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International Quarterly provides informative and practical information regarding legal and commercial developments in construction and energy sectors around the world.

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Welcome to Issue 36

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Welcome to our latest edition of *International Quarterly* which highlights issues important to international arbitration and projects.

In our 36th issue, we begin by looking at the new Civil Transactions Law for the Kingdom of Saudi Arabia, with Shahed Ahmed considering some of its key provisions. Effective from 16 December 2023, this Civil Code is a significant development in its legal landscape as it has codified – for the first time – a law that governs civil and commercial transactions in KSA.

We next turn to recent publications from the ICC Commission on Arbitration and ADR. Tajwinder Atwal discusses each in turn, as they touch on different dispute resolution techniques and how to facilitate a settlement of disputes in international arbitration.

Then, Adele Parsons provides an update on the proposed reforms to the Arbitration Act 1996 in England and Wales. These limited reforms focus on maintaining the effectiveness and efficiency of the arbitral process.

Finally, I review a recent UK Supreme Court case in which the court allowed an appeal against a decision staying court proceedings under section 9 of the Arbitration Act 1996.

If there are any areas you would like us to feature in our next edition, please let me know.

Jeremy

News and Events

Events

Fenwick Elliott is a proud sponsor of the annual **ICC FIDIC Conference on International Construction Contracts and Dispute Resolution**, hosted 12-13 October in Paris. Partner Nicholas Gould will chair an Oxford Union-style debate on the assertion that, '*This house believes that the construction arbitration process is broken...*'. Please *click here* for more information on the conference.

Partners Jeremy Glover and Nicholas Gould are speakers at the upcoming **DRBF MENA Regional Conferenc**e, hosted in Istanbul from 23-24 October, where they will share industry-leading information on dispute boards. *Click here* to view the full event programme.

We are the strategic sponsor of the annual **FIDIC Official International Contract Users' Conference and Awards**, which returns to London from 28-29 November. *Click here* for more information or to register to attend.

Partner Claire King is taking part in this year's **Adjudicaton Society Annual Conference** on 30 November, where she will join a moderated consideration of progress in the industry following the advent of the Equal Representation in Adjudication Pledge, which seeks to address the under-representation of women on international arbitration tribunals. Please *click here* for more information.

Webinars

Fenwick Elliott hosts regular webinars that address key issues and topics affecting the construction industry. To find out details of upcoming webinars please *click here* and select the 'webinar' drop down. To watch our previous webinars on demand, *click here*.

As well as our hosted webinar series, many of our specialist lawyers also contribute to webinars and events organised by leading industry organisations, where they are asked to share their knowledge and expertise of construction and energy law and provide updates on a wide range of topical legal issues.

We also are happy to organise webinars, events and workshops elsewhere. We are regularly invited to speak to external audiences about industry specific topics including FIDIC, dispute avoidance, BIM, digital design and technology.

If you would like to enquire about organising a webinar or event with some of our team of specialist lawyers, please contact Stacy Sinclair (ssinclair@fenwickelliott.com). We are always happy to tailor an event to suit your needs.

This publication

We aim to provide you with articles that are informative and useful to your daily role. We are always interested to hear your feedback and would welcome suggestions regarding any aspects of construction, energy or engineering sector that you would like us to cover. Please contact Jeremy Glover with any suggestions jglover@fenwickelliott.com.

New Civil Code for the Kingdom of Saudi Arabia

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On 19 June 2023, the Kingdom of Saudi Arabia ("**KSA**") enacted the new Civil Transactions Law (the "**KSA Civil Code**") via Royal Decree No. M/191.

As many will be aware, KSA's legal system to date has predominantly been based on principles of Islamic Shari'ah. Therefore, the introduction of the KSA Civil Code is a significant development in its legal landscape as it has codified – for the first time – a law that governs civil and commercial transactions in KSA.

The KSA Civil Code consists of 721 articles and is split into five sections:

1. Introduction;
2. Obligations;
3. Nominate contracts;
4. In-kind rights (relating to property/co-ownership rights); and
5. Final provisions.

This article considers some of the key provisions of the KSA Civil Code. Unsurprisingly, these are generally consistent with corresponding laws of other civil law jurisdictions. Unless otherwise stated, any references to "Article" are references to Articles of the KSA Civil Code.

Effective Date

Pursuant to Article 721, the KSA Civil Code comes into effect on 16 December 2023 (the "**Effective Date**"), following which, any contradicting provisions will be abolished. Accordingly, all new contracts signed on or after the Effective Date will be subject to the KSA Civil Code and contracting parties' rights, obligations and liabilities will be interpreted on that basis.

For existing contracts, the KSA Civil Code will have retrospective effect; albeit, this is subject to two exceptions.

First, in circumstances where "*any statutory provision or judicial term, relating to the case, contradicts the provisions of this law, and one of the parties adheres to it*". In other words, where a party proves that the application of the KSA Civil Code would contradict an established Shari'ah principle that predates the Effective Date, that Shari'ah principle will apply rather than the KSA Civil Code.

Second, the KSA Civil Code will not apply if the relevant provision relates to a statutory limitation period that started to run prior to the date upon which the new law has come into force. In other words, when a limitation period has already commenced before the Effective Date, the KSA Civil Code does not apply retrospectively. As an example, KSA's Commercial Courts Law specifies a five-year limitation period for commercial claims. If such limitation period has already commenced in respect of commercial claim, then based on this exception, the KSA Civil Code would not apply.

Islamic Shari'ah

The enactment of the KSA Civil Code does not necessarily mean that Islamic Shari'ah will no longer apply.

Notwithstanding that Article 1 confirms that the KSA Civil Code will apply "*to all matters*", it also states that, where there is no relevant statutory provision, relevant Islamic Shari'ah shall be applied by default. In this regard, Article 720 sets out 41 fundamental Islamic maxims that will apply to such circumstances. Put simply, these maxims are applicable in case the codified provisions do not cover a specific issue. In addition, Islamic Shari'ah may indirectly apply by virtue of a party seeking to rely upon a "*statutory provision or judicial term*", as described above.

Ultimately, given the sacrosanct nature of Islamic Shari'ah, it is anticipated that local Courts in particular (and possibly Tribunals) may still rely upon Islamic Shari'ah principles when seeking to understand,

Disclaimer

The author has relied upon an unofficial translation of the KSA Civil Code; therefore, the contents of this article must be considered in that context.

interpret and apply the KSA Civil Code. Indeed, the Courts may choose to adopt a narrow interpretation of Article 1 and apply Shari'ah whenever the KSA Civil Code does not make relevant provision in respect of a matter brought before them.

Effects of a Contract

A key principle of Islamic Shari'ah is that a contract is the "law" of the parties and accordingly they are generally bound by what they have agreed. Put simply, a Court or Tribunal is likely to recognise and enforce the terms agreed between the parties subject to any Shari'ah prohibitions. This principle has now been codified pursuant to Article 94, which provides, amongst other things, (i) that a contract may only be revoked or altered by mutual consent or for reasons provided by law; and (ii) each of the contracting parties must fulfil their obligations under the Contract.

Good Faith

A fundamental principle of Islamic Shari'ah is good faith, which is set out in Article 95. Similar to other civil law jurisdictions, it provides that a contract must be performed in accordance with the contract and in a manner consistent with the requirements of good faith.

Interpretation of a Contract

Consistent with the Islamic Shari'ah principle that a contract is the "law" of the parties (and other civil law jurisdictions), Article 104 provides that, if the language of the Contract is clear, the starting point would be to apply such terms, i.e., its meaning will not be altered. As such, the first port of call for a Court or Tribunal interpreting the parties' rights and obligations will be the underlying contract.

In the event that there is scope to interpret the contract, a Court or Tribunal will seek to ascertain the common will of the parties and, in doing so, Article 104 provides guidance by setting out criteria that should apply. These include custom, circumstances of the contract, nature of the transaction, and the trust that should exist between the parties.

Compensation and Limitation Periods

Articles 136 through 143 relate to compensation.

In summary, the KSA Civil Code provides for compensation to be paid for damages suffered with a view to returning the innocent party "*to the situation in which he was or would have been without the damage*" (Article 136). In doing so, the Court or Tribunal will be required to determine the extent to which the innocent party has suffered a loss as a natural result of the harmful act (Article 137). Interestingly, Article 137 appears to refer to "*loss of profits*", which indicates that such losses are recoverable.

Pursuant to Shari'ah, rights are not extinguished due to any lapse in time. Whilst this principle is confirmed in the KSA Civil Code, limitation periods are codified. Under Article 295 of the KSA Civil Code, a general limitation period of 10 years is confirmed subject to any other applicable statutory period or where the listed exceptions therein specify a shorter period. It should be noted, however, the language of Article 295 implies that the limitation period applies where a person against whom the action is brought denies the right.

Limitation of Liability

Consistent with other civil law jurisdictions, Article 178 provides that the parties may, in advance, agree the amount of compensation payable. It follows that this ability to agree would include or cover liquidated damages in respect of delay, a common feature of construction contracts. The principle of damages for delay is reinforced under Article 172 although equally it appears to provide an exemption for liability if a party can prove that the delay is "*due to a cause beyond his control*".

Notwithstanding, any pre-agreed amount of compensation, however, is subject to the power of adjustment under Article 179. This allows the Court or a Tribunal, upon the application of either of the parties, to vary the agreement so as to make the compensation equal to the loss suffered. Conditions apply and in particular where a party is seeking to increase the agreed compensation, this appears to be restricted to circumstances where the additional damage caused is due to fraud or gross error.

Where the underlying contract does not contain a pre-agreed amount of compensation, Article 180 requires the Court or a Tribunal to (i) determine the damages pursuant to Articles 136-139 relating to compensation, or where it relates to an obligation under the contract; and (ii) to determine the amount of compensation based on foreseeability unless the defaulting party has committed fraud or gross error.

Other Key Provisions of the KSA Civil Code

Abuse of Rights

Article 29 confirms that abuse of the exercise of a right is prohibited. There are three grounds under which an exercise of a right shall be considered unlawful. These are (i) if the use is intended solely to cause damage to others; (ii) or if the benefit is disproportionate to the harm that will be suffered by the other; or (iii) if the benefit itself is unlawful.

Contracts of Adhesion

Article 96 provides that, if a contract is made by way of adhesion and contains unfair provisions, it is permissible for a Court or Tribunal to vary those provisions or to exempt the adhering party therefrom in accordance with the requirements of justice.

Force Majeure

Article 97 is similar to other civil law jurisdictions whereby in "*exceptional circumstances of a public nature*" under which it becomes "*oppressive*" for the obliging party to perform its obligations and there is a risk of "*grave loss*", it can apply to the Court to reduce the oppressive obligation. The KSA Civil Code introduces an additional step; the obliging party is required to approach the other party to renegotiate the terms of the Contract and only if an agreement cannot be reached can an application be made to the Court.

Termination

Articles 105 to 114 make provision for termination and annulment of a contract. In summary, there are four grounds under which a contract may be terminated, namely (i) by mutual consent (Article 105); (ii) via the exercising by a party of an option to terminate (Article 106); (iii) for breach of an obligation (Article 107); and (iv) impossibility (Article 110).

Suspension

Article 114 of the KSA Civil Code provides a statutory right to suspend performance of one's obligations if the other party has failed to carry out its obligations.

Unjust Enrichment

Article 144 of the KSA Civil Code prohibits unjust enrichment in which case the guilty person is required to compensate the other for any losses incurred even if the enrichment is subsequently removed.

Conclusion

Underpinned by its Vision 2030 to continue modernising KSA and attract further investment to the country, the new KSA Civil Code is a significant shift in the legal landscape in KSA. It is consistent with other civil law jurisdictions and reinforces important internationally recognised principles and further provides clarity as to the rights, obligations, and liabilities of contracting parties. At the very least, the KSA Civil Code will enhance confidence in the region and hopefully improve predictability for parties contracting in KSA.

The above being said, there is scope for different interpretations of the KSA Civil Code. It will take a number of Court judgments to ascertain how provisions of the KSA Civil Code will be applied. Even then, given there is no concept of binding precedent in KSA, it is likely that some uncertainty will always remain. Parties should, therefore, continue to ensure their rights, obligations and liabilities are unambiguously set out in the contract.

As an aside, it is noteworthy that a draft Commercial Code is in circulation for public consultation in KSA. The Commercial Code, when it comes into effect, will supplement and apply to commercial transactions in parallel to the KSA Civil Code. ■

The ICC Commission on Arbitration and ADR publishes report and guide to the promotion of dispute prevention and resolution

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2023 marked 100 years of the ICC International Court of Arbitration, the world's leading arbitral institution. In light of this, the ICC Commission on Arbitration and ADR (the "**Commission**") published a Guide on Effective Conflict Management (the "**Guide**")[1] and a Report on Facilitating Settlement to International Arbitration (the "**Report**").[2] Both the Guide and the Report discuss different dispute resolution techniques and how to facilitate the settlement of disputes in international arbitration.

Every year, the Commission brings experts and practitioners in the field of arbitration and ADR together during plenary sessions to discuss proposed rules and the Commission Reports. This currently includes over 1,300 members from some 100 countries. The reports and other documents created by the Commission are all available online at iccwbo.org and on the online ICC Dispute Resolution Library.[3]

The president of the ICC International Court of Arbitration, Claudia Salomon commented that the latest publications deliver one of ten pledges set out in the ICC Centenary Declaration on Dispute Resolution,[4] that was announced early this year. Pledge 3 refers to "*Thought leadership*", meaning "*to drive thought leadership in dispute prevention and resolution through innovative services, best practices and standards that meet the evolving needs of an ever-wider range of businesses and markets, to enable the requisite legal frameworks, including the enforceability of arbitral awards*".

The Guide

There are many ADR techniques to promote settlement of disputes. One example is early neutral evaluation whereby parties engage the services of an ADR "neutral".

A neutral providing service under the ICC ADR Services may be an expert or a dispute board appointed to provide a non-binding preliminary evaluation of the parties' dispute. Neutrals can help parties to gain an early insight into the strength and weaknesses of their positions, which can inform parties on the best approach to a potential settlement. The Guide explains how to efficiently use ADR techniques to avoid escalation and potentially resolve disputes, which can reduce cost in the long run.

The Guide goes on to explain the available ICC Dispute Resolution Services, including the ICC Rules of Arbitration, the ICC Mediation Rules, Expert Rules and Dispute Board Rules and provides examples of how they can be used as standalone or combined services.

The Report

The Report focuses on proposals to allow parties to settle disputes even once arbitration proceedings have begun. As well as having obvious cost benefits, settling the claim can help to preserve business relationships.

It is usefully split into three main sections:

1. Case Management Techniques ("**Section 1**");
2. Mediation Windows and Protocols ("**Section 2**"); and
3. Preliminary View and Settlement ("**Section 3**").

Taking each section by turn, Section 1 discusses the first case management conference ("**CMC**"), which looks

at the first procedural order and procedural timetable to ensure they are both purpose built. The arbitral tribunal should also ensure that the CMC incudes steps that provide for effective management of the overall proceedings as well as facilitating a settlement.

It is important to remember that these case management techniques do not stop at the first CMC. The arbitral tribunal may schedule further procedural meetings, which will give everyone the opportunity to review, based on the submissions to date, how their initial positions may have changed. The arbitral tribunal will also be able to provide guidance on the issues to be addressed in further submissions or at the hearing.

Section 2 looks at the ICC Mediation Guidance Note, specifically paragraph 29 which describes the utility of mediation windows:

> *"29. Where mediation takes place in the course of arbitration proceedings, it may be appropriate for the arbitration to be stayed to allow time for conducting the mediation (such a stay or pause in the proceedings is sometimes referred to as a mediation window). This enables the parties to focus on the mediation without being distracted by the need to take steps in the arbitration and incurring the costs of those steps when a settlement may be imminent. In other cases, the parties may prefer to conduct the mediation without requiring a stay or pause in the arbitral proceedings.*
>
> *30. The suggestion that mediation be used during the arbitration proceedings may be made by one of the parties. Whether or not it is helpful to build a mediation window into the timetable for the arbitration proceedings – and, if so, when that window should occur – is also a topic which may be discussed between the parties and the arbitral tribunal at the first and subsequent case management conferences provided for in Article 24 of the ICC Arbitration Rules".*

Section 2 in the Report then explains how the idea of a mediation window should be raised, the timing/duration of the mediation window and whether the arbitration should be paused whilst the mediation takes place.

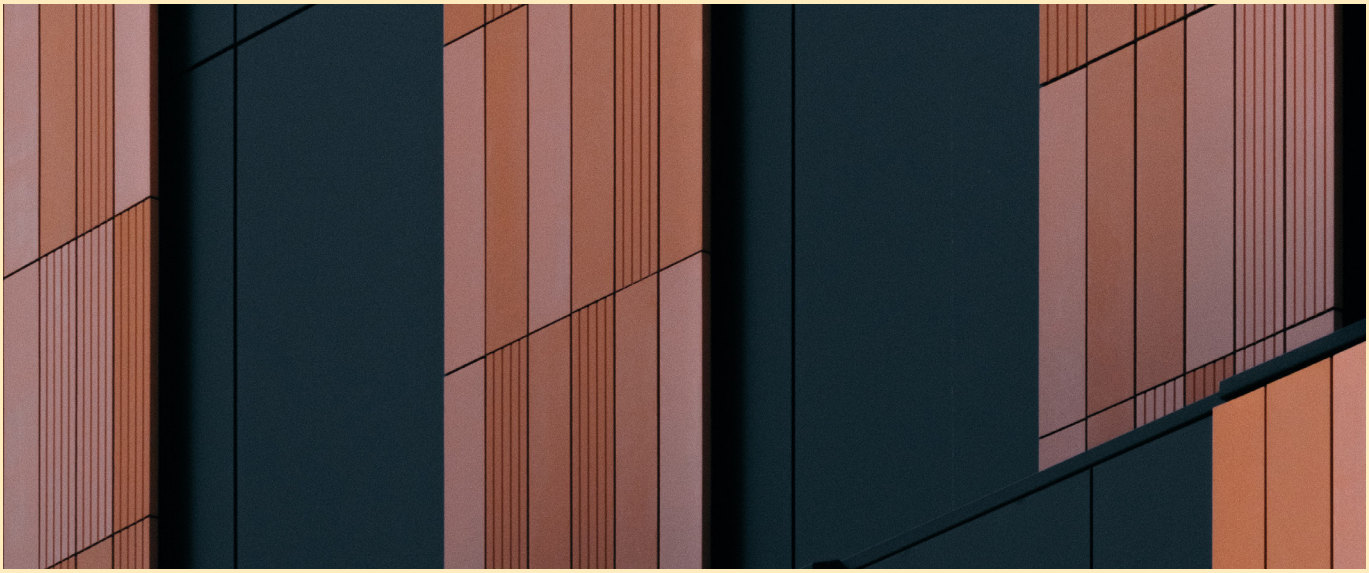
Section 3 of the Report discusses the possibility of the arbitral tribunal giving parties its non-binding and preliminary assessment on the issues in dispute in the arbitration. If the arbitral tribunal were to adopt this approach, they could give preliminary views on the whole case, or on specific issues. The advantage to the parties would be to help them understand the strengths and weaknesses of their respective cases and, perhaps most importantly, the parties will understand how the arbitral tribunal may ultimately decide its views on the merits. To seek this preliminary view, the arbitral tribunal understandably requires the express agreement of the parties.

The difference between the preliminary assessment and an early neutral evaluation given by an independent third party is that the former has the additional value that the views come from the arbitral tribunal that will decide the case.

Conclusion

Both the Guide and Report are driven by the needs of users, and the Commission is hopeful that this will target "*a wide range of businesses, from SMEs to multinational corporations, as well as states, external counsel using ICC dispute resolution services, alongside arbitrators, mediators and other ADR service providers*".

The credit for these publications goes to the ICC Task Force on ADR and Arbitration, created by the ICC Commission on Arbitration and ADR. Christopher Newmark, Co-Chair of the Task Force, states "*Arbitrators facilitating settlement is a common practice for some, but brand new territory for most. Increased interest in this developing role for arbitrators means that all practitioners should know how it can be done effectively and the pitfalls to avoid – reading the Report on Settlement Facilitation is a good place to start*".[6] ■



So, how does the UK plan to remain a world leader in international arbitration? By doing very little.

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Only limited reform recommended for the Arbitration Act 1996

In a November 2022 blog, I discussed a Consultation Paper[1] published by the UK Law Commission, which contained a number of provisional proposals in respect of reforming the Arbitration Act 1996 (the "**Act**"). These were focused on maintaining the effectiveness and efficiency of the arbitral process.

After some two and half years (the consultation process began in March 2021) and consulting hundreds of stakeholders, the Commission has published its final report in which it has decided to reform...very little.

Now, I hasten to add that the contents of the Law Commission's final report are not surprising. Industry feedback at the time of the consultation was that major reform was neither needed nor wanted, and why would it be? The UK is typically seen as a world leader for international arbitration, with London being the world's most popular seat. That reputation very much rests upon the effectiveness of the Act, which sets out the framework for arbitration in England, Wales and Northern Ireland. Therefore, and as I said in my earlier blog, there was very much an "*if it ain't broke, don't fix it*" mentality prior to and during the consultation period.

So, what made the cut?

A new rule on the governing law of the arbitration agreement

Presently, the law governing an arbitration agreement is the law chosen by the parties to that agreement. However, the common law position[2] is that if an arbitration agreement does not specify a choice of law, then the law chosen to govern the matrix contract (the matrix contract being the main contract between the parties, which is treated as separate from the arbitration clause or agreement to which it refers) will be implied in the arbitration agreement unless it renders the agreement invalid. Where there is no choice of governing law in the matrix contract, the arbitration agreement will be governed by the law with which it is most closely associated, which is usually the law of the seat of the arbitration.

To simplify the above, the Commission has recommended that where there is no express agreement in the arbitration agreement regarding the governing law, the law of the seat of arbitration will apply. This proposal certainly assists in making the arbitral process more efficient as the current common law position is still very much open to interpretation and additional satellite litigation.

Summary disposal of issues which lack merit

The Commission has also proposed that the Act should include an express summary judgment procedure to allow arbitrators to dispose of meritless matters put before them in the same manner as the English Courts where a party has no real prospects of success in respect of a certain issue.

The above is not a drastic proposal when you consider that, arguably, arbitrators already have the power to adopt a summary procedure as they are obliged to adopt procedures which avoid unnecessary delay and expense.[3] However, it was apparent that many arbitrators were reluctant to adopt a summary procedure out of what the report refers to as "*due process*

Footnotes

[1] *https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/*

[2] *Enka v Chubb* [2020] UKSC 38

[3] Arbitration Act, section 33(1)(b)

[4] Arbitration Act, section 33(1)(a)

[5] Arbitration Act, section 67

[6] *Dallah v Pakistan* [2010] UKSC 46

[7] Arbitration Act, section 33

[8] *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48

[9] Consulation Paper, paragraph 1.31

[10] Defined by section 4 of the Equality Act 2010 as age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

paranoia" and a concern for their express duty under the Act to act fairly and to give each party a reasonable opportunity to put their case.[4]

Although parties are free to opt out of or limit the summary process, I imagine the introduction of an express summary judgment procedure will be warmly welcomed both in terms of introducing certainty for arbitrators and ensuring claims remain streamlined by eliminating meritless points.

Challenging a tribunal's jurisdiction

The Consultation Paper originally asked whether the procedure for challenging a tribunal's jurisdiction should be amended from a full rehearing to an appellate review.

At present, the Act allows a party to challenge a tribunal's decision as to its own jurisdiction in court[5] and provides that any such challenges must be undertaken by way of a full rehearing.[6] Let's face it, a complete rehearing is hardly efficient; essentially resulting in duplication of time and costs, nor is it technically fair... second bite of the cherry, anyone?

In response, the Law Commission has recommended that where a party seeks to challenge a ruling on jurisdiction, and has participated in the arbitration proceedings in question, the Court will not entertain any new grounds of objection or any new evidence, save in the interests of justice. It is proposed that this change will be made through procedural rules rather than an express amendment to the Act.

Immunity of arbitrators

Should an arbitrator's immunity to legal liability be strengthened?

In short, the Commission has decided that yes, it should. The Act currently states that an arbitrator is not liable for anything done in the discharge of their functions unless done in bad faith. This is subject to two exceptions: (i) where an arbitrator potentially incurs liability when he or she resigns; and (ii) when an arbitral party makes an application to the Court which accuses an arbitrator of bad faith.

The Commission has proposed that an arbitrator would not incur any liability for resigning unless it can be shown that the resignation was unreasonable, and that an arbitrator will not incur costs liability in respect of an application for their removal unless it can be shown that they acted in bad faith.

The above is a positive step in supporting the finality of the dispute resolution process and preventing parties who are disappointed by the conduct or outcome of arbitral proceedings from pursuing further satellite litigation against the arbitrator in question.

Independence and disclosure

There is currently no express duty within the Act that requires that arbitrators be independent, i.e., that they have no connection to the arbitrating parties or the dispute. This is not surprising given that arbitrators are already subject to a statutory duty of impartiality[7] under the Act. In any case, if an arbitrator is impartial then technically it does not matter if they are not "*perfectly independent*", just so long as they disclose any connections to the parties.

Considering the above, the Commission has recommended that the principles from the *Halliburton* case setting out when an arbitrator should disclose a connection[8] be codified with the result that arbitrators have a continuing duty to disclose any circumstances which may reasonably give rise to justifiable doubts as to their impartiality. This will require disclosure of matters within the arbitrator's actual knowledge and also what he or she ought to reasonably know.

Interim measures

Finally, section 44 of the Act sets out the powers that a court can exercise in support of arbitral proceedings, such as orders for the preservation of evidence. While orders under section 44 can be made against arbitral parties, there is uncertainty as to whether those orders can be made against third parties. The Commission has therefore proposed that the Act be amended to confirm what orders the Court can make against third parties under section 44 of the Act.

As the Commission acknowledges, the foregoing does not create a one-size-fits-all regime, but it does provide some much-needed clarity where previously the case law on this topic has been uncertain.

What's next?

Ultimately the Commission's recommendations are a matter of fine tuning the arbitral process rather than completely overhauling it. This is to be expected given previous industry feedback was "*if it ain't broke, don't fix it*".

Personally, I think there was one area that did need to be fixed: discrimination. In an industry where, for example, women are three times less likely to be appointed as arbitrators than men,[9] the initial proposals which would have barred a party changing an arbitrator's appointment based on their "*protected characteristics*",[10] looked promising and certainly a means of ensuring the UK remained an up-to-date world leader in arbitration.

It is therefore somewhat surprising and disappointing that the Commission has not sought to address and confirm the issue of discrimination.

That aside, the Commission's recommendations are certainly a welcome addition to streamlining the arbitral process and ensuring it remains as efficient and cost friendly as possible for parties. ■

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Staying court proceedings: what's the matter?

In the case of *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) and others* [2023] UKSC 32, the Supreme Court allowed an appeal by the Republic of Mozambique ("**the Republic**") against a decision staying court proceedings under section 9 of the Arbitration Act 1996.

The decision here turned on a discussion about how to identify the "matter"caught by the arbitration clause in question.

Section 9 of the 1996 Act provides:

> *"(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter ...*
>
> *(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed".* [Emphasis added.]

The Republic had entered into three contracts with Privinvest Shipbuilding SAL ("**Privinvest**") for the supply of vessels and shipping infrastructure as part of the Republic's development of its Exclusive Economic Zone ("**EEZ**"), in particular through tuna fishing and the exploitation of its gas resources. The contracts contained arbitration agreements. A dispute arose after the Republic alleged that Privinvest was paying bribes to the Republic's offices. The Republic said it was exposed to a potential liability of about US$2 billion and issued court proceedings against Privinvest who applied for a stay.

The Commercial Court

Each of the supply contracts had different arbitration agreements. In the Commercial Court, Waksman J stated that the issue of law which arose was how to approach the identification of the "matter" which was caught by the arbitration clause, in respect of which the legal proceedings had been brought. The judge analysed the Republic's claim as being the alleged corrupt procuring by the defendants of transactions with the special purpose vehicles ("**the SPVs**") or the Republic, which were (i) the supply contracts; (ii) the financial facilities; and (iii) the guarantees. The alleged corrupt scheme involved all three elements of which the guarantees were the key element for the Republic as they exposed the Republic to loss.

Waksman J concluded that the disputes raised by the Republic's claims did not have a sufficient connection with the individual supply contracts. The judge noted that there were three separate arbitration clauses in three separate supply contracts which suggested that the parties intended that, in each agreement, the dispute resolution procedure was principally for the particular supply contract. The judge stated that:

> *"The more disparate and disjointed the collection of dispute resolution clauses (or absence in the case of the Proindicus sub-contract), the more one should conclude that so far as is consistent with the language of the relevant arbitration clauses, they should be confined to their immediate contractual context. In other words, the potency of the Swiss version of the 'one-stop shop principle' is much attenuated".*

The judge analysed each of the claims listed and concluded that each was not sufficiently connected to the supply contracts to fall within the relevant arbitration clauses. The Court of Appeal disagreed.

The Court of Appeal, in allowing the appeal, considered that it was

reasonably foreseeable that the validity of the supply contracts was bound to be relied on by Privinvest. The Court of Appeal also emphasised the sanctity of the parties' agreement and stated:

> *"Thus, whether or not there is futility in practical terms of any stay is immaterial. Equally, the fact that there may be (on the facts of this case particularly acute) unwelcome case management complications if all or parts of claims are stayed is irrelevant. These are complexities which flow from s. 9 and ones which will often arise in multi-party, multi-issue litigation such as this".*

Supreme Court

In the Supreme Court, Lord Hodge considered the meaning of a "matter" in respect of which legal proceedings are brought. Section 9 involved a two-stage process. First, the court must identify the matter or matters in respect of which the legal proceedings are brought. Second, the court must ascertain whether the matter or matters fall within the scope of the arbitration agreement on its true construction.

Having reviewed a number of decisions including cases from Australia and Singapore, Lord Hodge said that he considered that there was now a: *"general international consensus among the leading jurisdictions involved in international arbitration in the common law world which are signatories of the New York Convention on the determination of 'matters'"* which must be referred to arbitration.

He summarised that consensus as follows:

1. The court, in its consideration of such an application, adopts a two-stage process. First, the court must determine what the matters are which the parties have raised or foreseeably will raise in the court proceedings, and second, the court must determine in relation to each such matter whether it falls within the scope of the arbitration agreement. In carrying out this exercise, the court must ascertain the substance of the dispute or disputes between the parties, including taking into account all reasonably foreseeable defences to the claim or part of the claim.
2. The "matter" need not encompass the whole of the dispute between the parties.
3. A "matter" is a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute. If it is not an essential element of the claim or of a relevant defence to that claim, it is not a matter in respect of which the legal proceedings are brought. A "matter" is something more than a mere issue or question that might fall for decision in the court proceedings or in the arbitral proceedings.
4. A court should approach its evaluation by the application of judgment and the application of common sense, not a mechanistic exercise. It is not simply evaluating whether an issue is capable of constituting a dispute or difference within the scope of an arbitration agreement. The evaluation must consider whether the issue was reasonably substantial and whether it is relevant to the outcome of the legal proceedings of which a party seeks a stay whether in whole or in part.

In addition, although there was not (yet) consensus, there was a fifth point. When turning to the second stage of the analysis, namely whether the matter falls within the scope of the arbitration agreement on its true construction, the court must have regard not only to the true nature of the matter but also to the context in which the matter arises in the legal proceedings.

Lord Hodge said that in addressing the first stage of the section 9 exercise, the court was not tied to the pleadings but should look to the substance of the claims and likely defences. Here, standing back from the detail, it was clear, first, that in seeking damages resulting from the entering into the guarantees as part of the three transactions, the Republic was asserting that it did not get value for the monetary obligations which were purportedly entered into on its behalf. Were it otherwise, the Republic would not be seeking the repayment of any sums for which it might be held liable under the guarantees. Second, it is clear that no challenge was made to the validity of the supply contracts; instead, damages and indemnities were sought.

The components of a claim for bribery are (i) that a secret payment or other inducement has been made to an agent which gives rise to a realistic prospect of a conflict between the agent's personal interest and that of his principal; and (ii) the recipient of the bribe (or the person at whose order the bribe is made) must be someone with a role in the decision-making process in relation to the transaction in question. But the payment does not need to be linked to a particular transaction; it was sufficient that the agent is tainted with bribery at the time of the transaction between the payer of the bribe and the principal.

The claim here did not require an examination of the validity of any of the supply contracts. Nor was it necessary to prove dishonesty or that any fraudulent representation was made to the principal. Further, a defence that the supply contracts were valid and were on commercial terms would not be relevant to the question of a defendant's liability to account for the bribe. The law assumes that the price of the goods and services purchased by or on behalf of the principal was increased by at least the amount of the bribe.

Lord Hodge said that, standing back from the detail, if there were bribes, the bribes would have been to obtain the supply contracts and the Republic's guarantees. It may well be that the price fixed in one or more of the supply contracts was such as to fund the payments which are alleged to be bribes. But that was simply the mechanism by which the payments were funded. In relation to the question of Privinvest's liability, the commerciality of the supply contracts

or the value for money given by the implementation of those contracts were not matters in respect of which the legal proceedings were brought.

Lord Hodge agreed with Waksman J that the Republic's claims did not fall within the scope of the three arbitration agreements. This left the question as to whether, in the context of the legal claims which the Republic pursued, the partial defence on quantum, namely that each of the supply contracts gave something of considerable value which the Republic has squandered, gave rise to a dispute referable to arbitration under the arbitration agreement contained in each of the supply contracts which the Privinvest supply companies entered into with the SPVs.

Lord Hodge agreed with Waksman J that the existence of multiple arbitration clauses here suggested that a narrow approach to the sufficiency of the connection was required. He stated that the parties must have intended that each provision was a dispute resolution procedure principally intended for that particular contract. That was a common-sense proposition in the context of a dispute involving many parties and many contracts.

Lord Hodge said that in ascertaining the scope of an arbitration agreement, the court must have regard to what rational businesspeople would contemplate. The Swiss law principle of "in favorem arbitri" in the construction of an arbitration agreement reflected the idea that parties to an arbitration agreement were deemed to have intended that arbitration should be the single forum for resolution of their disputes rather than the court. This was analogous to the approach in English law: rational businesspeople are likely to intend that any dispute arising out of their contractual relationship be decided by the same tribunal.

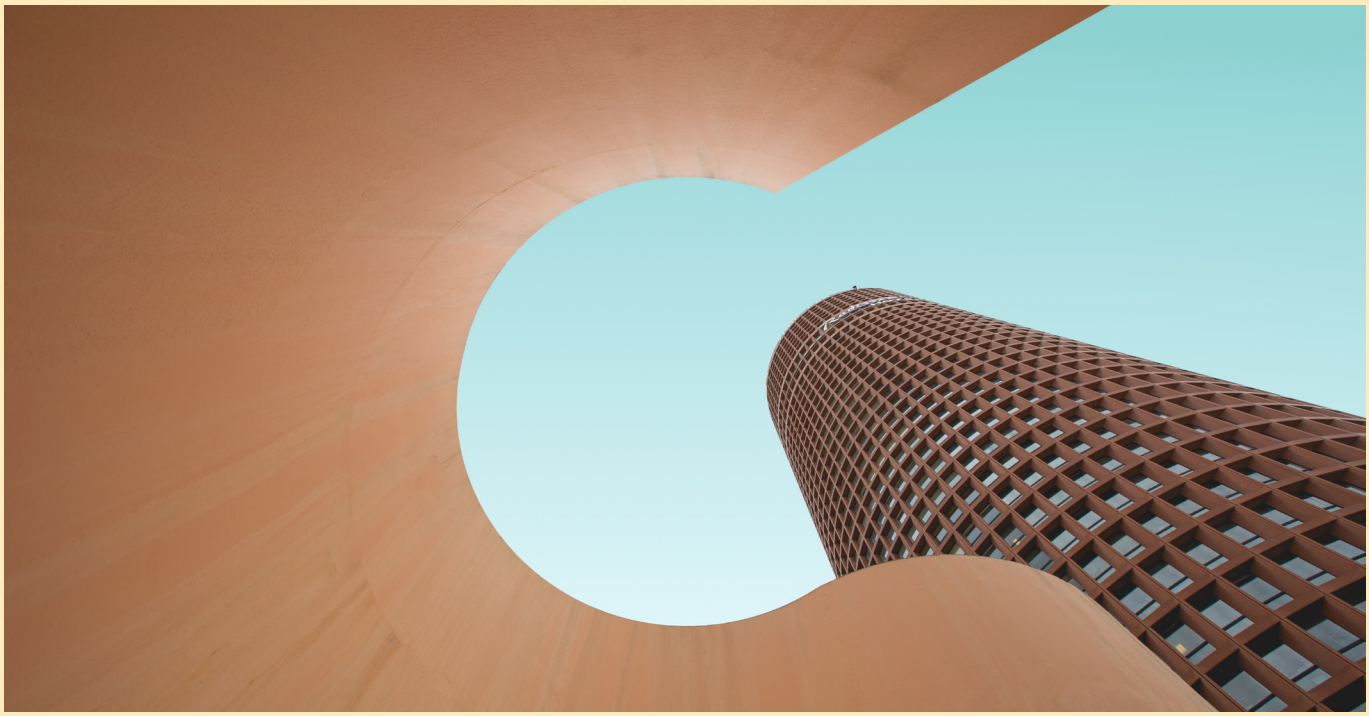
Here, there was no question of the arbitration agreements extending to cover the Republic's allegations on which it relied to establish the legal liability of Privinvest. The question for the court was whether the partial defence on quantum arising in the context of these legal proceedings, in which the legal claims were not within the scope of the arbitration agreements, was a matter which the parties are to be treated as having agreed to refer to arbitration. Lord Hodge said that it was not: "*Section 9 of the 1996 Act is to be applied with common sense. Rational businesspeople would not seek to send to arbitration such a subordinate factual issue arising in such legal proceedings and the arbitration agreements must be construed accordingly.*"

To reinforce this point, Lord Hodge noted that there were also no recorded cases under section 9 of the court granting a partial stay of legal proceedings for the determination by an arbitral tribunal of a dispute about the quantification of damages claimed in those legal proceedings in which the contested legal claims were beyond the scope of an arbitration agreement. In other words, there was no evidence of court decisions effecting the bifurcation of a dispute as to quantification of damages from contested claims as to liability.

The Republic's appeal was allowed.

Conclusions

The decision establishes a clear set of principles to be applied whenever the question arises. In the context of an application for a stay under section 9 of the 1996 Arbitration Act, an issue in the proceedings is a "matter" that the parties have agreed to refer to arbitration. Lord Hodge in the Supreme Court focused on the need to adopt a common-sense approach in identifying the real substance of the dispute, which is not something that is always found in the formal pleadings. ■



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