

KEY DEVELOPMENTS UPDATE OCTOBER 2026

MESSAGE FROM KHAWAR QURESHI KC, HEAD OF MCNAIR INTERNATIONAL

In this edition of our update, the highlights include a summary of recent developments before the International Court of Justice (“ICJ”) and an ICSID tribunal’s decision concerning liability, loss and damage arising from gas well blowouts in Bangladesh. Significant recent decisions from the English High Court have: (i) clarified the limits of cause of action estoppel and issue estoppel when a state seeks to resist enforcement of an arbitral award on the grounds of state immunity; (ii) reaffirmed the narrow scope of challenges to arbitral decisions under section 68 of the Arbitration Act 1996 (“AA 1996”); and (iii) provided guidance on interpreting amended charterparty provisions. We also note a decision from a US Court concerning Spain’s attempt to resist enforcement of arbitral awards following their annulment in Sweden.

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- **ICJ Case Updates.** This section highlights recent developments before the ICJ, focusing on key procedural and jurisdictional developments in cases of broader significance to public international law.
- **ICSID Tribunal awards Bangladesh’s National Oil Company approximately US \$21.4 million in environmental damage claim.** The ICSID tribunal ordered Niko to compensate BAPEX for gas losses, environmental restoration costs and certain social losses arising from the first Chattak gas field blowout, while rejecting claims for other losses, including direct compensation for atmospheric pollution.
- **Foreign Judgment Estoppel and State Immunity: High Court Clarifies Limits of Preclusion in Arbitral Award Enforcement.** The High Court held that a Swiss judgment dismissing Russia’s challenge to an arbitral award did not preclude Russia from raising state immunity in English enforcement proceedings, as neither cause of action estoppel nor issue estoppel applied.
- **English High Court confirms refusal of Interim Relief is not an Award challengeable for serious irregularity.** The High Court held that an arbitral tribunal’s refusal to grant interim relief was a procedural order, not an award challengeable under section 68 of the Arbitration Act 1996, and that an alleged error in applying the merits threshold did not constitute a serious irregularity.
- **Contractual Interpretation of Piracy Clauses: Scope of a Shipowner’s Right to take Preventative Measures.** The English High Court dismissed a challenge to an arbitral award, holding that a shipowner’s right to take reasonable preventative measures against piracy under a charterparty could include temporarily leaving a port, notwithstanding the deletion of related contractual provisions.
- **U.S. Court upholds Jurisdiction over Enforcement of Annulled ECT Awards.** In Foresight Fund Managers Ltd. v. The Kingdom of Spain, the Court confirmed that US courts may exercise jurisdiction under the FSIA arbitration exception to hear enforcement proceedings against Spain.

ICJ CASE UPDATES

This section highlights recent developments before the ICJ, focusing on key procedural and jurisdictional developments in cases of broader significance to public international law.

Nicaragua v Germany – Preliminary objections

In September 2026, the ICJ concluded public hearings on Germany's preliminary objections in *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v Germany)*. The proceedings concern Nicaragua's claims that Germany had breached its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions of 1949 and their Additional Protocols as well as principles of international humanitarian law by providing military and other support to Israel. Germany has asked the ICJ to dismiss the case on jurisdictional and procedural grounds, including arguments concerning whether a legal dispute existed between the parties when Nicaragua commenced proceedings. The Court's decision on Germany's preliminary objections is pending.

The press release is available [here](#).

South Africa v Israel – Colombia withdraws intervention

On 18 September 2026, Colombia informed the ICJ that it withdrew its declaration of intervention in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*. Colombia had intervened under Article 63 of the ICJ Statute in April 2024. The withdrawal represents a further procedural development in the ongoing proceedings concerning alleged violations of the Genocide Convention in Gaza.

The press release is available [here](#).

Iran v Canada, Sweden, Ukraine and United Kingdom – ICAO jurisdiction

In September 2026, the ICJ extended the deadlines for written pleadings in *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Iran v Canada, Sweden, Ukraine and United Kingdom)*. The proceedings arise from Iran's appeal against a March 2025 decision of the ICAO Council concerning the downing of Ukraine International Airlines Flight PS752 in January 2020. Iran challenges the Council's jurisdiction under Article 84 of the Chicago Convention, which concerns disputes between States relating to the interpretation or application of the Convention and its Annexes. The Court has allowed a second round of written pleadings, with Iran's Reply and the Respondent States' Rejoinder now due under the extended timetable. The case remains pending before the ICJ, with the Court yet to determine the merits of Iran's appeal.

The order is available [here](#).

Lithuania v Belarus – Russian intervention

On 20 July 2026, Russia filed a declaration of intervention under Article 63 of the ICJ Statute in *Alleged Smuggling of Migrants (Lithuania v Belarus)*. The case concerns Lithuania's allegations that Belarus breached its obligations under the Protocol against the Smuggling of Migrants by facilitating the movement of irregular migrants into Lithuania. Russia's intervention concerns the interpretation of various provisions of the Protocol against the Smuggling of Migrants relied upon by Lithuania. Such an intervention allows a State to participate in proceedings where it considers that the Court's interpretation of a convention may affect its own legal interests. The development follows Poland's earlier intervention and observations submitted by the European Union in the case.

The press release is available [here](#).

ICSID TRIBUNAL AWARDS BANGLADESH'S NATIONAL OIL COMPANY APPROXIMATELY US \$21.4 MILLION IN ENVIRONMENTAL DAMAGE CLAIM

Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited ("BAPEX") (ICSID ARB/10/11) (18 December 2025)

Introduction

By an award dated 18 December 2025 an ICSID tribunal ordered Niko Resources (Bangladesh) Ltd ("Niko") to pay BAPEX and the state approximately US \$21.4 million and BDT 50.1 million to affected villagers in compensation from losses arising out of the 2005 gas field blowout.

Background

In 2003, BAPEX entered into a joint venture agreement with Niko to develop two gas fields in Bangladesh (Feni and Chattak) (the "Agreement"). In 2005, there were two gas field blowouts, which caused environmental damage and disruption to the surrounding community. In 2010, Niko initiated two ICSID arbitrations against BAPEX, and the Bangladeshi government: one for a declaration of non-liability for damage caused by the blowouts and the other for the outstanding payment for the natural gas delivered. In February 2020, in its decision on liability, the tribunal found that the first blowout was caused by Niko's breaches of its obligations under the Agreement, but the second was not. In May 2021, the tribunal determined that environmental losses were recoverable but the impossibility of producing gas was irrecoverable.

Decision

In December 2025, the tribunal rendered its final award ordering Niko to pay BAPEX US \$21.4 million and affected villagers BDT 50.1 million plus interest. Amongst other things, the decision made findings in respect of Niko's liability for the loss of gas after the relief operations as well as environmental losses.

As to the loss of gas after the relief operations, the tribunal held that since the first relief operation resulted in the second blowout for which Niko was not liable, Niko was not liable for the subsequent

increased gas flow. By contrast, the second relief operation reduced gas flow with seepages remaining at surface level. In this regard, the tribunal agreed with Niko's arguments that these seepages would have "*diminished and eventually cease[d]*" had BAPEX approved its proposals to drill further production wells, which it did not. Thus, Niko was only liable for the gas that would have escaped, before the seepages ended, had the additional wells proposed been drilled.

As to environmental loss, the tribunal held that BAPEX had not demonstrated that there was a causal link from the damage to the atmosphere, from the Greenhouse Gas ("GHG") emissions resulting from the Chattak blowout, to a specific damage suffered by BAPEX or Bangladesh. As such, the claim for compensation for atmospheric pollution was rejected. This did not negate the tribunal's finding, however, that the Chattak blowout, as to which Niko was liable, did damage the atmosphere. Nor did this negate Bangladesh's "*concrete obligations*" under the United Nations Framework Convention on Climate Change to limit GHG emissions and promote GHG sequestration. Accordingly, restoring the damage caused by the emissions from the Chattak blowout was in line with Bangladesh's international commitments thereby entitling BAPEX to include the related costs in the claim against Niko.

Finally, BAPEX's claims for damage to vegetation, water, soil, ecosystems and human health were dismissed, while its claim for students' suffering due to disrupted schooling was upheld.

Concluding Remarks

The award is noteworthy for its treatment of greenhouse gas emissions and environmental restoration in the context of international commercial arbitration.

The decision is available [here](#)

FOREIGN JUDGMENT ESTOPPEL AND STATE IMMUNITY: HIGH COURT CLARIFIES LIMITS OF PRECLUSION IN ARBITRAL AWARD ENFORCEMENT

***Yukos Capital Ltd v The Russian Federation* [2026] EWHC 1918 (Comm) Before His Honour Mark Pelling KC (17 July 2026)**

Introduction

In *Yukos Capital Ltd v The Russian Federation* [2026] EWHC 1918 (Comm), the High Court considered whether a Swiss court's dismissal of Russia's application to set aside an arbitral award prevented Russia from subsequently challenging enforcement proceedings in England on grounds of state immunity. The judgment examines the application of cause of action estoppel and issue estoppel to foreign judgments, particularly where the foreign jurisdiction does not recognise issue estoppel as a distinct doctrine.

Background

Yukos Capital Ltd ("Yukos") obtained an arbitral award against Russia on 23 July 2021 for breaches of the ECT. The arbitration was seated in Switzerland. Russia applied for an order from the Swiss courts setting aside the award, which was dismissed on all grounds.

In November 2023, Yukos commenced English proceedings to recognise and enforce the award under section 101 AA 1996, which was granted. Russia subsequently applied to set aside that order, claiming immunity under section 1(1) of the State Immunity Act 1978 ("SIA"). It argued that the arbitration exception under section 9 did not apply because it had not agreed in writing to submit the relevant dispute to arbitration.

The Court directed the determination of three preliminary issues: (i) whether the Swiss judgment created cause of action or issue estoppel; (ii) whether the Swiss judgment satisfied the requirements for recognition and enforcement of a foreign judgment against a state under section 31 of the Civil Jurisdiction and Judgments Act 1982; and (iii) whether the resulting legal effect of (i) and (ii) would preclude Russia from disputing its agreement to arbitrate.

Decision

Cause of Action Estoppel

The Court rejected Yukos's argument that cause of action estoppel prevented Russia from pursuing its immunity application. Although the parties were identical, the proceedings concerned different cases of action. In Switzerland, Russia sought to set aside the award under Swiss private

international law; in England, it sought a declaration of state immunity under the SIA.

Applying established principles, including *Virgin Atlantic Airways v Zodiac Seats UK Ltd* [2013] UKSC 46, the Court held that the required identity of causes of action was absent. The Swiss proceedings therefore did not create cause of action estoppel.

Issue Estoppel

The Court considered whether the Swiss judgment prevented Russia from disputing issues concerning the tribunal's jurisdiction in the English proceedings. The relevant requirements for foreign issue estoppel included that the foreign court had competent jurisdiction, its decision was final and conclusive, the parties were identical and the issue in question was identical to one determined in the foreign proceedings. The first three requirements were satisfied whereas the fourth required closer examination.

The expert evidence established that Swiss law recognises *res judicata* only in relation to the operative part of a judgment. The reasoning underlying the decision had no independent preclusive effect and Swiss law did not recognise issue estoppel in the English sense.

Consequently, the Swiss judgment could not create issue estoppel by reference to its reasoning. The Court also emphasised that, even where foreign issue estoppel is available, it extends only to those issues that the Swiss court decided which Russia is seeking to rely on again in these proceedings. It could not apply to arguments that could have been raised but were not, or grounds declared inadmissible by the foreign court.

Concluding Remarks

The decision is significant for parties seeking to enforce investment treaty awards against sovereign states. It highlights the limits of relying on a foreign judgment to prevent a state from challenging arbitral jurisdiction in subsequent English enforcement proceedings, particularly where the law of the foreign jurisdiction does not recognise issue estoppel.

The judgement is available [here](#).

ENGLISH HIGH COURT CONFIRMS REFUSAL OF INTERIM RELIEF IS NOT AN AWARD CHALLENGEABLE FOR SERIOUS IRREGULARITY

JKD v IKC [2026] EWHC 2031 (Comm) Before the Honourable Mrs Justice Dias DBE (31 July 2026)

Introduction

In a recent decision, the Commercial Court dismissed an application by the claimants (“JHA”) to challenge an arbitral tribunal’s refusal to grant interim measures. JHA sought to set aside Procedural Order No. 4 (“PO4”) under sections 68(2)(b) and 68(2)(c) AA 1996, alleging that the tribunal had exceeded its powers and failed to follow the parties’ agreed procedure by applying an enhanced merits test rather than a prima facie test when considering the application for interim relief.

Background

The dispute arose during an arbitration conducted under the ICC Rules. JHA applied for interim measures and argued that the tribunal was only required to assess whether its claims met a prima facie standard. The tribunal, however, applied what JHA characterised as a more demanding merits-based assessment and subsequently rejected the application through PO4.

JHA contended PO4 was in substance an arbitral award and that the tribunal’s approach constituted a serious irregularity within the meaning of section 68 AA 1996. It argued that the parties had agreed, through their submissions in earlier proceedings, that a prima facie threshold would apply to interim measures applications. According to JHA, the tribunal’s departure from that alleged agreement both exceeded its powers and breached the agreed arbitral procedure.

Decision

The Commercial Court rejected the challenge in its entirety.

Firstly, the Court held that PO4 was not an arbitral award but a procedural order. The decision was interim in nature, did not finally determine any substantive rights of the parties, and the tribunal remained seized of the dispute and was not *functus officio*. Furthermore, the grant or refusal of

interim relief is a matter of the tribunal’s discretion. As section 68 permits challenges only to awards, the application failed at the threshold stage.

Secondly, the Court found that, even if PO4 could be characterised as an award, there was no objectively ascertainable agreement between the parties regarding the merits threshold to be applied to interim measures applications. The alleged agreement could not be established from the parties’ prior submissions or conduct.

The Court further held that, even if such an agreement existed, it would not have restricted the tribunal’s powers under Article 28.1 of the ICC Rules for the purposes of section 68(2)(b). Nor would the alleged disagreement concerning the applicable merits test amount to a procedural issue capable of engaging section 68(2)(c).

Finally, the Court reaffirmed the limited scope of section 68 AA 1996. The provision is intended as a longstop remedy for extreme cases of serious irregularity. It is not a mechanism for challenging disagreements with a tribunal’s reasoning, or the manner in which a tribunal exercises powers that are otherwise available to it.

Concluding Remarks

The decision reinforces the high threshold for challenges under section 68 AA 1996. In particular, it confirms that procedural orders relating to interim measures will generally not be susceptible to challenge as awards, and that section 68 is confined to exceptional cases involving genuine serious irregularity. The judgment also highlights the broad discretion afforded to arbitral tribunals when determining applications for interim relief.

The decision is available [here](#).

CONTRACTUAL INTERPRETATION OF PIRACY CLAUSES: SCOPE OF A SHIPOWNER'S RIGHT TO TAKE PREVENTATIVE MEASURES

Olam International Ltd v Pacific Basin Supramax Ltd [2026] EWHC 2136 (Comm) Before His Honour Judge Hodge KC (14 August 2026)

Introduction

In *Olam International Ltd v Pacific Basin Supramax Ltd* [2026] EWHC 2136 (Comm), the High Court considered the interpretation of an amended standard-form charterparty clause dealing with piracy risks and a vessel's entitlement to remain on hire when leaving a potentially dangerous area. The Court dismissed the charterer's appeal under section 69 AA 1996, holding that the vessel's departure from the relevant port was permitted under the remaining provisions of the contract.

Background

The parties entered into a time charter agreement for a dry bulk carrier intended for the delivery of wheat from Ghent to Nigeria. The charterparty incorporated the BIMCO Piracy Clause, subject to amendments agreed between the parties. Crucially, sub-clauses 81(a) and 81(b), which expressly addressed the owner's entitlement to refuse to enter or remain in an area exposed to piracy risks, had been deleted. The vessel arrived at Warri, Nigeria, but could not berth. Concerned about the risk of piracy in the Gulf of Guinea, the owner instructed the vessel to leave Warri and return temporarily to Lagos. The parties subsequently disputed whether the vessel remained on hire during the intervening period.

The charterer argued that deleting sub-clauses 81(a) and 81(b) removed the owner's contractual right to leave an area because of piracy risks and that hire should have been suspended under clause 17 of the charterparty. The owner contended that clause 81(c)(i), which permitted reasonable preventative measures to protect the vessel, crew and cargo, independently authorised the departure. The arbitral tribunal accepted the owner's position and held that the vessel remained on hire. The charterer appealed.

Decision

In considering the construction of clause 81 of the charter agreement, and whether recourse to deleted sections or words of a clause could serve as an aid to construction, the Court referred to the principles highlighted in case law such as *Mopani Copper Mines plc v Millenium Underwriting Ltd* [2008] EWHC 1331 (Comm). The general rule is that deleted words cannot be relied upon when interpreting a contract if the retained wording is unambiguous. Where ambiguity arises, deleted words may be considered to clarify the remaining provisions or to establish what the parties intended to exclude. However, caution must be exercised when drawing inferences from deleted wording.

On this basis, the Court dismissed the appeal. Firstly, it found that the language in clause 81(c)(i) was unambiguous. Temporarily departing a port to avoid the risk of piracy fell within the scope of "reasonable preventative measure". Furthermore, the examples listed in the sub-clause, preceded by the words "including but not limited to", were non-exhaustive. Secondly, even if sub-clauses (a) and (b) were admissible as aids to interpretation, they would not lead the Court to conclude that the range of reasonable preventative measures was limited to measures taken *within* the area of risk. Rather, sub-clauses (a) and (b) conferred certain rights on the shipowner, giving rise to corresponding obligations on the charterer if exercised. These were rights independent of, additional to, and more extensive than those under sub-clause (c).

Concluding Remarks

The decision provides useful guidance on the construction of commercial contracts, particularly where provisions of an industry-standard clause have been expressly deleted.

The decision is available [here](#).

U.S. COURT UPHOLDS JURISDICTION OVER ENFORCEMENT OF ANNULLED ECT AWARDS

Foresight Fund Managers Ltd. v. The Kingdom of Spain, Civil Action Nos. 18-1148 (TSC) & 20-925 (TSC) (D.D.C. 28 September 2026) Before District Judge Tanya Chutkan

Introduction

On 28 September 2026, the US District Court for the District of Columbia dismissed Spain's motion to strike out proceedings brought by Foresight Fund Managers Ltd ("Foresight") seeking confirmation of two arbitral awards issued against Spain under the Energy Charter Treaty ("ECT"). The decision is significant for enforcement proceedings involving foreign sovereigns where an award has been annulled at the seat of arbitration. The Court held that the Foreign Sovereign Immunities Act ("FSIA") arbitration exception provided subject-matter jurisdiction despite the Swedish courts' annulment of the awards and the CJEU's decision in *Komstroy*.

Background

Foresight and other investors invested substantially in photovoltaic facilities in Spain but suffered losses after Spain subsequently withdrew the favourable tariff arrangements. The investors commenced ECT arbitration proceedings in 2015, alleging breaches of Spain's obligation to accord fair and equitable treatment.

The Stockholm Chamber of Commerce tribunals issued awards in 2018, awarding €53.3 million to Novenergia and €39 million to Foresight. Spain challenged the awards before the Swedish courts. Following the Court of Justice of the European Union's 2021 *Komstroy* judgment, which held that the ECT arbitration mechanism did not apply to intra-EU disputes, the Svea Court of Appeal annulled both awards under Swedish law.

Meanwhile, enforcement proceedings were brought in the United States under Chapter Two of the Federal Arbitration Act, implementing the New York Convention. Spain argued that the Court lacked subject-matter and personal jurisdiction, including because the Swedish judgments meant that no valid arbitration agreement or arbitral awards existed.

Decision

The Court rejected Spain's jurisdictional objections. Under FSIA's arbitration exception, three jurisdictional facts were required: an

arbitration agreement, an arbitral award and a treaty potentially governing enforcement. Applying binding D.C. Circuit authority, particularly *NextEra*, the Court held that the ECT could be treated as an arbitration agreement entered into "for the benefit" of investors from contracting states. Whether the ECT ultimately applied to intra-EU disputes was a question concerning the scope and enforceability of the arbitration agreement, rather than the existence of an agreement for FSIA jurisdictional purposes.

The Court also held that the 2018 awards constituted arbitral awards for jurisdictional purposes, notwithstanding their subsequent annulment by the Swedish courts. Relying on *Process & Industrial Developments Ltd v Federal Republic of Nigeria*, it held that a foreign court's order setting aside an award is relevant to the merits of enforcement, rather than to the existence of jurisdiction under the FSIA.

The Court rejected Spain's collateral-estoppel argument, holding that the Swedish judgments did not preclude its FSIA jurisdictional findings because they were reached under different legal standards and addressed different issues.

Finally, the Court found that the New York Convention could potentially govern enforcement. Spain's arguments concerning the Convention's substantive requirements were matters for the merits stage, not jurisdiction. The Court therefore found the arbitration exception satisfied and declined to decide the alternative waiver exception.

On personal jurisdiction, the Court held that Foresight's subsequent proper service through the Hague Convention rendered Spain's objection moot.

Concluding Remarks

The decision reinforces the distinction between jurisdiction and enforceability in US proceedings to recognise foreign arbitral awards. In particular, annulment of an award at the seat does not necessarily deprive a US court of jurisdiction to consider an enforcement petition. The decision is available [here](#).