OCTOBER 2026

ISSUE 48 & 49 | SPECIAL EDITION

THE QUARTERLY JOURNAL OF NZDRC AND NZIAC

ReSolution



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From the Editor



Tēnā koutou katoa,

Welcome to this special edition combining the 48th and 49th issues of ReSolution. We have been on the road these past two quarters! Our team has divided itself between Wellington and Christchurch, attending the NZLS Property Law Conference and then the ILANZ conference in the same week. It was great to catch up with colleagues, see old friends and make new ones.

NZDRC sponsored Dentons' session on commercial leases at the Property Law Conference. One topic in the paper was the Consumer Price Index formula in the ADLS standard deed of lease, and a recent case on its application: A & H (Kumeu) Limited v Kumeu Playschool Limited [2025] NZHC 843. This was decided by NZDRC arbitrator, Catherine Green. The High Court agreed with the award, calling it "careful and reasonable" and noting that it was mathematically correct.

At the end of June, I presented a webinar to ILANZ – 'They have a hopeless case – why won't they settle' based on my article in ReSolution issue 42.

In our feature article, NZDRC and NZIAC panellist Gerard Doolin examines early-stage dispute resolution for software project disputes. This is particularly important in situations where parties are misaligned during the design or construction phases.

A theme in this issue is whether the same arbitrator must hear subsequent disputes between the parties to an arbitration. We look at two New Zealand cases, Galbraith and Van Leeuwen, and Hill Dickinson looks at the UK Petroleum Exports case. We also review a recent important New Zealand Court of Appeal decision on the reasonableness of withholding consent under cross leases.

In our Case in Brief, we look at the United Kingdom Supreme Court's decision on the Spain Energy Charter Treaty saga. Our former colleague, Dr Richard Pidgeon, looks at an English Court of Appeal case on the finality of a Rabbinical arbitral award. We also share articles from Rajah & Tann Asia, Peters & Peters, Des Voeux Chambers and Hill Dickinson.

Thank you to these authors and all who have contributed to this issue. Contributions of articles, papers, and commentary for future issues are always welcome.

I hope you find this issue interesting and useful. Please feel free to share ReSolution with your friends and colleagues, or ask them to register with us.

Ngā mihi nui, nā

Michael Jamieson

ReSolution is the quarterly journal of NZDRC and NZIAC, published online each February, May, August, and November. ReSolution contains a wide variety of articles on dispute resolution covering topics relevant to both the domestic and international markets, across a broad spectrum of dispute resolution practices.

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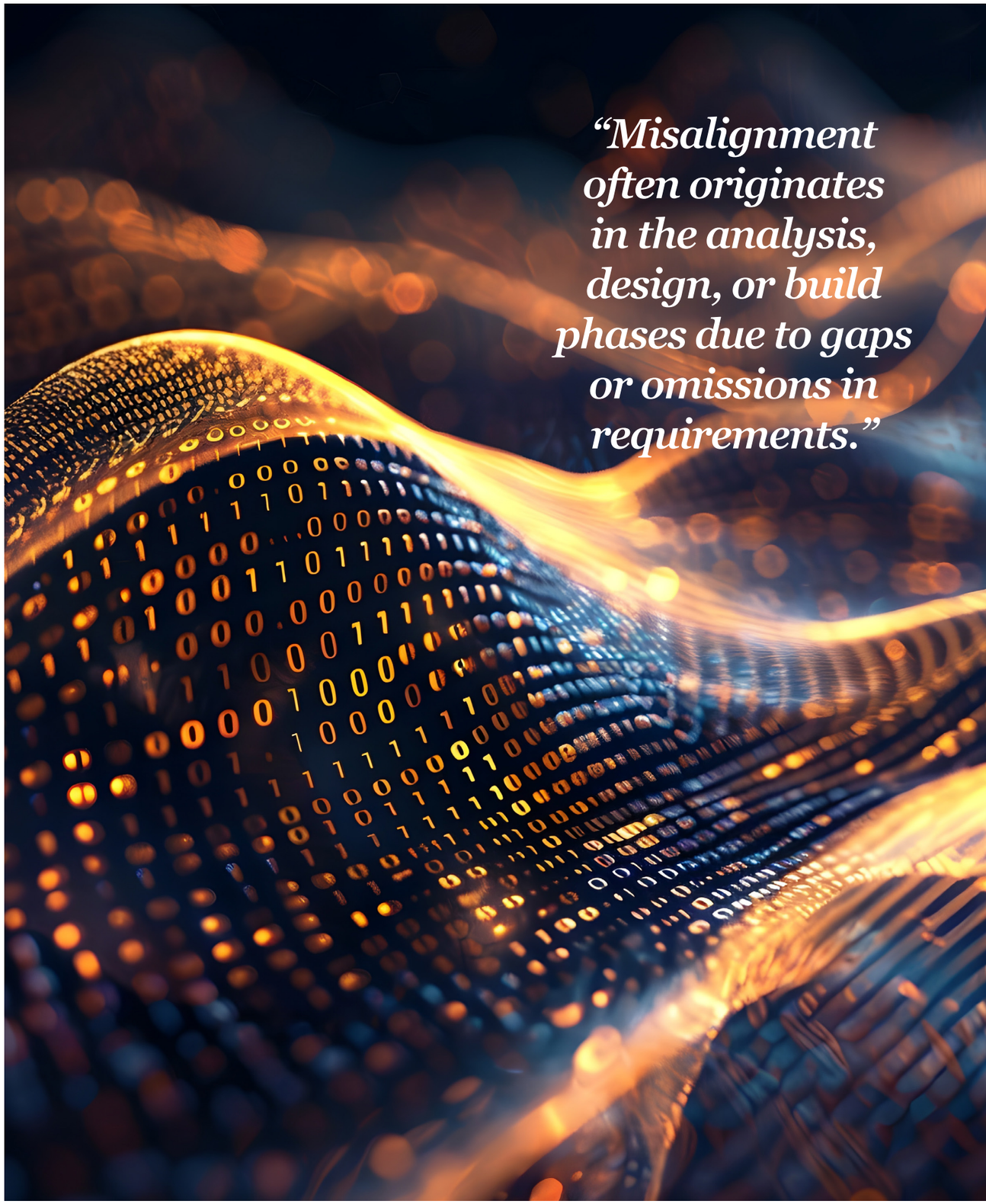
ADR FOR MISALIGNED SOFTWARE PROJECTS

Written by **GERARD DOOLIN**



This two-part series examines early-stage mechanisms for avoiding and resolving misaligned software project contracts. Part I synthesises research findings on common sources of misalignment and outlines practice-oriented mediation considerations. Part II analyses facilitation as a structured, non-adjudicative process, with particular attention to relationship models and the role of "restoration" in re-establishing alignment and delivery confidence.

To ensure consistency of usage, key terms are defined below and applied in that sense throughout this series.



Definitions

For the purposes of this series, the following terms are used as follows:

a. **Misalignment:** a material divergence between contractual expectations (including scope, requirements, governance, and delivery assumptions) and the project's evolving technical and operational reality.
b. **Alternative dispute resolution (ADR):** consensual, private processes used to prevent, manage, or resolve disputes outside court litigation, including mediation and facilitation.
c. **Mediation:** a confidential, without-prejudice process in which a neutral assists parties to negotiate and reach a mutually acceptable agreement (without imposing a decision).
d. **Facilitation:** a structured, non-adjudicative process in which a neutral designs and guides a collaborative discussion to clarify issues and support agreed next steps—not a binding legal decision (without determining rights or liability).
e. **Restoration:** the deliberate rebuilding of functional working relationships, confidence, and alignment sufficient to support continued performance and delivery.
f. **Issue/negotiation framework:** a living, structured document that records and organises issues, positions, options, and agreed actions to support systematic progress.

The New Zealand International Arbitration Centre **(NZIAC)** and Gerard Doolin (an NZIAC Panel Mediator and member of the Vienna International Arbitration Centre **(VIAC)** Mediator List, with expertise in software project contract disputes) have collaborated on this two-part series.

Part I (published in the *Kluwer Mediation Blog* in April 2025) reports on a joint research and design initiative between NZIAC and Gerard concerning misaligned software project contracts and the role of alternative dispute resolution (ADR). It also examines the application of mediation in this context.

Part II, co-authored by Gerard and NZIAC Director John Green, examines facilitation as a mechanism for addressing misaligned software project contracts, with particular emphasis on relationship models and the concept of restoration.

Part I – Mediation in Misaligned Software Projects

1. Understanding the Challenge

From 2019 to 2022, NZIAC collaborated with Gerard on an international research initiative examining the causes of software project misalignment and the role of alternative dispute resolution **(ADR)** mechanisms in mitigating or resolving emerging contract disputes.

The findings of this research, published in the report *Avoiding Conflict and Improving Dispute Resolution for IT Projects,* highlight that misalignment often originates in the analysis, design, or build phases due to gaps or omissions in requirements. These issues may stem from vendor–customer engagement during procurement, deficiencies in the vendor's solution, or a combination of both.

Software project misalignment can have severe consequences, including cost overruns, missed deadlines, and, ultimately, project failure. When issues remain unresolved, disputes often escalate into formal contract claims, leading to arbitration or litigation that can be costly and time-consuming.

In such scenarios, engaging a neutral mediator with industry expertise at an early stage can help prevent disputes from escalating. To support this approach, NZIAC and Gerard developed model contract modules, based on Agile or Waterfall governance frameworks, for inclusion in software project contracts. These modules encourage early mandatory party–to-party identification of delivery risks, thorough dialogue to find solutions, and, if necessary, engagement of a mediator with industry knowledge to conduct a mediation or an adjudicator with technical expertise to issue an interim binding determination. The aim is to reset project delivery rather than allow disputes to spiral out of control.



The key factors for successful resolution after a software project becomes misaligned are confidence in the solution, its delivery, and the relationships between stakeholders. Without these elements, project recovery can be significantly more challenging.

2. Core elements in the mediation of software project contract disputes

Against this background of technical, commercial, and relational risk, mediation—if engaged at an early stage and designed with appropriate structure—can provide a framework for re-establishing alignment and delivery confidence.

2.1. Preparation by framing the issues.

A mediator's role extends beyond reviewing contractual terms. The mediator should first request that each party provide a concise summary of its commercial, technical, and project-delivery perspectives on the causes of misalignment. Given that software project contract disputes often arise in the early to mid-project phase, common issues include delay, dissatisfaction with solutions, performance concerns, skill gaps, or budget constraints.

To ensure a structured approach, the mediator should issue a thematic questionnaire asking each party to articulate its views on misalignment within a specific project phase (e.g., analysis, design, build, or test) and a corresponding matter (e.g., scope, deliverables, personnel, schedule, or budget). This helps clarify whether the issue stems from a lack of understanding of business requirements, miscommunication between teams, or unexpected technical challenges.

The mediator can then consolidate the responses into a list of key commercial, technical, and delivery issues, together with any differences in perspective, to guide discussion. By identifying gaps in understanding early, the mediator can help focus engagement on the most critical areas.

2.2. Workshop approach

For software project contract disputes, an initial workshop-style meeting with a structured agenda is recommended. This format allows

parties to discuss key subject matters in a neutral and open setting.

Key considerations for the mediator include:

a. Neutral facilitation: establishing a process that enables parties to present perspectives without prejudice and promotes active, respectful listening.

b. Prioritisation of issues: Carefully listening to the evolution of the parties' commercial, technical, and contractual positions, intervening where necessary to reframe and prioritise interlinked issues.

c. Hierarchy Considerations: Noting whether individuals in project management or technical roles feel free to speak openly in the presence of senior managers and encouraging their participation.

d. Joint and Separate Sessions: Beginning with a joint session to share respective views, followed by breakout sessions as needed to explore priority issues in depth and bridge gaps between parties.

Ensuring the presence of key decision-makers—senior project managers, software specialists, service area managers, and executives—is crucial. While legal counsel may participate, the mediation process should initially focus on open exploration rather than rigid legal positioning.

2.3. Creating an issue or negotiation framework

Software project contract disputes often involve complex technical and delivery issues. To manage this effectively, the mediator should develop an issue or negotiation framework (as defined above)—a structured document that organises subject-matter issues:

a. by project phase (e.g., analysis, design, build, test);

b. by category (e.g., technical issues, commercial budget concerns, system design specifications, integration scope); and

c. by priority level based on resolution urgency (e.g., critical milestone deliverables).

The mediator should update and share the framework with the parties throughout the process. Doing so can help maintain momentum and ensure that concerns are tracked and addressed systematically.

3. Management of the mediation process

In practice, mediation in misaligned software projects rarely proceeds as a single, self-contained event. Effective outcomes depend on active process management across preparation, engagement, and follow-up.

Beyond initial issue framing and workshop engagement, effective mediation in misaligned software projects requires deliberate attention to process management over time.

3.1. Structuring the mediation timeline

Mediation should be seen as a process, not an event. Each issue may require time for review beyond the mediation sessions. Before concluding an initial mediation day, the parties should agree on the scope of outstanding issues, the parameters for their review, and a realistic but expedited timetable for resolution.

Key stakeholders who participate in the mediation should remain engaged in follow-up discussions rather than delegating matters to new colleagues, unless a subject-matter expert is required. Consistency in participation supports continuity in understanding and decision-making.

3.2. Observing, assisting, and reinvigorating

Mediating software project contract disputes requires close observation and process-management skills. Software systems are inherently complex, and project stakeholders often participate in mediation while simultaneously managing ongoing project responsibilities.

Project managers, in particular, hold crucial granular knowledge of project delivery issues. The mediator should observe signs of fatigue, frustration, or loss of confidence in the process and, where necessary, intervene to reset and reinvigorate discussions. Encouraging breaks, revisiting priorities, and fostering constructive dialogue can help maintain engagement and focus.

4. The interplay of project relationships and conflict resolution

Misalignment in software project contracts is not limited to technical and delivery concerns; it also affects stakeholder relationships. Strained working relationships—particularly among project managers engaged in day-to-day operational coordination—can exacerbate conflict and impede recovery.

During joint and private sessions, the mediator can support discussions that address relationship dynamics alongside technical issues. Such relational realignment may be material to sustaining collaboration during any subsequent delivery reset.

5. Avoiding pitfalls: balancing monetary and delivery outcomes

A recurring risk in software project contract mediation is prioritising financial settlement over addressing underlying technical misalignment. Organisations may seek early agreement on revised costs before completing a comprehensive technical review. This sequencing can result in:

a. incompletely addressed costs, requiring subsequent internal approvals that may be difficult to obtain; and

b. ongoing project risks, as unresolved technical issues may resurface and disrupt progress before contractual variations are finalised.

To mitigate these risks, the mediator should guide the parties to address financial and technical issues in parallel, supporting a more holistic resolution. Prompting consideration of both immediate and longer-term implications can also reduce the likelihood of recurrent disputes.

6. Conclusion

Mediating misaligned software project contracts requires a multifaceted approach. The mediator must systematically triage and align the parties on core issues while fostering patience and persistence. Using structured tools such as the issue or negotiation framework and maintaining momentum through a well-monitored resolution timetable are crucial.

When software project contracts become mired in delay and dispute, the mediator serves as a neutral facilitator, providing a space to re-explore, review, and reset both the project and stakeholder relationships. By doing so, the mediator helps parties find solutions that prevent costly and prolonged arbitration or litigation, ultimately restoring confidence in project delivery and collaboration.

While mediation provides an established framework for addressing emerging software project disputes, it is not the only non-adjudicative process available to parties seeking to stabilise delivery and working relationships. In circumstances where parties wish to adopt a more forward-looking or relationship-centred approach—particularly where formal positions are not yet fully crystallised—facilitation may offer a complementary or alternative pathway.

About the author



Gerard Doolin

Gerard is a New Zealand-qualified lawyer and accredited mediator.

Since 2000, Gerard has worked as a senior advisor, focussing on the development, provision, use of and management of software and services engagements.

Before establishing his specialised service offering, Be Amorgos IT Contractual Services, he worked from 2000 to 2016 for global IT consultancy groups (including the former EDS Inc group and the Accenture group) engaging with business and government agencies teams in the ANZ, Asia Pacific, North American, UK and European markets

ARTICLE

ReSolution *in Brief*



Falling outside the scope: New Zealand High Court determines arbitrator lacked jurisdiction

In Galbraith v Global Metal Solutions Limited [2026] NZHC 382, the High Court (the **Court**) considered an application under Article 16(3) of the Arbitration Act 1996 to decide whether an arbitrator in a lease dispute had jurisdiction.

Background

In September 2019, Hunua Holdings Trust (**Hunua**), as landlord and Global Metal Solutions Ltd (**GMS**) as tenant, entered into a lease. The lease contained a clause requiring the parties to resolve disputes by arbitration if they could not resolve the issue within a certain period.

The parties go to arbitration

The parties found themselves in a dispute over obligations under the Resource Management Act 1991. Unable to resolve the issue, the parties invoked their arbitration clause. The parties selected an arbitrator and indicated to him that they were satisfied with the terms on his website. However, they did not fill out the schedule in the appointment agreement reserved for listing the issues in dispute.

In the arbitration, Hunua claimed that:

- GMS' metal recycling operation required land use consent, which it did not have;
- GMS was discharging contaminants into the water at levels beyond those permitted by the Auckland Unitary Plan; and
- GMS was breaching the lease by blocking the drainage system at the premises.

Hunua sought to cancel the lease.

The arbitrator found that although GMS' misrepresentation induced Hunua, Hunua should not have relied on GMS' assertions without doing its own due diligence.

Application for a second arbitration

Following the arbitration, GMS obtained a land use consent. This led to a fresh dispute as Hunua declined to consent to GMS digging up a portion of its land for the drainage system (the **drainage dispute**).

The arbitrator considered that he had jurisdiction to hear the drainage dispute. In his view, this was a contractual matter arising from the lease terms. Hunua disagreed, arguing that the drainage dispute fell outside the scope of the parties' arbitration agreement. Hunua applied to the Court to have it declare that the arbitrator did not have jurisdiction.

The High Court's decision

GMS argued that the arbitrator had jurisdiction to hear the resource consent dispute. It primarily argued that, from the parties' conduct, it was implied that the arbitrator was to consider all disputes arising from the lease.

Furthermore, business efficacy would indicate that the two parties intend that a single arbitrator will deal with all related issues in dispute. This was supported by the "one stop shop principle", well known from the *Fiona Trust* decision in the House of Lords.

The Court disagreed:

- The lease's arbitration clause directed that each new issue required the appointment of an arbitrator. So, the drainage dispute would count as one issue, and the resource consent issue would count as another.
- The appointment agreement's schedule was left blank. So, it could not be said that GMS had directed the arbitrator to deal with the issues now faced by the parties.

These two factors meant that the arbitrator was "functus officio" – the award had been issued and he did not have the power to revisit the matter. The Court found that, because the award had been issued, there was no means by which the arbitrator could arbitrate the drainage dispute without Hunua's consent.

Conclusion

The Court found that the arbitrator lacked jurisdiction to hear the drainage dispute.

Comment

The issues discussed in *Galbraith* were also considered by the Court of Appeal in April 2026 in *Van Leeuwen v Attorney-General* [2026] NZCA 120.

Galbraith was issued before the Court of Appeal considered Van Leeuwen's appeal. It endorses the High Court's view in *Van Leeuwen* that the one-stop shop principle applies to the avenue of dispute resolution (i.e. arbitration vs mediation) as opposed to the appointment of the decision maker. Please see our brief on that case below.

New Zealand Court of Appeal rejects one-stop shop argument in Ministry of Primary Industries biosecurity dispute

In *Van Leeuwen v Attorney-General* [2026] NZCA 120, the Court of Appeal (the **Court**) considered the issue of maintaining a single arbitrator for a series of related disputes between the two parties.

Background

The dispute emerged after the trustees of a family trust, part of the Van Leeuwen Group, contacted the Ministry of Primary Industries



(**MPI**) after discovering bacteria, mycoplasma bovis, on their farm. MPI engaged in eradication activities, including the culling and restricting the movement of stock. Under section 162A of the Biosecurity Act 1993, MPI's efforts entitled the trustees to compensation. Section 162A directs the parties to arbitrate any dispute over the compensation amount, or whether there is entitlement at all.

The parties entered into a settlement agreement, which clarified the process for resolving the dispute. The agreement contained a provision allowing the trustees to continue raising claims. However, the agreement contained that these would *fall outside the agreed settlement process*.

The parties referred the dispute to arbitration, selecting Mr Galbraith as the arbitrator. Mr Galbraith substantially found in favour of the trustees.

Subsequently, the trustees commenced further claims. The parties disagreed about how further dispute resolution should proceed. The trustees proposed that Mr Galbraith remain the arbitrator. MPI did not consent to Mr Gilbraith's appointment.

High Court decision

In the High Court, the trustees applied for judicial review of MPI's decision not to consent to arbitration with Mr Galbraith. MPI argued that Mr Galbraith had discharged his duties and that neither the agreement nor the Biosecurity Act 1993 gave the trustees a right to maintain Mr Galbraith as arbitrator.

The High Court found in favour of MPI. The settlement agreement underscored that further disputes would sit outside the scope of the arbitration agreement. Furthermore, nothing in section 162A could be said to mandate that the same arbitrator must be appointed for seemingly related disputes. This was also not the position under the Arbitration Agreement 1996.

Court of Appeal decision

The Court dismissed the appeal. It found that there was nothing in section 162A that provided for an automatic appointment of the same arbitrator.

The Court also emphasised that the trustees' arguments dismissed a core component of arbitration – the parties' autonomy to select dispute-resolution procedures. MPI could not be forced into arbitration.

Comment

Practicality of multiple arbitrators

The Court recognised that parties will often find it beneficial to have the one arbitrator. However, the Court emphasised a distinction. While it might be more practically desirable to have the same arbitrator for an ongoing dispute, it was incorrect to state that there was a legal right to this.

Water, water everywhere, but no mistakes: English High Court finds no serious irregularity in arbitral award

In *Eagle Bulk PTE Ltd v Traxys North America LLC* [2026] EWHC 518 (Comm), the English High Court (the **Court**) considered whether an award was impacted by a serious irregularity.

Background

Traxys North America LLC (the **charterers**) and Eagle Bulk Pte Ltd (the **owners**) entered into a voyage charter for the vessel, MV Canary. This would see the charterers take MV Canary from India to Louisiana.

Upon arrival, the charterers discovered substantial flooding across MV Canary. This made it difficult for the charterers to discharge the cargo. The cost of the flooding, including the cost of the delayed discharge, became the subject of a contractual dispute between the parties.

The Arbitration

The parties arbitrated their dispute, each arguing that the flooding was the other's fault.

In the tribunal's view, the flooding was caused by defective valves in MV Canary's bilge system. The award was made in favour of the charterers.

The owners made a request under section 57 of the UK's Arbitration Act 1996 for a correction of the award. In response, the tribunal denied making any clerical errors, writing ambiguously or ignoring any of the owner's claims.

The High Court agrees with the tribunal

The owners sought to challenge the award in the Court under section 68, alleging a serious irregularity. The owners argued that the tribunal had considered arguments not raised by the parties and had failed to address those that were.

The Court began by clarifying that meeting the requirements of section 68 is a *high hurdle*. Success should only occur in *extreme cases*.

Source of the flood

The owners argued that the tribunal had focused on whether there was water ingress during the voyage. However, it needed to focus on whether the leaks resulted from defective valves in the bilge system.

The owners concluded that the tribunal had applied the wrong test by disproportionately focusing on a particular piece of evidence. Furthermore, the tribunal never gave the owners the opportunity to comment on its findings regarding that piece of evidence. Had it, the owners postulated, the owners would have redirected the tribunal.

No serious irregularity

In the Court's words, the owners' complaint *fell markedly short of establishing a serious irregularity:*

- It was unlikely that the tribunal based its conclusion on this evidence alone.
- The owners had opportunities to address the question of whether water came from outside MV Canary.
- It is common for tribunals to interpret documents in ways that differ from how parties submit they should be interpreted.
- It seemed likely that even if the owners could address the tribunal's finding on that evidence, the tribunal would have reached the same conclusion.

Conclusion

The Court agreed with the charterers that there was no serious irregularity with the award.

Hong Kong Court of First Instance finds tribunal did not allow prejudice to impact party in share purchase agreement dispute

In *AT & Another v. QC & Another* [2026] HKCFI 1437, a party unsuccessful in arbitration applied to the Hong Kong Court of First Instance (the **Court**) to set aside the award. The Court declined, further emphasising that courts across the common law world will only

set aside awards where mistakes seriously impact parties.

Background

AT and QC were parties to a complex share purchase agreement. The agreement was subject to a first supplemental purchase agreement and a second supplemental purchase agreement.

The parties strongly disagreed over a specific provision of the agreement. AT argued that a condition of the purchase was that the second defendant obtain from the Peoples' Republic of China (**PRC**) an Overseas Direct Investment Approval (the **Approval**). Both parties knew the difficulty of obtaining Approval within the stipulated timeframe and extended the deadline. Even after the second deadline, QC was still unable to obtain the Approval.

The company has discontinued its IPO plans. QC sought to exercise its put option under the agreements, exit the agreement and recover its investment. AT argued that QC was not entitled to these. The parties went to arbitration.

The Arbitration

The parties disputed whether QC was entitled to the return of its investment.

An important issue for AT was the Approval, or lack thereof. It sought to produce evidence showing that granting entitlement would circumvent PRC law. (In the Court, AT would claim that the tribunal denied it the right to produce this evidence.)

The tribunal found in favour of QC. AT sought to set aside the award.

Decision

The parties' arguments

AT argued that the parties had previously agreed on what would be presented to the tribunal. However, AT claimed, QC changed its submission at the last minute. This denied AT the right to address a matter it claimed the tribunal found important.

AT claimed that had it had the opportunity to make this argument, the tribunal would have found that QC was not entitled to the funds.

Without considering the PRC issue, was the award unjust?

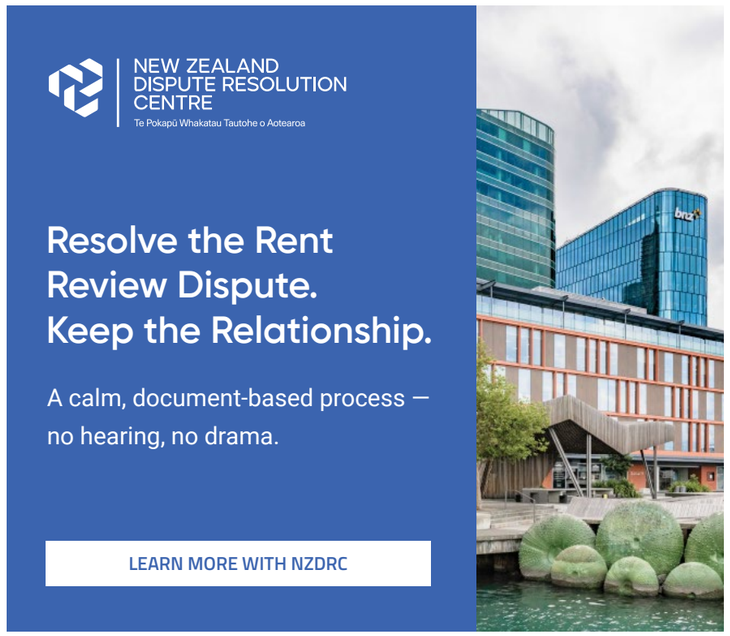
The Court started its assessment with the principle that:

> It is not the function of the court to comb an award to look for errors, find fault in the process or to assign blame. An award should be read generously, expecting, as is usually the case, that there will be no substantial fault that can be found with it, and only to remedy meaningful breaches of rules of natural justice which actually cause prejudice.

The Court first determined that AT had been able to address the PRC Approval issue. The Court nevertheless addressed whether the inability to present the PRC Approval case affected its ability to obtain a fair award. It concluded that the tribunal had found on three distinct grounds that QC was entitled to the relief. None of these outcomes would have changed had the tribunal found in favour of AT on the PRC Approval issue.

Conclusion

The Court declined AT's application to set aside the award.





LEADERSHIP& DISPUTE RESOLUTION

Silence is not alignment.

Written by **JOHN GREEN**



Conflict is not something to manufacture or celebrate. But handled well, it can expose risk, test assumptions and protect the relationships on which good business depends.

Most leaders know the meeting. Everyone nods, the decision is recorded, and the real disagreement begins in the corridor afterwards.

A meeting without disagreement may mean there is genuine alignment. It may also mean the cost of raising a concern has become too high. That is not a conflict-free business. It is a business where conflict has been pushed out of sight.

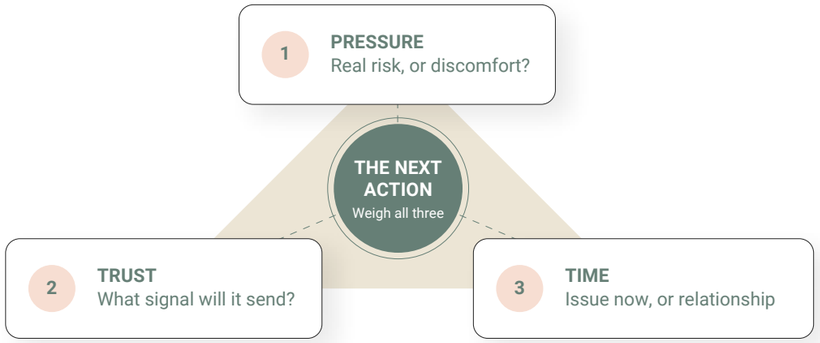
Conflict is often treated as a disruption to delivery - something to contain, smooth over or send to Legal. In complex work, however, it is a predictable consequence of competing priorities, incomplete information and genuine differences about scope, risk, performance, timing and money. The leadership question is not how to prevent every disagreement. It is how to make disagreement useful before it hardens into a dispute.

Not all conflict is useful

That distinction matters. The evidence does not support the simple idea that more conflict produces better results. Relationship and process conflict are consistently associated with poorer group outcomes. Task conflict - disagreement about the work, evidence or decision - can be valuable in some settings, particularly when it remains separate from personal friction and sharpens decision quality (de Wit, Greer and Jehn, 2012).

The leadership work is to preserve that boundary: challenge the proposal, not the person; test the assumption, not the motive; and make the disagreement specific enough to work with.

This is where psychological safety earns its place in the conversation. It is sometimes mistaken for comfort or consensus. In practice, it is the confidence



1. *Pressure - Trust - Time Visualisation*

to raise a risk, admit uncertainty or question the prevailing view without paying an interpersonal price (Edmondson, 1999). Leaders create that confidence in small moments: asking, 'What are we not seeing?', inviting the dissenting view, and responding to unwelcome information with curiosity rather than defensiveness.

Hold two concerns at once

Conflict is also mishandled when leaders accept a false choice: protect the commercial position or preserve the relationship. The dual concern model offers a more mature lens. It considers both concern for our own outcome and concern for the other party's outcome. When both are high, problem-solving becomes more likely (Pruitt and Rubin, 1986).

That does not mean splitting the difference or keeping everyone happy. It means being clear about rights, risks and non-negotiables while taking the other party's interests seriously. A robust position and a workable relationship are not mutually exclusive. Even where a binding decision is ultimately required, the way the pathway is chosen and managed will affect trust, credibility and the prospect of working together again.

Slow instinct, not action

When pressure rises, speed can look like competence. A formal notice is sent, senior people are copied in, a meeting is refused, or a position is locked down before the facts are fully understood. Sometimes that response is justified. Sometimes it simply turns discomfort into escalation.

A useful discipline is to test the next decision against three questions: Pressure, Trust and Time.

Pressure - Trust - Time[1]

Pressure.
What is actually driving the urgency? Is there a real legal, safety, financial or delivery risk - or are we reacting to the discomfort of not yet having an answer?

Trust.
What signal will the next action send? Will it increase predictability and credibility, and preserve dignity on both sides?

Time.
Are we optimising for the immediate issue or the longer relationship? What precedent are we creating for the next difficult conversation?

Give conflict the right structure

Once conflict becomes a dispute, leaders can behave as though only two choices remain: settle it privately or litigate. That is far too narrow. Alternative dispute resolution offers a spectrum of processes that can be matched to what the case actually needs.

A direct conversation or facilitated negotiation may be enough when the issue is still fluid. Mediation can help parties move beyond stated positions, explore interests and test practical options while there is still a relationship to protect. Early neutral evaluation can bring realism to differing views of the merits. Expert determination can unlock a discrete technical issue. Where certainty or enforceability is required, adjudication or arbitration can provide a binding outcome through a process designed for the case.

The important point is timing. ADR should not be treated as the final attempt after positions have calcified and trust has been depleted. Agreed escalation steps and well-designed dispute resolution clauses are not signs of distrust; they are relationship infrastructure. They give people a known path to follow when judgement is under pressure.

Bringing in a neutral is not handing leadership away. It is a leadership decision to give conflict enough structure to become manageable, and to use a process proportionate to the issue, the relationship and the outcome required.

Resolution should leave the business wiser

A signed settlement, determination or award may close the case, but it does not automatically create learning. Leaders should still ask: When did we first see the warning signs? What did we delay or avoid? Which process failed? What was the impact on the relationship? What will we change next time?

A resolution that closes the file but changes nothing can be an expensive form of amnesia.

Conflict is inevitable. Damage to trust is not. The strongest leaders are not conflict-free; they are conflict-capable. They make it safe to surface what others would rather leave unsaid, keep disagreement focused enough to remain useful, and recognise when an independent process is the wisest next step. Handled this way, conflict stops being an interruption to leadership. It becomes one of the places leadership is most visible.

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About the author



John Green
John is a professional arbitrator, adjudicator and mediator based in Auckland, New Zealand. He has been appointed in more than 1,250 building, construction and infrastructure disputes over the past 30 years relating to residential, commercial and industrial construction projects, power stations, gas fields, manufacturing and processing plants, stadiums, hotels, land subdivisions, roading, railways, wharves, marinas, drainage, water and wastewater treatment plants, recycling plants, mining, services, and utilities, involving domestic and internationally based parties, complex technical and legal matters, and sums in dispute exceeding $100M.

Court presumes parties intended their disputes to be resolved in one-stop adjudication

Written by **ANDREW LEE AND REEMA SHOUR**
Published on 2 March 2026

Hill Dickinson

Key takeaways

Court presumes parties intended their disputes to be resolved in one-stop adjudication
Parties will be taken to have intended any dispute arising out of the relationship into which they had entered to be decided by the same tribunal.

Settlement agreement
The dispute resolution provision in a settlement or termination agreement is likely to take precedence over the dispute resolution clause in the earlier underlying contract.

Drafting tip
Parties to multiple, interlinked contracts should aim to align the dispute resolution provisions in the different contracts.

Petroleum Exploration (PVT) Ltd -v- Frontier Holdings Ltd & another [2026] EWHC 56 (Comm)

This decision demonstrates that where parties have entered into a settlement agreement to resolve their disputes under an earlier contract, or where they enter into a termination agreement to end their previous contractual relationship, then there will be a presumption that all their disputes will be resolved in one forum pursuant to the dispute resolution provision in the later agreement, namely the settlement/termination agreement.

The background facts

The claimant, Petroleum Exploration (PVT) Ltd (**PEL**) is a Pakistani company that holds various petroleum exploration licences and production leases granted by the President of Pakistan relating (amongst others) to the Badin IV North and South oil and gas blocks. The first defendant, Frontier Holdings Ltd (**FHL**) is incorporated in Bermuda and the second defendant, Spud Energy Pty Ltd (**Spud**) in Australia.

In April 2006, PEL entered into a quasi-joint venture arrangement with FHL in relation to the Badin-IV North and South gas blocks. There were a number of agreements governing this relationship, including farm-in agreements which resulted in PEL holding a 47.5% Working Interest in the Badin IV North and South oil and gas blocks and FHL obtaining a Working Interest in each block of 27.5%.

There were also Joint Operating Agreements (**JOAs**), which governed the operational and financial aspects of exploration and production at the relevant gas blocks. FHL became a party to the JOAs following the execution of deeds of assignment on 2 June 2006. The JOAs each contained an arbitration agreement.

In 2015, a series of disputes arose between the parties relating to the Badin-IV North and South Blocks, as well as the Kandra Block, in respect of which FHL also had an interest. Spud also had an interest in another concession, the Badar Concession.

Two arbitrations were commenced: one arbitration was commenced by PEL against FHL and another arbitration was commenced by FHL against PEL.

Settlement Agreement
These disputes were settled by a Settlement Agreement dated 12 August 2016 between PEL, FHL and Spud. The Settlement Agreement was governed by English law, contained an entire agreement clause and provided for ICC arbitration in London.

The Settlement Agreement provided among other things that, subject to the approval of the Director General of Petroleum Concessions of the Government of Pakistan (**DGPC**), FHL and Spud would use reasonable commercial efforts to assign and transfer their Working Interests in the Kandra block and Badar Concession to PEL with FHL and Spud holding their respective Interests on trust for PEL pending receipt of DGPC approval.

As part of the settlement structure within the Settlement Agreement, PEL withdrew various default and forfeiture notices, the parties agreed various releases and the arbitrations that had been commenced were discontinued.

The DGPC declined to give its consent as required by the Settlement Agreement. PEL contended that FHL and Spud were in breach of the Settlement Agreement and sought to reverse the financial settlement contained in it.

In December 2022, FHL and Spud commenced ICC arbitration in London under the Settlement Agreement (**London Arbitration**).

Singapore Arbitration
In January 2023, PEL issued Notices purporting to forfeit FHL's interests in Badin IV North and Badin IV South blocks and to withhold FHL's 27.5% share of the gas produced from the Badin IV South concession on the basis that its interest had been forfeited.

In February 2023, FHL commenced separate ICC proceedings against PEL in Singapore pursuant to the arbitration agreements contained in the JOAs (**Singapore Arbitration**). FHL alleged that PEL was in breach of the terms of the JOAs and claimed damages in respect of revenues from sales of gas produced from the Badin IV South block which it alleged had been withheld in reliance on PEL's forfeiture.

PEL successfully challenged jurisdiction in the Singapore Arbitration on the basis that the disputes should have been referred to domestic arbitration in Pakistan. The decision of the tribunal in the Singapore Arbitration that it did not have jurisdiction was subsequently overturned by the Singapore International Commercial Court.

London Arbitration
In December 2024, the Tribunal issued a Final Partial Award (**Award**). It held that the claims in question arose under the Settlement Agreement and found that PEL had breached the Settlement Agreement so that it was not entitled to forfeit FHL's Working Interest in the Badin IV blocks.

The Tribunal made various declarations. Among others, the Tribunal declared that PEL was in breach of the terms of the Settlement Agreement by failing to discharge its obligations to the DGPC, thereby causing the DGPC to withhold its consent to the transfers of the Kandra Discovery Area and Badar Working Interests. The Tribunal also declared that neither PEL nor Spud were in breach of the Settlement Agreement.

The Tribunal additionally made various declarations confirming FHL's Working Interests in the relevant Concessions and also that PEL was not entitled to seek forfeiture of those Working Interests.

The Tribunal awarded FHL damages of almost US$2.5 million.

Jurisdictional challenge
In January 2025, PEL applied to the English Court under ss.67 and 68 of the Arbitration Act 1996 (**1996 Act**), challenging the Award and the Tribunal's subsequent Costs Award. PEL subsequently dropped the s.68 challenge (serious irregularity amounting to substantial injustice) and maintained only the

jurisdictional challenge under s.67.

It argued essentially that the Tribunal did not have the jurisdiction to make declarations regarding FHL's 27.5% Working Interests, nor that PEL was not entitled to seek forfeiture of those Interests.

Nor was it entitled to award FHL damages in this regard. Rather, those were issues to be dealt with by the Tribunal in the Singapore Arbitration, which had jurisdiction under the arbitration agreements in the JOAs.

FHL and Spud disagreed, maintain that their claims were not causes of action under the JOAs but remedies they sought for breach of the Settlement Agreement.

The Commercial Court decision

The Court dismissed the jurisdictional challenge. The wording of the arbitration agreement in the Settlement Agreement was wide enough to encompass any disputes relating to the JOAs.

In the circumstances, the Court thought it was appropriate to apply the presumption of one-stop adjudication in construing the arbitration clause in the Settlement Agreement, highlighting that the parties, as rational businessmen, were likely to have intended any dispute arising out of the relationship into which they had entered to be decided by the same tribunal.

One-stop adjudication was particularly apt where there was an agreement entered into for the purpose of terminating an earlier agreement between the same parties or settling disputes which had arisen under the earlier agreement. Where parties to a contractual dispute entered into a settlement agreement, the disputes which subsequently arose often gave rise to issues which related both to the settlement agreement itself and to the underlying contact.

Where one of the parties sought to impeach a settlement or termination agreement and advance a claim based on its rights under the main contract, the parties will have intended the dispute resolution clause in the settlement/termination agreement to govern all of their outstanding disputes, and to supersede any dispute resolution clause in the earlier agreement. This was because:

1. the settlement/termination agreement came second in time and was intended to supersede the earlier agreement.
2. the dispute resolution clause in the settlement/termination agreement was the operative one governing issues concerning the validity or effect of the termination/settlement agreement and therefore the only clause capable of applying to disputes which arose out of or related to the termination/settlement agreement.
3. in considering any dispute about the scope or efficacy of a settlement or termination agreement, the tribunal was likely to have to consider the background, of which an important element would often be the circumstances in which the dispute arose and the rights of the parties under the earlier contract. There would, therefore, often arise a risk of inconsistent findings if the tribunal addressing the validity or efficacy of the termination/settlement jurisdiction was not seised of disputes arising out of the earlier contract and the latter fell to be determined by a different tribunal.

The Court thought it was artificial to maintain that the subject matter of the disputed declarations were disputes under the JOAs. The claims between the parties concerned allegations of breach of the Settlement Agreement by FHL and Spud against PEL and a counterclaim in damages by PEL. The claim succeeded, and the counterclaim was dismissed. The remedies awarded by the Tribunal were not for claims under the JOAs but because of a failure on the part of PEL to give effect to what had been agreed in the Settlement Agreement. The declarations were of what PEL was required to do in order to place FHL and Spud in the position they would have been had PEL not breached the terms of the Settlement Agreement.

Comment

While one-stop adjudication is a rebuttable presumption, parties entering into related, interlinked contracts should carefully consider aligning the dispute resolution provisions in the different agreements.

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I have been with Hill Dickinson since 2001, having worked in London and the UAE before co-founding our Singapore office in 2009. That breadth of experience has helped shape my approach: commercially focused, calm under pressure, and always collaborative.

Clients know me for my tenacity and judgment, particularly when it comes to understanding the merits of a case and shaping the right strategy. I work closely with owners, charterers, P&I Clubs, insurers and trading houses.

When I am not working, I like to keep myself busy spending time with my three children, playing polo and sailing.



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I am a senior knowledge lawyer in Hill Dickinson's global shipping team, working with colleagues to produce informative and insightful content that's both relevant and useful to clients and others in the industry. That typically includes high level articles, thought leadership pieces and external publications. Due to the nature of my work, I am also responsible for keeping our shipping and trade groups fully informed on all legal and regulatory developments within the industry.

My expertise covers both 'dry' and 'wet' shipping, trade and commodities, marine insurance, commercial litigation and international arbitration.

As someone who qualified and previously practised in law for many years before moving into a knowledge management/professional support role in 2009, my colleagues rely on me for my attention to detail, thoroughness and diligence. It is a role I find rewarding in that I play a large part in driving the publication of content that further reinforces the firm's considerable expertise in marine and trade.



ARTICLE

Redefining "reasonableness" in cross-lease alterations:

Liow v Martelli [2026] NZCA 101

Written by **MICHAEL JAMIESON AND ALEXANDER LYALL**

The Court of Appeal's recent decision in *Liow v Martelli* represents a significant clarification of the law governing alterations to residential properties held under cross-lease titles.[1] The judgment dismissed the appeal and held that the long-standing "trifling detriment" test, derived from *Smallfield v Brown*, is not a correct statement of law.

Background

The impact of *Smallfield v Brown* on cross-leases

Cross-leases remain a common form of residential tenure in New Zealand, particularly in Auckland. They typically prohibit structural alterations without the prior consent of the lessors, provided such consent is not unreasonably withheld.

For decades, *Smallfield v Brown* was widely understood to establish that consent was unreasonably withheld only where a proposed alteration delivered substantial benefit to the applicant and caused only trifling detriment to the neighbour.[2]

The dispute

The dispute arose between neighbouring cross-lease owners in Auckland.

The Martellis sought consent to significantly enlarge their dwelling, install a swimming pool, and reconfigure outdoor areas. The Liows refused consent, citing concerns about bulk, proximity, privacy, amenity, and value.

The arbitration

The parties went to arbitration. The arbitrator recognised that the developments would provide the Martellis a "substantial benefit" to their property. However, and more importantly, he believed that the detriment to the Liows could not be dismissed as being merely trifling. Therefore, their refusal of consent could be considered reasonable.

The arbitrator's decision stemmed from his belief that *Smallfield* was good law. He accepted its "trifling detriment" test as the test to apply to determine whether the Liows' refusal to consent was unreasonable.

The Martellis challenged the award in the High Court on a question of law – whether Smallfield was the correct approach. The High Court concluded that it was not and, because the arbitrator relied so

1. *Liow v Martelli* [2026] NZCA 101.

2. *Smallfield v Brown* (1991) 2 NZ ConvC 191,110 (HC).

Cross-lease disputes

→ Arbitrators will find guidance in *Liow v Martelli*.

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heavily on it, remitted the matter to the arbitrator to reconsider.

The Liows appealed the High Court's decision. It asked the Court of Appeal (the **Court**) to reconsider the High Court's finding that *Smallfield* was wrong and whether the matter should return to arbitration.

The Court of Appeal provides guidance on cross-lease dispute resolution

The Court dismissed the appeal, agreeing with the High Court's assessment of *Smallfield* and the decision to remit the matter to the arbitrator.

Central to its reasoning was the contractual nature of the alterations covenant. The wording did not impose a "trifling detriment" threshold, and importing such language represented an unjustified "gloss" on the text. Instead, the covenant required an evaluative judgment: whether consent had been unreasonably withheld in the circumstances. The Court held that such an assessment was inherently fact-specific and should not be constrained by rigid rules.

The Court also criticised how *Smallfield* had entered the body of case law on the reasonableness of withholding consent. It highlighted that:

- Fisher J's comment in *Smallfield* was made orally and on an application for an injunction;
- although three decades old, *Smallfield* as a statement of law is new when compared to the term of most cross-leases (999 years);
- the Law Commission's *Shared Ownership* of Land report noted that it is through the slow ageing of buildings that problems with cross-leases will arise;[3] and
- there is a scarcity of case law defining "substantial" and "trifling".

The Court's conclusion

Ultimately, the Court held that the High Court was correct both to reject the Smallfield test and to remit the dispute to the arbitrator, given that the arbitral reasoning was permeated by an incorrect legal standard. The appeal was dismissed.

Lessons for arbitrators

Liow provides guidance to arbitrators on how to approach issues raised in cross-lease disputes, given that the provisions are relatively standard.

What makes a cross-lease?

The Court emphasised the unique legal structure of cross-leases. All owners collectively comprise "the lessors", and consent must be considered from their joint perspective, not that of a single objecting neighbour. Where lessors disagree, the procedural machinery in the lease—often requiring arbitration—must be used so the lessors can speak with one voice. A unilateral refusal by one owner does not, in itself, amount to a refusal by the lessors as a whole.

When considering consent

The Court provided a useful question for arbitrators to consider (emphasis added)[4]

If the cl 27 machinery is triggered and the granting of consent by the Lessors is not unanimously agreed, the question to be arbitrated will be *whether the Lessors ought to consent. That question will boil down to whether a reasonable lessor, having regard to the interests of all the lessees and the context of the cross-lease, could withhold consent*. If the answer is yes, the Lessors should not be compelled to consent, notwithstanding that one or more of the persons comprising the Lessors think otherwise. If the answer is no, it follows that the Lessors must consent.

The Court then listed non-exhaustive matters relevant for lessors when presented with proposals by the lessee:[5]

a. The degree of physical intrusion into the privacy and other amenities, such as light and view, of other lessees.

b. The impact on the possibility of future development of another lessee's flat (and any appurtenant restricted use areas), for example, by reducing the overall site coverage available for such development.

c. Whether the proposed alterations or additions have a material impact on the use or amenities of the other lessees.

d. The impact on the market value of the other lessees' flats.

e. The reasonable expectations of the lessee seeking to make alterations in respect of the enjoyment of their flat.

f. The current planning laws applicable to the area.

g. Changes in societal expectations in respect of the use of residential properties.

h. The counterfactual — that is, the use that could in any event be made of the lessee's flat and restricted use area, for example by placing a freestanding swimming pool on the restricted area as opposed to building an in-ground one, or being able to use the restricted area for socialising even without building a deck.

i. Whether the alterations or additions will create an additional household unit.

The Court acknowledged that the relevance of these matters may change over time.

Comment

The application of this new test will reinforce a more flexible, nuanced and context-sensitive approach to cross-lease alterations—one that recognises the realities of ageing housing stock and the need for mutual accommodation between neighbours. For arbitrators, this might take the form of a balancing act in which the interests of the lessee are weighed against those of the lessors.

It will raise the bar and make it harder for a neighbour to block a proposed development because they are unhappy about its effects on them. It also introduces higher uncertainty of outcomes for parties and their advisors, and makes awards even more challenging for arbitrators.

The previous test was relatively simple and easy to apply, although, of course, there were still many disputes. Applying a nuanced, multifaceted analysis to each specific set of facts will make predicting outcomes much more difficult, at least until a body of case law develops to provide guidance.

Hence, although this clarification of the law by the Court is welcomed and will support the development and upgrading of housing stock, it may have the unintended consequence of more complex disputes, more cross-lease arbitrations, and additional costs for neighbours.

Supreme Court declines leave

We also note that the Supreme Court has since declined leave to appeal. Although the Supreme Court accepted that questions arising from *Smallfield* were of general commercial significance and public importance, it did not consider the applicants had an arguable case to warrant granting leave to appeal.

The appellants also sought to argue that it was inappropriate to remit the dispute back to the arbitrator. The Supreme Court disagreed, stating that it *will be for the arbitrator to determine whether the withholding of consent by the lessors jointly was unreasonable applying the test identified by the Court of Appeal.*

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3. *Law Commission Shared Ownership of Land* (NZLC R59, 1999).
4. *Liow v Martelli* [2026] NZCA 101 at [93].
5. *Liow v Martelli* [2026] NZCA 101 at [111].



A clause that works only on paper

Designing cross-border dispute pathways that SMEs can actually use



Written by **CATHERINE GREEN**

A cross-border dispute clause can be legally sound and still be inaccessible to the business relying on it. For SMEs, the real test is whether the pathway remains usable when trust, cashflow and cooperation are under pressure.

A dispute clause is usually agreed when everyone is still getting along. The deal is moving, the relationship is promising and the possibility of a serious breakdown feels remote. That is precisely when an apparently safe clause can slip through without enough scrutiny.

Imagine a small New Zealand luxury food importer entering a supply arrangement overseas. The contract sends disputes to the supplier's home courts. Months later, payments, product quality and delivery are contested. Evidence sits in two countries, documents need translation and the importer has limited cash and no practical support in the chosen forum. Its legal rights may be perfectly respectable. Its ability to exercise them is another matter.

The problem is not the foreign court. It is the mismatch between the process and the person expected to use it. A remedy that exists only in theory is not a meaningful remedy for the business relying on it.

Start with the user, not the forum

Cross-border drafting often begins with familiar questions: which law, which court, which arbitral seat? Those questions matter, but they arrive too early if we have not first understood the business. The better starting point is: what will these parties realistically need when trust has fallen away?

For an SME, process design is not an abstract exercise. It is risk management. A clause must account for cashflow, language, access to advice, the location of evidence, the commercial relationship and the likely value of a claim. A beautifully drafted process that costs more to run than the dispute is worth is not sophisticated. It is unusable.

Tradition or innovation is the wrong choice

Traditional processes offer important protections. Courts and arbitration bring authority, procedural safeguards, finality and routes to enforcement. Newer or more flexible approaches - including online meetings, expedited arbitration, mediation, early neutral evaluation and institutional triage - can improve speed, access and fit.

The task is not to choose one camp. It is to combine legitimacy with usability. Parties seem to understand this intuitively: in Queen Mary University of London's 2021 international arbitration survey, 59 per cent of respondents preferred arbitration in conjunction with alternative dispute resolution, while a further 31 per cent preferred arbitration on its own. The strongest design often preserves a credible binding backstop while creating earlier opportunities to solve the problem proportionately.

Five questions that expose hidden friction

Before selecting a process, it helps to test the proposed clause against five practical questions.

Distance.
How far apart are the parties in language, legal systems, commercial expectations and ideas about a legitimate process? Institutional distance is not simply geography. Even close neighbours can make assumptions about notice, evidence or negotiation that do not travel well.

Value.
What is truly at stake? The invoice amount matters, but so may continuity of supply, reputation, intellectual property, precedent or access to a market. The process should reflect the whole commercial problem.

Capacity.
Can each party understand, fund and operate the pathway? Consider who will gather evidence, attend meetings across time zones, arrange translations and manage the matter alongside normal business.

Leverage.
What will make the other party engage? A conversation without a credible next step can drift. Equally, an immediate threat of formal proceedings may destroy the room needed for a practical agreement.

Exit.
If agreement is not possible, what kind of outcome is required and where must it work? The answer may point to a consent settlement, expert decision, court judgment or arbitral award. For international arbitration, the New York Convention provides a widely adopted framework for recognising arbitration agreements and enforcing foreign awards.

Turn the clause into an operating system

A good dispute clause does more than name a forum. It gives people an operating system for a difficult moment.

That system might begin with a named senior representative making direct contact within a short period. It might then provide for structured negotiation, followed by mediation or neutral evaluation. If those steps do not resolve the matter, an expedited or standard arbitration can deliver a binding result. Language, notice, document exchange, remote participation, time limits and the ability to seek urgent relief should be addressed rather than left to chance.

This need not become a rigid staircase that delays action. The clause can allow a party to bypass an early step where urgent interim protection is genuinely needed. It can set value thresholds, use

documents-only procedures for smaller claims, or provide for a neutral to help choose the proportionate track. UNCITRAL's Expedited Arbitration Rules, and NZIAC's own tiered expedited rules, show how procedural security can be retained while time and cost are scaled to the dispute.

Why the institution matters

An institution is sometimes viewed as an extra layer of administration. In a cross-border dispute, it can be the element that makes the agreed process usable. A neutral institution can appoint decision-makers, manage timetables, hold funds, support communication and keep the matter moving when the parties cannot agree on the next procedural step.

For smaller businesses in particular, that structure provides a credible procedural home without requiring them to invent the process during a crisis. It also strengthens the backstop behind negotiation and mediation: the other party knows that if agreement is not reached, the dispute has somewhere to go.

Design for the difficult day

No clause can remove all uncertainty. Nor should every commercial disagreement be funnelled through an elaborate sequence. The goal is a pathway proportionate to the parties, the transaction and the likely dispute - one that preserves the relationship where possible and provides finality where necessary.

The best process is the one parties can use when trust has collapsed. That is the standard against which cross-border clauses should be tested. For SMEs, proportionality is not a convenience at the margins of access to justice. It is often what makes access to justice real.

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Case in Brief:

United Kingdom Supreme Court rejects state immunity defence, denying Spain and Zimbabwe's application to set aside arbitral awards



Written by **ALEXANDER LYALL**

State immunity

→ The judgment endorses a 2021 New Zealand High Court decision.

In *The Kingdom of Spain v Infrastructure Services Luxembourg S.A.R.L. & Anor,*[1] the United Kingdom Supreme Court (the **Court**) considered separate appeals from Spain and Zimbabwe (**the States**) on whether they had state immunity preventing them from being subject to the jurisdiction of the English Courts.[2]

Background

The States had been subject to arbitral proceedings with investors. In both instances, the tribunals had found against the States. Since then, both States have been engaged in enforcement proceedings.[3]

The investors also sought to enforce the awards in England.

The Court considered two key questions:

1. The States had bound themselves to article 54(1) of the International Centre for Settlement of Investment Disputes (**ICSID**) Convention. Did this mean that they had consented to the jurisdiction of the English courts?
2. Had the States agreed to arbitrate with the investors within the meaning of section 9(1) of the State Immunity Act 1978 (**SIA**)?

At [28], the Court held that a state is not immune in relation to proceedings in the United Kingdom where it has submitted to the jurisdiction by a prior written treaty or convention.

Article 54(1) of the ICSID Convention

Having established how a state might subject itself to the United Kingdom's jurisdiction, the Court looked at whether the ICSID Convention resulted in subjection.

The investors argued that the States had waived its right to state immunity. In response, the States argued that while states can waive immunity, it must be done explicitly.

While the Court agreed that consent had to be clear and unequivocal, it found that this did not require a convention containing key words like "waiver" or "submission" and instead the test was whether *the words used necessarily lead to the conclusion that the state has submitted to the jurisdiction.*

The Court found it clear that the States had consented to two core principles; that their companies would enjoy protection under the Convention, and that they as States would subject themselves to the jurisdiction of courts.

Survey of jurisdictions – the Supreme Court endorses the New Zealand High Court's approach

The Court sought support from comparable jurisdictions. It found that judgments from the United States, Australia, Malaysia and New Zealand[4] supported its view that signing the Convention indicated consent to the subjection to the courts of fellow signatories.

It noted, however, that the High Court of the British Virgin Islands had come to a different conclusion.

Summarising the crux of the issue, the Court found that, in common with Spain and Zimbabwe's arguments, the High Court of the British Virgin Islands:

> takes no account of the fact that Pakistan had both agreed to abide by and comply with the terms of an arbitral award under the ICSID Convention (article 53) and consented, by becoming party to the ICSID Convention, to each other contracting state also being under an obligation to recognise an ICSID award as binding and to enforce the pecuniary obligations imposed by it within its territories as if it were a final judgment of a court in that state (article 54(1))

Conclusion

The Court answered both key questions in the affirmative and declined the States' application to set aside the awards.

[State immunity: The judgment endorses a 2021 New Zealand High Court decision]

1. *The Kingdom of Spain v Infrastructure Services Luxembourg S.A.R.L. & Anor* [2026] UKSC 9.
2. Although these were separate matters, the Court issued one judgment.
3. As one example, Spain unsuccessfully argued that it was not subject to the Australian courts. This cultimated in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. & Anor* [2023] HCA 11.
4. *Sodexo Pass International SAS v Hungary* [2021] NZHC 371. See our article for a helpful summary.

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SECURITY THAT STICKS:

Singapore's Pro Arbitration Approach to Enforcing an Award Against an Arrested Ship

Written by **KENDALL TAN AND ALEKSANDAR ANATOLIEV GEORGIEV**

Published on 4 February 2026

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Introduction

When a maritime dispute arises, a claimant often chooses to arrest a ship to obtain security for its claims, such right being a strategic advantage accorded by statutory regimes in many jurisdictions of the common law tradition. Such proceedings are known as admiralty actions *in rem*, meaning that the proceedings are against the ship itself.

Where the underlying maritime claims are subject to an arbitration agreement, as is commonplace, the admiralty *in rem* proceedings are often stayed in favour of arbitration between the parties. If the claimant is successful in the arbitration, it would then seek to enforce the arbitral award against the ship (or its sale proceeds, if the ship has been judicially sold). However, awards are generally rendered against named defendants *in personam* – that is, against a *person*. Can such an award be enforced in admiralty actions *in rem* commenced against a *ship*? Would the award extinguish the *in rem* claim, leaving the beneficiary of the award with no way to access the fruits of its victory? That was the question left unexplained in the much celebrated decision by Brandon J in *The "Rena K"* [1979] QB 377, which the Singapore High Court had occasion to revisit and to elucidate.

In *The "Yangtze Harmony"* [2026] SGHC 3 ("***The 'Yangtze Harmony'***"), the Honourable Mohan J of the Singapore High Court ("**Court**") noted that these issues had not been the subject of any reported decision in Singapore (or indeed, anywhere in the Commonwealth), and addressed this gap in the law in an eminently sensible and pro-arbitration manner. If arbitral awards were held to extinguish *in rem* claims, this result would: (i) undermine the fundamental purpose of admiralty *in rem* actions as a means of securing maritime claims; and (ii) defeat the very purpose of the enforcement framework under the Singapore International Arbitration Act 1994 ("**IAA**"), thereby counterintuitively placing unwarranted obstacles in the path of the beneficiary of the award. In the circumstances, the Court lifted the stay of proceedings in the action and ordered for judgment *in rem* to be entered in terms of the arbitral award, without resort to a common law "suit on the arbitral award".

In this article, we examine the Court's reasoning above, as well as its consideration of whether the Court had the power to lift the stay on the proceedings for the purpose of enforcing the relevant awards.

The Claimant was successfully represented by Partners Kendall Tan and Aleksandar Georgiev from our Shipping & International Trade Practice Group.[1]

Background

The dispute arose from a towage arrangement between the Claimant, a Singapore-incorporated company providing marine services, and the Defendant, the demise or bareboat charterer of the vessel "YANGTZE HARMONY" ("**Vessel**"). The parties entered into a towage contract dated 22 July 2022 ("**TOWCON Contract**"), under which the Claimant's tug was engaged to tow the Vessel from Brisbane, Australia to Singapore for repairs. The TOWCON Contract contained an arbitration clause providing for disputes to be resolved by arbitration in London ("**Arbitration Clause**").

The Claimant subsequently claimed against the Defendant for losses arising out of the TOWCON Contract. On 19 October 2022, the Claimant commenced an admiralty *in rem* action in Singapore and arrested the Vessel on 25 October 2022 as security for its claims relating to the TOWCON Contract and in exercise of its possessory lien.

In view of the Arbitration Clause, the parties obtained by consent an order of Court to stay the *in rem* proceedings in favour of arbitration in London ("**Stay Order**"). The Court allowed the Vessel to remain under arrest as pre-award security, and eventually ordered the Vessel's judicial sale *pendente lite*, on failure of the Respondent to furnish security. Following a partial determination of priorities, balance sale proceeds of S$2.97 million remained in court pending the outcome of the arbitration.

Following successful pursuit of the underlying claims in the arbitration, the Tribunal issued two awards in favour of the Claimant on 14 August and 15 November 2024 ("**Awards**"). The Claimant thereafter obtained permission to enforce both Awards as a judgment of the General Division of the High Court and entered judgment *in personam* against the

Defendant, on 23 April 2025. The Defendant still did not comply with the Awards or satisfy the *in personam* judgment.

Issues to be Determined

The Claimant filed the present application to: (i) lift the Stay Order; (ii) obtain permission to enforce the Awards in the same manner as a court judgment against the Vessel's balance sale proceeds; and (iii) to enter judgment *in rem* against the Defendant in terms of the Awards. Consequently, the key issues before the Court were whether:

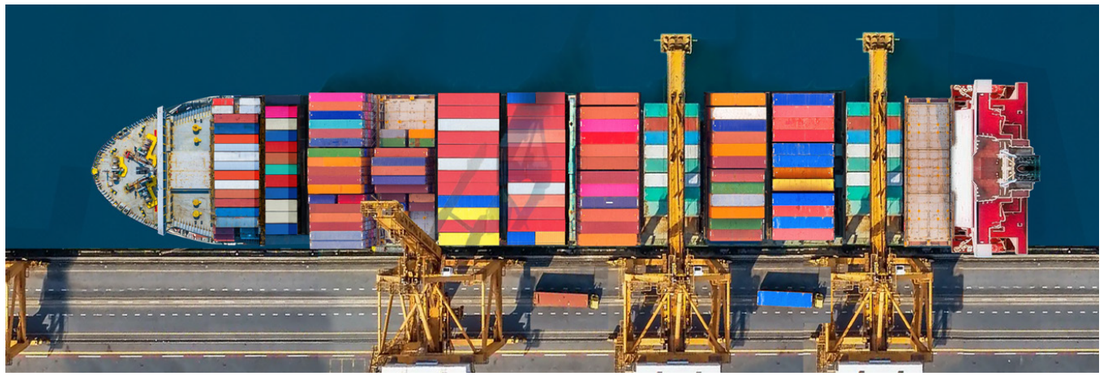
1. the Court has power under the IAA or at common law to lift a stay of admiralty in rem proceedings and to enter judgment *in rem* to thereby enable the enforcement of foreign arbitral awards; and
2. the *in rem* claim remained viable after an arbitral award has been made on the *in personam* claim, or whether the causes of action merged upon a claimant obtaining an arbitral award in its favour.

Decision of the Court

From Arbitral Award to Judgment in Rem

Under section 6 of the IAA, the Singapore courts are required to stay court proceedings in favour of arbitration unless the said

1. The team thanks our Relevant Legal Trainee Choi Myeong Jun and Associate Rahul Fuad Mohan for their excellent contributions to the case.



arbitration agreement is null and void, inoperative or incapable of being performed. In granting such a stay, the court is further empowered under section 7 of the IAA to retain arrested property as security (or order equivalent security to be provided) "*for the satisfaction of any award made on the arbitration*". In the context of maritime disputes, these provisions mean that a claimant is entitled to commence admiralty *in rem* proceedings in court to arrest a ship in Singapore as security for its underlying claim that is subject to *"international arbitration" i.e.* even if the arbitration may be seated in or outside of Singapore. When a stay is ordered, section 7 of the IAA allows the *in rem* proceedings to continue only as far as it is necessary to deal with the ship under arrest. As far as the underlying merits of the substantive claim are concerned, the *in rem* action is and remains stayed.

However, neither section expressly addresses the precise mechanism by which a successful claimant may enforce the award against the security that the claimant had earlier obtained by the arrest of the property in question (in this case, the Vessel).

Returning to the principle originally espoused in the English admiralty case *The "Rena K"* [1979] QB 377 ("***"Rena K" principle***"), the Court discerned the principle to encompass two aspects:

1. Courts may, when staying *in rem* proceedings in favour of arbitration, order the security (in the form of the arrested ship) to be retained where the arresting party faces a risk of being unable to enforce a foreign arbitral award.
2. Upon a defendant shipowner's failure to satisfy an arbitral award, a claimant/arresting party may need to seek the removal of the stay of the *in rem* proceedings and proceed to judgment *in rem* in order to enforce the award against the retained security.

The first aspect of the *"Rena K"* principle has been at least partially codified in section 7(1) of the IAA, with the important qualification that the arresting party need no longer demonstrate that the defendant shipowner is unlikely to be able to satisfy the award in order for the arrested property to be retained as security.

However, neither section 7 nor existing case law articulates whether the courts retain the power to implement the second aspect of the *"Rena K"* principle. The Singapore High Court held that it indeed retained the inherent power to do so by way of residual common law power for the following reasons:

1. The second aspect of the *"Rena K"* principle was a necessary corollary of the first. Without the power to order a lifting of the stay of proceedings for award enforcement purposes, the retention of security would be rendered meaningless – in the words of the Court, a *"hollow protection offering no practical remedy to successful claimants/ award creditors"*. This view further aligns with the essence of the *"Rena K"* principle to protect a maritime claimant's ability to effectively enforce arbitral awards against a shipowner/ bareboat charterer, particularly where shipowners commonly structure their fleet of ships under the ownership of "one-ship companies" to limit their liability to creditors.
2. Nothing in the IAA or the Rules of Court 2021 excluded this residual power. On the contrary, section 7(1)(a) of the IAA envisages the security being retained *"for the* ***satisfaction*** *of any award made on the arbitration*" (emphasis ours). The Court held that, to allow satisfaction of an award from the arrested property as security, Parliament must have intended for the court to be able to lift the stay of proceedings and permit the award creditor to enter judgment *in rem* in their *in rem* action, and ultimately order a payment out of the sale proceeds of the arrested property.
3. This approach would support one of the broader objectives of the IAA, which is to facilitate rather than hinder the enforcement of international awards.

On the present facts, the Claimant found itself squarely within the situation that the second aspect of the *"Rena K"* principle was designed to address. The Court hence ordered the lifting of the Stay Order and permitted the Claimant to proceed to enforce the Awards against the balance sale proceeds of the Vessel.

Merging of In Personam and In Rem Causes of Action

The Court noted that contrasting judicial approaches have emerged across the common law jurisdictions, including in the UK, Australia and New Zealand, on whether the *in rem* and *in personam* proceedings remain separate or merge into one another. Locally, in *Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 2 SLR(R) 793 (***"Kuo"***), the Singapore Court of Appeal had established that, in the context of a dissolution of a company, the action continues as a parallel *in rem* and *in personam* action, and the *in rem* characteristics of the action do not become subsumed by the additional *in personam* characteristics.

Although *Kuo* did not concern the enforcement of an arbitral award against an arrested ship, the Court found that the reasoning in *Kuo* was equally apposite and applicable to the present facts:

1. The fundamental principle established in *Kuo* was that *in rem* and *in personam* proceedings remain separate and parallel actions that do not merge or become subsumed into one another. The determination of the Claimant's underlying cause of action through arbitration did not disintegrate the parallel *in rem* actions.
2. If arbitral awards were held to extinguish any *in rem* claims against the arrested property, this would (i) undermine the fundamental purpose of admiralty *in rem* actions as a means of securing maritime claims, and (ii) defeat the very purpose of section 7 of the IAA and instead place unwarranted obstacles in the path of an award creditor wishing to realise the fruits of its victory in the arbitration.

Accordingly, the *in rem* claim did not merge with the *in personam* claim merely because the underlying cause of action had culminated in an arbitral award in the Claimant's favour. The Claimant was hence entitled to pursue the *in rem* proceedings and obtain *in rem* judgment for its claim as determined by the Awards.

Concluding Remarks

The *"Yangtze Harmony"* exemplifies the Singapore Courts' consistently pragmatic and pro-arbitration approach to the enforcement of awards. By confirming that an arbitral award does not extinguish an admiralty *in rem* claim, and recognising the Court's residual power to lift a stay for the purpose of enforcing that award, the Singapore High Court has ensured that such security as is obtained through a ship arrest remains meaningful and effective to the successful creditor.

This decision underscores two key assurances for maritime claimants and arbitration users alike.

First, security truly remains available for enforcement. A claimant who arrests a vessel as pre-award security can be confident that the arrest will not be rendered hollow once an arbitral award is issued. The Court affirmed that the *in rem* claim survives and can be converted into an *in rem* judgment to enable the claimant to access the sale proceeds.

Second, award creditors will not be denied the fruits of their victory. Parties need not fear that success in arbitration will leave them with an unenforceable award or a procedural dead-end under Singapore's ship arrest regime. The Court's interpretation of the IAA and legislative intent ensures that the framework functions cohesively to facilitate, rather than frustrate, enforcement.

About the authors



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Kendall Tan is a Partner in Rajah & Tann Singapore's Shipping & International Trade Practice and the Practice Lead for the Shipping Regional Practice Group across the Rajah & Tann Asia network. He also heads the firm's Brunei Desk Practice.

A leading shipping disputes lawyer, Kendall advises on complex domestic and cross-border matters. He is admitted to practise in Singapore, Brunei Darussalam, and England & Wales, and is often described as a "lawyer's lawyer", instructed by international law firms and in-house counsel in complex disputes and significant maritime casualties.

Kendall is the only Maritime and Trade lawyer from any Asia-Pacific based law practice to be ranked as a Global Market Leader for Shipping: Litigation in the Chambers Global 2026 Guide, placing him amongst that elite cohort of only 16 Shipping lawyers so recognised, worldwide.

Kendall serves as a Board Member at the SCMA, and as Chair of its Members' Consultative Council. He currently leads the SCMA-MPA Methanol Work Group.



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Aleksandar Georgiev is a Partner of Rajah & Tann Singapore's Shipping & International Trade Practice and Brunei Desk, qualified to handle both Singapore and English law matters.

He specialises in resolving disputes and contentious matters, with a focus on both "wet" and "dry" shipping, international trade, marine insurance, commodity, energy, offshore, shipbuilding, and related disputes. Aleksandar regularly appears before the Singapore Courts and in arbitrations (both ad hoc and institutional) under the SIAC, SCMA, LCIA, LMAA, ICC, and other arbitration rules.

He also has experience acting for clients in arbitrations administered by specialised trade bodies such as GAFTA and PORAM, and managing litigation in other jurisdictions. In addition, he is accredited as a maritime arbitrator by SIArb and SCMA.



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They have a hopeless case, so why won't they settle?



Written by **MICHAEL JAMIESON**

Negotiation stalemate

→ Why a party with a poor case won't accept a rational settlement offer

In June, I presented a webinar to 400 in-house lawyers. I focused on risk appetite and the asymmetry between a risk-averse party in a strong position and a risk-seeking party in a weak position. Surprisingly, the risk-seeking party holds the upper hand in negotiations. This session was well received, and the participants came away with an understanding of why seemingly irrational behaviours are explicable and predictable, including that a party facing a certain loss will double down, even at a high risk of a worse outcome later.

For those who missed it, we have provided the article that I based my webinar on. For the litigators reading, we would love to know whether this would change your approach.

Have you ever wondered why the other party won't give up on a case they are almost certain to lose? This article seeks to explain why.

The late Nobel prize-winner Daniel Kahneman and his late research partner Amos Tversky provide the answer. This is set out in part 4 of Kahneman's excellent book *Thinking, Fast and Slow*,[1] which I attempt to summarise in this article. (I hope to do it justice and apologise for the over-simplification!)

Losses loom larger than gains of the same amount

On average, losses feel twice as bad as the positive feelings of a gain of the same magnitude (they range between 1.5 and 2.5 times greater)[2] Imagine your positive feeling if you find a $100 note on the footpath. However, if you lose the $100 note, your negative reaction to the loss will be about twice as strong as the positive feeling of the gain. In other words, you would need to find around $200 (for most people, between $150 and $250) to compensate for losing $100.

This relates to the concept of 'loss aversion' – *we are driven more strongly to avoid losses than to achieve gains*[3] (probably for evolutionary reasons). The reference point can be the status quo (such as current wealth) or a future goal[4] or target (say, a desired settlement amount). Exceeding the target is experienced as a gain, while not achieving the target is experienced as a loss.

This suggests that the more realistic the settlement target is and the less any concession is viewed as a loss, the greater the chances and the higher the utility of settlement.

Decision weights, possibility effect and certainty effect

We over-weight unlikely events and under-weight likely events. Kahneman refers to *decision weights*. For example, people give the probability of a 5% gain a decision weight of 13.2, overweighting it by more than 2.5 times. This is known as the 'possibility effect' – the possibility of a rare event is over-emphasised in our minds.

At the other end of the scale, a 95% probability of a gain is given a decision weight of 79.3: a 5% reduction from a certain outcome feels like a 20% reduction. This is called the 'certainty effect', where highly probable outcomes are under-weighted.[5]

Diminishing sensitivity to gains and losses

1. Kahneman invites us to consider two problems.[6] Which option would we prefer in each? Get $900 for sure OR a 90% chance to get $1,000?
2. Lose $900 for sure OR a 90% chance to lose $1,000?

In problem 1, most people are risk averse and prefer the sure thing: subjectively, we value the gain of

1. *Daniel Kahneman Thinking, Fast and Slow (Penguin Books Ltd, 2012) at 269–321.*
2. *Daniel Kahneman Thinking, Fast and Slow (Penguin Books Ltd, 2012) at 284.*
3. *Daniel Kahneman Thinking, Fast and Slow (Penguin Books Ltd, 2012) at 302.*
4. *Daniel Kahneman Thinking, Fast and Slow (Penguin Books Ltd, 2012) at 303.*
5. *Daniel Kahneman Thinking, Fast and Slow (Penguin Books Ltd, 2012) at 315.*
6. *Daniel Kahneman Thinking, Fast and Slow (Penguin Books Ltd, 2012) at 279.*
7. *Daniel Kahneman Thinking, Fast and Slow (Penguin Books Ltd, 2012) at 316–319*

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$900 at more than 90% of the value of a $1,000 gain (even though the expected value is the same for both options, at $900).

In problem 2, most people are risk-seeking and take the gamble: subjectively, the negative value of a $900 loss is more than 90% of the negative value of a $1,000 loss (even though the expected value is the same for both options, at -$900). In each quadrant:

- The top row is a possible gamble or outcome.
- The second row is the operative emotion.
- The third row shows how most people act when faced with a choice between the gamble and a sure thing of the same expected value, for example, between a 95% chance of winning $100,000 and $95,000 with certainty.
- The fourth row shows the expected attitudes of parties to a dispute.

Fourfold pattern

The above factors combine to produce Kahneman and Tversky's 'four-fold pattern':[7]

	GAINS	LOSSES
HIGH PROBABILITY (Certainty effect)	95% chance to win $100,000 Fear of disappointment RISK AVERSE Accept unfavourable settlement	95% chance to lose $100,000 Hope to avoid loss RISK SEEKING Reject favourable settlement
LOW PROBABILITY (Possibility effect)	5% chance to win $100,000 Hope of large gain RISK SEEKING Reject unfavourable settlement	5% chance to lose $100,000 Fear of large loss RISK AVERSE Accept unfavourable settlement



The possibility effect influences the bottom row. In the bottom left-hand quadrant, the overweighting of the chance of a large gain explains why we buy lottery tickets and overpay for a very small chance of winning. The bottom right-hand quadrant is where insurance is bought. People overweight the possibility of a large loss and pay more than its expected value to avoid it.

The certainty effect influences the top row. In the top left-hand quadrant, people are risk-averse and will pay a premium to lock in a certain gain.

On the other hand, in the top right-hand quadrant, people are risk-seeking and will gamble to avoid a certain loss now, even at a high risk of a larger loss later.

This is due to (a) diminished sensitivity: a $100,000 loss does not feel much worse than a $95,000 loss; and (b) decision weight: for a 95% chance, the decision weight of 79.3 feels much less than the probability.

This is where bad options and desperate gambles are taken. The small hope of a favourable outcome is magnified, and the high chance of disaster is minimised. As we feel losses more than gains, we are hard-wired to avoid the pain of a certain loss now, and the remote possibility of relief is powerfully attractive.

Consequences for litigation

Kahneman cites work done by legal scholar Chris Guthrie[8] and concludes that a party with a strong case is likely to be risk averse and be attracted to the certainty of a settlement and the avoidance of the (low but magnified) risk of disappointment. Conversely, a party with a weak case will be loss-averse and risk-seeking, prepared to gamble (overweighting the chance of success) rather than accept a certain loss.

As Kahneman says: *In the face-off between a risk-averse plaintiff and a risk-seeking defendant, the defendant holds the upper hand.*[9] This is reflected in negotiated agreements where the plaintiff settles for less than the trial's expected value (expected outcome x probability). It explains why vexatious litigants may win a more favourable settlement than the merit of their case justifies.

It also explains why the other party, with a weak case, won't accept your perfectly reasonable settlement offer!

Unfortunately, you may need to pay 'over the odds' to settle. As a one-off proposition, this may be acceptable, but Kahneman sounds a note of warning.[10] In each quadrant of the four-fold pattern, systematic deviation from the expected return (for example, paying a premium to avoid a small risk of losing) for many similar decisions is expensive in the long run. It leads to sub-optimal outcomes for that party.

8. *Daniel Kahneman Thinking, Fast and Slow (Penguin Books Ltd, 2012) at 319.*
9. *Daniel Kahneman Thinking, Fast and Slow (Penguin Books Ltd, 2012) at 320.*
10. *Daniel Kahneman Thinking, Fast and Slow (Penguin Books Ltd, 2012) at 320–321*

About the author



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Michael is the Commercial Manager of the New Zealand Dispute Resolution Centre. Michael brings 30 years of legal practise, including 20 years gained in-house, most recently as General Counsel and Company Secretary for a State-owned enterprise.

The Finality of a Rabbinical Arbitral Award



Written by **RICHARD PIDGEON**

Unlimited amendments

→ The Court of Appeal stressed the importance of finality in arbitration.

In finding that an unlimited amendment clause was incompatible with the statutory scheme, in *Gluck v Endzweig and another* [2026] EWCA Civ 145 the English Court of Appeal emphasised the need for the finality of awards under the Arbitration Act 1996 (UK) (the **Act**).

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Background

Three parties contracted together pursuant to a Share Purchase Agreement (**SPA**) dated June 2019, the appellant Mr Gluck as seller of shares in Net Pex Limited, to the second respondent Evertop Limited, with the first respondent guarantor Mr Chaim Yaakov Endzweig. In effect Mr Endzweig was the buyer.

A dispute arose about whether reductions in the instalments payable should be made in terms of the SPA. A mechanism had been included in the SPA by which the purchase price would be reduced if the profits of Net Pex in the first two and a half years after the sale fell below the specified level of 1.58 million GBP per annum. Mr Endzweig duly disputed that Net Pex had not been as profitable as expected and contended there should be a reduction in the remaining deferred portions of the purchase price in accordance with the SPA.

The SPA contained an arbitration clause, and a further agreement was signed on 11 December 2019 by the parties, headed "arbitration agreement", which appointed two rabbis from the Beth Din (a private rabbinical court) as arbitrators.

Importantly, there were two sentences in the arbitration agreement that are crucial to this matter. First, that "this deed will be valid according to the Arbitration Act" and secondly that the Beth Din had the authority to "amend and add to and change the Judgement they have given at any time." This latter power was included with a view to giving the Beth Din untrammelled power to do what it thought best due to its religious authority. Later, when the Court of Appeal considered the matter, it referred to this clause as the "unlimited amendment clause".

Two rabbis were duly appointed arbitrators and on 15 March 2024, after much prevarication, a partial award (or Psak) was made (**First Award**). It held that the respondents were entitled to a price reduction and a further hearing had been convened in February 2024 to determine the quantum of the reduction.

An award was made in May 2024, by which the arbitral tribunal had found the respondents should pay approximately 460,000 GBP to the appellant, which, five months later, the Appellant obtained permission to enforce pursuant to section 66 of the Act (**Second Award**). The timing of events (between the Second and Third Awards) proved decisive.

The Respondents applied to set aside the enforcement order. Just before the enforcement hearing the Beth Din issued a Third Award for the reduced amount of 260,000 GBP. Mr Gluck was not happy with the 200,000 GBP difference.

High Court decision

Before His Honour Judge Pelling KC, Mr Gluck originally obtained a without notice order under section 66 of the Act to enforce the order and for a judgment to be entered in terms of the Second Award.

His Honour Judge Keyser KC then granted the respondents' (Mr Enzweig's and Evertop's) application to set aside the enforcement order because it remained under review by the Beth Din pursuant to the Unlimited Amendment Clause. Judge Keyser KC ruled the fact there was an Unlimited Amendment Clause a material non-disclosure by Mr Gluck on the papers. He set the enforcement order aside.[1]

Judge Keyser KC further ruled that it was not possible to imply the section 57 time limits for correction (28 days) because that time frame was expressly inconsistent with the Unlimited Amendment Clause. The arbitration could be made final despite requests for review by the arbitrators, simply declaring themselves functus officio. If the arbitrators delayed excessively, they could be removed under section 24 of the Act. The arbitration agreement was not incompatible with the Act.

The Appellant seller appealed in order to uphold Judge Pelling KC's original decision.

Court of Appeal Decision

Lord Justice Males granted permission to appeal on the papers in June 2025 identifying that it was arguable whether the arbitration agreement was compatible with the statutory scheme of the Act.

The Court ultimately allowed the appeal and reinstated the Pelling order enforcing the Second Award, thereby underscoring the need for bespoke agreements to nonetheless adhere to the statutory framework of the Act.

The Court noted that the autonomy provided to parties in arbitration is limited by section 4(1) of the Act which records the mandatory Schedule 1 has effect notwithstanding any agreement to the contrary. Section 4(2) sets out non-mandatory fall-back guidance rules which are used in the absence of any agreement. Section 57 is a non-mandatory provision. It is relevant to this arbitration agreement.

Section 58 sets out that an award is final and binding but does not affect the right of a person to challenge by any arbitral process of appeal or review. The parties thereby allow themselves to be bound by institutional rules of review.[2] An arbitration agreement must contemplate that the tribunal will make a decision which is binding on the parties. The arbitrators cannot be free to change their minds at any time.

The Court held that *the principled approach of a court to an arbitration agreement should be to uphold and respect, where possible, party autonomy.*[3] The Court considered the issue as to whether the Unlimited Amendment Clause could sit in an enforceable arbitration agreement either by contractual interpretation or section 57. Neither argument worked.

The practical outcome of the appeal for Mr Gluck (i.e., which Award applied) ultimately turned on whether section 57 was applicable or not. Section 57(1),(2) and (4) provide:

1. The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.
2. If or to the extent there is no such agreement, the following provisions apply.
3. …
4. Any application for the exercise of those powers must be made within 28 days of the date of the award or such longer period as the parties may agree.

The Court held that an analysis of section 57 did not assist with the Unlimited Amendment Clause, but it did have practical effect once the Unlimited Amendment Clause was excised from the arbitration agreement, being issue two of the appeal.

Lord Justice Dingemans for the Court held that, *[it] is therefore necessary to determine whether it is possible to construe the unlimited amendment clause in some way so that a final award can be made*[4] *and later that [it] is the width of the unlimited amendment clause that creates the problems*.[5] Those problems were insurmountable.

The SPA's arbitration clause made it clear that the parties intended to create an arbitration under the Act, which would give rise to an enforceable award. The Unlimited Amendment Clause was incompatible with this intention as it would enable an award that could be changed at any time and never be final. Judge Keyser KC's solution was that the tribunal could declare itself functus officio at any time, but it was not an answer as the tribunal could at any time reverse that declaration.

The Unlimited Amendment Clause was deemed repugnant to the arbitration agreement and unenforceable, while the Second Award was restored as none of the correction provisions set out in section 57 of the Act were used in the appropriate 28-day period.[6]

Conclusion

The English Court of Appeal, by preferring to sever a non-compliant term (the Unlimited Amendment Clause) in order to "save" the arbitration agreement, has displayed a pro-arbitration approach.

The Court, however, has clearly opined that while it will honour party autonomy, it will not be at the sake of deferring arbitral finality. Parties are well advised to obtain legal advice before utilising bespoke clauses in arbitration agreements.

1. *A v B* [2025] EWHC 798 (Comm)
2. *K v S* [2015] EWHC 1945
3. *Gluck v Endzweig and another* [2026] EWCA Civ 145 at [43].
4. *Gluck v Endzweig and another* [2026] EWCA Civ 145 at [49]
5. *Gluck v Endzweig and another* [2026] EWCA Civ 145 at [50]
6. *Gluck v Endzweig and another* [2026] EWCA Civ 145 at [56].

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Richard Pidgeon is the former Business Unit Leader at the FDR Centre and has now returned to private legal practice as a litigation solicitor with Integritas Law Firm. He holds a Doctorate in Law and is a former general civil litigation barrister enterprise.



Cross-Border Enforcement: High Court Reaffirms Finality of Mainland Judgments Notwithstanding "Trial Supervision" System

Case: ***Beijing Renji Real Estate Development Group Co., Ltd v Zhu Min*** [2026] HKCFI 197

Written by **DR WILLIAM M.F. WONG, SC, LAI CHUN HO, HAN SHENG LIM**

Published on 13 January 2026

DES VOEUX CHAMBERS

Case Highlights

Enforcement at Common Law: The Court of First Instance granted summary judgment to enforce a judgment of the Beijing Higher People's Court for over RMB 192 million.

Trial Supervision System vs. Finality of Judgment: The Court confirmed that the mere existence of the Mainland's "trial supervision" system does not render a judgment inconclusive for enforcement purposes, absent evidence of a likelihood of retrial actually being ordered.

Public Policy: Arguments alleging a breach of natural justice were rejected as, inter alia, attempts to impeach the merits of the foreign judgment.

Mr William Wong SC, Mr Lai Chun Ho, and Mr Han Sheng Lim acted for the successful Plaintiff in obtaining summary judgment.

Background

The Plaintiff (**"P"**) sought to enforce a judgment issued by the Beijing Higher People's Court ("**BHPC Judgment**") against the Defendant ("**D**") at common law. The dispute arose from a guarantee provided by D in relation to an investment in a fishery project.

The BHPC Judgment had held D liable for a principal sum of RMB 150 million plus interest. D opposed the enforcement in Hong Kong on two primary grounds:

1. **"Trial Supervision Ground"** – D argued that the BHPC Judgment was not "final and conclusive" because of the potential for retrial under Mainland civil procedure law.
2. **"Public Policy Ground"** – D argued that enforcement would be in breach of natural justice, alleging that in arriving at its decision, the BHPC relied on an arbitral award to which D was not a party.

The Decision

Deputy High Court Judge MK Liu granted summary judgment in favour of P, rejecting both of D's defences.

1. Trial Supervision Ground

The Court applied the principles recently set out by Deputy High Court Judge Jonathan Wong in *Sunsco International Holdings Ltd v Lin Chunrong* [2025] HKCFI 5238. DHCJ Wong held that the "trial supervision" procedure does not per se render a Mainland judgment non-final. The paramount consideration is the likelihood of a retrial being ordered.

D failed to establish that a retrial was likely. It was wrong for D to suggest that the BHPC Judgment lacked evidentiary support. A number of other defences that D intended to raise had already been rejected by the Mainland Court or had never been raised by D before the Mainland Courts. D could not show that an allegedly ongoing criminal investigation in the Mainland would yield new evidence that could be used to secure a retrial.

2. Public Policy Ground

The Court reiterated the established principle that a defendant cannot impeach a foreign judgment on its merits. D contended that the BHPC had breached natural justice by effectively binding him to findings from an arbitration he did not participate in.

The Judge rejected this, finding that instead of treating the arbitral award as binding on D, the BHPC had made independent findings of fact based on available evidence, including a criminal judgment against a third party. The Court found no breach of the "no accusation, no trial" principle under Mainland law and noted D had been given ample opportunity to present his case in the Mainland proceedings.

Key Takeaways

This decision serves as a robust affirmation of the enforceability of Mainland judgments in Hong Kong at common law. It clarifies that:-

The theoretical possibility of a retrial in the Mainland is insufficient to block enforcement. Concrete evidence of a likely retrial is required.

The Hong Kong Court will be vigilant against "public policy" defences that are, in reality, attempts to re-litigate the underlying merits or to raise new arguments which the defendant neglected to raise in the Mainland Court.

Read the judgment here: https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=176222&currpage=T

Mr William Wong SC, Mr Lai Chun Ho, and Mr Lim Han Sheng, instructed by Nixon Peabody CWL, acted for the Plaintiff.



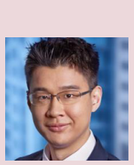
About the authors



William M.F. Wong, SC

Dr Wong has been in practice in Hong Kong since 1997. In 2010, he was also called to the Bar of the British Virgin Islands. In 2013, Dr Wong was appointed as a Senior Counsel in Hong Kong. He is also presently a Non-Executive Director of the Airport Authority and one of the Vice Chairmen of the Board of Review of the Inland Revenue. Dr Wong's practice covers a wide spectrum of contentious commercial litigation. He has a special focus and substantial experience in the areas of company, insolvency and securities law.

He frequently represents clients in contentious shareholders and/or investors disputes and disputes in liquidation. He is the first Hong Kong barrister to be admitted, on an ad hoc basis, in the Bermudian courts to conduct trials and appeals. He is experienced in offshore litigation. He also acted as an expert witness on HK company law in the People's Republic of China, and international arbitration. Dr Wong is also granted rights of audience in the Astana International Financial Centre Court and sits as an arbitrator in numerous international commercial arbitrations.



Lai Chun Ho

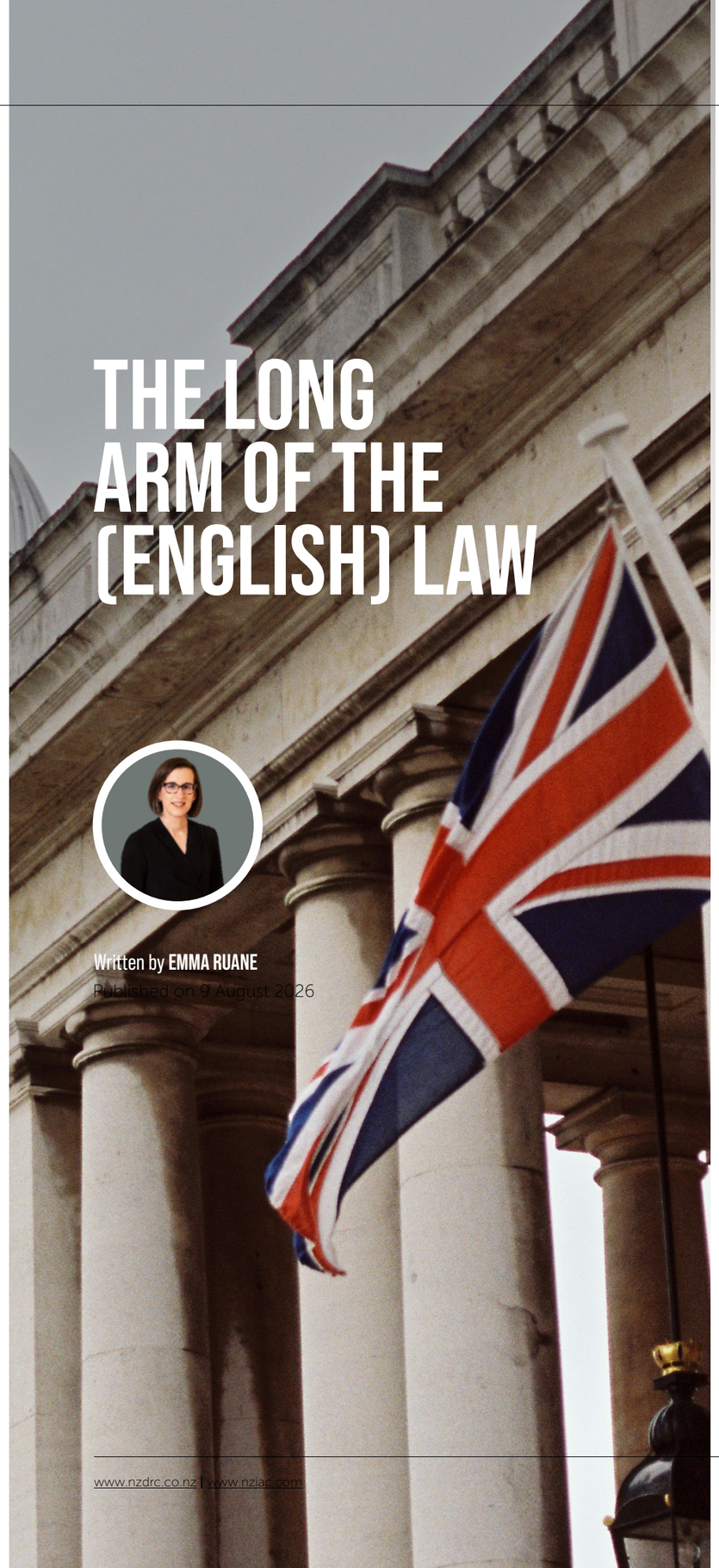
Chun Ho has a broad civil practice encompassing company and insolvency works, securities and regulatory matters, and a wide spectrum of other civil and commercial disputes, with particular experience in shareholders' dispute, breach of fiduciary duties claims, civil fraud, asset recovery claims and defamation. He has been appointed as a part-time lecturer of law (non-clinical) at the University of Hong Kong. He was awarded the Bar Scholarship in 2016. Chun Ho is fluent in English, Mandarin and Cantonese.



Han Sheng Lim

Han Sheng joined Chambers in 2023 after the successful completion of his pupillage under the supervision of Mr Adrian Lai JP, Mr Joseph Lee, Mr Christopher Chain SC and Mr Jason Yu. Han Sheng is from Singapore. Following his pre-university education at Raffles Institution and completion of national service, Han Sheng obtained his BA (now MA) in Law from the University of Cambridge with Triple First Class Honours. He went on to study the BCL at the University of Oxford and the PCLL at the Chinese University of Hong Kong, obtaining Distinctions for both.

During his studies, Han Sheng received multiple scholarships and prizes in recognition of his academic achievements, including the DVC Junior Scholarship, the DVC Oxford Scholarship and the Harry Liu Postgraduate Scholarship. At the same time, Han Sheng represented the University of Cambridge in powerlifting and was awarded a Full Blue.



THE LONG ARM OF THE (ENGLISH) LAW

Written by **EMMA RUANE**

Published on 9 August 2026

PETERS & PETERS

It is not unusual for commercial parties to agree that their disputes should be arbitrated in London, pursuant to English law, even where the parties themselves are foreign and the underlying transaction has little or no connection to England. The Commercial Court's judgment in *State Oil Company of the Republic of Azerbaijan & Ors* v Mansimov & Ors [2026] EWHC 2102 (Comm) is a reminder that those choices can have consequences beyond the arbitration itself. In particular, an award creditor may be able to invoke the English court's assistance to prevent steps designed to frustrate enforcement of an award, including by seeking relief in respect of transactions at an undervalue under ss.423 and 425 of the Insolvency Act 1986 (the **"Act"**) and, where the necessary elements are made out, by pursuing claims against those alleged knowingly to have procured the violation of rights established by an award or judgment.

Summary of the material facts

In 2020 and 2021, the claimants, the State Oil Company of the Republic of Azerbaijan ("**SOCAR**") and companies it directly or indirectly

controls, obtained London-seated arbitral awards against Mr Mansimov and companies in the Palmali Group, which he founded.

Alongside enforcement measures in other jurisdictions, the claimants issued proceedings in England against defendants including Mr Mansimov and companies within the Palmali Group. The claims included: (a) a claim under s.423 of the Act; (b) a claim in what has become known as the *Marex* tort; and (c) unlawful means conspiracy.

The claimants alleged that various restructurings of the Palmali Group in 2018, which took place at a time when the arbitrations were either imminent or already on foot, were undertaken for the purpose of putting assets beyond the reach of creditors. The defendants contended that the Palmali Group was under severe financial pressure and that the restructurings were legitimate measures driven by its creditors. It was common ground that the restructurings had taken place outside the jurisdiction, between parties who were not domiciled or incorporated in England, and that the contracts effecting the transfers were not governed by English law.

s.423 Insolvency Act 1986

Section 423 of the Act applies to transactions entered into at an undervalue, including gifts, transactions for no consideration, and transactions where the consideration received is significantly less than the value provided by the transferor. If the court is satisfied that the transaction was entered into for the purpose of putting assets beyond the reach of a person who is making, or may make, a claim, or otherwise prejudicing that person's interests in relation to such a claim, the court has wide powers under s.425 to restore the position or protect the victim of the transaction.

Where the impugned transaction is foreign, the claimant must establish a sufficient connection with England and Wales before relief under s.423 will be available. In these proceedings, the key connections relied upon included that the underlying contracts were governed by English law, required disputes to be resolved in London-seated arbitration, and had resulted in awards which the claimants sought to recognise and enforce in England.

Birt J held that those connections were sufficient for the purposes of the s.423 claim. Referring to *Integral Petroleum SA v Petrogat FZA & Ors* ([2021] EWHC 1365 (Comm) and [2023] EWHC 44 (Comm)), the judge reasoned that, if the restructurings were undertaken for the purpose alleged, they were directed at frustrating enforcement of awards likely to be made in London-seated arbitrations and ultimately capable of being reflected in English judgments. That was enough, at the jurisdictional stage, to found a sufficient connection with England and Wales.

The *Marex* tort

The tort of knowingly inducing or procuring a party to act in wrongful violation of a claimant's rights under a judgment originates in the judgment of Knowles J in *Marex Financial Ltd v Sevilleja* [2017] EWHC 918 (Comm). Its rationale is that, just as the law protects contractual rights from intentional third-party interference through the tort of inducing breach of contract, it should also protect rights established by judgments from intentional interference by third parties.

Per Bryan J in *Lakatamia Shipping Co Ltd v Su* [2021] EWHC 1907 (Comm), the elements of the Marex tort are that:

- A judgment has been entered in the claimant's favour;
- There has been a breach of the rights existing under that judgment;
- The defendant has procured or induced that breach;
- The defendant knew of the judgment; and
- The defendant realised that the conduct being induced or procured would breach the rights owed under the judgment.

The defendants accepted, for the purposes of the application, that the *Marex* tort could apply to arbitral awards as it does to judgments. However, they contended that an essential element of the tort was missing: there was no judgment or award in existence at the time of the alleged restructuring. Birt J accepted that submission. That did not mean that a claimant has no rights before judgment or award: the Judge noted, for example, the potential availability of contractual rights and accessory liability in tort against those who intentionally induce breaches of contract. But the *Marex* tort itself requires the relevant judgment or award right to have come into existence before the alleged procurement of its violation.

Conclusion

Although the claimants did not succeed on the Marex tort, Birt J upheld the order permitting service out of the jurisdiction in respect of the s.423 claim and the unlawful means conspiracy claim which depended on it. Although the decision arose following a challenge to permission to serve out of the jurisdiction, rather than after a full trial, Birt J observed that the sufficient-connection issue involved little factual dispute and was not obviously one that would look materially different after trial. The judgment therefore provides a significant indication of how the Commercial Court is likely to approach attempts to invoke s.423 in support of enforcement of English arbitral awards where the alleged asset-stripping activity took place abroad.

Practical takeaway

The practical lesson is simple. Parties who choose English law and a London seat should not assume that the foreign nature of the parties, assets or transactions will place subsequent restructuring activity beyond the reach of the English courts. In these proceedings, the alleged transfers took place outside England, between foreign parties, pursuant to foreign-law transactions. Nevertheless, the court concluded that there was a sufficient connection with England because the underlying disputes arose under English-law contracts, were to be resolved by London arbitration, and had resulted (or were likely to result) in awards capable of enforcement in England. For award creditors, the decision reinforces the usefulness of s.423 as part of a broader international enforcement strategy. For award debtors and those who advise them, it serves as a reminder that steps said to have been taken to frustrate payment of English arbitral awards may attract scrutiny in the English courts notwithstanding their overwhelmingly foreign character.

About the author



Emma Ruane

Emma is a partner at Peters & Peters, with more than a decade of experience in complex civil and commercial litigation, often involving an international dimension.

Her experience includes representing the Republic of Mozambique in the high-profile "tuna bonds" litigation, as well as acting in major banking, competition and multi-party disputes. She has extensive experience securing and challenging interim relief, including freezing orders, anti-suit injunctions and disclosure orders, and representing both claimants and defendants through trial and beyond.

Emma is recognised as 'Up and Coming' in Chambers 2025 (Fraud: Civil), with clients describing her as "an excellent litigator" and "a notably strong solicitor."

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