INTERNATIONAL ARBITRATION NEWS

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EDITORIAL by Tom Nixon

At a time when the United Kingdom is keen to reinforce its connections with the wider world, there is no better time for International Arbitration practitioners to be introspective about how English seated arbitration fits into the global picture. The two decisions covered in this newsletter represent – arguably – two potential weak spots in how arbitration in England may be perceived.

Koye Akoni considers the case of ***Process & Industrial Developments v The Federal Republic of Nigeria*** [2019] EWHC 2241 (Comm). He considers the finding (albeit obiter) that, despite the express incorporation of the Nigerian equivalent of the Arbitration Act 1996, which operates when Nigeria is the seat, the parties in fact intended the arbitration to be seated in England as the "venue" was designated as London. This may come as a surprise – to Nigerian lawyers and English lawyers alike – and, Koye notes, may be influenced by a presumption that England is a desirable seat.

Ben Gardner examines the effect of the Court of Appeal decision in ***Halliburton v Chubb*** [2018] 1 WLR 3361. It shows the Courts' profound reluctance to remove an arbitrator for apparent bias or failure to disclose, even where repeatedly appointed by the same party on the same legal issues. This may sensibly reflect the strong ethos of independence and impartiality that forms a central part of English legal culture. Yet anyone who has had to explain to a foreign client that, yes, your opponent is entitled to select the same arbitrator that found in their favour last time, knows that this can create a discomfort that cannot simply be reasoned away.

Justice must be seen to be done. The question is from whose perspective we consider the "seeing". English arbitration needs to be keenly sensitive to perceptions from the very international community who select it in the first place.

Seats, Venues, a *Quaere*:

A brief review of *Process & Industrial Developments Ltd v The Federal Republic of Nigeria* [2019] EWHC 2241 (Comm)

Author: Koye Akoni

Another day, another application to enforce an arbitration award against the Federal Republic of Nigeria ("**FRN**") (or one of its arms) in England. This occasion brings with it another in an interesting line of cases in which the English High Court has concluded that the seat of an arbitration is London because the arbitration agreement provided that "*the venue of the arbitration shall be London, England...*". In this case, the conclusion was reached notwithstanding that the agreement also provided that "*...a Party may serve on the other a notice of arbitration under the rules of the Nigerian Arbitration and Conciliation Act... which, except as otherwise provided herein, shall apply to the dispute between such Parties under this Agreement*" and included a Nigerian choice of law provision.

Three factors led the Court to conclude that London, as the agreed venue, was actually intended to be the seat: (i) the language of the agreement, in providing the venue "*of the arbitration*" was to be London, referred to the whole arbitration, up to and including, the final award, not simply some hearings, and thus anchored the entire arbitration to London; (ii) the provision that the venue "*shall be*" London unless the parties agreed otherwise, would have been an inconvenient provision that the parties are unlikely to have intended if "*venue*" is read as where the hearings were to be held as opposed to if it is read as 'seat'; and (iii) the reference to the Nigerian Arbitration and Conciliation Act ("**the ACA**") is not inconsistent with the choice of England as the seat because it can be read simply as displacing the non-mandatory provisions of the Arbitration Act 1996.

Strictly, the decision on this issue was *obiter* as the judge had found against the FRN on other grounds. To some (including, one imagines, the Nigerian lawyers that

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NEWS

» Simon Rainey QC appointed to the ICC United Kingdom Arbitration & ADR Committee

The Committee is led by new Chair Ania Farren. Ania is former Vice-Chair and a member of Arbitrators at 10 Fleet Street.

UPCOMING EVENTS

» 12 November - Quadrant Chambers International Arbitration Panel Debate: **ICSID arbitration in the age of populism; the case for reform.** Our panel includes Emma Johnson, Ashurst, Timothy Foden, LALIVE and Guy Blackwood QC, Quadrant.

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» 19 November - Quadrant Chambers is sponsoring the DIFC-LCIA Symposium in Dubai Arbitration Week. Stewart Buckingham will be joining the panel.

RECENT ARTICLES

» Section 70 Arbitration Act 1996: challenge or appeal: supplementary provisions - Ruth Hosking

» *P v D* and the dangers of failing to cross-examine witnesses - Paul Toms

» Enforcing Foreign Judgments against States in England : getting it right .... and getting it wrong - Simon Rainey QC and Paul Henton

» Confidentiality and transparency in arbitral applications - Nevil Phillips

» Anti-arbitration injunctions: the implications of Sabbagh - William Mitchell

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presumably advised the parties on a Nigerian law governed agreement), however, the decision and similar cases including ***Enercon GmbH v Enercon (India) Limited*** [2012] EWHC 689 (Comm) and ***Shashoua v Sharma*** [2009] EWHC 957, might raise questions.

At least three other factors may prompt those questions: (i) current perceptions aside, London is a popular and desirable destination for people from around the world, especially people from English speaking former British colonies; a desire to be in London against the backdrop of an arbitration hearing is probably not so extraordinary as to raise eyebrows; (ii) 'venue' is not synonymous with 'seat', thus an intention to have arbitration hearings take place in London does not necessarily involve an intention for the English Courts to supervise the arbitration; and (iii) in the same way that the Arbitration Act 1996 is largely premised on the English Courts having supervisory jurisdiction of the arbitration, the ACA is also premised on the Nigerian Courts having supervisory jurisdiction over the arbitration.

Why then, it might be asked, was the correct starting point in determining the seat of the arbitration an analysis of the meaning of "*venue*"? Why was it not the parties' agreement to apply a piece of Nigerian legislation that is premised on the supervision of the Nigerian Courts to the dispute? Might it not be easier to give full effect to the ordinary meaning of the word "*venue*" and the provision that "*the [ACA] shall apply to the dispute between such Parties under this Agreement*" without relegating the ACA to a role more akin to institutional rules by adopting the latter approach?

These are not obviously unreasonable questions but as the authorities currently stand, their answers appear unlikely to change the approach of the English Courts. *Quaere* whether they should.

Halliburton v Chubb - where next for arbitrator impartiality?

Author: Ben Gardner

The Court of Appeal in *Halliburton v Chubb* [2018] 1 WLR 3361 found that an arbitrator who accepted several appointments from the same party in relation to similar issues arising out of the Deepwater Horizon incident should continue to act notwithstanding their failure to disclose those multiple appointments.

The Court drew a distinction between "best practice" in international arbitrations, as evidenced by rules such as the IBA Guidelines on Conflicts of Interest in International Arbitration, and the grounds for removal under section 24 of the Arbitration Act 1996. The arbitrator "should" have disclosed the appointments, both under the IBA Guidelines and as a matter of law because of the "reasonable apprehension of lack of impartiality". However, a more stringent test was applied on the application to remove: whether the fair-minded and informed observer "would" conclude that there was a real possibility that the arbitrator was biased. There was a duty of disclosure, but breach of that duty did not justify removal where (as here) the arbitrator had responded properly to a party's concern. This decision highlights a tension between international arbitration practice and the English law on arbitral impartiality.

In certain practice areas, such as insurance, it is common for an arbitrator to be appointed by a party to decide similar issues in several arbitrations. This could be seen as giving the appointing party the inside track on the arbitrator's approach and likely reasoning. Further, the recognition of the IBA Guidelines as a common standard in international arbitration might be thought to give the impartial observer some pause for thought when assessing an arbitrator's decision to depart from best practice by declining to disclose multiple appointments. Another sign of the direction of travel for "best practice" guidelines is the ICC's 2019 practice note, suggesting that the prospective arbitrator ought to consider if a conflict arises from their involvement in cases involving one of the parties or "related cases". One might also ask what the point is of a duty to disclose, breach of which does not justify removal of the arbitrator.

The case is headed for the Supreme Court and a hearing in November 2019. It will be interesting to see whether the Supreme Court endorses the high bar for intervention put forward by the Court of Appeal, or if greater significance will be attached to breach of the duty of disclosure.

Ben Gardner has a busy commercial practice, focussing on international arbitration, energy, insurance, shipping, commodities and international trade and conflict of laws. He is consistently ranked as a leading junior by Chambers & Partners and the Legal 500. Recent comments include "very clever and a very good advocate", "very smart and focuses immediately on the issues", "an excellent barrister, who is precise, commercial and practical in his focus and forceful and effective in his arguments", "thorough, diligent and very personable", "incredibly fast at turning work around" and "mature beyond his years" .

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RECENT EVENTS

Quadrant Chambers and the DIFC-LCIA Arbitration Centre Special Seminar was held in Dubai on Topical Issues in International Arbitration: The role of third parties, interim measures and the new Prague Rules - Sir David Steel chaired the panel of Chirag Karia QC, Yash Kulkarni QC, Chris Smith QC and Ruth Hosking.

We held our 2019 Annual Energy Disputes Event: Current Challenges and Risks for Oil and Gas - Simon Rainey QC chaired the panel of Sarah Roach, senior counsel at BP, Elisabeth Sullivan, senior legal counsel at Centrica, Sue Millar, partner, Stephenson Harwood, Chris Smith QC and Gemma Morgan of Quadrant.

A recording is available, please contact marketing@quadrantchambers.com

Nigel Cooper QC spoke at the IPBA 2019 Singapore Conference

Eversheds Sutherland (pictured below) were the winning team by just 1 point at our fiercely competitive annual international arbitration quiz night.

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