DEVELOPMENTS IN THE LAW OF INTERNATIONAL ARBITRATION: INSIGHTS FROM THIRD EDITION OF *MUSTILL & BOYD*

This article discusses four themes which it suggests have characterised the development of international arbitration law over the last quarter of a century. The first is the increasing internationalisation of arbitration law, with courts reviewing the decisions of courts from other jurisdictions in the effort to find workable solutions in an essentially international enterprise. The second and third consider the influences of investment treaty arbitration, both the difficulties raised by court challenges to investment treaty awards and the utility of the distinction between issues of jurisdiction and admissibility originating in that specialist area of arbitral practice. Finally, the "de-contractualisation" of arbitration law, with the development of special legal principles for agreements to arbitrate.

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I. Introduction

1 In December 2024, the third edition of what is now *Mustill & Boyd: Commercial and Investor State Arbitration* was published.[1] The previous full edition had sought to state the law as at 1 January 1989.[2] A companion volume followed in 2001[3] which updated the position to 30 April 2001, but the authors of the third edition faced the daunting task of updating a book to reflect over 23 years of case law, legislation, "soft law" and academic commentary.

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1 *Mustill & Boyd: Commercial and Investor State Arbitration* (David Foxton gen ed) (LexisNexis, 3rd Ed, 2024).

2 Michael J Mustill & Stewart C Boyd, *Commercial Arbitration* (Butterworths, 2nd Ed, 1989).

3 Lord Mustill & Stewart C Boyd, *Commercial Arbitration: 2001 Companion* (Butterworths, 2nd Ed, 2001).

2 Perhaps the only benefit of that long period of gestation is that it provides an appropriate perspective from which to identify significant changes in arbitration law in the interval between the two full editions. This article considers four:

(a) The increasing internationalisation of arbitration law.

(b) The challenges raised by court challenges to investment treaty awards.

(c) The distinction between issues of jurisdiction and admissibility.

(d) The "de-contractualisation" of arbitration law.

3 The first three subjects were addressed in short speeches which I delivered at events held to mark the publication of the third edition in Singapore, London and Paris, respectively in January, February and April 2025. The fourth addresses what is something of a running theme of the third edition, developing ideas which were discussed by the original authors in *Commercial Arbitration: 2001 Companion*[4] ("*2001 Companion*") and by the current general editor in an article I published in 2022.[5]

II. Internationalisation of arbitration law

4 It is not straightforward to identify the number of non-English cases cited in the second edition of *Mustill & Boyd* in 1989, but in terms of decisions from clearly non-English law reports, there were four from Canada; three from Australia; one each from the US, Ireland, New Zealand and one from the Malayan Law Reports.

5 Turning to the third edition, Australia came in at 31, the US at ten, India at seven, New Zealand at six, Canada still at four, Ireland still at one and 137 from Singapore. Those statistics demonstrate the remarkable rise of Singapore as an arbitration venue over the ensuing two decades and vindicate the judgment of those who decided to make case law freely available through sites such as BAILII, the National Archives and

4 Lord Mustill & Stewart C Boyd, *Commercial Arbitration: 2001 Companion* (Butterworths, 2nd Ed, 2001) at pp 60–61.

5 David Foxton, "How Contractual is Arbitration Law?" (2022) JBL 459.

Singapore Law Watch, and to adopt a neutral citation methodology so that it was no longer necessary to subscribe to expensive sets of law reports to be able to access and deploy case law materials.

6 However, the statistics overall reflect the recognition, among common law and civilian jurisdictions, of the transnational nature of international arbitration. Many of its foundational instruments are international in character – most importantly the New York Convention,[6] but also the UNCITRAL Model Law.[7] So-called "soft law" documents have blended common law and civil procedural outlooks.[8] Arbitrations will frequently involve parties from two jurisdictions entering into a contract governed by the law of a third, which provides for disputes to be arbitrated with a legal seat at a fourth, perhaps by arbitrators from three more jurisdictions, who produce an award which has to be enforced in yet more. Reflecting that international context, when fashioning solutions to the problems which this highly-effective mechanism for cross-border dispute resolution can throw up, we need to be alive to how courts in other jurisdictions have tackled similar problems and try and identify any emerging international consensus. As I have put it in one note, with a nod to a speech by Chief Justice Sundaresh Menon on a different topic, we may have a somewhat uncommon law of commerce, but we have an increasingly common law of arbitration.[9]

7 The increasing readiness to consider arbitration jurisprudence from other jurisdictions has been led by apex courts where, dare I say it, there may be more time to obtain and consider it. A particularly important instance was the decision of the Singapore Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd*[10] ("*Tomolugen*") which has been cited in

6 United Nations Commission on International Trade, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (entered into force 7 June 1959).

7 United Nations Commission on International Trade, UNCITRAL Model Law on International Commercial Arbitration (1985, amended 2006).

8 International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration (17 December 2020) <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43efb624-f2cb2af7cf7b> (accessed 13 July 2025).

9 Paul S Davies & David Foxton, "Arbitration Matters in the Privy Council and Supreme Court" (2024) 140 LQR 337 at 342.

10 [2016] 1 SLR 373.

15 cases in England and Wales, two of them being judgments of mine. It features prominently in two recent decisions of apex courts for the legal systems of England and Wales and those common law countries who retain appeals to the Privy Council: *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)*[11] and *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corp*[12] ("*FamilyMart*"). What is particularly noticeable about *Tomolugen* and *FamilyMart* is that an internationalist approach is adopted when considering an issue which national parochialism has historically dominated: that of arbitrability.

8 Arbitrability – which I will somewhat inadequately define as the public policy limitations on the types of disputes which may be validly subject to binding determinations by private contractual tribunals – is a most elusive notion. The concept finds only very limited reference in the English Arbitration Act 1996[13] ("1996 Act"), ss 81(1)(a) and 81(1)(c) preserving "any rule of law as to … matters which are not capable of settlement by arbitration or … the refusal of recognition or enforcement of an arbitral award on the grounds of public policy", and s 103(3) providing that the court may refuse to recognise or enforce a New York Convention award "if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award". It is addressed more explicitly in s 11(1) of Singapore's International Arbitration Act 1994,[14] which provides that "any disputes which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so".

9 But, currently, arbitrability also comes into arbitration law through the law of contract, and in particular the public policy of the applicable law of the arbitration agreement. If an arbitration is expressly governed by the law of Ruritania, a dispute is referred in relation to the Ruritanian telecoms industry, and the law of Ruritania provides that disputes about essential communications services are not arbitrable, it may be argued that the agreement is not enforceable under its applicable law, and that a stay or injunction to enforce the arbitration agreement should be refused. The fact that different systems of law may govern the issue of

11 [2023] Bus LR 1359; [2023] UKSC 32.
12 [2024] Bus LR 190; [2023] UKPC 33.
13 c 23 (UK).
14 2020 Rev Ed.

arbitrability for different purposes – the law of the seat, the applicable law of the arbitration agreement and the law of a place of attempted enforcement – was confirmed by the Singapore Court of Appeal in *Anupam Mittal v Westbridge Ventures II Investment Holdings*[15] ("*Anupam*"). That decision came out shortly after I had written a section of *Mustill & Boyd* suggesting that, at least on conventional contractual principles, the first instance decision was wrong. That was also the view of the Singapore Court of Appeal, although the court was able to avoid what might otherwise been an unwelcome frustration of the parties' evident desire to arbitrate certain types of claims by limiting the application of the otherwise applicable law as a matter of construction. I am going to refer to these two different contexts as contractual arbitrability and forum arbitrability.

10 Focusing on contractual arbitrability for the moment, ordinary principles of the common law of contract suggest that a contract will not be enforced to the extent that the agreement is unenforceable under its applicable law. Thus, in *The Amazonia*,[16] the English Court of Appeal accepted that if the arbitration agreement in that case, which had a seat in England and Wales, had been governed by Australian law, it would not have been valid and enforceable because s 9 of the Australian Sea-Carriage of Goods Act 1924[17] so provided. But the courts of the forum may refuse to give effect to public policy rules of the applicable law if to do so would contravene the public policy of the forum. If, for example, the law of Ruritania said that disputes with individuals of a certain ethnicity could not be arbitrated, I suspect that the courts of England and Wales would feel able to enforce and support the arbitration agreement nonetheless. That is a somewhat improbable example. That argument is often advanced on the basis that the ability to resolve disputes in arbitration is such an obvious and unchallengeable universal good that any limit upon it outside of a very narrow category of disputes with an intensely public character is a bad thing. However, it might also be advanced on the basis that arbitration law should stand outside the conventional law of contract in this respect. I return to this issue below.

15 [2023] 1 SLR 349.
16 [1990] 1 Lloyd's Rep 236.
17 Cth.

11 What of forum arbitrability? The *2001 Companion* observed that:[18]

> No doubt … fragmentary examples of inarbitrability could be collected, but since they cannot be assembled into a coherent doctrine we shall not pursue them in this Companion Volume, leaving them to the Third Edition if a sufficient consensus has started to emerge.

12 A consensus has started to emerge, but its contours are still being fought over. In England and Wales, cases such as *FamilyMart*, *Nori Holdings Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp*[19] and *Bridgehouse (Bradford No 2) Ltd v BAE Systems plc*[20] have established that the policy of enforcing agreements to arbitrate disputes is so strong that something rather compelling is required for the court to refuse to give effect to such an agreement. Decisions in England and Wales have relied on the statement of general principles in s 1 of the 1996 Act including:[21]

> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; …

13 The *2001 Companion* predicted that s 1 would have a "profound psychological effect" on the courts, arbitral tribunals and the parties.[22] That prediction has proved entirely accurate. It has become a feature of arbitration and arbitration-related court hearings to find one or more of the principles being deployed by both sides to support diametrically-opposed positions. The *2001 Companion* expressed the view that the words "subject only to such safeguards as are necessary in the public interest" were not concerned with the issue of arbitrability, being "concerned with the manner of resolving arbitrations and not with the permissible subject-matter of arbitrations".[23] However, it is possible to read the words "free to agree how their disputes are resolved" not simply as a reference to how their disputes are resolved *in arbitration*, but as extending to what forum their disputes are resolved in. That reading has gained judicial traction, with s 1(b) of the 1996 Act being relied upon

18 Lord Mustill & Stewart C Boyd, *Commercial Arbitration: 2001 Companion* (Butterworths, 2nd Ed, 2001) at p 75.
19 [2018] 2 Lloyd's Rep 80; [2018] EWHC 1343 (Comm).
20 [2020] Bus LR 2025; [2020] EWCA Civ 759.
21 Arbitration Act 1996 (c 23) (UK).
22 Lord Mustill & Stewart C Boyd, *Commercial Arbitration: 2001 Companion* (Butterworths, 2nd Ed, 2001) at pp 24–25.
23 Lord Mustill & Stewart C Boyd, *Commercial Arbitration: 2001 Companion* (Butterworths, 2nd Ed, 2001) at p 27.

in the context of arbitrability disputes to support an expanded view as to what matters can be arbitrated. But we must not deceive ourselves. The strong pro-arbitration public policy seen in England and Wales and, I would respectfully suggest, in Singapore as well, is consistent with legislative policy, but it is very much a judicial work product.

14 I would like briefly to look at two areas where the tensions of arbitrability are most evident: shareholder remedies and relief arising in insolvency.

15 Taking shareholder remedies first, it is barely ten years ago that, as distinguished an arbitration lawyer as Justice Quentin Loh, in *Tomolugen* at first instance,[24] held that minority oppression claims were not arbitrable, and there was a body of Australian case law to similar effect. In *FamilyMart,* the Cayman Island Court of Appeal including Sir Bernard Rix and Sir Alan Moses, reached the same view.[25] The approach which ultimately prevailed in the apex courts involves a degree of dispute fragmentation, with findings as to the facts said to constitute shareholder oppression being made in the arbitration, which then form the basis for "relief which only a court can give".

16 So far as I am aware, the courts have yet to have a difficult case in which the preclusive effect of the arbitral factual determination and the independent interest of the court in determining what relief should be ordered have come into stark conflict. But then the fact that we have not may well tell its own tale, with the arbitral decision being determinative in practice, and the apparent fragmentation of the dispute being more apparent than real.

17 The insolvency context is more challenging, and one group of commentators has referred to a "clash of cultures" between the worlds of arbitration and insolvency law.[26] There are certainly conflicting public policies, as Lord Briggs noted in *Sian Participation Corp v Halimeda*

24 *Silica Investors Ltd v Tomolugen Holdings Ltd* [2014] 3 SLR 815.

25 *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corp* [2024] Bus LR 190; [2023] UKPC 33.

26 Shella Ng, Felicity Toube & Matthew Abraham, "Insolvency and Arbitration: Clash of Cultures?" *Singapore Global Restructuring Initiative* <https://ccla.smu.edu.sg/sgri/blog/2023/01/20/insolvency-and-arbitration-clash-cultures> (accessed 7 July 2025).

International Ltd[27] ("*Sian Participation*") in the Privy Council: the policy of upholding agreements to arbitrate, and the efficient conduct of the bankruptcy or liquidation for the benefit of all creditors.

18 Take first-class remedies – the setting aside of contracts entered into at undervalue or which involved a preference, where the contracts in issue contain arbitration clauses. In *Larsen Oil and Gas Pte Ltd v Petroprod Ltd*,[28] the Singapore Court of Appeal had to consider whether claims by the liquidator of a company to set aside a transaction as at an undervalue and to avoid certain payments on the basis that they constituted a transaction to defraud creditors fell within an arbitration agreement and were arbitrable. The court held that claims by a liquidator to avoid transactions of an insolvent company concluded at an undervalue were not arbitrable, the powers in question existing "for the benefit of the general body of creditors in an insolvency or insolvency-related context". There are statements to similar effect in other decisions in England and Singapore.[29]

19 These decisions, however, are all concerned with the arbitrability of avoidance claims arising under the *law of the seat*. Where avoidance claims have been raised in a foreign insolvency, and that insolvency has not been recognised under the Cross-Border Insolvency Regulations 2006,[30] the English courts have been willing to grant anti-suit injunctions restraining those proceedings on the basis that they involve a breach of the arbitration agreement: Males J did in *Nori Holdings Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp*[31] and I did in *Riverrock Securities Ltd v International Bank of St Petersburg*.[32] While the consistency of these states of affairs has been doubted, I was satisfied that there is a very real difference between the pursuit of insolvency-related relief under the laws of the forum or in a cross-border insolvency which the forum has recognised, and insolvency-related claims seeking to set aside a contract which is subject to an arbitration agreement in other cases.

27 [2024] UKPC 16.
28 [2011] 3 SLR 414.
29 See *Mustill & Boyd: Commercial and Investor State Arbitration* (David Foxton gen ed) (LexisNexis, 3rd Ed, 2024) at para 3.185.
30 SI 2006 No 1030 (UK).
31 [2018] 2 Lloyd's Rep 80; [2018] EWHC 1343 (Comm).
32 [2020] 2 Lloyd's Rep 591; [2020] EWHC 2483 (Comm).

20 Which brings me to *Sian Participation*.[33] This is not a case about arbitrability as such, but of something quite close to it: whether a pro-arbitration public policy should influence the court's approach when exercising judicial discretions arising outside arbitration legislation. *Sian Participation* came within a year of *FamilyMart*,[34] and with three of the same judges: Lord Reed, Lord Lloyd-Jones and Lord Briggs. The cases are consistent, but the mood music perhaps a little different. The immediate context was the merits test for a winding-up petition in determining whether the debt is genuinely disputed on substantial grounds. Where the debt arises under a contract with an arbitration agreement, the idea of the court determining whether there is an arguable defence brings immediate and unfortunate echoes of the time when it was possible to resist a stay in favour of the arbitration by bringing a cross-application for summary judgment at the same time.

21 In *Salford Estates (No 2) Ltd v Altomart Ltd,*[35] ("*Salford Estates*") the English Court of Appeal held that a creditor's winding-up petition neither was nor included a claim within the meaning of s 9 of the 1996 Act[36] such that the provisions of the Act were not directly engaged. However, the court applied the policy of the 1996 Act by analogy, saying that the court's discretion under s 122(1) of the Insolvency Act 1986[37] should be guided by the legislative policy of the 1996 Act.

22 The Privy Council held that *Salford Estates* was wrongly decided and that, in effect, the policy reach of the 1996 Act or the New York Convention was determined by the scope of the mandatory stay provisions. The Privy Council stated that:[38]

> None of the general objectives of arbitration legislation (efficiency, party autonomy, *pacta sunt servanda* and non-interference by the courts) are offended by allowing a winding up to be ordered where the creditor's unpaid debt is not genuinely disputed on substantial grounds.

33 *Sian Participation Corp v Halimeda International Ltd* [2024] UKPC 16.

34 *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corp* [2024] Bus LR 190; [2023] UKPC 33.

35 [2015] 1 Ch 589; [2014] EWCA Civ 1575.

36 Arbitration Act 1996 (c 23) (UK).

37 c 45 (UK).

38 *Sian Participation Corp v Halimeda International Ltd* [2024] UKPC 16 at [92].

23 *FamilyMart* and *Sian Participation* make for an interesting comparison. In the former, the public policies animating the laws governing minority shareholder protection did not prevent the enforcement of an arbitration agreement for the purposes of making the requisite findings of fact. It would have been possible for the law to adopt a similar approach to winding-up petitions based on the failure to pay debts, with arbitrators finding whether the debt is genuinely disputed on substantial grounds, and the court then making the winding-up order on the basis of those findings. The growing acceptance of summary determination procedures in international arbitration could have lent support to such an approach. But the Privy Council's decision is a reminder that sometimes the policy in favour of permitting the determination of disputes by a process of arbitration will find itself in conflict with other equally strong or stronger policies which animate other areas of the law.

III. Difficulties raised by court challenges to investment treaty awards

24 Those who have opened the third edition of *Mustill & Boyd*[39] will have seen that it has a new title, and three new chapters, addressing the issue of investor-state dispute settlement. That vibrant and controversial feature of the international arbitration landscape had yet to make much of an impression in England and Wales, when the second edition was published in 1989. The growth of that particular type of arbitration has brought a number of benefits to arbitration law – a good example being the publication of numerous tribunal rulings on issues such as bifurcation and stay, which have helped achieve greater consistency in arbitral practice.

25 The reality is that those who have framed English arbitration law, and those of us who have contributed our input to those efforts, have paid insufficient attention to the unique challenges of investment treaty arbitration. The 1996 Act[40] was silent on them. Their appearance in the 2024 Arbitration Bill came late, after two Law Commission Papers and two consultation processes,[41] when one of my co-authors Peter Webster

39 *Mustill & Boyd: Commercial and Investor State Arbitration* (David Foxton gen ed) (LexisNexis, 3rd Ed, 2024).

40 Arbitration Act 1996 (c 23) (UK).

41 Law Commission, *Review of the Arbitration Act 1996: A Consultation Paper* (LCP 257, 2022); Law Commission, *Review of the Arbitration Act 1996:*

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spotted the unintended consequences of the new s 6A of the 1996 Act on this particular field of arbitration, a penny which only dropped with me rather later. For International Centre for Settlement of Investment Disputes ("ICSID") arbitrations, that is not a problem because the Arbitration (International Investment Disputes) Act 1966[42] presents an essentially closed system which leaves relatively little for the supervisory or enforcement court to do.

26 Not so, however, where the investment treaty arbitration takes place on UNCITRAL or similar rules outside the closed ICSID system. There, the English court has found itself being asked to re-hear and re-determine a range of issues under s 67 or s 103 of the 1996 Act on the basis that they are jurisdictional for the purposes of s 30 of the Act: whether an investment was made;[43] who it was made by;[44] and where;[45] whether it was made in the host state; whether it was made lawfully;[46] the nationality of the investor;[47] whether the host state had adopted a measure, and if so, whether the measure adopted related to the investor;[48] and whether the claim for breach of the investment treaty involved an abuse of right.[49] To the extent that any of these issues are jurisdictional, they will involve the supervisory court getting into the underlying facts of the dispute to an extent not generally encountered in international commercial arbitration, and they can involve a municipal court opining on the legality under international law of the sovereign acts of a foreign state. To date, jurisdictional challenges have largely been brought by states ordered to pay compensation by investment treaty arbitration tribunals. But of course, an unsuccessful claimant can

Second Consultation Paper (LCCP 258, 2023); Law Commission, *Review of the Arbitration Act 1996: Final Report and Bill* (Law Com No 413, 2023).

42 c 41 (UK).

43 See *Czech Republic v Diag Human SE* [2024] EWHC 2102 (Comm); *Republic of Korea v Dayyani* [2020] Bus LR 884.

44 *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2016] 1 Lloyd's Rep 483.

45 *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2016] 1 Lloyd's Rep 483.

46 *Czech Republic v Diag Human SE* [2024] Bus LR 929; [2024] EWHC 503 (Comm).

47 *Czech Republic v Diag Human SE* [2024] EWHC 2102 (Comm); *Ruby Roz Agricol LLP v Republic of Kazakhstan* [2017] EWHC 439 (Comm).

48 *Republic of Korea v Elliott Associates LP* [2024] EWHC 2037 (Comm) (overturned in *Republic of Korea v Elliott Associates LP* [2025] EWCA Civ 905); and in Singapore, *Republic of Korea v Mason Capital LP* [2025] 4 SLR 308.

49 *PAO Tatneft v Ukraine* [2018] 2 Lloyd's Rep 403.

re-open jurisdictional issues under s 67, with the result that it is not inconceivable that a state's liability for certain conduct emerges for the first time from a decision of a municipal court.

27 In determining whether those issues are jurisdictional and, if so, whether the jurisdictional requirements are met, the court will generally have cited to it a range of investment treaty arbitration awards which use similar language, but where the consequences of determining whether an issue is "jurisdictional" or not is very different from such a determination by a court. The court will also be treated to extensive investment treaty award citations on what it is necessary to establish to show an investment – the so-called *Salini* test.[50] Or what constitutes control for the purpose of nationality. Or the effect on the width of the agreement to arbitrate of a most-favoured-nation clause. There are a vast number of investment treaty arbitration awards addressing these issues, and it seems to be a rare case in which each side is unable to point to a number of supportive decisions. The court is not assisted by a judicial hierarchy when deciding how to accord weight to those decisions. Merely weighing up the number cited by each side does not seem an appropriate response and would merely exacerbate the existing problem of the courts being drowned in citations.

28 These difficulties arise because investment treaty arbitration awards exist as a non-systemised body of law, with no doctrine of precedent, and in which many arbitral tribunals do not refer to, and may not have been referred to, investment treaty awards later cited to the court. While the body of awards is sometimes said to share the characteristics of *jurisprudence* in a civil law system, with a sufficient and consistent number of awards to the same effect establishing a source of law as a *jurisprudence constante*,[51] my own impression is that the system is more fluid than this, not least because it lacks the hierarchy of civilian court systems of appeal and cassation courts, and because a longer term view seems to show particular views gaining and losing traction with new generations of investment treaty arbitration lawyers.

50 *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco* ICSID Case No ARB/00/4 (23 July 2001).

51 See, *eg*, *BayWa r e AG v Kingdom of Spain* ICSID Case No ARB/15/16 (2 December 2019).

29 The problem is that when these issues reach the courts, they do enter a precedential and systematised legal system. Issues of international law are not determined by the courts as issues of fact, in the way issues of foreign domestic law are, but as part of the law of England and Wales in its wider sense. The issue of whether an investment treaty arbitration party could bring an appeal under s 69 of the 1996 Act in relation to a disputed principle of international law is canvassed in the third edition of *Mustill & Boyd*,[52] and it can only be a matter of time before someone tries.

30 Not only do many judges tend to handle the investment treaty awards cited to us as some form of case law, but our own decisions undoubtedly have precedential effect in our own systems, only presumptively for first instance decisions cited to fellow first instance judges,[53] but formally for the appellate and apex court decisions we will increasingly see in this area. And yet those same decisions will not have the same normative effect in the investment treaty arbitration system itself, where they are at best simply another award, and at worst, something less. I remember asking an experienced investment treaty practitioner what investment treaty arbitration tribunals made of the efforts of Commercial Court judges like myself when opining on these issues. They told me that municipal court judgments might well not be cited and, if they were, would have limited traction. As they endearingly put it, "Well, it's not like a Jan Paulsson award, is it?"

31 So we face the risk of a fluid system of law, with considerable scope for ebb and flow as ideas, preconceptions and fashions change, having superimposed on it in the supervisory or enforcement context a less flexible precedential system, and the risk over time of an increasing divergence between the two. The idea of a special court investment treaty arbitration jurisprudence troubles me, as do some of the issues judges may have to traverse when hearing jurisdictional challenges to investment treaty arbitration awards. I have no easy answer for this. Due to our collective investment treaty arbitration blindness, we have missed the boat on carving out an all-encompassing special sub-regime of arbitration law to address their peculiarities. There are, of course, extensive ongoing discussions as to the future of the investment treaty

52 *Mustill & Boyd: Commercial and Investor State Arbitration* (David Foxton gen ed) (LexisNexis, 3rd Ed, 2024) at para 14.129.

53 *Willers v Joyce (No 2)* [2016] UKSC 44 at [9].

arbitration ecosystem, including how best to achieve some form of uniformity in the content of the substantive rules applied. Whether the entire investment treaty arbitration system should become a closed system, like the ICSID Convention,[54] is a natural part of that debate, and would provide an alternative answer. Another possible approach would be for the courts to recognise that court decisions on the meaning and effect of investment treaties should be "precedent-light", with greater scope to respond to trends and developments in the investment treaty arbitration world.

IV. How useful is distinction between jurisdiction and admissibility?

32 Another investment treaty arbitration concept which has been transplanted into the arbitration mainstream is the distinction between issues of jurisdiction and issues of admissibility, the former reviewable *de novo* before the supervisory or enforcement court, the latter subject to due process review only. Under this heading, I want to consider how useful that investment arbitration transplant has proved in the world of international commercial arbitration.

33 The framers of the 1996 Act[55] took the bold step of including a statutory definition of the concept of jurisdiction – or, as it is put, "substantive jurisdiction".[56] This appears in s 30(1) of the Act:

> (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—
>
> (a) whether there is a valid arbitration agreement;
>
> (b) whether the tribunal is properly constituted; and
>
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

54 International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules (July 2022), (entered into force 14 October 1966) <https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf> (accessed 16 July 2025).
55 Arbitration Act 1996 (c 23) (UK).
56 See Robert Merkin, "Substantive Jurisdiction and the Arbitration Act 1996" (2021) 3 JBL 273.

34 English law differs from the UNCITRAL Model Law[57] in two respects: in referring the concept of "substantive jurisdiction", as opposed to just jurisdiction, and in providing some form of definition of the term. The closest to a definition one finds is in the commentary to the UNCITRAL Model Law, which refers to the arbitral tribunal's jurisdiction as "the foundation, content and extent of its mandate and power".[58]

35 Applying conventional principles of statutory construction under English law, English courts have held the s 30 definition to be exhaustive,[59] and the Departmental Advisory Committee commentary on the draft Arbitration Bill said that in s 30(1), they had "spelt out what we mean by 'substantive jurisdiction'".[60] Thus far, at least, courts have been able to apply that definition without too much difficulty, utilising the flexibility of the language used to arrive at intuitive applications of the binary jurisdiction/non-jurisdiction divide on the facts of particular cases. One potential area of difficulty is s 30(1)(b),[61] where the courts have been willing to imply the need for substantial non-compliance with the requirements for the appointment of the arbitral tribunal.[62] These conclusions are consistent with case law on Art V(1)(d) of the New York Convention requiring that the non-compliance have a meaningful effect on the arbitral process.[63]

57 United Nations Commission on International Trade, UNCITRAL Model Law on International Commercial Arbitration (1985, amended 2006).

58 Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 at para 26.

59 *Union Marine Classification Services LLC v Government of the Union of Comoros* [2015] 2 Lloyd's Rep 49; *C v D1* [2015] EWHC 2126 (Comm) at [127]–[135]; *Soletanche Bachy France SAS v Aqaba Container Terminal (Pvt) Co* [2019] 1 Lloyd's Rep 423 at [60]; [2019] EWHC 362 (Comm); *NDK Ltd v HUO Holding Ltd* [2022] Bus LR 761 at [17]; [2022] EWHC 1682 (Comm); *Wael Buheiry v Vistajet Ltd* [2022] EWHC 2998 (Comm) at [68].

60 Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (1996) at para 139.

61 Arbitration Act 1996 (c 23) (UK).

62 *Sumukan Ltd v Commonwealth Secretariat (No 2)* [2008] Bus LR 858 at [23]; *Flashbird Ltd v Compagnie de Sécurité Privée et Industrielle SARL* [2022] Bus LR 55.

63 *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd* [2019] 1 Lloyd's Rep 1 at [63]; Unattributed, "Tongyuan (USA) International Trading Group v Uni-Clan Ltd" [2001] ArbLR 58; (2001) *Arbitration Law Reports and Review* 727 <https://doi.org/10.1093/alrr/2001.1.727> (accessed 13 July 2025).

36 As is well known, the distinction between challenges to the arbitral process or award which are jurisdictional in nature, and those which are not, has received more extended consideration in the context of investment treaty arbitration. A particularly influential treatment is that of Prof Jan Paulsson[64] which distinguishes between a challenge to the legal power of a tribunal to hear a case (described as a jurisdictional challenge) and a challenge as to the appropriateness of the claim for adjudication (described as an admissibility challenge). While the view that there is a distinction of principle between issues going to jurisdiction and those going to admissibility has gained significant support, it is striking, to my mind, that there is a wide variety of formulations seeking to explain the nature of the distinction. In the investment treaty context, it is possible to find statements distinguishing between "the existence of adjudicative power" (jurisdiction), and "the exercise of adjudicative power" (admissibility),[65] or between challenges "directed against the tribunal (and … hence jurisdictional)" and those "directed at the claim (and … hence one of admissibility)".[66] These formulations have been considered by a number of investment treaty arbitration tribunals, although different views have been expressed as to which side of the divide particular challenges fall.[67]

37 In addition to an inherent suspicion of the utility of a conceptual divide which can be expressed in such different terms, I think caution is required in transferring the analysis adopted in the investment treaty context to international commercial arbitration, because of the particular mechanism by which a submission agreement comes into existence between the investor and the state, *viz,* the investor, by

64 Jan Paulsson, "Jurisdiction and Admissibility" in *Global Reflections on International Law, Commerce and Dispute Resolution:* Liber Amicorum *in Honour of Robert Briner* (Gerald Aksen *et al* eds) (ICC Publishing, 2005). For a discussion of this issue in the context of investment treaty arbitration see *Mustill & Boyd: Commercial and Investor State Arbitration* (David Foxton gen ed) (LexisNexis, 3rd Ed, 2024) at para 19.26.

65 Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) at pp 291 and 310.

66 C L Lim, Jean Ho & Martins Paparinskis, *International Investment Law and Arbitration: Commentary, Awards and Materials* (Cambridge University Press, 2nd Ed, 2018) at p 118.

67 See L Gouiffes & M Ordonez *"Jurisdiction and Admissibility: Are We Any Closer to a Line in the Sand?"* (2015) 31(1) *Arbitration International* 107.

commencing arbitration, accepting the standing offer of the state to arbitrate qualifying disputes.[68] This provides considerable scope for treating certain requirements as terms of the state's offer to arbitrate, and accordingly as jurisdictional issues, such as a requirement to exhaust local remedies.[69]

38 Nonetheless, the jurisdiction-admissibility distinction has been applied in common law court decisions dealing with international commercial arbitrations, both in Model Law jurisdictions where there is no statutory definition of which issues are jurisdictional, and under the 1996 Act, where there is.

39 Thus, in *BAZ v BBA*,[70] Justice Belinda Ang ("Ang J") relied upon the distinction when deciding that the contention that a claim was time-barred was not jurisdictional in nature. The Singapore Court of Appeal upheld the decision,[71] and there is a decision to similar effect in *The Nuance Group (Australia) Pty Ltd v Shape Australia Pty Ltd*.[72] Those decisions are obviously correct in their outcomes. But courts and arbitral tribunals having been deciding whether or not claims are time-barred for years, without thinking that they were deciding an issue of admissibility. Perhaps we are like Moliere's *Monsieur* Jordain, who was astonished to find he had been speaking prose all of his life without knowing it.

40 In *BTN v BTP*,[73] Ang J applied the distinction when finding that a preclusion argument based on an issue estoppel was not jurisdictional in nature,[74] describing the distinction as a "useful foil" in international commercial disputes.[75] Her decision was upheld on appeal.[76] Once again, the decision is clearly right in its outcome, but I question how useful the concept of admissibility is here.

68 See *Mustill & Boyd: Commercial and Investor State Arbitration* (David Foxton gen ed) (LexisNexis, 3rd Ed, 2024) at para 18.4.
69 For example, *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2019] 1 SLR 263 at [206]–[209].
70 [2020] 5 SLR 266 at [128]–[131].
71 *BBA v BAZ* [2020] 2 SLR 453 at [73].
72 [2021] NSWSC 1498.
73 [2020] 5 SLR 1250.
74 *BTN v BTP* [2020] 5 SLR 1250 at [63]–[70].
75 *BTN v BTP* [2020] 5 SLR 1250 at [70].
76 *BTN v BTP* [2021] 1 SLR 276 at [68]–[72].

41 The distinction between jurisdiction and admissibility has acquired its greatest traction when dealing with arguments that an arbitral tribunal lacked jurisdiction because a pre-arbitration element of a multi-tiered dispute resolution clause was not complied with - negotiations between principals, or a cooling-off period. In the Hong Kong Court of Appeal in *C v D*,[77] the court considered whether a failure to undertake good faith negotiations, when this was the first step in a tiered dispute resolution clause, deprived the arbitral tribunal appointed at the second stage of jurisdiction. The court held that the objection that the first tier of the clause had not been complied with raised an issue of admissibility rather than jurisdiction,[78] suggesting that the distinction informed the "construction and application" of Art 34(2)(*a*)(iii) of the UNCITRAL Model Law[79] as given effect in the Hong Kong Arbitration Ordinance.[80] The court suggested that a complaint of prematurity was aimed at the claim rather than the tribunal, and for that reason was properly characterised as going to admissibility rather than jurisdiction.[81]

42 It is in this context that the distinction has entered the law on international commercial arbitration in England and Wales – in *Republic of Sierra Leone v SL Mining Ltd*[82] and *NWA v NVF*.[83] Some previous English cases were inclined to treat compliance with legally enforceable obligations which arose at the earlier stages of a multi-tiered dispute resolution clause as jurisdictional for the purposes of s 30(1) of the 1996 Act.[84]

77 *C v D* [2022] HKCA 729. See Shaun Matos, "Jurisdiction Admissibility and Escalating Dispute Resolution Agreements" (2023) LMCLQ 18.

78 *C v D* [2022] HKCA 729 at [28]–[42] and [45].

79 United Nations Commission on International Trade, UNCITRAL Model Law on International Commercial Arbitration (1985, amended 2006).

80 Cap 609.

81 *C v D* [2022] HKCA 729 at [60].

82 [2021] Bus LR 704; [2021] EWHC 286 (Comm).

83 [2021] Bus LR 1788; [2021] EWHC 2666 (Comm).

84 *JT Mackley & Co Ltd v Gosport Marina Ltd* [2002] BLR 367 at [35]–[37]; [2002] EWHC 1315 (TCC) (serving notice of the dispute on the Engineer under cl 66(2) of the ICE Conditions); *Tang Chung Wah v Grant Thornton International Ltd* [2013] 1 Lloyd's Rep 11; [2012] EWHC 3198 (Ch); *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2015] 1 WLR 1145; [2014] EWHC 2104 (Comm).

43 There is no doubt that such a classification could be very inconvenient. There can be much for arbitral tribunals to do in the period before it is accepted that a fully enforceable right has crystallised, just as there is for a court: to determine whether the right is indeed so conditioned and, if so, what the true scope and effect of the condition is; whether the condition has been complied with, or waived; whether the non-compliance results from a breach of contract by the party alleging non-compliance, in which case what consequences follow; and in giving effect to the condition to ensure it is complied with.

44 Where compliance with a condition of pre-arbitration mediation is, properly analysed, a pre-condition to the *enforcement* of a right in arbitration, it is difficult to see why non-compliance should, on the proper construction of the arbitration agreement, deprive an arbitral tribunal of jurisdiction, any more than any other form of issue which might arise as to the present enforceability of an asserted right would do so.

45 So it is easy to understand why more recent cases have looked for means of holding that the many arguments which can arise in relation to compliance with the early stages of a multi-tiered dispute resolution clause are not jurisdictional. Describing those requirements as a matter of admissibility and not jurisdiction is one such step.

46 But it must be possible for parties to achieve through their arbitration agreement the outcome that the arbitral tribunal will have no jurisdiction in respect of a particular reference until the preliminary steps have been taken or the waiting period has elapsed – for example a clause which provided that no arbitral tribunal can be constituted until particular steps aimed at a negotiated settlement have been completed, or a particular period had elapsed, or which conditions a party's right to appoint an arbitrator on those matters having taken place.

47 If that is correct, then the effect of a failure to follow pre-arbitration procedures on the jurisdiction of the arbitral tribunal over a particular reference must ultimately depend on the terms of their contract, such that an *a priori* classification of any dispute of this kind as relating to admissibility rather than jurisdiction[85] would not be appropriate. Nor can

85 Which appears to be the approach of Sir Michal Burton in *Republic of Sierre Leone Mining v SL Mining Ltd* [2021] Bus LR 704 at [16]; [2021]

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the distinction often drawn between objections aimed at the claim and objections aimed at the tribunal provide an infallible litmus test, because it is easy to conceive of language capable of both characterisations which would be sufficiently clear to amount to a jurisdictional objection. What can be said, however, is that a construction which would deprive the parties' chosen tribunal of the ability to determine the many questions which can arise as to whether a right cannot be exercised because a pre-condition has not been satisfied, or at least to do so finally rather than on a basis which allows those issues to be argued *de novo* before the curial or an enforcement court, must weigh heavily in favour of a construction which makes non-compliance a possible defence to the pursuit of the claim, rather than something which deprives the arbitral tribunal of jurisdiction.

48 But there may be cases where the terms of the clause sufficiently clearly preclude the arbitral tribunal having jurisdiction until the pre-arbitral procedures have been complied with, however inconvenient and uncommercial the consequences of such an agreement might be, just as parties can, by sufficiently clear wording, divide their dispute into a series of separate and overlapping boutiques rather than providing for a one-stop shop.[86] However robust the interpretative presumption adopted by the court may be, there comes a point when it must yield to the language, however unwisely, chosen by the parties. The different opinions as to the correctness of particular decisions do not seem to reflect any conceptual disagreement, but different views as to where that point should be. In this context, at least, the description of the effect of compliance as going to "jurisdiction" or "admissibility" is essentially conclusory, describing the consequence of one of the two rival constructions.

49 To conclude on this topic, the question I wish to pose is whether the distinction between issues of jurisdiction and issues of admissibility is a conceptually sound and principled one. Or is this simply a slogan,

EWHC 286 (Comm). For a persuasive criticism of that decision see Serena Lee, "Procedural Prerequisites to Arbitration: Categorisation Over Construction?" (2022) LMCLQ 40.

86 *T v B* [2021] HKCFI 3645 at [23] places the distinction between admissibility and jurisdiction in this context – imposing a requirement for clear and unequivocal language before pre-arbitral procedural requirements engaged the tribunal's jurisdiction.

which sometimes is attached to issues we have been deciding without difficulty for years without it, and on other occasions obscuring policy-driven interpretative presumptions as to the effect of the parties' arbitration agreement?

V. "De-contractualisation" of arbitration law

50 That brings me to my final topic. For many years, common law systems have looked principally to the law of contract to guide their approach to questions of arbitration law in cases where the relevant statutory regime is silent. The application of conventional contractual principles has, however, proved inconvenient or artificial in a number of contexts, and we have begun to see a gradual "de-contractualisation" of arbitration law. As I have stated, this is something of a theme in the third edition of *Mustill & Boyd*.[87]

51 The most celebrated departure from conventional contractual principles has come in the development of special principles of contractual interpretation, in which the function of arbitration agreements, and of efficient dispute resolution, are prioritised over the particular wording of the agreement. This has involved the privileging of the agreement to arbitrate when the parties include more than one dispute resolution clause in their contract,[88] and the principle of "one-stop" adjudication.[89] The implied obligation to honour an arbitration award, the traditional foundation of the action of the award, is increasingly been seen not as a term to be implied under the applicable term of the arbitration agreement, but a principle of law of the forum where enforcement proceedings are brought, with the result that the relief available is not constrained by the remedies provided by the applicable law.[90]

87 *Mustill & Boyd: Commercial and Investor State Arbitration* (David Foxton gen ed) (LexisNexis, 3rd Ed, 2024).

88 For the extensive case law on this topic see David Foxton, "How Contractual is Arbitration Law?" (2022) JBL 459 at 461–462.

89 *Fili Shipping Co Ltd v Premium Nafta Products Ltd* [2007] 1 Bus LR 1719; Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2020) at p 1433.

90 See the decision of the Court of Final Appeal of Hong Kong in *Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd* [2020] HKCFA 32 at [108];

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52 Two apex court decisions which have proved controversial, one from England and Wales, the other in Singapore, have each followed the path of conventional contractual analysis to their conclusion, and in each case it has been necessary to find an "escape route" from that destination.

53 The English decision is *Enka Insaat Ve Sanayi AS v OOO Insurance Co Chubb*[91] in which the Supreme Court overturned the decision of the Court of Appeal which would, in the absence of a choice of applicable law of an arbitration agreement, have held the agreement to be governed by the law of the seat, rather than the applicable law of the matrix contract. Applying conventional principles for the determination of the applicable law of a contract, the Supreme Court held that, in such scenario, an express choice of law for the matrix contract would ordinarily operate as an implied choice of law for the arbitration agreement, save where other factors (*eg*, the invalidity of the arbitration agreement under that law) suggested otherwise. That approach risked denying arbitrations seated in England and Wales of some of the more pro-arbitration features of English arbitration law: the presumption of "one-stop" adjudication which gave a broad and purposive construction to arbitration agreements; the principle of separability, whereby an attack on the validity of the matrix contract did not automatically entail an attack on the validity of the arbitration agreement; and the generous approach to issues of arbitrability.

54 England and Wales has responded to those concerns by a legislative measure which has created a special rule for determining the applicable law of the arbitration agreement, detaching arbitration law for the general law of contract in this respect. That legislative reform was not without difficulty, necessitating the late amendment discussed earlier in this paper to address the special position of investment treaty arbitration, and creating a potential problem with a floating applicable law which similar attempts at reform in other jurisdictions would do best to avoid.[92] However, the perceived need for such a measure reveals the extent to which conventional contractual principles can conflict with the particular interests at play in the law of the arbitration.

Mustill & Boyd: Commercial and Investor State Arbitration (David Foxton gen ed) (LexisNexis, 3rd Ed, 2024) at paras 16.21–16.35.

91 [2020] Bus LR 2242.

92 See David Foxton, "The Applicable Law of an Arbitration Agreement: Floating or on the Rocks?" (2025) LMCLQ 203.

55 The Singapore decision has already been mentioned – *Anupam*.[93] The application of the conventional principle, that the court will not enforce a contract to the extent that it is unenforceable under its applicable law, would have led to the agreement to arbitrate disputes in Singapore relating to an investment in a company incorporated in India being inoperative in part. The court was able to avoid that outcome by holding that the putative inoperability of the arbitration agreement, if the law of the matrix contract (Indian law) was applied to it, was a reason for concluding that the parties had intended the arbitration agreement to be governed by the law of Singapore, where the arbitration was seated.

56 However, that "near-miss" has led some to argue that a special rule of enforceability should be adopted on the issue of arbitrability when applying arbitration agreements; one, moreover, to be arrived at through development of the common law rather than legislative intervention.[94]

57 We are likely to see further attempts to develop special rules for arbitration agreements, departing from those which would apply under the general law of contract. One may be construing clauses to prevent claims being brought elsewhere against the affiliates of contracting parties to the extent that they raise issues arising from the contract. The question of whether this can be achieved by either the construction of the arbitration agreement, an implied term, or only on the basis of the court's jurisdiction to restrain vexatious and oppressive conduct, remains a live issue under the arbitration law of England and Wales, with different views expressed on an *obiter* basis in the Court of Appeal.[95] It has been suggested – by myself – that if a purely contractual solution is to be found to these issues, it is unlikely to be through the application of wholly orthodox contractual principles.[96]

93 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349.

94 Salim Moollan, Robert Price & Oliver Browne, "Which Law Should Govern the 'Arbitrability' of a Dispute in England" (2024) 40 *Arbitration International* 445.

95 *Renaissance Securities (Cyprus) Ltd v ILLC Chlodwig Enterprises* [2025] EWCA Civ 369.

96 *JP Morgan Securities plc v VTB Bank PJSC* [2025] EWHC 1368 (Comm) at [112] and [125].

VI. Conclusion

58 I would suggest that this snapshot of the state of arbitration law in 2025 reveals a number of themes. The greater harmony in the legal principles applied, and the willingness to look to other jurisdictions for insights and answers, is very much to be welcomed. Advocates must rise to the challenge of being able to assist judges in this regard by being acquainted with the law and practice of other jurisdictions. The search for solutions to novel legal problems is also likely to involve careful consideration of the practice in investment treaty arbitration, including through examination of the published awards of arbitrations in that area. That will need to be undertaken with caution, because the application in a commercial arbitration context of concepts developed in the investment treaty context is not axiomatic. And finally, we may expect to see an increasing divergence between the law of arbitration and the law of contract as conventionally applied. Arbitration law looks likely to become increasingly broad in its international outlook but increasingly specialised in its content.