitration is invulnerable, but in an era characterised by the reassertion of state sovereignty and the erosion of multilateral institutions, it has demonstrated a degree of resilience that its younger, treaty-based counterparts currently lack. The broader lesson is that systems of dispute resolution are most durable when they align with the incentives of their users, minimise direct confrontation with sovereign authority and retain sufficient institutional flexibility to adapt to changing conditions. Commercial arbitration satisfies those conditions to a greater degree than its counterparts, but maintaining that advantage will require the system to confront its own internal challenges, from arbitrator diversity to transparency, with the same adaptive energy that has sustained it over its long history.



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# A rise in M&A arbitrations: Key considerations at the start of a dispute

By Ruth Cowley, Claire Irwin, Will Farrant, Emily Simpson

**In the last half-decade, dealmakers have had to grow accustomed to living in "unprecedented times", facing increased geopolitical volatility and seismic shifts in global markets. Despite this, 2025 was reportedly the second-highest year on record for global M&A volume (Mergermarket: M&A Highlights 2025). Buyers who shook hands on deals last year may now be left facing an unexpected and substantial loss in value of their once-coveted target. Against the backdrop of the dramatic rise in M&A disputes, this article reviews some of the key practical issues which parties facing arbitration should address at an early stage to ensure they are on the best footing in a post-closing dispute.**

## The rise in M&A disputes

Global deal volume hit USD 4.8 trillion in 2025, and reports from Q1 2026 suggest that dealmaking is expected to continue in a "cautious but steady" manner despite ongoing uncertainty about the consequences of global conflicts (Mergermarket: M&A Highlights 1Q26). 80 per cent of those surveyed in BRG's 2025 M&A Disputes Report said that the number of M&A disputes their firms worked on had risen in 2025, and around two thirds expected dispute volume to increase over the course of 2026.

With increased M&A activity comes the potential for more M&A disputes. In particular, increased activity in growth areas such as Artificial Intelligence can contribute to a rise in disputes, with deals navigating untested or conflicting regulatory frameworks.

But perhaps the most obvious driver of increased M&A disputes is geopolitical volatility and market turbulence. Buyer's remorse is all-too-likely in a world where the value of assets can shift drastically post-signing, and buyers may look for remedies under their deal terms if assets see significant and unanticipated decreases in value.

## Arbitration as a leading mechanism to resolve M&A disputes

International arbitration continues to be a popular mechanism in sale and purchase agreements, particularly for large, cross-border deals (2025 International Arbitration Survey). This is typically due to the significant advantages of arbitration in the context of complex, international transactions, such as the availability of jurisdiction-neutral seats, the cross-border enforcement of awards and the confidentiality and procedural flexibility available through arbitration. However, M&A buyers and sellers contemplating arbitration should be aware of some common practical challenges they might face, and how these can be managed. Some of these challenges arise due to the nature of an M&A transaction and some are inherent in the international and consent-based nature of arbitration. While steps can be taken at the start of an arbitration process, it is helpful for parties to be aware of these issues when negotiating the transaction documents and to seek to make provision for them in anticipation of a future dispute.

# Practical challenges in M&A arbitration and early arbitration strategy

## Documents: Access, preservation and privilege

Practical difficulties in relation to the control and preservation of relevant documents often arise in international M&A arbitration.

For example, sellers commonly face the difficulty of no longer having access to the documents relevant to a dispute, having sold the target whose servers contain the potentially relevant documents. Without access to documents, it can be difficult to bring or defend a claim. In anticipation of a dispute potentially arising in future, sellers should seek to address in the transaction documents as far as possible what, if any, access to these documents they will continue to have after completion.

Rules relating to the preservation of evidence differ across jurisdictions and can therefore give rise to uncertainty in cross-border disputes. The IBA Rules on the Taking of Evidence in International Commercial Arbitration 2020, widely accepted as best practice by arbitral tribunals, recommend early consultation between the parties and with the tribunal on questions of evidence, but this advice is often overlooked. Parties should consider their approaches to the preservation of documents as early as possible, not least as negative inferences can be drawn by a tribunal if relevant documents have been destroyed. While there is no overarching obligation in arbitration to implement a "litigation hold", parties should consider taking early advice on what evidence must be preserved.

Privilege is commonly a contentious issue in international arbitration, as privilege rules vary between jurisdictions, and, in the absence of agreement between parties, tribunals generally have broad discretion to determine the approach they deem appropriate. Tribunals often approach the task by looking at different available tests including the "connecting factor" test, which is based on the most salient connection to the privileged situation and a relevant law (for example, the law of the place of arbitration; the contract; or where the document was created/exchanged/stored); and the 'most-favoured nation' approach, which requires choosing the most protective privilege rules among those potentially applicable.

It is sensible to assess the approach to privilege in all potentially applicable jurisdictions as early as possible in the context of a potential dispute. Parties should remain vigilant as documentary evidence can continue to be created as a dispute progresses. However, even before a dispute is contemplated, internal communications during the due diligence and information gathering phases may become relevant to a later dispute and will not necessarily be privileged. It is therefore sensible to bear in mind the potential for a dispute post-closing when negotiating the deal itself so that steps are taken to limit sensitive communications to what is necessary and to ensure that recipients of any such communications are limited.

Similarly, interviews with personnel, especially those who may be witnesses in the arbitration, should also be treated with caution from a privilege perspective, with thought given to the question of who conducts interviews and stores or handles interview notes to ensure privilege is maintained.

Parties can also mitigate the uncertainty around privilege by seeking to agree an approach to privilege at the outset of an arbitration (where agreement is possible).

## Witnesses

Parties should be aware that the approach to witness evidence in arbitration may differ significantly from the rules and processes in their national courts and should seek advice at an early stage of the dispute. For example, arbitral rules may take a broader approach about who can give witness evidence on behalf of a commercial party and who can interview witnesses than the court rules in some civil law jurisdictions. Parties will want to avoid being surprised by a witness for the other side and/or the scope of their testimony.

Where a target company has been acquired, both buyers and sellers will need to consider access to the target's employees who have relevant knowledge of events leading to the dispute. Key personnel may have left as part of the transaction and/or be reluctant to give evidence (particularly where remaining employees are being asked to give evidence which could be adverse to their new employer or parent company). Identifying witnesses at an early stage enables parties to assess the strength of their case. Parties should consider how best to approach potential witnesses and should not assume it is possible to compel witnesses to participate in an arbitration.

As with access to documents, when negotiating the transaction, sellers should consider what access to target employees they may require after completion, for the purposes of obtaining evidence.

## Conclusion

Arbitration retains its status as a highly popular mechanism for the resolution of large, cross-border commercial disputes, including M&A disputes. Although arbitration proceedings have the benefit of flexibility, parties should give early thought to a number of practical issues, particularly given the breadth of tribunals' discretion in areas such as privilege. In a time of an increasing risk of buyer's remorse, early consideration of such issues in anticipated M&A disputes is key to ensuring that parties are on the best possible footing from the outset.



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# Closing the loop? The enforcement of ICSID Awards across Australia, the United States and the United Kingdom

By Tamlyn Mills, Duncan Bagshaw KC and Olivia Peck

## Introduction

Investors and funders often rely on the availability of investment protection rights against states as part of their assessment of the bankability of new projects. But if it becomes necessary to resort to those rights, can investors expect to be able to enforce a damages award against the state in question or assign the benefit of the award? A series of key questions relating to enforceability and assignability have been tested before the highest courts in Australia, the United Kingdom and the United States, with significant implications for the commercial viability of enforcing or monetising damages awards against states.

## The ICSID Convention Enforcement Regime

Many investment treaties between states provide that investors from one state party to the treaty can enforce the rights guaranteed in the treaty against another state, through international arbitration. When that protection is offered, the forum for such claims to be brought often includes ICSID, the International Centre for the Settlement of Investment Disputes. ICSID was created by and is governed by the ICSID Convention, which provides an independent, enforceable dispute resolution mechanism for foreign investors investing in the territory of member states.

Articles 53, 54, and 55 of the ICSID Convention set out its enforcement architecture. Article 53 confirms that awards are binding and not subject to review in local courts. Article 54 obliges each state to recognise and enforce an award "as if it were a final judgment of a court in that State." Article 55 preserves the state's immunity from execution. The system created by the ICSID Convention is, as courts across all three jurisdictions have confirmed, "self-contained."

Non-ICSID awards are commonly enforced under the New York Convention. Similarly to Article 54 of the ICSID Convention, Article III obliges each Contracting State to recognise arbitral awards as binding and enforce them in accordance with local rules of procedure.

## The Energy Charter Treaty ("ECT") and the Intra-EU objection

Article 26 of the ECT provides that each Contracting Party consents to submit investment disputes to international arbitration. However, the Court of Justice of the European Union (CJEU) held in *Moldova v Komstroy LLC* (2021) (applying *Slovak Republic v Achmea BV* (2018)) that investor-State arbitration between EU investors and EU Member States under Article 26 of ECT is incompatible with EU law.

EU Member States, including Spain, have relied on the CJEU's decisions to argue that intra-EU ECT awards are not binding and cannot be enforced (the intra-EU objection). In June 2024, the European Commission published an *inter se* agreement (signed by all EU members except for Hungary) which states that Article 26 cannot, and never could, serve as a legal basis for intra-EU investment arbitration. However, outside of the EU, the courts of most states have declined to accept this and given precedence to the ECT and ICSID Convention.

## Waiver of sovereign immunity: The Central question

States such as Spain will often seek to avoid enforcement of awards made in investor-State arbitration proceedings, requiring that state to pay damages, by asserting immunity from court proceedings in other countries in which orders are made for payment and/or enforcement against assets. Sovereign immunity is governed by legislation which typically provides that foreign states are immune from local court proceedings subject to

enumerated exceptions, including where the state has waived its immunity by agreement. Cases across all jurisdictions have tested whether a Contracting State's ratification of the ICSID Convention or the New York Convention amounts to a waiver of immunity in proceedings for the recognition and enforcement of awards.

### Australia

In *Kingdom of Spain v Infrastructure Services Luxembourg* (2023) 275 CLR 292 (Spain HCA), the High Court (HCA) became the first apex court to hold that ratification of the ICSID Convention constitutes a waiver of sovereign immunity from enforcement proceedings. The HCA found that waiver may arise by *necessary implication* from an international agreement, and that such a waiver was an "unmistakable" implication of Articles 53–55 (while emphasising that immunity from execution under Article 55 is preserved).

In *Blasket Renewable Investments LLC v Kingdom of Spain* [2025] FCA 1028 (Blasket FCA), Spain sought to distinguish the proceedings from *Spain HCA* by arguing that Spain HCA is limited to cases in which there is a "binding" award and disputing the binding nature of the awards in question (relying on the intra-EU objection). The Federal Court applied *Spain HCA*, rejecting Spain's submission and endorsing the "closed-loop" characterisation of the ICSID system. The decision is pending appeal.

The HCA's subsequent decision in *CCDM Holdings v Republic of India* [2026] HCA 9 (*India HCA*) drew the limits of the waiver principle into sharp relief. The HCA unanimously held that, in contradistinction to the ICSID Convention, ratification of the New York Convention alone does not constitute a waiver of sovereign immunity. It identified three structural distinctions. First, unlike the New York Convention, the ICSID Convention is expressly concerned with State parties and the official records of the Convention considered sovereign immunity. Second, Article 55's express preservation of immunity from execution supports the inference of a waiver of adjudicative immunity. Third, Article III of the New York Convention requires enforcement in accordance with local rules of procedure, incorporating local rules of sovereign immunity.

### United States

In the United States, the DC Circuit's decision in *NextEra v Spain* (2024) is reshaping the enforcement landscape for ICSID awards. The DC Circuit declined to resolve whether ratification of the ICSID Convention amounted to a waiver of immunity, instead holding that jurisdiction existed under the arbitration exception in the Foreign State Immunities Act. Critically, the DC Circuit held that jurisdiction turns on the *existence* of an arbitration agreement, not its scope, and that Spain's intra-EU objection concerned the scope of the agreement, not its existence. District Courts have since enforced ICSID awards against Spain on the merits, holding that ICSID awards receive "full faith and credit" as final judgments and that US courts are barred from re-examining the ICSID tribunal's jurisdiction.

In May 2025, Spain filed a petition for *certiorari* seeking Supreme Court review. In October 2025, the Supreme Court invited the views of the Solicitor General. Notably, the US Government had previously supported Spain before the DC Circuit and the Solicitor General's current position remains unknown. If the Supreme Court grants review, its decision could provide the definitive word on the enforceability of intra-EU arbitration awards in the United States.

### United Kingdom

In *Kingdom of Spain v Infrastructure Services Luxembourg* [2026] UKSC 9 (Spain UKSC), the Supreme Court unanimously held that by ratifying the ICSID Convention, each Contracting State consents to all other States undertaking the same enforcement obligation: a mutual, reciprocal acceptance from which waiver of immunity follows. The UKSC engaged with the Convention's official records, noting that Article 55 was included not to create a new immunity but "to leave no doubt" that the law on immunity from execution remained unaffected, and concluded that Spain's agreement constituted a "submission to the jurisdiction" within the meaning of section 2 of the State Immunity Act 1978.

## Enforcement versus execution

The cases discussed above draw a sharp distinction between enforcement (from which immunity may have been waived) and execution against state property (which remains subject to local sovereign-immunity protections). Enforcing the award is therefore the first step; actual recovery remains practically and legally challenging.

A recent thesis proposed by Phillipa Webb argues that a state's waiver of adjudicative immunity ought to entail a corresponding waiver of immunity from execution, collapsing the traditional two-step regime into a "double waiver". She grounds this argument by reference to *pacta sunt servanda*, the need for State accountability and a community-interest model of international law. Her survey of 20 jurisdictions identifies six that accept double waiver, undermining the claim that the current position constitutes settled custom. Whether the convergence on the "first waiver" may over time generate momentum toward the "second" remains to be

seen, particularly given the English Court of Appeal's willingness in *General Dynamics v Libya* (2025) to find that broadly drafted waiver clauses may provide for waiver of immunity from both enforcement and execution.

## Assignment of Awards – another new frontier?

Given the challenges of enforcement and recovery touched on above, investors often look to assign the benefit of their award to a third party to secure partial recovery and shift the enforcement risk. There is currently conflicting authority on whether this is permissible for ICSID awards. In *Blasket FCA*, Stewart J held that "party" in Article 54(2) includes an assignee and that there is no public international law prohibition on assignment. Conversely, in *Operafund v Spain* [2025] EWHC 2874 (Comm) HHJ Pelling KC reached the opposite conclusion, holding that "a party" refers only to a party to the arbitration and that ICSID awards are not assignable. Both decisions are pending appeal. Whether this divergence persists and the outcome of these cases will have significant implications for the growing secondary market in arbitral awards.

## Conclusion

The enforcement of ICSID awards against states has moved from procedural afterthought to a key battleground in the enforcement of investor protections and commercial certainty of state commitments. At its centre lies an increasing consensus that ratification of the ICSID Convention operates as a waiver of adjudicative immunity. The apex courts of Australia and the United Kingdom, together with the US Courts of Appeals, have each arrived at the same conclusion, and Spain's intra-EU objection has been uniformly rejected by non-EU courts. That convergence is significant and is reinforced by the contrast drawn in *India HCA*, which confirms that the ICSID Convention's structural architecture is critical to the waiver analysis.

However, the divergence between *Blasket FCA* and *Operafund* on whether assignees may enforce awards threatens to fragment the enforcement landscape, with significant commercial implications. Meanwhile, the gap between enforcement and execution means that creditors should adopt robust execution strategies, potentially involving multiple jurisdictions.

For practitioners and investors, the message is clear: risk assessment needs to go beyond winning the award. Often, the real contest now lies in closing the enforcement loop.



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# The long arm of American enforcement: Recent judicial decisions fortify the US's status as a premier forum for enforcing arbitral awards against sovereigns

By Denton Nichols and Timothy Tyler

**The United States is widely considered a preferred jurisdiction for the enforcement of arbitral awards against sovereigns – with good reason. For decades, a unique constellation of structural advantages and legal tools has made the US an effective forum for converting "paper awards" against award debtors – including sovereign ones – into tangible recovery. No capital's capital is untouchable in the US.**

**The US's standing as the world's preeminent enforcer of arbitral awards against sovereigns has gotten only stronger in the past year. Recent judicial rulings have rejected arguments that states had hoped would shield them in certain cases from the long arm of US courts. With these rulings in place, the path in the US for enforcing awards against sovereigns is now all the smoother.**

## Why international award creditors choose to enforce in the US

Even before the recent court rulings, the US had long been a "magnet forum" for international award creditors. A staunch pro-enforcement philosophy, deeply entrenched in American jurisprudence, is only one reason for the US's appeal. Additional structural and procedural advantages that few other jurisdictions can match set the US apart.

To start with a somewhat obvious advantage, the US in many cases is simply where the money is. As the world's primary financial hub, the US is a repository for vast amounts of wealth belonging to sovereigns and their state-owned enterprises. Additionally, because many global exchanges are US dollar-denominated, sovereign funds that pass through New York correspondent banks are potentially vulnerable to seizure by international award creditors.

In tandem with this structural reality, a comprehensive federal statute – the Foreign Sovereign Immunities Act (FSIA) – facilitates the seizure of state property to satisfy international arbitral awards. A commonly asserted ground for overcoming the sovereign immunity defense is that state property is used for a commercial activity in the United States. Because commercial activity is an expansive concept, award creditors can ask US courts to seize an airplane of a national airline landing at JFK airport, shipments of state-owned oil passing through the Port of Houston, or a commercial building in New York owned by a sovereign wealth fund.

Award creditors in US courts also have access to a fearsome discovery kit to locate state assets. Since 2014, the US Supreme Court has made clear that award creditors can wield against states a "quite permissive" federal procedural rule that authorizes discovery from literally "any person" – including both the states themselves and other persons who might know where to find state property. Sovereign states do not enjoy immunity from such discovery, even when the property itself may be held outside the US. Thus, information about state assets gathered in a US proceeding can be used to execute against state assets elsewhere, such as Singapore, London, or Luxembourg.

In addition, in key state-level jurisdictions like New York and Texas, courts can order third parties – such as banks holding sovereign assets – to turn over the debtor's assets wherever in the world they are held, including outside the US. This allows a creditor to reach, for instance, funds sitting in a foreign branch whenever the bank's headquarters or a major branch is within the court's reach.

The US legal system is also well equipped to overcome "shell games" that states may play. Leveraging alter ego theory and similar doctrines, creditors may be able to seize the assets of state-owned enterprises to satisfy the parent state's debts. Additionally, fraudulent transfer laws and the potential application of RICO (Racketeer Influenced and Corrupt Organizations Act) in the enforcement context may enable creditors to overcome efforts by states and their accomplices to thwart lawful award enforcement efforts.

## Recent rulings make enforcement easier than ever against states

Noteworthy judicial rulings rendered in the past year have further fortified the US as an advantageous forum for aggrieved creditors. These rulings have removed a traditional legal hurdle for establishing jurisdiction over state defendants, while also positioning the US as an antidote to anti-investment-arbitration trends in Europe.

In the first of these rulings, the US Supreme Court issued in June 2025 in *CC/Devas (Mauritius) Ltd. v. Antrix Corp*. a unanimous, 9-0 decision that eliminated a posited constitutional requirement for enforcing international arbitral awards against foreign states and their instrumentalities. As legal background, non-state defendants in US courts may be able to avoid US jurisdiction by asserting an age-old constitutional defense: that they lack sufficient contacts with the specific US state where the suit is brought. Leveraging this defense, several foreign sovereigns facing enforcement efforts had tried to evade US jurisdiction, some with success.

In *Devas*, however, the Supreme Court ended that line of argument for state defendants. It held that jurisdiction over a foreign state and its instrumentalities exists *automatically* whenever there is an applicable exception to sovereign immunity under the FSIA and service of process was properly done. These are usually low bars, since under the FSIA a state effectively consents to enforcement in the US just by agreeing to international arbitration governed by treaty (such as the New York and ICSID Conventions), and the procedures for serving process on foreign states are straightforward. By rejecting this potential constitutional defense, the Supreme Court left the doors of US courts wide open to post-award enforcement actions against sovereigns, even when the underlying dispute and arbitration have no connection to the US.

Not long after the Supreme Court's *Devas* ruling, in August and September 2025, multiple federal district (first-instance) courts in Washington, DC confirmed a series of investment arbitration awards rendered against Spain under the Energy Charter Treaty (ECT). For background, this string of rulings were enabled by a key jurisdictional ruling that the Court of Appeals for the DC Circuit rendered in the prior year. In that appeal, Spain argued that its consent to arbitrate disputes with EU private investors under the ECT had been ruled unlawful by the Court of Justice of the European Union in a pair of landmark rulings – widely known as the *Achmea* and *Komstroy* decisions. Spain argued, in effect, that EU law vitiated its consent to arbitrate under the ECT, and that it therefore enjoyed full sovereign immunity under the FSIA.

That argument did not succeed with the DC Court of Appeals, however. It held that under US law, Spain's consent to arbitration reflected in the ECT was an effective waiver of its immunity to post-award enforcement actions before the US courts. With this appellate ruling confirming the jurisdiction of US courts over Spain, the DC district courts proceeded to confirm one after another the underlying arbitral awards. In doing so, they consistently rejected Spain's attempted reframing of its EU-law arguments as a substantive defense to enforcement. This series of recent judgments, among others rejecting the *Achmea/Komstroy* arguments of other EU state defendants, has elevated the federal DC courts as a global destination for EU investors who may find their investment awards against EU states to be otherwise unenforceable in European cities like Brussels, Paris and Berlin.

## Outlook

In 2026, the United States remains the world's preferred forum for enforcing arbitral awards against sovereigns. By combining robust enforcement tools with a pro-enforcement judiciary, the US legal system aims to ensure that an arbitral award is not just a symbolic victory but a precursor to real compensation.



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# A Journey in Law: In conversation with Duncan Bagshaw, KC

**When Duncan Bagshaw was appointed King's Counsel, it marked a significant milestone in his legal career. Yet, in many ways, little has changed day-to-day. Duncan, a partner based in our London International Arbitration team talks about the honour of becoming a Silk, his career into legal, pivoting from his role as a Barrister to a partner in a global law firm, and his passion for travel.**

**You can watch the full interview with Duncan, interviewed by Ruth Cowley, Global Co-Head of International Arbitration, or read Duncan's story below.**

A Journey in Law: In conversation with Duncan Bagshaw, KC

## The attraction of disputes and arbitration

Duncan's path into law was shaped by a fascination with how legal principles operate in real-world scenarios. While academic study alone felt abstract, applying the law to resolve disputes brought it to life. He was drawn to the intellectual challenge of constructing arguments and representing a client's position.

"It was an application of the law for me that I found really interesting. Academic legal study for its own sake I found quite challenging but when it was translated into a scenario where the law was being used to make an argument and to represent one side I was much more engaged and I really understood the point of the authorities and the deep research that we were being encouraged to do."

Equally compelling was the competitive nature of disputes work, whether that's helping clients avoid conflict, negotiate a settlement or win a dispute.

Duncan has spent most of his career practising in international arbitration, with its additional dimensions, more flexibility and an international dimension.

"I get to go to court on occasion because we have court hearings in connection with arbitration related cases, but handling disputes in arbitration between parties from a range of regions of the world, coming from different cultures, it makes cases much richer."

"There's also a lot of fun to be had in hearings where you're appearing on the other side from lawyers from other. I remember very well the first time a US counsel on the other side said objection in a kind of Perry Mason style during my cross-examination. And I thought this is really fun to be against lawyers from different parts of the world and different styles."

## Experience across Africa

Duncan developed a practice with a strong international focus, particularly in Africa and within the mining and energy sectors. This direction was shaped by both intention and opportunity.

"I started off traveling to Africa simply by choice, going there for holidays and for visits. When I started getting access to some African work, which was just a few cases early in my career, I decided that that was an area that I wanted to focus because it gave me real joy working on the projects from that region and also having the chance to travel there."

Duncan moved to Mauritius and worked as the registrar of the LCIA Mauritius Arbitration Centre. He was encouraged to travel extensively across the continent to meet as many people as possible, visiting 21 countries and providing a wide experience of the continent.

Among the many matters he worked on, some stood out for their complexity and global significance, including litigation connected to the Mozambique "tuna bond" affair – a case that captured international attention.

## Life after taking Silk

On whether taking Silk has changed Duncan's day-to-day life at work, he responds "Not yet. In a law firm, as a partner you will be managing a team, working with a team, you'll be leading advocacy teams in many of your cases already, whether or not you're a Silk – and my colleagues at Norton Rose Fulbright already do that."

He hopes that, over time, in Silk he can lead teams of advocates from Norton Rose Fulbright to good effect in increasingly large cases. The firms' arbitration practice has grown, and Duncan is excited about how to build on the team "to create a powerhouse of in-house advocacy in very large cases, reflecting our practice and the level of clients that we act for."

## From the Bar to Partnership

Duncan talks about how he added dimensions to his work when he became a partner, and has developed those areas since he joined the firm.

"You're still thinking about the legal problem, you're still thinking about winning the case, but you're also thinking about client relationships, team development, the direction of the practice. So you have engagement with your overall role in multiple different ways. You also spend quite a lot more time mentoring which is great fun, it's hugely rewarding, you spend time building something collectively with colleagues and teammates who are coming up in their careers and it's brilliant to see them growing and developing in their work."

## Mentoring and professional values

Throughout his career, Duncan benefited from strong support—both professionally and personally – and he has sought to pass that on and help encourage and develop junior colleagues – especially in relation to advocacy, a passion for him.

On mentoring, his advice centres on two key principles. First, understanding the purpose behind every task, and understanding how it fits into the overall team's task, is essential for building a strong case, and delivering an effective written or oral submission.

"Secondly is to always satisfy yourself as to what you're saying. That's never been truer now that we're using AI significantly and we have another source of information and inputs into the material we receive. Verifying what we have before we deliver it is essential."

## Life beyond law

Duncan is a believer in the value of having a variety of interests, "we're all very busy in our jobs, but I think it keeps you fresh in work to do interesting things outside."

"I do some things outside of work which I particularly enjoy in the charity sector. So I have two positions on the boards of charities. I also have roles in some arbitral institutions. For example, I'm a director of the Scottish Arbitration Centre."

When he isn't working, Duncan likes being in very remote places, on long sailing journeys or visiting isolated islands or to remote hillsides in Scotland.

"In between the chances to do that, I generally just love having new experiences. So going to new cities, going and hearing live music from acts that I haven't heard before, or going to the theatre and seeing something new."

On what he would have done if he'd hadn't gone into law, Duncan thinks "it would have been good to work on the business side of an energy company or a mining company – the sort of businesses that we now act for and advise. I'd really like to wear a hard hat more often, if I could get the chance. I think that would make me happy."

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## International arbitration

At Norton Rose Fulbright, we combine decades of international arbitration experience with a commercial approach to offer our clients the very best chance of determining their disputes promptly, efficiently and cost-effectively. Our international arbitration group operates as a global team, regardless of the geographic location of the individual.

We deliver experience across all aspects of international arbitration, from commercial arbitrations to investment treaty arbitrations; skilled advocates experienced in arguing cases before arbitral tribunals, who will oversee the dispute from start to final award; and a commercial approach from a dedicated team experienced in mediation and negotiation and skilled in promoting appropriate settlement opportunities.

## Dispute resolution

We have one of the largest dispute resolution and litigation practices in the world, with experience of managing multi-jurisdictional disputes across all industry sectors. We advise many of the world's largest companies and financial institutions on complex, high-value disputes. Our lawyers both prevent and resolve disputes by giving practical, creative advice which focuses on our clients' strategic and commercial objectives.

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