Quadrant CHAMBERS

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International Arbitration News

Issue 11 | Summer 2021

Editorial by Simon Rainey QC

International Arbitration Silk of the Year 2020, Legal 500

As our gardens blossom (and as we hope to be able to leave them as Lockdown eases), this Summer Newsletter touches on two hardy perennials.

Allegations of conflicts of interest and of apparent bias are a constant theme in international arbitration. Hard on the heels of last year's English Supreme Court decision in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 last year come two interesting perspectives. One, considered by Ben Gardner in this newsletter, is a useful decision of the ICC Court on the 'barristers' chambers' issue. Another is the decision in *Newcastle United Football Co. Ltd v Football Association Premier League Ltd* [2021] EWHC 349 (Comm), in which the English Commercial Court considered for the first time how the principles on arbitrator bias developed by the Supreme Court are to be applied in practice, when it dismissed an application to remove an arbitrator (Michael Beloff QC) under s24 of the Arbitration Act 1996, where he had previously advised a party and was a regular party appointee. As part of its analysis, the Court reiterated that, while not binding, the IBA Guidelines provide a "practical benchmark" for assessing potential bias. The case also gave rise to an interesting debate on holding the challenge hearing in private. The Court did so, but subsequently held that, given the public interest in maintaining transparency and standards in the conduct of arbitration, judgment was to be handed down without anonymising the identity of the parties or the arbitrator: see *Newcastle United v Football Association (No. 2)* [2021] EWHC 450 (Comm).

Equally perennial are the vexed and complex issues which arise where there is intervening insolvency before or in the course of an arbitration. Cutting a path through the undergrowth, Peter Ashford, Head of International Arbitration, Fox Williams, and Robert-Jan Temmink QC give a useful practical guide.

Lastly, new growth: Quadrant is delighted to welcome Alexander Uff from Shearman & Sterling who joins us a member of chambers.

International Arbitration Set of the Year

Legal 500 UK Awards, Shortlisted 2020, Winners 2017

NEWS

International Arbitration Specialist Alexander Uff joins Quadrant Chambers

In April we were very pleased to welcome international arbitration and energy specialist Alexander Uff as a new member of chambers.

Alexander joins Quadrant from his role as a partner in Shearman & Sterling's International Arbitration Group. He joined Shearman & Sterling in Paris in 2007 and has been based in London since 2013. Alexander originally qualified as a barrister and previously practiced in the Paris and New York offices of two major international law firms. He is also admitted to practice in New York.

Alexander provides advice, representation and advocacy to corporations, States and State-owned entities in complex international commercial and investment treaty arbitrations. Alexander has appeared as counsel in numerous arbitrations conducted under the ICSID, ICC, LCIA and CRCICA rules, and in ad hoc arbitrations under the UNCITRAL rules. His practice has covered a broad range of industries and subject matters, with an emphasis in recent years on energy, mining, infrastructure, investment treaty cases and commercial disputes. He has in addition handled disputes relating to urban developments, the chemical, pharmaceutical, aviation, agribusiness and retail industries, telecommunications and insurance sectors and joint ventures and shareholder disputes, among others.

Alexander has been recognized for several years as a "future leader" in international arbitration by Who's Who Legal (2018-2021). The 2020 edition reports that he is 'a name to remember in investment treaty arbitration'; while the 2021 edition describes him as 'an extremely sharp and a creative lawyer' with 'great commercial sense'.

The relationship between insolvency and arbitration

Authors: Peter Ashford (Fox Williams) & Robert-Jan Temmink QC

Robert-Jan Temmink QC has a wide-ranging and international commercial practice. He is known for being a talented and intellectually-agile advocate, equally at home across a range of sectors and international commercial disputes. He is recommended as a leading silk: *"His delivery of complicated facts and law is exceptional, he's a real pleasure to work with and he's got a strong arbitration background."* (Chambers UK, 2020); *"Clever and inventive, he makes it difficult for the other side."* (Chambers UK, 2021)

Commercial arbitration is concerned with private, typically bilateral, contractual relationships where the parties are the masters of their own destiny: party autonomy permits them to agree how their dispute is resolved and to a large extent it will be a private and confidential process. A successful arbitration followed by successful collection or enforcement will potentially be to that claimant's advantage over other creditors: there is often a race for the available assets.

Insolvency, on the other hand, is characterised by class remedies, *pari passu* treatment of all unsecured creditors, and have many mandatory and structured norms imposed by national legislation, and will generally be a public matter. Often, therefore, arbitration and insolvency do not make happy bedfellows.

The ideal situation is to avoid any party to arbitration becoming insolvent! Claimants will typically want a monetary remedy and should be vigilant to ensure that they are pursuing somebody of adequate means. Typical steps both pre-arbitration and during the arbitration are to assess the ability of a respondent to meet the claim being advanced and undertake credit checks with a watch function that will alert if there are changes in creditworthiness.

Equally, a respondent will be vigilant that a claimant is able to meet a costs award should a claim be unsuccessful. If that is not apparent there may be an application for security for costs which, if successful, may oblige the claimant to post security for the respondent's costs. Although a topic in itself, security for costs in arbitration is certainly no easier to obtain than in equivalent court proceedings.

Claimant Insolvency

Under English law the commencement of insolvency proceedings against a party to an arbitration agreement does not affect the validity of that arbitration agreement: the insolvent party can still properly commence and pursue an arbitration.[1]

There is no automatic stay or moratorium of an arbitration by reason of claimant insolvency. The liquidator or administrator will have to determine, in the proper discharge of their duties, whether it is appropriate for the company to commence or continue with any arbitration that it has commenced prior to the insolvency. To the extent that the liquidator or administrator elects to continue with the proceedings, the costs of presenting the claims will be part of the costs of the liquidation or administration, and they will be paid from the company's assets.

The arbitration agreement will prevail even over the statutory powers of a liquidator to resolve claims and cross-claims through the taking of an account in the "insolvency set-off" process found in Rule 14.25 of the Insolvency Rules 2016 (SI 2016/1024).[2]

Plainly, if a claimant is in an insolvency process it will be especially vulnerable to a security for costs application.

Respondent Insolvency

Plainly, pursuing an insolvent party is unlikely to be fruitful. In arbitration, notwithstanding that any award may be unsatisfied, during the course of proceedings a claimant would have to assume that a respondent would not pay advances on costs or deposits, leaving the claimant to pay any institutional sums demanded (albeit a claimant could probably apply for an interim award for reimbursement).

The philosophy of insolvency is a *pari passu* distribution for unsecured creditors. It is to achieve this that there is generally a stay or moratorium on legal proceedings against the company after insolvency.

Extra-Territorial?

Generally, the English statutory prohibitions against creditors bringing legal proceedings against a company that is being wound-up do not prevent the commencement or continuation of proceedings in foreign courts or, by extension, in foreign-seated arbitrations.[3] Whether the English insolvency proceedings have an effect on arbitrations being conducted in a seat outside England and Wales will generally depend upon the law of the seat and the extent to which the English insolvency proceedings are recognised in that jurisdiction.

If foreign arbitration proceedings result in an award which then must be enforced in England and Wales, those enforcement proceedings will be subject to the moratorium on legal proceedings described above, and the award creditor will need to submit a proof of debt in the company's insolvency process.

Conclusion

In short, and in this article we have been able only to provide a "teaser" of some of the issues confronting a party facing an insolvent opponent, local advice needs to be taken whenever it is discovered that a party is subject to an insolvency process. Whether an arbitration can proceed with an insolvent party will depend on the seat of the arbitration; the country in which the insolvency process commenced; and the substantive law of those countries (if different). It is not, however, safe to assume, that an insolvent party will be able to bring arbitral proceedings to an end solely by dint of the insolvency process; and it will not always be the case that an award against an insolvent party will be valueless.

| This is a summary of a talk by Peter and Robert who would be happy to respond to any queries

[1] *Philpott and anor v Lycee Francais Charles De Gaulle School* [2015] EWHC 1065 (Ch); *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25

[2] ibid. (*Philpott* relates to Rule 4.90 of the Insolvency Rules 1986, the precursor to Rule 14.25 of the Insolvency Rules 2016; see also *Bresco*).

[3] *Harms Offshore AHT 'Taurus' GmbH and Co KG v Bloom* [2009] EWCA Civ 632; *Re Oriental Inland Steam Co* (1874) LR 9 Ch App 557

"Quadrant are head and shoulders above other sets who hold themselves out as specialists in arbitration work"

Legal 500, 2021

"Quadrant Chambers is a popular choice for major arbitrations in the commodities, energy, maritime, and infrastructure sectors, and fields a strong cadre of experienced counsel and arbitrators"

Legal 500, 2020

Conflicts of interest: chambers not like a law firm says ICC

Author: Ben Gardner

The role of a barrister and their chambers can be a source of bemusement among users of international arbitration. Often, the split profession is viewed as a harmless (and perhaps even helpful) idiosyncrasy of the English legal system. However, there are growing calls from some quarters for a closer look at the role of barrister-arbitrators and their relationship with other barristers within their chambers.

A recent example, made a matter of public record by filings in the Florida Court, arose in the context of a dispute over a US$3.5 billion contract to build additional locks on the Panama Canal.

The claimants challenged the arbitrators under Article 14 of the ICC Rules on a number of conflicts grounds, which was the subject of a decision of the ICC Court on 29 December 2020. Of particular interest were the complaints against one of the arbitrators, an English QC, on the basis that he had failed to disclose that (i) one of the parties' representatives, another English QC, was in the same chambers as a barrister who had appointed the arbitrator in a different case, and (ii) the arbitrator had failed to run a conflicts check in respect of other members of his chambers.

These allegations were levelled by the claimants on the basis that barristers' chambers should be treated like law firms for the purposes of conflicts of interest, and that the previous distinctions drawn between chambers and law firms could not be "tolerated in the 21st century". As an arbitrator in a law firm would (it is said) have been required to disclose these links, so should a barrister.

The Court was not persuaded by the analogy that the claimants sought to draw. On the first ground relating to appointment, it held that the "*general assertion*" that a chambers should be treated like a law firm was unsupported and "*ignores the structure of barristers chambers as well as confidentiality obligations applying between members of such chambers*".

The Court was no more convinced by the arbitrator's alleged failure to conduct a conflicts search of the other members in his chambers. The suggestion that a chambers was as able as a law firm to perform conflicts checks was "*unfounded*", given the internal confidentiality obligations between members.

This decision will be reassuring for barristers, and those using their services, in international arbitration. The ICC restated the orthodox view, in English law at least, that a barrister operates independently of other members of their chambers and so is not ordinarily required (or indeed permitted) to run conflicts checks or make disclosures based on the practice of other members of their chambers.

The claimants have renewed challenge before the United States District Court for the Southern District of Florida in an attempt to set aside the award. Therefore it is unlikely that we have heard the last of this challenge, let alone the argument that barristers' chambers are not so different from law firms when it comes to conflicts of interest.

With thanks to Joseph Gourgey for his assistance in research

Ben Gardner. Much of Ben's practice takes place under the auspices of international arbitration and he is regularly instructed as sole and junior counsel in arbitration on all manner of commercial disputes. He is familiar with a wide range of rules in various jurisdictions, including ICC, LCIA, LMAA, SIAC, HKIAC and UNCITRAL arbitrations in London, Paris, the Hague, Geneva, Singapore and Hong Kong. These arbitrations frequently address foreign law, and Ben has worked on cases applying Iranian, Saudi Arabian, French, Swiss and other governing laws.

PAST EVENTS

ICC YAF and Quadrant Chambers Event: How to Build Your Profile in International Arbitration

On Thursday 24 June, we were delighted to co-host a virtual networking social with ICC YAF. We were fortunate to have some fantastic speakers who gave a series of quick-fire presentations.

More info

No Deal on Jurisdiction and Enforcement – Where Does Brexit Leave Us?

2-part special with Simon Rainey QC, Robert Thomas QC, Gemma Morgan and Andrew Leung

What are the legal effects of Brexit on civil jurisdiction and the enforcement of judgments? Before Brexit, the applicable rules were harmonised between the UK, the EU and EFTA by Brussels Regulation (Recast) No. 1215/2012 and the Lugano Convention 2007. Those rules have now been swept away by Brexit. In this 2-part series, we review the legal framework that has taken their place and look at practical tips when dealing with these issues.

Watch now

UPCOMING EVENTS

International Arbitration Panel Debate- 'Is International Arbitration fit for purpose?'

Wednesday 21 July 2021

Our panel will debate whether international arbitration is fit for purpose. We are fortunate to have a fantastic panel which includes Alexander Uff, Barrister at Quadrant Chambers, Sarah Vasani, Partner at Addleshaw Goddard, Abhijit Mukhopadhyay, President (Legal) & General Counsel of Hinduja Group and Mark Beeley, Partner at Orrick, Herrington & Sutcliffe LLP

Register now

International Arbitration Quiz Night

Tuesday 20 July 2021

GAR Live Energy Disputes 2021 - featuring Simon Rainey QC

Thursday 30 September 2021

RenewableUK Legal & Commercial Conference

Friday 19 November 2021

| For more information, please contact marketing@quadrantchhambers.com

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ARTICLES

When arbitration and exclusive jurisdiction clauses conflict: which wins?
Chirag Karia QC

Multi-contract disputes and arbitration: minimising time and costs
Stephanie Barrett

Equitable compensation for failure to comply with arbitration clause - Argos Pereira España v Athenian Marine Ltd, M/V 'Frio Dolphin'
Paul Toms

Arbitral Appeals under s.69… "Question of Law" - No Second Bites (Round 2)
Simon Rainey QC

No Recognition of US Federal Court Judgment where Proceedings brought in in Breach of Arbitration Agreement
Professor Gerard McMeel QC

Article 12(9) of the new ICC Rules - Is Party Autonomy really being eroded?
Ruth Hosking

Witness Recollection and International Arbitration
James M. Turner QC

The availability of anti-suit relief, despite delay - Specialised Vessel Services Ltd v MOP Marine Nigeria Ltd
Saira Paruk

What happens when an arbitral tribunal makes a mistake? Doglemor Trade Ltd v Caledor Consulting Ltd
Paul Toms

An issue of consent? English courts emphasise the importance of party choice in exercise of court's powers in support of arbitration and when balancing competing issues of public policy
Nigel Cooper QC

Halliburton v Chubb: Is Timing Everything?
Simon Rainey QC and Gaurav Sharma

Preliminary Issues and Issue estoppel in Arbitration – Proceed with Caution
Benjamin Joseph

Enka v Chubb: Finally, a Final Decision on the Law of Arbitration Agreements
Simon Rainey QC & Gaurav Sharma

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PREVIOUS EVENTS

International Arbitration Panel Debate: Halliburton v Chubb

Our panel moderated by Gaurav Sharma, included Simon Rainey QC, Constantine Partasides QC of Three Crowns (who led the ICC Court's submissions before the Supreme Court), Philippa Charles, Head of International Arbitration at Stewarts, and full time Arbitrator Clare Ambrose.

One Contract, Two Arbitrations – Res Judicata in Long Term Contracts

Our panel chaired by Gaurav Sharma, included Simon Rainey QC, Jessica Gladstone, Partner at Clifford Chance and Ed Poulton, Head of Baker McKenzie's global arbitration practice.

Quadcast Live! - Arbitration Special (with guest panellist Sir Nigel Teare)

How does one decide the proper law of an arbitration agreement? What is the relevance of the parties' choice of law for the main contract under Rome I? When should the English Court defer to the foreign court in relation to anti-arbitration injunctions? And what is the extent of an arbitrator's duty of interests affecting his impartiality? These issues and others were discussed by the team.

NEWS

Sir Nigel Teare joined Arbitrators at 10 Fleet Street

Arbitrators at 10 Fleet Street was honoured to welcome Sir Nigel Teare as an Arbitrator in October 2020. Sir Nigel sat as a judge of the Queen's Bench Division from 2006 until his retirement from the High Court bench on 30 September 2020. He was the Judge in charge of the Commercial Court and the Admiralty Judge. He is now available to accept appointments as arbitrator.

Sir Nigel has had an exceptional career first as counsel and then as a High Court Judge. He has decided many of the most high-profile cases of recent years across many different business sectors.

Most recently, in 2019-2020 he decided which of two claimants to the Presidency of Venezuela was entitled to give instructions to the Bank of England regarding Venezuela's gold reserves (*Deutsche Bank and Bank of England v Central Bank of Venezuela* [2020] EWHC 1721 (Comm), who was party to a shareholders' agreement concerning a valuable site in central Moscow (*Filatona and Deripaska v Navigator and Chernukhin* [2019] EWHC 173 (Comm), and whether a shipowner had scuttled his ship by arranging for it to be attacked by persons pretending to be pirates (*Suez Fortune v Talbot Underwriting* [2019] EWHC 259 (Comm).

Arbitrators at 10 Fleet Street is a separate arbitrator wing set up by Quadrant Chambers.

Visit https://arb10fs.com/

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LIDW21 EVENTS

Are arbitrators getting away with too much?

The panel moderated by Barry Fletcher of LexisNexis, included Poonam Melwani QC, Philippa Charles, Partner at Stewarts, Jean-François Le Gal, Partner at Pinsent Masons and Hendrik Puschmann, Partner at Farrer & Co.

Co-hosted with HFW: Is the evolution of institutional arbitration rules at the expense of party autonomy?

The panel included James Turner QC, Ania Farren, Omnia Strategy and Chair of the ICC UK Committee for Arbitration and ADR, Damian Honey, Head of International Arbitration, HFW and Noradéle Radjai, partner at Lalive.

Co-hosted with Herbert Smith Freehills: The future of oil and gas disputes

The panel moderated by Rachel Lidgate of Herbert Smith Freehills, included Simon Rainey QC of Quadrant Chambers and James Robson, Chris Parker and Louise Barber of Herbert Smith Freehills.

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