HENSHAW J TALK TO COMMONWEALTH SOLICITORS GENERAL PLENARY CONFERENCE ON 19 JUNE 2025

"The English judiciary's approach to arbitration and enforcement of awards and judgments"

1. Thank you very much for inviting me to speak at your Plenary Meeting. It is a privilege to have the chance to address such distinguished company.

2. I would like to speak about three topics. First, the English court's approach in general to arbitration, including to challenges made to arbitration awards. Secondly, recent developments in cases where a party has commenced legal proceedings in breach of the parties' agreement to arbitrate. Thirdly, some aspects of the new Arbitration Act 2025 and its potential impact.

3. As a lead-in to the first topic, it might be useful to start with the benefits of having a thriving arbitration process in one's country. It is sometimes said that arbitration is more efficient and less expensive than court litigation, and it often is. However, for balance, I should make the point that a well run and properly resourced court system may deal with cases at least as quickly as arbitration, because the court should be in a strong position to compel parties to keep to timetables laid down by the court. And as to cost, parties often use the same kind of legal team in arbitration as they would in court litigation (in addition to paying the arbitrators themselves). Nonetheless, arbitration has at least four other, real, benefits.

4. First, it enables the parties to choose the tribunal, or at least how it will be selected: a factor of particular importance in specialist areas. For instance, by far the largest arbitration body in England, measured by volume of cases, is the London Marine Arbitrators Association. In 2024 it made 3,006 arbitrator appointments in an estimated 1,733 references, and its arbitrators made a total of 478 awards. LMAA arbitrators tend to be people who have spent their careers involved in one way or another with the business of shipping and international

sales. Another example of a busy specialist arbitral body is GAFTA, the Grain and Feed Trades Association.

5. The second benefit is confidentiality, which is rarely available in court proceedings.

6. Thirdly, arbitration can provide finality: provided the supervising court's powers and practice make intervention the exception rather than the norm. I note in parenthesis that court litigation can also often bring finality relatively quickly, so long as the appeal court is able to screen cases via an effective permission to appeal mechanism.

7. Fourthly, arbitration awards are potentially more readily enforceable in a wider range of countries than is sometimes the case with court judgments, especially in countries that are parties to the 1958 New York Convention.

8. Turning to the court's role, we see arbitration as needing help from the supervising court in at least five important ways. These are:

   i) support (appointment of an arbitrator, grant of a freezing injunction in aid of arbitration);

   ii) protecting the arbitration agreement (e.g. stays of court proceedings, anti-suit injunctions);

   iii) making arbitration effective (enforcement of awards);

   iv) control (the setting aside regime and grounds for refusing enforcement); and

   v) developing the law in respect of arbitration and commerce by published decisions in arbitration-related and other commercial cases.

9. Focussing for a moment on the fourth of these, control, the court provides a necessary backstop for the few cases where something goes badly wrong. We had a well-known example in the case *Republic of Nigeria v Process & Industrial Developments* [2023] EWHC 2638 (Comm), where my colleague Robin Knowles J concluded that an arbitration award had been procured by fraud. More recently, in *Republic of Kazakhstan v World Wide Minerals* [2025] EWHC 452 (Comm), a panel of very senior and distinguished arbitrators

omitted to deal with a key causation issue, even after court had remitted to them to deal with it. The award was set aside a second time, Bryan J saying this in his judgment:

> "If ever there was a case where there was a failure to comply with the due process of the arbitral proceedings by a tribunal failing to deal with a central issue that was put to it, then this was it, with the failure of the Tribunal to deal with the Counterfactual Case. In such circumstances, justice calls out for that serious irregularity to be corrected." (§ 151)

Similarly, on 2 June I handed down judgment in *Commodity and Freight Integrators DMCC v GTCS Trading DMCC* [2025] EWHC 1350 (Comm), holding that an arbitral appeal board had erred as regards jurisdiction, procedural irregularity and error of law.

10. However, those cases are the exception rather than the norm. It is important for court intervention to be restrained, otherwise the advantage of finality is lost and the parties may lose some of the benefits of their decision to choose arbitration. Restraint in itself has three elements.

11. First, the statutory provisions defining the court's powers. The UNCITRAL Model Law allows awards to be set aside in various instances including where a party was unable to present his case, or the award conflicts with public policy. I shall return to public policy in a minute. As regards procedural unfairness, section 68 of the UK's Arbitration Act 1996 contains language making clear how the court should usually defer to arbitrators' judgment on matters of procedure. The court can set an award aside on this ground only if there is "*serious procedural irregularity*" causing "*substantial injustice*".

12. Secondly, the case law or guidelines. English case law, for example, indicates that procedural irregularity challenges should be allowed only *"in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected"* (*Konkola Copper Mines v U&M Mining Zambia Ltd* [2014] EWHC 2374 (Comm) at [14], *RAV Bahamas Ltd v Therapy*

Beach Club [2021] UKPC 8).[1] That is the test Bryan J alluded to in the passage I read out from the *Kazakhstan* case. Similarly, in deciding whether arbitrators have dealt with the issues put to them, and more generally, *"A number of cases have emphasised that the court should read the Award in a reasonable and commercial way and not by nitpicking and looking for inconsistencies and faults"* (*Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm) per Flaux J. at [30]).

13. Thirdly, it is useful to have a defined group of commercial judges who deal with arbitration applications, so that the correct approach becomes a habit of mind. The *Kazakhstan* case is one of only a handful of procedural irregularity challenges that have succeeded in the Commercial Court over the last few years. For example, there were only three successful such challenges in the six legal years up to and including 2023/24.[2] Looking at challenges overall, the Commercial Court's annual report for 2023/24 published in March indicates that there was a higher than usual number of arbitration challenges, but at 118 challenges out of well over three thousand awards a year in London the number of challenges remained tiny: and only two of them succeeded.[3]

14. Similarly, a refusal to recognise or enforce an arbitration award is a rarity. Article V(2)(b) of the New York Convention allows refusal where recognition would be contrary to the public policy "*of that country*" i.e. the enforcing country. Provisions reflecting that are found in the UNCITRAL model law Articles 34(2)(b)(ii) (setting aside) and 36(1)(b)(ii) (refusal of enforcement): these apply where the court finds that the award/recognition or enforcement of the award would be "*in conflict with the public policy of this State*" or "*contrary to the public policy of this State*". Our Arbitration Act in section 103(3) allows the court to refuse to recognise/enforce a NYC award if it "would be contrary to public policy". That is similar to the ground of challenge for a UK-seated

[1] Similarly, it has been said that a challenge under section 68 involves a "high hurdle" and there will be a serious irregularity only if what has occurred is far removed from what could reasonably be expected from the arbitral process: *Islamic Republic of Pakistan v Broadsheet LLC* [2019] Bus LR 2753 at [17].
[2] 23/24 0; 22/23 0; 21/22 0; 20/21 1; 19/20 1; 18/19 1
[3] Jurisdiction challenges: 1 success out of 24 applications. Serious procedural irregularity: 0 out of 37; Appeal on point of law: 1 success out of 57. Total 2 success out of 118 applications.

award in section 68(2)(g) based on "*the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy*".

15. It is notable that the International Law Association (ILA) 2002 recommendations say that this ground for refusal of recognition should be confined to 'international public policy', and the ICCA (International Commercial Council for Arbitration) Guide to the New York Convention (p.107) says that most countries have taken that restrictive approach, adopting substantive norms from international cases. The ICCA Guide gives examples such as an award made after parties had reached a settlement that was concealed from the arbitrators.

16. In practice, the English courts have taken a very narrow approach to public policy. In *Soleimani* [1998] 3 W.L.R. 811, an award based on a contract to smuggle carpets out of Iran was found to be contrary to public policy, as was the award procured by fraud in the *Republic of Nigeria* case I have already mentioned. Both were obviously extreme cases. By contrast, in *Westacre Investment v Jugoimport* [1999] 2 Lloyd's Rep. 65 the court found an award founded on a contract for consultancy services for the sale of military equipment to Kuwait not to be contrary to public policy, deferring to the arbitrators' conclusion that the contract had not been brought about by bribery.

17. Turning now to my second topic, there have been several cases over the last year or two where the court's intervention has been sought where a party has commenced legal proceedings contrary to the parties' agreement to arbitrate. These problems have often arisen in contexts where an individual or entity is a sanctioned person. Such persons sometimes respond with legal proceedings in a non-contractual forum against the counterparty or one or more of its affiliates.

18. The English courts have in some cases found that to be in breach of the contractual obligations contained in an exclusive jurisdiction or arbitration clause. Thus in *Eurochem North-West-2 v Tecnimont* in 2023[4] Eurochem NW and Tecnimont were parties to a contract with an arbitration clause. A dispute arose about whether Eurochem was owned or controlled by a sanctioned person.

[4] *Eurochem North-West-2 v Tecnimont* [2023] EWCA Civ 688: see, in particular, §§ 62-65 and 127.

Tecnimont intervened in a judicial review claim in Italy involving one of Eurochem's affiliates raising that same issue. The majority of the Court of Appeal held that to be a breach of the arbitration clause. Carr LJ (now our Lady Chief Justice) said:

> "At the fundamental core, Tecnimont was seeking to litigate in Italy the very issue that it had agreed with EuroChem NW to address exclusively in London arbitration proceedings." (§ 64)

Tecnimont argued that the arbitration clause did not cover disputes with affiliates. However, Lewison LJ pointed out that that very strict interpretation of the arbitration agreement ignored the underlying reality. There was no evidence that Tecnimont had any real dispute with the affiliate: its intervention in the Italian proceedings was no more than a vehicle by which it hoped to engage in a proxy war with Eurochem NW.

19. Dicta in a more recent case, *Renaissance Securities (Cyprus) v Chlodwig Enterprises*[5], also support the view that trying to litigate a dispute via a claim against an affiliates may be breach of the contractual obligations contained in an arbitration clause. The defendants there issued tort claims in Russian against the claimant's affiliates. Males LJ noted that even if those claims were valid under Russian law, their only purpose was to circumvent the arbitration clause, and it was at least arguably necessary for business efficacy, and so obvious that it went without saying, to imply a term that the defendants would not circumvent the arbitration clause in that way.

20. Statements in the same case highlight another technique used by the English courts in these situations, namely to invoke the court's equitable jurisdiction to restrain vexatious or oppressive conduct. All three members of the court saw a *prima facie* case that the action against the affiliates was vexatious, as it seemed designed to circumvent the arbitration agreement (§§ 55-62, 76). There is a continuing debate about the relative scope of these contractual and equitable routes to a potential remedy in this situation, most recently illustrated by Foxton

[5] *Renaissance Securities (Cyprus) v Chlodwig Enterprises* [2024] EWHC 2843 (Comm) and on appeal [2025] EWCA Civ 359.

J's decision two weeks ago in *JP Morgan Securities Plc v VTB Bank PJSC* [2025] EWHC 1368 (Comm).

21. The equitable route can also apply in the converse situation where the counterparty seeks to conduct a proxy 'war' by getting one of its own affiliates – who is therefore not bound by the forum clause – to sue the counterparty in a non-agreed forum. Thus in *Ingosstrakh Investments v BNP Paribas*[6] (also known as the *Russian Machines* case) an anti-suit injunction was granted against an affiliate of the contracting party who collusively brought proceedings designed to act as a 'stalking horse' to outflank the arbitration clause.

22. Litigation of this kind has followed the introduction in June 2020 of Article 248.1 of the Russian Arbitrazh Procedural Code, by Law No. 171-FZ. That provision purports to confer exclusive jurisdiction on the courts of the Russian Federation, regardless of any arbitration or jurisdiction clause, if that clause is *"unenforceable due to application in relation to one of the persons participating in the dispute of restrictive measures by a foreign state … creating obstacles for such a person in access to justice"*. Then in December 2021, the Supreme Court of the Russian Federation in the *Uraltransmash* case held[7] (overturning the decisions of the first instance and Appeals Courts) that Article 248.1 applies even where the Russian entity could as a matter of fact fully participate in arbitration proceedings without any obstacles to its access to justice. It ruled that the application of sanctions to a Russian party in and of itself creates obstacles to its access to justice and renders forum selection clauses inoperable upon the application of the sanctioned party to a Russian Arbitrazh Court.

23. The Arbitrazh Courts have since then assumed jurisdiction despite agreed arbitration and jurisdiction clauses, and have also imposed penal measures in order to enforce their own rulings. That has been done using the "*astreinte*", a court-imposed penalty for non-compliance with a judicial order, particularly an order for specific performance of obligations. The astreinte was traditionally a modest daily monetary penalty designed to incentive compliance with a court

[6] *Ingosstrakh Investments v BNP Paribas* [2012] EWCA Civ 644
[7] Ruling of the Judicial Panel for Economic Disputes of the Supreme Court of Russia dated 9 December 2021 in case No. A60-36897/2020.

order for, say, the demolition of a building erected in breach of planning control. A specific example in a planning context was, converting into sterling, a £8,800 one-off payment and £1,600 for each additional month of non-compliance.

24. However, since the introduction of Article 248.1 there have been penalties equivalent to tens or hundreds of thousands of pounds a day, reaching an extreme in some cases involving Google and YouTube on the one hand and three Russian media organisations with close links to the State on the other. The media organisations or their owners had been subject to Western sanctions, and their Google and YouTube channels were terminated. They sued in Russia notwithstanding jurisdiction and arbitration clauses. Applying Article 248.1, the Russian arbitrazh courts assumed jurisdiction and directed the reopening of the channels. They imposed astreinte penalties that would double each week, so by May 2024 the value of some of the astreinte penalties amounted to the equivalent of about £1.85 octillion.

25. In January 2025, in the English case *Google v Tsargrad* [2025] EWHC 94 (Comm), I granted anti-enforcement injunctions restraining the Russian entities from seeking recognition or enforcement of the Russian courts' judgments anywhere outside Russia. The jurisdictional basis for that relief was that a person who has sued abroad in breach of contract, or in violation of the principles of equity and conscience, can be restrained in equity from enforcing a judgment thereby obtained: see e.g. *Ellerman Lines v Read* [1928] 2 KB 144 and *Bank St Petersburg v Arkhangelsky* [2014] EWCA Civ 593.

26. Two months later, essentially the same case came before Judge Davila in the Northern District of California, who also granted anti-enforcement relief. There are some interesting comparisons between the two cases. The jurisdictional basis for an anti enforcement injunction in California was an implied term of the arbitration clause, which allowed relief to be granted on a contractual basis as opposed to the equitable basis in England. (It remains to be decided whether the implied term route could also work in English law.) The standard applied in the Californian case was the traditional *Winter* test for preliminary

injunctions,[8] rather than the slightly lower test for anti-suit injunctions. In England, by contrast, the test for an anti suit injunction is higher than the usual *American Cyanamid* test for interim relief, since it requires "a high degree of probability" that the forum clause binds the respondent.[9] Judge Davila saw force in the argument that restraining enforcement, as opposed to restraining suit, was liable to infringe comity: but felt that those considerations were outweighed by other factors including the fact that the Russian judgment was the culmination of an effort to frustrate the US courts' jurisdiction in violation of US public policy, and what he described as the grossly excessive penalties under any reasonable view of due process.

27. The Russian courts have in turn reacted to Western injunctions by granting orders requiring parties to apply for their revocation, under threat of an astreinte penalty. Three banks, Unicredit, Commerzbank and Deutsche Bank, who obtained English anti suit injunctions last year, later applied to revoke them. One application came before the English Court of Appeal recently in *Unicredit Bank v RusChemAlliance* [2025] EWCA Civ 99. After hearing from the parties and an *amicus curiae*, the court agreed to approve an order revoking the injunction by consent, though it preserved other parts of the order in which it had declared that the English courts had jurisdiction over the matter.

28. There is an interesting example of a US judge making an order in anticipation of measures of that nature. Judge Lorna G Schofield in the US District Court for the Southern District of New York in the case *JPMorgan Chase Bank v VTB Bank* last year granted an anti-suit injunction after VTB sued in Russia despite a clause giving courts of New York exclusive jurisdiction. The order further provided that if JPM were constrained from seeking further relief, the injunction would automatically become a permanent one. VTB then, in breach of the anti-suit injunction, obtained a Russian injunction requiring JPM to discontinue the New York action. Judge Schofield found VTB in civil contempt, and ordered it to stay the Russian action and lift its anti suit injunction, or else pay a fine of $500,000, plus an additional fine equal to any payment JPM or its affiliates

[8] *Winter v. Nat. Res. Defendant. Council, Inc.,* 555 U.S. 7, 20 (2008).
[9] See, e.g., *Transfield Shipping v Chiping Xinfa Huayu Alumina* [2009] EWHC 3629 (Comm) [51]-[52]

made directly or indirectly to VTB as a consequence of the Russian action. That fine was maintained even when, in August 2024, JPM sought and was granted the dissolution of the New York action under the duress of the orders of the Russian court.

29. My third and last topic is the Arbitration Act 2025, which is expected to be brought into force shortly. This followed a very comprehensive '25 years on' review of the Arbitration Act 1996 by the Law Commission, and a very well-run and successful consultation exercise. The process took place under two successive Governments, and indicates how the UK regards arbitration as sufficiently important to undertake and then act on a very comprehensive and careful review in order to ensure that our regime is up to date and attractive to parties to contracts.

30. The new Act has useful provisions to tidy up and fill gaps in basic processes such as the powers of emergency arbitrators, court powers exercisable against third parties in support of arbitrations, and the time limits for challenges. For example, section 8 will treat emergency arbitrators in the same way as normal arbitrators for the purposes of sections 41 to 44 of the 1996 Act. So, as the Explanatory Notes say, where an arbitrating party fails to comply with an emergency arbitrator's order, the arbitrator will be able to issue a peremptory order (under section 41 as amended), and if there is still no compliance, an application can be made to court under section 42 for the court to order compliance with the arbitrator's order. Alternatively, an application can be made directly to court, for the court to make its own order under section 44.

31. Section 1 on the law governing an arbitration agreement will make that the law of the seat unless the parties expressly agree otherwise. This should promote clarity. Moreover, at least for arbitrations seated in England and Wales, given English law's use of the separability doctrine and its broad view on arbitrability, the new rule will tend to reduce the risks of arbitrations turning out to have been ineffective. As I noted in a previous talk, we will at the same time have to take the rough with the smooth. Occasionally the new rule will mean that the arbitration agreement is governed by an overseas law, and that could sometimes mean there is no 'gateway' under which the English court can assume

jurisdiction. That might, for example, be the case if there were a repeat of the fact pattern in the cases *Deutsche Bank v RusChemAlliance* [2023] EWCA Civ 1144 and *Unicredit Bank v RusChemAlliance* [2024] EWCA Civ 64. All the more reason, one might think, for stipulating for an English-seated arbitration.

32. Section 11 of the new Act will give the Civil Procedure Rule Committee power to introduce rules restricting jurisdiction challenges where a party has taken part in an arbitration and the tribunal has ruled on an objection to its substantive jurisdiction. The potential restrictions are on the advancing of new grounds for objection not previously raised before the arbitral tribunal; introducing new evidence not adduced before the arbitral tribunal; and re-hearing evidence that was heard by the tribunal. The restrictions are qualified, including by an overall proviso allowing the court to rule otherwise in the interests of justice.

33. Although these provisions attracted a lot of attention during the consultation and lawmaking process, it is worth remembering (a) how few jurisdiction challenges are made,[10] of which even fewer succeed (e.g. only one in the 2023/24 legal year) and (b) how few of the jurisdiction challenges that are made turn on issues of contested fact, as opposed to questions of pure law (English or foreign) or contractual interpretation[11] or procedural points[12]. Even where the new rules could potentially bite, there will be a spectrum of cases. These range from cases where any oral evidence of fact is peripheral or can easily be taken from good quality transcripts at the lower end; to cases where the whole jurisdiction debate turns on whether an alleged oral contract was made at all, and the issue is what

[10] The Commercial Court report for 2019/2020 recorded that only 19 jurisdiction applications had been issued; there were then 15 the following year, 27 in 2021/2022, 7 in 2022/23 and 24 in 2023/24. Those figures are obviously tiny compared to the 4,000 or more arbitrations taking place here every year.

[11] For example, *X v Y* [2015] EWHC 395 (Comm) (English and Iranian law on separability of arbitration agreement); *Electrosteel Castings v Scan Trans Shipping & Chartering Sdn Bhd [*2002] EWHC 1993 (Comm) (construction of telexes); ii) *Peterson Farms Inc v C&M Farming* [2004] EWHC 121 (Comm) (Arkansas law on piercing the corporate veil); *Primetrade v Ythan* [2005] EWHC 2399 (Comm) (two points of law under the Carriage of Goods by Sea Act 1992); *Port de Djibouti v DP World Djibouti* [2023] EWHC 1189 (Comm) (contract construction).

[12] E.g. the Scottish case *In the petition Arbitration Appeal No 3 of 2022* [2023] CSOH 69 (whether arbitrator *functus,* and whether prior arbitration award had resolved the issues); and *Province of Balochistan v Tethyan Copper Company* [2021] EWHC 1884 (Comm) (loss of the right to object, by not fully raising the objection before the arbitral tribunal)

was or was not said[13]. In cases at that higher end of the spectrum, the court may continue to think it sufficiently important for it to hear the witnesses itself, in the interests of justice.

34. By way of final comments, common law jurisdictions such as England and Wales have an outstanding cadre of arbitrators and arbitration lawyers. Our arbitration laws and supervising courts aim to strike the right balance between support for arbitration and intervention on the rare occasions when it is needed. So long as our arbitral institutions and practitioners can maintain and develop their international presence, particularly across key market regions, there are good reasons to be cheerful about the future of arbitration in our countries.

35. Thank you for listening to me.

Mr Justice Henshaw
19 June 2025

[13] E.g. Phillips J's decision in *A v B* [2015] EWHC 137 (Comm), a contract formation case