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KEY DEVELOPMENTS UPDATE OCTOBER 2025

MESSAGE FROM KHAWAR QURESHI KC, HEAD OF MCNAIR INTERNATIONAL

In this edition of our update, the highlights include the UK Supreme Court providing clarification in respect of English Law principles concerning fiduciary duties and tortious bribery, an ICSID decision finding Peru liable in respect of acts by a local community preventing a gold mine's operation, and the English Commercial Court restraining foreign proceedings enforcing an English judgment alleged to have been procured by fraud.

We look forward to welcoming many of you to our Annual Lecture which this year takes the form of a panel discussion on 14 October 2025 in Lincoln's Inn Old Hall, considering the theme of "International Conventions – a time of crisis or change". There are very few seats left if you have not yet RSVP'd and would like to attend.

Please click here to see the newsletter in full or visit www.mcnairinternational.com/publications for a full list of our previous publications.

CONTENTS

The following updates are covered in this newsletter:

- **Peru found liable for local community's physical seizure of investment.** In *Lupaka Gold Corp v Peru* (ICSID Case No. ARB/20/46) (Award), an ICSID tribunal held Peru liable for acts of a local community that physically prevented a gold mining project from operating.

- **EU sanctions render bond payments unenforceable under English Law.** In *LLC Eurochem North-West-2 v Société Générale SA* [2025] EWHC 1938 (Comm), the English Commercial Court refused to enforce bond payment obligations where to do so would be illegal at the place of performance.

- **UK Supreme Court rejects bribery and dishonest assistance claims against car-finance lenders.** In *Hopcraft v Close Brothers Limited* [2025] UKSC 33, the UK Supreme Court determined conjoined appeals of vast importance for the car-finance industry in the UK, clarifying, amongst other things, aspects of English Law on fiduciary duties and tortious bribery.

- **English court restrains foreign proceedings to enforce an English judgment alleged to have been obtained through fraud.** In *Nigeria v Williams* [2025] EWHC 2217 (Comm), the English Commercial Court restrained foreign proceedings from enforcing an allegedly fraudulently procured English judgment.

- **Two further arbitration-related judgments from the QFC Civil & Commercial Court.** In *D v E* [2025] QIC (F) 38, the QFC Civil & Commercial Court confirmed its jurisdiction to appoint an arbitrator; in *C v D* [2025] QIC (F) 44 it stayed proceedings initiated contrary to an arbitration clause.

- **Court of Appeal affirms *Benkharbouche* test for determining if an employee's duties are an exercise of sovereign authority.** *In Saudi Arabia v Alhayali* [2025] EWCA Civ 1162, the English Court of Appeal held Saudi Arabia was not immune from employment claims.

PERU FOUND LIABLE FOR LOCAL COMMUNITY'S PHYSICAL SEIZURE OF INVESTMENT

Lupaka Gold Corp v Republic of Peru (ICSID Case No. ARB/20/46) (Award)

Introduction

By an award issued on 30 June 2025 in *Lupaka Gold Corp v Peru* (ICSID Case No. ARB/20/46), a Tribunal (John Crook (president); Oscar Garibaldi; Gavan Griffith KC) held Peru liable for the acts of a local community that physically prevented a gold mining project from operating.

Background

The claimant Canadian mining company invested in a gold mining project in the Huaura Province in Peru through its local subsidiary Invicta Mining Corp ("IMC"). IMC secured agreements from various local communities to carry out the project and completed significant preparatory work.

However, in 2018, the project was physically seized by gunmen of the rural Parán community ("Community") demanding exclusive benefits and expelling the claimant's own security guards. While trying to regain control, some of IMC's security personnel were wounded and one was killed. IMC could not complete a required final inspection and the project could not operate. As a result, IMC incurred financial loss as it defaulted on its loans.

The claimant commenced arbitration under the Canada-Peru Free Trade Agreement ("FTA") based upon Peru's failure to intervene effectively.

Decision

The Tribunal held Peru had breached the FTA's full protection and security ("FPS"), fair and equitable treatment ("FET") and expropriation provisions.

Peru contended the claimant lost its investment in IMC in a foreclosure process before filing the claim, whereas the FTA's "*investor*" definition (a person who "*has made*" an investment) required continuing ownership of the investment at the time of filing. The Tribunal rejected that jurisdictional objection both as a matter of textual interpretation and on the basis that the investment was only lost through expropriation.

Peru's second jurisdictional objection, based on a failure to comply with a 'waiver' provision requiring both the claimant and IMC to waive their rights to access other dispute settlement mechanisms, was rejected because of an express exception if the investor no longer controlled their subsidiary enterprise due to the respondent's acts.

The Tribunal attributed the Community's acts to Peru. Peru's objection that Peruvian Law prevented it from directing the behaviour of the Community was rejected; a State cannot invoke its own national law to avoid international law obligations. Further, there was a "*network of Constitutional, statutory, and regulatory provisions and related provisions [which showed] both that Rural Communities are substantially integrated into the legal structure of the State, and that they perform important functions that are distinctly governmental in character*" (including armed operations authorised by the Peruvian military). As such they were a State "*organ*" of Peru (ILC State Responsibility Articles, art. 4), alternatively an entity allowed to exercise elements of governmental authority under Peruvian Law and acting in that capacity at the relevant time (ILC State Responsibility Articles, art. 5). Thus, the seizure was direct expropriation.

Peru's response, placing the burden of maintaining relations with rural communities on the investor, was "*weak, ineffectual, or non-existent*", and breached its FPS and FET obligations.

Concluding observations

The Tribunal's award contains detailed analysis of how a State may in certain circumstances be responsible for private acts, and illustrates the tension States can face when the interests of foreign investors and local communities clash.

The decision is available here.

EU SANCTIONS RENDER BOND PAYMENTS UNENFORCEABLE UNDER ENGLISH LAW

LLC Eurochem North-West-2 and another v Société Générale SA and others [2025] EWHC 1938 (Comm)

Introduction

By a decision handed down on 31 July 2025 in *LLC Eurochem North-West-2 and anor v Société Générale SA and ors* [2025] EWHC 1938 (Comm), the English Commercial Court (Bright J) refused to enforce bond payment obligations where to do so would be illegal at the place of performance.

Background

In 2021-2022, Societe Generale ("SG") and ING Bank ("ING") issued on-demand bonds (governed by English Law) in favour of the Russian entity EuroChem North-West-2 ("ECNW2") intended to guarantee ECNW2's obligations under its contracts with Tecnimont SpA.

Mr. Melnichenko (the EuroChem group's founder) and his wife were subjected to EU sanctions. The underlying contracts were terminated. ECNW2 called on the bonds, requesting payment to its Gazprombank account in Moscow via a Luxembourgish correspondent bank. SG and ING refused, fearing a breach of EU sanctions.

ECNW2 assigned the bonds' proceeds to EuroChem AG (a Swiss entity) and requested payment to a Euro-denominated bank account in Russia. SG and ING still refused on the basis that payment would be illegal under EU Law.

Decision

The Commercial Court found that the obligation to pay under the bonds was unenforceable.

The bonds were either "*funds*" (as expressly defined in Regulation 269/2014) or, alternatively, "*economic resources*" (which was to be given a broad interpretation).

Thus, the relevant issue was whether either ECNW2 or EuroChem AG were "*owned or controlled*" by Mr. or Mrs. Melnichenko under EU Regulation 269/2014, such that payment would breach the prohibition on making funds/economic resources available to a Designated Person.

The Commercial Court examined in detail the EuroChem group's ownership structure before and after the imposition of EU sanctions: ECNW2 was indirectly owned by EuroChem AG which was indirectly held through a discretionary trust for the Melnichenkos' benefit. After Mr. Melnichenko's resignation as its beneficiary, Mrs. Melnichenko appointed a Mr. Fokin as the trust's protector.

Adopting a purposive interpretation of Regulation 269/2014 (and its Article 2), a trust's beneficiary (whilst not having a proprietary interest in the assets) was either the assets' owner or the person to whom they belonged. Furthermore, Mr. Fokin was held to be someone who would act according to Mr. Melnichenko's wishes (for 'control' purposes).

Whilst acknowledging the impact of firewalls within the EuroChem group which prevented Mr. Melnichenko from controlling EuroChem AG and its EU subsidiaries, the Commercial Court found them insufficient to displace Mr. Melnichenko's control over the group's Russian subsidiaries (including ECNW2).

Moreover, the Commercial Court relied on decisions of national competent authorities in France and Italy (the place of performance of the bonds) that the bonds were frozen.

Since payment would be illegal in France and Italy, this amounted to a 'foreign law illegality' rendering performance of the bonds unenforceable as contrary to the principle in *Ralli Brothers* [1920] 2 KB 287 ("*a contract (whether lawful by its governing law or not) [is], in general, invalid in so far as the performance of it [is] unlawful by the law of the country where the contract [is] to be performed*"), alternatively as a matter of English public policy.

Concluding observations

Bright J's judgment provides a significant analysis of the application of the *Ralli Brothers* principle in relation to EU sanctions/restrictive measures.

The decision is available here.

UK SUPREME COURT REJECTS BRIBERY AND DISHONEST ASSISTANCE CLAIMS AGAINST CAR-FINANCE LENDERS

Hopcraft and another v Close Brothers Limited; Johnson v FirstRand Bank Limited; Wrench v FirstRand Bank Limited [2025] UKSC 33

Introduction

By a decision handed down on 1 August 2025 in *Hopcraft and anor v Close Brothers Limited; Johnson v FirstRand Bank Limited; Wrench v FirstRand Bank Limited* [2025] UKSC 33, the UK Supreme Court gave judgment on conjoined appeals of considerable importance for the car-finance industry in the UK, clarifying, *inter alia*, aspects of English Law on fiduciary duties and tortious bribery.

Background

In a series of cases, car dealers arranged for their customers to obtain credit from lenders on hire purchase terms, receiving a commission from the lender for doing so, but with no (or only partial) disclosure of that commission to the customers.

The customers alleged various claims against the lenders, seeking, *inter alia*, (1) equitable compensation for the lenders' dishonest assistance in the dealers' breach of fiduciary duty by receiving secret profits, and (2) payment of amounts equivalent to the commissions for tortious bribery.

The lenders appealed against a Court of Appeal decision upholding the dishonest assistance claim and the bribery claim.

Decision

The UK Supreme Court allowed the lenders' appeals.

As to fiduciary duty, whilst a fiduciary's distinguishing obligation is a single-minded loyalty to their principal (which includes the duty not to make a profit from their fiduciary position or to have a conflict of interest in the absence of their principal's fully informed consent), a fiduciary may have multiple principals whose interests compete. Such a fiduciary is required to exercise a discretion that will benefit some of its principals over the others.

It is often recognised that the categories of fiduciary relationships are not closed. The Supreme Court held that a person consciously undertaking responsibility for the management of another's property/affairs where they ought to appreciate that that would carry an expectation of loyalty was such a category. However, in the commercial context, it is normally not appropriate to expect that a commercial party will subordinate its own interests.

Having rejected the lenders' submission that the tort of bribery should be abolished in English Law, the Supreme Court explained that liability for bribery (whether at common law or in equity) depended upon the recipient of the bribe being a fiduciary (overturning previous Court of Appeal authority). Furthermore, whether or not "*full disclosure*" was given to the principal (relevant to whether or not the principal can be said to have given "fully informed consent") will depend on the circumstances of the relevant transaction and relationship. There was no difference in the disclosure requirement between that in common law and that in equity (again, overturning previous Court of Appeal authority).

In the context of tripartite commercial transactions where each party was pursuing separate objectives, there were no hallmarks of the single-minded loyalty that formed the core of a fiduciary relationship. Since no fiduciary relationship was imposed upon the lenders, the claims for tortious bribery also failed.

Concluding observations

Given the large number of people in the UK who obtain cars on hire-purchase terms, the UK Supreme Court's decision was eagerly awaited by those involved in the car finance industry (it was reported that around £40 billion was at stake). It clarifies many aspects of English Law on bribery and fiduciary duties.

The decision is available here.

ENGLISH COURT RESTRAINS FOREIGN PROCEEDINGS TO ENFORCE AN ENGLISH JUDGMENT ALLEGED TO HAVE BEEN OBTAINED THROUGH FRAUD

Federal Government of Nigeria and another v Williams [2025] EWHC 2217 (Comm)

Introduction

By a judgment handed down on 26 August 2025 in *Federal Government of Nigeria and anor v Williams* [2025] EWHC 2217 (Comm), the English Commercial Court (Henshaw J), on what is understood to be the first application of its kind, granted an anti-enforcement injunction to restrain foreign proceedings to enforce an English judgment alleged to have been procured by fraud.

Background

Dr. Williams obtained a US$ 15 million default judgment from the English courts against Nigeria (and its Attorney General), which Nigeria unsuccessfully sought to have set aside. Dr. Williams sought to have the default judgment recognised and enforced in New York.

Nigeria commenced fresh English proceedings seeking to set aside the default judgment on the grounds that it had been fraudulently obtained. In particular, it was alleged that Dr. Williams had relied upon falsified documents and had made a series of deliberate misrepresentations to the court. Pending the resolution of that claim, Nigeria sought an anti-enforcement injunction ("AEI") to restrain enforcement of the default judgment.

Decision

The Commercial Court granted Nigeria's AEI application.

This was thought to be the first time the English courts had been asked to restrain enforcement of one of its own judgments (rather than a foreign judgment). However, the Commercial Court held there was no principled reason why an AEI should not be available in such a claim.

The Commercial Court upheld Nigeria's contention that the enforcement of the default judgment before the determination of its fraud-related claim in England would be "*vexatious and oppressive*".

At the interim stage, the relevant test was whether there was a "*high probability*" that a final injunction would be granted at a trial.

The Commercial Court considered that Nigeria had a strong case on the merits of its "*vexatious and oppressive*" argument. There was a "*high probability*" that Nigeria would be successful in demonstrating that a final AEI would be granted after a full trial.

Conversely, there would be a risk of irreparable prejudice to Nigeria if enforcement of the default judgment took place before its claim that it had been fraudulently obtained was disposed of.

Importantly, the AEI would not be determinative of any forum issue. Rather, its effect would merely be to suspend the New York proceedings (which had in any event been stayed).

Furthermore, whereas AEI applications usually involved considerations of comity between England & Wales and a foreign jurisdiction, no such comity issue arose in the circumstances of this case. Rather, issuing the interim AEI would protect the integrity of English court process and stop an English judgment from being used as an instrument of fraud.

Concluding observations

Henshaw J's judgment is significant in explaining the principled basis upon which AEIs are granted, and demonstrates the importance the English courts attach to concerns that their judgments are being used in furtherance of a fraudulent purpose.

The decision is available here.

TWO FURTHER ARBITRATION-RELATED JUDGMENTS FROM THE QFC CIVIL & COMMERCIAL COURT

D v E [2025] QIC (F) 38 and C v D [2025] QIC (F) 44

Introduction

The QFC Civil & Commercial Court ("Court") recently issued two first instance judgments relating to its jurisdiction to appoint an arbitrator and stays of court proceedings begun contrary to an arbitration clause.

D v E [2025] QIC (F) 38

The parties' contract referred disputes to Doha-seated arbitration administered by the Qatar International Court and Dispute Resolution Centre ("QICDRC") pursuant to its arbitration rules.

However, the claimant asserted in correspondence that the QICDRC "*does not have jurisdiction over this dispute*" and proposed arbitration under the auspices of the Qatar International Center for Conciliation and Arbitration ("QICCA").

After unsuccessfully asking the courts of the State of Qatar to appoint an arbitrator (which refused given the arbitration clause's conferral of that jurisdiction upon the QICDRC), the claimant requested the QICDRC to do so.

The defendant resisted on several bases: (1) the claimant had waived its right to arbitration by petitioning the Qatari courts; (2) the dispute was pending in the Investment & Trade Court, without the claimant having asserted the arbitration clause there; (3) the contract was void for fraud; (4) the contract was unenforceable as it did not satisfy formalities under Qatari Law; (5) the claim was unevidenced.

The Court (Justices Ali Malek KC; Georges Affaki; James Allsop) held it had jurisdiction to appoint the tribunal (absent party agreement) and gave further directions for the resolution of other issues (including waiver).

The parties' arbitration clause had several possible interpretations, but the preferable one was that it was a choice of Doha-seated arbitration with the Court as the "*Competent Court*" under Law No. 2 of 2017 ("Qatar's Arbitration Law").

There remained a debate as to whether the Court, when it was the "*Competent Court*", applied Qatar's Arbitration Law or the QFC Arbitration Regulations. However, "*given the substantive identity*" of their arbitrator-appointment provisions, it was unnecessary to decide that point.

The contentions as to the arbitration clause's invalidity due to the main contract's alleged invalidity were rejected based, *inter alia*, on the separability doctrine.

C v D [2025] QIC (F) 44

The parties' contract referred disputes to Qatar-seated arbitration "*administered by [QICDRC] in accordance with [QICDRC's] rules in force at the time the request for arbitration is submitted*" and designated the Court as the "*Competent Court*" under Qatar's Arbitration Law.

Upon the defendant's jurisdiction objection, the Court (Justice Kirkham) stayed court proceedings commenced by the claimant.

The claimant's argument that the choice of the Court as the "*Competent Court*" gave it jurisdiction to hear the substantive claim was rejected. Rather, it gave the Court supervisory jurisdiction over an arbitration arising out of the contract.

Concluding observations

The decisions show the Court's approach to important areas of arbitration law, which may encourage users contemplating designating the Court as the "*Competent Court*" in Qatar-seated arbitrations.

The decisions are available here and here.

COURT OF APPEAL AFFIRMS *BENKHARBOUCHE* TEST FOR DETERMINING WHETHER AN EMPLOYEE'S DUTIES AMOUNT TO THE EXERCISE OF SOVEREIGN AUTHORITY

Royal Embassy of Saudi Arabia (Cultural Bureau) v Alhayali [2025] EWCA Civ 1162

Introduction

By a decision handed down on 11 September 2025 in *Royal Embassy of Saudi Arabia (Cultural Bureau) v Alhayali* [2025] EWCA Civ 1162, the English Court of Appeal allowed an appeal against a decision allowing Saudi Arabia ("KSA") to invoke State Immunity against employment claims.

Background

Between January 2013-January 2018, the claimant was employed in the Cultural Bureau of KSA's London embassy, performing duties such as assisting with the putting on of cultural events and processing requests to the embassy from KSA students in the United Kingdom.

Following her termination, she commenced wide-ranging proceedings before the Employment Tribunal, against which the embassy invoked State Immunity on the basis that her work duties involved the exercise of KSA's sovereign authority.

On 9 April 2019, the embassy's former solicitors conceded the Employment Tribunal had jurisdiction over the claimant's EU Law-derived claims (the claimant withdrew her domestic law-based claims). The embassy then participated in the proceedings for more than 2 years before "*reasserting*" immunity and asserting its previous concession had been unauthorised.

The Employment Tribunal found, *inter alia*, that the embassy had waived its immunity and that the exception to State Immunity in Section 4 of the State Immunity Act 1978 ("SIA 1978") applied. The Employment Appeal Tribunal reversed that decision.

Decision

The Court of Appeal (Bean LJ giving the main judgment) allowed the claimant's appeal and restored the Employment Tribunal's decision.

The Court of Appeal rejected the embassy's argument that the claimant's role had been close enough to the functions of a diplomatic mission listed in Article 3 of the Vienna Convention on Diplomatic Relations 1961 to amount to an exercise of sovereign authority. Applying *Benkharbouche* [2017] UKSC 62, the Court of Appeal determined the claimant's duties were merely ancillary to sovereign authority; she had no important decision-making functions and any "*non-standard*" matters were referred to her managers. Accordingly, there was no immunity from the employment proceedings pursuant to Section 4 of SIA 1978.

The Court of Appeal also rejected the embassy's argument that the personal injury exception to immunity in Section 5 SIA 1978 extended only to physical injuries. Following *Shehabi* [2024] EWCA Civ 1158, the exception covered psychiatric injuries.

Given its conclusions on Sections 4 and 5 SIA 1978, it unnecessary to determine whether immunity had been waived. The Court of Appeal nevertheless expressed concern if a State, having ostensibly submitted to jurisdiction and caused a claimant to incur costs, was allowed to change its position at or during trial. The Court of Appeal unanimously called for reconsideration of its previous decision in *Yemen v Aziz* [2005] EWCA Civ 745, saying it failed to distinguish between actual and deemed submission to jurisdiction.

Concluding observations

Bean LJ's judgment is important in affirming how the *Benkharbouche* approach to determining how close an employee's duties are to sovereign authority is carried out. Furthermore, given the unanimous concerns expressed as to *Yemen v Aziz*, it seems likely that, at an appropriate opportunity, the Court of Appeal will bring further clarity to the important issue of authority to waive State Immunity.

The decision is available here.