



DECISIONS, DECISIONS

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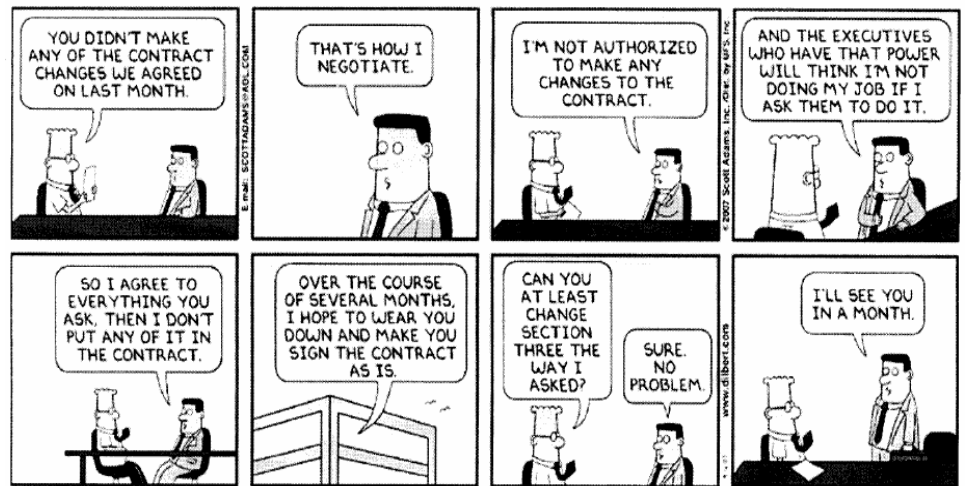


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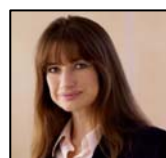
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INTERNATIONAL ARBITRATION – THE “FOREIGN” DIMENSION

by Melanie Willems



One of the most frequent conversations that we have with clients starts: “We have agreed to arbitrate in Oman / Kuwait / Malaysia under their laws. What does this mean? Can you help there?” The answer is yes. In these cases, the arbitration clause itself may offer little or no guidance as to what the applicable procedural rules are. What happens in that situation – which law(s) will apply to the proceedings? How can they be managed?

Before turning to this issue, we have briefly looked at the reasons for adopting arbitration in the first place, and the importance of a considered choice as regards the relevant systems of law. We then turn to the situation where a less than ideal choice simply has had to be made.

Back to basics - Why arbitrate in the first place?

If an arbitration is conducted properly by experienced practitioners (both as regards the lawyers representing the parties and the tribunal), arbitration can offer advantages over litigation in the national courts.

The advantages of international arbitration, particularly where it takes place in some of the established centres (such as London, Paris or Geneva) and under well-known procedural rules, include:

- (a) Confidentiality¹.
- (b) Procedural flexibility and therefore a quicker resolution.
- (c) Having the dispute determined by a neutral party with the necessary experience and understanding of the particular industry (if the right arbitrator is appointed). As regards the courts of some jurisdictions, there is still a fear of an inherent bias in favour of the domestic party – arbitration can remove (or significantly reduce) that concern.
- (d) Finality – if the right to appeal is curtailed or excluded².
- (e) Enforceability of the award against the foreign assets of the “paying party”, principally by virtue of the New York Convention³.

Arbitration does not, of itself, automatically ensure that a party will benefit from these advantages⁴. Like any other process, arbitration must be managed efficiently by

the participants (with particular emphasis on counsel for the parties, who should not abrogate the case management responsibility to the tribunal, as discussed further below). Pro-active case management by the parties is particularly important where the contract provides for arbitration to take place in a foreign jurisdiction that is not regarded as one of the centres for international arbitration. Of course, the identity of the tribunal makes a real difference.

A matter of choice

In any international arbitration, more than one system of law will usually be relevant. The key legal systems will be:

- (a) The substantive law of the contract. This is the system of law which the arbitrator will apply to determine the dispute. The choice of substantive law is essential. It can directly influence the outcome of any claim, be it for additional reimbursement or financial losses. If local law is chosen, difficulties can arise because jurisprudence is insufficiently developed. By way of example, English law has developed a body of decisions concerning large EPC projects. In our experience, that is not the case in those jurisdictions where EPC projects are commonly executed. Under the relevant local laws, a dispute might sometimes have to be resolved by, say, reference to very general provisions in a civil code, while the only possible further guidance has to be derived from prior decisions that deal with factually simple situations and which may not be analogous.
- (b) The procedural law of the arbitration. This will be the law of the place where the arbitration is formally based, or has its “juridical seat” (but as noted below, it does not have to be the law of the place where hearings will take place). This system of law will apply to the procedure of the arbitration, and may define the powers available to the arbitrator⁵. The relevant provisions might be found in the

¹ There is a presumption amongst many practitioners that arbitration proceedings are confidential. Institutional arbitration rules provide that the proceedings are confidential – see for example the LCIA Rules, Article 30. This is not, however, expressly stated in all the major rules. The main ICC Rules do not contain any article that specifically confirms confidentiality, although the appendices describe the work of the ICC Court (which exercises supervisory and administrative functions) as confidential. Where the parties do not specify confidentiality in the arbitration clause in their contract and any applicable rules are silent, the matter may be determined by the law of the place of the arbitration. In England, the Arbitration Act 1996 does not make provision for the proceedings to be confidential but a general presumption of confidentiality can be found in the case law – see for example *Dolling-Baker v Merrett* [1991] 2 All ER 891 (CA) and *Hassneh Insurance v S J Mew* [1993] 2 Lloyd's Rep 243.

² Under English law, it is possible to exclude any appeal on a point of law (and, of course, a factual determination). The Arbitration Act 1996 provides that any award may, however, be challenged if there is a serious irregularity affecting the tribunal, the proceedings, or the award – see s68.

³ The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 has been ratified by more than 130 signatory states. The New York Convention provides that arbitral awards made in the territory of one signatory state shall be enforceable in the courts of another signatory state (on the basis of reciprocity). At the same time, the New York Convention limits the possibilities of the award being challenged at the enforcement stage (see Article V, which preserves a breach of natural justice and a violation of public policy among the grounds for opposing enforcement).

⁴ However, at the very least, the above list may serve as a convenient “checklist” when reviewing any arbitration or dispute resolution clause in a proposed contract.

⁵ Such powers might include the ability to compel the attendance of witnesses, or to grant interim relief by way of an injunction.

local arbitration statute or the applicable section of a procedure code.

For both these systems of law, the parties can – and should - make a contractual choice.

A choice of law clause dealing with the substantive law applicable to the contract will be enforced in most jurisdictions⁶. The procedural law for any arbitration can also be chosen. It does not have to be the law of the place where the arbitration hearing is to take place: venue and procedural law can be separated⁷.

The “seat” of the arbitration may well have an impact on the governing law of the contract (if that is not specified). It is possible that the parties forget to specify their governing law but do choose a seat for any arbitration proceedings, the substantive law might just be deemed to be that of the place where the parties will arbitrate⁸.

⁶ Certainly in those jurisdictions where the state has signed the Rome Convention on the Law Applicable to Contractual Obligations 1980. However, a local court (even when following the Rome Convention) will always apply mandatory rules of the national law. For instance, if it is a mandatory rule of local law that exchange controls prohibit the payment of more than a certain amount of foreign currency over a period of time, the fact that a contractor may be entitled to be paid more by way of instalments would be disregarded by the local courts.

⁷ This perhaps unusual situation was considered by the English Court of Appeal in *Naviera Amazonia Peruana SA v Compania Internacional de Seguros de Peru* [1988] 1 Lloyd's Rep 116. The Court found that there was nothing, as a matter of English law, that would prevent the parties from holding an arbitration in Peru but subject to English procedural law rather than the law of Peru. There is a distinction between the place where, for example, hearings are to occur, and the “juridical seat” of the arbitration (see for instance Section 3 of the Arbitration Act 1996). The latter expression is concerned with a particular state or territory associated with a distinct system of law (see further *Dubai Islamic Bank v Paymentech Merchant Services* [2001] 1 Lloyd's Rep 65).

⁸ Such an inference might have been drawn before the Rome Convention 1990 – see the judgment of the House of Lords in *Compagnie Maritime SA v Cie Tunisienne de Navigation SA* [1971] AC 572. After the Rome Convention, it is still possible that the choice of an arbitration venue will work so as to demonstrate the parties' (implied) choice of law with “reasonable certainty”, as required under Article 3(1) of the Rome Convention. See further *Egon Oldendorff v Liberia Corporation* [1996] 1 Lloyd's Rep 380 where English law was found to apply on the basis of an arbitration clause in favour of London.

But my counterparty won't agree the ideal clause

As a matter of commercial reality, it may be impossible to obtain the perceived benefit and security of an arbitration clause prescribing ICC, LCIA or UNCITRAL rules, with London, Paris or Geneva as the “seat” of the proceedings. When dealing with certain counterparties such as government entities, a foreign contractor or investor will often be asked (sometimes firmly) to compromise on both substantive law and the place of the arbitration and accept the foreign option. What is the effect of this as regards the legal systems that will be relevant for any arbitration?

Much will depend on the procedural law that has to be accepted. A key feature that will enable the parties to work towards an efficient arbitration process is procedural flexibility. Arbitration is meant to be a process that can be tailored to the particular dispute in question, and to the needs of the parties. It is not meant to replicate the more rigid procedural framework often found in litigation in the national courts. The parties should be free to agree on the procedure that they wish the arbitrator to follow. Failing any agreement between the parties, the arbitrator should have the power to determine the procedure but without being bound to any prescriptive set of rules (such as the national civil procedure rules for litigation), subject to treating both parties equally and fairly.

Procedural freedom is enshrined in the UNCITRAL Model Law. This is a draft arbitration statute that promotes arbitration. The Model Law (or the concepts on which it is based) have been adopted by a number of countries. Under the Model Law, if the parties do not reach an agreement on the procedure, the arbitrator is to decide this subject to his duty to ensure that the parties are to be treated equally and given a full opportunity to present their case⁹. This principle has found its way into the national arbitration laws of a number of countries¹⁰.

⁹ UNCITRAL Model Law, Articles 18 and 19.

¹⁰ English Arbitration Act 1996, s34; French Code of Civil Procedure, Art. 1460, Belgian Civil Code, Art. 1693, Swiss Federal Code on Private International Law, Art. 182;

UNCITRAL has published a list of countries that have adopted legislation based on the UNCITRAL Model Law: in those jurisdictions, one may expect that there is flexibility regarding the arbitration procedure¹¹. The express duty of equal treatment in the UNCITRAL Model Law may give some comfort to the foreign contractor or investor who arbitrates in a jurisdiction where the law has been adopted (assuming that it is reflected in the relevant national legislation). However, in some jurisdictions¹², the national arbitration legislation will impose detailed rules of procedure which may lead to an unnecessarily time-consuming and expensive process.

The arbitration clause in the contract may also state that a certain set of arbitration rules is to be applied. This means that the parties have taken advantage of the freedom to agree the procedure for “their” arbitration – but most of the major institutional arbitration rules do not lay down any detailed procedural rules, recognising flexibility as the cornerstone of the arbitration process¹³.

Managing the arbitration process

Where local arbitration laws do not impinge on procedural freedom, international arbitration counsel will have the ability in

Swedish Arbitration Act 1999, s21 (although expressed more narrowly). In the U.S., the Federal Arbitration Act is silent on this matter but the courts have confirmed that the parties have the freedom to determine their own procedure – see for example *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 995 (8th Cir. 1998).

¹¹ The countries are (in alphabetical order): Australia, Austria (2005), Azerbaijan, Bahrain, Bangladesh, Belarus, Bulgaria, Cambodia (2006), Canada, Chile, in China: Hong Kong Special Administrative Region, Macau Special Administrative Region; Croatia, Cyprus, Denmark (2005), Egypt, Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nicaragua (2005), Nigeria, Norway (2004), Oman, Paraguay, Peru, the Philippines, Poland (2005), Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Turkey (2001), Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; in Bermuda, overseas territory of the United Kingdom of Great Britain and Northern Ireland; within the U.S.: California, Connecticut, Illinois, Louisiana, Oregon and Texas; Zambia, and Zimbabwe.

¹² For example, Ecuador.

¹³ See for instance: LCIA Rules, Art. 14(1), ICC Rules, Art. 15(1) – and also the ICSID Rules, Art. 20(2).

principle to steer the proceedings towards an efficient resolution. The correct procedure can also increase the prospects of success, depending on the case. The factors that need to be considered include:

- (a) Is the procedure to be adversarial (as in the common law tradition) or inquisitorial (with the arbitrator taking a more active role in ascertaining the facts and the legal issues)? The latter approach is generally more common in civil-law based jurisdictions.
- (b) Will there be extensive cross-examination of witnesses? In civil law based jurisdictions, witness evidence is less commonly relied on than contemporaneous, documentary records. If there is to be witness evidence, will the arbitrator “interview” the witnesses (sometimes called “conferencing”), or will counsel for the parties lead the questioning (which might result in a more aggressive approach)?
- (c) Should there be disclosure of documents? In civil law practice, the parties are generally not obliged to provide documents, on which they do not propose to rely, to the other side, while this is standard practice in common law jurisdictions such as England and the U.S. In international arbitrations, a compromise is sometimes adopted with a party being entitled only to those documents which it reasonably requests, without there being an automatic duty to search and disclose relevant records to the other side.
- (d) Will there be an oral hearing at all?¹⁴ Overall, in international arbitration written submissions and documentary proof are considered more persuasive than oral argument and cross-examination. However, in most complex cases one or other of the parties will strongly request the opportunity to test the other side’s arguments and evidence (or to present its own case) at

¹⁴ Since arbitration rules provide an express right to a hearing (such as the ICC Rules, Art.20(6)).

a hearing before the arbitrator – and this is generally granted. Any evidentiary hearing in an international arbitration presents opportunities for tailoring the process further, depending on the needs of the individual case.

That leaves the issue of determining the substance of the dispute. Assuming this is governed by a “foreign” law, it will be necessary to involve local counsel to advise on any distinct foreign law questions. However, there may be real difficulties in finding a local correspondent lawyer who has sufficient experience to conduct a major international arbitration – in some jurisdictions, this may be impossible. The best approach is to appoint specialist international arbitration counsel to manage the case and produce an overall strategy (as regards case theory – which may be as or more important than the strict legal position, as well as case management and procedure). Specific advice on local law issues (as may be required) can then be obtained from local correspondents. Indeed, that approach represents general, and best, practice.

A further concern is interference by the local, national courts in the arbitration process. Two international “norms” offer some protection here:

- (a) The New York Convention 1958 provides that the national courts should not interfere with arbitrations while the process is ongoing (although they can review the award at the enforcement stage, as noted above).¹⁵
- (b) The UNCITRAL Model Law (see for instance Article 5) also severely limits the rights of the national courts to interfere in arbitrations.

The New York Convention and UNCITRAL have been widely adopted (as noted above), and this provides a degree of protection that the national courts will not entertain any applications made in order to disrupt the arbitration process, or seize jurisdiction where the matter is properly one for the arbitrator.

In conclusion

Arbitrating in a jurisdiction that is not regarded as an established centre for international arbitration does not need to spell disaster. In many jurisdictions, international conventions and the Model Law provide at least the minimum foundation that enables efficient proceedings. However, the process needs to be carefully managed by experienced counsel. We at Howrey LLP are pleased to count ourselves among these, and enjoy the challenge of teamwork across frontiers.

GOOD FAITH RE-EXAMINED

by Markus Esly



It is often said that the English law of contract does not recognise a concept of “good faith”, as distinct from civil law jurisdictions where *bona fides* can operate as a standard of behaviour to which those wishing to enforce their contractual rights have to live up to.

A recent decision of the High Court, *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch) (7 June 2007),

prompts us to revisit the concept of good faith. In *Berkeley*, Morgan J found that an express obligation of good faith¹ in a property development agreement had been breached. While this is not (strictly speaking) an extension or development of the law, the decision serves as a useful reminder that English law does, in certain circumstances, lend teeth to a requirement to act in good faith.

¹⁵ That, it is submitted, is the correct interpretation of Article II(3) of the Convention.

¹ The circumstances in which English law recognises a duty of good faith were summarised recently by Briggs J in *Ross River Ltd and another v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch) - see paragraphs 197 to 199.

No general principle of good faith

The starting point for any review of the role of good faith in English contract law remains that there is no such general principle². Bingham LJ summarised the position as follows³:

"...In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair," "coming clean" or "putting one's cards face upwards on the table." It is in essence a principle of fair and open dealing. ... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."

"Demonstrated problems of unfairness" do not, however, concern the conduct of parties in negotiations⁴, the motives of a party in terminating a contract⁵ or the

intentions behind breaking a contract⁶. It is also clear that there is no general discretion on the basis of which a court might refuse to enforce a contractual right because the exercise of that right would be unconscionable, or unfair / in bad faith, in certain circumstances⁷.

Don't count on "unconscionability" or "good faith" trumping a technicality

Further, the English Court of Appeal and House of Lords have confirmed that it is open to a party to rely on what many might see as a "technicality" when denying the contractual validity of a promise. This is illustrated by the decisions of these courts in *Actionstrength Ltd v International Glass Engineering SpA*⁸. The case stresses the importance of complying with particular requirements of recording agreements in writing – here, guarantees. If that is not done, a party may find that it has no remedy in spite of what may seem a considerable injustice. Again, good faith will not come to the rescue.

In *Actionstrength*, an employer entered into a building contract with a contractor, who in turn secured the necessary labour by way of a sub-contract. The contractor was then late in paying the sub-contractor, who threatened to withdraw the workforce unless it was paid. The employer, concerned to keep the project going, was alleged to have promised (orally) that it would ensure that the sub-contractor be paid anything due to it from the contractor. The sub-contractor said that the employer had even promised to divert payments due under the main contract to the sub-contractor.

It then transpired that the contractor simply could not meet its liabilities to the sub-contractor. The employer appeared

² Commercial law in England developed away from a "governing principle" of good faith that applies in all cases – as might have grown out of the remarks of Lord Mansfield CJ in *Carter v Boehm* (1766) 3 Burr. 1905. Today, an overriding concept of "utmost good faith" can only be found in insurance contracts.

³ *Interfoto Picture Library Ltd v Stilleto Visual Programmes* [1989] 1 QB 433, at 439.

⁴ The House of Lords has refused to uphold an agreement to negotiate in good faith, on the grounds that this (like an agreement to agree) lacked certainty. See *Walford v Miles* [1992] 2 AC 128, 136.

⁵ Provided this was in accordance with its terms - *James Spencer & Co Ltd v Tame Valley Padding Co Ltd* [1998] (unreported).

⁶ "... a deliberate contract breaker is guilty of no more than breach of contract.": see *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1990] 1 QB 818, 894 per May LJ.

⁷ Where time was of the essence in a sale, the purchaser's delay of ten minutes in paying the price provided a valid ground for refusing specific performance. The seller was not ordered to go through with the sale irrespective of the buyer's delay: *Union Eagle Ltd v Golden Achievement Ltd*. [1997] AC 514.

⁸ Court of Appeal [2001] EWCA Civ 1477 and House of Lords [2003] UKHL 17.

unwilling to honour its (oral) promise that it would guarantee the contractor's liability under the sub-contract, so the sub-contractor brought proceedings on the back of the alleged agreement with the employer. In its defence, the employer relied on the venerable Statute of Frauds 1677. This old piece of legislation requires that all guarantees be reduced to writing: if they are not, they are ineffective⁹.

The judge sided with the sub-contractor. He found a way around the Statute of Frauds, on the basis that the agreement was not to guarantee the liability of another (that of the contractor to the sub-contractor), but was a "primary" promise to pay the sub-contractor from money that would be withheld from the contractor: the judge decided that this was different and would not be covered by the Statute of Frauds¹⁰.

The Court of Appeal and the House of Lords were having none of this. The employer's argument, that the Statute of Frauds applied irrespective of which source of funds or assets would be used to satisfy the guarantee, was upheld. The sub-contractor had also run an alternative argument that it would be unconscionable to allow the employer to rely on the Statute of Frauds in the first place (this argument was advanced as an "estoppel"). After all, the sub-contractor felt induced to remain on site by the assurance given by the employer. This argument was given short shrift. The Court of Appeal said it was "quite hopeless"¹¹:

"When asked what it was about this case which makes it unconscionable for the promisor to

⁹ s4a of the Statute of Frauds 1677 requires that a 'special promise to answer for the debt default or miscarriage of another person' (in modern terms, a guarantee) must be recorded in writing, otherwise it will be invalid.

¹⁰ The logic underlying this reasoning is not sound and cannot be squared with the wording of the Statute of Frauds, but it is an attractive conclusion to reach in view of the unfairness that might be seen to follow if the Statute of Fraud rendered the employer's promise void.

¹¹ At paragraph 42. It should be noted that the Court of Appeal left the door ever so slightly open for an estoppel to operate, but this would have required a different kind of promise from the employer – that he would pay the sub-contractor, and that his promise would in fact be binding whether or not it was put into writing. For a lay person, this distinction may be difficult to appreciate.

plead the Statute, Mr McGhee replied that the facts here are extreme: the respondent increased its risk from £197,000 to some £1.433m and did so at the appellant's specific encouragement. But an estoppel cannot be created by circumstances such as these: if it was, then either the Statute would be rendered nugatory or at the very least great uncertainty would be reintroduced into the law. Estoppel cannot depend merely on sympathy and an assessment of comparative hardship."

Things did not get any better in the House of Lords¹².

"What Mr McGhee submits in this case is that the estoppel principle is wide enough to be applied to contracts of guarantee. On the facts presently alleged, it is also the case that, in Lord Reid's words, St-Gobain stood by and let Actionstrength prejudice its position, by extending credit to Inglen, on the faith of the guarantee being valid. There is authority for saying that estoppel is a principle of broad, not to say protean, application: see, for example Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd (Note) [1982] QB 133. Although he cited no case in any jurisdiction in which estoppel had been applied to avoid the application of the statute to a guarantee, Mr McGhee says that there is no argument of principle against it.

The difficulty which faces this submission is that ... [i]t is in the nature of a contract of guarantee that the party seeking to enforce it will always have performed first. Unless he has advanced credit or forborne from withdrawing credit, there will be no guaranteed debt for which he can sue. It will always be the case that the creditor will have acted to his prejudice on the faith of

¹² At paragraphs 25 and 26.

the guarantor's promise. To admit an estoppel on these grounds would be to repeal the statute."

When can an obligation of good faith operate?

The recent decision in *Berkeley* shows when and how good faith can come into play in a commercial context. Berkeley were a property developer. The defendants, the Pullens, owned a farm and surrounding land. Berkeley entered into an agreement with the defendants. The agreement between them required Berkeley to take various steps to improve the value of the land, principally through the means of securing planning permission. If they succeeded, Berkeley were to be paid a fee. The agreement also imposed a number of obligations on the Pullens. The key terms were these:

- (a) The Pullens had to provide "all reasonable assistance" to obtain the planning consent.
- (b) They had to refrain from doing anything to the land (by obtaining a conflicting planning permission) that would prejudice Berkeley's efforts to obtain the planning consent.
- (c) In addition, there was a general obligation of good faith expressed as follows:

"In all matters relating to this agreement the parties will act with the utmost good faith towards one another and will act reasonably and prudently at all times."

The court found that Berkeley had been "very active" in carrying out their end of the bargain but had not quite managed to get everything in place needed for planning permission. The Pullens then wished to sell their land to a third party. The court found that this would have the effect of making it impossible for them (no longer the owners) to enter into a key agreement with the owners of adjoining premises which Berkeley needed for the purpose of securing planning permission. The court found that the agreement prevented the Pullens from selling the land to a third party.

Morgan J also decided that there had been a breach of the good faith obligation in the agreement¹³. In construing this express obligation, the judge cited the US Second Restatement of Contracts, paragraph 205:

"The phrase "good faith" is used in a variety of contexts and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasises faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterised as involving "bad faith" because they violate community standards of decency, fairness or reasonableness."

He then stated his conclusion that there had been a breach by describing the obligation in these terms:

"a contractual obligation to observe reasonable commercial standards of fair dealing in accordance with their actions which related to the Agreement and also requiring faithfulness to the agreed common purpose and consistency with the justified expectations."

So to Morgan J, "good faith" in a commercial contract requires the following: reasonable commercial standards, faithfulness to a common purpose and respecting justified expectations. All these are phrases that do not appear in the contract itself, and which flesh out the concept of "good faith". Of course, these standards may still not be easy to apply in practice – but at least they offer a fuller description of what is required to be in "good faith".

Conclusion - be mindful of an express obligation of "good faith"

The decision in *Berkeley* shows that while English law will not imply any duties of good

¹³ In view of findings that a sale by the Pullens would also have breached a number of other terms of the agreement, the case did not turn on this.

faith into commercial contracts and generally adopts a “laissez faire” approach to the exercise of contractual rights (as noted above), an express requirement of good faith in the contract can be sufficiently certain to be enforceable and will impose a standard of behaviour which must be met – provided that the obligation itself is not too uncertain (such as the famous “agreement to agree” struck down in *Walford v Miles*).

At the beginning of this article, we also noted Bingham LJ’s statement that English law had developed “*piecemeal solutions in response to demonstrated problems of unfairness*” rather than adopting any general principle. What then are the instances where the law will step in (perhaps using a different method) to prevent unfairness? To us, it seems that these include the following:

- (a) The way in which the terms of a contract are construed or interpreted. The more unreasonable and unfair the result of a particular way of interpreting a clause, the less likely it is that the parties intended it¹⁴.
- (b) Where the contractual arrangements mean that one party (or its agent) can make a determination that affects the liability or entitlement of the other party. One example of this can be found in building contracts, where the employer’s representative or his agent will frequently issue certificates or approve work. The certification is only valid if it has been done fairly as between the parties¹⁵.
- (c) The principle that a party in default under a contract cannot take advantage of its own wrong¹⁶.
- (d) In certain cases, a term will be implied qualifying a power or right (in circumstances which might, in a civil law system, be covered by a general duty of good faith). One example of this has arisen in the context of a credit agreement which allowed the mortgage company to vary interest rates for a consumer credit agreement¹⁷. The Court of Appeal implied a term that the power should “... *not be exercised dishonestly, for an improper purpose, capriciously or arbitrarily*”.
- (e) Implementation of EC Regulations or Directives may introduce further distinct areas of law where “good faith” requirements operate¹⁸, but it is questionable whether this will affect complex business transactions governed by the commercial law of contract.

It just goes to show that general, oft-quoted principles such as “no duty of good faith in common law” can, on close examination and in the right cases, provide substance for argument.

¹⁴ See *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1998] 1 WLR 461, *Investors Compensation Scheme Ltd v West Bromwich Building Society Ltd* [1998] 1 WLR 896 and *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313.

¹⁵ The architect should act independently, honestly and fairly (although what this means in practice will depend on the facts) – see *AMEC Civil Engineering Limited v Secretary of State for Transport* [2005] 1 WLR 2339, and also *Hickman & Co v Roberts* [1913] AC 229.

¹⁶ *Alghussein Establishment v Eton College* [1988] 1 WLR 587.

¹⁷ *Paragon Finance plc v Nash* [2001] EWCA Civ 1466

¹⁸ See for example the Unfair Terms in Consumer Contracts Regulations 1994. Where these apply, Regulation 4(1) controls any term “... *which contrary to the requirement of good faith causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.*”

GAMBLERS AND HIGHWAYMEN: ARBITRATING ILLEGAL CONTRACTS

by **Robert Blackett**



A difficult conceptual question arises when a party to a contract which provides for arbitration alleges that the contract had no effect. This might be because of a mistake, because the contract was induced by fraud or by a bribe or because the contract is illegal (for example, a cartel agreement). Is the issue of the contract's validity something which can be decided by an arbitrator, whose authority depends on that same contract?

The English solution has been to adopt a doctrine of 'separability'. The arbitration clause is treated as a distinct agreement. The arbitrator may decide the questions of fraud, illegality and so on provided that these do not specifically impeach the arbitration agreement – as where, for example, a party's agent has been bribed to agree to an arbitration clause rather than the jurisdiction of the courts.

Impeachment of contracts in English law

In English law a contract can be impeached in various ways. A first example is where a contract is 'voidable'. This occurs, for example, when a party is induced to enter a contract by fraud, or when an agent is induced by way of a bribe to make a contract on behalf of his principal.

When a contract is voidable the party against whom the fraud was committed, or whose agent took the bribe has an option. He can either avoid the legal relations the contract has created or affirm the contract, and lose his right of avoidance. When he chooses to avoid the contract it will, so far as possible, be rescinded and he will be returned to his original position. This means money will be repaid and goods returned. Where rescission is impossible (as in the case of contracts for services or where goods have been re-sold) there will be an action for damages against the fraudster, briber and/or agent. Until the right of avoidance is exercised, the contract is valid so, for example, a fraudster will acquire

good title to goods which he can transfer to an innocent purchaser for value.

A contract can also be 'void ab initio'. This means that the contract is treated as never having had any legal effect. Claims will lie in restitution to recover money paid under such contracts and, since no property will pass, goods delivered, or their value, will be recoverable in conversion. Contracts can be void ab initio for common mistake, for illegality or where one party has a defence of 'non est factum'. This is where a party, who would usually be bound by his signature to a document whether he read and understood it or not, will not be so bound if he has been misled into signing something which is essentially different from what he intended to sign.

The most common way in which contracts are void ab initio is where they are made so by statute, as in the case of agreements which have as their object or effect the prevention, restriction or distortion of competition¹.

Separability of arbitration agreements

English law recognises a doctrine of 'separability'. This is now enshrined in section 7 of the Arbitration Act 1996 as follows:

"Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement ... shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

The purpose of this section is to ensure that, when a question arises as to the validity of an agreement which contains an arbitration clause, that question is determined by the arbitrator. To do otherwise would undermine arbitration, because a party could always avoid the

¹ Competition Act 1998 s.2(4), giving effect to Article 81(2) EC Treaty of Rome

arbitrator's jurisdiction by claiming the contract was (say) induced by fraud.

A first point to note is that section 7 does not provide for automatic, absolute validity of arbitration agreements. It only provides that an arbitration agreement is not rendered invalid by the fact that the agreement of which it forms a part is invalid. This leaves open the possibility that the arbitration agreement might *of itself* be found to be "invalid, non-existent or ineffective". This is the doctrine of "direct impeachment", and is considered below.

That being the case, treating the arbitration clause as "*a distinct agreement*" would not seem sufficient to save it when the agreement in which it appears is impugned. Even when viewed in isolation, a "*distinct agreement*" will have been concluded between the same parties, at the same time and subject to the exact same influences as the main contract which is being challenged. A fraud, bribe or mistake which caused the main contract to be entered is therefore just as causative of the "*distinct*" arbitration agreement.

A further step would seem to be required before this doctrine of "distinct agreement" can logically save the arbitration agreement. It must be assumed that the wording of the distinct arbitration agreement is sufficiently wide as to cover disputes as to the validity of the main contract. An agreement to arbitrate such disputes necessarily contemplates the possibility of the main contract having been induced by e.g. fraud. In that situation the distinct arbitration agreement cannot be said to have been induced by the fraud, since it was made on the premise that fraud was a possibility, and intended to deal with that eventuality.

Harbour v Kansa and "direct impeachment"

English law recognised a doctrine of separability prior to the 1996 Act, when the leading case was *Harbour v Kansa*². A dispute arose whether a contract, which provided for arbitration, was void ab initio for

illegality. Specifically, it was alleged that insurance contracts between the parties were illegal because the defendants were not registered to carry on insurance business under the Insurance Companies Acts 1974 and 1982. The issue was whether this dispute could be decided by the arbitrator. Counsel submitted that the separability doctrine could not apply to a rule which would have prevented any contract from ever coming into existence.

At first instance Steyn J (as he then was) held that the dispute was caught by the arbitration clause, saying:

"Once it has become accepted that the arbitration clause is a separate agreement, ancillary to the contract, the logical impediment to referring an issue of the invalidity of the contract to arbitration disappears. Provided that the arbitration clause itself is not directly impeached (e.g. by a non est factum plea), the arbitration is as a matter of principled legal theory capable of surviving the invalidity of the contract"

The Court of Appeal agreed. Hoffmann LJ stated:

"In every case it seems to me that the logical question is not whether the issue goes to the validity of the contract, but whether it goes to the validity of the arbitration clause. The one may entail the other but...it may not..."

Earlier in the judgment he stated:

"There will obviously be cases in which a claim that no contract came into existence necessarily entails a denial that there was any agreement to arbitrate. Cases of non est factum or denial that there was a concluded agreement, or mistake as to the identity of the other contracting party suggest themselves as examples. But there is no reason why every case of initial validity should have this consequence..."

² *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance* [1993] QB 701

As such, the question is not whether the contract which contains the arbitration clause is voidable or void ab initio. Rather the question is whether the arbitration clause is (as Steyn J put it) 'directly impeached' by the fraud, bribe, illegality, mistake or whatever is alleged.

An example of a jurisdiction clause which can be said to have been directly impeached can be found in *Credit Suisse First Boston (Europe) v Seagate Trading Co.*³ In that case an oral contract for the sale of securities was followed by a confirmation describing the contract as subject to an English jurisdiction clause. This was said not to reflect the agreement which had been made, that agreement having been made on the understanding that it would be subject to a New York jurisdiction.

O'Callaghan v Coral Racing

Five years after the decision in *Harbour v Kansa* another case concerning the arbitrability of contracts void for illegality came before the Court of Appeal (though this was still a case subject to the Arbitration Act 1950). This was *O'Callaghan v Coral Racing*⁴. The *O'Callaghan* case attracted some public interest, because it concerned a bookmaker's refusal to pay out £259,200 which a gambler claimed to have won on his £50 bet. The bookmaker's procedures required that all slips be photographed so there could be no dispute as to verification. No photograph was taken of the slip, and the bookmaker returned the gambler's stake, relying on rules displayed in the shop which stated:

"We reserve the right to ... declare void any betting slip with whose bona fides we are not satisfied."

These same rules provided for any dispute to be "*submitted for arbitration*" with arbitrator's decisions "*to be considered final*". The dispute was referred to arbitration, and the arbitrator upheld Coral's right to declare the bet void for want of

photographic evidence. Mr O'Callaghan sought to appeal the award.

At the time, gaming contracts were void under s18 Gaming Act 1845⁵, which also prevented any suit being brought to recover money alleged to have been won under them. The question of the contract's illegality was never raised before the arbitrator. In the leading judgment Hirst LJ quoted Waller LJ in *Soleimany v Soleimany*⁶ as follows:

"There may be illegal or immoral dealings which are, from an English law perspective, incapable of being arbitrated because an agreement to arbitrate them would itself be illegal or contrary to public policy under English law. The English court would not recognise an agreement between the highwaymen to arbitrate their differences any more than it would recognise the original agreement to split the proceeds"

This is addressed not to the arbitration clause, and whether it is directly impeached, but to the nature of the dealings (i.e. the specie of illegality which is alleged to render the contract void). Hirst LJ referred to the *Harbour v Kansa* case before concluding (emphasis added):

"it is necessary to examine the particular form of illegality in issue in order to determine whether the arbitration clause survives.

In the present case the gaming transaction is declared null and void by section 18. Thus it is manifest that the arbitrator ... would be obliged to hold that the gaming transaction was void. He would also be obliged to acknowledge ... that he was debarred from awarding any sum of money alleged to have been won on the bet. Consequently it

³ [1999] 1 Lloyd's Rep 784

⁴ The Times 26 November 1998

⁵ This is no longer the case- s18 has been repealed under the s334 Gambling Act 2005, which came into force on 1 September 2007.

⁶ [1998] 3 WLR 811 at page 821

seems to me that this is a case where, having regard to the terms of the statute, this clause must be treated, ... as an integral part of the terms on which alone Coral was willing to do business with the appellant, and consequently cannot be separated from the rules and treated as distinct and apart. In other words the clause must be treated as part and parcel of the void agreement, and so cannot survive independently."

The arbitration clause in *O'Callaghan* was no more 'directly impeached' than the clause in *Harbour v Kansa*. One might therefore have thought an award by the arbitrator to the effect that the contract was void for illegality (had the issue been raised before him) would have been upheld. But this is not the case and, instead, such an award would have been a nullity, because of the illegality of the underlying contract.

The idea that arbitration clauses are not always separable, but that their separability depends on what kind of illegality is alleged is difficult to justify, and no such distinction is made in the 1996 Act. It is, in any event, difficult to see what is special about the Gaming Act provisions such that they are "a particular form of illegality" distinct from the insurance legislation in *Harbour v Kansa*. *O'Callaghan* also seems to say that the consequence of the illegality was that the parties (or at least Coral) intended the arbitration clause should not be separable. It is, again, difficult to see how the terms of the statute could reveal the parties' intentions.

Nonetheless it is clear that the award was a nullity. In his supporting judgment, May LJ described the decision of the arbitrator as follows:

"the decision cannot make any determination of rights, obligations or incidents of the transaction which has any effect in law. There are no such rights, obligations or incidents. That extends, not only to any entitlement to payment asserted by the person placing the bet, but also to the meaning and effect of the

bookmaker's terms of business. The arbitrator can make a domestically interesting statement expressing his view of their meaning and effect, but in law it is no more effective than silence"

The facts in *Fiona Trust*

Fiona Trust concerned charterparties entered by shipowning companies in the Russian Sovcomflot fleet. These owners alleged the charterparties were procured by bribes paid to Sovcomflot directors and employees. The charterparties contained clauses which provided for any dispute to be decided by the English courts, but with a right for either party to have the dispute referred to arbitration in London instead. The drafting of the clause was inconsistent – it referred first to disputes "under" the contract and elsewhere to disputes arising "out of" the charter.

The owners brought claims before the English courts seeking to rescind the charterparties. The charterers elected to have this dispute referred to arbitration, and had an arbitral tribunal appointed.

Section 72 of the Arbitration Act 1996 provides:

"(1) a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question-

- (a) whether there is a valid arbitration agreement*
- (b) whether the tribunal is properly constituted, or*
- (c) what matters have been submitted to arbitration in accordance with the arbitration agreement,*

by proceedings in the court for a declaration or injunction or other appropriate relief"

The owners applied under this section for an injunction restraining the arbitration on the basis that the charterparties, and the arbitration agreements contained in them, had been rescinded.

The charterers applied for a stay of the owners' claims, pursuant to section 9 of the Arbitration Act 1996, which provides:

(1) a party to an arbitration agreement against whom legal proceedings are brought ... in respect of a matter which under the agreement is to be referred to arbitration may ... apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern the arbitration.

...

(4) on an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null, void, inoperative or incapable of being performed.

At first instance Morison J held the case could not be distinguished from a case of a mistake going to the root of the contract. The arbitration clauses were not separable, and had been rescinded along with the charters. The judge also found that, as a matter of construction of the arbitration clauses, the claims that the charterparties had been rescinded fell outside the scope of those clauses. Consequently he granted the injunction and refused the stay.

Construction of the arbitration agreement

The Court of Appeal reversed the first instance decision, setting aside the injunction and granting a stay. The first issue which the court considered was the construction of the arbitration agreement. There were numerous previous decisions which turned on the precise meaning of phrases like "arising under" and "arising out of". The court considered that:

"...the time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context. Ordinary business men would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set

of words or another very similar set of words. If business men go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect (at any rate when they are making the contract in the first place) that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause. If any business man did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so.

... it seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The words "arising out of" should cover "every dispute except a dispute as to whether there was ever a contract at all"..."

Under this 'liberal approach' the disputes about whether the contract could be set aside or rescinded for bribery were within the scope of the arbitration clause. The decision is therefore both important and welcome. It simplifies the position, reduces the scope for disputes and means that the effect which the law gives to contracts coheres more closely with the users' expectations.

Separability in *Fiona Trust*

Having determined that the dispute fell within the arbitration agreement, the next question was whether the arbitration agreement was rendered invalid or unenforceable by the bribe. Giving the judgment of the court, Longmore LJ referred to the decision in *Harbour v Kansa*, concluding:

"If arbitrators can decide whether a contract is void for initial illegality, there is no reason why they should not decide whether a contract has been procured by bribery ...

Illegality is a stronger case than bribery which is not the same as non est factum or the sort of mistake which goes to the question whether there was any agreement ever reached. It is not enough to say that bribery impeaches the whole contract unless there is some special reason for saying that the bribery impeaches the arbitration clause in particular⁷

It would, of course, be quite rare to find such specific impeachment of an arbitration clause – someone being specifically bribed to agree an arbitration clause, or tricked into signing a contract on the understanding that it did not provide for arbitration.

Using arbitration to further illegality

It so happened that the arbitrator in *O'Callaghan* found against Mr O'Callaghan, and did not award him anything. This was not because he found the contract void for illegality but based on his interpretation and application of the (illegal) contract. He might just as well have made an award enforcing the illegal contract and awarding Mr O'Callaghan his winnings (e.g. on the grounds that the bookmaker should not be allowed to rely on its own error in processing the slip).

Following *Harbour v Kansa* an arbitration clause can confer upon an arbitrator jurisdiction to decide whether a particular contract is void for illegality. That necessarily admits of the possibility that the arbitrator might find the contract is not void, but is, rather, valid and enforceable. The status of a contract is a question of law and, by virtue of s69 Arbitration Act 1996⁷, the right to appeal against an arbitrator's finding on such a question can be excluded. The arbitrator's decision on the issue of illegality may, therefore, not be subject to review by the courts.

This leads to what might be termed a 'highwayman' problem, after the example given by Waller LJ in *Soleimann*, where an arbitration clause provides a route to

upholding and enforcing agreements which would not be enforced if they were before a court.

Consider a case under the 1996 Act where, as in *O'Callaghan*, the issue of illegality is never raised either with respect to its effect on the arbitrator's jurisdiction or the enforceability of the contract, though both parties are aware of all the relevant facts. The arbitrator does not consider the question of illegality on his own initiative. The arbitrator makes an award giving effect to the agreement.

It is not possible to appeal that award on the grounds that the contract was illegal, because that is a question of law which the tribunal was never asked to determine⁸. Even if it could be argued that the illegality 'directly impeached' the arbitration clause, so that the tribunal lacked jurisdiction, it will not be possible to challenge the award on that ground. The right to object on that ground will have been lost⁹ by reason of the fact that the losing party continued to take part in the proceedings, knowing all the facts on which a challenge might have been made.

Consider, further, a case where the issue of illegality is raised but (because of the separability doctrine) it is never suggested that the arbitrator lacks jurisdiction to determine this issue. The arbitrator considers the question whether the contract is void for illegality, finds that it is not and makes an award accordingly. If *Harbour v Kansa* applies, then the arbitrator will have had jurisdiction to make such an award and, if the arbitration agreement excludes appeals under s69, then there can be no appeal. Again, even if the illegality in fact did affect the arbitration agreement, then the right to challenge the award on the basis that the arbitrator lacked jurisdiction will have been lost.

There is potential, therefore, for arbitration to provide a mechanism whereby unlawful contracts can be interpreted and applied and result in enforceable awards. In the

⁷ And, previously under s3 Arbitration Act

⁸ under s.69(3)(b) Arbitration Act 1996.

⁹ under s73(1)(a)

context of a long term contract, parties might be reluctant to raise an illegality defence voiding the whole contract over a limited, short term disagreement. Could such parties ensure that their illegal contract is operated and enforced as if it were legitimate by choosing arbitration, and not taking an illegality point?

It seems likely that it is this sort of concern which lies behind the, rather opaque, reasoning in *O'Callaghan*. *O'Callaghan* seems to say that where an arbitration agreement could serve to further the illegal scheme set out in the agreement, it (and any resulting award) would be treated as having no effect. The fact remains, however, that it is difficult to distinguish the particular species of illegality in *O'Callaghan* from that in *Harbour v Kansa*. Suppose that the contract in *Harbour v Kansa* were properly void for illegality, but that neither party had taken the point or that, having done so, the arbitrator wrongly found it was valid. Why should an arbitration clause save an unregulated insurance contract, but not a gambling contract?

The leading practitioner texts refer to *O'Callaghan* but simply state that it is unclear what the approach of the court would be under the 1996 Act. *Fiona Trust* makes no reference to *O'Callaghan* and, so far as illegal contracts are concerned, simply restates the position in *Harbour v Kansa* that the issue of illegality is capable of being decided by the arbitrator provided the illegality does not directly impeach the arbitration clause.

The Arbitration Act 1996 would certainly allow a court to avoid enforcing an award in a "highwayman" type case. First there is Section 68 which is a mandatory provision allowing a court to set aside an arbitral award for 'serious irregularity'. The definition of serious irregularity includes "...the award...being contrary to public policy"¹⁰. Second there are the enforcement provisions for New York Conventions awards in section 103(3), which allows a court to refuse to recognise an award where "it would be contrary to

public policy to recognise or enforce an award". Being able to set aside an award on such grounds avoids the need to argue (as in *O'Callaghan*) that particular forms of illegality avoid the doctrine of separability.

Support for this approach can also be found in EC jurisprudence, in the case of *Eco Swiss China Time v Benetton International*¹¹. That case concerned awards made against Benetton pursuant to the arbitration provisions in a market sharing agreement. Benetton contended that it would be contrary to public policy to enforce the awards, when the agreement was properly void under Article 81 of the EC Treaty. The European court of Justice held that the provisions of Article 81 were to be regarded as matters of public policy for the purposes of the New York convention, and that national legislation ought to make provision for the annulment of awards made contrary to Article 81.

Relationship between sections 9 and 72

In *Fiona Trust*, the claims seeking to avoid the charterparties for bribery were just a small part of a much larger claim seeking to avoid many other contracts on similar grounds, seeking to recover bribes from those who had received them, and claiming damages in tort (deceit/undue influence) both from those who had paid and those who had received the bribes. At first instance, Morison J had indicated that even if the arbitrator had jurisdiction to decide the bribery issue, he would have exercised his power under section 72 to injunct the arbitral proceedings, and determine the bribery issues in court.

The Court of Appeal rejected this, and found that the proper course when faced with applications under sections 9 and 72 was:

- (a) First to determine the stay application under section 9.
- (b) If there was an issue as to the validity of the arbitration agreement, either to determine it as part of the section 9 process, or stay proceedings to permit the arbitrator to rule on those matters.

¹⁰ S.68(2)(g)

¹¹ C-126/97

- (c) Separability of the arbitration agreement will usually mean there is no real question about the validity of the arbitration agreement. If nothing is identified as specifically impeaching the arbitration agreement, the court will grant a stay.
- (d) If specific matters are identified impeaching the arbitration agreement, the court will have a discretion whether to determine the issue itself or refer it to the tribunal.
- (e) Generally, the court should be cautious about permitting parties to question the validity of an arbitration agreement under section 72.

The discretion to refer the question of whether the arbitration agreement is specifically impeached to the tribunal is interesting. The Arbitration Act 1996 section 30 (not referred to in the judgment) provides:

“... unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction, that is, as to-

(a) whether there is a valid arbitration agreement”

This suggests that even if an arbitration clause is argued to be ‘specifically impeached’, that is something which properly falls to be decided by the arbitrator, at least in the first instance. The Court of Appeal would therefore seem to be right to have recognised the option of referring such an issue to the arbitrator. The question

remains, of course, as to quite what such a decision is worth. The arbitrator may only ‘rule’ – he is not given a power of final decision. It is therefore hard to see why it would ever be desirable to refer such a question back to the tribunal, only, ultimately, to have it re-heard by the court.

Conclusion

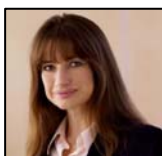
It is worth noting that the House of Lords has granted permission to appeal against the Court of Appeal’s judgment in *Fiona Trust*, and so the position may well change. At present, the position seems to be as follows.

If it is alleged that a contract which contains an arbitration clause is void or voidable, for whatever reason, that is something which falls to be determined by the arbitrator unless the arbitration agreement is specifically impeached. Even if there is an issue whether the arbitration agreement is specifically impeached, a court has a discretion to refer this to the tribunal.

If an arbitrator determines that the contract is valid, that is a finding of law. The result is that, if the arbitrator (incorrectly) finds that there was no mistake, fraud, duress, bribery non est factum and the right of an appeal is excluded his decision stands.

The exception would appear to be with respect to illegality. Although (as in *Harbour v Kansa*) an arbitrator may be competent to consider the question whether a contract is void for illegality, his decision (and the legality of the contract) may still be reviewed by the court when the resulting award comes to be enforced.

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Zoë Bent graduated as a solicitor in March 2002 and joined Howrey LLP in March 2003. Experience to date is primarily focused on commercial litigation and includes working on a complex multi-jurisdictional fraud matter involving over 50 defendants, preparing a wide range of pleadings and applications for numerous High Court and Court of Appeal hearings, culminating in application to the House of Lords. She has particular experience in dealing with issues relating to the Brussels and Lugano Conventions and conflict of laws.

Zoë has also worked on a range of intellectual property matters, including patent disputes, copyright and trade mark and has also gained commercial experience, having spent some eight months at Matra BAe, (British Aerospace) during the course of her training, where she worked closely with the procurement department on drafting contract terms and on general non-contentious matters.

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