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INVESTMENT ARBITRATION: A LEGAL ANALYSIS OF THE UNITED KINGDOM

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Abstract

Investment arbitration plays a very important role in resolving disputes between foreign investors and host states. It provides legal protection to investors against unlawful exploitation and discriminatory government actions. The United Kingdom has established itself as an important jurisdiction in the field of international investment arbitration because of its strong and developed legal system and tradition of arbitration. London is also considered a primary centre for international dispute resolution. The United Kingdom is a capital-exporting treaty state, a preferred arbitral seat and a leading forum for enforcement of awards against foreign sovereigns.

This paper examines the legal framework governing investment arbitration in the United Kingdom, namely the Arbitration Act 1996, the Arbitration Act 2025, the Arbitration (International Investment Disputes) Act 1966 and the State Immunity Act 1978, along with the judicial decisions and the recent shift in treaty policy. The 2025 reforms and the exit from the Energy Charter Treaty are clear signs that the state is repositioning itself from being an investor protector to a neutral forum.

Keywords: Investment Arbitration; ICSID; The State Immunity Act 1978; The Arbitration Act 1996; The Arbitration Act 2025; The Arbitration (International Investment Disputes) Act 1966.

Introduction

International investment plays a key role in the economic development of countries. Foreign investors, through capital investment, technology transfer and international business activities, contribute to economic growth. Disputes arise when the host state introduces regulatory measures, changes investment policies or fails to provide the protection covered under the investment agreement. Investment arbitration is an alternative legal mechanism through which foreign investors can bring claims against host states before an independent arbitral tribunal.

It is a form of arbitration in which a private foreign investor brings a claim directly against a state before an international tribunal, usually under a bilateral investment treaty (BIT) or a multilateral instrument

such as the Energy Charter Treaty.[224] The United Kingdom is involved in this system in several ways. It is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[225] and to a very large number of bilateral investment treaties.[226] It is a common seat for arbitrations conducted under non-ICSID rules such as the UNCITRAL Rules.[227] The English courts have also become a major venue for the registration and enforcement of awards against states. Each capacity is governed by a different statute.

This paper analyses the legal framework for the enforcement of investment arbitration awards in the United Kingdom. It also examines how the new policy reforms have enabled the United Kingdom to become a neutral forum. The paper uses a doctrinal approach based on statutes, judicial decisions, books and journals.

The Legal Framework

A. The ICSID Convention: The United Kingdom ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1966 and gave it domestic effect through the Arbitration (International Investment Disputes) Act 1966.[228] Under Article 53 of the Convention an award is binding and is not appealable in any manner except as provided within the Convention;[229] under Article 54 each contracting state shall recognise the award as binding and shall enforce the pecuniary obligations as if it were a final judgment of its own courts.[230] Section 1 of the 1966 Act allows registration of an ICSID award in the High Court, and it has the same effect as a High Court judgment.[231] Article 55 maintains state immunity from execution.[232]

B. The Arbitration Act 1996: This Act is based on certain basic principles given in section 1: fair resolution of disputes by an impartial tribunal without unnecessary delay or expense, party autonomy and limited court intervention.[233] Several features are relevant to investment disputes. Firstly, jurisdictional control: section 30 empowers the tribunal to rule on its own jurisdiction[234] and section 67 allows a party to challenge a ruling on substantive jurisdiction in the courts.[235] A state seeking to set aside an award on the basis that there was no valid consent to arbitrate will always rely on these provisions. In *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan*, the Supreme Court held that where there is a dispute as to whether an agreement to arbitrate exists, the court, rather than leaving it to the tribunal, examines the matter itself.[236] That is a principle which assists a state raising a jurisdictional objection. Secondly, procedural fairness: section 33 imposes a duty on the tribunal to act fairly and impartially[237] and section 68 allows a challenge on grounds of irregularity causing substantial injustice.[238] In *Federal Republic of Nigeria v. Process and Industrial Developments*

[224] Energy Charter Treaty, 1994, 2080 U.N.T.S. 95 (entered into force 16 April 1998) [hereinafter ECT].
[225] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; *see generally* Christoph Schreuer *et al.*, *The ICSID Convention: A Commentary* (2nd ed., Cambridge University Press, 2009).
[226] UNCTAD, *International Investment Agreements Navigator: United Kingdom*.
[227] UNCITRAL Arbitration Rules, 2010 (as revised in 2013 to include art. 1(4)).
[228] The Arbitration (International Investment Disputes) Act, 1966 (c. 41) (UK) [hereinafter 1966 Act].
[229] ICSID Convention, supra note 2, art. 53(1).
[230] *Id.*, art. 54(1).
[231] 1966 Act, supra note 5, s. 1.
[232] ICSID Convention, supra note 2, art. 55.
[233] The Arbitration Act, 1996 (c. 23), s. 1 (UK) [hereinafter 1996 Act].
[234] 1996 Act, supra note 10, s. 30.
[235] *Id.*, s. 67.
[236] *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 : [2011] 1 A.C. 763.
[237] 1996 Act, supra note 10, s. 33.
[238] *Id.*, s. 68.

Ltd., an award of US$11 billion was set aside under section 68 on the grounds of fraud and non-disclosure.[239] This decision clearly shows the courts' willingness to protect states and other parties from corrupted awards. Thirdly, section 69 allows an appeal on a question of law, which has very little practical relevance in investment arbitration.[240] Finally, sections 100 to 104 implement the New York Convention in England and provide the mechanism for the enforcement of non-ICSID awards.[241]

C. The Arbitration (International Investment Disputes) Act 1966: This Act implements the ICSID Convention. Section 1 provides for registration of ICSID awards in the High Court and section 2 gives them the same effect as a High Court judgment for the purpose of execution.[242] Article 54(1) requires each contracting state to recognise the award as binding and to enforce its pecuniary obligations as if it were a final domestic judgment.[243] Article 54(3) provides that execution is governed by the law of the forum on execution of judgments, and Article 55 maintains state immunity from execution.[244] In *Micula v. Romania*, the Supreme Court considered the United Kingdom's ICSID obligations against the competing claims of European Union law arising out of a Commission state aid decision, and registration of the award was dealt with under this Act.[245]

D. The State Immunity Act 1978: Section 1 gives foreign states general immunity from the jurisdiction of United Kingdom courts, subject to exceptions.[246] Section 2 states that if a state agrees to submit to a particular jurisdiction, including by way of a prior written agreement, it shall not be entitled to immunity.[247] Section 9 provides that a state which has agreed in writing to submit a dispute to arbitration is not immune in proceedings in United Kingdom courts relating to the arbitration, unless the agreement provides otherwise.[248] Section 13 limits the extent to which the property of a state may be subjected to execution, allowing it with the state's written consent or where the property is in use or intended for use for commercial purposes, while section 14 protects central bank property.[249] In *Kingdom of Spain v. Infrastructure Services Luxembourg S.à r.l.* and *Republic of Zimbabwe v. Border Timbers Ltd.*, the Supreme Court held that, by ratifying the ICSID Convention, Spain and Zimbabwe had submitted to the jurisdiction of the United Kingdom courts for the purpose of recognition of ICSID awards under section 2(2).[250]

Treaty Policy and Legislative Reforms

A. Withdrawal from the Energy Charter Treaty: One of the most important developments in United Kingdom investment arbitration policy is the decision to withdraw from the Energy Charter Treaty (ECT). The ECT was established to promote international investment and cooperation in the energy sector. It gives certain protections to investors and access to international arbitration. Growing concerns have been raised that its investment protection provisions could create difficulties for governments as they

[239] *Federal Republic of Nigeria v. Process and Industrial Developments Ltd.*, [2023] EWHC 2638 (Comm).
[240] 1996 Act, supra note 10, s. 69.
[241] *Id.*, ss. 100–104; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, 330 U.N.T.S. 3.
[242] 1966 Act, supra note 5, ss. 1–2.
[243] ICSID Convention, supra note 2, art. 54(1).
[244] *Id.*, arts. 54(3), 55.
[245] *Micula v. Romania*, [2020] UKSC 5.
[246] The State Immunity Act, 1978 (c. 33), s. 1 (UK) [hereinafter 1978 Act].
[247] 1978 Act, supra note 23, s. 2.
[248] *Id.*, s. 9.
[249] *Id.*, ss. 13, 14.
[250] *Kingdom of Spain v. Infrastructure Services Luxembourg S.à r.l.*, [2023] UKSC 32 (heard together with *Republic of Zimbabwe v. Border Timbers Ltd.*); 1978 Act, supra note 23, s. 2(2).

implement environmental policies and transition towards renewable energy. On 22 February 2024, the United Kingdom government decided to withdraw from the treaty after unsuccessful attempts to modernise it.[251] The withdrawal came into effect after a period of one year.[252] It shows a changing approach towards investment protection. The ECT contains an investor-state dispute mechanism and was the main source of many claims against European states. The United Kingdom's withdrawal took effect in April 2025, and Article 47(3) provides protection to existing investments for twenty years.[253]

B. Shifting Treaty Practice: Recent trade agreements of the United Kingdom, such as the UK–Australia Free Trade Agreement, have dropped investor-state dispute settlement completely and rely on state-to-state mechanisms.[254] The United Kingdom is moving away from the broad investor protections it previously championed, while its courts continue to enforce the existing treaty network.

C. The Arbitration Act 2025: This Act was enacted as a result of the Law Commission's review[255] and came into force on 1 August 2025, applying to arbitral proceedings commenced on or after that date.[256] It amends rather than replaces the 1996 Act. Its main reforms relevant to investment disputes are as follows:

(a) *Law governing the arbitration agreement.* Section 6A provides that an arbitration agreement shall be governed by the law expressly chosen by the parties; if no such choice has been made, it shall be governed by the law of the seat, and a choice of law for the main contract is not by itself such a choice.[257]

(b) *Disclosure.* Section 23A states the arbitrator's continuing duty to disclose any circumstances which might give rise to justifiable doubts about impartiality, following *Halliburton Co. v. Chubb Bermuda Insurance Ltd.*[258] In a field where repeat appointments and conflicts of interest are common, this duty holds clear significance.

(c) *Summary disposal and emergency relief.* Section 39A enables a tribunal, on application, to dispose of a claim or defence which has no real prospect of success, which parallels the preliminary objection mechanisms in treaty rules.[259] Section 41A and the amended section 44 make provision for emergency arbitrators and extend the court's powers to third parties.[260]

(d) *Arbitrator immunity and jurisdictional challenges.* The Act enhances the arbitrator's immunity from liability, except in cases of bad faith, and restricts the scope of section 67 challenges by a party who took part in the arbitration.[261] In those circumstances the court will not admit new grounds or new evidence and will not rehear any matter which the tribunal has already decided. These policy changes

[251] Department for Energy Security and Net Zero, Government of the United Kingdom, Press Release on the United Kingdom's Withdrawal from the Energy Charter Treaty (Feb. 22, 2024), *available at* https://www.gov.uk.
[252] ECT, supra note 1, art. 47(2).
[253] *Id.*, art. 47(3).
[254] Free Trade Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Australia, 2021 (in force May 31, 2023).
[255] Law Commission, *Review of the Arbitration Act 1996: Final Report and Bill* (Law Com No. 413, 2023).
[256] The Arbitration Act, 2025 (c. 4), s. 17 (UK) [hereinafter 2025 Act].
[257] 1996 Act, supra note 10, s. 6A (inserted by 2025 Act, supra note 33).
[258] 1996 Act, supra note 10, s. 23A (inserted by 2025 Act, supra note 33); *Halliburton Co. v. Chubb Bermuda Insurance Ltd.*, [2020] UKSC 48.
[259] 1996 Act, supra note 10, s. 39A (inserted by 2025 Act, supra note 33).
[260] *Id.*, ss. 41A, 44 (as amended).
[261] *Id.*, ss. 29, 67 (as amended).

can make London a more attractive seat for non-ICSID treaty cases, although they do not alter the position for ICSID awards.

Critical Analysis

The United Kingdom framework has real strengths. On non-ICSID awards the 2025 Act provides greater certainty and efficiency, and the 1996 Act's limited-intervention approach is preserved. There are three weaknesses. Firstly, enforcement still depends on execution, which is governed by a very narrow commercial-use test that is extremely difficult to meet in practice and requires the claimant to identify the assets.[262] Getting a registration is therefore not in any way equivalent to getting paid. Secondly, there is uncertainty about section 9. After the Supreme Court's decision on section 2(2),[263] it remains unclear whether treaty arbitrations fall within the scope of the arbitration exception for non-ICSID awards, a question of particular practical significance given the large number of treaty-based awards rendered under the UNCITRAL framework. Thirdly, the interaction of the 2025 Act with treaty arbitration is not fully worked out. The exclusion of treaty-based agreements from section 6A, the application of the more restricted section 67 rule to states that participate in part, and the use of summary disposal in treaty cases are all untested.[264] There is also a policy issue. Enforcing decisions safeguards the credibility of both investors and ICSID; however, this must be balanced against concerns regarding the legitimate regulatory interests of nations and potential conflicts with other legal systems, such as those that have arisen within the European Union.[265] A sensible next step would be legislative clarification of sections 9 and 13 of the 1978 Act.

Conclusion

The United Kingdom regime for investment arbitration is built on a division of labour. The 1996 and 2025 Acts deal with arbitrations seated in London; the 1966 and 1978 Acts deal with the recognition and enforcement of ICSID awards against states. Investment arbitration has become an essential part of the international investment protection system. The United Kingdom has developed a strong legal and institutional framework that supports international arbitration and the enforcement of arbitral awards. The Arbitration Act 1996, the Arbitration Act 2025 and the State Immunity Act 1978 collectively provide an important foundation for arbitration-related proceedings. It can be concluded that the future of investment arbitration in the United Kingdom depends upon maintaining a fair balance between the rights of foreign investors and the sovereign regulatory authority of the state.

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[262] 1978 Act, supra note 23, s. 13(4).
[263] *Kingdom of Spain*, supra note 27.
[264] 1996 Act, supra note 10, ss. 6A, 39A, 67 (as amended by 2025 Act, supra note 33).
[265] *Micula v. Romania*, [2020] UKSC 5.