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The City Law Review

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About The CLR

The City Law Review ('The CLR') is the student-led publication affiliated with The City Law School, a constituent of City, University of London. The Review's predecessor, The City Law Society Journal, was founded in 2015, and underwent rebranding in 2019. The Review is managed by an Editorial Board consisting of current City Law School students, with the objective of fostering students' participation and discourse in legal academic scholarship. The Review has undergone several changes over its near decade of legacy under the leadership of CLSJ I, CLSJ II, Shabbir Bokhari, Shabana Elshazly, Sophia Evans, Jonathan Lynch, Teya Fiorante, Monica Kiosseva, Nicholas Blaikie-Puk and, Mohammed Shamir Siddiqui.

This year, *The Review* is honored to be sponsored by 4 New Square Chambers, Matrix Chambers, The City Law School, and The City Women in Law Society. We extend our sincere gratitude to 4 New Square Chambers for their continued support, marking their third consecutive year of sponsorship and their second year of their esteemed writing prize.

The ongoing support of The City Law School has been instrumental in showcasing the work of aspiring lawyers, through initiatives such as hosting launch events, providing financial sponsorship, and the invaluable contributions of voluntary faculty members serving as guidance and Academic Reviewers.

The 2024 Editorial Board, comprising current LLB, GELLB, GDL, and BVS students at City Law School, has expanded the reach of *The Review* through key initiatives, including indexing with HeinOnline, obtaining a digital ISSN, rebranding the website, and launching *The CLR Blog*, which provides a platform for rolling contributions, smaller pieces, and discussions on contemporary legal topics.

This year, *The Review* presents three distinguished writing prizes, awarded by their respective namesakes:

- The 4 New Square Chambers 2025 Award
- The Editorial Board's Choice 2025 Award
- The Most Improved Piece 2025 Award

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Editor's Note

By Shamir Siddiqui, LLB2,
Editor-in-Chief of The City Law Review Volume VII
Managing Editor of The City Law Review Volume VI
Editorial Assistant of The City Law Review VI

Legal scholarship is more than an intellectual exercise it is a conversation, a challenge, and a responsibility. Each article in this volume is part of that ongoing effort to question, refine, and push the boundaries of legal thought. The law is not static, and neither is the way we engage with it.

It is my privilege to introduce the seventh volume of The City Law Review. As Editor-in-Chief, my goal has been to uphold the tradition of excellence that defines this publication while making space for new perspectives, refining, and extending it, ensuring that legal scholarship remains both rigorous and accessible. In these pages, you will find articles that challenge convention, interrogate precedent, and illuminate aspects of the legal system. This edition features articles that examine law from multiple angles doctrinal, economical, practical, and many more, reflecting the complexity of the legal world we study and engage with.

A journal like this is only as strong as the people behind it. I am deeply grateful to our Editorial Board, who have dedicated their time and expertise to ensuring the quality of this publication. Our Academic Reviewers and faculty mentors have provided invaluable guidance, shaping the work that appears in these pages. Most importantly, I want to thank our authors, who have approached their research with curiosity, rigor, and the courage to ask difficult questions.

As you read this volume, I encourage you not just to absorb its ideas but to engage with them, challenge them, discuss them, and build upon them. The law evolves through dialogue, and it is through these conversations that we shape its future.

Engage in curiosity.

Sincerely,

Shamir Siddiqui
Editor-in-Chief,
Volume VII, **The City Law Review**

I would like to thank:

At The City Law School

David Seymour - Head Academic Advisor of The City Law Review, Reader in Law

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With Special Thanks to Fuad & Humera Siddiqui

Foreword

By Professor Richard Ashcroft,
Executive Dean, City Law School, University of London

It is my pleasure to introduce this year's City Law Review.

Edited by students in The City Law School, the Review presents a breadth of new ideas and scholarship in law which is impressive and exciting. I am very pleased not only with the quality of the work presented, but also with the hard work and diligence of the editorial team, supported by Dr David Seymour. It is always a highlight of our year when the Review is published.

The City Law School is home to around 2,500 students at every level of legal academic and professional study. We aspire to be "the School for the Legal Services Industry", taking account of technological, professional, and commercial changes in the practice of law that are ongoing and will continue to disrupt the legal landscape for years to come. Yet certain core values will remain unchanged: justice, accountability, professionalism, and most of all "the rule of law". Good scholarship and clear writing remain at the heart of how we profess these values. Here is a good sample of such work!

Richard Ashcroft

Executive Dean, The City Law School

Arbitration ACT 1996 and English Arbitration Reform Bill: A Critical Analysis of Sections 30, 32 and 67 of Arbitration ACT 1996

By Faisal Ali Rana, BVS LLM

Introduction

The Arbitration Bill was introduced into Parliament in July 2024 and enacted the recommendations provided by the Law Commission of England and Wales to reform the Arbitration Act 1996.[1] The Arbitration Act 1996 is a cornerstone of UK law, providing a comprehensive framework for arbitration—a private, consensual process in which parties resolve disputes outside the courts through the decision of an impartial tribunal. The Act upholds party autonomy, promotes efficiency in dispute resolution, and reinforces the UK's position as a leading hub for international arbitration.

This Bill introduces several amendments to the current version of the Act, but for the primary purpose of our discussion, we will only focus on the relevant problems and issues attached to the question of jurisdiction raised by the parties at different stages of the proceeding, how the new bill overcomes these issues and the procedural issues that are in the current Act. This article will focus on three different jurisdictional issues, namely the pre-award stage brought before the tribunal and the court, and the post-award stage related to the substantial issue of the award given by the tribunal before the court. Lastly, it will focus on whether the relevant amendments are good enough to tackle the problems attached to the issue of jurisdiction.

[1] 'Arbitration Bill Re-introduced to Parliament', (*Law Commission Reforming the Law*, 18 July 2024), <https://lawcom.gov.uk/arbitration-bill-re-introduced-to-parliament/> accessed on 20 August 2024. Review of the Arbitration Act 1996- Law Commission, <https://lawcom.gov.uk/project/review-of-the-arbitration-act-1996/> accessed on 3rd March 2025.

The Overview of Jurisdiction in the Arbitration Act 1996

The primary power of the arbitration tribunal[2] in arbitration matters stems from the arbitration clause agreed between the parties in an agreement.[3] Any such agreement is signed prior to the arbitration taking place. Similarly, to establish the jurisdiction of the tribunal and enforceability of the award by the court, there is also a requirement to have a valid arbitration clause mutually agreed between the parties to the agreement.[4]
The Arbitration Act of 1996 allows parties to bring jurisdictional issues related to three stages. The first stage is before the tribunal; the second stage is before the court. These are both pre-award stages, which means that the award is still pending before the tribunal and the court. The third stage is before the court after the award is given by the tribunal. The first stage is governed by Section 30 of the Act, which provides that:

> Unless otherwise agreed by the parties, the tribunal may rule on its substantive jurisdiction: a) whether there is a valid agreement; b) whether the tribunal is properly constituted and c) are the matters submitted to the court per the agreement.[5]

The second stage is governed by Section 32 of the Act, which, in limited circumstances, confers on the party the right to apply to determine any question as to the substantive jurisdictional of the arbitral tribunal. The third stage is governed by Section 67 of the Act, which provides that;

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[2] 'Arbitrational tribunal' refers to the group of impartial adjudicators who resolve disputes through arbitration.
[3] Practical Law Arbitration, 'The Jurisdictional Challenges Under English Arbitration Act of 1996' (*Thomson Reuters*, 2023).
[4] Petar Petkov and others, 'Jurisdictional Challenges' (*Global Arbitration Review*, May 2023), <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/3rd-edition/article/jurisdictional-challenges> accessed on 20 August 2024.
[5] *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm), [2005] 1 Lloyd's Rep, 192 at [22]

> a party to arbitral proceedings may apply to the court challenging any award of the tribunal as to its substantive jurisdiction or apply to declare the award of the tribunal to not affect merits, in whole or part of it, because the tribunal did not have the substantive jurisdiction.[6]

The primary purpose of understanding the difference between pre-award and post-award stages is their impact on the timing, scope, and efficiency of arbitration proceedings. A potential challenge faced in the pre-award stage is the delay in determining the substantial issues in the dispute. In contrast, post-award jurisdictional challenges occur after the decision has been rendered by the tribunal, which raises the issue of enforceability and finality of the award. These issues create practical challenges for the parties as they can add to the cost and strategic considerations involved in arbitration.

Looking at the broader policy challenges, this disturbs the delicate balance between the parties' autonomy and the use of judicial oversight as a delay tactic in arbitration. This article examines the efficacy and practicality of the current legal framework under this Act and describes the challenges it might face after the recommended reforms.

The Scope and Implications of Section 30: *Kompetenz-Kompetenz*

The view taken by English law has always been that an arbitral tribunal cannot be the final adjudicator of its jurisdiction and that this power should be held by the courts.[7] However, there is no reason why the tribunal should not have the power to rule on its jurisdiction. Such power is referred to by the courts as the principle of *Kompetenz-Kompetenz* and is also recognised by other national legal systems.

The idea of *Kompetenz-Kompetenz* is that the arbitral tribunal will determine its jurisdiction, which plays an important role in maintaining the smooth functioning of the arbitration

[6] *Sumukan Ltd v Commonwealth Secretariat (No.2)* [2007] EWCA Civ 1148, [2008] 1 Lloyd's Rep. 40

[7] *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 1 A.C. 314, 327; *Dallah Real Estate & Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 A.C. 763 at [26}

process and its authority. This allows the tribunal to address the issue of jurisdiction early on and move to the substantial issues facing the parties. This minimises delays incurred in cases where a respondent contests the validity of an arbitration agreement, and the case is then referred to national courts. *Kompetenz-Kompetenz* empowers the tribunal to proceed without waiting for court intervention, ensuring the swift progression of the arbitration.

An example is found in the case of *Fiona Trust & Holding Corporation v. Privalov* [2015], where the tribunal's ability to determine its jurisdiction avoided unnecessary court proceedings, aligning with the overarching goal of arbitration to provide timely and cost-effective dispute resolution.[8]

This power of the tribunal has been put in writing under Section 30 of the Arbitration Act 1996.[9] The arbitration agreement is a requirement that allows the tribunal to rule under section 30 of the Act. In the case of *Harbour Assurance Co Ltd v Kansa General International Insurance Co Ltd*, it was held that there was a difference between the main agreement and the arbitral agreement, and that the arbitral agreement can still apply where the courts declare the main agreement invalid.[10]

The application of Section 30 of the Act is non-mandatory and could be excluded by the parties through mutual written consent. In practice, this is very rarely followed. Section 30 of the Arbitration Act empowers the tribunal to rule on its jurisdiction. However, this authority is not absolute: Section 32 allows parties to seek a review or appeal of the tribunal's decision before the court, rendering the tribunal's jurisdictional ruling non-final.

This process of duplication in arbitration is about the efficiency of the process. The duplication is not an inherent feature of the arbitration process but the issue can be used

[8] *Fiona Trust v Privalov* [2015] EWHC 527 (Comm)
[9] Hugh Beale, *Chitty on Contracts*, (35th Edition, Sweet and Maxwell, 2023)
[10] *Harbour Assurance Co Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701.

by the parties as a procedural loophole to delay proceedings or seek strategic advantage over the other party. From the practitioner's overview, this is a recurring issue in high-stakes disputes where jurisdictional arguments are used tactically.

The prime example of the above can be taken from the case of *Dallah Real Estate v. Ministry of Religious Affairs of Pakistan* [2011].[11] In this case, the court faced the simultaneous challenge of jurisdiction before the tribunal and the UK courts. This demonstrated the potential of overlapping proceedings to increase costs and prolong resolution times. Another significant issue was that if the jurisdiction of the tribunal is deemed void, then the ruling and award of the tribunal would also be considered void, making the whole process a waste of time and money for both parties. Therefore, it is extremely important to streamline these procedures to make sure that the disputes are resolved efficiently under the current legal framework.

The Scope and Implications of Section 32: Judicial Oversight in Jurisdictional Challenges

Section 32 of the Act provides the parties to challenge the jurisdiction of the arbitral tribunal before the court. This process is limited, however, to prevent unnecessary interference with the autonomy of the arbitral tribunal. A key restriction is that both parties must agree to challenge the issue of jurisdiction before the court. Without mutual consent, the court will generally refuse the application of the party, or the tribunal permits it despite objections from one party.[12] Similarly, in Section 32(2)(a), an application requires permission from the tribunal. Under Section 32(2)(b), the court may also rule on

[11] *Dallah Real Estate & Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011]

[12] Liam Hart and others, 'Important proposed changes to the English Arbitration Act: (3) challenging substantive jurisdiction of the tribunal', (*Reed Smith Driving Progress through Partnership*, 16 October 2023), < https://www.reedsmith.com/en/perspectives/2023/10/important-proposed-changes-to-the-english-arbitration-act-3> accessed on 23 August 2024.

the matter if the issues raised are likely to reduce costs and there is a valid reason for judicial intervention.

The importance of a written agreement to go to court was explored in the case of *Vale do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd.*[13] Here, it was held that where there is a lack of agreement between all the parties to the proceeding, the court can refuse to entertain the issue of the tribunal's jurisdiction.

This reaffirms that arbitration is a fundamentally consensual process, reliant on the mutual agreement of all parties involved. Without a clear, written agreement to arbitrate, the jurisdiction of the tribunal may be questioned, and the court can refuse to entertain the issue. This highlights the importance of having a properly documented arbitration clause to ensure that the tribunal has the authority to hear the dispute.
Sections 30 and 32 of the Act allow parties to raise issues of jurisdiction before the tribunal and the court. This dual opportunity increases the risk of duplicative proceedings and forum shopping, where parties may select the forum, they believe will be more favourable to their case.

Duplicative processes can cause unnecessary delays in the arbitration process. This process will prevent the tribunal from adjudicating on the issues at hand until purported jurisdictive issues are resolved by the court. Moreover, Section 73 of the Act complicates the process, as it sets out a time limit for parties to bring an action over the issue of jurisdiction before the court. Failure to comply with these limits may result in the party losing the right to bring the challenge and potentially prejudicing their position.

To curb these issues, the Law Commission has proposed that section 32 should be restricted in operating as a direct route for bringing preliminary questions of the tribunal's

[13] *Vale do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] C.L.C. 1200.

jurisdiction before the Court.[14] It is best to streamline the process for quicker and conclusive resolution of disputes.

The Scope and Challenges of Section 67: Rehearing and its Impact on Arbitration

Section 67 of the Act provides an aggrieved party with a mechanism to challenge before the court an award given by an arbitral tribunal. Certain grounds must be satisfied to challenge the award. These are (i) that the tribunal lacked the jurisdiction to pass the award, and (ii) that a successful challenge can result in the court setting aside the whole or part of the award.[15]

In the case of *Cockett Marine Oil DMCC v ING Bank NV and Others*, the court held that the assignee's power to insert an arbitration clause in an agreement was a question for the tribunal.[16] Section 67 of the Act is mandatory, and the parties cannot decide to opt out of it.[17] While arbitration is valued for its flexibility and party autonomy, Section 67 introduces a non-negotiable layer of judicial oversight. This ensures that awards rendered by arbitral tribunals adhere to the agreed jurisdictional scope and the principles of fairness and legality.

However, this provision mandates a full rehearing of the jurisdictional issue rather than merely reviewing the tribunal's decision. This approach, while ensuring thorough judicial scrutiny, has significant implications for the arbitration process. When an application is made under section 67 of the Act, the court carries out a complete rehearing of the issues of jurisdiction. In *Integral Petroleum v Melars Group Ltd,* the court held that the court's

[14] Liam Hart and others, 'Important proposed changes to the English Arbitration Act: (3) challenging substantive jurisdiction of the tribunal', (*Reed Smith Driving Progress through Partnership*, 16 October 2023), < https://www.reedsmith.com/en/perspectives/2023/10/important-proposed-changes-to-the-english-arbitration-act-3> accessed on 23 August 2024.

[15] Nathan Searle and Alice McCarthy, 'Challenging an award under section 67 of the English Arbitration Act 1996', (*Thomson Reuters*, 2023)

[16] *Cockett Marine Oil Dmcc v ING Bank and Others* [2019] EWHC 1533

[17] Arbitration Act (1996), s.4.

primary purpose was not to review the award but rather to carry out a complete rehearing of the issues.[18] This was confirmed in the Supreme Court case of *Dallah Real Estate & Tourism Co v Ministry of Religious Affairs of the Government of Pakistan*, which found that jurisdictional issues under section 67 should proceed by full rehearing.[19]
The concept of a full rehearing can lead to wasteful costs and time for both parties. The award's enforcement by the tribunal is also delayed by rehearing, causing further wait time for the successful parties. The full hearing can potentially provide the losing party with the opportunity to bring new arguments and evidence to cure the deficiencies identified by the tribunal. Moreover, this practice would be taken by the parties as a practice drill before the true game day in court. They would also refrain from putting the best arguments forward before the tribunal, choosing to keep it for the last possible moment[20].

Unlike a review, which would assess the tribunal's reasoning and decision, a rehearing involves a fresh examination of the evidence and arguments, placing additional time and resource burdens on the parties.

The Proposed English Arbitration Reform Act

The reform being brought to section 32 of the Act is through the insertion of section 32(1A) on the determination of the preliminary point of jurisdiction. This provides that '[an] application under this section must not be considered to the extent that it is in respect of a question on which the tribunal has already ruled.' [21] This is a welcome approach, as section 32 would supplement section 30 and minimise the duplicate proceedings of the 1996 Act. This would also help cut costs for the parties and uphold the principle of *Kompetenz-Kompetenz*. Implementing section 32 of the Act would waste resources and time for the court as the tribunal had already ruled on its jurisdiction, and a better route would

[18] *Integral Petroleum SA v Melars Group* [2016] EWCA Civ 108.
[19] *Dallah Real Estate & Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 A.C. 763
[20] Hart and others [14]
[21] Arbitration Bill 2024-2025 (HL Bill 1), s.5.

have been under section 67 of the Act.[22] Therefore, having an additional route was illogical and created complexities for the parties.

This addition of section 32(A) is a step towards expediting the ADR process and reducing the burden on courts by limiting the court's involvement in jurisdictional matters already ruled upon by an arbitral tribunal, decreasing the number of duplicative hearings and applications brought before the courts. This amendment would also save judicial resources and time, allowing courts to focus on cases requiring their intervention. From the parties' perspective, this would help them resolve their issues quickly with reduced costs, making arbitration an appealing way of resolving issues rather than a lengthy court process. From a commercial perspective, this reform would also appeal to the needs of modern business, especially in international markets where businesses aim to choose more streamlined and business-friendly frameworks.

The full effectiveness of this reform is still to be considered. The recent case of *Churchill v Merthyr Tydfil County Borough Council* may cause a problem for the current amendment, however.[23] Here, the Court of Appeal has shown its reluctance to accept the arbitration process' autonomy. They held that the court can lawfully stay existing proceedings or order the parties to engage in a non-court-based proceeding, including arbitration, 'if it does not impair the very essence of the claimant's right to a fair trial and is proportionate to achieving the legitimate aim of settling the disputes fairly, quickly and at a reasonable cost.' While this judgment reinforces the court's focus on balancing procedural fairness with efficient ADR, it also shows judicial discretion - leaving room for court involvement and reintroducing delays in certain cases. This reiterates the purpose of Section 32(1A) by not fully eliminating the duplicative nature of the process.

[22] *Film Finance Inc v Royal Bank of Scotland* [2007] EWHC 195 (Comm), [2007] 1 Lloyd's Rep 382.
[23] *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416

The reform being brought forward to section 67 of the Act is through the insertion of section 67(3B).[24] This subsection proposes that where the tribunal has already ruled on its jurisdiction, and the objecting party has participated in the procedure, then any challenge to the award must only be reviewed and should not be heard through a full hearing. Subsection 67(3C) restricts new evidence or new objections to be brought, unless it can be shown that the applicant had reasonable grounds for not providing such evidence during the arbitration proceedings.[25] Primarily, a) new objections are barred if not presented earlier unless undiscoverable, b) new evidence was not available earlier and c) evidence already heard by the court and cannot be heard again. Subsection s.67(3D) provides that these provisions do not prevent the court from making new rules.[26]

These reforms have not only streamlined the post-award challenges but also provided reliable alternate interpretations of litigation and made the UK a more attractive arbitration jurisdiction by fostering confidence in its efficiency. These amendments help reduce additional delays and costs that would otherwise result in repetition. This also allows parties to make objections upfront rather than at a later stage, preventing delays and saving costs.

Are the Proposed Reforms to Arbitration Act Fit for Purpose?

The Law Commission's recommendations for section 32 and section 67 are welcomed by the majority of the practitioners and arbitrators for their lowering cost and improving procedural predictability and fairness. While the principles are sound, however, the proposed amendments also create procedural uncertainties that may lead to new areas for exploration in dispute resolution, and which may confer unfair tactical advantages on either party. The following are some of the issues that could be encountered in practice:

[24] Arbitration Bill 2024-2025 (HL Bill), s.11(3B).
[25] ibid, section 11(3C)
[26] ibid, section 11(3D)

Balancing Efficiency and Fairness: The Implications of Amendments to Section 67

The new amendments propose to prohibit parties from bringing new arguments or evidence under section 67. However, it would not apply where, in the 'interest of justice', the parties were not able to bring arguments or evidence despite 'reasonable diligence' to put before the tribunal.[27] The exception provided under the 'interest of justice' lacks precise parameters, allowing for inconsistent application. For example, what would happen in cases where evidence was unavailable, or was not recorded by the tribunal because of some technical malfunctions, such as transcription errors, or only scenarios where external factors prevented evidence from being brought forward? Such uncertainties would create unpredictability and potentially undermine the efficiency of the whole process that amendments aim to achieve.

The criterion of 'reasonable diligence' further muddles the situation. How will courts assess whether a party exercised sufficient diligence in attempting to present arguments or evidence to the tribunal? For instance, if one party fails to bring key witness testimony because of some logistical challenges, would that meet the requirement of diligence?

A critical analysis must also be made of the unintended consequences of these vague words. While the reforms look at discouraging tactical delays and reinforcing finality in the award, overly strict judicial interpretations could discourage parties from seeking legitimate recourse in cases of genuine oversight or injustice. Conversely, overly lenient interpretations may reintroduce the inefficiencies the reform seeks to eliminate. The success of this reform is unclear but will be tested and experimented on by the courts in the future.[28]

[27] Arbitration Bill 2024-2025 (HL Bill), section 11(3C)
[28] Hart and others [14]

Defining Participation: A Potential Gray Area in Section 67 Reforms

The new limitation to the hearing that applies to section 67 of the Act would only apply where the parties have already participated in the arbitration before the tribunal. Otherwise, it would be the first chance for the arbitrating party to present their case before the court - no concern about duplicity would apply here. However, the meaning of participation in arbitration is not clear. The definition of steps or actions that would count as 'taking part in arbitration proceedings' poses a critical challenge in this reform. For instance, does written submission, attending preliminary meetings, or actively presenting evidence qualify as participation? If this is not defined by the courts, it would cause excessive litigation and undermine the whole concept of these reforms. This ambiguity may incentivise parties to dispute their level of involvement to circumvent the limitations, potentially leading to additional delays and costs. Without further legislative or judicial clarification, the full benefits of the Section 67 reforms may remain unrealised.[29]

Navigating the Jurisdictional Challenge Gap: Unintended Consequences of Section 32 and 67 Reforms

The purpose of the Arbitration Act was to streamline jurisdictional challenges, creating two distinct pathways: 1) allowing parties to challenge the jurisdiction before the court after an award is given by the tribunal under section 67; and 2) permitting parties to challenge the jurisdiction of the tribunal before the court on issues which are not determined by the tribunal. However, the language of these two sections has made significant procedural gaps in its application. Section 67 only allows challenges against the jurisdiction when it passes an award, and section 32 can only be invoked when the tribunal has not ruled over its traditional jurisdictional question.

As seen from practice, the tribunals tend to resolve the issue of jurisdiction in preliminary questions rather than taking it to the end to provide a decision as a whole part of the formal award. This creates a scenario where both pathways are effectively ruled out: the

[29] Hart and others [14]

tribunal's preliminary ruling on jurisdiction does not count as an 'award' under section 67, and section 32 is excluded because the tribunal has already ruled on its jurisdiction. This would leave parties with no recourse to challenge the question of jurisdiction.

This was certainly not the parties' intention, as it undermines the accessibility and fairness of arbitration. The parties may face significant challenges such as delay, increase in costs, and procedural uncertainty. Not only would this affect the process, but also risks diminishing public confidence in arbitration over litigation as a method of resolving disputes. To address this issue, tighter wording is needed, and precise legislation is required.[30]

Conclusion

The Arbitration Act 1996 has been a crucial legal framework for the UK and gained popularity for its new way of resolving legal issues with modern, efficient, and cost-effective alternative dispute resolution (ADR) mechanisms. It allows parties to resolve legal issues outside the court by appointing an arbitrator. The purpose of this Act was to provide flexible, cost-effective, and quicker resolution of disputes. However, the framework under sections 30, 32 and 67 relating to the issue of jurisdiction has been highlighted due to its duplicative effect, increased cost and time needed to resolve the legal issues.

The recent reforms provided under these sections are welcomed by the practitioners and arbitrators for their ability to combat delays, complexity, and duplicity in the process. However, even after the proposed amendments in the Arbitration Act, there are issues that still make the process ineffective for the parties. For example, the procedural gaps where parties may lack recourse to challenge jurisdiction necessitate clearer and tighter wording to safeguard the right to challenge. Another concern is the lack of a clear definition for 'participation' in arbitration under the new reforms, especially where the right to a full rehearing is limited. Without legislative clarity or guidance, inconsistent

[30]Hart and others [14]

interpretations by the courts may arise, undermining fairness in proceedings. To preserve the integrity and procedural efficiency of this Act, these lacunas need to be addressed by Parliament to ensure parties play a fair game in the process.

The Role of Arbitration in International Sale Contracts: A Comparative Study with English Litigation

This piece was awarded the '4 New Square Chambers 2025' award

By Keerththana Gnanavelrajah, LLM

Abstract

In the context of a rapidly globalizing economy, international trade agreements often involve parties from diverse legal jurisdictions, which can lead to complexities in dispute resolution. This paper explores the significance of incorporating arbitration clauses in international sales contracts as a proactive means to mitigate potential legal conflicts. By comparing arbitration to litigation, the paper highlights the advantages of arbitration, including neutrality, efficiency, and enforceability of awards across borders. It argues that arbitration provides a more predictable and effective mechanism for resolving cross-border disputes, thereby fostering greater confidence in international commercial transactions.

Assessing the Role of Arbitration in International Sale Contracts: A Comparative Study with English Litigation

1 INTRODUCTION

In today's globalized economy, most national markets are increasingly open and interdependent, significantly increasing international trade agreements. However, legal disputes might emerge when contracts span different jurisdictions, creating challenges and uncertainty for the parties in determining the applicable dispute resolution laws. These complexities can lead to delays, increased costs, and potential damage to business relationships, making it essential for parties to proactively address such issues. To mitigate

the potential disruptiveness of such disputes, lawyers can proactively address this by specifying a clear dispute resolution mechanism within the contract.[31] A dispute resolution clause is a significant element in cross-border contracts[32], and international commercial arbitration is often considered the preferred method of dispute resolution in an international context.[33]

2 UNDERSTANDING ARBITRATION

'Arbitration is a method of settling disputes outside the court system, involving the appointment of one or more arbitrators who listen to the parties' arguments and deliver a binding decision on the matter'.[34] The consent of the parties is the cornerstone of any arbitration procedure.[35] The neutral third party appointed to resolve disputes is known as the 'arbitrator'. Typically, arbitrators possess specialized knowledge and experience in the relevant field. The decision they issue, known as an arbitral award[36], is ultimately binding and enforceable, much like a court judgment. The efficiency of the process can be enhanced by including an 'arbitration clause' within the contract. Such a clause should

[31] Li Ya Wei, "Dispute Resolution Clauses in International Contracts: An Empirical Study" (2006) 39 Cornell International Law Journal 790.

[32] Anjika Verma, 'Introduction to International Arbitration' (2020) Guru Gobind Singh Indraprastha University Journal.

[33] Katharina Plavec, "The Law Applicable to the Interpretation of Arbitration Agreements Revisited" (2020) 4 University of Vienna Law Review p84.

[34] Marsh and Soulsby, *Business Law* (7th Edn, Stanley Thornes Ltd 1998) 37.

[35] William Rowley, *Arbitration World: Jurisdictional Comparison* (2nd Edn, The European Lawyer Ltd 2006) p 17.

[36] Maxi Schere, "Arbitration", [2023] Vol 40 (1) Journal of International Arbitration.

clearly define the types of disputes it covers and specify that arbitration will be the sole method of resolving conflicts. These clauses are commonly used in international contracts.

Parties may choose either institutional arbitration or *ad hoc* arbitration.[37] In ad hoc arbitration, the parties handle the arbitration proceedings independently, without the support and assistance of an arbitral institution. Conversely, institutional arbitration adheres to the established rules and procedures of a recognized arbitral institution, throughout the arbitration process. Arbitration can be either voluntary or mandatory, depending on the agreement between the parties or the applicable governing law.[38] In mandatory arbitration, the parties are legally required to resolve their disputes through arbitration. In voluntary arbitration, parties have the flexibility to explore alternative dispute resolution methods before opting for arbitration.

Following World War II, the growing need for international cooperation among nations fostered a desire for efficient dispute-resolution mechanisms, leading to a significant rise in the popularity of arbitration. As countries focused on economic development and infrastructure rebuilding, the need to settle disputes arising from post-war reconstruction efforts became paramount. This period also saw the rise of multinational companies, which required reliable and neutral forums for resolving cross-border disputes. Additionally, the establishment of international legal frameworks and institutions, such as the United Nations and the International Chamber of Commerce, provided formal structures for arbitration. These developments collectively contributed to arbitration becoming a preferred method for resolving conflicts in the globalized world.

[37] Indira Carr and Peter Stone, *International Trade Law* (6th Edn, Routledge 2018) 631.

[38] Andrea Bjorklund and Ruth Teitelbaum, "Arbitration International", (2022) Vol 38 Oxford University Press.

3 ARBITRATION v LITIGATION: A COMPARATIVE ANALYSIS

Litigation refers to the process of resolving problems between parties through the formal filing of a lawsuit in a court. While this approach may be appropriate for certain individual cases, businesses that have experienced a litigation process, even when the outcome was settled in their favour, often remain reluctant to engage in it again.[39] Companies engaged with other countries (internationally), tend to avoid litigation for several compelling reasons, including higher costs, lengthy processes, negative publicity, and public filings. They may also be concerned about biased decisions, unfamiliar judicial procedures, language barriers, a lack of flexibility, no choice of forum, and decisions made by judges without specialized expertise. Furthermore, businesspeople often prioritize swift dispute resolution, seeking timely outcomes that allow them to quickly resume their operations. Arbitration is widely considered the most effective method for businesspeople to resolve their disputes[40], bridging the gap left in litigation. An analytical report by the European Union for Georgia found that 63.5% of respondents preferred arbitration over litigation[41]. Similarly, the Australian Arbitration Survey 2021[42] reported that 80% of the respondents were satisfied with arbitration. According to a 2018 report by Queen Mary University of London, an impressive 99.08% of respondents favoured arbitration and would

[39] Bello Adesina Temitayo, "Why Arbitration Triumphs Litigation: Pros of Arbitration" (2014) 3 No.2 Singaporean Journal of Business Economics, And Management Studies <http://dx.doi.org/10.2139/ssrn.3354674> accessed 14 September 2024.

[40] ibid.

[41] 'Satisfaction Research on Mediation and Arbitration Use' (*UNDP. Org*, 2020) <https://www.undp.org/sites/g/files/zskgke326/files/migration/ge/undp_ge_dg_adr_survey_user_satisfaction_eng.pdf> accessed 19 September 2024.

[42] 'Australian Arbitration Report' (*ACICA.org*, 2023) <https://acica.org.au/australian-arbitration-report/> accessed 19 September 2024.

recommend it for cross-border disputes.[43] Furthermore, the Queen Mary University of London's 2021 survey report indicated that 90% of the respondents preferred international arbitration for resolving cross-border disputes.[44] The global popularity of arbitration, despite the availability of litigation, is evident.

3.1 KEY DIFFERENCES IN PROCESS AND OUTCOMES

Arbitration and litigation are two distinct methods of dispute resolution, each with its unique processes and outcomes. While both aim to resolve conflicts, they differ significantly in terms of formality, procedural rules, and the authority of the decision-makers.

In arbitration, parties have the autonomy to select the arbitrator with expertise and knowledge in the relevant field, which helps to ensure a precise decision. In contrast, during litigation, parties do not have the option to choose their judge, and judges may lack specialized knowledge in the relevant area, potentially leading to less informed and unpredictable judgment. Additionally, a judge acts as a representative of the state, carrying responsibilities tied to public policy and sovereignty. In contrast, an arbitrator's duties and responsibilities are more limited in scope, being determined by the specific terms agreed upon by the arbitral institutions or the parties.[45]

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[43] Queen Mary University of London, '2018 Arbitration Survey: The evolution of international arbitration' (*qmul.ac.uk*, 2018) <https://arbitration.qmul.ac.uk/research/2018/> accessed 19 September 2024.

[44] Queen Mary University of London, '2021 Arbitration Survey: Adopting arbitration for a changing world' (*qmul.ac.uk*, 2021) <https://www.whitecase.com/publications/insight/2021-international-arbitration-survey> Accessed 19 September 2024.

[45] Leela Kumar, 'The Independence and Impartiality of Arbitrators in International Commercial Arbitration' (2014) Social Science Research Network 1.

In litigation, parties may have concerns about the potential for biased decisions. However, when international commercial arbitration is selected, no party can concede a "home court" advantage to another[46], as arbitration ensures neutrality. Furthermore, arbitration is generally more enforceable due to its globally applicable and streamlined process.[47] In contrast, litigation often involves a complicated enforcement procedure and lacks consistent global recognition. The most significant advantage of arbitration over litigation in resolving international commercial disputes lies in its enforceability. According to the 2018 survey graph, 64% of respondents identified enforceability as the most valued characteristic of international arbitration. This highlights its pivotal role in making arbitration a preferred mechanism for cross-border dispute resolution.[48]

Even when a legal dispute arises, businesses must maintain their reputation and safeguard confidentiality. Arbitral awards are not made public, whereas court proceedings are typically reported in established forums, and most judgements are accessible to the public. In *Hassneh Insurance Co of Israel v Mew*[49], it was mentioned that arbitral documents cannot be disclosed to third parties. The protection of confidential information is stronger in arbitration than in litigation[50], and the advantages of privacy and confidentiality are well acknowledged within the arbitral process.[51] Certain national laws specifically include

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[46] Paul Klaas, 'International Commercial Arbitration' (2017) College of Commercial Arbitrator Journal 2.

[47] Craig R Trachtenberg, 'Nuts and Bolts of International Arbitration' (2019) 38 American Bar Association 451.

[48] 2018 Arbitration Survey: The evolution of international arbitration (n 13).

[49] *Hassneh Insurance Co of Israel v Stuart J Mew* [1993] 2 Lloyd's Rep 243.

[50] Amy Schmitz, "Untangling the Privacy Paradox in Arbitration" (2006) 54 University of Missouri Faculty Publications.

[51] Michel Young and Simon Chapman, 'Confidentiality in International Arbitration' (2009) 27 Kluwer Law International 26.

provisions to ensure confidentiality in arbitral proceedings. For instance, the New Zealand Arbitration Act 1996[52], Norway's Arbitration Act[53], and the Spain Arbitration Act[54] each contain measures that prioritize the protection of confidentiality during arbitration.

The decisions of arbitration (awards) are final and binding, with limited grounds for appeal. In contrast, litigation may be subjected to more prolonged appeals. Arbitration provides greater flexibility in procedural customization and the selection of arbitrators. Parties can opt for institutional arbitration, through bodies like the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), and the Permanent Court of Arbitration (PCA) and the procedures are tailored with the mercantile community in mind. Arbitration is widely recognized for its flexibility, which stands in contrast to the rigid procedures of litigation that often fail to meet the needs of the mercantile community. This procedural rigidity is a key element that distinguishes national courts from arbitration tribunals.[55] While arbitration is not always the least expensive option, it can become more affordable when parties agree on a simplified approach and limit costly practices. Compared to the expenses associated with litigation and its lengthy process, arbitration can be viewed as the most cost-effective choice.
International arbitration possesses several distinct characteristics, including the venue of arbitration, the seat of arbitration, and the doctrine of party autonomy.

1. The **venue of arbitration** refers to the location where the proceedings are held. The parties to an international contract may often agree to resolve their dispute in a

[52] New Zealand Arbitration Act 1996.

[53] Norwegian Arbitration Act 2005.

[54] Spanish Arbitration Act 2003.

[55] Julian D M Lew, Loukas A Mistelis and Stefan M K roll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) p 5.

country where neither party resides.[56] This allows for the selection of a neutral and convenient venue, regardless of where the dispute arose or where the contract was formed. In contrast, litigation does not offer such flexibility in choosing the venue.

2. The **seat of arbitration** refers to the country that provides the curial or procedural law *(lex arbitri).*[57] The parties involved in arbitration have the authority to choose the seat. While the seat and the venue of arbitration are typically the same, they can differ if the parties decide to specify different locations.
3. **Party autonomy** is the most pivotal characteristic of arbitration. This principle is recognized not only in national laws but also by international instruments, such as the New York Convention and the Model Law, as well as by international arbitral institutions.[58] Party autonomy in an arbitration agreement allows the parties to customize the arbitration proceedings to suit the type of disputes that may arise, with the aim of ensuring a swift and fair decision in a cost-effective manner for both sides. However, there are some limitations to this unique authority, as it is generally subject to public policy rules.[59] Unlike arbitration, party autonomy is not available in litigation.

The above-mentioned characteristics further enhance the growing preference for arbitration in resolving disputes. Litigation is often viewed less favorably as resolving international commercial disputes, while arbitration is increasingly gaining ground as a preferred method of dispute resolution due to its numerous advantages.[60] The enforcement of an arbitral award is facilitated in the same manner as a court

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[56] Avindra Rodrigo And Kasuni Jayaweera, "International Arbitration- A Transnational System of Justice" (2017) 23 The Bar Association of Law Journal p313.

[57] Ibid, 313.

[58] Nigel Blackaby, Constantine Partasides, and Alan Redfern, *Redfern and Hunter on International Arbitration* (7th Edn Oxford University Press, 2022) p.355.

[59] Avindra Rodrigo (n 28) p.314.

[60] Ya Wei Li (n 1) p.796.

judgment[61], making it clear that an arbitral award is equivalent to a judicial judgment. Moreover, international arbitration promotes peaceful international relations, especially in contrast to litigation. Arbitration is a non-adversarial process, helping to establish long-lasting business relationships by resolving disputes amicably and producing 'win-win' outcomes.[62]

4. INTERNATIONAL CONVENTION AND INSTRUMENT ON ARBITRATION

International Conventions and instruments play a crucial role in shaping the landscape of arbitration as a preferred method of dispute resolution. These frameworks establish the legal foundations for arbitration agreements, procedures, and the enforcement of arbitral awards across borders. Prominent among these are the UNCITRAL Model Law on International Commercial Arbitration and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

4.1 New York Convention 1958

Several International Conventions have simplified the process of recognizing and enforcing arbitral awards.[63] The primary catalyst for the development of an international arbitration regime was the adoption[64] of the 'New York Convention on the Recognition

[61] Chathura Warnasuriya, Enforcement of Arbitral Awards; Key Aspects Under English and Sri Lankan Law (2022) Vol 1 Kurunegala Law Journal p60.

[62] Nigun Serdar Simsek and Kerim Bolton, 'General Overview as to the Distinction between Litigation and Alternative Dispute Resolution Methods' (2015) Social Science Research Network 1.

[63] Indira Carr and Peter Stone (n 6) p.634.

[64] Julian D M Lew, Loukas A Mistelis and Stefan M K roll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) p 20.

and Enforcement of Foreign Arbitral Awards'.[65] More than 160 nations have agreed to adhere to this treaty, which aims to establish uniform international standards for the recognition of foreign arbitration agreements and arbitral awards.[66] It was adopted by the UK in 1975.

The convention consists of only sixteen Articles. Article I[67] defines the scope of the convention. The Convention is intended to apply to arbitral awards 'made in the territory of a state other than the state where the recognition and enforcement of such awards are sought.'[68] Article 1 (1) clearly establishes that the Convention applies to foreign awards. Article II[69] obligates contracting countries to recognize and enforce arbitration agreements, ensuring that these arbitration agreements are upheld and respected by all signatory countries. This provides a distinct advantage over litigation, as it guarantees international enforceability and cooperation. Article III states that each contracting state shall recognize and enforce an arbitral award[70], with the conditions outlined in Article IV[71], Article V[72] and Article VI[73]. This greatly enhances the global enforceability of arbitral

[65]The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) 330 UNTS 38.

[66] Gary Born, "The New York Convention: A Self Executing Treaty" (2018) 40 Michigan Journal of International Law 119.

[67]The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article I.

[68] Ibid, s 1(1)

[69] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article II.

[70] Ibid., Article III.

[71] Ibid., Article IV.

[72] Ibid., Article V.

[73] Ibid., Article VI.

decisions, a significant advantage over litigation, where court decisions from certain jurisdictions may lack international recognition. Article V[74] specifies the grounds under which the recognition of an arbitral award can be refused. It also states that the burden of proving the reason for refusal lies with the party opposing recognition and enforcement. However, this does not apply in cases involving non-arbitrability or public policy issues.

If a contracting state of the New York Convention agrees to recognize an award as binding, it is required to enforce it according to its procedural rules. It also agrees not to impose substantially more onerous conditions or higher fees on the recognition and enforcement of foreign awards than those applied to domestic awards.[75] The Convention also emphasizes the creation of a 'Central Authority' in each ratifying nation, which is responsible for handling requests related to the arbitral award.[76] Usually, the government of the nation makes the designation. The convention fosters global cooperation among courts and ensures international uniformity in the arbitral process, as several countries have ratified it. This uniformity and neutrality are key advantages of international arbitration.

4.2 UNCITRAL Model Law

The UNCITRAL Model Law on International Commercial Arbitration 2006, was designed to help countries reform and modernise their laws on arbitral procedures by considering the elements and requirements of international commercial arbitration. The

[74]The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V.

[75] Avindra Rodrigo And Kasuni Jayaweera, "International Arbitration- A Transnational System of Justice" (2017) 23 The Bar Association of Law Journal p320.

[76] Konstantina Kalaitsoglou, "Exploring the concept of arbitral awards under the New York Convention", [2021] Vol 5 (2) Sage Journal.

Model Law has achieved significant success, as it clearly explains the arbitral process from beginning to end and has been adopted in 93 states across 126 jurisdictions.[77]

The Departmental Advisory Committee on Arbitration Law (UK) chaired by Lord Mustill, advised against adopting the Model Law, considering its repute and significance.[78] Some of the reasons include that the Model Law applies to international commercial arbitration but not to domestic disputes, whereas English law integrates both regimes.[79] The Model Law was primarily aimed at jurisdictions with few or no established principles of arbitration law, whereas the UK already had a mature, tried-and-tested system[80] The committee recommended that a new 'user-friendly' and more accessible Act should be enacted.[81] It was noted that the UK is a leading arbitration centre globally; therefore, the country's law should encourage and promote other nations to adopt it, and it should be user-friendly. The UK chose to modernise its arbitration laws without adopting the Model Law, with caution to follow its format and consider its provisions[82]. Many similarities can be observed between the Model Law and the Arbitration Act of the UK.

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[77] United Nations, 'UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006' <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 20 September 2024.

[78] Jason Chuah, *Law of International Trade: Cross Boarder Commercial Transactions* (4th Edn, Sweet and Maxwell 2009) p 687.

[79] Ibid.

[80] Jason Chuah (n 58).

[81] Indira Carr and Peter Stone (n 6) p 636.

[82] Nigel Blackaby, Constantine Partasides, and Alan Redfern (n 27) p 66.

Several provisions of the Model Law were amended in July 2006.[83] Article 1 outlines the scope of application, stating that the law applies to international commercial arbitration.[84] Notably, Article 7, which defines and governs the formation of arbitration agreements, was amended in 2006 to better align with international contract standards[85]. This update has modernised the format necessary for an arbitration agreement, reflecting the advancement of the arbitration process along with the global changes. In contrast, traditional litigation has not kept pace with such developments. Article 12 addresses the grounds for challenging an arbitrator.[86] An arbitrator may be challenged if they lack the necessary qualifications or if reasonable doubts arise regarding their impartiality. This ensures that arbitration remains a fair and unbiased process. Furthermore, the Model Law strongly favours the finality of arbitral awards and seeks to minimize court intervention. However, courts do retain limited powers to intervene in certain areas, such as setting aside an award on grounds of procedural irregularity or public policy concerns[87], preserving a balance between autonomy and oversight.

The Model Law includes a recommended arbitration clause: 'Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force'.[88] This standardized clause serves as a guideline for countries

[83]UNCITRAL Model Law on International Commercial Arbitration 2006.

[84] Ibid. Article 1.

[85] Ibid. Article 7.

[86] Ibid. Article 12.

[87] Ibid. Article 34.

[88] 'UNCITRAL Arbitration rule' (uncitral.un.org) <"https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf> accessed 27 September 2024.

to draft arbitration agreements that align with international best practices, ensuring consistency and clarity in resolving disputes through arbitration.

The New York Convention and the UNICTRAL Model Law both play prominent roles in the realm of international arbitration, significantly contributing to the facilitation of international trade. However, there are significant differences between the two. The primary aim of the New York Convention is the recognition and enforcement of international arbitral awards, ensuring that arbitral decisions are upheld across member states. In contrast, the UNCITRAL Model law focuses on developing and creating a unified framework for conducting international arbitration, serving as a template for countries to develop their arbitration laws, thus promoting consistency and harmonization in arbitration practices worldwide.

5 ARBITRATION ACT 1996 AND ITS KEY PROVISIONS

The Arbitration Act 1996[89] is the principal legislation in the UK governing arbitration proceedings and establishing a legal framework for dispute resolution. It aims to provide greater autonomy to the parties and ensure fair dispute resolution without undue delays or excessive costs.[90] The Act marks a substantial improvement over the prior English arbitration statute[91], the Arbitration Act 1979[92], by simplifying the arbitration process in a more user-friendly manner. It is established on the provisions of the New York

[89] Arbitration Act 1996.

[90] Indira Carr and Peter Stone (n 4) p.437.

[91] Thomas Carbonneau, "A Comment on the 1996 United Kingdom Arbitration Act" (1998) 22 Tulane Maritime Law Journal 131.

[92] Arbitration Act 1979.

Convention and the UNCITRAL Model Law, reflecting international standards while adapting to domestic needs.

5.1.1 Key provisions of the Act

Section 1[93] of the Act outlines its general principles, including provisions of fair resolution, party autonomy, and limitation of court intervention. It clarifies both the regulatory objective of the statute and the policy of promoting the privatization of adjudication through arbitration.[94] Based on these provisions, it is advisable that international trade contracts include an arbitration clause as the preferred method of dispute resolution, rather than resorting to litigation. Section 3 of the Act[95] recognizes the concept of a seat of arbitration, stipulating that every arbitration must have a seat from which judicial control might be exerted.[96] The Advisory Committee Report on the Arbitration Bill stated that 'English law does not at present recognize the concept of an arbitration which has no seat, and we do not recommend that it should do so'.[97] According to Section 5(1), the arbitration agreement must be in writing.[98] However, agreements that are not in writing are not considered unlawful but would instead be governed by common law rules (as per

[93] Arbitration Act 1996, S 1.

[94] Thomas Carbonneau, "A Comment on the 1996 United Kingdom Arbitration Act" (1998) Vol22 Penn State Law p132.

[95] Arbitration Act 1996, S 3.

[96] Jason Chuah, *Law of International Trade: Cross Boarder Commercial Transactions* (4th Edn, Sweet and Maxwell 2009) p 698.

[97] Lord Justice Saville, 'Departmental Advisory Committee on Arbitration Law 1996 Report on the Arbitration Bill' (Arbitration International 1997) <https://doi.org/10.1093/arbitration/13.3.275> para 27.

[98] Arbitration Act 1996, s 5.

section 81). It is not always essential to use specific terms like arbitration or arbitrator in the arbitration clause. This was confirmed in the case of *David Homes Ltd v Surrey Service.*[99] Section 33 outlines the general duty of the tribunal, with a primary focus on impartiality, requiring it to act fairly and impartially between the parties and ensuring that each party has a reasonable opportunity to present their case.[100] It requires the tribunal to act fairly and impartially between the parties, ensuring that each party has a reasonable opportunity to present their case. Section 34(1)[101] gives the arbitrator the authority and discretionary power to determine the procedure for the arbitration as they see fit[102] This provision highlights the flexibility of arbitration, allowing arbitrators to tailor proceedings in a way that is suitable for the nature of the dispute.

Section 7[103] addresses the 'principle of separability' regarding the arbitration agreement. The doctrine, upheld by the English courts in the case of *Fiona Trust*[104], establishes that an arbitration agreement is treated as an independent contract. Lord Hoffman has emphasized that 'the arbitration agreement must be treated as a distinct agreement and can be void or voidable only on grounds which relate directly to the arbitration agreement'.[105] This principle is widely recognized internationally and is endorsed in Article 16(1) of the UNCITRAL Model Law, ensuring predictability and uniformity in arbitration. The separability doctrine supports the autonomy of arbitration agreements, allowing

[99] *David Wilson Homes Ltd v Surrey Services Ltd* [2001] EWCA Civ 34.

[100] Arbitration Act 1996, S 33.

[101] Arbitration Act 1996, S 34(1).

[102] Julian D M Lew, Loukas A Mistelis and Stefan M K roll (n 30) p 6.

[103] Arbitration Act 1996, s 7.

[104] Nigel Blackaby, Constantine Partasides, and Alan Redfern (n 27) p 70.

[105] *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, para 17.

disputes to proceed without delays from jurisdictional issues, a common occurrence in litigation. This autonomy enhances the efficiency of arbitration, providing a clear path for resolving conflicts swiftly and ensuring the enforceability of arbitral awards in international trade disputes. This promotes arbitration as a preferred mechanism for resolving such disputes.

Section 24 grants the court the authority to remove an arbitrator under certain circumstances.[106] Under s24(1)(a), a party can apply to the court when there are reasonable doubts about the arbitrator's impartiality.[107] The test of bias must be conducted by the courts to assess whether the arbitrator has a pecuniary interest or a close personal connection that might compromise impartiality. Relevant cases, such as *Save & Prosper Pensions Ltd v Homebase Ltd*[108], and *Sierra Fishing Company v Farran*[109] have dealt with this issue. Additionally, an arbitrator can be removed if they lack the necessary qualifications. In *Tonicstar Limited v Allianz Insurance*[110], it was decided by the court to remove an arbitrator due to a lack of expertise in the field of business insurance, further reinforcing the significance of qualifications and impartiality in arbitration. An arbitrator may also be removed if they are physically or mentally incapable of conducting the arbitration. While maintaining party autonomy, the Act upholds the integrity and legitimacy of the arbitration process, strengthening its reliability and allowing parties to incorporate an arbitration clause in their international commercial contracts.

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[106] Arbitration Act 1996, S 24.

[107] Ibid, s 24(1)(a).

[108] *Save & Prosper Pensions Ltd v Homebase Ltd & Clark* [2001] L & TR 11.

[109] *Sierra Fishing Company & Ors v Farran & Ors* [2015] EWCA Civ 817.

[110] *Tonicstar Limited v Allianz Insurance and Sirius International Insurance Corporation* [2017] EWHC 2753.

Furthermore, Section 30 addresses the competence of tribunals to rule on their jurisdiction.[111] The doctrine of *kompetenz-kompetenz* has been recognized under this section, as enshrined in the Model Law. This doctrine empowers arbitral tribunals to decide on their substantive jurisdiction. It is undeniably crucial, as it allows arbitral tribunals to rule at their discretion on matters within their purview. This not only streamlines the arbitration process but also instils greater confidence in the parties regarding the dispute resolution process. The Arbitration Act's utmost goal is to ensure a convenient, impartial, and effective arbitral process. Consequently, arbitration in the UK will become more competent, enabling parties to confidently opt for arbitration over litigation.

Section 52[112] specifies that an award must be in writing and provides reasons for the decision, although the parties are free to exclude this requirement. Section 46[113] addresses issues concerning the applicable law for non-domestic arbitration. When the parties have selected the law of a particular state to govern the substance of the dispute, no issues arise.[114] However, in the absence of such a choice, the tribunal will apply conflicts of law principles to determine which jurisdiction's law should govern the dispute. According to section 58 (1)[115], the decision of the arbitrator is final and binding. Section 69[116] allows parties to challenge an arbitral award, provided this right is affirmed in the initial agreement. The right to appeal might be construed if the parties had excluded the application of Section 52.

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111 Arbitration Act 1996, S 30.

112 Ibid., S 52.

113 Ibid., S 46.

114 Indira and Carr (n 6) p 640.

115 Arbitration Act 1996, S 58 (1).

116 Ibid., S 69.

6 CONCLUSION

Arbitration continues to be a prominent method for resolving disputes in international commercial transactions, offering parties greater control over the process compared to litigation in national courts. Cross-border commercial contracts frequently involve parties from different legal jurisdictions, each governed by distinct legal systems, rendering arbitration an attractive option due to its inherent neutrality and flexibility. The New York Convention, the UNCITRAL Model Law, and the Arbitration Act 1996 collectively provide a robust legal framework that underpins the arbitral process, ensuring the recognition and enforcement of arbitral awards across multiple jurisdictions. Moreover, London is widely regarded as a highly favoured seat of arbitration, esteemed for its efficiency and its well-established legal infrastructure, further enhancing its appeal as a preferred venue for parties from diverse countries.

Considering these advantages, contracts involving international commercial transactions should incorporate an arbitration clause, designating arbitration as the preferred method for resolving disputes, rather than resorting to litigation. This approach not only offers a neutral forum but also strengthens the predictability and enforceability of the dispute resolution process. Accordingly, arbitration stands as a dependable and efficient mechanism for managing and resolving disputes in the context of global commerce.

Basfar v Wong: A Crack in the Armour of Diplomatic Immunity?

By Georgia Bentley & Owen Henderson, BVS

Abstract

In the recent Basfar v Wong decision, the UK Supreme Court held that the exploitation of a domestic worker in circumstances of modern slavery could fall within the "commercial activity" exception to diplomatic immunity under Article 31(1)(c) of the Vienna Convention on Diplomatic Relations (VCDR). This is the first time any senior court globally has adopted such a broad interpretation of this exception, potentially setting a precedent that addresses a significant gap in accountability for foreign diplomats. This paper analyses diplomatic immunity's historical and theoretical background, tracing the evolution of the 'policy-principle' balancing act in the context of the 'functional necessity' theory. Through the analysis of case law cited by the Supreme Court, as well as other persuasive precedents, this paper is of the view that the introduction of a subjective assessment of the nature of the activity in question is a paradigmatic shift in the approach of the courts to prioritising the integrity of diplomatic immunities over violations of norms. The Court's reasoning introduces considerable uncertainty regarding the boundaries of diplomatic immunity, potentially diluting the fundamental purpose of the arrangement and risking a cascading effect given its reciprocal nature. While the drafting of explicit terms by the VCDR signatories would be a desirable clarificatory exercise, this is unlikely to happen soon. Therefore, further judicial guidance will be necessary to ensure that the evolving standards of international law are applied consistently.

INTRODUCTION

The recent ruling by the United Kingdom Supreme Court in *Basfar v Wong*[117], that diplomatic immunity cannot defeat an action by a victim of modern slavery, marks a significant departure from the de facto absolute immunity of immunity beneficiaries. It is a long-standing custom of international law that diplomats, and to a certain degree consular officials, are wholly immune from the criminal and majorly immune from the civil jurisdictions of a host state.[118] This practice has been recognised as "one of the most important tenets of civilised and peaceable relations between nation states". [119] The Vienna Convention on Diplomatic Relations of 1961 codified this practice, replacing such customary law with a clear, uniform framework.[120] The immunity afforded to diplomats is *procedural* rather than substantive immunity,[121] meaning that the host state is restrained from exercising legal authority in criminal and civil matters concerning the beneficiary as opposed to the law not applying to the individual. Since the coming into force of the Vienna Convention, it has generally been held that when there is a conflict between domestic or international norms of conduct and the integrity of the immunities afforded, more weight is to be afforded to the preservation of such immunities.[122] This balancing act is understandable given the reciprocal nature of the Convention, wherein a host nation nearly always places agents of its own in the sending jurisdiction, thus creating a form of mutual assurance and mutual interest in the permanence of the Convention's privileges

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[117] Basfar v Wong [2022] UKSC 20.

[118] Eileen Denza 'Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations', 4th ed (OUP, 2016).

[119] A Local Authority v AG [2020] EWFC 18; [2020] Fam 311, para 38 (Mostyn J), quoted by the UKSC in [2022] UKSC 20, [11].

[120] Vienna Convention on Diplomatic Relations, Art. 31.

[121] René Värk, 'Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes' (2003) JURIDICA INTERNATIONAL VIII 110,113. <https://www.juridicainternational.eu/public/pdf/ji_2003_1_110.pdf> accessed 8 October 2024

[122] Sophie Ryan, 'Modern Slavery and the Commercial Activity Exception to Diplomatic Immunity From Civil Jurisdiction: The UK Supreme Court's Decision in Basfar v Wong' (2024) 87(1) MLR 202, 203.

and immunities. In being immune from the jurisdiction of the host state, the beneficiary of the immunity continues to be subject to the jurisdiction of the sending state – they are, in that sense, not free of the constraints of the law, just the law of the land, an immeasurable privilege and concession.

Theories of Diplomatic Immunity

In seeking to explain the rationale behind diplomatic immunity in customary international law and the later Vienna Convention, three main theories came to the fore in the twentieth century: the extraterritoriality theory, the representation theory, and the theory of functional necessity.[123] The extraterritoriality theory is arguably the least robust of the propositions, for it posits that the beneficiary of the immunity continues to technically reside on the soil of the sending state – legally, they have not left, despite being very much physically and socially present in the receiving state. The term 'extraterritoriality', however, is unclear, and its status as a form of legal fudge leads to absurd variations on its technical underpinning, one example being an emphasis on the continued foreign residence of the beneficiary – which is entirely fallacious, given that tourists who do not reside in a given state are not immune from action based on their subsisting foreign residence.[124]

Therefore, on the basis of *'par in parem non habet imperium'* (equals have no sovereignty over each other, referring to the concept that to exercise jurisdiction over another state's jurisdiction is incompatible with the act of state doctrine and state immunity[125]), it would

[123] Mitchell S. Ross 'Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities', 4 AM. U. J. INT'L L. & POL'Y 173, 177 (1989).
[124] Clifton E. Wilson, DIPLOMATIC PRIVILEGES AND IMMUNITIES 4 (1967) 1-5; Ross (n 7) 178; Nina M. Bergmar, 'Demanding Accountability Where Accountability Is Due: A Functional Necessity Approach to Diplomatic Immunity Under the Vienna Convention', 47 Vanderbilt Law Review 501 (2021).
[125] Oxford University Press, *Oxford Reference* <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100306400> accessed on 12/1/25.

be an affront to the sending state for the receiving state to permit or pursue actions against such a diplomat. Yet this theory, too, faces difficulties, as it becomes difficult to design a system of hierarchy amongst diplomats and state officials. Furthermore, it is not clear how such officials would remain accountable to the laws of their own country while in the receiving state. Most importantly of all, this theory provides little reasoning for the exemption of a beneficiary's personal actions, given these would not be representative of the state, and action would not be a diplomatic affront[9] thus only providing theoretical justification for state immunity and not diplomatic immunity.

We are, therefore, left with the final theory of functional necessity[126], which proposes that the diplomat is immune from the jurisdiction of the host state to ensure that they can carry out their duties as an agent for the maintenance and advancement of diplomatic relations[127]. While this, as will be seen, is the general justification for diplomatic immunity in the UK, it still leaves unclear to what degree, and why, personal actions so far removed from the functions of the agent are to be, or should be protected/immune[128]. It is in this context that policy has always overridden principles.

Custom Codified: The Vienna Convention and its application

The Vienna Convention on Diplomatic Relations, signed on the 18th of April 1961 in Vienna, Austria, codified certain long-standing principles of diplomatic relations relating to the operation of foreign missions and representation, as well as setting new universal standards for immunities and privileges that diplomatic agents benefit from. Replacing customary international law, the Convention covered, among other provisions: the functions of diplomatic missions, appointment processes, as well as precedence rules; persona non gratia declarations; the privileges and immunities of diplomatic missions in relation to the host state; the withdrawal of missions, and the protection of a state's interests in the host jurisdiction by a third-state, if relations are terminated.

126 Wilson (n 8) 33.
127 Ross (n 7) 178-179.
128 Bergmar (n 8) 508

Article 31 of the VCDR, as enacted in domestic UK law under s.2 of the Diplomatic Privileges Act 1964, provides that diplomatic agents are wholly immune from the criminal and civil jurisdictions of the host state. However, three exceptions are listed below under 31(1)(a) to (c).

(a) A real action relating to private immovable property situated in the territory of the receiving State unless he holds it on behalf of the sending State for the purposes of the mission;

(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

To appease concerns raised during the negotiating process around the effect unhindered immunity may have on beneficiaries riding roughshod over the rule of law and general behavioural norms in the host country, the convention created four classes of diplomats, with decreasing rank receiving fewer immunities and privileges. Diplomatic Agents, who receive the highest form of protection under the VCDR provisions, are the only class of concern for this article. The stated purpose of the immunities is broadly in line with that of the functional necessity theory: to provide missions with the ability to represent their interests without interference.

The meaning of Article 31(1)(c) of the VCDR has generally been construed in light of Article 42 of the VCDR, which prohibits diplomatic agents from practising for "personal profit in any professional or commercial activity" in the host state. Eileen Denza argues that when considering the latter of the two limbs, "it was made clear during the drafting of Article 31(1)(c) that the exclusion did not apply to a single act of commerce but to a

continuous activity."[129] Therefore, it is widely accepted that ordinary contracts incidental to the daily life of a diplomat agent (e.g., purchase of goods, rent payments, medical, legal or educational services) do not constitute 'commercial activities,' since such an interpretation would impair the efficient performance of the functions of diplomatic missions in a receiving state. This was given legal force in the 1996 US Court of Appeals case, *Tabion v Mufti,*[130] where "day-to-day living services" were taken to fall outside the scope. Rather, as Denza posited, it is the "pursuit of trade or business activity" that Article 31(1)(c) intends to capture.

In the case of *Reyes v Al-Malki,*[131] the Supreme Court found the reasoning in *Tabion* persuasive. In his leading judgment, Lord Dyson accepts the statement of interest submitted by the State Department to the US Court of Appeals, asserting that Article 31(1)(c) "focuses on the pursuit of trade or business activity." He argues that "in the ordinary meaning of the words, the 'exercise' of a professional or commercial activity means practising the profession or carrying on the business." He supports this conclusion by reference to the French translation of the text, which uses the word '*exercer,*' meaning 'to practice, follow, pursue, carry on (profession, business).'"[132] Article 42 confirms this reading by providing that a diplomatic agent "shall not in the receiving state practise *for personal profit* any professional or commercial activity." Finally, the Court acknowledges that it would be a "strong thing to diverge from the US jurisprudence"[133]: international treaties must be interpreted "by reference to broad principles of general acceptation"[134] to ensure consistent application and *Tabion* has been consistently following in other

[129] Denza (n 2) 251
[130] *Tabion v Mufti*, 73 F 3d 535 (4th Cir 1996)
[131] 2017 [UKSC] 61
[132] Mansion J E, *Harrap's Standard French and English Dictionary*, ed Ledésert, (rev 1980)
[133] *Reyes* (n 15) [68]
[134] *Stag Line, Ltd v Foscolo, Mango and Co, Ltd* [1932] AC 328 at 350

circuits[135] as well as endorsed by academics such as Professor Denza.[136] Therefore, an employment contract for the provision of domestic services was deemed outside the scope of the Article 31(1)(c) VCDR exception.

Counsel for the plaintiff in *Reyes*[137] also argued that the plaintiff's status as a victim of trafficking, as defined by international agreements,[138] transformed the contract into a commercial activity that fell within the Article 31(1)(c) exception. However, the Court rejected the idea that the economic benefit derived from exploitative employment conditions implied that it was a commercial activity. The international agreements did not address the question of diplomatic immunity, which was the subject matter of the 1961 Vienna Convention, nor was it a superior rule of international law which entailed an exception to the principle.

While not the question at hand in *Basfar,*[139] the issue of state immunity undoubtedly played a role in the Supreme Court's decision, for despite remaining a matter of customary law, many common law states such as the United States and Canada (with persuasive status in England and Wales), also contain a commercial exception to immunity in their domestic codification of such a privilege. The Supreme Court looked to the interpretation of the commercial exception for state immunity in the US and Canada, given the contextual test applied in those cases, as inspiration for its own judgement on diplomatic immunity. State Immunity refers at times to both the immunity of the state and its government itself in its

135 see *Gonzales Paredes v Vila and Nielsen*, 479 F Supp 2d 187 (2007); *Sabbithi v Al Saleh*, 605 F Supp 2d 122 (2009), vacated in part on other grounds, no 07 Civ 115 (DDC Mar S 2011); *Montuya v Chedid*, 779 F Supp 2d 60 (2011); *Fun v Pulgar,* 993 F Supp 2d 470 (2014).

136 Denza (n 2)

137 *Reyes* (n 15)

138 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, 2000, UNTS vol 2237 p 319 ('the Palermo Protocol'); Council of Europe Convention on Action against Trafficking in Human Beings,

139 *Basfar* (n 1)

entirety, as well as actions against the persons possessing an office of a State.[140] For the purpose of interpreting diplomatic immunity, the latter is of more importance (persons holding an office, rather than the sovereign nation itself, as a defendant). The ICJ confirmed the customary status of this immunity in the 2002 case of *Arrest Warrant (DRC v Belgium).*[141] This immunity can be split further into two types of immunity, that of *ratione personae*, given to the holders of high-ranking offices, such as the head of state and foreign minister, with the ICJ describing their status as consisting of "immunity and . . . inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties"[142]. This immunity expires when they leave office. The other manifestation of state official immunity is that of *ratione materiae*, which attaches itself not to the person but to the acts carried out on behalf of the state. The material detail of the immunity varies slightly depending on the constituent legislation that provides for the immunity in the domestic context, as well as the interpretation of the domestic court. The United States[143] and Canada,[144] both in their relevant domestic legislation, contain exceptions to state immunity for 'commercial activity' on the parts of foreign states. The Supreme Court draws on this to begin its analysis of the VCDR exceptions and distinguish between state immunity and diplomatic immunity, where the former has a more contextual, principled approach to exceptions, while the latter traditionally functions more strictly, objectively, and on policy considerations.

[140] Beatrice Walton, 'Immunities' in Sue Gonzalez Hauk. Rafaella Kunz, and Max Milas(eds), 'Public International Law A Multi-Perspective Approach' (Routledge 2024) 357, 364

[141] ibid 36; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Jurisdiction and Admissibility) [2002] ICJ Rep 3 [51]

[142] *Arrest Warrant* (n 25) [47]-[50]

[143] Foreign Sovereign Immunities Act of 1976

[144] Canadian State Immunity Act 1985

The Conflict of Diplomatic Policy and Moral Principles

Immunity creates a moral dilemma for arbiters of the law in cases where a state or diplomatic agent is accused of committing grave human rights violations or other *jus cogens* crimes. The ICJ has consistently rejected the recognition of any exception to immunities based purely on human rights violations. The UK Supreme Court recently affirmed this in *Reyes,*[145] where they rejected the argument that the 1964 Act[146] and VCDR should be interpreted to achieve consistency with rules of international law which require states to prevent and provide effective remedies for human trafficking. Lord Sumption's reasoning was further reaffirmed in *Basfar,* where, according to Lord Briggs and Lord Leggatt:[147]

1. There is no conflict between the UK's international obligations to prohibit human trafficking and the principle of diplomatic immunity. The latter represents immunity from jurisdiction, not liability, which merely requires the agent to be sued in his own country (the concept of procedural immunity).

2. International treaties, like the VCDR, must be given their intentional meaning. Domestic principles of statutory interpretation are irrelevant.

3. Restrictions on the right of access to a court are a proportionate means of complying with a state's international law obligations to ensure the efficient performance of diplomatic functions

While at first glance, the legal reasoning is sound, the fact that it leaves victims of grave human rights infringements without redress is concerning and again raises the issue of balancing the principle of justice with policy choices. In *Reyes,* the court noted that it would be a desirable development if the International Law Commission considered,

145 *Reyes* (n 15)
146 Diplomatic Privileges Act 1964
147 *Basfar* (n 1) [23 (i) - (iii)]

consulted and reported on the international acceptability of amending Article 31 VCDR in favour of setting aside diplomatic immunity in similar cases (those involving a clear violation of international legal norms around human rights).[148] Some scholars view this preference for an International Law Commission intervention as "reflecting a desire to draw upon the expert body's study and recommendations to justify diverging from US and European courts' interpretation" of Article 31(1)(c).[149] Indeed, Lord Sumption notes the "recurrent problem"[150] of diplomats using their immunity to essentially act as human traffickers. Likewise, Lord Wilson describes the exploitation of migrant workers by foreign diplomats as a "significant problem,"[151] noting the "universality of the international community's determination to combat human trafficking"[152] through international instruments such as the Palermo Protocol 2000.

Though domestic workers constitute one of the most vulnerable groups to modern slavery, diplomatic immunity has effectively enabled employers to violate international law without repercussions. Therefore, *Reyes* should not be viewed as a one-off decision. Instead, it reflects what Phillipa Webb[153] views as a growing determination among states to combat human trafficking as demonstrated by the passing of the Palermo Protocol[154] and the Council of Europe Convention on Action against Trafficking in Human Beings[155] that would provide "the basis for a broader interpretation of Article 31(1)(c) exception.

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148 Reyes (n 15) [68-69]

149 Shayak Sarkar, 'The New Legal World of Domestic Work' (2020) 32 Yale Journal of Law and Feminism, 31.

150 *Reyes* (n 14) [3]

151 ibid [59]

152 ibid [60]

153 Philippa Webb, 'Introductory Note to Reyes v Al-Malki' [2018] 57 International Legal Materials 320 (note) 322; also see Phillipa Webb and Garciandia, R. (2020). "Chapter 12 Migrant Women at Risk of Domestic Servitude: Protecting Their Human Dignity with International Law". In *Human Dignity and International Law*. https://doi.org/10.1163/9789004435650_013

154 Palermo Protocol (n 22)

155 Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw 2005) 197 CETS

The Puzzle of Basfar

This is exactly what happened in *Basfar*[156] when the UK Supreme Court had to consider whether the Article 31(1)(c) VCDR exception applies where the diplomat remains in post. However, this time, the 3-2 majority held that the employment of a domestic worker in circumstances which amount to modern slavery falls within the "commercial activity" exception found within Article 31(1)(c) VCDR. For the first time, a senior court adopted a liberal interpretation of Article 31(1)(c), which potentially opens a new avenue to hold foreign diplomats accountable for exploiting domestic workers. Such an approach may have far-reaching and unintended ramifications. However, the judgement's fierce dissent also highlights the non-inevitable nature of the majority's conclusion and questions the sustainability of the Court's approach. For this reason, it is likely not to be the final word on modern slavery.

In widening the scope of the Article 31(1)(c) VCDR exception to include the exploitation of a domestic worker under conditions of modern slavery, it is prudent to ask whether the Supreme Court erred in its treaty-founded role, as given force under the Diplomatic Privileges Act of 1964, to balance policy and principle. Despite being reasoned as outside the issue of human rights and norms, the reality is that the ruling may very well be viewed by sending jurisdictions as a principle-driven erosion of a decades-old deference to principle. The sanctity of the remaining boundaries may no longer be seen as so deserving of preference – be it in the jurisdiction of the UK Supreme Court, or perhaps more worryingly, in other host jurisdictions where British agents rely on such guarantees.[157] We take particular notice of the majority in *Basfar*[158] introducing, as Sophie Ryan describes[159], a 'normative assessment' of the characteristics of the work being undertaken by a claimant to determine whether or not the activity is indeed commercial. This arguably moves away

[156] *Basfar* (n 1)
[157] Eileen Denza, 'UNITED NATIONS, VIENNA CONVENTION ON DIPLOMATIC RELATIONS' (2009) United Nations Audiovisual Library of International Law <https://legal.un.org/avl/pdf/ha/vcdr/vcdr_e.pdf> accessed 3 October 2024
[158] *Basfar* (n 1)
[159] Ryan (n 5) 209-210

from the rigid, but assured system that has persisted since the advent of the convention, introducing doubt as to the true boundaries of diplomatic immunity.

This paper seeks to unpick the reasoning behind the Supreme Court's decision in *Basfar,*[160] in comparison with prior case law in both the jurisdiction of England and Wales, as well as comparison with persuasive, and some select non-persuasive rulings. Whether or not *Basfar*[161] provides a clear basis for the continued protection of diplomatic immunity and its exceptions will be assessed, as will any potential issues it may pose to future courts in considering other actions against beneficiary agents.

THE RULING IN BASFAR V WONG

A. The facts of the case

The case was brought by Ms Josephine Wong, a Filipina migrant domestic worker who claimed severe mistreatment while working in the household of Saudi diplomat, Mr Basfar, in the UK. To secure her visa, Ms Wong was provided with an employment contract, specifying that she would work a maximum of eight hours per day, with one day off each week and one month off each year.[162] She would also be provided with sleeping accommodation and paid the national minimum wage.[163] However, upon arriving in the UK, she claims to have been confined to Mr Basfar's house except to take out the rubbish and allowed to speak to her family only twice a year using Mr Basfar's mobile phone.[164] She also alleged to have been forced to work from 7 am until 11.30 pm daily, subjected to constant verbal abuse and paid a fraction of her contractual entitlement.[165]

[160] ibid
[161] ibid
[162] ibid [7]
[163] ibid
[164] ibid [8]
[165] ibid [8] - [9]

Ms Wong subsequently filed a claim against Mr Basfar in the Employment Tribunal for unpaid wages and breaches of her employment rights. Mr Basfar sought to dismiss the claim by asserting diplomatic immunity. However, the Tribunal held that Ms Wong's claim fell within the "commercial activity" exception under Article 31(1)(c) of the VCDR. Though the ruling was reversed by the Employment Appeal Tribunal,[166] they granted Ms Wong a right to "leapfrog" the Court of Appeal and appeal directly to the Supreme Court.[167] This was also the first time that the EAT had granted such a right,[168] signifying the importance of the questions of law raised.

B. **The Judgment, Majority and Minority Reasoning**

For the first time, the Supreme Court could directly engage in the discussion on whether a diplomat has immunity for the employment of a domestic worker under Article 31(1)(c). The Court accepted the conclusion in *Reyes*[169] that such acts are 'outside the official functions' of a diplomat, so there was no suggestion that Mr Basfar's conduct constituted a 'professional activity'.[170] Instead, the only question for the Court to answer was whether Ms Wong's claim related to a "commercial activity" exercised by Mr Basfar, which is the second prong of the exception.

All members of the Court agreed on the applicable treaty interpretation principles,[171] as set out in the Vienna Convention on the Law of Treaties (VCLT) 1969.[172] Article 31(1) VCLT requires that a treaty be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object

166 *Mr Khalid Basfar v Ms Josephine Wong* [2020] Appeal No, UKEAT/0223/19/BA
167 [2020] ICR 1185 (Soole J sitting alone)
168 Rosana Garciandia, Domestic Servitude and Diplomatic Immunity: The Decision of the UK Supreme Court in Basfar v Wong, Industrial Law Journal, Volume 52, Issue 2, June 2023 at 453
169 *Reyes* (n 15)
170 *Basfar* (n 1) [14] - [15]
171 ibid [16] - [18], [190]
172 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

and purpose". Article 31(3) VCLT further mandates that "any relevant rules of international law applicable in the relations between the parties" must also be taken into account "together with the context".[173] Under Article 32 VCLT, supplementary means of interpretation may also be used to "confirm" the meaning reached through Article 31 VCLT or to 'determine' it when the approach produces an "ambiguous," "obscure," or "manifestly absurd or unreasonable" interpretation.[174] However, the majority and minority opinions diverged in the application of these principles.

The Majority's Approach

The majority's analysis started with an interpretation of the ordinary meaning of the words "commercial activity." For Lord Briggs (with whom Lord Leggatt and Lord Stephens agreed), this includes concepts such as "carrying on business" or "setting up shop,"[175] which aligns with Lord Sumption's judgement in *Reyes*.[176] However, the majority departs from Lord Sumption's analysis by concluding that the ordinary meaning of "commercial activity" is "*not limited"* to these terms but could also encompass activities such as "buying goods and services" or "entering an employment contract."[177] The majority reference caselaw on state immunity from the United States, Canada and the UK, where the concept of "commercial activity" has included the hiring of domestic staff,[178] not to transpose this interpretation directly onto diplomatic immunity, but to illustrate that "those words, like any ordinary English words, are capable of bearing different shades of meaning according to the context in which, and purpose for which, they are being used."[179] Indeed, this case law is crucial to the decision of both the majority and minority, with the diversity of opinions across jurisdictions being analysed later in this paper. It was therefore held that the meaning of Article 31(1)(c) VCDR cannot be answered by merely interrogating the

[173] ibid
[174] ibid
[175] *Basfar* (n 1) [28]
[176] *Reyes* (n 15)
[177] *Basfar* (n 1) [28]
[178] ibid [30] - [31]
[179] ibid [32]

ordinary meaning of the words: it must be considered within the context of the VCDR's purpose and object, as demanded by Article 31(1) of the VCLT.

According to the majority, the VCDR's purpose is to "protect the freedom of individuals sent to perform those functions to live and go about their ordinary daily lives in the receiving state without hindrance."[180] Seen in this context, they conclude that it would be "contrary to the purpose of conferring immunity on diplomatic agents to interpret the words 'any ... commercial activity' in article 31(1)(c) VCDR as including activities incidental to the ordinary conduct of daily life in the receiving state."[181] This analysis is consistent with traditional understandings of the principle expressed in other judgements and academic literature.[182]

The Court, however, significantly departs from tradition by holding that there is a "material and qualitative difference" between "keeping a person in circumstances of modern slavery" and "the ordinary hiring of a domestic employee," which makes the former a 'commercial activity', falling within the scope of the exception.[183] Firstly, the fact that employment is a "voluntary relationship, freely entered into and governed by the terms of a contract," whereas work under conditions of modern slavery is "extracted by coercion and the exercise of control over the victim."[184] Secondly, the fact that Mr Basfar gained a substantial personal profit from such control.[185]

[180] ibid [33]
[181] ibid [34]
[182] Denza (n 2); *Reyes* (n 14) [22] - [38]
[183] *Basfar* (n 1) [43]
[184] ibid [43]
[185] ibid [52]

Before *Basfar,* academic debates on the meaning of 'commercial activity' centred around the standard of continuity[186] and profitability[187]. In *Basfar,* the Court relied partially on the former and heavily on the latter. While the majority suggests that the ordinary meaning of 'commercial activity' includes individual transactions as well as continuous acts of commerce, they did stress that the exploitation had been "a systematic activity carried on over a significant period."[188] Meanwhile, Mr Basfar's significant profit from the exploitation was critical to the decision since "personal profit is an element of what may make a particular activity commercial."[189] Meanwhile, the Court.

It is unclear why the definition of 'commercial activity' only includes situations where money is gained. As Joseph Dyke and James McGlaughlin argue, "Just as a commercial deal does not stop being commercial merely because it is bad, employment under a contract (even a sham one) does not become anything other than employment because the conditions of that employment are (appallingly) bad."[190] The Palermo Protocol[191] similarly does not treat all instances of trafficking as inherently motivated by profit. Relying on the preparatory material (*travaux préparatoires),* Haynes shows that this was a deliberate decision by the delegates because "they were cognisant that not every instance of trafficking necessarily involves profitability".[192] Therefore, this requirement could have the potential to leave many victims without protection.

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[186] Denza (n 2) 128; X. Shi, Diplomatic Immunity Ratione Materiae, Immunity Ratione Materiae of State Officials, and State Immunity: A Comparative Analysis, (2021) 34 *Leiden JIL* 57

[187] B.S. Murty, The International Law of Diplomacy: the Diplomatic Instrument and World Public Order (1989), 356-357; L. Rodger, The Inviolability of Diplomatic Agents in the Context of Employment, in P. Behrens
(ed.), *Diplomatic Law in a New Millennium* (2017), 115

[188] Ibid [56]

[189] *Basfar* (n 1) [52]

[190] Joseph Dyke and James McGlaughlin, 'Diluting diplomatic immunity?' (March 2023) 8016 NLJ < https://www.mcnairinternational.com/client/publications/2023/nlj-2023-vol173-mcnair-dyke-and-mcglaughlin.pdf> accessed 7 January 2010: 12

[191] Palermo Protocol (n 22)

[192] Jason Haynes (2023) 'Revisiting the relationship between human trafficking and diplomatic immunity', 139(1) LQR 209

However, the rest of the judgement suggests that these 'standards' are simply factors to consider rather than a strict criterion, suggesting that the scope of Article 31(1)(c) is, in fact, much wider. For example, the Court's later inclusion of a diplomat participating in money laundering or commercial fraud within the meaning of 'commercial activity' clearly deviates from the standard of continuity. Similarly, the Court views Article 31(1)(c) as wider in scope than Article 42 and that the absence of the phrase "for personal profit" in the former means that non-profitable activities would also fall within the exception. In her analysis of *Basfar,* Xinxiang Shi demonstrates how this argument "sits at odds with the drafting history of Article 42," which demonstrates that the Articles cover the same range of activities and the phrase 'for personal profit' was included simply to clarify the meaning of 'commercial or professional activity.'[193] Nevertheless, the looseness of these two standards demonstrates the Court's liberal approach to Article 31(1)(c), exposing a far greater range of activities to its scope than before.

The Minority's Approach

The minority concurred that the normal employment of a domestic worker does not amount to "commercial activity"[194]; however, their reasoning differed. Lord Hamblen and Lady Rose agreed with Lord Sumption in *Reyes*[195] that the ordinary meaning of 'commercial activity' does not encompass the buying of goods and services for personal use.[196] Unlike the majority, they found a distinction between acting as a consumer versus a business.[197] Therefore, hiring a domestic worker falls outside the definition of Article 31(1)(c) VCDR because "it is an activity that is incidental to the ordinary conduct of daily life ... [which] is not itself a commercial activity."[198] Importantly, the minority also disagreed with the majority's view that "the conditions under which a person is employed or how they came to be employed can convert employment which is not of itself a

[193] Shi (n 73) 620
[194] *Basfar* (n 1) [111]
[195] *Reyes* (n 15)
[196] *Basfar* (n 1) [111]
[197] ibid [111]
[198] ibid [112]

'commercial activity' exercised by her employer into such an activity falling within the exception."[199]

To support this, the minority noted that, when the VCDR was being negotiated, the use of domestic staff by diplomatic households and instances of misconduct were well-known to the parties. Yet, no revisions were made to limit diplomatic immunity.[200] This implied that, per the preamble, where the treaty has not directly dealt with a matter, customary law is to continue to govern the issue. Though the meaning of Article 31(1)(c) could theoretically evolve, human trafficking has always existed in various forms. Therefore, the Court must determine whether subsequent international instruments have expanded the meaning of "commercial activity" to encompass trafficking. The minority found no indication in post-VCDR treaties, such as the Palermo Protocol 2000, that would suggest this shift.[201] Accordingly, broadening Article 31(1)(c) unilaterally to include trafficked employment would risk seriously undermining the scope and fundamental principle of diplomatic immunity (that of functional necessity) and could expose UK diplomats overseas to retaliatory measures.[202]

C. **Persuasive Case Law on State and Diplomatic Immunity**

State Immunity

In following the approach of the Supreme Court, it is apt to analyse in some more detail the approach of other jurisdictions as regards state immunity. This paper is of the view that the application of a seemingly hyper-subjective assessment of the nature of commercial activity is counterintuitive when the differing requirements of state and diplomatic immunity are considered. It is simply incompatible with the functionalist theory of diplomatic immunity and raises questions about the true ratio of the decision. This view will be explained in the following section.

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[199] ibid [113]
[200] ibid [113](i)
[201] ibid [141]
[202] ibid [113](iii)

While *Basfar*[203] was the first case across any jurisdiction wherein a court was asked to consider whether or not modern-day slavery fell within the 'commercial activity' exception, it was not decided in a vacuum. Instead, the judgement drew heavily upon decisions and the legislation of the United States and Canada. The analysis of exploitive employer-employee relationships has been heavily analysed in the context of state immunity claims. This is perhaps what makes the majority decision in *Basfar*[204] all the more curious, for we would argue that it marks a fundamental break in the uniform approach to widely interpreting the boundaries of immunity afforded under the VCDR and narrowly interpreting the exceptions under Article 31(1). As noted, the majority came to this conclusion by distinguishing the interpretation of 'commercial activity' under Article 31(1)(c) of the VCDR from the varying but broadly consistent interpretations of 'commercial activity' under legislation for Foreign Sovereign or State Immunity.

The United States has codified its approach to Foreign Sovereign Immunity under the Foreign Sovereign Immunities Act of 1976 (FISA), which precludes federal courts from exercising jurisdiction over a 'foreign state' except for the detailed circumstances of exception – one of these being actions that are commercial in nature. For the purpose of practical application, per *Chudian v Philippine National Bank,*[205] individuals may be considered 'foreign states' under FISA when they are acting within their official duties.
The 2002 case of *Park v Shin,*[206] a case involving a claim on the part of a domestic worker employed by the Deputy Consul of the Republic of Korea in California, saw the U.S. Court of Appeals, Ninth Circuit, ruled that FISA did not apply. This was because the domestic worker was employed by the deputy consul in his personal capacity. Of importance to this discussion, however, was the court's assertion in the alternative: had the domestic worker been employed within the scope of the official's duties, the defendant would still be subject to the jurisdiction of the court, for the claim concerned

[203] *Basfar* (n 1)
[204] ibid
[205] 912 F.2d 1095, 1103 (9th Cir.1990), quoted by United States Court of Appeals, Ninth Circuit in *Park v. Shin*, 313 F.3d 1138 (2002) [7]
[206] 313 F.3d 1138 (2002)

a commercial activity.[207] This is due to a rather subjective analysis that the FISA permits, wherein the court is to look not to the purpose of the activity to determine whether it is commercial, but rather to the nature, per *Joseph.*[208] The fundamental question becomes whether or not the activity carried out by the defendant – the 'foreign state' - could also be carried out by a private actor. If so, it is not an affront to the sovereignty of the state, and therefore, foreign sovereign immunity is not required. It should be noted here that foreign sovereign immunity was applied here as the employee was technically, per her A3 visa in the United States, an employee/official of the Consulate, and not employed external to the consulate by the defendant, which would instead raise the question of diplomatic, rather than state immunity.[209] This is even though the court subsequently found the employment to fall outside of the defendant's official duties, and therefore, the jurisdiction of the court was not precluded by FISA. *Park*[210] demonstrates the degree of subjectivity that is permitted to the courts in determining whether the activity in question can establish jurisdiction for the courts. The latter case of *El-Hadad v UAE,*[211] decided in 2007 by the Court of Appeals District of Columbia Circuit, saw jurisdiction again established for a plaintiff, this time dismissed as an employee of the UAE embassy. It was held that he was not a civil servant, and by analysis of his work description, his employment was held to be commercial, as opposed to governmental. Yet this subjective approach comes laden with obvious pitfalls, namely that it involves a value judgment and is by no means definitive. This was shown in *Jin v Ministry of State Security,*[212] where *El-Haddad*[213] was referenced, with the court finding that the hiring of 'thugs' to intimidate members of a spiritual collective, by a society associated with the PRC's Ministry of State Security, did not constitute a commercial activity, for the substance of the act, that being the use of force, was not a power that the private individual has available to them in a law-abiding society.

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207 ibid [11], [12]-[14]

208 ibid [13]; *Joseph v. Office of Consulate Gen. of Nig.*, 830 F.2d 1018, 1027 (9th Cir.1987) at 1023

209 *Park* (n 93) [14]

210 ibid

211 *El-Hadad v. United Arab Emirates,* 496 F.3d 658 (2007) [9]-[10]

212 *Jin v. Ministry of State Security,* 557 F.Supp.2d 131 (2008) [21]

213 El-Haddad (n 98)

In Canada, the State Immunity Act of 1985 codifies its approach to Foreign Sovereign Immunity. It, too, contains an exception for commercial activity, as in the United States. However, the act explicitly retains both the purpose and the nature of the act as bearing on the court's analysis of whether or not the action should fall within the commercial activity exception and, therefore, establish jurisdiction. The Supreme Court of Canada dealt with this issue in *Re Canada Labour Code,*[214] wherein it was questioned whether the Sovereign Immunity Act provided immunity from domestic labour law obligations as regards Canadian employees of a U.S. Navy base in Canada. The majority in *Re Canada Labour* concluded that the U.S. could claim state immunity, for while at its base, and on the nature side of the argument, a contract for hire can be considered a commercial agreement, and not exclusive to governmental or sovereign action, the overall purpose and context of the arrangement and action need be considered.[215] In taking this step, it becomes clear that precluding the U.S. from claiming such immunity would severely frustrate the overall purpose of the action, which is one of the military, and, arguably, sovereign means. This, therefore, renders it outside the commercial activity exception and prevents jurisdiction from being found. The majority explicitly refer to the unfortunate but necessary outcome being a result of policy considerations over those of pure principle. The crux of the approach in the United States to Foreign Sovereign Immunity, therefore, rests upon the nature of the act and whether it is exclusively governmental. It is subjective and unpredictable but still permits arguments to be made both for and against exceptions to sovereign immunity. On the topic of employing a domestic worker, this generally can be seen to fall under the commercial activity exception for sovereign immunity. While arguably wider, the Canadian approach to the interpretation of 'commercial activity' is more amenable to the preservation of immunity, in permitting a policy-focused, purposive analysis, which is perhaps why it received less attention in the UK Supreme Court's judgement, though the different context (absent any reference to a domestic worker) may also diminish its persuasiveness.

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[214] *United States v Public Service Alliance of Canada and Others Re Canada Labour Code* [1993] 2 LRC

[215] ibid [95] - [98]

The decision in *Basfar,*[216] when compared to other jurisdictions, is counterintuitive. It readily adopts the subjective approach taken in both the US and Canada as regards foreign state immunity to diminish for the first time, the protection afforded under Article 31(1)(c) VCDR, while other jurisdictions use an identical argument to preserve such immunities. This is despite the court clearly noting that the scope for diplomatic immunity is far more wide-reaching given the personal protections required under the functional necessity theory.

As already noted, the interpretation of the exceptions under Article 31(1)(c) VCDR must be dictated not by domestic interpretation but by the VCLT and the context of the agreement. In sum, it is the intention of the parties *at the time of signing* that the court is obliged to give effect to. It can, therefore, be argued that in contrast to foreign sovereign immunity, the court should have much less discretion in its interpretation of the treaty provisions, otherwise, this may invariably frustrate the intention of the drafting parties – that the VCDR should create a uniform, and certain environment of protection for diplomatic agents to carry out their roles without frustration. Up until *Basfar,*[217] the general approach has been to provide for an extremely narrow reading of the exceptions to diplomatic immunity, even in instances of actions that violate *jus congens.*

D. ***Basfar* as a Departure from Previous Case Law**

In *Tabion v Mufti,*[218] the United States Court of Appeals, Fourth Circuit, considered a claim from a domestic worker of a diplomatic agent based at the Jordanian Embassy in Washington D.C. The Court first rejected the ordinary meaning of 'commercial activity' under Article 31(1)(c), for it would logically be too wide and contradict the theory of functional necessity. The UK Supreme Court followed this in *Basfar.*[219] In *Tabion*, rather,

[216] *Basfar* (n 1)
[217] ibid
[218] *Tabion* (n 14)
[219] *Basfar* (n 1)

it was felt that the exception was only to encompass "trade or business activity engaged in for personal profit".[220] Elaborating on this logic, the court deferred to the commentary on the exception by Denza[221]. The exception is not to cover "commercial contracts that are incidental to the ordinary conduct of life in the receiving state,"[222] and, rather, found that immunity applied. When one compares this, to the caselaw on state immunity[223] there is a clear divergence between the approach that U.S. courts take in interpreting 'commercial activity' in the context of state immunity, and diplomatic immunity. There is far less subjectivity involved in the latter decision, and it is reiterated at the end of the *Tabion* judgement that while possibly unfair, a utilitarian assessment is required wherein the damage to the claimant by preventing access to recourse, is minimal compared to the damage that might be inflicted on general international relations, or worse, U.S. agents stationed abroad, should such an action be permitted, and the goalposts of immunity arguably be called into question.

The majority in *Basfar*, therefore, took the bold step of departing from the tradition established by the line of US caselaw, which suggested that an employment contract could never be transformed into a "commercial activity," even in the presence of human trafficking. Jason Haynes suggests that the US decisions of *Sabbiti v Al Saleh*[224] and *Fun v Pulgar*[225] could be distinguished on the basis that "the courts in those cases did not directly address the question of whether keeping a person in circumstances of modern slavery can reasonably be equated with the ordinary hiring of a domestic employee."[226] Though the claimant in *Sabbithi*[227] alleged to be a victim of human trafficking, the court viewed it as a case involving marginal wages, which was not a "commercial activity." Likewise, in *Fun,*[228]

220 *Tabion* (n 14) [6]
221 Denza (n 2)
222 ibid
223 cf Park (n 80)
224 *Sabbithi* (n 19)
225 *Fun* (n 19)
226 Haynes (n 79)
227 *Sabbithi* (n 19)
228 *Fun* (n 19)

the defendant's conduct was deemed insufficient to amount to human trafficking. Therefore, the Supreme Court in *Basfar*[229] were faced with a slightly different set of circumstances. Furthermore, the courts in *Sabbithi*[230] and *Fun*[231] did not consider questions about the involuntary nature or profitability of the services provided by the claimants. Instead, the courts in those cases treated the US Government's *Statement of Interest* as dipositive and wholly relied on *Tabion v Mufti*[232] without seriously interrogating its defensibility.

CRITIQUE

Basfar represents the first and, so far, only decision where a leading court has concluded that the economic activity exception under Article 31(1)(c) VCDR could encompass modern slavery and human trafficking. Given that the UK practice has frequently been followed or confirmed by other state parties,[233] the decision may become an inspiration for the development of new customary law that successfully carves out a human rights exception to the principle of diplomatic immunity through the recognition of human trafficking as an economic activity itself. However, this thinly veiled (and arguably morally laudable) attempt to vindicate the rights of exploited overseas domestic workers also leads to an unwelcome and theoretically uneasy blurring of the boundaries of Article 31(1)(c) VCDR exception. It is also unclear whether the majority's interpretation of Article 31(1)(c) VCDR is consistent with the treaty interpretation principles set out in Article 31 of the VCLT. This section will analyse the fracture between the majority and minority reasoning on the basis of this principle vs purpose paradigm that underpins the theory of functional necessity.

229 Basfar (n 1)
230 *Sabbithi* (n 19)
231 *Fun* (n 19)
232 *Tabion* (n 14)
233 Denza (n 2)

A. ***Interpretation of 'commercial activity': the relevance of the conditions***

The majority's distinction between modern slavery and ordinary employment is a defensible one, for the law has long recognised the difference between contracts entered voluntarily and those lacking true consent.[234] The commercial aspect of modern slavery is also widely reflected in international instruments. However, whether the exploitation of a domestic worker in such circumstances qualifies as a "commercial activity" within the meaning of Article 31(1)(c) remains less clear. As the minority rightly note, this reasoning also implies that the *conditions* of employment can convert a non-commercial activity into a commercial one, thereby introducing a normative element into a principle that has traditionally been approached functionally.[235] This raises questions about *how* and *when* such conditions will elevate an activity into the commercial sphere, something the majority devotes little attention to addressing.

On *how* the conditions of an activity will render it commercial, it could be argued that there is a limit to all activities that could reasonably be considered 'incidental to daily life'. This is implied by Lord Briggs' and Lord Leggatt's conclusion that: "it would be not merely wrong but offensive to suggest that conduct of the kind disclosed by the assumed facts of this case is incidental to daily life, let alone the daily life of an accredited diplomat."[236] The judgment itself does not clarify the exact threshold or reasoning for any such limit. However, Ryan suggests that the use of the term "ordinary" could imply "something in the realm of a reasonableness standard."[237] Another possible justification is that the "commercial activity" exception was intended to exclude from diplomatic immunity activities that are incompatible with the position of a diplomatic agent.[238] This is supported by the majority's analysis of the VCDR's purpose and objective as well as the relevant *travaux préparatoires*. According to the majority, they state that "a theme of the

[234] *De Francesco v Barnum* (1890) 45 Ch. D. 430 at [438]: "the Courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery"
[235] *Basfar* (n 1) [113]
[236] ibid [57]
[237] Ryan (n 6) 210
[238] *Basfar* (n 1) at [20]

preparatory work ... was that engaging in a commercial activity outside the diplomat's official duties would be inconsistent with the dignity of a diplomatic agent," which was also the reason behind the 'commercial activity' exception to immunity (and Article 42).[239] However, what precisely constitutes as being 'inconsistent' remains undefined.

Regardless of the reasons, defining Article 31(1)(c)'s scope by reference to the *conditions* of domestic work introduces a normative element to an analysis previously guided by functional considerations. This shift in approach is illustrated in Joseph Dyke and James McGlaughlin's comparison of *Basfar* with the Administrative Court's approach in *Fernando v Sathananthan,*[240] concerning a minister counsellor for defence at Sri Lanka's UK mission who was observed making a "cutthroat" gesture towards protesters while in military uniform.[241] The Administrative Court found that this act, while criminal, was not outside the mission's functions, as "they did not somehow lose that quality and become acts performed in a personal capacity."[242] Dyke and McGlaughlin rightly question why "the unlawful (even appalling) treatment of a domestic worker alters the fundamental nature of the activity,"[243] which the majority in *Basfar* do not address. While this change of approach may not necessarily be undesirable, it requires justification to guarantee the consistent interpretation of these treaty principles in all jurisdictions.

On *when* the conditions of an activity will render it commercial, the majority judgement acknowledges that the distinction between 'ordinary domestic employment arrangements' and the 'exploitation of a domestic worker for profit' is "not always a clear one."[244] They relied on legal definitions of various forms of exploitation (e.g. slavery, servitude, forced labour and trafficking) commonly grouped under the term of "modern slavery" to hold that "Mr Basfar was plainly involved in trafficking Ms Wong." However, this conclusion

[239] ibid [60]
[240] [2021] EWHC 652 (Admin)
[241] Dyke and McGlaughlin (n 77) 12
[242] *Fernando* (n 127) [39]
[243] Dyke and McGlaughlin (n 77) 12
[244] *Basfar* (n 1) [72]

"does not depend upon which particular manifestation of modern slavery may best describe his conduct".[245] The majority also identify various characteristics that make domestic workers vulnerable to exploitation without indicating which, singularly or in combination, must be present to make the relationship commercial. Regarding the "profit" element, the minority also highlight that it is unclear "what degree of disparity between the pay given the claimant and an acceptable rate of pay is essential before the employer is regarded as profiting unfairly." In the absence of further guidance, the categorisation of an activity as 'commercial' risks becoming a largely subjective exercise, opening the possibility for future decisions to significantly erode the principle of diplomatic immunity.

It is also unclear to what extent the majority's interpretation of Article 31(1)(c) is compatible with the treaty interpretation principles set out in the VCLT. On the one hand, the majority's reliance on international definitions of modern slavery is rooted in Article 31(3)(c) of the VCLT, which requires "any relevant rules of international law applicable in the relations between the parties" to be taken into account when interpreting a treaty. However, there are two problems with their approach. Firstly, Article 31(3)(c) of the VCLT states that such rules must be considered "together with the context." By contrast, the majority uses international law to determine the parameters for the *application* of Article 31(1)(c). Secondly, the exercise of referring *back* to Article 31(1)(c) after interpreting international law undermines the principle adopted in Article 31 of treaty interpretation being a single exercise that considers all admissible materials. For this reason, Ryan identifies "something very artificial"[246] about the majority's approach and its compatibility with international law is, at best, unclear.

The minority also raise two substantive concerns about the majority's reliance on international definitions of various forms of 'modern slavery' to define the scope of Article 31(1)(c). The first concerns the broad scope of the Palermo Protocol, which defines human trafficking as "the recruitment, transportation, transfer, harbouring or

[245] ibid [96]
[246] Ryan (n 6) 212

receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, for the purpose of exploitation."[247] If this definition were to become the test for trafficking, "'the immunity may be lifted whenever the test is satisfied, not simply when it is satisfied in a particularly egregious form."[248] Though the minority express concerns about the potential for long and complex hearings to determine the existence of trafficking as a preliminary issue, English courts are routinely required to apply broad concepts. Therefore, the 'breadth' of this definition does not necessarily require a narrow interpretation of Article 31(1)(c).

However, Lord Hamblen and Lady Rose more justifiably express concern that "underlying the majority's judgment is the assumption that there is a boundary with servitude and forced labour on one side of it and voluntary employment on the other side" whereas, in reality, there is "a broad spectrum between those who are in the fortunate position of working in congenial conditions and being free to leave their jobs when they please on the one hand and victims of trafficking, servitude and forced labour on the other".[249] It is submitted that this latter obstacle may be difficult to overcome. While situating trafficking with its broader modern slavery context reflects the reality of these intertwined concepts, these unclear boundaries create uncertainty regarding *what* exactly falls within the Article 31(1)(c) exception. For example, minority express concern for the "many people in the UK and elsewhere work long, antisocial hours in unpleasant conditions doing menial work for low pay and having to put up with rude, bullying employers ... but they are not generally regarded as 'slaves' or as working in 'forced servitude.'"[250] Yet, the majority devotes surprisingly little attention to the question of how to distinguish "ordinary illegal acts" from illegal acts that can turn the employment relationship into a commercial

[247]Palermo Protocol (n 22) Article 3(a)
[248] *Basfar* (n 1) [160]
[249] ibid [163]
[250] ibid [163]

activity. The result is a very broad and undefined criteria that risks seriously undermining the scope of the principle.[251]

Finally, there are practical concerns over the appropriate methodology to be used to determine profitability. According to the majority, the monetary value can be measured as the "difference between the amount for which the worker would willingly have provided the services or for which equivalent services could have been purchased in the labour market and the amount of money, if any, and other emoluments actually paid for them."[252] Following the ILO methodology for calculating the profit, the Court concluded that Mr Basfar had made a "substantial financial gain from his exploitation of Ms Wong's labour, albeit not in cash but in money's worth."[253] However, Haynes rightly argues that this criterion is "described at such a high level of generality that it may operate to the disadvantage of workers in relation to whom the disparity in pay vis-a-viz their comparators is not substantial enough to be properly regarded as affording a "profit" to their employers."[254] There are also difficulties associated with finding an appropriate comparator since many domestic workers choose to accept meagre pay to escape even direr economic circumstances in their home countries. Therefore, it remains to be seen whether future Courts will be able to apply the ruling to have any practical impact on the rights of vulnerable workers going forward.

B. ***Retaliation and Procedural Concerns***

The majority and minority members were also divided on the issue of reciprocity and the risk of retaliatory measures. Mr Basfar's counsel raised the concern that '[a] restrictive application of the immunity granted by article 31 ... may well be met by a restriction on the immunity granted to UK diplomats in Saudi Arabia' or, indeed, other retaliatory

[251] ibid [164]
[252] ibid [53]
[253] ibid [56]
[254] Haynes (n 79) 209

measures."[255] There is agreement among some that reciprocity seems, in principle, unlikely to serve as a legitimate basis alone to restrict the scope of diplomatic immunity. The majority similarly observed that "it is difficult to see how such a risk, even if genuine, can affect the meaning of the phrase "commercial activity" in article 31(1)(c)".[256] However, Ryan acknowledges that "probably some level of risk of retaliation" likely exists due to the open-ended nature of the exception, which would need to be "void of content" to be eliminated altogether.[257]

The majority also quickly dismissed the argument that the intrusive nature of determining immunity issues justified restricting the scope of Article 31(1)(c). The Court's judgement was made on the assumption that the alleged facts were true. But, to verify these allegations, the Employment Tribunal would now need to examine the details of the employment relationship between the parties. The dissent argued that parties to the VCDR had no intention to permit such an investigative process that would intrude into the private life of a diplomatic agent[258]. In response, the majority noted that some fact-finding exercise is always to determine the application of an exception in a particular case.[259] Therefore, "the possibility of such an inquiry is one which the parties to the Diplomatic Convention must be taken to have contemplated and accepted in establishing the commercial activity exception."[260] Furthermore, other provisions in the VCDR limit the extent of any such enquiry. For instance, under Article 30, the diplomat's residence, papers, and correspondence remain inviolable, and their property is only affected by Article 31(1) exceptions after a final judgment has been made. Article 31(2) also exempts diplomats from any obligation to give evidence. These protections prevent the fact-finding process from becoming unduly invasive and interfering with the fundamental

[255] *Basfar* (n 1) [169]
[256] ibid [105]
[257] Ryan (n 6) 214
[258] *Basfar* (n 1) [161] - [162]
[259]ibid [102]
[260]ibid [102]

purpose of the VCDR, that is, to permit the agents of the sending state to carry out their sovereign duties.

Ultimately, the potential negative consequences of an investigation process are salient in all immunity cases since claims hinge upon the nature of an act. This issue is mostly resolved in state immunity cases by the sending State asserting that the particular act is related to their official functions. Though ultimate authority to determine if an act is official rests with the court, the sending State's opinion also carries significant weight.[261] Therefore, the sending State could intervene if the investigation has the potential to interfere with a diplomatic mission's official activities or expose sensitive information. Such as in the *Kenyan Diplomatic Residence Case,*[262] where the Federal Supreme Court of Germany accepted the Kenyan ambassador's invocation of immunity because the building from which he contentiously evicted a tenant was still used for official purposes. The court also accepted his claim as sufficient prima facie evidence since the sending States do not have to disclose details of their diplomatic activities.[263] Within the context of Article 31(1)(c) VCDR, if the alleged commercial activity of a diplomatic agent is necessary to perform their duties, the sending State may similarly want to assert that the activity is within their official functions. However, if the commercial activity only concerns the diplomat's private life, an investigation is unlikely to disrupt official business.

Despite these strong points, the minority raised some valid concerns specific to diplomatic immunities. Ryan argues that the "practical difficulties with applying the commercial activity and concerns of potential retaliation cannot be divorced from friction that arises from interpreting the exception by reference to normative considerations."[264] Indeed, the move away from a strictly functional approach will likely raise controversies that are difficult to reconcile within the traditional framework of immunities. The approach of the minority, however, was the correct approach.

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[261] Denza (n 2) 334, 364
[262] 2003, 128 ILR 632
[263] ibid
[264] Ryan (n 6) 215

CONCLUSION

In sum, though the decision in *Basfar* has emancipatory potential, it is not a suitable remedy for addressing the gaps in accountability created by the principle of diplomatic immunity. The majority's shift from a purely functional to a more normative analysis of the 'commercial activity' exception under Art. 31(1)(c) of the VCDR is an innovative way to grapple with modern forms of exploitation. However, it also introduces ambiguity regarding the exact scope of the exception. First, the criteria that distinguish between cases of ordinary employment and exploitation amounting to a commercial activity are inherently subjective. Second, there are significant practical issues concerning the application of the rather ill-defined criteria put forward by the court. Together, these uncertainties create the potential for the exception to be interpreted inconsistently, which violates the theory of functional necessity and, we say, the general intention of the VCDR signatories in placing policy over principle.

Furthermore, the majority's definition of the parameters of Art. 31(1)(c) appears inconsistent with the interpretative process under the VCLT. The majority themselves acknowledge that the VCDR must be given the same meaning by all state parties, which requires interpreting its provisions according to the generally accepted principles of international law. However, the majority failed to fully incorporate the broader context of international law as a guiding framework during the initial interpretative process, as required by the VCLT. Instead, they relied on it to justify a conclusion they had already reached based on the VCDR text. This paper is of the view that the sequencing of the decision in Basfar is not inconsequential, with this rubber-stamping approach undermining the stability of such a profound decision. This approach also creates the potential for diverging interpretations of the VCDR among member states and increases the risk of retaliatory measures, while leaving room for other exercises with preconceived conclusions. For this reason, it would be preferable for the international community to draft specific exceptions to diplomatic immunity in cases of human rights violations rather than leaving it open to national courts to apply subjective standards to ordinary (but perhaps ill-defined) terms in international treaties to create a solution.

Basfar contributes to a growing recognition of the intersection between diplomatic immunity and the protection of vulnerable workers. However, its reasoning will need to be developed and refined in future cases to avoid overreach and inconsistency on the part of the courts and, on the other hand, to ensure that immunity does not become an entrenched shield for egregious conduct. As the legal community continues to debate the implications of this ruling, further judicial guidance will clearly be necessary to ensure that the evolving standards of international law are applied consistently and justly in the context of diplomatic immunity and human rights protections.

Economic Activity, Scientific Progression and Protecting Useful inventions - is the UK Patent Law System Achieving its Purpose?

By Nazanin Ilbeigi Taher, LLM

Abstract

The current system for registering and protecting an inventor's patent within the UK would better achieve the purpose of patent law through greater harmonisation and integration into the European patent system. While the UK's current patent system generally strikes an appropriate balance between promoting economic activity, scientific progress, and protecting useful inventions, divergent interpretations of the European Patent Convention ('EPC') by the European Patent Office ('EPO') and UK courts have tipped that balance. This essay concludes that judicial dialogue and cooperation are the most effective approaches for harmonising and integrating into the European patent system.

Introduction

The current system for registering and protecting an inventor's patent within the UK requires greater harmonisation with the European patent system to achieve the purpose of patent law - to strike an appropriate balance between promoting economic activity, promoting the progress of science and the protection of useful inventions.

This essay will first consider the purpose of patent law. It will then discuss the system for obtaining and protecting a patent in the UK and whether the current patent regime achieves the purpose of patent law. After this, it will discuss and analyse the impact of Brexit on the UK's participation in the EPC, the Unified Patent Court Agreement

('UPCA') and the Unitary Patent ('UP'). Finally, it will propose a solution on how the UK should develop its patent laws moving forward.

Purpose of Patent Law

Although subject to debate, it is generally understood that patent law incentivises invention, encourages innovation and promotes economic growth.[265] The patent system in the UK has supported 'innovation and economic growth in important areas of the economy from pharmaceuticals to information technology and advanced manufacturing',[266] and 'is closely connected to recent evolutions in innovation processes.' [267] By granting an inventor the reward of a 'sole proprietary right',[268] 'useful […] work which might not have been done without that prospective reward' comes into being and progresses developments in all fields.[269] However, such a right must also benefit society as a whole. Patents should simultaneously disclose and share relevant information in relation to the invention 'so that innovators can learn from advances made by others and build on them',[270] and such patents should 'contribute to the general body of technological understanding.'[271] Accordingly, the fundamental purpose and main aim of an effective patent system is to strike an appropriate balance between

265 Fritz Machlup, 'An Economic Review of the Patent System' [1958] 78; Mark Lemley, 'Faith based Intellectual Property' [2015] 62 UCLA L Rev 1328; Professor Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011); Thaddeus Manu, 'Challenging the validity of patents: stepping in line with EPO and US jurisprudence' [2017] 48(7) IIC 813, 813

266 Hargreaves (n 1) 53

267 Organisation for Economic Co-operation and Development, 'Patents and Innovation: Trends and Policy Challenges' (OECD 2004) 5

268 William D Nordhaus, 'Invention, Growth and Welfare: A Theoretical Treatment of Technological Change' [1969] MIT Press 168, 168

269 Joint Economic Committee of US Congress, 'Inventions and the Patent System' [1964] Government Printing Office, 59

270 Hargreaves (n 1) 53

271 Judith Embley, Keir Bamford and Nick Hancock, *Commercial and Intellectual Property Law and Practice* (CLP 2023) 307

promoting economic activity, promoting the progress of science and protecting useful inventions.

Current system for obtaining a UK Patent

A UK patent may be obtained through three avenues: the UK Intellectual Property Office ('UKIPO') following the law contained in the Patents Act 1977, the European Patent Office ('EPO') under the European Patent Convention ('EPC') or through an international application under the Patent Cooperation Treaty 1970 ('PCT'). An inventor applying to the EPC for a patent will be awarded national patents for various European countries party to the EPC if their invention is patentable. The PCT avenue, administered by the World Intellectual Property Organisation ('WIPO'), allows inventors to submit a single application stating in which country, from its 100 members, they wish to gain patent protection. The WIPO then conducts a preliminary search and sends the application to national offices to determine patentability.[272]

Patentability

The UKIPO and EPO broadly follow the same criteria to determine patentability.[273] A patent is granted if the following four criteria are satisfied: the invention must be novel,[274] involve an inventive step,[275] be capable of industrial application[276] and be free of exclusions.[277]

[272] ibid, 308
[273] David Bainbridge, *Intellectual Property* (10th edn, Pearson Education 2018) 1046
[274] Patents Act 1977, s 1 (a); Convention on the Grant of European Patents 1973, art 52
[275] ibid, s 1(b); Convention on the Grant of European Patents 1973, art 52; *Windsurfing International v Tabur International* [1885] RPC 59 (EWHC)
[276] ibid, s 1(c); Convention on the Grant of European Patents 1973, art 52
[277] ibid, s 1(2); Convention on the Grant of European Patents 1973, art 52

The patent specification must also be sufficiently clear and described 'in enough detail to allow a person with the requisite skills to carry out the invention.'[278] The patent specification should not be too ambiguous or excessively broad.[279] Patent specifications which are not sufficiently clear in this way will be rejected.[280]

Provided the above criteria are met, an inventor will be granted a short-term monopoly of 20 years over their invention.[281]

Appropriate Balance - Patentability Criteria

The UK's current patent system in the UK generally strikes an appropriate balance between promoting economic activity, promoting scientific progress, and protecting useful inventions.

The patentability criteria promotes the progress of science by requiring that any patentable invention must be novel and have an 'inventive step.' Whether an invention is new is judged by considering whether matter made available to the public (prior art)[282] discloses the invention to enable someone to make that invention.[283] Whether an invention constitutes an 'inventive step' is judged by identifying the state of the art and determining whether a person skilled in the art would find the invention obvious.[284] In this way, inventors and businesses who aim to create patentable inventions for commercial exploitation must make some scientific or technological progress in their field to patent an invention, as only real developments can be patentable.

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278 Embley, Bamford and Hancock (n 8) 314

279 ibid

280 *Schering v Plough ltd v Norbrook Laboratories Ltd* [2005] EWHC 2532 (Ch); *European Central Bank v Document Security Systems Inc* [2008] EWCA Civ 192 (CA)

281 Embley, Bamford and Hancock (n 8) 307

282 Patents Act 1977, s2(2); Convention on the Grant of European Patents 1973, art 54

283 *Synthon BV v SmithKline Beecham Plc* (No 2) [2006] RPC 10 (HL)

284 Patents Act 1977, s 1(b); Convention on the Grant of European Patents 1973, art 52; *Windsurfing International v Tabur International* [1885] RPC 59 (EWHC)

Moreover, the criterion that patentable inventions be capable of industrial application further ensures that patents are only granted to work that develops and promotes scientific or technological progress in their field.

Length of Patent and Patent Specification

Granting a 20-year monopoly over patented inventions and requiring that their specification be 'sufficiently clear' for another skilled individual to replicate the invention strikes a clear balance between promoting scientific progress and protecting useful inventions. These requirements enable disclosure and can be seen as a 'contract between the inventor and the state' that gives 'monopoly protection for a limited time' in return for 'the inventor [giving] his invention to the public once the patent has expired'.[285]

The 20-year monopoly, notably shorter than granted by any other intellectual property right, ensures that inventors and businesses are rewarded for their work through strong legal protection over their useful inventions.[286] This is a necessary and effective incentive in the pharmaceutical field, for example, where businesses must ensure they recover the costs of developing products that cost hundreds of millions of pounds and over a decade to produce.[287] This also promotes economic activity by businesses and their investors, who can ensure that business costs are justified, and can safely continue to invest time and money in producing such inventions.[288] The 20-year duration, however, ensures that the invention shortly falls into the public domain, thus promoting scientific progress as society can then create and use a new invention or process on the patent's expiration.

[285] Bainbridge (n 9) 827-8
[286] ibid, 825
[287] Embley, Bamford and Hancock (n 7) 307
[288] ibid

Simultaneously, a 'sufficiently clear' patent specification which should 'enable a person skilled in the art [to] work the invention,' ensures that full patent details are disclosed and available for public inspection.[289] This allows for scientific progress by disclosing the workings of the invention even while the inventor enjoys their monopoly right.

The 'Experimental Use' Exception

The 'experimental use' exception serves as a defence against alleged infringement of a patent and promotes scientific progress.[290] This defence directly addresses the concern that patents may slow down the rate of scientific progress by granting a monopoly right over an invention.[291] The courts have also taken a broad approach to this exception, allowing the use of patented technology for the purposes of experimentation, even when operating on a commercial motive.[292] By allowing the use of a patented invention for experimental use, the current system allows for an appropriate balance between promoting scientific progress and protecting useful inventions by granting the inventor a monopoly.

Remaining Issues

The current system faces unresolved issues that disrupt the balance between promoting economic activity, promoting scientific progress and protecting useful inventions. These issues primarily concern the uncertainty that follows the granting of a patent under the EPC, and divergent interpretations of the EPC by the UK courts and EPO.

[289] Bainbridge (n 9) 888

[290] Patents Act 1977, s 60(5)

[291] Kamal Saggi, Lee Branstetter and C Fritz Foley, 'Has the Shift to Stronger Intellectual Property Rights Promoted Technology Transfer, FDI and Industrial Development?' [2010] 2(1) WIPO J 93, 93

[292] *Monsanto Co v Stauffer Chemical Co* [1985] RPC 515 (CA)

EPC Post-Grant Uncertainty

A patentable invention using the EPC avenue will be awarded national patents for various European countries party to the EPC.[293] While this streamlines the process of applying for a patent,[294] the process fails to 'unify the invalidation and infringement proceedings in Europe', since proceedings have to be brought in each relevant contracting state where the patent is being infringed or claimed invalid.[295] This has led to contradictory outcomes, most notably in the case of *Improver Corp v Remington Consumer Products Ltd.*[296] In this case, an action for patent infringements in the UK, Germany and the Netherlands resulted in inconsistent rulings, with the UK deciding that there was no infringement and the remaining states deciding that there had been an infringement.[297] This uncertainty surrounding patent invalidation and the 'lack of a streamlined process' for infringement proceedings could discourage patent applicants from patenting their inventions in the UK.[298]

This fails to provide an effective system to protect useful inventions, promote scientific progress and economic activity as inventors are less likely to patent their inventions and disclose the workings of their inventions in a patent specification. Similarly, businesses and investors will no longer see the benefit of investing time and expense in developing new technologies and scientific inventions if they cannot obtain certain, consistent, and adequate protection for those inventions. [299]

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293 Embley, Bamford and Hancock (n 7) 307

294 ibid

295 Martin Stierle, 'The rise of the Unified Patent Court: A New Era' [2023] 54(5) IIC 631, 631

296 [1990] FSR 181 (Ch D)

297 *Improver Corp & Sicommerce AG v Remington Products Inc Case No 2* [1991] 27/89 OLG; *Epilady Netherlands III* [1993] 24 IIC 832; Karen Walsh, 'Promoting Harmonisation Across the European Patent System Through Judicial Dialogue and Cooperation' [2019] 50 ICC 408

298 Aisling McMahon, 'Brexit and the Unitary Patent Package: A Further Compromised Future?' [2018] 15(2) SCRIPTed 175, 205

299 ibid

Divergence of EPC Interpretation by UK courts and EPO

Additionally, differences in the interpretation of the EPC by the EPO and the UK courts have led to a lack of harmonisation. This is most notable when considering the interpretation of the patentability of computer programs.[300] In Case T208/84 *VICOM/Computer-related invention*,[301] the EPO stated that for a patent to be granted for a computer programme, it must have some 'technical effect' which 'must bring about some effect or consequence that, itself, as distinct from the computer programme, is new and shows an inventive step.' [302]

Since then, the EPO Board of Appeal has suggested in *IBM/Computer Programs* that the 'technical effect' requirement 'was more relevant to the questions of novelty and inventive step than deciding on possible exclusion from the meaning of "invention".'[303] However, the UKIPO and Court of Appeal have suggested that the correct approach has been expressed in *Aerotel Ltd v Telco Holdings Ltd* [2006] EWCA Civ 1371 and *Macrossan's Patent Application (No 0314464.9)* [2006] EWCA Civ 1371 which suggest, similarly to *Vicom*, that a programme must comprise a 'technical contribution' to be patentable.[304]

While the House of Lords stated that 'it would be highly undesirable for the provision of the EPC to be constructed differently in the EPO from the way they are interpreted in the national courts of a Contracting State',[305] these divergent interpretations of the EPC by the EPO and the UK courts were unavoidable, since the UK courts could only apply previous EPO decisions due to *stare decisis*.[306] This divergence increases uncertainty for inventors, businesses and investors who cannot rely on the certainty of harmony

300 Bainbridge (n 9) 897
301 [1987] EPOR 74
302 Embley, Bamford and Hancock (n 7) 313
303 [2000] EPOR 219; Bainbridge (n 9) 929
304 Embley, Bamford and Hancock (n 7) 313
305 *Merrell Dow Pharmaceutical Inc v Norton & Co Ltd* [1996] RPC 76, 82
306 Bainbridge (n 9) 928

between the interpretation of the EPC in UK courts and the EPO. This may result in applicants being discouraged from applying for patents and inventing with the goal of obtaining a patent to exploit commercially. Additionally, such disharmony does not provide a stable and consistent system for protecting useful inventions. As such, scientific progress and economic activity may be slowed, and useful inventions may not obtain the legal certainty needed to protect their inventions.

The EPC, UPCA, UP and Brexit

The EPC

The EPC is an intergovernmental treaty adopted in 1973 with thirty-eight contracting states. It allows inventors in the Contracting States to submit one application to obtain a bundle of national patents for patentable inventions in European countries party to the EPC.[307] As discussed, this presents the problem of national divergence on patents across the Contracting States.[308]

The UPCA

The UPCA is 'formally an instrument of public international law' and is an international agreement creating the basis for the Unified Patent Court ('UPC').[309] The UPC is intended to interpret EPC provisions and settle disputes in relation to EPC and UP patents, thereby addressing the issue of national divergence in patent enforcement across the Contracting States which have ratified the UPCA.[310]

[307] Bainbridge (n 9)

[308] Luke McDonagh, *European Patent litigation in the shadow of the UPC* (Edward Elgar Publishing Ltd 2016) 12

[309] Thomas Jaeger, 'Reset and Go; The Unitary Patent System Post-Brexit' [2017] 48(3) ICC 254, 255

[310] McMahon (n 34) 185

The UP

The UP is a new type of EU patent which allows parties to apply for a single European Patent with Unitary Effect instead of applying for a bundle of national patents under the EPC.[311] This means that the UP has 'equal effect in all participating Member States'[312] and 'should only be limited, transferred or revoked, or lapse, in respect of all the Member States.'[313] This system is intended to bring greater harmonisation and certainty throughout the Member States.[314]

Brexit - Effect on the EPC

As the EPC 'is a European system, not an EU one',[315] the UK has remained a party to the treaty post-Brexit, and the EPC will continue to have the same effect.[316]

Brexit - Effect on the UPCA and UP

However, the UP is 'an EU right created by two EU regulations and central to its legal basis is the EU system of enhanced cooperation.'[317] Accordingly, they are 'as a matter of principle, not open to non-Member States.'[318]

Additionally, the UPCA, although formally an international agreement, is 'connected to the EU and its law'[319] due to the 'primacy of EU law in the UPC's operation and the

311 Embley, Bamford and Hancock (n 7) 323
312 McMahon (n 34) 184
313 ibid
314 Embley, Bamford and Hancock (n 7) 323
315 Embley, Bamford and Hancock (n 7) 323
316 McMahon (n 34) 183
317 ibid, 184
318 Maria Aranzazu Gandia Sellens, 'The Viability of the Unitary Patent Package after the UK's Ratification of the Agreement on a Unified Patent Court' [2018] 49(2) ICC 136, 140
319 Jaeger (n 45) 270

links between the UPC and the [The Court of Justice of the European Union ('CJEU')].'[320]

Accordingly, the UK has withdrawn from participation, despite initially ratifying.[321] Whilst increased harmonisation would have been desirable, one effect of Brexit is that the UK could no longer participate in the UPCA or UP. However, UK applicants may still apply to obtain a UP to protect their inventions throughout the Member States.[322]

Development of UK Patent Law

Developments of UK patent law should address the two significant issues identified previously in the current system: the uncertainty following the grant of patents through the EPC and the divergences between the interpretation of the EPC by the UK courts and EPO. Resolving these issues would result in greater harmonisation of the current system and successfully achieve the purpose of patent law - to strike an appropriate balance between promoting scientific progress, and economic activity and protecting useful inventions.

Extension of UP Regulation

The creation of the UPCA and UP was intended to resolve the first significant issue - the uncertainty following the grant of patents through the EPC.[323] Accordingly, some commentators have suggested that the extension of UP Regulation applicability to the UK can be achieved through a simple international agreement between the EU and the

[320] McMahon (n 34) 179

[321] Sam Pearson and Dr Christine Egan, 'The UK will not be part of the Unified Patent Court or Unitary Patent System' (AJ Park, 11 March 2020) <https://www.ajpark.com/insights/uk-will-not-be-part-of-the-unified-patent-court-or-unitary-patent-system/> accessed 3 May 2023

[322] Ian Croft, 'Unitary Patent and Unified Patent Court' (Harper James, 13 March 2023) <https://harperjames.co.uk/article/unitary-patent/)> accessed 3 May 2023

[323] Justine Pila, 'The European Patent: An Old and Vexing Problem' [2013] 62(4) ICLQ 917, 917

UK.[324] However, there is no 'primary law authorisation to extend the patent *acquis* to third states.'[325] Moreover, the regulations are an 'instrument of EU law [... applying only] to EU Member States' and derive its legal framework from 'the tool of enhanced cooperation under Art 20 TEU,' which is 'only open to EU Member States.'[326] Accordingly, attempting to extend the patent to a non-member State such as the UK would be legally problematic.

Ratifying the UPCA

It may be more feasible to suggest that the UK should again ratify the UPCA since it is an international agreement and not an EU instrument. Despite the CJEU *Opinion 1/09* stating that the court is restricted to EU Members only,[327] the fundamental function of the UPC remains that of 'an international tribunal.'[328] However, attempting to ratify the UPCA would be politically problematic given that the UK has intended to 'bring an end to the jurisdiction of the CJEU in the UK,'[329] and ratification would mean that 'the UK would need to remain subject to the CJEU's jurisdiction in this context.'[330] Indeed, Article 20 of UPCA expressly states the primacy of EU law.[331]

Furthermore, it would not be practically efficient, since it would require the UK to 'meet additional requirements under Opinion 1/09 to safeguard EU Law.'[332] It is even

[324] W Tilmann, 'The Future of the UPC after Brexit' [2016] GRUR 753; W Hong, 'Does Brexit Mean the end of the UPC?' [2016] EPLAW 489
[325] Jaeger (n 45) 255
[326] ibid
[327] Opinion 1/09 [2011] ECR I-1137
[328] Jaeger (n 45) 255
[329] Department for Exiting the European Union, *The United Kingdom's Exit from and New Partnership with the European Union* (White Paper, Cm 9417, 2017)
[330] McMahon (n 34) 180
[331] Sellens (n 54) 141
[332] McMahon (n 34) 180

suggested that acceptance of EU law in 'its entirety' would be necessary.[333] Even with such protections in place, the UK's participation as a non-member State would be open to subsequent challenges of its compatibility under EU law. Considering the political and practical difficulties of negotiating and implementing ratification of the UPCA, this would not be an efficient solution to the problem of uncertainty following the grant of patents through the EPO.[334]

Judicial Dialogue and Cooperation

A better approach to tackle both issues and bring uniformity and harmonisation to the current system would be to move towards greater integration into the European patent system through judicial dialogue and cooperation.[335] Instances of judicial dialogue, cooperation and a positive attitude towards more integration with the European patent system have already been seen, most notably in *Actavis v Eli Lilly*.[336] In this case, the Supreme Court 'changed decades of precedent'[337] and implemented the previously rejected 'doctrine of equivalence',[338] introduced by Article 2 of the protocol,[339] to align practice with the EPO and other countries party to the EPC. Moreover, in *Human Genome Sciences Inc v Eli Lilly*, the Supreme Court stated that 'it would require very unusual facts to justify a national court not following' the approach of the EPO Board of Appeal.[340] In *Grimme Maschinenfabrik v Derek Scott (Scotts Potato Machinery)*, the UK Court of Appeal recognised that in the absence of a common European patent court, 'it is of obvious importance [...] that as far as possible the same legal rules apply [and are implemented by courts] across all the countries where the provisions of the conventions

333 Richard Gordon GQ and Tom Pascoe, "Opinion re the Effects of 'Brexit' on the Unitary Patent Regulation and the Unified Patent Court Agreement' [2016] BCC 256
334 McMahon (n 34) 199
335 Walsh (n 33) 408
336 [2017] UKSC 48 (UKSC)
337 Walsh (n 33) 410
338 *Kirin-Amgen v Hoechst Marion* [2004] UKHL 46 (HL)
339 Protocol on the Interpretation of Article 69 EPC 1973, art 2
340 [2011] UKSC 51 (UKSC) [87]

have been implemented.'[341] As such, judicial dialogue and cooperation is an effective and realistic way of ensuring greater harmonisation of the current system, leading to increased legal certainty of patents for inventors, businesses and investors.[342]

Conclusion

This report has argued that the current system for registering and protecting an inventor's patent within the UK will better achieve the purpose of patent law through greater harmonisation with and integration into the European patent system. This report has suggested that this is most appropriately achieved through judicial dialogue and cooperation as opposed to international legislation.

[341] [2010] EWCA Civ 1110 (CA), [77]
[342] Walsh (n 33) 410

Investment Arbitration Law, BITS, and remedy of estoppel in international law

By Zia Akhtar*, PhD*

Abstract

It has been suggested by scholars that investment arbitration in the form of Bilateral Investment Treaties (BITS) has been much influenced by international commercial arbitration. The ground rules of procedure in many investment arbitrations, whether conducted under the Model UNCITRAL Arbitration Rules ("UNCITRAL Rules") 2010 or the ICSID Rules of Procedure for Arbitration Proceedings ("ICSID Rules"), are sourced considerably on earlier cases in international commercial arbitration. Many procedural similarities between investment arbitration and commercial arbitration have developed into principles in BITS arbitration. The most important factor is the rule the courts adopt when they review the decisions of arbitral tribunals. This is when they have to apply the *res judicata* principle when deciding upon the finality of judgments. Until now there has been a lack of certainty about whether it is the substantive or procedural rule in case law that needs review and if *lex causae* or *lex arbitri* is the appropriate law to be applicable in cases. The research question is if the principle of equitable estoppel gives the courts, when judicially reviewing an arbitral decision, the flexibility to overrule the decisions reached in international arbitration.

Introduction

The arbitral mechanisms provided by BITs are governed by the concept of constructive consent, arbitration without privity, and equitable concepts such as *res judicata* and issue estoppel that exist at the intersection of procedural and substantive law. This enables an innovative and creative use of international arbitration outside of the traditional context

of arbitration clauses negotiated in contractual settings and included in traditional contractual instruments. [343] There is a need to consider the impact of international arbitration law within the framework of treaties governing investment arbitration.[344]

The concept of estoppel typically signifies equitable estoppel, which prevents a party from enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations. The concept of estoppel has to be distinguished from the doctrine of collateral estoppel, similarly derived from common law and while *res judicata,* while not as stringent, prevents parties from litigating an issue already effectively decided in a previous proceeding. In the international investment law context "estoppel could be defined as a legal response to prevent inconsistent behaviors, but not to create rights".[345] It is recognized under international law through four doctrinal concepts: recognition, acquiescence, waiver and estoppel".[346] These originate in the "concept of good faith and it is deemed that "acquiescence is a legal concept" as it is operational when silence or inaction is interpreted in order to apply "a state's acceptance of normative conduct and is defined as "qualified silence". [347]The consequence is that interferences between the two

[343] Jan Paulsson, 'Arbitration without Privity' (1995) 10 ICSID Rev-FILJ 232 https://doi.org/10.1093/icsidreview/10.2.232

[344] On the historical evolution of international arbitration law see IC MacGibbon, 'Estoppel in International Law' (1958) 7 ICLQ 468, 471; ILC, 'Yearbook of the International Law Commission' vol 2 (1953) 507

[345] Andreas Kulick, 'About the Order of Cart and Horse, Among Others – Estoppel in the Jurisprudence of International Investment Arbitration Tribunals' (2016) 27 EJIL 107 https://doi.org/10.1093/ejil/chw003

[346] Ibid

[347] J Müller and T Cottier, 'Acquiescence' in R Bernhardt (ed), *Encyclopedia of Public International Law* (vol 7, 1984) 5; E Suy, *Les actes juridiques unilatéraux en droit international public* (1962) 66; ME Villiger, *Customary International Law and Treaties* (1985) 19. See also Pellet in 'Summary Record of the 2629th Meeting' (30 May

notions (estoppel and *bona fide*) have led to the determination that the "party against whom estoppel is raised ought to have acted in bad faith for the doctrine to apply".[348]

In arbitration "traditionally, the principle of equitable estoppel was used to compel a non-signatory to arbitrate because the non-signatory had previously claimed that other provisions of the contract should be enforced to benefit him".[349] The doctrine of issue estoppel has been used to elevate the enforcement of the arbitration clause on the same principles as good faith in the component of treaties between states as stipulated by the Vienna Convention 1969, which protects the international transactions that may underpin bilateral agreements. [350] The element in international investment law upholds the duty of good faith, which is incorporated in arbitration clauses when a contract is made between a state party and the investing concern.[351]

2000) UN Doc A/CN.4/SR.2629, extracted from (2000) I Yearbook of the International Law Commission 137, [69]; he refers to _intentional eloquent silence expressive of acquiescence'.

[348] This was formulated in the ruling in *Amco Asia Corporation and others v Republic of Indonesia* (Award) ICSID Case No ARB/81/1 (20 November 1984)

[349]Alexandra A. Hui, Equitable Estoppel and the Compulsion of Arbitration, 60 Vanderbilt Law Review 711 (2019) Available at: https://scholarship.law.vanderbilt.edu/vlr/vol60/iss2/14

[350] While the precise nature of the bona fide principle is still debated, arbitral tribunals refuse to accept it an autonomous source of legal obligations. The principle is still debated and arbitral tribunals refuse to accept it as an autonomous source of legal obligations (for example, *Pact Sunt Servanda*, per Article 26 Vienna Convention of the Law of Treaties (VCLT 1969) and its process of treaty interpretation per Articles 31-32.

[351]S Đajić, S., *Mapping the Good Faith Principle in International Investment Arbitration: Assessment of its Substantive and Procedural Value*, in Novi Sad Faculty of Law Serbia, Collected Papers XLVI, 3/2012; Also see E De Brabandere, *'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims*, in Journal of International Dispute Settlement, Vol. 3 (3), 2012. Also see AR Ziegler, and J Baumgartner, *Introduction*, in

Collateral estoppel prevents additional litigation of a similar nature, also known as issue preclusion. The inference is that the determination by a prior court ruling is "conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." [352] These concepts often arise in arbitration proceedings and relied upon in order to preserve the finality of arbitral rulings.

Rheinheld has asserted that in general, international law rules such as" *pacta sunt servanda*, abuse of rights, estoppel and acquiescence and the negotiation of disputes are ingrained in the international arbitration law". [353] This in ingrained in "*Acquiescence and estoppel ascribe substantial legal consequences to the inactivity of a State; as such, these institutions should be restrictively interpreted and applied. They find their justification in the reasonable reliance of one State (based on good faith) on the representation or conduct of another*".

This is the affirmation that the "*State has the ability to make declarations to preserve its rights and preclude the effects of tacit consent, placing the onus of action on the State that has allowed the reliance and trust*".[354] The principle can be extended by incorporation into contract law where it may be deemed as part of negotiating a valid agreement that leads to its acceptance in arbitral proceedings.[355] The implication is that of determination within the framework of

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Andrew D Mitchell, M Sornarajah and Tania Voon, Good Faith and International Economic Law, Oxford University Press, 2015, p. 11.

[352] *Bulbitz v Commissioner of Revenue* 545 NW 2D 382, 385 (Minn, 1996)

[353] Steven Reinhold, Good Faith in International Law, 2013. discovery.ucl.ac.uk> 2 UCLJL 40 (2013) 40-63

[354] See generally on the standards for these actions or 'pleas' and on the difference between voluntarist and objective approaches to acquiescence, see Sophia Kopela, 'The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunals' 29 *Australian Year Book of International Law* 87, 88, (2010)27–30

[355] Article 7(1) of the Vienna Convention on Contracts for the International Sale of Goods 1980 states (1) In the interpretation of this Convention, regard is to be had to its international character and to

international arbitration law as to whether the investment tribunals decide consistently and if the decisions are in accordance with the international investment law. The legal reasoning based on the frequency and recognition of estoppel claims in international investment arbitration has become significant with more cases coming up for arbitration. This paper will ascertain the impact of rulings in international investment tribunals, estoppel, *res judicata* and its intersection with international arbitration law.

The framework is based on the empirical methods adopted in an analytical and critical approach that will examine the library research, case law, and arbitration hearings and their informal processes. This depends on experience and in aggregating the vocational knowledge of arbiters including those decisions that are appealed to the courts. This is particularly true of arbitration because it is outside litigation and does not conform to the same standards of evidence as court hearings. The methodology does not entail adopting the doctrinal approach of black letter law as the subject is not based on statute, case law or Law Commission reports and the empirical theory is more suitable in the analysis of the topic under study.

The empirical theory applies data analysis to study international Conventions, such as the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985. The study of arbitration rulings is about the international framework such as the seat of arbitration that is arrived at parties by choice and exists as separate from litigation. This involves the interpretation of clauses such as the intention of the parties and their expectations from the contracts. The framework of empirical research in law is often cited as consisting of

the need to promote uniformity in its application and the observance of good faith in international trade. https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf

a hybrid methodology that is "often difficult to categorise" as the subject does not fall under "any specific headings". [356]

This paper has a methodology that studies international Conventions and their adoption in BITS, and investment arbitration. The study is about law and not of law which is the reason empirical legal studies "take a step outside of legal texts to look at law and legal institutions using methods from social sciences, such as political science, sociology, and psychology".[357] The process of defining empirical research involves "four distinct steps: design the project, collect and code the data, analyse the data, determine the best method of presenting the results". [358] The first step, designing the project, involves the hypothesis in investment arbitration which is applied in BITS, and it collates the available collection of rulings and standardising them to compile the data into a format that can be analysed and then the thesis can be confirmed.

There are recent authoritative texts that have been published that cover the grounds of international arbitration law concerned with BITS and they address the equitable estoppel and *res judicata*. Kidane has authored 'The Culture of International Arbitration' [359] which is a on the transnational dispute resolution provided by arbitration and its utility for various commercial parties. This considers their origins and the role of "culture in modern-day arbitral proceedings" and provides a "detailed analysis of how cultural miscommunication could affect accuracy, efficiency, and fairness in both commercial and

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[356] Michael Salter and Julie Mason, Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research (Pearson 2007) 31

[357]Gallagher Law Library, University of Washington School of Law. 6 February 2023, https://liblawuw.libguides.com/els

[358]Lee Epstein and Andrew D. Martin, An Introduction to Empirical Legal Research, Oxford University Press (2014)

[359] Won L. Kidane, The Culture of International Arbitration, (2017) Oxford University Press

investment arbitration" when the parties come together to arbitrate before a tribunal. The book is concerned with the clauses of arbitration being lost in translation.
The Oxford Handbook of the 'Empirical Findings on International Arbitration: An Overview' which has the relevant chapter authored by Drahozal[360]. It offers an analytical and empirical methodology in considering arbitration as an alternative dispute mechanism and considers the quantitative rather than qualitative empirical studies, for "both international commercial arbitration and international investment arbitration". Part I describes empirical research on the use of "arbitration to resolve transnational disputes to the extent to which parties use arbitration clauses in international contracts" and their reasons for so doing. Part II examines arbitral procedures, and Part III considers the "applicable law in international commercial arbitration".

The gaps in knowledge that I have identified are by comparing the investor-state arbitration under BITS, and judicial review of decisions by tribunals. It is already accepted that BIT arbitration has borrowed many principles that are the basis of the international commercial arbitration. There is a need to evaluate the occurrence and frequency of administrative law challenges in investment arbitration, and by surveying the ICSID arbitrations and their competence in adjudicating on arbitration. The confirmation of the theory that the investor-state arbitrations navigate the complex administrative law issues in order to resolve the basis of deciding an arbitration law case.

The road map of this paper is as follows: Part I concerns the existence of equitable estoppel and international law and defines the occasions when it has been found to arise in arbitration rulings; Part 2 relates to the *res judicata* in international arbitration and its impact on the cases that have been heard before international arbitral tribunals; and Part 3 examines the rulings of the courts and how they impact on the remedy of estoppel. It is determined that the courts have been consistent in their rulings to achieve a precedent in international investment arbitration.

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360 Christopher R Drahozal, 'Empirical Findings on International Arbitration: An Overview', *Oxford Handbook on International Arbitration* (2016) OUP,

Equitable estoppel and international law

The decision as to which law to apply remains at the discretion of arbitration tribunals, making *res judicata* a potential area of uncertainty in the arbitration process. [361] The question to what either and to what extent an arbitration tribunal determines itself bound by earlier judgments and findings of a court or tribunal may fundamentally affect the outcome of an arbitration. This includes which factual and legal issues are to be considered and decided in the arbitration process. This needs to be ascertained when calculating the probable expenditure and strategy of an arbitration. This is because a party will have to take this into account, particularly in international arbitrations likely to involve several legal systems and laws before arriving at a ruling. [362]

The issue of *res judicata* and issue estoppel concern an earlier determination of a court on a central issue in related proceedings not subject to the arbitration clause. There are major differences between the common law and civil law approaches to the application of the doctrine of *res judicata* and its ambit. The concept of *Res judicata* under common law covers a number of distinct concepts such as are 'cause of action estoppel' and 'issue estoppel'.

The process of issue estoppel "*prevents a party from re-arguing against the same opponent an issue of fact or law already determined in the course of a previous proceeding". The issue estoppel does not operate on a previously-decided issue only where: (a) the previous decision directly affects the future determination of the rights of the litigants; (b) the previous decision was clearly wrong; (c) the error in the previous decision*

[361] The authority of *res judicata* applies only to the core aspect of a judgment. It is necessary that the object claimed be the same; to be based on the same cause; that the claim be between the same parties and brought by them acting in the same capacity. In *Sowinski v. California Air Resources Board*, (19-1558, (2020) Fed Cir which affirmed res judicata applied not only to cases resolved on the merits —the facts and evidence of a case—but also ones adjudicated on procedural grounds.

[362]Stephen Schill argues that "*arbitral jurisprudence, including on fair and equitable treatment is a source of expectation investors and states develop regarding the future application of the standard principles of international investment law, even if arbitral precedent is not formally binding*". Stephan W. Schill, International Investment Law and Comparative Public Law, Oxford University Press , 2010*, European Journal of International Law*, Volume 22, Issue 3, August 2011, Pages 156-157.

had stemmed from the fact that some relevant point of fact or law was not taken or argued before the court which made that decision and could not reasonably have been taken or argued on that occasion; (d) there is no attempt to claw back rights that have accrued pursuant to the erroneous decision or to otherwise undo its effects, and (e) great injustice would result if the litigant in question were estopped from putting forward the particular point which is said to be the subject of issue estoppel".[363]

The pleading or defence of issue estoppel, if successful, prevents a party in proceedings from contradicting a finding of fact or law in determination by a court that has already been upheld in earlier proceedings between the same parties. This is contingent upon the determination being central to the decision in those proceedings. A 'privy' under common law is one who claims title or right under, through or on behalf of a party bound by a decision, and this includes persons or entities with an interest, legal or beneficial, in the previous litigation or its subject matter.

There is a further type of issue estoppel related to *res judicata* that is part of the rule in *Henderson v Henderson,* [364] which operates to prevent a party from raising claims and defences that could have been raised in the earlier proceedings but were not argued.[365] The proper legal clause in a contract that stipulates the arbitration might be indicative of the intention of the parties to the contract. This might be sufficiently broad to be inclusive of the issues under which the *res judicata* might arise, and in common law jurisdictions this

[363] *PJSC National Bank Trust v Mints (2022) EWHC 871 (Comm)* in relation to the issue estoppel effects of a prior LCIA award in subsequent English court proceedings, Foxton J held that the doctrine of issue estoppel "appears to me to depend on a rule of law of the "receiving" tribunal rather than the rights adjudicated on by the "transmitting" tribunal'. At 23

[364] *Henderson v Henderson* (1843) 3 Hare 100 at 115

[365] In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* (2013) UKSC 46, Lord Sumpton held that "while the principle in *Henderson v Henderson* has been treated as part of the law of *res judicata*, it is better analysed as part of the principle of abuse of process; and whereas *res judicata* is a rule of substantive law, abuse of process is a concept which informs the exercise of the court's procedural powers". Para 24

can be defined as a rule of evidence and admissibility concerning the earlier decision and regarded as conclusive and binding.

In civil law jurisdictions, the concept of *res judicata* is also accepted and derives its legitimacy from codified law. The parties are prevented under *res judicata* principles from litigating the same dispute again once a final judgment has been rendered by a competent court. The civil law concept of *res judicata* has a much narrower application and an example is the French Civil Code (article 1351), which applies a strict triple identity test for the application of the doctrine of *res judicata.* [366] The French jurisdiction does not recognise the concept of issue estoppel because of the operative order of the court rather than the underlying reasons or factual findings are seen to be binding; the rule in Henderson v Henderson (or its equivalent) is also not accepted.[367] In the recent development of res judicata in France the "criterion of the "cause" is now strictly limited. and Article 1351 CC applies to civil, penal, and administrative law in keeping with the separate tribunals". [368]

[366] P.M. Protopsaltis,., *Les principles directeurs de la Banque Mondiale pour le traitement de l'investissement étranger*, in P Khan, and T Wälde, T. (eds.), Les aspects nouveaux du droit des investissements internationaux, Martinus Nijhoff Publishers, 2007. Also see R Kolb,_,_*La bonne foi en droit international public: contribution à l'étude des principes généraux de droit*, PUF, 2000.

[367]Filip de Ly (Chairman), Audley Sheppard, ILA Final Report on *Res Judicata* and Arbitration, *Arbitration International*, Volume 25, Issue 1, 1 March 2009, Pages 67–82, https://doi.org/10.1093/arbitration/25.1.67

[368] "*Res judicata has two legal sources in French law: the traditional article 1351 CC (since 1804) and the new article 480 of the civil procedural code (CPC since 1976 the CPC was called new civil procedural code since 2007 because several articles of the 1806 civil procedural code were still in force until 2007). The criteria are not exactly the same in both articles. Case law refers to both article but article 1351 CC is a statute whereas article 480 CPC is a decree, so article 1351 prevails over article 480. In the norms hierarchy, the statue prevails over decree*". Emmanuel Jeuland The Effect of European Community Judgments in Civil and Commercial Matters Recognition. Res Judicata and the Abuse of Process. (2008) https://www.biicl.org/files/3481_france_final_c.pdf

The objective of my thesis is to distinguish the issue of which law should be applied by an arbitration tribunal in its consideration of *res judicata* and the matter then requires the assessment on whether it is a question of procedural or substantive law. This is to prevent the abuse of process that may be the consequence of litigating a decision reached by an arbitral tribunal. [369] The object of the res judicata principle is to contributes in the solving of arbitration disputes that have been referred to courts and it has an important role "*in the management of complex cross border commercial disputes. It represents the finality of jurisdiction by courts and tribunals of competent jurisdiction and protects commercial parties from unnecessary prolongation of disputes*". [370]

This issue is significant because the location of the seat of arbitration determines the procedural rules which govern an arbitration, incorporating any mandatory local laws applicable to arbitration. In many instances, the law of the seat of the arbitration (the *lex arbitri*) is regarded to be the appropriate law to be applied by the arbitration tribunal. This is when the arbiter considers the application of *res judicata* in an arbitration and this arbitration is then a matter of applying the procedural law.[371]

There is also authority that implies the *res judicata* is a substantive rule of law which allows the tribunal to apply the governing law of the contract (*lex causae*) when it considers the application of *res judicata* and issues estoppel. The concept of *res judicata* overlaps the substantive and procedural law and until now there is no uniform principle under which the *lex causae* or *lex arbitri* should be adopted by an international arbitration tribunal in its

[369] P Rogerson, Issue Estoppel and Abuse of Process in Foreign Judgments (198) 17 Civil Justice Quarterly 91,92

[370]J.Y. Teo, Transnational res judicata in international commercial disputes and potential influences for BRI dispute resolution. *Journal of Private International Law*, *20*(2), (2024) 437–472. https://doi.org/10.1080/17441048.2024.2377400

[371] N Blackaby KC, C Partasides KC and A Redfern, *Redfern and Hunter on International Arbitration* (Kluwer, 7th edn, 2022), [1.59].

consideration of *res judicata* issues.[372] It will remain within the discretion of the particular tribunal, to be decided after due consideration of all relevant factors to the particular dispute, including the arbitration agreement and earlier decision as to which process to apply in adjudication.

This makes *res judicata* a potential area of uncertainty for parties and their legal representatives going into arbitration. There is variation in tribunal rulings and the authority and reasoning upon which they reached their judgments. This will take into account BITS, and the various forms of estoppel to determine its impact on international arbitration law and the argument can be advanced that there should be increased recourse to estoppel in arbitration to denude the impact of res judicata on arbitration rulings.

***Res judicata* application and international treaties**

The investment that a state ratifies with another state to invest in an industry is known as a Bilateral Investment Treaty (BIT). The investing state has a clause written into the contract which allows the foreign state to litigate in the country's domestic courts. There is also a Multilateral Investment Treaty (MIT), which involves more than one party who decides to invest in the state with which it signs an agreement. Both these treaties contain a clause of the host State's agreement to consent to arbitration if a dispute arises between

[372] If the tribunal considers the substantive rule of law under which the decision was reached by the tribunal that is res judicata then it should apply the governing law of the contract (*lex causae*). If there is a possibility that the law of the seat of the arbitration under which the decision is *lex arbitri*, then it is the appropriate law to be applied by the arbitration tribunal when it subjectively considers the application of *res judicata* in an arbitration. David Williams, Mark Tushingham, Application of Henderson v Henderson Rule in International Law, Singapore Academy of Law Journal, Vol 26 (2014) 1036 to 1058

the parties. The rules of investment arbitration can be differentiated from commercial arbitration which have "existed in isolation from wider governance frameworks". [373]

The arbitration is the alternative dispute resolution from a breach of an investment treaty and is governed by rules such as the Arbitration Rules of the International Centre for Settlement Disputes (ICSID), the UN Commission on International Trade Law (UNCITRAL), or the Arbitration Rules of the Stockholm Chamber of Commerce (SCC). In the past two decades, governments internationally have proactively negotiated hundreds of BITs, which are the most popular form of investment treaty.[374] The "purpose of bilateral investment treaties (BITs) is to protect and promote foreign investments" in the country in which the capital has been invested. [375]

The investment arbitration is generally concerned with narratives arising from investor-state relations with the host state or its agencies and macro-level issues such as from investment flows that are based on capital investment. The Investment treaty arbitration is considered as the" 'arbitration without privity', in which a state has given its consent in advance to arbitrate a dispute" submitted by a group or individual claimants that arise

[373] L. Cotula, (Dis)integration in global resource governance: Extractivism, human rights, and investment treaties. *Journal of International Economic Law 23*(2), (2020) 431–454, https://academic.oup.com/jiel/article/doi/10.1093/jiel/jgaa003/5875706.

[374] There has been an exponential growth of BITS and there are at present 2,290 BITs currently in force globally. UNCTAD Multi Stakeholders Platform discusses converging and diverging 11A reform platform. UN Trade Development Investment Policy Hub. 11/9/24. https://investmentpolicy.unctad.org/international-investment-agreements/..

[375] Lauge N Skovgaard Poulsen, The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence (October 1, 2010). Yearbook on International Investment Law and Policy 2009/2010, K. Sauvant, ed., Oxford University Press, 2010, Available at SSRN: https://ssrn.com/abstract=1685876

from a project. The uncertainty that arises means that "objections to the jurisdiction and admissibility of claims are frequent, indeed almost de rigueur". [376]

The international investment law is a nexus of public international law, international economic law, and contractual municipal law. The confluence of treaties into the framework is a hybrid form of law with several jurisdictions and their input into the formulation, including the arbitral seat of the dispute resolution process. Globalization has had an impact and the "internationalization of investment disputes has been conceived as an important valve for guaranteeing a neutral forum and depoliticizing investment disputes".[377] In recent times the arbitral tribunals have reviewed state conduct in key industries that include but are not limited to water services, cultural heritage, environmental protection, and public health. [378] The issues that have concerned the arbitrators are economic, but the arbitral awards have determined the boundary between "*two conflicting values: the legitimate sphere for state regulation in the pursuit of the public interest, on the one hand, and the protection of private interests from state interference, on the other*".[379]

In the construction of BITS and more generally under the international investment agreements (IIAs), state parties concede a certain degree of protection to investors who are nationals of contracting states or their investments in their treaty's framework. These are in the form of clauses which generally include "compensation in cases of

[376] AK Bjorklund, Particularities of Investment Arbitration. In Kroll S, Bjorklund AK, Ferrari F, eds. Cambridge Compendium of International Commercial and Investment Arbitration. Cambridge University Press, (2023) 104- 136.

[377] S.W. Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22 EJIL 875–908.

[378] I.F.I. Shihata, 'Toward a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 *ICSID Review–FILJ* 1–25.

[379] Valentina Vadi, International investment law as a field of international law, in Proportionality, Reasonableness and Standards of Review in International Investment Law, and Arbitration, Elgar on Line, (2018) 1-30, https://doi.org/10.4337/9781785368585.00008

expropriation, but fair and equitable treatment, non-discrimination and full protection and security", among other guarantees.[380] The IIAs are international law treaties and apply irrespective of the domestic law which have "limited powers available to review awards" and consist of mechanisms under which the state is brought under "some measure of control, which is the main aspiration of general international law'.[381]

The international arbitration procedures are within the competence of customary rules of treaty interpretation, as affirmed by the Vienna Convention on the Law of Treaties. Article 31(3)(c), enables the ICSID arbitrators to take into account other international law regimes when interpreting an IIA.[382] The international law governs the interpretation and application of investment treaties, including the jurisdiction, competence and powers of arbitral tribunals.[383] Similar to other international courts and tribunals, arbitral tribunals have to settle disputes in conformity with international law.[384] The presumption is to consider international investment law and arbitration as a product of international law and that "IIAs are viewed as contributing to the governance of international relations between states".[385]

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[380] Ibid

[381] J. Crawford, 'International Protection of Foreign Direct Investment: between Clinical Isolation and Systematic Integration', in R. Hofmann and C.J. Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011) 17–28, 22.

[382] A. Alvarez, 'A New Stratosphere? Is Investor–State Arbitration Public?', 548, 560.

[383] S. Puig, 'Recasting ICSID's Legitimacy Debate', Towards a Goal-Based Empirical Agenda, Fordham International Law Journal, Vol 36, Issue 2 (2013) 480.

[384] C. Foster, 'Investment Treaty Arbitration as Internationalized Public Law', 463.

[385] C. McLachlan, 'Investment Treaties and General International Law' (2008) 57 ICLQ 361–401; S.W. Schill, 'System-Building in Investment Treaty Arbitration and Law making' (2011) 12 *German LJ*, 1083–1110, 1088.

Both the BITS and the MITS define investors as nationals of a state acting as a corporation other than the state where the investment occurs, and this includes corporate entities such as companies registered in the investor-state. The international companies sometimes register local subsidiaries where there are large infrastructure projects to carry out the contract works, and if the treaty allows it is possible for a foreign parent to claim on behalf of a local subsidiary.[386]

The frameworks of BITS contain clauses as to dispute resolution in investment treaties under which the state grants the investor the right to choose the arbitration as a means to settle disputes in the domestic courts or by arbitration. The choice of the seat of arbitration is provided in the clauses based on the ICSID or UNCITRAL Rules. Where the treaty provides for arbitration under the ICSID rules, jurisdiction is also limited to investors as defined in the Convention.[387] Where the treaty stipulation of an investor differs from the ICSID Convention definition, both must be satisfied if the arbitration is to be under the ICSID Rules.[388]

The ICSID Convention has a self-contained regime for the enforcement of awards. The mechanism is provided by Article 51(1) of the Convention requires any Contracting State to the Convention to enforce the award on presentation of a certified copy by the Secretary General of ICSID. Article 43 presents disadvantages in terms of the transparency of the procedural rules because, firstly, it provides "a power to the tribunal to call further evidence such as independent experts; and, secondly, it allows "disputed

386 *Tulip Real Estate Investment and Development Netherlands B.V. v Republic of Turkey* ICSID Case No. ARB/11/28.(2015)

387 Convention on the Settlement of International Disputes between States and Nationals of Other States 1965.

388 Article 26 states "*Consent of the parties to arbitration under the Convention shall be deemed consent to such arbitration to the exclusion of any other remedy*".

questions which were not part of the parties submissions and expanded the boundaries of the dispute".[389]

The investment arbitration can be compared to commercial arbitration from which it has borrowed extensively. The commercial arbitration award has to be enforced under the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Unlike the ICSID Convention, the UNCITRAL Arbitration Rules do not contain a recognition and enforcement mechanism. Its "effectiveness and trustworthiness" have made it one of the UN's most important and successful private international law treaties governing international trade.[390] It underpins the success of international commercial arbitration as the preferred means for the resolution of international commercial disputes and it has no application to domestic arbitration agreements and awards.

The recognition and enforcement of an award made under the UNCITRAL Rules is governed under Article 18 by the law of the place of arbitration, including any applicable treaties. The Convention requires courts under Article 33 of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states. Article 35 governs the parties' right to select that jurisdiction as the seat of arbitration and it is important to distinguish the seat of arbitration from the place of the hearing.

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[389] Asaf Niemoj, *The Limitations on Article 43 ICSID Convention: An (Un)limited Instrument of the Tribunal? ICSID Review - Foreign Investment Law Journal*, Volume 34, Issue 3, Fall 2019, Pages 697–722, https://doi.org/10.1093/icsidreview/siz018

[390] David D Caron, and Lee M Caplan, 'Introduction', *The UNCITRAL Arbitration Rules: A Commentary*, 2nd Edition, Oxford Commentaries on International Law (2013; online edn, Oxford Academic), https://doi.org/10.1093/law/9780199696307.003.0001, accessed 20 Oct. 2014.

The states members of the New York Convention have a protocol in international arbitration for the resolution of international commercial disputes for businesses around the world.[391] The reason for preference is that in many sectors such as the construction industry the commercial arbitration is the preferred choice for arbitration. [392] There is a legal distinction between claims made under a commercial contract to which domestic law applies and claims under a BIT or MIT to which international public law applies.

As an example, investment treaty arbitration in the construction sector is used less frequently compared to the prevalence of commercial arbitration as a method of resolving international disputes. The reason is that important protections do not apply to two parties and a claim under a BIT or a MIT can only be brought against a host state or against an entity that is an emanation of a state whose acts can be attributed to that entity. The private cause of action can only be brought against a contracting party in a commercial arbitration where the sovereign authority of the state is not offered as a defence in the protection offered by an investment treaty. [393]

There is further criticism which is that the investor-state disputes are of longer duration which makes them a more expensive alternative to a contractual commercial arbitration

[391] A D Alharbi, A Critical Study to the Role of International Arbitration in the Resolution of International Business Disputes, Migration letters, no 1 S12 (2023) Transnational Press London Ltd, 531-539 https://migrationletters.com/index.php/ml/article/view/6236/4217

[392]Zlatan Meskic, Almir Gagula, Why the Applicable Law in International Commercial Arbitration Does Not Matter and Why It Should**,** Journal of Legal Affairs and Dispute Resolution in Engineering and Construction Volume 16, Issue 1. 2023
https://doi.org/10.1061/JLADAH.LADR-99

[393] Toto Construzioni, Generali SPAV Republic of Lebanon, ICID Case no. ARB/07/12 Award 7 June 2012; Imbreglio SpA v Islamic Republic of Pakistan, ICID Case No ARB/03/3 Decision on Jurisdiction 22 April 2005.

route. The average duration of ICSID arbitrations (including Additional Facility proceedings) was 3.6 years according to ICSID data and the average duration of an ICC arbitration in 2020 was 26 months.[394] Arguably, investment treaty arbitration has not yet been able to adopt more economically viable measures than international commercial arbitration has accomplished. The ICSID statistics establish that in 2021, of all new cases registered with ICSID 17 % related to the construction sector[395] When the oil, gas and mining, and power and energy sectors are included, this makes up the majority of treaty claims registered with ICSID in 2019 and 2020.[396]

There are further parallels between investor-state arbitration and commercial arbitration which are because of the procedural rules that govern both kinds of arbitration. They allow the choice of law, seat of arbitration and closed-door formalities. The awards made against host states can be enforced speedily against the host state property internationally because of the adoption of the New York[397] and Washington Conventions, [398] which provide for the prompt enforceability of foreign arbitral awards and ICSID awards,

[394] International Chamber of Commerce, Dispute Resolution Statistics: 2020 3 August 2021. cwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-dispute-resolution-statistics-2020/

[395] ICSID Caseload Statistics, Issue 2021, World Bank Group https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf

[396] Ibid.

[397] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 10 June 1958, 330 UNTS 38.

[398] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington DC, 18 March 1965, in force 14 October 1966, 575 UNTS 159

respectively. The awards have only limited avenues for revision and cannot be amended by the domestic courts.[399]

There is another reason which is that the ICSID arbitrations are wholly exempted from the supervision of local courts, with awards that are only deemed to be subject to an internal annulment process.[400] The grounds for revocation are concerned with the procedural issues which are based on objections that the tribunal may not have been properly vested at the outset of the dispute; or that it manifestly exceeded its powers and acted ultra vires; there was inherent bias that was exercised on the part of a member; or there was a fundamental serious departure from a procedural rule; or the award did not state the reasons on which it was based. The contemporary investment disputes include not only contract treaty claims but also relate to a wide variety of state conduct, ranging from commercial behaviour to regulation.[401] However, as much as the types of claims and disputes have transformed the method of settling these disputes has remained the same.[402] The commercial arbitration perspective "emphasises the private law aspects of investor-state arbitration, such as party autonomy and party equality".[403]

The BITS or MITs can be distinguished from international commercial arbitration in several respects, "which are the subject matter of the disputes [and] in the relationship of the parties.[404] While commercial arbitration generally involves private parties and

9 New York Convention, Article V.

0 ICSID Convention, Article 53.

401 Joost Pauwelyn, At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed, ICSID Review - Foreign Investment Law Journal, Volume 29, Issue 2, Spring 2014, Pages 372–418, at 408 https://doi.org/10.1093/icsidreview/siu001

402 Ibid.

403Ibid.

404 Ibid.

concerns disputes of a commercial nature, such as competition law disputes, investor-state arbitration involves states and private actors and may concern disputes of a public law nature. [405] There is another difference which is that investment treaty arbitrations are often regulatory disputes, with the consequence that the compensation payments 'may directly affect the social fabric of the host state'.[406] Furthermore, the " *investment treaty arbitration affects third parties and their behavior intensely, as the outcome of arbitrations … not only affect future interpretations of similar standards and shape the expectations of investors and states about the decision-making of tribunals, but also affect investment treaty making*". [407]

There are benefits of enlarging the scope of investment treaties that can borrow from the practice of commercial arbitration. The existing disadvantages of BITS are that there is no viable umbrella clause, and private contractors have to undergo a process of reformulating their contractual claims as relevant breaches of treaty obligations.[408] Their inability to do so may mean that the tribunal lacks jurisdiction. The international arbitration law does not preclude a contractor pursuing both contractual and treaty

405 See J. Paulsson, 'International Arbitration is not Arbitration' (2008) 2 Stockholm International Arbitration Review 1–20.

406 SW Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach', Virginia Journal of International Law, Vol 52 (2011) at 76

407 Ibid. 85

408 Raúl Pereira de Souza Fleury, Umbrella clauses: a trend towards its elimination, *Arbitration International*, Volume 31, Issue 4, 1 December 2015, Pages 679–691, https://doi.org/10.1093/arbint/aiv062

arbitration simultaneously. However, there is a lack of consistency in the investor-state tribunals case law where there is a prospect of parallel proceedings.[409]

The principles need to be devised about how investment treaty protections can be increased at the outset of a project by considering the corporate structure of the entity that carries out the works after the foreign state has made its investment. There is no doctrine of precedent under the investor-state regime, and they are a succession of inconsistent judgments. There needs to be careful consideration in the formulation of how contractors' claims are presented in a BIT and whether these will be arbitrated by the state.

The consequence of such a watertight regime needs the recourse to estoppel which has the objective to achieve justice in arbitral rulings and is overriding in arbitral proceedings. This is because the intention is to prevent litigation arising from tribunal rulings. The concept of estoppel is invoked frequently in international investment arbitration and each party may employ estoppel in order to prevent the other side from asserting a claim including that of procedural matters, admissibility, jurisdiction, liability or quantum. [410]

[409] See *SGS v Pakistan, SGS v Phillippine* Case No. ARB/02/6 (Decision on Objections to Jurisdiction and Separate Declaration) (2001); Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I), ICSID Case No. ARB/03/29 (2009); *Helnan international Hotel A/S v Egypt* Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19 (2008); *Duke Enerey Electroaquil Partners & Electroquil SA v Equador*ICSID Case No. ARB/04/19 (2008); *Hamester* GMBH & CO KG V. *v Ghana*, ICSID CASE NO. ARB/07/24 (2010)

[410]Andreas Kulick, About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals, *European Journal of International Law*, Volume 27, Issue 1, February 2016, Pages 107–128, https://doi.org/10.1093/ejil/chw003

Court rulings and fairness of judgments

It has become adjudicating complex administrative law issues in practice are not satisfactory".[411] These can be augmented by ingraining more specialised and trained arbitrators who are knowledgeable of the public law dimension of the framework of investor state treaties. This requires consideration of domestic legal systems and their implementation of the ICSID framework.

The types of disputes that investment arbitration tribunals have to consider and determine are generally considered to cover a wider spectrum of public concerns and are also of higher impact than just the private disputes between parties. Their scope oversees the general public law and includes such issues as the environmental damage and the "general regulatory scheme banning toxic waste".[412] They have adjudicated in circumstances where investment treaties are intended "to prevent an economic collapse" by invigorating the banking sector.[413] The far-reaching impact of investment disputes points towards the sectors that bring it within the domain of public law.[414] This is premised on the fact that "investment disputes being based partially or in some instances even exclusively on

[411] Vuk Cucić, Administrative Law Challenges in Investor-State Arbitration, *Journal of International Arbitration*, Volume 41, Issue 5 (2024) pp. 623 – 646

[412]Cf. *S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA), Partial Award, 13 Nov 2000.

[413]*BG Group PLC v. Argentine Republic*, UNCITRAL, Final Award, 24 Dec 2007, at paras 16–82. Also see Alvarez and Khamsi, 'The Argentine Crisis and Foreign Investors – A Glimpse into the Heart of the Investment Regime', in K.P. Sauvant (ed.), *Yearbook on International Investment Law & Policy 2008–2009* (2009), at 379.

[414]G. van Harten, *International Investment Treaty Arbitration and Public Law* (2007); also see van Harten and Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', 17 *EJIL* (2006) 121.

investment contracts do not substantially differ from ordinary contract law claims under domestic law, for they root in a relative, i.e., private relationship".[415]

The matter is of public interest because administrative rules apply and there is an application of the rule against bias and a right to a fair hearing. It has been argued that fair and equitable treatment in the investment context is rather a right than a principle.[416] This is sometimes used as fair and equitable treatment and transparency interchangeably.[417] It is deemed to be falling within the 'the more overarching principle of fair and equitable treatment'.[418] According to other sources the public law 'principles' such as legitimate expectations, due process and even to some extent proportionality form aspects of the fair and equitable treatment standard in international investment law. [419] The principle of legitimate expectations is based on the promise made by a public body that is part of the state infrastructure and its formulation has found its way into international investment law. [420]

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[415]MosheHirsch, 'Investment Tribunals and Human Rights: Divergent Paths', in P.M. Dupuy, F. Francioni, and E.-U. Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2009), at 108

[416]C. Donnelly, 'Public–Private Partnerships: Award, Performance, and Remedies', in the vol. under review, at 475.

[417] Ibid 480.

[418] Ibid 498.

[419] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law 2012, Oxford University Press, 2nd edition,at 133 ff

[420] See, Suez et al. v. Argentina, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 203 ('reasonable and legitimate expectations are important factors that influence initial investment decisions and afterwards the manner in which the investment is to be managed.

There are generally perceived to be two methods in which the public law might impact on the interpretation of investors' rights which are, firstly, 'it may extend those rights and sharpen their contours. Investment tribunals may deduce institutional and procedural requirements from domestic and international (public law) standards'. [421] Secondly, the comparative public law analysis may also be used to limit an investor's right and it 'may demonstrate that certain state conduct is permitted in domestic legal systems, and thereby support the argument that the state measure at issue in an investment dispute is justified'.[422]

There is no equivalent enforcement process for disputes that are resolved by litigation. [423] The international arbitral tribunals have viewed estoppel in its specific impact through the procedural aspects. In this regard 'estoppel acts as a more specific and technical mechanism designed to prevent an already litigated claim from being pursued again (similar to *res judicata)*. The important branches of *estoppel* which may preclude a claim from being relitigated are: *cause of action estoppel*; [424] and *issue* (or *collateral*) *estoppel*. [425]

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[421] Stephan W. Schill, International Investment Law and Comparative Public Law, An Introduction', at 31 ff.

[422] Ibid at 32.

[423] The Hague Convention on Choice of Court Agreements of 2005 is the litigation alternative to the The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"). It came into force on 1 October 2015 and, it has been ratified by the EU (including Denmark), Mexico, Montenegro, Singapore and the UK. There is also the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. It is not yet in force.

[424] Audley Sheppard, 'Chapter 8. Res Judicata and Estoppel' in Bernardo M. Cremades Sanz -Pastor and Julian D.M. Lew (eds). Parallel State and Arbitral Procedure in International Arbitration, p 225

[425] Ibid.

It is significant that both these doctrines preclude the parties from re-litigating an issue that has been ruled upon by a court of competent jurisdiction between them in a decided case. The only circumstances in which estoppel can be invoked include the discovery of further material relevant to issues in the previous litigation or fraud.[426] The distinction is that of specificity because the issue estoppel is concerned with *'the facts and issues required to establish the cause of action whereas cause of action estoppel looks only at the cause of action'*. [427] This perspective is challenged by those who contend that the '*cause of action*' is similar to the '*claim*' itself, whereas *issue estoppel* prevents reissue of legal process on a point of law or of fact already decided upon by an arbitral tribunal. [428]

In *Southern Pacific Railroad Co. v. United States*,[429] the Supreme Court of the United States stated that a general principle existed that pre supposed '*that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified'*.[430] The Court considered the '*issue estoppel as a legal concept'* [431] and the ruling

[426] Sean Wilken QC, Karim Ghaly, *The Law of Waiver, Variation and Estoppel. Third Edition* (Oxford University Press 2012), para. 14.08

[427] Ibid para 14.9

[428] Gavan Griffith; Isabella Seif, 'Chapter 8: Work in Progress: *Res Judicata* and *Issue Estoppel* in Investment Arbitration', in Neil Kaplan and Michael J. Moser (eds),), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Kluwer Law International 2018), p. 124

[429]168 U.S. 1 (1897)

[430]Ibid.

[431] Ibid. pp. 48-49

established the issue estoppel as a general principle that was inherited from the common law system.

There are investment tribunal decisions whose application of *estoppel* is that *of* a general principle of law. [432] This is rejected by those jurists who state that there is no consensus that could lead to the arbitral tribunals offering estoppel as a source of their jurisdiction.[433] Article 38 (1) (c) of the Statute of the International Court of Justice does not recognise *cause of action* or *issue estoppel* which means that there is no customary rule framing *estoppel* as binding in law.[434] The evidence is not conclusive and the assertion that it is a general principle is also unproven by the case law.

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432 Alexandros - Catalin - Bakos,Investment Tribunals Are Too Quick to Establish the Existence of Issue and Cause of Action Estoppel in International (Investment) Law. He postulates that "stating that *estoppel* is a principle of law serves two aims: firstly, the tribunal justifies the application of *estoppel* by reference to a source of international law (usually, part of the applicable law). Secondly, this gives the tribunal legitimacy, as the tribunal grounds its decision to rely on *estoppel* on a widely-applicable source of law (whether objectively true or not is not as important)". EFILA Blog, 3/9/18, efilablog.otg/tag/alexandros-catalin-ballos.

433 Charles T. Kotuby Jr. and Luke A. Sobota, *General Principles of Law and International Due Process. Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017), footnote 262, p. 200. Such a conclusion (that *estoppel* is not a general principle of law) is in accordance with one of the major views in international legal relations as to what constitutes a general principle of law: one '*which can be derived from a comparison of the various systems of municipal law, and the extraction of such principles as appear to be shared by all, or a majority, of them* [emphasis added]', Hugh Thirlway, *The Sources of International Law. Second Edition* (Oxford University Press, 2019), p. 108.

434 Christopher Brown, 'A Comparative and Critical Assessment of Estoppel in International Law', University of Miami Law Review [Vol. 50:369 1996], pp. 384-385;PanKaijun, 'A Re-Examination of Estoppel in International Jurisprudence', 16 Chinese Journal of International Law (2017), p. 761.

In *Petrobart Ltd v The Kyrgyz Republic*[435] the English company, a utility supplier, had agreed to provide services to the Kyrgyz Republic and the issue concerned the breach of the Energy Charter Treaty (ECT) 1994 between the state party and the UK-registered company. The alleged infringement was the domestic party not applying the WTO trade rules to energy-related trade with and among non-WTO members who are party to the ECT pending the full WTO membership of all ECT countries. This was because the 1998 Amendment to the ECT extends the coverage of the trade rules to energy-related equipment as well as materials and products. The SCC tribunal ruled that '*there exist rules which establish preclusion of issues which could have been raised but were not raised and that these rules occur outside of the American legal system, as well, does not transform* estoppel *into a principle of law'*.[436]

The tribunal did not mention in what form is estoppel recognised in public international law and it also did not identify the underlying state practice and *opinio juris* nor referred to awards/ judgements in which such a custom was established. The estoppel argument did not prevail because "there was no identity between the legal grounds relied on in the relevant proceedings". [437] The ruling stated that '*while the doctrine of collateral estoppel seems to have primarily developed in American law, other legal systems have similar rules which in some circumstances preclude examination of an issue which could have been raised, but was not raised, in previous proceedings. A doctrine of estoppel is also recognised in public international law*'.[438]

In another BIT breach claim in *RSM Production Corporation and others v. Grenada*[439] the ICSID tribunal accepted that the '*doctrine of collateral estoppel is now well established as a general principle*

[435] Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Case no 126/2003

[436]Ibid. pp 67-68

[437] Ibid.

[438]Ibid. pp. 66-67

[439]ICSID Case No. ARB/05/14

of law applicable in the international courts and tribunals such as this one'. [440] The tribunal relied on the previous rulings that had upheld the cause of issue estoppel as part of international law. [441] The Court held: '*In addition, Amco agreed that any methods it might use for calculating profits or losses in its private business relationships and dealings in Indonesia would not be binding on the Government which, for the purposes of taxes, would be entitled to determine PT Amco 's profits / losses in accordance with the Government's prevailing laws and regulations'.* [442]

In *Amco Asia Corporation and others v. Republic of Indonesia*[443] the respondent Indonesia argued that the claimant was estopped from invoking the conduct by another party whose evidence was introduced at a later stage of the proceedings. The ICSID tribunal relied on the principles based on the common law notion of estoppel, by raising the Anglo-American case law that affirmed the doctrine of equitable estoppel.[444] The judgment quoted Vice-President Alfaro's separate opinion in the *Temple of Preah Vihear (Cambodia v. Thailand) case*.[445]

It ruling that '*[a]lthough this dictum refers to activities of States, the Tribunal is of the view that the same general principle is applicable in international economic relations where private parties are involved.*

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[440] Ibid.para 7.1.2

[441] The tribunal referred to precedent ie : *Amco Asia Corporation v Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (Resubmitted Case), 10 May 1988, para. 30 ; *Company General of the Orinoco Case,* 10 R.I.A.A. 184(1905); and *Southern Pacific Railroad Co. v. United States*, 168 U.S. 1 (1897) Para 27

[442] Ibid. Para 30

[443] ICSID Case No. ARB/81/1

[444] Ibid. para 47

[445] ICJ 15 VI 62

In addition, the Tribunal considers that, in particular for its applications in international relations, the whole concept is characterized by the requirement of good faith'.[446]

The requirements of estoppel were not formulated in the ruling other than for the court to assert that it has to abide by the principle of *res judicita* and there was no reliance placed that was to be for the detriment or benefit of one or the other party.[447] The tribunal stated that '*it is by no means clear that the basic trend in international law is to accept reasoning, preliminary or incidental determinations as part of what constitutes res judicata*'. [448] It has been argued that the existence of an *issue/collateral estoppel* necessarily implies the fact that the reasoning for an award to be made must be stated for the principle of *res judicita* to be applied. [449]

There is an overlap between the existence of estoppel and *res judicata* and the tribunals may apply the principle of *estoppel* when they are applying *res judicata*. In *Marco Gavazzi and Stefano Gavazzi v. Romania* [450] the ICSID tribunal evaluated whether an initial decision which was based on a breach of good faith that precluded the claims before it had '*conclusive effects on the Parties to the present proceedings under the doctrine of res judicata or issue estoppel*'.[451] It referred to the conditions for res judicata *'under international law, three conditions need to be fulfilled for a decision to have binding effect in later proceedings: namely, that in both instances, the object of the claim, the cause of action, and the parties are identical*'.[452] This was based on the

[446] Ibid. para 47

[447] Ibid. para 48

[448] Ibid. para 32

[449] Sheppard, p. 234; Griffith, Seif, p.125.

[450] ICSID Case No. ARB/12/25

[451] Ibid. para 164

[452] Ibid. para. 166

reasoning in the landmark judgment of 1926 in the PCIJ in which there was a three-element test established to make an arbitrational ruling binding. [453]

In another ruling *Orascom TMT v Algeria* [454]the tribunal ruled that three submitted claims all concerned the same state actions in a BIT treaty. These had been challenged at several occasions of a single corporate chain and were ruled in inadmissible on the grounds of an abuse of process. The tribunal ruled that the claimant could not claim for the same harm as in the other arbitrations and, by re submission had committed an abuse of right.

There was an acknowledgement that the doctrine of abuse of rights is a 'general principle applicable in international law' that is applicable in situations where 'an investment has been restructured to attract BIT protection at a time when a dispute with the host state had arisen or was foreseeable'.[455] The decision stated that it was an abuse of process for an investor to 'impugn the same host state measures and claims for the same harm at various levels of the [corporate] chain in reliance on several investment treaties concluded by the host state'.[456] The tribunal ruling has established that the abuse of process doctrine is still valid and is an important factor for the application of *res judicata.*

453 In *Factory a Chorzów (Merits)* PCIJ Series A. No 1 in which Judge Anzilotti mentioned in his dissenting opinion to the three-element identity between the concerned claims (the same person, the same claim and the same legal grounds) is also known as the '*three-element test' belongs to res judicata* ;. p 126

454 ICID Case No ACB/12/35

455 Ibid. paras 540–541.

456 Ibid. para 542

Conclusion

The public law principles of legitimate expectations based on the promise made by a public body that is part of the State infrastructure have found their way into international investment law. [457] There are generally perceived to be two methods in which the public law may impact on the interpretation of investors' rights in BITS. These are, firstly, 'it may extend those rights and sharpen their contours. Investment tribunals may deduce institutional and procedural requirements from domestic and international (public law) standards. [458] Secondly, the comparative public law analysis may also be used to limit an investor right and it 'may demonstrate that certain state conduct is permitted in domestic legal systems, and thereby support the argument that the state measure at issue in an investment dispute is justified'.[459]

The doctrine of issue estoppel has been used to elevate the enforcement of the arbitration clause on the same principles as good faith as a component such as in treaties between states and the Vienna Convention 1969 protects the international transactions that may underpin bilateral agreements. The element in international investment law that is upheld is the duty of good faith that is incorporated in arbitration clauses when a contract is made

[457] See, Suez et al. v. Argentina, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 203 ('reasonable and legitimate expectations are important factors that influence initial investment decisions and afterwards the manner in which the investment is to be managed.

[458] Stephan W. Schill, International Investment Law and Comparative Public Law, An Introduction', at 31 ff.

[459] Ibid at 32.

between a state party and the investing concern. There are some investment tribunals whose application of *estoppel* is that of a general principle of law. [460]

The international arbitration tribunals in BITS have applied the principles of *res judicata* and collateral estoppel to preclude claims based on identical issues that may be raised against the respondent party. This is an important barrier that prevents claimants from invoking arbitration of the issues involved that may be viewed as an abuse of process. This founding principle of common law courts is now increasingly finding its way into the international arbitration forums, and the increasing workload of ICSID is testimony that it is giving rise to judgments that are consistent and respect the substantive rights of the parties.

[460] Alexandros - Catalin - Bakos,Investment Tribunals Are Too Quick to Establish the Existence of Issue and Cause of Action Estoppel in International (Investment) Law. He postulates that "stating that *estoppel* is a principle of law serves two aims: firstly, the tribunal justifies the application of *estoppel* by reference to a source of international law (usually, part of the applicable law). Secondly, this gives the tribunal legitimacy, as the tribunal grounds its decision to rely on *estoppel* on a widely-applicable source of law (whether objectively true or not is not as important)". EFILA Blog, 3/9/18, efilablog.otg/tag/alexandros-catalin-ballos.

OP v Commune d'Ans: Question of Whether Municipal Authority's Internal Rule Amounts to Indirect Discrimination

This piece was awarded the 'The Most Improved Piece 2025' award

By Navjothi Raju, BVS

Introduction

On 28 November 2023, under a request for a preliminary ruling, the Court of Justice of the European Union (CJEU) issued a judgement in *OP v Commune d'Ans, C-148/22, EU: C2023:924,* concerning the decision of Commune d'Ans to prohibit its workers from wearing visible signs of their ideological or philosophical affiliation or political or religious belief.[461] The CJEU found that Article 2(2)(b) of Directive 2000/78, regarding indirect discrimination, can be interpreted to mean that a rule of a municipal authority prohibiting the authority's staff from wearing visible signs of their philosophical or religious beliefs can be justified by the authority's desire to create an entirely neutral administrative environment; provided that the rule is appropriate, necessary and proportionate.[462]

This case commentary will first explain the factual background of the case and the CJEU's reasoning, followed by an analysis of four identified critiques of the CJEU's judgment. These critiques have been identified as:

1. The court did not fully discharge its supervisory responsibility;
2. the Court's expansion of the margin of discretion;

[461] Case C-148/22 *OP v Commune d'Ans* ECLI:EU:C:2023:924, para 2.
[462] [2] Ibid para 41.

3. the Court's inconsistent assessment of justifications for indirect discrimination; and
4. the Court's failure to consider the real-life consequences of their determination.

Factual Background

OP (the applicant) worked for the Belgian municipality of Ans since 2016. In February 2021, she made an application to her employer, a public authority, requesting permission to wear a headscarf at work.[463] The municipal board rejected her application, and she was provisionally prohibited from wearing signs revealing her religious beliefs until general rules, concerning wearing such signs within the municipal administration, were adopted.

In March 2021, the municipal board amended its terms of employment by incorporating the requirement of 'exclusive neutrality' in the workplace. This prohibits all municipal workers in that workplace, irrespective of whether or not they are in contact with the public, from wearing any visible signs that reveal their beliefs, particularly religious or philosophical beliefs, because workers are required to observe the principle of neutrality.[464]

The applicant issued legal proceedings against her employer in the Labour Court of Liège and claimed she was discriminated against based on her religion.[465] A question the Labour Court referred to the CJEU, which was the focal point of the judgment, was whether the provision in Directive 2000/78, regarding indirect discrimination, could be interpreted as permitting a public administration to implement an entirely neutral administrative environment.[466]

[463] Ibid para 12.
[464] Op cit note 1 para 15.
[465] Ibid para 16.
[466] Ibid para 20.

CJEU's Reasoning

The CJEU ultimately found that the internal rule of a municipal authority can be justified by the desire of the authority to establish an entirely neutral administrative environment provided that the rule is appropriate, necessary, and proportionate.[467]

The CJEU structured its reasoning by first establishing that Article 9 of the terms of the employment, the internal rule, puts into effect the principle of neutrality of public service, and Articles 10 and 11 of the Belgian Constitution are the legal basis for the principle of neutrality.[468]

The Court stated that the Directive provided a general framework for equal treatment in employment. Therefore, there is a margin of discretion afforded to Member States and their infra-States bodies to determine "the place they intend to accord…to religion, and philosophical beliefs in the public sector"[469] because the Member States and their infra-State bodies will be able to consider their specific context.[470] However, the Court caveated this position by stating that the margin of discretion goes hand in hand with supervision by the national and EU judicature, which entails determining whether the implemented measures are "justified in principle and proportionate".[471]

The CJEU held that, for the purposes of Article 2(2)(b)(i) of the Directive, it is for the Member States, their courts and, where appropriate, their infra-State bodies to reconcile freedoms of thoughts, conscience and religion with legitimate aims that[472] justify unequal

[467] Ibid para 41.
[468] Ibid para 32
[469] Op cit note 1 para 34.
[470] Ibid.
[471] Ibid para 34.
[472] Ibid para 35.

treatment.[473] Consequently, the Court held that Article 9 pursued a legitimate aim within the meaning of Article 2(2)(b)(i).[474]

It was also held to avoid indirect discrimination, the internal rule must be appropriate in ensuring that the intended aim is pursued in a consistent and systematic manner; and that the prohibition of wearing any visible signs of belief is limited to what is strictly necessary.[14] The Court left it to the referring court to make this determination.[475] However, this commentary furthers the position that this judgement is unsound for the following four reasons.

Analysis of the CJEU's Judgment

A) The CFEU did not fully discharge its supervisory responsibility

In its reasoning, the CJEU referred to a supervisory responsibility of EU judicature. Article 19(1) of the Treaty on European Union[476] and Article 258 of the Treaty on the Functioning of the European Union[477] create the basis of the CJEU's supervisory responsibility by, respectively, providing that the CJEU ensure the uniform application of EU law and the power to initiate infringement proceedings when there is failure to correctly apply the EU directives. However, the CJEU did not fully discharge this responsibility in its judgment because the prohibition established by the internal rule is incongruent with the aim of the principle of neutrality.

473 Ibid para 36.
474 Ibid para 37.
475 Ibid para 38.
476 Consolidated Version of the Treaty on European Union [2008] OJ C115/13.
477 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ L. 326/47-326/390.

Article 9 of the municipality's terms of employment provides that workers must observe the principle of neutrality and define the principle as:

Refraining from any form of proselytising and they are prohibited from wearing any overt sign which might reveal their ideological or philosophical affiliation or political or religious beliefs.[478] *Therefore, proselytising is the fundamental motivation for the prohibition of wearing religious signs, and neutrality policies are the mechanism to enforce that prohibition. Proselytising is an inherently voluntary act since it is the act of persuading another.*[479] *However, a Muslim woman covering her hair with a scarf is traditionally viewed as a religious obligation.*[20]

Per Article 4(2) of the Treaty on the European Union, the CJEU must respect the sovereignty of member states. Simultaneously, the CJEU has an obligation under Article 267 of the Treaty on the Functioning of the European Union to ensure the uniform and proper application of EU Directives. The Court executed part of its duty in stating that, under Article 2(2)(b) of the Directive in question, unequal treatment must be appropriate, proportionate, and necessary in achieving a justifiable aim. The Court left this determination to be made by the referring court. However, Article 2(2)(b) provides that indirect discrimination occurs when an apparently neutral rule places persons, in this case those of a particular religion, at a particular disadvantage. Article 9 of the municipality's employment terms specifically disadvantages Muslim women by applying a policy to prevent proselytising to a personal religious obligation. Therefore, in not acknowledging this incongruence between Article 9 and its proclaimed principle of neutrality aim, the CJEU has not fully discharged its supervisory responsibility in ensuring the proper administration of EU law.

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[478] Op cit note 1 para 15

[479] Oxford English Dictionary, https://www.oed.com/search/dictionary/?scope=Entries&q=proselytize, accessed 14 November 2024.

B) Expansion of the margin of discretion

Another shortcoming of the CJEU's judgement is that the Court has gone beyond what it established in *Wabe v Müller*[480]. In *Wabe,* the Court held that Member States have a margin of discretion, but the Court's current judgement expanded the margin of discretion to include infra-State bodies.

The margin of discretion is a central principle of EU Law by respecting the equality of Member States and their national identities.[481] However, affording a margin of discretion to infra-State bodies, when it comes to employment and neutrality policies, created the potential for legal uncertainty. Such a power affords public bodies the power to decide how to regulate the wearing of religious symbols in their workplace and, as correctly assessed by Erica Howard, this can lead to the exclusion of certain religious people from employment because it can strongarm Muslim women to avoid employment. After all, they cannot fulfil their religious obligations.[482]

An additional consequence is an infringement of Article 15 of the Charter of Fundamental Rights of the European Union: *the right to…pursue a freely chosen occupation*. The prohibition of headscarves voids the opportunity for free choice for Muslim women by limiting the employment options available to them.

Furthermore, the Court's judgement allows this expanded margin of discretion with regard to religious or belief discrimination but the same does not apply to other

[480] Joined Cases C-804/18 and C-341/19 *IX v Wabe eV and MH Müller Handels GmbH* ECLI:EU:C:2021:594.

[481] Op cit note 16, Article 4(2).

[482] Erica Howard, 'OP v Commune d'Ans: Another Step in the Wrong Direction for Headscarf-Wearing Women' (2024) Vol. 53 No. 2 Industrial Law Journal 305, 313.

discrimination grounds under EU equality law.[483] This can inadvertently create a hierarchy of discrimination grounds, with some grounds providing more protection than others.[484] A hierarchy of discrimination grounds is a significant problem; because, as poignantly quoted by Erica Howard, this creates the perception that "some equalities are more equal than others' and "the equality of Muslims is currently at the bottom of the pile".[485] A hierarchy of discrimination is in of itself a problem as it alludes to an inference of less protection for certain discrimination grounds. Furthermore, a hierarchy in which protection against religious or belief discrimination is at the bottom is a hindrance to pursuits of diversity and inclusion, especially in an increasingly diverse EU landscape. CJEU judgements should avoid such a consequence by respecting the sovereignty of Member States but be resolute in not expanding the ambit of the margin to the discretion afforded to Member States.

The Court's judgement is questionable because it fails to consider the consequence of deviating from its position in *Wabe* and expanding the margin of discretion. However, it is also unsound due to the Court's inconsistent approach to assessing justifications for indirect discrimination.

C) The Court's inconsistent assessment of justifications for indirect discrimination

The longstanding position of the CJEU has been that exceptions to the principle of equal treatment must be interpreted strictly.[486] However, the CJEU appears to have departed from this position in the present judgment by failing to examine if there was

[483] Ibid at 315.

[484] Ibid at 315.

[485] Erica Howard, 'OP v Commune d'Ans: Another Step in the Wrong Direction for Headscarf-Wearing Women' (2024) Vol. 53 No. 2 Industrial Law Journal 305, 315.

[486] Case 222/84 *Johnson v Chief Constable of the Royal Ulster Constabulary* ECLI:EU:C:1986:206*;* Case C-273/97 *Sirdar v the Army Board and Secretary of State for Defence* ECLI:EU:C:1999:523.

a genuine need for exclusive neutrality.[487] In *Wabe,*[488] the CJEU found that merely wanting a neutrality policy was insufficient. The employer had to demonstrate a genuine need which would be met by implementing the neutrality policy.[489] However, in the present case, the Court found that the municipality wanting to create an entirely neutral administrative environment was a legitimate justification.[490] In addition to being inconsistent with its ruling in *Wabe*, the judgment is also incongruent with the Court's position in *Chez v Komisia.*[491] In *Chez,* the Court focused on the outcome and impact of the rule instead of solely on the intention of the rule enforcer. However, in the present case, the Court seems to have prioritised the wants and intentions of the municipality without sufficiently considering the impact on Muslim women.

A fundamental issue in *Wabe, Chez* and *OP v Commune d'Ans* was justification for difference in treatment. *Wabe* also concerned wearing headscarves in the course of employment and *Chez* addressed the assessment of whether the practice in question would excessively prejudice the interests of the Roma people in the region. The issues and facts of all three cases are not materially different so there is no justification for the Court to make such a deviation in *OP v Commune d'Ans.*

Whilst utilising inconsistent reasoning in its judgement, the Court also failed to consider the real-life impact of its reasoning and judgement.

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[487] Op cit note 23 314.

[488] Op cit note 21.

[489] Ibid para 64.

[490] Gareth Davies, 'OP v Commune d'Ans: the Entirely Neutral Exclusion of Muslim Women from State Employment' (*European Law Blog,* 25 July 2024), https://www.europeanlawblog.eu/pub/op-v commune-dans-the-entirely-neutral-exclusion-of-muslim-women-from-state-employment/release/1, accessed 14 November 2024.

[491] Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* ECLI:EU:C:2015:480.

D) Court's failure to consider the real-life consequences of its determination

The Court was aware that the rule in question was made after the applicant's request, and that the municipality had been tolerating other employees wearing symbols of their religious or philosophical beliefs, albeit discreetly. In *Chez,* the court established a three-part test for the justification of difference in treatment. Part three of the test was a proportionality assessment of the impact of a practice on the interest of the Roma inhabitants, an ethnic minority. *Chez* is an example of the Court being mindful of the impact of policies on minorities. However, reasoning encompassing these considerations is absent from the judgment. The CJEU's reasoning glosses over the reality that neutrality policies aim to prevent proselytising. However, wearing a headscarf is not an act of proselytising but rather an expression of religious obligation; similar to Muslim men growing their beards. Yet, the Court and Member States have not viewed growing a beard to be proselytising and prohibited Muslim men, in certain employment, from growing their beards.

Although this infers a gender discrimination issue, the Court found the issue to be inadmissible. A further area of commentary could be investigating the Court's reliance on procedural rules to sidestep the gender discrimination issue. However, this commentary instead wishes to highlight the commonalities of growing a beard and wearing a headscarf to demonstrate the Court's failure to delineate between proselytising and religious obligation.

Furthermore, in addition to employment exclusion, the judgment raises a dignity issue. Wearing a headscarf is traditionally held as an of religious obligation related to modesty. Therefore, for women who wear a headscarf, doing so is intrinsic to their sense of self and their expression of their sense of self-dignity. The CJEU's judgement places Muslim women in a position of choosing between employment, which they require for financial security, independence, etc. and partaking in a religious obligation that is central to their individual sense of self-dignity.

Conclusion

This case commentary furthers four main arguments as to why the Court's reasoning and judgment in *OP v Commune d'Ans* is unsound: 1. the Court failed to fully discharge its supervisory responsibility; 2. the Court dangerously expanded the margin of discretion to include infra-State bodies; 3. the Court had an inconsistent assessment of justifications for indirect discrimination; and 4. the Court failed to be cognisant of the real-life consequences of their determination.

The judgment in *OP v Commune d'Ans* is one of the six CJEU cases that deal with women wanting to wear Islamic headscarves. The Court has failed to engage with the criticisms raised in those judgments, and in the aftermath of *OP v Commune d'Ans* there are cases of headscarf bans in Belgium schools which were upheld by the European Court of Human Rights.

It is recommended that scholarly legal investigation and research is required to excavate the systemic, and possibly institutional, biases prevailing in the legal and judicial system of the European Union. *OP v Commune d'Ans* is part of a concerning series of cases where Muslim women and girls are facing discrimination that is being legitimized by courts prioritising neutrality policies that are not fundamentally applicable to the act of wearing a headscarf.

Ongoing Divisions Regarding the Investment Court System: "Is Don't Worry Be Happy" the Answer?

By Melike Naz Batmazoglu, PhD

Due to the lack of ratification of the Comprehensive and Economic Trade Agreement (CETA)[492] in the European Union's (EU) Member States, the Investment Court System (ICS) remains inoperative. It appears that the CETA might not come into force in the near future, leaving an open question about the current and future scenarios for international investors. Even though the EU is struggling to instil confidence in investors by abandoning the current investor-state dispute settlement system (ISDS), it has adopted a rhetorical approach that can be likened to a "Don't Worry, Be Happy" philosophy. This stance has not been a recently adopted one, it has been the EU's attitude even before the current investment regime has commenced operating against itself. In other words, the "Don't Worry, Be Happy" might be stated as their state of mind. Nevertheless, rather than offering a concrete and functional dispute resolution mechanism, the EU's assurances appear to be based on fancifulness rather than substantive solutions. This stagnant progress has only exacerbated the uncertainty about the foreign investment regime in the EU. If the fragmentation in the current investment law system was not already significant, the lack of unanimity across the EU Member States further complicates the situation. This article will examine the EU's dissatisfaction with the existing bilateral investment treaties (BITs) and the current ISDS mechanism. It will also scrutinise the formation of the CETA's investment chapter and its ICS mechanism. Afterwards, it will discuss the lack of consensus among the EU Member States regarding the CETA's ICS system and critically assess whether the EU's "Don't Worry, Be Happy" approach effectively addresses investors' concerns. Ultimately, it concludes that this

[492] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, 14.1.2017, p.23-1079.

approach may not only fail to provide a tangible solution for investors but also may risk deepening the fragmentation of the investment law regime.

1- Introduction

The current investment law regime and its investor-state dispute settlement (ISDS) mechanism have been under criticism due to their constraining effect on the host states' right to regulate in the public interest. In response, the European Union (EU) has initiated an ambitious agenda by starting to sign the Comprehensive Economic and Trade Agreement (CETA)[493] with Canada, which prioritises the host states' right to regulate. However, the lack of consensus among EU Member States has stalled its ratification and left the Investment Court System (ICS) inoperative. By including or "creating" the two-tiered ICS mechanism into the CETA, the EU and Canada have officially abandoned the traditional ISDS mechanism. This initiative seeks not only to remedy the drawbacks related to the right to regulate in the public interest but also to tackle the limitations of the current ISDS mechanism such as lack of consistency in decisions,[494] transparency in

[493] Ibid.

[494] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), 'Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters: Note by the Secretariat' (UNCITRAL 2018) A/CN.9/WG.III/WP.150 https://uncitral.un.org/en/working_groups/3/investor-state (Accessed 13th January 2025)

proceedings[495] and arbitrators' impartiality[496] and high costs and long procedures.[497] However, this aim might just stay as a pipe dream because the lack of consensus among the EU Member States has created a regulatory void, leaving international investors uncertain as to how to resolve disputes in a predictable and reliable manner. In the absence of progress, the EU appears to have embraced a "Don't Worry, Be Happy" approach, trying to relieve investors without addressing international investment disputes without an operational ICS. This optimistic stance suggests that investors should trust the EU's regulatory intentions despite the lack of a binding legal mechanism to resolve disputes. At first glance, this analogy might not be seen clearly, but it is understandable. It was chosen because the EU claimed it asserted its control over FDI and guaranteed

[495] Thomas Henquet, 'International Investment and the European Union: An Uneasy Relationship' in Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013).;Marius Dotzauer, *The Popular Legitimacy of Investor-State Dispute Settlement: Contestation, Crisis and Reform* (Routledge 2023).; Federico Ortino, 'ISDS and Its Transformations' (2023) 26 Journal of International Economic Law 177.; Pia Eberhardt and Cecilia Olivet, 'Profiting from Injustice: How Law Firms, Arbitrators, and Financiers Are Fuelling an Investment Arbitration Boom' (Corporate Europe Observatory and the Transnational Institute 2012).; David M. Howard, 'Creating Consistency Through a World Investment Court' (2017) 41 Fordham International Law Journal 1.

[496] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), 'Possible Reform of Investor-State Dispute Settlement (ISDS): Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS: Note by the Secretariat' (UNCITRAL 2018) A/CN.9/WG.III/WP.151 <https://uncitral.un.org/en/working_groups/3/investor-state> (Accessed 13th January 2025).; United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), 'Possible Reform of Investor-State Dispute Settlement (ISDS): Arbitrators and Decision Makers: Appointment Mechanisms and Related Issues: Note by the Secretariat' (UNCITRAL 2018) A/CN.9/WG.III/WP.152 <https://uncitral.un.org/en/working_groups/3/investor-state> (Accessed 13th January 2025).

[497] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), 'Possible Reform of Investor-State Dispute Settlement (ISDS) — Cost and Duration: Note by the Secretariat' (UNCITRAL 2018) A/CN.9/WG.III/WP.153 <https://uncitral.un.org/en/working_groups/3/investor-state> (Accessed 13th January 2025).

that the investment protections introduced through new generation investment agreements, particularly via the Treaty of Lisbon, would be more beneficial.[498] In fact, this attitude was not new, it might be argued that it was a continuous condition, as it will be seen with the situation of the intra-EU BITs and the ISDS mechanism. However, this approach appears insufficient to respond to the concerns of the investors, because abandoning the ISDS without implementing a dispute settlement mechanism cannot provide a trustworthy international investment environment. The EU seems to possess a clear understanding of the situation; however, it does not demonstrate actual clarity in its actions. This represents a form of misguided optimism and/or fancifulness.

The challenges are exacerbated by notable divisions among EU Member States, such as from the Kingdom of Belgium's Wallonia Parliament[499] and the Republic of Ireland's Green Party MP Patrick Costello,[500] as their lack of consensus on CETA's ratification highlights the wider fragmentation of international investment law within the region. The ICS was developed in response to increasing dissatisfaction with bilateral investment treaties (BITs) and the ISDS mechanism;[501] however, its implementation has become a symbol of the EU's struggle to reconcile investment protection and public policy

[498] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1–271

[499] Court of Justice, Opinion 1/17 of 30 April 2019

[500] Patrick Costello v Government of Ireland [2022] IESC 44

[501] Hannes Lenk, 'An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada' (2016) 1 European Papers 665.; Maria Laura Marceddu, 'The EU Dispute Settlement: Towards Legal Certainty in an Uneven International Investment System?' (2016) 1 European Investment Law and Arbitration Review 33.; Naboth van den Broek and Danielle Morris, 'The EU's Proposed Investment Court and WTO Dispute Settlement: Comparison and Lessons Learned' (2017) 2 European Investment Law and Arbitration Review 35.; Henrique Sachetim and Rafael Codeco, 'The Investor-State Dispute Settlement System amidst Crisis, Collapse, and Reform' (2019) 6 Arbitration Brief 20.

objectives. This article delves into the EU's dissatisfaction with the current BITs and the ISDS mechanism. It will analyse the creation of CETA's investment chapter and its ICS mechanism and the implications of this deadlock for the international investment regime. Furthermore, it critically assesses the lack of consensus among the EU Member States in relation to the CETA's ICS mechanism and whether the EU's optimistic "Don't Worry, Be Happy" philosophy offers an effective solution. Ultimately, this article argues that a lack of meaningful progress on the ICS not only undermines investor confidence but also risks exacerbating the already fragmented investment regime.

2- The EU's Dissatisfaction with the Existing Bilateral Investment Treaties (BITs) and the Investor-State Dispute Settlement (ISDS) Mechanism

The "Don't Worry, Be Happy" approach has begun with the increase of the bilateral investment treaties (BITs) and the investor-state dispute settlement (ISDS) mechanism. Before delving into the above-mentioned stance, it should be explained what the BITs and the ISDS mechanisms are. On the one hand, the BITs are the investment protection agreements which are signed and ratified by states.[502] The BITs have roots in the decolonisation period, and in particular, they are mostly signed between developed and developing countries.[503] Nevertheless, the main aim of the BITs is to promote and protect foreign direct investments (FDIs).[504] On the other hand, the ISDS mechanism is the dispute resolution mechanism which enables investors to initiate claims against the host states when they breach their obligations towards foreign investors.[505] The main reason

[502] David Collins, *An Introduction to International Investment Law*, (Cambridge University Press 2017).

[503] Collins (n.11); Subedi (n.14)

[504] Ibid.

[505] P Surya QC Subedi, *International Investment Law Reconciling Policy and Principle* (4th edn, Hart Publishing 2020).

why it has been frequently used by foreign investors is that due to the sophisticated nature of investment disputes, the domestic courts may lack specific expertise in these specific disputes.[506] The domestic courts tend to take the side of their states; for this reason, the bias towards foreign investors may become inevitable. Furthermore, foreign investors do not, in general, unless the parties agree otherwise, need to exhaust local remedies to initiate their disputes.[507] Notably, this occurs due to the ISDS mechanism's inclusion as a provision in BITs.

However, the EU's hostility towards the current BITs and ISDS mechanism has fragmented the current investment regime within the EU. Before this hostility, the EU had the "Don't Worry, Be Happy" attitude until the BITs and ISDS mechanism commenced threatening the EU legal order and their right to regulate. It is crucial to understand this fragmentation and how it has led the EU to initiate international investment law reform with the CETA. Thus, this section will explore why the EU has distanced itself from the BITs and the ISDS mechanism despite its "Don't Worry, Be Happy" approach.

2.1. The EU's Dissatisfaction with the BITs

Although the EU has been one of the foremost pioneers of the current international investment law regime, it may have failed to anticipate that the BITs, particularly, the intra-EU ones, would affect the supremacy of EU law. Before the Treaty of Lisbon[508] came into force, the EU did not have any exclusive competence to sign or ratify international investment agreements; only the six founding EU Member States could sign and ratify BITs with the third countries, namely the Central and Eastern European

506 Collins (n.11); Subedi (n.14)

507 Ibid.

508 Treaty of Lisbon (n.7)

countries (CEE), and they were extra-EU BITs.[509] Notably, when liberalism became the mainstream economy model, the CEE countries were encouraged to sign and ratify BITs in order not just to attract foreign direct investment (FDI) from the six founding EU Member States, but also to boost their economic growth.[510] When these countries became members of the EU, these extra-EU BITs evolved into intra-EU BITs.[511] Accordingly, the expansion of the EU has introduced additional legal challenges related to the intra-EU BITs. The European Commission (Commission) has begun warning the EU Member State terminating their intra-EU BITs due to their potential harm to the internal market and the autonomy of EU law.[512] However, the six founding Member States did not choose to follow the Commission's warnings.[513] The founding Member States seemed to adopt a "Don't Worry, Be Happy" mindset, assuming that they were the main players of the investment regime on European soil, although there were other new Member States, such as Austria, Finland, and Sweden, as significant as the founding Member States,[514] and the new Member States from the CEE needed their investments in order to prove to

[509] Veronika Korom, 'Intra-EU BITs in Light of the Achmea Decision' (2022) 3 Central European Journal of Comparative Law 97.; Wojciech Sadowski, 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?' (2018) 55 Common Market Law Review 1025.; Francesco Montanaro, *THE EUROPEAN UNION AND INTERNATIONAL INVESTMENT LAW: THE TWO DIMENSIONS OF AN UNEASY RELATIONSHIP* (Hart Publishing, 2023)

[510] Korom (n.18); Sadowski (n.18); Montanaro (n.18)

[511] Ibid.

[512] Korom (n.18); Angelos Dimopoulos, 'The Validity and Applicability of International Investment Agreements between EU Member States under EU and International Law' (2011) 48 Common Market Law Review 63.; Angelos Dimopoulos, *EU Foreign Investment Law* (Oxford University Press 2011).

[513] Dimopulos (n.21) "The Validity and Applicability of International Investment Agreements between EU Member States under EU and International Law"

[514] Korom (n.18); Sadowski (n.18); Montanaro (n.18); Robert Basedow, 'A Legal History of the EU's International Investment Policy' (2016) 17 Journal of World Investment & Trade 743.

themselves that they were ready to take a place in the liberal investment regime. Despite the reciprocal nature of the intra-EU BITs, they might have assumed that they would not encounter any investment disputes because of their "founding status".[515] This "founding status" indicates that these countries serve as significant influencers in international investment law. Therefore, they might have a belief that they would unilaterally benefit from these intra-EU BITs. Accordingly, this may suggest that the investors from the founding states due to their dominant position in shaping the investment regime could initiate claims against the new Member States, thereby reducing the likelihood of their status as respondent states. This mindset led to an underestimation of the influence and potential contributions of both existing and new member states.

This indicates that the right to regulate of the new EU Member States is not adequately respected. Nonetheless, the Commission did not stop its war against the intra-EU BITs. The Commission sent an amicus curiae brief in the *Eastern Sugar v Czech Republic*[516] dispute, which arose from the Czech Republic-Netherlands BIT, to raise its concerns, about the intra-EU BITs. It is a noteworthy case because the Commission expressed that the intra-EU BITs encouraged discriminatory treatment among European investors.[517] Furthermore, it continued that intra-EU BITs violated the mutual trust principle between the Member States and favoured forum shopping.[518] Notably, the most important point in its amicus curiae brief was that intra-EU BITs breached the authority of the Court of Justice of the European Union (CJEU) to interpret EU law and bypassed the CJEU's review of EU law by creating parallel adjudication through arbitral tribunals.[519] However, the Commission's opposition was insufficient to prevent the intra-EU investors from

[515] Montanaro (n.18); Basedow (n.23)

[516] Eastern Sugar B.V. (Netherlands) v The Czech Republic, SCC Case No.088/2004

[517] Ibid.

[518] Ibid.

[519] Ibid.

initiating investment disputes against the CEE countries. As observed, the "Don't Worry, Be Happy" attitude was consolidated due to the continued confidence of the founding Member States in their own positions. The foundational rationale of investment law pertained the desire of developed founding Member States to maintain their competitive advantages.[520] This further corroborated the previously mentioned stance. Nevertheless, the Respondent States from the CEE countries asserted that the automatic termination of their intra-EU BITs stemmed from their EU membership.[521] In particular, they stated that the EU Treaties and intra-EU BITs were sharing the same subject-matter, which meant that the EU law also regulated the investment; for this reason, intra-EU BITs could not be taken into account.[522] As predicted, the arbitral tribunals rejected those views by stating that the intra-EU BITs and the EU Treaties did not share the same subject matter.[523] On the one hand, the logic behind the intra-EU BITs was to promote and protect FDI.[524] On the other hand, the EU Treaties aimed to regulate the internal market.[525] Therefore, EU law could not invalidate the intra-EU BITs, as they were not in an equal position.[526] When the arbitral tribunals' arguments are considered, even though they contained elements of truth, this situation demonstrated that the founding Member States were the beneficiaries of the intra-EU BITs. Somehow, it may be stated that they helped them to embrace the "Don't Worry, Be Happy" mindset more.

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[520] Subedi (n.14); Basedow (n.23)

[521] Jan Ooestergetel and Theodora Laurentius v Slovakia (ad hoc), Decision on Jurisdiction, 30 April 2010; Anglia Auto Accessories Ltd v Czech Republic, SCC Case No. V 2014/181; WNC Factoring v Czech Republic (PCA Case No. 2014-34); Micula v Romania, ICSID Case No. ARB/05/20.

[522] Ooestergetel (n.30); Anglia Auto (n.30); WNC Factoring (n.30); Micula (n.30)

[523] Ibid.

[524] Ibid.

[525] Ibid.

[526] Ibid.

Although the above-mentioned situation has somehow created a vicious cycle between the Commission and the EU Member States, the CJEU's *Achmea*[527] decision has terminated this vicious cycle. Notably, the "Don't Worry, Be Happy" attitude towards intra-EU BITs was shattered with this decision. Although this decision was about the ISDS clause of the Netherlands-Slovakia BIT, it was the beginning of the end of intra-EU BITs. This case arose when the Slovak government annulled the liberalisation of the health insurance market, which hampered the Dutch investor Achmea's activities in the Slovakian market.[528] The arbitral tribunal constituted under the United Nations Commission on International Trade Law Arbitration (UNCITRAL) Rules determined that Slovakia breached its obligations under the Netherlands-Slovakia BIT.[529] Despite the award, Slovakia initiated setting aside proceedings before the German courts by defending that the arbitral tribunal lacked jurisdiction due to Article 8 of the BIT (ISDS clause) with Articles 18, 267, and 344 of the Treaty on the Functioning of the European Union (TFEU).[530] After the Higher Regional Court of Frankfurt declined Slovakia's arguments, Slovakia appealed to the German Federal Court of Justice.[531] The Federal Court of Justice sent a preliminary reference to the CJEU under Articles 267 and 344 TFEU.[532] The CJEU held that the ISDS clause of the BIT infringed the supremacy of EU law, which meant that arbitral tribunals could not be seen as the equals of the EU domestic courts.[533] In other words, the arbitral tribunals constituted under the intra-EU BITs were not entitled

[527] Case C-284/16 Slovak Republic v Achmea BV [2018] ECLI:EU:C: 2018:158

[528] Ibid.

[529] Ibid.

[530] Ibid.

[531] Ibid.

[532] Ibid.

[533] Ibid.

to send preliminary references to the CJEU related to the EU law issues within Article 267 TFEU.[534] For this reason, they could not interpret EU law according to Article 344 TFEU.[535] Therefore, according to the CJEU, the intra-EU BITs and their ISDS clauses should be invalidated to protect the autonomy of EU law.[536] The CJEU's rationale is that the ISDS clauses in intra-EU BITs create parallel jurisdictions, obstructing the interpretation of EU law and the development of relevant jurisprudence.[537] In other words, the entity responsible for interpreting EU law and producing jurisprudence in this context is the CJEU, rather than ISDS tribunals, since the latter do not qualify as domestic courts.[538] Even though this result has strengthened the Commission's hand, the most notable aspect of this case is that an investor from a founding EU Member State initiated arbitral proceedings against a CEE country again. As previously stated, their mindset has not changed, and this case has demonstrated it. This decision is purported to have terminated the intra-EU BITs; however, it is evident that this mindset persists, albeit in a disguised form. Nevertheless, this decision effectively advanced the agenda of the EU and its institutions concerning FDI as stipulated by the Treaty of Lisbon.[539] However, this

[534] Ibid.

[535] Ibid.

[536] Ibid.

[537] Achmea (n.36); Ivana Damjanovic, The European Union and International Investment Law Reform: Between Aspirations and Reality (Cambridge University Press, 2023); Chrispas Nyombi and Tom Mortimer, 'The Turf War Between the European Commission and Intra-EU BITs: Is an End in Sight?' (2018) 21 International Arbitration Law Review 66.; Smaranda Miron, 'The Last Bite of the BITs- Supremacy of EU Law versus Investment Treaty Arbitration' (2014) 20 European Law Journal 332.

[538] Case 102/81 Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG. ECLI:EU:C:1982:107; Achmea (n.36); Damjanovic (n.46); Nyombi and Mortimer (n.46); Miron (n.46)

[539] Treaty of Lisbon (n.7)

decision has created turbulence in the current investment regime in the EU and has affected the future of the ISDS in Europe.

2.2. The EU's Opposition Towards the ISDS Mechanism

Although the BITs are the main components of the current international investment regime, the ISDS mechanism is the contentious feature of the current system. For decades, the EU Member States have operated under a "Don't Worry, Be Happy" mindset regarding the ISDS mechanism as in the intra-EU BITs. As key players in the modern investment law regime, they have been confident that the ISDS mechanism would continue to serve the interests of their investors.[540] However, the reality of investment disputes shattered this mindset when the ISDS commenced challenging the EU's regulatory autonomy.[541] Although the ISDS was initially designed to protect investors from the host states' interference, it has become a double-edged sword.[542] However, the problem here is the attitude of the EU Member States. One can articulate this situation as follows: Historically, the ISDS system has faced criticism from developing countries,

[540] Victoria Barausova, 'Slovak Republic v. Achmea from a Public International Law Perspective: Is State Consent to Arbitrate Under Intra-EU BITS Still Valid?' (2018) 3 European Investment Law and Arbitration Review 129.

[541] Subedi (n.14); M Sornarajah, *The International Law on Foreign Investment* (5th edn, Cambridge University Press 2021).; Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 Vanderbilt Journal of Transnational Law 775.; Judit Glavanits, 'Dispute Resolution That Divides: The EU -USA Conflict on Investment -State Dispute Resolution' (2020) 25 Białostockie Studia Prawnicze 43.;Roderick Abbott, Fredrik Erixon, and Martina Francesca Ferracane, 'Demystifying Investor-State Dispute Settlement (ISDS)' (European Centre for International Political Economy (ECIPE) 2014) ECIPE Occasional Paper, No. 5/2014 <https://hdl.handle.net/10419/174728> accessed 2 April 2024.; Annalisa Daniela Puppo, 'Legal Issues within the EU Member States Concerning Bilateral Investment Treaties' (2021) 14 Bulletin of the Transilvania University of Braşov 71.

[542] Subedi (n.14); Sornarajah (n.50)

yet these criticisms remain unacknowledged.[543] Recently, their status aligned with that of developing countries, indicating that the ISDS system does not differentiate between developed and developing countries.[544] This suggests that the international investment regime has fulfilled its intended objective. For this reason, the attitude of the EU Member States is problematic because they might have recognised that the ISDS system no longer discriminates against them, as it is now impacting them directly. In addition to the intra-EU BIT disputes, the intra-EU ECT disputes in renewable energy investments consolidate importance here because renewable energy disputes might have triggered the EU's anti-ISDS stance based on the right to regulate. It is also worth noting that the EU might have failed to anticipate the ECT's potential effect on its Member States. The 2008 financial crisis was a turning point due to economic instability; many EU Member States had to adjust their renewable energy policies, prompting intra-EU investors to claims under Article 26 of the ECT.[545] Countries such as Spain,[546] Italy,[547] and the Czech

[543] Ibid.

[544] Ibid.

[545] Danae Azaria, 'The Renewable Energy Arbitrations under the Energy Charter Treaty' in Edoardo Stoppioni and Hélène Ruiz Fabri (eds), *International Investment Law: An Analysis of the Major Decisions* (Hart Publishing 2022).; George A. Bermann, 'Energy Charter Treaty and EU Law' in Maxi Scherer (ed), *International Arbitration in the Energy Sector* (Oxford University Press 2018).; Jeffrey Sullivan and David Ingle, 'Arbitration Under the Energy Charter Treaty: The Relevance of EU Law' in José Rafael Mata Dona and Nikos Lavranos (eds), *International Arbitration and EU Law* (Edward Elgar 2021).

[546] Charanne B.V. and Construction Investments S.A.R.L. v Spain, SCC Case No.062/2012; Isolux Netherlands v Kingdom of Spain, SCC Case V2013/153; CSP Equity Investment Sarl v Spain, SCC Case No. 094/2013; Antin v Spain, ICSID Case No. ARB/13/31; Eiser v Spain, ICSID Case No. ARB/13/36; NextEra Energy v Spain, ICSID Case No. ARB/14/11; InfraRed v Spain, ICSID Case No. ARB/14/12; RENERGY Sarl v Spain, ICSID Case No. ARB/14/18; Stadtwerke München GmbH v Spain, ICSID Case No. ARB/15/1; RREEF Infrastructure v Spain, ICSID Case No. ARB/13/30; Masdar v Spain, ICSID Case No. ARB/14/1.

[547] Blusun SA v Italy, ICSID Case No. ARB/14/03; Greentech Energy System and Novenergia v Italy, SCC Case No. V 2015/095; Belenergia SA v Italy, ICSID Case No. ARB/15/40; Eskosol v Italy, ICSID Case No. ARB/15/50; ESPF v Italy, ICSID Case No. ARB/16/5; VC Holding II Sarl v Italy, ICSID Case No. ARB/16/39

Republic[548] found themselves at the receiving end of costly ISDS disputes, despite their efforts to defend their right to regulate in terms of shifting their renewable energy policies. This is where the "Don't Worry, Be Happy" approach quickly turns into a state of denial. Therefore, the host states began rejecting the arbitral tribunals' jurisdiction with the support of the Commission by claiming that Article 26 ECT could not be invoked between an investor from an EU Member State and another EU Member State.[549] Moreover, they asserted that the Treaty of Lisbon invalidated the ECT because they shared the same subject matter.[550] The arbitral tribunals rejected these defences, as they should have. According to the arbitral tribunals, the EU and its Member States unconditionally consented to arbitrate under Article 26 ECT, even if it was an intra-EU dispute.[551] For this reason, they could not reject the arbitral tribunals' jurisdiction in intra-EU ECT disputes. Furthermore, the arbitral tribunals also rebutted the respondent states' arguments concerning the Treaty of Lisbon and the ECT sharing the same subject matter by stating that although Articles 191 and 194 TFEU concentrate on the energy matters within the internal market, they do not refer to the promotion and protection of energy investments.[552] However, the ECT focuses explicitly on the promotion and protection of

548 Antaris Solar and Dr. Michael Göde v Czech Republic, UNCITRAL, PCA Case No. 2014-01; Natland Investment Group NV and others v Czech Republic, UNCITRAL, PCA Case No. 2013-35; Voltaic Network GmbH v Czech Republic, UNCITRAL, PCA Case No.2014-20; ICW Europe Investments v Czech Republic, UNCITRAL, PCA Case No.2014-22; Photovoltaik Knopf v Czech Republic, UNCITRAL, PCA Case No.2014-21; WA Investments- Europa Nova Ltd v Czech Republic, UNCITRAL, PCA Case No.2014-19; Mr Jürgen Wirtgen v Czech Republic, UNCITRAL, PCA Case No.2014-03.

549 Masdar (n.55); Eskosol (n.56); Antaris (n.57)

550 CEF Energia BV v Italian Republic, SCC Case No. 158/2015; Cube Infrastructure Fund SICAV and others v Kingdom of Spain, ICSID Case No. ARB/15/20

551 Masdar (n.55); RREEF (n.55)

552 Sullivan and Ingle (n.54); Gloria M. Alvarez, 'Redefining the Relationship Between the Energy Charter Treaty and the Treaty of Functioning of the European Union: From a Normative Conflict to Policy Tension' (2018) 33 ICSID Review 560.; April Lacson, 'What Happens Now? The Future of Intra-EU

energy investments.[553] Even though every state has a right to change its laws due to the changing circumstances, it can be observed that the respondent states and the Commission have been in a state of denial in this situation. It does not seem to be persuasive for the EU Member States to reject the obligations arising from international law when they do not operate in favour of them. This system was established to uphold the rule of law and safeguard investors from their respective countries;[554] however, they are currently in violation of their own rules. Consequently, they lack persuasiveness. Their response appears to be reactionary- an effort to renounce responsibilities they previously advocated for, now they are confronted with expensive claims. This inconsistency undermines the EU's credibility, indicating that its opposition to ISDS is driven more by political expediency than by a principled legal position. By hastily denouncing this system as a scapegoat, they demonstrate a failure to recognise the flaws in their mindset.

Despite the fact that the ISDS mechanism constrains the host states' right to regulate in the public interest, it should not be seen as an unsuccessful system. It has somehow put the developed countries, such as the EU Member States, in a similar position to developing countries. In other words, their "Don't Worry, Be Happy" approach has somehow enabled that the exposure to investment disputes is consistent across developed and developing countries, which proves that investment risks are universal. Nevertheless, it does not mean that this system does not have any limitations. The main issue here is that when developing countries discussed these limitations, developed countries, as EU Member States, preferred to overlook the situation until the current ISDS system touched their "immunity armour". Apart from the right to regulate issues within the ISDS

Investor-State Dispute Settlement under the Energy Charter Treaty' (2019) 51 International Law & Politics 1327.; Kim Talus and Katariina Sarkanne, 'Achmea, the ECT and the Impact on Energy Investments in the EU' in Crina Baltag and Ana Stanic (eds), *THE FUTURE OF INVESTMENT TREATY ARBITRATION IN THE EU: INTRA-EU BITS, THE ENERGY CHARTER TREATY, AND THE MULTILATERAL INVESTMENT COURT* (Wolters Kluwer 2020).

553 Masdar (n.55); RREEF (n.55); Alvarez (n.61)

554 Collins (n.11); Subedi (n.14)

mechanism, it has been suggested that the ISDS regime should be reformed due to the arbitral tribunals' inconsistent decisions,[555] lack of transparency,[556] arbitrator bias,[557] high costs, and lengthy procedures.[558]

Firstly, it is important to have consistency in the ISDS decisions, and it is crucial for both parties. However, when the current situation of the investment law regime is considered, for instance, the number of investment treaties, and they are not identical, it would be difficult to maintain consistency in the arbitral awards.[559] Although this criticism has merit; however, there should be some flexibility because the circumstances might change.
Secondly, even though transparency is a preferable feature for ameliorating the current ISDS system,[560] it must also be acknowledged that the parties may still prefer secrecy.

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555 UNCITRAL Working Group III (n.3) "Consistency"; Howard (n.4); Lenk (n.10); Jaemin Lee, 'Mending the Wound or Pulling It Apart? New Proposals for International Investment Courts and Fragmentation of International Investment Law' (2018) 39 Nw. J. Int'l L. & Bus. 1.; Rob Howse, 'Designing a Multilateral Investment Court: Issues and Options' (2017) 36 Yearbook of European Law 209.

556 Henquet (n.4); Baetens (n.4)

557 UNCITRAL Working Group III (n.5) "Independence and Impartiality"

558 UNCITRAL Working Group III (n.6) "Cost and Duration"

559 August Reinisch, 'The Future of Investment Arbitration' in Christina Binder and others (eds), *International Investment Law For the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009).; Ameyavikrama Tanvi, 'Bringing Consistency to Investment Arbitration: Challenges and Reform Proposals' in Alan M. Anderson and Ben Beaumont (eds), *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?* (Kluwer Law International BV 2020).; Flavia Marisi, *Rethinking Investor-State Arbitration* (Springer 2023).; Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521.

560 Christoph Schreuer, Rudolf Dolzer, and Ursula Kriebaum, *Principles of International Investment Law* (3rd edn, Oxford University Press 2022).; Stuart Boyarsky, 'Transparency in Investor-State Arbitration' (2015) 21 Dispute Resolution Magazine 34.

Thirdly, the arbitrators' impartiality issue has been another triggering factor for the ISDS reform.[561] Even though the ISDS mechanism provides parties with party autonomy, which enables the parties to select their arbitrators, and which is more advantageous than the domestic court system. However, the arbitrators have been under scrutiny because of their preference to protect the investors' interests more.[562] Due to their enthusiasm for being reappointed again by the investors, they might disregard the host states' interests as well.[563] Furthermore, they might also continue their parallel careers, such as practising as lawyers and counsellors, which may impair the current ISDS system.[564] However, party autonomy does not only exist for the investors, it also includes the host states. Even though the impartiality criticism is partially valid, the host states can also benefit from the party's autonomy; for this reason, this criticism can be inaccurate.

Fourthly, it is understandable that the costs and lengthy procedures can be overwhelming for both parties. Every country or investor might not be able to bear these costs, and when the complex nature of the ISDS disputes is considered, this would also delay dispute resolution.[565] Due to this correlation between the costs and the length of the procedures,

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561 Erika Bihari, 'International Investment Arbitration in the European Union' (2021) 10 Acta Univ. Sapientiae, Legal Studies 21.;Valentina Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge University Press 2015).

562 Dushyant Kishan Kaul, 'Bias in Arbitral Awards' (2019) 30 International Company and Commercial Law Review 559.; Stepan Puchkov, 'Subconscious Bias as a Factor Influencing Arbitral Decision-Making' (2018) 84 Arbitration 52.; Gus Van Harten, Investment Treaty and Public Law (Oxford University Press 2011)

563 Kaul (n.71); Puchkov (n.71); Van Harten (n.71)

564 Ibid.

565 United Nations Conference on Trade and Development, 'World Investment Report 2023: Investing in Sustainable Energy For All' (UNCTAD 2023) <https://unctad.org/publication/world-investment-report-2023> (Accessed 5th April 2023).; Ladan Mehranvar and Sunayana Sasmal, 'THE ROLE OF INVESTMENT TREATIES AND INVESTOR-STATE DISPUTE SETTLEMENT IN RENEWABLE

it may be unrealistic to expect that the arbitrators would resolve the disputes correctly and on time. Therefore, this situation could lead to the lengthy arbitral procedures that can result in additional costs and time consumption. In light of these shortcomings, the EU has initiated a reform process for ISDS mechanism, opting to eliminate the ISDS in newly negotiated Free Trade Agreements (FTAs), particularly in CETA, which will be analysed in the subsequent section, and replace to it with the ICS mechanism. Yet, uncertainty looms because the ICS is still an unproven alternative to the current ISDS mechanism. For this reason, the extent to which this ICS mechanism will address the deficiencies of the ISDS system remains uncertain, and the EU Member States have yet to achieve consensus on this matter. Investors face a legal limbo, unsure whether the EU will honour past commitments or continue its shift towards a protectionist regulatory stance. The EU's evolving approach for the ISDS mechanism highlights a classic case of complacency turning into crisis. For a long time, the "Don't Worry, Be Happy" stance allowed EU Member States to overlook potential risks. What is clear, however, is that the EU cannot ignore the very investment protections it once promoted.

3- The Comprehensive and Economic Trade Agreement (CETA) and its Investment Court System (ICS)

One can view the CETA as a symbol of the new investment regime era. Proponents have proposed that CETA is a potential solution in a context characterised by scepticism towards international investment law.[566] This is where the "Don't Worry, Be Happy" mindset becomes relevant because the EU has been claiming that the new investment system that it is initiating has potential. Despite framing this agreement as a new

ENERGY INVESTMENTS' (Columbia Center on Sustainable Investment (CCSI) 2022) <https://doi.org/10.7916/62m7-6v66> (Accessed 5th May 2024).

[566] Elaine Fahey, 'CETA and Global Governance Law: What Kind of Model Agreement Is It Really in Law?' (2017) 2 European Papers 293.; Dorieke Overduin, 'Investment Chapter in CETA: Groundbreaking or Much Ado about Nothing?' in Nikos Lavranos and Stefano Castagna (eds), *International Arbitration and EU Law* (Edward Elgar 2024).

opportunity, the underlying system remains unproven in its effectiveness. For this reason, there exists uncertainty in this matter because it raises potential questions for both investors and host states in terms of investment promotion and protection and dispute resolution. Nevertheless, it is necessary to comprehend the CETA because it is a new generation FTA and an alternative to the current BITs by providing narrower protection to investors. Furthermore, it has brought a new approach to the investment dispute settlement by introducing the two-tiered ICS mechanism. This section will explore the CETA's investment chapter and how the functioning of the ICS mechanism affects both investors and host states.

3.1. The CETA's Investment Chapter: Priority to the Host States, Less Protection for Investors

The CETA emerged as a response by the EU to the traditional BITs and ISDS mechanism. One could even characterise it as the EU seizing control over investment law, which are trying to reassure investors by stating that they should not worry. However, the EU still exercises this control through bilateral investment agreements, albeit in an extra-EU context. Nevertheless, this argument may only be countered in the following manner: prior to the CEE countries' accession to the EU, their BITs were the extra-EU ones, and they evolved into the intra-EU ones.[567] In other words, the EU's approach has not yet changed. This remains the foundational aspect despite the commitment to transition from traditional BITs. When the Treaty of Lisbon came into force, the EU expanded its authority in international investment law and negotiating new investment and trade agreements. According to Article 207 TFEU, the EU has an exclusive competence in the FDI area, and so this brings an external treaty-making power in the FDI field.[568] Simultaneously, a divergence in the international investment regime was occurring, prompting the EU to initiate negotiations for new trade and investment

[567] Korom (n.18); Robert Basedow (n. 23).

[568] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

agreements, a mandate conferred by the Treaty of Lisbon.[569] For this reason, the CETA has become an opportunity for the EU to assert its competence.

The EU has revived the "Don't Worry, Be Happy" mindset with the CETA. Although the EU aims to reassure investors to rely on CETA, it appears that the host states are being reassured and/or prioritised. Therefore, this priority has evolved the most-invoked investment protection provisions in investment disputes. However, it is questionable whether this evolution is going to be efficient. For instance, the fair and equitable standard (FET) in the CETA has been narrowed down due to the arbitral tribunals' open-ended interpretation and the ambiguous meaning of the investors' legitimate expectations. Notably, this provision has caused trouble for both the EU, with its intra-EU BITs and the ECT disputes, and Canada due to its experiences in the North American Free Trade Agreement (NAFTA).[570] It provides a non-exhaustive list of what would infringe the FET standard, such as denial of justice,[571] breach of due process,[572] arbitrary conduct,[573] discrimination,[574] and abusive treatment.[575] Moreover, the CETA parties have decided to determine the legitimate expectations issue - whether the host state made a specific representation to persuade the investor to make an investment that created a legitimate

[569] Treaty of Lisbon (n.7)

[570] August Reinisch and Marc Bungenberg (eds), *CETA Investment Law Article-by-Article Commentary* (Hart Publishing 2022).; Anna Bilanová and Jaroslav Kudrna, 'Achmea: The End of Investment Arbitration as We Know It?' (2018) 3 European Investment Law and Arbitration Review 261.; Ramon Torrent, Xavier Fernández-Pons and Rodrigo Polanco, 'CETA on Investment:The Definitive Surrender of Eu Law to Gats and NAFTA/BITS' (2017) 54 Common Market Law Review 1319.; Enrique Boone Barrera, 'The Case for Removing the Fair and Equitable Treatment Standard from NAFTA' (Centre for International Governance Innovation 2017) 128.

[571] CETA (n.1) (2) (a)
[572] CETA (n.1) (2) (b)
[573] CETA (n.1) (2) (c)
[574] CETA (n.1) (2) (d)
[575] CETA (n.1) (2) (e)

expectation.[576] Thus, CETA aims to prevent the investment disputes even if there is a general legislation or policy shift that affects the investment unless there is a specific representation made to the investor.[577] Apart from the FET standard, indirect expropriation has also been narrowed down in the CETA. Although in its Article 8.12(1) it explains how a lawful direct or indirect expropriation can occur, as in the traditional investment agreements, in its Annex 8-A on Expropriation, it states that non-discriminatory measures taken by a host state to protect public interest cannot be considered as an indirect expropriation.[578] Notably, it explicitly affirms that indirect expropriation claims will be assessed on a case-by-case basis.[579] When these changes are considered, it can be clearly observed that even though the states follow the premise in terms of treaty-making, namely the bilateralism, even if they have a regionalist approach, narrowing down the investors' protection seems questionable. Nevertheless, it should not be interpreted that the host states should have any constraints related to the public policy. Still, the question is whether decreasing the investors' protections would be an answer to ameliorate the current investment system and how to reassure them that the EU is taking everything under control.

3.2. The Formation of the ICS Mechanism

The ICS was established to address the shortcomings of the ISDS system, which include inconsistency, lack of impartiality, elevated costs and prolonged procedures. Notably, it has been welcomed as a progressive step. Although it is not the subject of this article, the ICS can be regarded as a "precursor" of the future multilateral investment court (MIC)

[576] Ibid. (4)

[577] Ibid.

[578] *Comprehensive Economic and Trade Agreement (CETA)* (EU-Canada, signed 30 October 2016, provisionally applicable 21 September 2017), Annex 8-A (Expropriation)

[579] Ibid.

that the EU wishes to have in the future to replace the ISDS mechanism completely. The ICS is a two-tiered adjudication system with permanent tribunal members from the EU, Canada, and non-party third countries to replace the ad hoc tribunals.[580] Nevertheless, this transition seems to embody a "Don't Worry, Be Happy" mindset that presumes any reform will constitute an improvement, without scrutinising whether these modifications effectively address the shortcomings of the existing ISDS system. This optimistic approach, while aiming to reassure states and investors, may introduce risks by potentially overlooking flaws in the ICS mechanism. It suggests that the system will operate as intended, notwithstanding ongoing concerns related to expertise, independence, cost and time efficiency.

The first step of the adjudication is the Tribunal of First Instance (TFI), which consists of 15 permanent members (5 from the EU Member States, 5 from Canada, and 5 from the non-party third countries).[581] The members of TFI will serve for five years, and their appointments can be renewed only once.[582] The qualifications of the tribunal members represent a central issue in this context. The TFI members should demonstrate their expertise in public international law; however, their expertise in international investment law is only desirable.[583] This requirement seems to be a degrading feature of the ICS mechanism because when the complex nature of the investment disputes is considered, the expertise of public international law cannot be enough to resolve the disputes. Energy disputes exemplify their complex nature regarding the examination of subsidy regulations and the assessment of economic damages, areas not addressed by public international

[580] CETA Article 8.27 (n.1)

[581] CETA (n.1) (2)

[582] CETA (n.1) (5)

[583] Article 8.27 (4) CETA; Alan Uzelac, "Why Europe Should Reconsider its Anti-Arbitration Policy in Investment Disputes?" (2019) 1(2) Access to Justice in Eastern Europe 6.

law.[584] Accordingly, it could be difficult to believe that the ICS mechanism would ameliorate the inconsistency issue only with public international law expertise. Thus, the question arises: is this optimism sufficient to address the knowledge gap?

Furthermore, the appointment of the tribunal members is also crucial to be examined. The ICS mechanism eliminates the party autonomy; only the member states of the CETA will be able to appoint members of the tribunals.[585] Although this feature appears to respond to the current ISDS mechanism's limitations, another factor is missing. Due to the perception that only investors have an advantage in appointment procedures, addressing this limitation is difficult. However, it should also be taken into account that the states have agreed on the appointment rules.[586] For this reason, the "Don't Worry, Be Happy" mindset seems evident in this context, as it posits that the ICS mechanism's removal of party autonomy inherently guarantees impartiality and neutrality. Despite claiming that the current ISDS system is biased, they prevent investors from benefiting from party autonomy and put the system under their monopoly. Therefore, the lobbying activities in the appointment of the tribunal members might be more competitive compared to the "pool of arbitrators" and this can risk of the increase of the states'

584 Bermann (n. 48); Íñigo del Guayo and Álvaro Cuesta, 'Towards a Just Energy Transition: A Critical Analysis of the Existing Policies and Regulations in Europe' (2022) 15 The Journal of World Energy Law & Business 212.

585 Patrick Leonard, 'Ratification of the ISDS Provisions in CETA – Current Court and Legislative Challenges – an Overview' (2022) 7 European Investment Law and Arbitration Review Online 113.; Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' (2016) 19 Journal of International Economic Law 27.; Shai Dotham and Joanna Lam, 'A Paradigm Shift? Arbitration and Court-like Mechanisms in Investors' Disputes' in Güneş Ünüvar, Joanna Lam, and Shai Dotham (eds), *European Yearbook of International Economic Law: Permanent Courts* (Springer 2020).

586 Eduardo Zuleta, 'The Challenges of Creating a Standing International Investment Court' in Jean E. Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff 2015).

influence.[587] Accordingly, the states may tend to select adjudicators who align with their interests.[588] For this reason, efforts to rectify the ISDS system may result in a loss of investor confidence. Moreover, a viable solution for the time and costs issue in this new system appears to be lacking. According to Article 8.28(6) of the CETA, the TFI should issue its provisional award within 18 months of the submission of the claim or issue a decision motivating the delay.[589] In particular, the CETA does not provide any specific explanation of the possible length of the TFI proceedings; for this reason, if the TFI issues a decision that explains its delay, it can prolong the proceedings.[590]

At first glance, a two-tiered court system appears to be appealing; its execution can still be a dilemma. In particular, it is debatable how the Appellate Tribunal (AT) can provide a solution for the limitations of the ISDS mechanism. Before delving into this question, the AT should be briefly explained. The second step of the ICS adjudication is the AT, which consists of 6 members (2 from the EU, 2 from Canada, and 2 from the non-party third countries).[591] The AT members hear the appeals against the TFI's provisional awards. They are appointed for 9 years for a non-renewable term, and their qualification

[587] José E. Alvarez, 'ISDS Reform: The Long View' (2021) 36 ICSID Review 253.; Gus Van Harten, 'European Commission and UNCTAD Reform Agendas: Do They Ensure Independence, Openness and Fairness in Investor-State Arbitration' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press 2016).

[588] Alvarez (n.96); José Manuel Alvarez Zarate, 'Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?' (2018) 59 Boston College Law Review 2765.

[589] CETA (n.1) Article 8.28 (6)

[590] Nikos Lavranos, 'The ICS and MIC Projects: A Critical Review of the Issues of Arbitrator Selection, Control Mechanisms, and Recognition and Enforcement' in Julien Chaisse, Leila Choukroune, and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021).

[591] Lavranos (n.99)

requirements are similar to the TFI members.[592] From the beginning, the idea of appeal in the investment disputes seemed tempting because of the inconsistent decisions; the AT's possibility of modification or reversal of awards would enhance the case law and predictability issue. As in the situation of the TFI members, investors do not have any involvement in selecting their adjudicators,[593] which raises questions about the independence and impartiality of the tribunal members. Although the AT has a timeframe, a general rule, which is 180 days from the disputing party formally notifying its decision to appeal to the date the AT issues its award, and the appeal proceedings should not exceed 270 days,[594] there might be a possibility that the proceedings can take longer. The "Don't Worry, Be Happy" approach appears to presuppose that these deadlines would be adhered to. However, if the system allows for delays without strict enforcement, it may become time consuming and expensive as ISDS mechanism. Given these potential issues, it is not unexpected that this agreement has yet to come into effect.

4- The Lack of Consensus in terms of the CETA's ICS Mechanism

While the EU and its institutions are actively working towards the acceptance of the CETA by its Member States, their efforts cannot be deemed successful, as EU Member States are attempting to address the issues arising from their intra-EU BITs and the ECT. The EU's "Don't Worry, Be Happy" approach presumes that its Member States will ultimately conform to its investment law framework. Although the CETA's trade provisions are provisionally applicable, the investment chapter has created divisions among the Member States. In particular, another reason for the delay in the full implementation of the CETA is the CJEU's *Opinion 2/15* concerning on the EU-Vietnam FTA. According to the *Opinion 2/15*, while the EU possesses an exclusive competence on negotiating and signing international investment agreements under the Treaty of

592 Lavranos (n.99); Article 8.28 (4) CETA

593 Article 8.28 (5) CETA

594 Article 8.28 (9) CETA

Lisbon,[595] it does not have an exclusive competence on portfolio investments and the regime governing dispute settlement investors and states.[596] To implement these agreements, the approval of all the EU Member States is required.[597] For this reason, its ratification has been in limbo.

Understanding the opposition to the CETA's ICS mechanism is essential, as it demonstrates that the EU has not fully convinced its Member States of its investment law vision. Convincing the member countries is essential, as without their support, persuading investors seems exceedingly difficult. Accordingly, at first strike to the CETA's ICS mechanism came from the Kingdom of Belgium's regional parliament of Wallonia. The members of the Wallonia Parliament threatened to block the ratification of the CETA related to the ICS mechanism's incompatibility with the EU legal order's autonomy.[598] Therefore, Belgium requested a preliminary ruling from the CJEU on whether the CETA's ICS mechanism was compatible with EU law. Interestingly, the CJEU affirmed the ICS's compatibility with EU law in its Opinion 1/17. This decision enables the EU to uphold the international investment framework outlined in the Treaty of Lisbon and reinforces its political position by facilitating the establishment of the ICS mechanism.[599] If even Belgium exhibits hesitation, what does this indicate about the effectiveness of the EU's strategy in instilling confidence in the ICS mechanism?

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[595] Treaty of Lisbon (n.7)

[596] Court of Justice, Opinion 2/15 of 16 May 2017

[597] Ibid.

[598] Catherine Titi, 'Opinion 1/17 and the Future of Investment Dispute Settlement: Implications for the Design of a Multilateral Investment Court' in Lisa E. Sachs, Lise Johnson, and Jesse Coleman (eds), *Yearbook on International Investment Law & Policy 2019* (Oxford University Press 2021).; Arman Melikyan, 'The Legacy of Opinion 1/17: To What Extent Is the Autonomous EU Legal Order Open to New Generation ISDS?' (2021) 6 European Papers 645.

[599] Court of Justice, Opinion 1/17 (n.8)

The second strike to the ICS mechanism came from Ireland. It has been opposing its ratification in the *Costello v Government of Ireland (Costello)*[600] decision. A Green Party Member, Mr. Patrick Costello initiated this case to restrain the Irish government from ratifying CETA on the grounds that its ICS rules were unconstitutional.[601] Despite the Irish High Court dismissing his claim, he benefited from the leapfrog mechanism which allows claimants to appeal directly to the Supreme Court on matters related to public interests.[602] The Supreme Court held its decision by majority that the ICS provisions of the CETA would undermine the Irish constitutional identity.[603] However, it also stated that Ireland's Parliament can ratify the CETA if the national arbitration law is amended to allow courts to dismiss the CETA awards that undermine Ireland's constitutional identity or EU law.[604] When this decision is assessed, one might wonder why such a drastic decision is made to end the current ISDS system. Notably, this decision should be seen as a cornerstone as it allows for the "unpopular" opinions related to the EU's reform initiatives. Consequently, this scenario underscores the notion that if the EU lacks the capacity to persuade its Member States, it faces significant challenges in influencing investment law via CETA, potentially deterring investors from investing to EU countries. However, the subsequent question arises: despite these divisions, what motivates the EU to maintain the perception of control? Furthermore, these challenges highlight a fundamental concern: if the EU struggles to convince its own Member States to fully adopt the ICS, how can it anticipate influencing international investment law via the CETA?

600 Patrick Costello (n.9)

601 Ibid.

602 Ibid.

603 Ibid.

604 Ibid.

5- Conclusion

The persistent debate regarding the CETA's ICS mechanism emphasises the disparity between the EU's aspirations for reforming the international investment law and the actual resistance encountered by its Member States. Although the EU is dedicated to the establishment of a more structured dispute settlement mechanism, the opposition from certain Member States, such as Ireland[605] and Belgium,[606] raises significant doubt about its long-term viability. Despite legal victories, including the CJEU's Opinion 1/17 on the ICS mechanism's compatibility with EU law,[607] the lack of ratification of the CETA underscores a significant issue: legal validation does not necessarily imply political acceptance. The "Don't Worry, Be Happy" approach has consistently been embraced by the EU. And it continues to presume that these challenges such as those found in the intra-EU BITs[608] and the ECT issues,[609] are simply obstacles to unavoidable progress. However, the reality indicates that the ICS may be equally contentious as the ISDS system as it aims to substitute. In the absence of comprehensive support from Member States, the EU may jeopardise investor confidence, as an investment protection mechanism that does not achieve widespread adoption within the bloc creates uncertainty rather than stability. For this reason, this may further fragment the already fragmented system. A pragmatic approach that genuinely addresses legal, political, and constitutional concerns may be more effective than projecting artificial confidence through a "Don't Worry, Be Happy" mindset in securing a widely accepted investment framework.

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605 Patrick Costello (n.9)

606 Court of Justice, Opinion 1/17 (n.8)

607 Ibid.

608 Lenk (n.10); Marceddu (n.10); Eastern Sugar B.V. (n.25); Achmea (n.36)

609 Masdar (n.55); Eskosol (n.56); Antaris (n.57)

Regulatory Discretion and Nature's Legal Standing: Lessons from R (River Action UK) v Environment Agency

By Anjali Gananathan, BVSS

Introduction

"The protection of the environment is a matter of public interest and a fundamental duty of public authorities".[610] This sentiment, echoed by Lord Carnwath, highlights the expanding duties entrusted to regulatory bodies in enforcing environmental laws. In a recent ruling, the High Court in *R (River Action UK) v Environmental Agency* [611]examined whether the Environment Agency had fulfilled its statutory obligations under the Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018—commonly known as the Farming Rules for Water. The case scrutinised the Agency's enforcement of these regulations, particularly concerning the prevention of agricultural diffuse pollution into the River Wye, raising concerns about compliance with mandated water quality standards.

Facts of the Case

The Claimant, River Action UK, an environmental charity, has, since 2021, been committed to addressing river pollution, particularly due to agricultural practices affecting the River Wye; a body of water crucial for biodiversity and designated as a Site of Special

[610] *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28, [30].

[611] *R (River Action UK) v Environment Agency* [2024] EWHC 1279 (Admin).

Scientific Interest ('SAC').[612] Excessive phosphorus levels in recent years have exacerbated the issue of water pollution. As a result, harmful algal blooms have emerged, upsetting the balance of the aquatic ecosystem.[613]

Judicial review was initiated on three grounds.[614] The first and second grounds pertain to the legality of the Environmental Agency's enforcement of the Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 ('2018 Regulations').[615] At large, these grounds challenge both the actions taken by the agency and the Statutory Guidance intended to inform these enforcement efforts. The third ground contends a breach of Regulation 9(3) of the Conservation of Habitats and Species Regulations 2017 ('Habitats Regulations'),[616] an assertion that the agency failed to adequately consider the requirements specified in these regulations.

The Ruling

The High Court considered the claimant's application for judicial review, which challenged the defendant's enforcement of the 2018 Regulations,[617] particularly in relation to the River Wye. The claimant argued that the environment agency had neglected to enforce the regulations effectively and had inadequately considered the provisions of the Habitats Regulations.

[612] ibid [1]

[613] ibid [5]

[614] ibid [2]

[615] The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 ("**2018 Regulations"**) SI 2018/1517.

[616] The Conservation of Habitats and Species Regulations 2017 SI 2017/1012.

[617] 2018 Regulations (n.6)

The court ultimately ruled in favour of the defendant, finding that River Action's grounds for judicial review were not substantiated. [618] It stressed that regulatory authorities are granted significant discretion in how they enforce the law, and this discretion ought not to be undermined by judicial intervention, save that there is a clear violation of the law.[619] Justice Dove J emphasised that judicial intervention should not restrict the flexibility of regulatory bodies in setting enforcement priorities. His judgment reflected a clear deference to the discretion of regulatory agencies, stressing that courts should not micromanage enforcement decisions unless there is a manifest failure to uphold legal obligations. He further reasoned that policymakers are entitled to set broad policies that reflect overarching priorities without being required to account for every potential exception in advance. [620] His decision reaffirmed the principle that regulatory discretion is necessary to manage complex environmental challenges**,** even if this results in variation in enforcement strategies.

It was further emphasized that while regulators must enforce the law, they are not required to pursue every possible breach with equal intensity. The Environmental Agency's approach to enforcement of the regulations was ultimately viewed as proportionate and ensured that the law was upheld without overreach. [621] It was said that regulators are not bound to simply choose not to enforce laws that they are legally responsible for under Parliament's mandate.[622]

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[618] R *(River Action UK) v Environment Agency* [2024] EWHC 1279 (Admin). [145]

[619] ibid [126]

[620] ibid [123]

[621] ibid [127]

[622] ibid [126]

Furthermore, the court was in dispute over the River Action's contention that the defendant had failed to properly consider the River Wye SAC's protected status when enforcing the regulations. The court found that the Agency adopted a "proactive collaborative" approach in ensuring that environmental concerns were effectively addressed. [623] Mr. Justice Dove, in his sole judgment, acknowledged the existence of other agencies in addressing diffuse agricultural pollution, even though the defendant held primary responsibility for enforcing the 2018 Regulations.[624] His reasoning suggested that shared regulatory responsibility was a justification for the agency's selective enforcement approach. All three grounds for judicial review were dismissed. [625]

Commentary

In the face of growing environmental concerns, the judiciary's influence over the enforcement of laws protecting natural resources has become significantly more complex. At the heart of the *River Action* case lies the extent of discretion granted to regulatory bodies like the Environment Agency in enforcing environmental laws. While the court upheld the Agency's discretion under the 2018 Regulations, this ruling highlights the inherent risks of overly broad regulatory flexibility. Discretion, while necessary for managing competing priorities, can result in delayed or inconsistent enforcement, as seen in the Agency's reliance on collaborative efforts with other bodies like Natural England and Natural Resources Wales. This raises important questions about whether the current regulatory framework is equipped to address long-term, diffuse environmental harm effectively.

[623] ibid [142]

[624] ibid [140]

[625] ibid [145]

Beyond the issue of regulatory discretion, this case recognises a fundamental gap in environmental governance: the absence of legal standing for ecosystems. Without independent legal recognition, natural entities like the River Wye remain reliant on human advocates to represent their interests. As Vogel observed, "Until such entities are capable of making and defending claims, human beings are the only viable way through which their rights can be discussed and decided upon".[626] In this case, River Action, as a charity, acted as a proxy advocate for the River Wye. However, if the River Wye itself were recognized as a legal person, it could assert its rights directly, potentially reframing the legal discourse from a focus on procedural discretion to substantive environmental harm.

Legal personhood for nature has already been recognized in jurisdictions such as New Zealand, where the Whanganui River was granted legal personhood in 2017. This innovative decision allowed the river to hold rights and be represented in court independently, reflecting a shift away from anthropocentric governance. [627] In the context of *River Action*, granting legal personhood to the River Wye could have reoriented the court's analysis from a procedural review of the Agency's discretion to the river's inherent right to protection. This might have strengthened arguments for stricter enforcement of the 2018 Regulations, particularly given the ongoing ecological degradation caused by agricultural runoff.

However, an alternative route for strengthening environmental protections could emerge through a purposive interpretation of judicial review powers. Section 31 of the Senior Courts Act 1981[628], which governs applications for judicial review, provides courts with discretion to issue declarations and injunctions that are just and convenient. While traditionally applied to quash unlawful decisions, there is scope for courts to apply this more expansively, ensuring that not only unlawful acts but also regulatory inaction can be

[626] Vogel, S., 'The Silence of Nature' (2006) 15 Environmental Values 145, 166.
[627] Hsiao, C.E., 'Whanganui River Agreement – Indigenous Rights and Rights of Nature' (2012) 42 Environmental Policy and Law 371, 375.

[628] Senior Courts Act 1981, s 31

scrutinized where environmental protections are at risk. Similarly, the requirement under Section 31(3) that a claimant must demonstrate sufficient interest could evolve to recognize a direct legal interest in the protection of natural entities rather than relying solely on representative organizations like River Action UK. If applied in this way, judicial review could become a more effective tool for ensuring regulatory accountability, particularly in cases where discretionary enforcement leads to ongoing environmental harm.

The case also raises important questions about the precautionary principle in environmental law, which mandates proactive measures to prevent environmental harm even in the absence of full scientific certainty. While the court acknowledged the Environment Agency's efforts, it failed to emphasise the need for preventative measures against diffuse pollution, relying instead on reactive enforcement—a missed opportunity to strengthen regulatory safeguards.

Regulatory discretion must be balanced with judicial oversight to ensure substantive environmental protection. A more purposive interpretation of Section 31 could provide an effective legal check on regulatory inertia, reinforcing the judiciary's role in ensuring that environmental law functions as a safeguard rather than a discretionary tool. By maintaining a principled and proportionate approach, courts can hold regulatory bodies accountable without overstepping institutional boundaries.

Conclusion

This case highlights the balance between regulatory discretion and effective environmental protection**.** While the court's deference to the Environment Agency acknowledges the complexities of regulating diffuse pollution, it raises concerns about whether such discretion adequately safeguards ecosystems, particularly those facing long-term degradation. A regulatory framework shaped solely by human-defined priorities may not fully address urgent ecological preservation needs**.**

A potential solution lies in granting legal personhood to nature**,** enabling ecosystems like the River Wye to assert their rights directly rather than relying on human intermediaries. This shift could reframe environmental law, compelling regulatory bodies to adopt proactive protections rather than reacting to harm after it occurs. [629]

This transformation could bridge systemic enforcement gaps that stem from regulatory discretion. Moreover, it could shift environmental governance from reactive damage control to a preventative model, ensuring ecosystems are safeguarded before harm occurs. As environmental challenges grow more complex, legal frameworks must evolve to ensure that environmental governance not only responds to human needs but also recognizes the intrinsic rights of the natural world.

[629] 'Dearing, A., Legal Personhood: Extending Rights to Nature' (2020) *JSTOR Daily* https://daily.jstor.org/legal-personhood-extending-rights-to-nature/ accessed 11 November 2024.

Stop and search: Is it appropriate for juveniles, and how can they be protected?

This piece was awarded the 'Editorial Board's Choice 2025' award

By Thomas Charlie Hills, LLB2

Introduction:

This piece shall provide an in-depth analysis of whether the current stop and search powers executed by the police are adequate and appropriate for use on child suspects. Firstly, a brief overview of the history which led to the creation of stop and search legislation as it is utilised today will be given so that it can be better understood as to why this power is utilised. Following this, the current law governing stop and search will be outlined, with the exceptions to the rules of stop and search included as well so that any reader can understand the subject material before recommendations for change are made. The subsequent section shall propose prospective safeguards which could be introduced to provide additional protection to child suspects when a search is being carried out by a constable and potential remedies which could be awarded in the event that the police breach these safeguards. After that, the results generated by the stop and search of children shall be analysed and debated. The concluding section shall address the author's overall view of the current law and what suggested policies and safeguard procedures would most likely yield the most beneficial result for children in our society. This most likely being that stop, and search will remain an important and accessible power to police constables but with added protections in place for when children are involved.

The History of Stop and Search:

When analysing stop and search practices, the *European Convention on Human Rights (ECHR)*[630] must be considered. The Council of Europe was formed in 1949 with forty-seven member states. The key reason as to why this was created was due to the horrors of World War Two, which affected many millions of people because their human rights had not been protected. Originally proposed by Winston Churchill, the *ECHR*[631] was based on the United Nations' Universal Declaration of Human Rights. It was mainly drafted by British lawyers, and it was signed in Rome in 1950 and became enforceable in 1953. This meant that any citizen of a state that has signed the *ECHR*[632] could take their case to the European Court of Human Rights (ECtHR), alleging that their human rights have been violated. In the modern day, the *Human Rights Act*[633] states that the *ECHR*[634] is now directly applicable in UK courts, and the plaintiff no longer has to go all the way to Strasbourg to make a claim.

At this point, it would be beneficial to point out that the European Union and the European Convention on Human Rights are two completely separate entities. As a result of this Brexit has not withdrawn the English and Welsh legal systems from the purview of the *ECHR*[635]. However, as proposed under Rishi Sunak's Conservative Government if we were to withdraw from the convention. Human rights would not need to be as heavily considered when drafting new statutory powers for the police when executing a stop and search. This could result in inhumane treatment of suspects as there would not be relevant protections in place.

630 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

631 Ibid

632 ECHR (N 1)

633 S.7 of the Human Rights Act [1998]

634 ECHR (N 1)

635 Ibid

In the late 1970s, it was decided that police powers needed to be changed. The powers used by the police were based on common law, which was mildly effective. This realm of the law was governed by the *Vagrancy Act*[636] which allowed for a wide application of stop and search powers to anyone who was deemed "suspicious". This element of subjectivity instead of objectivity led to a lot of unnecessary searches and hence reduced the effectiveness of the powers. It was felt that they needed to be updated through statute, which would also enable people to seek remedy in the event that said powers were breached by law enforcement. The *Phillips Commission*[637] was established to delve into this issue. Following many recommendations made by the commission, the *Police and Criminal Evidence Act*[638] was passed into law which provided how, when and why a search should be conducted. This helped to ensure the welfare of all parties involved and to prevent abuse of power taking place. as well as this, codes of practice for officers to aid them in the application of their powers in more specific scenarios such as Code D which gives guidance on how a suspect should be identified.

Legal Components of Stop and Search for adults and children:

Stop and search is often considered in the realm of human rights as they involve the deprivation of the suspect's liberty and privacy, as demonstrated in *Gillan v UK*[639]. The *ECHR*[640] is constructed through a series of articles with *Article 5* (Right to Liberty)[641] and *Article 8* (Right to respect for private and family life)[642] being relevant issues

[636] Vagrancy Act (1824)

[637] Phillips Commission (Royal Commission) [1981]

[638] Police and Criminal Evidence Act [1984]

[639] Gillan v United Kingdom [2010] 1 WLUK 74

[640] ECHR (N 1)

[641] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 5

[642] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 8

regarding stop and search practices. The *ECHR*[643] provides three categories of rights: absolute rights, limited rights, and qualified rights.

Absolute rights cannot be interfered with by the state. An example of such would be Article 3[644] which prohibits the use of torture. The reason that these rights cannot be infringed is because they are essential to a person being free and able to live their lives as they see fit. Whilst it could be argued that all rights fulfil this, absolute rights allow for other rights to function. If *Article 2*[645] (right to life) were to be infringed the individual cannot enjoy other rights afforded to them under the *ECHR*[646].

Regarding limited rights, the state cannot justify an interference with a limited right unless the limitation is allowed under the article, or the state chooses to derogate. *Article 15*[647] states are allowed to derogate from the convention. Derogation is where nations can move away from enforcing articles of the *ECHR*[648] in certain circumstances as seen in *Lawless v Ireland*[649]. The state can do so if there is a war or public emergency threatening the life of the nation. An example of this would be derogating *Article 2*[650] during wartime. The decision to derogate must be consistent with other obligations

643 ECHR (N 1)

644 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 3

645 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 2

646 ECHR (N 1)

647 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 15

648 ECHR (N 1)

649 Lawless v Ireland (No. 3) [1961] 7 WLUK 1

650 ECHR Art 2 (N 16)

which the state holds under international law and the derogation must be communicated to the European Council.

Qualified rights are rights that need a balance between the rights of the individual and the community. This means that the state can limit these rights in accordance with its own law. To exemplify a qualified right, the reader's attention should be directed to *Article 9*[651] (Freedom of thought, conscience, and expression). This right may be "compromised" through the censorship of hate speech.
When deciding if there has been a violation of a qualified right, such as *Article 8*[652] (a particular issue revolving around stop and search powers), the court will decide if there is proportionality and whether there is a margin of appreciation when the violation occurred and the power which allowed for the violation.

Proportionality asks the question of whether the state's interference with the right was proportionate in that it has struck a fair balance between the rights of the individual and those of the community. This is an important element of this area because without it the flexibility of the states would be very slim. Due to the UK's constitution being uncodified, difficulty arises in regard to the constitutional principle of Parliamentary Sovereignty. This principal purports that Parliament are the highest legal authority in the realm but if they were constrained by having to follow the *ECHR*[653] it would be at issue if Parliament were truly sovereign. An example of this would be placing limits on the manner in which people protest, which is protected under *Article 11*[654] (freedom of assembly and association). In the United Kingdom, there is a four-step proportionality test that the courts apply. First, it must be ascertained if the objective of the

[651] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 9

[652] ECHR Art 8 (N 13)

[653] ECHR (N 1)

[654] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 11

infringement is sufficiently important. Secondly, it is assessed whether the measure is rationally connected to the objective sought. Furthermore, the measure must be no more necessary to achieve the objective. Moreover, does the measure strike a fair balance between the rights of the individual and the interests of the community[655]. The margin of appreciation means to determine the ambit of discretion that the ECtHR gives the state in their interpretation of the convention. This element is particularly beneficial as it allows different states to have different margins of appreciation depending on their own societal tolerances. The margin of appreciation permitted can either be narrow or wide; this depends on the right that is being considered and the level of consensus amongst member states. A narrow margin of appreciation applies when the right which is being considered is regarded as being of the utmost importance, such as sexual privacy, as seen in *Dudgeon v United Kingdom*[656].

A wide margin of appreciation, on the other hand, is where there is a lack of consensus in the member states or where the right involves a moral issue, such as the legality of sadomasochism, as illustrated in *Laskey, Jaggard and Brown v United Kingdom*[657] or more sensitive issues such as the legality of assisted dying/euthanasia in *Pretty v United Kingdom*[658]. This allows nations to cater their implementation of the *ECHR*[659] to what their society deems to be appropriate.

Article 5[660] (the right to liberty and security), is a limited right which cannot be interfered with by the state unless it is allowed subsection A-F of the article allows it or the state derogates it. The right to security aspect places a positive duty on the state to provide an explanation when a person has been detained in any way. For a claim to arise under

655 Bank Mellat v HM Treasury (No.2) [2013] UKSC 39

656 Dudgeon v United Kingdom [1981] 9 WLUK 88

657 Laskey, Jaggard and Brown v United Kingdom [1997] 2 WLUK 339

658 Pretty v United Kingdom [2002] 4 WLUK 606

659 ECHR (N 1)

660 ECHR Art 5 (N 9)

Article 5[661], a person must be deprived of their liberty, not just have it restricted as this restriction does not always amount to deprivation, but the ECtHR or domestic courts would decide this on a case-by-case basis as seen in *Guzzardi v Italy*[662]. Police powers of stop and search, as well as powers of arrest, are highly likely to interfere with rights under *Article 5*[663].

Article 8[664] (the right to respect for family and private life) is a qualified right meaning that the individual's freedom to family and private life must be weighed up against the rights of the community and limit the breadth of the right if it is to meet a legitimate aim. Article 8[665] covers a wide range of activities which are protected but the most relevant aspect of this right is the individual's "private life." This includes a "person's physical and psychological integrity"[666] which envelops a person's name, reputation, gender, sex life, photographic images, and personal data. These may be interfered with if the state aims to prevent crime or uphold national security but any interference which is made by the state must have a legal basis and be a proportionate measure.

The protection of this right clashes with stop and search as it will interfere with the suspect's physical integrity and potentially even their psychological integrity. Due to the nature of stop and search these protections must be slightly infringed to meet the legitimate aim of ensuring that our society is safe. Without this infringement, the search would not be able to take place and as such it would be easier to commit crime because the police would not be preventing it.

661 Ibid

662 Guzzardi v Italy [1980] 11 WLUK 49

663 ECHR Art 5 (N 9)

664 ECHR Art 8 (N 13)

665 Ibid

666 Botta v Italy [1998] 2 WLUK 523

The powers of stop and search are mainly provided by the *Police and Criminal Evidence Act*[667]. This act is accompanied by codes of practice, but they are not legally binding, they only provide further guidance[668]. Section 1 of PACE[669] gives the police the right to stop and search people and vehicles in a public place. To exercise such a power, the officer must hold reasonable grounds for suspecting that the person is in possession of stolen goods or contraband such as illicit drugs at the time of the search. Moreover, it is important to note that the officer must have reasonable grounds for suspicion before the search begins[670]. Code A of the Police's Code of Practice governs the exercise of a police officer's statutory power to execute a stop and search. It states that personal factors cannot amount to reasonable grounds for suspicion. As a result of this, unless the police have information which provides a description of a person carrying an article which allows for the use of stop and search, certain factors cannot be used. Some such factors are age, disability, gender reassignment, pregnancy, race, religion or belief, sex, or sexual orientation, as they are protected characteristics under the *Equality Act*[671]. Furthermore, generalisations or stereotypes that certain groups of categories of people are more likely to be involved in criminal activity, such as possession of illicit drugs[672]. This requirement for reasonable grounds allows greater protection to the public as they limit the number of potential suspects. This is because, without reasonable grounds, suspects cannot be searched and hence removes the opportunity for lawful abuses of power by the police.

However, reasonable grounds are not always required, as exemplified by *Section.60 of the Criminal Justice and Public Order Act*[673]. This statute confers the power to the police to

667 Police and Criminal Evidence Act (N 2)

668 Ewan McKendrick, "Contract Law" (15th Ed, Bloomsbury Publishing) [2023]

669 S.1 of the Police and Criminal Evidence Act [1984]

670 Ewan McKendrick (N 5)

671 Equality Act [2010]

672 S.23 of the Misuse of Drugs Act [1971]

673 S.60 of the Criminal Justice and Public Order Act [1994]

search individuals in a certain locality for a period of twenty-four hours without the need for reasonable suspicion for the search. A police officer of or above the rank of inspector reasonably believes that incidents involving serious violence may take place in any locality in his police area, as seen in *Roberts*[674]. It is acknowledged that this only applies to weapons which may be used to inflict said violence, so if there were to be a stop and search regarding the possession of illegal drugs or stolen goods, there would still be a need for reasonable grounds to permit an individual to be searched. Another example would be the *Protection of Freedoms Act*[675] which acts similar to the previously mentioned powers but the key distinction being that the authorisation is given when there is reasonable suspicion of there being terrorist activity not just serious violence. In addition to the need for reasonable grounds, there are extensive requirements accompanying stop and search to ensure that they are exercised appropriately and proportionally with respect to individual rights,[676] as seen in *Osman v DPP*[677]. Such requirements are found under *Sections 2 & 3 of PACE*[678], which states that police must provide their name and the police station to which they are attached. In the event that the officer(s) are not in uniform, they must provide documentary evidence of their identification[679]. Additionally, they must provide information to the suspect, such as why the search is being made and the grounds for the search. The officer must also make a record of the search at the time of said search or as soon as is practicable after the fact. A copy of this record may be able to be obtained from the police station the officer is attached to. This record should include the suspect's ethnic origin, the object of the search, the grounds for making the search, the date, time, and place of the search as well as what the outcome of the search was[680]. Failure to satisfy all of these requirements

[674] R. (on the application of Roberts) v Commissioner of Police of the Metropolis [2015] UKSC 79

[675] S. 61 of the Protection of Freedoms Act [2012]

[676] Ewan McKendrick (N 5)

[677] O (A Juvenile) v DPP [1999] 7 WLUK 8

[678] S.2 and S.3 of the Police and Criminal Evidence Act [1984]

[679] S.2(3) of the Police and Criminal Evidence Act [1984]

[680] S.3 of the Police and Criminal Evidence Act [1984]

renders the search unlawful and evidence gathered inadmissible, as illustrated in[681]. Moreover, there are additional safeguards in place for the actual application of stop and search powers. Firstly, if a body search takes place embarrassment must be kept to minimum and only outer clothes may be removed such as coats or jackets unless there are circumstances which allow for such powers. One such example would be found in the *Criminal Justice and Public Order Act,*[682] where if *Section 60 of the act* was in operation, then a constable (who is in uniform) could require the suspect to remove headgear or any article which could constitute a disguise. A thorough search of the suspect must be carried from the view of the general public. An additional safeguard is that the search must be carried out by a person of the same sex as the defendant[683].

Proposed safeguards for stop and search on children:

The use of stop and search powers on any individual is likely to be intimidating at best and harrowing at worst. It is likely that the event of a stop and search being executed on a child would be a traumatising event for young children. Statistics show that at least 432 children under the age of criminal responsibility were stopped and searched by police forces in England and Wales[684]. This is an issue because some of these children may be below the age of criminal responsibility (ten years of age) and as such it would be difficult for a successful search to yield any significant benefit, such as the prosecution of the suspect. It is acknowledged however that this is not an issue for all children and depends on how old they look compared to their actual age. the older they appear the higher likelihood they could be searched. Also, if these children are below the age of criminal responsibility, they may not understand why this is happening to them and, more importantly, what is actually happening to them during the search. It is

681 R v Bristol [2007] EWCA Crim 3214

682 S.60AA of the Criminal Justice and Public Order Act [1994]

683 S.44(3) of the Terrorism Act [2000]

684 [2024] Data.Police.UK <https://data.police.uk/data/fetch/276f93b9-17d5-4a26-b0a9-c3c52ee00192/> (accessed 25/05/2024)

likely that a young child would be scared in such a situation and subsequently would not understand what is being said to them when the constable attempts to identify themselves and their station, as well as why the search is being made and the grounds for said search. It is all the more unlikely that they would go to collect the record of the search from the police station. This warrants the question of what specific safeguards should be in place to protect children beyond the normal protections of their liberty and private life that are already afforded to adult suspects.

The safeguards which shall be discussed over the following pages are based on the opinion of the author and what may be done on a wider level to make the power of stop and search less invasive towards children.

Third party Presence:

One potential safeguard, this article contends should be in place for children is that a chaperone should be present when a stop and search is performed. A chaperone could be a range of individuals to not restrict the operation of the police force. Such individuals could be a parent, guardian, or trusted family member. However, this evokes the issue of how their relationship would be verified. This could be remedied through affirmation from the child and providing some identification for who they are. A drawback of this is that it may infringe on the child's right to privacy. Subsequently, this objective must be weighed against the qualified right to privacy[685] through the four-step test for proportionality[686]. This protection would operate in a comparable way to the powers of the police regarding interviewing suspects during detention under the *PACE*[687]. This statute provides that juveniles or those who are mentally handicapped must have an appropriate adult with them otherwise the interview would be considered

[685] ECHR Art 8 (N 13)

[686] Bank Mellat v HM Treasury (N 26)

[687] S.57 of the Police and Criminal Evidence Act [1984]

unlawful, and the evidence gained through the interview would be inadmissible in court as demonstrated in *Aspinall*[688].

However, instead of rendering evidence from the interview unlawful, the lack of a chaperone for a stop and search of a juvenile would render the search unlawful and any evidence gathered inadmissible. The reason for such an onerous penalty for breaching this safeguard is to ensure that it is abided by. If there was no incentive to abide by this safeguard then whilst it would have effect at law, it would not be effective in practice. Hence it would yield minimal protection to children, defeating the purpose of the safeguard altogether. The current regime under *section 78 of PACE*[689], the court may refuse to admit evidence which may have been procured in an improper manner and hence has an adverse effect on proceedings. This safeguard would fall within the remit of this section and subscribes to the current regime of what constitutes admissible evidence. This is because if the prosecution were to deploy evidence which had been gathered through searching a child when they were unaware of what to do in such a situation and the police could potentially take advantage of such a child. This could be through coercion or through bad faith such as planting evidence on the child's person in addition to what they already had in their possession and the child would think nothing of it. Whereas if a chaperone was present, there is a significantly lower chance that this would occur. Code C of the police codes of practice states that under 18s must have an "appropriate adult" with them unless the suspect refuses and the refusal is documented[690]. The author suggests that the ability to refuse a chaperone should be removed. The aim of this safeguard would be to create a safer environment during the search to be carried out and to inform the adult that the child's liberty is only being restricted, not deprived. However, there are some issues which arise in relation to this.

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[688] R v Aspinall (Paul James) [1999] 1 WLUK 752

[689] S.78 of the Police and Criminal Evidence Act [1984]

[690] HM Government "PACE Code C 2019" (Gov.uk, 20th December 2023) <https://www.gov.uk/government/publications/pace-code-c-2019/pace-code-c-2019-accessible#police-and-criminal-evidence-act-1984-pace-code-c> Accessed 13th October 2024

One such issue would be if a chaperone cannot be located. In this situation, the police would have to hold the child until a chaperone can be sourced. Moreover, this in itself may be depriving the child of their liberty whilst waiting for the chaperone to arrive if they are not already present at the time of the search. Upon this basis, it is suggested that this safeguard could only apply to those under the age of criminal responsibility, those who have mental disabilities, or physical disabilities. Another issue which could arise is if the chaperone is abusive, such as in scenarios of domestic abuse. This requirement of the chaperone being required may cause the child to be put into a potentially dangerous situation once they have gone home with their chaperone. To ensure this is not the case, if there is reasonable suspicion that this is the case the police could dispatch an officer to visit the child X amount of time after the search has taken place to ensure they have not been harmed. If the child has been found to be harmed, then the police can refer the matter to social services and take action if it is deemed appropriate.

This safeguard would align with the *Human Rights Act*[691] requirements for public authorities to act in a manner compatible with an individual's convention rights. On the other hand, the safeguard could severely limit the efficiency of police work. The police would have to wait for a chaperone, a parent or guardian or an adult who bears responsibility for the child before they could search the juvenile, which could take hours if the adult was at work or did not have a car or any multitude of issues which could arise. Instead, this author suggests that the safeguard should only apply when a child under the age of criminal responsibility is being searched. This would be a more appropriate measure, as these children will often have their parents or an adult with them to act as a chaperone in the event a search is needed. They are the main demographic of juveniles which will need the search and its surrounding details explained to them in a simple way whereas, for example, a seventeen-year-old is more likely to understand what is happening and what is being explained to them than a ten-year-old child. Furthermore, only those above the age of ten would have the potential

[691] S.6 of the Human Rights Act [1998]

to be criminally liable for what was found in their possession, which would play a factor in whether they should be searched or not. However, it is worth noting that legal proceedings regarding juveniles of all ages are much more sensitive than those for adults. As such greater care must be taken in situations involving them no matter where they fall in that category.

A limitation on Reasonable Force:

A second safeguard which could be put in place for the removal or limitation of powers found under *Section 117 of PACE*[692] for children during a stop and search. This statutory power allows reasonable force to be used when carrying out a stop and search on a suspect who is resisting the search. This evokes the question of whether this is truly necessary in all potential scenarios? It must be acknowledged that the force used must be reasonable. As such, minimal force should be applied when dealing with a child resisting the stop and search, even if reasonable force is above applicable. It is noted that this is a rare circumstance in itself. However, current legislation is mute as to whether it is appropriate to apply even a minimal level of force to a child. One argument is that it is never appropriate for a constable to apply force to a child, as it would be unnecessarily cruel in an already intimidating position for a child. An ordinary reasonable child would be intimidated if not scared by a police officer executing a stop and search upon them. The child may not understand what is going on or the nature of the constable's actions, they may try to flee from the situation. If this were an adult fleeing from the police who are trying to do their duty, reasonable force would be justified in its application. They understand what may befall them if they resist the police as seen in *McGarrick*[693]. However, a child acting in this manner may not perceive the potential consequences of their action, and their intention might not be as sinister as that of an adult when resisting a search. This is not to remove the thought that they may be sinister children, but it is less likely that these types of traits would be seen in

[692] S.117 of the Police and Criminal Evidence Act [1984]

[693] R. v McGarrick (Shaun James) [2019] EWCA Crim 530

children. This reasoning could lead to the assumption that the application of force should not be allowed regarding children. However, this brings forth a question of distinction: Is there a difference between a child and a juvenile, as force may be more justifiable against a resisting 17-year-old than a 10-year-old: this leads to the recommendation that the parliament should legislate On the issue of reasonable force and that it should not be used when a child under the age of criminal responsibility is resisting a search.

On the other hand, if reasonable force cannot be used to search those under the age of criminal responsibility, criminals may exploit this. They may do this through county lines, which is a prevalent issue at the time of this article. "A County Line is a term used to describe gangs and organised criminal networks involved in exporting illegal drugs into one or more importing areas, using dedicated mobile phone lines or other forms of "deal line."[694]. They commonly exploit children and vulnerable adults to smuggle drugs and money. If the police cannot use reasonable force to search such suspects, drug trafficking will go unchecked, as the carrier of the drugs can just refuse a search, and the police would have no power to carry one out once consent is withdrawn by the suspect.

This leads to the conclusion that some level of force is needed to be at the police's disposal to ensure that they can protect society. It is due to this that the final recommendation of this author on the issue is that the legislation regarding reasonable force should not be altered. The concept of reasonable force should be viewed comparatively with the general use of force. This means that constables must take into consideration the context of the situation when applying force for if they apply an unreasonable level they would be acting unlawfully. A reasonable constable would apply a lot less force when searching a child compared to an adult meaning that the powers afforded to the police may be unsavoury, but they are needed for the protection of our

[694] National Police Chief's Council, "County Lines" [2018] National Crime Agency https://nationalcrimeagency.gov.uk/what-we-do/crime-threats/drug-trafficking/county-lines (Accessed 31/05/2024)

society. Without this power in the police's arsenal, their possible course of action in certain circumstances would be severely limited. The use of force does affect the suspect's human rights, as it is likely to amount to a deprivation of their liberty under *Article 5 of the ECHR*[695] but is allowed under [696]as lawful arrest or detention for court non-compliance or legal obligation fulfilment does not violate human rights.

In simpler terms, this means that the police applying reasonable force will not contravene human rights, but it must be stressed that the level of force applied is of significant importance. Lawful arrest or detention for court non-compliance or legal obligation fulfilment does not violate human rights

Changing Allowances for stop and Search on children:

A third safeguard that could be introduced is to allow the removal of outer clothing only, regardless of the circumstances, unless the individual is at a police station with a parent or guardian present. For a routine search, only the outer layer of clothing is expected to be removed such as a coat or a jacket, but it is generally expected that shoes and headgear such as a Turban, a Hijab or a hat, shall remain on the person unless the situation compels the police to remove them, and the police have adequate powers and grounds to make this request[697]. Requiring a child to remove these items would be unnecessarily harsh. Whilst the removal of shoes or a hat is widely used, the order to remove one's Hijab would not always apply as only girls of the Islamic Faith wear them once they are around the age of eight to thirteen years of age. Regarding Turbans, they are commonly worn by followers of Sikhism, there is no regimented age when they must be adorned so it is of sound logic and reason to assume that some children would

[695] ECHR (N 1)

[696]Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 5 (B)

[697] Criminal Justice and Public Order Act (N 52)

be wearing a Turban. This would violate *Article 8*[698] as it would infringe on the child's physical and psychological integrity as they are being forced to remove something which is sacred to them which holds a large amount of spiritual value. Following on from this, a child irrespective would find the requirement to remove their shoes and headgear distressing and causes anxiety, like in adults, but their lack of understanding may heighten distress. This distress may manifest as resistance, which would then impede the search, and the constable would have to use reasonable force to complete the search on the child would be an unsavoury prospect. As well as this, those who wear headgear for religious purposes may be reluctant to remove their head-garment for the search as it would go against their religious belief. As previously stated, race and or religion or belief cannot be the basis for a stop and search[699] but these children are still expected to remove them. This seems like an unreasonable request, given that these garments should not have been a defining factor in executing the search. This leads to the recommendation that if an individual is stopped and a search is performed, there would be an expectation as to remove religious garments for children. Shoes and hats may still be removed as these are mere fashion items and do not bear spiritual significance. Furthermore, this becomes the question, of how these children will be searched if the garments cannot be removed. This author's proposition is as follows: instead of removal, the constable would feel over the material of the garment as, then if there is any cause for concern such as feeling a stash of drugs or a weapon, then the headgear should be removed for closer inspection. Meanwhile, it is recognised by this author that reasonable grounds for suspension cannot be found during the search, and this presents an issue with the idea just submitted. To work around such, the actions by the constable could be seen as a continuation of the same search instead of a new search altogether.

Overall, this safeguard proposes that Constables abide by the requirement of there being reasonable grounds to conduct a search and subsequently meeting a higher threshold to validate conducting a search on a child. Whilst this would result in fewer searches of

[698] ECHR Art 8 (N 13)

[699] Equality Act (N 8)

children taking place, it may result in more children being taken into police custody. This would be a result of the need to facilitate a lawful search of the child. However, this safeguard would come with some possible drawbacks. One drawback is that it may create a situation where the searches could be regarded as discriminatory as children in religious garments would have special procedures which would not apply to an atheist child for example. Furthermore, if a child is taken into police custody and no contraband is found, this could create a large amount of public backlash because religion, race and the well-being of children as very sensitive matters[700]. This means that the measures being used by the state would be proportional as this safeguard would strike a fair balance between the rights of the child (them retaining their garment unless absolutely necessary to have it removed) and the rights of the community (to ensure that they are safe from any potential harm in any way). Proportionality is a key feature in deciding if there has been a violation of qualified rights. It asks the question of whether the state's interference is proportionate in that it has struck a fair balance between the rights of the individual and the rights of the community. Examples of this balance could be seen in the limitations of an individual's right to protest as illustrated through the implementation of the *Public Order Act*[701]. Also, the ECtHR recognises that different states which have signed the ECHR[702] have varying tolerances to how religion ties into private life and as such there is a wide margin of appreciation for matters such as this. The term, the margin of appreciation, seeks to find the amount of discretion that the *ECHR*[703]affords signatory states in their interpretation of the convention. An area where this is an example would be in the case of *Goodwin v UK*[704] which explored the rights of transsexuals in the United Kingdom. Subsequently, it is reasonable to assume that this

[700]"Hackney schoolgirl strip-searched by met police was taken out of exam" BBC News (London, 16th March 2022) https://www.bbc.co.uk/news/uk-england-london-60766891

[701] Public Order Act (1986)

[702] ECHR (N 1)

[703] Ibid

[704] Goodwin v United Kingdom [2002] 7 WLUK 347

safeguard would comply with *Article 8 of the ECHR*[705] (right to respect for private and family life). Whilst these safeguards aim to protect children, they are bound to be breached eventually, and as such, it must be established what remedy would be fitting for such a breach. This would depend on whether these safeguards were written in statute or if they were entered into a code of practice which are not legally binding as they only act in an advisory capacity to couple with the application of the powers found in *PACE*[706], and this limits the availability of judicial review for potential decisions made by the police. "A claim for judicial review means a claim to review the lawfulness of an enactment; or a decision, action or failure to act in relation to the exercise of a public function"[707] If the violation arose as a result of the codes of practice being ignored, it is unlikely but not impossible that the claimant would be able to bring a public law action such as judicial review against the police force. This is due to the fact that whilst there is no "universal test… which will indicate… when judicial review is or is not available"[708]. However, Lord Justice Lloyd does offer some guidance on the matter: "The source of the power will often… be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review"[709]. The impact of this is that if new legislation were drafted on this matter a claim of judicial review could be brought by the child's parent or guardian. It is likely that if police forces do not abide by the powers afforded to them, act within their scope and follow the necessary procedures established by these safeguards said claim would be successful. This would negatively impact the finances of police forces across the nation, but it would act as a deterrent to unlawful behaviour when stopping and searching a child. Following on from this, it is unlikely that violations of mere codes of conduct would allow for judicial review proceedings, yet they may still be able to take private law

[705] ECHR Art 8 (N 13)

[706] PACE (N 9)

[707] Rule 54.1 of the Civil Procedure Rules [1998]

[708] Ex Parte Noble [1990] ICR 808

[709] R. v Panel on Takeovers and Mergers Ex p. Datafin Plc [1987] Q.B. 815

action as seen in *Roy*[710]. A person may sue the police and claim damages for injuries and or loss sustained through their actions. Usually, the Chief Constable of the perpetrating police force is sued, and the matter is heard in the High Court, where a jury decides the outcome and the quantity of damages to be awarded to the claimant, as seen in *Goswell*[711]. It is relevant to note, however, that there is a cap on the number of damages which can be awarded with a current ceiling of £50,000 for exemplary damages for "oppressive, arbitrary or unconstitutional behaviour"[712] by the police. However, if the safeguards were written in statute, it is likely the claimant would be able to bring a claim through judicial review to challenge the decision made by the police to search in the way they did and as such, they would be entitled to remedies. These remedies could be a mandatory quashing order if the search led to a conviction[713], an injunction, a declaration or damages[714].

Results of Stop and Search on Children:

"The Highest number of stop and searches on children under the age of 10 were logged by Avon and Somerset Police – at 117 – followed by Kent and the Metropolitan police"[715]. However, 79% of these searches led to no further action from officers, either formal or informal[716] . This demonstrates that stop and search powers only generate results in one in five searches, indicating that young children typically are not contributing to criminal activity. Alternatively, the number of children between the ages

[710] Roy v Kensington and Chelsea and Westminster Family Practitioner Committee [1992] 1 A.C 624

[711] Goswell v Commissioner of Police for the Metropolis [1998] 4 WLUK 569

[712] Thompson v Commissioner of Police of the Metropolis [1998] Q.B. 498

[713] Rule 54.2 of the Civil Procedure Rules [1998]

[714] S.34 of the Senior Courts Act [1981]

[715] Andrew Kersley, "Hundreds of Children under 10 subject to stop and search in England and Wales" (2024) The Guardian https://www.theguardian.com/law/article/2024/may/25/children-under-10-stop-and-search-police (accessed 25/05/2024)

[716] Ibid

of ten and seventeen form a substantial part of the total number of stops and searches in the metropolitan area. 9073 children in this age range were searched between March 2024 and September 2024, compared to 41354 adults (eighteen years of age or older)[717]

Based on these results, it is worth pondering if stop and search powers are really needed when it comes to young children. As addressed earlier in this piece, children are used in criminal activity, which is an undisputed fact. However, the number of searches which are fruitless whilst still causing harm to the child's mental health cannot go unrecognised[718]. Due to this, it is the recommendation of this author that a minimum age be established for stop and search powers to apply and children below which cannot be challenged or there be additional requirements in place for them to be searched to reduce the number of unnecessary searches being performed.

If there was a minimum age for which children had to be in order to be searched it bears the same issue as that of there being a minimum age for there being a ban on the use of reasonable force. It would simply allow county lines and other criminal activity which children are a part of to go unchecked and the influence of these criminal gangs to grow. However, an argument must be made for a point as to where it becomes unreasonable to perform a stop and search on a child, for example, if they are aged five or below. As stated earlier, hundreds of children under ten years of age were searched by the police and approximately a fifth yielded any result that the police could pursue

[717] Metropolitan Police, "Stop and search in Metropolitan police service" (Police.uk, August 2024) <https://www.police.uk/pu/your-area/metropolitan-police-service/performance/stop-and-search/?tc=E05000362> Accessed 12th October 2024

[718] Israel Campos and Paul Murphey-Kasp, "Stop-and-Search: How being stopped can affect mental health" BBC News (London, 4 January 2022) <https://www.bbc.co.uk/news/av/uk-england-london-59756203>

further[719], due to this it is evident that children under ten are still involved so an outright ban would not be the solution.

Overall, it would be a difficult task as to set an age limit as to what age can be searched and who cannot be searched but a sufficient middle ground may be that if it is evident that the child is with their parents and the child has satisfied the grounds for the search so that the police can ask the parents if they can search the child. If consent is given, then the search could be carried out by the constable in view of the parent(s) and/or guardian(s) to alleviate some of the stress for the child as having a trusted adult there would hopefully put them at ease slightly more than if they were taken into custody or accosted in the street. However, if consent is not given the police should have the power to compel the child and relevant adult to attend the police station where the search can be carried out in a secure and safe environment. This would also create a situation of particular unease for all parties involved. This is because custody of children andchildren's welfare is an extremely sensitive issue and that such an action would infringe the qualified right to liberty[720] and so this must be carried out proportionally to the rights of the individuals. If a child under the age of ten (age of criminal responsibility) is without a parent, especially those on the lower age range, this is a cause for concern as and such the child should be returned to their home/residence and then the parents should be asked the same questions as stated above and the same procedure should be followed.

Conclusion:

It goes without saying that stop and search is an important part of the preventative measures which the police have in place to halt criminal activity during or even before it has been committed. As previously stated in this article, children have a limited

[719] Andrew Kersley, "Hundreds of Children under 10 subject to stop and search in England and Wales" (2024) (N 59)

[720] ECHR Art 5 (N 9)

involvement in crime but there is still a number who are, and it is due to these perpetrators that stop and search must remain applicable to children. However, efforts have been made to make it safer for children as this article has explored and suggest grounds for further reform to introduce new safeguards to protect children against unnecessarily harsh treatment whilst still allowing the police to carry out their very important work. In conclusion, it is the belief of this author that stop, and search is appropriate for use on children, but it must be further refined to be in its best form for application to protect children's rights as currently there are still some possible issues which could arise.

Would modifying or overruling Foakes v Beer yield a practical benefit?

By Thomas Charlie Hills, LLB2

Introduction

This article shall analyse whether the current law regarding a promise to pay less has a positive impact on contract law, or if it provides more of a hindrance. It shall also discuss the most appropriate course of action if a change in the law is required.
To assess such areas, it shall first be established what the current law regarding promises from the creditor to accept partial payment. This shall subsequently be compared with the current law on promises to pay more for services rendered. This article argues why the law in this area should be modified or overturned and then reasons for the law remaining unchanged shall be given. Subsequently, these reasons shall be evaluated and then a judgment shall be reached as to whether change is needed or not and if so, how would the change be best carried out as well as possible drawbacks of said change. Finally, this article will suggest that Parliament should draft legislation to repeal the case law established by *Foakes v Beer*[721]. This is because it will yield a large benefit to society.

Promise to accept less vs. promise to pay more

Pinnel's Case established that partial payment of an existing debt could not count as good consideration for the creditor's promise to partial payment instead of collecting the full amount owed[722]. *Van Bergen v St. Edmunds*[723] developed this, for an agreement to accept

[721] Foakes v Beer (N 1)
[722] Penny v Cole [1602] 5 Co. Rep 117a
[723] Van Bergen v St. Edmunds [1933] 2 K.B 223

less than is owed to be binding, extra consideration must be given as to yield a benefit to the creditor. In *Foakes v Beer* the House of Lords held that acceptance of less cannot qualify as good consideration for the promise to forgo the remaining balance of the debt[724]. It was held that the creditor's promise not to sue for interest was unenforceable for want of consideration. The debtor had not provided any as they were already obliged to repay the full amount including the accrued interest. In essence, *Foakes v Beer* states that a promise to accept partial payment of a debt which is supported by a practical benefit will not create a binding contractual agreement[725].

This is radically different when examining the law pertaining to promises to pay more. This issue was first raised in the case of *Stilk v Myrick*[726] where the crew of a merchant vessel had been promised that they would be paid more for staying on and completing the voyage after they had faced some difficulties. It was ruled that the promise to pay more wages was unenforceable due to lack of consideration. This was because the crew were only carrying out duties which they were already contracted and being paid to do. Whilst this decision may have been deemed good law, we also cannot ignore this also being a policy decision. In the early nineteenth century maritime commerce was of the utmost importance. This was because it was the principal method of cross-border trade as well as the navy playing a key role during wartime and many battles being at sea all together. Examples of this would be the 'Battle of the Nile' in 1798, 'The Glorious First of June' in 1794 and the 'Battle of Trafalgar' in 1805. Such as decision was made in the time of the Napoleonic Wars emerged (18th of May 1803 - 20th of November 1815). Subsequently, this may have been in the minds of the judges when deciding this case. This is due to the fact that if this stance had not been taken, maritime warfare and trade would have become far less efficient. The reason for this being is that sailors and crew could argue that if they did one task which was beyond their contractual duty (which was likely to arise in war time) then the navy/ owner of the merchant vessel would encounter serious financial hardship. Moreover, the sailors/crew may have refused to

724 Foakes v Beer (N 1)
725 Ibid
726 Stilk v Myrick [1809] EWHC KB J58

work until they received this additional payment which would have negatively impacted society.

An exception to the rule emerged in the 1859 case of *Hartley v Ponsonby*[727]. It was held that the crew were doing more than they were contractually obligated to do. Hence, they provided good consideration in way of the captain obtaining a practical benefit and as such the crew were entitled to the extra pay as promised by the captain of their vessel. Instead, the modern law which is applied in this context was established in *Williams v Roffey Bros*[728] is applied by the courts. The principle derived from this case established that if one party only fulfilled their duty based upon an agreement but provided a practical benefit in doing so, a promise to pay more by the other party will be enforceable as this practical benefit will act as good consideration in the eyes of the court.

Based on the descriptions of the law from the previous paragraphs, it is clear to see that promises to pay more and promises to accept less are treated radically differently even in cases which have a similar factual pattern. This was exemplified in *Re Selectmove Ltd*[729]. Lord Justice Peter Gibson refused to make the extension of the principle from *Williams v Roffey Bros*[730] to debt obligations. As a result of this, such cases are still under the purview of the principle as established in *Foakes v Beer*[731]. Lord Gibson goes on to state that 'Foakes v Beer was not even referred to in Williams v Roffey Bros, and it is in my judgment impossible, consistently with the doctrine of precedent, for this court to extend the principle of Williams to any case governed by the principle of Foakes v Beer'. He subsequently states that 'if that extension is to be made, it must be by the House of Lords or, perhaps even more appropriately, by parliament after consideration by the Law Commission'. However, the English courts have not yet unilaterally chosen which

727 Hartley v Ponsonby [1857] 26 LJ QB 322
728 Williams v Roffey Bros & Nicholls (contractors) Ltd [1991] 1 QB 1
729 Re Selectmove Ltd [1995] 1 W.L.R 474
730 Williams v Roffey Bros (N 10)
731 Foakes v Beer (N 1)

principle to apply overall and as a result both *Williams v Roffey Bros*[732] and *Foakes v Beer*[733] remain good law within their respective spheres of operation.

Reasons for change in the law

The key reason for the law to be changed is the inconsistency that arises from the continued application of the principle established in the case of *Foakes v Beer*[734], as exemplified in *Integral Petroleum SA v Bank GBP International SA*[735]. As a result of this, the court when hearing a case must decide which of the two approaches they wish to apply. 'We ought not to have emphasis on practical benefit in some cases… but an emphasis on legal benefit in other cases' with there being no rational explanation for the continued existence of such inconsistent rules[736]. If this inconsistency remains, claimants shall be unsure when bringing a claim if they are to be successful which reduces the amount of claims being brought. Consequently, claimants who should receive damages continue to face a detriment which is not their fault.

Based on this view, the law should be changed either by modifying the existing principles or by outright overturning them through the courts setting a new precedent. This issue arose in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*[737]. The facts of this case were that MWB licensed a business premises to Rock Advertising. After some time had passed, Rock Advertising started to miss payments and so MWB agreed to allow the payment of arrears in instalments. They also promised to accept a reduced amount on initial payments under this new payment plan and the missing amount would be back loaded onto payments. These payments were to take place in the further future as to allow Rock Advertising to get their finances in order. However, MWB claimed that

732 Williams v Roffey Bros (N 10)
733 Foakes v Beer (N 1)
734 Ibid
735 Integral Petroleum SA v Bank GBP International SA [2022] EWHC 659 (Comm)
736 Ewan McKendrick, Contract Law (15th edition, Bloomsbury Publishing 2023) P 161
737 Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24

the original contract had indeed been breached by Rock Advertising and they took action against them. In this case Lord Sumption stated that this area is 'probably ripe for re-examination' and this view was supported by Lord Wilson, Lord Lloyd Jones and by Baroness Hale.

It is argued that the *ratio deciendi* goes against the argument that reform is needed because the majority ruled against changing the law around promises to pay less. I submit that the judgement was to do with the context in which the case was heard, rather than the court holding that change should not occur. Lord Sumption states that if the principle of *Foakes v Beer*[738] was to be substantially modified or overturned. For this precedent to be overturned, it must be carried out before an enlarged panel of the court rather than only the five judges who sat in *MWB*[739]. Additionally, if a decision to modify or overturn Foakes v Beer[740] was made by Lord Sumption and his fellow judges, the decision would have been merely *obiter dictum* comments and as such no new precedent would have been formed. It would have been persuasive to change if this issue arose in a case at a later date. This resulted in Lord Sumption stating that if change were to occur, it would have to be implemented in a case where issues relating to promises to accept partial payment were central. Consequently, a new *ratio deciendi* judgment would be formed, hence creating a new binding precedent for all courts in the land to follow.

This judgment demonstrates that there is a prevailing sentiment within the judiciary that some level of change should be made to this area of law. Furthermore, if this is to be done the judges have set a very specific criteria. Firstly, it must be carried out in the Supreme Court or by Parliament as per the guidance of Lord Gibson. This decision by the Supreme Court should be made by an enlarged panel to ensure that the decision reached is correct and based on sound reasoning and logic. However, this should be done in a case where the judges' comments on this area are more than just obiter dicta, so that new common law can be established.

738 Foakes v Beer (N 1)
739 Rock Advertising Ltd v MWB Business Exchange Centres Ltd (N 19)
740 Foakes v Beer (N 1)

This change in the law would result in greater certainty in the application of the law. This would reduce the number of appeal cases heard concerning this matter on the grounds that the judge erring in the law. It is acknowledged that this is a rare occurrence in of itself. More importantly, however, it would allow for greater protection for struggling debtors in need of creditor aid to rectify their finances.

Reasons for the law to stay the same

If partial payment of existing debt supported by good consideration created a binding agreement, the creditor(s) could be leveraged by the debtor(s). Subsequently, they (creditor and debtor) will enter into an agreement in which the debtor does not have to repay the full amount owed. Creditor(s) would then be inclined to accept as 'a bird in the hand is worth much more than a bird in the bush'[741]

This situation may arise when a debtor cannot make payments of their debt, such as the commercial lease of a warehouse. In such cases the creditor and debtor enter negotiations with the aim of establishing a repayment schedule. Once these negotiations have commenced, the debtor may state that if they are not given preferential treatment in the form of only having to repay a portion of the debt, they will not pay anything more to the creditor.

To illustrate, consider the following example:

Smith Holdings Ltd owns a warehouse used for commercial purposes and rents it out to other companies. Khan Storage Ltd leases this property from Smith Holdings Ltd for £20,000 per month, payable on the first of each month, as set out in their contract. Initially, this arrangement works for both parties. However, after a few months, Khan Storage Ltd encounters cash flow issues and can no longer pay the full rent as per their

[741] Corbin, 'On Contracts' (1963, West Publishing Company)

agreement, resulting in arrears of £100,000 owed to Smith Holdings Ltd, which is now a creditor in this instance.

Both parties enter negotiations to resolve the issue by creating a payment plan. Smith Holdings Ltd states that they will accept monthly payments to clear the arrears in full. However, Khan Storage Ltd insists on reducing the debt to £75,000 and proposes a more lenient repayment plan to avoid further financial difficulties. They refuse to amend their offer, and if Smith Holdings Ltd does not accept Khan Storage Ltd's terms, they will be forced to evict them and find new tenants. A process that may take a long time, during which Smith Holdings Ltd would not generate any rental income from the property.

If this example was to be analysed in the current state of the law, the result would be that the promise to accept less would not be binding. This is due the fact that no adequate consideration has been provided at law. However, Smith Holdings Ltd would have the option of claiming for promissory estoppel.

Alternatively, If this example were to be assessed in the context that the principle from *Foakes v Beer*[742] had been modified or overturned, then there would be a legally binding agreement between Khan Storage Ltd and Smith Holdings Ltd because a practical benefit would amount to good consideration for promises to accept less. A practical benefit can also be avoiding a detriment[743]. As a result of this, if Khan and Smith agree to the repayment of £75,000 in lieu of the full £100,000, this will be supported by good consideration. Khan would have provided a practical benefit through allowing Smith Holdings Ltd to not lose rental income over the re-letting period.

However, it must be noted that there are some protections in the law already in place to avoid circumstances such as this. It was stated in *Williams v Roffey Bros*[744] that a party's

742 Foakes v Beer (N 1)
743 Willaims v Roffey Bros (N 10)
744 Ibid

actions can only amount to a practical benefit in the absence of economic duress or fraud. The most likely to arise out of the two in the given scenario would be economic duress.

Economic duress is where a party is forced into a contract due to the financial or economic pressure from another. There are five conditions which must be satisfied if there is to be a finding of economic duress.

1. Pressure was exerted on the contracting party. This was demonstrated in the case of *North Ocean Shipping v Hyundai Construction*[745] where a contract was made to build a super tanker for an agreed price. The seller (Hyundai Construction) then refused to complete the contract unless the buyer (North Ocean Shipping) paid an extra 10% on top of the initially agreed amount. North Ocean Shipping agreed to this new term and paid the extra 10% as demanded as they needed the super tanker to fulfil a subsequent contract for the charter of the vessel. It was held that there was economic duress as pressure was applied to North Ocean Shipping to make these extra payments.

2. The second condition is that the pressure applied upon the claimant was illegitimate and not just the operation of competitive business as 'illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining'[746]. In *Atlas Express v Kafco*[747] it was held that Atlas Express could not enforce an agreement to pay a higher price which had been agreed under the influence of illegitimate pressure. However, not all illegitimate pressure has to be unlawful. Unlawful threats will generally amount to illegitimate pressure, as seen *in Pao On v Lau Yiu Long*[748]. However, some lawful threats may also constitute illegitimate pressure. Lawful threats will only be

745 North Ocean Shipping v Hyundai Construction [1979] Q.B 705

746 DSND Subsea Ltd (formerly DSND Oceantech Ltd) v Petroleum Geo Services ASA [2000] 7 WLUK 875

747 Atlas Express v Kafco [1989] Q.B 833

748 Pao On v Lau Yiu Ling [1980] A.C 614

considered illegitimate in exceptional circumstances, such as when they are used to achieve an unlawful goal, as seen in *The Universal Sentinel*[749].

3. The third condition is that said illegitimate pressure induced the claimant to enter into the contract as seen in *Barton v Armstrong*[750]. Armstrong had made a number of death threats to Barton to pressure him into signing an agreement to purchase Armstrong's shares in a company at a substantial over value. Barton agreed to this partly due to the threats but also since Armstrong no longer had controlling interest in the company. It was held that a contract could be set aside where death threats had been received. This threat was at least one cause of entering into the contract. The economic pressure does not have to be the only cause.

4. The fourth condition is that the claimant must have no choice but to enter into the contract as seen in *The Universal Sentinel*[751]. In this case, the International Transport Workers Federation blocked the claimant's ship from leaving dock unless they signed new contracts with their employees. It was held that the contracts were void as the claimant was under duress when signing as they had no choice but to sign the contract with the employees.

5. The fifth and final condition for economic duress is that the claimant must have protested at the time of contracting or shortly after. This was illustrated in *North Ocean Shipping v Hyundai Construction*[752]. In this case, the claimant did protest shortly after the contract was made in regard to the extra 10% being paid for completion which he was forced to agree.

This safeguard means that if there was to be any foul play, there would be some protection. However, it still remains that all five conditions must be met for there to be

[749] Universe Tankships of Monrovia v International Transport Workers' Federation [1983] 1 A.C 366
[750] Barton v Armstrong [1976] A.C 104
[751] Universe Tankships of Monrovia v International Transport Workers' Federation (N 31)
[752] North Ocean Shipping v Hyundai Construction (N 27)

a finding of economic duress and hence this may not always come to aid a claimant. Returning to the previous example given, if Smith Holding Ltd tried to claim for economic duress but they did not protest the agreement out of fear that Khan Storage Ltd making further demands. Their claim of economic duress would fail and the agreement would be considered binding. As a result of this, Smith Holding Ltd would have to abide by it. This is a drawback which cannot be overlooked if the law in this area is to be altered in a substantial way.

This area of law which would be addressed by overturning *Foakes v Beer*[753] has some overlapping features with the principle of promissory estoppel. This operates as a principle of equity and acts to stop a promisor from reneging on one's promise and trying to enforce their pre-existing legal rights. Estoppel protects the reliance interest of the claimant even when there was no good consideration provided and allows for flexibility and a reduction in absurd outcomes. The classic doctrine of promissory estoppel is derived from *Hughes v Metropolitan Railway*[754]. This case established that if a promise cannot be complied with due to the principle of the promise being impossible. It will not be enforceable as it would be inequitable to do so.

On the other hand, this principle does not operate as a direct ban on the exercise of the promisor's rights. If the promisee has been led to believe that the promisor will not enforce their legal rights, they cannot renege on this promise in the short term, but the promisor could rely on their legal rights at a later date. If the promisor does wish to apply their legal rights in the long term, sufficient notice must be given to the promise that this is the intention of the promisor.

753 Foakes v Beer (N 1)
754 Hughes v Metropolitan Railway [1877] UKHL 1

Promissory estoppel legal framework

The modern doctrine of promissory estoppel arises from the case of *Central London Property Trust Ltd v Hightrees House Ltd*[755]. The version of the doctrine extended estoppel to cover representations of intent made by the promisor. Lord Denning stated: 'Where an unequivocal promise is made with the intention that the promisee rely upon it and in fact rely upon it, then it cannot be revoked'[756]. Similar to economic duress, there are five conditions which must be met for a successful claim of promissory estoppel.

1. The first element is that there must be a pre-existing contractual relationship between the party before the promise was made, as exemplified in *Collier v P & MJ Wright*[757]. In *Waltons Stores v Maher*[758], which established the principle of promissory estoppel in Australian law, where there was no actual contractual relationship. It was found in favour of the claimant and would act in a persuasive capacity in the English and Welsh courts.

2. The second condition is that if a clear and unambiguous promise was made to the promisee in regard to the expected future actions of the promisor. These actions shall not be used to enforce their legal rights as per *Woodhouse A.C. Israel Cocoa Ltd v Nigerian Product Marketing*[759].

3. The third condition which must be satisfied is that the promisor must have the intention that their promise shall result in action by the promisee. It is proper to mention that Lord Denning stated in *obiter dictum* comments that a detrimental reliance is not always required for promissory estoppel to be an available

755 Central London Property Trust Ltd v Hightrees House Ltd [1947] K.B 130
756 Ibid
757 Collier v P & MJ Wright (Holdings) Ltd [2007] EWCA 1329
758 Walton Stores (Interstate) v Maher (1988) 164 CLR 387
759 Woodhouse A.C. Israel Cocoa Ltd v Nigerian Product Marketing Co Ltd [1972] A.C 741 A

solution[760]. This comment being obiter means that no binding precedent could have been created. As a result of this, detrimental reliance is still needed for a successful claim.

4. The fourth condition is that the promisee must have acted in reliance on the promisor's promise. These actions must have led to the promisee's position being altered to a position in which it would be inequitable to enforce the original contract[761]. This will not apply in every case since it be equitable for the promisor to renege on their promise. This element will not be satisfied as reliance is required, it cannot be presumed.

5. The fifth condition is that the promisee must also act in a fair and equitable manner to receive an equitable remedy. In *D & C Builders Ltd v Rees*[762] the debtor took advantage of the creditor's financial position. Estoppel could not operate because the promisor's promise not being given of their own free will.

The principle of promissory estoppel collides with partial repayments of debt in the case of *Collier v P & MJ Wright*[763]. Lord Justice Arden enforced promises to accept a part repayment of a debt. This allowed that part payment must actually be made not just the mere promise of it. This common law principle directly undermines the principle derived from *Foakes v* Beer. As a result of this, there is no need for either the Supreme Court or Parliament to alter the current law.

Is change needed?

I believe that change is needed in the law regarding promises to accept partial payment. The key point of thought is that if the law were to be changed, safeguards like promissory estoppel would no longer have to be used as the legal dispute would have

760 WJ Alan & Company Ltd v El Nasr Export & Import Co [1972] 1 Lloyd's Rep 313
761 Société Italo-Belge v Palm Oils the Post Chaser [1982] 1 ALL ER 19
762 D & C Builders Ltd v Rees [1965] EWCA Civ 3
763 Collier v P & MJ Wright (Holdings) Ltd (N 39)

been tackled and further hardship would be prevented. For example, if *Foakes v Beer*[764] was overturned. The issue could be resolved directly between the parties rather than having to apply different legal principles to this area saving time and emotional strain for the parties involved. To conclude, *Foakes v Beer*[765] should be modified or overturned. This would allow for practical benefits to serve as good consideration for promises to accept less/partial payment. This means that the law governing promises to accept less and promises to pay more would be harmonised. However, the method of such change is a contentious issue. This shall be addressed in the subsequent sections.

Method of change

Lord Gibson and Lord Sumption offer advice on how to alter the principles of promises to pay less should be carried out. The two key methods would be the Supreme Court overturning its previous judgment and which could lead to creating new common law principles. On the other hand, this change could be executed by Parliament after review by the Law Commission. Over the following pages, I will discuss what both methods would look like and how they would fulfil this change. Following on from this, I will decide what the most appropriate method of change would be.

Modification of Overturning in the Supreme Court:

The Supreme Court is the highest court in the realm and sets a precedent for all courts below it to follow based on the Ratio Deciendi. This is the reason for the decision in the case and is what creates new precedents. This is exactly what occurred in the case of *R v R*[766]. The Supreme Court could overturn its own decision through the use of the *Practice Statement*[767] as seen in *R v Shivpuri*[768]. Before 1966, the approach that the House of Lords

764 Foakes v Beer (N 1)
765 Ibid
766 R v R [1992] 1 A.C. 599
767 Practice Statement (N 3)
768 R. v Shivpuri (Pyare) [1987] A.C. 1

followed was set out in the case of *London Street Tramways v London County Council*[769]. This case established that the House of Lords was to be bound by its own previous decisions with the only exception to this being if the decision were made *per incuriam*. This was limited to where a decision had been made without consideration of the legislation or precedent of the day, although this was very rare. However, the contemporary application of the *Practice Statement*[770] allows for a wider use of their powers to overrule their previous decision. A key example of this in civil law would be *Pepper v Hart*[771] which overruled the decision in *Davis v Johnson*[772]. This case was in relation to the use of Hansard when trying to determine the intention of parliament. Hansard is used when judges are attempting to interpret ambiguous legislation. However, the Lord Justices of the Supreme Court are reluctant to use the *Practice Statement*[773] as seen in *C v DPP*[774]. In this case, Lord Lowry stated that there were five important factors to consider when employing the powers bestowed by the *Practice Statement*[775].

1. The first is that where the solution to a dilemma is doubtful, judges should be wary of imposing their own answer.

2. Secondly, judges should be cautious when ruling on issues that Parliament chose not to clarify or address through legislation.

3. The third is that areas of social policy over which there was dispute were least likely to be suitable for judicial law-making and should ideally be avoided.

4. The fourth is that fundamental legal doctrines such as judicial precedent should not be lightly set aside.

769 London Street Tramways Co Ltd v London County Council [1898] A.C. 375
770 Practice statement (N 3)
771 Pepper (Inspector of Taxes) v Hart [1993] A.C. 593
772 Davis v Johnson [1979] A.C. 264
773 Practice Statement (N 3)
774 C (A Minor) v DPP [1995] 5 WLUK 198
775 Practice Statement (N 3)

5. The fifth and final main consideration to be made is that judges should not change the law unless they can be sure that doing so is likely to achieve finality and certainty on the issue.

The Supreme Court would be inclined to act following on from Lord Lowry's first recommendation that if there is minimal chance of a solution then no action should be taken. This would not be accurate in this circumstance because action by the Supreme Court may be the very thing that is needed. Their action would be the catalyst for change. This could set a new precedent which would provide arguably the most apt solution to the current issue faced in this legal sphere.
Another reason as to why the Supreme Court may be inclined to act is because of Lord Lowry's fifth recommendation. I believe that a decision to overturn the current law would yield a final and certain resolution to the issue of promises to accept less. This is because the new law would most likely be in line with the law pertaining to other sides of contractual modification such as promises to pay more. This harmonisation would allow for greater certainty for both the claimant and the defendant in these cases. Moreover, the decision would possess an element of finality, as it is highly unlikely that the Supreme Court would overturn its own ruling within a short period, given considerations such as Lord Lowry's recommendations.

However, the Supreme Court may be reluctant to make changes on this area of law. However, parliament has been reluctant to make changes regarding this area of law. Whilst this has not been confirmed through Hansard. It can be inferred that parliament has rejected the opportunity to clear up this known difficulty. This is because the discrepancies between promises to pay more and promises to accept less have been an issue for thirty-three years at the time of writing. Parliament has taken no action to create new legislation for this area to overrule the common law which is in place. To reinforce this point, the court of appeal stated in *Simmons v Castle*[776] that judges should be inclined to change the law if parliament already intends to do so as demonstrated

[776] Simmons v Castle [2012] EWCA Civ 1288

with *Simmons v Castle*[777]. Parliament's introduction of *LASPO*[778] made it clear that in the current circumstances, this course of action would not be appropriate based on this convention.

An additional reason why the Supreme Court could be reluctant to take action is because the fundamental legal doctrine of precedent should not be easily set aside. The precedent set by *Foakes v Beer*[779] has sustained for one hundred and forty years. Such a long-standing principle cannot be easily cast aside and as such this may yield some difficulty when judges attempt to change the law through binding precedent. Besides the technical side of the law, it must be acknowledged that for a new precedent to be set, a case regarding this very issue must come before the court. Said case must concern promises to accept less as its key issue otherwise new precedent cannot be set as seen in *MWB*[780] as in this case it was a mere obiter issue.

For such a case to reach the Supreme Court it must pass through many stages. It must first be heard as a case of first instance in either the County Court or the High Court. If a case of first instance is heard in the County Court, a decision must first be read in the initial case. This must then be appealed in line with the regulations established in the *CPR*[781] which would bring the case to the High Court for review. In exceptional cases, there is a possible further appeal for cases which started in the County Court to allow for them to be heard in the Court of Appeal (civil division). This is provided that the appeal would raise an important point of legal principle or practice and that there is some other kind of compelling reason coupled with the first meaning that the Court of Appeal should hear it[782]. But even if a case did reach this stage, which is highly unlikely, a new precedent cannot be set as the Supreme Court's previous judgment would still

777 Ibid
778 Legal Aid, Sentencing and Punishment of Offenders Act [2012]
779 Foakes v Beer (N 1)
780 Rock Advertising Ltd v MWB Business Exchange Centres Ltd (N 19)
781 Rule 52 of the Civil Procedure Rules (1998)
782 S.55 of the Access to Justice Act (1999)

stand as the Court of Appeal is lower in the court hierarchy. In a case where to be appealed from the high court, there is a higher likelihood of it reaching the Supreme Court as the case would be appealed to the Court of Appeal (civil division) then to the Supreme Court or in rare circumstances straight to the Supreme Court in a 'leapfrog' appeal. Overall, it is highly unlikely that a case will reach the level of importance to be heard in the Supreme Court and subsequently, it will be hard for new binding precedent to be created.

Creation by Parliament:

Besides the Supreme Court, Parliament would be the only body which could create new law regarding this issue. To begin the process of drafting new legislation, it is likely to be recommended by the Law Commission. The Law Commission, which was established by the *Law Commission Act*[783]. It is the main body for law reform in England and Wales. The commission has five members when investigating an area of the law. The chair of the commission is either a High Court or An Appeal Court judge who was appointed to the commission by the Lord Chancellor and Secretary of State for Justice for up to a period of three years. The other four Commissioners would be experienced judges, barristers, solicitors or teachers of the law. They too are appointed by the Lord Chancellor and Secretary of State for Justice, but these appointments may last up to five years and there is the opportunity for a further extension of their tenure to be made, though beneficial. The key roles of the Law Commission are to review and amend the law through codifying the law as seen in *PACE*[784], repealing the law as seen in the *Statute Repeal Act*[785] and consolidating the law as seen in the *Powers of the Criminal Court Act*[786]. These processes allow for the law to develop and to remove anomalies as well as obsolete or unnecessary legislation.

783 Law Commission Act (1965)
784 Police and Criminal Evidence Act (1984)
785 Statute Repeal Act (1995)
786 Powers of the Criminal Court Act (2000)

The Law Commission works in a multi-stage process. Firstly, the Lord Chancellor may ask the commission to review an area of law, or the commission may select areas for reform of their own accord. Following on from this the Law Commission will then prepare a working paper and send it to interested parties and for the press to comment on possible reforms. Subsequently, these comments from the working paper are considered and debated by the commission. At this stage, draftsmen are requested to prepare a bill. Once this has been prepared the bill is presented to the Lord Chancellor with a statement made regarding the current law and details of the feedback given through the previous stages of the process. Following this, the Government decides whether it is prepared to promote the bill through parliament or not. There is no need for the Government to consider every bill or any bill put forward by the law commission. This was exemplified when the Law Commission produced a draft Criminal Code in 1985, but it was never considered by Parliament. However, it must be brought to the attention of the reader that modern legislation has made it more difficult for the Legislature to overlook the Law Commission's comments through the implementation of the *Law Commission Act*[787]. This statute improved the rate at which the Law Commission's recommendations were implemented by the Government, hence becoming law.

For changes to be made for the Principles of *Foakes v Beer*[788], the working paper would be sent to the press but would also likely be sent to large creditors such as banks and others in the finance industry. After their comments have been made, they would be considered by the Commission. Following this, a bill would be drafted to be presented to the Lord Chancellor and Parliament detailing how the law should be changed to allow for promises to accept partial payment with the presence of good consideration should be legally binding.
For the sake of clarity, there are different types of bills. The two types of bills are Government Bills and the other being Private Member's Bills.

[787] Law Commission Act (2009)
[788] Foakes v Beer (N 1)

1. A Government Bill is introduced as a result of the Government of the day making promises and carrying them out such as delivering on manifesto promises.

2. A Private Member's bill is introduced by an individual MP rather than a government minister, but these types of bills are rarer. The parliamentary process allows for a ballot in each session in which twenty MPs are selected to present their bill to the House of Commons. Debating time is limited so only six or seven ballots have a realistic chance of introducing their bill. Not many are successful but one of the few private Members Bills which has become statute would be the *Arbitration Act*[789]. Beyond this there are two subdivisions of bills. These are Private and Public Bills.

    A. A Private Bill will affect one particular area or organisation instead of the whole country, an example of this would be the *UCL Act*[790] which was passed to combine two schools of medicine.

    B. A Public Bill would be a Bill which affects the whole population often concerning a general issue of public policy such as the *Disability Discrimination Act*[791]. The new Bill that would be introduced to effect promises to accept partial payment would most likely be a Government Bill and a Public Bill as it will be introduced by a government minister after a recommendation by the Law Commission and it will affect the General population rendering it a Public Bill.

Once parliament has agreed to consider the bill it must go through the nine stages of the legislative process. It is important to note that this process can be carried out by either the House of Lords or the House of Commons. The first stage of this process is the

[789] Arbitration Act (1967)
[790] University College London Act (1996)
[791] Disability Discrimination Act (1995)

issuing of a Green Paper. A Green Paper is issued by the minister with responsibility for the matter. It is a consultative document on a topic in which the government's view is put forward with a prospectus for change. Interested parties are invited to comment so the full consideration of the people is taken on board and if necessary, changes can be made. Green paper consultations are valuable as it allows time for more consideration and hence avoid an unwise reaction to incidents which sometimes result in unworkable legislation such as the *Dangerous Dogs Act*[792].
The second stage will be the White Paper. This is a document that is published by the government and contains a firm proposal for the new law and the government decides to proceed with the legislation. Following this, a draft of the legislation will be produced and introduced to parliament.

Following this stage, there is the first reading of the proposed bill. A first reading is a formal procedure where the main aims and name of the bill are read out. This lets MPs and the public know about the proposed legislation. At this stage there is usually no discussion or vote around the matter. After some time, the second reading then commences. In this stage the bill is fully debated by the House of Commons and a vote is taken which needs a majority in favour of the bill for it to progress to the subsequent stages of the process.

Thereafter, the bill progresses to the Committee stage. This is where the current form of the bill is put under inquiry by members of the public such as businesses, concerned citizens, public services, and the media as well as discussions taking place about the proposed bill between representatives and constituents. Next the bill will face the report stage. This is where the House of Commons will debate and change the bill as needed following the public's recommendations. If there are no amendments to be made there will be no report stage, but this is very rare.

The seventh stage of the legislative process is the Third reading. At this stage, members of the House vote on the final form of the bill and it is then passed over to the House

[792] Dangerous Dogs Act (1991)

of Lords or vice versa depending on where the bill was first put forward. Once in the House of Lords, the bill will go through a similar process to the one it faced in the House of Commons until the House of Lords are content with it form and then sent back to the House of Commons and will continue to go back and forth until both houses are content with the final form of the bill. It must be brought to the attention of the reader that the House of Commons does not always require the assent of the House of Lords. The Lord's powers are limited by the *Parliament Acts*[793] [794]. These allow for a bill to move forward even if that form of the bill is rejected by the Lords but a two-year period of stalemate between the houses must have passed for this to be possible. If this power is to be employed by the House of Commons, the bill must face all of the aforementioned stages again but will just skip over the House of Lords stage. It is worth mentioning that this is exceedingly rare circumstance and is only used as a last resort, having only been used four times since 1949 an example of such being the *War Crimes Act*[795].

Once all parliamentary stages have been completed the bill moves to its final stage before becoming law, Royal Assent where the Crown formally approves the bill and hence makes it law. An act of law will come into force at midnight of the day of royal assent unless a specified date for this has been set. There is a growing trend for acts not to be implemented immediately as seen with the *Disability Discrimination Act*[796]. There is also the instance where an act never comes into force despite it receiving royal assent such as occurred with the *Easter Act*[797].

If the principles governing promises to accept partial payment were to be changed by Parliament, the Law Commission would carry out their aforementioned role and the bill would go through the white and green paper stages to its first reading. When it comes to

793 Parliament Act (1911)
794 Parliament Act (1949)
795 War Crimes Act (1991)
796 Disability Discrimination Act (N 72)
797 Easter Act (1928)

the second reading, it will likely be discussed how to reach an adequate balance between the creditor and the debtor so as to not be unfair to one party. Regarding the Committee stage, it is likely that banks and money lenders will be the principal parties to voice their opinion on the matter alongside most of the public as the vast majority of the population have debt in one form or another be it a credit card or a mortgage. These recommendations will then be considered, and the bill will be reassessed. It is doubtful that the House of Lords would unnecessarily waylay the bill allowing it to progress past this stage to later gain royal assent to then become statute as there would be minimal reason to delay its enactment.

Preferred Method of Change:

One of the fundamental principles of the United Kingdom's uncodified Constitution is parliamentary sovereignty meaning that parliament is free to make or unmake law with no to minimal constraints in doing so. This renders them the highest legal authority in the realm, above the Judiciary. The Legislature should be responsible for the creation of laws, not the Judiciary, as to respect the principle of the separation of powers. However, the Judiciary has the opportunity to quickly react to social change through setting a new precedent. This advantage cannot be overlooked as seen in *Fitzpatrick v Sterling Housing Association*[798]. Nevertheless, some commentators suggest that the Judiciary's approach might have stretched too far to be seen as unconstitutional. In this circumstance, it would be most appropriate for Parliament to overturn or modify the principles of *Foakes v Beer*[799] instead of the Supreme Court.

Conclusion:

In conclusion, reform is needed in cases where a creditor agrees to accept partial payment. The most appropriate approach is for Parliament to legislate, ensuring such promises when they are supported by good consideration, like a practical benefit. This

[798] Fitzpatrick v Sterling Housing Association [2001] 1 A.C. 27
[799] Foakes v Beer (N 1)

would allow the formation of legally binding contracts, similar to agreements to pay more. Subsequently, there would be less litigation and greater certainty when agreeing on this nature.

The CLR Blog.

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The following piece
from **The CLR Blog.** has been selected
to be featured in Volume VII of the CLR.

Unlocking Africa's Economic Potential: A Critical Examination of The African Continental Free Trade Area's Protocol on Competition Policy

By Shaurya Shrestha Awasthi & Sneha Sharma, LLB V

ABSTRACT

With the promise of a single market to spur growth and competitiveness, the African Continental Free Trade Area (AfCFTA) represents an important turning point in African economic integration. It aims to boost up intra-African trade, to accelerate the development of African countries and increase the competitiveness of African industrial products. In the effective realization of such a goal, Member states have adopted the Competition Policy Protocol which seeks to eliminate potential anti-competitive risks, foster innovation, and maintain fair competition in the market. But given the particular difficulties facing Africa, questions remain about how the Competition Protocol will be implemented.

This article thoroughly analyzes the protocol, examining its strengths and weaknesses. It also proposes solutions to overcome obstacles, enabling African countries to fully realize the transformative potential of the AfCFTA. By addressing these challenges, the agreement can promote sustained economic growth and foster shared development within and across the continent.

INTRODUCTION

The African Continental Free Trade Area (AfCFTA) is a one-of-a-kind initiative to create a single, integrated African market. The AfCFTA aims to boost intra-African trade through economic integration, accelerate the development of African countries, increase the competitiveness of African industrial products, and enhance the participation of the continent in global trade.

However, such efforts of trade relaxations and inclusive growth can be nullified by companies operating in AfCFTA resorting to anti-competitive behaviours or strategies. Therefore, enacting competition policy or provisions in AfCFTA is a *sine qua non* to fulfilling the objectives of economic integration and trade liberalisation. The adoption of the Protocol on Competition Policy by AfCFTA member states provides a solid foundation for fulfilling the objectives and aspirations of AfCFTA.

The Protocol on Competition Policy aims to promote and enhance competition, foster innovation, and eliminate anti-competitive practices, which ultimately facilitate the economic integration of the African continent. Despite the immense benefits of the Competition Protocol, its implementation seems dubious, considering the various issues encompassing the Protocol and the practical challenges surrounding the African Continent.

This article critically analyses the Protocol on Competition Policy in a comprehensive manner with probable areas of concern. It provides recommendations to overcome challenges in implementing the Protocol to foster economic growth in Africa. By addressing these issues head-on and devising pragmatic solutions, African nations can unlock the transformative potential of AfCFTA, paving the way for sustained economic growth, prosperity, and shared development across the globe as well as within the continent.

UNFOLDING THE KEY DIMENSIONS OF COMPETITION POLICY PROTOCOL

The Protocol aims to establish a unified pan-African competition regulation regime that supports economic integration. It seeks to ensure that trade liberalization gains are not undermined by anti-competitive behaviour. Additionally, it oversees the interaction between sectoral regulatory laws and competition regimes at national and regional levels.

The scope of the Protocol applies to any undertaking having a continental dimension and significant impact on the competition in the African continent.[1] It excludes its application to employment matters and conditions, including collective bargaining.[2] The Protocol addresses anti-competitive behaviors in the market, including practices that restrict or distort competition, abuse of dominant position, and abuse of economic dependence.

Notable Highlights and Innovations of the Protocol:

Prohibition of Anti-Competitive Business Practices

The Protocol prohibits both horizontal and vertical anti-competitive conduct unless there is clear evidence that technological, or efficiency gains outweigh its negative effects. The prohibitory conduct within horizontal agreements includes bid-rigging, price-fixing, and restraint upon production quotas in the AfCFTA market.[3] Under vertical agreements, minimum resale price maintenance and passive sale restrictions are prohibited unless the recommendation is non-mandatory.[4]

[1] ibid.
[2] ibid.
[3] ibid.
[4] ibid.

Inclusion of Abuse of Economic Dependence

The inclusion of the abuse of economic dependence by platforms in the Protocol is a major innovation in the competitive regime of AfCFTA.[5] This regulation aims to prevent platforms from exploiting their superior bargaining positions, which leads to supply chain inefficiencies and negatively impacts trade and regional integration. Additionally, the Protocol allows certain platforms to be designated as 'gatekeepers'-entities that control access to markets or essential services. As gatekeepers, these platforms are prohibited from engaging in self-preferencing, where they favor their products or services over those of competitors. They are also restricted from using consumer or business data collected through their platform to gain an unfair competitive advantage.

Check Upon Mergers and Acquisitions

The Protocol ensures that the mergers must be notified upon the occurrence of a permanent change of control. Specifically, the transactions must showcase a continental dimension, affecting competition in at least two state parties outside the same regional economic community. They must also meet specific financial thresholds and consider public interest and competitiveness.[6]

Provision of Technical Support, Cooperation and Capacity Building

The Protocol provides for technical support, collaboration, and capacity building, which not only helps in generating awareness among member states but also helps in creating a solid national competitive regime. As per the Protocol, the AfCFTA Secretariat will work with State Parties, Regional Economic Communities, and development partners to

[5] ibid.
[6] ibid.

strengthen institutional capabilities and provide technical assistance in enacting competition legislation and establishing enforcement bodies.[7]

These are a few of the most important aspects addressed in the protocol to prohibit and eliminate the distortion of competition. This, in turn, supports the free flow of goods and services and spurs economic growth across the Continent.

NAVIGATING THE COMPLEXITIES OF AFCFTA PROTOCOL ON COMPETITION POLICY

The AfCFTA brings significant economic prosperity to the African countries through integration among African Union member states.[8] The formulation of the Competition Protocol is a positive step towards this objective. However, there are significant challenges that need to be addressed to ensure effective implementation of the AfCFTA competition protocol, which is determined to lead global trade. It ensures effective use of the vast resources unevenly distributed[9] across the countries of Africa.

Exploring Real-World Hurdles in Aligning RECs with Protocol on Competition Policy

The AfCFTA integrates and harmonizes the existing Regional Economic Communities (RECs) to enhance competition in African economies.[10] To address market uncertainty caused by differences between RECs and the Competition Protocol, Article 3 states that the Protocol will prevail in case of conflict with regional competition agreements.[11] However, the protocol contains no suitable mechanism which guides consistent intranational management and harmonization of competition regimes at regional and continental levels.

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[7] ibid.

[8] Mesut Saygili et al, *African Continental Free Trade Area: Challenges and Opportunities of Tariff Reductions*, UNCTAD Research Paper No. 15 (2017).

[9] De Melo Jaime et al, *Regional Integration in Africa: Challenges and Prospects*, UNU-WIDER (2014).

[10] Protocol To The Agreement Establishing The African Continental Free Trade Area on Competition Policy art. 2, Feb. 18-19, 2023.

[11] *Supra* note 2.

The AfCFTA aims to integrate African countries into the world's largest free trade area. This integration is expected to enhance competition, which could lead to the efficient use of resources in promoting trade. However, the RECs have a higher level of integration among themselves in comparison to the residual areas of Africa such as North Africa (outside COMESA), parts of Central Africa not fully integrated into ECCAS, and certain West African nations that are not ECOWAS members. It would be a significant challenge to divert their integration under a new framework with a different set of regulations. In case of disregard by the prominent Regional Economic Communities, it would be highly challenging for the AfCFTA Secretariat and national governments to deal with the anti-competitive effects. Thus, it would be more difficult to address the competition concerns at the REC level than the continental level.[12]

Impediment of Overlapping Membership in Implementation of Competition Protocol

National and regional competitive frameworks with specific jurisdictional reach can adversely impact the implementation of the Protocol on Competition Policy. The lack of uniformity in the competition regimes among the countries does pose great challenges to economic integration. The overlapping membership of countries in Regional Economic Communities (RECs) like the East African Community (EAC) and Southern African Development Community (SADC), along with AfCFTA, would complicate the implementation of supranational competition enforcement.[13]

Overlapping memberships across multiple regional agreements make it challenging to fulfill the compliance requirements of a member state. This is because these agreements encompass varying rules and regulations with unique sets of arrangements. Such a problem of overlapping membership can impede the realization of the trade potential of

[12] Willard Mwemba, *The African Continental Free Trade Area Competition Protocol: a necessity or an overzealous endeavour?* 19 COMPET. LAW J (2023).
[13] *Ibid.*

AfCFTA and pose significant challenges in the harmonization of standards across Africa.[14]

Non-Inclusion of Public Interest Consideration in Abuse of Economic Dependence

Another major area of concern in the protocol is the absence of the consideration of public interest under Article 11.[15] Article 11(3)[16] of the Protocol prohibits the abuse of economic dependence over a supplier or a customer if the conduct substantially impacts the competition in the market.[17] Assessment of abuse of economic dependence under such a framework follows a traditional approach, e.g. considering consumer welfare or the impact on competition in the market. Normally, a dominant buyer who extracts gains from the supplier because of its strong bargaining position passes those benefits to end consumers. As a result, such conduct is not found to be abusive when weighed against a consumer welfare standard.[18]

However, this conceptual framework ignores AfCFTA's public interest objective. It does not consider the adverse impact upon suppliers, particularly SMEs, who are exploited by dominant buyers with unfair conditions of business such as excessively cheap pricing, shifting unnecessary risk to them or straining their margins and earnings. It overlooks the exploitative treatment of SMEs by dominant buyers while maintaining consumer welfare standards. Such a supplier-oriented approach is required for public interest, specifically for the growth of SMEs and the sustainable economic development of the African continent. Specifically, considering Africa's socio-economic situation, where SMEs make

[14] United Nations. Economic Commission for Africa, *Harmonization of standards across Africa is vital to the realization of trade and industrialization potential of the AfCFTA* (2020).

[15] *Supra* note 6.

[16] Protocol To The Agreement Establishing The African Continental Free Trade Area on Competition Policy art. 11(3), Feb. 18-19, 2023.

[17] ibid.

[18] Zoe van der Hoven et al, *An economic perspective on the new South African buyer power provision and enforcement guidelines*, 16 COMPET. LAW INT. 139, 140-141 (2020).

up more than 90% of total businesses[19], public interest considerations are crucial for their growth. Otherwise, dominant buyer power would continue to exploit SMEs, defeating the goal of economic prosperity.

EXAMINING OTHER SIGNIFICANT GAPS IN THE IMPLEMENTATION OF THE AFCFTA COMPETITION PROTOCOL

Apart from the potential limitations of the Protocol, there are other factors which impact its implementation. The first and foremost is the *size[20] of the African* continent. Its geographical variation would pose difficulties in implementing a centralized Competition Policy across different regions. There would be a requirement of immense capital to raise production and facilitate fair trade in response to the Competition Protocol. Further, the *lack of investment in infrastructure* would impede the advancement of trade.[21] As a result, most AfCFTA member states lack strong institutional capacity, suffer from low levels of competitiveness, and have limited capabilities to participate in regional value chains. Effective implementation of the Competition Protocol requires robust production capabilities; without them, member states cannot fully capitalize on its benefits.[22]

A significant portion of Africa's vast natural resources is unevenly distributed across the continent. These resources have not been developed due to a lack of information, adequate capital, and excessive foreign dependence.[23] Moreover, *political instability* in African countries should be addressed to ensure successful implementation. The

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[19] The African Union Annual Small and Medium Enterprises Forum, AFRICAN UNION (Mar. 18, 2023, 6:20 PM), https://au.int/en/newsevents/20220627/african-union-annual-small-and-medium-enterprises-forum.

[20] 'JEFF DESJARDINS, *MAPPED: VISUALISING THE TRUE SIZE OF AFRICA' (VISUAL Capitalist)*, MISC (Mar.18, 2023, 8:25 PM), https://www.visualcapitalist.com/map-true-size-of-africa/.

[21] *Supra* note at 12.

[22] Kasirim Nwuke*, I Confess, I am an AfCFTA Sceptic*, THE AFRICA REPORT (Mar. 17, 2023, 8:50 PM), https://www.theafricareport.com/176253/i-confess-i-am-an-afcfta-sceptic/.

[23] Victor H. Mlambo, *The African Continental Free Trade Area: Challenges and Possible Successes* 12 LAJTP (2022).

increased political differences, such as a lack of political will, issues of sovereignty, territorial integrity, fear of dumping goods, and competing hegemonic interests, have harmed trade in the continent.[24]

Another significant challenge is the *huge variation in economic development* among the member states. It is well established that countries still in the early stages of economic growth are less likely to prioritize competition law.[25] The AfCFTA's focus on centralizing competition laws would face substantial difficulties due to varying levels of response and cooperation from national authorities.

There is a threat to effective coordination in enforcing competition laws at the national, regional, and continental levels. This increases the risk of the protocol failing to function effectively. It could also undermine existing national and regional competition enforcement frameworks, potentially leading to further economic decline in African countries.[26]

PROPOSING THE WAY FORWARD: THE PATHWAY TO EFFECTIVE IMPLEMENTATION OF THE COMPETITION PROTOCOL

The foundation of the AfCFTA was meant to accelerate the economic development of the countries of Africa. However, it is necessary to have effective implementation of the Competition Protocol to ensure that all AfCFTA member states are adequately benefitted. The aforementioned gaps need to be addressed to boost trade opportunities in Africa.

[24] *Ibid.*
[25] *Supra* note 13.
[26] *Supra* note at 18.

Harnessing the Role of RECs in economic integration and harmonization

The African Continental Free Trade Area (AfCFTA) acknowledges the role of RECs in the intra-regional trade agreement. The RECs exhibit a higher degree of integration and are well-positioned to coordinate among member states. They can help mediate disagreements arising from inconsistencies between regional frameworks and the AfCFTA Competition Protocol. The RECs can play a crucial role in ensuring that AfCFTA regulations are accepted by member states. This, in turn, would lead to more effective implementation.[27]

For instance, one of the RECs, namely the Economic Community of West African States (ECOWAS), has played a crucial role in tariff negotiations between the member states. It provided a mechanism to represent the interest of private sectors as a means to advance the "regional positions" on the AfCFTA.[28] Furthermore, ECOWAS initiatives, such as infrastructure projects and customs reforms, can significantly enhance free trade by advancing intra-African trade frameworks. This would be conducive to the effective implementation of AfCFTA.

Maximizing Member State Engagement

The AfCFTA has been envisioned to stimulate socio-economic prosperity among the AfCFTA member states. Stakeholders of the AfCFTA Competition Protocol must cooperate with central authorities to promote fair competition and advance intra-African trade. Member countries can play a pivotal role in effectively implementing the AfCFTA through various measures. Synchronising domestic trade policies with the regulations

[27]Amanda Bisong, *ECOWAS And The Role Of The Recs In Afcfta Implementatio*n, ECDPM (Mar. 18, 2023, 9:00 PM), *https://ecdpm.org/work/the-african-continental-free-trade-area-from-agreement-to-impact-volume-9-issue-1-2020/ecowas-and-the-role-of-the-recs-in-afcfta implementation#:~:text=RECs%20are%20important%20for%20the,mediate%20disagreements%20between%20member%20states.*

[28]ibid.

under the AfCFTA would address inconsistencies in competition policies at the regional, national, and continental levels.

The member states can undertake positive steps to advance trade through the creation of better treaty networks in Africa, which would reduce immigration hurdles and result in the enactment of trade and industrial policies with a prime focus on value addition.[29] Member countries should actively publicize the latest updates on the AfCFTA, including its benefits and progress. They should also ensure that AfCFTA documents are easily accessible to promote awareness. This would encourage greater acceptability, coordination, and integration among stakeholders in the Competition Protocol regime. Member states can use AfCFTA regulations to guide key stakeholders in aligning their operations with the protocol.[30]

Empowering SMEs: Addressing Abuse of Economic Dependence for Public Good

As previously mentioned, *Article 11 of the Protocol on Competition Policy*[31] does overlook the concerns of suppliers, specifically SMEs. A supplier-oriented approach should be sought while formulating the framework of abuse of economic dependence. Such an approach is required in the public interest, specifically for the growth of SMEs and the sustainable economic development of the African continent. It not only ensures the welfare of consumers but also upholds the interests of other economic actors, namely SMEs, in the public interest, leading to equitable access to the African market.

It is imperative to empower Small and Medium Enterprises (SMEs) to promote social welfare, innovation, and economic progress. SMEs must be provided with a level playing field to counter the abuse of high bargaining power by large corporations. Therefore, the

[29] *AfCFTA's potential solutions to Africa's trade obstacles*, PWC (Mar.19, 2023, 8:30 PM), *https://www.pwc.com/ng/en/assets/pdf/afcfta-potential-solutions.pdf.*
[30] ibid.
[31] *Supra* note at 6.

Protocol must include appropriate provisions in the public interest to support SME empowerment.

CONCLUSION

The Protocol on Competition Policy broadens the competition law framework to promote fair trade across the continent. The Protocol aims to promote economic growth and prosperity in African markets as a means of fostering global trade. It eliminates anti-competitive practices and aspires to create innovative and competitive markets. However, significant gaps hinder the effective implementation of the Competition Protocol and must be addressed. This initiative has great potential to harmonize the different regional and national competitive frameworks. The RECs and the member states can significantly contribute to the fullest realization of AfCTA's objectives and its implementation with utmost diligence.

Afterword

By Lucy Heap, LLB2,
Senior Article Editor of The City Law Review Volume VII

As we conclude this volume of *The City Law Review*, we take a moment to reflect on the depth of scholarship and the evolving landscape of the legal field that has shaped the articles within these pages. This year, a strong thematic thread has emerged one that highlights the legal industry's gradual yet undeniable shift away from traditional court-based litigation and toward arbitration and alternative dispute resolution (ADR). The prevalence of ADR-focused discussions in this volume reflects not only an academic interest but also the broader transformation occurring in practice, as efficiency, flexibility, and the pursuit of equitable solutions drive the legal profession forward.

The authors of this journal have engaged with a diverse range of legal disciplines, dissecting the implications of procedural shifts and doctrinal developments while contextualising them within the framework of contemporary legal challenges. From contractual disputes resolved through arbitral tribunals to international commercial mediation, and from the ever-changing nature of patent rights to the expanding scope of judicial review, the pieces in this edition shed light on how the legal community is adapting to an era where legal processes are becoming more dynamic and responsive.

Beyond the discussion of these key themes, this volume serves as a testament to the intellectual rigor and commitment of our contributors, students, and academics alike who have devoted themselves to exploring pressing legal questions. Their insights contribute to an ongoing dialogue that bridges the gap between theory and practice, ensuring that legal scholarship remains relevant in shaping the future of law and justice.

As we look ahead, it is crucial that we continue to engage in critical discourse, challenging conventions while embracing the innovations that redefine our legal systems. The work presented in this journal highlights our collective responsibility to adapt, evolve, and make meaningful contributions to a rapidly changing legal landscape.

On behalf of the editorial team, I would like to extend my deepest gratitude to the authors, editors, and managers who have contributed to the creation of this volume. Your dedication to legal inquiry and scholarship is invaluable, and we hope that the ideas explored in these pages will serve as a catalyst for further discussion, research, and reform.

Sincerest Regards,
The Editorial Board
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