

17th ANNUAL REVIEW OF THE ARBITRATION ACT 1996
BIICL AND SIMMONS & SIMMONS CONFERENCE ON 26/3/2019

“THE INTERPLAY BETWEEN JUDGES AND ARBITRATORS”

KEYNOTE LECTURE BY SIR RUPERT JACKSON

1. INTRODUCTION

1.1 This conference. This is a timely conference. The importance of international arbitration to successful international trade has been reaffirmed by the Supreme Court in *Taurus Petroleum Ltd v State Oil Marketing Co* [2017] UKSC 64 at [54]. London is a major centre of international arbitration, supported by the Commercial Court within the framework of the Arbitration Act 1996 (‘the 1996 Act’). The present conference will focus on recent developments in arbitration law, with particular reference to challenges under ss. 67 and 68 of the 1996 Act.

1.2 This lecture. In this lecture I will go off piste for a few minutes to talk about s.45 of the 1996 Act, before turning to the core issues under discussion today.

2. SECTION 45 OF THE 1996 ACT AND THE RELATIONSHIP BETWEEN THE COURTS AND ARBITRATORS

2.1 Section 45. The recent Commercial Court decision *Goodwood Investments Holdings Inc v Thyssenkrupp Industrial Solutions AG* [2018] EWHC 1056 (Comm) has focused attention on a little used provision of the Arbitration Act 1996, namely s. 45. That section provides:

“(1)Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings (upon notice to the other parties) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties.

An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section.

(2)An application under this section shall not be considered unless—

(a)it is made with the agreement of all the other parties to the proceedings, or

(b)it is made with the permission of the tribunal and the court is satisfied—

(i)that the determination of the question is likely to produce substantial savings in costs, and

(ii) that the application was made without delay.

(3) The application shall identify the question of law to be determined and, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the question should be decided by the court.

(4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

(5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.

(6) The decision of the court on the question of law shall be treated as a judgment of the court for the purposes of an appeal.

But no appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance, or is one which for some other special reason should be considered by the Court of Appeal.”

2.2 The textbooks reveal very little use of s. 45. I am only aware of three such cases. In *Taylor Woodrow Holdings Ltd v Barnes and Elliott Ltd* [2006] EWHC 1693 the arbitration clause in a construction contract provided that either party could refer any question of law arising to the court under s. 45. In a subsequent arbitration the employer applied to the court to determine which party bore the risk of unforeseen structural works becoming necessary. The contractor opposed the application, principally on the ground that the arbitrator should decide that question. The Court held that it had a discretion whether to answer the question posed, and that it should exercise its question by doing so. The court answered the question by holding that, subject to one qualification, the contractor bore the risk of unforeseen structural works.

2.3 In *Beegas Nominees Ltd v Decco Ltd* [2003] EWHC 1891 (Ch), on an application under s. 45, Patten J determined the correct construction of a rent review clause in a lease of business premises. It is not clear from the judgment how the question came before the court, whether by agreement of the parties or following an opposed application.

2.4 In *Goodwood Investments Holdings Inc v Thyssenkrupp Industrial Solutions AG* [2018] EWHC 1056 (Comm) the question arose whether or not the arbitration had been settled by agreement reached in correspondence. It was not appropriate for the arbitrators to decide the question, because that would involve them reading ‘without prejudice’ correspondence which – if the arbitration went ahead – they should not see. The arbitrators and both parties agreed that there should be an application under s. 45. Males J determined the question, holding that the correspondence did not give rise to a binding settlement agreement.

- 2.5 Standing back from the authorities, we can see that the two principal ways in which a s. 45 application can come before the court are (a) agreement between the parties and (b) an application by one party with the permission of the arbitrator. The section has many obvious uses. If the arbitrator has technical expertise, but is not a lawyer, the parties or the arbitrator may prefer a judge to answer a difficult question of law: see *Babanaft International v Avant Petroleum* [1982] 1 WLR 871 – an application under s. 2 of the Arbitration Act 1979.¹ Alternatively, the arbitrators may be well able to decide the question, but in doing so they would see privileged material, as was the case in *Goodwood*.
- 2.6 It may be that currently s. 45 is under-used. Depending on the state of the TCC list and Commercial Court list, there could be great advantage in seeking a judicial decision on one or more legal issues, while the arbitration proceeds on other issues (as envisaged in s. 45 (4)). Also, it must be admitted that judges are cheaper than arbitrators. So there may be a cost saving. Date-fixing for a preliminary issue may occasionally be easier with a judge than with a panel of three arbitrators, if their diaries do not coincide in the near future. When I was judge in charge of the TCC I tried to expedite all arbitration applications and I have little doubt that this is still the practice. *Taylor Woodrow* proceeded from issue to judgment within two months and those court proceedings dovetailed in with the arbitration timetable: see [79]-[81]. Likewise, you can see from the dates in the *Goodwood* judgment that the Commercial Court dealt with the issue swiftly after the dispute had arisen. According to the Commercial Court Report for 2017-2018 (published last month), in general applications of half a day or less can be heard within a month.
- 2.7 If parties and arbitrators made greater use of s. 45, this would meet a particular concern which has been voiced in recent years. That concern is that arbitration is inhibiting the development of commercial law, because so many decisions on important questions of law/principle are cloaked by confidentiality.
- 2.8 There is, however, a wider point here. The old antithesis between arbitration and litigation has been replaced by a culture of co-operation. Even when the court is hearing appeals under s. 69 or challenges under s. 67 or s.68, it is still making orders ‘in support of’ arbitration. This symbiosis does not mean that there is a ‘cosy’ relationship between judges and arbitrators. On the contrary, judges promote confidence in the arbitration regime by intervening fearlessly and independently when things have gone wrong in an arbitration. This is so, even though (a) many arbitrators are part time judges or former judges and (b) many judges are former arbitrators or future arbitrators.

¹ At 882 Donaldson LJ said: “Put colloquially the arbitrator or the parties nip down the road to pick the brains of one of Her Majesty's judges and, thus enlightened, resume the arbitration. It is essentially a speedy procedure designed to interrupt the arbitration to the minimum possible extent and it is an exception to the general rule that the courts do not intervene in the course of an arbitration.”

2.9 It is no accident that when overseas jurisdictions set up common law courts to resolve international commercial/construction disputes, they usually set up an arbitration centre as well. In a 2015 lecture² Chief Justice Sundaresh Menon of Singapore acknowledged that the London Commercial Court and the LCIA had inspired many of the overseas developments. In Kazakhstan, the Astana International Financial Centre Court and the International Arbitration Centre, which were set up last year, share the same building and the same registrar.

2.10 Section 45 must now, therefore, be considered in the context of the culture of co-operation which exists between the courts and arbitral tribunals. It may often be convenient for the court to deal with a particular legal issue before the arbitrators decide other matters. For example, if it is the sort of point which is likely to generate an appeal under s. 69, there is great advantage in obtaining the court's decision before the arbitrators decide other matters rather than afterwards.

2.11 Another manifestation of the Commercial Court's support for arbitration is its robust approach to granting anti-suit injunctions, where foreign proceedings are in breach of an arbitration agreement: see *Nori Holdings v Public Joint-Stock Company Bank Otkritie* [2018] EWHC1343 (Comm)³ and *Aqaba Container Terminal v Soletanche Bachy France SAS* [2019] EWHC 471 (Comm). Arbitration applications comprise a significant part of the Commercial Court's work. According to the Commercial Court Report for 2017-2018:

"A significant proportion of the claims issued (roughly 25%) relate to matters arising out of arbitration. This reflects London's importance as a centre for international arbitration. The applications include challenges to awards, whether on the grounds of jurisdiction (s. 67), appeal on a point of law (s. 69) or irregularity (s. 68). However, there are also numerous applications for injunctions arising from arbitrations, and for enforcement of arbitration awards. There are also many other types of application, including applications to the court for the appointment of an arbitrator."

2.12 The Chartered Institute of Arbitrators is not, of course, an arbitral institution like the LCIA or ICC. Nor is it compulsory for arbitrators to be members. Even so, in *Chartered Institute of Arbitrators v B, C and D* [2019] EWHC 460 (Comm) Moulder J accepted the strong public interest in making an order (in this instance for the disclosure of documents under CPR rule 5.4C) in aid of disciplinary proceedings brought by the Chartered Institute against one of its fellows. At [48] she said:

"It was submitted by counsel for B that the parties have a route under the Arbitration Act to seek the removal of an arbitrator in a particular case and nothing more is required which

² Opening Lecture for the DIFC Series 2015, entitled *International Commercial Courts*: see [10].

³ The court granted an anti-suit injunction in respect of the Russian proceedings, but could not do so in respect of the Cypriot proceedings because Cyprus is an EU member.

would justify waving confidentiality. However, in my view there is a general public interest in maintaining the quality of and standards of arbitrators and this extends beyond the interests of the parties in a particular case to the wider section of the public who choose to refer their disputes to arbitration. I do not accept the submission that any distinction is to be drawn in this regard between an institution which regulates all members of the profession such as solicitors or barristers and an institution, membership of which is voluntary, and which regulates only a section of the profession, as I understand to be the position in relation to chartered accountants or arbitrators. In my view the general public are entitled to expect that arbitrators who belong to a recognised body meet certain minimum standards as laid down by that body and that those standards will be enforced. Arbitration is a quasi-judicial process for the resolution of disputes and in my view the interests of justice lie in supporting the integrity of this alternative dispute resolution mechanism.”

By making an order against the arbitrator in the case under consideration, the court was firmly supporting the arbitral regime.

3. THE CENTRAL THEMES OF THIS CONFERENCE

3.1 The topics for discussion in the first two panel sessions focus on how the court may intervene in arbitrations when things go wrong. The speakers will review the recent authorities on challenges to jurisdiction under s. 67 and challenges for serious irregularity under s. 68. I will not duplicate their material but will add a few comments of my own.

3.2 Challenges to jurisdiction. If there is any serious doubt about the arbitrator’s jurisdiction, a preliminary application to the court under s.32 is a more constructive (and less expensive) approach than a challenge after the event under s.67. Similar considerations apply here to those discussed above concerning s. 45. For the parties to go through an entire arbitration only to be told at the end that the tribunal lacked jurisdiction would be a disaster. Sir Ross Cranston avoided such an outcome in *SEA2011 Inc v ICT Ltd* [2018] EWHC 520, by correcting (as a matter of construction) an error in the description of one party to the arbitration agreement.

3.3 Section 68. A substantial number of challenges are brought under s. 68, but very few succeed. The latest figures from the Commercial Court which I can find⁴ are:

2015: there were 34 s. 68 challenges, of which 1 succeeded.

2016: there were 31 s. 68 challenges, none of which succeeded.

2017: there were 48 s.68 challenges, none of which succeeded.

Recent challenges since the publication of those figures to have had a higher success rate. See *Reliance Industries v Union of India* [2018] EWHC 822 (Comm) – failure to

⁴ Minutes of Commercial Court Users’ Group 18 March 2018

address an issue; *RJ v HB* [2018] EWHC 2833 (Comm) – deciding case on a basis significantly different from that raised by or with the parties; *Fleetwood Wanderers v AFC Fylde Ltd* [2018] EWHC 3318 (Comm) - arbitrator making inquiries and eliciting information without informing the parties. *RJ* is a significant judgment because it reviews the powers of the court under s.68. Andrew Baker J *obiter* doubted that they extended to removing the arbitrator. Any application for removal should be made under s. 24.

3.4 Applications for removal under s. 24. The hot topic here is, of course, *Halliburton v Chubb* [2018] EWCA Civ 817. The facts are well known to this audience and I shall not repeat them. The Court of Appeal held that M ought to have disclosed his appointment in references 2 and 3 to the parties in reference 1, but that applying the ‘fair minded observer’ test apparent bias was not established. This case is going to the Supreme Court in November. Two aspects of that appeal are important.

3.5 First, the Supreme Court’s decision may have a massive impact on London as a centre for international arbitration. The Court may conclude that – whatever was acceptable in the past – when it comes to disclosure obligations London *arbitrators* must now comply with the emerging international standards. The Court will also, no doubt, bear in mind that specialist arbitrators inevitably acquire background knowledge through undertaking many arbitrations in the same area. Indeed, that is often why parties appoint them or agree to their selection as chairmen. Provided that proper disclosure is made, it should not be a ground for disqualification that an arbitrator has dealt with other cases about the same subject matter. I accept that judges are different from arbitrators, but sometimes comparison is helpful. About fifteen years ago I heard a lot of different cases about the construction of Wembley Stadium and visited the construction site at least once. In any one case the parties did not know what I had learnt from other cases, but no-one suggested that that was a ground for disqualification.

3.6 Secondly, the ‘fair minded observer’ test may require review. There is an encrustation of authority upon this concept. Passing over the earlier cases, in *Gillies v SS for Work and Pensions* [2006] UKHL 2 the majority of the House of Lords agreed with the following proposition at [17]:

“The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny. It is to be assumed, as Kirby J put it in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53, that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be

given to the facts that are relevant.”

Any person with all those qualities would be make an excellent judge. Earlier authorities (and I have not trawled through them all for the purpose of this lecture) equip the fair-minded observer with an understanding of the way the legal system operates. It is an odd intellectual exercise to create a fictitious person, to endow him or her with an impressive list of virtues and then to speculate what he or she would make of the case before the court. In practice, the judge may simply project upon this imaginary person the judge’s own opinions.

3.7 Irregular conduct by parties. People tend to think of s. 68 challenges as necessarily involving criticism of the arbitrator, but that is not always the case: see s.68 (2) (g). The recent decision in *Celtic Bioenergy Ltd v Knowles Ltd* [2017] EWHC 472 (TCC); [2017] BLR 312 is an illustration. The court set aside an arbitration award on the grounds that one party had deliberately failed to draw to the attention of the arbitrator correspondence which was adverse to that party’s case. In a helpful summary of the law at [64]-[67] Jefford J said:

“64. s.68(2) requires an applicant to establish a “serious irregularity”. The irregularity must be of the nature falling within subsections (a) to (i), which is a closed list, and it must have caused substantial injustice. *Lesotho Highlands Development Authority v Impreglio SpA* [2005] UKHL 43 at [28].

65. The threshold for any challenge under s. 68 is high. The 1996 Departmental Advisory Committee Report, para. 280, is often and properly relied upon for this proposition: s.68 “*is really designed as a long stop, available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.*” At paragraph 282 of the same report the Committee recommended that the law should adopt “*the internationally recognised view that the court should be able to correct serious failure to comply with the “due process” of the arbitral proceedings*”. Whilst paragraph 280 is focussed on the categories of irregularity that arise from the tribunal’s conduct, where the sub-paragraph relied upon is that relating to fraud, the focus is on the conduct of party and the threshold is necessarily high. That is consistent with the view that the Court should only be able to correct serious failure to comply with due process.

66. Consistent with that high threshold, under s. 68(2)(g) it is not sufficient to show that one party inadvertently misled the other, however carelessly: *Double K Products 1996 Ltd. v Neste Oil OYJ* [2009] EWHC 3380 (Comm) at [33]; *Cuflet Chartering v Carousel Shipping Co. Ltd.* [2001] 1 All ER (Comm) 398 at [12]; *Profilati Italia Srl v Paine Webber Inc* [2001] 1 All ER (Comm) 1065; *Elektrim SA v Vivendi Universal SA* [2007] EWHC 11 (Comm).

67. There must be some form of dishonest, reprehensible or unconscionable conduct that has contributed in a substantial way to obtaining the award.”

3.8 *Celtic Bioenergy* reached that high threshold. The court upheld the s. 68 challenge and remitted the case to the arbitrator. This is a good example of the court and the arbitrator working together to secure justice for the parties.

4. IMPACT OF BREXIT

4.1 The conference organisers have asked me to say something about the impact of Brexit on London arbitration.

4.2 Brexit in AD 409. The last occasion when Britain dropped out of an European Union (which had a single currency, a federal government and administration devolved to provinces) was in AD 409. Things did not go well on that occasion. Our economy crashed. Overseas trade dried up. So did the money supply. Barter replaced cash transactions. The so-called ‘Dark Age’ (now an unfashionable term) had arrived.

4.3 Is the same thing going to happen next week? Absolutely not. Although I am a ‘remainer’, I do not suggest that Brexit this time will be an apocalypse. But it will be harmful to our economy in the short term. Simon Davis, the Vice-President of the Law Society, has rightly pointed out the difficulties which will arise for British lawyers working in EU countries, if they cannot rely upon the Lawyers Services Directive. For an international law firm with offices on the Continent, there may be barriers between its own legal teams in different countries. The Law Society Gazette published a collection of articles about these issues on 4th March 2019. So far as I can see, the problems which practitioners may face will be highly disruptive, but not ultimately insoluble. What the long term holds no-one really knows, despite many bold assertions on both sides of the debate.

4.4 What will be the effect of Brexit on international arbitration? Logically, there should not be any significant adverse effect. I say this for four reasons:

- (i) No-one brings an arbitration in London because the UK is a member of the EU.
- (ii) London’s attractions include the quality of the Commercial Court judges and TCC judges, the expertise of London solicitors and counsel, the quality of London arbitrators, the efficiency of the LCIA, the English language, London’s location and time zone.⁵
- (iii) The UK’s accession to the New York Convention and the ability of the English courts to enforce judgments and arbitration awards will be unaffected by Brexit.
- (iv) Some 40% of international contracts are agreed to be subject to English law.⁶ It is

⁵ Talking to Hong Kong and Singapore in the morning and to New York in the afternoon

⁶ According to Lord Neuberger, Toulson Lecture 13th March 2019

therefore understandable that many of the parties to such contracts wish to litigate their disputes in England.

4.5 Avoid complacency. Having said all that, I cannot emphasise too strongly the importance of avoiding complacency. The fact that London has been the venue of choice for many overseas litigants over the last century does not automatically mean that this will be the case for the next century. London arbitrators will maintain their reputation for so long as they merit that reputation. In particular, they must resist the temptation of taking on too much work. Having offered hearing dates to a party, no arbitrator should re-offer those dates to anyone else unless the first party has said no. Likewise, we have a strong Bar and world class solicitors in the City of London. The legal profession will maintain its reputation for excellence for so long as it merits that reputation and provided that the fees which it charges are proportionate.⁷

4.6 Personal experience. Everyone here will have their own experience to draw upon. In all of my own arbitrations, the parties on both sides are overseas and only a minority are based in the EU. These cases will not be affected by Brexit. I am confident, indeed optimistic, about the future of London as a major centre for international arbitration.

Rupert Jackson

26th March 2019

⁷ The costs budgeting regime, although not beloved by everyone, plays an important role in that regard.