

Beyond arbitration: Real-world outcomes

While arbitration remains of central importance to resolving cross-border disputes, Ian Whitehurst, FCI Arb of 33 Chancery Lane explains why high-risk, sanctions-exposed cases require a change in focus. Securing legal victory is increasingly no longer sufficient in itself – outcomes need to be realisable in practice.

THE LIMITS OF TRADITIONAL MODELS

The modern system of international arbitration, including the enforcement regime under the New York Convention, is a product of the post-war liberal international economic order. It reflects a period of relative alignment between states in relation to trade, legal cooperation, and the mutual recognition of judicial and arbitral outcomes.

Arbitration continues to occupy a dominant position in the resolution of international disputes. Alongside litigation, it forms part of a mature and highly developed framework that has evolved over decades, and in many respects centuries, of commercial practice. In stable environments, it remains an effective mechanism for the determination of legal rights.

However, the framework is not politically neutral. Alignment can no longer be assumed as the current international environment is increasingly characterised by geopolitical fragmentation, shifting alliances, and the reassertion of domestic political priorities over multilateral cooperation. In such conditions, enforcement behaviour is less predictable and, in some jurisdictions, more closely aligned with state interest than with legal principle.

This is not to say that the arbitration framework is failing. Rather, it is being asked to operate in conditions for which it was not originally designed. The assumption that legal rights can be determined and reliably enforced across borders is increasingly open to challenge.

The result is a growing tension between legal outcome and commercial reality. The central question is no longer simply whether a case can be won, but whether the process adopted is capable of delivering an outcome that can be realised in practice.

THE CHANGING RISK ENVIRONMENT

Cross-border disputes do not exist in isolation. They are embedded within broader political and economic systems which, in some regions, are increasingly volatile.

Armed conflict, regional instability, regime change, sanctions regimes, and regulatory intervention can materially alter the landscape during the life of a dispute. These factors may affect not only the availability of assets but also the willingness and ability of courts to support enforcement. In certain regions, ongoing geopolitical tensions create an environment in which legal processes operate alongside and are sometimes influenced by broader strategic considerations.

At the same time, the nature of commercial activity has evolved. Modern corporate structures are often complex, asset-light, and geographically dispersed. Value may be held across multiple jurisdictions, including digital or non-traditional forms, making it more difficult to identify, locate, and attach assets through conventional mechanisms.

Corporate decision-making has also shifted. Boards and stakeholders increasingly prioritise speed, cost-efficiency, and commercial certainty. Lengthy and expensive dispute processes that culminate in uncertain enforcement outcomes are now less attractive.

These developments require a broader conception of dispute resolution. Legal analysis alone is insufficient. Effective strategy must incorporate geopolitical risk, regulatory exposure, asset tracing considerations, and the practical realities of enforcement behaviour.

ARBITRATION AS LITIGATION 2.0

Arbitration is often promoted as a flexible and efficient alternative to litigation. In



practice, it frequently replicates many of the same characteristics.

Pleadings expand, disclosure becomes contested, and hearings increasingly resemble full-scale trials. Procedural complexity has increased, driven in part by the desire for consistency and procedural robustness. Institutional rules and frameworks, including those developed under UNCITRAL, have contributed to a more structured and, in some cases, more legalistic process.

Alongside this, there has been a recognised increase in so-called ‘guerrilla tactics’ in arbitration. These include tactical jurisdictional challenges, aggressive disclosure strategies, and challenges to arbitrators on grounds of bias, independence, or expertise. While often formally legitimate, such tactics may be deployed to delay proceedings, increase costs, or exert strategic pressure.

The cumulative effect is that arbitration, in many cases, operates as a form of litigation 2.0: procedurally sophisticated, resource-intensive, and increasingly adversarial.

This evolution is not inherently problematic in stable environments. However, in high-risk disputes, it creates a worrying disconnect. The process risks

becoming detached from the commercial objective it is intended to serve.

THE ENFORCEMENT PROBLEM

Assets may be located in jurisdictions affected by sanctions, political instability or interference, or weak enforcement frameworks. During the life of a dispute, those assets may be restructured, relocated, or otherwise placed beyond effective reach.

State actors and state-linked entities present particular challenges. In some cases, there may be limited engagement with arbitral processes following an adverse award. In others, assets may be reorganised through corporate structures or moved to jurisdictions where enforcement is more complex or uncertain.

Enforcement itself has become a strategic exercise. Parties increasingly engage in ‘forum shopping’ not only during the dispute but also at the enforcement stage, identifying jurisdictions that offer the most favourable legal, procedural, or political conditions for recovery. This includes jurisdictions with effective disclosure regimes, supportive courts, and robust interim relief mechanisms.

Sanctions regimes introduce an additional layer of complexity to the enforcement process. Whilst sanctions



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represent genuine legal constraints, they may also be invoked strategically to delay payment, resist compliance, or complicate enforcement. In some cases, counter-parties may seek to restructure transactions or route assets through jurisdictions perceived to offer greater flexibility.

Enforcement risk is no longer a secondary consideration; it is a central determinant of the overall value of the dispute.

RETHINKING THE OBJECTIVE: OUTCOMES, NOT JUST RIGHTS

These dynamics require a reassessment of the objectives of dispute resolution.

Traditional models are rights-based, focusing on liability and remedy. In high-risk disputes, this approach is often insufficient. The critical issue is not simply who is right, but whether the chosen process is capable of delivering a recoverable outcome.

This shifts the analytical starting point. Rather than defaulting to arbitration or litigation, practitioners must begin by asking where assets are located, who controls them, and what barriers, legal, political, or regulatory, may impede recovery.

This does not displace arbitration or litigation. It reframes their role. They become tools within a broader strategy rather than ends in themselves.

ALTERNATIVE AND ADAPTIVE MODELS

Where traditional adjudicative processes are unlikely to deliver effective outcomes,

more adaptive approaches may offer greater prospects of recovery.

Structured negotiation and international mediation are increasingly used to achieve commercially realistic solutions. These processes allow parties to design outcomes that reflect the practical constraints of the dispute, including staged payments, asset transfers, or performance-linked arrangements.

Hybrid models, such as mediation-arbitration, combine negotiated resolution with a fallback determination mechanism. More sophisticated structures may incorporate escrow arrangements, third-party oversight, or conditional performance provisions designed to ensure compliance.

These approaches offer flexibility and responsiveness, particularly in environments where political or regulatory conditions may change over time. They allow parties to manage risk dynamically rather than relying solely on a final adjudicated outcome.

EMERGING TRENDS: BEYOND FORMAL ADJUDICATION

There are increasing indications that dispute resolution in high-risk environments is evolving beyond conventional legal frameworks.

This evolution is reflected in practice across a range of disputes. In cases involving state entities or politically exposed counter-parties, it is increasingly common for proceedings to run in parallel with formal negotiation. Arbitration may be commenced to establish leverage, while resolution is ultimately achieved through structured settlement rather than final award enforcement.

Similarly, in complex fraud and asset recovery matters, parties frequently deploy a combination of civil proceedings, regulatory engagement, and commercial pressure to achieve recovery. Formal adjudication remains part of the process, but it is rarely the sole driver of outcome.

Practitioners increasingly consider enforcement pathways at an earlier stage, including identifying favourable jurisdictions, securing interim relief, and targeting assets proactively rather than reactively. In some cases, proceedings are structured from the outset with enforcement in mind.

However, the increasing tendency to treat dispute resolution and enforcement as a



single, unified strategy requires careful handling. While early integration can be advantageous, an overly rigid approach risks constraining strategic flexibility. In complex and rapidly evolving geopolitical environments, conditions may change during the life of a dispute. Assets may move, sanctions regimes may shift, and political relationships may evolve.

A strategy that is too tightly fixed at the outset may become ineffective or counterproductive. The better approach is one of structured adaptability. Enforcement considerations should inform early decision-making, but practitioners must retain the ability to adjust course as circumstances develop.

The growing importance of digital assets reinforces this need for flexibility. The speed at which value can be transferred across jurisdictions means that delay or strategic miscalculation can have immediate consequences.

These developments do not displace arbitration or litigation. Rather, they reposition them within a broader strategic framework in which legal process operates alongside negotiation, enforcement planning, and commercial leverage.

A PRACTICAL FRAMEWORK FOR LITIGATORS

In high-risk disputes, a structured and enforcement-led approach is essential.

First, asset identification and control must be addressed at the outset. Practitioners must understand not only where assets are located, but how they are held, who controls them, and how easily they can be moved.

Second, enforcement mapping should be undertaken early. This involves identifying viable enforcement jurisdictions, assessing their procedural tools, and evaluating their political and regulatory environment.

Third, forum selection must be approached strategically. Decisions regarding arbitration or litigation, as well as seat and governing law, should be informed by enforcement considerations rather than procedural or geographical preference or convenience.

Fourth, speed is critical. Early applications for interim relief, coordinated multi-jurisdictional strategies, and proactive enforcement planning are often decisive.

Fifth, sanctions and regulatory risk must

be integrated into strategy. This includes anticipating how sanctions regimes may affect enforcement and how they may be used tactically.

Sixth, alternative resolution mechanisms should be considered alongside formal proceedings. Mediation, structured negotiation, and hybrid models may provide more effective routes to recovery.

Finally, strategy must remain dynamic. Conditions may change during the life of a dispute, requiring ongoing reassessment.

This approach reflects a shift in the role of the litigator from proving the case to securing a recoverable outcome.

CONCLUSION

Arbitration and litigation remain central to international dispute resolution. However, in geopolitical, high-risk, and sanctions-exposed disputes, they are no longer sufficient on their own.

The traditional assumption that legal rights can be determined and reliably enforced is increasingly open to challenge. Enforcement risk is not a secondary issue; it is fundamental.

For practitioners, this requires a more strategic and commercially grounded approach. Success is measured not by the strength of the award, but by the ability to convert it into recovery.

This demands realism, flexibility, and a willingness to move beyond purely rights-based analysis. In some cases, the optimal outcome may lie outside formal adjudication altogether.

In this environment, the role of the litigator is evolving. The task is no longer simply to win, but to design and execute a strategy that delivers a result. 🚀



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