MAY 2026 VOLUME 7, ISSUE 3

ITA | *in Review*

A PUBLICATION OF THE INSTITUTE FOR TRANSNATIONAL ARBITRATION

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Institute for TRANSNATIONAL ARBITRATION
THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

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ITA IN REVIEW

VOL. 7	2025	NO. 3

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a Publication of the
Institute for Transnational Arbitration
a Division of the
Center for American and International Law

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THE FUTURE OF JUSTICE: ENFORCING ONLINE ARBITRATION AWARDS

by Tatevik Karapetyan

I. INTRODUCTION

A number of legal and procedural challenges arise when arbitration is conducted online, posing potential risks to the enforceability of a final award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("NYC").[1]

The digitalization of international arbitration has revolutionized how disputes are resolved, providing a more efficient, accessible, and cost-effective alternative to traditional arbitration. However, as online arbitration progresses, a critical issue arises concerning the enforcement of online arbitration awards. This critical issue concerns the enforcement of online arbitration awards and whether they satisfy procedural due process, any relevant seat/jurisdictional requirements, alongside public policy standards under various enforcement frameworks such as the NYC.

If such issues are left unaddressed, some courts may refuse the recognition of online awards despite the efficiency of online dispute resolution. It is well known that the enforcement of an award is a fundamental aspect of arbitration which ensures that arbitral awards are not merely theoretical victories, but ones which are given practical effect. Despite the potential benefits of online arbitration, the enforcement of such awards raises several complex legal, jurisdictional, and technological challenges that remain unresolved in contemporary arbitration law.

II. LEGAL FRAMEWORK AND INTERNATIONAL CONVENTIONS

One of the central challenges concerning the enforcement of online arbitration awards is the lack of a cohesive global framework governing the recognition and enforcement of arbitral decisions rendered in virtual settings. Whilst the NYC has

[1] Convention on the Recognition and Enforcement of Arbitral Awards ("NYC"), Jun. 10, 1958, 330 U.N.T.S. 3.

established a robust international regime for the enforcement of traditional arbitral awards, its provisions do not explicitly address online or virtual arbitrations. This gap leaves parties, especially those involved in cross-border digital transactions, with limited certainty as to how such awards will be treated in foreign jurisdictions.

Leading arbitral institutions (ICC, LCIA, AAA) have embraced online procedures, and courts are often unlikely to deny enforcement solely because a proceeding was conducted virtually. Notwithstanding this fact, the current framework for international arbitration treaties requires expanding in order to explicitly account for the unique characteristics of online arbitration, such as the absence of a parties' physical presence in addition to the parties' reliance on various digital communication platforms. This issue is compounded by the potential fragmentation of national enforcement procedures which is a core challenge faced by international arbitration practitioners.

Several studies analyzing online arbitration under the NYC have explored critical aspects of its application in the digital era.[2] These studies seem to suggest that the future of online arbitration remains uncertain because unresolved legal and procedural challenges may hinder its widespread adoption. Key concerns include the enforceability of digital arbitration agreements and the procedural fairness of virtual proceedings, particularly in cross-border disputes.

One growing area of concern is the rising number of consumer disputes being directed towards arbitration, including online arbitration. More broadly, international organizations and commentators register a clear trend. For example, analyses conducted by the United Nations Conference on Trade and Development (UNCTAD) and the Organization for Economic Co-operation and Development (OECD) describe the rapidly growing adoption of online dispute resolution ("ODR") by

[2] *See* Slavomir Halla, *Arbitration Going Online-New Challenges in 21st Century?*, 5 MASARYK U. J.L. & TECH. 215, 215–25 (2011); Nasir Motassem and Hong-lin Yu, *Can Online Arbitration Exist within the Traditional Arbitration Framework?*, 20 J. INT'L ARB. 455, 455–73 (2003); Alejandro López Ortiz, *Arbitration and IT*, 21 ARB. INT'L 343, 343–360 (2005); Julia Hornle, *Online Dispute Resolution: The Emperor's New Clothes?*, 17 INT'L REV. L. COMPUTS. & TECH. 27, 27–37 (2003).

consumer protection agencies and national arbitration/conciliation bodies and appear to welcome ODR as a scalable route for low-value and cross-border consumer complaints. These reports document reforms alongside their implementation (*e.g.*, national online complaint portals and the integration of ODR with consumer arbitration boards) though they do not always provide granular percentages of the outcomes of certain cases.[3] With the expansion of e-commerce and digital transactions, consumers may find themselves bound by arbitration clauses embedded in online contracts, often without fully understanding their implications. This raises concerns about potential power imbalances, a lack of transparency, and the risk of compelling consumers into arbitration proceedings which may not adequately protect their rights.

Enforcing ODR awards presents unique challenges for courts, which often extend beyond the traditional obstacles encountered with arbitral awards rendered in offline settings. One of the principal difficulties that arises lies in the lack of a universally recognized legal framework that specifically governs the enforcement of ODR. Whilst mechanisms such as the NYC provide a robust system for enforcing international arbitral awards, ODR processes often fall into a grey area, particularly when they are not conducted under established arbitration rules or are framed more as mediation or conciliation outcomes as opposed to binding arbitral determinations. In such cases, courts may hesitate to treat the award as an "arbitral award" within the meaning of domestic arbitration statutes, which undermines its enforceability.

Even when an ODR award formally qualifies as arbitral in nature, courts face evidentiary and procedural challenges. These include questions about the authenticity of the award when issued digitally, the sufficiency of electronic signatures, and the admissibility of electronic records under a jurisdiction's domestic law. Jurisdictional uncertainties may also arise. For example, parties may reside in different states or countries, with no clear agreement on the seat of arbitration or the

[3] *See* https://unctad.org/system/files/official-document.

applicable law, thereby making it harder for courts to determine their competence to enforce an arbitral award. Moreover, consumer protection concerns can further complicate enforcement considering the status of consumers, who are often considered as the weaker party in a consumer contract, thereby leading courts to scrutinize the fairness of the ODR process more strictly than they might have done in a traditional arbitration.

Having outlined the legal framework and its limitations, the following section can now address in detail the challenges of enforcing ODR awards. These challenges extend beyond the doctrinal gaps in the legal framework and encompass practical, technological, and policy issues, such as:

- the lack of uniform recognition of ODR awards across jurisdictions,
- difficulties in establishing the legitimacy and transparency of online proceedings,
- concerns over cybersecurity and the integrity of digital evidence, and
- resistance from courts and practitioners unfamiliar with ODR mechanisms.

As online arbitration continues to evolve, addressing these challenges will be essential to ensure fairness, accessibility, and enforceability of arbitration awards whilst maintaining the efficiency and flexibility that digital dispute resolution promises.

III. JURISDICTIONAL CHALLENGES

Another significant challenge regarding the enforcement of online arbitration awards is that of jurisdictional uncertainty. A fundamental principle of arbitration relates to party autonomy, *i.e.* the parties' consent to arbitrate, and often, this consent is implicitly tied to the notion of the parties' connection to a particular legal jurisdiction. Online arbitration complicates this traditional model, as the parties may be located in different jurisdictions with differing attitudes towards arbitration and the enforcement of arbitral awards. For instance, some jurisdictions adopt an approach that arbitration is autonomous and "delocalized." Courts that adopt this logic routinely enforce arbitration awards that have been set aside by courts of the seat of arbitration on the basis that the decisions of the latter have no bearing on whether the award should be enforced.[4]

The issue of international comity, the recognition of foreign judgments and arbitral awards by national courts, becomes particularly salient in the context of online arbitrations. For instance, some jurisdictions may have strong public policy objections to certain types of awards, such as those concerning consumer protection or labor rights. In the digital era, the diverse legal systems that govern virtual platforms create a patchwork of enforcement standards, making it difficult to ascertain where and how an award can be enforced. International comity provides the doctrinal foundation for recognizing foreign awards, but in online arbitration, its operation is complicated by jurisdictional uncertainty, the absence of a clear seat, and divergent national public policy considerations. This explains why courts may vary in their willingness to enforce digital arbitration awards and highlights the need for greater clarity in both international rules and national frameworks for ODR enforcement.

This jurisdictional challenge becomes even more problematic with the use of digital platforms, which often operate without clear territorial boundaries. Platforms that host online arbitration—such as arbitration through third-party service providers, such as Modria (now part of Tyler Technologies),[5] FairClaims,[6] and eBRAM International Online Dispute Resolution Centre[7]—are frequently subject to multiple, often conflicting, legal and regulatory systems. This is because online arbitration usually involves parties from different jurisdictions, servers or providers located elsewhere, and disputes that may not have a clear territorial connection. The

[4] *See e.g.*, Arab Rep. of Egypt v. Chromalloy Aeroservices, Inc., Cour d'appel de Paris, civ. Jan. 14, 1997, 95/23025.

[5] *See* Modria, *Online Dispute* Resolution, *available at* https://www.tylertech.com/Portals/0/OpenContent/Files/4080/Modria-Brochure.pdf.

[6] *See* FairClaims, https://www.fairclaims.com/.

[7] *See* eBRAM, https://www.ebram.org/.

question of applicable law—specifically concerning which *lex arbitri* governs the arbitral process—becomes more complex when dealing with purely online disputes, where there may be no obvious "seat" of arbitration.

Traditionally, the "seat of arbitration" determines the *lex arbitri* or procedural framework and the courts with supervisory jurisdiction. However, in online arbitration, the seat is often ambiguous or contractually designated in terms of service drafted by the platform, which may not always align with mandatory rules in the parties' home jurisdictions (*e.g.*, consumer protection or employment law).

Dell Computer Corp. v. Union des Consommateurs, 2007 SCC 34 (Canada), involved a web-based contract whereby a consumer had placed an order based on a pricing error on Dell's website. Dell's terms and conditions included an arbitration clause; however, the consumer attempted a class action lawsuit. In this case, the consumer in question might not have easily accessed or understood the arbitration clause hidden via hyperlink. Various considerations arose as to whether the clause was "reasonably accessible" or "integral" to the contract, which ties into enforceability, and thus indirectly as to which law (consumer protection or contract law) governs the arbitration clause. In this case, ultimately, the Supreme Court of Canada held that the arbitration clause *could be enforced*, because the clause was accessible via hyperlink and not so buried in the contract as to be unenforceable. As a result, the class action was dismissed in favor of arbitration. This case shows that courts may uphold arbitration clauses in online contract settings, although transparency and contractual notice remain important considerations.[8]

In another case, *Douglas v. U.S. District Court for the Central District of California ex rel. Talk America, Inc.*, 495 F.3d 1062 (9th Cir. 2007), Talk America changed its service contract terms (including adding an arbitration clause and a choice-of-law provision, *etc.*) and posted the revised contract online, but did not give specific notice

[8] Dell Computer Corp. v. Union des Consommateurs, 2007 SCC 34 (Can.).

to customers. The user continued using the service, unaware of the changes. The key issue arising in this case concerns "notice" alongside how knowledge of an arbitration clause/choice of law clause in an online environment interacts with its enforceability. Whilst not purely an issue relating to international arbitration or the law of the seat, this case shows how courts may refuse to enforce arbitration clauses which have been added unilaterally and without notice. Considering these issues, the court held that the user was *not bound* by the revised contract terms (including the arbitration clause) because the change was an offer that was not clearly accepted as he did not know of the existence of the changes. As a result, absent the awareness of the consumer (or sufficient constructive notice) of the changed terms, arbitration clauses implemented in online consumer contracts may run the risk of being found to be invalid.[9]

IV. TECHNOLOGICAL AND PRACTICAL CONSIDERATIONS

From a technological standpoint, the integrity and security of online arbitration systems are critical to the enforceability of awards. Unlike traditional paper-based or in-person arbitration proceedings, the digital nature of online arbitration involves the use of electronic signatures, digital platforms, and potentially blockchain technology for recording and storing arbitral awards. These technologies raise questions about authenticity, as well as the mechanisms for verifying their compliance.

Furthermore, the challenge of anonymity in online arbitration proceedings can undermine the enforceability of arbitral awards. Many digital platforms permit parties to use pseudonyms or remain partially anonymous during proceedings, which can obscure their true identity and legal capacity. This anonymity becomes problematic when a party refuses to comply with an arbitral award or with procedural directions issued by the tribunal or an enforcement order from a competent court.

If the respondent's true identity or jurisdictional location is unclear, the claimant

[9] Douglas v. U.S. Dist. Ct. for the Central Dist. Cal. ex rel. Talk America, Inc., 495 F.3d 1062 (9th Cir. 2007).

may be unable to serve the award, initiate recognition and enforcement proceedings, or seek judicial assistance in enforcing tribunal orders (for example, orders to produce evidence, disclose identity, or stay parallel proceedings).

Moreover, if an award is rendered by a tribunal whose members' identities or qualifications are not verifiable through the platform, courts may question the tribunal's legitimacy or competence, further complicating enforcement. In such cases, the party seeking enforcement may struggle to determine the proper forum or jurisdiction for recognition, especially when the platform or its servers are hosted in one country while the parties are located in others.[10]

This fragmentation of identity, authority, and territorial connection demonstrates how digital anonymity—while protecting user privacy—can erode the fundamental principles of due process and enforceability in international arbitration.

In the context of emerging technologies, artificial intelligence (AI) and smart contracts present both challenges and opportunities. AI tools can assist in creating efficient dispute resolution processes and in predicting the outcome of proceedings, which can streamline the enforcement of awards. They serve two primary functions: (i) assisting parties and tribunals in reaching faster and more consistent decisions, and (ii) forecasting likely outcomes. Both functions can significantly improve the efficiency at the *enforcement stage* of arbitration awards. One of the biggest barriers to enforcement is when a losing party challenges an award on grounds such as due process violations, excess of mandate, or public policy. AI-driven prediction tools can simulate how similar cases have been treated by courts in the past, thereby guiding

[10] *See* Harold Hongju Koh, *The "Gants Principles" for Online Dispute Resolution: Realizing the Chief Justice's Vision for Courts in the Cloud*, 62 B.C. L. REV. 2768 (2021); Michael Hewitt, *What Attorneys Should Know About Blockchain Disputes*, Law360 (Oct. 15, 2021), *available at* https://www.law360.com/articles/1429691/what-attorneys-should-know about-blockchain-disputes; FLORENCE GUILLAUME & SVEN RIVA, *Blockchain Dispute Resolution for Decentralized Autonomous Organizations: the Rise of Decentralized Autonomous Justice*, *in* BLOCKCHAIN AND PRIVATE INTERNATIONAL LAW (Andrea Bonomi, Matthias Lehmann, & Shaheeza Lalani, eds., 2023); Benedetta Cappiello, *Blockchain and AI: An (Almost) Perfect Liaison a Preliminary Study of the Civil Responsibility Regime*, 14 AMSTERDAM L. FORUM 2 (2022).

arbitrators to draft awards that are less vulnerable to annulment or refusal of enforcement. For instance, tools that analyze case law under the NYC can flag risk factors that commonly lead courts to deny recognition (*e.g.*, vague choice of law, lack of notice, procedural irregularities). Smart contracts are programmable, self-executing pieces of code that live on blockchains which can automatically carry out transactions when predefined conditions have been met. These features can be used to *operationalize* arbitral awards, instead of waiting for a court to recognize an award and compel enforcement. In addition, the award's operative effect (payment, transfer of a tokenized asset, release from escrow, *etc.*) can be encoded as a trigger in a smart contract so the award is executed instantly when the tribunal issues its determinative output.[11]

Smart contracts utilize software routines which are deployed on blockchain that automatically execute agreed rules when specified conditions occur. Such contracts promise a step-change in how arbitral awards are enforced. In an idealized model, parties would place assets (cryptocurrency, tokenized property, or funds held in on-chain escrow) under the control of a smart contract at the time they contract. They would then agree that a tribunal (or an authorized oracle[12]) would determine the outcome of any dispute; and when the tribunal issues a final award, the smart contract, reading an authenticated trigger, would release the escrow or transfer the tokenized amount automatically. For disputes that involve purely on-chain assets, this architecture could make enforcement near-instant, virtually costless, and largely independent of national court processes.[13]

Despite advances in technology, the legal recognition of smart-contract enforcement mechanisms remains unsettled across jurisdictions and that

[11] *See* Amy J. Schmitz, *Resolving NFT and Smart Contract Disputes*, *in* THE CAMBRIDGE HANDBOOK OF LAW AND POLICY FOR NFTS, 372–94 (Nizan Geslevich Packin, eds., 2024).

[12] In blockchain and digital arbitration contexts, an oracle is a third-party data service or protocol that transmits verified information from the outside world (off-chain) to a blockchain (on-chain).

[13] *See* https://kleros.io/assets/whitepaper.pdf.

unsettledness meaningfully constrains how far smart contracts can substitute for courts, that is to say the automation of enforcement steps—such as a method of self-executing payment or transfer—which is not intended to be the replacement of adjudicative or supervisory functions. Several reasons explain why recognition is still fragile. First, international arbitration and enforcement regimes (notably the NYC) and many national laws require a written agreement with respect to a valid arbitration agreement alongside various formalities for the form of arbitral awards. If an award is reflected only as a blockchain event or a smart-contract instruction without an accompanying conventional written award, courts may hesitate to treat it as an enforceable award under existing legal frameworks. Second, many jurisdictions have not yet adopted comprehensive rules that equate code/automation with a legally recognizable "writing," "signature," or "final award". These are concepts which institutions such as the United Nations Commission on International Trade (UNCITRAL) and other bodies are beginning to address.[14] Thirdly, even when on-chain enforcement works, in practice it only reaches assets that are tokenized or otherwise subject to on-chain control; most commercial value (real property, bank deposits, receivables) remain off-chain and typically require judicial recognition to effect a transfer or seizure of assets.

V. CONCLUSION

The enforceability of online arbitration awards represents a convergence of traditional arbitration principles with the evolving realities of digital commerce and dispute resolution. Whilst the NYC provides a robust foundation for the recognition and enforcement of international arbitral awards, its silence concerning online and virtual proceedings underscores the need for an updated, cohesive global framework. The current legal landscape leaves parties engaged in cross-border digital transactions facing uncertainty about the treatment of awards rendered via online platforms, digital signatures, or smart contracts.

[14] *See* https://uncitral.un.org/en/mlac?utm_source.

Key challenges persist across multiple dimensions. Jurisdictional ambiguity, especially regarding the "seat" of arbitration and applicable law, complicates enforcement and exposes parties to inconsistent treatment by national courts. Technological considerations, including digital authentication, cybersecurity, anonymity, and the integration of AI or smart contracts, introduce both opportunities and risks. Although emerging tools can streamline enforcement and enhance predictability, their legal recognition remains unsettled, and reliance on technology cannot entirely substitute established procedural safeguards.

Concerns relating to consumer protection add a further layer of complexity because online arbitration often intersects with power imbalances inherent in digital contracts, raising questions about transparency, informed consent, and fairness. Courts and regulators are therefore likely to scrutinize such awards more rigorously, particularly when less well-resourced parties are involved thereby highlighting the need for procedural safeguards which need to be adapted to virtual contexts.

Despite these challenges, the growing adoption of online dispute resolution reflects a broader shift toward scalable, efficient, and accessible mechanisms for resolving disputes in the digital economy. The experiences of leading arbitral institutions, the application of existing case law, and the potential of smart contracts and AI indicate that online arbitration can evolve into a credible, enforceable framework—provided that legal norms and technological systems develop in tandem.

Ultimately, the enforceability of online arbitration awards will hinge on a delicate balance: preserving the efficiency, flexibility, and accessibility of digital processes whilst ensuring legal certainty, procedural fairness, and compatibility with international enforcement regimes. Achieving this balance requires not only the adaptation of existing treaties and national laws but also a continued innovation in technology, institutional practice, and international coordination. The path forward lies in embracing digital transformation without compromising the core principles of arbitration, thereby creating a future where online awards are both practically effective and universally respected.

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Nachingwea U.K. Limited v. Tanzania (Indiana Resources): A Case Study on the Use (or Not) of Awards by Consent in International Arbitration

by Matthew Brown & Diana Dilday

I. Introduction

Arbitration awards issued by a tribunal pursuant to party settlement agreements—commonly called awards by consent, or simply "consent awards"—can serve as a valuable tool for parties in both international commercial arbitration and investor-state dispute settlement (ISDS) proceedings. They function in international arbitration as a sort of subspecies of arbitral awards in which the tribunal records the terms of the disputing parties' settlement agreement in the form of an arbitral award. In so doing, the consent award transforms a settlement agreement, *i.e.*, an otherwise standard contract, into an arbitral award with all the enforceability benefits that that designation entails.

The recent example of *Nachingwea U.K. Ltd. v. Tanzania*,[1] an ISDS arbitration that proceeded under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,[2] provides an interesting, albeit nuanced, case study on the possible use (or in that case, non-use) of consent awards.

This article will first survey the source of tribunals' authority to issue consent awards in the form of arbitral rules that commonly govern such proceedings. Then it will discuss the possible benefits of consent awards when it comes to enforcement of party settlements. The article will further examine the publicly available information on *Nachingwea U.K. Ltd v. Tanzania* with an eye toward the decision-making process

[1] Nachingwea U.K. Limited (UK), Ntaka Nickel Holdings Limited (UK) and Nachingwea Nickel Limited (Tanzania) v. United Republic of Tanzania, ICSID Case No. ARB/20/38.

[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159 [hereinafter, ICSID Convention].

as to whether to memorialize the parties' settlement in a consent award, before finally concluding.

II. CONSENT AWARDS IN INTERNATIONAL ARBITRATION

Consent awards reflect a core principle of arbitration: party autonomy. In both international commercial arbitration and ISDS, parties may settle their dispute during the proceedings and request that the arbitral tribunal record their agreement in the form of a binding award. Institutional rules provide the procedural framework for doing so.

In international commercial arbitration, institutional rules expressly authorize tribunals to issue awards on agreed terms. For example, Article 33 of the International Chamber of Commerce (ICC) Rules provides that, if the parties reach a settlement after the file has been transmitted to the tribunal, the settlement shall be recorded as a consent award at the parties' request and with the tribunal's agreement.[3] Similarly, Article 26.9 of the London Court of International Arbitration (LCIA) Arbitration Rules permits a tribunal to issue a "Consent Award" upon the parties' joint written request; absent such a request, confirmation of settlement results in termination of the proceedings.[4] These provisions demonstrate how commercial arbitral institutions facilitate settlement while preserving the enforceability and finality of arbitral outcomes.

Consent awards are equally recognized in ISDS. Here the 2006 and 2022 ICSID Arbitration Rules state that a tribunal may record a settlement as an award if the parties submit the full, signed text of their agreement.[5] The 2022 amendments apply to arbitrations where consent was given on or after July 1, 2022,[6] and maintain this

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[3] ICC Rules of Arbitration (2021), art. 33.

[4] LCIA Arbitration Rules (2014), art. 29.6.

[5] ICSID Arbitration Rules of Procedure for Arbitration Proceedings, Rule 43(2) (Apr. 10, 2006) [hereinafter, 2006 ICSID Arbitration Rules].

[6] ICSID Convention, art. 44.

mechanism.[7] Unlike most international arbitrations, ICSID proceedings do not have a legal seat;[8] awards are not subject to set-aside by domestic courts but may be challenged only through the Convention's internal annulment mechanism before an ad hoc committee. Consent award provisions also apply in that context.

Outside the ICSID system, ISDS proceedings frequently proceed under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. Article 36(1) permits a tribunal, upon settlement, either to terminate the proceedings or—if requested by the parties and accepted by the tribunal—to record the settlement as an award on agreed terms. Across these regimes, the process is consistent: if both parties request it and the tribunal agrees, the settlement may be embodied in a binding consent award.[9]

The principal advantage of a consent award lies in its enforceability under international treaty regimes. Most international commercial awards and non-ICSID investment awards are enforced under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[10] With 172 Contracting States,[11] the Convention obliges courts to recognize and enforce foreign arbitral awards under conditions no more onerous than those applied to domestic awards.[12] This framework gives consent awards the same cross-border enforceability as any other arbitral award.

ICSID awards, by contrast, are enforced under the self-contained regime of the ICSID Convention. Article 53 provides that ICSID awards are final and binding, subject

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[7] ICSID Rules of Procedure for Arbitration Proceedings, Rule 55(b)(2) (July 1, 2022) [hereinafter, 2022 ICSID Arbitration Rules].

[8] Savić Milica & Ugale Anastasiya, *Seat of Arbitration*, JUS MUNDI WIKI NOTES, June 19, 2023, https://jusmundi.com/en/document/publication/en-seat-of-arbitration.

[9] UNCITRAL Arbitration Rules (2013), art. 36(1).

[10] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V, 330 U.N.T.S. 38, 7 I.L.M. 1046 [hereinafter, New York Convention].

[11] New York Convention Contracting States, https://www.newyorkconvention.org/contracting-states.

[12] New York Convention, art. III.

only to the remedies provided within the Convention.[13] Article 54 requires Contracting States to recognize and enforce pecuniary obligations imposed by an ICSID award as if it were a final judgment of their own courts.[14] Unlike awards governed by the New York Convention, ICSID awards are not subject to annulment or set-aside by domestic courts; challenges proceed exclusively through the Convention's internal mechanisms.

In sum, across commercial arbitration and ISDS, consent awards translate negotiated settlements into enforceable arbitral awards. Institutional rules provide the authority; international conventions supply the enforcement regime. Together, they ensure that settlements reached within arbitration retain both finality and global enforceability.

III. RECENT CASE STUDY OF NACHINGWEA U.K. LTD. V. TANZANIA

A recent ICSID case demonstrates the possible options when deciding whether to transform a regular settlement into a consent award. *Nachingwea U.K. Ltd. v. Tanzania* was initiated in 2020. The dispute originated over a nickel mining development project in Tanzania.[15] The claimants were three subsidiaries of Australian mining company, Indiana Resources (hereinafter referred to as "Indiana Resources"). They alleged that Tanzania canceled several retention licenses with them in breach of the UK and Tanzania bilateral investment treaty (the "UK-Tanzania BIT").[16] The Tribunal found in favor of Indiana Resources and awarded US$109 million in damages and costs in July 2023.[17] Tanzania thereafter initiated proceedings before an ad hoc committee to annul the award pursuant to article 52 of the ICSID

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[13] ICSID Convention, art. 53.

[14] 2022 ICSID Rules art. 54.

[15] Akinyi Agutu & Munia El Harti Alonso, *Tanzania Hit by Second ICSID Dispute Related to Mining Retention Licenses*, AFRONOMICS LAW, Nov. 23, 2020, https://www.afronomicslaw.org/2020/11/23/tanzania-hit-by-second-icsid-dispute-related-to-mining-retention-licenses.

[16] *Id.*

[17] Nachingwea U.K. Ltd. (UK), Ntaka Nickel Holdings Ltd. (UK) & Nachingwea Nickel Ltd. (Tanz.) v. United Republic of Tanz., ICSID Case No. ARB/20/38, Award, ¶ 413 (July 14, 2023) [hereinafter, Nachingwea Award].

Convention and rule 50 of the 2006 ICSID Arbitration Rules.[18] During the course of the annulment proceedings, Indiana Resources and Tanzania agreed to settle for US$90 million.[19]

Notably, the ad hoc committee was not requested to issue a consent award pursuant to articles 52(4) and 44 of the ICSID Convention and Rules 43(2) and 53 of the applicable 2006 ICSID Arbitration Rules. Rather, the parties agreed to request that the ad hoc committee merely suspend the annulment proceedings and included in their settlement agreement an arbitration agreement referring any disputes to the LCIA.[20] According to press reports, Indiana Resources has since lodged an LCIA arbitration for breach of the settlement agreement, indicating an alleged breach of the settlement agreement.[21]

Indiana Resources had the procedural option to seek a joint request (with Tanzania) for a consent award from the ad hoc committee. The practical viability of such an approach would typically depend on the parties' relative bargaining positions at the relevant stage of the proceedings. In this case, several observable factors suggest that Indiana Resources may have possessed meaningful negotiating leverage.

First, the company held an ICSID award in the amount of approximately US$109 million. Second, the ad hoc committee had dismissed three of Tanzania's four annulment grounds pursuant to 2006 ICSID Arbitration Rule 41(5) on the basis that they were manifestly without merit,[22] thereby narrowing the scope of potential annulment and potentially reinforcing the award's stability. These procedural

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[18] *Nachingwea v. Tanzania*, Decision on Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), ¶ 9 (Feb. 2, 2024) [hereinafter, Nachingwea Annulment].

[19] Matthew Craig, *Indiana Resources complete* US$90M *settlement deal with Tanzania*, THE MARKET BULL, July 29, 2024, https://themarketbull.com.au/2024/07/29/indiana-resources-complete-us90m-settlement-deal-with-tanzania/. *See also*, Indiana Resources Limited press release on the settlement, dated July 29, 2024, https://www.italaw.com/cases/8457.

[20] Matthew Craig, *supra* note 19.

[21] Jack Ballantyne, *Tanzania Liable Over Revoked Mining Licenses*, July 18, 2023, https://globalarbitrationreview.com/article/tanzania-liable-over-revoked-mining-licence.

[22] *Nachingwea Annulment*, at ¶ 166.

developments may have strengthened Indiana Resources' position in settlement discussions.

Further, Tanzania's agreement to a reduction of less than 20% of the award amount, in exchange for payment in three tranches over an eight-month period,[23] may be indicative of a negotiated outcome reached under conditions of asymmetrical risk exposure. While these factors do not establish that a consent award was either available or strategically optimal, they provide a basis for considering whether such an option was realistically within the range of procedural possibilities.

Even assuming that a consent award was procedurally available, the more salient question is why Indiana Resources may have declined to pursue that course. Although a consent award would have provided Indiana Resources with the ability to immediately enforce the terms of the parties' settlement as a domestic judgment in contracting states to the ICSID Convention, it would have limited Indiana Resources flexibility in dealing with the situation. First, the effect of a consent award would have been to replace the terms of the award with that of the new consent award, effectively extinguishing nearly US$20 million in value. Second, since the parties had merely suspended the annulment proceedings, if Tanzania had failed to pay either of the latter two payment tranches, then Indiana Resources could have simply requested the ad hoc Committee to resume the annulment proceedings.[24] Given that the ad hoc Committee had already dismissed 75% of Tanzania's annulment claims as being manifestly without merit, it is likely that the remaining claim for annulment would be rejected on the merits and Tanzania would be on the hook for the full amount of the award.

In other words, it appears that Indiana Resources used its superior bargaining power to push through the payment of an overwhelming majority of the award, while

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[23] Matthew Craig, *supra* note 19.

[24] *Indiana Resources receives first payment in US$90m Ntaka Hill settlement with Tanzania*, STOCKHEAD, July 30, 2024, https://stockhead.com.au/resources/indiana-resources-receives-first-payment-in-us90m-ntaka-hill-settlement-with-tanzania/.

maintaining the flexibility to pursue either the full award after obtaining a full dismissal of Tanzania's annulment request or in the event of a 'lesser' breach, an LCIA international commercial arbitration.

IV. CONCLUSION

Overall, tribunal rules governing consent awards provide a clear roadmap where parties can take their private negotiated settlements and turn them into binding arbitral awards. Without this procedural tool, parties risk the possibility that one side might not hold up their end of the private settlement. If that occurs, litigation (or more arbitration) is the most likely path to enforce the privately negotiated settlement. Parties will then either start again the whole arbitral process or be left at the mercy of a court. Consent award rules simply provide procedural efficiency that incentivize parties to settle early. If those rules are initiated, the tribunal acts as the facilitator helping to bring about a final award. Once the private settlement becomes an arbitral award, challenges to the award are strictly limited. To reiterate, consent awards not only allow parties to gain control over the outcome of their dispute, but institutional rules and arbitration laws provide binding and simplified enforcement mechanisms. This minimizes disruptions in both day-to-day business as well as potential larger diplomatic issues.

The case discussed supra in *Nachingwea U.K. Ltd. v. Tanzania* provides a glimpse into the decisions being weighed by parties when initiating settlement options during the course of an arbitration or annulment proceeding. While there is never one right answer in the legal field, the unique insights from the case provide food for thought when parties are considering settlement and the use—or not—of consent awards.

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FREEDOM OF SPEECH AS THE MEDIA FIRM'S PROXY FOR INVESTMENT CLAIMS

by Larissa Barhebréus

I. INTRODUCTION

> One of the things that I wanted to talk about today is, of course, our shared values. . . .And what I worry about is the threat from within, the retreat of Europe from some of its most fundamental values—values shared with the United States of America. . . I look to Brussels, where EU commissars warn citizens that they intend to shut down social media during times of civil unrest the moment they spot what they've judged to be, quote, "hateful content."[1]

U.S. Vice President JD Vance's statement at the 2025 Munich Security Conference frames the contemporary geopolitical climate in which freedom of speech is increasingly weaponized in debates over fundamental democratic values. As a response to this, several European leaders, including Finland's President Alexander Stubb and German Chancellor Friedrich Merz, rejected Vance's characterization of its policies and defended European jurisdictions' right to regulate disinformation and hate speech.[2]

This geopolitical exchange reflects the intensification of a broader global regulatory conflict over how democratic societies reconcile expressive freedom with platform accountability in an increasingly borderless digital economy. Thus, what began globally as a period of liberal regulation fostering rapid platform growth has given way to an era of heightened intervention. In consequence, the rise of global digital media platforms has produced a complex intersection between freedom of speech and international investment law. Governments increasingly impose

[1] US Vice President J.D. Vance, *Speech at the Munich Security Conference 2025* (Feb. 14, 2025), *in* MUNICH SECURITY CONFERENCE 2025: SPEECH BY J.D. VANCE AND SELECTED REACTIONS 15–17 (Benedikt Franke ed., 2025), *available at* https://securityconference.org/en/publications/books/key-speeches-volume-ii-jd-vance-msc-2025/.

[2] *Id.* at 61–62, 69–70.

regulatory measures, ranging from content takedowns, speech controls, and license revocations to extensive compliance obligations, that affect how platforms operate, monetize, and engage people across borders. These measures are often divergent across jurisdictions and administratively opaque, creating substantial uncertainty for foreign media investors. Investors may claim that abrupt or disproportionate state interventions frustrate legitimate expectations, or diminish the economic value of investments and intangible assets such as contracts, user agreements, or access to data.

Recent scholarship and arbitral practice indicate that claims once grounded in constitutional or public law discourse could plausibly be advanced under standards such as fair and equitable treatment and indirect expropriation under investment protection treaties. While freedom of speech does not constitute a standalone source of rights under investment treaties, this article suggests that its normative weight within public international law can function as a contextual benchmark for assessing investment protection standards and claims.

This article presents how free speech embedded human rights arguments can operate as a *proxy* within the interpretive framework of investment arbitration law. By situating this question within the broader implications of new regional media regulations, economic research, and arbitral precedent, the analysis illuminates the possibilities between sovereign regulatory authority and the protection of media investments in an increasingly volatile legal context.

II. HUMAN RIGHTS LAW AS CONTEXT – NOT CAUSE OF ACTION

Tribunals have scarcely confronted claims arising from the media or technology sectors, and occasionally investment protection standards have been interpreted broadly enough to encompass injuries to the media sector and related enterprises.[3]

[3] CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Partial Award, ¶ 533 (Sept. 13, 2001); *see* CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Final Award, ¶¶ 490–615 (Mar. 14, 2003) (the tribunal found that the Czech media regulator (the Media Council) coerced amendments to the investor's memorandum of association and supported termination of its service agreement in 1999, thereby undermining the investor's legal position).

Human rights provisions can inform this analysis but are not self-executing in investment arbitration disputes, which largely has to do with the systemic nature of public international law. As noted by the *Eskosol* tribunal regarding the organization of the international legal system "it is useful to recall that the international legal system is a general system without any central authority from whom the entire system flows . . . composed of different legal sub-systems which have independent life, even if at times there may be interactions between them."[4]

Nevertheless, while rarely invoked successfully in investment arbitration, the right to freedom of speech may be supplemented by the principle of systemic integration codified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, and thus, constitutes a relevant rule of public international law that arbitral tribunals may be required to consider.[5] A clear expression of this interpretive approach appears in *Urbaser v. Argentina*, where the tribunal held:

> [t]he BIT cannot be interpreted and applied in a vacuum. The Tribunal must certainly be mindful of the BIT's special purpose as a Treaty promoting foreign investments, but it cannot do so without taking the relevant rules of international law into account. The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.[6]

Dillon has developed this interpretive dynamic regarding investment arbitration in the media sector, arguing that although tribunals seldom treat human rights instruments as self-standing sources of investment obligation, many investment treaties through references to public international law principles implicitly incorporate such rights into the interpretive framework governing state conduct.[7] For example, Dillon demonstrates that human rights jurisprudence, *e.g.*, under Article

[4] Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, ¶ 143 (May 7, 2019).

[5] Thomas Dillon, *The Human Right of Freedom of Expression in Investor-State Arbitration*, 40 J. INT'L ARB. 179, 192–93 (2023); *see* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3)(c), 1155 U.N.T.S. 331.

[6] Urbaser S.A. v. Argentina, ICSID Case No. ARB/07/26, Award, ¶ 1200 (Dec. 8, 2016).

[7] Dillon, *supra* note 5 at 192–201.

13(3) of the American Convention or Article 10 of the European Convention on Human Rights and its analogues in other regional systems, creates a presumption in favor of the freedom to broadcast and a corresponding burden on states to justify refusals of broadcasting licenses on legitimate and proportionate grounds.[8] When a state denies or manipulates such licenses for political reasons, the resulting interference may therefore constitute unfair or inequitable treatment under the relevant treaty—not because the investor enjoys a freestanding human rights claim, but because human rights law supplies the normative baseline against which the fairness of state action is measured.[9]

Therefore, Dillon makes clear that human rights norms can function in investment arbitration as contextual determinants of meaning rather than as independent causes of action.[10] They assist in defining the content of treaty standards such as fair and equitable treatment, legitimate expectations, and proportionality, without displacing the treaty's autonomous structure. As Dillon notes, this interaction reflects an evolving "systemic integration" between investment law and other branches of public international law and that while investment tribunals are not human rights centered, they operate within the same normative universe and cannot adjudicate in isolation from it.[11] Bollinger and Sauvant observe similarly that international investment arbitration law provides robust enforcement mechanisms that human rights treaties lack, making investment treaties an attractive vehicle for vindicating press freedoms that might otherwise go uncompensated.[12] Thus, human rights law contributes to the interpretation and substance of investor protection but not to its source. Human rights can guide how investment treaty obligations are *understood*, yet remain

[8] *Id.* at 185–91.

[9] *Id.* at 187–89, 201.

[10] *Id.* at 200–01.

[11] *Id.* at 192–93.

[12] Lee C. Bollinger and Karl P. Sauvant, *How Investment Agreements Can Protect Free Media*, PROJECT SYNDICATE, Jul. 11, 2016, *available at* https://www.project-syndicate.org/commentary/al-jazeera-egypt-free-media-investment-by-lee-c--bollinger-and-karl-p--sauvant-2016-07.

incapable of grounding *a claim in their own right*.[13]

III. Investment Protection Amid Global Regulatory Fragmentation

Investment treaties typically obligate host states to afford foreign investments a defined standard of protection.[14] Classic investment protection provisions guarantee fair and equitable treatment and full protection and security of covered investments and bar unjustified discrimination or illegal expropriation. Such provisions usually prohibit uncompensated expropriation of investments of both direct or indirect nature.[15] These protections are often phrased in economic terms, *e.g.*, safeguarding investors' legitimate expectations and freedom from "unreasonable or discriminatory measures" impairing their business, including taking into account business and regulatory risk.[16] Professor Krzykowski has underscored that "[t]he judgements of arbitration tribunals indicate that the notion of reasonable and legitimate expectations is relevant when the actions of a contracting party lead the investor to develop reasonable and legitimate expectations regarding the behavior of said party."[17] Consistent with this reasoning, the tribunal in *LG&E v. Argentina* described the legal criteria of fair expectations having, among others, the following characteristics: " . . . they are based on the conditions offered by the host state at the

[13] Dillon, *supra* note 5 at 209–10.

[14] Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 188 (3d ed. 2022); *cf.* U.S. Dep't of State, 2012 US Model Bilateral Investment Treaty, art. 5 & annex A (2012) (defining fair and equitable treatment and full protection and security as the customary international law minimum standard of treatment); Asia-Pacific Economic Cooperation, Handbook on Obligations in Investment Treaties 24–51 (2019) [hereinafter APEC] (describing typical standards of protection found in modern IIAs).

[15] Dolzer & Schreuer, *supra* note 14 at 190; APEC, *supra* note 14 at 28–39; Organization of Economic Cooperation and Development (OECD), *"Fair" and "Equitable" Treatment Provisions in Investment Treaties: A Large-Sample Survey of Treaty Provisions* 11 (OECD Working Papers on International Investment, April 12, 2023).

[16] Técnicas Medioambientales Tecmed S.A. v. Mexico, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003) (the tribunal held that the FET clause in the Spain-Mexico bilateral investment treaty (BIT) obliged the state to protect the "basic expectations that were taken into account by the foreign investor to make the investment"); Michał Krzykowski, Michał Mariański, and Jakub Zięty, *Principle of Reasonable and Legitimate Expectations in International Law as a Premise for Investments in the Energy Sector*, 21 Int'l Env't Agreements: Pol., L. & Econ. 75, 79 (2021).

[17] Krzykowski, Mariański & Zięty, *supra* note 16 at 78.

time of the investment . . ..”[18]

Notably, the tribunal emphasized the relevant baseline for assessing investment protection claims as being the situation at the time of the investment, highlighting that investors cannot retroactively create expectations based on later developments. This insight is particularly significant in the media platform context, because as noted by Professor Pollicino, the technology sector initially developed under a liberal, minimally regulated framework that enabled rapid platform growth and market consolidation.[19] This period of regulatory permissiveness is now being replaced by intensified governmental oversight aimed at content moderation, competition, and platform accountability. Because of this development, regulatory frameworks across the globe are becoming increasingly volatile and grant government authorities—and media platforms as intermediaries—wide discretion to determine what constitutes permissible speech.[20]

For example, the EU Digital Services Act (“DSA”) requires intermediary services such as host providers, online marketplaces, and social media networks to remove or restrict “illegal content,” but the thresholds for “illegal” material and its enforcement remain subject to ongoing interpretation by national judicial or administrative authorities.[21] The enforcement of the DSA, however, is more pervasive than merely content regulation. In a recent development, the European Commission has preliminarily found TikTok in breach of the DSA due to design features that may promote addictive user behavior, marking a novel focus on platform design rather than content issues.[22] Defining what constitutes addictive design and determining

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[18] LG&E Energy Corp., LG&E Capital Corp., and LG&E Int'l, Inc. v. Argentine Republic, ICSID Case No. Arb/02/, Decision on Liability, ¶ 130 (Oct. 3, 2006).

[19] Oreste Pollicino, A *New Geometry for Digital Constitutionalism*, *in* A DIGITAL EUROPE FOR CITIZENS: DATA GOVERNANCE, DATA MARKETS, DATA SERVICES 11 (Enes et. al. eds., 2026).

[20] Giovanni De Gregorio, *The Law of the Platforms*, *in* DIGITAL CONSTITUTIONALISM IN EUROPE: REFRAMING RIGHTS AND POWERS IN THE ALGORITHMIC SOCIETY 81 (Cambridge University Press ed. 2022).

[21] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services (“Digital Services Act”), arts. 1–9, 2022 O.J. (L 277).

[22] European Commission Press Release, Commission Preliminarily Finds TikTok's Addictive Design

which features must be modified or eliminated involves complex judgements about user autonomy, behavioral science, and the balance between engagement and harm.[23] The Commission's findings suggest it is prepared to make those judgements,[24] but the legal and practical challenges of implementing design-level interventions should not be underestimated. If the Commission's preliminary findings are confirmed, the DSA framework positions design choices as potential sources of regulatory risk that must be assessed, mitigated and, where necessary, restructured.

Beyond the EU framework, significant regional developments in content moderation laws have emerged. Nigeria's National Information Technology Development Agency ("NITDA") Code of Practice mandates rapid content takedowns within 48 hours of government notice, providing no opportunity for platforms to verify claims or appeal decisions, leaving platforms little predictability over enforcement.[25] At the regional level, the African Union's ACHPR Resolution 630/2025 establishes broad obligations for digital platforms to moderate misinformation and hate speech, but the resolution leaves significant discretion to its member states in implementation.[26] Similarly, India's Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, as amended in 2022, 2023, and 2026, impose extensive content-governance obligations on media platform

in Breach of the Digital Services Act, Press Release (Feb. 5, 2026) *available at* https://ec.europa.eu/commission/presscorner/detail/en/ip_26_312.

[23] Xin Ye, *Dark Patterns and Addictive Designs*, 5 WEIZENBAUM J. DIGITAL SOC'Y (2025), https://ojs.weizenbaum-institut.de/index.php/wjds/article/view/5_3_2/189.

[24] European Commission, *supra* note 22.

[25] National Information Technology Development Agency ("NITDA"), Code of Practice for Interactive Computer Service Platforms/Internet Intermediaries (Sept. 26, 2022), *available at* https://nitda.gov.ng/wp-content/uploads/2022/10/APPROVED-NITDA-CODE-OF-PRACTIVE-FOR-INTERACTIVE-COMPUTER-SERVICE-PLATFORMS-INTERNET-INTERMEDIARIES-2022-002.pdf; Vincent Obia, *Digital Policy and Nigeria's Platform Code of Practice: Towards a Radical Co-Regulatory Turn*, 7 DATA & POL'Y e12-1, e12-6 (2025).

[26] African Commission on Human and Peoples' Rights, *Resolution on Developing Guidelines to Assist States Monitor Technology Companies in Respect of their Duty to Maintain Information Integrity Through Independent Fact Checking*, ACHPR/Res. 630 (LXXXII) 2025.

intermediaries.[27] Platforms designated as "Significant Social Media Intermediaries" are subject to heightened due diligence duties.[28] Enforcement operates less on independent monetary sanctions, and instead primarily through the withdrawal of statutory intermediary immunity under section 79 of the Indian Information Technology Act, 2000. Non-compliant platforms forfeit safe-harbor protection and are thereby exposed to direct civil and criminal liability for third-party content.[29] Furthermore, by an amendment in February 2026, platforms are required to remove or disable access to such information which is used to commit "unlawful acts" *within three hours of receiving actual knowledge* of such information.[30] This recent amendment reinforces India position as one of the world's most aggressive regulators of online content, and places considerable compliance burdens on platforms. India's regulatory architecture effectively puts platforms in a position where continued market access depends on aggressive risk-averse content moderation. In practice, major digital media platforms operating in India face a structural choice between over-compliance with indeterminate regulatory standards or exposure to criminal and civil liability, effectively risking operational paralysis.

In the United States, free speech is governed by the First Amendment. To date, no comprehensive federal regulatory initiative comparable to those adopted in other jurisdictions has been enacted. Several state-level content moderation laws have been enjoined on First Amendment grounds before taking effect. The Supreme Court addressed two such state laws in *Moody v. NetChoice*[31] where it held that certain applications of these statutes burden media platforms constitutionally protected

[27] Ministry of Electronics and Information Technology, Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E), (India), Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules.

[28] *Id.* Rules 2(1)(v), 3(1), 4, 5, 7.

[29] *Id.* Rule 7.

[30] *Id.* Rule 3(1)(d) (defining actual knowledge arises for a platform when it receives an order of a court of competent jurisdiction considering its content as such, or by an intimation in writing by a competent officer).

[31] Moody v. NetChoice, LLC, 603 U. S. 707 (2024).

editorial discretion. Specifically, the Court reasoned that when platforms such as Facebook and YouTube decide whether to host, remove, or organize third-party content, they engage in expressive activity protected by the First Amendment.[32] Laws that restrict a platform's ability to curate, prioritize, or exclude speech may therefore infringe its editorial control and violate constitutional protections.[33] Correspondingly, the U.S. government and agencies have conducted directed efforts to regulate certain media platforms.

For instance, in *TikTok Inc. v. Garland*,[34] the Supreme Court upheld the Protecting Americans from Foreign Adversary Controlled Applications Act signed by the Biden Administration—a U.S. federal law that bans social networking services classified as "foreign adversary controlled applications" if deemed a national security threat. The Act specifically targets ByteDance Ltd.'s ownership of TikTok and alleges it could give the Chinese government access to sensitive user data or enable influence operations via its algorithms and content moderation, thus, embedding national security rationales against allegations of overt free speech restrictions.[35] On September 25, 2025, the Trump Administration announced an Executive Order stating that "[TikTok] will be majority-owned and controlled by United States persons and will no longer be controlled by any foreign adversary . . .."[36] Another recent U.S. development on free speech takes aim at broadcasting services. The Federal Communications Commission (FCC) has revived the application of the statutory equal opportunities rule under 47 U.S.C. § 315. The equal opportunities rule essentially requires broadcasting stations

[32] *Id.* at 13–29.

[33] *Id.*

[34] TikTok Inc. v. Garland, 604 U.S. 56 (2025).

[35] *Id.* at 72–73 (the Supreme Court specifically narrowed their holding by stating: "While we find that differential treatment was justified here, however, we emphasize the inherent narrowness of our holding. Data collection and analysis is a common practice in this digital age. But TikTok's scale and susceptibility to foreign adversary control, together with the vast swaths of sensitive data the platform collects, justify differential treatment to address the Government's national security concerns. A law targeting any other speaker would by necessity entail a distinct inquiry and separate considerations.").

[36] Exec. Order No. 14352, Saving TikTok While Protecting National Security, 90 Fed. Reg. 47219, 47219 (Sept. 30, 2025).

to provide political candidates "equal opportunities" to public airwaves, with non-compliance risking license revocations, *inter alia*.[37] This is an ongoing development, however, having prompted a domestic debate whether the FCC is materially correct in certain enforcement cases, and whether the FCC is *itself* partisan in its enforcement method by targeting only certain broadcast stations.[38]

Because most media platforms often distribute the same content across multiple jurisdictions, each jurisdiction applies divergent rules, enforcement standards, and thresholds for permissible speech. Reflecting the structural challenges this creates, Morais Rocha observes that "[digital platforms] are often virtual places without *state* and *law* and, therefore, without the *rule of law*."[39] Therefore, the business model of the digital media platform combined with an increasingly politically aggressive and volatile regulatory global market, investors cannot rely on stable content rules or consistent application of regulatory authority.[40] In extreme cases, sudden content takedowns, license revocations, or sweeping censorship requirements could effectively deprive the investor of the use or value of their media outlet,[41] thus, raising the prospect of indirect expropriation claims[42] and the potential discretionary nature of these developing legal regimes can frustrate investors' legitimate expectations.

IV. CONSTRUCTING THE MEDIA PLATFORM'S CLAIM: FREEDOM OF SPEECH AS PROXY

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[37] For more information about the relationship between First Amendment protections and the equal opportunities rule, *see* Eric N. Holmes, CONG. RESEARCH SERV., LSB11239, THE EQUAL TIME RULE FOR POLITICAL CANDIDATES: CONSTITUTIONAL CONTEXT (2024).

[38] Eric Columbus, *Brendan Carr Has a Point About the Equal Time Rule*, LAWFARE (Mar. 4, 2026), *available at* https://www.lawfaremedia.org/article/brendan-carr-has-a-point-about-the-equal-time-rule; *see also* Noah Feldman, *The FCC is Using "Equal Time" to Silence Late Night*, BLOOMBERG OPINION (Feb. 19, 2026), https://www.bloomberg.com/opinion/articles/2026-02-19/trump-s-fcc-is-using-equal-time-to-silence-colbert-and-late-night.

[39] Tiago Morais Rocha, *Digital Services Act: Towards the Digital Rule of Law*, *in* A DIGITAL EUROPE FOR CITIZENS: DATA GOVERNANCE, DATA MARKETS, DATA SERVICES 192 (Enes et. al. ed., 2026).

[40] De Gregorio, *supra* note 20.

[41] Aram Aghababyan, *Government Blocking of Social Media Platforms as Expropriation of Contractual Rights*, 5 ITA IN REV. no. 3, 2023, at 18, 22–27 (2023).

[42] *Id.* at 18, 37–38.

Building on the foregoing, a media investor may contend that a government-ordered content takedown, license cancellation, onerous content-regulation requirements, or censorship law violated its legitimate expectations under the Fair and Equitable Treatment ("FET") standard,[43] or that such measures amounted to an indirect expropriation of its investment.[44] To qualify for protection a claimant must first establish that the grievance relates to a *protected investment* as defined under the relevant treaty. Once investment status is satisfied, the claimant *invokes investment protection standards*. The following analysis turns to the circumstances under which a media investment may qualify for protected investment status and subsequently to its potential claims under relevant protections. Thus, the following discussion aims to demonstrate how the human rights-based free speech argument may function as proxy *within* the interpretative system of investment treaty arbitration.

A. *The Investment Status of Media Platforms and Conceptualizing Free Speech as "Economic Investment"*

Tribunal jurisdiction presupposes the existence of a covered investment. As the term lacks a uniform definition, its scope differs across treaties. Most treaties were drafted before the platform economy emerged and center on tangible assets and traditional services. According to United Nations Trade and Development's ("UNCTAD") World Investment Report 2025 "old-generation investment treaties generally lack provisions directly related to digital investment but also contain an open-ended definition of investment, covering physical assets, such as information and communication technology infrastructure, and non-physical assets, including intellectual property rights."[45] Though absent express references in many treaties today, media platform assets may still qualify under broad formulations, such as "any

[43] Dillon, *supra* note 5 at 180-81.

[44] *Cf.* Neustar, Inc. v Republic of Colombia, ICSID Case No. ARB/20/7, Notice of Intent (Sept. 13, 2019) (Neustar's case against Colombia in taking over its management of an internet domain).

[45] UNCTAD, *World Investment Report 2025: International Investment in the Digital Economy* 231, UNCTAD/WIR/2025 (Jun. 19, 2025).

asset" or "any economic interest," which grant tribunals interpretive leeway to encompass non-traditional investment types. For media platforms, intangible assets pose the most significant interpretive challenges and are highly dependent on the treaty's wording and the nature of that asset.[46] Aghababyan has identified that for mixed or purely intangible assets, the requirement of territoriality is more complex. Because assets such as contracts, data, revenues from advertisement, intellectual property, or know-how are inherently borderless, tribunals have adopted different tests.[47]

Some tribunals have also considered the contribution to the host state's economic development as an additional element in identifying a covered investment.[48] Aghababyan has highlighted that with the pervasive penetration of social media services into foreign digital economies, entire populations may effectively contract with the platform[49]—an engagement whose aggregate economic and societal

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[46] *Id.* UNCTAD further notes that "[d]igital economy investment that relies on some form of physical presence in the territory of the host State, such as a local company or branch, tends to be covered whereas stand-alone digital goods and services, such as apps and websites, may not fall under the treaty definition of investment."; *cf.* Aghababyan, *supra* note 41, at 26. In *Tidewater v. Venezuela*, the tribunal affirmed that an "investment" may include both tangible and intangible assets, including contractual rights, thereby extending treaty protection to such interests. Tidewater Investment SRL v. Venezuela, ICSID Case No. ARB/10/5, Award, ¶ 118 (Mar. 13, 2015). In EMV *v. Czech Republic*, the tribunal held that a series of contracts collectively qualified as an investment under the Belgium-Luxembourg Economic Union-Czech Republic BIT. European Media Ventures SA v. Czech Republic, UNCITRAL, Partial Award on Liability, ¶ 40 (Jul. 8, 2009).

[47] Aghababyan, *supra* note 41, at 29–30. Aghababyan lifts the example of *Abaclat v. Argentina*, where the tribunal departed from rigid territorial standards, holding that for financial investments, the relevant questions are where and for whose benefit the funds are ultimately used. *Id.*; *see* Abaclat v. Argentina, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 374 (Aug. 4, 2011). Similarly, Aghababyan contrasts in *Nova Scotia Power v. Venezuela*, how the tribunal emphasized the benefit conferred upon the host state as the decisive link for establishing territoriality. Aghababyan, *supra* note 41, at 30; Nova Scotia Power Inc. v. Venezuela, ICSID Case No. ARB(AF)/11/1, Excerpts of Award, ¶ 130 (Apr. 30, 2014)).

[48] *Cf.* Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I], ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (Jul. 31, 2001) (establishing a set of "objective" criteria for the existence of an investment under Article 25 the ICSID Convention, including the contribution to the economic development of a state); *see* also Romak S.A. (Switzerland) v. The Republic of Uzbekistan, UNCITRAL, PCA Case No. AA280 (*Romak v. Uzbekistan* is an example of when a non-ICSID tribunal applied the *Salini*-criteria as an objective test for the determination of the term "investment").

[49] Aghababyan, *supra* note 41 at 19.

significance surpasses that of ordinary commercial arrangements.[50] Major platforms now operate as central economic intermediaries affecting consumption, labor, local and global R&D initiatives, advertising, and information flows, and their scale and reach have significant societal implications beyond typical market transactions.[51] Media platforms may argue within this determination that their operations advance this criterion by facilitating public goods such as access to information and freedom of speech, thereby situating fundamental freedoms and human rights as a relevant contextual lens grounded in economic empirical results. This approach finds a useful point of departure in Nobel Prize winning economist, Professor Amartya Sen's central argument in *Development as Freedom* (1999) where he reconceptualized "development" not as traditional GDP growth, but as the expansion of substantive human freedoms.[52] According to Sen, political freedoms, including freedom of speech, are identified as "instrumental freedoms" constitutive of development.[53] For instance, Professor Sen argues that political freedoms—such as free speech—can have a major role in providing incentives and information in the solution of acute economic needs of nations.[54] Thus, in accordance with Sen's argument, economic development should be viewed as a means to extending freedoms rather than an end in itself. Another proposition that supports such thesis is the research presented by Professors Guernsey, Serfling, and Yan investigating the cost of equity ("COE") for private firms enacting U.S. anti-Strategic Lawsuits Against Public Participation (SLAPP) laws into their corporate governance structure.[55] According to their findings,

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[50] European Parliament, EPRS Study No. 656.336, *Online Platforms: Economic and Societal Effects*, Panel for the Future of Science and Technology, European Parliamentary Research Service (Mar. 10, 2021); Keyao Li, *Analysis of the Economic Effects of Digital Platforms*, 67 COMMS. IN HUM. RESEARCH 78 (2025) (identifying the pervasive economic impacts of digital platforms on global economic growth and market structures).

[51] European Parliament, *supra* note 51; Li, *supra* note 51.

[52] AMARTYA SEN, DEVELOPMENT AS FREEDOM (2000).

[53] *Id.* at 152.

[54] *Id.* at 147.

[55] Scott Guernsey, Matthew Serfling, & Cheng Yan, *When Speaking Freely Pays: Anti-SLAPP Laws and*

greater freedom of speech enhances the credible flow of negative information, supporting the timely incorporation of “bad news” into markets, mitigating shocks, and alleviating mispricing resulting in lowered COE for firms.[56] Notably for this article's thesis, their findings further indicated that U.S. states that enacted stronger anti-SLAPP statutes showed state-wide correlation in lower COE for corporations, associating an intersection between protections of free speech and strong capital markets.[57]

A critical point of demarcation arises regarding whether *commercial speech* rather than freedom of speech is the predominant driver of the media firm’s economic contribution to the host state’s development. The assessment of this distinction will ultimately depend on the quality and availability of empirical evidence capable of disentangling the economic effects attributable to commercial activity from those associated with core expressive functions. At a minimum, the absence of a dominant free speech *nexus* would not preclude a finding of economic contribution, insofar as other aspects of the media firm’s operations independently support indicators of the host state’s economic development. Nonetheless, depending on the nature and framing of the evidence presented, reliance on predominantly commercial economic evidence to substantiate the investment criterion, may risk narrowing the scope for human rights arguments to operate as a relevant contextual factor in evaluating alleged breaches of investment protection standards.

B. *Media Investments Under Potential FET and Expropriation Claims*

Once investment status is satisfied, the claimant invokes treaty standards. Assessing a breach requires juxtaposing the legal and factual circumstances at the time of the investment with those prevailing when the state adopted the contested

Firms’ Cost of Equity 1 (ECGI Fin. Working Paper No. 1078/2025 (2026) (The authors explain that “SLAPPs are lawsuits that are used by firms to intimidate individuals and organizations who are publicly critical of the firms’ practices.”).

[56] *Id.* at 21, 24–25, 31.

[57] *Id.* at 33–34.

measures. If that comparison discloses an inexcusable significant departure from the state's original assurances, the state may be deemed responsible for the losses sustained by the investor.[58]

The FETs enshrined in virtually all bilateral investment treaties require host states to administer their regulatory frameworks in a manner consistent with the investor's legitimate expectations. Arbitral tribunals have repeatedly emphasized that legitimate expectations arise from the legal and regulatory conditions prevailing at the time of the investment, as well as from specific assurances on which the investor reasonably relied.[59] The standard has been interpreted to encompass core requirements of transparency, stability, due process, and freedom from arbitrariness.[60] For media investors—whose operations are typically grounded in licenses, regulatory approvals, and ongoing interaction with public authorities—these elements acquire particular importance. Broadcasting and platform-based business models depend not only on formal authorization, but on the predictable and procedurally fair exercise of regulatory power, rendering them structurally sensitive to abrupt or opaque state intervention.[61]

In practice, a media investor alleging a breach of FET must demonstrate that the host state's conduct fundamentally departed from the framework on which the investment was made. Tribunals have consistently held that states retain the sovereign right to regulate—including in politically sensitive sectors such as health and national security—but that this right is not unfettered.[62] Where regulatory

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[58] Krzykowski, Mariański & Zięty, *supra* note 16 at 78.

[59] Tecmed v. Mexico, ICSID Case No. ARB(AF)/00/2, Award, (May 29, 2003); LG&E Energy v. Argentina, ICSID Case No. Arb/02/, Decision on Liability, ¶¶ 125–31 (Oct. 3, 2006).

[60] Tecmed v. Mexico, ICSID Case No. ARB(AF)/00/2, Award, (May 29, 2003) ; LG&E Energy v. Argentina, ICSID Case No. Arb/02/, Decision on Liability, ¶¶ 125–31 (Oct. 3, 2006); DOLZER & SCHREUER, *supra* note 14 at 193; Waste Management, Inc. v. United Mexican States (No. 2), ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004); Stephan W. Schill, *Fair and Equitable Treatment Under Investment Treaties as an Embodiment of the Rule of Law*, 11 IILJ WORKING PAPER 1, 9–23 (2006).

[61] *Cf.* DE GREGORIO, *supra* note 20.

[62] Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, ¶ 305 (Mar. 17, 2006); Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, ¶ 332 (Sep. 11, 2007).

changes are unreasonable or inequitable, and where they materially frustrate expectations of regulatory continuity or lawful process, FET may be breached.[63] This reasoning underpinned the findings in cases such as *CME v. Czech Republic*, where the manipulation of licensing regimes and selective regulatory enforcement against due process were found to dismantle the legal security of the investment and distort competitive conditions.[64] Therefore, the FET inquiry in the media context is not only concerned with the substantive content of regulation but also with its manner, coherence, and impact on the investor's reliance on an established legal order.

As discussed above, although investment tribunals do not adjudicate freedom of speech as a freestanding right, human rights norms could increasingly inform the interpretive environment within which FET is applied. Relevant rules of public international law may guide the interpretation of treaty standards—including arbitrariness and due process—allowing human rights arguments to supply a normative baseline for assessing FET breaches arising from interferences with media operations, as contextual determinants of fairness.[65] In this sense, suppression of broadcasting activity, politically motivated license revocations, or coercive content controls may reinforce a finding that state conduct was manifestly inequitable, particularly where it undermines both the commercial viability of the investment and the procedural values embedded in public international law.

Alongside FET, regulatory measures affecting media enterprises may also under certain circumstances give rise to claims of indirect expropriation. Investment treaties uniformly prohibit both direct and indirect takings of covered investments, and tribunals have long accepted that expropriation may occur through measures

[63] Saluka v. Czech Republic, UNCITRAL, Partial Award, ¶ 305 (Mar. 17, 2006); Parkerings-Compagniet, ICSID Case No. ARB/05/8, Award, ¶ 332 (Sep. 11, 2007); LG&E Energy v. Argentina, ICSID Case No. Arb/02/, Decision on Liability, ¶ 130 (Oct. 3, 2006); Krzykowski, Mariański & Zięty, *supra* note 16 at 78–80.

[64] CME v. Czech Republic, UNCITRAL, Partial Award, ¶ 533 (Sept. 13, 2001).

[65] Dillon, *supra* note 5 at 187–89, 201; Vienna Convention on the Law of Treaties, May 23, 1969, art 31(3)(c), 1155 U.N.T.S. 331; Schill, *supra* note 61; Urbaser v. Argentina, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016).

that do not formally transfer title but nonetheless neutralize the economic substance of the investment.[66] As the *Metalclad* tribunal established, indirect expropriation encompasses "covert or incidental interference" that has the effect of depriving the investor of the use or reasonably expected economic benefit of its property.[67] In the media sector—where the commercial value of the investment often resides in regulatory entitlements and market access rather than in physical assets—permanent bans, license cancellations, or regulatory restructuring that renders operation impossible may satisfy the "substantial deprivation" threshold, as articulated by the tribunal in *Pope & Talbot v. Canada*.[68] This logic underpinned the finding in *CME v. Czech Republic*, where the dismantling of the claimant's broadcasting framework was held to have effectively extinguished the investment and to constitute an indirect expropriation.[69]

Furthermore, Aghababyan has highlighted that for digital and social-media enterprises in particular, the core assets most vulnerable to expropriation are intangible and relational: contractual rights, user agreements, and the commercial capacity to collect data and monetize audience access.[70] International jurisprudence has consistently recognized that contractual rights capable of economic valuation may constitute expropriable property.[71] The Permanent Court of International Justice in *Certain German Interests in Polish Upper Silesia* treated the taking of a factory as simultaneously expropriating the contractual rights attached to it, while later tribunals have affirmed that "any right which can be the object of a commercial transaction" may be subject to expropriation.[72] As underscored by Aghababyan, this

[66] DOLZER & SCHREUER, *supra* note 14 at 153.

[67] Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 103 (Aug. 30, 2000)

[68] Pope & Talbot Inc. v. Canada, UNCITRAL, Interim Award, ¶¶ 102–04 (Jun. 26, 2000).

[69] CME v. Czech Republic, UNCITRAL, Partial Award, ¶¶ 591–609 (Sept. 13, 2001).

[70] Aghababyan, *supra* note 41 at 37–40.

[71] DOLZER & SCHREUER, *supra* note 14 at 147–49.

[72] *Cf.* Aghababyan, *supra* note 41 at 37–40; Certain German Interests in Polish Upper Silesia (Merits), PCIJ

approach has been reiterated in modern investment arbitration, including *Siemens v. Argentina*, *EMV v. Czech Republic*, and *Saipem v. Bangladesh*, all of which confirm that state measures substantially neutralizing contractual rights may amount to indirect takings.[73] Aghababyan has further noted that when a government blocks a social-media platform, it exercises sovereign authority in a manner that may deprive thousands or millions of user agreements of any economic value, severing the legal and commercial relationships through which the platform extracts data, advertising revenue, and market presence.[74] Where such measures permanently extinguish the platform's ability to operate and monetize its contractual network, tribunals may be prepared to characterize the interference not merely as regulation, but as a *de facto* expropriation of an integral component of the investment.[75]

V. CONCLUSIONS AND FUTURE OUTLOOK

Looking ahead, the confluence of investment law and digital regulation will shape both treaty practice and arbitration case law. Media and digital platforms may press for treaty-based relief when major markets impose new speech controls, and ongoing disputes will test whether tribunals treat content moderation mandates as a legitimate exercise of state power or as treaty violations. Furthermore, the potential intersection between free speech rights and investment claims raises profound policy questions. Proponents argue that investment arbitration can vindicate globally recognized norms of free expression by giving investors binding remedies.[76] Professors Bollinger and Sauvant, for example, contend that when domestic or human rights mechanisms fall short, investors and their home states may rely on treaties'

Series A No. 7, Judgment, 44 (May. 25, 1926); Amoco International Finance Corp. v. Iran, Iran-US Claims Tribunal, Partial Award No. 310-56-3, ¶ 108 (Jul. 14, 1987).

[73] *Cf*. Aghababyan, *supra* note 41 at 37–40; Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶¶ 267û70 (Jan. 17, 2007); EMV v. Czech Republic, UNCITRAL, Partial Award on Liability, ¶ 84 (Jul. 8, 2009); Saipem S.p.A. v. Bangladesh, ICSID Case No. ARB/05/7, Decision on Jurisdiction, ¶ 127-28 (Mar. 21, 2007).

[74] Aghababyan, *supra* note 41, at 39–40.

[75] *Id*.

[76] Bollinger and Sauvant, *supra* note 12.

enforceable, damages-based dispute resolution to uphold media freedom.[77] Indeed, where censorship anywhere can chill discourse everywhere, some might view investment law as a tool for protecting the worldwide discussion necessary to democracy.[78] In this respect, an award for a media investor is justifiable compensation for the real harm of suppressed speech.

However, investment arbitration was not originally designed to adjudicate free speech controversies, and granting platforms proxy-rights through investment protection could undermine democratic governance. Tribunals may therefore attempt to limit their role to economic effects (compensation for lost business) rather than approving or overruling pervasive content-moderation and compliance decisions. Ultimately, any award balancing media firms' speech claims against state regulation must grapple with sovereignty concerns. States will assert their right to regulate their territory, just as they regulate health or national security. Investment tribunals have long recognized a state's "right to regulate" often deferring to *bona fide* public purpose measures. In speech-related cases, this principle requires careful analysis of proportionality and motive. Tribunals may insist that only truly excessive or discriminatory restrictions cross the line into investment protection violation. Importantly, as free speech continues as one of the main battlegrounds of a reconfiguring international legal order, the adjudication of speech-related disputes in investment arbitration carries a heightened risk of generating politically controversial awards capable of undermining the perceived legitimacy and, ultimately, the enforceability of the arbitral system.

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[77] *Id.*

[78] *Id.*

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The Particulars of Megaprojects

by Luis E. Rey

I. Introduction

The Construction Industry Institute (CII) characterizes a megaproject as a complex project exceeding US$1 billion in total installed cost. They usually involve several complexities, including numerous stakeholders, multiple interfaces, a demanding location, limited access to resources, the use of novel technology, strict regulatory hurdles, large-scale infrastructure demands, teams spread across multiple locations, or considerable impact on political, economic, environmental, or societal landscapes.[1]

Over the past few decades, investors, developers, contractors, and suppliers have expressed growing concern regarding the escalating scale and complexity of major capital projects. These initiatives often demand substantial long-term capital investment. They are frequently plagued by recurring challenges, including cost overruns, schedule delays, and a persistent inability to mitigate well-known project risks effectively. Yet, despite these obstacles, demand for large-scale infrastructure and energy megaprojects endures, with increasingly ambitious outcomes that often outpace the industry's ability to manage them effectively.

A notable example is the California High-Speed Rail project, which was originally forecasted in 2008 to cost US$33 billion for a 500-mile route linking San Francisco and Los Angeles/Anaheim.[2] Since then, the project has experienced considerable setbacks, with revised estimates now ranging between US$88.55 billion and US$127.93

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[1] Carlos Caldas & Ashish Gupta, *Successful Delivery of Megaprojects*, ¶ 1.1, Report to the Construction Industry Institute, The University of Texas at Austin, CII Research Report 315-11 (Aug. 2016).

[2] California High-Speed Rail Authority, *Business Plan: November* 2008, https://hsr.ca.gov/wp-content/uploads/docs/about/business_plans/BPlan_2008_FullRpt.pdf.

billion, and initial operations for a 119-mile segment not anticipated before 2030-2033.[3]

Similarly, the expansion of Plant Vogtle in Georgia, through the addition of reactor units 3 and 4, has highlighted the formidable challenges endemic to large-scale nuclear infrastructure. Initially budgeted at US$14 billion with planned commissioning in 2016 and 2017, the project ultimately exceeded US$30 billion, with commercial operations commencing in July 2023 and March 2024, respectively.[4]

In the refining sector, Mexico's Dos Bocas (Olmeca) refinery, intended to bolster national energy independence, was launched in 2019 with a projected cost of US$8.9 billion and a targeted completion date of 2022. However, cost estimates have since exceeded US$14.6 billion, with full operational capacity now expected in 2026.[5]

These examples underscore how megaprojects are often launched with ambitious goals, and are often shaped by political, cultural, and environmental imperatives that sustain them.

This article examines the history of cost overruns in megaprojects, revealing consistent patterns across infrastructure initiatives in the transportation and oil & gas sectors. It then explores the industry's leading explanations for the recurring failures of these projects, especially their tendency to exceed budget forecasts and experience significant schedule delays.

II. A HISTORY OF CONTINUOUS COST OVERRUNS

Researchers at Aalborg University in Denmark conducted a landmark study analyzing 258 transport infrastructure megaprojects, collectively valued at nearly

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[3] California High-Speed Rail Authority, 2023 *Project Update Report*, Table 3.7 *available at* https://hsr.ca.gov/wp-content/uploads/2023/03/2023-Project-Update-Report-FINAL-022823.pdf.

[4], *Plant Vogtle Unit 4 begins commercial operation*, U.S. ENERGY INFORMATION ADMINISTRATION (May 1, 2024), https://www.eia.gov/todayinenergy/detail.php?id=61963.

[5] *Mexico's Pemex Requests $6.5 Billion More Funding for 'Dos Bocas' Refinery – Documents, Source*, U.S. NEWS (Aug. 12, 2022), https://money.usnews.com/investing/news/articles/2022-08-12/mexicos-pemex-requests-6-5-billion-more-funding-for-dos-bocas-refinery-documents-source. See also, RBN Energy LLC, *Here I Go Again – Pemex's Dos Bocas Refinery Still Facing The Startup Blues*, Apr. 2024, https://rbnenergy.com/here-i-go-again-pemex-dos-bocas-refinery-still-facing-the-startup-blues.

US$90 billion (based on 1995 figures).[6] This was the first major investigation to produce statistically significant insights into the prevalence and magnitude of cost overruns in large-scale transportation ventures. The study encompassed a wide variety of infrastructure types, including bridges, tunnels, highways, freeways, and rail systems (high-speed, urban, and conventional), spanning 20 countries across five continents. These projects, both in developed and developing regions, were completed between 1927 and 1998.

By including projects from earlier decades, the research sought to evaluate potential progress in cost estimation accuracy over time, possibly indicating institutional or methodological advancement. Nonetheless, the findings demonstrated a persistent trend of cost underestimation: in approximately 90% of cases, initial projections fell short, resulting in significant cost overruns. Rail ventures experienced the most pronounced discrepancies, with actual expenditures exceeding estimates by an average of 45%, followed by tunnels and bridges at 34%, and road projects at 20%. Across all types, the mean cost escalation was calculated at 28%.[7]

Notably, this pattern emerged as a global phenomenon, with cost overruns documented across all 20 countries in the sample. While universally present, these discrepancies were notably more severe in developing nations compared to those in North America and Europe.[8] The absence of discernible improvements in forecasting accuracy over the 70-year period analyzed suggests a lack of systemic learning,[9] notwithstanding advancements in project planning methodologies and technologies. The study ultimately attributed the widespread underestimations not merely to technical errors but to deliberate strategic misrepresentation.[10]

[6] BENT FLYVBJERG, NILS BRUZELIUS & WERNER ROTHENGATTER, MEGAPROJECTS AND RISKS: AN ANATOMY OF AMBITION at 15 (Cambrdige University Press, 2003).

[7] *Id.* at 15-16.

[8] *Id.* at 16.

[9] *Id.*

[10] *Id.*

Project advocates often attribute underestimated costs and overstated projected benefits to obtaining funding and approvals, leading projects to be authorized based on overly optimistic assumptions. As a result, budgetary excesses are frequently managed post-authorization, compounding inefficiencies and intensifying long-term financial risk.

In 2011, Edward W. Merrow shared his findings at the Offshore Technology Conference ("OTC") that examined the performance of oil and gas exploration and production ("E&P") megaprojects during the first decade of the 21st century.[11] He reported that the success rate of these large-scale initiatives had sharply declined, with only 22% delivering results that could be considered successful. Projects were deemed unsuccessful if they experienced major deviations from the commitments made at the final investment decision (FID) stage. In the case of E&P megaprojects, these failures often manifested as cost overruns of 25% and schedule delays averaging 22%. Merrow also considered project failures those where the first-year production averaged less than 50% of planned production.[12]

In 2014, Ernst & Young (EY) undertook a comprehensive evaluation of megaproject performance within the oil and gas industry.[13] The study examined projects with budgets exceeding US$1 billion, including upstream facilities, liquefied natural gas (LNG) plants, pipelines, and downstream refining operations. Assessments were based on original cost and time estimates, with cost data available for 205 projects and schedule data for 242 projects. The findings revealed that 64% of these megaprojects experienced cost overruns. When analyzed by sector, the incidence of overruns was 67% for LNG projects, 64% for pipelines, 62% for downstream

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[11] Edward W. Merrow, *Oil and Gas Industry Megaprojects: Our Recent Track Record*, SPE paper No. 153695 accepted for presentation at the Offshore Technology Conference, Houston, 2–5 May 2011, *https://www.spe.org/media/filer_public/de/15/de15f740-fa58-4ca9-9383-ff54030f990f/153695.pdf*.

[12] *Id.* at table 4.

[13] EY Oil and Gas Capital Project Series, *Spotlight on Oil and Gas Megaprojects* (2014), https://www.scribd.com/document/251494380/EY-Spotlight-on-Oil-and-Gas-Megaprojects-2014.

operations, and 65% for upstream developments. On average, the final completion costs were 59% higher than the initial estimates, which translated into a staggering additional cost of US$500 billion across the projects assessed. Schedule delays were even more prevalent, affecting 73% of the projects overall, including 68% of LNG, 50% of pipelines, 79% of downstream, and 78% of upstream projects.

Numerous other studies and datasets further affirm the widespread occurrence of cost overruns and schedule delays in megaprojects. While these findings are not included in this article, the core issue remains clear: regardless of facility type or infrastructure sector, megaprojects routinely experience significant deviations from the initial budget and scheduled forecasts. The following section examines the underlying causes of these persistent challenges.

III. UNDERLYING ISSUES BEHIND PERSISTENT FAILURES IN MEGAPROJECTS

A. *The CII Research Report*

In 2013, the CII embarked on a research initiative to identify necessary changes in the planning and execution of megaprojects, aiming to enhance their success rates. The initial objective was to conduct an extensive literature review to gain a deeper understanding of the practices involved in planning and executing megaprojects.[14] As a result, in August 2016, the CII research team produced a comprehensive report outlining the factors that negatively impact the success of megaprojects and providing recommendations to project teams on how to manage and mitigate these factors.

1. Identifying Impact Factors

The CII research team identified 34 impact factors and grouped them into 5 categories.[15] These factors had a significant occurrence and negatively impacted project performance. The impact factors were prioritized based on a survey

[14] Carlos Caldas & Ashish Gupta, *supra* note 1, at ¶ 1.

[15] *Id.* at ¶ 4.5.

conducted across 35 large projects and 41 megaprojects.[16] The categories and impact factors are summarized in Table 1 below.

The types of projects included oil and gas exploration and production, oil refining, mining, power generation, natural gas processing, and heavy industrial.[17] The approved budgets for large projects ranged from US$100 million to US$750 million, while for megaprojects, budgets ranged from US$1 billion to over US$10 billion.[18]

Table 1 – CII Categories and Impact Factors[19]

Category A Location and Technology	**Category B Team, Organization and Communications**	**Category C Planning and Execution Processes**	**Category D Governance and Stakeholders**	**Category E Delivery Strategy**
New or unproven technology	Unplanned changes in key personnel	Lack of execution input to front end planning (FEP)[20]	Unclear definition of roles, responsibilities and authority	Inappropriate project delivery contracting strategy
Logistical challenges	Ineffective stakeholder communication	Optimism bias	Inadequate size, skills, and experience of project management team	Limited capable contractors
Jurisdictional complexities	Multi-location challenges	Inadequate FEP resources	Cultural differences among stakeholders	Unclear scope definition in contracts
Unavailability of qualified craft workers	Inadequate organization planning and staffing	Inadequate risk assessment and mitigation	Inadequate owner participation in risk management	Unexpected materials and/or equipment delays
	Ineffective interface management	Inadequate project control systems	Misalignment within partner organization	Underperforming contractor or key subcontractor

[16] *Id.* at ¶ 5.3.

[17] *Id.* at table 5-1.

[18] *Id.* at table 5-2.

[19] *Id.* at table 4-2.

[20] FEP is also referred to in the industry as front-end loading.

	Inadequate document management plan	Lack of execution plan alignment	Business approach differences among stakeholders	
		Inadequate integrated schedule		
		Regulatory and environmental delays		
		Baseline schedule acceleration		
		Quality compromised for schedule		
		Ineffective change management		
		Incomprehensive risk management		
		Unfit documents, procedures, and processes		

2. Using Industry Data to Quantify Risks in Megaprojects Execution

To fulfill the final objective of its research, the CII team developed a comprehensive tool to assist project teams in identifying and mitigating the impact factors affecting megaprojects.[21] A significant feature of the tool is its integration of the industry survey findings. These findings prioritize the 34 impact factors based on their frequency across surveyed projects, and their average effect on cost, schedule, and business performance. These ratings help project teams understand which factors have historically had minor, moderate, or serious effects.[22]

The CII research team categorized the frequency of occurrence of impact factors into three distinct groups based on survey data. Factors falling within the 0 to 33rd percentile were classified as having low frequency of occurrence, those

[21] *Id.* at ¶ 7.

[22] *Id.* at ¶ 7.1.

between the 33rd and 66th percentiles as moderate, and those above the 66th percentile as high frequency. To evaluate the influence of these factors on project performance, the team applied a severity scale ranging from 0 to 3 across three dimensions: cost, schedule, and business impact. On this scale, scores between 0 and 1 indicated minor impacts, scores from 1 to 2 reflected moderate impacts, and scores between 2 and 3 represented serious impacts.[23]

The analysis of the survey research findings[24] reveals several critical themes that influence project outcomes. Among the most frequently occurring issues are unplanned changes in key personnel (59%), optimism bias (59%), logistical challenges (49%), multi-location challenges (49%), limited capable contractors (49%) and underperforming contractors (46%). These factors, while common, vary in their severity of impact. For example, personnel changes and logistical challenges tend to have moderate cost and schedule impacts, whereas optimism bias and underperforming contractors often lead to more significant disruptions.

Planning and execution deficiencies—particularly those in Category C—emerge as the most damaging to project performance. Factors such as lack of execution input to front-end planning (FEP), inadequate integrated schedules, and poor risk assessment consistently score the highest in cost, schedule, and business impact, with ratings reaching up to 2.7. Although these issues are less frequent, their consequences are disproportionately severe, indicating that strategic planning and alignment are essential to mitigating high-impact risks.

Contracting and execution-related issues (Category E) also play a substantial role in project challenges. Inappropriate delivery strategies, underperforming contractors, and unclear scope definitions in contracts are not only frequent but also carry high impact scores across all dimensions. These findings suggest that early-

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[23] *Id.* at ¶ 7.3.2

[24] *Id.* at table 7-1.

stage decisions around contracting and partner selection are pivotal to project success.

Optimism Bias stands out as one of the most critical challenges in mega-projects, with a high frequency of occurrence (59%) and notable impact scores, 2.3 for cost, 2.1 for schedule, and 1.6 for business outcomes. This cognitive tendency to underestimate risks and overestimate benefits contributes to unrealistic planning assumptions, budget overruns, and schedule delays. The survey data further reveals a strong correlation between frequency of occurrence and cost/schedule impact, indicating that frequently encountered issues tend to escalate project risks. However, the most damaging factors often stem from inadequate planning and misaligned execution strategies. Addressing these through disciplined forecasting, clear scope definition, and effective stakeholder engagement, particularly during front-end planning, can significantly enhance mega-project performance.

B. *The OTC Paper*

In his 2011 publication presented at the Offshore Technology Conference, Merrow examined the underlying causes of failure in oil and gas E&P megaprojects. He highlighted three core issues: the incomplete execution of front-end loading, instability in project leadership, and overly aggressive project schedules.[25]

1. Front-End Loading ("FEL")

FEL is the structured process by which oil and gas projects are planned and designed in stages. These stages include FEL 0, the initial conceptualization; FEL 1, focused on feasibility assessments; FEL 2, where preliminary designs allow for cost and schedule estimation; and FEL 3, the stage for basic design development. On a typical project, the end of FEL 3 coincides with the final investment decision (FID). Projects that are approved proceed to the execution phase, which involves detailed design and construction. According to Merrow, the success of megaprojects is highly sensitive to the thoroughness of this front-end planning. He noted that as the

[25] Edward W. Merrow, *supra* note 13.

completeness and quality of FEL diminishes, the likelihood of cost overruns increases sharply. For instance, if critical deliverables such as design documents are incomplete at the end of FEL 2 or FEL 3, the estimates generated for cost and schedules are often overly optimistic and unreliable.

2. Instability in Project Leadership

Leadership continuity was identified as another key factor. Merrow found that the replacement of a project director during execution correlates with a substantial decline, approximately 30%, in the probability of achieving a successful outcome. Even when FEL quality is maintained, inconsistent leadership undermines coordination, accountability, and strategic direction.

3. Overly Aggressive Project Schedules

Lastly, the paper addressed the industry's tendency to impose unrealistic timelines. Using a schedule aggressiveness index, Merrow compared schedules established at the time of the FID to benchmarks from equivalent projects. An index value above one indicated a more conservative schedule, while a value below one pointed to an overly aggressive timeline. His research revealed that upstream projects had an average index of 0.90 and a median of 0.87, indicating that schedules were routinely shorter than what was realistically achievable. Merrow concluded that the relentless push for rapid first oil was not only inflating project costs by tens of billions annually but also negatively impacting production performance after initial startup.

C. *The EY Study*

In its 2014 spotlight on oil and gas megaprojects, EY identified a range of non-technical internal and external factors contributing to project delays and budget overruns.[26] Their analysis uncovered 15 distinct impact factors, systematically grouped into five thematic categories. These factors reflect challenges in

[26] *Spotlight on Oil and Gas Megaprojects*, *supra* note 15.

organizational dynamics, governance, and external pressures that commonly derail large-scale initiatives.

Table 2 provides a structured summary of EY's findings, offering a lens into the patterns that influence performance in complex projects.

Table 2 – EY Categories and Impact Factors[27]

Internal Factors			External Factors	
Portfolio and Project Commercial Context	**Project Development**	**Project Delivery**	**Regulatory Challenges**	**Geopolitical Challenges**
JV conflict and relationship challenges	Inadequate planning – overly aggressive forecast	Ineffective project management	HSE risk and local content	Diplomatic and security issues
Access to funding	Poor procurement of contractors	Poor contractor management	Regulatory delay and policy uncertainty	Financial and supplier market uncertainty
Poor portfolio management and changing risk appetite	Aggressive estimates and optimism bias	Human capital deficit	Inadequate infrastructure	Civil and workforce disruption

IV. CONCLUSION

Despite decades of recurring cost overruns, schedule delays, and familiar root causes, owners and contractors have failed to rectify the persistent underperformance of megaprojects. Projects continue to grow in scale, complexity, and expense, while often replicating the same mistakes seen in notorious past examples, where costs ballooned well beyond initial estimates and delivery timelines stretched by years.

[27] *Id.* at figure 7.

Advancements in project management practices have made only modest headway in reversing this trend. Tools and methodologies may have evolved, but their effectiveness is often diluted by the sheer complexity inherent in megaproject delivery. Studies by CII, IPA, and EY consistently highlight critical factors as recurring drivers of failure. In particular, inadequate FEL or FEP and overly aggressive project schedules continue to impair outcomes. Leadership turnover further compounds these issues, undermining strategic continuity and accountability.

Adding to the challenge is the joint venture model common to megaprojects, where culturally and professionally diverse teams must collaborate under intense pressure. While collaboration is unavoidable and diversity brings valuable perspectives, it can also hinder communication, decision-making, and execution. Studies highlight this misalignment as a major vulnerability, particularly when it is not proactively managed.

Given the persistent challenges facing mega-projects, the focus must shift from trying to eliminate complexity to managing it more effectively. Rather than expecting flawless execution, success lies in effectively responding to unforeseen challenges. By embracing pragmatic planning, strengthening risk management, adopting adaptive project frameworks, and building high-performing, culturally agile teams, the industry can reduce vulnerability and improve outcomes. Acknowledging and adapting to these realities is not just prudent, it is imperative for navigating the complexities inherent in large-scale initiatives.

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BOOK REVIEW:
U.S. SUPREME COURT PRECEDENTS ON ARBITRATION: SHAPING THE AMERICAN ARBITRATION LAW AND PRACTICE BY KABIR DUGGAL, ET AL. EDS.

Reviewed by Samuel Chestna

I. INTRODUCTION

Although individuals, business entities, and sovereign states are increasingly turning to arbitration as a flexible and effective means of resolving disputes, the parties often rely on federal and state courts to uphold arbitration agreements, procure evidence, and enforce arbitral awards, both in the domestic and international contexts. As such, the efficacy of arbitration as a means of alternative dispute resolution depends, at least in part, on the willingness of courts to recognize the authority of private or quasi-private bodies to impose legally binding rulings on those voluntarily submitting themselves to arbitration. In the United States, parties seeking enforcement (or non-enforcement) of an arbitration agreement typically seek relief initially from either federal or state courts. However, due to the complex and unsettled nature of the legal issues at the heart of many disputes submitted to arbitration, lower courts often diverge in their approach to relevant issues, which may in turn lead to forum shopping by parties seeking a judicial ruling that enforces or circumscribes an arbitral determination. As such, it is imperative for practitioners to keep abreast of the decisions issued by the United States Supreme Court relative to the field of arbitration, which may provide guideposts in the wake of the uncertainty among the lower courts.

U.S. Supreme Court Precedents on Arbitration: Shaping the American Arbitration Law and Practice[1] provides a comprehensive and insightful analysis of the United States Supreme Court's jurisprudence impacting the field of arbitration and details

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[1] U.S. SUPREME COURT PRECEDENTS ON ARBITRATION: SHAPING THE AMERICAN ARBITRATION LAW AND PRACTICE (Kabir Duggal, et al. eds., 2025).

the evolution of the Court's approach to key issues, including the enforceability of arbitration agreements and arbitration awards, the level of deference granted to the legal determinations made by an arbitrator, and the use of federal district courts to procure evidence for use in international disputes, among others. The book contains thirty-six chapters, each contributed by different authors. It opens with a detailed and informative historical and theoretical framework for analyzing the Supreme Court's approach to the relevant issues, which is followed by individual chapters, arranged in chronological order, analyzing the Supreme Court's key rulings and their impact on the field of arbitration. Each chapter also provides a discussion of both the issues resolved by the Court's decision and those which remain undecided. The reader is left with a comprehensive understanding of the Supreme Court's historical approach and an awareness of the multifaceted effects of the Court's rulings. Although the Court has arguably adopted a generally pro-arbitration approach in the sense that the Court has provided for broad judicial recognition of arbitration agreements and arbitral awards, the Court's rulings often have second and third order effects which, although expanding the scope of arbitration on the one hand, provide for necessary judicial oversight on the other.

II. THE BOOK

The first three chapters provide a conceptual lens for the analysis of individual cases presented throughout the remainder of the book. The opening chapter, contributed by Professor George Bermann, presents a thought-provoking question which helps to frame the chapters that follow: Is the Supreme Court generally "pro-arbitration" in its approach? Implicit in this question is a second one: what does it mean to be pro-arbitration?[2] Professor Bermann identifies key aspects of the Court's jurisprudence which have served to expand the efficacy of arbitration as a means of alternative dispute resolution. For example, the principle of separability, pursuant to

[2] Professor Bermann has explicitly raised this very question elsewhere. *See* George A. Bermann, *What Does it Mean to be Pro-Arbitration?*, 34 ARB. INT'L 341 (2018).

which a legal challenge to the enforceability of a contract does not necessarily implicate the validity of an arbitration provision contained therein. The Court's enforcement of the separability principle is arguably a clear-cut example of the Court taking a pro-arbitration stance in the sense that the effect of the Court's rulings has been to expand the authority of arbitrators to issue binding judgments without necessitating direct judicial review. However, as Professor Bermann illustrates, some rulings issued by the Court have enhanced the availability of arbitration while simultaneously imposing judicial constraints on the process. Professor Bermann highlights the Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*.[3] That decision was, in a sense, highly "pro-arbitration" in that the Court permitted parties to submit federal antitrust disputes to arbitration. At the same time, the *Mitsubishi* Court provided for judicial review of the arbitrator's award to ensure that the arbitrator "took cognizance" of the applicable law.[4] Professor Bermann convincingly argues that the limits the Supreme Court has placed on arbitrators' freedom to issue legally binding rulings independent of judicial review is not indicative of a retreat from a "pro-arbitration" stance, but instead reflects a careful balancing of various considerations at play due to the often complex and multifaceted nature of arbitration.

Chapter 2 provides helpful context surrounding the historical developments influencing the Court's decisions relative to the field of arbitration. The authors explain that arbitration as a means of dispute resolution has existed in the United States (albeit in limited form) since before the nation's founding. Before the passage of the Federal Arbitration Act (FAA) in 1925, both state and federal courts typically declined to enforce contractual agreements to arbitrate if one party objected to arbitration. Where all parties consented to arbitration, courts generally demonstrated willingness to enforce arbitration awards, while also holding that

[3] 473 U.S. 614 (1985).

[4] *Id.* at 638.

awards obtained due to fraud or manifest mistake of law were unenforceable. Still, lower court rulings relative to arbitration agreements and arbitral awards were far from uniform prior to the FAA. When Congress passed the FAA, it specifically required the enforcement of arbitration agreements while also providing clear criteria for the invalidation of arbitral awards, incorporating aspects of pre-1925 case law. The FAA, as interpreted by the Supreme Court, mandated a "liberal federal policy favoring arbitration agreements,"[5] which has influenced the Court's adoption of the generally "pro-arbitration" approach identified in Chapter 1.

Chapter 3, entitled *The Importance of the U.S. Supreme Court in Shaping U.S. Arbitration Law & Practice*, builds on the themes of the prior chapters, providing additional historical and political context for the Court's evolving approach to the field of arbitration. Specifically, the authors highlight that the Court's expansive interpretation of the Commerce Clause during the New Deal era led to an equally expansive interpretation of the scope of federal law and regulation, including the FAA. As such, the FAA's "pro-arbitration" framework was applied to an increasing number of legal issues relating to arbitration. The expanded applicability of federal law in this area has also led to a greater volume of Supreme Court rulings on issues affecting the availability and scope of arbitral proceedings.

Chapters 4 through 36 present a detailed summary and analysis of individual Supreme Court cases which have impacted the field of arbitration, with each chapter providing a thoughtful overview of both the issues addressed by the Court and those that remain unaddressed, as well as the impact of the decision as a whole. The chapters are arranged in chronological order, dating from the Court's 1967 decision in *Prima Paint Corporation v. Flood & Conklin Manufacturing Company* (expanding the scope of arbitration by affirming the separability principle, pursuant to which an arbitration provision in a contract will be enforced even where other parts of the

[5] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

contract are invalid)[6] through its 2024 decision in *Coinbase, Inc. v. Suski.* (holding that where parties have entered multiple contracts which conflict as to which body—a court or an arbitration panel—possesses the authority to determine the threshold question or arbitrability, that question must be decided by a court).[7] Although not arranged by subject area, the book develops several clear themes in the evolution of the Court's jurisprudence. For example, Chapters 6 through 8 address the Court's increasing willingness to permit arbitration of disputes traditionally reserved solely for judicial resolution. In *Scherk v. Alberto-Culver Co.*,[8] addressed in Chapter 6, the Court held, for the first time, that securities claims in the international context were subject to arbitration. In Chapter 7, the book analyzes the *Mitsubishi* decision, mentioned above, in which the Court applied similar reasoning to hold that antitrust claims asserted pursuant to an international agreement were arbitrable.[9] Chapter 8 addresses the Court's decision in *Shearson/American Express, Inc. v. McMahon*,[10] in which the Court held that claims under the Securities Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act (RICO) were both subject to arbitration.

A second development in the Court's jurisprudence explored throughout the book is a series of more recent decisions which have expanded—albeit not without limits—the freedom of parties and arbitrators to engage in class proceedings. Chapter 23 analyzes the Court's decision in *AT&T Mobility LLC v. Concepcion*,[11] establishing that Section 2 of the FAA preempts state law regarding the unconscionability of a waiver of class-action arbitration contained within a consumer contract. Chapter 24 addresses *Oxford Health Plans LLC v. Sutter*,[12] which held that because the Court must

[6] 388 U.S. 395 (1967).

[7] 602 U.S. 143 (2024).

[8] 417 U.S. 506 (1974).

[9] Mitsubishi Motors Corp., 473 U.S. at 638–40.

[10] 482 U.S. 220 (1987).

[11] 563 U.S. 333 (2011).

[12] 569 U.S. 564 (2014).

grant a high level of deference to an arbitrator's determinations, the Court may not vacate an arbitral award on the basis that the arbitrator wrongly permitted class arbitration where class proceedings were not explicitly authorized by the arbitration agreement. Chapter 25 summarizes *American Express Co. v. Italian Colors Restaurant*,[13] which upheld a contractual provision mandating individual rather than class arbitration on the basis of freedom of contract. Chapter 27 discusses *Lamps Plus, Inc. v. Varela*,[14] in which the Court imposed some limits on class action arbitrations by holding that class proceedings are not permitted where the arbitration agreement is ambiguous.

Another topic addressed throughout the book is the Courts' interpretation of 28 U.S.C. § 1782, which provides a mechanism for U.S. courts to assist foreign or international tribunals in procuring evidence. This statute is the primary focus of Chapters 16 and 31. Chapter 16 analyzes the Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*,[15] holding that Section 1782 is broad in scope both as to which persons or entities may seek discovery and what types of proceedings qualify for evidentiary assistance from U.S. courts. Specifically, the Court held that a complainant seeking an investigation by the European Commission fit the definition of an "interested person" permitted to seek discovery via Section 1782, and the European Commission, as a quasi-judicial body, constituted a "foreign or international tribunal" entitled to such discovery. Chapter 31 addresses *ZF Automotive, Inc. v. Luxshare, Ltd.* and *AlixPartners, LLP v. Fund for Protection of Investors' Rights in Foreign States*,[16] in which the Court held that tribunals not imbued with governmental authority are not permitted to obtain evidentiary assistance from U.S. courts via Section 1782. Thus, as set forth in those chapters, the Court's efforts

[13] 570 U.S. 228 (2013).

[14] 587 U.S. 176 (2019).

[15] 542 U.S. 241 (2004).

[16] 596 U.S. 619 (2022) (both cases were decided together).

to clarify the application of Section 1782 have led to more questions than answers. Although the Court has held that Section 1782 only provides for U.S. judicial assistance where the foreign or international tribunal is imbued with sovereign or international authority, it is an open question as to what extent arbitral tribunals constituted pursuant to certain investment arbitration rules, such as the International Centre for Settlement of Investment Disputes (ICSID), can take advantage of Section 1782 discovery. Overall, the book provides a clear picture of how the Court's treatment of these issues has evolved, and how they continue to do so.

III. CONCLUSION

In sum, *U.S. Supreme Court Precedents on Arbitration* provides an accessible yet thorough guide to the Supreme Court's approach to arbitration as a means of alternative dispute resolution. The book presents the Court's jurisprudence as being arguably pro-arbitration, while also complicating this narrative by highlighting the aspects of the Court's approach which have led to the imposition of judicial restraints on arbitrability. By presenting a historical view of the Court's decisions, the book provides the reader with a deep understanding of the Court's evolution and equips both practitioners and outsiders to the field of arbitration to consider what issues remain outstanding and how they might be resolved.

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BOOK REVIEW:
ARTIFICIAL INTELLIGENCE AND INTERNATIONAL ARBITRATION LAW: REVOLUTION OR EVOLUTION
BY PROF. MAGDALENA ŁĄGIEWSKA

Reviewed by Joel Evans

I. INTRODUCTION

Artificial Intelligence and International Arbitration Law: Revolution or Evolution[1] by Professor Magdalena Łągiewska is a very timely piece of scholarship on a topic of immense importance. In fact, it would probably be no understatement to say that this book deals with an area of law that may very well be arbitration's seminal issue of the day, namely the impact that artificial intelligence (AI) has, and will continue to have on the field of international arbitration.

Tackling a highly technical, and somewhat evocative subject such as this, quite obviously requires a level of thoughtfulness in order to succinctly deal with the complex issues at play. It is this delicate balancing act that Professor Łągiewska treads with ease by providing the reader with a thought-provoking piece, which addresses the impact of AI on international arbitration in a prudent and well thought out fashion.

II. BOOK REVIEW

The first chapter, titled *Fourth Industrial Revolution' and International Commercial Arbitration*, introduces the reader to the scholarship on AI and the literature[2] surrounding what Schwab has called the "Fourth Industrial Revolution"[3] and the various technologies that come with it, such as machine learning, large

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[1] MAGDALENA ŁĄGIEWSKA, ARTIFICIAL INTELLIGENCE AND INTERNATIONAL ARBITRATION LAW: REVOLUTION OR EVOLUTION (2025).

[2] *Id.*, at 5.

[3] KLAUS SCHWAB, THE FOURTH INDUSTRIAL REVOLUTION 12 (World Economic Forum, 2016) (defining the "Fourth Industrial Revolution" as the convergence of AI, ubiquitous connectivity, and advanced digital technologies).

language models, and blockchain technology, to name but a few. The chapter then addresses the effect the Fourth Industrial Revolution is having on the field of international arbitration. By providing the reader with the background concerning the Fourth Industrial Revolution in addition to some context behind the various technologies that it utilizes, Professor Łągiewska lays the foundation for her analysis of the impact such developments have had on the field of international arbitration. For instance, the technology which has been developed by the Fourth Industrial Revolution has, as Professor Łągiewska quite rightly points out, facilitated the rapid advancement of online dispute resolution ("ODR") alongside an array of accompanying technologies, that have been referred to by scholars as the "Fourth Party" in dispute resolution,[4] because of the way they interact with the dispute resolution process and its users more generally. In addition to exploring the complex developments surrounding ODR, the chapter also looks at the lack of uniform standards concerning the use of AI in international arbitration, something that likely leads to a significant disparity in the field. In addressing this issue, Professor Łągiewska quite rightly contends that arbitrators must have a degree of technological competence which not only extends to the conduct of hearings (some of which may be run entirely remotely) but also in respect of cybersecurity and issues pertaining to the data protection of all the parties concerned.

Chapter 2 continues the practical focus of the previous chapter but does so with an emphasis on the impact AI has and continues to have on arbitration's various stakeholders. More specifically, the chapter guides the reader through a variety of popular technologies that are already being utilized by arbitration practitioners today. The chapter does this by taking the reader through various case studies such as the American Arbitration Association's (AAA) Clause Builder AI Tool,[5] IBM's Ross

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[4] Leah Wing, Janet Martinez, Ethan Katsh & Collin Rule, *Designing Ethical Online Dispute Resolution Systems: The Rise of the Fourth Party*, 37 NEGOT. J. 52 (2021)
[5] AAA ClauseBuilder, https://www.clausebuilder.org/.

Intelligence,[6] and Westlaw Edge,[7] a further AI legal research tool. The author of this review found the case study of the AAA's Clause Builder AI Tool particularly interesting given its ability to streamline the process of drafting arbitration and mediation clauses. Chapter 2 also looks at the way in which AI powered tools can assist arbitrators at hearings using a variety of technologies that have been designed to increase efficiency, thereby allowing arbitrators to dedicate more of their time to a case's more substantive issues. Given the author of this review's longstanding interest in the development of international arbitration in China, it was interesting to see attention drawn to the Guangzhou Arbitration Commission's AI Assistant[8], which appears to have been used to great effect, particularly as it pertains to the expediting of various tasks such as translation and the summarizing of the parties' positions.[9]

With the previous chapters having provided some useful context with respect to the development of AI in international arbitration, Chapters 3 addresses the legal framework that seeks to regulate its usage. Of note in this chapter is discussion concerning the Council of Europe's Framework Convention on Artificial Intelligence and Human Rights, Democracy, and the Rule of Law,[10] which seeks to ensure that activities within the lifecycle of artificial intelligence systems are fully consistent with such principles. The chapter also looks at the Artificial Intelligence Act Regulation (EU) 2024/1689, otherwise known as the EU AI Act,[11] which provides a risk-based AI classification system that can be employed in different applications. The author also

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[6] Ross Intelligence, https://www.rossintelligence.com/what-is-ai.

[7] Westlaw Edge, https://legal.thomsonreuters.com/en/products/westlaw-edge.

[8] MAGDELINA ŁĄGIEWSKA, *supra* note 1, at 57.

[9] Qui Quanlin, *AI Arbitration Used for Dispute in Guangzhou*, CHINA DAILY, Sept. 1, 2023, https://www.chinadaily.com.cn/a/202309/01/WS64f13406a310d2dce4bb34ad.html.

[10] Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, Sept. 5, 2024, C.E.T.S. 225.

[11] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonised Rules on Artificial Intelligence and Amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828, 2024 O.J. (L. 12.7.2024) 1.

looks at various instruments of soft law that have arisen in the field of international arbitration, such as the AAA's and International Centre for Dispute Resolution's Principles[12] covering the use of AI in alternative dispute resolution, which was released back in 2023. In addition to this interesting case study, the author also delves into the impact the Silicon Valley Arbitration and Mediation Centre's Guidelines on the Use of Artificial Intelligence in Arbitration[13] have had on the field in attempting to regulate the use of AI in international arbitration. By analysing these case studies, the author can chronicle the response of the arbitration community to the groundbreaking developments posed by AI, which is particularly useful given the speed at which this area of enquiry has developed.

The final chapter of the book poses the question as to whether AI can be best characterised as a "revolution" or perhaps simply an "evolution" that has developed from previously existing technologies. In looking at this question, the author addresses the important issue of human oversight or the concept of "human in the loop," which is characterised by a continuous level of human involvement throughout a workflow undertaken by AI. This chapter also looks at key considerations relating to the use of AI in international arbitration, such as transparency in the decision-making process and confidentiality of the arbitral proceedings, alongside a variety of ethical issues that undoubtedly arise through the use of AI, and, in particular, the contention that AI should never be used to replace human arbitrators. This chapter is followed by the author's concluding remarks which include several recommendations concerning the use and development of AI in international

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[12] AAA-ICDR (AMERICAN ARBITRATION ASSOCIATION-INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION) PRINCIPLES SUPPORTING THE USE OF AI IN ALTERNATIVE DISPUTE RESOLUTION, Nov. 1, 2023, https://jusmundi.com/en/document/rule/en-american-arbitration-association-international-centre-for-dispute-resolution-principles-supporting-the-use-of-ai-in-alternative-dispute-resolution-2023-aaa-icdr-principles-supporting-the-use-of-ai-in-adr-2023-wednesday-1st-november-2023; *see also* AAAI STANDARDS FOR AI IN ADR, May 9, 2025, https://www.adr.org/media/sx2mjcdj/aaai_standards_for_ai_in_adr_.pdf.

[13] SVAMC GUIDELINES ON THE USE OF ARTIFICIAL INTELLIGENCE IN ARBITRATION, Apr. 30, 2024, https://svamc.org/wp-content/uploads/SVAMC-AI-Guidelines-First-Edition.pdf.

arbitration. These recommendations are highly practical in nature, and, amongst other things, argue that arbitrators should be equipped with technical knowledge concerning AI and that arbitral rules should be amended to specifically regulate the use of AI, in addition to the recommendation of a framework similar to the IBA Guidelines on Conflicts of Interest in International Arbitration,[14] which is tailored to regulate the use of AI in international arbitration. The writer of this review considers the concept of such guidelines to be an innovative solution to the highly contentious issue of the use of AI in the arbitral process.

III. CONCLUSION

In summary, *Artificial Intelligence and International Arbitration Law: Revolution or Evolution* is a welcome piece of literature that contributes to the field of international arbitration through its timely analysis of the impact AI has, and continues to have, on the field of international arbitration. Readers of this book will no doubt find themselves somewhat better informed as to the latest developments AI is having in the field, in addition to where we might be headed.

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[14] *See* IBA Guidelines on Conflicts of Interest in International Arbitration (2024), *available at* https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024.

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