FENWICK ELLIOTT 40

Celebrating 40 years in construction and energy law

Issue 43 – July 2026

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:

www.fenwickelliott.com

Welcome to Issue 43

Jeremy Glover
Partner
jglover@fenwickelliott.com

Sam Thyne
Senior Associate
sthyne@fenwickelliott.com

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

Our 43rd issue begins with an overview of the new ICC Arbitration Rules. Sam Thyne covers many of the key changes in the 2026 Rules which together aim to make ICC arbitration faster and therefore more cost-efficient.

Next, Nicholas Gould and Alex Atherton examine the growing jurisdictional and enforcement challenges facing parties in disputes with Russian entities. Focusing on recent decisions from the Russian Supreme Court and the English courts, they consider the practical implications for dispute resolution and enforcement and highlight how parties can mitigate risks when contracting with parties based in the Russian Federation.

Mark Pantry then explores FIDIC's Gold Book and its distinctive approach to integrating design, construction, operation and maintenance within a single contractual framework. He examines how the Gold Book allocates long-term risk, the practical challenges of pricing and managing operational obligations over extended periods and why, despite its focus on whole-life asset performance, it has seen only limited adoption compared with the other standard FIDIC forms.

We then turn to two case summaries on key developments in international arbitration. Sana Mahmud examines a UK Supreme Court decision confirming that states party to the ICSID Convention cannot rely on adjudicative immunity to resist the recognition of arbitral awards in the UK, while Jonathan Clarke and Jake Marouane consider a Singapore case highlighting the risks of third-party funding, where substantial funding costs were held to be irrecoverable despite the claimants' success. Together, the cases illustrate the practical challenges of enforcement and recovery in international disputes.

Finally, Jeremy Glover reviews another recent Singapore case which considers the consequences of an ad hoc DAB declining to hear disputes referred under a FIDIC contract. The case provides useful guidance on when parties may proceed directly to arbitration.

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

Jeremy and Sam

News and Events

News

This year, Fenwick Elliott celebrates 40 years in construction and energy law. To celebrate this milestone, we have launched our new website, opening up our archives of four decades of thought leadership and specialist expertise as part of a single, searchable Knowledge Hub.

From industry developments to articles, case law and practical guidance, the Knowledge Hub makes it easier to access the insights we have shared with clients and the wider industry over the past four decades. **Click here** to explore the Knowledge Hub, including all previous issues of *International Quarterly*.

Events

Fenwick Elliott is proud to sponsor the Conflict Avoidance Conference in London on 16 September. The move to embrace conflict avoidance is one of the more important trends we are seeing across the construction industry. This conference brings together leading professionals to discuss conflict avoidance, early intervention and better project outcomes. **Click here** to register to attend.

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. If you would like to enquire about organising a webinar or event with some of our team of specialist lawyers, please contact Dr 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 (*jglover@fenwickelliott.com*) or Sam Thyne with any suggestions (*sthyne@fenwickelliott.com*).

Sam Thyne
Senior Associate
sthyne@fenwickelliott.com

Introducing the new International Chamber of Commerce 2026 Arbitration Rules

Introduction

The International Chamber of Commerce's (ICC) new Rules of Arbitration (the "**2026 Rules**") came into force on 1 June 2026, replacing the previous rules (the "**2021 Rules**"). The 2026 Rules apply to arbitrations commenced on or after 1 June 2026.

The 2026 rules were introduced to enhance efficiency, clarity and usability in ICC arbitrations. While the 2026 Rules include some novel changes to procedure, many of the amendments made between 2021 and 2026 codify already established principles and practice, reflecting the way ICC arbitration has already developed and aligning the ICC Rules with those of other arbitration institutions such as the Singapore International Arbitration Centre (SIAC).

We[1] discuss below a non-exhaustive list of some of the key changes in the 2026 Rules.

Written communication (Article 3)

Article 3(1) states that written communications to the Secretariat are to be sent electronically, with hard copies of the Request, Answer and any Request for joinder reserved for situations where the party filing such submission requests transmission against receipt, registered post or courier or if electronic transmission is not practicable.

Arbitrator disclosure and confidentiality (Article 12)

While prospective arbitrators remain under the same disclosure obligations, Articles 12(2) and 12(4) codifies the pre-existing principles outlined in the ICC's 2021 "*Note to Parties and Arbitrators on the Conduct of Arbitration into the ICC Rules*" (the "**2021 Note**"). Accordingly, the 2026 Rules provide that where a prospective arbitrator has any doubt as to whether they should make a disclosure that doubt must be resolved in favour of disclosure (Article 12(2)). Consistently with the 2021 Note, the 2026 Rules now also state that a disclosure itself does not establish a lack of independence or impartiality (Article 12(4)).

One for practitioners to be aware of is the introduction of Article 12(5). In order to "*assist*" prospective arbitrators and arbitrators, under the new Article 12(5) at key junctures in the proceedings (i.e. during the submittal of their respective Request, Answer, Request for Joinder, Answer to a Request for Joinder or request for an extension of time for submitting an Answer) parties are now required to submit a list of persons and entities they believe to be relevant to assessing an arbitrator's disclosure, providing reasons for the consideration.

The ICC have stated that this obligation does not displace the burden of disclosure from the prospective arbitrator or arbitrator, and on the face of the 2026 Rules this appears to be correct. However, it is difficult to see how this requirement could not be considered to be pushing some of this burden towards the parties. It will be interesting to see how this obligation will work in practice – for instance could a party's failure to list a person or entity in its list(s) be relied on by a potential arbitrator or arbitrator as a reason for failing to make a disclosure?

Finally, Article 12(8) closes a lacuna by providing that tribunals are obliged to keep confidential all matters relating to the arbitration unless otherwise in the public domain, agreed by the parties, required by applicable law, or necessary to protect a legal right or comply with disclosure obligations.

Footnote

1. With thanks to Peony Reece.

Removal of mandatory Terms of Reference (Articles 24 and 25)

One of the most significant changes to the 2026 Rules is the removal of the requirement to prepare Terms of Reference ("**ToR**"). Instead, the Case Management Conference ("**CMC**") – which remains mandatory under Article 24 – shall be held to outline the procedural measures and claims the parties seek to establish.

Under Article 24(1), the CMC must now be held within 30 days of the Secretariat receiving the file. Further, the details of claims made will be referenced to how they were described in the CMC, as the ToR will no longer be the point of reference. This makes the CMC, and Procedural Order No. 1 ("**PO1**"), more significant features. The removal of a mandatory ToR is laudable and reflects the already diminishing significance of the ToR. The change will hopefully accelerate case management.

Early determination (Article 30)

The 2026 Rules codify and clarify a principle which had previously only existed in the 2021 Note. Parties may now apply for an early determination of claims or defences which are "*manifestly without merit*" or fall outside the tribunal's jurisdiction, to be judged at the arbitrator's discretion (Article 30(2)).

Time limit for the final award (Article 34)

With the ToR becoming optional, the time limit for rendering the final award is now to be fixed by the President of the ICC Court (pursuant to Article 34). This replaces the 2021 Rule that the time limit for rendering the final award was within six months from the signing of the ToR. Practically the supposed "*six-month*" time limit is usually extended in arbitration cases. The change in rule therefore reflects common practice.

Emergency arbitration (Appendix IV)

Pursuant to Article 1(2) of Appendix IV, emergency arbitrator proceedings can now be initiated against any party, where the President is satisfied (upon considering evidence) that "*an arbitration agreement binding such a party may exist*". This extends the application of emergency arbitrations beyond parties that are signatories to the arbitration agreement.

Further, Article 7(1) of Appendix IV, recognises and codifies preliminary orders, stipulating that parties can request them without notice to other parties where necessary (however the arbitrator must give the respective parties the opportunity to present their case in return). This change ensures a fast-moving and effective use of preliminary orders.

New threshold for Expedited Procedure Provisions (Article 1(3) of Appendix V)

For arbitration agreements concluded on or after 1 June 2026, the Expedited Procedure Provisions ("**EPP**") shall apply by default to agreements where the amount in dispute is up to and including US$4 million, thereby establishing a further tier to the previous threshold of US$3 million for agreements concluded after 1 January 2021 (Article 1(3) of Appendix V).

This change reflects the increasingly popular use of the EPP, established in 2017, a system which enables more efficient case management and procedure. Disputes that are subject to the EPP require no ToR, are appointed a sole arbitrator, and are issued a final award within six months of the CMC (Appendix V, 2026 Rules). This cost-efficient, streamlined system has been adopted by other arbitral institutions – which may be taken as evidence that rollout of the EPP has been successful. The additional tier will subject a greater proportion of cases to EPP by default; however, parties still retain the ability to opt in or out of the EPP, regardless of the value of the dispute.

Introduction of Highly Expedited Arbitration Provisions (Article 33 of Appendix VI)

The addition of Highly Expedited Arbitration Provisions ("**HEAP**"), a further expedited arbitral process, marks a novel change in the ICC Rules, setting the 2026 Rules apart from previous editions. Under Article 33, parties may now opt in to HEAP, regardless of the value of the claim. The key features of HEAP are as follows:

- disputes are decided by a sole arbitrator, to be decided by the court 20 days after the respondent's receipt of the Request and Statement of Claim, if the parties have not jointly nominated one (Article 4 of Appendix VI);
- CMCs are to be held within 7 days of the Secretariat's receipt of the file (Article 6(1) of Appendix VI);
- the arbitral tribunal may choose to limit the number of written submissions and witness evidence (Article 6(2) of Appendix VI);
- the tribunal may decide the dispute based on the parties' documents, with no hearing or witness examination (Article 6(3) of Appendix VI); and
- the arbitral tribunal must render the final award within three months from the first CMC (Article 7(1) of Appendix VI).

These features illustrate the ICC's commitment to providing faster, cheaper dispute resolution for less complex cases by building on the popularity of the EPP. Article 7(1) of Appendix VI also demonstrates how the 2026 Rules follow recent rule evolution in other arbitral institutions, such as the new 2025 SIAC Rule 13, Schedule 2, which offers a "*Streamlined Procedure*" for low complexity disputes where awards are to be made within three months of the constitution of the Tribunal.

Conclusions

The 2026 Rules aim to make ICC arbitration faster and therefore more cost-efficient, marking a concerted effort by the ICC to evolve and consider current practice. ■

Jurisdiction and enforcement: challenges in disputes with parties based in the Russian Federation

Nicholas Gould
Partner
ngould@fenwickelliott.com

Alex Atherton
Trainee Solicitor

One of the many consequences of geopolitical tensions surrounding the Russian Federation has been the impact on jurisdictional challenges arising in disputes between Russian and non-Russian contracting parties, as well as difficulties surrounding enforcement of arbitral orders or awards. This has been especially exemplified in a 2024 decision from the Russian Supreme Court[1] which sought to restrict the enforcement of international arbitration awards against parties based in Russia if the arbitrators providing the award are based in a politically "*unfriendly state*". The ruling is based on the presumption that countries imposing sanctions on Russia carry a political bias which extends to determinations made in the course of dispute resolution.

The decision in *Tecnimont SpA v LLC Eurochem North-West-2*[2] demonstrates that English courts are keen to maintain a finding of jurisdiction and enforce the orders of an arbitral tribunal provided such jurisdiction can be established. In this dispute, a Russian company was restrained from pursuing proceedings in Russia in breach of English arbitration agreements. The Russian legislature has increased the basis on which Russian courts can claim jurisdiction in international disputes and while English courts are more likely to uphold and enforce an arbitral order or award, the difficulty in ultimately enforcing any such decision in the Russian courts remains.

Difficulties with Russian courts finding jurisdiction over international disputes were nothing new in 2024. The consequence of Russian courts finding jurisdiction could mean amplified difficulties in enforcement against Russian parties, as observed in the case leading up to the Russian Supreme Court ruling on 26 July 2024 (the "**Ruling**"). The Russian legislature, in 2020, amended the Arbitration Procedural Code of the Russian Federation by introducing Articles 248.1 and 248.2 (the "**Articles**"), granting exclusive jurisdiction to Russian courts regarding disputes over foreign sanctions or sanctioned persons.

This was discussed in *Unicredit Bank GmbH v RusChemAlliance LLC*,[3] where the Russian court determined it had exclusive jurisdiction over proceedings in Russia pursuant to the Articles when the parties' contract was governed by English law. The judgment concluded that the English court had and should exercise jurisdiction over this claim and that England was the proper forum for the claim. It was furthermore found that a final injunction to terminate proceedings commenced in Russia was necessary.

The 2024 Ruling followed a case concerning a failure of JSC Novosibirskhlebprodukt ("**NHP**") to perform obligations on time due to force majeure and the proposition to C. Thywissen GmbH ("**Thywissen**"), of an extended delivery date, which led to a rejection of the proposal and the triggering of the arbitration clause. Under the agreement, the seat of arbitration was nominated as London. In 2022, NHP was ordered to compensate Thywissen for damages, interest and arbitration and legal costs. Thywissen applied for the award to be recognised and enforced with the Arbitrazh (Commercial) Court of Novosibirsk. The first instance court granted the application on the basis that the award was not contrary to Russian policy.

In response, NHP applied to the cassation court to challenge the first instance court's ruling on the basis that it was not properly notified of the proceedings and that the award contravened Russian policy where the arbitrators lacked independence and awarded excessive damages. NHP's arguments were not accepted by the cassation court and NHP applied to the Supreme Court to overturn the prior decisions. The Supreme Court annulled the prior decisions and

Footnotes

1. Case No. A45-19015/2023.
2. *Tecnimont SpA v LLC Eurochem North-West-2* [2025] EWHC 3151 (Comm).
3. *Unicredit Bank GmbH v RusChemAlliance LLC* [2024] EWCA Civ 64.
4. [Russian Supreme Court's Stance Shakes Up Enforcement of Foreign Arbitral Awards | Kluwer Arbitration Blog]
5. *Tecnimont SpA v LLC Eurochem North-West-2* [2025] EWHC 3151 (Comm).

referred the case back to the court of first instance for reconsideration with guidance to take into account the considerations of this Ruling.

The Supreme Court's presumption that the nationality of the arbitrators carried a lack of impartiality and objectivity is important to consider when contemplating disputes with parties based in the Russian Federation. Furthermore, NHP argued that one of the arbitrator's shared FOSFA committee membership with Thywissen's representative was found to be insufficiently examined by the lower courts. The Supreme Court also applied the 2020 Articles 248.1 and 248.2 of the Russian Arbitrazh Procedure Court which imposes jurisdiction over cases involving sanctioned entities, allowing injunctions against foreign arbitration or litigation.

The implications of this Ruling should be carefully considered by parties in considering entering into dispute resolution proceedings (or already in dispute proceedings) with entities based in the Russian Federation. While the Supreme Court did not establish the grounds on which a party can rebut the presumption of lack of independence of arbitrators from politically adverse jurisdictions to Russia, there are nevertheless ways in which a party can mitigate the risk of Russian courts dismissing the arbitration proceedings as invalid. It would be especially important to keep closely to all due processes, maintain highly ethical conduct and to maintain accurate records of proceedings in order to evidence a rebuttal to any argument of lack of due process.[4]

Should English courts successfully find jurisdiction over a dispute, they have shown willingness to enforce arbitral orders or awards against Russian parties seeking to establish the Russian courts' jurisdiction past the 2024 ruling. This does not, however, negate the challenge of ultimately enforcing the orders in Russia.

In *Tecnimont SpA v LLC Eurochem North-West-2*[5] the claimant sought an order for the Russian party to withdraw the Russian actions and anti-arbitration applications. The Russian party failed to comply with orders from an arbitration tribunal to withdraw the Russian anti-arbitration application and action which were found to be contrary to the arbitration agreement between the parties. The English court granted the order under section 42 of the Arbitration Act, although it was noted that the order may not be enforced in the Russian courts which was not a reason in itself for the order not to be granted by the English court.

The cases identified above highlight the importance of clearly identifying the governing law and jurisdiction for any potential dispute when contracting with parties based in the Russian Federation. The ultimate challenge of enforcing any decision by the English courts nevertheless remains. It is important to mitigate any possible grounds for the Russian courts to dismiss the validity of any arbitration proceedings, orders or awards, especially if members of the tribunal originate from a jurisdiction considered politically unfriendly by the Russian courts.

By complying completely with all due processes in arbitration proceedings and establishing a tribunal with no possible grounds for the Russian courts to establish a lack of impartiality, it would be more difficult for Russian courts to dismiss the validity of any arbitral order or award. The willingness of the Russian courts to establish such grounds highlights that difficulties with enforcement may remain and should be taken into account when contemplating potential disputes. ■

Mark Pantry
Partner
mpantry@fenwickelliott.com

The FIDIC Gold Book: a whole life contract?

Introduction

There has been a growing trend in major infrastructure projects for the employer to appoint the main contractor as the initial operator of the plant. The logic is straightforward enough: a specialist contractor will know its product better than an incoming third-party operation and maintenance contractor, and if the EPC contractor has to live with the asset after completion, it has a much better reason to think seriously about durability, maintainability and long-term performance, rather than simply getting the job built and handed over.

In practice, this often means negotiating two contracts in parallel, with the main contract being entered into at the same time as a separate operation and maintenance contract. Less frequently do the parties agree to wrap design, construction, operation and maintenance into a single contract package.

That single contract package is the commercial thinking behind FIDIC's Conditions of Contract for Design, Build and Operate Projects, better known as the Gold Book. When the first edition was published in 2008, it was an attempt by FIDIC to fill a gap in the existing FIDIC suite by offering one form that covered not just design and construction, but also operation and maintenance over the years that followed.

It has never come close to the market dominance of the Red, Yellow or Silver Books and there are good reasons for that. Even so, it remains an important form, particularly on water, wastewater, transport and energy projects where the performance of the plant for its full life cycle is as important as the original construction. Few would disagree that aligning design, construction and operation should produce better outcomes. The more difficult question is whether employers are prepared to pay for that alignment and whether contractors are willing to accept the extended risk that comes with it.

A different procurement model

The Gold Book is fundamentally different from most other FIDIC contracts because it contemplates a contractual relationship which continues after the works are complete and the Commissioning Certificate has been issued. The contract comprises two distinct phases:

1. the Design-Build Period; and
2. the Operation Service Period (intended to be at least 20 years).

The Design-Build Period operates in a broadly familiar manner based on the principles set out in the FIDIC Yellow Book. The contractor designs and constructs the works, assumes fitness-for-purpose obligations in relation to the completed plant and is paid for the works it undertakes.

The Operation Service Period commences on the date stated in the Commissioning Certificate (Clause 10.2, Gold Book). During the Operation Service Period the contractor provides the Operation Service in compliance with the Operation Management Requirements prepared by the employer and its own as-built documents and operation and maintenance manuals which are prepared as part of the Design-Build Period. In practice, the Operation Management Requirements are often given far less attention during procurement than the Employer's Requirements for the design and construction of the works. That can be a mistake. Poorly drafted Operation Management Requirements can create uncertainty that persists throughout the entire Operation Service Period.

During the Operation Service Period the employer is responsible for the supply and delivery of the raw materials, fuels and consumables required for the plant to operate in accordance with the Employer's Requirements. The employer is under its own fitness for purpose obligation in relation to such items, ensuring that they comply with the contract in respect of quality, purpose and function.

In my experience, this is the point at which many proposed Gold Book procurements begin to unravel. Employers are understandably attracted to the prospect of transferring operational risk but are often less enthusiastic when the contractor prices that risk appropriately. There can be a significant gap between the employer's desire for certainty in the long term and its willingness to pay for it. That gap is often only exposed once contractors begin pricing the operational risk properly. Contractors are being asked to make assumptions about maintenance cycles, staffing, energy consumption, replacement of key components and the cost of keeping the facility at the required level of performance for many years. Making it harder is that this is all done before the asset has been fully designed or built, often the Operation Service Period will not commence for many years after the contract is signed.

Performance-based obligations

A notable feature of the Gold Book is its emphasis on the performance of the plant through the Operation Service Period. Clause 10.7 of the Gold Book requires the contractor to achieve the production outputs required under the contract. Where there is a failure to achieve such outputs, the parties are to jointly establish the cause of failure. If the cause of the failure is established to lie with the contractor, then the contractor shall pay the employer pre-agreed performance damages.

If a failure caused by the contractor continues for a period of more than 84 days, the employer has the option to reduce payment to the contractor or, if production output fails to reach pre-agreed minimum values, terminate the contract.

I have seen performance regimes where the parties spent months debating liquidated damages for delay but relatively little time considering how operational outputs would actually be measured ten years later. In a Gold Book project, that is usually the more important question. Too often the parties devote significant attention to construction requirements but leave operational outputs expressed at a high level. Those issues may not become apparent until years after completion, when the individuals who negotiated the contract have moved on.

As with all term-based contracts, the real issue is often a shift in the perceived risk allocation ten or fifteen years after contract signature when the project has moved well beyond the assumptions made at that stage. For example, in relation to changes in law, on a 20-year operating term it is unrealistic to assume that environmental rules, health and safety requirements or sector-specific operating standards will stand still.

The same is true of inflation and market volatility. A pricing model that looks workable at contract signature may no longer be fit for purpose years later, particularly where labour, energy or replacement parts move sharply. No contract can perfectly allocate 20 years of future risk. The Gold Book sometimes gives the impression that all risk for the Operational Services Period can be completely transferred to the contractor. In reality the parties are often agreeing a risk allocation based upon assumptions that both know may prove inaccurate over time.

The interface with PPP and concession structures

The Gold Book is sometimes described as a simplified PPP contract. Whilst there are similarities, important distinctions remain. Under a conventional concession structure, the private-sector entity often assumes financing obligations and derives revenue directly from users or through availability payments. The Gold Book does not try to deal with financing arrangements; the foreword reads, "*The Contractor has no responsibility for either financing the project or for its ultimate commercial success*".

That makes the Gold Book more attractive in the right set of circumstances, particularly where an employer intends to secure a meaningful operating commitment without taking on the full complexity of a concession model. That is one reason why many major infrastructure projects still rely on bespoke PPP documentation rather than the Gold Book itself. That may explain why the Gold Book is frequently discussed but comparatively rarely encountered in the market. The Gold Book arguably occupies an uncomfortable middle ground. The projects that need sophisticated long-term operation and maintenance arrangements often move towards bespoke concession documentation, whilst projects that do not need that level of sophistication may struggle to justify the additional complexity of the Gold Book.

Why has the Gold Book not achieved wider adoption?

Given the market's increasing focus on whole life asset performance, it might seem surprising that the Gold Book has not seen wider adoption. Part of the answer is that the Gold Book asks the parties to do something many are reluctant to do: price and allocate risk over a period that may run well beyond 20 years. Many contractors are understandably more comfortable with a design-build model where the risk profile is more defined and the commercial exposure does not continue deep into the asset's operating life.

There is also a cultural issue. Most contractors are construction businesses rather than long-term asset operators. Whilst many have developed operational capabilities, committing to a 20-year operating obligation requires a fundamentally different approach to risk, staffing and business planning than that required under a conventional EPC contract.

There is also a market reality. Projects that genuinely need operation and maintenance obligations are often procured through bespoke and separate operation and maintenance agreements. In that environment, lenders, sponsors and public authorities usually want heavily negotiated, project-specific documentation rather than a standard form.

Conclusion

The Gold Book occupies a distinctive place in the FIDIC suite. It tries to deal with the life of an infrastructure asset, not just its delivery, and that remains a worthwhile ambition.

At its best, it encourages the right kind of thinking: design choices are tested against performance, maintenance burden and operating reality, rather than being treated as someone else's problem after handover. That is a sensible and commercially mature approach to procurement.

My own view is that the Gold Book is probably best deployed on technically complex process plant where operational performance is central to the employer's objectives and where the contractor already possesses genuine operational expertise. It is far less convincing when used simply as a mechanism to push additional risk onto the contractor. Like many FIDIC contracts, its success depends less on the form itself and more on whether the parties understand the commercial bargain they are striking. ■

Sana Mahmud
Senior Associate
smahmud@fenwickelliott.com

State immunity and enforcement of ICSID arbitration awards

The Kingdom of Spain v Infrastructure Services Luxembourg S.À.R.L. and another; Republic of Zimbabwe v Border Timbers Ltd and another [2026] UKSC 9

This Supreme Court decision concerned the application of state immunity in the context of the enforcement of ICSID arbitration awards in the UK. On appeal, the Supreme Court was asked to determine whether Spain and Zimbabwe could rely on their on their sovereign immunity under the State Immunity Act 1978 ("**SIA**") to set aside the registration of two adverse ICSID awards in the High Court under the Arbitration (International Investment Disputes) Act 1966 (the "**1966 Act**"). The UK has given effect to its obligation to make the provisions of the ICSID Convention effective in its territories under the 1966 Act.

The case concerned two separate investment disputes. In the first dispute, Infrastructure Services Luxembourg S.À.R.L. and Energia Termosolar BV successfully obtained an ICSID award against Spain after changes to Spain's renewable energy subsidy regime allegedly breached protections under the Energy Charter Treaty ("**ECT**"). In the second dispute, Border Timbers Ltd and Hangani Development Co. obtained an ICSID award against Zimbabwe following the expropriation of forestry investments protected under a bilateral investment treaty ("**BIT**") with Switzerland. In both cases, the successful investors sought to register the award in England under the 1966 Act, which implements the ICSID Convention into domestic law. In response, Spain and Zimbabwe argued that they were entitled to immunity from the jurisdiction of the English courts under section 1 of the SIA as sovereign states.

Both the High Court and the Court of Appeal rejected Spain and Zimbabwe's immunity arguments for different reasons. The two appeals were therefore brought before the Supreme Court.

The Legislative Framework

The facts

The UK signed the ICSID Convention on 26 May 1965, which entered into force in the UK on 18 January 1967. The ICSID Convention separately entered into force for Spain on 17 September 1994 and on 19 June 1994 for Zimbabwe.

Spain's appeal

Spain ratified the ECT in 1997 and introduced Royal Decree 661/2007 to assure a reasonable return for renewable investments. The investors, Infrastructure Services Luxembourg S.À.R.L. and Energia Termosolar BV who were Luxembourg and Netherlands companies, claimed to have invested €139.5 million in Spanish solar energy projects relying on these incentives.

Subsequently, Spain substantially altered the regulatory regime governing renewable energy subsidies. Following these regulatory changes, the investors commenced ICSID arbitration under ECT article 26. Spain challenged jurisdiction on intra-EU grounds under EU law and ECT interpretation.

In an award dated 15 June 2018, those objections were rejected by the arbitral tribunal, and the investors succeeded in their substantive claim. The tribunal found that by amending its regulatory regime, Spain had breached the fair and equitable treatment standard in article 10(1) of the ECT. Spain was ordered to pay €112 million in compensation, plus interest and costs, which was subsequently reduced by €11 million after rectification. Spain then sought annulment before an ICSID ad hoc committee, again arguing that the tribunal had exceeded its powers by accepting jurisdiction contrary to EU

law. The committee rejected Spain's application in July 2021, and any stay of enforcement was lifted.

Infrastructure Services Luxembourg S.À.R.L. and Energia Termosolar BV then applied without notice to register the award in the High Court under section 1 of the 1966 Act. The award was registered as though it were a High Court judgment. Spain applied to set aside that registration, arguing that section 1 of the SIA protected it from the adjudicative jurisdiction of the English courts.

Fraser J dismissed Spain's application, concluding that Spain had submitted to jurisdiction by becoming party to both the ICSID Convention and the ECT. The Court of Appeal, hearing both cases together, affirmed that conclusion, holding that Article 54(1) constituted a prior written submission to jurisdiction for the purposes of section 2(2) of the State Immunity Act. Spain appealed to the Supreme Court.

Zimbabwe's appeal

A 1996 Switzerland–Zimbabwe BIT provided for ICSID arbitration of unresolved investment disputes; Border Timbers Ltd alleged uncompensated expropriation and commenced ICSID proceedings, following which Zimbabwe disputed jurisdiction denying an agreement to arbitrate under the BIT's definitions of "*investments*" and "*investor*".

Pursuant to an award dated 28 July 2015, the arbitral tribunal dismissed Zimbabwe's jurisdictional objections, and ordered Zimbabwe to pay Border Timbers Ltd US$124,041,223 together with interest and a further US$1 million in moral damages and costs. Zimbabwe applied to have the award annulled under article 52 of the ICSID Convention. On 21 November 2018, that application was dismissed by the ICSID annulment committee, with further costs ordered to be paid by Zimbabwe. Zimbabwe also sought a stay of enforcement, which was also refused.

On 15 September 2021, Border Timbers Ltd applied without notice to the High Court to register the award as a judgment under section 1 of the 1966 Act. Zimbabwe then applied to set aside on grounds of state immunity.

Dias J dismissed Zimbabwe's application, finding that while Article 54(1) constituted a general waiver of immunity under public international law, such a general waiver did not meet the elevated threshold she applied to qualify as a submission to the jurisdiction for the purposes of section 2 of the SIA. Section 9 of the SIA required the English court to make its own determination of whether Zimbabwe had agreed to arbitration, and an arbitral tribunal's own finding that it had jurisdiction could not preclude the English court from doing so. In any event, Dias J held that registration of an ICSID award was a purely administrative act and therefore not an exercise of adjudicative jurisdiction, which meant that the SIA did not apply at all to registration proceedings under the 1966 Act.

The Court of Appeal disagreed with Dias J's administrative characterisation and held that registration did engage adjudicative jurisdiction, however, as stated above it upheld the registration because it found that Article 54 constituted a prior written agreement submitting contracting states to the jurisdiction of English courts.

The issues

Section 1(2) of the 1966 Act provides that a person seeking recognition or enforcement of an ICSID award "*shall be entitled to have the award registered in the High Court subject to proof of the prescribed matters and to the other provisions of this Act*". Section 2 provides that a registered award has the same force as a High Court judgment for execution and related purposes.

Section 1 of the SIA confers state immunity subject to exceptions. Section 2(1) removes immunity where a state has submitted to the jurisdiction of the UK court, including by prior written agreement, and section 17(2) confirms "*agreement*" includes a treaty or convention.

The ICSID Convention requires written consent to arbitrate between a contracting state and a national of another; articles 53 to 55 render awards binding, oblige recognition and enforcement as if final judgments, and preserve only immunity from execution.

The main issues to be considered by the Supreme Court in respect of the two appeals were as follows:

- **Issue 1:** By agreeing to be bound by article 54(1) of the ICSID Convention, did the appellant states submit to the jurisdiction of the English courts by agreement within the meaning of section 2(2) of the SIA such that they do not enjoy immunity from adjudicative jurisdiction with respect to these proceedings under section 1(1) of the SIA?
- **Issue 2:** Did the appellant states agree to arbitrate with the respondent investors within the meaning of section 9(1) of the SIA such that they do not enjoy immunity from adjudicative jurisdiction with respect to these proceedings under section 1(1) of the SIA?

The decision

The Supreme Court unanimously dismissed the appeals of both Spain and Zimbabwe on the first ground and held that each state had submitted to the jurisdiction of the courts of the UK by virtue of Article 54(1) of the ICSID Convention. Consequently, the states could not rely upon adjudicative immunity under section 1 of the SIA to resist registration of the ICSID awards in England. The court also confined its judgment to the first issue identified on appeal. Having answered that question affirmatively, it found that it was unnecessary to determine the alternative argument.

In reaching its decision, the Supreme Court held that a treaty does not need to use explicit words such as "*waiver*", "*submission*" or "*immunity*" to constitute a waiver of state immunity. Instead, the relevant question is whether the treaty, properly interpreted, clearly and necessarily demonstrates the state's consent to the jurisdiction of another state's courts.

In interpreting Articles 53 to 55 of the ICSID Convention, the Court held that Article 54 requires every contracting state to recognise and enforce ICSID awards as if they were final domestic judgments. This obligation necessarily involves submission to the jurisdiction of national courts for recognition and enforcement proceedings. Article 55 preserves immunity only from execution against state assets, not from the registration of awards. Accordingly, the awards against Spain and Zimbabwe were validly registered in England.

Analysis

This judgment constitutes significant authority on the relationship between state immunity and the enforcement of ICSID awards. Here, the Supreme Court adopted a practical approach, holding that states may waive immunity through treaty obligations even without express language referring to waiver. The court confirmed that treaty interpretation depends on the ordinary meaning and effect of the words used.

The decision is welcome confirmation that contracting states to the ICSID Convention cannot invoke state adjudicative immunity to avoid recognition of ICSID awards in the UK. However, the question of immunity from execution remains fully preserved and is a separate question. The judgment provides important certainty for investors and contracting states by confirming that the UK will honour its obligations under the ICSID Convention and facilitate the recognition of investment arbitration awards while preserving the statutory protections governing execution against sovereign property. ■

Jonathan Clarke
Senior Associate
jclarke@fenwickelliott.com

Jake Marouane
Paralegal

DTH v DTF: an example of the potential issues with third-party funded arbitrations

The metaphorical "*third rail*" in third-party funded disputes has long been that of overall recoverability when judgments return less than expected and necessary deductions for funding costs have been taken into account. The recent case of *DTH v DTF*[1] before the Singapore International Commercial Court ("**SICC**") is a striking example of this tension.

In this case, DTH and DTI (collectively, the "**Applicants**") were the successful parties in a Singapore-seated arbitration (the "**Arbitration**") conducted under the SIAC 2016 Rules brought against DTF, DTG and DTJ (collectively, the "**Respondents**"). However, the Applicants' claim for a share buyout figure of US$65 million was significantly reduced with the majority decision of the Tribunal only awarding approximately US$14.7 million. As part of this decision, the Applicants' claimed third-party funding costs ("**TPF costs**") of US$14,608,695.11 were deemed irrecoverable, leaving the Applicants with "*almost nothing*"[2] and a somewhat pyrrhic victory.

The particular facts and issues with this case are explored further below, as the Applicants (unsuccessfully) sought the SICC's help in setting aside the impugned portion of the costs award.

Background

The Applicants entered into a joint venture agreement with the first (DTF) and second respondents (DTG) for the provision of financing technology services as shareholders in the third respondent (DTJ).

The parties' relationship subsequently deteriorated, and the first and second respondents purported to terminate shareholder and investment agreements entered into with the Applicants (the "**Agreements**"). The Applicants were also removed as directors of the third respondent and terminated as employees.

As a consequence, the Applicants brought claims against all three respondents for alleged breaches of the Agreements, and against the first and second respondents for minority oppression under section 216(1) of the Companies Act 1967.

The funding arrangement

The Applicants had entered into a Litigation Funding Agreement ("**LFA**") with an anonymised litigation funder (the "**Funder**"), pursuant to which the Funder was entitled to receive the following from any "*Resolution Sum*":

1. reimbursement of the total funded costs paid or payable by the Funder;
2. an amount in respect of each "*Resolution*" calculated as the greater of:
   a. a multiple of the total funded costs, the multiple varying from 0.5 times to 3 times depending on the length of time from the date of the LFA to the "*Resolution*"; or
   b. a percentage of the total "*Resolution Sum*", the percentage varying from 5% to 30% depending on the length of time between the date of the LFA and the "*Resolution*"; and
3. if the Funder funded any ancillary proceedings, the amounts payable under (2) shall be increased by adding either another whole multiple to each multiple in (a), or 5% to each percentage in (b).

It is understood that the LFA was subsequently varied to increase the Funder's entitlements in return for additional funding.

Arbitration Partial Award

In the Partial Award, the Tribunal unanimously determined that DTF and/or DTG had breached the Agreements in a number of respects, and that the purported termination of the Agreements was invalid. The Tribunal further determined that DTF had become the majority shareholder in DTJ

Footnotes

1. *DTH & Another v DTF & Others* [2026] SGHC(I) 5.
2. Ibid, paragraph 16.
3. Ibid, paragraph 72(d).
4. Ibid, paragraph 86.
5. Ibid, paragraph 91.
6. *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal* [2023] UKSC 28.

in the course of the parties' relationship, and had acted in a manner oppressive to the Applicants in contravention of section 216(1) of the Companies Act 1967.

In particular, the Tribunal declared that an issuance of shares in DTJ to DTF – which had the effect of watering down the Applicants' interest in the joint venture vehicle – was invalid. Therefore, the Tribunal ordered that DTF should buy out the Applicants' shares in DTJ for a total sum of US$14,736,000 – comprising US$9,824,000 to the first applicant and US$4,912,000 to the second applicant.

The Costs Award

As the Applicants had been the successful party in the Arbitration, they naturally submitted to the Tribunal that their costs should be recoverable from the Respondents – the classic "*loser pays*" principle. Accordingly, the Applicants sought US$14,608,695.11 in TPF costs, as well as legal costs and disbursements amounting to US$4,561,716.59 and a conditional-fee uplift relating to the legal costs of US$1,403,701.38.

In doing so, the Applicants relied on SIAC Rule 37, which empowered the Tribunal to order that "*legal or other costs*" be paid by another party. The Tribunal rejected the argument that Rule 37 included recovery of TPF costs and decided that section 12(5) of the International Arbitration Act 1994 limited the Tribunal to remedies or relief that could have been ordered by the General Division of the High Court, and that TPF costs did not fall within "*other costs*" under Rule 37.

Consequently, the Tribunal awarded the applicants US$4,129,633.56 in legal costs, including the costs of the arbitration, plus interest. But by majority, it dismissed the claim for TPF costs and the uplift claim.

The Tribunal's decision that the TPF costs were irrecoverable prompted the SICC application.

The SICC application

The application is brought by the Applicants on the grounds:

1. that the Tribunal's determination in the Costs Award is in conflict with the public policy of Singapore; and
2. that the arbitral procedure adopted by the Tribunal in arriving at its decision on the recoverability of TPF costs was not in accordance with the agreement of the parties.

The Applicants requested that the SICC set aside the impugned portion of the Costs Award, or remit the matter for the Tribunal to reconsider its decision.

The decision

The SICC rejected the application on both grounds.

On the public policy issue, the SICC noted that "*the Applicants must first identify the particular rule or principle of public policy with which the award is said to be in conflict, as well as the part of the award in respect of which such conflict is said to arise (BNX v BOE [2017] SGHC 289)*". The SICC continued and noted that such conflict must further meet the stringent standard articulated in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [59], namely, that the enforcement or upholding of the award would "*shock the conscience*".

The Applicants failed to meet this threshold, because in the SICC's words:

> "*…[I]t cannot credibly be said that the inability to recover TPF costs from the unsuccessful party shocks the conscience, violates Singapore's most basic notions of morality and justice or is injurious to the public good*".[3]

On the arbitral procedure issue, the SICC decided that SIAC Rule 37 is, in their view, not procedural. It is not part of the arbitral procedure as referred to in or envisaged by Article 34(2)(a)(iv) of the Model Law upon which the Applicants based their argument.[4]

Rule 37, as understood by the court, purports to authorise the Tribunal's disposition of costs, not how the Tribunal shall act procedurally in coming to its disposition of costs. If the Tribunal was incorrect in its conclusion that it was acting outside of its ambit to award the TPF costs, then such a decision was at most an error of substance, not of procedure.[5]

Comment

This case illustrates the emerging global position in which courts and tribunals have largely moved beyond questioning the legitimacy of third-party funding and are instead concerned with ensuring early disclosure of its existence (for example, ICC 2026 Rules, Article 12(6)) and then focused on defining its limits.

In this regard, in *DTH v DTF*, it is notable that the court stressed that it was not challenging the permissibility of funding as a mechanism for enabling claims, but that it drew a clear boundary between the costs of pursuing litigation and the costs of financing it. In refusing to allow recovery of the funder's return, this decision demonstrated a principled reluctance to treat private funding arrangements as part of ordinary cost-shifting norms, even where such funding may be essential to the advancement of a claim.

A similar parallel can be drawn to the UK position where the consequences of the Supreme Court's ruling in *PACCAR*[6] are still being felt. In *PACCAR*, it was held that some LFAs were damages-based agreements ("**DBAs**") and, consequently, fell under the purview of section 58AA of the Courts and Legal Services Act 1990, which strictly regulates DBAs and sets out specific statutory conditions that must be satisfied in order for the agreement to be enforceable. Again, placing limits on the scope of funding.

In the UK, it is fair to say that the market has since adapted, and pre-PACCAR LFA terms have been amended to try and avoid categorisation as a DBA. However, what these cases remind us of is that third-party funding arrangements will always be subject to scrutiny and the recoverability risks are clear. In DTH v DTF, an awarded sum of US$14.7 million was eroded by TPF costs of US$14.6 million, creating a somewhat pyrrhic victory.

Parties therefore need to carefully consider, prior to any potential dispute, whether third-party funding is:

1. essential to bring the claim;
2. lawful in the relevant forum;
3. a permissible category of recoverable costs; and
4. properly balanced against a range of potential outcomes and monetary awards.

This case serves as an important reminder for all. ■

Jeremy Glover
Partner
jglover@fenwickelliott.com

Referring disputes to an ad hoc DAB under the FIDIC form

What if the DAB declines the referral?

Under the standard FIDIC form (both 1999 and 2017), the basic default position is that obtaining a Dispute Adjudication Board ("**DAB**") decision is a pre-condition to a dispute being referred to arbitration. Where there is no DAB, questions sometimes arise about how a party can actually proceed to arbitration.[1]

In the case of *DSR v DSQ* [2026] SGHC 67, the Singapore High Court had to consider a variant on this theme: here the DAB did not consider that it had jurisdiction to hear the claims that were referred to it. The DAB was an ad hoc one, and the case provides useful guidance as to when you can refer disputes to this type of board. The case also considers whether objections based on the alleged non-compliance with pre-arbitral procedure go towards admissibility of the disputes which were referred to arbitration, or to questions about the jurisdiction of the Tribunal.

Here, the parties entered into a design and build contract for works on a railway project. Disputes arose, which the contractor referred to arbitration. The Tribunal awarded monies to the contractor, but the employer applied to the High Court of Singapore to set the award aside, arguing that the Tribunal lacked jurisdiction.

Since the court case followed an arbitration, the project and parties are not identified. However, the contract was clearly based on the FIDIC standard form which required, in the usual way, that any disputes were referred to a DAB. The DAB in question was an ad hoc board, which typically is formed only once a dispute has arisen. Under the 1999 FIDIC Yellow Book, Sub-clause 20.2.2 provides that a DAB is appointed once a dispute arises and that that appointment expires upon the delivery of its decision, unless a further dispute has been referred to it before the 84-day referral period had expired.

The DAB proceedings: Disputes 1 to 4

The DAB was constituted and the contractor referred the first dispute (the "**AEB dispute**") to it. Before the DAB gave its decision in the first referral, the contractor referred four other disputes to the DAB ("**Disputes 1 to 4**"), which it later referred to the arbitration. The contractor presumably did this to keep the DAB alive, so steps did not need to be (re-) taken to form the existing or a new DAB.

However, the DAB declined to decide Disputes 1 to 4 on the basis that it had only been appointed for the AEB dispute. No decision was given within 84 days or at all. After 84 days had passed, the contractor issued a notice of dissatisfaction, and a further 59 days later, the contractor filed and served its request for arbitration.

The employer's objection was that the contractor was not entitled to refer Disputes 1 to 4 to the DAB, stating that the contractor should have taken steps to have a new DAB appointed to decide those disputes instead of issuing the notices of dissatisfaction.

The Tribunal and Andre Maniam J disagreed, meaning that the contractor was entitled to have commenced the arbitration when it had. Both noted that Sub-clause GCC 20.4 provided that:

> *"If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, ... then after a DAB has been appointed pursuant to Sub-Clause 20.2 ... either Party may refer the dispute in writing to the DAB for its decision...".*

Footnote

1. See for example: "*FIDIC Dispute Adjudication Boards*" (February 2015).

This meant that if a fresh dispute arose between the parties, then, after a DAB has been appointed under Sub-clause 20.2 following the issue of a notice of an intention to refer a dispute to a DAB, either party may refer that fresh dispute to the DAB for its decision.

Once a DAB had been appointed under Sub-clause 20.2, any other dispute which has arisen in the meantime may be referred to it. The question of whether any particular DAB can (or must) deal with more than one dispute was put beyond doubt by the last paragraph of Sub-clause 20.2. The expiry of the appointment of a DAB occurred when it had given its decision on the dispute referred to it under clause 20.4 "unless other disputes have been *referred to the DAB by that time under Sub-Clause 20.4*". If further disputes could not be referred to the already appointed DAB, these words would have no meaning.

The result was that a DAB must deal with any further disputes referred to it prior to the date on which it gives its decision in the first dispute. In the Tribunal and judge's view, this was the only realistic interpretation. To Andre Maniam J, this made "*commercial sense*". It would be "*unwieldy*" for there to be a series of DABs in place at the same time, each dealing with a separate dispute.

The judge agreed with the employer that the DAB was not a standing DAB; it was an ad hoc DAB whose appointment could expire before the end of the project. However, this did not help the employer. The DAB did not need to be a standing DAB for the contractor to be able to refer other disputes to it. Clause 20 contemplated that other disputes may be referred to an ad hoc DAB before it had given its decision on the first dispute referred to it, and Sub-clause 20.2 further made specific provision for the duration of the DAB's appointment to be extended in that event.

Further, the DAB fee structure, which was on a "*per dispute*" basis, did not support the idea that the DAB was appointed only to decide the AEB dispute. If Sub-clause 20.4 allowed the contractor to refer other disputes to the DAB, then the DAB members were obliged to decide those other disputes. The fact that there was only one dispute (the AEB dispute) when the DAB was appointed, and in that sense the DAB was appointed to decide that dispute, did not mean that it could only decide that dispute.

Finally, the opinion of the Tribunal and judge was supported by the FIDIC Contracts Guide (1st Ed, 2000):

> "*...the appointment expires when the ad-hoc DAB has given its decision, unless (by that time) another dispute has been referred to it in accordance with the procedure specified in Sub-Clause 20.4.*"

That is what has happened here.

The DAB proceedings: Disputes 5 to 6

The contractor approached Disputes 5 to 6 differently, simply submitting them straight to arbitration, along with Disputes 1 to 4.

In the arbitration, the employer conceded that if it was wrong on Disputes 1 to 4, then it would be sensible for Disputes 5 and 6 to be referred directly to arbitration. This would make sense since the claims were inextricably tied up with Disputes 1 to 4. However, the Tribunal went on to ask whether a wrongful refusal to accept the referral of a dispute affected the obligations of the parties to the principal contract. The Tribunal said that it did.

The refusal of a DAB to accept a valid referral of a dispute may cause the contractually agreed dispute resolution machinery in relation to the DAB to break down. Here, the situation would have become unworkable if a DAB was required to determine (the interrelated) Disputes 5 and 6 whilst Disputes 1 to 4 were the subject of arbitration proceedings.

The upshot of a party being able to refer a dispute to the DAB was the obligation on the DAB to accept that referral. The refusal by the DAB to do so enabled a claimant to go straight to arbitration. Here, the contractor had properly complied with the dispute resolution machinery in the contract. Given the DAB's wrongful refusal to accept the referral of further disputes, the contractor did not need to refer Disputes 5 to 6 to the DAB; it could go straight to arbitration.

The judge added that Sub-clause 20.8 gave further support to the contractor, stating that, "*[i]f a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise*", then the dispute may be referred directly to arbitration.

The judge emphasized the words "*or otherwise*", noting that this covered where the dispute resolution machinery relating to the DAB had broken down, for example, a DAB wrongfully refusing to accept the referral of further disputes (which were properly referred under Sub-clause 20.4).

When it came to the question of jurisdiction, the employer was further prevented from making its challenge because of the law applying to the dispute resolution provisions of the contract. Under Article 16(3) of the UNCITRAL Model Law and/or section 10 of the International Arbitration Act 1994, the employer had 30 days to raise its jurisdictional challenge, which it failed to do.

Did the employer's jurisdictional objections go towards jurisdiction or admissibility?

Finally, the court also had to consider what happens when a party commences arbitration without complying with the pre-arbitration dispute resolution steps set out in the contract. Were these matters of jurisdiction which prevented the Tribunal from deciding the claims, or were they matters of admissibility (whether or not it was appropriate for the Tribunal to hear the case)?

Here, the dispute resolution procedure involved the making of a reference to a DAB. Under Sub-clause 20.4, the DAB's decision was, in the familiar words of the FIDIC form, binding on the parties who were required to: "*promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award*".

If a party disagrees with the decision, they must serve a timely notice of dissatisfaction, and any arbitration cannot be started until the amicable settlement period has elapsed. The judge noted that, in other words, if either party does not accept the DAB's decision and the parties do not settle the matter amicably, then it is arbitration rather than reference to a DAB that ultimately decides a dispute between the parties.

Andre Maniam J considered that this left the case "*squarely*" within the general rule that pre-arbitral procedure is typically a matter of admissibility rather than jurisdiction. Having agreed to submit their disputes to arbitration rather than to a court, the parties likely intended for the arbitral tribunal to resolve any dispute over compliance with pre-arbitral procedure, rather than to have a further round of decision-making before a court to resolve that dispute. This meant that the Tribunal's decision on the employer's jurisdictional challenge was a decision on admissibility, which the court could not review. ■

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

Sam Thyne
Senior Associate
sthyne@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