INTERNATIONAL ARBITRATION QUARTERLY | EDITION Q4/2025

Welcome to the Q4 2025 edition of the HFW International Arbitration Quarterly, which features articles from colleagues across our network of global offices. This edition includes the following articles:

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BLASKET RENEWABLE INVESTMENTS LLC V KINGDOM OF SPAIN [2025] FCA 1028

On 29 August 2025, the Federal Court of Australia handed down its decision in *Blasket Renewable Investments LLC v Kingdom of Spain* [2025] FCA 1028 (*Blasket*), once again rejecting Spain's challenge to enforcement. Justice Stewart's judgment carries significant implications, not only for the global campaigns being pursed by a number of investors to enforce awards against Spain across multiple jurisdictions, but also for numerous EU-based ICSID award holders seeking to recover their investments. The judgment, and its connection to ongoing litigation in the United States and the United Kingdom also illustrates the extent of the procedural hurdles investors must overcome before realising an arbitral award.

Background

The saga began in 2007, when the Spanish government launched a program that promised above-market prices for electricity generated from renewable sources. This scheme was designed to attract foreign investment into Spain's renewable energy sector by offering investors stable and predictable returns. The program succeeded in drawing significant international capital. However, following the global financial crisis and the subsequent EU sovereign debt crisis, this program became economically unattractive for Spain and so Spain drastically restructured the scheme, retroactively cutting incentives and leaving investors facing substantial losses.

A number of investors impacted by Spain's restructuring brought claims against Spain under the *Energy Charter Treaty* (1994) (**ECT**). The ECT is a multilateral treaty designed to promote cross-border cooperation in the energy sector, offering investment protections such as fair and equitable treatment, protection against expropriation, and access to international arbitration to resolve disputes between investors and States. The investor may choose to commence arbitration under the framework of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965) (**ICSID Convention**). By invoking the ECT together with the ICSID arbitration clause, investors were ensured that any dispute with Spain relating to legislative and policy changes or other actions by Spain that had an adverse impact on their investment in renewable energy projects and were covered by the protections afforded by the ECT could be resolved through arbitration rather than domestic courts.

Many investors brought claims in ICISD arbitration, alleging that Spain had breached its obligation under the ECT to provide fair and equitable treatment and/or to not expropriate their investment except in certain limited circumstances. It is reported that as of 2024, Spain faced more than 50 claims under the ECT with damages totalling over USD 10 billion. There are currently 24 unpaid awards worth at least USD 1.5 billion that have been issued by arbitral tribunals against Spain.[1]

Some investors have embarked on a global enforcement campaign to have their award recognised, enforced and executed against Spain in multiple jurisdictions, including Australia. In an earlier case involving a different group of investors, *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* [2023] HCA 11 (***Sàrl***), the High Court of Australia held that Spain's agreement to the ICSID Convention constituted a waiver of foreign state immunity for the purposes of recognition and enforcement of ICSID awards in Australia.[2] Foreign state immunity is a legal principle that insulates foreign states from the jurisdiction

1 AM Editorial Team, Spain's renewable energy reckoning: A case study in non-compliance with investment treaty awards. Accessed 24 November 2025.

2 *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* [2023] HCA 11 [8].

of Australian courts.[3] However, the Court confirmed that Spain had not waived its immunity from execution of the award.[4] The ruling paved the way for other award creditors, including the plaintiffs in *Blasket*, to pursue recognition and enforcement proceedings in Australia.

It is important to note that while the ICSID framework provides a process for recognition and enforcement of ICSID Awards, it does not cover the subsequent (and critical) execution phase. The subsequent execution phase of recovery is subject to the enforcement state's domestic law on execution. Article 55 of the ICSID Convention provides that the Convention does not derogate from the enforcement state's domestic law concerning immunity from execution. Therefore, the type of waiver of sovereign immunity that was upheld in *Sarl* will not apply to execution, and the enforcement state's domestic law may provide for such immunity and provide any applicable waiver.

Spain's arguments to resist enforcement

In *Blasket*, the plaintiffs sought recognition and enforcement of an ICSID award that ordered Spain to pay the plaintiffs USD 520 million in damages for breach of the ECT. Spain again asserted foreign state immunity, on three bases. *First*, that the High Court's decision in *Sàrl* was wrongly decided.[5] *Second*, that *Sàrl* was confined to situations where the binding effect of an award is not in dispute.[6] The third argument introduced a new layer of controversy: Spain asserted that the award was invalid because the investors are nationals of EU Member States, and under EU law, arbitration between EU investors and EU Member States under the ECT is prohibited. Spain contended that this alleged invalidity should undermine recognition and enforcement proceedings in Australia.[7]

The Court rejected Spain's argument regarding the correctness of the High Court's decision in *Sàrl*, noting that a court of first instance is bound to follow established precedent.[8] In support of its argument that *Sàrl* should not be followed because, unlike in *Sàrl*, the validity of the award in *Blasket* was contested, Spain relied upon two decisions by the Court of Justice of the European Union (**CJEU**), concerning the relationship between EU Member States to contest the validity of the award.[9] The EU's position was that disputes under the ECT between EU Member States should be resolved within the EU legal framework, and any resort to arbitration is prohibited – a stance that, from Spain's perspective, casts doubt on the validity of such awards. Although Spain did not raise the validity issue in *Sàrl*, these two CJEU decisions were invoked in that case to advance the argument that Spain did not submit to the jurisdiction of the Australian courts. The High Court rejected this argument, holding that, irrespective of EU law principles in those decisions, "*the relevant agreement arose from Spain's entry into the ICSID Convention, which included its agreement as to the consequences of an award rendered pursuant to the ICSID Convention.*"[10] In light of this reasoning, Stewart J concluded that *Sàrl* should be applied broadly and accordingly rejected Spain's second argument.[11]

The most significant aspect of the case concerns Spain's third argument regarding the validity of the ICSID award. Spain submitted that the two CJEU decisions establish a principle in EU law that EU Member States should not arbitrate disputes

3 See the *Foreign States Immunities Act 1985* (Cth).

4 *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* [2023] HCA 11 [9].

5 *Blasket Renewable Investments LLC v Kingdom of Spain* [2025] FCA 1028 [15]-[18].

6 Ibid [14].

7 Ibid [15].

8 *Blasket Renewable Investments LLC v Kingdom of Spain* [2025] FCA 1028 [176].

9 *Slovak Republic v Achmea BV* [2018] 4 WLR 87; *Republic of Moldova v Komstroy* LLC [2021] 4 WLR 132. Stewart J also considered *European Commission v European Food SA*, Grand Chamber, ECLI:EU:C:2022:50 (Case C-638/19 P) (25 January 2022), and *DA v Romanian Air Traffic Services Administration (Romatsa)*, Tenth Chamber, ECLI:EU:C:2022:749 (Case C-333/19) (21 September 2022).

10 *Kingdom of Spain v Ivnfrastructure Services Luxembourg Sàrl* [2023] HCA 11 [79]; *Blasket Renewable Investments LLC v Kingdom of Spain* [2025] FCA 1028 [182]-[183].

11 *Blasket Renewable Investments LLC v Kingdom of Spain* [2025] FCA 1028 [183].

under the ECT, as alternative remedies are available within the EU legal system.[12] Spain argued that this principle should apply to the investors in the present case as they are EU Member States, thereby rendering the award invalid.[13]

The Court first rejected Spain's claim that the award was invalid, emphasising that ICSID operates as a closed and self-contained system.[14] Unlike the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (**New York Convention**), which specifies several grounds on which domestic courts may refuse recognition and enforcement of an arbitral award (such as lack of jurisdiction, irregular tribunal composition, or public policy), the ICSID Convention provides its own exclusive review mechanism. Under Articles 50 to 52, challenges to an ICSID award – such as annulment, revision, or interpretation – must be pursued within ICSID's internal framework (and referred to an Annulment Committee), and there is no mechanism for challenge to the courts. There are also no grounds for challenging enforcement of an ICSID award under the ICSID Convention.

It should be noted that the much more limited availability of award debtors to challenge enforcement of ICSID Awards is one of the key attractions of the ICSID framework for international investors seeking compensation for host state's interference with their investments, whereas arbitral awards being enforced under the New York Convention may be subject to a wider range of potential challenges as mentioned above.

The Court held that the ICSID Convention does not require that a tribunal's determination of its jurisdiction be proven correct for an ICSID award to be "binding" and subject to the obligations imposed on Contracting States under Articles 53 and 54: "An ICSID award issued by a tribunal remains binding and enforceable (subject to any stay of enforcement) unless annulled under Article 52".[15] This view is reinforced by sections 33 and 34 of the *International Arbitration Act 1974* (Cth), which provide that an ICSID award is binding, not subject to challenge or appeal except as provided in the ICSID Convention, and that the ICSID Convention prevails over other laws on recognition and enforcement.[16]

The Court then considered and rejected Spain's submission that the impugned ICSID award was not an "award" under the ICSID Convention because it was allegedly not binding on Spain due to a conflict between Spain's obligations under public international law and its obligations under EU law as an EU Member State.[17] The Court acknowledged the EU law principle and that Spain may owe obligations to other EU Member States. However, Spain's obligations under EU law apply only within the EU. Spain nonetheless remains bound by its international obligations under the ICSID Convention, which are unaffected by its legal commitments under EU law. Even if such conflicts arise, it is for Spain to resolve them – such as by withdrawing from certain treaties or conventions. These conflicts do not alter the status of the award as an "award" under the ICSID Convention, as Spain's public international law obligations remain intact.[18]

Spain's final argument was that Article 53 of the ICSID Convention had been modified by treaties among EU Member States, and that the tribunal therefore lacked jurisdiction. The Court rejected this submission, referring to the self-contained nature of the ICSID system.[19] An ICSID award, once issued by the tribunal, is binding and enforceable. It is not subject to any appeal or to any other remedy, otherwise than in accordance with the ICSID system itself. National courts are obliged to enforce the award, and enforcement cannot be resisted on any procedural, jurisdictional grounds or grounds of public policy. It further dismissed the notion of modification by invoking principles of international law and Spain's broader obligations to all Contracting States under the ICSID Convention.[20] Most importantly, even if such a modification existed, it would not affect Australia's obligation owed to all Contracting States under the ICSID Convention to recognise and enforce a valid ICSID award.[21]

Assignment of awards

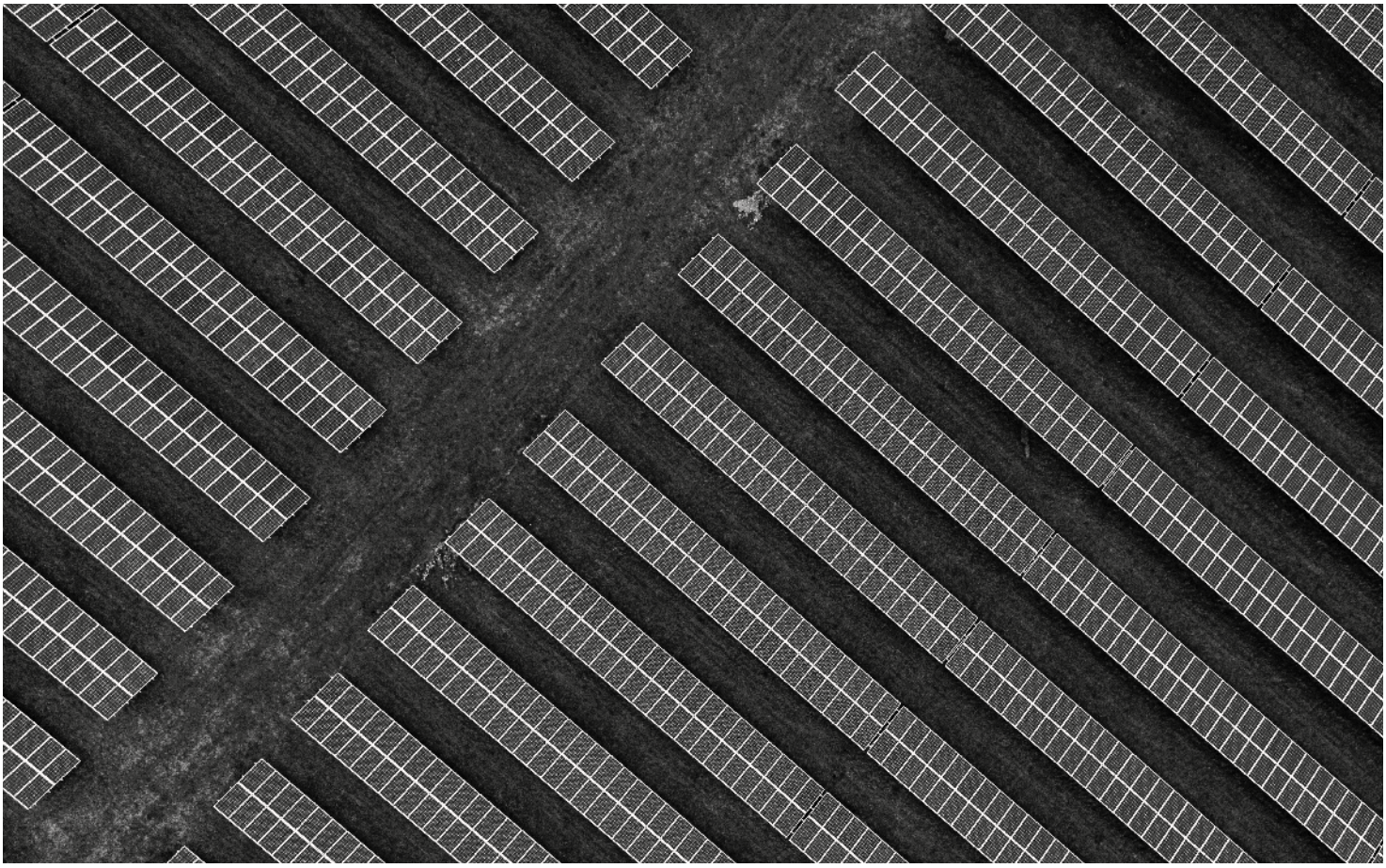
What makes this case particularly noteworthy is that it is the first case in Australia to decide whether an ICSID award can be assigned to a third party, with Stewart J affirming that it can.

However, on 10 November 2025, the English High Court reached the opposite conclusion regarding the same award and assignee and found that the ICSID awards are not assignable.[22]

The resolution of that issue is significant because, for years, selling and assigning arbitration awards has been a common exit strategy and business model for award creditors – especially those who do not want to spend years in enforcement battles.

The English High Court has now ruled that ICSID awards cannot be assigned (at least in ECT disputes), after interpreting the ICSID Convention as a whole under strict principles.[23] This does not make the selling awards business impossible, but it does make it far less convenient: The original award creditor must remain the party enforcing the award, even if they have sold the economic interest to an assignee. In practice, that means investors who buy awards may lose direct control over enforcement and timing, which undermines the simplicity of the traditional model.

12 Ibid [195]-[198].
13 Ibid [185].
14 Ibid[167].
15 Ibid [171].
16 Ibid [173].
17 Ibid [186].
18 Ibid [222].
19 Ibid [232].
20 Ibid [233]-[270].
21 Ibid [274].
22 *Operafund Eco-Invest Sicav Plc & Anor v Spain* [2025] EWHC 2874 (Comm) [79].
23 Ibid [71].



This can potentially affect the extent of an investor's overall recovery.

Once an award creditor obtains recognition and enforcement of an arbitral award (which in the case of an ICSID award is ordinarily intended to be a straightforward administrative process and not a judicial process), it must identify specific State-owned property that is free from sovereign immunity and execute the award judgment against that property.

Conclusion

The decision reinforces fundamental principles of international law in Australia, particularly the primacy of treaty obligations under the ICSID Convention, which is given force in Australia under the *International Arbitration Act 1974* (Cth). Australia continues to stand out as an attractive jurisdiction for the enforcement of ICSID awards including those involving EU Member States under the ECT. *Blasket* also raises the broader question of whether the purpose of the ICSID Convention can be undermined by the internal rules or policies of regional supranational organisations. Spain has confirmed its intention to appeal the decision.[24]

The case also illustrates the global interplay of ICSID award enforcement with varying domestic recognition, enforcement and execution frameworks of domestic states where recognition, enforcement and execution are sought. For example, the present judgment has influenced enforcement proceedings before the Supreme Court of the United States, where the parties filed supplemental briefs in response to this decision.[25]

Meanwhile, the UK Supreme Court is scheduled to consider the issues raised by Spain in *Sàrl* in December 2025.[26]

The path to final enforcement and recovery of the award will be protracted, given that early this year the EU Commission concluded that paying the arbitration award to EU creditors would violate EU state aid rules.[27] On top of that, recovering the funds will involve navigating multiple jurisdictions and likely resistance from the debtor state.

Regarding the assignment of awards, appeal courts in other jurisdictions will almost certainly have to weigh in, and if the UK approach stands, it could reshape the secondary market for ICSID awards – still viable, but with more complexity and risk for buyers.

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24 *Operafund Eco-Invest Sicav Plc & Anor v Spain [2025] EWHC 2874* (Comm) [4].
25 See the supplemental brief filed on 12 September 2025 and 29 September 2025. Accessed 10 November 2025.
26 *Infrastructure Services Luxembourg S.A.R.L and another (Respondents) v The Kingdom of Spain (Appellant)*. Accessed 10 November 2025.
27 Reuters, 'EU Commission tells Spain not to pay up in long-running renewable subsidies case' (24 March 2025). Accessed 10 November 2025.

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PROTECTING CONSTRUCTION CONTRACTOR'S INVESTMENTS IN INTERNATIONAL CONSTRUCTION PROJECTS

Cross-border construction activity has grown in recent years, with numerous complex construction projects initiated in developing countries, involving multiple parties with diverse specialisations and operating in multiple jurisdictions.

Contractors are often required to enter into long-term contractual relationships with foreign host Governments that involve the contractor bearing the up-front costs of constructing the built asset and then recovering the contract price by way of progress payments from the host Government.

Arrangements of this kind involve precisely the kinds of contributions of capital and assumptions of risk that the global system of International Investment Treaties (**Investment Treaties**) – including Bilateral Investment Treaties (**BITs**) and Free Trade Agreements (**FTAs**) – was designed to promote and protect. Historically, this Investment Treaty system has been used more by other industries, such as the oil and gas and mining industries, than by participants in the construction sector.

However, construction contractors and other construction project stakeholders are increasingly making use of the Investment Treaty system, in circumstances where the protections afforded under their contractual arrangements may not afford adequate relief against host Government interference in their projects.

The high-profile and politically sensitive nature of such construction projects renders them susceptible to host State interference and adverse Government policy changes. This is especially so in jurisdictions where the rule of law is not robust and mechanisms for the control of Government actions are not well established or enforced.

It is therefore in the interest of international construction contractors to familiarise themselves with the protections provided by Investment Treaties, which may provide protection and relief from these forms of sovereign risk. Most Investment Treaties are of the bilateral variety, in the form of BITs or FTAs between two States, but an increasing proportion of such agreements are multilateral/multi-State in nature.

In practice, the most important protections that an Investment Treaty offers are: (i) the protection against unlawful expropriation, direct or indirect, and (ii) the guarantee of Fair and Equitable Treatment by the host State authorities. It is these protections that are most often invoked by Contractors in claims under Investment Treaties.

However, qualifying for protection under such Investment Treaties is not guaranteed, and Contractors should look to take steps to ensure that they have maximised their prospects of acquiring such protections.

Typically, to qualify for protection under Investment Treaties, Contractors will need to satisfy the following two jurisdictional "*gateway criteria*".

First, the Contractor must be an "*investor*" under the Treaty, which requires the Contractor to be a company of a contracting State, other than the host state. Second, the Contractors' assets and interests in the host state must be within the Treaty definition of "investment" and must be made in the host state.

Investment Treaties' definition "*Investment*" usually covers most assets and interests in a large scale construction project and typical protected investments include rights under typical construction contracts, including D&B, EPC and BOT contracts etc., company shares, permits and licences, and intellectual property. Accordingly, major construction projects ***made in the host state*** will usually qualify as "investments" under Investment Treaties.

While these requirements appear straightforward, the multi-jurisdictional nature of cross border construction projects can make qualification for protection a complex process.

For example, the requirement for the investment to be ***made in the host state*** was recently at issue in an ICSID Arbitration between a Kenyan Contractor carrying out construction and fit-out works on an embassy in Somalia for the UAE Government (*Spentech Engineering Limited v United Arab Emirates* ICSID Case No. ARB/24/16).

The parties fell into dispute over payment claimed by Spentech (the Contractor) for work performed. The contractor brought a claim under the Kenya-UAE BIT.

The Kenya-UAE BIT affords protection to an investment "*in the territory*" of the Contracting State, which in relation to the UAE meant "*the territory of the United Arab Emirates its territorial sea, airspace and submarine areas…*".

On that basis, Spentech argued that the embassy premises, and the contractual rights in the project, constituted investments "*in the territory of*" the UAE, given the UAE's sovereignty over its embassy.

The UAE applied to have the case dismissed on the basis that all construction work and assets were physically located in Mogadishu, Somalia, not in UAE "*territory*", and that a State's diplomatic premises do not constitute the territory of that State under international law, and therefore the BIT did not apply.

The Tribunal held that while a Government's embassy is inviolable, meaning that the premises are protected from intrusion by the host state, the host country retains sovereignty over the land on which the embassy sits. Accordingly, the land was not UAE "*territory*" for the purposes of the BIT, and therefore the works at the embassy did not amount to an "*investment in the territory*" of the UAE under the BIT.

On that basis, the Tribunal held that the claims were manifestly without legal merit under ICSID Arbitration Rule 41 and dismissed the case.

This case, along with many others, serves a warning to Contractors to pay close attention to whether their investments in international construction projects are protected by relevant Investment Treaties. In circumstances where the relief available under their contractual relationships may fall short of what is required to protect their investments and profits, Investment Treaty Protection may afford an additional avenue for relief. However, Contractors will only benefit from such protections where they qualify for such protections under the terms of the relevant Investment Treaty.

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ASIA'S INVESTMENT TREATY LANDSCAPE

Although some of the earliest investment treaty arbitrations were initiated against states in the Asia-Pacific (**APAC**) region in the 1980s, more than four decades later, the proportion of cases involving APAC states remains relatively low – accounting for only about 10% of all investment treaty disputes globally. This is notable given that APAC states have entered into over 700 bilateral investment treaties (**BITs**) and numerous multilateral investment treaties and free trade agreements (**FTAs**), particularly through the Association of Southeast Asian Nations (**ASEAN**). ASEAN has established a network of multilateral investment agreements both within the region and with external partners. Many of these BITs and FTAs include provisions for the settlement of investor state disputes (**ISDS**) through international arbitration.

In recent years, however, there has been a marked increase in claims brought by APAC investors as well as claims against APAC states, signalling a shift in the significance of the region within the global investment landscape. At the same time, some APAC States, such as Indonesia and India, have terminated their BITs and sought to renegotiate new treaties with reduced investment protections and in some cases, no ISDS provisions.

Slow growth of investment arbitrations in Asia

The first investment arbitration case in Asia was commenced by Amco Asia Corporation (US), Pan American Development Limited (British) and PT Amco Indonesia (Indonesian) against Indonesia in 1981 in relation to the construction and management of a hotel in Jakarta. The claim was brought under the Indonesian Foreign Capital Investment Law.

The first investment arbitration brought under an investment treaty was brought by Asian Agricultural Products Limited (**AAPL**), a Hong Kong investor, against Sri Lanka following the destruction of AAPL's shrimp farm by the Sri Lankan authorities.[1] The claim was brought under the BIT between Sri Lanka and the United Kingdom (Hong Kong being an overseas territory of the UK at the time).

During the 1990s and 2000s, however, there were not many investment treaty cases brought against APAC States as compared with other regions around the globe. This may have been for political, economic and/or culture reasons. It may have been fortunate for the countries involved in the Asian Financial Crisis in 1997 that the crisis occurred before the exponential increase in investment treaty cases.

By 1996 there had only been 38 cases registered at ICSID. The first NAFTA cases started in 1998, but it was not really until the early 2000s that the growth in investment treaty cases accelerated. By 2011, there were 450 known cases, and by 2025, there have been more than 1,400 known investment treaty cases. Approximately 10% of these cases have been brought against States in the APAC region.

Following the Asian Financial Crisis, major economic reforms were implemented which contributed to the significant economic growth that has occurred in many APAC countries in more recent years. Whilst China and India have led the way, there has also been high economic growth in other countries, including Indonesia, Vietnam, Mongolia and the Philippines. Cultural differences may also have played a role, given that many Asian parties from countries such as Japan, Vietnam, Korea and China, have traditionally preferred to resolve conflicts through amicable settlement rather than to pursuing claims through court or arbitration proceedings. However, as those companies have been more involved in cross border projects, that mindset has shifted and there has been an increase in cross border arbitrations involving parties from these jurisdictions.

1 *Asian Agricultural Products Limited v Democratic Socialist Republic of Sri Lanka* (1987) (ICSID Case No. ARB/87/3).

In more recent years, there has been a gradual increase in cases brought by investors against APAC States under BITs and FTAs, including the ASEAN FTAs, as considered further below.

ASEAN Investment Treaties

ASEAN has played an active role in the APAC region to bring harmonisation and cooperation amongst the South East Asian countries. ASEAN comprises 11 member states: Singapore, Indonesia, Malaysia, Thailand, the Philippines, Laos, Cambodia, Brunei, Myanmar, Vietnam, and Timor-Leste.

The first ASEAN Investment Agreement was signed in 1987 and came into force in 1998. It was replaced with the ASEAN Comprehensive Investment Agreement, which was signed in 2009 and came into force in 2012.

Since the early 2000s, ASEAN has negotiated multilateral treaties, including FTAs, around the APAC region. ASEAN entered into cooperation or framework agreements with China (2002), India (2003), Korea (2005), the United States (2006) and Japan (2008). Many of these agreements had very basic investment protections for foreign investors but no ISDS provisions.

By the late 2000s, ASEAN negotiated new FTAs with a number of States, such as Australia and New Zealand. These FTAs, such as the ASEAN, Australia and New Zealand FTA (**AANZFTA**), include investment protections for foreign investors as well as ISDS provisions. In addition, these FTAs address some of the issues that had arisen in investment treaty cases.

For example, the AANZFTA, which was signed in 2009 and entered into force in 2010, includes the following provisions:

- **Denial of benefits**: Article 11 provides that a host State may deny benefits to a foreign investor if the investor does not have substantial business operations in the "home" state in which it is incorporated, or if the investor is owned or controlled by another party from the host State and the investor has no substantial business operations in the home state. This may prevent foreign investors from being able to bring an ISDS claim by incorporating a special purpose vehicle (**SPV**) in a State that is party to the AANZFTA in order to take advantage of the investment protections as the SPV must have substantial business activities in that State.
- **Fair and equitable treatment**: Article 6 provides for fair and equitable treatment and full protection and security and requires that States do not deny justice in any legal or administrative proceedings and that States to take such measures as may be reasonably necessary to ensure the protection and security of the investment. However, treatment is not in addition to or beyond that required in customary international law and does not create additional substantive rights, thereby limiting the potential application of this investment protection. It also provides that just because there is a breach of another provision does not mean there is a breach of this provision
- **Expropriation**: Article 9 expands on the meaning of expropriation by providing an explanation as to when an indirect expropriation may occur. It also excludes from expropriate measures taken by the State to achieve legitimate public welfare objectives, such as protection of public health, safety and the environment.
- **ISDS**: Articles 18 to 28 set out very detailed provisions on the resolution of disputes and the conduct of arbitration proceedings, such as:
  - the timing and use of consultations;
  - the timing of commencement of an arbitration;
  - time limitations for commencing a claim (this being 3 years of when known or should reasonably have known of a claim);
  - sending a notice of intention to submit the claim;
  - a written waiver of right to pursue claims in domestic forums;
  - expressly providing that there is no diplomatic protection;
  - the appointment of arbitrators and requirements for their selection such as experience in international law or international investment law;
  - the ability to consolidate related claims;
  - the conduct of the arbitration such as hearing jurisdictional objections first;
  - the transparency of the arbitration proceedings;
  - the governing law (which was often overlooked in BITs); and
  - the requirements for the award.

These provisions go beyond the ISDS provisions that traditionally have been included in BITs.

Some of these provisions have been carried through to subsequent FTAs such as the FTAs with China (2009), Korea (2009), India (2014) and Hong Kong (2017).

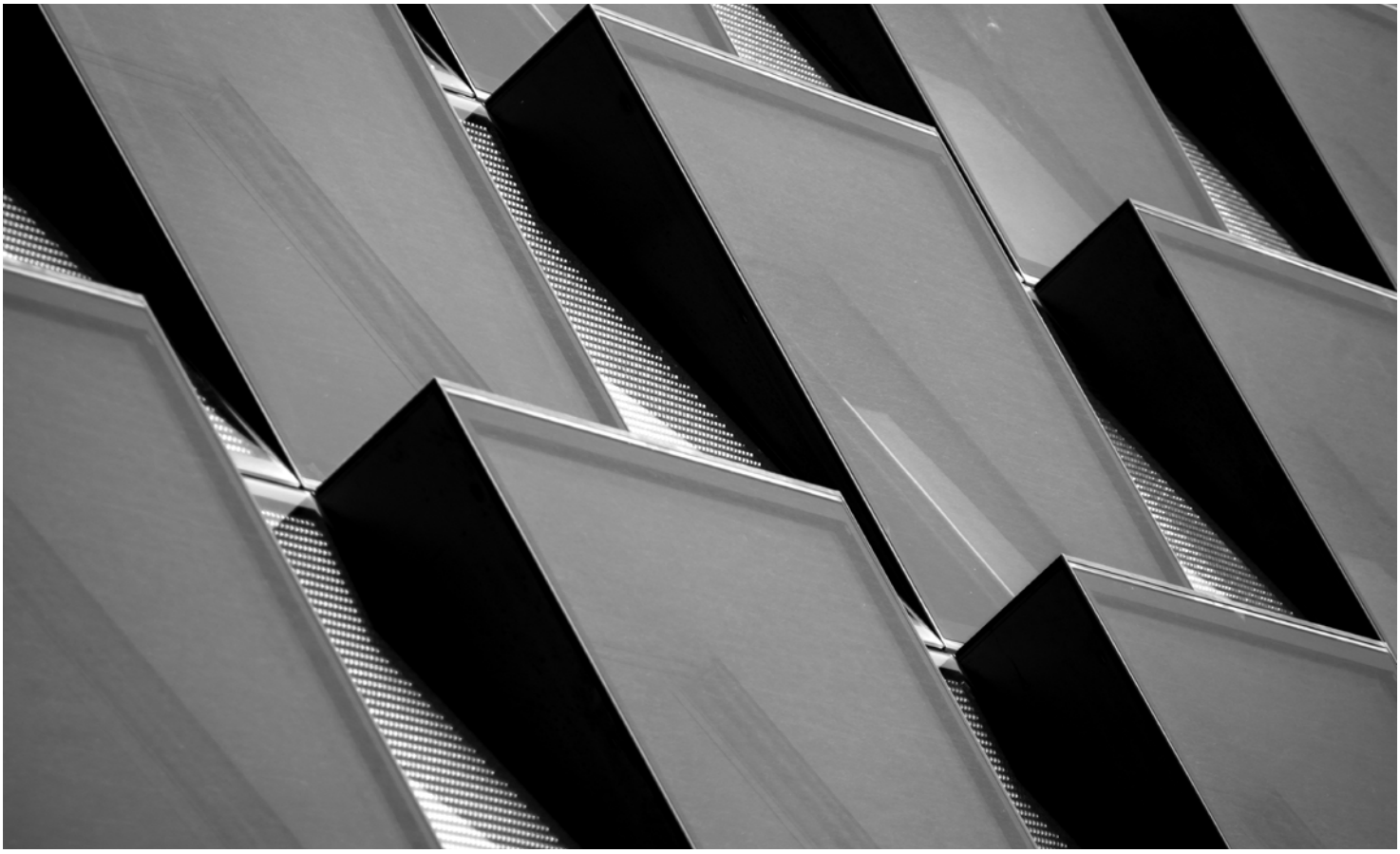
The AANZFTA has been invoked in a number of cases brought by foreign investors who are nationals of one of the AANZFTA parties against a host State who is an AANZFTA party. For example, Zeph Investments Pte Ltd, a Singapore investor which is a member of the Mineralogy group ultimately owned by Clive Palmer, an Australian national, has brought four cases against Australia in relation to iron ore mining project in Western Australia and a coal mining project and a proposed coal fired power plant Queensland.[2] It has been reported that the first case has been rejected by the arbitral tribunal though the award is not yet available.[3]

Recent multilateral investment treaties in Asia

After many years of negotiation, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) was signed in March 2018 and came into force in December 2018 between Australia,

2 *Zeph Investments Pte. Ltd. v. The Commonwealth of Australia (II)* (PCA Case No. 2023-67); *Zeph Investments Pte. Ltd. v. The Commonwealth of Australia (III)* (PCA Case No. 2024-23); and *Zeph Investments Pte. Ltd. v. The Commonwealth of Australia (IV)* (PCA Case No. 2024-48).

3 *Zeph Investments Pte. Ltd. v. The Commonwealth of Australia (I)* (PCA Case No. 2023-40).



Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. The United Kingdom joined the CPTPP in December 2024.

CPTPP includes similar provisions to the ASEAN FTAs. In addition to the provisions in the ASEAN FTAs, the CPTPP also includes:

- **Definition of investment** which requires that every kind of investment must have the characteristics of an investment (which are essentially based on the *Salini* test)[4] including:
  - commitment of capital or other resources;
  - the expectation of gain or profit;
  - the assumption of risk; and
  - not an order or judgment entered in a judicial or administrative action.
- **Minimum Standard of Treatment**: Article 9.6 is similar to Article 6 of AANZFTA in that treatment is to be in accordance with customary international law, including fair and equitable treatment and full protection and security. Article 9.6 also provides that relevant standard is limited to the customary international law minimum standard of treatment of aliens.
- **Expropriation excludes regulatory measures**: Article 9.16 provides that a State is not prevented from adopting, maintaining or enforcing any measure otherwise consistent with the Investment Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.
- **ISDS**: Articles 9.18 to 9.30 includes detailed provisions relating to the conduct of the arbitration, including provisions addressing consent of the Parties to the arbitration, the selection of arbitrators, transparency, the governing law and potential consolidation of arbitrations.

Three ICSID arbitrations have been commenced under the CPTPP. In December 2023, a Canadian investor commenced an arbitration against Mexico in relation to a mining project.[5] In October 2024, a Canadian investor commenced an arbitration against Mexico in relation to a renewable energy project[6] and in December 2024, an Australian investor commenced an arbitration against Canada in relation to a mining project.[7]

In November 2020, the Regional Comprehensive Economic Partnership (**RCEP**) was signed between ASEAN and other States, such as Australia, China, Japan, Korea and New Zealand. RCEP came into force on 1 January 2022. RCEP includes provisions to ensure fair and equitable treatment for investments (Article 10.5(1)) but does not include any ISDS provisions.

Similarly, the ASEAN Investment Facilitation Agreement, which was signed in 2021 but is not yet in force, does not include any investment provisions or ISDS provisions. However, it does seem to incorporate diplomatic protection as Article 5 provides that States are to assist investors in amicably resolving complaints or grievances to prevent the disputes from escalating.

4 *Salini Costrottori SPA v Kingdom of Morocco* (ICSID Case No. ARB/00/4).
5 *Caisse de dépôt et placement du Québec and CDP Groupe Infrastructures Inc. v. United Mexican States* (ICSID Case No. ARB/23/53).
6 *Almaden Minerals Ltd. and Almadex Minerals Ltd. v. United Mexican States* (ICSID Case No. ARB/24/23).
7 *Riversdale Resources Pty Ltd and Hancock Prospecting Pty Ltd v. Canada* (ICSID Case No. ARB/24/50).

Termination of BITs in Asia

There have been States in Asia, such as Indonesia and India, which similar to States in other regions, have terminated BITs.

Indonesia

In March 2014, Indonesia announced that it would terminate all 67 BITs. This announcement was made soon after Indonesia lost on jurisdiction in the ICSID arbitrations brought by Churchill Mining and Planet Mining.[8] Indonesia had argued that it had not consented to the jurisdiction of the ICSID Tribunal. This argument was rejected by the Tribunal.

Indonesia has only actually terminated BITs with 25 countries, these being Argentina, Australia, Belgium, Bulgaria, Cambodia, China, Denmark, Egypt, France, Germany, Hungary, India, Italy, Kyrgyzstan, Lao, Malaysia, Netherlands, Pakistan, Romania, Singapore, Slovakia, Spain, Switzerland, Turkey and Vietnam.

Indonesia has also continued to negotiate new treaties with a number of States, such as an FTA with Australia. However, the new treaties have addressed some key issues for Indonesia, such as consent by the State to the arbitration, the Tribunal being bound by the joint interpretation of the treaty by the States, which is included in the Australia-Indonesia FTA, and that investment cannot be established through illegal conduct such as fraudulent misrepresentation, concealment or corruption.

As a member of ASEAN, Indonesia is a party to the ASEAN Investment Agreements and FTAs. It is also a party to RCEP, which does not include ISDS. However, it is not a party to the CPTPP, which does include ISDS.

India

More than 30 investment arbitrations have been commenced against India since 2003. Whilst many of these have settled, there have also been a number of investment treaty cases which have resulted in awards ordering India to pay substantial amounts in damages, including cases brought by Devas Multimedia Private Limited,[9] Deutsche Telekom,[10] Vodafone,[11] Cairn Energy[12] and Vedanta Resources[13]. As a result of these cases, India revisited its BIT regime between 2012 and 2016. This resulted in the adoption of a new model BIT in December 2015 and the termination of many of the old BITs.

In March 2023, India issued termination notices for 68 BITs that had been entered into between 1993 and 2003 and requested these States to enter into new negotiations using India's 2015 Model BIT.

Since then India has negotiated a number of FTAs and other agreements, which include limited investment protections and often no ISDS provisions. For example, India has entered into the Comprehensive Economic Partnership Agreement with the UAE in May 2022, the India-Australia Economic Cooperation and Trade Agreement with Australia in December 2022, the Indo-Pacific Economic Framework for Prosperity Agreement relating to Supply Chain Resources in February 2024 and the Trade and Economic Partnership Agreement with the European Free Trade Association in March 2024.

Recent cases brought by APAC investors

Whilst there has been a gradual increase in the number of cases brought against APAC States, there has also been a growing number of cases brought by APAC investors. Investors from China, Indonesia, Malaysia, Japan, the Philippines and Korea have brought cases against States in and outside the APAC region.

There are currently nine pending ICSID arbitrations (or arbitrations being administered by ICSID) brought by Chinese investors against a diverse range of States including: Mexico relating to a mining concession[14] and Trinidad and Tobago relating to a steel industry project[15] in the Americas; Vietnam relating to a construction project,[16] Lao relating to the gaming industry[17] and Korea relating to a real estate project[18] in Asia; Sweden relating to a telecommunications licence[19] and Malta relating to a banking enterprise[20] in Europe; and Saudi Arabia relating to a telecommunications project[21] in the Middle East. There are three pending cases brought by Malaysian investors these being a case against South Sudan relating to the oil and gas industries,[22] Bahrain relating to banking and financial services[23] and Argentina relating to a toll concession[24]. There is one case brought by a Japanese investor against Spain brought under the Energy Charter Treaty in relation to renewable energy which is pending annulment proceedings.[25]

8 *Churchill Mining Plc and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No. ARB/12/14 and ICSID Case No. ARB/12/40).
9 *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India (I)* (PCA Case No. 2013-09).
10 *Deutsche Telekom AG v. The Republic of India* (PCA Case No. 2014-10).
11 *Vodafone International Holdings BV v. India (I)* (PCA Case No. 2016-35).
12 *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India* (PCA Case No. 2016-7).
13 *Vedanta Resources PLC v. The Republic of India (I)* (PCA Case No. 2016-05).
14 *Bacanora Lithium Limited, Sonora Lithium Ltd., and Ganfeng International Trading (Shanghai) Co. Ltd. v. United Mexican States* (ICSID Case No. ARB/24/21).
15 *China Machinery Engineering Corporation v. Republic of Trinidad and Tobago* (ICSID Case No. ARB/23/8).
16 *PowerChina HuaDong Engineering Corporation and China Railway 18th Bureau Group Company Ltd v. Socialist Republic of Viet Nam* (ICSID Case No. ADM/23/1).
17 *Sanum Investments Limited v. Lao People's Democratic Republic* (ICSID Case No. ADHOC/17/1).
18 *Fengzhen Min v. Republic of Korea* (ICSID Case No. ARB/20/26).
19 *Huawei Technologies Co., Ltd. v. Kingdom of Sweden* (ICSID Case No. ARB/22/2).
20 *Alpene Ltd v. Republic of Malta* (ICSID Case No. ARB/21/36).
21 *PCCW Cascade (Middle East) Ltd. v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/22/20).
22 *Petronas International Corporation Ltd v. Republic of South Sudan* (ICSID Case No. ARB/24/36), this case is currently suspended.
23 *Naftiran Intertrade Co. (NICO) Limited v. Kingdom of Bahrain* (ICSID Case No. ARB/22/34).
24 *IJM Corporation Berhad v. Argentine Republic* (ICSID Case No. ARB/23/52).
25 *ITOCHU Corporation v. Kingdom of Spain* (ICSID Case No. ARB/18/25).

In 2024, an Australian investor brought a case against the Philippines under the Australia-Philippines BIT relating to paper production services project[26] and a Philippine investor commenced a claim against Honduras under the Honduras Investment Law in relation to a port concession.[27] Two cases have recently been commenced by Korean investors, one commenced in 2023 against Nigeria under the Korea-Nigeria BIT in relation to an oil and gas project[28] and one commenced in 2025 against Panama under the Central America-Korea FTA in relation to a mining concession.[29]

In 2025, an Indonesian investor commenced a claim against Malaysia under the ASEAN Comprehensive Investment Agreement 2009 relating to a construction project[30].

Also, in 2025, an Australian investor commenced a claim against Myanmar under AANZFTA relating to a mining concession.[31] In addition, there are two pending cases brought by Australian investors against the Congo in relation to a lithium mining project, which has been suspended,[32] and Gambia in relation to a farming project, where the award is subject to annulment proceedings[33].

The recent increase in the number of claims brought by APAC investors indicates a growing awareness of ISDS as an avenue of recourse in the event that the host State interferes with a foreign investment and an applicable investment treaty is in place.

Future of ISDS in APAC

With the sustained high economic growth across many countries in APAC, we anticipate an increase in cross border investments by APAC investors. With rising awareness of ISDS as a mechanism for recourse, we anticipate seeing more potential investment claims and investment arbitration cases being brought by APAC investors where there has been interference, or a potential interference, with those investments by the host State and where there is an investment treaty available that provides relevant investment protections and ISDS provisions.

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26 *TMA Australia Pty Ltd and others v. Republic of the Philippines* (ICSID Case No. ARB/24/41).
27 *International Container Terminal Services Inc. v. Republic of Honduras* (ICSID Case No. ARB/24/34).
28 *Korea National Oil Corporation, KNOC Nigerian West Oil Company Limited, and KNOC Nigerian East Oil Company Limited v. Federal Republic of Nigeria* (ICSID Case No. ARB/23/19).
29 *Korea Mine Rehabilitation & Mineral Resources Corporation v. Republic of Panama* (ICSID Case No. ARB/25/20).
30 *Eka Tjandranegara v. Malaysia* (ICSID Case No. ARB/25/27).
31 *Bright Mountain Pty. Ltd. v. Republic of the Union of Myanmar* (ICSID Case No. ARB(AF)/25/1).
32 *AVZ International Pty Ltd., Dathcom Mining SA and Green Lithium Holdings Pte Ltd. v. Democratic Republic of the Congo* (ICSID Case No. ARB/23/20).
33 *West African Aquaculture Ltd, Kurt Lennart Hansson and Martje Bolt Hansson v. Republic of The Gambia* (ICSID Case No. ARB/18/10).

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ENGLISH COMMERCIAL COURT RULES THAT ASSIGNMENT OF ICSID AWARDS IS NOT PERMITTED

In a keenly awaited judgment, the English Commercial Court has ruled on appeal that ICSID and ECT arbitration awards are not assignable in the case of Operafund Eco-Invest SICAV plc and another v Spain [2025] EWHC 2874 (Comm).

In this article, we analyse the key issues involved in this case, namely:

- the issue of estoppel;
- the issue of assignment; and
- the effect of registration of the Award in accordance with the Arbitration (International Investments Disputes Act) 1966.

Notably, the Federal Court of Australia decided at a similar time a similar assignment issue involving overlapping parties, but decided in that case that the award could be assigned (the judgment is subject to appeal). Our Australian colleagues comment on this case in this edition of the IAQ.

Background

Between 2008 and 2009, Operafund Eco-Invest SICAV PLC and Schwab Holding AG (together, **Operafund**) invested in a number of solar energy plants in Spain, allegedly relying on representations made on behalf of Spain with respect to minimum tariffs and other incentives to be extended to renewable energy projects in Spain.

Operafund subsequently commenced ICSID arbitration proceedings against Spain whom it alleged had breached the terms of the *Energy Charter Treaty 1994* (**ECT**) by passing legislation which revoked relevant tariffs and incentives causing Operafund substantial loss. Operafund obtained a favourable award against the Kingdom of Spain in the sum of €29.3m (the **Award**).

Operafund, as existing claimants, and Blasket Renewable Investments LLC (**Blasket**) brought an application to substitute Blasket as claimant in the proceedings under English Civil Procedure Rule 19.2(4)(a), which provides that a court can order a new party to be substituted for an existing party if the existing party's interest or liability has passed to the new party. The application was brought on the basis that Blasket and Operafund had entered into an Assignment Agreement dated 31 January 2024 by which Operafund sought to assign its interests in the Award to Blasket. Spain opposed the application on the ground that the Award is not assignable as a matter of international law.

As mentioned, a similar issue had previously arisen between Blasket and Spain in proceedings brought before the Federal Court of Australia (the **Australian Proceedings**).[1] In the Australian Proceedings, the Federal Court of Australia resolved the assignability issue against Spain and granted the claimants' substitution application. The ruling of the Australian Proceedings remains subject to an appeal, and is analysed by our Australian colleagues on this edition of the IAQ.

The Estoppel Issue

The Operafund and Blasket (together, the **Claimants**) argued that the judgment in the Australian Proceedings created an issue of estoppel preventing Spain from arguing on the same point in this application.

In determining the estoppel issue, HHJ Pelling KC considered and applied the principles as summarised by Males LJ in *Hulley*[2] and Clarke LJ *Good Challenger*[3]. Namely, that for an issue of estoppel to arise based on the judgment in the Australian Proceedings, the judgment needed to be fall within English law rules on the recognition of foreign judgments.

Spain contended that the Australian Proceedings judgment was not capable of being registered in

1 *Blasket Renewable Investments LLC v the Kingdom of Spain* [2025] FCA 1028.
2 *Hulley Enterprises Ltd v Russian Federation* [2025] EWCA Civ 108.
3 *Good Challenger Navegante SA v Metalexportimport SA* [2004] 1 Lloyd's Rep 67.

England and Wales as the judgment was not final or binding and a final order had not yet been made. HHJ Pelling KC accepted this argument and concluded that the Claimants had failed to establish that Spain was estopped from putting forward arguments on the assignability issue because:

1. the judgment was not final and binding; and
2. by appearing in the Australian Proceedings to assert its state immunity, Spain had not submitted to the jurisdiction of the Australian Courts and therefore, section 33 of the Civil Jurisdiction and Judgments Act 1982 was not satisfied.

The Assignability Issue

The Claimants argued in the alternative that, if estoppel was not available, Spain's objection to the assignability of the Award should be rejected on its merits.

The Claimants contended that, absent an express prohibition on assignment in either the ICSID Convention or the ECT, and given that there is no other applicable principle of international law prohibiting assignment, non-parties are entitled to seek recognition and enforcement of ICSID awards. Spain argued that, on its proper construction, the ICSID Convention precludes ICSID awards being assignable without the express permission of the relevant state.

HHJ Pelling KC found that there is no consistent practice establishing a customary rule of international law setting out whether or not rights under treaties or conventions are or are not capable of assignment.

HHJ Pelling KC next turned to examining the proper construction of the ICSID Convention and the ECT by reference to the rules of interpretation set out in the *Vienna Convention on the Law of Treaties 1969*, noting first that the ICSID Convention does not contain an express provision permitting or prohibiting the assignment of ICSID Awards.

The Claimants placed emphasis on the wording of Article 54(2) of the ICSID Convention (set out below) and submitted that the phrase "*a party*" is used without limitation and therefore a person, other than a party to the dispute, is entitled to seek recognition and enforcement of an ICSID award.

> "*(2)* ***A party*** *seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. (...)*" (emphasis added)

HHJ Pelling KC analysed the use of the phrases "*the parties*" or "*a party*" throughout the text of the Convention and found that this was used interchangeably with the longer form "*party* [or parties] *to the dispute*" where the context in which the phrases are used clearly show that they relate back to or mean the parties to the arbitration in issue.

It was also held that the requirement within Article 54(2) to furnish a copy of the award to the competent court or authority also suggested that it was not contemplated that any party, other than a party to the dispute, would seek recognition and enforcement of an award since on the face of the award it could be binding only on the parties mentioned therein.

Additionally, Spain submitted that Article 15 of the ECT was inconsistent with the notion that the ECT allowed the general assignment of claims, awards, or judgments. Spain argued that if these rights were freely assignable under the ECT or customary international law, there would be no need for a requirement that the relevant Host Party recognise an assignment. The judge accepted that this analysis was correct.

HHJ Pelling KC concluded that as a matter of construction of the ICSID Convention, awards made in ICSID arbitrations are not capable of assignment and there is no customary international law rule, which provides that such awards are either assignable or not assignable.

The effect of registration of the Award in accordance with the *Arbitration (International Investments Disputes Act) 1966*

Finally, HHJ Pelling KC was asked to consider whether the rights accrued to the claimant from the inception of these proceedings were assignable as a matter of English law.

The Claimants submitted that rights accrued by the claimant following registration of the award under Section 2 of the *Arbitration (International Investments Disputes Act) 1966* were rights created pursuant to and governed by English law.

Spain contended that such registration of the award would not accord to the claimant rights that it did not otherwise have under the Award and therefore, rights arising as a result of registration are unassignable. HHJ Pelling KC found that registration under the 1966 Act was not intended to create new substantive rights and thus, the non-assignability of an Award would not be capable of change by registration.

Comment

This judgment casts some doubts over common market practice in assigning pecuniary interests in ICSID or ETC awards to third parties, as HHJ Pelling KC found that rights accruing under the ICSID or ECT award are personal and cannot be passed to a third party- and that this is not overwritten even where the award has been assigned.

In HHJ Pelling KC's opinion, the English court should give effect strictly to the ICSID Convention's framework and respect the decision of States to choose to arbitrate with specific investors, rather than the world at large.

1. the English Courts will not uphold the purported assignment of an ICSID or ECT award; and
2. the registration of an ICSID award will not create additional rights under English law, which can be assigned to a third party.

However, similar to the Australian proceedings, this Commercial Court decision is not the end of the saga. The case remains subject to appeal, and as HHJ Pelling KC observed, the judgment does not eliminate the secondary market for ICSID awards – it simply makes it less convenient. Blasket cannot enforce the award directly, but Operafund can still enforce it against Spain, while certain aspects of the assignment agreement between Blasket and Operafund continue to operate to help Blasket recover its investment.

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THINK BEFORE YOU ELEVATE: WHY TREATY ARBITRATION SHOULD NOT BE CONSIDERED A SECOND CHANCE

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The International Centre for Settlement of Investment Disputes (ICSID) has issued its final award in the long running dispute between international construction contractor Sacyr S.A. (Sacyr) and the Republic of Panama (Panama)[1]. The landmark investment treaty arbitration, arising from the Panama Canal Expansion Mega Project, followed multiple arbitrations brought under the contract and offers valuable lessons for contractors considering treaty arbitration against nation states when earlier contractual claims have failed. It is also a valuable reminder of the importance of validating site data and establishing a clear allocation of risk in construction contracts as to unforeseen site conditions.

Factual background and Sacyr's claims

This dispute arose out of the Panama Canal Expansion Project, specifically the Third Set of Locks Project (**TLP**). The TLP was a critical component of the canal's development, necessary for it to accommodate so called 'New Panamax' vessels. The TLP effectively doubled the canal's capacity.

Sacyr was part of a joint venture (**GUPC**) that entered into a design and build contract for the TLP works with the Panama Canal Authority (**ACP**). The TLP faced significant delays and cost overruns, reportedly driven by, amongst other things, unforeseen geotechnical conditions. Multiple ICC Arbitrations followed between GUPC and ACP, with ACP being successful in the majority of cases.

In 2018, Sacyr brought a claim of US$2.4 billion under UNCITRAL Rules through its minority interest in GUPC against Panama under the Spain-Panama Bilateral Investment Treaty of 1997 (**BIT**). Sacyr alleged that Panama – acting through ACP – breached key treaty obligations, including by failing to provide fair and equitable treatment and full protection and security for Sacyr's investment. Webuild, another GUPC partner, is currently involved in separate investment treaty proceedings against Panama in relation to the TLP worth US$2.2 billion.

Sacyr argued that Panama (acting through ACP) provided inaccurate and incomplete information at tender stage, specifically relating to geotechnical and seismic data. For example, Sacyr alleged that Panama withheld key documents recording previous dredging activity and which were necessary for Sacyr to establish its geotechnical assumptions for its cofferdam designs.

Sacyr also sought damages arising from Panama's post-tender conduct, alleging that these actions impaired its investment in breach of the BIT. Specifically, Sacyr claimed that Panama enacted arbitrary and discriminatory measures, such as increasing the minimum wage in a way that unfairly impacted Sacyr. Sacyr further argued that Panama failed to provide assistance during periods of civil unrest and industrial action, which contributed to additional delays and costs. According to Sacyr, this conduct amounted to Panama's failure to provide fair and equitable treatment and full protection and security of Sacyr's investment as required by the BIT.

Decision

In 2022, the arbitral tribunal found on a preliminary basis that the actions of ACP could be attributed to Panama as a matter of international law.

In the final award (which has yet to be published) the Tribunal appears to have reversed its preliminary decision and determined that Sacyr had failed to prove on the merits that ACP's actions could be attributed to Panama. The Tribunal has dismissed Sacyr's claims in their entirety.

1 UNCT/18/16. The Award has not been made public. For the purposes of drafting this article, we rely solely on media reports, the public statements of the Republic of Panama and other open-source information.

It found that Sacyr's claims were inadmissible as they were rooted in contractual disputes under the design and build contract rather than treaty breaches to be addressed in investment treaty proceedings. The Tribunal emphasised that the conduct complained of was commercial rather than sovereign and therefore Sacyr's claims could not be brought under the BIT. The actions of ACP could not be attributed to Panama as sovereign acts.

In any case, the Tribunal found that Sacyr did not prove its claims on the merits. In particular, it found that Sacyr's allegations of misrepresentation and the concealment of geotechnical and seismic data were unsubstantiated. The Tribunal also rejected Sacyr's position as regards Panama's failure to provide fair and equitable treatment; it said that, for example, Panama's increasing of the minimum wage was not discriminatory to Sacyr as other contractors on the TLP had not been treated more favourably.

The Tribunal ordered that Sacyr pay Panama's costs in the arbitration, totalling over US$6 million.

Comment

Large infrastructure and building projects are often cross-border in nature, involving parties from different jurisdictions. A key risk in such projects is exposure to actions by the host state where the project is located. In addition to pursuing claims under the construction contract, contractors may also bring claims under an investment treaty against the state or its state-owned entities, where appropriate. This may be possible, depending on the terms of the applicable investment treaty, if the contractor can demonstrate that the state (or state-owned entity) has:

- failed to fulfil its contractual obligations; and/or
- taken actions through public authorities that adversely impact the project; and/or
- expropriated property, assets, or the company; and/or
- through its courts, refused to enforce a valid commercial arbitration award without legitimate justification.

Construction contracts are generally considered to be "investments" under major bilateral investment treaties. However, whether an action exists under the investment treaty against the state entity would depend on the specific provisions of that treaty and whether the action taken by the entity is sovereign in nature or simply a contractual decision under the construction contract.

In this case, Sacyr failed to prove that the actions of ACP could be attributed to Panama. Further, the Tribunal determined that the actions of ACP were commercial in nature, and thus considered inadmissible as a treaty claim.

This award serves as a reminder to contractors pursuing claims in relation to state funded projects that the presence of an investment treaty will not necessarily allow it a second opportunity to pursue a contractual claim. In particular, if the contractor wishes to bring an investment treaty claim, it needs to prove that the actions of the state entity were in a sovereign capacity, rather than acting on a commercial basis under a contract.

This award is also a helpful reminder that contractors should carry out their own due diligence to verify the accuracy and robustness of site data provided by employers, particularly at the tender stage, and provide for appropriate contractual relief where actual conditions differ from the data provided during tender. Clear contractual drafting is essential in allocating responsibility for unforeseen site conditions and mitigating exposure to costly disputes.

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ISDS AT STAKE: HOW EU SANCTIONS ARE TESTING INVESTOR-STATE DISPUTE SETTLEMENT

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The European Union's sanctions against Russia have triggered a legal confrontation at the core of investor-state dispute settlement (ISDS). It raises the question of whether the EU can lawfully prevent investors from bringing arbitration claims under Bilateral Investment Treaties (BIT) in response to sanctions, and whether Member States can be held internationally liable for complying with EU sanctions. Belgium is already facing threats of arbitration over frozen Russian assets, while the Court of Justice of the European Union (CJEU) is preparing to rule on whether EU regulations restricting ISDS are compatible with international law.

ISDS threats against Belgium over Euroclear

Belgium is at the centre of this storm. Following Russia's invasion of Ukraine in 2022, Western states froze around USD 300 billion of Russian sovereign and private assets, most of them in Europe. Euroclear, the Brussels-based central securities depositary, holds about EUR 185 billion of those assets.

In September 2025, four Russian nationals, whose assets have been frozen by Euroclear in 2022 despite not being individually sanctioned, threatened Belgium with investment treaty claims,[1] sending trigger letters under the 1989 USSR-Belgium-Luxembourg Economic Union BIT.

They invoke the BIT's broad guarantee on "free transfer of funds" to request the release of their assets arguing that EU sanctions regime and the freeze of their assets violate Belgium's obligations under the BIT. Since the BIT provides for a six-month cooling off period before arbitration can be initiated under Stockholm Chamber of Commerce (**SCC**) or UNCITRAL rules, the arbitration proceedings have not yet been formally initiated.

Belgian officials recognise the seriousness of the situation. Foreign minister Maxime Prévot has warned that any new measures concerning the Euroclear assets must meet the highest level of "legal robustness".[2] He stressed that Belgium cannot unilaterally bear the consequences of potential claims arising out of EU regulations that could reach the size of Belgium's annual state budget.

Euroclear's CEO, Valérie Urbain, has likewise warned that further EU proposals to use or reinvest the frozen assets would amount to expropriation,[3] as they would prevent the owners from recovering their assets once sanctions are lifted.

The CJEU challenge

In parallel, Russian investors have filed proceedings before the CJEU to challenge the EU's 18th package of Russia sanctions introduced in July 2025.

In this package, Regulations 2025/1494 and 2025/1472 introduced two unprecedented measures:

- A prohibition on enforcing any ISDS award that relates to measures adopted under the EU's Russia sanctions regulations.
- A right for Member States to seek damages from investors who pursue such ISDS claims.

The EU presents these restrictive measures as a response to Russia's aggression in Ukraine.[4]

Pursuant to Article 215 of the Treaty on the functioning of the European Union (**TFEU**), the EU may impose restrictive measures in accordance with its Common Foreign and Security Policy, and Article 4(3)

1 Ballantyne, Jack. 2025. "Belgium Faces More Claims over Frozen Euroclear Assets." Global Arbitration Review, November 14.

2 Dubois, Laura, and Barbara Moens. "Belgium Open to Softening Stance on Frozen Russian Assets if EU Shares Risk." Financial Times, 10 September 2025.

3 Katanich, Doloresz. "Could the EU's Frozen-Assets Plan Really Destabilise European Bond Markets?" Euronews Business, 29 November 2025.

4 European Commission. "Holding Russia Accountable: EU Actions on International Crimes and Frozen Assets." European Union, 3 December 2025.

TFEU compels Member States to comply with such measures. In effect, this enables the EU to require Member States to implement sanctions, even in circumstances where such measures may conflict with their existing international treaty obligations.

So far, five actions for annulment under Article 263 of TFEU have been filed against the package's provisions designed to block ISDS claims.[5]

The investors argue that the new measures violate the New York Convention, the ICSID Convention, and the principle of good faith under the Vienna Convention on the Law of Treaties. They also invoke EU constitutional principles, such as sincere cooperation, legitimate expectations, and legal certainty, as well as rights under the European Convention on Human Rights, including non-discrimination, proportionality, and effective judicial protection.

Legal Implications for ISDS

This creates unavoidable tensions: EU law requires compliance with sanctions, while international law requires Member States to respect their treaty obligations. For that reason, the CJEU's decision will have far-reaching consequences.

If the CJEU annuls the ISDS-blocking measures, this will dismantle a key pillar of the EU's sanctions framework and reaffirm that Member States cannot disregard their BIT obligations because of unilateral EU action.

Belgium would then be exposed to a wave of investment arbitration claims, and arbitral tribunals would need to determine how to balance EU-mandated sanctions with the protections granted under pre-existing BITs.

Belgium has already sought protection from the EU against this risk. Prime Minister Bart De Wever has insisted that Belgium will not pay EUR 140 billion alone and demanded firm guarantees from other Member States.[6] In response, the European Commission has offered legally binding financial guarantees (initially EUR 140 billion and potentially rising to EUR 210 billion) to cover arbitration risks.[7] This would amount to an unprecedented risk-sharing mechanism, illustrating the intense pressure now placed on the EU's sanctions regime.

If, however, the CJEU upholds the ISDS-blocking measures, the EU's foreign policy authority would be significantly strengthened. The EU would be able to prioritise collective foreign policy, even at the expense of investor protections under BITs.

However, even in that scenario, Member States' international obligations remain. BITs continue to bind them under the Vienna Convention, and arbitral tribunals are unlikely to decline jurisdiction based on EU's prohibition on ISDS.

Conclusion

The ISDS threats against Belgium and the ongoing challenges before the CJEU highlight a crucial turning point in how EU sanctions interact with international investment protections. Belgium's exposure shows that complying with EU law does not shield Member States from liability under BITs. The CJEU's decision will determine whether the EU can lawfully restrict access to arbitration to safeguard its sanctions policy, or whether Member States must continue to bear the international consequences of measures they are bound to implement. Whatever the outcome, the decision will set a major precedent for how the EU balances foreign policy objectives with long-standing investment treaty commitments.

This also raises a broader question that remains largely unresolved: What is the legal status of frozen assets? EU sanctions prevent owners from using and controlling their assets, yet without formally transferring ownership or extinguishing their rights. But if, in practice, frozen assets amount to a lasting or irreversible loss of control, the boundary between a temporary restriction and an expropriation becomes blurred. This raises difficult questions: Could a custodian of frozen assets be held responsible if the assets are not returned? Could investors claim that such an outcome amounts to an expropriation under a BIT, giving rise to arbitration claims?

Exploring these issues shows how much the legal framework around EU sanctions remains unsettled. The CJEU's decision will not only shape the future of ISDS in the sanctions context, but it may also help define how far frozen assets can go before they amount to an expropriation.

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5 See Case T-640/25, Case T-655/25, Case T-679/25, Case T-698/25 and Case T-699/25.

6 Liboreiro, Jorge. "'Fundamentally Wrong': Belgian Prime Minister Doubles Down on Opposition to Reparations Loan." Euronews, 28 November 2025.

7 "EU pledges protection for Belgium over risks of using frozen Russian assets for Ukraine", TRT World, 18 November 2025.

FORUM SHOPPING, ILLEGALITY AND STATE RESISTANCE: INSIGHTS FROM *JASON YU SONG V PRC*

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In Jason *Yu Song v People's Republic of China*, investor-state arbitration proceedings took place in Geneva between a UK citizen and an alleged Chinese national and it appears that it is the first example of a Chinese citizen acquiring another nationality in order to seek protection under an international treaty and enter into investor-state proceedings. This matter is also a rare example of an investor-state dispute which China resisted unsuccessfully: China faces the prospect of paying a substantial Award to the claimant. More importantly, the lessons which can be gleaned about China's approach to investor-state disputes will be of great interest to the International Arbitration community in Asia and beyond.

Jason Yu Song v People's Republic of China (PCA Case No. 2019-39) relates to a set of investor-state disputes between a citizen of the United Kingdom of Great Britain and Northern Ireland (**UK**) and the People's Republic of China (**China**) which were administered by the Permanent Court of Arbitration and seated in Geneva.

By decisions dated 17 April and 26 June 2025, the Swiss Federal Supreme Court (**Swiss Court**) dismissed China's requests to set aside an interim arbitral Award on jurisdiction under the 1986 China-UK Bilateral Investment Treaty (**BIT**).

This case is significant for a number of reasons:

- It appears to be the first case in which a Chinese national acquired another nationality to seek protection under BIT and thereafter entered into investor-state proceedings[1].
- The Final Award issued by the Permanent Court of Arbitration in January 2025 ordered China to pay approximately US$26 million to the claimant[2]. When interest and costs are added to that sum, the Final Award is worth over US$60 million.[3] This is therefore a significant ruling and appears to be the first investor-state dispute settlement (**ISDS**) award of this magnitude made against China[4].
- This is one of a handful of investor-state disputes in which China is the respondent. From the procedural history detailed below, one can see how vehemently China resisted the claim, giving International Arbitration practitioners and claimants alike a valuable insight into China's attitude and tactics when resisting an investor-state dispute.

China has appealed the Final Award, and as at the date of publication of this article, the appeal was pending before the Swiss Court.

Background

The dispute arose with Yu Song claiming that China unlawfully expropriated land rights held by B Ltd in Shaanxi Province without compensation and in breach of the BIT. The arbitral tribunal was established in 2019. Jurisdiction was under dispute throughout the set of proceedings. The tribunal upheld jurisdiction over the case in the interim Award issued on 30 December 2021. On 23 January 2024, China filed its first appeal on points of law with the Swiss Court against the jurisdictional decision of the tribunal on 30 December 2021, on the basis of newly discovered evidence based on Article 190a(1)(a) of the Swiss Federal Act on Private International Law (**PILA**) (4A_46/2024). The Swiss Court dismissed the application in its judgment of 17 April 2025. China also made application to the tribunal for reconsideration of its Decision

1 中国政府国际投资争端解决策略——如何应对自然人国籍变更的挑战, published by Allbright on 19 August 2025 (assessed on 19 November 2025).

2 Decision 4A_528/2024, Swiss Federal Supreme Court, 26 June 2025 [E].

3 China suffers first loss in ISDS case, published by Global Arbitration Review on 22 July 2025 (accessed on 19 November 2025).

4 Kevin Warburton and Curtis Pak, 'China (including the Hong Kong and Macao SARs)' in Julien Fouret (ed), *Enforcement of Investment Treaty Arbitration Awards*, (3rd edn, Global Law and Business 2026) (forthcoming).

on Jurisdiction. The request was rejected on 12 April 2024. China filed a further request for an appeal on points of law for the Swiss Court to set aside the jurisdictional decision of the tribunal and that the matter be referred back to the tribunal for a new decision on jurisdiction on 4 October 2024 (4A_528/2024). This led to the judgement dated 26 June 2025. The arbitral tribunal rendered its Final Award on 24 January 2025, finding that China violated Art 5 of the BIT and ordered China to pay damages of US$ 26,045,613.90 plus interests. China filed an appeal against the Final Award (4A_100/2025) which is now pending.

Forum Shopping?

In 4A_46/2024, China argued that it had subsequently discovered three crucial pieces of evidence, which it was unable to present during the arbitration, and that their consideration would have led to a different jurisdictional Award[5]. Two pieces of evidence could allegedly show that Yu Song acquired British citizenship solely to assert claims against China under the BIT[6]. The evidence was found inadmissible due to time bar[7].

The case pattern exposes deeper problems where natural persons or legal entities change nationalities artificially to take advantage of investor-state disputes mechanisms.

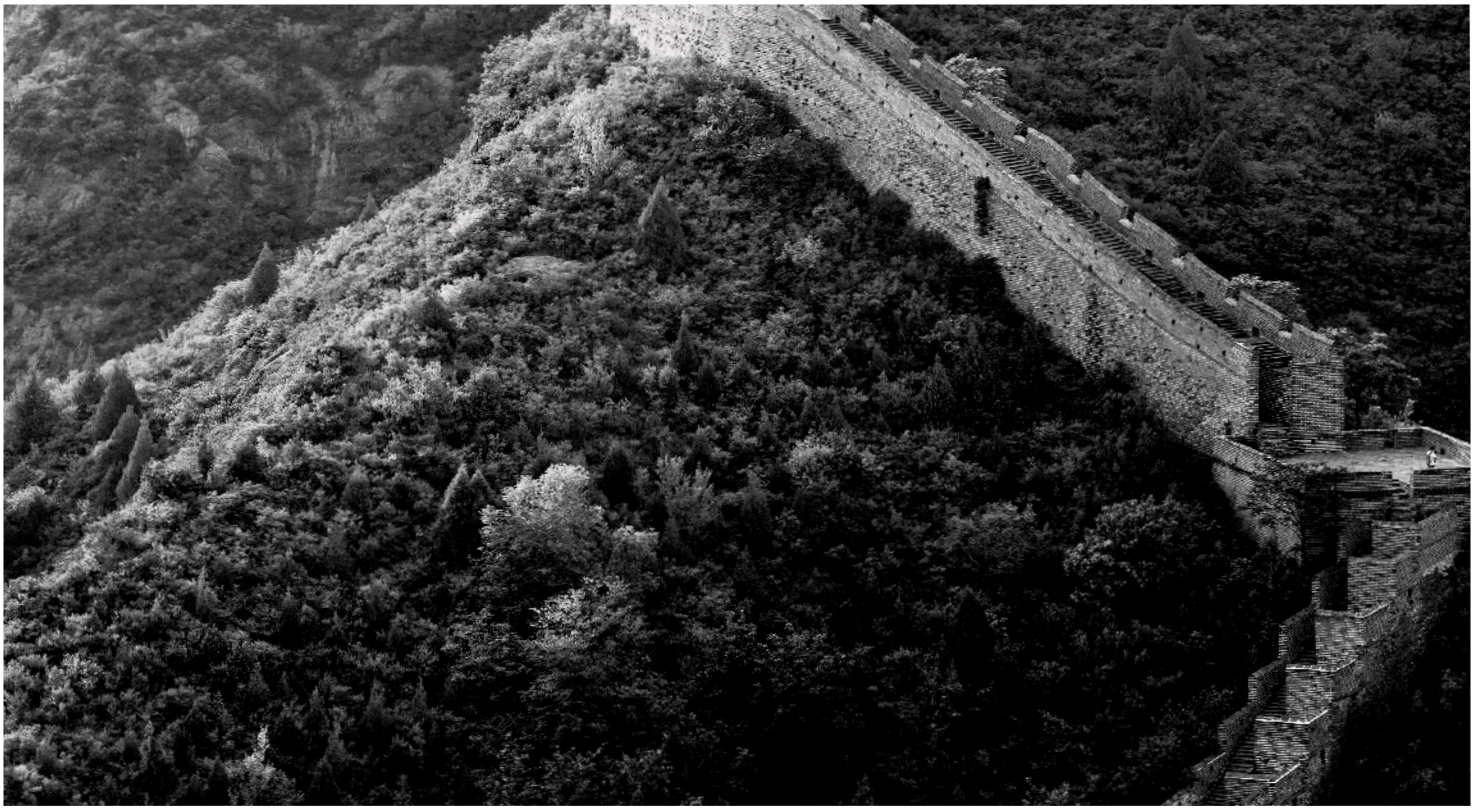
While neither forum shopping nor treaty planning per se is regarded as abusive, these activities are limited by the general requirements regarding the jurisdiction of arbitral tribunals and the admissibility of treaty claims[8]. A ground for limiting forum shopping or treaty planning is the temporal rule, where it was said that investors can only claim protection with regards to breaches taking place after they become protected under the international treaties[9].

Another ground is to refuse treaty protection to investments made in an abusive manner[10]. In the context of structuring investments such that protection could be afforded under international treaties, the general position is that if a specific dispute is already foreseeable at the time when restructuring takes place, such corporate restructuring would be an abusive conduct such that jurisdiction may be denied[11]. In other cases, the standard was expressed as there being a 'very high probability'[12] or 'reasonable prospect'[13] that the host State will adopt incriminated measures.

Phoenix Action Ltd. v. Czech Republic is an example of cases where an investment was found not to have been made in good faith and constituted an abuse of the ICSID system due to forum shopping[14]. The case concerned a Czech national who owned 2 Czech companies, one burdened with civil litigation and the other involved with problems with the tax and customs authorities that led to seizure of all its assets. The Czech national fled to Israel and established a new company that acquired all the shares from these two Czech companies from his family members. Further, there was no economic activity in this new company at the time and after the investment. The claim was brought before ICSID by the new company under the Czech–Israeli BIT (1997). The tribunal considered different factors such the timing of the investment, the initial request to ICSID, the timing of the claim, the substance of the transaction in which the investor purchased and transferred its investment, and the nature of the investment's operations[15] and found that '*the unique goal of the investment was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty.*'[16] And this kind of transaction was found not to be bona fide and not protected under the ICSID system.

Going back to the *Jason Yu Song* case, we have limited information from public sources. As mentioned, the Award is not published. However, if we consider the temporal rule, the rule on prohibition of abuse and factors in *Phoenix Action Ltd* (though that was an ICSID case), it is arguable that the outcome of jurisdictional Award might have been different if procedural rules had been complied with. This also goes to show the importance of finding reliable local counsel in investor-state disputes to help navigate laws of the domestic court.

5 Decision 4A_46/2024, Swiss Federal Supreme Court, 17 April 2025 [5.2].
6 *Ibid.*
7 Decision 4A_46/2024, Swiss Federal Supreme Court, 17 April 2025 [5.4].
8 Forum Shopping: Investment Arbitration, published by Oxford Public International Law on (assessed on 19 November 2025).
9 *Ibid, citing Gallus, 2009, 8.*
10 Forum Shopping: Investment Arbitration, published by Oxford Public International Law on (assessed on 19 November 2025).
11 *Ibid, citing Tidewater Inc and others v Venezuela*, Decision on Jurisdiction, 8 February 2013, ICSID Case No ARB/10/5 [185].
12 *Ibid, citing Philip Morris Asia Ltd v Commonwealth of Australia*, Award on Jurisdiction, 17 December 2015, PCA Case No 2012-12 [539] [554].
13 *Phoenix Action Ltd v Czech Republic*, Award, 15 April 2009, ICSID Case No ARB/06/5.
14 *Phoenix Action Ltd v Czech Republic*, Award, 15 April 2009, ICSID Case No ARB/06/5 [135]-[144].
15 *Phoenix Action Ltd v Czech Republic*, Award, 15 April 2009, ICSID Case No ARB/06/5 [135]-[144].
16 *Phoenix Action Ltd v Czech Republic*, Award, 15 April 2009, ICSID Case No ARB/06/5 [142].



Illegality of the investment

Another dramatic turn of events in the *Jason Yu Song* case is where China, again, requested to set aside the Award on Jurisdiction, citing evidence subsequently discovered in the form of a criminal judgment of the PRC Court (under Article 190a(1)(a) of PILA) and that the arbitral Award was tainted by a felony or misdemeanour (under Article 190a(1)(b) of PILA)[17].

Article 190a(1)(b) of PILA warrants more attention. The rule provides that application for revision of an arbitration decision may be filed if criminal proceedings have shown that the arbitral decision was influenced by a felony or misdemeanour to the detriment of the party concerned[18]. This case operates within Swiss law and does not directly deal with the doctrine of investment illegality in international investment law. The Swiss Court found that a conviction by a criminal court is not required[19]. Given the satisfaction of procedural safeguards such as compliance with Article 6(2) and (3) of the ECHR and Article 14(2)-(7) of the ICCPR, it is irrelevant that the criminal proceedings were conducted abroad[20]. What is decisive is the finding of a causal link between the criminal offence and the arbitral decision which the appeal was sought[21]. Specifically, the criminal offence must have had a direct or indirect impact on the award to the detriment of the applicant[22]. The decision of the criminal court must also show the objective requirements for a felony or misdemeanour to be met[23]. Nonetheless, the arbitral tribunal is not bound by the criminal judgment rendered in the context of the same facts[24].

In *Jason Yu Song*, the illegality ground was dismissed with the Swiss Court finding that there is insufficient causal link between the proven criminal offence and the jurisdictional Award[25].

Amongst other policy considerations, the illegality ground demonstrates the limits of an international investment agreement's protection: Only investments made in accordance with the laws of the host State will be protected.

Commentary

Of all the investor-state dispute cases made against China, *Jason Yu Song* is the only claim which proceeded to a Final Award[26]. The outcome of those other cases and the procedural history in Jason Yu Song makes it clear that China will not easily concede defeat. There is much to be learned from.

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17 Decision 4A_528/2024, Swiss Federal Supreme Court, 26 June 2025 [3].
18 Decision 4A_528/2024, Swiss Federal Supreme Court, 26 June 2025 [5.1].
19 *Ibid.*
20 *Ibid.*
21 *Ibid.*
22 *Ibid.*
23 *Ibid.*
24 *Ibid.*
25 Decision 4A_528/2024, Swiss Federal Supreme Court, 26 June 2025 [5.3].
26 Kevin Warburton and Curtis Pak, 'China (including the Hong Kong and Macao SARs)' in Julien Fouret (ed), *Enforcement of Investment Treaty Arbitration Awards*, (3rd edn, Global Law and Business 2026) (forthcoming).

REVISED PRC ARBITRATION LAW INTRODUCES MAJOR REFORMS

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Long-awaited revisions to China's Arbitration Law have been published, which include modernisation of China's arbitration regime and the explicit adoption of concepts and procedures which will be familiar to the international arbitration community. These changes to China's arbitration law align the PRC's regime more closely with standard international arbitration practice, making China a more attractive, and accessible, seat of arbitration. At the same time, the Revised Law seeks to open the jurisdiction to the international arbitration community, a development which may have a significant impact on arbitration in China and beyond.

Background

The Arbitration Law of the People's Republic of China (**Arbitration Law**) was first adopted on 31 August 1994. Although the Arbitration Law was amended in 2009 and 2017, reform of China's arbitration regime was, according to some commentators, long overdue. Various draft amendments had been proposed over the years which also caused uncertainty as to the future of arbitration in China, as did questions over whether China would adopt the UNCITRAL Model Law.

China's Revised Arbitration Law

On 12 September 2025, the Arbitration Law of the People's Republic of China (2025 Revision) (**Revised Law**) was adopted[1]. The Revised Law has 8 chapters, containing a total of 96 articles, and comes into effect on 1 March 2026[2]. In this article we explore aspects of the Revised Law which, in our view, will be of interest to the global international arbitration community and to parties who engage in arbitration in China.

Online Arbitration

Arbitration in China has taken place online for many years. For example, the arbitral rules published by the China International Economic and Trade Arbitration Commission (**CIETAC**) included rules regulating online arbitration as far back as 2009. Online arbitration proved popular in China and in 2024 CIETAC administered 1,766 remote hearings.[3] The Revised Law expressly permits online arbitration (unless the parties expressly disagree), and online arbitration activities have the same legal effect as face to face activities.[4] The use of information technology (e.g., service by email) and remote hearings during arbitral proceedings has many benefits, including reduced costs, delay and carbon footprint. This aspect of the Revised law will therefore be welcomed by the global arbitration community and by parties alike.

Arbitration Agreements: Deemed Existence

Article 27 of the Revised Law deals with the terms of arbitration agreements and goes on to state that if one party asserts that an arbitration agreement exists when applying for arbitration, the other party must deny that the agreement exists before the first hearing, or the arbitration agreement shall be deemed (regarded) to exist.[5]

Early disposal of disputes over the existence of an arbitration agreement will enable claimants to proceed with their claims swiftly, particularly where there is no written arbitration agreement, and avoid such argument being deployed by respondents to delay the inevitable and/or exhaust the claimant's funding.

On the other hand, respondents will need to bear this provision in mind and clearly set out their position

1 You can access the official Chinese version of the Revised Law here.
2 Revised Law, Article 96.
3 CIETAC 2024 Work Report and 2025 Work Plan, published by CIETAC (accessed 17 September 2025).
4 Revised Law, Article 11.
5 Revised Law, Article 27.

– at an early stage – if they intend to argue that the arbitration agreement relied by the claimant does not, in fact, exist and/or was not entered into by the parties.

Arbitration Agreements: Separability and 'Kompetenz-Kompetenz'

The Revised Law confirms that the validity of an agreement in which the parties agreed to arbitrate disputes arising out of a specific contract (**arbitration agreement**) is not affected by the effectiveness, modification, invalidity or revocation of that contract.[6] The Arbitration Law (2017 Revision) included a similar provision, which the Revised Law has expanded upon.

Arbitration tribunals will be empowered by the Revised Law to confirm the validity of the arbitration agreement and the Revised Law sets out the process whereby parties can request a decision from the tribunal – or a ruling from the People's Court.[7] This party-led approach is pragmatic, commercial and will be familiar to the international arbitration community, given that it is in line with the position elsewhere.

The 2021 State Council Public Consultation Draft featured broader drafting, which embraced the concept of *Kompetenz-Kompetenz* more fully. Under Article 28 of the Draft, questions regarding the existence, validity and effectiveness of the arbitration agreement as well as the arbitration panel's jurisdiction to hear the dispute, would have been decided by the arbitral tribunal,[8] whereas the Revised Law takes a more conservative stance.

Preservation Measures

The Revised Law makes available, for the first time, that interim measures to preserve assets and evidence and/or restrain certain conduct (i.e., injunctive relief) are available before parties commence arbitration.[9] Conduct preservation is another new feature of the Revised Law, aligning itself with the availability of conduct preservation in PRC court proceedings under the Civil Procedure Law of the People's Republic of China.[10]

Emergency relief is also available, upon application by parties to the People's Court.[11]

In addition, arbitral tribunals will be empowered to collect their own evidence and request assistance with collection of evidence from relevant authorities.[12]

Service of Arbitration Documents

There has been discussion around the frequency with which PRC courts agree to set aside or refuse to enforce arbitral awards due to defects in the service of arbitration documents.[13]

The Revised Law states that:

> *"An arbitration document shall be served in a reasonable manner agreed upon by the parties; if the parties have no such agreement or the agreement is unclear,* ***the arbitration document shall be served in the manner prescribed by the rules of arbitration****."*[14] *(emphasis added)*

The Revised Law therefore provides a "*fail safe*" mechanism, applying the service requirements set out in the applicable arbitral institute's rules.

Arbitral institutions update their rules frequently, to remain an institution of choice, so their service rules tend to keep up with developments in modern technology, which is another benefit.

Setting Aside Awards: Time Limits

Under the Revised Law, parties will only have three months from the date

6 Revised Law, Article 30.
7 Revised Law, Article 31.
8 中华人民共和国仲裁法（修订）（征求意见稿）, published by the Ministry of Justice of the People's Republic of China on 30 July 2021 (accessed 19 September 2025).
9 Revised Law, Article 39, Article 58.
10 Revised Law, Article 39, Article 82.
11 Revised Law, Articles 39, 58.
12 Revised Law, Article 55.
13 新修订的《仲裁法》对实务的重要影响, published by Zhihu on 16 September 2025 (assessed 17 September 2025).
14 Revised Law, Art 41.

of receipt of the arbitration award to file set aside applications[15], rather than the six months allowed under the current regime.

This is a significant reduction and one which parties and lawyers alike should bear in mind, lest they miss the opportunity to set aside a valuable award. On the other hand, this reform will result in disputes being disposed of swiftly, providing certainty and finality, and will be welcomed on that basis.

Foreign-Related Disputes: Expanded Scope of 'Foreign-Related Disputes'

China's arbitration regime defines "*foreign-related disputes*" as "*arbitration of disputes arising from economic, trade, transportation and maritime activities involving a foreign element*"[16].

The Revised Law will extend this definition significantly to include "*and other foreign-related disputes*"[17], which will increase access to provisions which only apply to arbitration of foreign-related disputes[18].

Foreign-Related Disputes: Seat of Arbitration

The Revised Law empowers parties who are arbitrating a foreign-related dispute to choose the seat of arbitration[19]. This provision also clarifies that the 'seat of arbitration' dictates the law applicable to the arbitration proceedings and the court which has jurisdiction to hear any disputes arising from it (e.g., set aside or enforcement applications).

Significantly, this provision explicitly adds the concept of "*seat of arbitration*" to Chinese arbitration law, which is welcome clarification.

Foreign-Related Disputes: Recognition & Enforcement

The Revised Law permits recognition and enforcement of arbitral awards made outside Mainland China[20]. Rules setting out how jurisdiction is established are based on concepts which will be familiar to the international arbitration community, such as the domicile of the award debtor, location of assets and "*an appropriate connection*" to the matters in dispute and the Revised Law explicitly requires Chinese courts to act in accordance with international treaties to which China is a party "*or on the principle of reciprocity*".

Foreign-Related Disputes: Ad Hoc Arbitration in Foreign-Related Disputes

The Revised Law will permit entities formed and registered in designated locations to engage in ad hoc arbitration of foreign-related disputes[21].

Ad hoc arbitration is not formally recognised under China's current arbitration regime, albeit pilot schemes were trialled in certain areas (e.g., free trade zones)[22], so this development – which respects party autonomy and provides enhanced flexibility and efficiency – will be welcomed by the international arbitration community and parties alike.

Opening Up: International Ambitions

The Revised Law encourages Chinese arbitration institutions to open offices on foreign soil and permits foreign arbitration institutions to open in certain, designated, areas in China (e.g., free trade pilot zones) – on the proviso that foreign institutes "*carry out foreign-related arbitration activities in accordance with the relevant provisions issued by the state*"[23].

Commentary

The Revised Law represents a major development in China's arbitration law, modernising the regime, respecting parties' autonomy and incorporating concepts which are familiar to the international arbitration community.

This will foster trust in the Chinese arbitral regime and make arbitration in China more attractive, especially to foreign parties.

It is clear that the PRC aspires to continue to develop reputation as a respected arbitration seat of choice for international disputes, building on its experience as a centre for domestic arbitration.

Looking forward, as is the norm in China legislative amendments will be followed by judicial interpretation or other guidance at some stage. It may be that previous guidance will no longer be applicable. As a result, this new legislation is likely the first step in continued reform of China's arbitral regime.

We will monitor developments closely and provide further updates and analysis in due course.

Cotrina Fung, Trainee Solicitor, assisted in the preparation of this briefing.

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15 Revised Law, Article 72.
16 Arbitration Law of the People's Republic of China (2017) Article 65.
17 Revised Law, Article 78.
18 Chapter VII of the Revised Law '**Special Provisions for Arbitration Involving Foreign Elements**' deals with, for example, preservation of evidence, seat of arbitration, set aside and recognition and enforcement of arbitral awards.
19 Revised Law, Article 81.
20 Revised Law, Article 88.
21 Revised Law, Article 82.
22 See Development and practice of ad hoc arbitration in mainland China, published by Global Arbitration Review on 15 May 2025 (accessed 19 September 2025).
23 Revised Law, Article 86.

HFW EVENTS AND SPEAKING ENGAGEMENTS

Events

- London Arbitration week was held between 04 – 11 December 2025
- Australian Arbitration Week was held in Sydney between 12 – 17 October 2025.
- Dubai Arbitration Week was held between 10 – 14 November 2025.
- HFW hosted the Solomonic Panel and Drinks reception in our London office in November 2025.
- Dan Perera and Nick Longley hosted an APAC Arbitration Webinar series on 'Psychological Warfare; Mind Games in Arbitration'
- Jo Delaney, Peter Sadler and Tom Hutchison hosted an APAC Arbitration Webinar Series – Energy Transition and Renewable Energy Disputes
- HFW Sydney & Burford co-hosted a seminar during Australian Arbitration Week 'Armed and dangerous – opportunities and challenges in third party funding of construction disputes'. Sean Marriott was the moderator and Nick Longley featured as a panellist. See link to LinkedIn post here.
- HFW Sydney & ICSID co-hosted a seminar during Australian Arbitration Week 'The gathering storm – Investor State Arbitration in the APAC energy transition and lessons learned from other regions'. Sean Marriott was the moderator, and Jo Delaney featured as a panellist. See link to LinkedIn post here.
- HFW Dubai co-hosted two sessions with Serle Court during Dubai Arbitration Week
  - Nick Braganza spoke at Session 1: The Court Practitioner's Toolkit: How to Effectively Utilise the DIFC and ADGM Courts in International Arbitration. Other speakers included Zoe O'Sullivan KC, Gregor Hogan, Stephen Doherty (Serle Court Chambers)
  - James Plant and Junaid Tariq spoke at Session 2: Maximising Financial Recovery from Construction Claims through Arbitration, with a panel including David Dellar (Ankura) and Sanjay Patel KC (4 Pump Court)
- HFW Dubai's Slava Kyriushin participated in the Kroll Mock Arbitration for Kids at the DIFC Courts, marking the unofficial start of Dubai Arbitration Week. This unique event brought together disputes partners and experts from various law firms, helping the next generation understand our work.

Speaking Arrangements

- Dan Perera spoke at London Arbitration Week, as part of a panel on 'The New Trade Wars: Navigating Tariffs, Sanctions and Arbitration across borders'
- Jo Delaney was part of a panel on 'From Bricks to Bench: Navigating the Complexities of Construction Arbitration' at the ICC India Arbitration Conference in Mumbai on 14 November 2025.
- Helen Lee and James Plant spoke at the Seoul ADR Festival 2025, on the topic of NEOM, Reform, and Disputes in the Desert: Can SCCA Win Global Trust? See link to LinkedIn post here.

Thought Leadership

- Choosing London Arbitration – is your award final and binding, written by Michael Buffham. Read the insight here.

TEAM NEWS

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Thought Leaders

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Partner
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Highly Recommended

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