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WHY THEY ARE HERE TO STAY IN CONSTRUCTION AND ENGINEERING

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CASE NOTE
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THE Resolver

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Winter 2023 ciarb.org

Under the microscope

THE INTERPLAY BETWEEN ARBITRATION AND MEDIATION IN THE NEW YORK AND SINGAPORE CONVENTIONS

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Need for relevance

Those who know me from my five years as Chair of the Board of Trustees won't be surprised to hear me say that I intend to approach my new role as your President with what I think I can describe as my trademark enthusiasm.

I am also looking forward to seeing the governance review that resulted in the changes to our Charter, which received the King's assent earlier this year, being put into action by our new Trustees. I met them at our November Board meeting. They come from varied backgrounds, geographical locations and bring much-needed skills to enhance the value we offer you, our members. I am proud to say that I see the review as my legacy.

I was also, of course, a Trustee myself for eight years, and during that time I was part of significant change and transformation at Ciarb. If there was one principle, one idea, that guided me during those years, it was relevance.

Several key areas of work contribute to Ciarb's increased relevance. Our work to reform governance will make Ciarb fit for purpose in the years ahead. Our three-year strategy will soon be revised to ensure Ciarb is aligned to present and future needs. Our ongoing work to improve our financial and IT systems will ensure we make the most of current technology to better serve our members.

Now that I have the honour of being your President, I will do everything within my power to ensure that we are and continue to be relevant to you

And now that I have the honour of being your President, I will do everything within my power to ensure that we are and continue to be relevant to you, our growing corpus of members. I know that our education, training and thought leadership must always be perceived as relevant to you not only now, but also to future ADR neutrals. And those who use our services also need to feel we are relevant to them and understand how we can add value to their lives and livelihoods.

Jonathan Wood FCIArb, President, Ciarb

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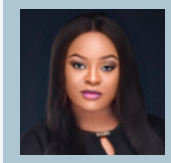

Nwamara Inegbenoise MCIArb
CEDR accredited mediator; Principal ADR Consultant, Noise & Blue, Nigeria

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The opener

Churchill judgment allows courts to order mediation

In a milestone for mediation, the highly anticipated *Churchill* judgment overturns the decision in *Halsey*, confirming it is not a breach of human rights to order parties to mediate. The Civil Mediation Council (CMC), Ciarb and the Centre for Effective Dispute Resolution (CEDR) joined forces to intervene in the case, arguing strongly for this outcome.

Halsey suggested that whilst the court may encourage parties to engage in private dispute resolution, ordering them to mediate would breach Article 6 of the European Convention on Human Rights, the right to a fair trial.

Most commentators considered *Halsey* bad law because even if the court orders parties to mediate, this does not force them to settle and they (unless agreed otherwise) continue to have access to the courts. Also, many considered the comments made by Dyson LJ in the *Halsey v Milton Keynes General NHS Trust (2004) 1 WLR 3002* case on this point to be *obiter*, i.e. persuasive but not binding on the lower courts.

The decision in *Churchill v Merthyr Tydfil Borough Council* clarifies that the courts are able to integrate mediation, and other forms of dispute resolution, into the court process and may, where appropriate, stay proceedings, or order mediation or other forms of dispute resolution.

Chair of the CMC Rebecca Clark said: "We are delighted by this judgment in which the Court has expressly acknowledged the benefits of mediation for parties who want to resolve their differences cheaply and quickly. Mediation is now where it should be – firmly embedded within the civil justice system."

Ciarb CEO Catherine Dixon MCIArb said: "This judgment confirms that integrating mediation into the civil justice system does not breach human rights. Private dispute resolution is an integral part of an effective justice system. Providing parties with access to mediation and other dispute resolution processes creates more opportunities for parties to reach a resolution appropriate for them."

JOHN WREFORD/SHUTTERSTOCK

"This judgment confirms that integrating mediation into the civil justice system does not breach human rights"

CEDR Chief Executive James South hailed the judgment as "a new era of positive change. When justice is looked at from the perspective of the disputants, they want their dispute resolved in a cost-effective and fair way, ensuring they have the opportunity to be heard and that resolution meets their commercial and personal needs. Mediation can provide this, and this judgment gives the courts the tools to actively encourage settlement by allowing courts for the first time to order parties to mediate if, in their discretion, they consider it reasonable to do so."

Ciarb has its say at UNCITRAL

At the latest session of UNCITRAL Working Group III, discussion focused on a proposed advisory centre's service scope and the eligibility of non-member states and non-state members, especially micro, small and medium enterprises (MSMEs) to access its services.

Ciarb emphasised the link between MSMEs' access to the centre's services and Sustainable Development Goal 16: supporting the rule of law and access to justice. It also highlighted the need for clear vetting criteria and the mutual benefits of contracting states sponsoring MSMEs' participation.

Those benefits include extending access to justice and promoting a general understanding of dispute resolution mechanisms. The role of the secretariat, the governing body and the executive director were also discussed. The question of which states would fund the centre was also posed.

60-SECOND INTERVIEW

Louise Barrington FCIArb

Louise Barrington FCIArb is an independent arbitrator and mediator with more than 15 years' experience resolving complex disputes in various sectors and jurisdictions

Tell us a bit about yourself

My arbitration eureka moment came in a lecture by Professor Gaillard in the DEA programme at Panthéon-Sorbonne, in the 1980s, where I was taking a break from Ontario law practice to perfect my French and expand my horizons. International arbitration seemed the perfect career I'd been seeking, even though there were no actual arbitration courses in the universities back then. Instead, I learned from top-echelon male arbitrators who were happy to share their war stories and wisdom with me, never dreaming I might actually want to use them.

In Hong Kong to open ICC Asia in 1997, one of my tasks was to promote ICC arbitration in countries from Pakistan to New Zealand. A dream job, except that it wasn't actually doing arbitration, just talking about it. Once ICC Asia was established, I joined the faculty of CityU to teach ADR and take appointments in my spare time. Then, two years directing King's College London's MSc in Construction Law and Arbitration led to counsel work and more appointments.

You set up Vis East Moot. Why?

As a neophyte arbitrator in 2000, I was amazed by the Mooties who would arrive young, inexperienced and nervous on Friday and emerge on Monday as confident, poised professionals with an impeccable grasp of their facts and arguments. After six months of gruelling teamwork, then the crucible of the oral competition, those Mooties knew what most new law associates lacked: how to hit the ground running.

I approached Professor Eric Bergsten, the Vis Moot's creator, to discuss the dearth of Asians in Vienna. We agreed that travel time and expense was one issue, while the other was that there was no 'moot culture' in Asia. Law schools invariably clung to the 'listen, note, memorise and regurgitate' teaching method. I proposed a 'sister Moot' in Hong Kong and Eric eventually agreed to let me try. Backed by the Ciarb East Asia Branch, Vis East was born in 2003, with 14 teams. Eric judged our finals the next year, and since then Vis East has grown to this year's record of 150 teams from four continents. Over half are from Asian schools.

You are also a founder and past president of ArbitralWomen. Do you think the organisation has achieved what it set out to do?

At my first ICCA conference in Bahrain, in 1993, a few women were gathered around the coffee table, flashes of colour in a sea of otherwise gray suits and djellabas. "Where are the others?" we asked one another.

I did some research which Geoffrey Beresford-Hartwell came to hear about. He invited me to present my findings at the Ciarb Boston Conference. Over the lunch preceding our panel, I overheard the moderator (who was also my boss) exclaim: "But – women in arbitration? What on earth can she have to say?"

It was the genesis of ArbitralWomen. In the 30 years that followed, ArbitralWomen has supported and promoted women around the world with networking events, held proactive discussions with other groups to call out 'manels' and suggested qualified women to diversify them. Mentorship, parental mentoring, educational grants, a Diversity Toolkit and the Young AW Practitioners group are but a few of our initiatives. Our member profiles are a resource for anyone looking for a woman with particular language, educational or subject matter skills. Mireze Philippe, my colleague and ArbitralWomen co-founder, compiled statistics about the number and proportion of women arbitrators at the ICC. Her historic initiative started a trend among institutions, which realised that diversity was a valuable selling point. Today women appointments range from 15–45%, depending on whom (and where) you ask.

While it is gratifying to witness the change, it is dangerous to assume the job is done. True behavioural change is generational. Meanwhile, it is too easy for busy professionals to take the easy route of 'we always choose him; we know him and he's dependable'. The moment we stop pushing, we will start sliding backwards and lose what we've worked so long to achieve. Remember *Roe v Wade* as a caution. ArbitralWomen's work is not finished; I hope that three decades from now it will be remembered like the suffragettes: something which achieved lasting reform.

I overheard the moderator (who was also my boss) exclaim: "But – women in arbitration? What on earth can she have to say?"

France's Panthéon-Sorbonne University

K SAMURKAS/SHUTTERSTOCK

The diversity challenge

It is three years since Ciarb launched its strategy to improve membership inclusivity. Catherine Dixon MCIArb assesses how far we've come

It is the lawyer and political ethicist Mahatma Gandhi who is generally cited as having said: "The measure of a civilisation is how it treats its weakest members." The words have certainly steered much of my career with its focus on supporting social justice and campaigning for the human rights of underrepresented groups who experience discrimination, including the LGBTQ+ communities.

A fundamental part of this mission is ensuring equity and diversity, and facilitating inclusivity. Enabling people to succeed in dispute resolution irrespective of their background is therefore a priority for me and for Ciarb. For it is this which leads to increased diversity in the profession and which, in turn, ensures that those who feel excluded from justice systems around the world are more likely to seek the support they need. It is crucial that justice systems are represented by the people they seek to serve.

However, ensuring diversity globally is not without its challenges. Ciarb does not have much information about members' backgrounds and so measuring the diversity of our membership is not straightforward. In addition, diversity and inclusion can mean different things to different people. Our interpretation of these concepts is influenced by our cultural backgrounds and lived experience.

In 2020, Ciarb developed a strategy that was underpinned by the desire to improve inclusivity globally. Three years into that strategy it is reasonable to assess how far this objective has been met.

Let's begin with gender: Ciarb's female membership is growing at twice the speed of its male membership, with the share having increased from 21% in 2020 to 23% by October 2023. Women still don't have parity; however, we are seeing more women get involved.

Our age profile is also a cause of cheer: our under-50 membership is growing.

We also made a commitment to ensuring diverse, inclusive and equitable events by adopting an events strategy and diversity and inclusion policy statement. It sets out our commitment to ensuring event themes are inclusive and draw contributions from a diverse range of members, speakers and participants who reflect the diversity of the profession. We also undertook that our events should be accessible to all. To this end, they are mostly hybrid: people can participate online or in person.

From 2021 to September 2023 our London HQ hosted 59 events involving 427 speakers, 56% of whom were women. In 2021, the speakers came from 29 countries. In 2022, they came from 46 countries. This year, we count speakers from 29 countries and participants from 138, making for a truly global events programme.

To ensure Ciarb is at the forefront of developments in private dispute resolution, we have created a number of thought leadership groups to support professional practice. A total of 27 countries are represented at our thought leadership groups, which combine the expertise of over 50 experienced Ciarb members, primarily Fellows, and a small number of non-member experts. These groups contribute to professional practice guidelines (we hope shortly to issue a guideline on artificial intelligence and one on sustainability), and to consultation responses such as the UK consultations on changes to the Arbitration Act 1996, to integrating mediation into the court system, and those on other areas of strategic importance to dispute resolution.

However, there is still much work to be done. If we look at our training we see that, of those who took our construction adjudication courses in the past three years, only 10% were women, compared to 34% in international arbitration and 25% in mediation.

It is also inescapable that women and people from minority ethnic backgrounds continue to be underrepresented on our panels, including our Presidential Panels. We are keen to increase the number of women on our panels, particularly in adjudication, and ensure a greater level of diversity including people from minority ethnic backgrounds.

Over the next year we will ask members for information about their backgrounds so we can measure whether our work to increase diversity is successful and to enable us to consider what more can be done to improve our diversity globally. Our aim is to ensure that the best can succeed in the dispute resolution profession, irrespective of their background.

NSTAFEEVA/SHUTTERSTOCK

ABOUT THE AUTHOR

Catherine Dixon MCIArb is Chief Executive Officer of Ciarb. She is a Solicitor and an Accredited Mediator.

Under the microscope

Paolo Marzolini MCIArb explores the interplay between arbitration and mediation in the New York and Singapore Conventions

This article explores the interplay between mediation and arbitration by focusing on those situations in which these two methods of resolving the parties' international disputes may enter into contact, such as:

- multi-tier clauses;
- mediation 'windows' within the arbitration;
- situations in which arbitrators are called upon by the parties to act as settlement facilitators; and
- awards by consent.

The article focuses on the support (if any) offered by international instruments such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the NY Convention) and the UN Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention). The key questions to be answered are as follows:

- Is such support complete and exhaustive?
- Are there areas in which one can perceive a lack of protection in terms of recognition and enforcement?

SCOPE OF THE CONVENTIONS

The protection afforded to arbitration agreements and mediation agreements

There is a time gap of 60 years between the NY Convention (1958) and the Singapore Convention (2018). The initial striking difference between these two international instruments is, of course, the number of jurisdictions in which each Convention is currently in force. ►

P.ILLI./SHUTTERSTOCK

So far, the NY Convention has been ratified by 172 states, while only 12 states have ratified the Singapore Convention. The widespread success of the NY Convention arguably paved the way to the global affirmation of arbitration as a primary and prominent means to resolve international disputes.

The impact that the Singapore Convention might achieve in the future remains to be seen. There is, however, a second important element which marks a significant difference between the two Conventions: these two instruments cannot be said to be aligned in their scope:

- Despite its name, the NY Convention does not cover only the final product of arbitral proceedings (viz. the award); it also covers the recognition and enforcement of arbitration agreements by which the parties agree to defer their dispute (already arisen or which may arise) to arbitration (Article II).
- The Singapore Convention does not have quite the same scope. According to its Article 1, the Convention "applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute", which must be "international" in nature. In other words, it is apparent that the Singapore Convention is intended to cover only the result of the mediation attempt; that is, the potential international mediation settlement agreement which is precisely the end product of a successful mediation.

This key difference already creates an imbalance in the protection granted by the two Conventions to arbitration agreements and mediation agreements. The consequence of this is that, in case of escalation or multi-tier clauses providing for mediation as a pre-arbitral step, the potential lack of compliance by one party with such pre-arbitral step will be dealt with and ultimately resolved by national courts, either by having regard to the law of procedure of the court seized with that issue or by arbitral tribunals applying the *lex arbitri*.

In other words, no protection is afforded by the Singapore Convention to the pre-arbitral mediation step. Experience shows that issues touching upon the lack of compliance with pre-litigation or pre-arbitral steps are often resolved by courts and/or arbitral tribunals through the traditional canons of interpretation of contractual provisions in order first to establish whether the common intention of the parties at the time of the execution of the multi-tier clause was that the pre-litigation or pre-arbitral steps should be conceived as mandatory or optional. This approach is shared by common law jurisdictions and civil law jurisdictions.

The initial striking difference between these two international instruments is, of course, the number of jurisdictions in which each Convention is currently in force

By way of example, in England, this approach was confirmed in *Thang Chung Wah et al v Grant Thornton International Ltd et al*[1] and *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd*[2] (these cases dealt with mediation as pre-arbitral step); or, more recently, in *Kajima Construction Europe (UK) Ltd et al v Children's Ark Partnership Ltd*[3] (this case dealt with a dispute resolution procedure as a pre-litigation step).

If the conclusion is that the pre-litigation/pre-arbitral step is indeed mandatory, then the lack of compliance should be resolved as an issue of admissibility of the claims (in France, the expression used is *fin de non-recevoir*); or as an issue of lack of jurisdiction *ratione temporis* of the authority untimely seized by the plaintiff/claimant.

In Switzerland, the Swiss Federal Supreme Court dealt with the issue of multi-tiered arbitration clauses in a number of decisions.[4] The position was finally clarified in 2016 when the Swiss Federal Supreme Court decided on the consequences of lack of compliance with pre-arbitral steps.[5] In a nutshell, the position in Switzerland is that the question of whether a party complied with a mandatory pre-arbitral step relates to the arbitral tribunal's jurisdiction *ratione temporis*. The first step is to determine whether the pre-arbitral step is mandatory or optional. If it is optional, non-compliance will not affect the arbitral tribunal's jurisdiction *ratione temporis*.

If the pre-arbitral step is mandatory and not complied with, the next step is determining whether the respondent raised a timely plea of lack of jurisdiction. Should this not be the case, the respondent will be deemed to have forfeited

1 [2012] EWHC 3198 (Ch).
2 [2014] EWHC 2104 (Comm).
3 [2023] EWCA Civ 292.
4 4A_18/2007, 4A_46/2011, 4A_124/2014 and ATF 142 III 296.
5 ATF 142 III 296.

DENNIS G ZILL/SHUTTERSTOCK

its right to challenge jurisdiction as a matter of Swiss law. If the respondent raised a plea of lack of jurisdiction in a timely fashion, they might be estopped from challenging jurisdiction on the basis of the rules of good faith. This may be the case if the respondent dragged its feet when the claimant attempted to set into motion the pre-arbitral step.

Assuming the jurisdictional objection was raised immediately and no further bar exists, the arbitral tribunal lacks jurisdiction *ratione temporis*. In this case, the sanction is not necessarily the inadmissibility of the claims and the termination of the proceedings. The arbitral tribunal will have to stay the arbitration to allow the parties to comply with the mandatory pre-arbitral step.

To summarise the points made above:

- **Arbitration Agreements:** Protected by Article II of the NY Convention.
- **Pre-arbitral mediation step or, in general, agreements to mediate:** Not protected by the Singapore Convention. Potential protection by Article II of the NY Convention only in an indirect way: what is protected is the agreement to arbitrate and not the pre-arbitral step(s) as such.

MEDIATION 'WINDOWS' WITHIN THE ARBITRATION

Putting aside the field of multi-tier/escalation clauses, there is another situation in which arbitration and mediation may enter into contact. These are the situations in which a mediation 'window' is open during the course of a pending arbitration. This window sometimes becomes necessary during the arbitration when the parties realise that it would be beneficial for them to try to resolve their dispute with the assistance of a mediator. These windows often imply the stay of the arbitration proceedings while the mediation attempt is carried out. In other cases, the parties may agree at the beginning of the arbitration – possibly, during the initial organisational conference or case management conference – that a mediation attempt might subsequently take place. In these cases, a dedicated procedural slot is inserted in the procedural timetable of the arbitration. The slot may be placed right after the filing of the parties' first round of comprehensive submissions on the merits. This may particularly happen in cases in which a memorial-style approach is adopted as opposed to a pleading-style approach.

ANTIKWAR/SHUTTERSTOCK

These mediation attempts which take place while the arbitration is on foot may be relevant to the Singapore Convention and/or the NY Convention, as summarised below:

- **Agreement to attempt mediation:** Not protected by the Singapore Convention. Not protected by the NY Convention.
- **Mediation procedure:** Not directly protected by the Singapore Convention; however, indirect control at the enforcement stage of the settlement reached through mediation. Not protected by the NY Convention.
- **Settlement resulting from the mediation attempt:** Protected by the Singapore Convention (the exclusion contained in Article 1(3)(a)(i) does not apply to settlements reached through mediation conducted while arbitration proceedings are pending). Not protected by the NY Convention (see, however, the case of consent awards below).

ARBITRATORS ACTING AS SETTLEMENT FACILITATORS

One further situation in which arbitration and mediation may enter into contact relates to cases where arbitrators – upon the agreement of the parties – act as settlement facilitators. In other words, arbitrators using various techniques may try to help the parties to settle their dispute. These hybrid situations are expressly recognised by most international arbitration rules.[6]

One further situation in which arbitration and mediation may enter into contact relates to cases where arbitrators – upon the agreement of the parties – act as settlement facilitators

6 For example, ICC Rules, Appendix IV(h); Swiss Rules, Article 19(5); and the Chamber of Arbitration of Milan Rules, Article 25(3).

For present purposes, one should stress that the manner in which arbitrators conduct themselves during these attempts to prompt the parties' settlement may in principle be scrutinised during the challenge phase of the ensuing award (should the settlement attempt fail) as well as at the recognition and enforcement stage (see Article V(1)(b) of the NY Convention). Should the arbitrators' facilitation attempt succeed, it is doubtful whether it would be possible for the parties to elect to enter into an international mediation settlement agreement protected by the Singapore Convention. This is for the simple reason that the arbitrators would, in principle, not switch hats and act as mediators in running those attempts.

To summarise the points made above:

- **Arbitrators acting as settlement facilitators (procedure):** Not protected by the Singapore Convention. Not protected by the NY Convention. In case of failure of the attempt, the arbitrators' conduct may be scrutinised at the challenge stage and/or at the recognition and enforcement stage (see Article V(1)(b) of the NY Convention).
- **Settlement agreement reached:** Not protected by the NY Convention unless incorporated in an award by consent (see below). Not protected by the Singapore Convention (international mediation settlement agreement unavailable).

ENFORCEMENT OF THE SETTLEMENT REACHED

The relationship with consent awards

According to the Singapore Convention, the parties have two options when they reach a mediated settlement during the arbitral proceedings to resolve an international commercial dispute:

1. They may draft and sign an international mediation settlement agreement and enforce such agreement under the said instrument; or
2. They may convert their settlement agreement into an arbitral award (consent award) and enforce it under the NY Convention.

The choice of which way to follow very much depends on a number of legal and practical considerations which the parties should take into account:

- as stated above, the limited geographical coverage of the Singapore Convention compared to the NY Convention;
- the restricted scope of consent awards;
- the non-existence of a supervisory court;
- the existence of a contractual defence under the Singapore Convention;
- different standards for refusing to grant relief in relation to an international mediation settlement agreement and an arbitral award, respectively (in the context of mediators' and arbitrators' ethical standards); and
- the opportunity to opt out of the Singapore Convention.

Focusing in particular on the awards by consent, to be enforceable under the NY Convention, consent awards must cover matters/claims which fall within the arbitral tribunal's jurisdiction; if that is not the case, these awards are not enforceable under that Convention. A settlement agreement protected by the Singapore Convention is, in principle, capable of covering matters which do not strictly fall within the arbitral jurisdiction in the underlying arbitration.

To summarise:

- **Consent awards:** Not protected by the Singapore Convention. Protected by the NY Convention provided that the matters covered by the consent awards fall within the scope of the arbitral tribunal's jurisdiction.
- **Settlement resulting from the mediation attempt:** Protected by the Singapore Convention irrespective of whether the settlement in question covers matters which go beyond the arbitral jurisdiction. Not protected by the NY Convention.

ABOUT THE AUTHOR

Paolo Marzolini MCIArb is a Partner at Patocchi & Marzolini. He acts as counsel representing clients and sits as arbitrator in Switzerland and a number of other jurisdictions under various sets of arbitration rules. He has been involved in several major international arbitrations and has experience acting as a mediator, counsel in mediations as well as a member of dispute boards in complex construction projects.

CONCLUSION

This article attempts to offer a preliminary overview of the protection granted by the NY Convention and the Singapore Convention to complex situations where an interplay exists between mediation and arbitration. The article has endeavoured to show that the protection of these complex situations offered by the two international instruments in question is neither all-encompassing nor complete. Why? Because the Conventions vary in scope.

The parties and their counsel should be encouraged to raise awareness of the intricacies of these two Conventions. In so doing, they will be able to extract the best solutions from the options made available to them in each particular case and improve the successful management of their disputes.

IS IT TIME FOR A DISPUTE REVOLUTION?

SERGEY KORKIN/SHUTTERSTOCK

Kenneth T. Salmon MCIArb and Marcus Cato FCIArb consider whether arbitration and adjudication are new stablemates

The dispute resolution landscape in Britain has seen dramatic changes this year. In May, the UK became a signatory to the Singapore Convention on Mediation. In July, the Government agreed to integrating mediation as a key step in the court process for small civil claims valued up to £10,000. And in September, following two consultations, the Law Commission published its final report on the review of the Arbitration Act 1996.

How, against this fast-moving backdrop, might arbitration and adjudication complement each other? Is there an opportunity to revisit and evolve these mechanisms to better meet parties' needs? Could arbitration become a sensible alternative to litigation and a natural evolution of adjudication?

Is it, in short, time for dispute revolution?

Looking at litigation

The evolution of the small claims track has made it uneconomic for litigants to engage lawyers, particularly now that there is very little legal support. Those on the fast-track fare little better because the application of Fixed Recoverable Costs (FRC), which already limits the legal costs the successful party may recover, is now set to be extended to cases on the multi-track of up to £100,000 in value. Add in cost budgeting (which requires court approval, an expense in itself); long and arduous cost assessment; the detailed letters entailed in pre-action protocols; court fees (5% of the claim value between £10,000 and £100,000, plus supplementary fees for applications and hearings); the cost and likelihood of losing rights to call evidence entailed by sanction regimes, and litigation becomes unpalatable to many. And while FRC provides certainty, it is difficult for litigants to ascertain how much it costs to get to that point.

In addition, in the wake of the pandemic, disputes now take between 30 and 50 weeks to progress to trial from allocation. So, if time is an imperative, arbitration and adjudication are both appealing alternatives.

Advantages of adjudication

In fact, adjudication is a particular champion of speed. It is also a statutory right under construction contracts subject to the Housing Grants, Construction and Regeneration Act 1996. But it is equally available as a contractual right.

In addition:

- It is a paper-based procedure with hearing, if this is required by the parties or deemed essential by the adjudicator. ►

Could arbitration become a sensible alternative to litigation and a natural evolution of adjudication?

- It is a 28-day process capable of being extended by agreement of the parties and adjudicator to 42 days.
- It is delivered by a fixed date with brief reasons (or full reasons if requested by either party).
- Its decision is temporarily binding, that is until the dispute is finally determined by agreement, litigation or arbitration.
- Execution of the judgment may only be stayed upon very limited grounds.
- There is no costs recovery in statutory adjudication.
- The adjudicator decides who bears payment of their fees.

Adjudication does not fit every dispute scenario, but it provides a model that could be adopted and applied to arbitration. We should explore fast-track or expedited arbitration rules as a way of injecting disputes with commercially attractive rigour.

Further, the Technology and Construction Court specialises in streamlined processes and case management practices. Its efficiencies come with judges well versed in technical evidence, expert opinion and industry standards, thereby mirroring many of the benefits of arbitration.

Advocating for arbitration

The advent of adjudication as an inexpensive and fast method of construction dispute resolutions has led to less enthusiasm for arbitration in the UK, particularly when combined with the standard forms of building contract, such as JCT. But compared to litigation, it still has many advantages. It is not subject to the Civil Procedure Rules (the CPR), which means there is:

- no pre-action protocol;
- no fee to commence proceedings (beyond the fee for appointing an arbitrator, typically £300–£400);
- no costs budgeting, so no front-loading of costs;
- no FRC rules; and
- no test of proportionality as such, although costs must be deemed reasonable.

This means there is greater potential for a full order for costs as opposed to a fixed or partial recovery.

However, when it comes to costs, the arbitrator is paid 'on the meter', and although processes are similar to litigation, they can offer parties the benefit of being able to determine how they might innovate and focus the dispute. Plus, arbitration is accessible, whether through ad hoc agreements to arbitrate or more usual contract provisions provided within standard contracts, or boilerplate provisions.

The exchange of pleadings, disclosure and witness statements, and expert reports means arbitration has always been open to the criticism of having 'soft' time limits and a malleable timetable not subject to automatic sanctions as exist in the CPR. And it is true that it has been necessary to apply for sequential orders to remedy defaults which have led to timetable creep. However, it has the potential for time advantages over litigation while still providing the rigour and procedural satisfaction that complex and higher-value disputes might deserve.

And it may have more flexibility than either litigation or adjudication in specialist and technical disputes within industries and disciplines. Whereas adjudication is often better suited to construction disputes, the flexibility of arbitration means it arguably has greater market penetration.

Together is better?

Most organisations now have expedited rules for arbitration. RICS, for example, has provided expedited arbitration rules since 2015. The International Chamber of Commerce provides expedited procedure provisions, and UNCITRAL has its 2021 Expedited Arbitration Rules. So there appears to be recognition of the need for a more considered approach to awards, but under expedited timescales.

Meanwhile, adjudication brings the aforementioned benefits. So, might a solution lie between a reshaped adjudication and expedited arbitration? Could a hybrid which builds on the benefits of adjudication, and which overcomes some of the disadvantages of traditional arbitration, work? Arbitration, that is, which functions as was originally intended: a quick, efficient and specialist procedure for resolving disputes with the minimum of cost and expense. Such an approach would avoid the constraints of litigation and entitle the successful party to seek its reasonable costs and not be limited to a fixed recovery.

Put another way, could arbitration be restored to its rightful place as a safe and sensible alternative to litigation, and a natural evolution of adjudication?

Whereas adjudication is often better suited to construction disputes, the flexibility of arbitration means it arguably has greater market penetration

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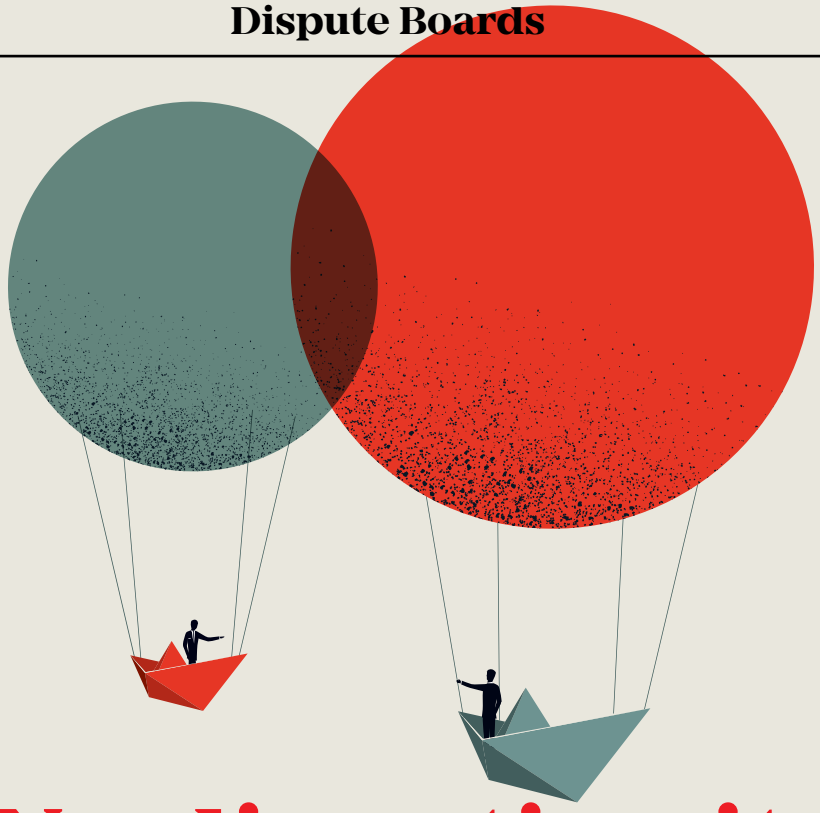

No disputing it

Their proven ability for swift and cost-effective solutions to disputes in the construction and engineering industries means Dispute Boards are here to stay, and expand. Paul Sills FCIArb reports

The complexity of modern construction and engineering projects, with their intertwined relationships and multifaceted contractual agreements, has given rise to various dispute resolution mechanisms. Among these, Dispute Adjudication Boards (DABs) have become an essential tool for dispute resolution and avoidance. The efficacy and versatility of DABs have seen their use expand beyond their traditional realms, which signifies an evolution in proactive dispute management. This article will delve into the genesis, purpose, effectiveness and future applications of DABs and their preventive counterparts, highlighting their role in the dynamic landscape of legal project management.

DABs now come in various forms with slightly different language and purpose, whether they be Dispute Resolution, Adjudication or Avoidance Boards or a combination thereof. While these boards have differing approaches, they all share the goal of providing a less formal, more collaborative and more cost-effective alternative to traditional dispute resolution methods, such as arbitration or litigation. The main difference lies in their timing of intervention and whether their decisions are binding or advisory in nature.

Dispute Boards' purpose is to offer the swift and effective resolution of disputes that arise during the course of a project

For the purposes of this article, we will treat these boards in their various forms as one and refer to them collectively as Dispute Boards.

WHAT ARE THEY?

Dispute Boards are independent bodies typically composed of one or three experts who are appointed at the commencement of a project. Their purpose is to offer the swift and effective resolution of disputes that arise during the course of a project. The members of a Dispute Board are usually experienced professionals with expertise in the specific field related to the project, such as engineering or construction law, or industry-specific knowledge.

The main objective of a Dispute Board, regardless of the particular form it takes, is to resolve disputes as they emerge, rather than letting them fester and escalate into more significant issues that would lead to arbitration or litigation. Dispute Boards achieve this by providing decisions that are temporarily binding until the final resolution of the dispute through arbitration, litigation or agreement.

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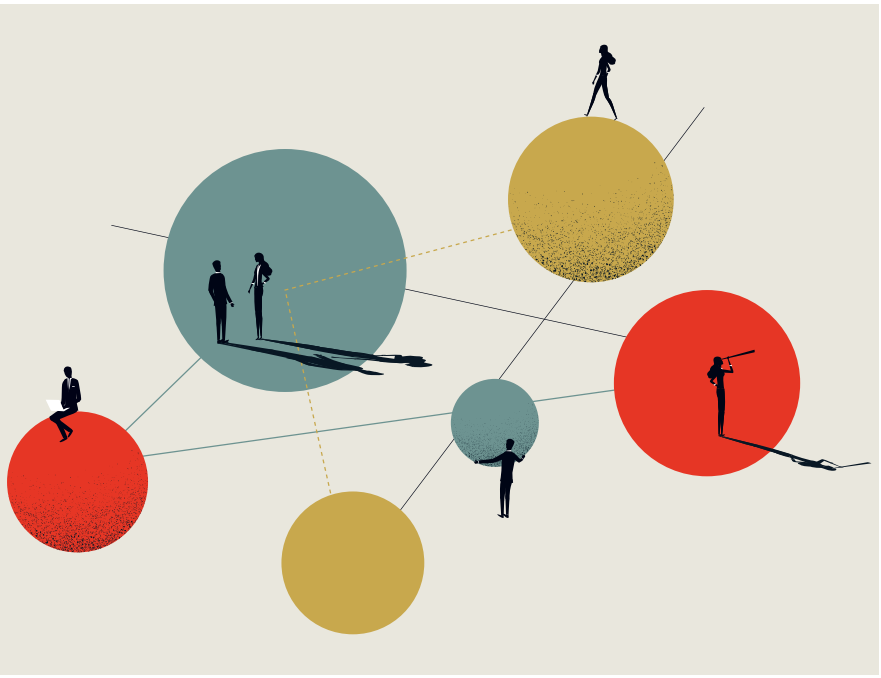

THE GENESIS AND APPLICATION

The Dispute Board concept was born in the US following the *Better Contracting for Underground Construction* report published in 1974 for the tunnelling industry.

The process was first used in the US in 1975 during construction of the second bore of the Eisenhower Tunnel for Interstate 70 in Colorado. Originally developed for large-scale construction projects, the idea was to resolve disputes swiftly and efficiently, minimising disruptions to the project timeline, and to assist in the flow of payments to contractors.

The first Dispute Board outside the US occurred in Honduras with construction of the El Cajon Dam and Hydroelectric Plant in 1980.

Dispute Boards gained international prominence in 1995 with the Fédération Internationale des Ingénieurs-Conseils (FIDIC) leading the way in incorporating Dispute Board provisions into their standard forms of construction contracts.

In the past 30 years, Dispute Boards have attracted widespread attention through their use in complex projects that involved parties from multiple jurisdictions, often where governing laws vary significantly.

The utilisation of Dispute Boards has extended beyond their original geographical confines. They are now used worldwide, including in the Middle East, Asia, Africa and South America, particularly in countries adopting international standards for infrastructure development. The types of projects where Dispute Boards are applied have also diversified and now include energy, mining, oil and gas, and even IT and telecommunications projects.

Dispute Boards' proactive approach ensures that disputes are resolved with minimal delay, thereby avoiding costly project hold-ups and cash-flow delays

EXAMPLE PROJECTS

1. The Channel Tunnel (Eurotunnel) between the UK and France. In 1987 the construction of the Channel Tunnel was one of the most significant engineering projects globally and faced numerous technical and financial challenges. On this US$14bn project only 13 disputes arose, of which 12 were settled pre-arbitration.
2. The Gautrain Rapid Rail link in South Africa. A Dispute Board was included as part of the contractual framework for this project to establish an 80km-long mass rapid transit railway system in time for the FIFA World Cup.
3. The 2016 Panama Canal expansion.
4. The Hong Kong Airport at Chek Lap Kok.

THE SUCCESS RATE

Dispute Boards have been hailed for their effectiveness in reducing the time and costs associated with traditional dispute resolution methods. Their proactive approach ensures that disputes are resolved with minimal delay, thereby avoiding costly project hold-ups and cash-flow delays. A study by the International Chamber of Commerce reported that the use of Dispute Boards significantly reduces the occurrence of disputes progressing to arbitration.

STANDING vs AD HOC

Ideally, a Dispute Board functions by overseeing the project from the outset, with the board members keeping abreast of the project's progress and potential issues. When a dispute arises, the parties present their cases to the Dispute Board, which then deliberates and issues a decision. This decision is binding until the final resolution method as specified in the contract, which can include negotiation, mediation, arbitration or litigation. The Dispute Board's early intervention helps maintain the project's momentum and reduces the likelihood of a dispute escalating.

One issue that arises frequently is whether Dispute Boards should be standing or ad hoc. That is, whether they should be constituted at the start of a project and remain in place and available for the duration of the project or whether they should only be constituted when a dispute within the project arises. The answer is clear: to be effective, Dispute Boards need to be standing in nature – they need to be in place well before any dispute under a project may arise.

It is difficult to get all parties to a project to agree to appoint a Dispute Board after a dispute has arisen.

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Unfortunately, by then one party will often see its strategy for the dispute as lying in a different direction.

An ad hoc Dispute Board, only brought together when a dispute arises, may be tailored to meet the needs of the specific dispute but will not have the background knowledge of the project that a standing board does. This will add time and cost as the board members are brought up to speed. This will also limit the effectiveness of the Dispute Board as it is often the relationships that the standing board members develop with the parties over time that are instrumental in getting the parties to agree on timely, consensual outcomes to issues or disputes that would historically result in payments being halted, damaged or destroyed relationships, adversity and arbitration or litigation. By effective, early and continuous engagement with the project and the parties, standing Dispute Boards not only reduce the need for the parties to refer disputes to arbitration, but also prevent many issues from turning into disputes.

Typically a standing Dispute Board will make regular site visits on a project (often quarterly), during which time they will meet with the parties, inspect progress on the project and deal with any issues of immediate concern. These visits allow the board members to learn first-hand about the parties and their relationship, the project, its geographic location and any particular difficulties involved with the location or the subject matter of the project.

Site visits provide an important opportunity for the parties to engage with the Dispute Board members and obtain informal guidance from the board on the issues that have developed recently or are developing that might otherwise turn into disputes if left unattended. This enables the board to facilitate discussions between the parties at the right time to help reduce tensions within the project and prevent adversarial relationships from either developing or continuing. Standing Dispute Boards should, if run effectively, have a significant real-time influence on a project.

DISPUTE AVOIDANCE

Building on the concept of Dispute Resolution or Adjudication Boards, the construction industry is witnessing the emergence of Dispute Avoidance Boards, which serve a more proactive role. Rather than waiting for disputes to arise, Dispute Avoidance Boards aim to identify potential issues before they become disputes. They provide ongoing guidance and recommendations during the project life cycle, thereby helping parties avoid disputes altogether.

Regardless of its official title, an effective Dispute Board would be proactively working with the parties to avoid or resolve disputes without the need for the board to make a determination.

WHERE NEXT?

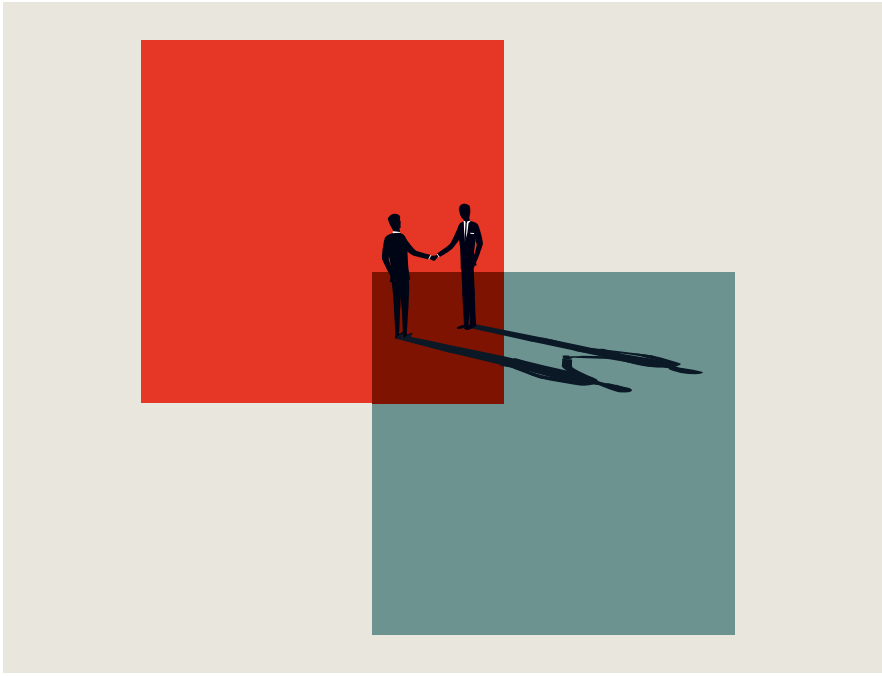
The future of Dispute Boards seems promising, as the construction industry continues to recognise the value of resolving disputes promptly or avoiding them when possible. The rise of mega-projects in emerging economies, where the cost of dispute resolution can be prohibitively high, will likely see an increased reliance on these boards. Moreover, as projects become more technically complex and funders and parties seek efficient ways to manage disputes, the use of Dispute Boards is poised to grow.

What's more, the international standard-setting bodies are increasingly integrating Dispute Board provisions into their recommended practices, signalling a shift towards a broader adoption of these mechanisms. The construction industry's growing emphasis on collaborative contracting models, such as partnering and alliancing, is also conducive to the principles underlying Dispute Boards.

Most if not all of the world's leading dispute resolution bodies, such as Ciarb, have promulgated their own version of Dispute Board Rules. Since 2017, FIDIC has opted for a combination of avoidance and adjudication in its *Red, Yellow and Silver Books*.

NAVIGATING ENERGY TRANSITION DISPUTES

The global energy sector is undergoing a historic transformation as it shifts from fossil fuel-based systems of energy production and consumption to



Rather than waiting for disputes to arise, Dispute Avoidance Boards aim to identify potential issues before they become disputes

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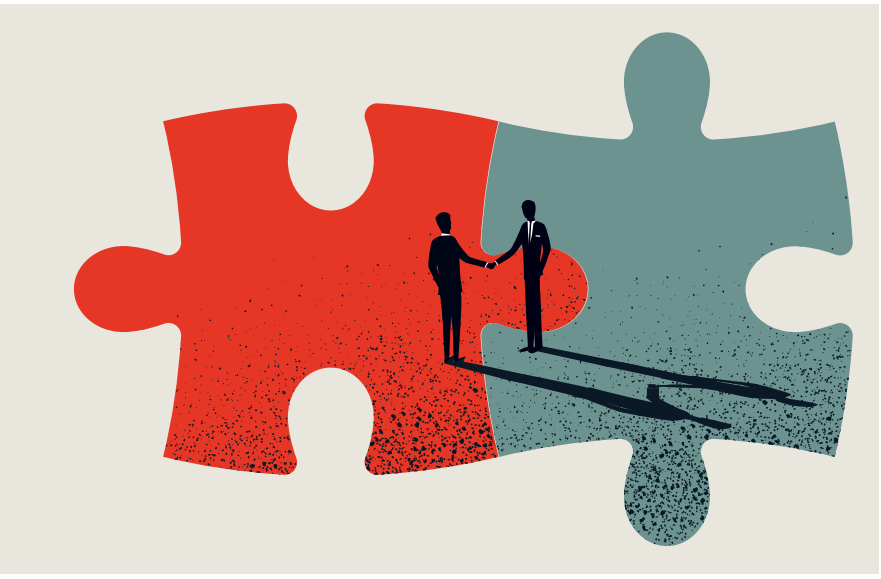

Dispute Boards' ability to offer swift, expert and cost-effective solutions to disputes, and to help avoid them, has proven invaluable

renewable energy sources. This energy transition is characterised by large-scale infrastructure projects, including the development of wind farms, solar parks, energy storage facilities and the significant expansion of national power grids. The scale and urgency of these projects, coupled with the integration of still-emerging green technologies, pose unique challenges that make the potential for disputes in this area markedly higher.

As nations race to meet ambitious climate goals, the pace of construction for energy transition projects is accelerating. These projects often utilise cutting-edge technologies that have not been tested over the long term, and the contractual frameworks surrounding them are evolving rapidly to keep pace with innovation. These factors contribute to an environment ripe for technical, financial and regulatory disputes.

The complexity of energy transition projects often requires substantial upfront capital investment and involves a broad array of stakeholders, including governments, private companies and international investors, each with their own interests and expectations. The interplay between these different parties, along with the necessity for these projects to be completed in a timely manner, underscores the need for effective dispute resolution mechanisms.

Dispute Boards are particularly well suited to the energy transition landscape. Their ability to offer real-time resolution and avoidance of disputes can be critical in projects that cannot afford the delays associated with traditional dispute resolution methods. The temporary binding nature of Dispute Board decisions ensures that projects continue to move forward while awaiting final settlement, which is vital in a sector where time is of the essence.

Moreover, Dispute Boards can adapt to the technical intricacies of green technologies, bringing expertise that is often beyond the scope of standard judicial or arbitral processes. With their help, parties can navigate the uncharted territories of new energy technology deployments, addressing disputes related to performance guarantees, technology risks and the interpretation of complex regulatory frameworks.

Dispute Boards offer a proactive dimension, providing ongoing oversight and advice that can anticipate and mitigate potential disputes before they crystallise into formal disagreements. This foresight is invaluable in energy transition projects, where emerging technologies and fast-tracked timelines leave little room for error or prolonged conflict.

The anticipated increase in the frequency of disputes within energy transition projects makes the role of Dispute Boards even more pertinent. These boards are likely to become an integral component of the contractual strategies developed for such projects, offering a shield against the risks of disputes and a catalyst for constructive resolutions.

The strategic application of Dispute Boards could well become a hallmark of successful energy transition projects, enabling stakeholders to manage the complexities and speed required in these critical undertakings. As the world grapples with the dual challenges of climate change and sustainable development, the energy sector's ability to effectively manage disputes will be crucial.

Dispute Boards stand at the forefront of this endeavour, providing tools not just for resolution but for the foresight and prevention of disputes, ensuring that the energy transition can proceed with the urgency that it demands.

CONCLUSION

In conclusion, Dispute Boards have significantly transformed the landscape of dispute resolution within the construction and engineering industries. Their ability to offer swift, expert and cost-effective solutions to disputes, and to help avoid them, has proven invaluable. As the global economy continues to expand and the complexity of projects escalates, the role of Dispute Boards will undoubtedly become more entrenched and essential.

Their adoption across various geographical regions and project types, especially in the burgeoning field of energy transition, is a testament to their effectiveness and the value they add to the project management process. As the industry evolves, so will the application of these boards, potentially leading to a future where dispute resolution is not just an endpoint process but an integrated project management philosophy, particularly critical in the energy sector's race against time to combat climate change.

ABOUT THE AUTHOR
Paul Sills FCIArb is a leading independent international arbitrator and mediator with over 27 years of litigation experience, often involving multiple parties and complex commercial issues.

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Making waves

The maritime and insurance sectors have had an enormous influence on the development of international arbitration in recent decades. Ciarb President Jonathan Wood FCIArb reports

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It has been intriguing to observe, over the past 40 years or so, the impact that the maritime and insurance sectors have had on the development and shaping of international arbitration. Arbitrations, that is, where the parties are from different jurisdictions, even when the seat has been England and associated proceedings have been brought before the English courts and beyond.

The maritime and insurance industries have something of a symbiotic relationship. A recent reminder of their impact arises from the English Commercial Court decision, handed down on 6 October 2023, in *London Steamship Insurance Ltd v Kingdom of Spain*. The case arises out of the sinking of the oil tanker MV *Prestige* in 2002 off the Atlantic coast, resulting in an oil spill of 60,000 tonnes, causing extensive environmental damage to the coast of France and Spain.

Proceedings relating to this were complex, bouncing as they did between arbitral tribunals, the English courts and the Court of Justice of the European Union.

In June 2022, the CJEU concluded that, although arbitration falls under the general exclusion of the Brussels I Regulation embodied in Article 1(2)(d), that does not preclude a ►

The maritime and insurance industries have something of a symbiotic relationship

judgment relating to an excluded matter from coming within the scope of Article 34(3). So a judgment in the form of an arbitral award made in a Member State could prevent the recognition and enforcement of a judgment given by another Member State, if they are irreconcilable.

The CJEU, however, decided this did not apply in the present case.

Taking a purposive approach to interpretation, the decision established that a judgment entered by a court of a Member State in the terms of an arbitral award does not constitute a 'judgment' within the meaning of Article 34(3) of the Brussels I Regulation where a judicial decision resulting in an outcome equivalent to the outcome of that award could not have been adopted by a court of that Member State without infringing the provisions and the fundamental objectives of that regulation, in particular as regards the relative effect of an arbitration clause included in the insurance contract and the rules on *lis pendens* contained in Article 27 of the regulation. The decision caused considerable debate among scholars and practitioners.

When the issue came before Butcher J in the Commercial Court in relation to the insurers' case that the Spanish judgment should not be enforced by the English court, in a judgment running to 369 paragraphs of detailed reasoning, he found that he was not bound by the decision of the CJEU. The Spanish judgment was not enforceable. This too caused considerable comment, with one commentator calling it a "pretty bold move".

During his judgment, reference is made to two other significant marine and insurance-related arbitration cases. They both concern the Brussels Convention and subsequent regulations and they have both occupied international arbitration practitioners over the past few decades. The first is *Marc Rich & Co AG v Società Italiana Impianti PA ('The Atlantic Emperor')*, one of the earliest cases to go before the European Court in relation to the Brussels Convention. The decision was rendered in 1991, deciding that arbitration is excluded in its entirety, including proceedings brought before national courts. The second is *West Tankers Inc v Allianz SpA ('Front Comor')* in 2009, where the CJEU held that the validity of arbitration agreements falls within the scope of the Brussels Regulation, but that anti-suit injunctions restraining a party from commencing or continuing proceedings in the court of another Brussels Regulation Member State cannot be granted.

But the cases do not just involve wrangles under the Brussels Convention and subsequent regulations. One of the best-known decisions is the House of Lords decision in *Fiona Trust v Privalov* in 2007, involving the owners of Russian ships that were chartered; it was alleged the charterparties were said to have been rescinded (including the arbitration clauses within them) on the grounds they had been induced by bribery. The charterers commenced arbitration proceedings but application was made by the owners seeking a stay under Section 9 of the Arbitration Act 1996. The House of Lords upheld the Court of Appeal decision that the arbitration clause was wide enough to encompass a fraud claim.

More recent is the Supreme Court case of *Halliburton v Chubb*, a case arising out of the *Deepwater Horizon* offshore incident where Halliburton brought a claim against its insurers under a Bermuda Form policy, governed by New York law, seated in England. It is regarded as being the leading English case on arbitrator conflicts and bias. It was notable for the interventions by the London Court of International Arbitration, International Chamber of Commerce, Ciarb, London Maritime Arbitrators Association and the Grain and Feed Trade Association.

The recent Law Commission review and report on the Arbitration Act 1996 expressly considered this issue. Its findings and recommendations have been embodied in the Arbitration Bill, legislation that King Charles III announced in his speech before Parliament, giving it a place in the current legislative season.

There is no denying that maritime and insurance arbitration has had a significant influence on the development and shaping of international arbitration, or that the stakes therein are often enormous.

ABOUT THE AUTHOR

Jonathan Wood FCIArb is President of Ciarb. He is a full-time arbitrator with 40 years' experience in international dispute resolution, arbitration and mediation acting for government departments, insurers, banks and traders. He sits as an arbitrator for ad hoc, ICC, LCIA, LCAM and other institutions.

GERASYMOVYCH OLEKSANDR/SHUTTERSTOCK

Case note

Alexander Brothers Limited (Hong Kong S.A.R.) v Alstom Transport SA and Alstom Network UK Limited [2020] EWHC 1584 (Comm)

Can claimants rely on corruption at the enforcement stage?

This dispute stemmed from consultancy agreements between Alstom and Alexander Brothers Ltd (ABL), a Hong Kong company led by a former Alstom employee. ABL aided Alstom in securing and executing railway concessions in China. Although successful in tenders, Alstom withheld part of the payments due to criminal investigations into corrupt payments, resulting in substantial fines for the Alstom group. ABL, seeking unpaid fees of €2,975,480 plus interest, pursued ICC arbitration in Geneva under Swiss law.

During the arbitration, Alstom alleged corruption suspicions against ABL, insisting on clearance from the Serious Fraud Office for payments. The Tribunal rejected Alstom's defence, requiring payment and deeming circumstantial evidence insufficient for corruption under Swiss law. Alstom contested the award in Switzerland, but the Federal Court upheld the Tribunal's decision, stating no authority to review merits except when the facts are "established in a patently inaccurate manner or in violation of the law".

Upon delving into whether Alstom could introduce bribery allegations, the Commercial Court dismissed Alstom's application. The court conducted a two-step analysis where it first addressed whether the arbitral tribunal had conclusively ruled on these allegations and, secondly, whether Alstom had not presented these allegations during the arbitration, despite having the opportunity.

Regarding the first point, the Court, with reference to previous case law addressing issues arising from section 103(3) of the English Arbitration Act 1996 where there are allegations of bribery, underscored the limited room for reopening issues of illegality when the Tribunal had already made a determination.

In its analysis, the High Court criticised the contention that the Tribunal had positively

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The Court... underscored the limited room for reopening issues of illegality when the Tribunal had already made a determination

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evaluated the bribery argument, asserting that a detailed analysis revealed a conceptual cross-over rather than the true identity of the issue. This is because the Tribunal's focus was on ABL's adherence to ethics rather than explicit bribery allegations. The Court emphasised the importance of precision in considering both the actual issue at hand and the standard of proof, noting that, according to the Award, the Tribunal applied a significantly higher standard when addressing bribery and, ultimately, rejected the conclusion that the same point was determined "on the facts" by the Tribunal, deeming it unrealistic and contrary to legal principles due to the aforementioned lack of demonstrated identity of the issue.

Concerning the second point, the Court barred Alstom from introducing the issue at the enforcement stage. Given that no new evidence was brought into light post-arbitration, the Court asserted that Alstom "could and should" have presented the bribery case during the arbitral proceedings. The argument presented was that Alstom opted not to present a comprehensive illegality case before the Tribunal because it would have been futile, as, according to its allegation, it couldn't advance a bribery case meeting the Swiss standard of proof. Nevertheless, Alstom was unable to present sufficient evidence of this alleged futility. It failed to explain how much the Swiss standard of proof diverges from the 'balance of probabilities' test, nor did it explain why this allegation was never brought before the Tribunal. Thus, the Court concluded that there was no reason to consider that the case fell outside of the *Handerson* principles requiring the meeting of the "could and should" test and dismissed Alstom's argument.

The divergence in judgments across various state courts underscores the critical need for a clear and unified standard of evidence in arbitrating corruption allegations. If a well-defined standard was in place, Alstom's assertion that it refrained from bringing claims during arbitration due to the stringent Swiss standard of evidence would have been untenable, and it would not have been possible for the French and English courts to have come to a different conclusion. Furthermore, a consistent standard would have ensured uniform consideration of public policy across all three state courts tasked with assessing the award's enforceability. This uniformity is pivotal in safeguarding the principles of due process and legal certainty.

The divergence in judgments across various state courts underscores the critical need for a clear and unified standard of evidence in arbitrating corruption allegations

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