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International Arbitration Update – Content

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Update December 2021 International Arbitration

Dear friends and readers,

We are pleased to introduce you to Wikborg Rein's first International Arbitration Newsletter, which we hope will serve to assist in highlighting important issues that our clients face in international arbitration, including choices between different institutions, common issues arising during arbitrations, enforcing settlement and challenges to awards.

The use of international arbitration as a way of resolving cross-border disputes continues to gain popularity, partly due to the perceived neutrality it offers, the comparative flexibility to court based litigation and the successful adoption of the New York Convention which seeks to enable the prompt enforceability of awards internationally.

While London retains its position as a dominant setting for many parties to determine their arbitral disputes, competition is fierce, with more and more arbitrations having their seats in Asia, particularly Singapore, as well as initiatives to increase the use of arbitration in Norway and Scandinavia generally.

At Wikborg Rein, the scope of our international arbitration practice continues to grow, with our multi office team having experience conducting arbitration proceedings governed by numerous different governing laws and under, among other things, the ICC, OCC, LCIA, HKIAC, UNCITRAL, LMAA, DIA, SCC and SIAC rules.

We hope that you will find the articles interesting and informative. Please do not hesitate to get in touch if you would like any further information, specific legal advice or would like us to cover a specific topic in future newsletters. •

A wealth of experience in contentious work including large and complex arbitrations involving multi-jurisdictional and cross-border disputes.

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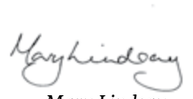

Mary Lindsay
Specialist Counsel

LONDON CALLING?

Enduring appeal of London arbitration for multinational parties unaffected by turbulent recent years for the UK

Legal research group LegalUK have recently published a report which explores the economic value of English law as a choice of substantive law across sectors as well as its enduring appeal as a seat of arbitration. The report cited that:

- English law governed at least EUR 661.5 trillion of OTC derivatives trading in 2018, USD 11.6 trillion of global metals trading in 2020, and GBP 250 billion of global M&A in 2019;
- English law is the "preferred legal framework for global commercial maritime contracts";

> …'boom and bust', political upheaval, Brexit and pandemic woes have had little to no effect on London as a choice of arbitral seat.

- English law comprises **40% of all governing law in corporate arbitrations** generally; and
- A 2019 survey of 600 legal practitioners and in-house counsel involved in cross-border transactions in Asia found that English law was selected as the most frequently used governing law by 43% of respondents.

This reinforces the view of London as the world's leading choice of arbitral seat in international arbitrations.

Accurate figures on the use of London arbitration as a seat are difficult to obtain as arbitrations remain private and confidential, and (in contrast to several other jurisdictions) London arbitrations do not require parties to use an appointing authority – even where there is a default by one party in appointing their arbitrator (unless the parties had previously agreed on a sole arbitrator). However, it bears highlighting that:

- In London, two of the best known arbitration bodies, the LCIA and the LMAA received 444 and 1,775 new arbitrations registered in 2020 respectively. (LCIA Annual Casework Report 2020)
- This contrasts with 483 total referrals to the HKIAC (the default appointing body under Hong Kong law) and 1,080 total filings to the SIAC (the default appointing body under Singapore law) in 2020. (SIAC Annual Report 2020)

The trend suggests that whilst the popularity of specialist and regional arbitration centres remains cyclical and often linked to short-term boosts in local investment, London's appeal as a reliable seat of arbitration abides.

There are a number of attractions to London arbitration which have led to this state of affairs, including:

1. The user-friendly and sensible approach of the Arbitration Act, which avoids unnecessarily complex rules governing service of process in favour of service by "*any effective means*" (s76 of the Act) and which allows for the default appointment of a Tribunal without the need of the further delay and expense of applying to an appointing authority (s17 of the Act).
2. The right to appeal on a point of law under s69 of the Arbitration Act 1996, rather than only the limited grounds of serious irregularity under s68 of the Arbitration Act – in marked contrast to the UNCITRAL Model Law on International Commercial Arbitration, which is incorporated almost verbatim into the national legislations of several jurisdictions, most notably the Hong Kong (via the Arbitration Ordinance (Cap 609)) and Singapore (via the International Arbitration Act).
   This acts as a useful safeguard from obviously wrong decisions, but is not simply an automatic rehearing of the issues – in 2020 only 7 permissions to appeal under s69 were granted (Commercial Court Users Group Minutes November 2020). This gives parties added certainty.
3. The strength of the legal market in London, and the stable of professional arbitrators, the value of which is often respected and recognised by the judiciary (for instance in the recent Supreme Court ruling in *Halliburton v Chubb* [2020] UKSC 48) in contrast to jurisdictions where arbitrators are often seem as interlopers impinging on the authority of the Courts.
4. The stability of the legal system in London in a jurisdiction where 'boom and bust', political upheaval, Brexit and pandemic woes have had little to no effect on London as a choice of arbitral seat.

Our international arbitration team combines extensive experience of institutional and ad hoc arbitrations, an in-depth experience of jurisdictions around the world and specialist sector-based industry knowledge to provide our clients with a team that can successfully run large and complex multi-jurisdictional arbitral proceedings. The legal directories recognise our international arbitration practice and for 7 years running, we have been included in the Global Arbitration Review's annual guide to 'approved' international arbitration firms around the world.

Recent public successes include a win for Naftogaz against Gazprom totalling over US$2.6 billion in a widely reported SCC arbitration concerning gas supplies and acting in what Latin Lawyer called "the dispute of the year for 2021 across all of Latin America". The latter dispute represents the first time an arbitral tribunal enforced a forfeiture provision in a joint operating agreement under Brazilian law.

Our international arbitration team has full spectrum arbitration capabilities in several key sectors, and regularly acts for institutional and multinational clients in international arbitrations at the pre-action, arbitration and enforcement stages. Our team has specific experience conducting arbitration proceedings under, amongst others, the ICC, LCIA, HKIAC, UNCITRAL, SCC, LMAA and SIAC rules, and our team members are regular speakers and writers in relation to international arbitration developments and issues. •

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Negotiating enforceable settlement

The referral of a dispute to arbitration does not mean parties have to be stuck on a straight track to a hearing with an award issued by the tribunal. Very often, arbitration can lead to or support parties in reaching a negotiated settlement in advance of any hearing or award. In some cases, commencing arbitration can be used as a strategy to encourage parties to negotiate. The fact of arbitral proceedings getting underway should certainly not lead parties to automatically forgo all hopes of settling the dispute.

Arbitration is, of all the alternative methods of dispute resolution, one of the most similar to court-based litigation. Commercial arbitration proceedings often take, from commencement to issuing a final award, as long as and sometimes longer than court proceedings. Of these methods, arbitral proceedings also tend to involve the greatest costs. In similarity with a court based process, the facts and evidence in dispute will typically be scrutinised to a far greater degree than in mediation or other methods of dispute resolution.

Often that passage of time or the scrutiny of evidence can lead parties to reach a negotiated commercial settlement without having to conclude the arbitral proceedings. Provided the proceedings do not have the effect of further entrenching a party's position, parties may be brought closer together because perhaps, for example, expert evidence has made the outcome of the proceedings more obvious or evidence has come to light which either undermines or bolsters one party's position. Settlement may also come about for reasons outside the arbitral proceedings, perhaps as part of an overall or ongoing commercial relationship between the parties.

There are also circumstances where arbitration might be commenced for strategic reasons – to be used to encourage or support settlement negotiations for example. The fact of being in arbitration, perhaps combined with the ensuing costs, might encourage a previously reluctant party to engage in settlement discussions.

For whatever reason the parties reach a commercial settlement, they will want to ensure that there is a binding settlement agreement in place before terminating the arbitral proceedings. Both the settlement agreement and the termination need to be binding and enforceable. Of particular note at this point are any cross-border aspects to the dispute or the parties involved.

CONSIDERATIONS

Ending or terminating the arbitral proceedings

The various arbitral institutions' rules provide for the settlement of matters before a final award. Generally, this is by way of an order or award, often in a format agreed by the parties as part of a settlement agreement.

Each of the institution's rules differ slightly.

- **UNCITRAL Arbitration Rules**
  Settlement of a dispute under an UNCITRAL arbitration is dealt with under Article 36 of the 2013 UNCITRAL Rules. Where the parties agree on settlement, the tribunal can either issue an order for the termination or, if requested by the parties and accepted by the tribunal, make an award recording the settlement of the dispute and ending the proceedings.
- **ICC Arbitration Rules**
  As with other institutional rules, there are no express provisions under the 2021 ICC Rules dealing with the particular mechanism for settlements made in arbitration. However, guidance can be found in Appendix IV which sets out various case management techniques that can be used by the tribunal and the parties for controlling time and cost. One technique is the encouragement of settlement through negotiation or other methods (e.g. mediation). If the parties and the tribunal agree, the tribunal may take steps to facilitate settlement provided that every effort is made to ensure that any subsequent award remains enforceable. Often parties may want a stay of the proceedings for a period of time in order to accommodate settlement discussions. Provision for this is reflected in the ICC report on "*Controlling Time and Costs in Arbitration*" which suggests that parties may request the tribunal to suspend the arbitration proceedings for a specific period of time while settlement discussions take place.

  If settlement is reached, Article 33 of the ICC Rules provides that a consent award can be obtained where it is requested by the parties and if the tribunal agrees.

- **LMAA Arbitration Rules**
  The 2021 LMAA Terms provide a slightly stricter regime for the parties regarding settlement. Under Article 19, the parties are under a duty to notify the tribunal immediately if the arbitration is settled or otherwise terminated. The parties must also make provision in any settlement for payment of the fees and expenses of the tribunal and to inform the tribunal of the parties' agreement as to the manner in which such payment will be made.
- **LCIA Arbitration Rules**
  Similarly to the ICC Rules, Article 26.9 of the 2020 LCIA Rules provides that the tribunal may make a consent award where the parties have reached commercial settlement. To obtain the award the parties must make a joint request in writing and the award must contain an express statement on its face that it is an award made at the parties' joint request and with their consent. The award need not contain reasons or a determination in relation to the costs of the arbitration and legal costs (per Article 28 of the LCIA Rules). Where the parties do not require a consent award, they must provide written confirmation to the LCIA Court that a final settlement has been reached. The LCIA Court will then discharge the tribunal and deem the arbitration proceedings terminated, subject to payment by the parties of any outstanding costs.
- **Stockholm Chamber of Commerce Arbitration Rules 2017**
  Article 45 of the SCC Rules 2017 provides for the making of a consent award in the event of settlement before a final award. This is similar to the provisions of the ICC Rules.

THE TERMS OF SETTLEMENT

Parties will also need to ensure that the underlying settlement agreement is enforceable. Along with any case specific factors, parties will need to ensure that the following are dealt with:

- Jurisdiction – where are the parties based? If relevant, where are their assets?
- Third parties, particularly where the arbitration was multi-party.
- Is settlement contingent upon something? Payment from one party to the other perhaps.
- Does settlement deal with the entirety of the issues in arbitration and under the tribunal's jurisdiction? Similarly, a consent order or award can only deal with matters under the tribunal's jurisdiction.
- How will the costs already incurred in the arbitral proceedings be dealt with?
- Are there any parallel proceedings? What will happen with them?
- Is either party subject to requirements to report the settlement? For example, to shareholders.

These are not issues that are usually insurmountable but they should not be forgotten whilst negotiating the terms of a settlement.

If parties are able to benefit from the scrutiny and pressures of arbitration to bring about a negotiated settlement, they should ensure that nothing is lost and that the negotiated settlement is as enforceable as the arbitral award that they will forgo. •

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ARBITRAL TRIBUNAL

undertaking its own research

Can an arbitral tribunal undertake its own research? The answer is ' "it depends" – as is often the case in international arbitration. The question of whether a tribunal has gone beyond the scope of the arbitration will often arise in a challenge to the enforcement of an arbitral award.

Article V(1)(C) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards allows for the recognition and enforcement of an award to be refused if the award (or part of it) "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration". Whilst Article V(1)(C) makes reference to issues which are outside of the terms submitted to arbitration or outside the scope of the arbitration, when it comes to what should have been "contemplated" by the parties or how the "scope" of the arbitration is delineated, there will clearly be nuances for domestic courts to consider.

THE INSTITUTIONAL RULES

Various of the institutional rules provide some guidance as to whether or not a tribunal may undertake its own research. The presumption of some institutes seems to be that tribunals may do so, although the guidance may not be explicit.

For example:

The ICC Rules 2021 ("the ICC Rules")

The ICC Rules give tribunals a general power to establish the facts of a case. However, that power is tempered by a duty to afford the parties equal treatment.

Article 25(1) of the current ICC Rules (and of the ICC Rules 2017) provides that:

The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.

In addition, Article 22(4) of the ICC Rules provides that:

In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

The Secretariat's Guide to the ICC Rules advises arbitrators who consider information falling outside of the proceedings to give the parties an opportunity to comment on that information "*in the interests of fairness and due process*".

The 2016 SIAC Arbitration Rules ("the SIAC Rules")

The SIAC Rules allow tribunals to consider issues other than those put expressly before the tribunal but subject to the other party having an opportunity to respond. Rule 27(m) provides that:

Unless otherwise agreed by the parties, in addition to the other powers specified in these Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to:...

...(m) decide, where appropriate, any issue not expressly or impliedly raised in the submissions of a party provided such issue has been clearly brought to the notice of the other party and that other party has been given adequate opportunity to respond...

The LCIA Arbitration Rules 2020 ("the LCIA Rules")

The LCIA Rules do envisage tribunals taking it upon themselves to explore other issues. Article 22.1(iii) gives the tribunal power to:

...conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute...

The UNCITRAL Arbitration Rules of 2013 ("the UNCITRAL Rules")

The UNCITRAL Rules, the rules most often chosen for ad hoc arbitration, give tribunals power to conduct an arbitration as they see fit but subject to the parties receiving equal treatment. Article 17.1 provides that:

...the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case.

APPROACHES UNDER DIFFERENT JURISDICTIONS

Of course, the provisions of any of the institutional rules will be subject to the relevant procedural law, the law of the place of the arbitration.

England and Wales

A challenge to an award under section 68(2)(b) of the Arbitration Act 1996 ("the Arbitration Act 1996") for serious irregularity was allowed when the arbitrator was found to have made his own investigations.

Fleetwood Wanderers Ltd v AFC Flyde Ltd related to the termi-

nation of a footballer's employment contract and his subsequent employment with another club. The dispute itself centred around the Football Association ("the FA") Rules and whether particular rules relating to the transfer of footballers were incorporated in the FA Rules. The arbitrator had, unknown to the parties, consulted with the FA with regards to this question. The court found that, by making his own investigations and not sharing communications between the arbitrator and the FA, the arbitrator had breached his duties under Section 33 of the Arbitration Act 1996 – that being to "*act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent*". In failing to give the parties an opportunity to comment on the outcome of his investigations, he failed to give the claimant an opportunity to adduce evidence which might have led him to a different decision.

The award was remitted to the arbitrator for reconsideration.

In England and Wales, the Arbitration Act 1996 provides for a tribunal's own investigations. Section 33(1)(b) provides, subject to a tribunal's duty to "*act fairly and impartially as between the parties*", that a tribunal may "*adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined*". Section 34(2)(g) then envisages tribunals being permitted to "*take the initiative in ascertaining the facts and the law*".

Germany

In a recent German ruling (*Docket No 26 Sch 18/20*), a party applied for the annulment of an arbitration award when it transpired that the arbitral tribunal had undertaken its own research after proceedings had closed. The arbitration was seated in Frankfurt and subject to the ICC Rules of Arbitration 2017.

The party against whom damages were awarded, PEC, objected to the tribunal undertaking its own internet research into the method used to calculate damages relied upon by the other party. The tribunal's research came to light in a footnote in the award and, as the proceedings had closed, PEC was not afforded an opportunity to comment on the information that the tribunal now relied on. In fact, neither party was able to comment on this new information.

However, the application for annulment was rejected. In addition to the provisions of Article 25(1) of the ICC Rules of Arbitration 2017 (as set out above), the German civil procedure rules permit a German tribunal to make and rely on its own research provided that doing so does not result in what is described as a "surprise decision".

In this case, the result was not thought surprising. It was held that PEC could reasonably have anticipated that the tribunal might look at this information – the other party had referred to the website used by the tribunal and the relevant method was established in German case law.

It should be added that German mandatory procedural rules mean that a domestic arbitral award, such as the award in this case, will be enforced in all but rare cases, for example where there has been a serious violation of one party's right to be heard.

Singapore

Singapore's International Arbitration Act, which makes provision for the conduct of international commercial arbitrations and is based on the UNCITRAL Model Law, does not expressly comment on independent research of the arbitral tribunal. (*Please note that section 12(3) of the International Arbitration Act does allow the arbitral tribunal to adopt inquisitorial processes for the purposes of fact finding, rather than researching a point of law, but in any event this is rarely done.*)

However, in the case of *CIM v CIN [2021]*, the High Court of Singapore dealt with this point briefly in relation to an ICC arbitration seated in Singapore. The court noted that if an arbitrator takes their own steps to "*polish or hone the law relied on by counsel*" it "*may be an indulgence, but it does not begin to amount to a breach of natural justice*". Then, with regards to the tribunal having considered alternative scenarios with respect to the calculation of damages and not mooted by the parties, "*an arbitrator is not required to slavishly follow one or other of the alternatives presented, but may apply his own reasoning to assess them and make adjustments that he considers just, so long as he does not… [answer the] question in a way that is so far removed from any position which the parties have adopted that neither of them could have contemplated the result*". The judgment implies a similar approach to other countries. That is in the sense that an arbitral tribunal refining knowledge on a point of law arising in the proceedings is not problematic, but researching an entirely new, unforeseeable point of law as a basis for a decision would not be permissible.

Switzerland

Under the long-standing case law of the Federal Court of Switzerland, arbitrators may conduct research and apply the law on their own motion. In the leading case of BGE 130 III 35, the Swiss Federal Court highlighted the principle of *jura novit curia* ("the court knows the law") and referred to a tribunal's ability to "*freely assess the legal relevance of the facts and may also decide on the basis of other rules of law than those invoked by the parties*". This means that arbitrators are not restricted by the legal arguments submitted by the parties and a tribunal is allowed to apply provisions not referenced in the parties submissions.

There are, however, certain exemptions to this principle. The parties can, for instance, expressly exclude the applicability of the jura novit curia principle. Moreover, in BGE 130 III 35, the Swiss Federal Court also noted that parties "must be asked when the judge or the Arbitral Tribunal considers basing the decision upon a norm or a legal consideration which was not invoked during the proceedings and the pertinence of which the parties could not anticipate". Thus, if the parties could not reasonably have foreseen such norm or legal consideration being invoked, the arbitrator may not apply the law on its own motion, but must grant the parties the opportunity to comment (BGE 130 III 35 para 6.2). With this said, it needs to be emphasised that the Swiss Federal Court adopts a narrow approach when considering the question of whether the application of a norm or legal consideration came as an unforeseeable surprise to a party. One successful challenge on this ground was the decision of Bger. 4A_400/ 2008 where the tribunal had applied a Swiss Statue, applicable to Swiss residents only, to a dispute between parties located in Spain and Portugal with no connection to Switzerland whatsoever.

CONCLUDING REMARKS

Parties must be alive to the possibility of arbitrators founding their decisions on research, legal principles or alternative outcomes that might not have explicitly arisen in the hearing room or, indeed, at any time during the proceedings. It is apparent though that the possibility of arbitrators doing so is tempered by rights to a fair hearing and to natural justice and arbitrators must balance their duties with those rights.

Those rights may, in turn, be qualified. Generally, if it should not be surprising to the parties for arbitrators to research or consider particular issues not heard at a hearing, then the parties may be deemed to have been afforded a fair hearing and natural justice has been applied.

As we started, the answer as to whether a tribunal can carry out its own research is "it depends". Of course, a better understanding of the position relating to any arbitration can be taken from full consideration of the laws and rules applicable to that arbitration but this analysis underlines a need for parties and their legal advisers to explore every aspect of a dispute. •

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CHALLENGES TO ARBITRAL AWARDS

on the basis of 'Serious Irregularity'

In this article we discuss challenges to arbitration awards in the context of alleged 'serious irregularity' in the award given by the arbitral tribunal. This was addressed in the recent decision by the Privy Council in London, on appeal from the courts of the Bahamas, in RAV Bahamas Ltd and another v Therapy Beach Club Incorporated [2021] UKPC 8.

Given the similarities between the relevant legislation of the Bahamas and England, as well as that the Privy Council contained members of the UK Supreme Court, the decision is likely to act as an important guide to challenges to awards in English-seated arbitrations on grounds of serious irregularity as well as being considered by courts of other jurisdictions that are called upon to address challenges to awards.

CHALLENGES TO AWARDS

The 1996 Arbitration Act (the "English Act"), provides the following discrete grounds on which an arbitration with an English seat may be challenged:

1. Section 67: Challenge to the arbitral tribunal's substantive jurisdiction (i.e. that an award was made by a tribunal without jurisdiction to issue it).
2. Section 68: Challenge on the basis of a 'serious irregularity' affecting the tribunal, the proceedings or the award.
3. Section 69: Appeal on a point of law (i.e. an error of law in the award).

While it is possible to exclude the right to challenge an award on the basis of Section 69, which the rules of a number of arbitral institutions such as the LCIA and ICC do, Sections 67 and 68 are mandatory provisions and cannot be excluded by the parties. The threshold for success in challenging an award is high under each ground and the vast majority of applications to the English courts to challenge arbitral awards are rejected.

In this article we focus on the basis for a Section 68 challenge for serious irregularity. Section 68 provides a list of circumstances where substantial injustice will be established if the court considers they have caused or will cause substantial injustice to the applicant, including:

1. failure by the tribunal to comply its general duties, such as the duty to give each party a reasonable opportunity to put its case;
2. the tribunal exceeding its powers;
3. failure by the tribunal to deal with all the issues that were put to it; and
4. the award being obtained by fraud or in a manner contrary to public policy.

The requirement that the relevant irregularity has caused "substantial injustice" means not only will the irregularity need to be established, but also that injustice. The intention of that requirement was to limit challenges to only the most extreme circumstances and not merely where a party considers that the tribunal has failed to reach the 'correct decision'.

RAV BAHAMAS

The *RAV Bahamas* case involved Section 90 of the Bahamas Arbitration Act 2009 (the "**Bahamas Act**") which is materially the same as Section 68 of the English Act. Bahamas Ltd and Bimini Bay Resort Management Ltd ("**RAV**") challenged an arbitral award against them in ad hoc arbitration (i.e. non-institutional arbitration).

RAV had leased land to Therapy Beach Club ("**Therapy**") on which RAV was to construct a beach club which Therapy would operate. Disputes arose regarding the construction, leading RAV to demolish the beach club and evict Therapy. Therapy's claims for wrongful eviction, trespass and unlawful interference with economic interests was referred to arbitration. Although the arbitrator found for Therapy on these claims, Therapy had also claimed a variation of the lease to include the lease of a nearby restaurant, leading to additional damages being suffered. That additional claim was unsuccessful and the arbitrator reduced the award of damages by one third, and by a further 15% on the basis that figures for loss of profits were based on the expert's memory and not documented evidence.

RAV alleged serious irregularity in the award on two grounds:

1. The arbitrator had failed to deal with a central issue affecting the period for which damages were calculated; and
2. The arbitrator had not afforded RAV the opportunity to respond to adjustments made to figures of loss which had previously been presented on a global basis and where evidence was based on the expert's memory.

The Supreme Court of the Bahamas agreed with RAV finding that both grounds gave rise to serious irregularity.

1. On the first ground, the arbitrator had awarded damages for consequential loss of profits beyond the original term of the lease (the termination of which was at the root of the original dispute), thereby failing to deal with the fact that the lease agreement required six months' notice in order to renew. RAV was entitled to demand consideration of this issue as it was so central to the award of damages. This fell within Section 90(2)(d) of the Bahamas Act which sets out that irregularity occurs where there is a failure by the tribunal to deal with all issues that were put to it (identical to Section 68(2)(d) of the English Act).
2. On the second ground, the Court agreed that the Arbitrator had acted unfairly in not affording RAV the opportunity to make representations regarding the level of damages awarded and the basis on which they were calculated. This failure fell within Section 90(2)(a) of the Bahamas Act, materially identical to Section 68(2)(a) of the English Act which both refer to the general duties of a tribunal.

The vast majority of applications to the English courts to challenge arbitral awards are rejected.

The Court of Appeal of the Bahamas reversed this decision on the premise that RAV had not separately evidenced and established that the irregularities had caused them substantial injustice. They considered that this was a necessary part of the due process in establishing Section 90/Section 68 and that the burden is on the applicant seeking to set aside an award to establish substantial injustice. RAV subsequently appealed this decision to the Judicial Committee of the Privy Council in London.

For those unfamiliar with the Judicial Committee of the Privy Council, this is based in London and is the court of final appeal for the UK overseas territories and Crown dependencies. It also serves those countries of the Commonwealth, such as the Bahamas, that have retained the right of appeal to it.

THE PRIVY COUNCIL'S DECISION

The principal legal issue for the Privy Council was whether Section 90/Section 68 required there to be a separate and express allegation, consideration and finding of substantial injustice for a serious irregularity to be established. In allowing the appeal, the Privy Council decided that it is not a requirement of serious irregularity that there be a separate investigation and finding of substantial injustice, instead taking a pragmatic approach to the analysis of whether substantial injustice had in fact occurred.

On the first ground, the nature of the irregularity of failing to deal with a central issue was inherently likely to cause substantial injustice, therefore serious irregularity would be established. On the second ground, the Privy Council allowed the appeal in part, finding that the failure of the arbitrator to provide RAV with a fair opportunity to address adjustments made to damages did constitute serious irregularity and again substantial injustice was self-evident. They noted that it 'goes without saying' that arbitrarily reducing damages by a third is seriously prejudicial to RAV. However, RAV did in fact have a fair opportunity to address the obvious failure of Therapy's expert in not relying on documented evidence (because this fact was obvious to the parties) and therefore this part of the challenge was dismissed.

COMMENT

The RAV Bahamas judgment provides a useful source of guidance as to whether there is a serious irregularity in an award and how that might be established, including that:

1. Failure by an arbitrator to address central issues and/or precluding a party from addressing an alteration of award can constitute serious irregularity, with the court looking at the resulting injustice to the party.
2. There is no mandatory requirement to have a separate, express allegation of substantial injustice in every circumstance, but it is good practice to do so as that will still need to be established.
3. Ambiguous and even incorrect reasoning is not sufficient for a successful challenge under Section 68.

In the present case the irregularities in question were significant and would likely have had a material impact on the outcome of the award. While the Privy Council was careful to emphasise that challenges under Section 90/Section 68 would not easily succeed, the decision will no doubt give hope to parties who feel that an award issued against them resulted from or was impacted by a serious irregularity, particularly where a party has not had the opportunity to address a material issue that impacts on their liability. •

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ARBITRATION CLAUSES

Three rules of thumb for in-house counsel

With sufficient time and resources, an in-house counsel can ensure that each arbitration clause their organisation signs onto is carefully crafted and reviewed. But we recognize that time and resources are rarely sufficient and believe that these three rules of thumb can help ensure that arbitral clauses do not create an unacceptable level of risk.

Arbitration clauses can be an afterthought. They appear at the tail end of contracts, typically alongside boilerplate provisions. And in organisations where commercial contract negotiations are handled without lawyers, negotiators can view the clauses as easy give-aways in exchange for an improvement in commercial terms or to signal that they are focussed on relationship building, not future disputes. The result can be an arbitration clause that is vague ("Any dispute arising out of or in connection with this contract shall be settled by arbitration in Switzerland") or a Frankenstein clause, with incongruous provisions sewn together (Yemeni law to be used in English-language arbitral proceedings with seat and forum in Paris). An in-house counsel in a busy organisation may not have time to review and edit every single arbitration clause that works its way into a contract negotiated by her commercial team, but she can establish some rules of thumb to limit the risk of her organisation signing onto vague or unwieldy arbitration clauses.

The third rule of thumb is: beware of haggling.

THE FIRST RULE OF THUMB

Arbitration clauses should specify that the arbitral seat will be a city with a well-established arbitration market. According to the School of International Arbitration's 2021 International Arbitration Survey, the top five preferred arbitral seats are London, Singapore, Hong Kong, Paris and Geneva. There are good reasons that these cities are preferred. Most importantly, the seat of an arbitration determines the procedural law that applies to the arbitration and the court to which a prevailing party will apply for enforcement of the arbitral award. The cities listed all have efficient courts and well-developed laws and legal traditions. Additionally, the seat is usually the place where arbitral proceedings will take place. Cities that are established arbitration hubs are easy to reach, have facilities that are suited to hosting arbitral proceedings and will likely be home to experienced arbitrators.

THE SECOND RULE OF THUMB

There should be a match between the value of the contract and the arbitral procedure specified in the arbitral clause. For a hundred million dollar contract, it may make sense for the clause to specify that three arbitrators will be used and that the arbitration will be governed by the standard, unabridged procedures of an arbitration institution. For a contract worth only ten thousand dollars in a specialised industry sector like maritime or commodities, it is likely to be more practical to specify that only one arbitrator will be used and that ad hoc arbitration rules developed by industry experts will apply. Of course, it is also possible to combine these approaches and provide that, for disputes above a certain value threshold, three arbitrators and a standard institutional procedure will be used, while for disputes below this threshold, one arbitrator and an expedited procedure will be used.

THE THIRD RULE OF THUMB

Beware of haggling. When parties are negotiating arbitration clauses which can often happen when commercial points have been agreed and negotiating fatigue has begun to set in – it can be tempting to make simple trades. A party may feel that it is a fair trade to accept that arbitration will be carried out in its counterparty's native language in exchange for insisting that the arbitration be seated in an international hub (e.g., Russian language arbitration seated in London). Or a party may demand that it be compensated for accepting foreign governing law by having the arbitral seat local (English law, with an arbitral seat in Palermo). But this can lead to arbitration clauses that are unworkable or one-sided. The translation costs for using a counterparty's native language in arbitration may be prohibitive. And the reliability afforded by choosing a governing law commonly used in international business may be undermined when enforcement will require appearing before a counterparty's home courts. •

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English courts supporting international arbitration

This article looks at the treatment of international arbitration agreements by the English courts, particularly at how the courts have upheld the decision of parties to resolve disputes through arbitration rather than through the courts.

The Court of Appeal in *Fiona Trust & Holding Corporation v Privalov* [2007] EWCA Civ 20 (affirmed by the House of Lords in [2007] UKHL 40) considered Section 9(1) of the Arbitration Act 1996 ("the 1996 Act"), under which a party to an arbitration agreement may apply for a stay of court proceedings where the subject matter is subject to an agreement to arbitrate. This provision provides the principal remedy where English court proceedings are commenced in breach of an arbitration agreement.

The specific facts in *Fiona Trust* involved a dispute as to whether a contract could be set aside or rescinded for bribery. The dispute was covered by an arbitration clause and, consistently with the presumption that parties who enter into an arbitration agreement intend for *all disputes arising out of their relationship* to be decided by arbitration (also known as the *presumption in favour of one-stop arbitration*), there was no reason why the arbitrators should not have jurisdiction. This was supported also by the principle of separability under Section 7 of the 1996 Act, which provides that an arbitration agreement must not be regarded as invalid, non-existent or ineffective simply because it forms part of another agreement which is itself invalid, or has not come into existence or has become ineffective, and but that the arbitration agreement must instead be treated as a distinct agreement.

The decision in Fiona Trust highlights the English courts' liberal approach to the construction of arbitration agreements, and their commitment to legal certainty, by ensuring that parties who agree to resolve disputes through arbitration will be free to do so without interference from the courts.

EXTENDING THE FIONA TRUST PRINCIPLE

In a number of cases subsequent to Fiona Trust, the generous interpretation to be given to jurisdiction clauses has been extended to cover multi-contract disputes, so that a jurisdiction agreement contained in one contract could be found to extend to a claim made under another contract. This will be so if the wording of the arbitration clause in one contract is fairly capable of applying to disputes under the other, the parties to the two contracts are the same and the contracts are interdependent or have been concluded at the same time as part of a single package of agreements or deal with the same subject-matter. This was referred to in *Terre Neuve SARL and others v Yewdale Limited and others* [2020] EWHC 772 (Comm) *as the extended Fiona Trust principle.*

A recent example of the application of the extended principle is provided by *Alexander Tugushev v Vitaly Orlov and others* [2021] EWHC 926, where the court refused a co-defendant permission to bring a Civil Procedure Rule (CPR) Part 20 claim against another co-defendant under a contract between them on the basis that the issue between them fell within the scope of an arbitration agreement made in a subsequent contract between them.

The arbitration agreement in question purported to cover "any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination". The claimant relied on Section 9(4) of the 1996 Act, which provides that the court "*shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed*".

In reaching its decision to refusing permission to bring the Part 20 claim, the court noted a two-stage process is required under Section 9. The court must:

1. identify the matters at issue in the relevant proceedings; and
2. decide which of those matters, if any, the parties have agreed to refer to arbitration.

On the first point, the court explained that this does not merely refer to the main issue, but also to "any and all issues which may be the subject matter of the arbitration agreement". This is a common-sense enquiry, having regard to any reasonably foreseeable issues.

On the second, the court will have regard to the presumption in favour of one-stop adjudication, as explained in the Fiona Trust decisions. Thus, the starting point is that these parties intended to determine any dispute arising out of their relationship by the same forum—arbitration seated in London. The court acknowledged that there was sufficient similarity between the parties and subject matter of the different agreements, such that claims under the prior agreements were 'in connection' with, and therefore could be subject to, the later agreement containing the arbitration clause.

The recent judgment in *Surrey County Council v Suez Recycling and Recovery Surrey Ltd* [2021] EWHC 2015 (TCC) confirms that the presumption of 'one-stop adjudication' has application in situations where there are multiple contracts between the same parties containing multiple dispute resolution clauses.

INCONSISTENT DISPUTE RESLUTION CLAUSES

The recent case of *Melford Capital Partners (Holdings) LLP and others v Frederick Digby* [2021] EWHC 872 (Ch) required the English courts to consider an agreement containing competing dispute resolution clauses – providing for both the jurisdiction of the English courts and for LCIA arbitration.

Digby had been a partner in Melford and, following his expulsion from the partnership, injunctions had been sought in the English courts to prevent Digby from using confidential information to undermine the partnership. Digby made a number of counterclaims which Melford argued were not within the English court's jurisdiction but should be determined by arbitration. Melford went on to commence an LCIA arbitration.

The parties' relationship was governed by two limited liability partnerships – one which provided for the exclusive jurisdiction of the Guernsey courts and a

second which contained competing provisions on jurisdiction. Those competing clauses provided for dispute resolution through the courts and, in conflict to that provision, also through LCIA arbitration as follows:

27.2. The parties irrevocably agree that the courts of England have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this agreement.
28. Any dispute arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, or the legal relationships established by this agreement, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration (LCIA), which Rules are deemed to be incorporated by reference into this clause.

Digby claimed that, as a consequence of having sought the injunctions through the English courts, Melford had waived the right to invoke the arbitration clause. Melford however claimed that the clauses meant that the English court provision (27.2 above) provided the courts with a supervisory role.

The court granted the stay, taking the view that the parties, described as "sophisticated business people", must have intended to enter into an arbitration agreement. The competing clause 27.2 would be given operative effect as vesting the courts with "supervisory jurisdiction" or "residual jurisdiction" as to the proper law. Thus, there was no conflict and the arbitration agreement would be upheld as operative.

The English courts' liberal approach to the construction of arbitration agreements, and their commitment to legal certainty.

LIMITATIONS ON THE COURT'S POWER TO ORDER A STAY

Looking more specifically at jurisdictional issues relating to the ability to order a stay, the decision in *Hulley Enterprises Ltd & others v The Russian Federation* [2021] EWHC 894 (Comm) saw the English court reject an application to lift a stay on proceedings to enforce awards of the Permanent Court of Arbitration in the Hague. The court found that the stay should not be lifted whilst Russia's challenge of the awards was ongoing in the Dutch Supreme Court.

The case arose from the long running Yukos Oil dispute, in which The Hague held that Russia had breached the Energy Charter Treaty, awarding the claimants (the Yukos shareholders) a combined total of $50 billion in compensation, the largest arbitration award in history. Following this, the claimants applied for recognition and enforcement of the awards in England under Section 101 of the 1996 Act. Russia challenged the English court's jurisdiction and applied for a stay under Section 9, claiming there was no valid arbitration agreement on grounds of state immunity.

Russia had successfully challenged the awards in the District Court of the Hague in 2016. However, in February 2020, the Court of Appeal in the Hague reinstated the awards and the claimants began enforcement in the Netherlands, the seat of the arbitration. Russia has challenged the awards but the Dutch courts have not granted a stay on enforcement.
The claimants applied to lift the stay of the recognition and enforcement proceedings in England. In the alternative, the claimants relied on Section 103(5) of the 1996 Act to seek an order that Russia pay security amounting to USD7 billion (which would have been the largest recorded order for security made in English court history).

The English court concluded that the stay should be maintained while the parties awaited the outcome of the Dutch proceedings, giving consideration to the risk of inconsistent decisions and that it was more appropriate for the courts of the seat, the Netherlands, to decide on the validity of an award.

As to the application for security, Section 103(5) of the 1996 Act provides that the court:

"...may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security."

The court decided it could not exercise any powers under Section 103 unless and until Russia's claim to state immunity had been rejected, noting that security should only be ordered where the challenge is "flimsy" (with reference to Sections 67 and 70 of the 1996 Act).

This case clarifies the scope of the court's powers in ordering a stay and importantly, highlights that remedies under the 1996 Act are only available if it is determined that the court can assume jurisdiction over the defendant.

COMMENT

These decisions demonstrate the non-interventionist approach to disputes governed by arbitration that the English courts have adopted following the 1996 Act. The courts will seek to give effect to arbitration clauses and avoid meddling where the parties have agreed to refer disputes to arbitration. Their treatment of international arbitration works to bolster London's standing as a leading destination for the resolution of such disputes. •

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Comparing the duration and cost of international arbitration

International arbitration as a method for resolving cross-border disputes continues to gain popularity. However, when considering which of the arbitral institutions' rules to include in an arbitration agreement, there are two practical points to consider: (i) the likely duration and (ii) the likely cost of any arbitration.

International arbitration as a method for resolving cross-border disputes continues to gain popularity. In choosing which arbitral institutions' rules to include in an arbitration agreement (if any), parties will often consider: (i) the likely duration and (ii) the likely cost of any arbitration.

For this reason, the individual arbitral institutions regularly publish the average duration and costs of the arbitrations they administer. Here, we have summarised the statistics provided by some of the more commonly chosen institutions and, where available, we have provided general indications of the administrative costs levied by those institutions based on theoretical disputes of US$1 million, US$10 million and US$100 million in value. Cost here relates only to an institution's administrative fees and the fees of arbitrators, not a party's own legal costs.

COMPARISON OF FIVE OF THE MORE POPULAR ARIBTRAL RULES

International Chamber of Commerce Rules of Arbitration (the ICC Rules)

946 arbitrations were registered with the ICC in 2020 with the majority conducted under the 2017 ICC Rules (replaced on 1 January 2021 by the 2021 ICC Rules). 53.5% of those arbitrations were seated in North and West Europe.

Duration

The ICC Dispute Resolution 2020 Statistics show the median duration for arbitrations reaching final award in 2020 to be 22 months.

Cost

The average cost of arbitrating under the ICC Rules is not provided.

The ICC administrative expenses and the arbitrators' fees are fixed ad valorem ("according to value") and the ICC Rules contain scales for these relative to the value in dispute with the ICC website providing a costs calculator to give an indicative guide to the expenses and fees that may be fixed by the ICC, based on the sums in dispute and the number of arbitrators to be appointed.

	Sole Arbitrator	Three Arbitrators
US$1m dispute:	62,714 (average)	141,472 (average)
US$10m dispute:	170,799 (average)	397,367 (average)
US$100m dispute:	315,559 (average)	744,727 (average)

Arbitration Rules of the Singapore International Arbitration Centre (the SIAC Rules)

The most recent SIAC cost and duration study was prepared in October 2016 and based on arbitrations under the SIAC Arbitration Rules 2013. SIAC's caseload has increased significantly since then – from 343 in 2016 to 1,080 in 2020. The SIAC Arbitration Rules 2016 have been introduced since the latest study, however none of the changes in the new 2016 rules have impacted the likely cost or duration of an arbitration.

Duration

The median duration to a final award from commencement was 11.7 months.

Cost

Like the ICC, the SIAC applies scale costs, charging on the basis of the amount in dispute and number of arbitrators.

	Sole Arbitrator	Three Arbitrators
US$1m dispute:	50,036	131,234
	(max 66,715)	(max 174,979)
US$10m dispute:	119,313	311,086
	(max 159,085)	(max 414,782)
US$100m dispute:	257,337	666,298 *
	(max 343,116)	(max 888,398) *

As to the median cost of an SIAC arbitration, the SIAC indicated in its Costs and Duration Study of October 2016 that this was US$29,567.

** Figures based on exchange rate of 1 USD to 1.348 SGD.*

Hong Kong International Arbitration Centre Administered Arbitration Rules (the HKIAC Rules)

318 arbitrations were submitted to the HKIAC in 2020 with over 99% of HKIAC arbitrations seated in Hong Kong. In June 2021, the HKIAC published its average costs and duration report which covers arbitrations administered by HKIAC under the HKIAC Rules and with a final award issued between 1 November 2013 and 31 May 2021.

Duration	The median duration to a final award was 13 months from commencement.
Cost	The median cost was US$64,606. Parties have the option of paying arbitrators at a capped hourly rate (approximately US$840) or on an ad valorem fee scale (as is the case with the ICC). The 2021 report notes that the majority of HKIAC arbitrations provide for remuneration on an hourly rate basis. This seems to lead to increased costs relative to the *ad valorem* basis. For example, the costs of arbitrating disputes between US$10 and 100 million were reported to vary between an average of US$280,345 on an hourly basis and a lower average of US$161,800 for an ad valorem basis. Applying the HKIAC's scale costs gives the following figures: **Sole Arbitrator** / **Three Arbitrators** US$1m dispute: 61,972 (max) / 163,906 US$10m dispute: 149,329 (max) / 397,185 US$100m dispute: 317,276 (max) / 846,905 * * *Figures based on exchange rate of 1 USD to 7.777 HKD and estimated costs based on the maximum fees of one arbitrator as* provided by the calculator

London Court of International Arbitration Rules (the LCIA Rules)

The LCIA Annual Casework Report for 2020 reveals its continuing popularity in the energy and resources, transport and commodities and banking and finance sectors – 68% of LCIA arbitrations in 2020 were referred from those sectors.

The most recent study of the costs and duration of LCIA arbitrations was published in 2017.

Duration	The median duration to a final award was 16 months from registration.
Cost	The median cost was US$97,000. The LCIA does not apply scale costs, but instead are comprised of tribunal fees (arbitrators' hourly rates, cancellation fees etc.) and administrative charges (registration fee, 5% fee of total tribunal fee etc.). The analysis contained in the Report suggests that cost and duration are directly linked under the LCIA Rules.

Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Rules)

The SCC introduced new rules in 2017 which sought to emphasise efficiency and expediency in SCC arbitrations. General statistics prepared by the SCC in 2020 provide an insight into duration, however updated cost details were not provided.

Duration	40% of final awards were provided within 6 months from when the case was referred to the arbitrator or tribunal, while a further 42% of final awards were provided within 12 months from the date of referral.
Cost	The average cost of arbitrating under the SCC Rules is not provided. The fees paid to arbitrators and to the SCC are fixed ad valorem and the SCC rules contain tables to determine the minimum and maximum fees in relation to the value of a claim. As with the ICC, there is an online costs calculator which helps estimate the costs that may be fixed by the SCC (excluding VAT). **Sole Arbitrator** / **Three Arbitrators** US$1m dispute: 65,236 / 116,049 US$10m dispute: 171,617 / 315,172 US$100m dispute: 320,492 / 593,019 * * *Figures based on exchange rate of 1 USD to 0.862 EUR.*

EXPEDITED ARBITRATION

Recent years have seen the arbitral institutions introduce alternative expedited procedures to address concerns of the increasing time and costs of international arbitration. In general, expedited arbitral procedures are reserved for smaller value claims or on an opt-in basis, and will not be suitable for all types of dispute.

Proceedings may be expedited by appointing a sole arbitrator, reducing the time between procedural steps or dispensing with some steps altogether. The SCC's 2020 statistics (which has a standalone procedure – 2017 Rules of Expedited Arbitrations) show that 50% of expedited arbitrations received an award within 3 months, while the HKIAC expedited process resulted in awards being received around 6 months from commencement.

CONCLUSIONS

Duration and cost will not be the only considerations when choosing arbitral rules – whether at contract negotiation or once a dispute has arisen. For example certain arbitral institutions are more popular in particular industries and countries. It is however helpful to know what a party might be "in for" in terms of costs of the various institutions and what the track record of various institutions is on time to final award. •

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KEY CONSIDERATIONS when choosing a party-appointed valuation or quantum expert in arbitration

Arbitration often involves resolving complex and technical matters which call for specific knowledge or experience, including determining the value or quantum of a claim. Expert witnesses are often instructed by parties to do this through written statements and oral testimony before the arbitral tribunal. Generally, in most high value, large and/or complex arbitrations, the parties will benefit from having a party-appointed expert to assess quantum, or to rebut an opposing party's assessment of quantum. In some instances, relying on experts will simply be a prerequisite to convince the tribunal. In this article, we discuss key considerations when appointing such an expert.

Knowledge is the key reason why parties appoint experts. Education, academic publications and experience, create an expert's professional qualifications. Perhaps as important as professional qualifications, are the expert's personal skills. Communication skills are imperative and credibility and trustworthiness are also important. The expert's academic degree, publications and reputation are necessary prerequisites for credibility, but the extent to which an arbitral tribunal will find the expert credible or trustworthy also depends on the expert's personality. That the expert is likable is a clear advantage, since parties, their counsel and the arbitral tribunal will be spending several hours in the hearing room together.

Expert evidence should be given in a clear, concise and persuasive manner. If the expert communicates poorly, important points risk being lost as opaque, vague or confusing, or the arbitral tribunal may simply lose confidence in the expert.

ABILITY TO COPE WITH PRESSURE DURING CROSS-EXAMINATION

Presenting evidence clearly and completely is one thing. Presenting the same evidence under fire from the other party's counsel in an extensive cross-examination, is an entirely different exercise and requires a calm and resilient expert.

Many arbitral tribunals make use of "hot tubbing", meaning that the parties' experts provide evidence concurrently, so that they may engage in discussion and address questions in parallel. Depending on the way it is handled by an arbitral tribunal, "hot tubbing" risks turning into mud wrestling. An expert with previous experience of arbitration or litigation may cope better with the pressure of cross-examination and hot tubbing. However, thorough preparation, as well as an expert's willingness to dive deep into the details of the case, will be strong armour against opposing counsel.

The benefits of personal preparations should not be underestimated. Our best advice to an expert facing cross-examination the next day is that enough sleep may be more helpful than last-minute cramming. Also, personal comfort is important when under pressure – you may not want your expert to wear a heavy winter suit for cross-examination!

INDEPENDENCE AND INTEGRITY

The party-appointed expert shall generally be independent from the parties. The IBA Rules on Taking of Evidence in International Arbitration, which are often used as guiding principles in international arbitration, require the party-appointed expert to provide a statement to this effect. The statement must include the expert's present and past relationship (if any) with any of the parties, their legal advisors and/or the arbitral tribunal, as well as a declaration of independence from the parties, their legal advisors and the arbitral tribunal. The CIArb Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration provides that an expert's opinion shall be "*impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party*".

This does not mean that the expert owes no duty to the client. Indeed, the simple fact that the expert is paid by one party may challenge the proposition of impartiality and independence. Different legal systems may also have different views on how independent and impartial the expert must be, and how to ensure independence. For example, the expert's duty of independence is traditionally stronger in the UK than in continental Europe.

In any event, integrity and independence are must have features for a good expert. The expert needs to give client and counsel a true and honest opinion of the chances of success early on. An expert who backtracks from his or her written opinions in cross-examination, or comes across as biased, will immediately lose credibility in the eyes of the tribunal and can do more harm than good.

TIME AND AVAILABILITY

Time and availability is an obvious point, but its importance should not be ignored. Having appointed the go-to expert in the industry is worthless if he or she does not have the time for proper preparation of written statements and hearings together with client and counsel. We have in this note stressed a few key parameters when choosing the expert, including personal skills, resistance to pressure, independence and availability, which we recommend the parties and their counsel take into account. Having done a good mapping and selection, it is up to the the client and their counsel to maximise the full potential of having an expert on board, and extensive preparation is always key. •

The benefits of personal preparations should not be underestimated.

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Third time's the charm:
UK Supreme Court affirms orthodox approach to liquidated damages

In July 2021, the Supreme Court handed down a long awaited judgment in *Triple Point Technology v PTT*, overturning the earlier Court of Appeal decision and in doing so provided clarity on the applicability of a liquidated damages clause in circumstances where the contract has been terminated prior to its completion. The judgment also provided a helpful reminder of the correct interpretation of "negligence" when included in a limitation of liability clause.

PTT Public Company Ltd ("**PTT**", the customer), a Thai oil and gas company, entered into a contract in February 2013 with US-based Triple Point Technology, Inc ("**Triple Point**", the supplier) for the design, installation, maintenance and licencing of software in relation to PTT's commodity trading business. The project was split into two phases, the first being the replacement of PTT's existing system and the second involving the development of the system to incorporate new types of trade. The total contract price was to be paid in instalments following the completion of various milestones.

The project experienced significant delays, and only two milestones in Phase 1 were completed (albeit 149 days late) and work did not commence at all on Phase 2. PTT accepted and paid Triple Point for the completed work, but refused to pay any further invoices for work not yet completed. Triple Point suspended work as a result of the non-payment and PTT consequently terminated the contract in 2015. Triple Point commenced proceedings for the sums said to be due under the unpaid invoices and PTT counterclaimed for damages (i.e. wasted costs and costs for the replacement system) and for liquidated damages arising from Triple Point's failure to meet the contractual timetable.

The relevant contractual provisions provided the following:

1. In case of delay, Triple Point would pay liquidated damages at a rate of 0.1% of undelivered work per day of delay from the due date for delivery **until PTT accepted such work** (Article 5.3); and
2. There was a cap on Triple Point's overall liability, but this excluded "*fraud, negligence, gross negligence or wilful misconduct*" (Article 12.3).

THE COURT OF APPEAL DECISION

At first instance, Jefford J dismissed Triple Point's claim, holding that they were in breach of contract by failing to exercise reasonable skill and care in the performance of the contract. PTT was therefore entitled to both liquidated damages (uncapped) up until the date of termination and damages for wasted costs and the costs of procuring a replacement system (subject to the liability cap).

On appeal in 2019, the Court of Appeal set aside the first instance decision. Triple Point successfully arguing that the liquidated damages provision under Article 5.3 (see point (1) above) did not apply because such remedy would only be available where work was (i) delayed, (ii) subsequently completed and (iii) accepted by the customer. Here, that was not the case because the work had never been completed and thus never accepted by PTT.

On consideration, the Court of Appeal accepted that the orthodox view was that liquidated damages applied until termination, with general damages being claimable thereafter, but concluded that in this case liquidated damages were not payable in respect of works which remained incomplete at termination. PTT was therefore entitled to recover liquidated damages **only** for the works completed (i.e. the works delivered 149 days late) but not for any remaining works. The Court of Appeal also held that these liquidated damages were subject to the liability cap.

On the applicability of the capped carve-out, the Court of Appeal held that the reference to "negligence" applied to independent torts and deliberate wrongdoings but not to breaches of the contractual duty of care. This was because both the judge at first instance and the Court of Appeal considered there would be "*little point in imposing a cap on liability for breach of the contractual duty of skill and care in a contract which was wholly or substantially for services, which had to be provided with skill and care, only to remove the cap in the final sentence* [of Clause 12.3]".

THE SUPREME COURT DECISION

This decision was appealed to the Supreme Court which held that the Court of Appeal had erred:

1. in its "*radical re-interpretation of the case law on*" liquidated damages clauses because it had failed to consider the commercial reality and function of clause 5.3; and
2. in its conclusions on the meaning of "negligence", in failing to appreciate that the contract was not solely for the provision of services but also covered absolute obligations such as that to provide the relevant software.

Issue 1: applicability of the liquidated damages clause

The key issue considered by the Supreme Court here was whether liquidated damages were payable in circumstances where Triple Point did not complete the work such that PTT could not accept it. The judge found that the Court of Appeal's conclusion in respect of clause 5.3 was "*inconsistent with commercial reality and the accepted function of liquidated damages.*". This was on the basis that the key function of such a provision was to provide the parties with a predictable and certain outcome following the occurrence of a particular event (i.e. delay). Once termination of a contract occurs, the court confirmed that, as was well known, general damages take the place of liquidated damages. The correct interpretation of Article 5.3 (see point (1) above) was therefore that liquidated damages continued to be available when the contractual completion date had passed, regardless of whether the work had been accepted, up to the date of termination. The court went on to confirm however that such liquidated damages were subject to the contractual liability cap.

> [...] concluded that in this case liquidated damages were not payable in respect of works which remained incomplete at termination.

Issue 2: interpretation of "negligence" in the liability cap

The contract provided for carve-outs to the overall cap on liability, which included an exception from negligence. Under English law, the meaning of "negligence" covers both breaches of the contractual duty of care and the tort of failing to exercise due care. Contrary to the conclusions reached in the Court of Appeal, the Supreme Court held that "negligence" in Article 12.3 (see point (2) above) did not exclude breaches of the contractual duty of care. They considered that "negligence" should be given its ordinary and accepted meaning under English law and confirmed that "*the court in construing the contract starts from the assumption that in the absence of clear words the parties did not intend the contract to derogate from these normal rights and obligations*". As the contract went wider than simply a provision of services, liability arising out of Triple Point's negligence was therefore uncapped.

COMMENT

The Court of Appeal's "radical" decision led to concerns about a party's ability to recover liquidated damages under clauses drafted in line with the traditional view i.e. where the other party had abandoned the contract or termination occurred before the works were complete. The Supreme Court's return to the orthodox position, confirming that liquidated damages will apply up to the date of termination of the contract (whether or not expressly stated) provides welcome clarity.

However, the case as a whole provides a salient reminder that, to avoid any subsequent and potentially costly disputes, parties to a contract should endeavour to spell out clearly the scope and intention of clauses dealing with liquidated damages and the relationship between one party's liability to pay such liquidated damages with any limitation/exclusion clause included in the contract. •

The Supreme Court's return to the orthodox position, confirming that liquidated damages will apply up to the date of termination of the contract...

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