Quadrant CHAMBERS

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International Arbitration News

Issue 12 | Spring 2022

Editorial by Natalie Moore

Welcome to the Spring 2022 issue of International Arbitration News. The relationship between national courts and arbitral tribunals is a recurrent theme in international arbitration. In this issue of the newsletter, members of Quadrant review recent case law and procedural developments in the English courts on this topic. We also look at the important Supreme Court decision in ***Kabab-Ji v Kout Food Group*** [2021] UKSC 48.

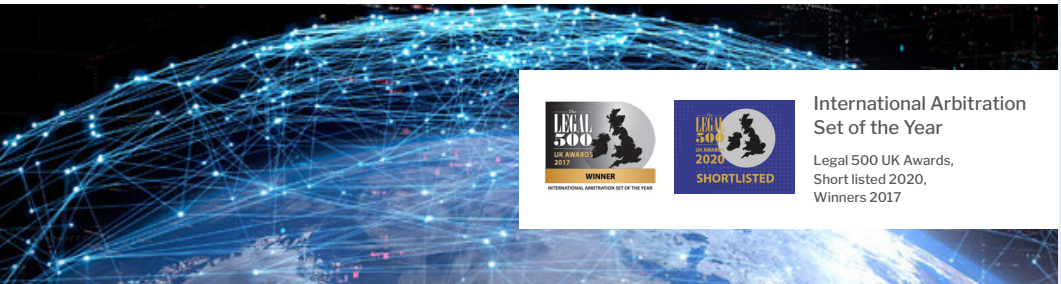
In our first article, Maya Chilaeva considers two recent decisions on the availability of a challenge under s67 of the English Arbitration Act 1996 where there is a failure to comply with pre-arbitration ADR requirements in a multi-tiered arbitration clause: ***Republic of Sierra Leone v SL Mining Ltd*** [2021] EWHC 286 (Comm) and ***NWA v NVF*** [2021] EWHC 2666 (Comm). Maya offers a practical guide on how to distinguish between disputes which raise issues of jurisdiction (susceptible to s67 challenge) and those which raise issues of admissibility (not susceptible to s67 challenge).

Joseph England reflects on procedural cross-fertilisation between international arbitral tribunals and the English courts. In 2021, the Business and Property Courts adopted the new Practice Direction 57AC and Appendix (Statement of Best Practice) on trial witness statements which aims to ensure that witness evidence focusses on the issues where oral evidence really matters. Joseph provides his views on the extent to which the new regime is likely to inform the approach taken in international arbitration.

Finally, Alexander Uff reviews the Supreme Court decision in ***Kabab-Ji v Kout Food Group*** [2021] UKSC 48 which highlights the risks involved in parties choosing an arbitral seat which is different to the governing law of their contract. As Alexander explains, in Kabab-Ji post-award proceedings in the Paris Court of Appeal in relation to an ICC arbitration with a Paris seat resulted in a different outcome to subsequent enforcement proceedings before the English courts due to the different approaches taken in French and English law to the law governing the arbitration agreement and the relevance of the arbitral seat in determining that question.

Natalie Moore has a broad commercial practice with particular experience in international commerce and shipping. She regularly appears in the Commercial Court and in arbitration, both as sole and junior counsel.

Natalie is consistently ranked as a leading junior barrister in the directories, where she has been described as "*an excellent junior*", "*an intelligent and persuasive advocate*" and "*a rising star*" with "*a razor sharp legal mind*".



International Arbitration Set of the Year

Legal 500 UK Awards, Short listed 2020, Winners 2017

UPCOMING EVENTS

Investment Treaty Arbitration and the Changing Energy Landscape

26 April 2022, 6pm
Quadrant House and via Zoom

We are pleased to welcome Sarah Vasani, Partner, Co-Head of International Arbitration at CMS and Graham Coop, Partner, Volterra Fietta and former General Counsel to the Energy Charter Secretariat to our next Quadrant Chambers International Arbitration Panel Event. They will join Alexander Uff and Gaurav Sharma in discussing 'Investment treaty arbitration and the changing energy landscape'. Simon Rainey QC will chair proceedings.

Registration: www.quadrantchambers.com/events/investment-treaty-arbitration-and-changing-energy-landscape

LIDW22

Quadrant is very pleased to be supporting London International Disputes Week 2022

International Day: Ukraine and Kazakhstan

9 May 2022, 9am

Alexander Uff will be speaking alongside LK Law, QMUL, Quinn Emanuel Urquhart & Sullivan LLP and RPC.

Navigating sustainability from regulation to dispute resolution

13 May 2022, 12pm

Hosted by the LMAA, HFW and Quadrant.

Our panel includes Mrs Justice Sara Cockerill DBE, Jamie Wallace, The Standard Club, Daniella Horton, LMAA, Alessio Sbraga HFW and Nigel Cooper QC, Quadrant Chambers.

Registration: https://2022.lidw.co.uk/

GAR London Live

12 May 2022

We are pleased to be sponsoring GAR London Live.

Registration: https://tinyurl.com/GARQuadrant

Multi-Tier Dispute Resolution Clauses – Parties Beware

Author: Maya Chilaeva

Parties often like the idea of requiring ADR before arbitrating because they consider that will help them to settle cases. However, this can have unintended and complicated consequences, as two recent Commercial Court decisions have highlighted.

The issue: admissibility or jurisdiction?

Multi-tier dispute resolution clauses require parties to engage in certain ADR procedures before commencing arbitration. But what happens when Party A alleges that Party B has failed to comply with the relevant procedures? Does B's non-compliance prevent the tribunal from having jurisdiction over the dispute, giving rise to a challenge under s67 of the Arbitration Act 1996 ("AA 1996")? Or is it only a matter of admissibility, with the relevant question being whether the tribunal should exercise its power in relation to the claim submitted to it?

The answer depends on whether B's non-compliance falls within s30(1)(c) of the AA 1996.

The AA 1996 does not define what matters fall within s 30. However, some guidance has been provided by two recent cases.

Republic of Sierra Leone v SL Mining Ltd [2021] EWHC 286

The relevant contract provided that the parties were obliged to first "endeavour to reach an amicable settlement" of any dispute. If settlement was not reached within three months, the matter should be referred to arbitration.

The respondent issued arbitration proceedings early. The claimant challenged the tribunal's jurisdiction under s67 of the AA 1996, relying on s30(1)(c).

Sir Michael Burton rejected the s67 challenge and highlighted the following distinction between issues of admissibility and jurisdiction:

(1) If the issue relates to whether a claim can be arbitrated, the issue is one of jurisdiction (and s30(1)(c) applies).

(2) If it relates to whether a claim should be heard by the arbitrators at all, it is one of admissibility (and s30(1)(c) does not apply).

NWA v NVF [2021] EWHC 2666

As in ***Sierra Leone***, the relevant contract provided that the parties should seek to settle their disputes by mediation. If settlement was not reached within 30 days, the matter could be referred to arbitration.

Calver J held that claim was plainly arbitrable, the relevant question being whether the defendants' alleged failure to mediate was a matter merely affecting the admissibility of the claim or went to the tribunal's jurisdiction. The Judge held that it was the former and thus there could be no s67 challenge.

Analysis

Commercially, the decisions are unsurprising. In both, the parties wished to explore settlement before resorting to arbitration. Where that is not possible, they are unlikely to have intended not to arbitrate their disputes at all.

However, there might be a tension in how the cases were decided. In ***Sierra Leone***, it was held that the precise language of the provision was not relevant to the question of whether the relevant dispute raised issues of admissibility or jurisdiction (see [16] of the judgment). In contrast, in ***NWA v NVF***, the issue was analysed as one of construing the parties' agreement, applying ordinary principles of contractual interpretation (see [33]).

It may be possible to square the circle by interpreting the cases as requiring the following approach to be applied when interpreting multi-tier dispute resolution clauses:

(1) First, the parties' contract should be construed to establish whether a particular issue falls within s30(1)(c). If the contract makes clear that the parties wished to arbitrate their disputes, s30(1)(c) will not apply.

(2) Once this issue has been determined, the precise wording of the provision will not affect the conclusion. It will only affect whether the claim is admissible.

Implications for practitioners

It follows that if parties want to make compliance with certain requirements a condition precedent to the right to arbitrate at all, they must say so in very clear terms. Otherwise, such requirements will be construed as raising procedural issues relating to the admissibility of the claim, rather than an issue which deprives the tribunal of jurisdiction.

Maya Chilaeva joined Quadrant Chambers on 1 October 2021 following the successful completion of her pupillage. She is developing a broad commercial practice in line with Chambers' profile. During pupillage Maya assisted in several arbitrations under varying institutions, including ICC, LCIA and LMAA. She also advised on the prospects of challenging jurisdiction under sections 67-69 of the Arbitration Act 1996.

CPR PD57AC: Impact on Witness Statements in Arbitration

Author: Joseph England

A new regime came into force on 6 April 2021 for trial witnesses statements in the Business and Property Courts of England and Wales (the "BPC"). This marked a sea-change in the preparation of trial witness statements.

The requirements are set out in CPR PD 57AC and the accompanying Statement of Best Practice. In short, it aims to end the days of long, submission/opinion infused statements, written by lawyers and not witnesses, that comment on evidence and narrate documents and quote them at length. The focus is now on evidence that might traditionally have been given in-chief and on facts the witness has personal knowledge of that need to be proved at trial. A list of documents that the witness has referred to or been referred to is required, as are certificates of compliance with the regime, signed by both the witness and the relevant legal representative. Sanctions can be imposed by the Court for non-compliance including not allowing a party to rely on a statement, striking out parts of it, ordering it to be re-done and/or costs sanctions.

PD 57AC also applies to arbitration claims in the BPC as its definition of *"trial witness statement"* includes a statement served pursuant CPR 8, the Part under which arbitration claims are issued.

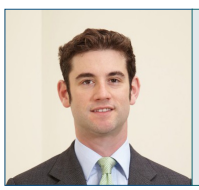
However, the bigger question is the extent to which the new regime will find favour in arbitration itself, directly or indirectly. Indeed, some of the worst excesses that PD57AC seeks to address have been said to be more prevalent in international arbitration.

The LMAA has taken the lead (as it did when the Court introduced cost budgeting), introducing a regime akin to PD57AC in its 2021 Terms applicable to arbitrations commenced after 1 May 2021.

There are certainly existing powers and broad discretion available to tribunals in various institutional rules to adopt similar measures. There are also provisions in most arbitration acts and rules about minimising cost and delay. There were attempts to deal with witness evidence in "The Prague Rules" introduced in December 2018 and the ICC earlier this year published a major report entitled *"The Accuracy of Fact Witness Memory in International Arbitration"*. This dealt with how witness evidence and memory can be altered by the process of taking a witness statement in arbitration and made a number of recommendations that echo (and in some places go further) than PD57AC.

With the high degree of party autonomy in arbitration and the strict rules of evidence not applying unless by agreement, it will ultimately be up to the parties and their representatives to agree, or argue for, or least have more regard to, the type of measures/ spirit of PD57AC, even if not adopting them prescriptively. Could a tribunal easily resist, for example, a request that witness statements should not narrate documents, especially when pleadings in arbitration are more submission-based?

In 2019, the BPC borrowed aspects of the document production regime in arbitration in the "Model C" disclosure regime under CPR PD51U. It remains to be seen whether arbitration will make use of Court's introduction of PD57AC. There has been a view that one of the advantages now of arbitration is to avoid the Court's costs budgeting regime. My view is that the same will not be said of PD57AC which is already finding favour in arbitral quarters. This is especially so as aspects of PD57AC that are perceived to cause difficulty and cost, such as those associated with the Certificates of Compliance, are less likely to be adopted in arbitration.



Joseph England is ranked in the latest edition of Legal 500 as a Leading Junior in four separate categories: International Arbitration, Energy, Civil Fraud and Insolvency, where he is described as: "Very conscientious, hardworking and enthusiastic, he is good on his feet and should go far"; "An up-and-coming star in civil fraud litigation. He has an intuitive feel for how the court will see cases. His grasp of the law and how to put legally complicated points is also excellent. He is a dangerous adversary, constantly looking for weaknesses in his opponent's position and clients love him."

ARTICLES

Click on headings to view

Can enforcement of a New York Convention foreign arbitral award be stayed using domestic English procedural rules? - Jeremy Richmond QC & Koye Akoni

Confidentiality undone? Publication of Court judgments in challenges to arbitration awards - Stephanie Barrett

Expedited arbitration, autonomy and due process - Alexander Uff

Irrelevance of arbitration awards on related legal proceedings: Vale SA v Steinmetz - Paul Toms

CATCH UP

Click on headings to view

Quadrant Panel Debate: Is international arbitration fit for purpose?

Alexander Uff moderated our panel of Abhijit Mukhopadhyay, President (Legal) & General Counsel of Hinduja Group, Mark Beeley, Partner at Orrick, Herrington & Sutcliffe and Nathalie Allen, Legal Director at Addleshaw Goddard.

No Deal on Jurisdiction and Enforcement – Where Does Brexit Leave Us? - Part 1

No Deal on Jurisdiction and Enforcement – Where Does Brexit Leave Us? - Part 2

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.

Our panel of Simon Rainey QC, Robert Thomas QC, Gemma Morgan and Andrew Leung explore the principles governing jurisdiction, and a number of wider issues.

Kabab-Ji: a Note of Caution Over Fortuitous Arbitral Seats

Author: Alexander Uff

The decisions of the French and English courts underscore their different approaches to arbitration agreements. While neither decision comes as a surprise, it nonetheless seems unlikely that the parties would have contemplated these outcomes when negotiating their agreement.

Parties usually choose an arbitral seat that has no connection with potential disputes, or at least will not affect their resolution. The choice is often fortuitous, made for considerations of neutrality and convenience.

Kabab-Ji v Kout Food Group [2021] UKSC 48 sounds a note of caution, as an apparently fortuitous choice of arbitral seat produced an outcome that it seems unlikely the parties would have contemplated when negotiating their transaction.

Kabab-Ji concerned a claim by a licensor under a series of franchise agreements which were governed by English law and provided for ICC arbitration with a Paris seat. The choice of Paris as the seat led the arbitral tribunal to exercise jurisdiction over a non-signatory of the contract, Kout Food Group (KFG), by applying French law to the issue of jurisdiction, where KFG would not have been bound, had the issue been determined applying English law.

The different approaches to the law governing the arbitration agreement and the relevance of the arbitral seat in determining that question, and their impact on the outcome in ***Kabab-Ji***, are illustrated by the post-award proceedings before the French and English courts, both of which followed established authority.

Ruling on KFG's objection to jurisdiction in a passage of its award later cited with approval by the Paris Court of appeal (23 June 2020, case no. 17/22943), the arbitral tribunal considered that it "should apply French law to determine whether it had jurisdiction over the respondent, as the validity of the arbitral award [...] will depend on the law applicable at the seat".

The tribunal then noted that under well-established French law, as a substantive rule of international arbitration "the existence and validity of an arbitration agreement is to be assessed without reference to any national law, but only by reference to the common will of the parties in light of the facts of the case", and found that KFG was bound by the arbitration agreement. The Paris Court of appeal also found that the choice of English law as the governing law of the contract was not enough to demonstrate a common intention that the arbitration clause was to be governed by English law, reflecting the separability principle as effected in French law: that as a substantive rule of international arbitration law, an arbitration clause is legally independent from the contract in which it is contained.

Whether KFG had acquired rights and obligations under the substantive contract was a separate question from that of jurisdiction, and fell to be determined under the governing law of the contract, English law. The arbitral tribunal decided by majority that it did, an English-qualified arbitrator dissenting, moreover this aspect of the award was not subject to review in a set aside application.

When Kabab-Ji sought to enforce the award in England KFG raised the same jurisdictional objection, arguing that the award should not be recognised and enforced pursuant to Article V(1)(a) of the New York Convention as implemented by s. 103(2)(b) of the 1996 Arbitration Act, because the arbitral tribunal lacked jurisdiction over it.

In contrast to the decision of the arbitral tribunal and the Paris Court of Appeal, the English High Court, Court of Appeal and Supreme Court found that the arbitration agreement was governed by the substantive law of the contract, English law. Applying English law, KFG had not become bound by the arbitration agreement. The Supreme Court referred to its recent consideration of the law applicable to arbitration agreements in ***Enka v Chubb*** [2020] UKSC 38, according to which "where the law applicable to an arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract."

While ***Enka*** concerned a common law conflict of laws rule and ***Kabab-Ji*** concerned the statutory conflicts rule in section 103(2)(b) of the Arbitration Act (implementing Article V(1)(b) of the New York Convention), the Supreme Court emphasised that adopting a different approach from ***Enka*** would have the "illogical" result of applying a different law to the same arbitration agreement, depending on whether it was considered before or after the issuance of an award. The Court also found there was no international consensus on the interpretation of Article V(1)(b) for it to follow. The Supreme Court thus concluded that the general choice of English law as the governing law of the franchise agreements in ***Kabab-Ji*** constituted an "indication" of the law to which the parties had subjected the arbitration agreement contained therein, and that there was "no good reason to infer that the parties intended to except [the arbitration agreement] from their choice of English law to govern all the terms of the contract," contrasting the Paris court's approach to separability.

Kabab-Ji does not reflect a change in either French or English law. It reaffirms the approach the Supreme Court recently laid down in ***Enka v Chubb*** and highlights the different approaches of French and English law to the law applicable to arbitration agreements and to separability.

On a practical level, ***Kabab-Ji*** illustrates the impact the choice of arbitral seat may have on the law governing an arbitration agreement and the implications this may have on who was bound by the arbitration agreement. It seems unlikely that the parties, having chosen to regulate their substantive relations under English law, would have contemplated the effect that the choice of Paris as an arbitral seat would have had on them, and the scrutiny of the proposed arbitral seat may have focused on its arbitration-friendly credentials rather than its potential impact on the extension of the arbitration agreement to non-signatories. In this respect ***Kabab-Ji*** strikes a cautionary note.

It is of course common in international arbitration for the parties to select an arbitral seat that is different from the substantive law governing their contract. Well-advised parties have for some time expressly specified the law applicable to the arbitration agreement in cases where the place of arbitration differs from the law governing the contract, however this practice is not widespread and it is likely that situations similar to ***Kabab-Ji*** will continue to arise in the future.

Alexander Uff specialises in international commercial and investment treaty arbitration. Originally qualified as a barrister, Alexander was a partner in an elite global arbitration practice at Shearman & Sterling for several years before joining Quadrant Chambers in 2021. He provides advice, representation and advocacy to corporations, States and State-owned entities in complex international commercial and investment treaty arbitrations. His work has focused in recent years on disputes in the energy, mining and infrastructure sectors, investment treaty claims and commercial disputes across a number of sectors.