FENWICK ELLIOTT

The construction & energy law specialists

Issue 41 – October 2025

International Quarterly

International Quarterly provides informative and practical information regarding legal and commercial developments in construction and energy sectors around the world.

Inside this issue:

- The Arbitration Act 2025: a new era for UK arbitration?
- Collateral Attacks under the Arbitration Act: lessons learnt from *Deinon v Reen*
- State immunity and the execution of investment treaty arbitral awards against state assets
- This town ain't big enough for the two of us: *Eletson Gas LLC v A Limited & Ors*

www.fenwickelliott.com

Welcome to Issue 41

Jeremy Glover
Partner
jglover@fenwickelliott.com

Welcome to our latest edition of *International Quarterly* which highlights issues important to international arbitration and projects.

In our 41st issue, we begin with a look at the Arbitration Act 2025 (the "**2025 Act**"), which came into force on 1 August this year and amends the Arbitration Act 1996 (the "**1996 Act**"). The 2025 Act seeks to strengthen the UK's position as an arbitral seat and to modernise aspects of the legal framework that applies to arbitration as a method of dispute resolution. Sam Thyne and Rhea Yactine assess what has changed with the 2025 Act and what effects it will have on arbitration in the UK.

We then turn to a recent case handed down in the weeks before the 2025 Act went into effect. Jonathan Clarke reviews *Deinon Insurance Brokers LLC v Reen*, which was subject to the 1996 Act, and considers what lessons can be learnt from this case as the UK moves into a new legislative landscape.

Sana Mahmud then examines a *Zhongshan Fucheng Industrial Investment Co Ltd v The Federal Republic of Nigeria*. This case, heard before the British Virgin Islands Commercial Court, confirmed that a state's written commitment in a bilateral investment treaty to enforce arbitral awards may be understood as agreeing not only to the execution of such awards but also to execution against state assets in cases where the treaty does not explicitly differentiate between enforcement and execution.

Finally, Layla Blair and Freddy Ashe take a closer look at *Eletson Gas LLC v A Limited & Ors*. The judgment provides clarification on points of principle regarding the recognition and enforcement of foreign arbitral awards and holds significance for practitioners both in the UK and internationally, particularly those in New York Convention signatory states.

If there are any areas you would like us to feature in our next edition, please let me know.

Jeremy

News and Events

News

This year marks the tenth anniversary of Fenwick Elliott's Dubai office – a decade of supporting clients across the Middle East with first-class construction and energy law expertise. We are proud to celebrate this milestone and extend our thanks to our clients, colleagues and partners for their continued trust and collaboration.

Events

Partner Claire King is taking part in this year's **Adjudication Society Annual Conference** on 20 November, where she will moderate a panel on "Client Insights". *Click here* for more information or to register to attend.

We are the strategic sponsor of the annual **FIDIC Contract Users' Conference and Awards**, which returns to London from 1-5 December. Jeremy Glover will be speaking at the launch of the FIDIC Carbon Management Guide. More information on the session can be viewed *here*. We hope to see you there. Please email *events@fenwickelliott.com* if you would like to arrange a meeting over the course of the conference.

We are teaming up with **AIA-Arbit under 40** to host a December breakfast panel discussion among representatives of different arbitral institutions. More details will be available soon.

Webinars

Fenwick Elliott hosts regular webinars that address key issues and topics affecting the construction industry. To watch our previous webinars on demand, *click here*.

As well as our hosted webinar series, many of our specialist lawyers also contribute to webinars and events organised by leading industry organisations, where they are asked to share their knowledge and expertise of construction and energy law and provide updates on a wide range of topical legal issues.

We also are happy to organise webinars, events and workshops elsewhere. We are regularly invited to speak to external audiences about industry specific topics including FIDIC, dispute avoidance, BIM, digital design and technology.

If you would like to enquire about organising a webinar or event with some of our team of specialist lawyers, please contact Stacy Sinclair (*ssinclair@fenwickelliott.com*). We are always happy to tailor an event to suit your needs.

This publication

We aim to provide you with articles that are informative and useful to your daily role. We are always interested to hear your feedback and would welcome suggestions regarding any aspects of construction, energy or engineering sector that you would like us to cover. Please contact Jeremy Glover with any suggestions (jglover@fenwickelliott.com).

The Arbitration Act 2025: a new era for UK arbitration?

Sam Thyne
Senior Associate
sthyne@fenwickelliott.com

Rhea Yactine
Paralegal

In the world of international contracting, when contracting parties enter into an arbitration agreement, they agree on a seat of the arbitration (or should).[1] The choice of seat requires careful thought, especially where the parties are from different jurisdictions.

The Arbitration Act 2025 (the "**2025 Act**") came into force on 1 August 2025 and amends the Arbitration Act 1996 (the "**1996 Act**") with the goal of strengthening the United Kingdom's position as an arbitral seat, by modernising aspects of the legal framework that applies to the popular dispute resolution method.[2]

Key considerations for choosing a seat include its reliability and how arbitration friendly the applicable law will be. Several of the changes made to the 2025 Act are aimed at clearing up areas of ambiguity that have arisen. It is hoped that the 2025 Act will make dispute resolution clearer, fairer, more efficient, effective and economical – and that these changes will attract parties to nominate London as their arbitral seat.

What has changed and what are the effects on arbitration in the UK?

Applicable Law

The 2025 Act clarifies that the law applicable to an arbitration agreement is the law the parties agreed upon or, where the parties have not agreed on a jurisdiction, the law of the seat of the arbitration.

This change has addressed an area of substantial ambiguity, as highlighted in *Enka v Chubb*[3] where the parties had not specified the law that governs their arbitration agreement. The Supreme Court ruled in this case that if parties have not specified the law that governs their arbitration agreement, then the governing law of the contract applies.

The 2025 Act now clarifies that the law governing the contract is not necessarily considered an agreement that this law also applies to the arbitration agreement. This change encourages parties to be diligent when drafting their agreements to limit the possibility of potential disputes and streamline the arbitral process.

The 2025 Act also introduces an express carve-out for investor-state arbitration agreements to ensure that they are governed by the relevant rules and regulations of international law, and to avoid the risk of conflicting with the investor-state's intention, where it may not wish English law to govern its disputes.

Arbitrators' Impartiality: Duty of Disclosure

The 2025 Act also aims to limit the circumstances in which an arbitrator's impartiality might be doubted, by imposing a duty of disclosure on arbitrators. This section codifies the Supreme Court's judgment in *Halliburton v Chubb*[4] (previously covered in *International Quarterly*, Issue 38) where the Supreme Court ruled that arbitrators have a duty of disclosure under English law.

Immunity of Arbitrators

Arbitrators who resign now benefit from immunity, except for situations where the resignation is considered "*unreasonable*". The 2025 Act also grants arbitrators who have been removed by the court, immunity from incurring the costs of court proceedings except where it was proven the arbitrator acted in bad faith.

These amendments encourage arbitrators to act independently without apprehending any cost or liability consequences, thereby fostering fairness in the arbitral process.

Emergency Arbitrators

Emergency arbitrators have been given the authority to make peremptory orders and grant parties permission to

Footnotes

1. To see what complications arise when contracting parties do not agree on a seat of arbitration, see "*The Importance of Choosing an Arbitral Seat for the Parties*" and "*International arbitration: governing law*".
2. *https://www.gov.uk/government/news/boost-for-uk-economy-as-arbitration-act-receives-royal-assent*
3. [2020] UKSC 38.
4. [2020] UKSC 48.
5. *https://iccwbo.org/news-publications/news/icc-dispute-resolution-statistics-2024/*

apply to court for a section 44 order. Section 44 provides that an English court may make orders in support of arbitral proceedings against third parties. With emergency arbitrations becoming more widespread, this amendment was a welcome change to the 1996 Act, giving emergency arbitrators the same authority as other arbitrators and further promoting trust in the arbitral process.

Powers of Summary Disposal

The 2025 Act now allows the parties to apply for an expedited procedure to give the tribunal power to make an award on a summary basis, where the tribunal considers there is no real prospect of success in the claim, defence or the relevant issue. Although there is no specific procedure for deciding whether there is 'no real prospect of success', parties and the tribunal could look to the English Civil Procedure Rules and LCIA rules when deciding an award on a summary basis. Parties can choose to opt out of this in their Arbitration Agreement or by a later agreement. This amendment to the 1996 Act was brought in an effort to promote efficiency in the arbitral process.

Jurisdictional Challenges

Under the 1996 Act, a party who objected on jurisdiction during the arbitration could challenge the award on jurisdictional grounds, which would often lead to new evidence being brought to the courts and a re-hearing of the same issues argued before the tribunal. The 2025 Act now forbids the parties from raising new grounds of objection, new evidence and arguing the same issues heard by the tribunal, unless they meet the requirements of a "*reasonable diligence test*". The 2025 Act also gives the Civil Procedure Rule Committee authority to limit jurisdictional challenges from becoming full re-hearings by creating new rules. The aim of this amendment is to limit costs and boost effectiveness in arbitration by eliminating unnecessary delays and challenges.

The amendments introduced to the 1996 Act by the 2025 Act aim to improve dispute resolution by making it more transparent, equitable, and accessible. The 2025 Act seeks to enhance the efficiency and effectiveness of the process, ensuring that cases are handled in a timely and cost-effective manner.

Looking ahead – Arbitration in the UK under the 2025 Act

These reforms strive to create an up to date, more streamlined and effective legal framework for resolving disputes, with the aim of continuing London's position as a leader in international arbitration. But will it work in convincing parties to nominate London as their seat?

The ICC International Court of Arbitration's 2024 published data revealed that the most frequently selected places of arbitration (for disputes under the ICC rules) were cities in the United Kingdom (96 cases), France (91), Switzerland (83), and the United States (72), followed by the United Arab Emirates (38), Spain (33), Brazil and Mexico (30 each), Singapore (28), and Germany (20).[5] Notably the United Kingdom was the most popular seat. However, where it was not, was the difference between parties nominating the United Kingdom and another jurisdiction concerns about niche legal ambiguities? Or was it other practical considerations, such as cost, geographical proximity, ease of obtaining visitor visas for witnesses, or perhaps even cuisine preference of the parties' negotiators?

Whether the changes will work in attracting more London seated arbitrations remains to be seen. Construction projects can run many years, and parties are inclined to hold off arbitrating until the conclusion of their projects. It could be years before disputes under arbitration agreements drafted now, under the new regime, find their way before arbitrators.

Jonathan Clarke
Associate
jclarke@fenwickelliott.com

Collateral Attacks under the Arbitration Act: lessons learnt from *Deinon v Reen*

Deinon Insurance Brokers LLC v Reen [2025] EWHC 1263 (Comm)

With the Arbitration Act 2025 coming fully into force on 1 August 2025 (the "**2025 Act**"), this is an opportune moment to take a closer look at a recent arbitral decision under its predecessor, the Arbitration Act 1996 (the "**1996 Act**"), and consider what lessons can be learnt from this case as we move into a new legislative landscape.

Introduction

"*Without prejudice*" privilege is recognised in several common law jurisdictions. The "*without prejudice*" principle offers protection against certain communications made during the course of negotiations or discussions concerning settlement. It prevents these statements from being used as evidence in court or other legal proceedings, specifically against the party who made the "*without prejudice*" statement. The purpose of this principle is to encourage open, honest and unreserved discussions between parties in an attempt to resolve and settle disputes without the fear that communications will later be held against parties later on in the proceedings.

Facts

There were two English-seated arbitration proceedings between Deinon and Mr Reen, and between Deinon and KMDH as a result of a dispute about the repayment of certain underlying loan agreements. Mr Reen and KMDH contested the enforceability of these loan agreements but were ultimately found liable to Deinon. In total, there were four arbitration awards in Deinon's favour.

Following unsuccessful attempts to challenge these awards, Deinon applied to the English Court, pursuant to s.66 Arbitration Act 1996 (the "**1996 Act**"), to register and enforce the arbitration awards as though they were judgments of the English Court. The Court issued six enforcement orders and money judgments were entered in Deinon's favour in the terms of the awards.

Mr Reen and KMDH then sought a stay of enforcement. Their basis for the stay application was that unless a stay was granted there was a real risk of prejudice. The applicants claimed that Deinon was currently under the control of Mr Mahmood Khairaz ("**Mr Khairaz**") who wrongly claimed to be Deinon's beneficial owner, and procured it to bring the proceedings which led to the Awards and Orders. The Applicants said that Mr Khairaz's status as Deinon's beneficial owner (and therefore his ability to exert control over Deinon's conduct and affairs) was being challenged by Mr Eric Dastur ("**Mr Dastur**") in ongoing proceedings in Dubai.

It was said that if Mr Dastur is found by the Dubai court to be the true beneficial owner of Deinon, then the Orders would not be enforced against the applicants. However, it was claimed that if monies are paid to Deinon before the Dubai proceedings were resolved, there was a risk that those monies: (a) may be appropriated and dissipated by Mr Khairaz; and (b) would not therefore be available to be returned to the Applicants.

Lessons Learnt

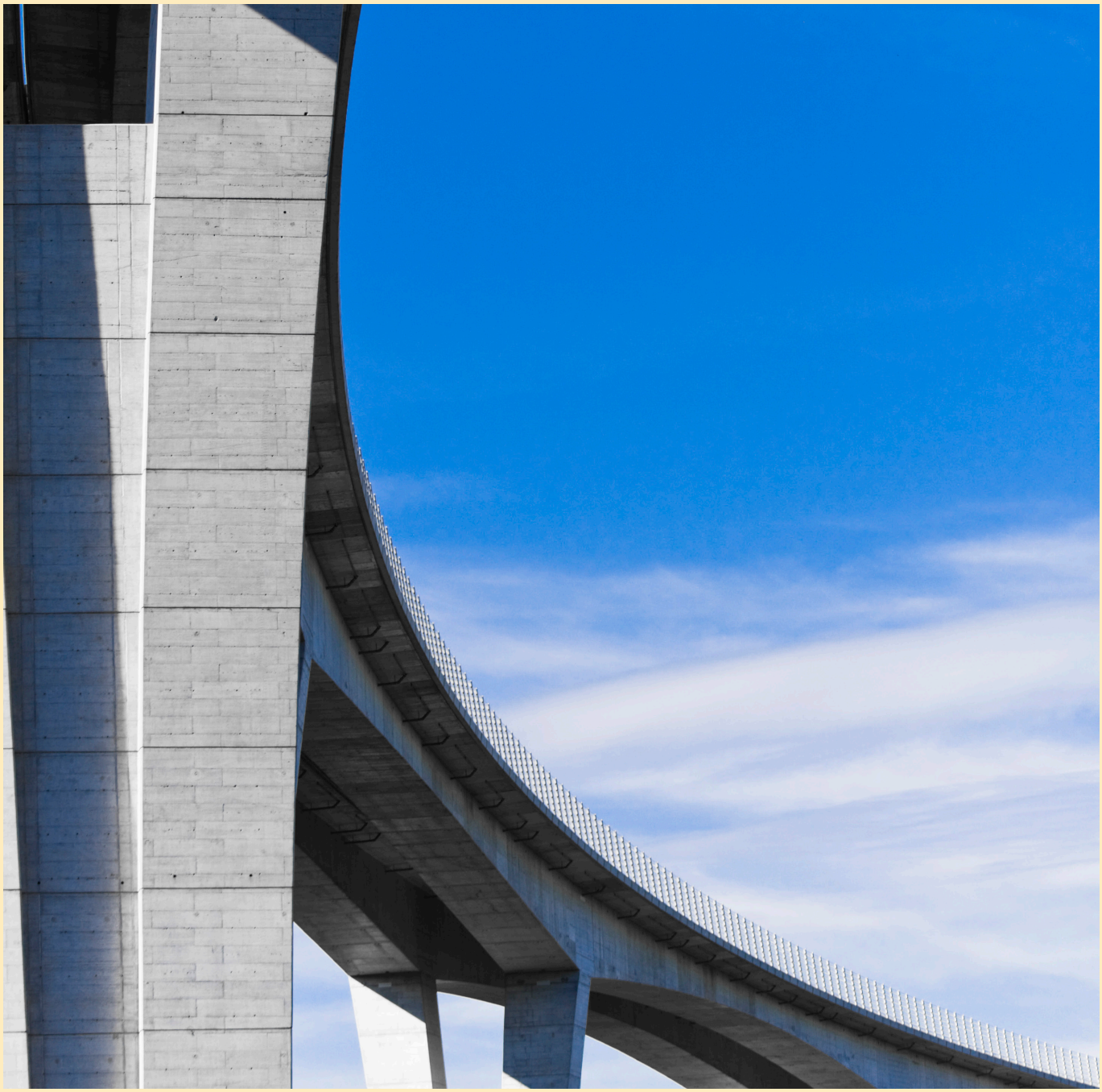
Although the legal principle of a collateral attack is not mentioned in the 1996 Act, nor in the updated 2025 Act, this case reiterates the established line of case law that flows from the decision in *C v D* [2007] EWHC 1541, which confirms that attempts to nullify the result of an arbitration via foreign

proceedings should be rejected as oppressive conduct amounting to a collateral attack.

The English Courts have consistently taken a narrow remit on challenges to arbitral awards. For example, the 2023-2024 Commercial Court Report, shows that the number of Section 68 challenges under the 1996 Act rose 34%, but out of 37 applications, none succeeded. The position was similar for jurisdiction challenges under Section 67 of the 1996 Act and appeals on a point of law under Section 69. While the number of applications rose 242% for Section 67 challenges and 40% for Section 69 appeals, there was only one successful challenge under Section 67 and one successful appeal pursuant to Section 69.

Looking forwards, this trend is only like to continue (and perhaps become even more pronounced) under the 2025 Act. This is because the 2025 Act is introducing a new procedure for Section 67 challenges whereby the Court will adopt a narrower scope for this type of challenge and not consider any new grounds of objection or any new evidence (subject to a reasonable diligence test), nor will the Court allow evidence already heard by the original arbitral tribunal to be relitigated as part of a challenge.

Thus, the 2025 Act is re-emphasising the importance of finality of arbitral awards. Cases such as Deinon v. Reen are likely to be entertained even less by the English Courts in the future.



Sana Mahmud
Senior Associate
smahmud@fenwickelliott.com

State immunity and the execution of investment treaty arbitral awards against state assets

Zhongshan Fucheng Industrial Investment Co Ltd v The Federal Republic of Nigeria

This British Virgin Islands ("**BVI**") Commercial Court case confirms that a state's written undertaking in a bilateral investment treaty ("**BIT**") to enforce arbitral awards may be understood as agreeing not only to the recognition of such awards, but also to execution against state assets, provided the treaty does not expressly differentiate between enforcement and execution.

The case concerned the execution of an arbitral award by Zhongshan Fucheng Industrial Investment Co Ltd ("**Zhongshan**") against property of the Federal Republic of Nigeria ("**Nigeria**"). Zhongshan applied to the BVI court for a final attachment of debts order attaching a debt of £20 million payable by Process & Industrial Developments Ltd to Nigeria. Nigeria contested the order on the basis of state immunity under the State Immunity Act 1978 ("**SIA**").

The Facts

Zhongshan, a Chinese company, qualified as an investor under a bilateral investment treaty ("**BIT**") signed in 2001 between China and Nigeria. The BIT was designed for the reciprocal promotion and protection of investments between the two countries and specifically included arbitration as a dispute resolution mechanism for disputes arising from investments made under the treaty.

Around June 2007, Ogun State, an arm of the Nigerian government, entered into a joint venture with Chinese entities to develop a Free Trade Zone in Ogun State. Zhongshan and its related companies made substantial investments in this Free Trade Zone and played a key role in its development. By the end of 2015, the Free Trade Zone had approximately 4,900 employees and 60 tenants, indicating significant operational success.

However, in May 2016, Nigeria initiated steps to terminate its arrangements with Zhongshan and evict it from the Free Trade Zone. This action by Nigeria effectively amounted to an expropriation of Zhongshan's assets, resulting in substantial losses and damage to Zhongshan.

On 30 August 2018, Zhongshan commenced arbitration proceedings against Nigeria under the BIT, seeking damages and relief for the expropriation. Although Zhongshan was not a direct party to the BIT, as a qualified investor it benefited from its protections and dispute mechanisms. The arbitral tribunal dismissed Nigeria's jurisdictional objections and assumed jurisdiction over the dispute.

A final award was issued on 26 March 2021, with the tribunal ordering the Federal Republic of Nigeria to pay Zhongshan:

- US$55.6 million as compensation for expropriation;
- US$75,000 as moral damages; and
- Interest and legal costs.

As of 14 December 2023, the outstanding amount on the award (including interest) had accumulated to US$73,413,608 and £3,232,076. Nigeria had made no payments to Zhongshan pursuant to the award, and all amounts remained outstanding.

In response to Nigeria's non-payment, Zhongshan initiated enforcement proceedings in the BVI

in January 2022. Zhongshan sought recognition and enforcement of the arbitration award as a court judgment. The BVI court issued an order on 15 February 2022 recognising the award and making it enforceable as a judgment in the amounts of US$65,075,000 and £2,864,445 (including interest) in the BVI.

Following the BVI court order, additional unrelated proceedings against Nigeria emerged: Process & Industrial Developments Ltd ("**PIDL**"), a BVI company, owed £20 million to Nigeria following a separate arbitration. Nigeria had applied to set aside the award, and the English court granted an order to that effect. In a further related hearing on 8 December 2023 in open court PIDL was ordered to pay £20 million to Nigeria within 28 days as an interim payment on account of the latter's costs. The £20 million was not paid and remained a debt owing to Nigeria by PIDL (the "**Third-Party Debt**").

Subsequently, Zhongshan sought to attach the Third-Party Debt in partial satisfaction of the outstanding enforcement order. The court granted a provisional attachment of debts order in March 2024, barring PIDL from paying Nigeria until final determination of the attachment of debts application. Service on Nigeria was challenged on technical grounds, but ultimately Nigeria withdrew its challenge, allowing the application for final attachment of debt to proceed.

The issues

Nigeria disputed Zhongshan's entitlement to an attachment of debts order against the Third-Party Debt on the basis that it was property belonging to Nigeria and it is immune from execution under the SIA.

As a state, Nigeria was entitled to enforcement immunity against its property under subsection 2(b) of the SIA. However, that immunity was subject to certain exceptions, including that a process of enforcement can be issued with the written consent of the state. Such consent may be contained in a prior agreement and may be general or specific (subsection 3 of the SIA).

Zhongshan relied on primarily this exception to argue that the Third-Party Debt was subject to enforcement to recover at least a part of the judgment debt in the enforcement order. Zhongshan argued that Nigeria had consented in writing to enforcement and execution of the enforcement order under article 9.6 of the BIT by which Nigeria committed itself to the enforcement of an award arising out of the BIT arbitration proceedings. Zhongshan relied on the decision in *General Dynamics United Kingdom Ltd v State of Libya*.

Nigeria argued that it did not consent to its property being subject to the execution of an award under the BIT or otherwise, and that the better source for deciding whether Nigeria consented within the meaning of subsection (3) of the SIA was the ICSID Convention, which made a clear distinction between enforcement and execution. If Nigeria had consented, which was denied, it was to the enforcement of the enforcement order, not execution.

Consequently, the BVI court, amongst other matters, had to decide whether:

1. The Third-Party Debt (being the property of Nigeria) was immune from execution under section 13(2)(b) of the SIA, as extended to the BVI. This involved determining if any relevant exceptions to immunity applied.
2. Nigeria, by virtue of the wording in Article 9(6) of the BIT, had given the necessary written consent for its property to be subject to enforcement and execution, as required to displace state immunity under the SIA.
3. The commitment to "*enforcement*" of arbitral awards in the BIT also entailed "*execution*" (e.g., attachment of assets), or whether these concepts are distinct such that only recognition/enforcement (not asset seizure) is permitted without further or clearer waiver of immunity. This involved comparing the BIT's language to other treaties, such as the ICSID Convention, which explicitly distinguishes between enforcement and execution.

Decision

The court held that Nigeria had, through the BIT, expressly consented to the enforcement and execution of arbitral awards against its property as contemplated by section 13(3) of the SIA. The distinction drawn in the ICSID Convention between enforcement and execution was deemed inapplicable to the BIT, and the court interpreted "*enforcement*" to include execution measures such as attachment of debt orders.

Section 13 of the SIA granted immunity to states from enforcement measures against their property but contained exceptions for circumstances where the state has consented to enforcement (section 13(3)).

Article 9(6) of the BIT dealt with the decision-making process and provided that:

> "*The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding upon both parties to the dispute.* ***Both Contracting Parties shall commit themselves to the enforcement of the award***" [Emphasis added].

The court found that the addition of the final sentence above showed that the contracting parties to BIT (Nigeria and China) committed themselves to the additional step of enforcing awards made in BIT arbitration proceedings. This was tantamount to Nigeria saying that it consented to the enforcement of awards made in BIT arbitration proceedings, including the process of execution against state property. The court found that it was not necessary to include the word

execution in Article 9.6 because execution was by necessary implication included in the word enforcement.

The court referred to *General Dynamics v State of Libya*, adopting the rationale that terms such as "enforceable" in the treaty context were not limited to mere judicial recognition but extended to actual enforcement and execution measures, unless expressly limited. Furthermore, as the original treaty arbitration was not conducted in accordance with the ICSID Convention, the court distinguished the BIT from it, emphasising that, unlike the ICSID Convention (which bifurcates enforcement and execution in articles 54 and 55), the BIT did not draw such a distinction, nor did it restrict enforcement to exclude execution. The court highlighted that the inclusion of "*enforcement*" in the BIT without differentiating execution was a deliberate choice by the drafters, especially as they were evidently familiar with the ICSID Convention, which was explicitly referenced elsewhere in the BIT.

The court accepted that Nigeria, in acceding to the BIT, had given written consent within the meaning of section 13(3) of the SIA to enforcement (including execution) against its property to satisfy BIT-sourced arbitral awards.

Accordingly, the court found that Zhongshan was entitled to proceed with execution pursuant to section 13(3) SIA as Nigeria had waived its immunity under the BIT. The court made the provisional attachment of debts order final, subject to an interim stay pending application for a full stay of execution.

Analysis

This case was very fact specific in that:

1. The asset against which execution was sought was a third-party debt, which only came to light as a result of court proceedings in another jurisdiction;
2. The arbitration under which the award was issued was not conducted under the ICSID Convention, and there was no clear distinction between "*enforcement*" and "*execution*" in the underlying BIT; and
3. State immunity in the BVI was governed by the UK SIA, as extended to BVI.

However, some general points can still be drawn from the judgment. When seeking execution of an arbitral award under a BIT against a state's assets where the state resists execution on the basis of state immunity, consideration should be given to any exceptions to state immunity provided for in the relevant jurisdiction's applicable legislation.

The decision clarifies that a state's written commitment in a BIT to "*enforcement*" of arbitral awards may be interpreted as consent not only to recognition, but also to execution against state property, provided the treaty language does not distinguish between enforcement and execution. The wording of relevant treaties should be reviewed to assess whether such consent exists and whether it extends to execution measures such as attachment of debt orders.

For example, where a treaty arbitration is not conducted under the ICSID Convention resulting in an award requiring execution, careful consideration should be given to the wording of the dispute resolution provisions in the relevant BIT. These should be reviewed to ensure clarity on terms like "*enforcement*" and "*execution*", as there is a risk that courts may interpret these broadly in the absence of explicit limitations. This judgment, alongside *General Dynamics United Kingdom Ltd v State of Libya*, is useful precedent for cases where the underlying BIT does not make such a distinction.

This town ain't big enough for the two of us: *Eletson Gas LLC v A Limited & Ors*

Layla Blair
Associate
lblair@fenwickelliott.com

Freddy Ashe
Trainee

Eletson Gas LLC v A Limited & Ors [2025] EWHC 1855 (Comm) concerns an application made under section 32 of the Arbitration Act 1996 (the "**1996 Act**") to determine the jurisdiction of an arbitral tribunal. This case holds significance for arbitration practitioners both in the UK and internationally, particularly those in New York Convention[1] signatory states. It provides important clarification on key principles governing the recognition and enforcement of foreign arbitral awards in the UK, while also offering important guidance on a range of factual, procedural, and foreign law issues.

A dispute arose between the parties, broadly split into two groups - one group constituting the fourth to eighth defendants, and the second constituting the ninth and tenth defendants. Each group claimed to constitute the duly appointed officers of Eletson Gas LLC ("**Eletson Gas**"). The first to third defendants are the owners of three oil tankers, who had entered into a bareboat charter with Eletson Gas that included an option to purchase the tankers on the purchase option date.

Each group (i.e. the fourth to eighth defendants, and the ninth and tenth defendants) had served a purchase option notice on behalf of the Eletson Gas board to purchase each of the three oil tankers. The dispute was referred to arbitration in London (pursuant to the agreement with Eletson Gas and the first to third defendants) where both groups simultaneously appointed arbitrators on behalf of Eletson Gas. This gave rise to a further dispute regarding which group was entitled to appoint an arbitrator on behalf of Eletson Gas. The ninth and tenth defendants commenced the section 32 proceedings to determine which group was entitled to appoint an arbitrator on behalf of Eletson Gas.

JAMS Arbitration

The hostility between the two rival groups dated back to an arbitration commenced in the US in 2022 to resolve a dispute to determine whether shares in Eletson Gas had been sold to a company associated with the fourth to eighth defendants ("**Levona**") (the "**JAMS arbitration**")

After commencement of the JAMS arbitration, but before it had been completed, three petitioning creditors filed Chapter 7 bankruptcy proceedings[2] against Eletson Holdings Limited - the claimant in the JAMS arbitration and holder of the common shares in Eletson Gas. Levona maintained in the JAMS arbitration that the effect of this was to impose a mandatory stay on the JAMS arbitration. The JAMS arbitration was stayed to allow for the decision of the Bankruptcy Court. The Bankruptcy Court found that Levona owned the preferred shares.

The Bankruptcy Court then made an order which had the effect of lifting, in part, the statutory stay imposed so as to permit the JAMS arbitration to continue.

The final award in the JAMS arbitration found that Eletson Holdings Limited and Eletson Corporation (controlled by the ninth and tenth defendants) succeeded; Levona had no membership interest in Eletson Gas ("**JAMS award**"). Eletson Holdings commenced confirmation proceedings in the US District Court. These proceedings are broadly equivalent to making an award enforceable as if it were a judgment of the Court.

Levona applied to vacate the JAMS award on the ground of fraud, based on documents that had been reluctantly disclosed by Eletson.

Footnotes

1. The New York Convention or the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) applies to the recognition and enforcement of arbitral awards in other countries.
2. Chapter 7 proceedings are liquidation bankruptcy proceedings which do not anticipate a restructure or reorganisation.
3. Chapter 11 proceedings are restructuring bankruptcy proceedings (i.e. commenced by a company looking to reorganise its debts and continue trading).

Bankruptcy Proceedings

The Chapter 7 proceedings were converted to Chapter 11 proceedings.[3] The Bankruptcy Court then approved a Chapter 11 Plan proposed by the petitioning creditors for Eletson Holdings.

The effect of the Chapter 11 Plan was to replace the board of Eletson Holdings with a new board, made up of parties within the first group of defendants. This new board, in its first act, removed defendants nine and ten as directors of Eletson Holdings, and appointed defendant eight in their place. The ninth and tenth defendants disputed the validity of the Chapter 11 Plan.

The Eletson Gas Board

The board of Eletson Gas was therefore made up of directors appointed by the two groups of shareholders:

1. Two directors were appointed by the holders of the common shares, Eletson Holdings; and
2. Up to four directors who were to be appointed by the holders of the preferred shares.

Each group of defendants contended that their associated interests controlled all the shares and therefore they were entitled to appoint the full board of Eletson Gas, and to appoint or remove officers of the company as they saw fit.

Issues for Resolution

The two issues for resolution before the Commercial Court (in deciding who had control of Eletson Gas) were:

1. who controlled Eletson Holdings (as the agreed holder of the common shares); and
2. who controlled the preferred shares in Eletson Gas (and, crucially, whether this was the ninth and tenth defendants and their nominees).

On the first issue, Judge Pelling KC decided that the Chapter 11 Plan provided that the previous board of Eletson Holdings was deemed to have resigned and that from that date defendants seven and eight (and a Mr Matthews) were Eletson Holdings' directors.

The real issue in these proceedings was who the Court should conclude has control of the preferred shares. The key issue on which this question turned was whether the preferred shares were transferred to the companies represented by the ninth and tenth defendants.

The fourth to eighth defendants contended that the ninth and tenth defendants were not entitled to rely upon the JAMS award. The fourth to eighth defendants challenged the

reliance on the JAMS award on the basis that:

- no application had been made by the ninth and tenth defendants for an order under section 101 of the AA in the UK recognising the JAMS award;
- the ninth and tenth defendants were not parties to the JAMS award and therefore could not seek recognition of the award;
- the formal requirements for recognition had not been satisfied; and
- even if the ninth and tenth defendants were entitled to apply for recognition of the JAMS award, on a proper analysis, the JAMS award was not binding on the parties to these proceedings, had been suspended in the US and/or because recognition should be stayed pending resolution of the application to set aside the JAMS award for fraud.

The Court had to consider whether the ninth and tenth defendants were entitled to rely upon the JAMS award being binding on the fourth to eight defendants.

Decision

In considering the points raised above, the Court accepted that the rule in *Hollington v Hewthorn* [1943] KB 587 applies, which states that findings made in earlier proceedings (including arbitration) are inadmissible in subsequent proceedings between different parties.

Following on from the above, Judge Pelling KC stated that if the parties to these proceedings are not the same as the JAMS award, the ninth and tenth defendants are not entitled to rely upon the JAMS award in these proceedings because, at common law, that award is not admissible between different parties.

There were no applicable exceptions to the rule, other than the alleged availability of issue estoppel. Judge Pelling KC went on to say that even if the JAMS award involved the same parties (or could be treated as such) it still could not be available to support an issue estoppel claim, as it had not been recognised under section 101 of the AA. The ninth and tenth defendants had not made such an application, and even if it had, it is probable that such an application would have been stayed until after the application setting aside the JAMS award for fraud had been determined. Judge Pelling KC noted that the potential for wasted costs, and huge commercial uncertainty, point firmly toward a Court postponing recognition until after final determination of a set-aside application.

Conclusion

This case is relevant for those practicing international arbitration, not only in the UK but also international practitioners. The decision provides clarification on points of principle regarding the recognition and enforcement of foreign arbitral awards, as well as the Court's approach to dealing with section 32 applications. The decision makes clear that parties seeking to rely upon a foreign arbitral award in Commercial Court proceedings must first make an application for the award to be recognised under section 101 of the AA (pursuant to the New York Convention). Without recognition, a party will not be able to rely upon that decision in a claim for issue estoppel.

International Quarterly is produced quarterly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world. International Quarterly is a newsletter and does not provide legal advice.

Edited by
Jeremy Glover
Partner
jglover@fenwickelliott.com
Tel: + 44 (0) 207 421 1986

Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN

Fenwick Elliott LLP
Office 1A, Silver Tower
Cluster i, Jumeirah Lakes
Towers
PO Box 283149
Dubai

www.fenwickelliott.com