INTERNATIONAL ARBITRATION NEWS

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EDITORIAL by Brandon Malone

In theory, arbitration and litigation achieve the same result: a legally binding decision in which the law of the contract is applied to the facts of the case. In an idealised, platonic model of dispute resolution, the same outcome is achieved when the truth and the law combine to produce justice. Of course, reality is much more complicated. Any number of factors can influence the outcome of a case, from the demeanour of a witness to the mood of the decision maker. Some go as far as to say that there can never be any real certainty in the law.

These issues ought to be at the forefront of the mind of the contract drafter. A deal has been reached in principle, and must be set down in writing. Which aspects of the contract are likely to give rise to disputes, and if they do, what will be the most effective way to resolve these disputes? The answer to that question might be litigation, arbitration, mediation, expert determination or some hybrid method.

Whilst there is no one-size-fits-all dispute resolution solution, international arbitration has a number of advantages over litigation, including international enforceability, confidentiality, and commerciality.

In this issue, Ruth Hosking considers one of the most important of these advantages, the ability to select the arbitrator, which allows a degree of predictability into the process, and she considers how the pool of arbitrators might be expanded.

Of course, in some cases, insufficient thought has been given to how disputes might be resolved, and there can be a lack of clarity as to whether a dispute is covered by the arbitration clause in the contract. In his article, Simon Rainey QC analyses the recent case of ***Sodzawiczny v Ruhan & Others*** where this very question was in issue.

Who is my Arbitrator?

Author: Ruth Hosking

Roy Cohn, the well known US lawyer, said "*I don't want to know what the law is, I want to know who the judge is*". One of the advantages of arbitration over court litigation is that the parties know from the outset the arbitrator(s) who will be making the decisions in their case. As international arbitration practitioners we believe that by knowing the identity of the arbitrator(s) at an early stage we can better predict how a case may play out: how a tribunal is likely to respond to particular interlocutory applications; what their view of the "merits" might be; how long it might take to get a decision.

In a blog post for the PLC arbitration blog I examined some of the responses to the 2018 International Arbitration Survey which were relevant to the issue of transparency (questions 12 & 26- 28). In the short space here I want to focus on party appointed arbitrators and questions 26 & 27 of the survey. Question 27 was: "*Do you have access to enough information to make an informed choice about the appointment of arbitrators?*" The majority of respondents (70%) indicated that they had sufficient information about arbitrators (although for in-house counsel as a sub-group it was only 57%). However when you look at this answer combined with the answers to question 26 (which asked where information about arbitrators came from) the picture is potentially problematic. The majority of respondents identified "word of mouth" followed by "from internal colleagues" as the sources of information about arbitrators. The authors of the Report interviewed a number of practitioners working in large-scale international law firms who confirmed that their firms' internal intelligence is the primary, if not exclusive, source of information they think of when considering an arbitrator. How then do new entrants into the arbitrator market make their mark? How can we widen the pool (particularly in relation to all forms of diversity) of potential appointees? Could we adopt blind reviewing practises (as many firms and chambers do when doing the first sift of recruitment of trainees and pupils so as to prevent unconscious bias)? Such a system would need to be carefully organised so as to still meet the requirements of the Pledge. Another route would be industry specific "meet potential arbitrator" events where potential appointers of arbitrators could ask potential arbitrators direct questions about their experience and approach to arbitration. Chambers co-hosted (with HFW and 20 Essex Street) a Meet the Female Commodities Arbitrator event recently which worked well and a similar format could be adopted for other under represented groups.

Ruth Hosking practises in a range of commercial disputes including general commercial litigation, arbitration, commodities, energy, insurance, international trade, private international law and shipping. Since joining chambers in 2003, she has appeared in the House of Lords, Court of Appeal, High Court and has represented clients in a variety of international and trade arbitrations (including ICC, LCIA, LMAA and GAFTA).

INTERNATIONAL ARBITRATION SET OF THE YEAR

NEWS

» Quadrant Chambers has been shortlisted for Chambers of the Year 2018 at the British Legal Awards

» Ania Farren joins Arbitrators at 10 Fleet Street. In addition to her arbitral experience, Ania has over 15 years' experience as counsel specialising in international arbitration, both commercial and investment treaty, with a particular focus on energy related disputes.

Ania is also Managing Director at Vannin Capital, overseeing the funding of arbitration matters.

UPCOMING EVENTS

» 25-26 October - Quadrant Chambers is sponsoring the LCIA-AIPN Joint Conference: Dispute Resolution in the Oil and Gas Business

» 15 November - Nigel Cooper QC, James M Turner QC, Nevil Phillips and Henry Ellis are presenting a panel event in Aberdeen for the northern chapter of CIArb Scotland

» 20 November - **Quadrant Chambers International Arbitration Panel Debate - 'Feeding Back to Arbitrators'**. Our fantastic panel includes future LCIA President Paula Hodges QC, Herbert Smith Freehills LLP, Joe Tirado, Garrigues and Damian Honey, HFW.

Continued from cover

Getting to the heart of the matter:

Sodzawiczny v Ruhan & Others [2018] EWHC 1908 (Comm)

Author: Simon Rainey QC

Under s.9(1) of the Arbitration Act 1996 "A party to an arbitration agreement against whom legal proceedings are brought … in respect of [A] a matter which under the agreement is to be referred to arbitration may … apply to the court in which the proceedings have been brought to stay the proceedings [B] so far as they concern that matter." [Lettering A and B inserted] What does "matter" mean at [A]? To what extent does the 'pro tanto wording' at [B] permit a wide approach premised on promoting a single (arbitral) solution or require the separation out of different aspects of the parties' disputes between what has to be arbitrated and what can remain before the Court?

Previous English cases have not always spoken with one voice (to put it mildly). Further, they do not always sit easily with the valuable analyses in other common law jurisdictions: see notably that of Sundaresh Menon CJ in ***Tomolugen Holdings Ltd v Silica Investors Ltd*** [2015] SGCA 57.

The recent judgment of Popplewell J of 26th July in ***Sodzawiczny v Ruhan*** [2018] EWHC 1908 (Comm) brings welcome re-analysis of the question, in the light of the previous jurisprudence. The Court's conclusion was that fragmentation of proceedings may be the necessary consequence of s.9 and that, as it was elegantly put, "The desideratum of unification of process must give way to the sanctity of contract, as the mandatory terms of s.9(4) intend" [44].

S brought an action for breach of contract, deceit, and breach of fiduciary duty against both parties and non-parties to an arbitration agreement, in the form of a LCIA arbitration clause. Two defendants C and M commenced arbitration seeking a stay under s.9. S argued that "matter" looked simply at what *claims* had been made and at causes of action. C and M contended that "matter" was wider, encapsulating what was truly *in issue* between the parties.

The Judge held that where parties have agreed to refer something to arbitration and exclude it from court jurisdiction, the key question was what was the "something" which they had chosen to refer: "The answer is a dispute or difference which for these purposes can be treated as synonymous" [40]. He unsurprisingly rejected the submission that the focus was purely on the claim and not on any defence or answer to the claim. As he explained, the grounds for disputing a claim may involve a wholly different set of facts and legal principles from those under the claim; it was for the Court to identify the issues to which claim and defence gave rise and to evaluate the extent to which they fell within the arbitration agreement.

He summarised the relevant principles in four propositions [43]: (i) any issue which is capable of constituting a dispute of difference is a "matter" for the purposes of s.9; (ii) the task of identifying the issues is straightforward if the case has been pleaded out before the s.9 application is made, but if that has not occurred, then it is for the Court to identify "the issues which it is reasonably foreseeable may arise"; (iii) the exercise is a "granular" one: the Court will stay proceedings to the extent that any and all of the identified issues fall within the scope of the arbitration agreement; there is no 'centre of gravity' approach and the Court is not concerned to assess what is the main or the substantial issue in the proceedings viewed overall; (iv) the question is one of substance, not of form, so the Court investigates what is the true substance of the claim and issues to which it gives rise, irrespective of how they have been pleaded (precisely to avoid attempts to circumvent the arbitration agreement in the formulation of the claim or defence).

The Court considered that any undesirable consequences of fragmentation would usually be reduced by the wide ***Fiona Trust*** approach to construing the scope of the arbitration agreement and by case management of any issues remaining to be determined in Court proceedings.

The decision is a clear (and welcome) endorsement of the primacy of the arbitration agreement and of the fact that that primacy and the nature of the parties' choice will unavoidably throw up multiple proceedings depending on the true issue or issues between the parties.

Simon Rainey QC is one of the best-known and most highly regarded practitioners at the Commercial Bar noted for his intellect and advocacy and with extensive experience of international arbitration as advocate and arbitrator under all of the main arbitral rules (LCIA; SIAC, UNCITRAL; ICC, Swiss Rules etc). He is ranked by Chambers and Legal 500 as a first division international arbitration specialist ("*Highly regarded for his expertise in handling high-profile international arbitrations in connection with complex oil and gas, banking and finance and trade issues.*" 2018; "*Incredibly good, with a particular skill in reducing the complicated to the elegantly simple.*" 2018). He also sits as a deputy High Court Judge (Commercial Court).

RECENT EVENTS

HFW and Simon Rainey QC of Quadrant Chambers jointly presented a Conflict of Interest Seminar for Arbitrators to the Sugar Association of London and The Refined Sugar Association.

UK Energy Law Group Event: FPSOs – use, disputes and contractual variations - Simon Rainey QC and Chris Smith spoke to a full house at this IBA event, jointly hosted with Bracewells (UK) LLP

Simon Rainey QC was a keynote speaker at the Oil & Gas UK Annual Legal Conference

Quadrant Chambers was delighted to take part in the Arbitration Ball for Save the Children (*see picture below*). An excellent evening, which raised over £500,000 for a very worthy charity.

Photo credit: Matt Crossick/Save the Children

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