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Recalcitrant Parties in Investment Treaty Arbitration: Balancing Legitimacy and Due Process

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Introduction

1. The considerable sums at stake in investment treaty disputes mean that parties often feel incentivised to abuse arbitral procedures to what they consider are their own ends.

2. The spectrum of tactics such recalcitrant parties adopt are well-known to practitioners. At the one end are relatively innocuous manoeuvres designed to delay the progress of proceedings, such as late filing of pleadings or evidence. Occupying the midpoint in the spectrum, there are abusive applications such as unmeritorious challenges to arbitrators. Finally, at the more sinister end of the scale, lie recalcitrant measures such as the intimidation of witnesses or parties to the arbitration.

3. This paper seeks to introduce[1] some of the legal responses to which parties and Tribunals can turn in order to resist such recalcitrant practices. Its central thesis is that the armoury of measures available to the parties and Tribunals to respond to such abuses (and the likelihood a Tribunal will utilise such measures) is significantly influenced by the legal regime pursuant to which the arbitration is conducted. Parties should, accordingly, carefully consider their position, both prior to entering into legal relationships and at the outset of any dispute, with a view to ensuring as fair a procedural playing field as possible later on.

Recourse to national courts

4. Some investment treaty disputes will be amenable to oversight from national Courts. This can be beneficial as parties may have access to sophisticated legal regimes designed to ensure the proper and efficient conduct of arbitrations, such as the scheme provided for by ss.42 to 44 of the English Arbitration Act 1996.

5. Under ss.42 to 44, the English Court has a range of powers including to enforce peremptory orders of the Tribunal (s.42) and secure the attendance of witnesses (if the

[1] The paper does not deal exhaustively with this topic, which has already generated specialist commentary in its own right: Horvath and Wilske (eds.), **Guerrilla Tactics in International Arbitration** (Wolters Kluwer) (2013).

arbitral proceedings are being conducted in England and Wales and the witness is in the United Kingdom) (s.43). A further wide range of powers exist under s.44 which provides that, unless otherwise agreed, the Court has powers in making orders about matters in respect of arbitrations such as the taking and preservation of evidence or assets or the granting of interim injunctive relief. The English Court shall act only if the Tribunal has no power to act or is unable for the time being to act effectively (s.44(5)), thus providing for the potential for swift oversight by the English Courts in circumstances where the Tribunal may be in some way incapacitated.

6. Whether such municipal law provisions will be available to protect investment treaty arbitration from the actions of recalcitrant parties will depend on a variety of factors, not least the arbitral seat and rules which the parties have chosen to govern their dispute.

7. A selection by the parties of a legal seat in England and of the rules of arbitral institutions such as the UNCITRAL Rules will, in principle, provide for the possibility of recourse under provisions such as s.44 of the Arbitration Act 1996 even in respect of arbitrations concerning investment treaty disputes.[2]

8. In **Republic of Ecuador v Occidental Production** [2005] EWCA Civ 1116; [2006] QB 432, the English Court of Appeal held that a different provision of the Arbitration Act 1996 (s.67) was capable of application in respect of an arbitral dispute concerning a bilateral investment treaty between Ecuador and the U.S.A. in circumstances where the seat of the arbitration was London and the proceedings were governed by the UNCITRAL Rules. The same reasoning should in principle apply to provisions such as ss.42 to 44 of the Arbitration Act 1996.[3]

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[2] David Joseph, **Jurisdiction and Arbitration Agreements and their Enforcement** (3rd Ed.) (Sweet & Maxwell) (2015), [17.28]: "…*Where, however, a party opts to commence arbitration against a State under either the UNCITRAL Rules or one of the international institutional rules such as ICC or LCIA then the arbitration will be governed by those rules, and the laws of the selected seat. In general terms most national supervisory laws permit some degree of access to local courts for provisional measures in such cases. [FN 49 states: "Arbitration Act 1996 s.44 by way of example. Those powers are not excluded by the LCIA or ICC Rules.] Enforcement will be governed by the New York Convention. By contrast art.26 of the Washington Convention excludes the local court supervisory jurisdiction, for example by reference to provisional measures. Unless the parties have agreed otherwise, an agreement for ICSID is to the exclusion of any other remedy.*"

[3] Merkin and Flannery, **Arbitration Act 1996** (6th Ed.) (Informa Law) (2020) p. 457 fn. 108: "*Although there is no direct authority on point,* ***Occidental Exploration and Production Co v Republic of Ecuador*** *[2005] 2 Lloyd's Rep 707 (Aikens J) is the first of a few authorities confirming that the Act can apply to [bilateral investment treaty] arbitrations, other than under the auspices of ICSID (commonly, such proceedings may exist under the aegis of either UNCITRAL or the ICC).* ***That case concerned a section 67 challenge, but the principle remains that section 44 ought to be applicable to (non-ICSID) BIT arbitrations.*** *How this will play out in the light of the 2018*

9. By contrast, the selection by the parties of ICSID arbitration will likely preclude the application of the protective measures against recalcitrant parties provided for in the Arbitration Act 1996 (including s.44): **ETI Euro Telecom International NV v Republic of Bolivia** [2008] EWCA Civ 880; [2009] 1 WLR 665 at [35], [95] and [96].[4]

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*CJEU decision in **Slovak Republik v Achmea** (Case No C-284/16) in which it ruled that an arbitration clause contained in the Netherlands-Slovakia BIT was incompatible with EU law, time will tell. Someone should tell the Brexiteers that the CJEU judgment is happily reproduced in the English law reports ([2018] 4 WLR 87).*" For completeness, the ***Achmea*** case concerned a BIT between two EU member states providing for arbitration under the UNCITRAL Rules. Important questions regarding the scope of the ***Achmea*** decision (which are outside the scope of this paper) are still being resolved by the Courts and being discussed in academic literature, see e.g. ***Re CETA Investment Court System (Belgium and others)*** [2019] 3 CMLR 25 and "*Achmea does not apply to intra-EU ICSID Arbitration*" Int. A.L.R. 2018, 21(6), 149-151.

[4] Merkin and Flannery, **Arbitration Act**, p. 456: "*Section 3(1) of the 1966 Act (as amended by section 107 of the 1996 Act) provides for an Order in Council to be passed enabling any one or more of sections 36 and 38 to 44 of the 1996 Act to apply to ICSID arbitration proceedings, but no such Order in Council has been passed to date. It follows that the English courts have no jurisdiction to provide any relieve at all under section 44 in respect of ICSID arbitrations: **ETI Euro Telecom International NV v Republic of Bolivia***." The reference to the 1966 Act is to the Arbitration (International Investment Disputes) Act 1966.

See also: David St John Sutton, Judith Gill, Matthew Gearing, **Russell on Arbitration** (24th Ed.) (Sweet & Maxwell) (2015), [7-186] (emphasis added): "*Section 44 of the Arbitration Act 1996 confers wide powers on the court in relation to the preservation of assets and evidence for an arbitration, including the important power to grant interim injunctions. The court's powers under this section are the same as those exercisable in legal proceedings, save for urgent cases where it is now established that they are limited by the requirements of s.44(3). **The provisions of s.44 must be read in conjunction with the relevant rules of the court governing the exercise of those powers in relation to legal proceedings. Section 44 does not apply to ICSID Arbitrations. The nature of ICSID arbitration is that the parties may only seek provisional measures from the ICSID tribunal itself, and not from any national court.** Although it has been the subject of some debate, the better view is that s.44 does not allow relief to be sought against third parties i.e. non-parties to the arbitration agreement.*"

See also: Steven Gee QC: **Commercial Injunctions** (6th Ed.) (Sweet & Maxwell) (2016), [6-043]: "…*Section 44 does not apply to ICSID arbitrations*."

The investor in the **ETI** case attempted to circumvent the non-application of s.44 to ICSID arbitrations by relying instead on a provision which was to some extents similar, namely s.25 of the Civil Jurisdiction and Judgments Act 1982. The Court of Appeal rejected this attempt for a variety of reasons including that the non-application of s.44 of the Arbitration Act 1996 indicated that s.25 of the Civil Jurisdiction and Judgments Act 1982 was not intended to apply to ICSID arbitrations either, **ETI v Bolivia** [89]-[96].

One potential complicating factor is that r. 39(6) of the ICSID arbitration rules is designed to allow the parties to consent to apply to a Court for provisional measures. However, it is questionable whether an agreement under r.39(6) would provide the English Court with jurisdiction to make such orders in circumstances where the relevant Order in Council applying s.44 to ICSID Arbitrations has not been made. See **Merkin and Flannery** p. 456: "*Collins LJ stated that the Order in Council applying inter alia section 44 to ICSID arbitrations had not been brought into force because there was no need for such a power in the light of inter alia rule 39(6) of the ICSID Arbitration Rules. That provision gives parties the right to seek judicial provisional measures, before or after instituting proceedings, for the preservation of their respective rights or interests. With respect, that may not be a sufficient answer; so long as there is no Order in Council bringing ICSID arbitrations within the ambit of section 44, it is difficult to see on what basis the court would exercise any such power other than perhaps section 37 of the Senior Courts Act 1981, which is a fairly unsatisfactory regime for what might inevitably turn into an extremely complex application*."

Nonetheless, s.9 of the Arbitration Act 1996 applies even in respect of ICSID proceedings. Merkin and Flannery, **Arbitration Act 1996**, p. 188 in commenting on s.9 of the Arbitration Act 1996, state: "***ICSID Arbitrations** Despite the fact that ICSID arbitrations are generally not subject to any of the supportive or supervisory powers of any national courts [FN. Excepting the award enforcement provisions, which are contained in CPR Part 62…], section 3(2) of the Arbitration (International Investment Disputes) Act 1966 (as amended) specifically preserves the right to apply to stay court proceedings brought in breach of an agreement to refer any dispute to arbitration under the auspices of ICSID*."

State immunity and recourse to national courts

10. In deciding whether to select an arbitral regime to which recourse to national courts is potentially available to respond to recalcitrant tactics (for example, London-seated UNCITRAL proceedings as opposed to ICSID proceedings), parties to investment treaty disputes should carefully consider the effect of the doctrine of state immunity on measures such as those under ss.42 to 44 of the Arbitration Act 1996.

11. For instance, although s.9[5] of the State Immunity Act 1978 provides that states are not immune in proceedings in UK Courts which "*relate to the arbitration*", s.13(2)(a) provides:[6] "*relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property*." The Court of Appeal in **ETI** held "*that there is nothing in section 9 which overrides the prohibition in section 13*" [113]. Consequently, recourse to national courts against states for

Dicey, Morris & Collins: The Conflict of Laws (15th Ed.) (Sweet & Maxwell) (2018) notes that enforcement of ICSID awards is also subject to a regime outside the New York convention usually applicable to arbitrations: ***Enforcement of ICSID awards 16-188*** *The position is different as regards ICSID awards, as a result of the special provisions of the Washington Convention, the effect of which in England is reflected in Rule 72. Article 53(1) of the Convention provides that: "The award shall be binding on the parties and shall not be subject to an appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention." Article 54(1) provides that each Contracting State shall recognise an ICSID award as binding and enforce the pecuniary obligations imposed by the award as if it were a final judgment of a court in that State.*
16-189 *These articles take ICSID awards outside the normal regime for the enforcement of arbitral awards, including the New York Convention regime, which enables recognition to be refused by national courts on specified grounds. Instead, the Washington Convention contains its own internal procedures for the interpretation, revision and annulment of awards. In particular, an award may only be annulled on the grounds: "(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based." A request for annulment is dealt with by an ad hoc Committee. If the award is annulled, the dispute is, at the request of either party, to be submitted to a new Tribunal. Unless an ICSID award is annulled pursuant to this procedure, the courts of Contracting States are bound to recognise it and enforce it in accordance with Art.54(1), to which effect is given in England by ss.1 and 2 of the 1966 Act. The Convention does not, however, affect the law in relation to state immunity from execution. Thus, the question of the property in respect of which an ICSID award may be enforced must be determined by the law on immunity from execution."* Questions of the law on state immunity in the execution of arbitral awards are outside the scope of this paper but readers are referred to Rule 26 of **Dicey, Morris & Collins** ([10R-001]ff.) for further information.

[5] "***9.— Arbitrations.*** *(1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration. (2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States."*

[6] Subject to certain exceptions such as the state consenting to the contrary in writing – s13(3)

injunctive relief under s.44 of the Arbitration Act 1996 is, very likely,[7] prohibited by s.13(2)(a) of the State Immunity Act 1978.

12. This is not to say that all recourse against states under ss.42 to 44 of the Arbitration Act 1996 is prohibited on the basis of the doctrine of state immunity. For instance:

    (1) **Pearl Petroleum v Kurdistan Regional Government of Iraq** [2015] EWHC 3361 (Comm); [2016] 4 WLR 2 concerned an application to the English Court under s.42 of the Arbitration Act 1996 to enforce a peremptory order made by a Tribunal in LCIA proceedings. The Tribunal's peremptory order had been for interim payment of US$100m by the Kurdistan Regional Government ("KRG") to its opponent petroleum company in order to preserve the status quo pending final resolution of the arbitral proceedings (see headnote and [1] of **Pearl Petroleum**).[8]

    (2) The KRG relied on a state immunity defence to resist the s.42 application and failed. The Court held that the KRG was not entitled to state immunity because it was not a "state" but rather a "separate entity" within the meaning of the State Immunity Act 1978, and its act of entering into the relevant petroleum exploitation agreements had not been an exercise of Iraqi sovereignty (**Pearl Petroleum** [28] and [37]).

    (3) However, the Court also held that, even had the KRG been in principle entitled to state immunity, the relevant provision of the State Immunity Act 1978 (namely s.13(2)(a), discussed above) would not have prevented the s.42 application from succeeding because (**Pearl Petroleum** [41]):

    "*…an application for a section 42 [Arbitration Act 1996] order is not an application for an injunction,*[9] *such that section 13(2)(a) [State Immunity Act 1978] would not have applied*."

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[7] Although **ETI** concerned an application under s.25 of the Civil Jurisdiction and Judgments Act 1982 (as discussed above), the leading English commentary on injunctive relief supports this analysis. Gee, **Commercial Injunctions**, [3-035] states: "*Section 9 [of the State Immunity Act 1978] does not extend to the granting of Mareva [i.e. injunctive] relief under s.44 of the Arbitration Act 1996 because those proceedings are directed at preserving assets for purposes of enforcement of an award as opposed to resolution of the dispute which has been submitted to arbitration, and immunity depends upon s.13(2).*" Gee cites the **ETI** case in support of this proposition.
See also **Russell on Arbitration**, [7-205]: "*…injunctions are outside the scope of the s.9(1) exception*."

[8] The circumstances were that the KRG was receiving petroleum product but had ceased paying for it – see the summary of the Tribunal's decision at [6] of **Pearl Petroleum**.

[9] The Court did not specify what precisely is meant by an injunction for the purposes of s.13(2)(a) State Immunity Act 1978. Gee, **Commercial Injunctions**, states at [3-035]: "*It is thought that what is meant by an injunction is a court order for breach of which there can be contempt proceedings, and penalties including imprisonment. Specific performance can be enforced by contempt proceedings with imprisonment and this is why both an*

(4) The **Pearl Petroleum** case accordingly demonstrates that careful consideration will need to be given to the particular form of relief sought from the national Court before determining whether the doctrine of state immunity will apply.

13. All the above being said, in respect of ICSID arbitrations the measures under the Arbitration Act 1996 for dealing with recalcitrant parties are likely unavailable (including those under s.44, as already noted above). This is a significant *lacuna* in the availability of recourse to national Courts to deal with recalcitrant behaviour in investment treaty disputes. Consequently, parties and the Tribunal will often need to rely on measures available to the arbitral Tribunal itself to deal with recalcitrant tactics. It is, accordingly, to those Tribunal measures that this paper will now turn.

Dismissal of claims manifestly without legal merit

14. Investors have in the past brought claims against states that are manifestly without legal merit. The ICSID Arbitration Rules have responded to this form of abuse of the investment treaty arbitral procedure by the introduction, in 2006,[10] of rule 41(5) which provides:

> "*Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding that a claim lacks legal merit.*"

15. The test of "manifestly" establishes a high hurdle for respondent states to surmount before claims are eligible for dismissal under this rule; reflecting a concern to ensure that claimant investors are not unfairly denied access to a forum for bringing their claim.

injunction and specific performance are subject to immunity under s.13(2)(a). It is not sufficient to have an order for payment of money from no specific source which cannot be enforced in such a way."

[10] The provision being brought in to complement the limited powers of the Secretary-General under ICSID Convention Article 36(3) to refuse to register an arbitration request "*manifestly outside the jurisdiction of the Centre*."

As stated in **Trans Global Petroleum, Inc v The Hashemite Kingdom of Jordan** in respect of the meaning of the word "manifest" in r.41(5):[11]

> *"the ordinary meaning of the word requires the respondent to establish its objection clearly and obviously, with relative ease and despatch. The standard is thus set high. Given the nature of investment disputes generally, the Tribunal nonetheless recognises that this exercise may not always be simple, requiring (as in this case) successive rounds of written and oral submissions by the parties, together with questions addressed by the tribunal to those parties. The exercise may thus be complicated; but it should never be difficult."*

16. Pursuant to this provision, claims have been dismissed in circumstances where, for example:

(1) a contractual claim was wrongly presented as a Treaty claim and where, moreover, that contractual claim had previously been decided by an ICSID Tribunal possessing jurisdiction to deal with both Treaty and contractual issues: **Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, and RSM Production Corporation v Grenada**.[12]

(2) non-expropriation claims were brought in circumstances where the consent to arbitrate covered only expropriation claims: **Emmis International Holding B.V., Emmis Radio Operating B.V., Mem Magyar Electronic Media Kereskedelmi Es Szolgaltato v Hungary**.[13]

(3) where Claimant's counsel acknowledged the Claimant had no basis for one of its claims given the relevant obligation on which the claim was predicated was not owed to the Claimant: **Trans Global Petroleum v The Hashemite Kingdom of Jordan**;[14] and

[11] ICSID Case No. Arb/07/25 (12 May 2008).
[12] ICSID Case No. Arb/10/6 (10 December 2010). See [7.3.7]: "*Claimants' present case is thus no more than a contractual claim (previously decided by an ICSID tribunal which had the jurisdiction to deal with Treaty and contractual issues), dressed up as a Treaty case. Having regard to all that has gone before, the Tribunal finds that the initiation of the present arbitration is thus an improper attempt to circumvent the basic principles set out in Convention Article 53 and the procedures available for revision and rectification of awards provided for in Article 51.*"
[13] ICSID Case No. Arb 12/2 (11 March 2013). See [72]: "*Accordingly, the Tribunal considers that it is necessary for it to enter a formal dismissal of the non-expropriation claims from these proceedings, pursuant to its powers under Rule 41(5).*"
[14] [118] and [119].

(4) unusually, given ICSID Tribunals are often reluctant to determine the correctness or otherwise of a Claimant's factual allegation on such r. 41(5) applications, a claim was dismissed on the basis that the Claimant's assertion that it possessed property rights was manifestly unsustainable: **Almasryia for Operating and Maintaining Touristic Construction Co LLC v Kuwait**.[15] The majority noted at [31] that in **Trans Global Petroleum v Jordan**, the Tribunal had stated "*it is rarely possible to assess the legal merits of any claim without also examining the factual premise on which that claim is advanced… The Tribunal need not accept at face value any factual allegation which the tribunal regards as (manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith; nor… accept a legal submission dressed up as a factual allegation. The Tribunal does not accept, however, that a tribunal should otherwise weigh the credibility or plausibility of a disputed factual allegation.*"[16]

17. Respondents should, however, carefully consider their position before invoking the r. 41(5) procedure.

18. Friedrich Rosenfeld's review of ICSID decisions concerned with r.41(5) concluded that:

> "*[i]n line with the applicable high standards [before a claim will be dismissed under r.41(5)], most of the hitherto applications under ICSID Arbitration Rule 41(5) have been unsuccessful*." [17]

19. Similarly, ICSID's table of "Decisions on Manifest Lack of Legal Merit" lists 33 decisions on this topic and indicates that only 4 have resulted in complete dismissal and 3 resulted in partial dismissal.[18]

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[15] ICSID Case No. ARB/18/2, majority decision (1 November 2019) [49]-[58], see esp. [58]: "*Once again, the Tribunal is of the view that, while it must take the facts as given by the Claimant as true, it is not to turn a blind eye as to what the evidence provided shows on its face. In this case, it is obvious that an essential element for the Claimant's expropriation claim is missing, i.e. the existence of property rights in accordance with the laws of Kuwait. Therefore, the legal premise that it owns 5% of the land which was expropriated by the Respondent manifestly lacks legal merit."*

[16] There was a further basis for the majority's decision, namely that the Claimant had failed to comply with the cooling off provisions in the Egypt-Kuwait BIT (i.e. a six-month period for negotiation prior to arbitration), majority decision: [34]-[48].

[17] Friedrich Rosenfeld, "Early Dismissal of Claims in Investment Arbitration" pp. 94 and 95 in Andreas Kulick (ed.), **Reassertion of Control over the Investment Treaty Regime** (Cambridge University Press) (2017).

[18] https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Manifest-Lack-of-Legal-Merit.aspx (accessed on 15 April 2020). So too, Jeffery Commission and Rahim Moloo's 2018 study noted that in 6 of 25 proceedings in which r.41(5) had at the time of their study been invoked, 3 resulted in a complete dismissal and 3 resulted in a

20. Rosenfeld has further noted that, in general, arbitral tribunals have adopted a "cost follows the event" procedure in respect of r.41(5), meaning that respondents who unsuccessfully attempt to have claims dismissed under r.41(5) are ordered to bear the costs of the procedure. Equally, however, the case law has examples of respondents succeeding in their application under the r.41(5) procedure and recovering costs from the claimant.[19]

21. Other institutional rules commonly adopted by parties in investment treaty arbitration are not as explicit in providing for a summary procedure for the determination of claims. By way of example, the UNCITRAL Rules[20] provide that the tribunal may conduct the arbitration in such manner as it considers appropriate and that each party must be given a reasonable opportunity of presenting its case (Art. 17(1)). Art. 17(3) provides that the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses or oral argument if "*at an appropriate stage of the proceedings any party so requests*."[21]

22. Such provisions are vaguer than r.41(5), allowing for potential dispute as to the appropriate procedure to be adopted on a case-by-case basis. They do not provide the same clear procedural mechanism for the summary determination of claims provided by ICSID Arbitration r.41(5).[22] This is an example of how the selection of the legal regime pursuant to which arbitral proceedings will be conducted should be carefully

partial dismissal with the other 19 applications under r.41(5) failing in their entirety: Jeffery Commission and Rahim Moloo, **Procedural Issues in International Investment Arbitration** (Oxford University Press) (2018) [9.27].

[19] See the award in **RSM v Grenada** (10 December 2010) [8.3.4]: "*In this case, each of the parties has asked the Tribunal to exercise its discretion under Article 61, based on the principle that such costs should follow the event. Having regard to its' conclusions that Claimants present claims are manifestly without legal merit, and that, it was impermissible for Claimants to advance them in new ICSID proceedings, the Tribunal considers it appropriate that Respondent should be fully indemnified for all of its costs, reasonably incurred or borne, in this proceeding.*"
Readers interested in further detail on r.41(5) are referred to Rosenfeld's paper cited above.

[20] With new article 1, paragraph 4, as adopted in 2013.

[21] Commission and Moloo, **Procedural Issues in International Investment Arbitration**, [9.22]: "*There is currently no equivalent procedure for early dismissal [under ICSID Arbitration r.41(5)] in cases under the UNCITRAL Arbitration Rules, absent a mechanism established in the treaty...*"

[22] This is not to say summary determination necessarily would not be available under the UNCITRAL Rules, merely that there is not the same clear procedural mechanism as provided for in ICSID Arbitration r.41(5).
It is to be noted that the proposed amendments to the ICSID arbitration rules dated February 2020 (Working Paper No. 4) contain, in proposed rule 41, a provision enabling claims to be dismissed for manifest lack of legal merit. Proposed arbitration rule 52(2) provides that "*The Tribunal shall award the party prevailing on an objection made pursuant to Rule 41 its costs of submitting or opposing the objection, unless the circumstances justify a different allocation of costs in accordance with paragraph (1)*."

considered by the parties and can affect the measures available to respond to recalcitrant tactics.[23]

Delay

23. The means by which investment treaty arbitral proceedings can potentially be disrupted through delaying tactics by a recalcitrant party are multitudinous. For example, a party might refuse to participate in proceedings at all. Recalcitrant parties might also file pleadings and evidence late in breach of procedural orders.

24. The arbitral rules commonly applicable to investment treaty arbitrations have provisions which target non-participation.

[23] Parties in a dispute to which the ICSID Arbitration Rules apply that are faced with unmeritorious claims but which do not meet the threshold required to succeed in an application under r.41(5) may also consider making an application for security for costs. ICSID Arbitration Rule 39(1) states that "*At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures*." Nonetheless, in practice it has proved difficult for parties to succeed in security for costs applications with the Tribunal in **RSM v Grenada** stating in its decision on the Respondent's Application for Security for Costs (14 October 2010) that: "*In an ICSID arbitration, it is also doubtful that a showing of an absence of assets alone, would provide a sufficient basis for such an order. First, as was pointed out in Lihananco, it is far from unusual in ICSID proceedings to be faced with a Claimant that is a corporate investment vehicle, with few assets, that was created or adapted specially for the purpose of the investment. Second, as was noted by the Casado Tribunal, it is simply not part of the ICSID dispute resolution system that an investor's claim should be heard only upon the establishment of a sufficient financial standing of the investor to meet a possible costs award*." In that case, the security application was denied. Further commentary on this matter can be found in Webster, **Handbook of Investment Arbitration**, [C-39-20] to [C-39-22].
It should be noted that there is an example of a security for costs application succeeding in an ICSID arbitration, namely: **RSM Production Corporation v Saint Lucia**; ICSID Case No. Arb/12/10 (13 August 2014) where the claimant was ordered to post security for costs in the form of an irrevocable bank guarantee for US$750,000 within 30 days of the decision ([90]) albeit the Tribunal emphasised in the course of its award that security for costs would only be granted in "*exceptional cases*" ([75]). The respondent in that case pointed to, *inter alia*, the fact that the claimant had failed to satisfy costs awards made against it in previous ICSID arbitrations ([76]-[82]).
By contrast, the UNCITRAL Rules provide that one of the provisional measures that may be ordered against a party (pursuant to Art. 26(2)(c)) is to "*[p]rovide a means of preserving assets out of which a subsequent award may be satisfied*." Webster, **Handbook of UNCITRAL Arbitration** (Sweet & Maxwell) (3rd Ed.) (2019) confirms at [26-63] and [26-64] that the provision was intended to cover security for costs but notes that arbitral practice in respect of ordering, or refusing to order, security costs has varied between tribunals. Webster says that parties applying for such an order "*should provide precedents as to when security for costs has been ordered or has been refused and not simply rely on general principles*." Webster provides further discussion on when security for costs might be granted in the subsequent paragraphs.
The amended UNCITRAL *Notes on Organising Arbitral Proceedings* (United Nations) (2016) confirm in respect of interim measures at [64] that: "*The party requesting an interim measure may be required by the arbitral tribunal to provide security for possible costs and damages arising therefrom*."
It is to be noted that the proposed amendments to the ICSID arbitration rules dated February 2020 (working paper no. 4) contain a provision which would expressly provide for security for costs and allows for the discontinuance of the proceeding if a security for costs order by the Tribunal is not met (Rule 53 of the proposed amended ICSID arbitration rules).

25. For example, Rule 42 of the ICSID Arbitration Rules provides for a party which fails to appear or present its case at any stage of the proceeding (referred to in r.42 as a "*defaulting party*") to be notified of a request by the other party to deal with the questions submitted to the Tribunal. The Tribunal is then to provide a grace period which, unless the other party consents, should not exceed 60 days following which the Tribunal shall resume consideration of the dispute. Failure by the defaulting party to appear or to present its case shall not be deemed an admission of the assertions made by the other party (r.42(3)). Rule 42(4) then provides (emphasis added):

> "*The Tribunal shall examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied,* ***decide whether the submissions made are well-founded in fact and law.*** *To this end, it may, at any stage of the proceeding, call on the party appearing to file observations, produce evidence or submit oral explanations*."

26. Accordingly, r.42(4) does not provide for the automatic issuance of a "default judgment" upon a party's failure to appear such as is sometimes found in national Court systems. This is consistent with Article 45(1) of the ICSID Convention which provides: "*(1) Failure of a party to appear or to present his case shall not be deemed an admission to the other party's assertions*."[24]

27. So too, the UNCITRAL Rules have similar (but not identical) provisions to deal with the practice of a recalcitrant party refusing to participate in the arbitration. Under Article 30(1)(b), if the Respondent fails to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order the proceedings to continue "*without treating such failure in itself as an admission of the claimant's allegations*."[25]

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[24] Article 45(2) of the ICSID Convention provides: "*If a party fails to appear or present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.*"
Readers interested in further commentary on ICSID r.42(4) are referred to Thomas H. Webster's commentary on the provision in **Handbook of Investment Arbitration** (Sweet & Maxwell) (2012) which, among other things, analyses the different approaches adopted by tribunals when faced with parties that claim to be barred from participating owing to anti-arbitration injunctions. The commentary notes that where such injunctions are issued by the Courts of the state concerned, or where it is obtained by an affiliate of the investor concerned, the arbitration will in general proceed. "*In that case, the party may well have caused its inability to act*." Webster notes the "*more difficult situation where the court order is issued by a genuine third party to prevent the arbitration. In such cases, one would expect that the arbitration would proceed given the primacy of the rights of the party to the arbitration*." It is to be noted that the working paper which accompanied the proposed amendments to the ICSID arbitration rules dated February 2020 (working paper no. 4) provides for a defaulting party procedure in proposed rule 49.

[25] Commenting on Article 30(1)(b) of the UNCITRAL Rules, Jan Paulsson and Georgios Petrochilos state in **UNCITRAL Arbitration** (Wolters Kluwer) (2018) p. 268: "*As such, arbitral tribunals acting under the Rules are unable to render the equivalent of a national court's "default judgment". The claimant or counterclaimant*

See also Art. 30(2) of the UNCITRAL Rules[26] and Article 6 of the ICC Rules (which also, as with the ICSID Arbitration Rules do not provide for a "default" judgment procedure such as might be found in national courts).[27]

28. The rules cited above also provide a means for dealing with parties that request late extensions of time for filing pleadings and evidence. Such parties run the risk, if such extensions are not granted, of being found to have failed to present their case and of proceedings continuing in their absence.[28]

29. Delay tactics, such as late requests for extensions of time for filing pleadings and evidence, can also be sanctioned with costs awards. ICSID Tribunals have, pursuant to Article 61(2) of the ICSID Convention, a broad discretion with regards to allocation of

must make out both the jurisdictional and substantive merits of its case, without benefiting from a lighter burden of proof. The tribunal should, "without substituting itself for the defaulting party, satisfy itself that the claimant's claims are well-founded in law and fact", and produce a reasoned award."

[26] Art. 30(2) UNCITRAL Rules: *If a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.*"

[27] See in particular Art. 6(8) of the ICC Rules which provides: "*If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure.*" Commenting on this provision, Thomas H. Webster and Michael W. Buhler state in **Handbook of ICC Arbitration** (Sweet & Maxwell) (3rd Ed.) (2008) [6-120]: "*The more complex issue, which is discussed under art. 25, is how the Tribunal should proceed if a party fails to participate or refuses to participate. The main point in this respect is that arbitral proceedings do not provide for default Awards. Therefore, even if a party fails to take part in the arbitral procedure, the Tribunal must proceed to determine the facts of the case and give a reasonable opportunity to the defaulting party to participate or to present its case*." Readers are advised that a fourth edition of this work is now available (Sweet and Maxwell) (2018), although owing to the coronavirus restrictions the authors have been unable to obtain a copy in the presentation of this paper.

[28] See Rule 26(3) of the ICSID Arbitration Rules: *"(3) Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise."*
It is to be noted that the proposed amendments to the arbitration rules in working paper no. 4 dated February 2020 provide in Rule 11 appear designed to emphasise the importance of adhering to time limits even more than the rules as currently formulated: "*(1) The time limits in Articles 49, 51 and 52 of the Convention cannot be extended. An application or request filed after the expiry of such time limits shall be disregarded. (2) A time limit prescribed by the Convention or these Rules, other than those referred to in paragraph (1), may only be extended by agreement of the parties. A procedural step taken or document received after the expiry of such time limit shall be disregarded, unless the parties agree otherwise or the Tribunal decides that there are special circumstances justifying the failure to meet the time limit. (3) A time limit fixed by the Tribunal or the Secretary-General may be extended by agreement of the parties or the Tribunal, or the Secretary-General if applicable, upon reasoned application by either party made prior to its expiry. A procedural step taken or document received after the expiry of such time limit shall be disregarded, unless the parties agree otherwise or the Tribunal, or the Secretary-General if applicable, decides that there are special circumstances justifying the failure to meet the time limit. (4) The Tribunal may delegate the power to extend time limits to its President.*"

costs[29] and have taken account of the recalcitrant practices of parties in deciding costs allocation.[30]

Evidentiary abuses

30. Evidentiary abuses can come in many forms from seizing documents, to a failure to disclose or wilful destruction. These abuses too can, and have been, dealt with by costs sanctions not just at final award stage but also through the application of interim costs orders. By way of example, the Tribunal in **Hassan Awadi, Enterprise Business Consultants, Inc. and Alfa El Corporation v Romania**[31] ordered in the final award that the Respondent was to pay 50% of the Claimants costs incurred for gaining access to documents "*seized in the frame of criminal investigations*".

31. The cases also provide a variety of examples of Tribunals in ICSID arbitrations ordering the preservation of documents pursuant to its powers to order interim relief under r.39[32] (a provision which has already received consideration in footnote 23 above). So too, Article 26(1)(d) of the UNCITRAL Rules provides that one of the interim measures the

[29] With commentators noting that ICSID Tribunals are increasingly moving away in their final costs awards from ordering each party to pay their own costs to a "costs follow the event" rule whereby the winning side has its costs (or a portion of them) borne by the loser: Webster, **Handbook of Investment Arbitration**, [A-61-3] to [A-61-34].

[30] The Tribunal in **Waguih Elie George Siag & Clorinda Vecchi v The Arab Republic of Egypt**; ICSID Case no. ARB/05/15 (1 June 2009) (discontinuance of annulment proceedings) stated: "*[621] Having considered all of this material the Tribunal finds that it is appropriate in this case for the losing party to bear the reasonable costs of the successful party in these proceedings… Moreover, in view of the repeated and belated re-formulated jurisdictional arguments advanced by Egypt, all of which have failed, the Tribunal is of the opinion that Egypt was responsible for greatly increasing the costs of these proceedings*."

[31] ICSID Case No. Arb 10/13 (2 March 2015) ([532]).

[32] A useful summary of some of the decisions appears in Katia Yannaca-Small (ed.), **Arbitration under International Investment Agreements: A Guide to the Key Issues** (2nd Ed.) (Oxford University Press) (2018) [24.66]: "*ICSID Tribunals have granted measures aimed at the protection of evidence. The **Biwater** tribunal, for example, recommended that the respondent preserve certain documents and make an inventory of given categories of documents. In **Border**, the tribunal directed the respondent not to visit claimants' offices to inspect share registers of the claimant's parent companies following a decision of the Attorney General and ordered it to abide instead by the procedure for production of documents in the ICSID arbitration. In an earlier case, **Agip v Congo**, the tribunal had granted the claimant's request for measures requiring the government to collect all the documents kept at Agip's local office, furnish a complete list of these documents to the tribunal, and keep them available for presentation to the tribunal on Agip's request. In another case, **Vacuum Salt v Ghana**, the claimant sought an order to preserve its corporate records. The government gave a voluntary undertaking that it would not deny the claimant access to its records, which was acknowledged by the tribunal. In **Ablacat v Argentina**, the tribunal ordered the claimants to refrain from altering or destroying certain documents, including powers of attorneys. Measures protecting the evidence include preserving access to potential witnesses. In **Quiborax**, the suspension of the criminal proceedings was in part ordered so that witnesses could be free to participate in the ICSID arbitration.*"

Tribunal may order is for a party to "*preserve evidence that may be relevant and material to the resolution of the dispute*."

32. The issue of adverse inferences arising from a failure to disclose provides, however, an example of divergence between different arbitral rules.

33. The ICSID rules do not expressly provide for adverse inferences to be drawn from a failure to disclose, although they do contain a provision which is often thought to permit such inferences to be drawn. ICSID Arbitration Rule 34(3) provides (emphasis added):

> "*The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take* ***formal note*** *of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure*."[33]

34. The UNCITRAL Rules similarly do not expressly provide for adverse inferences to be drawn although they do contain a provision (Article 27(4)) which various commentators consider permits the drawing of adverse inferences:

> "*The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered*."[34]

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[33] See, for example, Commission and Moloo, **Procedural Issues in Investment Arbitration** [7.20]: "*If a party does not comply with its obligations to produce evidence, the tribunal must take formal note of such failure and any reasons given by the delinquent party. The tribunal in* ***Rompetrol v Romania*** *noted that this rule authorizes a tribunal to draw "whatever inferences it deems appropriate" when a party fails to produce evidence it was expected to produce. The rule's authorization of a tribunal to consider "any reasons" for a failure to produce documents, as well as its use of the phrase "take formal note of", indicate that adverse inferences may not always be appropriate and that a party's failure to produce documents may sometimes be excused*."

[34] Paulsson and Petrochilos, **UNCITRAL Arbitration**, p. 240: "*Article 27(4) also provides a foundation for a tribunal's power to draw adverse evidential inferences, as discussed above. The provision allows the tribunal to assess the "materiality and weight of the evidence offered". This means that the tribunal may, and in fact must, assess the totality of the evidential file. In so doing, the tribunal must assess evidence that could or ought to have been offered but was not in fact offered by either or both parties*."

David D. Caron and Lee M. Caplan, **The UNCITRAL Arbitration Rules: A Commentary** (2nd Ed.) (Oxford University Press) (2013) state on pp. 570-571 (emphasis added): "*Whatever the standard justifying the issuance of production orders, compliance with such orders is quite another matter. An international tribunal like the Iran-US Claims Tribunal has no direct means of enforcing its orders; nor do the UNCITRAL Rules provide for any sanctions in case of non-compliance. This, however, does not mean that the arbitral tribunal is entirely without means to elicit respect for its orders. Instead of waiting silently it may ask a party to submit specific explanations as to why it has not followed a production order.* ***If the documents are not produced and no satisfactory explanations are provided, the arbitral tribunal may in some cases entertain the possibility of drawing a negative inference from the party's failure to respond.*** *This sanction, however, presupposes that the arbitrators are convinced that the party in question has access to the documents and that these documents are essential to the disposition of the case. Otherwise, the possibility of a successful court challenge against the award, or difficulties in its enforcement, may arise*."

Relatedly, the amended UNCITRAL **Notes on Organising Arbitral Proceedings** (United Nations) (2016) in [74] and [75] expressly contemplate that the Tribunal may not accept late submissions of evidence: "*74. The arbitral tribunal may clarify the consequences of late submissions of evidence and how it intends to deal with requests to*

35. The **IBA Rules on the Taking of Evidence in International Arbitration** (International Bar Association) (2010) ("the IBA Rules") in Articles 9(5) and 9(6),[35] by contrast, expressly provide for the drawing of adverse inferences. Consequently, these provisions in the IBA Rules may mean that parties to disputes governed by the ICSID Arbitration Rules (and the UNCITRAL Rules) may be well advised to seek to establish at some early stage of the arbitration (for instance, in the issuance of the first procedural order) that the IBA Rules will apply or will be able to be used as guidance in their dispute.[36] This will put beyond doubt that adverse inferences may potentially be drawn from a failure to disclose. Furthermore, the express reference to such a power in the IBA Rules may also encourage the Tribunal to exercise its power to draw adverse inferences in the event that such a failure occurs.

36. An additional strength of the IBA Rules is that pre-amble 3 expressly provides that the parties shall conduct the taking of evidence in good faith, providing a further basis for the Tribunal to impose sanctions should a party not conduct itself in the appropriate manner.[37]

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accept late submissions. It may require a party seeking to submit evidence after the time limit to provide reasons for the delay. The arbitral tribunal, in determining whether to accept late submissions, would need to consider the procedural efficiency achieved by refusing late submissions, the possible usefulness of accepting them, and the interests of the parties (for example, providing the other party an opportunity to comment or submit its own further evidence in response to the late submission).
75. The arbitral tribunal may remind the parties that if a party makes submissions that were not scheduled, the arbitral tribunal may consider whether to accept such submissions. Also, if a party is requested to submit evidence to support its case but fails to do so within the time limit without showing sufficient cause for such failure, the arbitral tribunal may make the award solely on the evidence before it."

[35] Article 9(5) (emphasis added): "*If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal,* ***the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.***"
Article 9(6) (emphasis added): "*If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced,* ***the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.***"

[36] Commission and Moloo, **Procedural Issues in Investment Arbitration**, note in [2.21] that parties "*often decide to adopt, either as binding on the tribunal or as guidance*" the IBA Rules.

[37] Detailed commentary on the good faith condition in the pre-amble is provided in Roman Khodykin and Carol Mulcahy **A Guide to the IBA Rules on the taking of evidence in international arbitration** (Oxford University Press) (2019) [2.40]-[2.107]. Further commentary on the use of "good faith" by arbitration tribunals to refuse to admit improperly obtained, fabricated or manipulated evidence to the arbitral record is provided by Emily Siporski **Good Faith Investment in International Investment Arbitration** (Oxford University Press) (2019) [7.43]-[7.52].

Unmeritorious challenges to arbitrators

37. Unmeritorious challenges to arbitrators have become a standard procedural tactic employed in ICSID arbitrations. Commission and Moloo's survey of ICSID proceedings in their work **Procedural Issues in International Investment Arbitration** makes for sobering reading:

> "*[4.01] In 1964, during the drafting of the ICSID Convention, it was suggested that "the disqualification of a member of an arbitral tribunal for lack of independence was a serious weapon which parties to the dispute might be very reluctant to use." More than fifty years later, the use of that "serious weapon" has become commonplace, in terms of both frequency and application. Between 1982 and 2017, parties filed 121 disqualification proposals in ICSID proceedings. These include not only original arbitration proceedings, but also post-award proceedings, such as rectification, interpretation and annulment proceedings…*
>
> *[4.07] …Not all disqualification proposals resulted in a final decision: in two arbitrations proposals were withdrawn; in two arbitrations proceedings were discontinued before a decision on the disqualification proposal; in one arbitration, the proceeding was suspended prior to a decision; and in twenty-three arbitrations, the challenged arbitrator resigned prior to a decision by the unchallenged arbitrators.*
>
> …
>
> *[4.09] Of the ninety-three disqualification proposals that resulted in a decision, five proposals were upheld (5%), and eighty-eight were declined (95%)…*"

38. Equally sobering is a perusal of Appendix 3A to Commission and Moloo's work which summarises key details of challenges to arbitrators. It is not uncommon to see figures of well over one hundred days between the proposal to remove an arbitrator and the decision on the proposal being made. In many other cases, there are figures of around 50 days.

39. Some protection from the abuse of the procedure to challenge arbitrators is provided in the "*promptness*" requirement under ICSID Arbitration Rule 9(1):

> "*A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention*[38] *shall promptly, and in any event before the proceeding is*

[38] Article 57 of the Convention provides: "*A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV*."

declared closed, file its proposal with the Secretary-General stating its reasons therefor."

40. Commission and Moloo note that:

> "*[4.14] …In practice, tribunals have generally held that a proposal made within one month or less upon learning of the underlying facts which gave rise to the proposal is considered promptly filed for Arbitration Rule 9(1) purposes*."[39]

41. Furthermore, with only 5% of challenges that reach decision resulting in a successful challenge, parties may be relatively safely assured that the ICSID Arbitration Rules are relatively robust in ensuring that unmeritorious challenges do not regularly result in the wrongful dismissal of an arbitrator.[40]

42. Where the ICSID system appears to be more obviously under strain, however, is in respect of the time for determination of the challenges, particularly in the light of the fact that only 5% succeed. As noted above, such challenges commonly take considerable time to determine.[41] Furthermore, in certain circumstances the decision in respect of dismissal is to be taken not by the unchallenged arbitrators but by the Chairman of the ICSID Administrative Council.[42] Rule 9(5) of the ICSID Arbitration Rules provide that the Chairman shall use his best efforts to take that decision within 30 days after he has received the proposal. Commission and Moloo's survey reveals,

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Article 14(1) provides: "*Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators*."
Section 2 of Chapter IV for its part contains various requirements such as that (Article 39) (by way of example only): "*The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties*."

[39] The proposed amended ICSID arbitration rules dated February 2020 provide that a proposal for disqualification shall be filed within 21 days of the later of the constitution of the tribunal or the date on which the party proposing the disqualification first knew or should have known the facts on which the proposal is based (proposed rule 22).

[40] The 5% figure comes from Commission and Moloo's 2018 study. The ICSID table of Decisions on Disqualification indicates (similarly to Commission and Moloo's study) that in the vast majority of cases, the application for disqualification is declined: https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Disqualification.aspx (accessed 15 April 2020).

[41] The proposed amendments to the ICSID Rules contain timetabling provisions designed to shorten the time for challenge to arbitrators.

[42] ICSID Convention, Article 58: "*The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV."*

however, that disqualification proposals decided by the Chairman are regularly decided well in excess of 30 days citing 7 decisions taking 30-60 days, 3 decisions taking 60-90 days, 3 decisions taking 90-120 days and 3 decisions taking in excess of 120 days.[43]

43. The prospect of delay is particularly concerning given Rule 9(6) of the ICSID Arbitration Rules provides:

> "*The proceeding shall be suspended until a decision has been taken on the proposal*"

44. Webster states, commenting on this provision (emphasis added):

> "*Arbitration Rule 9(6) requires suspension of the proceedings until a decision has been made on the proposal for disqualification.* ***In this respect the Arbitration Rules differ from those of many if not most arbitral institutions that provide the Tribunal with the possibility of suspending proceedings. The justification for the difference is that the proceeding regarding disqualification is intended to be rapid under the Arbitration Rules.*** *Nevertheless, this requirement could lead to disruption of arbitral proceedings where the proposal for disqualification is made shortly prior to the evidentiary hearings for example*."[44]

45. By contrast, Paulsson and Petrochilos in commenting on Article 13 of the UNCITRAL Rules (which provides the procedure for challenging arbitrators) note:

> "*The rules do not spell out whether the tribunal is entitled to continue with the proceedings pending a challenge, but nor do they state that the proceedings must be stayed… In the authors' submission, the tribunal may, subject to the lex arbitri, decide to proceed pending a challenge taking into account the stage of the arbitration, the perceived seriousness of the challenge, and any possible need to retain its functions for the sake of orderly proceedings, for example to issue interim measures or uncontroversial procedural documents such as the timetable of the proceedings*."[45]

46. Again, therefore, there may be significantly different scope for Tribunals to respond to recalcitrant tactics depending on the arbitral regime that is adopted. There is a risk, given the suspension provided for by r.9(6) of the ICSID Arbitration Rules that parties are incentivised to make unmeritorious challenges not because they have genuine concerns about an arbitrator but in order to obtain a perceived tactical benefit of

[43] Commission and Moloo, **Procedural Issues in International Investment Arbitration**, [4.22].
[44] Webster, **Handbook of Investment Arbitration**, [C-9-27].
[45] Paulsson and Petrochilos, **UNCITRAL Arbitration**, p. 96.

suspended proceedings.[46] By contrast, the latitude provided by the UNCITRAL Rules may mean that Tribunals elect to continue the arbitral proceedings even if an unmeritorious challenge were made.

Witness or party intimidation

47. The darker arts of arbitral abuses consist of practices such as witness or party intimidation; tactics so repugnant to principles of justice that to describe them as merely "recalcitrant" is a significant understatement.

48. One obvious way of potentially dealing with such underhand tactics is to disclose them to the Tribunal. ICSID Tribunals have in the past expressly addressed such behaviour by issuing Procedural Orders warning against such wrongful acts.[47] The advantage of such an approach is that it alerts the recalcitrant party to the fact that the Tribunal is aware of, or suspects, their improper practices. Such parties may then be inclined to desist, aware that such a perception does no benefit to their case.

49. The more extreme the abuses, the more extreme the remedies that have been proposed in the academic literature to deal with them. These include the exclusion of parties from proceedings or the dismissal of the offending party's case in its entirety. However, a study has shown that Tribunals rarely if ever resort to such extreme measures, in practice preferring for less extreme remedies such as adverse inferences or costs awards.[48]

50. It may be that parties resort to more imaginative methods to protect themselves against such unethical behaviour. If, for instance, the parties have agreed that the IBA Guidelines on Party Representation in International Arbitration are to apply, there are potentially far-reaching remedies if the party's representative has been involved in the misconduct.[49]

[46] In this regard, it is notable that the proposed amendments to the ICSID rules dated February 2020 provide in Rule 23(2) "*(2) The proceeding shall be suspended upon the filing of the proposal until a decision on the proposal has been made, except to the extent that the parties agree to continue the proceeding.*"
[47] Examples are provided in Horvath and Wilske (eds.), **Guerilla Tactics in International Arbitration**, p. 40.
[48] Abba Koloo, "Witness Intimidation, Tampering and Other Related Abuses in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal" in **Arbitration International, vol. 26 No. 1**, p. 83.
[49] "*26. If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may: (a) admonish the Party Representative; (b) draw appropriate inferences in assessing the evidence relied upon, or the legal*

51. Our own experience is that ignoring tactics such as party intimidation is often the best way to deal with them. The problem is often that it would be difficult to prove such allegations were they to be made before the Tribunal. We have found that ignoring such tactics often dissuades recalcitrant parties from continuing to utilise them when they discover they are not efficacious.

Conclusion

52. The above is an introduction to the wide range of responses that are potentially available to parties and Tribunals confronted with recalcitrant tactics. Which measure is suitable for selection will be highly dependent on the particular circumstances of each case and the nature of the abuse in question.

53. The above discussion has, however, aimed to show that the governing arbitral regime can significantly affect how such recalcitrant practices are able to be, and likely to be, confronted. Accordingly, careful consideration before entering into legal relationships should be given as these may affect the arbitral regimes a party finds itself operating under in a high-value dispute. Careful consideration is also required at the outset of a dispute (for example, in respect of seeking the application of measures such as the IBA Rules in Procedural Order No. 1) to ensure as fair a procedural playing field as possible.

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16 April 2020

arguments advanced by, the Party Representative; (c) consider the Party Representative's Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative's Misconduct leads the Tribunal to a different apportionment of costs; (d) take any other appropriate measure in order to preserve the fairness and integrity of the proceedings."