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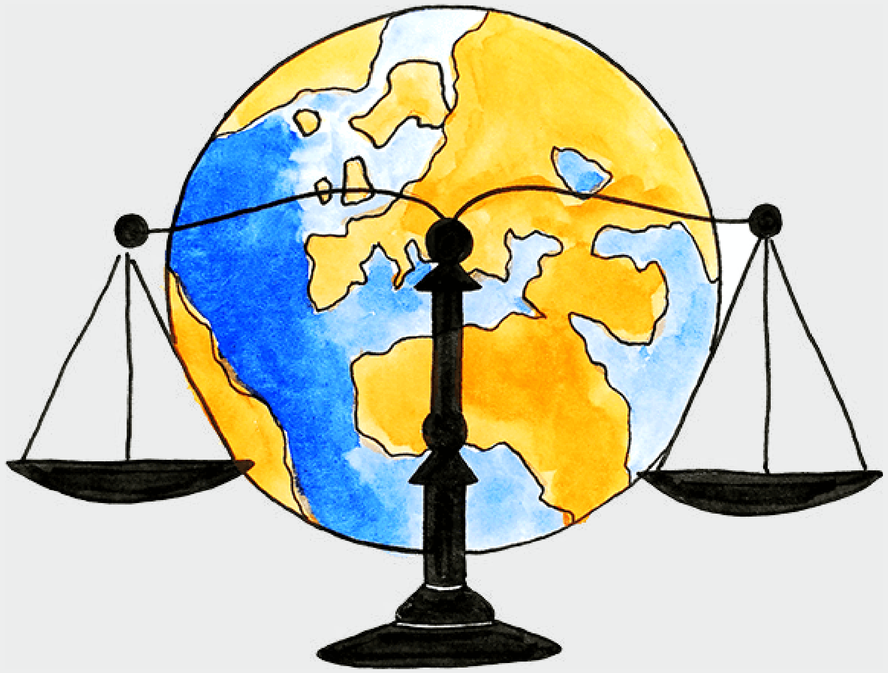

Admissibility of Remote Hearings Under Austrian Arbitration Law

Thomas Herbst

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ADMISSIBILITY OF REMOTE HEARINGS UNDER AUSTRIAN ARBITRATION LAW

Written by Thomas Herbst

On 23 July 2020, the Austrian Supreme Court entered a ruling on an arbitrator challenge that sparked significant response in the arbitration world. In the matter docketed under case no. 18 ONc 3/20s, the Court rendered a decision that was acknowledged – and by some hailed – as the first supreme court decision worldwide to take an expressly supportive stance on the use of videoconferencing technology in arbitration. This article analyzes the landmark case and its relevance for future arbitrations in Austria.

THE FACTS

Besides the general impact on life, the rise of the COVID-19 pandemic has confronted pending proceedings with difficult decisions, especially disputes involving stakeholders based in different locations, who had to cope with increasing restrictions on travel and congregation. Prior to the pandemic, the solution of video conferencing technology had become an increasingly common tool to improve procedural efficiency. However, while its use was ordinarily limited to the examination of individual witnesses or procedural conferences, as the pandemic continued, in many proceedings the decision had to be made to substitute an in-person hearing for an entirely virtual hearing.

In the case at hand, that call had to be made as well. In a VIAC-administered arbitration, pending since 2017, an evidentiary hearing had been scheduled for March 2020. Among other reasons, the purpose of the hearing was to examine the respondents' lead witness located in Los Angeles (U.S.). In mid-January 2020, the Arbitral Tribunal postponed the hearing to April 2020, for the first time. While the respondents requested to postpone the hearing again, after a procedural call in March the Arbitral Tribunal ordered that the evidentiary hearing would take place using the WebEx platform. This decision was made one week before the scheduled date of the hearing.

Shortly after the hearing took place, the respondents challenged the Arbitral Tribunal with the Board of VIAC. The respondents contended, among other things, that the decision to schedule the hearing by video conference qualified as unfair and unequal treatment. After the Board rejected the challenge, respondents filed their challenge with the Austrian Supreme Court – the competent court in Austria.

Before the Court, the respondents essentially reiterated their previous arguments. In summary, they argued that the use of a remote hearing against their objections gave rise to justifiable doubts as to the arbitrators' impartiality. A remote hearing would in and of itself violate respondents' right to a fair trial. Further, respondents relied on the fact that the tribunal had not enacted specific rules to address the risks of undue influence over the witnesses. As examples, respondents suggested rules concerning the documents to which witnesses would have access to, witness sequestration, and whether witnesses could receive chat messages via the video conferencing platform while giving evidence.

THE RULING

The Court summarily dismissed the challenge. Before addressing the respondents' individual arguments, it ruled on the applicable standard. In accordance with its previous case law, the Court held that mere "procedural impropriety or violations of procedure" could not give rise to justifiable doubts. Only where serious violations of procedure, or a (permanent or substantial) preferential or discriminatory treatment of a party was established, a challenge for bias could be warranted.

In its analysis of the objections, the Court noted that the respondent had not asserted any specific procedural irregularities but purported that a remote hearing would generally violate principles of a fair trial and their right to be heard.

The Court rejected the argument and explained that, especially as the pandemic continued, the use of video conferencing technology had become a widespread feature before the domestic courts of law, and recommended in arbitration. Further, the Court held that ordering a hearing by video conference would not violate Art 6 ECHR – even where one party objected to it. As explained by the Court, the fair trial standard of the convention not only guarantees the right to be heard but also the opposing sides' access to justice and effective legal protection. In particular, where the COVID-19 pandemic might cause standstill of the judiciary, video conferencing technology could facilitate both aspects of this procedural guarantee in a timely and cost-effective manner.

The Court then addressed and rejected the respondents' blanket assertions concerning the potential misuse of video conferencing technology in examining witnesses. As a general point, the Court noted that the risk of witness tampering could not be excluded for in-person hearings either. The Court further pointed out that in a virtual hearing, witnes-

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ses could be viewed up close and their testimony recorded. Thus, control over witnesses was in some respects even superior to that of an in-person hearing.

Further, the Court explained that there were various measures that could mitigate the risk of undue influence, all of which would not require prior rules by the tribunal. The Court suggested that witness could be required to look directly into the camera and to always have their hands visible, making it impossible to read chat messages. Further, witnesses could be instructed to zoom out and show the room from which the witness was testifying, to ensure that no one else was present. Consequently, the Court found that the mere use of video conferencing technology "certainly" would not amount to such grave procedural misconduct or a violation of the right to a fair trial that could justify the challenge.

COMMENT

Especially in the time of a pandemic, the Court's decision sends a strong signal. It demonstrates a common sense approach towards the use of video conferencing technology, which had substantially contributed to managing the challenging circumstances in an efficient way. Evidently, however, the Court has not decided whether the Arbitral Tribunal correctly applied the procedural rules before it. Ruling on a notoriously fact-dependent arbitrator challenge, the decision turned on the question whether the use of video conferencing technology – despite the objections of a party – violated the basic principles of procedure and thus indicated bias on the part of the arbitrators. The Court found that this was not the case.

Given this specific standard, the question arises if the Court would approach the admissibility of remote hearings differently if it was raised in future cases, specifically, in the context of setting aside actions. Indeed, as was pointed out by some more critical voices, the arbitrators had no express authorization to order the remote hearing, less so against a parties' will. Neither the applicable procedural rules (2013 Vienna Rules) nor Austrian arbitration law expressly regulates this question.

RELEVANCE FOR SETTING ASIDE PROCEEDINGS

Under the Austrian lex arbitri, not all procedural violations entitle an aggrieved party to request the arbitral award to be set aside. In a case like the matter at hand, the respondents would most likely assert the violation of their right to be heard as well as, a violation of Austrian procedural public policy (§ 611 (2) subparas 2 and 5 ZPO). Under these grounds, the Court must establish that the way the tribunal conducted the proceedings violated basic principles of due process. Therefore, just as in arbitrator challenges, the Court will apply a similar high-level analysis.

Consequently, the Court's reasoning as to the general admissibility of video conferencing technology is relevant for future setting-aside actions as well. As detailed above, the Court expressly rejected the very allegation that the tribunal's decision to substitute the oral hearing with the remote hearing would – on its own – violate the right to a fair trial and the right to be heard even when a party objected to it.

IS A REMOTE HEARING AN "ORAL HEARING"?

One point the Court did not address was whether the remote hearing would qualify as an "oral hearing" as required by these rules. Both Austrian arbitration law and the Vienna Rules require that an "oral hearing" must take place, where a party so requests (§ 598 ZPO; Art 30 Vienna Rules). Certainly, prior to the pandemic, few would have contemplated whether a remote hearing would qualify as such "oral hearing".

This question, however, could be of particular interest due to the Court's prior case law. In the case docketed under 7 Ob 111/10i, the Court held that the above-mentioned § 598 ZPO was a mandatory provision that determined the scope of the parties' right to be heard. Since the arbitrators decided to dispense with an oral hearing against the objections of a party requesting it, the Court set aside their award.

In a more recent decision, from 15 January 2020 (docket no. 18 OCg 9/19a), the Court expressly upheld this decision but made some relevant exceptions to its previous ruling. The Court clarified that a tribunal could dispense with the oral hearing where the request was significantly belated or where the hearing would amount to a mere technicality. This would be the case, when the requested hearing could not achieve its purpose, namely, allowing for oral pleadings before the tribunal and the examination of any witnesses.

While not explicitly referring to the above case law, the Court's broad approval of virtual hearings in the present case implies that it considers hearings conducted as a video conference equivalent to the oral hearing mandated by the *lex arbitri* and the Vienna Rules. Although technical disruptions or malfeasance could impact the viability of any (virtual) hearing, most would agree that, in their absence, a hearing held by video conference affords a party an almost identical right to exercise its right to be heard as an in-person hearing. Arguably, the purposes of an oral hearing, as determined by the Court in 18 OCg 9/19a – allowing for oral pleadings before the tribunal and the examination of witnesses – can be achieved to a comparable extent in a remote hearing. There should not be any serious doubt that an in-person hearing would amount to a mere technicality once

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a fully-fledged remote hearing has already taken place.

Although the case must be seen in the context of the current COVID-19 pandemic, the Court's decision suggests that, in the absence of concrete factors prejudicing one party, the arbitrator's decision to hold a virtual hearing will likely not suffice as a ground to set aside the award.

PARTIES MAY WAIVE RIGHT TO AN "ORAL HEARING"

Unsurprisingly, many procedural rules that have been amended since the inception of the pandemic expressly authorize tribunals to order hearings be held virtually. Examples are: the 2021 ICC Arbitration Rules (Art 26(1); allowing hearings to be conducted "*by physical attendance or remotely by videoconference, telephone or other appropriate means of communication*"); the 2020 LCIA Arbitration Rules (Art 19.2; allowing for hearings that "*may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places*"); or the 2021 ICDR International Dispute Resolution Procedures (Art 26(2); stipulating "*[a] hearing or a portion of a hearing may be held by video, audio, or other electronic means when: (a) the parties so agree; or (b) the tribunal determines, after allowing the parties to comment, that doing so would be appropriate and would not compromise the rights of any party to a fair process.*"). Similarly, Art 8.2 of the 2020 IBA Rules on the Taking of Evidence stipulates that "*[a]t the request of a Party or on its own motion, the Arbitral Tribunal may, after consultation with the Parties, order that the Evidentiary Hearing be conducted as a Remote Hearing.*"

There is little debate that parties may agree to substitute an in-person hearing for a remote hearing or they can grant arbitral tribunals the powers to dispense with a hearing. In fact, the parties' right to waive an oral hearing altogether is undisputed and consistently confirmed by the European Court for Human Rights. Indeed, Austrian arbitration law specifies that the parties may even opt for "documents only" proceedings. Thus, the case at hand will have particular significance for those arbitrations, to which these updated rules do not apply.

OUTLOOK

In challenging times, this case provides welcome guidance and security to both arbitrators and parties alike. Nevertheless, with the right to be heard on the line, arbitrators will be well advised to continue balancing all interests when ordering remote hearings against the objection of one party. The Court's general acknowledgment of video conferencing technology as unobjectionable, arguably, has significance beyond the case at hand. Despite the decision's side references to the pandemic, the importance of the decision will likely continue long after public health measures are lifted. It is safe to assume that this decision will give arbitrators increasing confidence to consider the use of video conferencing technology for reasons of procedural economy in the future.

Read the full decision here (in German).

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GUIDE — 44 Pages

Guide to Austrian Arbitration Law

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2021 ICC ARBITRATION RULES: WHAT HAS CHANGED?

Written by Innhwa Kwon & Andrea de la Brena

Three years after their last revision in 2017, the International Chamber of Commerce ("ICC") has updated their arbitration rules. This update incorporates developments seen in practice, such as increasing adoption of technology, concerns revolved around third party funding and the parties' demand of enhancing the scope of joinder and consolidation. The new ICC Arbitration Rules, which came into effect on 1 January 2021 (the "**2021 ICC Rules**"), do not contain major changes, but still introduce notable amendments as addressed in the following points.

NON-CONSENSUAL JOINDER OF ADDITIONAL PARTIES

The 2021 ICC Rules allow for greater time flexibility for joinder and confer the authority to decide on the joinder to the arbitral tribunal. According to the 2012/2017 Rules, no additional party could join once an arbitrator has been confirmed or appointed, unless all parties, including the additional party, otherwise agree. Now under new Article 7.5, a request for joinder may be made even after the confirmation or appointment of an arbitrator and without having the agreement of all parties (i.e., such request for joinder must be decided by the arbitral tribunal once constituted).

In the occasion of a late request for joinder, the additional party must accept the constitution of the arbitral tribunal and agree to the Terms of Reference, where applicable. The

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arbitral tribunal's decision on joinder, which may include prima facie jurisdiction over the additional party, is nevertheless without prejudice to its ultimate jurisdictional decision over the additional party.

CONSOLIDATION OF CASES INVOLVING NON-IDENTICAL PARTIES OR MULTIPLE COMMON CONTRACTS

While the old version of the ICC Rules allowed consolidation of cases brought under the same arbitration agreement, the amended provisions confirm that consolidation may happen where claims are brought under "the same arbitration agreement *or agreements*" [emphasis added], enabling consolidation of non-identical parties (Article 10(b)). Article 10(c) further confirms that arbitration claims that are "*not* made under the same arbitration agreement *or agreements*" [emphasis added] can be consolidated into a single arbitration case for multiple common contracts between identical parties. This amendment provides for greater access for the involved parties or similar cases to be resolved in a cost-efficient manner.

SAFEGUARD FOR ARBITRATORS' INDEPENDENCE, IMPARTIALITY AND CONFLICT OF INTEREST-FREE STANCE

With aims to assist arbitrators in complying with their duties to remain impartial, independent and without conflict of interest, the 2021 ICC Rules introduces the following new provisions:
First, parties now bear an obligation to promptly notify the existence and identity of any third-party funder with an economic interest in the outcome of the arbitration, noting that such is in order to assist prospective arbitrators and arbitrators in complying with their duties of independence and impartiality (Article 11.7).

Further, Article 17, re-titled as "party representation", requires each party to promptly announce any changes in its representation and now provides the arbitral tribunal the explicit authority to "take any measure necessary to avoid a conflict of interest of an arbitrator" which arises from a change in party representation. This way, the arbitral tribunal can exclude a newly appointed party representative whose involvement would create a conflict of interest.

ICC COURT'S POWER TO OVERRIDE THE PARTIES' ARBITRATOR APPOINTMENT IN THE INTEREST OF EQUAL TREATMENT

With the inclusion of Article 12.9, the 2021 ICC Rules provide an explicit authority for the ICC Court to appoint arbitrators, despite the parties' agreement on the method of constitution of the arbitral tribunal, when circumstances call for the Court's intervention "to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award".

VIRTUAL HEARINGS

Seeing the global COVID-19 pandemic in 2020 which caused many of the hearings to be held remotely and virtually, the 2021 ICC Rules confirm that the arbitral tribunal has the discretion to decide whether a hearing will be held in-person or virtually ("by videoconference, telephone or other appropriate means of communication") (Article 26.1). A similar approach to encourage the use of technology in arbitral hearings is also seen in Article 14.6(iii) of the 2020 LCIA Rules (see our article on the 2020 LCIA Arbitration Rules below).

OTHER CHANGES

- Shift away from paper-filing requirement for Request for Arbitration and Reply (letting go of provisions Article 4.4(a) and Article 5.3 of the 2017 Rules; also amending Article 1.2 of Appendix V Emergency Arbitrator Rules)
- Restriction to the appointment of arbitrators whose nationality is same with any of the parties to state-investor treaty claims, unless the parties agree otherwise (Article 13.6)
- Exclusion of state-investor treaty claims from the emergency arbitrator procedure (Article 29.6(c))
- Confirmation of the arbitral tribunal's power to make an additional award on claims omitted in a prior award (Article 36.3)
- Dispute settlement clause for disputes arising out of or in connection with the administration of the arbitration proceedings by the ICC Court, with French law as governing law and Paris Judicial Tribunal as a dispute resolution body (Article 43)
- Some substantial changes to Appendix I and II on appointment of ICC Court President, and formation of committees, ICC Court's constitution, quorum and decision making.
- Increase in the threshold value of dispute subject to the expedited proceedings from 2 million dollars to 3 million dollars (Article 30.2; Appendix VI)

Meanwhile:

- It's noteworthy to mention that LCIA's new rules incorporate provisions on early determination or tribunal secretaries, which are not included in the 2021 ICC Rules (albeit, for the latter, see the ICC's Note to Parties and

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Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, Section XIII "Administrative Secretaries"). For more information about the latest LCIA Rules, please see our article 2020 LCIA Arbitration Rules.

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Additional content on this topic:

2020 LCIA ARBITRATION RULES: CHANGES TO BE AWARE OF

Written by Andrea de la Brena & Innhwa Kwon

On 1 October 2020, the new LCIA Rules became effective ("**2020 LCIA Rules**"). These rules apply to arbitrations commencing after this date. The purpose of this update is to improve the efficiency and effectiveness of the proceedings in view of the lessons taught by practice. The amendments span from newly introduced rules to changes on existing provisions. Some of the most relevant additions and changes are addressed below.

USE OF TECHNOLOGY IN THE ARBITRATION PROCEEDINGS AND TREND TO GOING PAPERLESS

The COVID-19 pandemic has revealed that regulating the use of technology in international arbitration is a necessity. In light of the increasing adoption of technology, Article 14.6(iii) of the new rules stipulates that the tribunal's power includes "employing technology to enhance the efficiency and expeditious conduct of the arbitration (including any hearing)." As to the form of the hearing, the new rules stipulate that the hearing may take place in person, virtually or as a combination of both forms (Article 19.2).

Furthermore, the new default format for parties to submit a request for arbitration and a response is through "electronic forms, either by email or other electronic means" (Article 4.1), relieving the parties from paper submission.

Finally, unless otherwise determined, "any award may be signed electronically" and transmitted to the parties by the LCIA "by any electronic means, and (if so requested by any party or if transmission by electronic means to a party is not possible) in paper form." (Articles 26.2 and 26.7)

RULES ON TRIBUNAL SECRETARY

The scope of the secretary's role has been subject to challenges and debates over the past few years (for example, it was discussed in the case P v. Q and others, [2017] EWHC 194 (Comm) (9 February 2017)). In 2017, the LCIA published some guidance on the scope of the secretary's role, the duty to inform the parties on this scope and the need of parties' approval (LCIA Notes for Arbitrators, Notes 8.1, 8.2 and 8.3). Under Note 8.1, first and foremost, it is stipulated that the tribunal may, under no circumstances, delegate its fundamental decision-making function to the secretary. Furthermore, under Note 8.2, the tribunal has the duty to inform the parties which tasks are to be performed by the secretary. Finally, under Note 8.3, the parties need to consent to the use of a secretary and his/her role and scope of work proposed by the tribunal. The new Article 14A elevates what was previously highlighted in the guidance to rules.

TRIBUNAL'S POWER TO ORDER CONSOLIDATION/CONCURRENT CONDUCT OF ARBITRATION

The 2020 LCIA Rules expand the scope of the arbitral tribunal's power to consolidate and add an independent and separate provision for this power. Under the 2014 LCIA Rules which included a provision for consolidation under Article 22 titled "Additional Powers", consolidation was only possi-

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ble, in general, upon agreement of the parties or if multiple arbitrations were taking place under the same arbitration agreement or under compatible agreements **with the same parties** (2014 LCIA Rules, Article 22.1(x)). According to the 2020 LCIA Rules, the tribunal may also order the consolidation of arbitrations which are arising out of the **same transaction** or **series of related transactions** without requiring to be brought by the same parties (Article 22.7(ii)). Consolidation is only possible when the arbitral tribunal of the arbitration(s) has not been constituted or if the tribunals are composed of the same arbitrators.

Furthermore, Article 22.7(iii) allows the tribunal to conduct arbitrations concurrently in similar circumstances and where the same arbitral tribunal is constituted in respect of each arbitration.

EARLY DETERMINATION

The new rules contain a list of express powers granted to the arbitral tribunal in the exercise of their wide discretion to conduct the proceedings (Articles 14 and 22). One of them is the tribunal's power to dispose of claims, defences or counterclaims lacking any merits at an early stage (Article 22.1(viii)). This power brings the LCIA in line with the general trend in commercial and investment arbitrations to allow the early determination of claims (e.g, ICSID Convention Arbitration Rules, Rule 41(5); 2016 SIAC Rules, Rule 29; HKIAC, Article 43). The purpose of granting the tribunal this power is mainly to enhance the efficiency of international arbitration, save costs and protect parties from manifestly unmeritorious, frivolous claims, defences or counterclaims.

COMPOSITE REQUESTS

Under the 2014 LCIA Rules, composite requests were not permitted (*A v. B* [2017] EWHC 3417 (21 December 2007)). Articles 1.2 and 2.2. of the new rules allow for composite requests to be filed by claimant, to which respondent can submit a composite response, allowing the parties to commence more than one arbitration proceedings at the same time. While the issue of a composite request may be accompanied by a request for consolidation of those disputes, consolidation is not automatic and will need to be sought in accordance with the corresponding rules set forth in Article 22A.

CORRECTION OF AWARDS

The arbitral tribunal is now allowed to correct and issue an addendum, not only when a request for correction of "any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature" is considered justified, but also when such request is deemed unjustified (Article 27.1). If, after consulting the parties, the tribunal does not consider the request to be justified, it may issue an addendum to the award dealing with the request, together with any arbitration costs and related legal costs.

OTHER CHANGES

- Introduction of provisions on compliance, bribery and corruption issues (Article 24(A)) and special measures on data protection when the circumstances of the case require so (Article 30(A)).
- The obligation of confidentiality extends to any authorised representative (legal and non-legal), witness of fact, expert or service provider, as well as the arbitral tribunal, the tribunal secretary and any expert to the arbitral tribunal (Articles 30.1 and 30.2).
- Dispute settlement clause for disputes arising between the parties and the LCIA, their organs, any arbitrator, tribunal secretary or expert for matters arising out of or in connection with an LCIA arbitration (Article 31.3).
- Reinforcement of the arbitrators' endeavour to issue their awards no later than three months following the last submission (Article 15.10).
- Parties and the tribunal are now required and not just "encouraged" to make contact within 21 days of the tribunal's appointment (Article 14.3).
- Update of LCIA's schedule of costs increasing the maximum hourly rate to be charged by arbitrators from £450 to £500 for complex cases.

Meanwhile:

- It is noteworthy to mention that the 2020 LCIA Rules did not introduce any provision regulating third party funding. See in contrast, Article 11(7) of the 2021 ICC Rules. For more information about the latest ICC Rules, please see our article 2021 ICC Arbitration Rules.

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TSARGRAD V GOOGLE – MOSCOW COURT SAYS GOODBYE TO ARBITRATION CLAUSES WITH SANCTIONED RUSSIAN ENTITIES

Written by Philip Vagin

BACKGROUND

In June 2020, new sanctions-related amendments to the Russian Commercial Procedure Code came into force. The amendments were aimed to protect sanctioned Russian companies and their foreign subsidiaries from court and arbitration proceedings abroad. The amended Code now gives Russian courts exclusive jurisdiction over all disputes arising out of sanctions involving such companies. As a result, a sanctioned entity may now sue in a Russian court regardless of a foreign forum selection clause if it shows that it has been denied "access to justice" in the agreed jurisdiction.

The amendments and their potential impact on the shipping sector have already been analysed in several articles and client alerts (See article by the Russian Maritime Law Association (RUMLA) here). However, until quite recently, no reported judgment in Russia has considered the effect of the new rules.

FACTS

In *Tsargrad v Google* (case A40-155367/2020), the Moscow Commercial Court decided for the first time whether it should apply the new sanctions rules to invalidate English and California exclusive jurisdiction clauses.

Tsargrad is a Russian Christian Orthodox right-wing TV channel owned by a Russian conservative businessman Konstantin Malofeev. In 2014, the U.S.'s Office of Foreign Assets Control (OFAC) included Mr. Malofeev in its Specially Designated Nationals (SDN) List for funding Russian-backed separatists in Ukraine. In July 2020, Google blocked Tsargrad's YouTube account for alleged violations of the terms of use, also citing U.S. sanctions compliance concerns and rules on international trade in services.

In response, Tsargrad sued Google Ireland, Google LLC (a US corporation) and OOO "Google" (a Russian subsidiary) in Russia. Mr. Malofeev's company argued that Google's termination of its contract with Tsargrad was invalid and sought an order to restore access to the YouTube account. Google Ireland and Google LLC moved to dismiss the claims, relying on English and California exclusive jurisdiction clauses in their terms of use.

Tsargrad argued that since the dispute involved an entity owned by a person subject to U.S. sanctions against Russia, the commercial court in Moscow should have exclusive jurisdiction over the case – despite the forum selection clauses in Google's terms of use.

ORDER

In a 5-page order handed down on 18 December 2020 which accepted all Tsargrad's arguments, judge Chadov from the Moscow Commercial Court denied Google's motions to dismiss.

The judge based much of his conclusions on a single expert witness statement offered by Tsargrad. In the statement, solicitors from the London office of a U.S. firm, Steptoe Johnson, explained that since Tsargrad's owner, Mr. Malofeev, was subject to personal U.S. sanctions, the firm could not accept instructions or receive payment from Tsargrad without special licenses from U.S. and U.K. sanctions regulators. Moreover, any violation of these rules would expose Steptoe Johnson's lawyers to criminal liability.

From this statement alone, the judge deduced that Tsargrad could not obtain qualified legal assistance in England and the U.S. He also found that Tsargrad could not produce the appearance of Mr. Malofeev, as a third party, in either England or the U.S. due to him being under a travel ban. All of this was taken to mean that the claimant was effectively denied access to justice in both jurisdictions. The judge noted that Tsagrad provided "exhaustive evidence" of its inability to receive competent representation and obtain an effective remedy before English and U.S. courts.

Since Tsargrad was being denied access to justice in both contractual forums, the judge held that it therefore had an option to commence proceedings in Russia, whose courts would then have exclusive jurisdiction over the dispute.

Google has already filed appeals against the order with the Ninth Commercial Court of Appeal, which is due to consider them this winter.

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COMMENTS

The outcome in *Tsargrad* demonstrates the low bar that a sanctioned entity needs to meet under the amended Commercial Procedure Code in order to persuade a Russian court that a forum selection clause is "inoperative" on the grounds that the sanctioned entity is being denied access to justice in the agreed forum. In practical terms, all that the sanctioned person may need to produce to show "denial of access to justice" is a statement from any law firm incorporated in the agreed forum that it cannot represent that person due to local rules on sanctions.

In this connection, it is perhaps revealing that the Moscow Commercial Court did not even attempt to analyse whether Tsargrad (or any other Russian entity subject to sanctions) could obtain adequate representation by instructing a *Russian law firm* – many of which proudly list their English- and U.S.-qualified counsel on their websites and presumably advise on English and U.S. law.

From the enforcement perspective, the new Russian rules on exclusive jurisdiction will give Russian claimants little by way of monetary recovery. It is quite likely that no final judgment or anti-suit injunction issued by a Russian court in breach of a foreign selection clause would be recognised or enforced abroad. However, when the sanctioned claimant's aim is to shield its own Russian assets or to put pressure on a multinational corporation present in Russia (which was the situation in *Tsargrad*), then the new rules may very well bite.

It is an open question whether Google's potential refusal to comply with a final judgment in Tsargrad will in turn trigger administrative action from Russia's media regulator Roskomnadzor. The dispute in Tsargrad may have wider implications in light of new Russian legislation which allows Roskomnadzor to block websites that remove or restrict content produced by Russian state-funded media companies.

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JURISDICTIONAL ENTANGLEMENTS: STATE COURTS AND ARBITRATION AGREEMENTS

Written by Alexander Zojer

In most cases, parties concluding an arbitration clause agree to submit their disputes to an arbitral tribunal instead of a state court. There are, however, instances where the parties' agreement is not straightforward. In a recent decision, the Austrian Supreme Court provided some clarification on the issue of so-called "optional" arbitration agreements and the state courts' competence to decide on jurisdictional matters in the context of arbitration agreements (docket no 3 Ob 127/20b).

THE CASE

The Claimant and the Respondent concluded a sales contract that contained both an arbitration agreement and a forum selection clause providing for jurisdiction of a Moscow state court. The Claimant believed the two jurisdiction clauses in the underlying contract were contradictory and therefore both invalid. Following this – misguided – conclusion, the Claimant filed a statement of claim against the (Austrian) Respondent with the Austrian court at the Respondent's seat.

The first instance court dismissed the claim in *limine litis*

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(i.e., before serving the statement of claim on the Respondent) due to a lack of jurisdiction. The second instance court confirmed the dismissal of the claim, holding that the inclusion of both an arbitration agreement and a choice of court clause results in an option to choose the preferred forum in case of a dispute (optional/facultative arbitration agreement) rather than in a reciprocal elimination of both dispute resolution clauses.

Unconvinced by the lower instance courts' reasonings, the Claimant filed an appeal with the Austrian Supreme Court, which was confronted with the following two legal issues: 1) was the first instance court authorized to dismiss the claim in *limine litis*; and 2) did the parties indeed conclude an optional arbitration agreement?

STATE COURTS' EXAMINATION OF JURISDICTION IN *LIMINE LITIS*

Until recently, it was disputed amongst Austrian scholars whether a state court is bound to reject a claim in *limine litis* when finding that it lacks jurisdiction due to a valid arbitration agreement, or whether the parties should be given the opportunity to deviate from the arbitration agreement (by one party filing a claim with state courts and the other party refraining from raising jurisdictional objections).

In confirming the first instance court's dismissal of the claim in *limine litis*, the Supreme Court's recent decision has put an end to this discussion.

The Supreme Court held that the relation between the jurisdiction of arbitral tribunals and state courts qualifies as a matter of (dispositive) jurisdiction *in rem* ("*prorogable sachliche Unzuständigkeit*").

Pursuant to Section 41 of the Austrian Act on Jurisdiction ("JN"), Austrian courts must assess their jurisdiction upon receipt of the statement of claim based on the information provided by the Claimant.

According to Section 584(1) of the Austrian Code of Civil Procedure ("ZPO"), "[a] *court before which an action is brought in a matter which is the subject of an arbitration agreement shall dismiss the claim unless the respondent enters an appearance on the merits of the dispute without raising jurisdictional objections* [...]"

Therefore, a state court can only dismiss a claim based on a lack of jurisdiction *in rem* due to a valid arbitration agreement 1) before serving the claim on the Respondent *or* – once the claim has been served – 2) upon jurisdictional objection of the Respondent.

Consequently, the Supreme Court found that by dismissing the claim already *in limine litis*, the first instance court has acted in accordance with the applicable procedural law.

OPTIONAL ARBITRATION AGREEMENT

The Supreme Court further confirmed the lower courts' opinion that the arbitration agreement and the choice of court clause contained in the underlying contract constitute alternatives rather than contradictions.

The Supreme Court held that an arbitration agreement can "coexist" with a choice of court clause in the same contract if the choice of court is not exclusive. However, the specific interplay between the dispute resolution clauses must be determined by means of interpretation on a case-by-case basis. In the case at hand, the Parties have neither agreed on the exclusive applicability of one of the two clauses nor on a mandatory recourse to one of the eligible fora (arbitration proceedings or proceedings before Russian courts). The Parties therefore have the right to choose between arbitration proceedings and proceedings before the Moscow state court. Notably, in a previous decision involving an arbitration agreement and a choice of court agreement included in the same contract (docket no 2 Ob 65/13t), the Supreme Court interpreted the dispute resolution clauses to the effect that the choice-of-court agreement only applies to cases in which state courts have jurisdiction despite a valid arbitration clause (for example, when issuing an interim injunction).

SOME ANSWERS, MORE QUESTIONS

When it comes to the intricate relation between state court and arbitration proceedings, it appears that resolving one issue gives rise to a series of follow-up questions. A state court decision on jurisdiction rendered prior to the initiation of arbitral proceedings, for example, might considerably impact the arbitral tribunal's competence-competence (i.e., the tribunal's competence to rule on its own jurisdiction). Is an arbitral tribunal bound by the court's decision? If so, is it bound directly via the decision's res judicata effect or, as some scholars argue, bound indirectly by putting a subsequent award contradicting the state court's decision on jurisdiction at risk of being set aside? Does the same reasoning apply to decisions made by non-Austrian courts?

It appears very likely that this will not be the Supreme Court's last decision on the allocation of jurisdiction between different dispute resolution bodies. After all, there are still plenty of complexities to untangle in the jurisdictional no man's land between state courts and arbitral tribunals.

Read the full decision here (in German).

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"NARROW" ARBITRATION CLAUSES INCLUDE DAMAGE CLAIMS BASED ON THE ABUSE OF A DOMINANT POSITION (ART 102 TFEU)

ZEILER FLOYD ZADKOVICH SECURES LANDMARK DECISION BEFORE THE AUSTRIAN SUPREME COURT

THE ISSUE

Often, arbitration agreements only state that disputes arising "under" or "out of" a certain contract shall be settled by arbitration and omit the words "in relation to" or "connected". In literature, these are called narrow arbitration agreements.

Recently, Zeiler Floyd Zadkovich represented the claimant in an ICC arbitration, where the arbitral tribunal was confronted with the following issue: Does a narrow arbitration agreement extend to a damage claim based on the assertion that the underlying contract contains unfavourable contract terms, which the claimant would not have accepted had the respondent not abused a dominant position in the sense of Art 102 TFEU when concluding the contract?

The arbitral tribunal held that this was not the case and declined its jurisdiction. The tribunal reasoned that a damage claim would only be covered by a narrow arbitration agreement when a breach of contract is alleged. By contrast, a behaviour of the respondent outside the contents of the contract leading to damages, e.g., an abuse of dominance when concluding the contract, was not covered.

DECISION OF THE SUPREME COURT

Subsequently, the claimant brought a setting aside claim against the arbitral award before the Austrian Supreme Court and asserted that the arbitral tribunal had wrongly denied its jurisdiction. The claimant relied on the following three arguments:

- Generally, the conclusion of an arbitration agreement shows the parties' intention to have all their disputes covered by this agreement and to avoid a split jurisdiction, i.e., to have to argue some parts of a commercial dispute before an arbitral tribunal and other parts before a state court.
- Regularly, parties do not differentiate between a wide and a narrow arbitration agreement. Ordinary businessmen would be surprised at the distinctions drawn in the cases and the time taken up by argument in debating that a case would fall within one wide arbitration agreement but not within a remarkably similar narrow arbitration agreement.
- In a very similar case, namely C-595/17 Apple Sales International et al. v. MJA, the European Court of Justice held that a narrow jurisdiction clause designating a specific state court also encompassed damage claims based on Art 102 TFEU.

The Supreme Court followed the claimant's arguments. It held that arbitration agreements must, as a rule, be interpreted broadly and expansively. Pursuant to the Supreme Court, parties to an arbitration agreement typically intend to bring all disputes arising out of their legal relationship to arbitration and not also to court litigation. Therefore, in a case with two possible interpretations of an arbitration agreement, the one favouring the agreement's applicability

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should be given preference. Based on these considerations, the Supreme Court held that the arbitral tribunal had wrongly declined its jurisdiction over the claimant's damage claim based on Art 102 TFEU. The Supreme Court also noted that its decision stands in line with the jurisdiction of the European Court of Justice, in the case mentioned above, as there is no discernible difference in interpreting the scope of an arbitration agreement or a jurisdiction clause.

The judgment of the Austrian Supreme Court is a landmark decision. It not only clarifies that damage claims based on an abuse of dominance pursuant to Art 102 TFEU fall within the scope of an arbitration agreement, but also, on a more general basis, that arbitration agreements must be interpreted broadly and expansively to avoid split jurisdiction between an arbitral tribunal and a state court. This highlights the arbitration-friendly approach of the Austrian Supreme Court and confirms that Austria is an excellent place for international arbitration.

Read the full decision here (in German).

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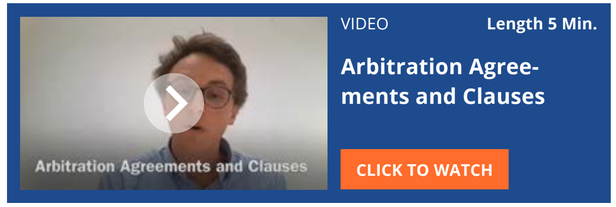

THE CIRCUIT SPLIT ON THE APPLICATION OF INFINITE ARBITRATION CLAUSES

Written by Andrea de la Brena

INTRODUCTION

Arbitration is built upon various pillars. Commercial arbitration is built on consent. In the United States, the Federal Arbitration Act ("FAA") contains a pro-arbitration approach to interpret arbitration agreements in a favorable manner. *Volt Info. Scis. v. Stanford Univ.,* 489 U.S. 475, 476 (1989). However, how far could this interpretation stretch without affecting the parties' true meeting of the minds?

During the last ten years, the use of arbitration clauses in consumer contracts has increased considerably. Consumer contracts' terms and conditions are commonly not subject to negotiation between the parties. Rather, they are drafted by the service provider. The consumer simply adheres to said terms and conditions if they want to benefit from the service. Despite this adherence, the incorporation of arbitration clauses in consumer contracts has been generally accepted. However, the scope of arbitration clauses in consumer contracts has become progressively wider to the point that their enforceability has created a Circuit Court split in U.S. courts (e.g., *Mey v. DIRECTV, LLC* and *Revitch v. DIRECTV, LLC*).

1. "INFINITE CLAUSES"

Traditionally, broad arbitration clauses referred to "any disputes between the parties arising out of or related to the contract." However, arbitration clauses in certain consumer contracts have gone a step further. Now, it is common to come across clauses referring to "any disputes between the parties, including their affiliates." David Horton has named these "infinite clauses." Horton identifies three main distinctive features of these clauses. First, they cover any disputes between the parties, even though the dispute does not relate to the underlying contract. Second, they bind the consumer with its counterparty in the underlying contract and any other related party to said counterparty. Finally, they do not have an end date because they survive the termination of the underlying contract.

2. THE U.S. CIRCUIT COURT SPLIT

2.1. *MEY V. DIRECTV, LLC*

The first case that caused a U.S. Circuit Court split was *Mey v. DIRECTV, LLC*, 971 F.3d 284, 286 (4th Cir. 2020). Mey brought suit against DIRECTV, LLC and others, for allegedly violating the Telephone Consumer Protection Act. Mey stated DIRECTV called to advertise their products, despite being on the National Do Not Call Registry. DIRECTV moved to compel arbitration, arguing Mey's agreement with AT&T Mobility LLC, a DIRECTV affiliate, included an arbitration clause in the contract.

Years before, Mey entered in a customer agreement with AT&T Mobility, which included, in the relevant part, the following arbitration agreement: "AT&T and you agree to arbitrate **all disputes** and claims between us. (…) References to 'AT&T,' 'you,' and 'us' include our respective subsidiaries,

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affiliates, agents, employees, predecessors in interest, successors, and assigns (…)." (emphasis added).

The court determined that there was a valid agreement and the scope of the dispute fell within the agreement, thus they remanded the proceedings to arbitration.

The dissenting judge disagreed with the majority's conclusions. According to her, no reasonable person would deem "affiliate" to mean "[a]ny and all future corporate cousins, as yet unidentifiable (…)." She emphasized that the U.S. Supreme Court has made clear that arbitration is a "matter of consent, not coercion." She concluded that the decision "distorts the bedrock notion that arbitration is a matter of consent (…)."

2.2. *REVITCH V. DIRECTV, LLC*

A short time later, a substantially similar dispute arose between Jeremy Revitch and DIRECTV, LLC. However, in this instance, the court decided that DIRECTV may not invoke the arbitration agreement between Revitch and AT&T Mobility to compel arbitration. R*evitch v. DIRECTV, LLC*, 977 F.3d 713, 718 (9th Cir. 2020).

The Court concluded there was no valid arbitration agreement between Revitch and DIRECTV, LLC. The Court based its analysis on state contract law; in particular, it relied on the absurd-results canon. According to the court, when interpreting a contract one must "[l]ook to the reasonable expectation of the parties at the time of contract." Hence, the Court decided that when Revitch signed his mobile services agreement with AT&T Mobility, he could not reasonably have expected that he would be forced to arbitrate an unrelated dispute with DIRECTV, a satellite television company, which at the time was not affiliate of AT&T Mobility.

Furthermore, the Court rejected DIRECTV's argument that the FAA provides for a pro-arbitration principle, which requires ambiguities concerning an arbitration agreement, be resolved in favor of arbitration. The Court noted that the principle is intended to "make arbitration agreements as enforceable as other contracts, but not more so." (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)*). The Court also held that the principle applies to interpretation of the scope of the agreement but not to its formation.

The concurring judge agreed with the Court's denial of the motion to compel arbitration but on the basis that the dispute at hand did not come within the FAA. Section 2 of the FAA provides the possibility to submit to arbitration disputes "arising out" of the underlying contract. According to the concurring judge, by negative implication, the FAA does not require the enforcement of an arbitration clause to settle a dispute that does not arise out of the contract or transaction.

The dissenting judge disagreed with the majority's view. According to him, there was no debate between the parties on the existence and validity of the arbitration agreement; rather, the matter was whether the dispute fell within the scope of the arbitration clause. He maintained that the text of the clause clearly referred to AT&T's affiliates, without specifying a temporal limitation of this affiliation. Thus, he believed the dispute fell within the scope of the clause.

3. OPINION/SUMMARY OF CONCLUSIONS

In the U.S., there are a wide variety of consumer agreements which contain infinite clauses. These agreements have been concluded by thousands of consumers. One possible reason for this situation, could be that by including arbitration clauses, service providers may avoid massive class actions because the Supreme Court will not uphold class arbitration in the absence of an arbitration clause expressly providing for class arbitration. *Lamps Plus, Inc. v. Varela,* 139 S.Ct. 1407, 1418 (2019).

However, the enforceability of infinite clauses to disputes, beyond those related to the underlying contract or against parties which were unknown at the time of the agreement, remains uncertain. The *Mey and Revitch* decisions demonstrate two possible approaches courts might take when dealing with similar claims. There are courts which might grant supremacy to the text of the arbitration clause and the pro-arbitration approach in the event of ambiguities in said text. However, other courts might find consent cannot stretch to cover consequences or situations that the consumer could not reasonably expect when he/she entered into the arbitration agreement. It is expected that, in the future, a Supreme Court decision will be needed to solve the split.

In any event, to improve chances of a court compelling arbitration, drafters must be sure to specify, among other things, whether the agreement explicitly covers past, present, or future affiliates and the nature of the disputes which the agreement shall cover.

The aforementioned cases should also encourage consumers to read all contracts carefully before signing them because their terms and conditions may imply broad and unrelated consequences.

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ENKA V CHUBB [2020] UKSC 38 – THE U.K. SUPREME COURT SETTLES THE CONTROVERSY ON THE LAW GOVERNING ARBITRATION AGREEMENTS

Written by Philip Vagin

In its recent judgment in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, the U.K. Supreme Court set out the rules on determining which law governs an arbitration agreement.

The Court held that if the parties have not specifically chosen the law for the arbitration clause, but the main container contract includes a choice-of-law provision, then the law selected for the main contract will also apply to the clause.

However, where no choice of law can be discerned – either for the main contract or for the arbitration clause – the law of the seat of arbitration will apply to the clause. On the facts, in *Enka*, the parties failed to agree on the law for the container contract and for the arbitration clause. Thus, English law applied by default as the law of the seat.

BACKGROUND

The underlying dispute arose out the construction of the Berezovskaya power plant in Russia. Enka was a subcontractor engaged by the Russian head contractor, Energoproekt. The very long and detailed contract between the two companies (almost 500 pages) provided for all disputes to be resolved by ICC arbitration in London. Surprisingly, it did not contain a choice-of-law clause. Energoproekt later assigned the contract to the plant's owner, Unipro.

Chubb provided fire insurance for Unipro. After a fire damaged the plant, Chubb paid Unipro and became subrogated to its rights under the contract with Enka. However, instead of commencing arbitration in London, the insurers sued Enka and other subcontractors in the Moscow Commercial Court in Russia. Chubb argued that Russian law applied to the main contract and thus to the arbitration clause. The Moscow Commercial Court found that under Russian law, Chubb's subrogation claims sound in tort and are not covered by the arbitration agreement.

In turn, Enka commenced arbitration in England and sought an antisuit injunction in the English High Court. Enka argued that the arbitration clause was governed by English law as the law of the seat and covered Chubb's tort claims.

Andrew Baker J. declined to issue an injunction. He found that the Russian court was a more appropriate forum to determine the applicable law. The Court of Appeal reversed and granted the injunction. It ruled that English law applied to the clause, which thus extended to tort claims. Chubb appealed to the Supreme Court.

JUDGMENT

The majority of the Court (Lords Hamblen, Leggatt, and Kerr) dismissed the insurers' appeal.

Their Lordships reasoned that the question as to which law

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governs an arbitration agreement must be determined under English common law as *lex fori.* Under English law, the law expressly or impliedly chosen by the parties to govern the arbitration clause will apply. However, where no choice can be discerned through interpretation, the law of the seat applies by default as most closely connected to the arbitration agreement.

Where the main contract contains a choice-of-law provision, then it is presumed that the parties intended this single chosen law to also govern the arbitration agreement, and the principle of separability is of little assistance. The law of the container contract is presumed to apply even if the parties selected a different law of the seat. This provides commercial certainty and avoids the complexities of splitting the contract into several parts governed by different laws. In a rare case where the law of the main contract would invalidate the arbitration clause, the law of seat may still apply – this is the so-called "validation principle".

But the position is different if the parties have not chosen a law for the container contract. In this case, the law of the seat will apply to the arbitration clause as most closely connected with it. This default rule is clear and consistent with the approach in the New York Convention and the Model Law.

On the facts in *Enka*, the majority found that the parties simply did not agree on the law for the arbitration clause. Even though under Rome I the main contract was governed by Russian law, it did not contain a choice-of-law clause. Other indications in the main contract were inconclusive. Thus, the majority found that English law applied as the law of the seat.

The minority (Lords Burrows and Sales) dissented on both the result and the applicable legal standard.

On the facts, their Lordships found that because of indications in the main contract, the parties impliedly chose Russian law to govern it and therefore Russian law also extended to the arbitration clause.

However, the minority went on to say that even if there had been no implied choice of Russian law, this law would still have applied. In their view, there was no need to impose a default rule that, absent parties' choice, the arbitration agreement has its closest connection with the seat and is therefore governed by the law of the seat. This approach would force an inconvenient division of the laws governing different parts of the contract.

Despite the 3-2 split among their Lordships, the long-awaited decision in *Enka* provides welcome clarity on which law applies to the arbitration agreement in a variety of scenarios and, quite importantly for any practitioner, contains a handy summary of applicable rules (See para. 170 of the judgment).

It should be noted that the dispute in *Enka* will likely receive more Supreme Court-quality treatment in the future. First, among the arbitrators who sat on the ICC tribunal in the arbitration commenced by Enka in London were two former U.K. Supreme Court justices – Lords Hoffmann and Mance.

Second, despite the antisuit injunction being upheld in England, Chubb's claims in Russia are still going through the Russian court system (case A40-131686/2019). As of today, the case has been decided by the Ninth Commercial Court of Appeal in Moscow, which upheld the decision at first instance, dismissing Chubb's claims in their entirety. Given the amounts in dispute, the case is likely to land before a three-strong panel of the Russian Supreme Court this year. Sadly, the interesting question as to whether subrogation claims framed in tort are covered by the standard ICC arbitration clause, will not be considered – Enka voluntarily withdrew its appeal after the court of first instance found against Chubb on the merits.

Read the full decision here.

For additional information and queries, please contact philip.vagin@zeilerfloydzad.com

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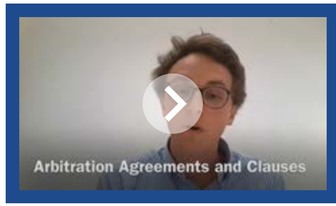

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FROM GULF OF MEXICO TO UK SUPREME COURT

FALLOUT FROM DEEPWATER HORIZON LITIGATION BRINGS NEWS ON ARBITRATOR DISCLOSURE REQUIREMENTS AND MULTIPLE APPOINTMENTS IN *HALLIBURTON V. CHUBB*

Written by Jonas Patzwall

Much has been said about the UK Supreme Court's impactful decision in *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48 (November 27, 2020). The Court clarified arbitrators' disclosure duties in situations with multiple appointments of the same arbitrator in different arbitrations involving the same or overlapping facts or subject matter. The decision caused a buzz in the world of commercial arbitration clarifying the position under the UK Arbitration Act of 1996 ("Arbitration Act"). Below, we look at the industry practices at display forming the backdrop for the Court's ruling, and take a brief glance at the US counterpart (or rather best match) to removal under the Federal Arbitration Act of 1925 ("FAA").

BACKGROUND

The dispute in *Chubb* originated from the Deepwater Horizon litigation following the well-known drilling rig incident in the Gulf of Mexico in April 2010. Halliburton was a subcontractor engaged by BP. The incident gave rise to claims against Transocean, BP, and Halliburton. Halliburton settled the claims against it for approximately US$1.1 billion and sought to recover from Chubb Bermuda Insurance Ltd. ("Chubb"), its insurer. Chubb rejected Halliburton's claims (based on the settlement) as unreasonable.

The liability policy held by Halliburton contained an arbitration clause providing for disputes to be resolved by three arbitrators in London on an *ad hoc* basis. In 2015, Halliburton commenced arbitration against Chubb. After a bout regarding appointment of the third arbitrator, the English High Court appointed Kenneth Rokison QC (an individual originally proposed by Chubb). Prior to this appointment Rokison disclosed he was acting as arbitrator in two pending proceedings involving Chubb. Later in 2015, Rokison accepted another appointment by Chubb in an arbitration commenced by Transocean in a similar context. A year later, Rokison accepted appointment in a third matter with Transocean seeking recovery from a third-party insurer. In 2016, Halliburton discovered Rokison's later appointments, and the parties disagreed over whether Rokison should recuse himself or resign. Halliburton applied to the English High Court for an order under Section 24(1)(a) of the Arbitration Act that Rokison be removed as arbitrator. The order was denied.

THE DECISION

The UK Supreme Court affirmed the prior ruling and declined to order the removal. Although the Court held that Rokison had a duty to disclose all his appointments, the Court concluded that as at the date of the hearing at issue, a fair-minded and informed observer would not conclude that circumstances existed which gave rise to justifiable doubts as to Rokison's impartiality. The Court's decision looked closely at arbitral fora and their rules. In short, if arbitral bodies would like to restrict or expand what proceedings its members might be appointed for, the associations may do so keeping appropriate rules and procedures on their books. The Court's analysis considered a couple of major points:

First, the duty of impartiality derived from Section 33 of the Arbitration Act which requires a tribunal to "act fairly and impartially as between the parties." In considering an allegation of apparent bias in an English arbitration, the Court applies an *objective* test of whether a fair-minded and informed observer, having regard to the particular characteristics of international arbitration, would conclude that there was a real possibility that the tribunal was biased. This takes into consideration, among other things, the private nature of arbitration, an arbitrator's financial interest, and the fact that unlike court decisions, an arbitrator is not usually subject to appeals on issues of fact. Importantly, an arbitrator's failure to disclose relevant matters is a factor for the fair-minded and informed observer to take into consideration in assessing the possibility of bias.

Second, the duty of impartiality is framed by a duty to disclose. In that, the Court agreed with submissions by several interveners (comparable to *amici* in US legal parlance), the ICC, LCIA, and CIArb. The Court had permitted written and oral submissions from a total of five arbitral bodies: the London Court of International Arbitration ("LCIA"), the International Chamber of Commerce ("ICC"), the Chartered Institute of Arbitrators ("CIArb"), the Grain and Feed Trade Association ("GAFTA"), and the London Maritime Arbitrators Association ("LMAA").

The Court confirmed that the disclosure obligation is not just good practice but a legal duty under English law. The duty of disclosure therefore requires an arbitrator to disclose matters which might reasonably give rise to justifiable doubts as to their partiality. In a sense, disclosure is the door to challenges based in partiality – what needs to be disclosed is heavily influenced by the practices in the re-

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spective forum. Unlike the rules of many arbitral bodies, an arbitrator's duty of disclosure under English law is judged by an objective standard. In assessing whether an arbitrator has failed the duty to disclose, the fair-minded and informed observer considers the facts and circumstances at the time when the duty to make disclosure arose.

Although the legal duty of disclosure applies equally to all English arbitrations, including GAFTA and LMAA arbitrations (which also appeared as interveners), the Court's decision suggests that it would not typically be necessary for arbitrators in such arbitrations to disclose common or overlapping appointments because the practices of GAFTA and the LMAA are such that multiple appointments are not generally perceived as matters raising doubts about an arbitrator's impartiality.

PRACTICAL CONSIDERATIONS

The Court considered submissions from the parties and interveners and recognized that there was a variety of different practices in relation to the disclosure of multiple appointments. Importantly, what is appropriate for arbitrations under institutional rules such as those of the ICC and LCIA, may differ from the practice in GAFTA and LMAA arbitrations and the industries they serve. The ICC, CIArb, and LCIA seemed to agree that as a general rule, parties are taken to implicitly consent to the disclosure of limited information regarding their arbitrations. Unless the parties to an arbitration have agreed to prohibit disclosure, an arbitrator may for that reason, without express consent, disclose information such as the existence of a current or a past arbitration involving a common party. In contrast, GAFTA and LMAA arbitrations are more permissive regarding the involvement of arbitrators in multiple arbitrations which would not generally call into question an arbitrator's impartiality. Further, in the absence of a requirement to disclose multiple appointments, the question of the balance between the duty of disclosure and the duty of privacy and confidentiality does not arise.

In the same vein, whether an arbitrator's acceptance of multiple appointments involving a common party and the same or overlapping facts or subject matter would give rise to the appearance of bias is, in the eyes of the Court, a question of the custom and practice in the relevant field of arbitration. This, too, is an objective test. The fair-minded and informed observer considers differences between arbitrations and the rules in the respective arbitral bodies, those (such as ICC and LCIA arbitrations) where there is an established expectation of disclosure of other relevant appointments and arbitrations, and those (such as GAFTA and LMAA arbitrations) where, as a result of custom and practice in the industry, expectations of the kind would not normally arise.

The same would apply to the question of whether an arbitrator may disclose their acceptance of appointments in multiple proceedings concerning the same or overlapping facts or subject matter only to the common party. This, too, will depend on the custom and practice in the relevant field. If disclosure is required, the acceptance of the appointments and failure to disclose the appointments taken in combination may give rise to the appearance of bias.

COMPARISON TO REMOVAL OF ARBITRATOR UNDER FAA

The FAA provides that a US district court may vacate an arbitration award, among other reasons, "where there was evident partiality or corruption in the arbitrators." 9 U.S.C. §10(a). This is not removal power such as under Section 24 of the Arbitration Act, but the power to vacate an award. Accordingly, US courts are generally taking a hands-off approach to removal of arbitrators during the pendency of the proceeding. See, e.g., *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476 (5th Cir. 2002).

Looking briefly to the disclosure and disqualification sections from the Rules of the Society of Maritime Arbitrators ("SMA"), this structure becomes more apparent. There it is stated:

> *Section 8. Disqualification*
> *No person shall serve [...] who has [or had] a financial or personal interest in the outcome [...] [or] acquired from an interested source detailed prior knowledge of the matter in dispute.*
>
> *Section 9. Disclosure by Arbitrators of Disqualifying Circumstances*
> *Prior to the first hearing or initial submissions, all Arbitrators are required to disclose any circumstance which could impair their ability to render an unbiased award [...] if the challenged Arbitrator(s) consider(s) the challenge to be without merit and declines to withdraw, the arbitration shall proceed with due reservation of the challenger's right to seek recourse from the appropriate United States District Court after the Award has been issued.*

In short, a bias or disclosure-based court challenge usually starts post-award as far as US courts are concerned. However, US district courts apply different standards of "evident partiality," (under Section 10 of the FAA) depending on the circuit in which they are located. The US federal circuit courts are split as to which is the correct standard of "evident partiality." The Eighth, Eleventh and Ninth Circuits have adopted similar requirements requiring something akin to a "*reasonable impression*" of bias. See *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130, 1138 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 164, 207 L. Ed. 2d 1100 (2020); see also, e.g.,

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Gianelli Money Purchase Plan and Trust v. ADM Inv. Services, Inc., 146 F.3d 1309, 1312–13 (11th Cir. 1998); recent cases from the Eighth Circuit have been less clear indicating a possible change but have not yet overruled cases applying the "reasonable impression" standard, see *Ploetz v. Morgan Stanley Smith Barney LLC*, 894 F.3d 894, 898 (8th Cir. 2018).

The First, Second, Third, Fourth, Fifth, and Sixth Circuits seem to have adopted standards based on precedent from the Second Circuit looking to whether a "reasonable person would *have to conclude*" there was bias. See *Morelite Construction Corp. v. N.Y.C. District Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984); *JCI Commc'ns, Inc. v. Int'l Bhd. of Elec. Workers, Local 103*, 324 F.3d 42, 51 (1st Cir. 2003); *Freeman v. Pittsburgh Glass Works, LLC,* 709 F.3d 240, 252 (3d Cir. 2013); *Three S Del., Inc. v. DataQuick Data Sys.*, 492 F.3d 520, 530 (4th Cir. 2007); *Cooper v. WestEnd Capital Mgmt., LLC*, 832 F.3d 534, 545 (5th Cir. 2016); *Nationwide Mut. Ins. v. Home Ins.,* 429 F.3d 640, 644-45 (6th Cir. 2005).

Notably, on June 29, 2020, the US Supreme Court declined to grant *certiorari* in *Monster Energy Co. v. City Beverages LLC,* 940 F.3d 1130 (9th Cir. 2019), *cert. denied*, No. 19-1333 (U.S. June 29, 2020) that would have allowed the Court to clarify the standard for vacating awards when arbitrators fail to disclose facts perceived to impact partiality.

A comparison of the standards in US and UK should first acknowledge that the context of the evident partiality standard is that of vacatur of an award, not removal of an arbitrator in an ongoing proceeding. It appears logical that there should be a higher standard for vacating an award once the proceedings have concluded compared to a challenge to an arbitrator during the course of arbitration. On the flipside, the parties in arbitrations under Chapter 1 of the FAA appear to depend more on the arbitral bodies effective means of policing and enforcing disqualification rules for its arbitrators.

With that thought in mind, the "have to conclude" standard clearly sets the higher bar compared to the "reasonable impression" test. When comparing the tests themselves to the UK counterpart (which contemplates an objective observer of the proceedings in fair mind that "would conclude" there was bias) it would appear the UK test is more akin to the "reasonable impression" test. However, the stakes are also different in the UK removal proceeding that allows courts to remove pre-award.

Finally, from a US perspective, *Monster Energy* is significant, because it underscores the need to understand what arbitrator disclosures are required, how repeat appointments are treated, and how the arbitral body enforces its own rules. This is particularly important in US districts where the "reasonable impression" test is used. To that end, choosing arbitral seats for appropriate reasons arguably carries more weight in the US than in the UK where the primary determinative appears to be the applicable arbitral rules. It should be noted that US state laws are not considered in this.

SUMMARY

Appointing the same arbitrator in different arbitration proceedings is a common practice in some industries under the rules/practices of certain institutional arbitral bodies, including shipping and commodities trading. However, such appointments are not the norm under other international arbitral bodies such as ICC arbitration. There is no one-size-fits-all answer as to what is proper or improper. This depends on the law that allows avenues to challenge appointment or awards as well as the practices of the arbitral bodies and the agreement of the parties.

For English arbitrations post-*Chubb*, the approach and the requirements can and will require careful consideration of the custom and practice in the relevant industry. What may work for one arbitration may not apply with respect to another. We will follow with particular interest how different arbitral bodies continue to address questions of how to balance disclosure and duties of impartiality, privacy, and confidentiality. It can be expected that private entities and institutions will seek to improve and clarify their agreements and rules to specify the required extent of disclosures.

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THE SAGA OF *HENRY SCHEIN, INC. V. ARCHER AND WHITE SALES, INC.*

Written by Innhwa Kwon

THE FACTS AND PROCEDURAL HISTORY

Back in 2012, Archer and White Sales, Inc. ("Archer"), a small dental distribution business, filed suit against several dental equipment manufacturers including Henry Schein, Inc. ("Schein") for damages, along with a request for injunctive relief. Schein moved to compel arbitration based on the distribution agreements, which provided that "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief[…]) shall be resolved by binding arbitration[…]". Archer argued that its inclusion of request for injunctive relief should send the entire dispute to court.

A magistrate judge initially compelled arbitration and ruled to stay the litigation, as the question of whether the carve-out clause applies to Archer's request should be decided by the arbitrator. The District Court, however, sided with Archer and vacated the magistrate judge's order and denied Schein's motion to compel arbitration. The District Court interpreted the carve-out in the arbitration agreement ("except for actions seeking injunctive relief") to mean that the inclusion of injunctive relief request entitled Archer to a jury trial. Schein appealed, and the Court of Appeals for the Fifth Circuit affirmed, noting that "the argument that the claim at hand is within the scope of the arbitration agreement is 'wholly groundless'" (an exception to the gateway question, decided by the arbitrator, once delegated).

SCOTUS STRUCK DOWN THE "WHOLLY GROUNDLESS" EXCEPTION

In March 2018, Schein filed a petition for a writ of certiorari with **SCOTUS**, asking whether this "wholly groundless" exception is valid under the Federal Arbitration Act (FAA). In its unanimous opinion, the Supreme Court ruled that the courts must honor a clear and unmistakable delegation of arbitrability question to an arbitrator and may not themselves weigh the merits of the arbitrability question. That is, the "wholly groundless" exception to arbitrability is not consistent with the FAA. SCOTUS reasoned that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract". The Court remanded the case to the Fifth Circuit to address the question whether the contract at issue delegated the threshold question of arbitrability to an arbitrator. Read the full decision here (*Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. (2019)*).

On remand, the Fifth Circuit ruled that an arbitration agreement with carve-outs does not clearly and unmistakably delegate the question of arbitrability to an arbitrator for disputes that fall within the exception, and refused to compel arbitration. Turning to the merits of the arbitrability question, the Court found that Archer's action was "seeking injunctive relief" under the carve-out provision, and thus exempt from arbitration.

SCOTUS DISMISSED CERTIORARI

Again, Schein petitioned for a writ of certiorari with SCOTUS, this time asking whether a carve-out provision negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator. While SCOTUS granted certiorari and heard oral argument, SCOTUS revoked its decision to review this case and issued a one-page per curiam decision to dismiss the writ of certiorari "as improvidently granted". Read the decision here (*Henry Schein, Inc. v. Archer and White Sales, Inc., 592 U.S. (2021)*).

REMAINING QUESTIONS

The dismissal by SCOTUS does not provide clarity in how a delegation of arbitrability question to an arbitrator can remain "clear and unmistakable" when there is a carve-out provision exempting certain claims from recourse to arbitration. Further, it is still debated if an incorporation of arbitral rules by arbitral institutes would qualify for "clear and unmistakable" delegation.

Costing the parties nearly a decade, we can hope such jurisdictional battle will serve as a good reminder to carefully conclude arbitration agreements, especially when carve-out is involved.

For additional information and queries, please contact innhwa.kwon@zeilerfloydzad.com

Additional content on this topic:

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NEWS & EVENTS

TEAM

| LONDON

Our London office had a busy April, with two new joiners as senior associates!

First to join is Howard Quinlivan, an England & Wales qualified Solicitor Advocate, with a practice covering all aspects of the marine world from loss of life and personal injury in the shipping, yachting and fishing communities to other contractual disputes, collisions and liabilities in the leisure craft and commercial sector.

Second is Richard Murray, also an England & Wales qualified Solicitor Advocate, with a broad international litigation practice focused on marine insurance, major casualty handling, commercial shipping, and extensive experience of running high value claims before the English Courts, London Maritime Arbitration (LMAA) tribunals and other specialist proceedings.

EVENTS

| JUNE

Disputes for Tea | Shipping
With Timothy S. McGovern and Luke Zadkovich.
June 2021 - details coming soon

| SEPTEMBER

Disputes for Tea | Energy
"Energy Disputes: Spotlight on LNG"
Hosted by Damon Thompson and Lisa Beisteiner.
Thursday, 23 September 2021

| NOVEMBER

Disputes for Breakfast | Intellectual Property
"The Human Factor – Creation, Ownership and Infringement of IP Rights in the Age of AI"
With Alexander Zojer and Lukas Hutter.
Thursday, 18 November 2021

| DECEMBER

Disputes for Tea | Litigation
"US Class Action and European Representative Action compared"
With Edward Floyd and Alfred Siwy.
Thursday, 9 December 2021

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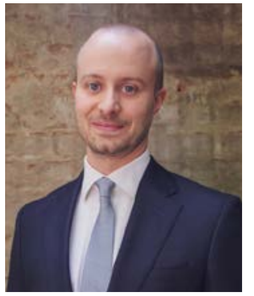

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