INTERNATIONAL ARBITRATION NEWS

Quadrant CHAMBERS

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EDITORIAL by SIMON RAINEY QC

The New Year brings with it an urge (for some) to make good resolutions for the forthcoming year. It is regarded as a time for a clean start and a commitment to personal improvement; a time to shake off the bad habits of the past. What better time to take stock of lessons to be learned? The recent Quadrant Chambers' panel event, *"Procedural plays for substantive goals in international arbitration: old lessons and recent developments"*, apart from being very well attended and highly enjoyable, also threw up some suggestions which arbitration users could well use when drawing up their New Year list.

A common complaint is delay: not procedural delay by parties, usually addressed by proactive case management by responsible arbitrators, but the time it takes for an award to be rendered by those same arbitrators, once the hearing and the final flurry of post hearing memorials are over.

Ideas were discussed by Audley Sheppard QC and Dr Jacomin van Haersolte-van Hof, enthusiastically received speakers at our event, as to how to address the problem. More forward planning by arbitrators and a better realisation on the part of users that closings and written materials can and should be focussed on simplifying the decision making process, not obscuring it, were floated as possible solutions; so too was the importance of the role to be played by arbitral institutions, such as the LCIA, SIAC and ICC, in actively monitoring prompt progress and requiring commitment to deadlines by arbitral tribunal members.

2015 saw two interesting but starkly contrasting events in this connection. In July, in *B.V. Scheepswerf Damen v Marine Institute* [2015] EWHC 1810 (Comm), the English Court held that inordinate delay by an arbitrator (over twelve months to produce an award following a three day hearing under rules which encouraged a six-week turnaround) did not of itself amount to a "serious irregularity" justifying the setting aside of the award under s.68 of the Arbitration Act 1996, although it was a breach of the arbitrator's duty under s.33 to avoid unnecessary delay. In December, a senior Mercantile Court judge was reprimanded by the Lord Chief Justice for misconduct in respect of a six month delay in handing down a judgment (the judicial guideline is that any delay beyond three months requires justification).

Food for thought and, for arbitrators at least, a suggestion for a New Year's resolution at the top of the list.

"Foreign" law in international arbitration

AUTHOR: PAUL HENTON

Participants in international arbitration have the opportunity to make two important choices, which can give rise to a need to involve non-English practitioners in the settlement of disputes. First, the choice of seat usually carries an implicit choice of the procedural and conflicts laws of the seat. Thus English lawyers conducting an ICC arbitration seated in Paris under English substantive law should obtain input from French practitioners before seeking (for example) orders for security for costs, which are not usually granted under French procedure. Second, the choice of a non-English substantive law inevitably gives rise to the need to involve practitioners from that jurisdiction. An important question will be when and how. In English Court proceedings or domestic arbitration, the fiction still holds good that foreign law must be "proven" by expert evidence. However, in international arbitration, no system of law is considered "foreign" per se, and the content of the applicable law is likely to be a matter for submissions alone. Participants therefore need to appoint an overseas practitioner to contribute to the memorials from the outset.

Where the only express choice is one of curial law, to what extent can inferences be drawn as to the substantive law the Tribunal should apply? A familiar argument in London is that London arbitrators are presumptively chosen for their expertise in English law. However, as early as 1971, Lord Wilberforce (in *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572 at 596B-E) cautioned that such reasoning gives insufficient recognition to the international character of the City of London as a commercial centre and neutral forum for resolution of international disputes. This is truer now than ever: every day London plays host to a large

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UPCOMING EVENTS

Quadrant Chambers will be hosting an event on **Monday 18 April 2016** entitled "A dialogue: W(h)ither ICSID jurisdiction?". We will be delighted to host Yas Banifatemi of Shearman & Sterling, Paris, and Stephen Fietta of Fietta, London, as the lead speakers at this event.

In **mid-late April 2016** Quadrant Chambers will also be hosting a panel / lecture event on the topic 'Energy in a Cold Climate – Current Issues in Upstream Oil & Gas Disputes'. The event will explore legal and commercial challenges in the current economic climate and will feature an in-house legal representative from the oil / gas industry, along with Quadrant barristers.

In **June 2016** we are planning an International Arbitration event provisionally titled "The front and back ends of your arbitration: Getting started well, and paid quickly". The panellists will explore some of the most important parts of starting an arbitration and enforcing any positive Award achieved.

For more information on any of our upcoming events please contact Simon Slattery or to register your interest in attending, please e-mail events@quadrantchambers.com.

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number of non-English arbitrators, in many cases deciding cases in accordance with non-English law. Despite this, the pre-Rome I Regulation authorities continued to recognise the choice of arbitral seat as a relevant factor in ascertaining a choice of law (the most recent example of which is *King v Brandywine* [2005] 1 Lloyd's Rep 655 (CA)). When the Rome Convention came into force, the guidance in the *Giuliano-Lagarde* Report was to similar effect.

Almost five years into the operation of the Rome I Regulation, it is questionable whether the choice of seat still carries even a *prima* facie inference as to choice of law, especially where the contract is not on an English standard form and does not provide for the Tribunal to be members of any London-based organisation such as the LCIA. Whilst there is recognition in the recitals that a choice of Court agreement may be a possible factor, there is nothing similar in the context of a choice of arbitral seat. In borderline cases, participants in international arbitrations would, therefore, be well advised to either seek agreement or an early determination from the Tribunal as to the procedural rules and substantive law to be applied, before the Terms of Reference are drawn up and the process of drafting memorials begins.

Paul has a broad commercial practice with particular experience of international arbitration. In recent years he has acted in arbitrations seated in London and Paris, applying the procedural and substantive laws of (for example) Chile, Israel, France, Algeria and elsewhere, and working closely with practitioners from those jurisdictions.

Is a "binding" DAB Decision binding?

AUTHOR: ROBERT-JAN TEMMINK

There has for a time been some difficulty in convincing arbitral tribunals to enforce binding, but disputed ("non-final") Dispute Adjudication Board ("DAB") decisions. This short article can provide no more than a summary of those difficulties. The full article can be read and downloaded from the publications section of our website.

DABs provide a contractual mechanism by which parties to (usually) a construction contract can obtain a swift decision which is final and binding on both parties unless and until a party files a Notice of Dissatisfaction. At that point, the decision remains binding, but the dispute may then be referred to arbitration (or court - depending on the contractual dispute resolution mechanism).

Failure to comply with binding but "non-final" decisions has led to some difficulty in FIDIC contracts: there are no express provisions in the conditions of FIDIC red, yellow and silver book contracts which require a party to comply with a binding but non-final DAB decision.

Because most FIDIC contracts require disputing parties to proceed to arbitration there have been few public decisions from which disputing parties, and arbitral tribunals, have been able to draw any guidance.

The Appeal Court in Singapore has, however, now provided some public guidance on the issue, although the (majority) decision in *PT Perusahaan Gas Negara (Persero) TBK v CRW* Joint Operation [2015] SGCA 30 deals as much with the factual nuances examined in detail by the first instance judge as it does with more important matters of principle. The differences between the majority and the minority are also significant.

There are a number of different approaches which a successful, but unpaid, claimant may consider. These, together with the points raised by the cases in the context of international arbitration are discussed more in greater depth in the full article. However, the author suggests that the best course is:

1. to refer binding, but non-final, DAB decisions directly to an arbitral tribunal for enforcement; and
2. to do so by submitting the underlying dispute to arbitration, but applying immediately for an interim final award which requires compliance with the DAB's binding decision, leaving the underlying dispute to be determined in the same reference.

Robert is recognised as a talented advocate with a commercial practice encompassing a broad spectrum of chambers' core areas together with construction, financial services, insolvency and fraud. Many of Robert's cases involve cross-border, or other jurisdictional issues both in the UK and abroad and he regularly appears in the Dubai International Financial Centre Court and in arbitrations all over the world, both as advocate and arbitrator. He is a fellow of the chartered institute of arbitrators.

Lucas Bastin recently lectured at Università degli Studi di Siena on the institutional and substantive law of the WTO and the World Bank/ICSID, and at Universidad de los Andes, Bogata, on investment treaty arbitration.

Poonam Melwani QC and Simon Rainey QC will be speaking at the LSLC event "The Arbitration Act 1996 – 20 years on – The Bar's view" on Thursday 10 March 2016.

Nigel Cooper QC will be presenting a paper on "Contractual allocation of commercial risk for piracy and security measures" at the Martime Law Committee Session (The Future of Maritime Security, 2015-2020) at the Inter Pacific Bar Association Annual Conference in Kuala Lumpur on Thursday 14 April 2016.

If there are any topics you would like covered in future editions of the newsletter or enquiries arising out of this edition please contact Simon Slattery.

Contact Simon Slattery
simon.slattery@quadrantchambers.com

Quadrant House, 10 Fleet Street, London EC4Y 1AU
DX: London/Chancery 292 Tel: +44 (0)20 7583 4444 Fax: +44 (0)20 7583 4455

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www.quadrantchambers.com