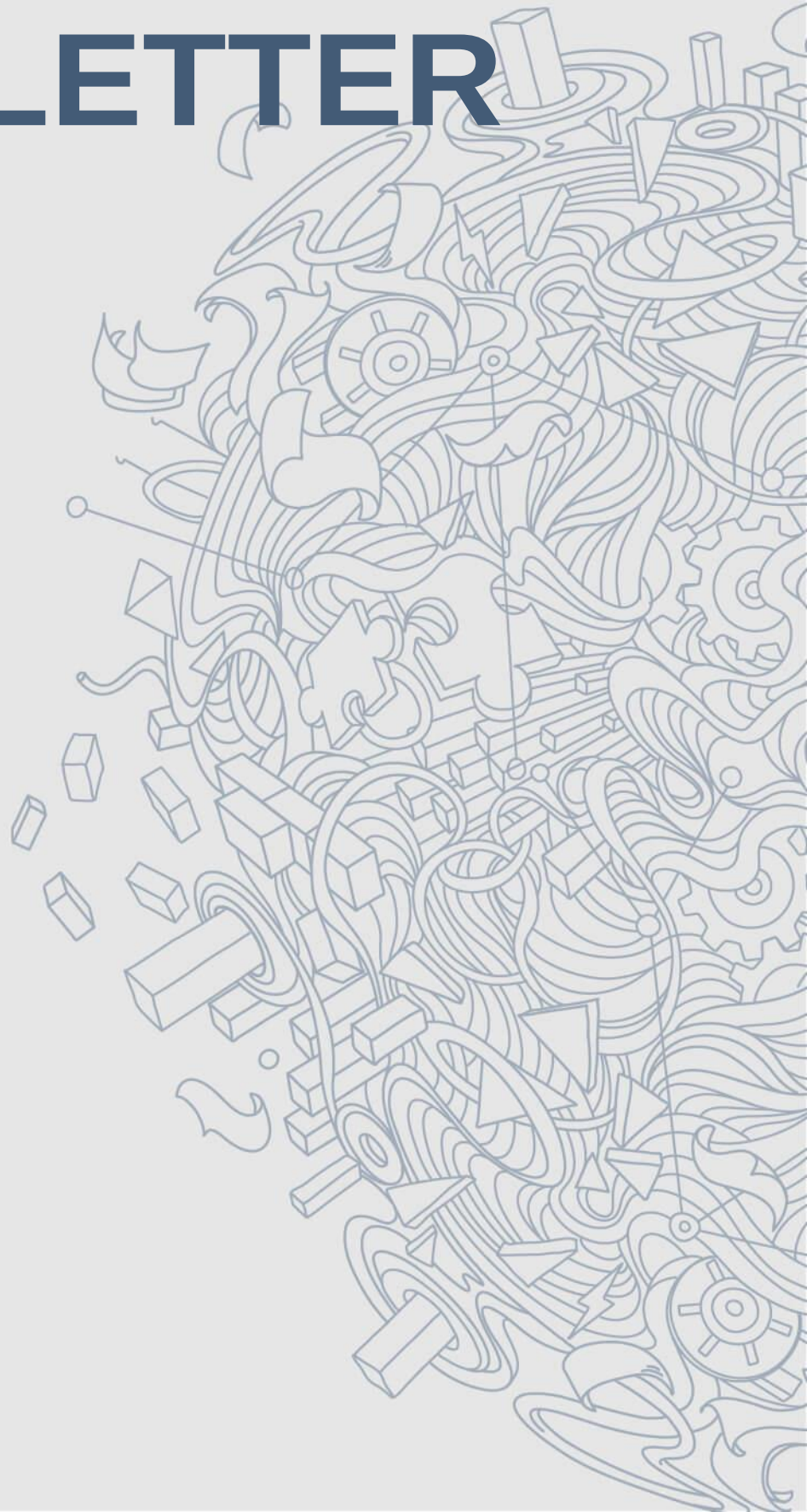
INTERNATIONAL ARBITRATION NEWSLETTER



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WHICH LAW GOVERNS THE ARBITRATION AGREEMENT?

Enka Insaat Ve Sanayi AS (Respondent) v OOO Insurance Company Chubb (Appellant) [2020] UKSC 38

OVERVIEW

How is the law governing the validity and scope of an arbitration agreement determined (absent any express choice) when the law applicable to the main contract differs from the law of the seat of the arbitration?

Where parties have agreed on the law to govern a contract, that law will also apply to an arbitration agreement contained in the contract (even where the law chosen to govern the contract differs from that of the place chosen as the seat of the arbitration).

Where there is no choice of applicable law, the arbitration agreement will be governed by the law with which it is most closely connected. The Supreme Court has now confirmed that the default rule is that it will be most closely connected with the law of the seat of the arbitration (even if this differs from the law applicable to the parties' substantive contractual obligations).

FACTUAL BACKGROUND

In February 2016, a power plant in Russia was severely damaged by fire. The appellant (**Chubb**) had insured the owner of the power plant against fire damage. The principal contractor responsible for the design and construction of the power plant had engaged the respondent (**Enka**) as a sub-contractor. The contract between the principal contractor and Enka included an agreement that disputes would be settled through arbitration proceedings, seated in London. The contract did not expressly specify a choice of law.

In May 2014, the principal contractor transferred its rights and obligations under the construction contract to the owner of the plant. After the fire, Chubb paid approximately US$400m to the owner under its property insurance policy and thereby assumed any rights of the owner to claim compensation from third parties for the damage caused by the fire.

In May 2019, Chubb filed a claim against Enka in the Russian courts in respect of the damage caused by the fire. In response, in September 2019 Enka brought a claim in the Commercial Court in London seeking an anti-suit injunction to restrain Chubb from further pursuing the Russian court proceedings on the basis that this was a breach of the arbitration agreement contained in the construction contract.

In December 2019, the High Court dismissed Enka's claim on the basis that the Russian court was the appropriate forum to decide whether Chubb's claim against Enka falls within the arbitration agreement. This decision was overturned by the Court of Appeal in April 2020, which issued an anti-suit injunction restraining Chubb from continuing the Russian proceedings.

The Court of Appeal held that, unless there has been an express choice of law to govern the arbitration agreement, the general rule is that the arbitration agreement is governed by the law of the seat, as a matter of implied choice. Since there was no express choice of law in this case, the arbitration agreement was therefore governed by English law. Accordingly, it was appropriate to grant an anti-suit injunction restraining Chubb from pursuing the claim before the Russian courts. Chubb appealed to the UK Supreme Court (the **UKSC**).

SUPREME COURT

By a majority (3:2) the UKSC dismissed the appeal. The majority concluded that the contract from which a dispute arose contained no

WHERE THERE IS NO CHOICE OF APPLICABLE LAW, THE ARBITRATION AGREEMENT WILL BE GOVERNED BY THE LAW WITH WHICH IT IS MOST CLOSELY CONNECTED.

choice of law governing the contract or the arbitration agreement within it. In these circumstances, the validity and scope of the arbitration agreement (and the rest of the dispute resolution clause containing that agreement) is governed by the law of the chosen seat of arbitration, as the law with which the dispute resolution clause is most closely connected.

The seat of the arbitration was London. This meant that the majority upheld the Court of Appeal's conclusion that English law governs the arbitration agreement, albeit for different reasons.

PRINCIPLES GOVERNING THE LAW APPLICABLE TO THE ARBITRATION AGREEMENT

The Rome I Regulation[1] does not apply to arbitration agreements. This means that the English court must apply the common law rules when determining the law governing an arbitration agreement. Those rules are that a contract (or relevant part of it) is governed by: (i) the law expressly or impliedly chosen by the parties; or (ii) in the absence of such choice, the law with which it is most closely connected.

The correct approach in determining whether there has been a choice of law is to apply English law as the law of the forum. In deciding whether there has been a choice of law applicable to the arbitration clause, the court will interpret the contract as a whole applying the ordinary English rules of contractual interpretation. The main contract law, if different, has no part to play in the analysis[2].

Where parties have agreed on a choice of law to govern a contract,

[1] Regulation 593/2008 on the law applicable to contractual obligations (Rome I) (Article 1(2)(e) excludes from its scope "arbitration agreements and agreements on the choice of court").

[2] The Court of Appeal had asserted that, in construing the contract to determine whether a choice of governing law applies to an arbitration agreement within it, the court should apply the principles of construction of the main contract law if different from English law. The UKSC did not consider this to be correct.

that should generally be construed as applying to an arbitration agreement set out in a clause of the contract (even where the law chosen to govern the contract differs from that of the place chosen as the seat of the arbitration). This approach provides certainty and consistency, ensures coherence and avoids complexities and artificiality.

In the majority's view, the Court of Appeal was wrong to find that there is a "*strong presumption*" that a choice of seat is an implied choice of the law which is to govern the arbitration agreement. Whilst a choice of seat and curial law is capable in some cases (based on the content of the relevant curial law) of supporting the inference that the parties were choosing the law of that place to govern the arbitration agreement, the content of the Arbitration Act 1996 does not support such a general inference where the arbitration has its seat in England and Wales.

Accordingly, the choice of a different country as the seat of the arbitration is not, without more, sufficient to negate that a choice of law to govern the contract was intended to apply to the arbitration agreement.

Additional factors which may negate such an inference, and which may in some cases imply that the arbitration agreement was intended to be governed by the law of the seat, are: (i) any provision of the law of the seat which indicates that (where an arbitration is subject to that law) the arbitration agreement will also be treated as governed by that country's law; and (ii) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective. Either factor may be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration.

Where there is no express choice of law to govern the contract, a choice of the seat of arbitration does not by itself imply that the arbitration agreement is intended to be governed by the law of the seat.

CLOSEST CONNECTION TEST

In the absence of an express choice, the law governing the arbitration agreement will be that with which it is most closely connected. The default rule is that the arbitration agreement will be most closely connected with the law of the seat of the arbitration (even if this differs from the law applicable to the parties' substantive contractual obligations).

This default rule is supported by various reasons of principle and policy: (i) the seat of the arbitration is the place where the arbitration agreement is to be performed; (ii) consistency with international law and legislative policy; (iii) giving effect to commercial purpose and the reasonable expectation of contracting parties; and (iv) there is merit in recognising a clear default rules in the interests of legal certainty.

THE ANTI-SUIT INJUNCTION

The UKSC agreed with the Court of Appeal that the principles governing the grant of an anti-suit injunction in support of an arbitration agreement with an English seat do not differ according to whether the arbitration agreement is governed by English law or foreign law. The court is concerned with upholding the parties' bargain (absent strong reason to the contrary) and the court's readiness to do so is itself an important reason for choosing an English seat of arbitration[3].

In the circumstances, the arbitration agreement was valid, the dispute between the parties fell within it and the injunction granted by the Court of Appeal to restrain Chubb from proceeding against Enka in Russia was properly granted. Accordingly, the UKSC dismissed the appeal.

IMPACT

This decision is welcome clarification on a "*question of law which courts and commentators have been grappling with for many years*" (and the difficulty of the question is emphasised by the split decision in the UKSC).

The general rule set out by the UKSC gives priority to the law chosen by the parties to govern the main contract. This is in contrast to the view taken by the Court of Appeal that the choice of law to govern the main contract has little if anything to say about the arbitration agreement due to the doctrine of separability.[4] The UKSC considered that the Court of Appeal's approach "*put the principle of separability of the arbitration agreement too high*".

Parties should exercise care when drafting arbitration agreements to avoid the ambiguities and satellite litigation that arose in this case.

This case is also a good advertisement for the English courts generally and, in particular, the way in which they support international and domestic arbitrations over which they exercise a supervisory jurisdiction. The UKSC noted that the trial, the appeal to the Court of Appeal and the appeal to the UKSC had all been heard in just over seven months. This was said to be a "*vivid demonstration of the speed with which the English courts can act when the urgency of a matter requires it.*"

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[3] Had the arbitration agreement been governed by Russian law, it would have been necessary for the English court to determine whether the agreement was valid under Russian law and whether the claim which Chubb was seeking to pursue in Russia fell within its scope. If those questions were answered in the affirmative, it would in any event have been appropriate to grant an anti-suit injunction.

[4] Under the separability doctrine, an arbitration agreement is viewed for certain purposes (both at common law and under the Arbitration Act 1996) as separate from the main contract. This is to ensure that the arbitration agreement is effective despite the non-existence, invalidity or termination of the main contract.

A MISSED OPPORTUNITY? ARBITRATOR APPARENT BIAS AND THE DUTY OF DISCLOSURE

Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) (First Respondent) [2020] UKSC 48

OVERVIEW

The UK Supreme Court (the **UKSC**) considered the circumstances in which an arbitrator in an international arbitration may appear to be biased, specifically in the context of appointment in multiple references concerning the same overlapping subject matter with only one common party.

The UKSC, upholding the decision from the High Court and Court of Appeal: (i) expressly recognised that impartiality is a cardinal duty of an arbitrator; (ii) confirmed that the relevant test under English law to establish bias, of the "*fair-minded and informed observer*", is objective and applies equally to judges and arbitrators; and (iii) held that arbitrators have a legal duty to make disclosure of facts and circumstances which would or might reasonably give rise to the appearance of bias.

THE CONTEXT

The case arose from the 2010 explosion and fire on the Deepwater Horizon oil rig in the Gulf of Mexico. BP was the lessee of the rig. Transocean was the owner of the rig and provided crew and drilling teams to BP. Halliburton Company (**Halliburton**) provided cementing and well monitoring services to BP. Both Halliburton and Transocean had Bermuda Form liability insurance policies with Chubb Bermuda Insurance Ltd (**Chubb**), which provided for disputes to be resolved by ad hoc arbitration.

Numerous claims were made against BP, Halliburton and Transocean in connection with the incident. Halliburton concluded a settlement of the claims against it, and then claimed on its liability insurance against Chubb. However, Chubb refused to pay Halliburton's claim. Transocean made a similar claim against Chubb, which was also contested.

Halliburton then commenced an arbitration against Chubb. Both parties selected their own arbitrator but were unable to agree on the appointment of a third arbitrator as chairman. This led to a contested hearing at which the court appointed Mr Rokison (**R**), who had been proposed by Chubb. Subsequently and without Halliburton's knowledge, R accepted an arbitrator appointment in two separate references also arising from the Deepwater Horizon incident. The first appointment was made by Chubb and related to Transocean's claim against Chubb. The second was a joint nomination by the parties involved in a claim by Transocean against another insurer.

> **IN REACHING ITS DECISION, THE UKSC EXAMINED THE SCOPE OF THE DUTIES OF IMPARTIALITY AND DISCLOSURE IN THE CONTEXT OF INTERNATIONAL ARBITRATION, AND THE TEST FOR APPARENT BIAS.**

On discovering R's appointment in the later references, Halliburton applied to the court under section 24 of the Arbitration Act 1996 (the **1996 Act**) to remove R as an arbitrator. That application was refused. The Court of Appeal dismissed the subsequent appeal, holding that, whilst R ought to have disclosed his proposed appointment in the subsequent references, an objective observer would not in the circumstances conclude that there was a real possibility R was biased. Halliburton then appealed to the UKSC.

JUDGMENT

The UKSC was asked to consider: (i) whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party, without thereby giving rise to an appearance of bias; and (ii) whether and to what extent the arbitrator may do so without disclosure.

In reaching its decision, the UKSC examined the scope of the duties of impartiality and disclosure in the context of international arbitration, and the test for apparent bias. Ultimately, the UKSC dismissed Halliburton's appeal, finding that, as at the date of the hearing to remove R, the "*fair-minded and informed observer*" would not have concluded that circumstances existed that gave rise to justifiable doubts about R's impartiality.

THE DUTY OF IMPARTIALITY AND THE TEST FOR APPARENT BIAS

The UKSC observed that impartiality, as enshrined within section 33 of the 1996 Act, is a cardinal duty of both judges and arbitrators.

It then held, considering the facts of this case, that there may be circumstances in which the acceptance of appointments in multiple overlapping claims with only one common party "*might reasonably cause the objective observer to conclude that there is a real possibility of bias*".

Turning to the relevant test, the UKSC noted that the objective common law test of the fair-minded and informed observer applies equally to judges and all arbitrators. There is no difference between the test in section 24(1)(a) of the 1996 Act, which speaks of the existence of circumstances "*that give rise to justifiable doubts as to [the arbitrator's] impartiality*" and the common law test.

That said, the UKSC did highlight certain characteristics of arbitration which the English courts should have

regard to when addressing an allegation of apparent bias in an English-seated arbitration. In particular, the features flowing from the private and confidential nature of international arbitration, which leads to less visibility for the parties on arbitrator appointments and to a higher onus being placed on frank disclosure.

THE DUTY OF DISCLOSURE

The UKSC clarified that under English law, disclosure is not merely good arbitral practice, but a legal duty, and a component of the arbitrator's statutory obligations of fairness and impartiality. This clarification represents an important development of English arbitration law. An arbitrator must disclose facts and circumstances which would or might reasonably give rise to justifiable doubts as to his or her impartiality. A failure to disclose relevant matters is a factor for the fair minded and informed observer to take into account when assessing whether there is a real possibility of bias. However, a failure to disclose is not in itself sufficient to lead to the removal of an arbitrator.

As regards the tension between this duty and the confidentiality of arbitrations, the UKSC recognised that disclosure can only be made if the parties who are owed confidentiality obligations provide their consent. Such consent can be inferred from the parties' contract having regard to the customs and practices of arbitration in their field.

On this basis, the UKSC held that:

- R was under a legal duty to disclose his subsequent appointments to Halliburton because the existence of potentially overlapping arbitration proceedings with only one common party was a circumstance which might reasonably give rise to the real possibility of bias. R breached this duty by failing to make the relevant disclosure.
- However, this was not sufficient to lead to the removal of R as arbitrator. The UKSC gave several fact-specific reasons for this, including the fact that there appeared to have been a lack of clarity in English case law as to whether there was a legal duty of disclosure and whether disclosure was needed; the time sequence of the three references; R's measured response to Halliburton's challenge; and there being "*no question*" of R having received any "*secret financial benefit*".

> **PRACTITIONERS AND PARTIES TO ARBITRATIONS ARE LIKELY TO BE DISAPPOINTED BY THE LACK OF CLEAR PRACTICAL GUIDANCE - PARTICULARLY WHERE THE OUTCOME IS SO FACT-SPECIFIC.**

COMMENTARY

This much awaited decision was handed down by the UKSC a year after it was heard. Whilst it provides a useful overview and clarification on the principles relating to apparent bias (and, in particular, confirms the existence of a legal duty to disclose), practitioners and parties to arbitrations are likely to be disappointed by the lack of clear practical guidance - particularly where the outcome is so fact-specific.

In addition, some may wonder whether the decision will have any real impact on arbitrator practice in relation to bias and disclosure, because a breach of the legal duty to disclose was not met with a removal, or indeed any, substantive repercussions.

Parties requiring additional certainty in relation to this question, may choose to turn instead to arbitrations under the auspices of arbitral institutions whose rules focus on the perceptions of the parties and expressly require arbitrators to disclose any facts or circumstances which might in the 'eyes' or 'mind' of the parties call into question the arbitrator's impartiality (such as the ICC rules (article 11) or the LCIA rules (article 5.4)). Such provisions potentially lead to a stricter view on the interpretation of the arbitrator's obligation to disclose prior appointments, and therefore wider scope for challenging an arbitrator who breaches such an obligation.

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ICC UNVEILS NEW RULES: WHAT YOU NEED TO KNOW

SUMMARY

On 1 January 2021, the new Arbitration Rules of the International Chamber of Commerce (**2021 Rules**) officially came into force. Any case submitted to the ICC after 1 January 2021 will be subject to the 2021 Rules, unless parties agree otherwise.

The principal amendments and new provisions follow four key themes: (1) efficiency; (2) flexibility; (3) conflicts of interest; and (4) party equality. They are intended to mark a further step towards ever more efficient, flexible and transparent procedures, reflecting recent trends and best practices and responding to what users are looking for in the arbitral process. We discuss the key amendments below.

EFFICIENCY

Joinder and consolidation (Articles 7(5) and 10)

Article 7(5) of the 2021 Rules allows requests for joinder to be made after the tribunal has been constituted, and will now allow a respondent to join as co-respondent without the claimant's agreement. In determining requests for joinder under Article 7(5), a tribunal will take into account all relevant circumstances, including whether it has *prima facie* jurisdiction over the additional party, potential conflicts of interest and the impact of the joinder on the arbitration procedure. Crucially, under Article 7(5), "*any decision to join an additional party is without prejudice to the arbitral tribunal's decision as to its jurisdiction with respect to that party*". It follows that a non-consenting claimant may still challenge a tribunal's jurisdiction over the new party. Further, the additional party must agree to the Terms of Reference and accept the constitution of the tribunal. This is particularly aimed at ensuring that the arbitral process continues to run smoothly and efficiently, and that the new party cannot subsequently challenge an award under Article V(1)(b) New York Convention (on grounds that it "*was not given proper notice of the appointment of the arbitrator*").

Article 10 allows the ICC Court to consolidate two or more pending arbitrations where "*all of the claims in the arbitrations are made under the same arbitration agreement or agreements*" or where the claims are under multiple agreements and "*the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible*." This reflects a more expressly liberal approach to consolidation than the previous iteration of the ICC Rules, and is consistent with recent trends in national courts in favour of so-called "*one-stop adjudication*", even where arbitration clauses in related contracts are not identical.

THEY ARE INTENDED TO MARK A FURTHER STEP TOWARDS EVER MORE EFFICIENT, FLEXIBLE AND TRANSPARENT PROCEDURES, REFLECTING RECENT TRENDS AND BEST PRACTICES AND RESPONDING TO WHAT USERTS ARE LOOKING FOR IN THE ARBITRAL PROCESS.

Virtual hearings and modern communications (Article 26(1))

Article 26(1) expressly gives tribunals the discretion to order virtual or remote hearings - a matter which has taken on considerable importance since the start of the Covid-19 pandemic. It may do so "*after consulting the parties*", although the parties' mutual agreement to a remote hearing is not required. Again, this new provision makes it harder for parties to resist enforcement on grounds that they were not granted an in-person hearing. Article 26(1) requires the tribunal to consult with the parties and to consider the fairness of the procedure, and removes the presumption of an in-person hearing, presenting a neutral expectation as to whether a hearing will be in-person, virtual or hybrid.

Article 3(1), meanwhile, moves away from the presumption that pleadings and other communications should be submitted in hard copy, and merely requires that communications and documents be "*sent*". This reflects long-standing practice in relation to email correspondence, and a practice which in relation to voluminous pleadings and evidence has become the norm for many during the COVID-19 pandemic.[1] Article 3 stops short, however, of stating that electronic notifications and communications are sufficient, in order to allow for compliance with mandatory laws which may still require the submission of hard copies.

Not only do these changes reflect current practice, in particular during the COVID-19 pandemic when so many offices have been shut, but they also reflect a move towards a more sustainable arbitral practice.

Case management (Articles 22(2) and 24(2))

Article 22(2) now requires arbitral tribunals to adopt procedural measures that are appropriate to ensure effective case management - using "*shall*" rather than "*may*" (as under the previous rules). Thus, active case management becomes an obligation rather than choice.

Appendix IV now recommends that arbitrators actively "*encourage*" parties to consider amicable settlement of all or part of their dispute, whereas previously the rules provided only that a tribunal might "*inform*" the parties of the availability of methods of amicable settlement. This is a subtle but significant change, encouraging tribunals to take a more proactive role in efficient settlement of disputes.

[1] Articles 4 and 5 and Article 1 of the Emergency Arbitrator Rules have similarly been amended to reflect current practice.

Expedited arbitration (Article 30)

The 2021 Rules increase the financial limit for expedited arbitrations to USD 3m (from USD 2m), provided the arbitration agreement was concluded after 1 January 2021. Parties are still able to opt out of the Expedited Procedure Rules.

FLEXIBILITY

Provisions applying to arbitration under investment treaties (Article 13(6) and 29(6))

The 2021 Rules contains certain amendments designed to make the ICC Rules more appropriate for use in treaty-based arbitrations. Article 13(6) prevents the appointment of an arbitrator of the same nationality as any party to the arbitration where "*the arbitration agreement upon which the arbitration is based arises from a treaty*". This is consistent with practice in such cases and mirrors equivalent provisions in the ICSID Arbitration Rules. Article 29(6), meanwhile, provides that the provisions of the 2021 Rules dealing with emergency arbitrations do not apply in treaty-based arbitrations, reflecting concerns as to the compatibility of the initiation of treaty-based arbitration with the requirement under the 2021 Rules that for an emergency arbitration all parties be signatories of the arbitration agreement. This reflects the fact that tribunals in such cases can make decisions which have significant State policy impact. This reflects nationality rules that are already included in other institutional rules, such as the UNCITRAL Rules.

Additional Awards (Article 36(3))

Under Article 36(3), if a tribunal omits to decide a particular claim in an award, parties can now submit an application for an additional award to decide that which has been omitted to the ICC Court within 30 days of receipt of an award. This adds to the existing right under the Rules to apply to correct clerical errors in awards for the interpretation of awards.

CONFLICTS OF INTEREST

Obligation to disclose third-party funding arrangements (Article 11(7))

In light of the prevalence of third-party funding in international arbitration and inspired by the IBA Guidelines, Article 11(7) requires parties to inform the ICC Secretariat, tribunal and other parties of any non-party funding arrangement (in relation to claim or defence), under which the non-party has an economic interest in the outcome of the arbitration. The rationale for this provision is said to be "*to assist prospective arbitrators and arbitrators in complying with their duties [of disclosure in relation to potential conflicts of interest]]*". Article 11(7) is wide-ranging in that it requires disclosure of a non-party that has an "*economic interest*" in the outcome of the arbitration which need not be a "*direct economic interest*." The ICC has actively encouraged greater transparency of third funding arrangements. Recently, the ICC noted that when considering whether to make a disclosure of a conflict of interest, arbitrators should consider any relationship with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award.

Exclusion of new party legal representatives (Article 17(1) and 17(2))

Parties are now required under Articles 17(1) and 17(2) to promptly notify the Secretariat, tribunal and other party of any changes in representation, and tribunals are granted powers to exclude new legal representatives where their appointment creates a conflict of interest. This provision is designed to address, for example, the situation in which barristers from the same chambers as one of the members of the tribunal are introduced once the arbitration is well underway. Parties are required to take other measures to avoid a conflict of interest with any member of the tribunal. This provision requires tribunals to strike a balance between conflicts and the right to choose one's own counsel and the impact of a change of counsel, and it cannot be used as a carte blanche for tribunals to disqualify certain counsel.

PARTY EQUALITY

Where there is a "*significant risk of unequal treatment and unfairness*" caused to one of the parties, the ICC Court will now have the power to appoint each member of an arbitral tribunal under Article 12(9). The ICC has stated that this is to allow the Court to disregard unconscionable arbitration agreements that may risk the validity of the award. This provision is designed to address the very rare circumstances in which there has been significant risk of unequal treatment during the appointment of the tribunal which could affect the enforceability of the award. This provision is designed to address very rare and esoteric cases. By way of illustration, the ICC has explained that this situation has arisen about three times in total. It is therefore not designed for widespread application.

COMMENT

The 2021 Rules do not represent a radical change from the current rules. However, they crystallise a number of common current practices, in particular, in relation to efficiency, virtual hearings and third party funding. Whilst not revolutionary, the 2021 Rules are a welcome update to conducting ICC arbitrations.

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ENFORCEMENT OF ARBITRAL AWARDS: – HONG KONG COURTS HAVE POWER TO GRANT RELIEF AND REMEDIES BEYOND THE TERMS SET OUT IN AN ARBITRAL AWARD

INTRODUCTION

With the growing number of arbitration cases administered by the Hong Kong International Arbitration Centre (**HKIAC**) in recent years, arbitration has undoubtedly become one of the prevailing alternative dispute resolution mechanisms widely adopted by domestic and international businesses. Hong Kong, as a well-recognised hub for international arbitration, has developed a set of widely accepted rules and procedures which warrants the effective recognition and enforcement of arbitral awards.

In Hong Kong, an arbitration award may be enforced by Hong Kong courts by converting the arbitral award into a court judgment that has the same effect. This can be done either by (1) invoking the statutory procedure under the Hong Kong Arbitration Ordinance (Cap. 609), or (2) by bringing a common law action. However, do Hong Kong courts have the power to grant relief which goes beyond the scope of the arbitral awards, particularly in the event that the arbitral award has become incapable of being performed by the parties?

On 9 October 2020, the Hong Kong Court of Final Appeal (the **Court**) delivered a landmark judgment in the case of *Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd and others* [2020] HKCFA 32. The decision signifies the end of a 12-year dispute concerning the jurisdictional limits and powers of Hong Kong courts when enforcing arbitral awards. The Court concluded that Hong Kong courts have the power to order remedies falling outside the scope of the arbitral awards in a common law action in the event that the parties fail to perform the award.

FACTUAL BACKGROUND

The dispute arose out of a sales and purchase agreement made between Xiamen Xinjingdi Group Co Ltd (**Plaintiff**) and Eton Properties Limited and Eton Properties (Holdings) Limited (**Defendants**) in July 2003 (**Agreement**). The Agreement provided, amongst other things, that:

- the Plaintiff would acquire the right to develop a piece of land in Xiamen (**Lot 22**). Lot 22 is owned by a PRC-incorporated company called Legend Properties (Xiamen) Company Limited (**Legend Properties China**) which, in turn, is wholly and indirectly owned by the Defendants through a Hong Kong-incorporated company sharing the same name as Legend Properties China (**Legend Properties HK**).
- The Defendants would transfer their shares in Legend Properties HK to the Plaintiff in consideration of the total transfer price paid by the Plaintiff.
- Delivery of Lot 22 was to take place within 6 months of the date of the Agreement.

Shortly after the execution of the Agreement, the Defendants wrote to the Plaintiff in November 2003, expressing their intention to terminate the Agreement. Despite the Plaintiff's refusal to the Defendants' renunciation, the Defendants nevertheless took steps to develop Lot 22 contrary to the Agreement without the prior consent of the Plaintiff.

In light of the Defendants' breach, the Plaintiff commenced arbitration proceedings against the Defendants at the China International Economic and Trade Arbitration Commission (**CIETAC**) in Beijing in August 2005. The Plaintiff eventually obtained an arbitral award (**Award**) from CIETAC in October 2006, awarding the Plaintiff damages for the Defendant's breach and requiring the Defendants to continue to perform the Agreement (**Specific Performance**). However, unbeknownst to the Plaintiff, the Defendants, during the course of the arbitration proceedings, transferred all their shares in Legend Properties HK to another company called Eton Properties Group Limited (**EPGL**). As such, the rights to develop Lot 22 were also transferred to EPGL (**Restructuring**).

FIRST ENFORCEMENT ACTIONS

After obtaining the Award, the Plaintiff successfully applied to the Court of First Instance and obtained a statutory judgment mirroring the terms of the Award pursuant to section 2GG of the Arbitration Ordinance (Cap. 341).[1] The Defendants then applied to set aside the statutory judgment on the basis that the Restructuring has rendered the Specific Performance impossible.

SECOND ENFORCEMENT ACTIONS

After the Restructuring had come to the attention of the Plaintiff during the First Enforcement Actions, the Plaintiff commenced a fresh common law action at the High Court in May 2008 to enforce the Award. The Plaintiff also commenced enforcement proceedings against additional parties including Legend Properties China, Legend Properties HK and EPGL to, amongst other things, assert proprietary rights over Legend Properties HK's shares held by Eton Properties. Considering that the Restructuring may have rendered the performance of the Award by the Defendants impossible, in the alternative the Plaintiff also sought damages and compensations for the Defendants' failure to honour the Award.

The remedies that the Plaintiff sought in the Second Enforcement Actions were additional forms of relief which were not included in the Award. The key legal question on the Plaintiff's application was therefore whether

[1] The Arbitration Ordinance (Cap. 341) has since been repealed and replaced by the Arbitration Ordinance (Cap. 609).

Hong Kong courts have jurisdiction to grant relief beyond that set out in an arbitral award.

The matter first came before the High Court, which was then appealed by the parties to the Court of Appeal and ultimately, to the Court of Final Appeal. A summary of the courts' decisions is summarised below:-

High Court[2]

The High Court dismissed the Plaintiff's claim entirely. The court recognised that whilst there was an implied promise on the part of the Defendant under the arbitration agreement to honour the Award, the enforcement power of Hong Kong courts is limited to converting an arbitral award into a judgment mirroring the exactly the same terms. The relief sought by the Plaintiff neither fell within the scope of the Award, nor had been considered by the arbitral tribunal. As such, the High Court had no jurisdiction to grant of the relief sought by the Plaintiff in the Second Enforcement Action.

Court of Appeal[3]

The Court of Appeal overturned the High Court's decision and awarded damages to the Plaintiff for the Defendants' failure to perform the Award. In doing so, it distinguished enforcement proceedings taken pursuant to the statutory procedure under the Arbitration Ordinance (Cap. 609), and a common law action to enforce parties' implied promise to honour arbitral awards. If the statutory procedure is invoked, the enforcing court's power is limited to converting the terms of the arbitral award into a court judgment, but no more. However, in a common law action, the enforcing court power would have jurisdiction to grant relief outside the scope of the arbitral award, such as damages or equitable compensation arising from the non-compliance of the arbitral award.

The Court of Appeal also held that a common law action to enforce the parties' implied undertaking to honour an arbitral award fell outside the ambit of the arbitration agreement. The enforcing court would therefore have the jurisdiction to hear the Plaintiff's application and to grant the requested relief. Parties are not obliged – nor could they possibly - submit the same to arbitration at first instance.

However, the Court of Appeal held that the Plaintiff will need to make a decision either to retain the statutory judgment, or alternatively, to claim for damages and equitable compensation on the Defendants' breach of implied promise to honour the Award, as both remedies are contradictory and cannot stand together concurrently. The Plaintiff eventually opted for an order for damages and equitable compensation against the Defendants. The Plaintiff and the Defendants then sought leave to appeal to the Court of Final Appeal against different parts of the Court of Appeal's decision.

Court of Final Appeal[4]

The Court of Final Appeal affirmed the Court of Appeal's decision and dismissed the appeal by the parties. It clarified the following principles concerning the power and jurisdiction of Hong Kong courts when enforcing arbitral awards: -

- The role of the arbitral tribunal is to determine the rights and liabilities of the parties arising from the underlying contract. Once this has been determined by the tribunal by way of an arbitral award, the matter then falls within the enforcing court's jurisdiction for enforcement purposes. The role of the enforcing court is to ensure that the arbitral award will be given effect and honoured by the parties. As such, the jurisdiction of the enforcing court should not be limited to only granting court orders which replicate the term of the arbitral awards.[5]
- Enforcement action taken pursuant to the statutory procedure (i.e. the Arbitration Ordinance) is very different from that of a common law action. The statutory procedure is a summary procedure which allows the Plaintiff to convert an arbitral award into a judgment by an ex parte application. As such, the court may only "mechanistically" replicate the terms of an arbitral award. On the contrary, a common law action involves the party seeking to enforce the award to sue on the award and prove his case. This, in turn, gives the enforcing court a wider power to grant relief and remedies, including those that fall outside the scope of the arbitral award.[6]
- A dispute resolution clause only governs disputes arising directly from the performance of that underlying contract. As such, an implied promise to honour the arbitral award is a distinct and separate cause of action in the enforcement phrase, and the parties seeking to enforce such implied promise is not bound by the provisions and/or agreed dispute resolution mechanisms set out in the arbitration agreement and/or dispute resolution clause.[7]

CONCLUSION

The decision of the Court of Final Appeal is a positive development which further confirms the respect and status accorded by Hong Kong courts to arbitration as an alternative dispute resolution mechanism. An arbitral award will only have legal force in Hong Kong after it has been recognised and enforced by a Hong Kong court order. This decision guards against the danger of a party taking action to frustrate the arbitral award prior to enforcement proceedings having taken place. Were the Courts' power limited to enforcement of an arbitral award by converting it into a court judgment in identical terms to the award, situations may arise (as in the

[2] *Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd [2012] HKEC 859*

[3] *Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd [2017] HKEC 2105*

[4] *Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd and others [2020] HKCFA 32*

[5] paras. 117-126.

[6] paras. 91-97

[7] paras. 102-116

present case) in which a party could take actions to render relief granted in award incapable of performance and thereby meaningless. Allowing enforcing courts to grant broader forms of relief therefore helps to avoid such a situation and to promote fair and effective dispute resolution through the use of arbitration.

> **THIS DECISION GUARDS AGAINST THE DANGER OF A PARTY TAKING ACTION TO FRUSTRATE THE ARBITRAL AWARD PRIOR TO ENFORCEMENT PROCEEDINGS HAVING TAKEN PLACE.**

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OFFSHORE COURT RESTRAINS ONSHORE LITIGATION – THE FIRST EVER ANTISUIT INJUNCTION BY THE DIFC

Multiplex Constructions LLC v Elemec Electromechanical Contracting LLC

SUMMARY

In a recent ruling, the Dubai International Financial Centre (DIFC) Courts have issued their first ever anti-suit injunction to uphold the enforcement of arbitration agreements. The anti-suit injunction, issued in November 2020, restrains the respondent, Elemec Electromechanical Contracting LLC, in an ongoing DIFC-LCIA arbitration from pursuing ongoing litigation before the onshore Dubai Courts. The decision has reaffirmed Dubai's place as an arbitration friendly jurisdiction and should help retain its position as a popular seat for disputes, not just regionally but also globally.

BACKGROUND

In 2015 Multiplex Constructions LLC (**Multiplex**), an Australian company which has completed numerous projects in the Middle East including the Emirates Towers in Dubai and the W Hotel in Doha, entered into a construction sub-contract with Elemec Electromechanical Contracting LLC (**Elemec**), a Dubai based company which provides electromechanical installations for various projects in the Middle East and India. The contract contained an arbitration clause which provided for a DIFC seated arbitration under the DIFC-LCIA rules. United Arab Emirates law was chosen as the governing law of the contract.

DISPUTE

A dispute (the details of which have not been disclosed) arose between the parties. Elemec in disregard of the arbitration agreement initiated proceedings before the onshore Dubai Courts. Multiplex resisted the claim on the grounds that it was in violation of the arbitration agreement which provided for a DIFC-LCIA arbitration. The court reserved a decision on its jurisdiction to adjudicate upon the dispute.

Meanwhile, Multiplex commenced the DIFC-LCIA arbitration. Thereafter, Multiplex initiated proceedings before the DIFC Courts seeking the following:

1. a declaration that the arbitration agreement is binding;
2. a declaration that the DIFC Courts possess exclusive jurisdiction over the arbitral proceedings; and
3. an anti-suit injunction ordering Elemec to discontinue proceedings before the onshore Dubai Courts.

FINDINGS

The DIFC Courts held three hearings on Multiplex's application. Justice Al Swalehi examined three main issues:

1. the construction of the arbitration agreement;
2. the capacity of the signatories; and
3. whether Multiplex by participating in the onshore court proceedings, despite its express reservation of rights, had waived its rights to challenge them.

Justice Al Swalehi restrained Elemec from pursuing this dispute before the Dubai courts.

COMMENTARY

The Order by the DIFC Court is a landmark development in both DIFC and general international arbitration jurisprudence. Initiating onshore proceedings in is a common guerrilla tactic which parties deploy to subvert arbitral proceedings or DIFC litigation. This judgment reposes the confidence of all stakeholders on the DIFC Court's resolve to uphold the sanctity of contract. This positive development should further complement the substantial increase in the cases being administered by the DIFC-LCIA.

The decision builds upon the DIFC Court's reasoning in the case of *Brookfield Multiplex Construction LLC v DIFC Investments* (in which Addleshaw Goddard represented the Claimant), which expresses the "*seat's exclusive supervisory jurisdiction*" and "*the primary responsibility for the enforcement of the arbitration agreement would lie on the courts of the seat*."

The DIFC Courts and Dubai Courts, through the Law No. (16) of 2011 (the Judicial Authority Law), have in place a system to recognise each other's judgments and orders. This Order granted by the DIFC Court is within that spirit and demonstrates the healthy evolution of the Dubai legal landscape.

The onshore and offshore courts are often faced with questions of competing and overlapping jurisdiction. This led to the creation of the Judicial Tribunal, which was established in June 2016 by Dubai Decree No. 19/2016 to adjudicate on jurisdictional conflicts between the DIFC Courts and the onshore courts. One of the main reasons for this jurisdictional conflict has been the prior use of DIFC courts as a conduit jurisdiction for the enforcement of foreign arbitral awards and foreign judgments.

The Order also raises concerns on what route the Abu Dhabi Global Markets (ADGM), another off-shore jurisdiction, will adopt. In May 2020, the ADGM announced a number of important amendments by Law No. 12 of 2020 to its founding law, Abu Dhabi Law No. 4 of 2013, which confirmed that the ADGM Courts

cannot be used as a conduit jurisdiction for the enforcement of non-ADGM judgments and awards in other jurisdictions outside of the ADGM.

If the DIFC Courts had not been the seat of arbitration, the decision of this case could have been quite different. It is therefore imperative that commercial parties pay close attention to the arbitration clause in their agreements.

> **THE DECISION HAS REAFFIRMED DUBAI'S PLACE AS AN ARBITRATION-FRIENDLY JURISDICTION AND SHOULD HELP RETAIN ITS POSITION AS A POPULAR SEAT FOR DISPUTES, NOT JUST REGIONALLY BUT ALSO GLOBALLY.**

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