

EDITORIAL by Lord Clarke of Stone-cum-Ebony

The recent publication of the 2018 International Arbitration Survey by Queen Mary University of London and White & Case is a timely reminder of what providers of international arbitration services are doing right and which areas need improvement. Happily for those of us in the International Arbitration field, 99% of respondents would recommend international arbitration for cross-border disputes and 97% say that it is their preferred method of dispute resolution. Particularly desirable are the enforceability of awards, avoiding specific legal systems, flexibility and the ability of parties to select arbitrators. This last benefit does not extend to appointing an arbitrator whose connection with a party or dispute gives rise to apparent bias. Peter Ashford discusses the uncertain ambit of that restriction below.

As one might expect, cost is identified as the main drawback to international arbitration. Another issue was the lack of power in relation to third parties. One might quibble that this is inherent in the nature of arbitration, but John Russell's article on the next page shows that there are still battles to be had about the extent to which arbitrators have jurisdiction in relation to third party claims.

It is incumbent on any editorial writer these days to mention Brexit and the 2018 Survey affords me that opportunity. Hearteningly for practitioners in London, the Survey records that most respondents think Brexit will have no impact on London as a seat, although Paris is in the frame as the seat most likely to benefit from any Brexit dividend. For now, London remains the preferred seat for respondents in all regions, but the Survey shows an impressive diversity of international arbitration across the world, befitting of its international users.

Unanswered Question on Apparent Bias

Author: Peter Ashford, Fox Williams

The law on apparent bias has received particular attention recently. In *Almazeedi v Penner* and *Halliburton v Chubb* the Privy Council and Court of Appeal respectively, applied established law, albeit with different results.

There remain three areas of the law that were not directly addressed and remain unsatisfactory.

Firstly, the sentence in *Halliburton*: "You can only disclose what you know and there is no duty of inquiry." The first part of that sentence is a truism, it is the second that is more insidious. The duty on the arbitrator to enquire and investigate is well recognised. Moreover, in *Locabail*, the Court of Appeal recommended that solicitors "conduct a careful conflict search". However it is framed, the Court in *Locabail* plainly endorses inquiry and investigation and the Court in *Halliburton* is at odds with that.

Secondly, both *Almazeedi* and *Halliburton* were cases of 'known knowns' i.e. they both knew that they had the other appointments. Equally, both Courts held that the other appointments ought to have been disclosed, but reached different results. The Privy Council held that the non-disclosure

"represented a flaw in his apparent independence". The Court of Appeal, however, rejected the concept of non-disclosure amounting to unconscious bias. As bias means the absence of demonstrated independence and impartiality it is difficult to reconcile these positions.

Thirdly, there are cases of 'unknown knowns': these are cases where a tribunal does not, but ought to, know, at the time of making an award, of some connection or other matters that might question their independence. In *W v M* it was held ignorance cannot have had any impact. Is it satisfactory that a challenge to an arbitrator or an award is to be determined by the asserted state of mind of the arbitrator? The apparently subjective nature of the knowledge of the arbitrator sits unhappily with the objective nature of the test for apparent bias. The answer to this conundrum lies, as ever, in a spectrum: anything of substance ought, out of caution and to protect the integrity of the process and any award, to lead to those results.



NEWS

Quadrant Chambers welcomes international arbitration specialist Brandon Malone as an associate member.



We have produced a number of articles on issues arising under arbitration. The articles, including those listed below and more, can be accessed in an extended version of this newsletter.

[Click to download extended newsletter](#)

- » Arbitral Appeals under s.69...No Second Bites?
- » Who should pay for serious irregularities in international arbitration?
- » Interim court assistance in arbitral proceedings under s44
- » Clarifying / Correcting an Award and the Effect on the 28 days for Challenge: Clarity at last
- » Time to stop trying? Attempting to sidestep the 'rehearing' nature of a s.67 jurisdiction challenge
- » Internal EU Bilateral Investment Treaties Arbitration Clauses declared incompatible with EU Law

Peter Ashford has extensive experience in all aspects of the litigation, arbitration and mediation processes across a broad range of commercial disputes, but is a specialist in international arbitration.

He is also a Fellow of the Chartered Institute of Arbitrators and the author of the Handbook on International Commercial Arbitration published by Juris Publishing of New York in 2014. He has also written a Guide to the IBA Rules on the Taking of Evidence in International Arbitration and a Guide to the IBA Guidelines on Party Representation in International Arbitration, both published by Cambridge University Press in early 2013 and mid-2016 respectively. Both guides are available here. A Guide to the IBA Guidelines on Conflict of Interest in International Arbitration is being written and is anticipated to be published in 2018.

Is the Fiona Trust “one-stop” presumption under attack?

Author: John Russell QC

Is the Fiona Trust “one-stop” presumption under attack?

Two recent cases raise this question.

First up is *Michael Wilson & Partners v John Emmott* [2018] EWCA Civ 51, the latest instalment in the long running saga following the falling out of former partners, or quasi-partners, Michael Wilson and John Emmott.

The origins of the dispute lie in the MWP Agreement made in December 2001, whereby Emmott became a director of, and acquired shares in, MWP. It included an arbitration agreement in wide terms that, “all and any disputes shall be referred to and are subject to arbitration in London”.

In 2015/2016 MWP took assignments of contribution claims against Emmott from other persons whom MWP has successfully sued in New South Wales. Emmott applied to the English courts for an antisuit against the New South Wales proceedings, on the basis that any claim by MWP against Emmott had to be brought in London arbitration. The CA refused to grant an antisuit.

The essence of the decision was that “disputes” in the arbitration clause only captured claims between MWP and Emmott in their capacity as quasi-partners. It did not capture claims originally vested in third parties which MWP had acquired by assignment.

Some commentators¹ have interpreted this as an erosion of the Fiona Trust presumption. But, Lord Hoffmann’s presumption was that, “rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.” The assigned claims were not, in origin, disputes arising out of the MWP/Emmott relationship at all- they were claims by third parties. It is very hard to see how, absent very specific wording, an arbitration clause could properly be construed as capturing claims which originally vested in strangers to the arbitration agreement. The decision, therefore, seems entirely orthodox, and the criticism unfounded.

More difficult, perhaps, is the decision of Butcher J in *Eurochem v Drey Moor* [2018] EWHC 909 (Comm). In this case there were numerous contracts between the

parties. An “umbrella” agency agreement for the sale of fertilizer into the Indian market had a choice of law clause in favour of English law, but was silent as to forum. In some cases the “agent”, Drey Moor, bought the goods as principal from Eurochem and on-sold to Indian buyers; in other cases the sale was between Eurochem and the Indian buyer with Drey Moor named as agent in the sales contract. The former type of sales contracts each contained an LCIA arbitration clause, the latter type each contained an ICC arbitration clause.

The breaches of the sales contracts alleged by Eurochem (essentially, that they were procured by bribery) would, if made out, all also be breaches of the agency agreement.

Drey Moor argued that the proper application of the one-stop presumption, as explained in multi-contract cases by the CA in *AmTrust v Trust Risk* [2015] 2 Lloyd’s Rep 154, was that none of the claims were captured by the arbitration clauses. The claims, in essence, arose out of the agency agreement, and therefore should fall within the dispute resolution provision of that agreement. That was not altered by the fact that the agency agreement was silent as to forum: the claims would all be heard together in whatever court took jurisdiction according to its own gateway and forum conveniens rules. If the claims were captured by the arbitration clauses there would be fragmentation: essentially the same bribery allegations would be determined in multiple arbitration fora.

Butcher J rejected this argument. Rather than applying a one-stop presumption, he considered the absence of a specified forum in the agency agreement to be a key feature. He said: “I consider that reasonable business people would not have considered that this uncertain jurisdictional position should apply to a dispute such as the present as opposed to the specified dispute resolution mechanism in the individual contracts.”

Thus, certainty of forum was favoured over the identification of a single “stop”.

To this extent, the *Eurochem* case, though not the *Wilson* case, may be seen as at least a limited attack on the universality of the one-stop presumption.

1 For example, <http://arbitrationblog.practicallaw.com/an-erosion-of-the-fiona-trust-one-stop-shop-presumption/>



John Russell QC is an experienced and determined advocate and has acted as lead Counsel in numerous Commercial Court trials, international and maritime arbitrations and appellate cases. He relishes both detailed legal argument and cross-examination of lay and expert witnesses. He will always ensure that a client’s case is presented in the most persuasive manner possible, both in writing and orally. He combines first rate technical legal analysis with a pragmatic, commercial, problem solving approach to cases and accepts instructions in many fields of commercial dispute resolution.



UPCOMING EVENTS

- 12 September - UKELG IBA event - jointly presented by Quadrant Chambers and Bracewell (UK) LLP
- 14 November - Quadrant Chambers International Arbitration Event

RECENT EVENTS

Our event on **Jurisdiction Issues in International Arbitration**, was chaired by Simon Rainey QC and our distinguished panel of speakers included Sir David Steel, Louis Flannery QC of Stephenson Harwood and Philippa Charles of Stewarts Law.

Simon Rainey QC spoke at the ICC Austria Seminar on **Damages in International Arbitration**.

We were in South Korea: Seoul IDRC 36th lecture series ‘**International Arbitration: making the hearing work for you**’

Meet the Female Arbitrator: Arbitration Pledge Event focused on the commodities sector, hosted by HFW, Quadrant and 20 Essex Street

The 2nd Quadrant Chambers **International Arbitration Team Quiz Night** took place on 12 July with teams from Allen & Overy, Baker McKenzie, Clifford Chance, Hogan Lovells, Pinsent Masons, Reed Smith and Stewarts Law competing for the prestigious trophy. Pinsent Masons took the title this year.

Contacts



Gary Ventura
Senior Clerk
gary.ventura@quadrantchambers.com



Simon Slattery
Senior Clerk
simon.slattery@quadrantchambers.com



Sarah Longden
Business Development Director
sarah.longden@quadrantchambers.com

