A WORLD OF CHOICE: THE COMPETITION FOR INTERNATIONAL ARBITRATION WORK—PART I

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This article is an edited version of a paper given to an evening meeting of the Chartered Institute of Arbitrators (East Asia Branch) on 3 December 2007. It considers some of the principal factors that influence party choice of venue for international arbitration disputes, in particular factors arising from the legal environment. In this part, the author considers the influence of choice of arbitration rules, the balance between party autonomy and judicial supervision of awards, separability of arbitration agreements and anti–suit injunctions.

INTRODUCTION

International commercial arbitration is big business for arbitration venues. The economic benefits to a city of attracting high–value disputes, while difficult to quantify accurately, are very considerable. London, for example, handles in any given year international arbitrations with a combined value of US$40–50 billion (giving a HK$ equivalent of $312–390 billion). These contribute significantly to the US$15 billion, (giving a HK$ equivalent of $117 billion) value of UK legal services, amounting to over 1.5% of the country's total GDP. The benefits are felt by the arbitration community, the providers of legal and dispute resolution services, such as expert witnesses and claims consultants, and the wider service economy.

THE STANDARD FORM CONTRACT–ARBITRAL REGIME RELATIONSHIP

An example from the construction and engineering sector illustrates the influence that a contractual choice of arbitral regime can have on where and how a dispute is resolved. FIDIC (the Fédération Internationale des Ingenieurs Conseils) has a close relationship with the ICC. Both date from the same era historically (FIDIC 1913, ICC 1919) and both have member organisations in many countries around the world (FIDIC 75, ICC 84). The strand of ICC activity linking them is dispute resolution. Whilst the most visible form of cooperation takes the form of worldwide co–hosted conferences, the fundamental relationship goes to the heart of the FIDIC suite of contracts, where ICC procedures are enshrined in the dispute resolution provisions. Clause 67 has provided for ICC arbitration since the first edition of the Red Book in 1957, though it is open to parties to make alternative provision.

The very presence of the ICC route has, however, created a strong presumption in its favour. Far from getting FIDIC arbitrations purely by reason of a 'default' provision, the ICC has genuinely positive attractions, such as a reputation for providing greater administrative and supervisory assistance (albeit at a higher cost) than some alternatives and for competence in doing so. The ICC Rules of Arbitration are perceived as flexible and the overriding ethos of party autonomy as attractive. The ICC has a reputation for the quality of its arbitrators, whether appointed by the parties or by the organisation. The role of the ICC's International Court of Arbitration in making appointments and providing scrutiny of awards is seen as an advantage. Whilst there is some doubt as to the extent of this scrutiny, it is a service that is not generally available to parties to arbitration.

The 'profile' of ICC arbitration may be ascertained from the latest ICC statistics.[1]

(1) Over three–quarters of the parties come from Europe and the Americas; two–thirds of them from Europe and North America. 17% come from Asia.

(2) Given that 75% of all awards were rendered in English, with French and Spanish combined only comprising 15%, the choice of law selections and most frequently used venues provide a somewhat surprising picture.

(3) The choice of law in contracts coming to ICC arbitration in 2006 was most frequently that of Switzerland, followed by the US (notably the State of New York), France and England.

(4) The leading choices of venue were:

2005	2006
Paris	Paris
Geneva	Geneva
London	Zurich
Zurich	London
New York	New York
Singapore	Singapore

It is not suggested that a simple casual link exists between the choice of ICC arbitration in a contract and a particular single 'profile' of the arbitration. Such a conclusion would be too facile, given especially the flexibility and party autonomy afforded to the parties. What these facts and figures surely illustrate, however, is that it would also be simplistic and inaccurate to see competition for international arbitration work as falling within a perfect global free market. In large infrastructure or other engineering projects, for example, there will not always be freedom of choice of contract. Funding institution constraints may require the use of the FIDIC MDB form; indeed in such circumstances it is possible that no other contract would be acceptable to the funder. That is enough to demonstrate that the world's arbitration centres do not compete on equal terms, whatever the theory of party autonomy.

FACTORS INFLUENCING CHOICE OF ARBITRATION VENUE

A recent report has identified a number of the factors that influence the parties in making their choice of arbitration location.[2] They are as follows:

- enforceability of the award through an arbitration–friendly legal framework;
- procedural flexibility;
- confidentiality;
- party autonomy;
- impartiality and quality of judiciary;
- availability of legal expertise, especially advocacy;
- specialist expertise, e.g. in shipping, insurance and construction;
- availability of support services; and
- availability of suitable physical venues, i.e. premises.

These factors can be divided into (i) those that relate to the legal system as it interacts with the arbitral regime, and (ii) those that relate to the physical rather than legal environment, e.g. availability of specialist services and resources. The focus of this article is on the legal environment. Although at the margins, what can be called the 'user friendliness' of a centre may tilt the scales in favour of Centre A over its otherwise equal rival Centre B, generally speaking it is the legal environment that will crucially affect the outcome of the dispute and thus, in turn, influence the choice of venue.

Recent decisions of the English courts of a diverse number of issues, especially at appellate level, represent significant developments affecting London's competitiveness on the strength of its legal environment.

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JUDICIAL SUPERVISION AND PARTY AUTONOMY

In 2005, Professor Antonio Crivellaro, Head of International Arbitration at the Italian law firm Bonelli Erede Pappalardo, published a provocatively titled article,[3] the centrepiece of which was the decision of the House of Lords in *Lesotho Highlands Development Authority v Impregilo SpA*.[4] The case derived from an arbitration of disputes between LHDA and a consortium of international contractors on the Katse Dam project in Lesotho. LHDA challenged in the English courts an award made by an ICC arbitral tribunal. The Commercial Court at first instance and the Court of Appeal upheld LHDA's challenge under the English *Arbitration Act 1996* ('the 1996 Act') on the ground that the tribunal had exceeded its powers regarding the currency of the award and interest on the sums payable.

The controversial aspect of the LHDA case, so far as the wider arbitration community was concerned, was the reviewability of the award in the courts. Under art 28 of the ICC Rules of Arbitration (1998 Edn) ('the ICC Rules'):

The parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

As the right to challenge awards on a question of law under s 69 of the 1996 Act is subject to the reservation, 'Unless otherwise agreed by the parties', many commentators assumed that an ICC arbitral award was final and not subject to challenge (absent 'serious irregularity' for the purposes of a challenge under s 68). This reservation is, of course, a classic example of the legislature's intention to give the parties autonomy to proceed in accordance with their own preferences. The decisions of the Commercial Court and Court of Appeal therefore caused a degree of consternation amongst those who assumed that such challenges had been excluded by the parties' agreement to adopt the ICC Rules.

As Professor Crivellaro put it in his article:

If upheld, the decision of the Court of Appeal would have seriously threatened the future of international arbitration in England, Wales and Northern Ireland ... The London arbitration community should be grateful to ... [Impregilo SpA[5]] for having taken their case to the highest level. Had they abandoned the case after the decision of the Court of Appeal, London would have become uninviting as a venue for international arbitration.

Professor Crivellaro went on to provide an insight into how international arbitration work might move between centres:

As counsel for the claimants, I myself had suggested moving the venue from Geneva to London. I did so on my then (limited) knowledge of the [1996] Act based on the reading of various commentators, and especially on my (unlimited) confidence of the English legal system. That confidence was put to extreme test following the decisions of the High Court and the Court of Appeal.

In the House of Lords, Lord Steyn quoted Lord Wilberforce, who played a leading role in the passage of the 1996 Act, criticising the former willingness of the English courts to allow challenges on points of law:

Other countries adopt a different attitude and so does the UNCITRAL Model Law. The difference between our system and that of others has been and is, I believe, quite a substantial deterrent to people to sending arbitrations here ...

The Department Advisory Committee on Arbitration Law Report on the Arbitration Bill (1996) had previously confirmed this view of the pre–1996 position:

There is no doubt that our law has been subject to international criticism that the courts intervene more than they should in the arbitral process, thereby tending to frustrate the choice the parties have made to use arbitration rather than litigation as the means for resolving their disputes.

The decision of the House of Lords in the LHDA case was consistent with the ethos of the 1996 Act in restricting the opportunities for legal challenge, upholding the finality of the award and supporting the autonomy of the parties to resolve their disputes as they wish. Indications of its importance can be found in reactions of the legal community, especially those concerned with the arbitration of construction disputes.

Praise the Lords was the clarion headline in *Building* magazine to an article by Nick Gould, Society of Construction Law Chairman in 2006.[6] Arbitration in England strikes right balance was the enthusiastic tag to an article in *Construction News* by Jeremy Winter of Baker & McKenzie.[7] The threat that they regarded as having been averted is contained in a trenchant footnote by Professor Crivellaro in his *ICLR* article:

... during the last three years and before the 30 June [2005] decision of the Lords, I advised clients to refrain from holding international arbitrations in London.

PARTY AUTONOMY AND ENFORCEABILITY—UPHOLDING THE PARTIES' CHOICE

Other recent English case law supports the choice of arbitration against legal, and legalistic, challenges. One very contentious area has been the extent to which the arbitration clause might be attacked by a party wishing to pursue litigation or other means of dispute resolution, via the device of attacking the legality of the contract in which it is contained.

In *Fiona Trust & Holding Corp v Privalo*,[8] it was alleged that a number of shipping charterparties had been procured by bribery. The charterers had sought to enforce their rights in arbitration under the arbitration agreement, but were met with an application to restrain arbitration proceedings on the ground that the contract, and therefore the arbitration agreement, had been rescinded for fraud. The Court of Appeal rejected the arguments advanced in favour of restraining the arbitration. The arbitrator was entitled to consider the bribery issue in relation to rescission; the argument that this was beyond the scope of the arbitration agreement therefore failed. Equally unsuccessful was the contention that the arbitration clause fell with the contract, if it had been validly rescinded. The Court of Appeal held that:

... the arbitration clause is a separate (and unrescinded) agreement unimpeached by the claim to set aside the charterparties and wide enough to determine whether the charterparties can indeed be set aside.[9]

As a result, the rescission claim in litigation was stayed and the application to stay and the application to stay the arbitration was dismissed. The attention paid to the international perception of the decision was very clear from the court's concern that failure to stay the litigation proceedings would mean 'a potential breach of the United Kingdom's international obligations ... under the New York Convention ...'.[10] More generally, the Court of Appeal was at pains to emphasise that 'any jurisdiction or arbitration clause in an international commercial contract should be liberally construed',[11] supporting 'the presumption in favour of one–stop arbitration.[12]

The House of Lords upheld the Court of Appeal's decision, under the name *Premium Nafta Products Ltd v Fili Shipping Co Ltd*.[13] Lord Hoffmann's analysis of the requirements of the parties to a commercial agreement clearly influences the court's robust attitude to the legalistic arguments urged by the appellants:

The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on it face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.[14]

Lord Hoffman quoted with approval the approach of German law as expressed thus in Bundesgerichtshof's Decision of 27 February 1970.[15]

There is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising therefrom, irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals.[16]

This case not only supports the independence of the arbitration clause and its severability from the principal contract, but also the broad interpretation of it to cover all disputes.

These decisions have been remarkable for the courts' insistence on the need for a 'fresh start' in English law in avoiding the legalism and intricate interpretation of arbitration agreements that have been both incomprehensible and unattractive to commercial users. Commentators agree that this commonsense interpretation, supportive of the arbitration process, sends a clear signal to the international business community and specifically to those who advise on appropriate centres for international arbitration.

The question of the validity of the arbitration clause when the contract in which it is located is alleged to be void or rescinded is a crucial one. The US Supreme Court had to tackle the issue at almost the same time as the English Court of Appeal was deciding *Fiona Trust*. In *Buckeye Check Cashing Inc v Cardegna*,[17] the Supreme Court held by an 8–1 majority that challenges to the validity of the contract as a whole, rather than to the arbitration clause itself, do not deprive the arbitrator of jurisdiction. Indeed, the US courts have gone further that the English courts in determining that in such circumstances the challenge to the validity of the contract must be determined

in arbitration. Jan Paulsson has argued[18] that the English courts, by only agreeing that the arbitrator could determine this issue, are 'robbing the doctrine of much of its practical application.' He commends the approach of the ICSID tribunal in *World Duty Free Co Ltd v Republic of Kenya*[19] which, faced with an allegation that the overall contract had been procured by bribery, actually ruled on that substantive issue in order to dispose of it, rather than consider what the effect might be on jurisdiction.

Few recent cases have been so strongly influenced by the competition for international arbitration business as *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA, The Front Comor*.[20] The case concerned an insurance claim that resulted from a shipping collision in Italy. The insurers had commenced legal proceedings before the Italian courts to enforce their subrogation rights. West Tankers argued before the English courts that RAS was bound by the arbitration clause in the original charterparty and sought to restrain RAS from continuing the Italian proceedings.

The issue was complicated by European Union Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, which provides (inter alia) that the courts of one EU member state must not interfere in a dispute until the court of another member state previously seized of the dispute has ruled on it. However, Lord Hoffmann supported the grant of the order to restrain the Italian proceedings. In doing so, he made a number of highly revealing references to the factors informing judicial policy in this area:

The existence of the jurisdiction to restrain proceedings in breach of an arbitration agreement clearly does not deter parties to commercial agreements. On the contrary, it may be regarded as one of the advantages which the chosen seat of the arbitration has to offer ... [I]f other Member States wish to attract arbitration business, they might do well to offer similar remedies.[21]

Finally, it should be noted that the European Community is engaged not only with regulating commerce between Member States but also in competing with the rest of the world. If the Member States of the European Community are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there is no other shortage of other states which will. For example, New York, Bermuda and Singapore are also leading centres of arbitration and each of them exercises the jurisdiction which is challenged in this appeal. There seems to me to be no doctrinal necessity or practical advantage which requires the European Community to handicap Itself by denying its courts the right to exercise the same jurisdiction.[22]

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