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Client Alert

Arbitration Update: A Summary of Recent Developments

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The first half of 2021 has seen a host of developments in the London arbitration market, and in this briefing, we summarise some of the more notable and interesting cases, as well as certain updates from the institutions. Once again, the English Courts have demonstrated their support and respect for parties' decisions to arbitrate, and recently released institutional statistics show that the popularity of arbitration as a dispute resolution mechanism continues to rise.

No red card for apparent bias

In Newcastle United Football Company Limited v The Football Association Premier League Limited and others,[1] the High Court applied the test as regards arbitrator impartiality for the first time since the test was clarified at the end of last year by the Supreme Court in Halliburton v Chubb.[2]

The Newcastle United case concerned arbitration proceedings in relation to the correct interpretation of particular provisions in the rules of the Premier League.[3] The claimant (Newcastle United)[4] sought to remove the Tribunal chairman (Michael Beloff QC, who had been appointed jointly by the parties' chosen arbitrators) under s24 of the Arbitration Act 1996 (the "**Arbitration Act**") on the ground that there were justifiable doubts concerning his impartiality. Those doubts included that he had given advice to the Premier League concerning other provisions in its rules in 2017; he had initially failed to disclose other appointments by the Premier League's solicitors; and he had private communications with the Premier League's solicitors.

Applying the objective test of "*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the* [arbitrator] *was biased*",[5] the Court considered the cumulative effect of the evidence at the date of the hearing, and dismissed the challenge. While noting that

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[1] [2021] EWHC 349 (Comm).
[2] Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) [2020] UKSC 48 (see our full briefing here).
[3] The Football Association Premier League Limited.
[4] Newcastle United Football Company Limited.
[5] Newcastle United at [26], quoting Lord Hope at [103] in Porter v Magill [2002] 2 AC 357.

the arbitrator had made "*an error of judgment*" in certain of his *ex parte* communications with the Premier League's solicitors,[6] the Court found that the fair-minded and informed observer would not have concluded that there was a real risk of bias.

Interestingly, the Court placed substantial weight on the IBA Guidelines[7] in determining whether there was any unacceptable conflict of interest and what matters should be disclosed by an arbitrator, noting that none of the arbitrator's prior instructions and other appointments relied on by Newcastle United were disclosable under the IBA Guidelines.

Equitable compensation for failure to arbitrate

It is well known that insurers may, by way of subrogation, step into the shoes of insureds in relation to their claims against contractual counterparties (where the insured parties have been indemnified for their losses) in order for the insurers to pursue these claims directly against the relevant counterparties. In Argos Pereira España S.L. and another v Athenian Marine Ltd,[8] the Court found that a non-contracting party's (in this case, an insurer's) failure to comply with the applicable jurisdiction clause under the contract resulted in the right to equitable compensation.

The contract in question was a bill of lading for the carriage of frozen seafood (which arrived in a defective state at the arrival port) and included a London-seated arbitration agreement. Having indemnified the consignee, the subrogated insurer brought proceedings against Lavinia (the entity-manager of the owner and the vessel's charterer) in the Spanish Courts. However, Lavinia was not a contracting party to the bill of lading, and it successfully challenged jurisdiction on the basis that there was no valid cause of action against it; nevertheless, it was only awarded part of its costs by the Spanish Courts. Therefore, the owners brought an arbitration in London against the insurer for the remaining costs which had not been recovered in the Spanish litigation, on the basis that the insurer (which was also not a contracting party to the bill of lading) had an equitable obligation to comply with the jurisdiction clause of the bill of lading (the breach of which opened the door to equitable compensation for the owners/Lavinia).[9]

The Court held that English law does not prevent such a claim – not least because an assignee of a contracting party's rights (or a subrogated insurer) might otherwise be able to issue proceedings in different jurisdictions from those prescribed by the contractual provisions (i.e., forum shop) without financial consequence and an anti-suit injunction in those circumstances may not be readily available and/or may not be a sufficient deterrent.[10]

This case addressed an important gap in the English common law regarding available remedies against assignees who do not comply with the underlying contract's jurisdiction provisions, and has opened the door for parties to claim equitable compensation (including for foreseeable financial consequences caused by the failure to comply with the jurisdiction clause), especially in situations where the typical alternative of an injunction may not be available.

Policy favouring agreements to arbitrate

In the last six months, the English Courts have on several occasions demonstrated their respect for, and willingness to uphold, agreements to arbitrate, wherever possible.

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[6] Ibid at [58], in particular, by his request that the Premier League confirm whether it wished him to continue or recuse himself.
[7] International Bar Association Guidelines on Conflicts of Interest in International Arbitration.
[8] [2021] EWHC 554 (Comm).
[9] The owners were able to bring this claim (even though the costs were incurred by Lavinia) on the basis of the doctrine of 'transferred loss' – see Lowick Rose LLP (in liquidation) v Swynson Ltd [2017] UKSC 32.
[10] The Court did note, however, that damages in lieu of an injunction under s50 of the Senior Courts Act 1981 may be open to a party in Lavinia's position if an injunction is available as a remedy.

In Melford Capital Partners (Holdings) LLP and others v Digby,[11] the defendant (Mr Digby) was disputing his expulsion as a partner from the first and second claimants (Holdings and MCP).[12] The claimants had obtained court orders preventing Mr Digby from using confidential information or calling an investors' meeting, and Mr Digby brought counterclaims in those proceedings. Related arbitration proceedings were also ongoing as were claims before the Guernsey Courts. The first claimant sought to stay or dismiss Mr Digby's English Court counterclaim based on an exclusive jurisdiction clause in the Holdings Limited Liability Partnership Agreement in favour of the Courts of Guernsey, and both claimants sought to stay Mr Digby's counterclaim against MCP because the dispute arose under a contract (the MCP Limited Liability Partnership Agreement (the "**MCP LLPA**")) that was subject to a compulsory LCIA arbitration agreement.

The High Court granted both applications. With regard to the MCP LLPA, that agreement contained an exclusive jurisdiction clause in favour of the English Courts but also provided that "[a]*ny dispute arising out of or in connection with this agreement…shall be referred to and finally resolved by arbitration*".[13] The Court held that there was no conflict between these provisions and that no "*judicial manipulation*" was required to "*give effect to what the parties must have intended*",[14] finding that the arbitration agreement should be given effect and that the exclusive jurisdiction clause meant that the English Courts should retain supervisory jurisdiction over the arbitration. The Court held that Mr Digby's counterclaim fell within the scope of the arbitration agreement and therefore granted the stay. While the pertinent issues in this case were of construction and interpretation of the relevant arbitration agreement, the case joins a growing list of examples where the English Courts have resolved the tension between an agreement to arbitrate and an exclusive jurisdiction clause to give effect to the parties' arbitration agreement.[15]

In AdActive Media Inc v Ingrouille,[16] the Court of Appeal adopted a broad interpretation of an arbitration clause (contrary to the decision of the lower court) in order to enforce an agreement to arbitrate in relation to disputes that might, on a stricter interpretation, have been considered to have been carved out in favour of the jurisdiction of the Californian Courts. The Court also held that, in circumstances where claims that ought to be resolved via arbitration (because they fall within the scope of an arbitration clause) are brought in a foreign court, the resulting judgment obtained in that court cannot be enforced in the English Courts, pursuant to section 32 of the Civil Jurisdiction and Judgments Act 1982.

AdActive Media had engaged Mr Ingrouille for consulting services under a consulting agreement. This agreement included both (i) an arbitration clause which stated that "*all claims, disputes, controversies, differences or misunderstandings*"[17] arising from the contract, save for claims arising under two specific clauses in the contract, would be resolved by arbitration; and (ii) a governing law clause which stated that "[a]*ny case, controversy, suit, action, or proceeding*"[18] must be brought in the Californian Courts.

AdActive had obtained a default judgment in the Californian Courts against Mr Ingrouille for breach of contract, fraud, and breach of fiduciary duty. However, when AdActive tried to enforce the judgment in the English Courts, Mr Ingrouille argued that the proceedings had been brought in breach of the dispute clauses of the consultancy agreement (as they covered claims which ought to have been the subject of an arbitration). The High Court disagreed but, on appeal, the Court of Appeal held that, on a proper analysis, AdActive's claims did not fall within the carve-out. The Court of Appeal also resolved any inconsistency between the arbitration clause and the governing law clause by regarding the language in the governing law clause that addressed jurisdiction as applying only to those claims that fell outside of the scope of the

[11] [2021] EWHC 872 (Ch).
[12] Melford Capital Partners (Holdings) LLP and Melford Capital Partners LLP.
[13] Melford at [8].
[14] Ibid at [79].
[15] Referred to by the Court in Melford at [45] to [58].
[16] [2021] EWCA Civ 313.
[17] Adactive at [10].
[18] Ibid.

arbitration agreement. Therefore, the Court of Appeal reversed the decision of the High Court and refused to recognise or enforce the California judgment.

This case highlights the difficulties parties may face when carving out certain disputes to be resolved through one dispute resolution mechanism, with others to be determined in a different forum (as opposed to a single forum dealing with any and all disputes under the relevant contract).

Admissibility or jurisdiction?

In The Republic of Sierra Leone v SL Mining Limited,[19] the Court considered the difference between admissibility of arbitration claims and the jurisdiction of the Tribunal to determine the claims.

The claimant in this case brought an application under s67 of the Arbitration Act challenging a partial final award on the ground that the Tribunal lacked jurisdiction to hear the case because SL Mining (the claimants in the arbitration) had commenced arbitration proceedings prematurely, in breach of the relevant multi-tiered dispute resolution clause. The High Court found that any prematurity in starting the proceedings did not affect the jurisdiction of the arbitral Tribunal but raised a question of admissibility only. The Court held that the arbitrators (not the Court) were best placed to decide this question and dismissed the challenge to the award.

The Judge in this case (Sir Michael Burton GBE) also went on to consider whether Sierra Leone had waived the three-month amicable settlement period, and (on the facts) found that it had done so. The Judge also considered the correct interpretation of the agreement to an amicable settlement period, holding the issue was "*whether objectively* [the parties would] *be able to reach an amicable settlement, given another 6 weeks.*"[20] The Court found that SL Mining had not failed to comply with the dispute resolution clause because "*there was not a cat's chance in hell of an amicable settlement*"[21] within the relevant period, and the Judge would therefore have dismissed the challenge on this alternative ground too.

Rare guidance on preliminary points of jurisdiction

The claimant in Armada Ship Management (S) Pte Ltd v Schiste Oil and Gas Nigeria Ltd[22] made an application under s32 of the Arbitration Act for a binding determination on a preliminary point of jurisdiction. Such applications are unusual because (as discussed above in relation to the Sierra Leone case) "*the primary scheme of the* [Arbitration] *Act is to allow the arbitrators to decide their jurisdiction first and if the parties are dissatisfied with the decision they can challenge it under s.67*".[23] In Armada the bespoke amendments that had been made to the standard BIMCO dispute resolution clause had made it unclear how the Tribunal should be appointed, and the claimant sought orders declaring that the sole arbitrator had been validly appointed and had jurisdiction to hear the dispute between the parties relating to unpaid invoices under a charterparty. The defendant had not engaged with the substance of the arbitration proceedings nor with the application before the Court.

The Court refused the claimant's s32 application because of the interrelationship between that section and the defendant's rights under s72 of the Arbitration Act not to take part in arbitration proceedings (and simply ignore the arbitral process) where it disputed the jurisdiction of the Tribunal, and to later challenge the Tribunal's award under ss67 and 68 of the Arbitration Act.[24] The Court found that making a binding determination on jurisdiction is "*unlikely to be appropriate in circumstances where section 72 is engaged.*"[25]

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[19] [2021] EWHC 286 (Comm).
[20] Sierra Leone at [34].
[21] Ibid at [36].
[22] [2021] EWHC 1094 (Comm).
[23] Armada at [31], citing Russell on Arbitration paragraph 7-160.
[24] On the grounds of lack of substantive jurisdiction or serious irregularity, respectively.
[25] Armada at [41].

However, the Court also provided a useful non-binding indication that it would have granted the application if s72 had not been engaged. The Judge noted that determining the jurisdiction question would likely have produced substantial cost savings because there was a serious question about how the Tribunal should be constituted and there was a risk that an award could be set aside on the basis that the Tribunal was wrongly constituted. There was also good reason why the matter should be decided by the Court because the arbitrator had expressed concern as to the correct application of the relevant clause. The Judge found the claimant's reasoning on the correct interpretation of the dispute resolution clause "*broadly persuasive*",[26] and absent s72, would have made a determination that the arbitrator had been validly appointed.

International arbitration on the rise: institutional statistics

In May 2021, the LCIA released its casework report for 2020.[27] The institution received an all-time high of 444 referrals including 407 arbitrations subject to the LCIA rules, which reflects an international trend of rising numbers of arbitrations in 2020. The ICC has preliminarily reported a total of 946 new arbitration cases in 2020 (which is the highest number since 2016)[28] and the HKIAC reported receiving 318 arbitrations in 2020, up from 308 in 2019 and 265 in 2018.[29] While the AAA-ICDR saw a small decrease in the number of cases in 2020, the value of the total claims increased substantially compared to 2019.[30] Perhaps unsurprisingly given the Covid-19 pandemic, the use of virtual hearings also increased in 2020, which coincided with the LCIA updating its arbitration rules in response to the pre-Covid demand for greater flexibility for virtual hearings. The HKIAC reported high numbers of virtual hearings, with 80 of 117 hearings being fully or partially virtual in 2020.

While it is difficult to compare the industry sectors dominating arbitration caseloads between arbitral institutions as each categorises them differently, it is interesting to note that the LCIA's top three sectors (energy and resources, transport and commodities, and banking and finance) remained stable in 2020. There was a drop in the proportion of banking and finance cases (20% of cases in 2020, compared to 32% in 2019), but the LCIA attributes this to a large group of arbitrations that accounted for over a third of the banking and finance cases in 2019. The HKIAC saw a slight rise in banking and finance cases, from 10.5% in 2019 to 13.5% in 2020.

International arbitration also saw a welcome rise in the number of female arbitrator appointments in 2020, with women being appointed in 33% of arbitrator appointments pursuant to the LCIA rules. Female appointments by the HKIAC were slightly lower than by the LCIA, at 22.8%, but there has been a continued and sustained increase in the number of female arbitrator appointments by the HKIAC in recent years. The AAA-ICDR also reported 33% diverse appointments in 2020, compared to 30% in 2019.

Institutional updates: the 2020 IBA Rules

In February 2021, the IBA formally released its updated Rules on the Taking of Evidence in International Arbitration (the "**2020 IBA Rules**"). The updated rules make mostly minor revisions to the prior version of the rules (the 2010 rules) to reflect recent developments in arbitral best practice. These are discussed in more detail in our previous briefing note, but of particular interest are the additional provisions providing the Tribunal and parties with greater flexibility in relation to remote hearings and the admissibility of illegally obtained evidence:

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[26] Ibid at [64].
[27] https://www.lcia.org/News/lcia-news-annual-casework-report-2020-and-changes-to-the-lcia-c.aspx.
[28] https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr/.
[29] https://www.hkiac.org/about-us/statistics.
[30] https://www.adr.org/sites/default/files/document_repository/AAA-2020-B2B-Caseload-Press-Release-11Feb2021_0.pdf and https://www.adr.org/sites/default/files/document_repository/AAA261_2019_B2B_Infographic_0.pdf.

- While hearings could be conducted remotely under the 2010 rules, the 2020 IBA Rules expressly include new procedures for Tribunals to order remote evidentiary hearings, and to establish specific hearing protocols to maintain efficiency and fairness (including to address concerns about witnesses appearing remotely, as the new rules have removed the default position that witnesses should appear in person).

- The new rules now include an express provision (in Article 9.3, with guidance in the Commentary)[31] that the Tribunal may, on its own motion or at the request of a party, exclude evidence obtained illegally. National laws differ on whether illegally obtained evidence should be excluded, and this new provision adds clarity about the scope of the Tribunal's powers whilst still preserving flexibility to reflect the international context.

[31] Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration (January 2021).

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