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International arbitration report

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Venezuela: One country with two governments

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Compelling witness testimony under the 1996 Arbitration Act

Nigeria v. P&ID: Caution against an arbitral tribunal's non-interventionist approach to arbitration?

The role and potential for arbitration in cross-border insolvency disputes

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Editorial

Welcome to Issue 21 of our International Arbitration Report. This is one of our most comprehensive reports as our team of arbitration lawyers from around the world discuss how allegations of corruption in commercial and investment arbitration have become increasingly commonplace and provide considerations and strategies for counsel and clients.

We detail the Shanghai International Economic and Trade Arbitration Commission's (SHIAC) new arbitration rules, which take effect January 1, 2024; and also provide an overview of the new SCCA Arbitration Rules in the Kingdom of Saudi Arabia (KSA), highlighting some of the key innovations in the New Rules as well as the cost implications since the new Rules place an emphasis on greater efficiency.

Our lawyers highlight how the state of Venezuela currently has two acting governments. Under these circumstances, foreign courts are grappling with the unusual question of who should be recognized as acting on behalf of the state. We dive into how international arbitrations facilitated by litigation funding agreements (LFAs) have become commonplace in recent years.

We next review enforceability issues, a key Supreme Court decision and the projected consequences. Our lawyers explain the exceptions to the enforceability of arbitration agreements in the Canadian context. We examine compelling witness testimony under the 1996 Arbitration Act and navigate the inherent risks in compelling an uncooperative witness to give evidence in the hope that evidence will support the case at hand. Our lawyers then examine an extraordinary judgment from the English High Court on October 23, 2023, and how Nigeria successfully challenged a US$11 billion arbitral award under Section 68 of the Arbitration Act 1996. We provide observations in respect of the arbitration proceedings. Finally, we discuss the increase in global trade and business, often involving complex corporate structures in multiple jurisdictions, and highlight our expectation of a significant increase in cross-border insolvency and restructuring matters in coming years.

I hope you find the information and guidance not only interesting but useful as we enter another exciting year.

C. Mark Baker

C. Mark Baker

Global Head of International Arbitration,
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Arbitrating disputes involving allegations of corruption: Considerations and strategies for counsel and clients

By Jenna Anne de Jong

Allegations of corruption in commercial and investment arbitration have become increasingly commonplace following anti-corruption reform such as amendments to Canada's *Foreign Corrupt Practices Act* (CFPOA), the introduction of the UK's *Bribery Act 2010*, as well as earlier amendments to the *Foreign Corrupt Practices Act (*FCPA) in the United States. Companies are often required by their domestic criminal law and regulatory requirements to terminate contracts with parties whom they suspect have engaged in corruption. If they fail to do so, they themselves risk being subject to criminal prosecution and penalties. However, the termination of a contract may lead to a subsequent commercial dispute with the counterparty. Parties arbitrating disputes involving allegations of corruption may find that there is a tension between their obligations under criminal law and their contractual and other obligations. Understanding these tensions can enable appropriate preparation prior to and during an arbitration involving corruption allegations.

This article focuses on two key issues: first, the differences in the standards and thresholds which may apply in the criminal and regulatory context and in a contractual dispute subject to arbitration. Second, it addresses issues of legal privilege in terms of protecting internal anti-corruption investigations and how this may become more complicated in cases involving subsequent arbitrations. Different legal counsel will often be involved in any anti-corruption investigation as compared with the commercial arbitration arising because of action taken by the company. Both sets of counsel and the client should be alert to these issues.

Additionally, the article will consider the challenges that may arise when allegations of bribery are made within the context of investor-state arbitrations.

How arbitrations involving corruption allegations arise

A commercial party whose contract has been terminated or who has had performance withheld on the grounds of corruption, and who considers such action to be wrongful, may seek recourse by commencing arbitration under the dispute provisions in the contract. Similarly, in an investor-state context, an investor may allege that it has suffered discrimination, expropriation or another violation of an applicable investment treaty where the state party's action or inaction harms an investor or investment. In its response, the state party may allege that the investor's claim is inadmissible as the investment was initially obtained through corruption of a state official.

The potential for mismatch between regulatory and contractual requirements

An example of corrupt activity that can give rise to criminal prosecution is the bribery of public officials. It is axiomatic amongst the anti-corruption bar that nearly all prosecutions for bribery of foreign public officials will involve an agent, local partner or other intermediary ("agents"). There are many reasons for this: in some cases, only a local will know who to bribe and how. Agents who are paid a success fee or commission may be incentivized to pay bribes to local officials if they believe the financial upside outweighs the risk to them personally (particularly if domestic laws are perceived to be lax). Under current anti-corruption regimes, a similar incentive rarely applies to large global companies who face penalties in the millions, or even billions, for involvement in such activities. However, companies can be at risk of prosecution for the actions taken by the local agents with whom they have contracted.

Most sophisticated companies now have detailed anti-corruption warranties and representations in their agency contract templates to address this risk and enable the company to take steps under

the contract where allegations of corruption arise. However, difficulties may arise in many scenarios. For example, (i) where corrupt acts are alleged to have taken place prior to the agency contract being updated to reflect modern anti-corruption legislation, (ii) where there is no written contract with the agent or (iii) where the law of the contract or the law governing an arbitration following termination of the contract is different from the law of the jurisdiction where the company faced potential criminal or regulatory liability.

In such cases, there can be a mismatch between what a company is required to do under criminal law and applicable regulations and what it is permitted to do under the law and terms of the contract with the agent. By way of example, while still allowed under US law, facilitation payments were made illegal under Canadian law in 2017 and under the UK Bribery Act 2010. Facilitation payments, colloquially known as "grease" payments, are typically aimed at expediting an otherwise routine administrative process (such as customs or port clearances, to use two common examples). One can readily imagine a scenario where a Canadian company hires a US agent under a contract governed by US law to perform work in some third country. The agent may make small facilitation payments to prevent work required by the contract from being unduly delayed by bureaucratic red tape. In this scenario, the agent's conduct may be excusable under the law of the contract and its home jurisdiction, but if the Canadian company, after learning that a facilitation payment has been made, does not take steps to stop further payments to the agent, it could face prosecution in Canada. If the contract with the agent does not address this situation, it creates a difficult situation for the company and the potential for a dispute.

Similarly, there can be a disparity between criminal and commercial obligations where criminal law or regulation requires a company to take steps on the mere suspicion of corrupt activities, and whether it is in the company's best interests to do so. At this stage of an internal anti-corruption investigation, the priority and focus will rarely be the same as in any subsequent commercial arbitration dealing with the termination of a contract following the investigation. In an internal anti-corruption investigation, the focus is on limiting a client's exposure to criminal and civil liability for corrupt activities, particularly as penalties for companies can be large. The client will want to establish whether the threshold imposed by applicable criminal laws and regulations has been met, either triggering liability on the part of the client or requiring the client to take active steps, such as terminating the agent, to avoid facing criminal or regulatory penalties. Corruption by an agent may also attract liability for the client. Many anti-corruption regimes impose criminal or other forms of liability where continued payments are made in the face of early warning signals indicative of the agent engaging in corruption. If corrupt activities are suspected, counsel will want to distance their client as much as possible from the activity. What is permitted by the law and within the terms of the contract with the agent at this stage (where there is no conviction or direct evidence of bribery) may be of secondary consideration if the amounts at stake are comparably smaller.

We can see examples of this in Canadian law. In Canada's *Criminal Code*, liability may be imposed on a company as an accessory if a court concludes they have been willfully blind to the prospect of bribery by an agent.

A similar mismatch can occur where certain conduct is proscribed by the criminal law or regulations to prevent corruption, but such conduct may not provide grounds to terminate the contract. In the US, the "books and records" offense in the FCPA does not require proof of bribery, but rather the statute requires listed entities in the US to keep books and records that fairly and accurately reflect the corporation's transactions. Individuals have been charged for failing to adequately supervise employees to make and keep accurate books and records and implement an adequate set of internal controls, despite not necessarily having direct knowledge or involvement in a bribery scheme. For example, Con-way Inc. was charged with violations of the FCPA after a subsidiary in the Philippines in its freight forwarding business allegedly paid hundreds of thousands of dollars in small sums to customs and other government officials. Con-way Inc. was not prosecuted for bribery. Instead, the complaint was based on the allegation that (i) none of the improper payments made by its subsidiary to government officials were accurately reflected in Con-way's books and records and (ii) that Con-way knowingly failed to implement a system of internal accounting controls concerning its subsidiary complying with the FCPA and require that the payments it made to foreign officials were accurately reflected on its books and records. In the case of agents, prosecutors may point to abnormally large commissions as a sign that employees of the principal knew or were willfully blind to such funds being used to pay bribes.

Accordingly, to avoid the risk of criminal prosecution, companies often need to take proactive steps to end the relationship with parties who cannot provide assurance that their activities are legal, even where there may not yet be sufficient evidence to convict the agent. Under the terms of a contract, the threshold for termination may be higher or lower (or simply different) to when termination is required in the criminal or regulatory context. Where a contract is terminated for a regulatory offense that does not require direct evidence of bribery, such as improper record keeping, this may be necessary from the perspective of avoiding

prosecution but (depending on the law and terms of the contract) may not, on its own, justify termination of the contract.

Ultimately, in such circumstances, while the evidence uncovered in an internal anti-corruption investigation will be helpful in subsequent disputes relating to contractual termination, the core focus of such investigations will likely be different from the issues in dispute in an arbitration. Arbitration counsel should therefore consider whether the grounds and evidence required to meet the contractual threshold for termination are different from those triggering termination in a criminal or regulatory context.

Privilege considerations

An internal anti-corruption investigation typically results in a report by legal counsel setting out legal advice in response to the evidence uncovered during an investigation. This may include an assessment of whether the client faces any liability for the acts of their agent, future steps for the client to prevent any further criminal or regulatory liability from accruing, and an assessment by investigation counsel of whether the agent is likely to have committed the bribery or another suspected corruption offense. The latter point may be relevant to a claim by an agent for wrongful termination.

However, there will often be good reasons why arbitration counsel will not wish to waive privilege over such a report in a subsequent arbitration with the agent. For one, for the purposes of the report, investigation counsel may have found it unnecessary to reach firm conclusions on whether the agent committed bribery. As discussed above, if there is no explanation from the agent for suspicious conduct, a client may have to terminate the agent's contract to avoid potential liability under criminal or regulatory law. In some cases, this may satisfy the contractual threshold for termination. However, where there is an absence of clear language in the contract supporting termination in such circumstances, some jurisdictions may require that bribery be proven on the civil standard for it to succeed as grounds for termination.

Furthermore, in an anti-corruption investigation, facts may be learned which are irrelevant to a subsequent arbitration, but which are nonetheless critical to the client as part of the client's compliance efforts. For example, an investigation may reveal that a client's due diligence practices in the terminated agent's jurisdiction were satisfactory, but that due diligence on agents in another jurisdiction fall short. A client may reasonably object to such irrelevant but sensitive information being disclosed in an arbitration, even where confidentiality protections are in place.

Considerations in the investment arbitration context

In investor-state arbitrations where a state has made an allegation of bribery, there are two competing needs from an investigation: first, the need to gather evidence to refute the allegations of bribery in the arbitration, and second, the more general need to investigate the allegations and determine if remedial action needs to be taken.

In the context of investor-state disputes, different challenges arise. For an investor who is accused by a state of having achieved an investment through bribery, there is the potential difficulty that the original investment was made many years prior and that witnesses who could refute allegations that it had been obtained through bribery are no longer available, either to testify or to participate in an internal investigation.

If the investor was not aware of any allegations of bribery prior to commencing a claim against the state, allegations by the state that the investment was obtained through bribes may come as an unpleasant surprise. For the investor who commenced the arbitration believing that the dispute was about the interpretation and application of a treaty, their focus will now have to shift to a different area of the law— refuting evidence that the investment at issue was obtained through bribery.

It is critical that claimant counsel be aware of indicia of corruption and seek appropriate advice if they have reason to believe an investment may have been achieved through a bribe. In one of the best-known arbitration awards where the arbitral tribunal rejected a claim because an investment had been obtained through bribery, the evidence of bribery came from the claimant's very own witness statement and prompted the arbitral tribunal to make its own inquiries about whether bribery had occurred.

In *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, the claimant, a company incorporated in the United Kingdom, commenced an arbitration against Kenya. Unlike most investment arbitrations pursued under investment treaties, this arbitration was commenced pursuant to an arbitration agreement contained in a contract between the claimant and Kenya entered by the parties in 1989 (the "1989 Contract"). Under the 1989 Contract, the claimant was to construct, maintain and operate duty-free complexes at two airports in Kenya. The claimant alleged Kenya had breached this agreement. The arbitral tribunal ultimately held that the claimant had obtained the 1989 Contract through a bribe to the former President of Kenya. As a result, the claimant had no right to pursue or recover under any of its

pleaded claims under the 1989 Contract, because it had obtained the contract through bribery.

What is unusual about the case is that the evidence of bribery came, apparently unprompted, in the form of a witness statement from the claimant's CEO, where he described making a "personal donation" to the former president of Kenya to obtain the 1989 Contract.

While there may have been strategic reasons why the claimant's counsel chose to risk the introduction of this evidence, this case highlights the importance of arbitration practitioners being aware of indicia of bribery by their own client when preparing their case.

In the context of bribery of state officials, some commentators have suggested that the existence of bribery should not be grounds for inadmissibility of an investment claim, since (the argument goes) the state shares complicity for the bribery of the official. The problem with this argument is that it fundamentally ignores the nature of bribery: the state – or rather the citizens it represents – are the victims of the state official who committed the bribery. A similar argument was advanced in *World Duty Free Co. Ltd. v. Republic of Kenya* but rejected by the tribunal. Arbitration counsel should accordingly be aware that such arguments are unlikely to gain much sympathy from arbitrators.

Recommendations

Many steps can be taken to proactively address the dynamics described above.

During an investigation

If an arbitration has not been commenced but is anticipated in the future, one option is to seek separate opinions following an internal anti-corruption investigation: (i) one giving the client advice on what it should do to protect itself from criminal or regulatory liability and (ii) a separate opinion from different counsel assessing whether the evidence supports terminating the agent's contract. The risk in this approach is the potential for conflicting opinions, and waiving privilege over the latter report could give rise in some jurisdictions to arguments that privilege has also been waived over the first report.

When there is more than one legal system involved, it may be necessary to have reports or opinions under the laws of different jurisdictions. For example, for an internal anti-bribery investigation, a Canadian company will typically need legal advice on what constitutes bribery under Canadian law and often US law (as those are the states most likely to claim jurisdiction). However, if the contract with the agent or other party accused of bribery is governed by the law of a different jurisdiction altogether, then legal advice will be needed from that jurisdiction to determine whether the law of the contract permits termination based on the facts uncovered by the investigation.

In cases where there are signs of bribery by the agent or partner, but no conviction or other direct evidence of bribery, the advisable course from an anti-corruption perspective may nonetheless be to terminate the contract. At the same time, depending on the law governing the contract and the terms of the contract, indirect evidence of bribery may be insufficient to justify contractual termination. In such cases, a client will have to weigh the respective risks, and may determine that the heavy penalties imposed in bribery prosecutions outweigh the risk of an adverse award in a subsequent arbitration claim for wrongful termination.

When an arbitration is underway

Where an arbitration is already underway, it is often appropriate to obtain an expert report from an anti-corruption expert to address whether the conduct described by the evidence meets the threshold for termination in the contract. Expert evidence on anti-corruption obligations is also vital where a contract contains anti-corruption obligations of a very general nature, to explain what conduct is prohibited. Because there are often local nuances to how bribery occurs – the form of the bribe and how, where and when it is made – expert evidence explaining why particular conduct is suspicious and indicia of bribery are often critical.

Expert evidence may also be vital when the underlying reason for the termination is the potential for a regulatory offense that does not require direct evidence of bribery, such as a books and records offense. Expert evidence will also be important when the law of the contract or the arbitration is different from the law of the jurisdiction where the respondent faces potential criminal or regulatory liability.

The trend in some jurisdictions, particularly the US, to resolve anti-bribery charges through negotiated settlements (such a deferred prosecution agreements) can mean that there is little or no case law resolving difficult legal issues, such as the adequacy of the state's jurisdiction to prosecute. This makes expert evidence particularly important in establishing that what has occurred satisfies the provisions in the contract permitting termination.

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The SHIAC Arbitration Rules (2024) in a nutshell

By Wang Weijun and Li Tingwe

On November 7, 2023, the Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center, "SHIAC") introduced new arbitration rules effective January 1, 2024. These comprise the *SHIAC Arbitration Rules (2024)*, the SHIAC Arbitration Rules for Aviation, the SHIAC Arbitration Rules for Data and two instruments of SHIAC Guidance for online arbitration and for assisting ad hoc arbitration. The new *SHIAC Arbitration Rules (2024)* replace those made in 2015. The update reflects demand from a rapidly growing Chinese arbitration market reaching an annual growth of 14.3 percent and 14.7 percent in the number of cases and amounts in dispute in 2022. The *SHIAC Arbitration Rules (2024)* are formulated from the users' perspective and aim for effective administration of domestic and international arbitration representing a rebalance among the principle of party autonomy, the arbitrators' procedural management power and the needed safeguard and support from the institution throughout the lifespan of an arbitration.

Background of updating the SHIAC Arbitration Rules

The current SHIAC Arbitration Rules consist of the Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center) Arbitration Rules and the China (Shanghai) Pilot Free Trade Zone Arbitration Rules, both of which became effective on January 1, 2015. As a leading arbitration institution in Mainland China, SHIAC has stayed close to the forefront of practice and commenced the amendment of its 2015 version of arbitration rules in November 2021. In July 2021, the Ministry of Justices of P.R.C. released its draft amendment to the Chinese Arbitration Law (1994), thus the Chinese institutions were called upon to reconfigure their existing rules, and, in May 2022, the PRC government also announced a policy of promoting Beijing, Shanghai, Guangzhou, Shenzhen and Hai'nan into international commercial arbitration hubs. On December 1, 2023, the Shanghai local legislature on fostering the city as an international commercial arbitration center officially came into force. Following this and rounds of professional consultation, SHIAC now ushers in the *SHIAC Arbitration Rules (2024)*.

The *SHIAC Arbitration Rules* (2024) contain the collective wisdom of 27 experts, including distinguished Professor Ding Wei, Vice-Chair of SHIAC, coming from prominent law firms, big corporations and experienced judges of commercial courts.

Structure of the SHIAC Arbitration Rules (2024)

The new SHIAC arbitration rules are designed as a group of instruments that include the *SHIAC Arbitration Rules (2024)*, the SHIAC Arbitration Rules for Aviation, the SHIAC Arbitration Rules for Data, the SHIAC Guidance for Online Arbitration and the SHIAC Guidance for Services for Ad Hoc Arbitration.

To further strengthen the capacity of SHIAC and assist the Chinese companies going global with more accessible arbitration services, the *SHIAC Arbitration Rules (2024)* mandate in Article 2 that SHIAC establishes its first overseas branch, that is, the Shanghai International Arbitration (Hong Kong) Center. Accordingly, Chapter 9 of the *SHIAC Arbitration Rules (2024)* is dedicated to regulating the arbitration procedures in SHIAC's new center in Hong Kong. At the same time, the *SHIAC Arbitration Rules (2024)* specifically amend the arbitration fee schedules, including to clarify the fee cap and the installation method of making the advancement.

the SHIAC Arbitration Rules (2024) mandate in Article 2 that SHIAC establishes its first overseas branch, that is, the Shanghai International Arbitration (Hong Kong) Center."

Major changes in the SHIAC Arbitration Rules (2024)

In summary, 15 major changes across the provisions on the parties, the arbitrators and the institution have been made in the *SHIAC Arbitration Rules (2024)*.

(i) Further enriching the parties' procedural options

The development of international arbitration in recent years has been driven by the user's needs. In addition to the traditional demands of the parties for international arbitration, such as fairness, professionalism and convenience, "green," "smart," "pluralistic," "economical," "transparent" and "predictable" are becoming the new development concepts of international arbitration. The new rules respond in several ways:

(a) Enriching the options for consolidated arbitration. For reasons of efficiency or strategy, the parties may need to resolve disputes between multiple parties in a single case. Article 15 of the rules provides for consolidation of multiple contracts to one arbitration, allowing the parties to initiate an arbitration on the consolidation of disputes arising from the same transaction or the same series of transactions, or the existence of related contractual relationship, or the subject matter of arbitration is of the same type, subject to certain conditions. At the same time, Article 40 provides for the tribunal to decide upon consolidation of arbitrations where the subject matter of multiple arbitration is of the same type or is related.

(b) Improving the system for third parties to be joined. Article 41 provides for "joinder of third parties" and "joinder of other parties to the arbitration agreement" that were written in the FTZ Arbitration Rules and standardizes the constitution of arbitral tribunals in such circumstances. In order to effectively balance the procedural autonomy of the parties and the control of the arbitral tribunal over the efficiency of the arbitration, the rules also respond to the changes in the constitution of the arbitral tribunal that may arise due to the joinder of third parties and distinguishes between the situations of "joining before the constitution of the tribunal" and "joining after the constitution of the tribunal." Article 41(3) provides that, after the Secretariat agrees to the joinder of third parties in the arbitration proceedings, if the multiple claimants or the respondents cannot jointly select the co-arbitrator, all the arbitrators in the case shall be appointed by the chairman of SHIAC, unless the parties have otherwise agreed on the constitution of the arbitral tribunal. Article 41(4) provides that, if the joined third parties and the original parties fail to reach an agreement on the constitution of the arbitral tribunal after the arbitral tribunal has been constituted, the arbitral tribunal has the right to disagree with the joinder of third parties in the arbitral proceedings.

(c) Providing interim measures and emergency arbitrator relief. The new rules incorporate the "interim measures" in the FTZ Arbitration Rules and further optimizes the "Emergency Arbitrator Procedure." Article 25(2) shortens the time for the Chairman of SHIAC to appoint an emergency arbitrator from three days to two days. Article 26 further shortens the time limit for an emergency arbitrator to decide on interim measures to ten days for "unsecured" cases and five days for "secured" cases. The rules continue the "pre-arbitration interim measures" of the FTZ Arbitration Rules and shortens the time limit to two days for SHIAC to forward an application for pre-arbitration interim measures to a court of competent jurisdiction.

(d) Further opening the methods for selecting arbitrators. Article 30 allows the parties independently to agree on the constitution of the arbitral tribunal without violating the mandatory provisions of the law. Article 31 expands the scope of arbitrators from outside the panel that the parties may recommend to all members of the arbitral tribunal. Article 32 allows the parties to agree that the presiding arbitrator shall be jointly appointed by the two co-arbitrators and allows the parties to apply to SHIAC to use the "recommended short list" method to determine the presiding arbitrator. This responds to the need for party autonomy in the selection of arbitrators.

(e) Smooth online arbitration. Articles 10 and 39(2) provide that the parties may agree that all or part of the arbitration proceedings shall be conducted online through the SHIAC E-Platform or other internet or private networks and stipulate that the principles of technological neutrality, efficiency and convenience, equality of rights, safety and reliability shall be followed when using digital intelligence technology. Article 9 establishes the principle of encouraging green arbitration and stipulates that parties may give priority to electronic submission of materials and Article 20 and Article 85 also stipulate that documents and materials may be served electronically.

(ii) Further strengthening the procedural control of the arbitral tribunal

The rules provide robust procedural powers of the arbitral tribunal:

(a) The tribunal has the power to regulate party conduct. Article 8 stipulates that the parties shall participate in arbitration following the principles of good faith and conduct the procedures with

goodwill and cooperation. The tribunal has the power to regulate bad behavior. In the case of the situation where the parties deliberately change their representatives that may create a conflict of interest between the representative and the arbitrator after being notified of the constitution of the arbitral tribunal, Article 21(3) provides that the parties shall submit a written application to the arbitral tribunal for a change of representation, and the arbitral tribunal shall have the discretion to decide on the matter.
If a party requests to withdraw its application for arbitration after the conclusion of the arbitration procedures to avoid an adverse award, Article 52(3) allows the tribunal to refuse to agree to withdraw and continue the arbitration proceedings or to allow the opposing party to file a counterclaim for the arbitration costs already incurred. If parties submit their documents, applications and/or evidentiary materials late or deliberately delay the proceeding of the case, Article 63(4) allows the tribunal to punish the party at fault when allocating the arbitration costs.

(b) The tribunal has the right to declare the procedures concluded. To encourage the arbitral tribunal to improve the quality and efficiency of the hearing, Article 51 provides that the tribunal may determine the deadline for the parties to submit documents and evidence and decide to conclude the procedure after such time limit. In exceptional circumstances, the tribunal may, at any time before the award is rendered, decide to resume the proceedings at the request of the parties or if the tribunal deems it necessary.

(c) The tribunal has the power to make procedural decisions. Article 6 adopts the principle of "competence-competence," that is, after the arbitral tribunal is constituted, SHIAC authorizes the arbitral tribunal to make a jurisdictional decision, and the jurisdictional decision made by SHIAC on the basis of prima facie evidence shall not prevent the arbitral tribunal from making a new decision based on facts or evidence found in the course of the hearing. Article 6 also provides that the tribunal may determine the existence of a written arbitration agreement. Article 39 provides that the tribunal may decide to hold the hearing in whole or in part online, may issue procedural instructions, issue a list of issues, hold a pre-hearing conference, convene a preliminary hearing, prepare a statement of the scope of hearing, make an interim award or a partial award and may also make arrangements for the exchange and verification of evidentiary materials, witness testimonies and post-hearing submissions.

(d) The tribunal shall have the power to determine the rules of evidence, which do not have to be the same as those in domestic litigation; especially in the hearing of foreign-related arbitration cases, the cross-jurisdictional nature of the case makes it difficult for a single set of evidence rules of a fixed paradigm to meet the needs of the individual case and may also be inconsistent with the expectations of the parties in the arbitration agreement for the processing of evidence. Article 46(5) provides that the form of evidence submitted by the parties and the matters related to the submission of evidence shall be in accordance with the rules of evidence applicable to the case; and if the parties have not agreed on the rules of evidence or the agreement cannot be enforced, the arbitral tribunal may make a decision by reference to the relevant provisions applicable to the law in the arbitration proceedings.

Article 6 also provides that the tribunal may determine the existence of a written arbitration agreement."

(e) The tribunal shall have the power to determine the applicable law. Article 59 provides for the ascertainment and application of law in foreign-related cases. If the parties have not agreed on the applicable law, the tribunal has the right to determine the law and rules applicable to the arbitration agreement and the substantive dispute. The tribunal may decide on the method of ascertaining foreign laws and rules, including adopting the examined legal opinions of witness(es) retained by the parties. Where the parties agree, the tribunal may apply principle of fairness and reasonableness if it does not violate the mandatory provisions of the law of the seat of arbitration.

(iii) Further clarifying the institution's procedural administration

The new rules introduce innovative powers and procedures to strengthen the case management function of the institution:

(a) Arbitrator disclosure. Article 35 improves the obligation of arbitrators (including emergency arbitrators and mediators) to disclose information from the acceptance of the appointment to the conclusion of arbitration proceedings. The IBA Guidelines on Conflicts of Interest in International Arbitration can be used as a reference for disclosure of arbitrators and the disclosure of third-party funding for arbitration. In addition, considering that the independence and impartiality of experts and appraisers in the arbitration process is also an important aspect affecting the procedural rights of the parties, Article 48(4) provides that the expert or appraiser shall also disclose in writing the circumstances that may give rise to doubts about his or her independence and impartiality before accepting the selection or appointment. To prevent the parties from abusing the right, Article 36(5) provides that, after being informed of the constitution of the tribunal, if a matter arises between a party and an arbitrator that the arbitrator should have disclosed as a result of the party's conduct, that party

is deemed to have waived its right to challenge the arbitrator on the same grounds.

(b) Improving the efficiency of arbitration procedures. The new rules unify the procedural time limits for foreign-related cases and non-foreign-related cases, except for the time limit for rendering awards. For example, the time limit for submitting the defense, presenting evidence and applying for counterclaims is no longer distinguished between foreign-related cases and domestic cases. The new rules also merge the original summary procedures and the small claims procedures under the FTZ Arbitration Rules into the new Summary Procedures.

(c) Optimizing the service of documents. Article 85 makes clear provisions regarding the service of documents, the method of service, the rules for service by mail, the rules for electronic service, the change of service address, the time of service and the handling of objections to service raised by the parties. Article 85(7) provides that if a party objects on the ground that it has not received the arbitration documents or notice, it shall state the reasonable reasons for not receiving the documents.

(d) Increasing the transparency of arbitration. The new rules address concerns on transparency in international arbitration and the principle of confidentiality. Article 11(4) provides that SHIAC may, with the written consent of the parties, publish the redacted award. The new rules omit a former provision that the chairperson of the SHIAC may not explain the reasons for the decision on the challenge of arbitrators.

The new rules unify the procedural time limits for foreign-related cases and non-foreign-related cases, except for the time limit for rendering awards.”

(e) Upgrading mediation services. The *SHIAC Arbitration Rules (2024)* incorporate the mediation procedures prescribed in the FTZ Arbitration Rules and covers the mediation before the constitution of the arbitral tribunal to all types of cases without increasing the costs of the parties. The mediator will no longer be a member of the arbitral tribunal in the same case. To facilitate the parties to enforce settlement agreements in the country where the Convention on International Settlement Agreements Resulting from Mediation comes into force in the future, Paragraph (6) of Article 54 of the *SHIAC Arbitration Rules (2024)* adds a provision that the parties may request the mediator to endorse the settlement agreement or apply to SHIAC for certifying the mediation procedures.

Final remarks

The new *SHIAC Arbitration Rules (2024)* propel SHIAC into a world-class arbitral institution adopting international best practice with a firm commitment to parties on their procedural rights. At a time when the users perspective has become the voice of the international arbitration community, the *SHIAC Arbitration Rules (2024)* respond to the needs of the whole market. The *SHIAC Arbitration Rules (2024)* find a balance between party autonomy, the procedural management power of the arbitrators and the needed safeguard and support from the institution. Altogether, the *SHIAC Arbitration Rules (2024)* serve to resolve the disputes in a fair, professional and efficient manner.

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Leveling the playing field: An overview of the new SCCA Arbitration Rules in the Kingdom of Saudi Arabia (KSA)

By Mohammed Al Tammami, Aarti Thadani and Emily Greig

Those who operate in the Middle East may have experience with the Dubai International Arbitration Centre's (DIAC) new Arbitration Rules which were introduced in 2022 following the abolition of the DIFC-LCIA Arbitration Centre. Just over a year later, the Saudi Centre for Commercial Arbitration (SCCA) has also announced the publication of its own revised rules which came into effect on, and apply to all arbitrations filed on or after, 1 May, 2023 (the SCCA Rules).

The new DIAC and SCCA Rules aim to put both institutions in line with global best practice, including instilling useful procedural and case management changes to enable arbitrations to be conducted more efficiently and effectively. While much will depend on the application of these new rules, they reflect best practice and seek to improve time/cost efficiencies while ensuring the quality and enforceability of awards.

Background to the SCCA

a) The SCCA and arbitration in the KSA

The SCCA was first established in 2014 to offer alternative dispute resolution (ADR) services, including arbitration and mediation, for commercial disputes both in English and Arabic. Its vision is to become the preferred ADR service provider in the region by 2030.

Rapid economic growth in KSA means that there is significant potential for the SCCA to serve as a key center for the resolution of disputes arising in the region. The establishment of the SCCA Court and the SCCA Rules are significant steps towards making this ambition a reality.

b) The SCCA Court

The SCCA announced the creation of an independent SCCA Court in November 2022 to make key administrative and procedural decisions relating to SCCA administered arbitrations. The Court is comprised of 15 members with an impressive array of arbitration experience between them. They have been selected from a range of backgrounds including international arbitrators, former leaders of arbitral institutions, academics and high-profile practitioners from a range of both KSA-based and international firms.

The President of the SCCA Court is Professor Jan Paulsson who was a former president of the London Court of International Arbitration (LCIA) and vice-president of the ICC International Court of Arbitration. The introduction of the SCCA Court has brought the SCCA in line with other international arbitration institutions such as the LCIA and ICC who each have their own designated supervisory courts.

Rapid economic growth in KSA means that there is significant potential for the SCCA to serve as a key center for the resolution of disputes arising in the region."

Key innovations in the New Rules

a) Technology

The SCCA Rules place a new-found importance on the use of technology to optimize efficiency in arbitrations while reflecting the importance of the parties, the arbitrators and the SCCA adopting reasonable information security measures to protect data privacy, as well as safeguarding against cybersecurity breaches and data protection risks (Article 46).

For example:

Service	Article 4.1 provides that a notice of arbitration can now be served by email or "other electronic means" if it provides a record of its transmission, which brings the New Rules into line with other arbitral institutions like the LCIA Rules.
Case Management	Article 25.2 now provides that the Arbitral Tribunal and the parties are actively encouraged to consider how technology can be used in arbitrations. Progressively, this is to help reduce the environmental impact of arbitrations as well as to assist with case management and presentation of evidence. Ultimately the Arbitral Tribunal has the discretion to determine the extent to which technology will be used.
Electronic Signing of Awards	Article 36 provides a new default for all awards to be signed electronically.
Online Dispute Resolution (ODR)	Appendix IV of the New Rules enables parties involved in lower value disputes (not exceeding SAR 200,000 / circa US$53,000) to opt to use ODR to resolve their dispute, which uses the latest technologies in a virtual format for smaller scale commercial disputes to be dealt with in a cost-efficient manner.

b) Early Disposition of claims or defenses (Article 26)

The SCCA Rules provide that any party may request that the arbitral tribunal summarily dispose of issues of jurisdiction, admissibility or legal merit raised in a claim or defense. This is a significant development and mirrors provisions for 'early determination' under the LCIA Rules and 'expeditious determination' under the ICC Rules. Article 26 may potentially truncate proceedings (and consequently reduce costs) where a claim or defense is manifestly without merit, no award can be issued under the applicable law or where, for other reasons, the case should be disposed of early.

c) Increased case management and widened discretion

The SCCA Rules provide that both the SCCA Court and the arbitral tribunal should actively engage in case management. They are provided with discretion to make decisions in this regard.
For example:

Expedited proceedings	The New Rules now importantly provide for an expedited procedure for determining claims (Article 1 of Appendix II) mirroring the provisions of other arbitral institutions such as the ICC. The expedited procedure will apply if the parties agree or where the amount in dispute does not exceed SAR 4 million (circa US$1 million). This is a significant change so claims can be dealt with quickly where desired by the parties.
Emergency arbitrator	The New Rules have also developed the provisions for emergency relief in cases of urgency (Article 7). An Emergency Arbitrator, if appointed, will now order or award any interim, provisional, or precautionary measures no later than 15 days from when the case file was transmitted to him/her, albeit this timeframe can be extended if necessary.

The SCCA Rules provide that any party may request that the arbitral tribunal summarily dispose of issues of jurisdiction, admissibility, or legal merit raised in a claim or defense. This is a significant development and mirrors provisions for 'early determination' under the LCIA Rules and 'expeditious determination' under the ICC Rules."

Consolidation/ Coordination	The New Rules provide that parties have the option to file a single request for arbitration at the outset for all claims arising out of or in connection with multiple contracts or arbitration agreements, subject to certain conditions (Article 11). Article 13 also provides that the parties or Arbitral Tribunal can request that two or more existing arbitrations be consolidated into a single arbitration in certain circumstances (Article 13). However, for a request to be made, the parties to all arbitrations must agree to consolidation or there must be the same members in each Arbitral Tribunal who request consolidation individually. Article 14 further provides the Arbitral Tribunal with the discretion to coordinate parallel arbitrations.
CMC	Article 25.2 tightens the timeframe for conducting the initial case management conference and provides that the Arbitral Tribunal must convene the conference within 30 days from the date of constitution.
Review of Awards	The New Rules provide (Article 36(4)) that the SCCA Court shall review and approve all draft awards and suggest modifications if necessary. This is a significant development and will be key in ensuring the quality and enforceability of SCCA awards.
Settlement	Article 25(7) now provides a renewed emphasis on settlement; the Arbitral Tribunal may encourage parties to consider settlement of all or part of a dispute by any form of ADR such as mediation.

Costs

As the New Rules place an emphasis on greater efficiency, it is useful to consider the reality of the cost implications. The SCCA has a helpful fee calculator (Saudi Center for Commercial Arbitration | Arbitrators (sadr.org)) for estimating administrative fees and the arbitral tribunal's fees.

A comparison of administrative and arbitration tribunal fees across the SCCA, DIAC and ICC demonstrate that, whilst DIAC has a marginally lower registration fee, the SCCA has substantially the lowest administrative and arbitral tribunal fees, followed by DIAC; and the ICC proves the most expensive. For example, based on a US$10 million claim with a sole arbitrator, the SCCA's fees are estimated to be 31 percent less than those of DIAC and 37 percent less than those of the ICC. The relatively modest administrative and arbitral tribunal fees will undoubtedly serve as another attractive feature for taking disputes to the SCCA.

Conclusion

The SCCA Rules provide for greater certainty and clarity and bring the SCCA in line with international best practice alongside other leading international arbitration institutions. They are a significant step forward to demonstrate the KSA's commitment to becoming a leading arbitration institution in the region and provide a solid framework for ensuring claims are dealt with consistently, and notably more cost effectively.

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Venezuela: One country with two governments

By Matthew Kirtland, Katie Connolly and Esha Kamboj

The state of Venezuela currently has two acting governments. Under these circumstances, foreign courts are grappling with the unusual question of who should be recognized as acting on behalf of the state.

By way of background, Nicolás Maduro assumed the presidency following the death of Hugo Chávez in March 2013. In May 2018, a presidential election was held, the results of which were heavily disputed. While he claimed victory, in January 2019, the National Assembly recognized Maduro's opponent, Juan Guaidó, as Interim President. The United States, United Kingdom and European Union formally recognized Guaidó as President, with the United States explicitly withdrawing its prior recognition of him and levying extensive sanctions on Maduro, his government and government officials.

Enforcement of arbitral awards in the US

The expropriation of various investments by the Chávez regime in Venezuela has resulted in numerous arbitral awards and judgments against Venezuela and its instrumentalities. As many of these awards remain unpaid, creditors have sued in multiple countries to enforce them. In all, these awards are estimated to total upwards of US$20 billion.

In 2019 and 2020, this enforcement process was complicated by the political situation in Venezuela. In Delaware, certain creditors sought to enforce their awards and judgments against shares held by Venezuela national oil company PDVSA in the US. In those cases where the award or judgment was against Venezuela, a question arose as to whether PDVSA was (or is) an alter ego of Venezuela. The US District Court for the District of Delaware first found that PDVSA was an alter ego of Venezuela in late 2018, prior to Guaidó's recognition by the National Assembly, in *Crystallex*.[1] That decision was affirmed by the US Third Circuit Court of Appeals. However, in 2023, the Third Circuit was asked to consider the question a second time. One question before the Court, which had not arisen in 2018: What is Venezuela? On review before the Third Circuit was the District Court's decision that, looking to the actions of both the Maduro and Guaidó regimes, the nature of the relationship between the Republic and PDVSA had not "materially changed" in the time after the Court made its alter ego finding in *Crystallex*.

The Third Circuit ultimately reached the same conclusion and affirmed the District Court's decision but did so based on different reasoning.[2] The Third Circuit affirmed the "differentiation between government representatives and a sovereign." While the government controls the state, "the state is more than its government." The Court also determined that while the Executive may recognize a government (as the State Department did with Guaidó), simply adopting the Executive's recognition would undermine the principal purpose of the Immunities Act – to transfer the primary responsibility for deciding claims of immunity from the State Department to the courts. Thus, the Third Circuit determined that it had to look to "*the actions of both the Guaidó and Maduro governments as the totality of the sovereign conduct of Venezuela*." Doing so, on the facts before the Court, it affirmed the District Court's alter ego finding.

The expropriation of various investments by the Chávez regime in Venezuela has resulted in numerous arbitral awards and judgments against Venezuela and its instrumentalities."

1 https://jusmundi.com/en/document/decision/en-crystallex-international-corporation-v-bolivarian-republic-of-venezuela-opinion-of-the-united-states-district-court-for-the-district-of-delaware-thursday-9th-august-2018#decision_19393

2 https://jusmundi.com/en/document/pdf/decision/en-koch-minerals-sarl-and-koch-nitrogen-international-sarl-v-bolivarian-republic-of-venezuela-opinion-of-the-united-states-court-of-appeals-for-the-third-circuit-friday-7th-july-2023

Control of gold reserves held in the United Kingdom

In the UK, courts were tasked with deciding which head of state – Guaidó or Maduro – properly controlled approximately half of Venezuela's gold reserves (circa US$1.95 billion) held by the Bank of England ("BOE"). Under the "one-voice" doctrine, requiring courts to act consistently with statements made by the government, the UK Court of Appeal held in a June 30, 2023 decision[3] that courts applying the law of England and Wales cannot recognize judgments of the Venezuelan Supreme Tribunal of Justice ("STJ") nullifying Guaidó's appointment of the board of the Central Bank of Venezuela (the "BCV") and validating the board appointed by Maduro.

In July 2019, following his recognition by the National Assembly, Guaidó appointed an ad hoc BCV board and declared the Maduro Board invalid. In May 2020, the BCV (still controlled by the Maduro Board) initiated proceedings against the BOE claiming that it was obligated to accept instructions from the Maduro Board, and the BOE simultaneously sought an order from the English Court to determine from which board it was authorized to take instructions. Also in May 2020, the National Assembly passed a resolution stating that BCV's assets abroad could only be administered by the Guaidó Board. Simultaneously, the STJ – Venezuela's highest court – issued several judgments holding that the actions taken by Guaidó and the National Assembly were null.

The Court decided two preliminary issues: (1) the "one-voice" doctrine required it to accept the February 4, 2019 statements of then-UK Foreign Secretary Jeremy Hunt MP, which recognized Guaidó as the constitutional Interim President; and (2) the "act of state" doctrine prevented it from questioning Guaidó's legislation or other laws concerning acts that took place or effect within the territory of Venezuela and that it therefore could not question the validity of the Guaidó Board's appointment.

However, the Court also found that the Maduro Board may be able to rely on the relevant judgments of the STJ and remitted the proceedings to the Commercial Court to consider whether any such judgments should be recognized. On remittal, the court considered that such recognition would conflict with the "one-voice" doctrine given that the "starting point" of the judgments was that Guaidó was not the constitutional President, which conflicted with the UK government's position.

While the decision was on appeal, the UK's Foreign, Commonwealth & Development Office Minister for the Americas and Caribbean issued a statement in January 2023 respecting the National Assembly's December 2022 decision to disband the position of Interim President held by Guaidó. The Maduro Board accordingly argued on appeal that because the UK government no longer recognizes Guaidó, the one-voice doctrine no longer applies. In its June 2023 decision, the Court of Appeal disagreed. It found that although the government's position had changed, the focus for the "one-voice" doctrine was the authority with which the executive acts that were the subject of the STJ judgments were passed. Because Guaidó was recognized by the UK government as president at the time he appointed the Guaidó Board, the Court could not give effect to the STJ judgments voiding that appointment. Thus, the Court of Appeal dismissed the appeal.

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3 https://jusmundi.com/en/document/decision/en-deutsche-bank-v-venezuelan-central-bank-bcv-judgment-of-the-high-court-of-justice-of-england-and-wales-2023-ewca-742-friday-30th-june 2023

UK Supreme Court decision renders many litigation funding agreements unenforceable

By Nicola Henshall

International arbitrations facilitated by litigation funding agreements (LFAs) have become commonplace in recent years. In July 2023, the UK Supreme Court handed down its judgment in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others (2023)* UKSC 28, the effect of which is that many LFAs currently in existence are likely to be unenforceable. The decision has placed funders in an uncertain and difficult position as agreements need to be renegotiated and they face the prospect of successful parties seeking to avoid or recover payments made pursuant to their LFA.

LFAs typically provide that a third-party funder with no prior connection to the dispute will finance all or part of a party's legal costs of a claim on condition that, if that party is successful in the proceedings, the funder will recover its investment plus a multiple of its investment or a percentage of the damages recovered from the other side, whichever is higher.

Enforceability issue

The enforceability issue arose in the context of competition law, where it is common for proceedings to be brought by groups of consumers with individually modest claims collectively funded by an LFA. The Competition Appeal Tribunal (CAT) only allows such claims to continue where it is satisfied that the class representative has sufficient resources to pursue the claim and satisfy any adverse costs order made against it. In this case, UKTC and RHA applied to bring collective proceedings, for breaches of competition law, on behalf of a group who had acquired trucks from DAF and other truck manufacturers. The truck manufacturers sought to defeat the applications by challenging UKTC's and RHA's funding arrangements. They argued that the funding arrangements were inadequate as the LFAs were damages-based agreements (DBAs) within the meaning of s.58AA of the Courts and Legal Services Act 1990 as amended (CLSA 1990) but did not comply with the requirements of the regime regulating DBAs (that is the DBA Regulations 2013) and so were unlawful and unenforceable.

Section 58AA of the CLSA 1990 defines a DBA as an agreement between a person providing advocacy services, litigation services (in relation to any sort of proceedings for resolving disputes) or claims management services and the recipient of those services, which requires:

a. the recipient to pay the provider if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided; and
b. the amount of that payment to be determined by reference to the amount of the financial benefit obtained.

There was no suggestion that the funders of the claims were providing advocacy or litigation services. The question was whether the funders were providing "claims management services."

The Competition Appeal Tribunal (CAT) only allows such claims to continue where it is satisfied that the class representative has sufficient resources to pursue the claim and satisfy any adverse costs order made against it."

Section 58AA of the CLSA 1990 defines "claims management services" by reference to s.4(2) of the Compensation Act 2006 |(CA 2006) pre-1 April 2019 and s.419A(2) of the Financial Services and Markets Act 2000 (FSMA 2000) thereafter.

- CA 2006 defines "claims management services" as "advice or other services in relation to the making of a claim."

- FSMA 2000 provides that "claims management services" means "advice or other services in relation to the making of a claim," where "other services" includes "financial services or assistance."

It had been assumed that "other services" would only be "claims management services" if they were part and parcel of services that included the active management of claims. On this basis, LFAs where funders purely provided capital were not drafted to comply with the DBA Regulations 2013. In this context, it is worth noting that in 2018 the Ministry of Justice asked Professor Rachael Mulheron and Nicholas Bacon KC (who represented the truck manufacturers in this case) to review the DBA Regulations 2013 and they produced the draft Damages-Based Agreements Regulations 2019 which specifically provided that LFAs were not DBAs. However, these draft regulations have never been introduced.

The CAT and the Divisional Court rejected the argument that the LFAs were DBAs, on the basis that they did not involve the provision of "claims management services," and the matter was referred to the Supreme Court.

The Supreme Court noted that regulations, which had not been introduced contemporaneously with the primary legislation or as part of a coherent scheme, could not be used as an aid to its interpretation."

Supreme Court decision

In the absence of the 2019 draft regulations, "claims management services" had to be construed by applying the rules of statutory interpretation to a web of dated and disparate provisions. In a 4:1 majority decision, the Court determined that the primary legislation did not expressly provide that "claims management services" must include the active management of claims, and that there was no established and generally accepted meaning of "claims management services" which qualified or coloured the express language of the primary legislation.

The Supreme Court noted that regulations, which had not been introduced contemporaneously with the primary legislation or as part of a coherent scheme, could not be used as an aid to its interpretation. Part 2 of the CA 2006 was drafted widely to afford the Secretary of State broad powers to determine the regulatory response to what, at that time, were new types of litigation services. Interpreting the language of s.4(2) of the CA 2006 in a narrow sense was therefore contrary to the overall purpose of Part 2 of the CA 2006 and the government's intention.

The consequence of giving the words their natural meaning was that LFAs, where the funder takes a share of the damages recovered, are DBAs within the meaning of s.58AA of the CLSA 1990 and must comply with the DBA Regulations 2013.

Consequences

While it is not explicitly stated that the regulatory regime which governs funding arrangements in England and Wales applies to arbitration, and s.58AA of the CLSA 1990 does not expressly confirm that "claims management services" may relate to any sort of proceedings for resolving disputes (as it does for advocacy or litigation services), most arbitration practitioners adopt a conservative approach which is consistent with recent case law and anticipate that both the regulatory regime and the Supreme Court's decision will apply to funding arrangements for English-seated arbitrations.

In compliance with the DBA Regulations 2013, LFAs which include a percentage return:

- must include a justification for the level of the percentage return;
- cannot provide a return which is more than 50 percent of the damages recovered in the proceedings;
- must not require the client to pay an amount other than (i) the percentage return, net of any costs and disbursements in respect of Counsel's fees that are payable by another party to the proceedings and (ii) any expenses incurred by the funder, net of any amount payable by another party to the proceedings.

In most instances, these criteria will not create insurmountable barriers to new agreements, albeit that funders will need to restructure their offering and may take measures to avoid their LFAs being DBAs. However, where non-compliant agreements are already in place, the only safe way to proceed is to enter into a re-drafted agreement. Depending on the payments made and the progress of the proceedings, this may prove to be problematic.

In many cases, the funded party will need further investment to continue the proceedings, and it will be in both the provider and the recipients' interests to find a workable solution. However, reopening negotiations may have detrimental consequences for

one side or the other. There will also inevitably be cases where recipients who are "in funds" or reaching the end of proceedings are reluctant to take measures to enforce their LFAs and cases where successful parties seek to avoid payments or even to recover payments already made pursuant to their LFAs. In these circumstances, funders might seek to rely on a severance provision to remove the provision allowing for the percentage return, leaving only the fixed multiple. However, it is unclear whether an agreement which the DBA Regulations 2013 provide is unenforceable can be rendered enforceable by removing the element which makes it a DBA. There may also be change-of-position defenses, unjust enrichment defenses and, depending on when the funding took place, limitation defenses.

Parliament is expected to legislate to resolve the issues that have arisen because of the Supreme Court's judgment, but the timing is unknown, and it is unclear whether the legislation will be retrospective. In the meantime, parties and funders are considering their options and searching for clarity as they line up to renegotiate their funding arrangements.

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> **"In many cases, the funded party will need further investment to continue the proceedings and it will be in both the provider and the recipients' interests to find a workable solution."**

Exceptions to the enforceability of arbitration agreements in the Canadian context

By Clarke Hunter, Lucy L'Hirondelle and Clinton Slogrove

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, obliges *signatory States to not only recognize and enforce arbitral awards but also valid arbitration agreements*. This fundamental principle of arbitration law, in combination with the separability of arbitration agreements and the competence-competence doctrine, all provide arbitration agreements in Canada with robust protection. That said, the validity of the arbitration agreement itself is a threshold consideration in determining its recognition and enforceability.

In general, Canadian courts are reluctant to intervene in arbitration proceedings preferring to give deference to the tribunal, as is expected under the competence-competence doctrine. In instances where courts are asked to determine questions of validity they again, generally, uphold the validity of arbitration agreements unless they are void, inoperative, or "incapable of being performed." Recently Canadian courts have examined specific instances in which arbitration agreements may be found to be unenforceable on these grounds.

In its 2020 decision, *Uber Technologies Inc v Heller,* the Supreme Court of Canada (SCC) developed a new and narrow exception to the enforceability of arbitration agreements: *unconscionability*. Mr. Heller had launched a class action lawsuit against the ride-hailing app Uber claiming that Uber drivers were employees pursuant to the *Ontario Employment Standards Act*, and therefore entitled to certain benefits. Uber's position was that the standard form contract entered between Uber and its drivers required disputes to be resolved through mediation and arbitration in the Netherlands. However, to commence the arbitration, a claimant was required to pay a filing fee of US$14,500, as well as other fees. This was almost equal to a drivers' annual income and thus created significant practical barriers to bringing a claim.

To address concerns over the inequality of bargaining power, the Court held that a party must be able adequately to protect their interests in the contracting process and employed the equitable doctrine of unconscionability "*When the traditional assumptions underlying contract enforcement lose their justificatory authority, this doctrine provides relief from improvident and unfair contracts.*" The Court explained that the concept of unconscionability is to protect those who are vulnerable in the contracting process from loss or improvidence in the bargain that was made. The Court held that a stronger party must not unduly disadvantage or obtain an advantage over a more vulnerable party.

The SCC's decision in Uber to declare the arbitration agreement invalid provides insight into a narrow but clearly defined exception to the Court's general deference to tribunals, the 'competence-competence' principle, and in doing so provides clarity around contractual conditions that may render an arbitration agreement unenforceable.

In its 2022 decision, *Peace River Hydro Partners v Petrowest Corp.*, the SCC addressed whether it would enforce an otherwise valid arbitration agreement in the context of ongoing insolvency proceedings. Peace River had subcontracted work to Petrowest as part of a hydroelectric dam project. The subcontracts contained arbitration agreements. When Petrowest became insolvent, its receiver initiated a claim against Peace River for unpaid invoices under the subcontracting agreements. Relying on British Columbia's Arbitration Act, Peace River sought a stay of proceedings on the basis that the dispute must proceed by arbitration. The Court was tasked with determining the circumstances in which a valid arbitration agreement would be deemed unenforceable in the insolvency context. In doing so, the Court was required to address the conflict between the *voluntary* nature of arbitral proceedings and the involuntary, collective forum in which insolvency proceedings occur. In resolving the issue, the Court took a two-part approach:

1. First, the Court specified the technical prerequisites required to grant a stay of proceedings in favor of arbitration: (a) whether there was an arbitration agreement; (b) whether the court proceedings were started by a party to the arbitration agreement; (c) whether the proceedings involved a dispute

the parties had agreed to resolve by way of arbitration; and (d) whether Peace River had, as a first step, applied for a stay of proceedings.

2. Second, the Court shifted the onus to the receiver to establish that the arbitration agreement at issue was "void, inoperative, or incapable of being performed" within the meaning of the Arbitration Act. The Court warned that the scope of that language should be interpreted narrowly to prevent parties from avoiding arbitration to which they have contractually agreed, in favor of what they now view as a preferable procedure.

The Court provided guidance on how each aspect of the criteria upon which an agreement to arbitrate may be voided, stating that:

- To be "void" the arbitration agreement must be intrinsically defective according to the usual rules of contract law, including when it is undermined by fraud, undue influence, unconscionability, duress, mistake or misrepresentation, expressly noting that this would be rare.
- "Inoperative" had no universal common law definition, but possible reasons for finding an arbitration agreement inoperative include frustration, discharge by breach, waiver or a subsequent agreement between the parties.
- Arbitration agreements are "incapable of being performed" where the arbitral process cannot effectively be set into motion because of a physical or legal impediment beyond the parties' control. Physical impediments may include inconsistencies, inherent contradictions or vagueness in the arbitration agreement that cannot be remedied by interpretation or other contractual techniques; the non availability of the arbitrator specified in the agreement, the dissolution or non existence of the chosen arbitration institution, political or other circumstances at the seat of arbitration rendering arbitration impossible. Legal impediments include express legislative overrides of the parties' agreement to arbitrate.

In *Peace River Hydro*, the Court concluded that while Step 1 had been satisfied, the arbitration agreement would have had the effect of compromising the resolution of the insolvency proceedings, and, as such, the arbitration agreement was found to be unenforceable. The Court, however, took the opportunity to highlight the outcome, and emphasized that courts should, in almost all cases, enforce arbitration agreements even where one party becomes insolvent, underscoring the public policy objective that such agreements help achieve in the insolvency context: the "expeditious, efficient and economical clean-up of the aftermath of financial collapse."

Most recently, the British Columbia Court of Appeal applied the unconscionability analysis from Uber in its 2023 decision, *Williams v Amazon.com Inc*. Distinguishing the facts in Uber, the Court found that the arbitration agreement contained in the conditions of use agreement was reasonable and neither an affront to public policy nor unconscionable. The Court upheld a partial stay of a proposed class action in favor of referring the dispute to arbitration.

By and large, Canadian courts continue to show resolve in ensuring that arbitration agreements are enforced. There are, however, circumstances in which courts may find them unenforceable.

Care should be taken when drafting arbitration agreements so that the mode of arbitration is suitable for the resolution of any anticipated disputes, especially in the case of standard-form contracts. To quote the SCC in *Uber*:

> *"Respect for arbitration is based on its being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all."*

Likewise, it may be that public policy requires the orderly and efficient collective resolution of insolvency proceedings take precedence over arbitration.

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Compelling witness testimony under the 1996 Arbitration Act

By Zayba Drabu, Cloudesley Long and Majdie Hajjar

Witness evidence is pivotal in the outcome of most disputes. Working collaboratively with witnesses is always the best way to secure testimony, not only because it saves time and costs, but, more importantly, because there are inherent risks in compelling an uncooperative witness to give evidence in the hope that evidence will support your case.

When faced with a witness who is unwilling to give evidence, steps may be taken to compel that witness to give testimony. In those circumstances, it is necessary to consider what purpose the witness would have in assisting in the determination of the dispute – for example, whether their evidence is material – and then balancing that against the risk of an uncooperative witness giving evidence which is unhelpful.

Where it is decided to compel a witness in an arbitration seated in England, Wales and Northern Ireland, practitioners should consider whether the provisions of the Arbitration Act 1996 (the Arbitration Act) can assist in compelling witness testimony. This article looks at the different considerations, and therefore processes, required to compel witness testimony under the statutory framework of the Arbitration Act. As noted below, certain provisions can apply to arbitrations seated outside this jurisdiction.

Witnesses located inside the United Kingdom

Section 43 of the Arbitration Act entitles a party to arbitral proceedings to apply to the court to "*secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.*" This is a mandatory provision that cannot be excluded by parties to an arbitration agreement and entitles a party to an arbitration to use the same court procedures for summoning witnesses that are available for court proceedings under CPR 34.

To do so, some conditions must be met. First, the witness must be in the United Kingdom, second the arbitral proceedings must be conducted within the jurisdiction of the Arbitration Act, and third – and the most difficult hurdle – is that the agreement of the other party (or parties) to the arbitration or permission of the tribunal is required. Practically, it is likely to be difficult to obtain agreement from opponents – particularly in respect of compelling testimony of witnesses who are, for example, "under their control."

Importantly, the place where the arbitral proceedings is conducted does not necessarily mean the 'seat' of the arbitration. Provided that the physical hearing is conducted inside the jurisdiction, Section 43 will apply. Therefore, the court may make an order in respect of a foreign seated arbitration, unless it considers that the fact that the seat of the arbitration is outside England, Wales or Northern Ireland makes it inappropriate to do so (s.2(3) of the Arbitration Act).

Witnesses located outside the United Kingdom

Section 44(2)(a) of the Arbitration Act provides the court with expansive powers to obtain evidence. It applies regardless of whether the witness is within the United Kingdom, and whether the arbitral proceedings are conducted in England, Wales or Northern Ireland.

However, unlike Section 43, Section 44 is a non-mandatory provision, meaning that the parties can agree to exclude it. Therefore, in considering whether to apply under Section 44, it is necessary to confirm that such provisions have not been excluded in the arbitration agreement or applicable rules.

Like Section 43, Section 44 applies regardless of the seat of the arbitration meaning that the court may make an order under Section 44 with respect to a foreign-seated arbitration, unless (as with Section 43 orders) it considers it inappropriate to do so.

Unless the case is one of urgency (in which case the court may make such order as it thinks necessary to preserve evidence), the court will only act where the application is made with the permission of the tribunal or the agreement in writing of the other parties to the arbitration. The English courts are cautious about intruding into the arbitral process and regard their role as being gatekeepers of arbitral proceedings.

The case of *A, B v C, D, E [2020] EWCA Civ 409 (A v C)* concerned a New York-seated arbitration and addressed the "long-standing controversy" as to whether orders under Section 44 can be made against non-parties to the arbitration. The dispute concerned bonus payments.

The tribunal granted permission for A and B to apply to the English courts to compel E to give evidence. E was the lead negotiator of the bonuses, resided in England but was not a party to the arbitration agreement. The English court initially refused the application on the basis that the Section 44 provision does not permit orders to be made against third parties.

The English courts are cautious about intruding into the arbitral process and regard their role as being gatekeepers of arbitral proceedings."

The Court of Appeal overturned the decision, holding that, amongst other reasons: (i) Section 44 was not purely limited to domestic arbitrations, (ii) the wording of Section 44 was not confined to witnesses who were party to the arbitration, and (iii) the court's powers in relation to the "taking of evidence" included a deposition.

When will the courts intervene with respect to foreign-seated arbitrations?

Section 2(3) of the Arbitration Act provides that a court will only make orders under Section 43 and Section 44 with respect to foreign-seated arbitrations where the fact of the foreign seat does not make it inappropriate to do so. *Commerce and Industry Insurance Co of Canada v Lloyd's Underwriters [2002]* 1 *Lloyds Rep 219*, sets out the test for situations where such an order is "appropriate."

The case concerned applications to set aside a "without notice" application in a New York seated arbitration that required two former employees of one of the arbitral parties to attend a hearing to give a deposition; and under Section 44 of the Arbitration Act by the same party in respect of securing the same deposition. The court set aside the "without notice" application, but refused to grant an order under Section 44. Moore-Bick J, suggested for such an application to be successful it should consider the inconvenience of the witness and stated:

> *... The greater the likely inconvenience to the witness, the greater the need to satisfy the court that he can give [necessary] evidence ...*

Is prevention better than cure?

That Section 44 can be excluded provides practitioners with control where they consider there is a risk that certain non-party witnesses might have material evidence. When a dispute arises, in addition to any other rights to accessing witnesses which may be provided for under the documents, practitioners must carefully consider any provisions regarding witness evidence contained within the arbitration agreement or applicable rules.

As set out above, where the tribunal grants permission or a counterparty agrees, the English courts have broad powers to compel witness testimony in arbitrations. The objective of such powers is to create parity between litigation and arbitration and witness testimony can be secured before a tribunal when it is really needed.

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Nigeria v P&ID: Caution against an arbitral tribunal's non-interventionist approach to arbitration?

By Paul Stothard, Olivia Fox and Mariana Plaza Cardenas

In an extraordinary judgment from the English High Court on 23 October 2023, Nigeria successfully challenged a US$11 billion arbitral award under Section 68 of the Arbitration Act 1996 (the Act) on the basis that the award was obtained by fraud and conduct contrary to public policy, including bribery of a witness, improper retention of privileged documents and perjury by a key witness.

The Hon Mr. Justice Robin Knowles CBE appeared to question the integrity of arbitration itself, observing that there were risks associated with the process (particularly in cases of significant public money), including vulnerability to fraud and a lack of transparency. Mr. Justice Knowles noted that in this case "*the Arbitration was a shell that got nowhere near the truth*" and expressed hope that the circumstances of the case would provoke debate and reflection among the arbitration community.

Whilst the circumstances of fraud leading to the *Nigeria v P&ID* judgment were probably sui generis, the judgment should give pause. In particular, the obiter comments made by Mr. Justice Knowles about Nigeria's representation during the arbitration and the tribunal's role in managing the arbitration process should be of concern to all practitioners. Where London is the seat of the arbitration, the tribunal's general duty under Section 33 of the Act can give rise to a tension between the duty to act fairly and impartially in giving each party the opportunity to put its case; and the duty to adopt procedures suitable to the circumstances of the case (avoiding unnecessary delay or expense in the arbitration process). These are tensions that can arise in commercial and investor-state arbitrations alike.

Brief background

Process & Industrial Developments Ltd (P&ID) and the Nigerian Ministry of Petroleum Resources signed a 20-year gas supply and processing agreement (GSPA) in 2010. P&ID issued an arbitration against Nigeria, accusing Nigeria of failure to perform its obligations under the GSPA.

In January 2017, the tribunal rendered a final award against Nigeria finding it liable to pay damages of US$6.6 billion. By the time the High Court rendered its judgment in October 2023, the award had a value exceeding US$11 billion including interest.

Nigeria first attempted to set aside the partial award on liability before the English courts in 2016 but was unsuccessful. P&ID began enforcement proceedings of the final award in 2019.

Following successful actions for discovery against P&ID in various courts internationally, in December 2019, Nigeria applied to set aside the final award and to challenge enforcement based on new evidence that the GSPA itself and the award had been procured by fraud. In 2020, Nigeria obtained an 'unprecedented' extension of time from the English court under Section 70(3) of the Act to apply to set aside the award. Sir Ross Cranston decided that there was a 'strong prima facie case' of fraud and that Nigeria had not made any deliberate decision not to investigate the fraud.

Observations in respect of the arbitral proceedings

It was plain that Nigeria has been inadequately represented in the arbitration. This gave rise to the question of what, if anything, the tribunal should have done when they realized this. Mr. Justice Knowles noted that the tribunal was entitled to rely on the parties' legal representatives to take points that their clients wanted taken; and to manage the arbitration firmly in response to delay by Nigeria and failure by Nigeria's legal counsel properly to engage during the arbitration process.

However, Mr. Justice Knowles questioned whether the tribunal could and should have been more interventionalist when confronted with red flags associated with Nigeria's legal representation during the arbitral proceedings, including Nigeria's witnesses not having been shown core witness evidence from P&ID; and that Nigeria's counsel failing to understand either basic questions that the tribunal put to him or key matters that should have been put to P&ID's workers skilled in quantum in cross-examination.

The result of these shortcomings on the legitimacy of the arbitral process, in Mr. Justice Knowles' view, was that the "*Tribunal did not have the assistance that it was entitled to expect, and which makes the arbitration process work. And Nigeria did not in the event properly consider, select and attempt admittedly difficult legal and factual arguments that the circumstances likely required. Even without the dishonest behavior of P&ID, Nigeria was compromised*."

Mr. Justice Knowles acknowledged that the tribunal took certain measures in the arbitration to address Nigeria's inaction, including applying pressure and attempting to encourage proper engagement. However, the court found that there had not been a 'fair fight' between the two parties throughout the arbitration, and that the tribunal's approach was 'very traditional.'

The balancing act under Section 33 of the AA 1996

The Act contains mandatory provisions in relation to certain core features of arbitration seated in the jurisdiction. Section 33 prescribes the general duty of the tribunal to act fairly and impartially between the parties and requires that the tribunal give each party a reasonable opportunity of putting his case and dealing with that of his opponent. Section 1(a) also states that "*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense*."

The Court decided that the award against Nigeria should be set aside because it was tainted with corruption but it left open the question of whether Nigeria might also have succeeded in challenging the award on the basis that there has not been (as the judge put it) a 'fair fight' between the parties to the arbitration. The judge was critical of the tribunal's failure to intervene, so Nigeria's case was properly put. Could the award also have been challenged based on a failure by the tribunal in this case to satisfy its duty for fair proceedings?

The answer is unclear. The High Court has previously determined that a tribunal's assessment of what fairness depends on the specific circumstances in a case. In the case of *Bandwidth Shipping Corp v Intaari (A Firm) (The Magdalena Oldendorff)* [2007] EWCA Civ 998, Lord Justice Waller observed that "if an arbitrator appreciates that a party has missed a point then fairness requires the arbitrator to raise it so that the party can deal with it." This observation was made in the context of a point which was in issue, and which was required to be dealt with. Conversely, in ED & F Man Sugar Ltd v. Belmont Shipping Ltd [2011] EWHC 2992 (Comm) the High Court found that Section 33 does not require arbitrators to draw a party's attention to a possible argument or specific authority that has been missed. Indeed, this kind of intervention risks giving the party an opportunity to put a different case from the one it had chosen to put. Intervention of this type was not encompassed by the duty to give a reasonable opportunity to put its case, and, whilst arbitrators are not barred from asking a party whether it has considered raising a different case from that which it has advanced, Section 33 of the AA 1996 does not oblige them to do so.

The case of *ED & F Man Sugar Ltd v. Belmont Shipping Ltd* also reflects that, even if the tribunal in Nigeria v P&ID had felt (based on the circumstances) that it had justification on the grounds of fairness to intervene and grant Nigeria an opportunity to run its case differently, there are other duties beyond the duty to promote fairness which must be considered and weighed up by the tribunal. There would have been impartiality concerns associated with allowing Nigeria to advance a different case from the one it had chosen to put. The tribunal also had a duty to adopt suitable procedures and avoid delay in the arbitration, in a case that had already been plagued by delay caused by Nigeria's failure to engage.

In his speech to the ICC UK Annual ADR and Arbitration Conference in October 2023, Mr. Justice Foxton highlighted difficulties with an interventionalist approach and why a tribunal may be hesitant to scrutinize, probe and ask for further submissions from a party:

> *"It is of course always open to the tribunal to go back to the parties to ask for further submissions on alternative bases. However, a tribunal's reluctance to do so is easy to understand. There is not only a statutory duty, under s.33 of the Arbitration Act 1996, but a professional impetus, to resolve an arbitration as expeditiously as possible. The closing of the record and filing of post-hearing memorials are generally regarded as a watershed moment in the arbitral process. Further, for the tribunal to "show" its hand in this way, for the purpose of inviting further submissions, risks the parties adjusting their behavior in anticipation of the terms of the award. Lewison LJ's description of the trial is equally applicable to the merits hearing in an arbitration: it is not "a dress rehearsal." It is the first and last night of the show.*
>
> *There is a difficult line for the arbitral tribunal to walk here. In my view, it is important when the court is asked to determine whether they have stepped over it to pay appropriate regard to the reasons why the arbitral tribunal found themselves in such a position, and the pressures of finality which they face."*

The court's approach to challenges under Section 68 of the AA 1996

The figures reported in the annual Commercial Court Report (published by the Judiciary of England and Wales) show that it is difficult to successfully challenge an arbitral award on the basis of serious irregularity. Of 26 applications in 2020 to 2021, only one succeeded. The second limb of Section 68 requires the applicant to demonstrate not only a serious procedural irregularity but also that this risks a "substantial injustice." *Nigeria v P&ID* met the threshold owing to the factual findings of bribery and corruption and not because of the tribunal's conduct.

Recent cases in which applicants have failed to set aside awards under Section 68 include the challenges leading to *LMH v EGK* [2023] EWHC 1832 (Comm) and *BPY v MXV* [2023] EWHC 82 (Comm). Both challenges arose (in part) from a tribunal's decision not to intervene procedurally during the arbitral proceedings. In *LMH v EGK*, one of the alleged irregularities was that the tribunal determined damages using a methodology not put forward by either of the parties. Mr. Justice Foxton held that Section 33 did not require the tribunal to give the parties an opportunity to make submissions on the tribunal's methodology or calculation. It suffices that the issues relied upon by the tribunal were 'in play' or 'in the arena' during the arbitral proceedings. He quoted Popplewell J's judgment in *Reliance Industries Ltd v The Union of India* [2018] EWHC 822:

> *"It is enough if the point is 'in play' or 'in the arena' in the proceedings, even if it is not precisely articulated… a party will usually have had a sufficient opportunity if the 'essential building blocks' of the tribunal's analysis and reasoning were in play in relation to an issue, even where the argument was not articulated in the way adopted by the tribunal. Ultimately the question which arises under s.33(a), whether there has been a reasonable opportunity to present or meet a case, is one of fairness and will always be one of fact and degree which is sensitive to the specific circumstances of each individual case."*

In *BPY v MXV*, one of the bases on which the applicant brought a Section 68 challenge was that the arbitrator made a finding of dishonesty without that case having been put to the witnesses having directed that she did not expect all points to be expressly challenged in cross-examination. The Court held that the arbitrator's decision was not contrary to the general duty under Section 33 and, given the constraints of time, there was no irregularity in the witnesses not being cross examined more than they were about the alleged dishonesty.

Specifically in relation to whether Section 68 can be used where a tribunal allegedly fails to act positively to protect a party from inaction or negligent representation from its legal team, Mr. Justice Knowles acknowledged in the *Nigeria v P&ID* judgment that there are limitations to the applicability of Section 68 in these types of scenarios. He accepted that P&ID's counsel provided a 'blunt and correct' assessment of the limitations to Section 68:

> *"Section 68 is not there to give you a remedy if you instruct an honest lawyer who makes a mess of it or doesn't take an available point. That is just tough. You have made your arbitration bed and you lie on it."*

Conclusion

The general approach in international arbitration, particularly in the common law jurisdictions, is for the tribunal not to intervene to protect a party (including from its own legal team). On this view, the parties have agreed to arbitrate their disputes, selected their own representation for the arbitration and should accept the consequences of that decision to arbitrate. The decision in *Nigeria v P&ID* serves as a cautionary example of when the general approach fails. The English courts recognize that the correct approach to the tribunal's balancing act under Section 33 depends on the circumstances of the case. When a tribunal determines what procedural decisions to make, and how interventionalist it should be, its responsibility is considering all the circumstances in the case and weighed up all competing factors.

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International arbitration report — Issue 21
The role and potential for arbitration in cross-border insolvency disputes

The role and potential for arbitration in cross-border insolvency disputes

By Scott Atkins and Dr. Kai Luck

With the increase in global trade and business, often involving complex corporate structures in multiple jurisdictions, we expect to see a significant increase in cross-border insolvency and restructuring matters in coming years. This is especially the case with rapid advancements in technology and digital change driving "borderless" transactions and investments in every industry. The transition to net-zero emissions and an enhanced focus on sustainability by regulators and investors is causing businesses to realign and restructure operations, leveraging new sources of sustainability-linked finance and equity capital.

In this context, alternative dispute resolution (ADR) processes, particularly mediation and arbitration, have a major role to play in enhancing the efficiency of insolvency proceedings, the resolution of creditor disputes and achieving consensus among disparate stakeholders. ADR can maximize creditor returns by increasing the chance of successful restructuring outcomes for distressed but viable entities.

The benefit of ADR in an insolvency and restructuring scenario has been identified by the World Bank and UNCITRAL in their best-practice guidelines for the design and implementation of optimal insolvency systems. While mediation has had great success in recent times in helping to resolve complex creditor disputes in "mass tort" insolvency cases, and in guiding creditor negotiations during a formal reorganization process, the focus of this article is arbitration, and how it may be used as an important component of an effective insolvency system.

The existing use of arbitration in insolvency

Arbitration is already a well-developed tool of insolvency systems across the world in resolving individual creditor disputes. In the United States, the courts have generally adopted a distinction between matters that are "core" (matters involving rights specifically created by federal bankruptcy law such as avoidance provisions) and "non-core" (matters that do not invoke substantive rights created by federal bankruptcy law). The latter are capable of being resolved by arbitration taking place within the scope of an arbitration agreement entered by the parties prior to the debtor's insolvency. A similar approach is taken by courts in Singapore, France and Italy. In Australia, generally there is no automatic stay on arbitration proceedings when a company undergoes administration or a compulsory winding up of the court and leave of the court to continue with the arbitration is not required. The onus will be on an insolvency practitioner specifically to seek an extension of the usual moratorium in such cases.

Future focus: Arbitration in informal rescue scenarios

A key benefit arbitration can offer in the *pre-insolvency* stage is in providing a structural enforcement framework to guide creditor negotiations during an informal (or "out-of-court") workout attempt when a debtor encounters financial distress.

Creating incentives to support informal workouts is currently a key focus of regulators globally, and features prominently in the best-practice recommendations of policy makers. In contrast to more complex, expensive formal insolvency frameworks, informal workouts have several key benefits. As noted in INSOL International's *Statement of Principles for a Global Approach to Multi-Creditor Workouts*:

> Although there is a growing international trend in the development of local insolvency laws to facilitate the rescue and rehabilitation of companies and businesses in financial difficulty (as opposed merely to closing them down through liquidation), it is a truism that, no matter how debtor-friendly and 'rescue'-orientated local insolvency regimes may be, there are often material advantages for both creditors and debtors in the expeditious implementation of informal or contract-based rescues or workouts (particularly in cases of debtors having cross-border businesses or complex capital structures), compared with the unpredictable costs and uncertainties of a formal insolvency.

This can have positive flow-on impacts for local and regional economies by spurring entrepreneurship; lessening the impact that deleveraging has on gross domestic product growth; improving financial stability by reducing protracted creditor disputes and coordination difficulties and thereby hastening the normalization of non-performing loans.

Informal workout negotiations are often hampered by creditor disagreements and hold-outs, in the absence of any mechanism to guide negotiations and to put forward a restructuring model that can maximize value for all stakeholders.

Arbitration can provide a means for creditors to select a governing restructuring-friendly law to be applied to their claims, providing certainty and fairness that may incentivize hold-out creditors to participate constructively in a restructuring."

While mediation can be helpful in coordinating creditor claims outside the "adversarial cauldron" of the court, one key limitation of the process is that it depends on consensus-based process and leaves open the chance for an impasse when creditors are deadlocked and cannot agree on a single workout proposal. Further, while the Singapore Convention on Mediation provides an international framework for the recognition and enforcement of settlement agreements reached during a mediation process, to date it only has 56 signatories and 11 parties. Therefore, there continues to be disparity in the global "infrastructure" that supports the use of mediation in cross-border insolvency.

This is where arbitration can play a key role in filling the gap. Arbitration can provide a means for creditors to select a governing, restructuring-friendly law to be applied to their claims, providing certainty and fairness that may incentivize hold-out creditors to participate constructively in a restructuring. An arbitration award can also be recognized and enforced on a much broader basis than a mediation agreement. In that regard, the New York Convention provides for the recognition and enforcement of arbitral awards in 172 member states.

For states with an under-developed rescue culture and limited experience of workouts among creditors, whether formally or informally, arbitration can offer a particularly important means to build greater creditor collectivism and to implement a genuine pre-insolvency, rescue-oriented negotiation process.

At the same time, however, there are challenges with arbitration in this context. Notably, it would be necessary to have a set of standard insolvency-tailored arbitral rules that could be adopted as a matter of course in an insolvency-based arbitration, rather than having the rules as another contentious point of negotiation among diverse classes of creditors. These rules would need to provide for fundamental issues such as the seat or place of the arbitration, applicable rules, arbitrator powers, challenge or review of any award and confidentiality terms – but also the substantive applicable law to govern insolvency claims and priorities, and the processes for commencing formal insolvency proceedings if an arbitral award is not complied with.

One option is for insolvency-specific arbitral rules reflecting best-practice to be adopted. Examples are UNCITRAL's Legislative Guide on Insolvency and the World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes.

Insolvency-specific arbitral rules could also be developed by arbitral centers based in jurisdictions with respected insolvency and broader financial ecosystems that would encourage creditors to resort to those jurisdictions as a means for resolving their claims in a binding manner. Within the Asia-Pacific, Singapore has emerged as a preferred seat for arbitration, supported by Singapore's reputation as one of the world's centers for international trade and finance, and its place as an optimal market for raising capital and attracting investment. It also has a highly respected judiciary and supporting institutions. In the insolvency context, Singapore is also regarded as having one of the most flexible restructuring regimes in the world, with debt obligations able to be restructured effectively and efficiently. Notably, a series of reforms in 2017 incorporated several features of Chapter 11 of the US Bankruptcy Code within the Singapore insolvency system – including pre-packed restructuring plans, rescue finance (with the possibility for super-priority for new lending), a worldwide moratorium on debt collection pending a restructuring process and a non-consensual cross-class cramdown on dissenting creditors in approving a plan under a scheme of arrangement.

Insolvency arbitration is currently a focus for the Singapore International Arbitration Centre (SIAC) and the Singapore International Commercial Court (SICC), the latter being empowered to hear proceedings under the Singapore International Arbitration Act, including applications to set aside awards, jurisdictional challenges and enforcement applications. The SICC's jurisdiction was expanded in October 2022 so that it now has express jurisdiction over international restructuring and insolvency matters. It also has active case management powers, and the ability to refer parties to ADR during an insolvency proceeding. The SICC, together with the infrastructure of the SIAC, could held to drive arbitration as a key insolvency process to enhance efficiency and maximize creditor claims in the Asia-Pacific region in future.

Takeaway

With the current focus on insolvency law reform by regulators globally making financial and economic stability, arbitration can serve as a valuable option for resolving complex creditor disputes and providing a framework for creditor cooperation and negotiations during an informal workout attempt. With a widely adopted existing arbitral award enforcement model under the New York Convention, and the institutional support of international arbitration centers, there is a strong platform that could enable arbitration to become a key feature of best practice insolvency and restructuring systems across the world in future years.

The SICC, together with the infrastructure of the SIAC, could held to drive arbitration as a key insolvency process to enhance efficiency and maximize creditor claims in the Asia-Pacific region in future.”

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