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Welcome to the Q2 2025 edition of HFW's International Arbitration Quarterly, which features articles from colleagues across our network of global offices. This edition includes the following articles:

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"The CIArb's 2025 Guidelines on AI in arbitration are a necessary and pragmatic response to the growing use of AI in legal proceedings."

NEW CIARB GUIDELINES ON THE USE OF AI IN ARBITRATION

The Chartered Institute of Arbitrators (CIArb) recently published its guidance on the *Use of AI in arbitration (2025)* (*Guidelines*). The Guidelines provide a framework for the use of artificial intelligence (AI) in arbitration, and are intended to encourage proper use of AI, and to help support practical efforts to mitigate the risks associated with using AI, and which are also well documented in litigation across many jurisdictions.

The CIArb Guidelines are designed to be used in conjunction with institutional rules.

The Guidelines provide a comprehensive overview of AI in arbitration, and are divided into four key sections:

1. benefits and risks
2. general recommendations
3. arbitrators' powers on the use of AI by the parties
4. the use of AI by arbitrators

The Guidelines also include a template agreement on the use of AI by the parties, and two template procedural orders.

1. What are the benefits and risks associated with using AI?

The following includes some of the key benefits and risks associated with using AI in arbitration proceedings.

Benefits	Risks
Efficiency. AI-based tools assist in the arbitration process. AI based legal research tools are more adaptable and user-friendly than traditional search technologies.	Enforceability. There are risks associated with enforceability of arbitral awards, and adverse implications for the credibility and legitimacy of arbitration. Enforcement may also be complicated in jurisdictions where AI tools are banned or restricted.
Data analysis. AI can run through data and identify patterns far quicker and more accurately than the human reviewer, making spotting conflicts in evidence and arguments more straightforward.	Confidentiality. Substantial risks to confidentiality - the AI tool could cross-contaminate different cases, which might result in a breach of confidentiality.
Text generation and summarisation tools. Useful when creating chronologies.	Cybersecurity. Minimising the possibility of cyber threats is essential.
Prediction. AI based tools can run the data and generate legal outcome predictions.	Bias. Potential for bias due to selection of specific databases and configuration of particular algorithms.
	Jurisdictional acceptance. The use of AI may give rise to challenges in jurisdictions where there is less acceptance.
	Hallucinations. Risk of platforms referencing legal arguments and cases that are not real.
	Environmental considerations. AI platforms can use a very high level of energy.

2. Recommendations on the use of AI in arbitration

a. parties and arbitrators need to investigate and consider the benefits and risks of using any prospective AI tool in arbitration.

b. reasonable enquiries should also be made into AI-related laws, regulations, or court rules in the relevant jurisdictions.

c. the duties and responsibilities, which apply in arbitration will continue to apply irrespective of whether AI is used.

3. Arbitral powers on the use of AI by the Parties

The use of AI will not impact on the tribunal maintaining responsibility for the conduct of the proceedings.

Tribunals will be able to give directions regulating the use of AI to preserve the integrity of proceedings and help to ensure enforceability of awards. Where the tribunal requires assistance with understanding the AI tool being used, AI experts can be appointed to advise.

The Guidelines provide for decisions on the use of AI to be recorded in the procedural order. If the parties fail to comply, then the arbitrators can take measures to remedy breaches and take any failures into account when awarding costs.

The importance of party autonomy is also highlighted. The Guidelines state that parties can exercise their autonomy to agree whether and if so, how they wish to use AI tools. Where the arbitration agreement does not discuss the use of AI, the arbitrators will invite the parties to agree. Where parties disagree on the use of AI, the Guidelines provide that the tribunal should be requested to make a ruling based on the circumstances of the case. If the tribunal considers that the use of AI by the parties has jeopardised the integrity of the proceedings, it can make a ruling on its admissibility and use, taking into considering the following factors:

a. the benefits/risks associated with the AI tool.

b. the nature and specific features of the AI tool.

c. any applicable laws, regulations or policies, or institutional rules related to the use of AI.

d. the data used to train the model – the parties can be required to disclose this.

Under the Guidelines, the parties will be required to disclose the use of AI, where it has an impact on the evidence, or the outcome of the arbitration. If a party fails to disclose the use of an AI tool, the tribunal can make related enquiries and assess any impact that the failure may have had on the integrity of proceedings.

4. The Tribunal's use of AI

The Guidelines state that the tribunal can use AI tools to enhance the efficiency and quality of arbitration but that they must not delegate their decision-making authority to AI. Whilst AI can assist with processing information, the arbitrators should maintain independent judgment and avoid using AI in ways that could compromise the integrity or enforceability of their award. Arbitrators should always independently verify AI-generated information and ensure that it does not unduly influence their decision-making.

Importantly, arbitrators continue to remain fully responsible for all aspects of the award, regardless of any AI assistance.

Arbitrators will need to consult the parties prior to using AI tools and provide the parties with an opportunity to comment. If there is disagreement between the parties and the tribunal, then the AI tool should not be used.

5. AI and Sustainability

The use of AI comes with a significant environmental cost. Running these technologies requires a lot of electricity resulting in high carbon emissions. AI systems also use large amounts of water to cool the data centres that power them. This raises concerns about sustainability—especially as arbitral institutions (including the ICC, LCIA, and SIAC), and initiatives like the *Campaign for Greener Arbitrations* encourage more eco-friendly practices, such as virtual hearings, paperless processes, and choosing greener venues.

6. Potential for Legal Challenges

If confidential arbitration materials are uploaded to third-party AI tools, this may constitute a breach of an arbitration agreement and/or breach of any applicable confidentiality obligations, leading to a claim for damages or a challenge to the enforceability of the award.

Alternatively, challenges could also arise where parties have expressly agreed to limit or prohibit the use of AI, in which case the use of AI tools could lead to challenges for a breach of due process or procedural fairness. Improper use has the potential to undermine the legitimacy of the proceedings or any award.

Comment

The CIArb's 2025 Guidelines on AI in arbitration are a necessary and pragmatic response to the growing use of AI in legal proceedings.

The Guidelines acknowledge the benefits of AI; highlight the real risks associated with the use of this technology: from confidentiality breaches to enforceability concerns and algorithmic bias, and provide a useful tool for parties and arbitrators alike.

Importantly, the Guidelines discuss the powers that arbitrators have in relation to AI, as well as discussing how arbitrators should use AI themselves. The crucial point the Guidelines highlight throughout, is that AI is here to stay, but must not replace human judgment, and should be used with care, transparency, and control.

The Guidelines also include a template agreement and two template procedural orders[1], helping to imbed this in proceedings and achieve a consistent approach.

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1 Use of AI in arbitration (2025)

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DRAFT PROPOSAL TO REFORM FRENCH ARBITRATION LAW

Is French arbitration law on the brink of reform? Amid the global wave of arbitration reform across Europe and beyond, France initiated in late 2024 the process of reforming its 14 year old arbitration law. On 20 March 2025, an ad hoc working group submitted its report to the French Ministry of Justice, recommending several significant changes, including the creation of an arbitration code. This is the first major reform proposal since the 2011 Reform which positioned France as a progressive and arbitration-friendly jurisdiction.

Key Highlights of the Guidelines

1. The Current Reform Project and the Key Contributors

Thirteen years after the last reform of arbitration law, the French Ministry of Justice reaffirmed its commitment to further modernisation. In November 2024, it appointed a working group, co-chaired by François Ancel, a judge of the French Court of Cassation, and Thomas Clay, professor and arbitrator (the **Working Group**). The Working Group included representatives from arbitral institutions and associations, as well as leading academics and practitioners.[1] It was tasked with reviewing and modernising the legal framework governing arbitration in France with the aim to enhance its efficiency and attractiveness and addressing the evolving needs of the arbitration community.[2]

These ambitions were reflected in the mandate of the Working Group, which was tasked with: (i) assessing the effectiveness of the current legal framework, (ii) drafting proposals to address identified gaps or areas for improvement in the current legal framework, and (iii) summarising the Working Group's findings, analyses, and proposals in a comprehensive report.[3]

On 20 March 2025, the Working Group submitted to the Ministry a comprehensive report containing 40 detailed proposals and a draft arbitration code (the **Report**).[4]

During Paris Arbitration Week, Professor Thomas Clay emphasised that the reform project, through its various proposals, seeks to broaden the scope of arbitrability while making the law more effective, simple, modern, and precise.[5]

2. Key Proposal

1. A new standalone arbitration code

To increase the autonomy of arbitration law, the Working Group proposed the establishment of a separate, unified and autonomous arbitration code (the **Proposed Code**).[6] The Proposed Code was unanimously endorsed by all members of the Working Group.[7]

Currently, French arbitration law is dispersed across nearly 20 different codes and several laws.[8] By consolidating all relevant provisions into a single, coherent text, the Proposed Code will significantly improve the clarity and accessibility of French arbitration law.[9] Codification is also expected to enhance the international attractiveness of French arbitration law: a unified code will be easier to translate, thereby promoting its global circulation and influence.[10]

2. An increased flexibility

Several proposals in the Report seek to reduce unnecessary formalism and redefine key legal concepts such as:

- Simplification of the formalism of arbitration agreements: The Working Group aims to remove any formalism that impedes the arbitration process, in favour of a more pragmatic approach reflecting the consensual and practical nature of arbitration, as well as parties' voluntary commitment to the arbitration clause and eventual arbitral award;
- Simplification of signature requirements for arbitral awards: The Working Group proposes to allow the presiding arbitrator to sign the arbitral award alone, a departure from current domestic arbitration practice where unanimous signatures are required;
- Recognition of electronic awards: The Working Group proposes to explicitly allow the issuance of electronic arbitral awards;
- Replacing "*notification*" with "*communication*" of the award: The term "*communication*" is proposed as a broader, less restrictive alternative that also accommodates the delivery of electronic awards.

3. An increased protection of parties' rights

The proposed reform also aims to promote a more protective arbitration framework for the parties involved in the proceedings. This objective is reflected in several proposals such as:

- Requirement for an odd number of arbitrators in tribunals seated in France, while allowing awards rendered abroad by evenly composed tribunals: In the latter situation, the enforcement judge (*juge de l'exequatur*) would have discretion to enforce the award despite the even number of arbitrators;
- Requirement that arbitrators seated in France be natural persons: This proposal reflects the Working Group's intention to exclude the possibility of fully AI-generated arbitral tribunals;
- Introduction of measures to address party impecuniosity: Under Article 33 of the Proposed Code, the *juge d'appui*, the French judge competent to support and assist the arbitration proceeding, would be empowered to adopt any necessary procedural or substantive measures to safeguard the rights of an impecunious party;
- Clarification of arbitration rules in family, labour, and consumer matters: One of the key objectives of the Working Group is to clarify the application of arbitration law rules in family law, labour law and consumer law. To achieve this, the group proposes codifying arbitration rules in these areas and introducing protective derogatory rules for family arbitration;
- Protection of third-party rights: The Working Group proposes the introduction of new provisions to clarify matters related to third-party opposition (*tierce opposition*) and to allow accessory voluntary interventions (*intervention volontaire accessoire*) before the Court of Appeal, thereby enhancing procedural fairness and transparency for non-parties affected by arbitral decisions.

4. An increased efficiency

The proposed reform also aims to promote a more efficient arbitration framework. Among the key proposals put forward by the Working Group are the following:

- Clarification of the conditions of the negative effect of the *compétence-compétence* doctrine: the Working Group suggests a revised version of Article 1448 of the French Code of Civil Procedure, aiming to better delineate the conditions under which this principle applies;
- Empowering arbitral tribunals to consolidate arbitration proceedings: While an increasing number of arbitration institutions already allow consolidation of procedures, this will be particularly useful for *ad hoc* arbitrations, or institutional arbitrations lacking specific consolidation provisions;
- Considering the introduction of class arbitration proceedings: Inspired by practices in other jurisdictions like the United States, this proposal suggests integrating class arbitration into the French system;
- Expanding the powers of the *juge d'appui*, by granting him, for example, the power to prevent a denial of justice;
- Establishing an autonomous procedural regime for the examination of appeals before the Court of Appeal: This would include eliminating the Court of Appeal's ability to rule on the merits of arbitral awards, and allowing the *juge d'appui* or the Court of Appeal to hear arbitrators or collect their statements. The Working Group also proposes incorporating certain rules applicable before the international commercial chamber of the Paris Court of Appeal into the Proposed Code, such as allowing the production of English-language documents

1 Working Group under the direction of François Ancel and Thomas Clay, *Proposed reform of French arbitration law dated 20 March 2025 (2025)*, p. 2.

2 Working Group under the direction of François Ancel and Thomas Clay, *Proposed reform of French arbitration law dated 20 March 2025 (2025)*, p. 8: "*Le contexte international s'y prête. Plusieurs pays se sont engagés dans une voie de réforme de leur droit de l'arbitrage que ce soit en Europe (Royaume-Uni, Allemagne, Luxembourg, Belgique, Italie, Grèce, Suisse) ou ailleurs dans le monde (Chine, Maroc), témoignant ainsi de leur volonté de moderniser leur droit de l'arbitrage pour gagner en attractivité dans le contexte d'une concurrence avivée entre les droits de l'arbitrage. La France ne peut ignorer ce mouvement général ; surtout si elle souhaite conserver sa prééminence en maintenant un droit de l'arbitrage qui réponde aux besoins des acteurs économiques tout en garantissant un haut degré de sécurité juridique. Si le leadership de la place de Paris est incontesté et si Paris est assurément la capitale mondiale de l'arbitrage international, cette place est enviée. Il était donc temps de réaffirmer la primauté du droit français de l'arbitrage.*".

3 French Minister of Justice, *Engagement latter dated 12 November 2024*.

4 Working Group under the direction of François Ancel and Thomas Clay, *Proposed reform of French arbitration law dated 20 March 2025 (2025)*, p. 9: "*La date de remise des travaux du groupe de travail a été fixée dans le courant du mois de mars 2025, ce qui sera respecté puisque le rapport a été officiellement remis le 20 mars 2025.*".

5 *Paris Baby Arbitration, Special Edition Biberon (Paris Arbitration Week)*, April 2025: "*The project also aims to extend arbitrability, establish an autonomous regime of action for annulment, and to introduce the unenforceability of certain decisions against third parties.*".

6 Working Group under the direction of François Ancel and Thomas Clay, *Proposed reform of French arbitration law dated 20 March 2025*, p. 18: "*Proposition n° 1 : Regrouper l'ensemble des textes de valeur législative et règlementaire dans un code autonome intitulé « Code de l'arbitrage », le diviser en plusieurs livres et toiletter les autres codes qui y renvoient*".

7 Working Group under the direction of François Ancel and Thomas Clay, *Proposed reform of French arbitration law dated 20 March 2025 (2025)*, p. 15: "*Le principe d'un code a d'ailleurs été adopté à l'unanimité des membres du groupe de travail.*".

8 Working Group under the direction of François Ancel and Thomas Clay, *Proposed reform of French arbitration law dated 20 March 2025 (2025)*, p. 14: "*En l'état actuel, le droit français de l'arbitrage est éparpillé dans près vingt codes différents et plusieurs lois.*".

9 Working Group under the direction of François Ancel and Thomas Clay, *Proposed reform of French arbitration law dated 20 March 2025 (2025)*, p. 14: "*L'intérêt est d'abord pédagogique. Une telle présentation est de nature à renforcer la cohérence et la lisibilité du droit de l'arbitrage, en centralisant l'intégralité des dispositions au sein d'un seul et unique texte. Cette démarche permet de rendre accessible à tous ce mode de résolution des litiges et donc de le populariser.*".

10 Working Group under the direction of François Ancel and Thomas Clay, *Proposed reform of French arbitration law dated 20 March 2025 (2025)*, p. 14 : "*La codification est ensuite un outil de rayonnement du droit français de l'arbitrage. Là où de très nombreux codes s'adressent avant tout à un « lectorat interne », le droit de l'arbitrage cherche à se faire connaître dans le monde entier afin de convaincre les opérateurs économiques de fixer le siège en France ou d'adopter le droit français. Dans cet environnement concurrentiel, l'utilité d'un regroupement de l'ensemble des normes dans un corpus autonome est un facteur décisif dans la recherche de compétitivité du droit français de l'arbitrage. La création d'un code favorisera sa diffusion, notamment en facilitant sa traduction et en ciblant les dispositions à faire connaître.*".

without the need for translations and allowing documents in languages other than French and English to be produced without certified translations;

- Modernising the recognition and enforcement of arbitral awards: Notable measures include adding a provision for an *action en inopposabilité* allowing a party to challenge the recognition or enforcement of an arbitral award and removing the suspensive effect of appeals against awards in domestic arbitration.

3. Up-coming Steps

As recalled by Louis Degos, president-elect of the Paris Bar, during Paris Arbitration Week, the reform process will unfold in three phases:

- A first set of consensual measures to be introduced in autumn 2025;
- A second set addressing more sensitive issues by summer 2026;
- A third set to present the final version of the Code de l'arbitrage in autumn 2026.

On the same day, the Minister of Justice, Gérald Darmanin, announced that a series of consultations on expertise and key issues will take place in the coming weeks.

Indeed, it is important to note that the reform project has not yet secured unanimous support among Paris-based arbitration practitioners. Many key actors – including a vast majority of practitioners, institutions, and associations – have not been involved in the drafting process yet.

As highlighted in April during Paris Arbitration Week, a consultation phase with the main arbitration associations and institutions in Paris has only recently begun, under the supervision of the Direction des Affaires Civiles et du Sceau (DACS) of the Ministry of Justice. Consequently, both the provisional timeline and the content of the reform project remain subject to potential revisions.

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PARIS JUDICIAL COURT DECISIONS RELATING TO FROZEN ASSETS

In three nearly identical decisions issued on 25 February 2025, the Paris Judicial Court (the Court) issued an important ruling that frozen assets cannot be seized for the benefit of a creditor without prior authorisation from a competent national authority (*e.g. the French Treasury – Direction Générale du Trésor*). Consequently, the court ordered the lifting of enforcement measures sought against the Iraqi assets.

1. Factual background

Through the issuance of two ICC arbitral awards, dated 6 February 1996 and 12 March 2003, Iraq's Ministry of Defence, Ministry of Justice, and the Salah Aldin public entity (**Iraqi State Entities**) were ordered to pay a Dutch company, Instrubel N.V. (**Instrubel**), the amount of 16.7 million euros, in addition to interest.

On 20 March 2013, said awards were granted *exequatur* by the French first-instance court. The Paris Court of Appeal subsequently upheld the decision of the French first-instance court on 20 November 2018.

Almost a year later, on 20 January 2014, Instrubel sought provisional seizure (*saisie conservatoire*) of various assets – such as claims (*créances*), intangible assets (*droits d'associés*), and securities (*valeurs mobilières*) –, owned by Montana, a company incorporated under the laws of Panama. Montana was listed among the entities whose funds, assets, or resources were frozen under UN Security Council Resolution 1518 of November 2003 (the **2003 Assets UN Resolution**), due to their association with Saddam Hussein's regime. Instrubel argued that Montana was linked to the Iraqi State.

In 2019 and 2020, Instrubel initiated several seizures (*saisies-attributions*), all of which were based on a judgment issued by the Nanterre First Instance Court on 15 May 2018 and authorised by an order from the Paris First Instance Court dated 29 May 2019. These included:

- A seizure initiated on 25 June 2019, targeting assets held by Montana in accounts at BP2S bank;
- A seizure initiated on 27 June 2019, targeting assets held in accounts at Société Générale bank;
- A seizure initiated on 24 July 2019, again targeting assets at Société Générale bank; and
- A seizure initiated on 16 January 2020, targeting assets held at BP2S bank.

In response to these seizures, Montana commenced proceedings in 2019, seeking to challenge the order of the Paris First Instance Court dated 29 May 2019 and to annul the seizures carried out on 25 June 2019 at BP2S bank.

Montana also commenced another action in 2020, also seeking to challenge the same order and the seizures carried out on 16 January 2020 at BP2S bank.

In 2021, Montana commenced a third action, targeting the same order and the seizures carried out on 27 June 2019 and on 24 July 2019 at Société Générale bank.

2. Key Issue

In those three proceedings, the central issue was whether Instrubel could lawfully seize Montana's frozen assets, on the basis that the ICC arbitral awards – ordering Iraqi State Entities to pay damages and interests – had already been recognised.

Under French law, Articles L.111-1-1 and L.111-1-2 of the Code of Civil Enforcement Procedures (CCEP), as interpreted by relevant case law, recognises the possibility of seizing assets held or controlled by an entity deemed an "*emanation of the State*".[1]

1 *Tribunal judiciaire de Paris, 25 février 2025, RG n° 24/81607* : "*L'article L. 111-1-2 du code des procédures civiles permet l'exercice de mesures d'exécution forcée sur des biens appartenant à un Etat étranger si l'Etat concerné a expressément consenti à l'application d'une telle mesure, ou qu'il a réservé ou affecté ce bien à la satisfaction de la demande qui fait l'objet de la procédure, ou lorsqu'un jugement ou une sentence arbitrale a été rendu contre l'Etat concerné et que le bien en question est spécifiquement utilisé ou destiné à être utilisé par ledit Etat autrement qu'à des fins de service public non commerciales et entretient un lien avec l'entité contre laquelle la procédure a été intentée. Ces articles organisent l'articulation entre les droits des créanciers et l'immunité d'exécution des Etats. La jurisprudence admet que la saisie puisse être dirigée contre une émanation de l'Etat, soit une entité qui, quelle que soit sa forme, ne se trouve pas dans une indépendance fonctionnelle suffisante pour bénéficier d'une*

Such a qualification requires the demonstration of two cumulative criteria, namely:

(i) the entity lacks sufficient functional independence; and

(ii) its assets are indistinguishable from those of the State.[2]

3. The Three First-instance Decisions

On 25 February 2025, the Paris Judicial Court issued three key decisions regarding the frozen assets, addressing several critical issues, including the ownership of the assets (**A**), the relationship between Montana and the State of Iraq (**B**), and the need for prior administrative authorisation to enforce seizures (**C**).

A. The ownership of the assets

The court first raised the issue of ownership of the frozen assets and deemed it necessary to verify whether the transfer of funds from Montana was properly executed.

As mentioned above, the court observed that Montana was listed among the entities whose funds, assets, or resources were frozen under the 2003 UN Assets Resolution. This was deemed relevant by the court because the European Council Regulation (EC) No 1210/2003 of 7 July 2003 (**the 2003 EU Regulation**) adopted the UN Resolution into European law, thereby making it directly applicable under French law.

Article 104 of Law No. 2009-1674 of 30 December 2009 provided for the transfer of funds and economic resources targeted by Regulation (EC) No. 1210/2003 to be carried out in several stages. First, the French Government issues a list of frozen assets, informing potential creditors whether their claims can be collected. Second, a subsequent government decree is required to operate and finalise the transfer.[3]

Instrubel argued that the transfer of funds and economic resources of Montana was already carried out following the issuance of a first decree, without the need to await a second decree which it considers purely informative.

However, the Paris Judicial Court took a different stance. The court found the terms of Law No. 2009-1674 to be unambiguous in requiring two distinct steps for the transfer of funds and economic resources. It also found that the decree's terms specifying that the funds and economic resources of the entities listed in the annex are "*subject to*" transfer, necessarily indicates that it is only the first decree, pending the issuance of the second decree which completes the transfer of funds.

As a result, the frozen assets remained the property of Montana, and Instrubel needed to prove that Montana was an emanation of the State of Iraq.[4]

B. The relationship between Montana and the State of Iraq

The Paris Judicial Court consequently raised this second issue. The court relied on the aforementioned Article 111-1-2 of the CCEP, allowing the enforcement of measures on assets belonging to a foreign State, and on case law admitting that the seizure could be directed against an emanation of a State.[5]

Regarding the first criterion, namely the entity's lack of functional independence, Instrubel argued that

autonomie de droit et de fait à l'égard de l'Etat et si son patrimoine se confond avec celui de l'Etat (Cass. Civ. 1ère, 6 février 2007, n° 04- 13.107 et 04-16.888, 1re Civ., 6 février 2007, pourvoi n° 04-13.108, 04-16.889, 1re Civ., 14 novembre 2007, pourvoi n° 04- 15.388, CA Paris 26 janvier 2023 n° 21/22374, CA Paris 15 sept. 2022 n° 20/00419), de sorte que cette entité se confond avec l'Etat.". [Translation by AI : Article L. 111-1-2 of the Code of Civil Procedure allows for the enforcement of measures on property belonging to a foreign state if the state concerned has expressly consented to the application of such a measure, or if it has reserved or allocated this property to satisfy the claim that is the subject of the procedure, or when a judgment or arbitral award has been rendered against the state concerned and the property in question is specifically used or intended to be used by the said state for purposes other than non-commercial public service and is linked to the entity against which the procedure was initiated. These articles organize the relationship between the rights of creditors and the immunity of states from execution. Jurisprudence admits that the seizure can be directed against an emanation of the state, that is, an entity which, regardless of its form, does not have sufficient functional independence to benefit from legal and factual autonomy from the state, and if its assets are merged with those of the state.]

2 *Tribunal judiciaire de Paris, 25 février 2025, RG n° 24/81607* : *"La jurisprudence admet que la saisie puisse être dirigée contre une émanation de l'Etat, soit une entité qui, quelle que soit sa forme, ne se trouve pas dans une indépendance fonctionnelle suffisante pour bénéficier d'une autonomie de droit et de fait à l'égard de l'Etat et si son patrimoine se confond avec celui de l'Etat (Cass. Civ. 1ère, 6 février 2007, n° 04- 13.107 et 04-16.888, 1re Civ., 6 février 2007, pourvoi n° 04-13.108, 04-16.889, 1re Civ., 14 novembre 2007, pourvoi n° 04- 15.388, CA Paris 26 janvier 2023 n° 21/22374, CA Paris 15 sept. 2022 n° 20/00419), de sorte que cette entité se confond avec l'Etat.".* [Translation by AI : Jurisprudence admits that the seizure can be directed against an emanation of the state, that is, an entity which, regardless of its form, does not have sufficient functional independence to benefit from legal and factual autonomy from the state, and if its assets are merged with those of the *(Cass. Civ. 1ère, 6 février 2007, n° 04- 13.107 et 04-16.888, 1re Civ., 6 février 2007, pourvoi n° 04-13.108, 04-16.889, 1re Civ., 14 novembre 2007, pourvoi n° 04- 15.388, CA Paris 26 janvier 2023 n° 21/22374, CA Paris 15 sept. 2022 n° 20/00419)*, so that this entity is merged with the state.]

3 *Tribunal judiciaire de Paris, 25 février 2025, RG n° 24/80751* : *"L'article 104 de la loi n° 2009-1674 du 30 décembre 2009 prévoyait un transfert des fonds et ressources économiques visés par le règlement (CE) n° 1210/2003 en plusieurs étapes : un premier arrêté listant les fonds et ressources économiques faisant l'objet de la mesure de gel et ouvrant un délai de recours à toute personne qui prétendrait disposer d'un droit sur ces biens, puis un second arrêté opérant le transfert effectif vers le Fonds de développement pour l'Irak, et enfin un décret en Conseil d'Etat qui viendrait préciser les modalités particulières de transfert pour chaque catégorie de biens. Cet article a été abrogé par la loi n° 2013-672 du 26 juillet 2013 et le mécanisme de transfert en plusieurs étapes a été reproduit dans son article 85.".* [Translation by AI : Article 104 of Law No. 2009-1674 of December 30, 2009, provided for the transfer of funds and economic resources targeted by Regulation (EC) No. 1210/2003 in several stages: a first decree listing the funds and economic resources subject to the freezing measure and opening a period for any person claiming to have a right to these assets to appeal, then a second decree effecting the actual transfer to the Development Fund for Iraq, and finally a decree by the Council of State specifying the particular modalities of transfer for each category of assets. This article was repealed by Law No. 2013-672 of July 26, 2013, and the multi-stage transfer mechanism was reproduced in its Article 85.]

4 *Tribunal judiciaire de Paris, 25 février 2025, RG n° 24/80751* : *"Ainsi, il convient de retenir qu'en l'absence du second arrêté prévu par le mécanisme législatif de transfert aux mécanismes successeurs du Fonds de développement irakien, les fonds et ressources économiques de la société Montana Management Inc. sont demeurés la propriété de la société Montana Management Inc. Page 6 / 15 25 février 2025 Il n'y a donc pas lieu d'étudier le moyen subsidiaire de la société Montana Management Inc. concluant à l'insaisissabilité de ses fonds et ressources en raison de leur transmission au mécanisme successeur de Fonds de développement irakien, transmission qui n'a pas eu lieu."*[Translation by AI: Thus, it should be noted that in the absence of the second decree provided for by the legislative transfer mechanism to the successor mechanisms of the Iraqi Development Fund, the funds and economic resources of Montana Management Inc. remained the property of Montana Management Inc. Therefore, there is no need to consider the subsidiary argument of Montana Management Inc. regarding the non-seizability of its funds and resources due to their transfer to the successor mechanism of the Iraqi Development Fund, a transfer that did not take place.]

5 *Tribunal judiciaire de Paris, 25 février 2025, RG n° 24/81607* : *"L'article L. 111-1-2 du code des procédures civiles permet l'exercice de mesures d'exécution forcée sur des biens appartenant à un Etat étranger si l'Etat concerné a expressément consenti à l'application d'une telle mesure, ou qu'il a réservé ou affecté ce bien à la satisfaction de la demande qui fait l'objet de la procédure, ou lorsqu'un jugement ou une sentence arbitrale a été rendu contre l'Etat concerné et que le bien en question est spécifiquement utilisé ou destiné à être utilisé par ledit Etat autrement qu'à des fins de service public non commerciales et entretient un lien avec l'entité contre laquelle la procédure a été intentée. Ces articles organisent l'articulation entre les droits des créanciers et l'immunité d'exécution des Etats. La jurisprudence admet que la saisie puisse être dirigée contre une émanation de l'Etat, soit une entité qui, quelle que soit sa forme, ne se trouve pas dans une indépendance fonctionnelle suffisante pour bénéficier d'une autonomie de droit et de fait à l'égard de l'Etat et si son patrimoine se confond avec celui de l'Etat (Cass. Civ. 1ère, 6 février 2007, n° 04- 13.107 et 04-16.888, 1re Civ., 6 février 2007, pourvoi n° 04-13.108, 04-16.889, 1re Civ., 14 novembre 2007, pourvoi n° 04- 15.388, CA Paris 26 janvier 2023 n° 21/22374, CA Paris 15 sept. 2022 n° 20/00419), de sorte que cette entité se confond avec l'Etat.".* [Translation by AI: Article L. 111-1-2 of the Code of Civil Procedure allows for the enforcement of measures on property belonging to a foreign state if the state concerned has expressly consented to the application of such a measure, or if it has reserved or allocated this property to satisfy the claim that is the subject of the procedure, or when a judgment or arbitral award has been rendered against the state concerned and the property in question is specifically used or intended to be used by the said state for purposes other than non-commercial public service and is linked to the entity against which the procedure was initiated. These

"...Instrubel sought provisional seizure (saisie conservatoire) of various assets – such as claims (créances), intangible assets (droits d'associés), and securities (valeurs mobilières) –, owned by Montana, a company incorporated under the laws of Panama."

Montana was not truly independent from the Iraqi State. Rather, it argued that Montana was used by the Iraqi State to manage and invest state funds abroad.

Regarding the second criterion, namely the entity's assets being the same as those of the State, Instrubel presented compelling evidence demonstrating a commingling of assets between Montana and the Iraqi State. In fact, Montana appeared to lack independent resources, operating instead with funds diverted from the Iraqi State.

Additionally, the court observed that Montana's inclusion in the 2003 Assets UN Resolution also created a presumption that it was an emanation of the Iraqi state. In the court's view, Montana's subsequent delisting further demonstrated the Iraqi State's interest in the company and served to reinforce that presumption.[6]

Based on all these elements, the court concluded that, at the time the enforcement measures were undertaken, Montana constituted an emanation of the Iraqi State. Accordingly, Instrubel was entitled to proceed with the seizure of its assets in execution of the judgment and awards issued against Iraq.

C. The need for prior administrative authorisation before enforcing seizures

Although Montana could be equated with the Iraqi State, the Paris Judicial Court held that this alone was not sufficient to render its assets subject to enforcement.

The judges relied on Article 6.1 of the 2003 EU Regulation, which empowers the designated national competent authority to authorise the use of frozen funds under certain conditions.

Referring to a prior ruling by the French Court of Cassation, the Paris Judicial Court held that Instrubel was required to obtain an administrative authorisation from the *Direction Générale du Trésor*, the competent French authority designated for such matters.[7]

Furthermore, this authorisation was a necessary precondition to initiating any application for judicial authorisation under Article 111-1-1 of the CCEP for provisional or enforcement measures against frozen assets.

The French judges also relied on the Court of Justice of the European Union's (**CJEU**) ruling of 11 November 2021 in the Bank Sepah case, which stated that no seizure of frozen assets could be carried out without administrative authorisation obtained from a national authority concerning Iranian funds. To reinforce its position, the Paris Judicial Court highlighted that the French Cour de cassation had already adopted this approach in a decision dated 7 September 2022.[8]

Ultimately, the court annulled the seizure of the frozen assets by Instrubel and lifted the enforcement measures imposed on Montana.

The three decisions issued by the Paris Judicial Court are significant as they illustrate the legal and procedural complexity of seizing frozen assets. Such enforcement is particularly difficult when it requires navigating overlapping frameworks of international (EU) and domestic (French) law, including the need to obtain both administrative and judicial authorisations.

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articles organize the relationship between the rights of creditors and the immunity of states from execution. Jurisprudence admits that the seizure can be directed against an emanation of the state, that is, an entity which, regardless of its form, does not have sufficient functional independence to benefit from legal and factual autonomy from the state, and if its assets are merged with those of the state]

6 *tribunal-judiciaire_n°2480751_25_02_2025.pdf* : *"Le délistage ultérieur de la société Montana Management Inc. résulte d'une demande de l'Etat irakien, suite au décès de [C] [R] et au changement des dirigeants de la société, ainsi qu'il ressort de la décision du Comité irakien de gel des avoirs des terroristes et de la réponse du point focal de l'ONU confirmant que le délistage était intervenu à la demande d'un Etat membre. Ce délistage sans explication ni motif ne peut permettre de renverser la présomption de fait qui existait au jour des mesures conservatoires et d'exécution forcée pratiquées et il démontre au contraire l'intérêt que porte l'Etat d'Irak à la société Montana Management Inc. et les liens qui les unissent.".* [Translation by AI : The subsequent delisting of Montana Management Inc. was the result of a request by the Iraqi state, following the death of [C] [R] and the change in the company's management, as indicated by the decision of the Iraqi Committee for the Freezing of Terrorist Assets and the response from the UN focal point confirming that the delisting was carried out at the request of a member state. This delisting, without explanation or reason, cannot overturn the presumption of fact that existed on the day of the conservatory and enforcement measures taken, and it instead demonstrates the interest that the State of Iraq has in Montana Management Inc. and the ties that unite them.]

7 *Tribunal judiciaire de Paris, 25 février 2025, RG n° 24/80751* : *"Au jour des mesures contestées, la société Montana Management Inc. était toujours listée par l'annexe IV de ce 25 février 2025 règlement et la société Instrubel N.V. devait donc solliciter l'autorisation de la Direction Générale du Trésor, autorité française compétente désignée par l'annexe V, pour obtenir le déblocage des fonds et ressources économiques (2e Civ., 11 mai 2017, pourvoi n° 15-26.658)."* [Translation by AI : On the date of the contested measures, Montana Management Inc. was still listed in Annex IV of the regulation as of February 25, 2025, and Instrubel N.V. therefore had to seek authorization from the Directorate General of the Treasury, the competent French authority designated in Annex V, to obtain the release of the funds and economic resources.]

8 *Tribunal judiciaire de Paris, 25 février 2025, RG n° 24/80751* : *"La Cour de cassation a d'ailleurs appliqué la solution retenue dans l'arrêt Bank Sepah au règlement (UE) 2016/44 du Conseil du 18 janvier 2016 concernant des mesures restrictives en raison de la situation en Libye et abrogeant le règlement (UE) n° 204/2011, considérant que les mesures de gel sont définies en termes similaires par le règlement de gel des fonds iraniens et le règlement de gel des fonds libyens (1re Civ., 7 septembre 2022, pourvoi n° 19-21.995)."*[Translation by AI: The Court of Cassation also applied the solution adopted in the Bank Sepah decision to Council Regulation (EU) 2016/44 of January 18, 2016, concerning restrictive measures due to the situation in Libya and repealing Regulation (EU) No. 204/2011, considering that the freezing measures are defined in similar terms by the regulation freezing Iranian funds and the regulation freezing Libyan funds.]

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"The paramount object of the Act is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense."

SETTING ASIDE ARBITRAL AWARDS: A HIGH BAR FOR PROCEDURAL FAIRNESS CHALLENGES

Background

On 31 March 2025, the Supreme Court of Queensland delivered its judgment in the matter of *Clarke Energy (Australia) Pty Ltd v Power Generation Corporation (Trading as Territory Generation) and Robert Holt KC* [2025] QSC 64 (**Clarke Energy**). In this matter, the Supreme Court dismissed an application to set aside an arbitral award on the basis there was a lack of procedural fairness which violated public policy.

In *Clarke Energy*, the parties entered into two identical engineering, procurement and construction contracts regarding power stations located in the Northern Territory. Arbitration proceedings were commenced under the ACICA Arbitration Rules for disputes concerning extensions of time and variations.

On 21 July 2023, the arbitrator delivered a partial award dismissing most of the applicant's claims with damages awarded to the first respondent.

Subsequently, the applicant commenced proceedings in the Supreme Court of Queensland to set aside the arbitral award, alleging a lack of procedural fairness contrary to public policy of the State of Queensland. The conflict with the public policy is alleged to have arisen because of a denial of natural justice. The applicant contended that the content of natural justice in arbitrations required compliance with the fair hearing rule which requires a decision maker to afford a person an opportunity to be heard before making a decision affecting their interests. The applicant alleged the arbitrator failed to consider issues put before him in breach of the fair hearing rule.

Promoting consistency in domestic and international arbitration standards

In its submission, the applicant solely relied on s 34(2)(b)(ii) of the *Commercial Arbitration Act 2013* (Qld) (the **Act**) which states that an *"arbitral award may be set aside by the Court only if the Court finds that the award is in conflict with the public policy of this State."* This section substantially follows the UNCITRAL Model Law (**Model Law**) on International Commercial Arbitration.

The paramount object of the *Act* is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense. With this in mind, his Honour Kelly J also highlighted the need to promote uniformity between the application of the Act to domestic commercial arbitrations and the application of the *Model Law* to international commercial arbitrations and the observance of good faith.

His Honour referred to TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (2014) 232 FCR 361 (TCL) which noted the importance of paying regard to decisions in other countries which also model their law on the Model Law for the facilitation of a degree of international harmony and concordance of approach to international commercial arbitration. In TCL, the Court endorsed the judgment of the Court of Final Appeal of Hong Kong in *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111, in which the presiding judges said that:

1. an *"award must be so fundamentally offensive to [a] jurisdiction's notions of justice that, despite its being a party to the Convention, it cannot reasonably be expected to overlook the objection."*
2. the public policy ground is limited to cases where an award is *"contrary to the fundamental conceptions of morality and justice"* of the forum.

In *TCL*, it was held that to succeed in setting aside an award under Article 34 of the *Model Law* (of which s34 of the Act is modelled), the applicant must demonstrate that it had suffered *"real unfairness or real practical injustice"* in how the arbitration was *"conducted or resolved by reference to established principles of natural justice or procedural fairness"*.

Decision

Adopting this same view and emphasising that courts should avoid assessing the merits of an arbitration, his Honour found against the applicant.

His Honour found that the issue in question was not revealed in the applicant's notice of arbitration, was not pleaded, did not come within the tribunal's jurisdiction by reason of the conduct of the arbitrations and was only raised for the first time in the applicant's written closing submissions in reply.

His Honour commented that it is difficult to understand how there could possibly be a case of real unfairness or real practical injustice against a party because a substantial issue, which was not pleaded, was not decided by the arbitrator. His Honour also identified that if the applicant wanted the issue to be considered, it should have requested to amend its pleadings to bring the matter within the tribunal's authority.

In any case, his Honour found that the arbitrator did in fact consider the issue and had decided against the applicant. His Honour also noted that the applicant suffered no practical injustice, since it had failed to prove that it had suffered any delay in the arbitration proceedings.

Key Takeaways

In *Clarke Energy*, his Honour demonstrated a real emphasis on ensuring consistency between the application of the *Act* to domestic commercial arbitrations and the application of the *Model Law* to international commercial arbitrations.

In line with various domestic and international authorities, the *Clarke Energy* decision reaffirms the high threshold applicable to challenges of arbitration awards on grounds of denial of natural justice. There must exist real unfairness or real practical injustice to amount to a violation of public policy, which may only be enlivened where there is a breach of the fundamental conceptions of morality and justice.

More broadly, the *Clarke Energy* decision also protects the authority of an arbitral decision by indicating that the court's role should be limited to dealing with arbitral missteps that are real and substantial, rather than merely technical or procedural.

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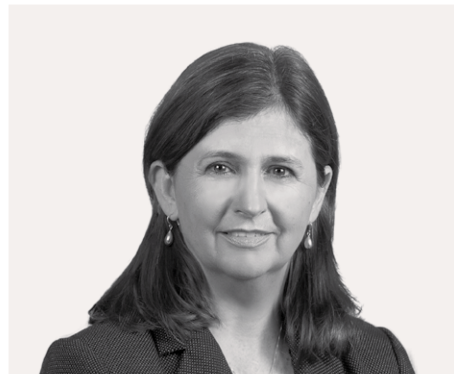

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THE ENGLISH COMMERCIAL COURT UPHOLDS INDIA'S STATE IMMUNITY IN RELATION TO ENFORCEMENT OF AN INVESTMENT TREATY AWARD

The English Commercial Court upholds India's State immunity in relation to enforcement of an investment treaty award

In *CC/Devas Mauritius Ltd v The Republic of India*, the applicant (**CC/Devas**) applied to the English Commercial Court for enforcement of an award (**Award**) obtained against India in an investment treaty arbitration under the Mauritius-India BIT. In the previous International Arbitration Quarterly, we reported on the decision of the Full Court of the Federal Court of Australia upholding India's right to state immunity to the jurisdiction of the Australian courts under the *Foreign States Immunities Act 1985* (**FSIA**) thereby preventing the Australian court from enforcing the Award against India under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (the New York Convention).

The English Commercial Court has reached a similar decision. The Court has also upheld India's right to state immunity to the jurisdiction of the English courts under the *State Immunity Act 1978* (**Act**), thereby preventing enforcement of the Award under the New York Convention by the English courts.

India claimed that it was immune to the jurisdiction of the English courts arguing that it had not waived immunity to enforcement of awards under the New York Convention due to a reservation it had made to the New York Convention, known as the "*commercial reservation*". The reservation provides the New York Convention only applies to enforcement of awards relating "*to differences arising out of legal relationships whether contractual or not, which are considered commercial under*" the law of India.

State Immunity Act 1978

Under the Act, a State has immunity from the jurisdiction of the English courts unless an exception applies (section 1).

One of the exceptions is that the State has submitted to the English courts "*by prior written agreement*" (section 2(2)). A prior written agreement may be an arbitration agreement to which the State is party. As the definition of "agreement" includes treaties (section 17), the exception may arise from a treaty such as the Convention.

State immunity is a procedural matter relating to the jurisdiction of the Court.

Court's decision

The Court confirmed that a waiver of state immunity must be express: it must be "*expressed in a clear and recognisable manner, as by an unequivocal agreement*".[1] In *Infrastructure Services Luxembourg SARL v The Kingdom of Spain [2025] 1 Lloyd's Rep 66*, the Court of Appeal commented that:

> *If the express words used amount, on their proper construction, to an unequivocal agreement by the state to submit to the jurisdiction, that is sufficient to satisfy section 2(2) of the SIA, even if the words "submit" and "waiver" are not used.*[2]

By ratifying the New York Convention, States may waive the right to state immunity in relation to the jurisdiction of the courts of another State (who is party to the New York Convention) in relation to enforcement of an award in that State under the New York Convention.

Article III of the New York Convention provides that that:

> *Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.*

However, the Court emphasised that ratification of the New York Convention is not, on its own, a waiver of state immunity.[3] In other words, there may not be a waiver of state immunity to jurisdiction, or such waiver may be qualified by reservations made by the State to the New York Convention.

In the present case, India had not waived state immunity with respect to the enforcement of awards essentially relating to non-commercial disputes. India had only waived immunity with respect to the enforcement of an award that relates to a dispute arising out of a relationship that is considered to be commercial under the law of India.

The Court noted that CC/Devas did not make any arguments or provide any evidence as to whether the dispute fell within the commercial reservation and that it was difficult for the English courts to determine whether the dispute was commercial under the laws of India.

The Court also emphasised that the decision should not be taken as undermining the arbitration friendly approach of the English courts.

Leave for appeal

Leave for appeal has been granted to CC/Devas. The High Court of Australia has also granted special leave to CCDM to appeal the decision of the Full Federal Court to the High Court.

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1 Infrastructure Services Luxembourg SARL v The Kingdom of Spain [2025] 1 Lloyd's Rep 66 at [84] in CC/Devas (Mauritius) Ltd v Republic of India [2025] EWHC 964 at [50].
2 Infrastructure Services Luxembourg SARL v The Kingdom of Spain [2025] 1 Lloyd's Rep 66 at [92] in CC/Devas (Mauritius) Ltd v Republic of India [2025] EWHC 964 at [53]
3 CC/Devas (Mauritius) Ltd v Republic of India [2025] EWHC 964 at [107].

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WHEN ARBITRATION MEETS INSOLVENCY: AUSTRALIAN COURT REAFFIRMS DOCTRINE OF UNARBITRABILITY IN ENFORCING AN ARBITRATION AGREEMENT

Elecnor Australia Pty Ltd v Clough Projects Australia Pty Ltd [2025] NSWSC 610

Background

On 8 October 2020, Elecnor Australia Pty Ltd (**Elecnor**), a subsidiary of the Spanish power infrastructure builder Elecnor SA, entered into a Joint Venture Deed (**JV Deed**) with Clough Projects Australia Pty Ltd (**Clough**), an Australian Construction company.

The joint venture was established to execute the Engineering, Procurement, and Construction (**EPC**) contract for building the New South Wales segment of the 900-km Energy Connect high-voltage interconnector with South Australia.

On 31 October 2022, Clough failed to meet an obligation to provide security under the EPC contract. Due to ongoing financial and operational difficulties, Clough entered voluntary administration two months later. Meanwhile, Elecnor exercised its "step-in" rights under the JV Deed and finished the works required under the EPC contract.

On 16 February 2023, Clough entered a Deed of Company Arrangement (**DOCA**), a mechanism under Australian Corporations law which assists companies in administration to reach agreements with creditors to restructure the business and exit the administration process. Similar statutory mechanisms exist in other countries, such as the "Company Voluntary Arrangements" in the UK. Under the DOCA of Clough, the property of Clough and its related parties must be transferred to the trustees of an administration trust (**Trustees**).

Proceedings

On 1 July 2024, Elecnor claimed that Clough's failure to provide security constituted a "Material Default", triggering its compulsory acquisition rights under the JV Deed. In exercising those rights, Elecnor offered to purchase Clough's interest in the joint venture for one Australian Dollar. However, the Trustees refuted Elecnor's compulsory acquisition rights, asserting that the DOCA had transferred all of Clough's interest to them, thereby barring the acquisition.

Elecnor commenced proceedings at the Supreme Court of New South Wales against Clough and Trustees to determine the legal effect of the DOCA on its compulsory acquisition rights (the **Main Proceeding**).

Clough and the Trustees filed a crossclaim, requesting Elecnor to pay them for half of the $110 million bank guarantees and insurance bonds that were called on by the principal of the EPC contract (the **Securities Recovery Claim**). They also alleged that Elecnor breached quasi-fiduciary and good faith obligation in the JV Deed by making the one Australian Dollar offer (the **Bad Faith Breach Claim**).

Elecnor argued that both the Securities Recovery Claim and the Bad Faith Breach Claim should be resolved through arbitration rather than court proceedings because the JV Deed contained an arbitration clause (**Arbitration Clause**). Clough and the Trustees opposed this. They further argued that the if their proceedings got stayed, the Main Proceeding should be stayed for similar reasons.

The Court must determine which proceeding or claim to be stayed, necessitating a thorough examination of the arbitration clause at the outset.

The Arbitration Clause

The JV Deed incorporates a multi-tiered dispute resolution framework. The framework began with a negotiation procedure overseen by a Steering Committee. If the parties failed to resolve the dispute through the Steering Committee, the clause provided that the parties "**may**" initiate arbitration.

Clough and Trustees contended that the use of "may" indicated a choice between arbitration and litigation, suggesting that arbitration should not be mandatory. Conversely, Elecnor contended that the Arbitration Clause should not prevent parties from pursuing litigation and that if one party opted for arbitration, it should be mandatory.

The Court upheld that the arbitration is mandatory, confirming that "a court will normally require clear words in a contract before concluding that the parties did not intend to have all their disputes resolved by one tribunal."[1] It also found that the word "may" invoked "a choice between arbitrating the dispute in Singapore or taking it no further", in accordance with an earlier NSW Court of Appeal decision.[2]

Which Proceeding to Stay?

Given that the arbitration is mandatory, the Court returned to the question of which proceeding or claim should be stayed.

The Court determined that the three proceedings and claims really constituted only two matters. The first matter involves a dispute over the engagement and enforcement of the compulsory acquisition process in the JV Deed, encompassing the Main Proceeding and the Bad Faith Breach Claim. The second matter pertains to a dispute regarding Clough's entitlement to contribution for the call on the security by the principal of the EPC contract, which went to the Securities Recovery Claim.

Both matters were captured by the scope of the Arbitration Clause. Nonetheless, the Court treated them differently due to policy considerations.

The Court found that the first matter was not arbitrable. It dealt with questions under Australian Corporations law and had the potential to affect the substantive rights of creditors. The Court held that "*There may be a 'legitimate public interest' in seeing a dispute of that type 'resolved by public institutions' or in accordance with structures that are established by parliament rather than institutions and structures established by the parties.*"[3]

The second matter, on the other hand, only dealt with private rights between the parties. The Court found that none of the same public policy considerations were present.

In conclusion, the Court stayed only the Securities Recovery Claim and referred it to arbitration, while allowing the Main Proceeding and the Bad Faith Breach Claim to proceed in Court.

Comments

The Australian Court reached a similar position to the Court of Appeal of Singapore in *Sapura Fabrication Sdn Bhd and others v GAS and another appeal* [2025] SGCA 13, which held that "*the right of a party to pursue a claim which is subject to a valid arbitration agreement is typically in direct conflict with the nature of insolvency proceedings. This is not surprising since arbitration and insolvency proceedings are driven by two competing public policy considerations. The enforcement of arbitration agreements upholds party autonomy and freedom to contract, while insolvency proceedings advance the collective interests of the general body of creditors.*"[4]

Although this case does not involve the interplay between a moratorium and an arbitration clause, it has reinstated some basic principles and provided leeway regarding the enforcement of arbitration agreements in an insolvency context. This contrasts with some jurisdictions, where entering a moratorium effectively ends any resort to arbitration for relief.

The case is also instructive in showing how Australian courts have navigated the complex intersection of insolvency and arbitration. By reaffirming the enforceability of arbitration agreement in certain matters, despite the backdrop of insolvency, the Court demonstrate a principled approach that aligns with many arbitration-friendly jurisdictions.

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1 Ibid at [79].

2 ABB Power Plants Ltd v Electricity Commission of New South Wales t/as Pacific Power (Supreme Court (NSW), Giles J, 5 August 1994, unreported) BC9402904 at 9 in Elecnor Australia Pty Ltd v Clough Projects Australia Pty Ltd [2025] NSWSC 610 at [76].

3 Elecnor Australia Pty Ltd v Clough Projects Australia Pty Ltd [2025] NSWSC 610 at [110].

4 Sapura Fabrication Sdn Bhd and others v GAS and another appeal [2025] SGCA 13 at [1].

HFW EVENTS AND SPEAKING ENGAGEMENTS

- Keep an eye out for the upcoming announcement of our next webinar in HFW's Arbitration Webinar Series, focusing on Climate Change Overview and Future Disputes
- Join us in Sydney for Australian Arbitration Week (14-16 October), where we will be hosting two events: "The gathering storm – Investor State Arbitration and the APAC energy transition and lessons learned from other regions" and "Armed and dangerous – opportunities and challenges in third party funding of construction disputes"
- Jo Delaney presented workshops for the judiciary of Papua New Guinea in collaboration with the Hon, addressing arbitration issues arising under the newly enacted International Arbitration Act and Domestic Arbitration Act in Papua New Guinea
- HFW recently collaborated with London Maritime Arbitrators Association London at Cercle de la Terrasse in Geneva to discuss tariffs, maritime trade, and how LMAA arbitration can offer clarity in a shifting global landscape
- Julien Fouret spoke on 10 June at the Chartered Institute of Arbitrators Conference 2025 in Lebanon, under the patronage of His Excellency the Prime Minister of Lebanon, Nawaf Salam. Julien participated in a panel discussion entitled, "Lebanon's Regulatory, Arbitration & ADR Landscape – The Status Quo and Its Reform"
- Kevin Warburton and Sinyee Ong attended the 10th ICC Asia Pacific Conference on International Arbitration, held in Hong Kong on 27 June
- On 30 June, Kevin Warburton attended an invitation only roundtable hosted by the HKIAC to discuss the arbitration landscape in Hong Kong and to seek input on the HKIAC's wider strategy and proposed reforms

TEAM NEWS

- We are pleased to confirm that Partners Nick Longley and Julien Fouret have been appointed as co-heads of our International Arbitration (IA) practice

London-based Partner Damian Honey steps down from the role after a decade in post. Damian will continue to advise and represent HFW's global clients on a wide range of dispute resolution matters, including international arbitration. HFW's IA practice saw significant growth under Damian's leadership, with recent developments including the hire of international arbitration specialist Shaun Leong as Partner in Singapore.

Julien Fouret, Partner and co-head of International Arbitration, HFW:

"We're very proud of HFW's IA practice being one of the most active in the world. With the rise of investment treaty arbitrations and the upcoming implementation of the English Arbitration Act 2025, this is certainly an interesting time for our global team, and we're looking forward to supporting clients navigating these ongoing developments."

Nick Longley, Partner and co-head of International Arbitration, HFW:

"We've seen continued growth and expansion of our global international arbitration practice in recent years, assisting our clients within our key industry sectors and in international commercial arbitration more generally. I look forward to working with Julien to continue that growth and build on Damian's legacy."

- HFW named as a market leader among global international arbitration firms
- HFW continues Asia Pacific growth with hire of leading tech and energy disputes Partner Shaun Leong and Senior Associate Theodore Ang in Singapore
- HFW's Damian Honey, Nicola Gare, Caroline West and Geraldine Valenzuela have produced a chapter for the Global Arbitration Review, "Prevention of asset stripping: worldwide freezing orders"

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HFW has over 700 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our International Arbitration capabilities, please visit www.hfw.com/international-arbitration.

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