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The construction & energy law specialists

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International Quarterly

International Quarterly provides informative and practical information regarding legal and commercial developments in construction and energy sectors around the world.

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Welcome to Issue 38

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Welcome to our latest edition of *International Quarterly* which highlights issues important to international arbitration and projects.

In our 38th issue, we begin with a thorough comparison between the ongoing fire safety and cladding issues in the United Kingdom and the systemic weathertightness or "leaky building" issues prevalent in New Zealand homes constructed during the 1990s. Marina Samountry looks closely at the consequences of these issues and lessons learned.

We turn next to the question of full disclosure in arbitration, with Rebecca Ardagh reviewing approaches to determining an arbitrator's independence or impartiality. Rebecca also covers the pending reforms and decisions which signal a big year ahead for the disclosure obligation.

I follow with a closer look at apparent bias and applications to remove arbitrators, via the recently decided *H1 & Anor v W & Ors* [2024] EWHC 382 (Comm), in which the claimants sought an order for the removal of the sole arbitrator on the ground of apparent bias. You will see that both Rebecca and I refer to the UK case of *Halliburton v Chubb* from 2020, a reminder of its general importance.

Finally, Giuseppe Franco summarises the facts and procedural issues explored in this year's Willem C. Vis International Commercial Arbitration Moot, in which legal students participate in simulated court proceedings before an arbitral tribunal. Giuseppe served as an arbitrator, and provides an in-depth review of the issues at play in the moot case.

If there are any areas you would like us to feature in our next edition, please let me know.

Jeremy

News and Events

News

On 4 March, Fenwick Elliott announced our strategic alliance with Chilean law firm, Molina Ríos Abogados. The alliance brings together the firms' joint expertise in construction and energy law and complex arbitration to provide clients with a comprehensive offering within Latin America and internationally. Partner James Cameron said: "*This alliance makes us uniquely well-placed to service both our existing and new clients who are expanding their operations across Latin America*". To learn more about our new alliance, *visit our website*.

There is still time to reply to the King's College London **2024 Dispute Boards International Survey**. The aim is to provide a wide-ranging report, gathering insights from across the globe; affording a 'voice' to all participants in all building and engineering industries about the use and effectiveness of Dispute Boards. So your assistance would be greatly appreciated. Anyone whose practice involved Dispute Boards in the past six years is invited to answer the survey, *available here*.

Events

Fenwick Elliott's annual charity run, **Jog On**, returns to Battersea Park on 16 May. Join us, along with members of the built environment, to walk, run or jog in either a 5k or 10k, followed by well-earned refreshments nearby. Our fundraising efforts will support the important work of the Construction Youth Trust. *Click here* for more information or to register to attend.

Partner Edward Foyle is speaking at this year's UK Adjudicators 2024 Adjudication & Arbitration Conference, taking place in London on 5 June. *Click here* for more information or to register to attend.

Webinars

Fenwick Elliott hosts regular webinars that address key issues and topics affecting the construction industry. Our next webinar looks at recent updates to the Building Safety Act, with Senior Associates Ben Smith and Huw Wilkins discussing the latest developments, recent case law and what is on the horizon in respect of the BSA on Thursday, 16 May 2024. Please *click here* to register to attend.

We also are happy to organise webinars, events and workshops elsewhere. We are regularly invited to speak to external audiences about industry specific topics including FIDIC, dispute avoidance, BIM, digital design and technology.

If you would like to enquire about organising a webinar or event with some of our team of specialist lawyers, please contact Stacy Sinclair (ssinclair@fenwickelliott.com). We are always happy to tailor an event to suit your needs.

This publication

We aim to provide you with articles that are informative and useful to your daily role. We are always interested to hear your feedback and would welcome suggestions regarding any aspects of construction, energy or engineering sector that you would like us to cover. Please contact Jeremy Glover with any suggestions jglover@fenwickelliott.com.

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A Tale of Two Countries: reflections on cladding and fire safety issues in the United Kingdom and "leaky building" issues in New Zealand

Introduction

Nearly two years ago this April, the Building Safety Act 2022 (the "**BSA**") received Royal Assent, heralding a new building safety regime for the construction sector. Following the Grenfell Tower fire, the government established an independent review led by Dame Judith Hackitt to examine existing building regulations and fire safety measures. Her final report, "Building a Safer Future" (the "**Hackitt Report**"), published in May 2018, highlighted "*deep flaws*" within the construction industry, calling for a cultural shift to instil the principles of safer high-rise buildings following a national tragedy. The Hackitt Report identified "*many shared issues and challenges through its consideration of other countries' regulatory frameworks*" and cited international evidence pointing to the need for wide culture change including a case study of New Zealand.[1]

This New Zealand-qualified lawyer cannot help but draw comparisons between the ongoing fire safety and cladding issues in the United Kingdom and the systemic weathertightness or "leaky building" issues prevalent in New Zealand homes from the mid-1990s. While this article could delve at length into a myriad of comparisons, consequences, and lessons learned, given the ongoing nature of the topic, it will primarily offer some remarks of these parallel experiences.

Background

Before turning to how both countries responded to these issues, it is helpful to paint a brief picture of the background in which these issues arose.

New Zealand

From the mid-1990s onwards, many New Zealand homeowners found themselves grappling with homes that leaked. Water ingress resulted in damp and humid environments which caused mould to develop requiring costly remediation. The Building Industry Authority commissioned the Hunn Report in 2002 which confirmed leaky buildings were a substantial issue in New Zealand. This would cost homeowners billions in remediation costs (not to mention legal costs associated with bringing claims against parties involved in the construction) over the next two decades. A conservative estimate in 2009 placed the cost at $11 billion (NZD).[2]

There is no single cause of how leaky buildings arose but the various factors that are often cited include poor workmanship and changes to building methods; inadequacies with the Building Code, Approved Documents and the inspection and consent process; to more environmental factors, such as the inappropriate use of untreated timber and monolithic cladding systems (both considered unsuitable for New Zealand's climate). One key factor that draws similarities to the UK is the impact of changes to the regulatory regime of the era. This is considered further below.

UK

The Hackitt Report commented on the key issues underpinning the flaws within the industry including the regulations surrounding fire safety and compliance, such as the Approved Documents being "*ambiguous and inconsistent*" along with the methods for achieving compliance with building safety requirements being "*weak*". Existing guidance has often been misunderstood or misinterpreted leading to a "*race to the bottom*" culture of seeking the most cost-effective and quick method of

achieving compliance, rather than prescribing the safest possible solution.

The Grenfell Tower Inquiry also raised several concerns with the climate in which the Grenfell Tower fire was able to occur. In his Phase 2 Closing Submissions, Richard Millett KC, as counsel to the Inquiry, summarised several discrete (and familiar) factors, including poor practices in the construction industry, the failure of central government to act on known risks, poor, ill-focused or insufficient training and various deregulatory policies pursued by successive governments.[3]

The Building Act 1984 notably introduced performance-based reform, sweeping away over 300 pages of previous building regulation (some dating back centuries). Such deregulatory policies over time also include regulatory reform of fire and rescue service legislation such as the Fire and Rescue Services Act 2004 (replacing the Fire Services Act 1947) which abolished national standards of fire cover and has been criticised for leading to slower response times and poorer service.[4]

Responses

New Zealand

Key legislative changes in New Zealand were reforms to the Building Act and Codes and the establishment of the Weathertight Homes Tribunal (the "**WHT**") through the Weathertight Homes Resolution Services Act 2006 (the "**WHRS Act**").[5]

Like the UK, New Zealand launched an inquiry into the issue. The Inquiry into the Weathertightness of Buildings in New Zealand, which was concluded in March 2003, labelled the problem as a systemic one, stating: "*Changes to the building control regime brought about by the Building Act, and too greater reliance of market competitiveness have, we believe, contributed to the systemic failure of the building industry*".

The Building Act 1991 (NZ) in question was the product of regulatory reform which established a performance-based[6] approach to regulating building work in New Zealand much like the 1984 UK Building Act. To address this, the 1991 Building Act was repealed and replaced by the Building Act 2004 which sought to tighten up building procedures. Industry commentators noted that subsequent revisions of the Building Code from 2013 demonstrated attempts to prescriptively document standard building practices.[7] For example, Acceptable Solution B2/AS1 (Durability) reintroduced the requirement for treated timber to prevent rot of internal framing and Acceptable Solution E2/AS1 (External Moisture) introduced a risk matrix to assess weathertightness risk.

The Hackitt Report refers to New Zealand as a case study of regulatory reform stating, "*widespread issues with the weather-tightness of buildings acted as a tipping point for regulators and industry to recognise systematic failure, particularly with regards to competence and standards*".[8] This is not too dissimilar from the tipping point (the Grenfell Tower fire) faced by the UK and the need to confront systemic failures as they relate to cladding and fire safety.

Both New Zealand and the UK introduced limited means of financial assistance to help homeowners and leaseholders with remediation. In New Zealand, this was the implementation of the WHT and financial assistance packages. The WHT gave leaky building homeowners a "*fast-track*" way of adjudicating claims against responsible parties. The WHRS Act also provided for financial assistance packages until 2016, although this funding was limited to up to 50% of the agreed remediation cost. For this reason, it often made more sense to proceed to recover the cost of remediation through the Courts. As a result, the case law regarding liability and recovering those losses is well developed (as will be discussed below).

UK

The most significant response to the Grenfell Tower fire is the introduction

of the BSA. Much has already been written about the BSA, but the overall message behind it is clear: its priority is to address fire safety concerns arising out of the Grenfell Tower fire by creating new lines of accountability so that those who are responsible can be held to account. Some ways in which this is demonstrated include the amendment of the Defective Premises Act 1972 (the "**DPA**") which extends the limitation period to 30 years retrospectively and 15 years prospectively for claims.

By comparison, New Zealand's equivalent in section 393 of the Building Act 2004 (NZ) provides for a 10-year "*long-stop*" limitation period in relation to "*civil proceedings relating to building work*". Although not without criticism, this demonstrates a clear intent to give those affected a pathway to recover for the costs of remediation over a remarkably extended period that the BSA affords.

Following the Hackitt Report, the government published the Building a Safer Future implementation plan signalling its intention for "*fundamental reform of building safety*" and "*more effective regulatory and accountability framework*". The UK, like New Zealand, has also adopted some prescriptive measures, for example, the ban of the use of combustible cladding in certain high-rise buildings[9] and amendments to Approved Document B clarifying the role of desktop assessments in high-rise buildings over 18 metres demonstrating this shift towards greater regulation.

To date, the government has established several schemes to provide financial assistance, including the Building Safety Fund ("**BSF**") in 2020 (for buildings over 18 metres in London) and the Cladding Safety Scheme ("**CSS**") in 2023 (for buildings between 11 and 18 metres in England) to address unsafe cladding on residential buildings where developers or building owners are not currently doing so. Unlike New Zealand, the UK currently has a much easier environment in which it is possible to go through the developers to pay for remediation, for example, developers who are members of the Responsible Actors Scheme are obliged to either self-remediate their buildings or reimburse the government for taxpayer funded remediation such as the BSF and CSS.

However, these funds are not a silver bullet. On top of the need to remove and replace unsafe cladding, buildings will often require work to non-cladding fire safety issues to make the building safe, but such works might not be covered by the BSF or CSS. Leaseholders are also required to exhaust other avenues before making a successful application, for instance, through insurance claims, warranties or legal action.[10] Therefore, much like in New Zealand, despite some government funding, it is inevitable that UK courts and tribunals will see plenty of action parties seek to recover their costs or losses.

Development of case law

Case law from both jurisdictions offer insights into the different ways of reaching a similar result, that is to ensure that those who have suffered loss have clear ways to recover from those responsible.

New Zealand

A distinct feature of the law related to leaky building claims in New Zealand is the ability to recover the costs of remediation for leaky homes from a local authority through a claim in negligence; perhaps due to an absence of legislative direction similar to the UK DPA. This is significant in New Zealand because local authorities often remain the last solvent party.[11]

In New Zealand, the legal approach regarding the liability of local authorities notably diverges from the UK's approach. New Zealand's position is clear: a local authority owes a duty of care to homeowners and can be

held liable for negligence for its roles in inspection and issuing building consents. This principle is established in landmark cases such as *Invercargill City Council v Hamlin* [1996][12] (rejecting the UK case of *Murphy v Brentwood District Council*[13]) which held that a duty of care could apply to pure economic loss such as the cost of remediation. This was upheld in later key leaky building decisions *Sunset Terraces*[14] and *Byron Avenue*.[15]

One of the reasons for the departure from UK precedent was because there were distinct differences in the New Zealand housing scene and social circumstances compared to the UK which justified local authorities owing a duty of care.[16] This was set out in *Hamlin* (and affirmed in *Sunset Terraces* on appeal to the New Zealand Supreme Court). It was, therefore, a matter of policy which prompted and shaped the landscape which ensured New Zealand homeowners could recover against at least one party involved in the building work.

UK

We are now beginning to see substantial building safety litigation through the courts and tribunals considering how the BSA should be applied. It is becoming clear that the judiciary is eager to enforce the BSA's provisions, paving way for various parties to more readily recover losses associated with remediation of fire safety issues. For example, one of the key takeaways from *URS Corporation Ltd v BDW Trading Ltd*[17] is that the BSA applied to an existing claim before the BSA came into force. This allowed the developer (BDW) to amend its pleadings to add new claims against the structural engineer (URS) and overcome the limitation argument that its claim seeking to recover remediation costs from URS was time barred.[18]

Another recent decision, *Triathlon Homes LLP v Stratford Village Development Partnership*,[19] held that a Remediation Contribution Order could be made for remediation costs incurred before the commencement of the BSA noting it was "*consistent with the purpose and structure of Part 5 that the radical protection it extends to leaseholders should not be restricted by precise distinctions of time*". The Tribunal summed up the current environment trending towards leaseholders when it went on to say that the effect of this approach "*provides for wholesale intervention in and beyond normal contractual relationships in order to transfer the potentially ruinous cost of remediation from individual leaseholders to landlords, and to distribute it between landlords and developers and their associates according to criteria which Parliament has decided are necessary and fair*".

Conclusion

History doesn't repeat itself, but it often rhymes. The shared experiences and consequences faced by the UK and New Zealand offer interesting insights into present circumstances. Both countries have enacted significant legislation aimed at addressing past shortcomings, and both share a similar stance regarding recovery of costs and losses. It is premature to draw definitive conclusions on the impacts of the government's intended culture change in building and fire safety, but the current trajectory is promising. ■

Footnotes

[1] Hackitt Report at 10.16 and 10.17.

[2] Department of Building and Housing Weathertightness – Estimating the Cost (Report prepared by PricewaterhouseCoopers, 29 July 2009).

[3] Day 312, 10 November 2022, Grenfell Tower Inquiry RT Transcript at 28-30.

[4] Fire Brigades Union, "The Grenfell Tower fire: Background to an atrocity" (5 September 2018).

[5] The purpose of the WHRS Act is to "*provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for assessment and resolution of claims*". There is a notable emphasis on cost over effective dispute resolution.

[6] It is performance-based in the sense that it set out purposes and objectives to be achieved which allowed flexibility as to how best to achieve those purposes and replaced a previously prescriptive regime.

[7] Nuth, M. (2020) "Industry Perceptions of Weathertightness Failure in Residential Construction" (BRANZ Study Report SR442) at page 6.

[8] Hackitt Report at 10.9.

[9] See the Building (Amendment) Regulations 2018 (SI 2018/1230).

[10] See *Building Safety Fund Guidance for new applications 2022* (accessed 13 March 2024) at: *https://www.gov.uk/government/publications/building-safety-fund-guidance-for-new-applications-2022/building-safety-fund-guidance-for-new-applications-2022*.

[11] This is because in New Zealand parties involved in the building work have joint and several liability. Many companies also go bankrupt before claims can be made against them.

[12] *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, [1996] 1 NZLR 513.

[13] *Murphy v Brentwood District Council* [1991] UKHL 2, [1991] 1 AC 398.

[14] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 79.

[15] *North Shore City Council v Body Corporate 189855 (Byron Avenue)* [2010] NZSC 78.

[16] *Body Corporate 207624 v North Shore City Council* [2012] NZSC 83 at [7] and also *Hamlin* where Richardson J considers six distinct and longstanding features of the New Zealand housing scene which justified a duty of care being owed by the local authorities.

[17] *URS Corporation Ltd v BDW Trading Ltd* [2023] EWCA Civ 772.

[18] Section 135 of the BSA extends the time limit for claims arising before 28 June 2022 from six years to 30 years.

[19] *Triathlon Homes LLP v Stratford Village Development Partnership & Others* [2024] UFTT 26 (PC).

Full disclosure – what do we really need to know?

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The appearance of justice

A maxim of the judicial world is that justice not only be done, but that it be ***seen*** to be done. The importance of faith and trust in the system cannot be overstated when it comes to its continued successful operation.

With international arbitration, the dispensation of justice relies on the decision making of the arbitral tribunal, and that these decisions are based solely on the merits of the case without deference to any other influences. As above; it is just as important that this be the ***appearance*** given by the tribunal as it is that it is the reality behind the scenes.

Independence and/or impartiality

Accordingly, the international community holds arbitrators to certain standards of impartiality and independence through domestic arbitration law, institutional rules, and even various soft-law mechanisms (such as the IBA Guidelines on Conflicts of Interest in International Arbitration 2014 and UNCITRAL Model Law on International Commercial Arbitration 1985). Though there are some differences between these standards across the various sources,[1] the approach is mostly consistent and is akin to that set out in the IBA Guidelines, which can be summarised as follows:

1. The arbitrator has an obligation to be independent and impartial.

2. This obligation continues throughout the proceeding and until the final award has been rendered.

3. The test of independence or impartiality is an objective one, considering whether a reasonable third party with full knowledge of the facts and circumstances would consider it likely the arbitrator may decide a case based on factors other than its merits. This test is founded on the appearance of bias or assessment of "*apparent*" bias, rather than identifying actual bias.

An arbitrator can be challenged on his or her lack of independence and/or impartiality either through the institutional body governing the arbitration or under the applicable domestic law. If successful, this will result in the arbitrator being removed and replaced or, in the event the challenge is taken after the award has been rendered, the award being nullified. Clearly, a challenge to an arbitrator's independence and impartiality can be incredibly disruptive and costly depending on when it occurs. Ideally a challenge will be made at the beginning of proceedings to ensure minimal cost and delay (whether successful or otherwise).

Disclosure

In order to know whether there are grounds for a challenge at the beginning of a proceeding or when an arbitrator is first appointed, the parties need to be aware of any facts and circumstances that may give rise to a justifiable doubt as to the arbitrator's independence or impartiality. This information is likely held solely by the arbitrator and therefore, in order to best ensure the obligations of independence and impartiality are maintained, there is generally considered to be an obligation of disclosure held by arbitrators throughout a proceeding.

The interdependence of the obligations of impartiality and disclosure was somewhat confirmed by the English Supreme Court in *Halliburton Company v Chubb Bermuda Insurance Ltd*.[2] There is currently no express obligation of disclosure under the English Arbitration Act (though this is likely to change through the ongoing reform[3]), however, the Supreme Court

Footnotes

[1] For example, under the English Arbitration Act 1996, the US Federal Arbitration Act and the Swedish Arbitration Act 1999, arbitrators are required to be impartial but there is no express obligation of independence.

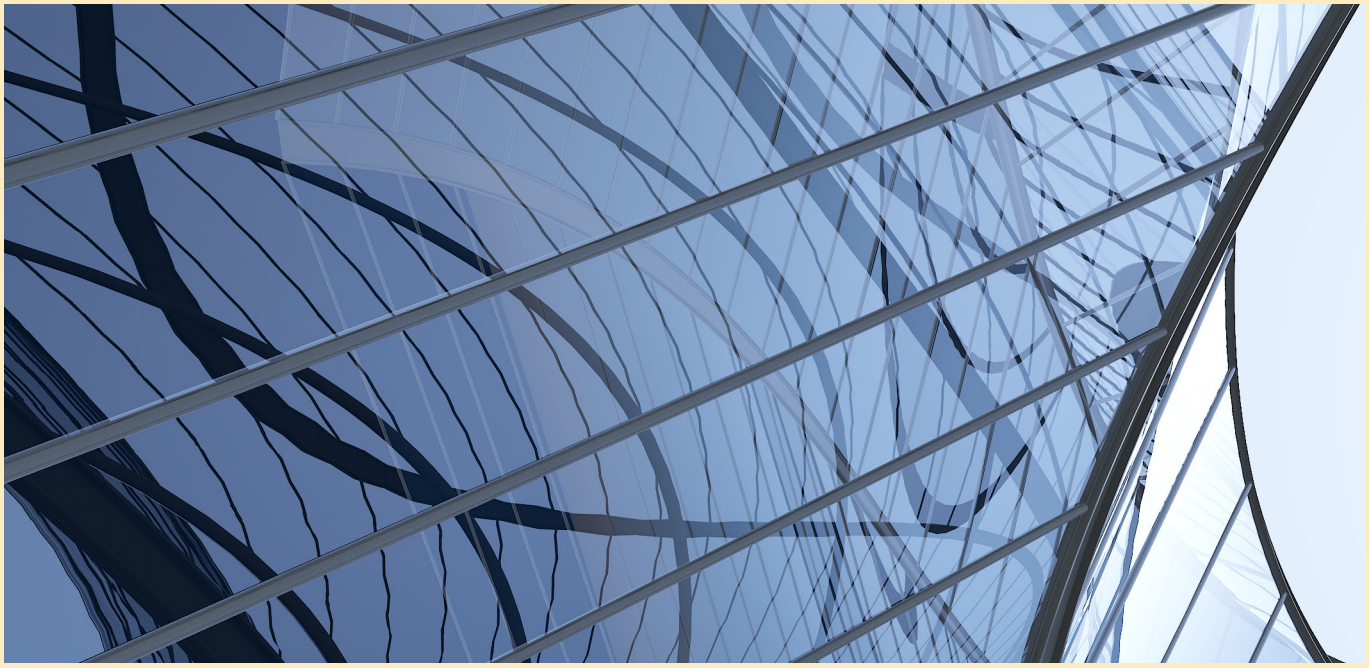
[2] [2020] UKSC 48. See *Dispatch*, Issue 246.

[3] See "So, how does the UK plan to remain a world leader in international arbitration? By doing very little".

[4] Paris Court of Appeal, 10 Jan 2023, No. 20/18330.

[5] No. 21-14408 (11th Cir. 2023).

[6] Paris Court of Appeal, 25 May 2021, No. 18/20625.



found that there was necessarily a legal obligation of disclosure implied under section 33 of the Act, which requires arbitrators to remain impartial; in order to act impartially, one must disclose any matters that have the potential to impact this ability. In other jurisdictions, institutional rules, and guidelines, there is an express obligation on an arbitrator to disclose such matters.

There is a natural tension between the idealistic (though, of course, necessary) expectations of impartiality and independence, and the realities of international arbitration in practice; arbitrators do not exist in a vacuum and, particularly depending on the industry, are likely to have some sort of experience with counsel or parties and existing professional views on legal issues in consideration, and, in any event, are usually appointed directly by one of the disputing parties. None of these influences necessarily render an arbitrator partial, however, there can be instances where a pre-existing relationship with counsel or a party is one of influence, where an arbitrator has a direct financial interest in one of the parties or even the outcome of the arbitration, or when an arbitrator's existing view on an issue of law is so entrenched that he or she has a pre-determined decision rather than considering the merits of the case.

Somewhere on this continuum, facts and matters concerning these potential influences become relevant rather than innocent; the question is, how do we know and what should be disclosed?

In order to ensure the parties have the best information available as early as possible, arbitrators are generally encouraged to resolve this question in favour of disclosure. In fact, most laws, rules, and guidelines that give guidance as to the test to be applied for disclosure prefer a subjective approach rather than an objective one, such as the IBA Guidelines which confirm that the arbitrator's duty of disclosure "*rests on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view*" [Emphasis added].

Too much of a good thing

The concern with this approach is that disclosure of every circumstance may, in some cases, be extensive and yet still not contain any fact or matter that would necessarily give rise to a justifiable doubt as to the arbitrator's impartiality or independence. Ultimately, it cannot be up to an arbitrator to consider and form a view as to the probative value of his or her own information. In order to ensure the parties can accurately consider whether a challenge is justifiable as early as possible, there must be a preference for disclosure. However, parties must be realistic about the nature of the information that is disclosed and the facts or matters the may evidence; not all information will be grounds for a successful challenge (in fact, it will more frequently not be the case).

This assessment is inherently fact specific and approached on a case-by-case basis. For example, the recent Paris Court of Appeal decision of *Douala International Terminal (DIT) v Port Autonome de Douala*[4] considered an undisclosed relationship between an arbitrator and the late lawyer for one of the parties. This relationship became apparent after the final award had been rendered when the arbitrator wrote a eulogy for the lawyer. In this eulogy, the arbitrator confirmed that the two would meet regularly, that he loved and admired the lawyer, and that the lawyer would often advise him in his decision-making process. In this case, it was not the existence of the un-disclosed relationship that met the threshold to void the award; it was the fact that the arbitrator expressly confirmed the relationship was one that held particular influence over him and his decisions. The existence of a relationship with counsel alone, particularly in smaller legal industries, has been frequently held not to be indicative of apparent bias (see, for example, *Grupo Unidos por el Canal,*

S.A. v Autoridad del Canal de Panamá[5] in the United States).

The wide-ranging nature of the duty may provide some comfort to arbitrators in alleviating the need to make an assessment as to pertinence him or herself, though it risks becoming overly burdensome. In France, this obligation is fettered by a "*notoriety*" exception, where there is no need to disclose information that is a matter of public knowledge. Similar exceptions exist in other jurisdictions, such as Egypt. This, to some extent, shifts some of that burden to the parties to carry out their own due diligence as to potential arbitrators at the time of appointment and familiarise themselves with the information available at least in the public arena.

The extent to which this exception evolves into a positive duty on the parties remains to be seen; it is not drafted with the intention of requiring the parties to undertake significant research, however, the courts have been open to invoking the exception on a relatively liberal basis. For example, in *Delta Dragon v BYD*,[6] the Paris Court of Appeal held that an arbitrator's connection to the automotive industry (being a member of the advisory board for a company that was the parent company to a strategic partner to one of the parties) would have been evident by typing the arbitrator's name with the German word "*automobil*" in quotations into an internet search engine, and therefore fell within the notoriety exception. The court went so far as to state that parties are required to demonstrate a "*modicum of curiosity*" and conduct their own research (in this case, even in other languages) in order to identify such possible objections and raise them in a timely manner, otherwise they risk waiving this right after a reasonable time has passed from the original appointment.

The notoriety exception may go some way to tempering the potential landmine of social media and disclosure obligations, which gives rise to such questions as whether "contacts" warrant disclosure or only offline relationships, and whether posts or views shared or expressed on personal platforms are captured, or only those from professional pages.

We should be cautious, however, of placing too high of a burden on parties to uncover such information through onerous research and investigation.

Further clarity

There is currently a large amount of reform going on in this space; there are current draft updates to the IBA Guidelines, the English Arbitration Act 1996, and the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlements. All these proposed updates provide further recognition of the obligation of disclosure and more refined attempts at guidance as to the application of this obligation.

In particular, the IBA Guidelines provide guidance by way of practical examples of facts and matters that warrant disclosure and may give the appearance of bias in an arbitration. These are colour coded into a traffic light system ranging from the Red list, which includes examples of situations in which an arbitrator must be removed or expressly require the consent of the parties to continue with the appointment, to the Green list which includes examples that are so innocuous they do not require disclosure. While further updates to this list are being made to provide more clarity, there are still those who criticise the utility of these guidelines practically. In particular, there is often criticism of the middling Orange list, which includes situations that must be disclosed but do not necessarily imply a conflict of interest. Matters that fall within or outside the Orange list necessarily require examination on a case-by-case basis and so it has been argued that the mere existence of this list creates more confusion than clarity.

Finally, there are also a number of cases currently awaiting decisions at the time of publication that may provide more clarity on the scope of disclosure obligations. *Aroma Franchise Company v Aroma Espresso Bar*, which was heard by the Ontario Court of Appeal in December 2023 and is currently awaiting decision, concerns the impact of non-disclosure of multiple appointments by common counsel. *Occidental Petroleum v Andes Petroleum* is currently awaiting leave from the US Supreme Court to appeal following a petition for writ of certiorari filed in November 2023. This relates to an allegation of apparent bias based on the failure of an arbitrator to disclose an appointment to an unrelated tribunal as co-arbitrator with a member of the counsel team for one of the parties. The Second Circuit concluded "*a reasonable person would have to conclude that an arbitrator was partial*" where Occidental Petroleum argues that Supreme Court precedent confirms that an appearance of bias is sufficient to demonstrate "*evident partiality*" under the Federal Arbitration Act. The appearance of bias would clearly be a lower bar than that applied by the Second Circuit.

Conclusion

These pending reforms and decisions signal a big year ahead for the disclosure obligation, however, expectations must be tempered; the appearance of bias is so fact and circumstance specific that, though it would be welcome, it is difficult to see how guidance could be any more detailed or prescriptive and still have any practical application for parties and arbitrators.

In order to ensure the appearance of an impartial and independent decision maker, there must be complete transparency. It is, however, up to the parties to approach this transparency reasonably and not take the mere action of disclosure by an arbitrator as evidence of partiality; the bar applied to warrant disclosure is much lower than that applied to an assessment of partiality, and expectations should be sensibly set, and challenges taken cautiously. Arbitrators should look to err on the side of disclosure whenever a question arises. Parties should also carry out brief exercises of due diligence to ascertain at least what is already in the public domain (including web searches and a review of platforms such as LinkedIn). ■

Apparent bias and applications to remove arbitrators

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At the end of 2020, the UK Supreme Court, in the case of *Halliburton Co v Chubb Bermuda Insurance Ltd* [2021] AC 1083,[1] had to consider an application under section 24 of the Arbitration Act 1996 for the removal of the arbitrator. When considering an allegation of apparent bias against an arbitrator, the test is whether the fair-minded and informed observer would conclude there is a real possibility of bias. The court decided that, as at the date of the hearing, to remove the arbitrator, the fair-minded and informed observer would not have concluded that circumstances existed that gave rise to justifiable doubts about the arbitrator's impartiality. However, the judgment also provided, as you would expect, a number of helpful comments about how a court should approach similar applications.

In the case of *H1 & Anor v W & Ors* [2024] EWHC 382 (Comm), the claimants (referred to in the judgment as "the insurer") also sought an order for the removal of the sole arbitrator ("W") on the ground of apparent bias. The dispute in question was with a film company and a film production guarantor ("the insured").[2]

Why it was suggested that the arbitrator was biased

Although the original grounds of the claim were wide-ranging, at the time of the hearing before Mr Justice Calver, they focused upon the observations made by W during the second procedural hearing which the insurer said gave rise to: "*justifiable doubts about the arbitrator's ability to assess the witness evidence impartially*". Specifically, the insurer complained that:

> *"statements made by W, concerning his knowledge of the insured's factual and expert witnesses, gives rise to an apprehension that he has pre-determined favourable views of those witnesses and pre-determined negative views of the insurer's witnesses. They also complain about the inconsistency of explanations given by W as to the nature and extent of his relationships with the insured witnesses."*

The insurer was clear that it was not suggesting that W was actually biased, but that applying the test in *Halliburton*, a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

On 29 June 2023, the parties agreed W's Terms of Appointment. By the agreement, the parties confirmed that they waived any objection to the appointment on the grounds of potential conflict of interest and/or lack of independence or impartiality in respect of any matters known to them at the date of the agreement. In statements exchanged on 10 November 2023, the insured's experts disclosed that they had all previously had some dealings with and knew W. The insurer did not at that stage request any further information about these relationships.

One of the notes recorded W as saying:

> *"W: Okay, look, I have 12 witnesses I would like to appear. For me, I don't need to hear any of the expert witnesses. I don't think they will add any value. I know what they are saying. They are exceptional people in their fields. They are the best, but I don't need them to say what is normal on a film. I know what is normal on film.*
>
> *JP (counsel for the insurer): Well, there are a number of ways to go about this: we can cross examine; or we can make submissions. You can control what and how this proceeding works, but it is important that the parties aren't shut out from making submissions.*

Footnotes

[1] *https://www.judiciary.uk/wp-content/uploads/2023/10/Nigeria-v-PID-judgment.pdf*

[2] Paragraph 495 of the judgment.

[3] Paragraph 591 of the judgment.

You may not accept them but I need to be able to make them.

W: Look, if you want to cross examine the expert witness, that is fine by me. But I don't think we need to listen to them. I know them all personally extremely well on the insured side. I don't know your expert witnesses. You have an underwriter expert [JY]. But I don't think he adds much" [Emphasis added].

The judge noted that it was clear that what the arbitrator was saying was that he knew the three expert witnesses for the insured extremely well, that they were exceptional people in their fields, and so it was not necessary to call them for cross examination because he would believe what they were saying.

Following the hearing, solicitors for the insurer wrote to W to request further information about his relationship with the insured's witnesses. W replied that the witnesses for the insured were known to him, as he had made clear at the second procedural hearing. He stated that he had worked with each on at least one film and had no shared financial interests with any of them. Reflecting on the industry, he considered that he would be surprised if any experienced film producer had not either known and/or worked with some of the expert witnesses in the arbitration. The experts In response to the removal application gave statements which confirmed the position.

Legal principles

Mr Justice Calver noted that in cases (such as here) where there is an allegation not of actual bias but of apparent bias, the relevant legal test is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. The judge further noted that the matters raised in Halliburton that were potentially relevant to the present application included:

"(1) Given the private and confidential nature of arbitration and limited discovery, there is a premium on frank disclosure (Halliburton at [56]).

(2) An arbitrator is not subject to appeals on issues of fact and often not on issues of law (Halliburton at [58]).

(3) There is a marked difference between a judge who is the holder of a public office, funded by general taxation and has a high degree of security of tenure of office and, therefore, of remuneration, and an arbitrator who has a financial interest in obtaining further income from other arbitral appointments and so may have an interest in avoiding action which would alienate the parties to an arbitration (Halliburton at [59]).

(4) Arbitrators may have very limited involvement in and experience of arbitration (Halliburton at [60]).

(5) The professional reputation and experience of an individual arbitrator is a relevant consideration for the objective observer when assessing whether there is apparent bias (Halliburton at [67]).

(6) The objective observer is alive to the possibility of opportunistic or tactical challenges (Halliburton at [67])."

The context of the industry in which the appointment takes place was also relevant. For example, a fair-minded and informed observer would understand that arbitrators in a relatively small industry are likely to have formed acquaintanceship with others in that industry in the course of their work. Where the parties have agreed to the appointment of a sole arbitrator because of his technical skill and knowledge, procedural responses to a case involving relatively complicated evidence might not necessarily reflect the kind of management regime that would be imposed by an experienced legal professional.

The insured noted that an arbitrator may display conduct which is "palpably bad" without giving rise to an apprehension of bias. Behaviour may be "inept" and show lack of due forethought but not occasion a real possibility of apparent bias. There is also a crucial distinction between a ***predisposition*** towards a particular outcome and a ***predetermination*** of the outcome; the former is consistent with a preparedness to consider and weigh factors in reaching a final decision; the latter involves a mind that is closed to the consideration and weighing.

The insurer said that an arbitrator should not be influenced in expressing his views by extraneous matters, in particular by assessing witnesses' evidence and their credibility by reference to his previous knowledge of them.

The decision

The judge was clear that there could not be any justifiable doubts about W's impartiality based purely upon the degree of professional acquaintance shown by the details of his past relationships with the witnesses. The fair-minded and informed observer would understand that such commercial dealings are entirely to be expected of "*an experienced practitioner in ... television programme production*" who has been in the market for some time and the parties must be taken to have had this in mind at the time of the arbitration agreement.

However, the remarks which W made about the witnesses generally would result in the fair-minded and informed observer, having considered the facts in the present case, concluding that there was a real possibility that W was biased. The judge's reasons included that:

(i) Whilst ultimately agreeing that the parties could call their witnesses, including their expert witnesses, and have them cross-examined, the arbitrator expressed a clear view that it was not necessary for them to be called. This remark was coupled with the observation that he did not know the insurer's expert witnesses. The fair-minded and informed observer would consider that the arbitrator was saying that he would accept at face value the evidence of the insured's expert witnesses because he knew them to be "*exceptional*

people in their fields". He was thereby pre-judging the merits of the dispute. This prejudice in favour of the insured's expert witnesses would prevent an impartial assessment of the evidence of the insurer's witnesses.

(ii) The appearance of bias in the sense of appearing to pre-judge this issue by reference to the expert's status was not cured by the arbitrator saying, in response to the comment, that he should first hear the evidence before making up his mind, "*I will of course reserve my judgement,*" because he then immediately added, "*but I have read the statements and I know the professionals. I can say now what I think*". A fair-minded and informed observer would not be reassured by this further statement. Instead, it would reinforce in their mind that, regardless of what might happen when the evidence is tested in cross-examination, the arbitrator would judge that evidence by reference to his personal knowledge of the status of the expert he knew.

(iii) This was not a case where an arbitrator was merely indicating a predisposition towards a particular outcome, giving the parties an opportunity to persuade him that his initial assessment of an issue may be wrong. It was a case where: "*the arbitrator had given the firm impression of having already allowed extraneous, illegitimate factors to influence his assessment of evidence which he has not yet heard and, moreover, of not even realising that that is an unfair approach to adopt*".

(iv) This was a sole inexperienced arbitrator (without the "tempering" influence of two other co-arbitrators), making findings of fact which were not susceptible to appeal.

This was not a case of expressing a preliminary view as to the merits of a dispute or the credibility of a witness after hearing the parties' evidence. It was the expression of such a view before even hearing the witnesses, based upon knowing that witness by reputation or acquaintance. The parties would expect the arbitrator: "*to undertake an objective assessment of the evidence after he had heard it and heard it tested in cross examination.*"

The judge accordingly held that W should be removed as arbitrator pursuant to section 24(1) of the 1996 Act.

Commentary

The facts of the case, when distilled, suggest that the decision was an obvious one, but as originally brought, the application was far more wide ranging, and the court made its decision on only one of those issues. However, the judgment provides a very helpful example of how the *Halliburton* principles will be applied generally. It also provides a useful reminder of the value of careful contemporary notes hearing. ■

The Procedural Issues of the Vis Moot: addition of a new claim and consolidation under the ICC Rules

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*In March this year, Associate **Giuseppe Franco** travelled to Austria to serve as an arbitrator for the 2024 Willem C. Vis International Commercial Arbitration Moot ("Vis Moot"). This annual competition, in which legal students participate in simulated court proceedings before an arbitral tribunal, serves as practical training, drawing participants from over 300 law schools across the world to study and present on the moot case. In this article, Giuseppe takes a closer look at the facts and procedural issues of this year's Vis Moot case.*

Introduction

This year's Vis Moot case concerned a dispute in the automotive industry about the payment of electronic sensors supplied by the Claimant, SensorX plc, to the Respondent, Visionic Ltd (together, the "**Parties**"). The transactions in the spotlight of the arbitration occurred on the basis of two purchase orders issued under a Framework Agreement ("**FA**") entered into by the Parties to regulate the supply of sensors.[1]

In keeping with tradition, the problem dealt with two separate sets of issues which, for convenience, are referred to by mooties[2] and arbitrators as the 'procedural' and 'merits' issues of the arbitration. This article deals with the procedural issues of this year's case.

The facts

For almost three years after execution of the FA, the respondent purchased millions of sensors from claimant. In January 2022, the respondent submitted two additional purchase orders, respectively on 4 and 17 January ("**First PO**" and "**Second PO**"). The First PO provides the background for the procedural issues, while the Second PO prompts the merits issues.

On 5 January 2022, the claimant suffered a phishing attack due to one of its employees disregarding internal cybersecurity guidelines.[3] This allowed the hackers to infiltrate the claimant's IT system and access all communication between the Parties. On 28 March 2022, the respondent received an email, allegedly from one of the claimant's employees, requesting to transfer payments to a bank account different from the one agreed upon by the Parties in the FA. In compliance with the request, the respondent transferred the money to the wrong bank account. As it turned out, the email came from the hackers.

Owing to internal issues, the claimant discovered about the missing payment only in August 2022 and requested the respondent to pay shortly thereafter. The respondent refused to pay stating that payment had already been made according to the instruction contained in the spoof email. The standoff prompted the claimant to commence arbitration under the ICC Rules pursuant to the arbitration agreement contained in the Second PO.

With regard to the First PO, the respondent made payment of the first instalment correctly. The second instalment was, however, never paid due to complaints about the allegedly defective quality of the sensors. Again, the claimant's internal issues prevented discovery of the missing payment until after commencement of the arbitration, when the arbitral tribunal was already formed, and the Terms of Reference ("**TOR**") had already been signed. The claimant thus submitted a request to add this new claim to the arbitration. In the alternative, it requested the ICC Secretariat to consider its submission as a Request for Arbitration so that the arbitral tribunal could consolidate the second arbitration with the already pending one.

The procedural issues thus concerned (i) the addition of a new claim and, alternatively, (ii) the consolidation of the two arbitrations.

Addition of the new claim

A question of jurisdiction

The claimant contended that the new claim had to be added to the

pending arbitration. For this, the claimant first needed to convince the tribunal that the claim can be added even if it pertains to a different contract, namely the First PO. A way to bypass this hurdle was to submit that the arbitral tribunal had jurisdiction over both claims under the overarching arbitration agreement contained in Article 41 of the FA. The claimant would need, however, to explain why Article 41 was not superseded by the later arbitration agreements contained in the two purchase orders.[4] In addition – the claimant argued – the arbitration agreements in the purchase orders were compatible with Article 41 "*so that there can be no doubt as to the Parties' will to submit to arbitration*".[5]

Therefore, this issue was first a jurisdictional one. The claim that the claimant sought to add to the arbitration arose from a purchase order containing a separate arbitration agreement, clause 7, which appeared to be incompatible with both Article 41 of the FA and the arbitration agreement contained in the Second PO. To mention some discrepancies:

- Article 41 required the Parties to first negotiate or mediate. Clause 7 and the Second PO did not;
- Article 41 allowed the Parties to agree to a sole arbitrator before providing for a three-member tribunal. Clause 7 only provided for a three-member panel and the Second PO provided for an alternative between one and three.

However, the claimant had an ace up its sleeve. Article 9 of the ICC Rules allows the parties, under certain conditions, to bring claims arising out of more than one contract in a single arbitration "*irrespective of whether such claims are made under one or more than one arbitration agreement*". The first condition, established by Article 6(4)(ii) of the ICC Rules, is to demonstrate that the arbitration agreements "*may*" be compatible, and that the parties have agreed to have the claims determined together in a single arbitration. Therefore, the debate reverted to compatibility of the agreements and interpretation of the Parties' structure of the transaction (i.e. a series of purchase orders issued under a framework agreement).

From what I have seen sitting as an arbitrator in Vienna, arbitrators were slightly more convinced by arguments affirming the tribunal's jurisdiction on the basis of Article 41, rather than arguments trying to reconcile two (or three) ostensibly different arbitration agreements.

A question of procedure

The claimant's first argument was further challenged by Article 23(4) of the ICC Rules, which does not allow parties, after the signing of the TOR, to make new claims that fall outside the TOR's limits. This is with the significant exception that the tribunal authorises the parties to do so in consideration of the "nature of such new claims, the stage of the arbitration and other relevant circumstances". The question thus became a procedural one: whether the new claim should be added considering its nature vis-à-vis the

first claim, the stage of the pending arbitration and other circumstances.

The Vis Moot sessions in Vienna confirmed that, from the respondent's perspective, it would be very hard to argue that the arbitration reached such a stage that it would be cost- and time-inefficient to add the new claim. Instead, considering that the claimant submitted its request for addition only 10 days after issuance of the TOR, it would be more cost-efficient to have the two claims determined in a single arbitration.

Alternatively, the respondent might have more luck arguing that the factual and legal questions underlying the two claims (i.e. their nature) did not seem to overlap. Indeed, the pending arbitration concerned the question of whether the claimant was entitled to the payment which the respondent made to the wrong bank account. While the second claim was also a claim for debt, it involved the different question of whether non-performance was justified in light of the supply of allegedly defective sensors.

When it came to Article 23(4) of the ICC Rules, the Vis Moot sessions witnessed the rise of a variety of ingenious arguments. From thorough analyses of the costs of the arbitration to the risk of conflicting awards, teams did their best to defend their positions.

Consolidation

The second procedural issue was somewhat neglected, probably because most teams chose to plead consolidation as a fall-back argument. Considering that teams normally have 15 minutes to address all procedural issues – and this time must also include the arbitrators' questions – there was little time left to build on consolidation.

The drafters of the problem made the claimant's position on consolidation deliberately vague. While on the one hand, the claimant appeared to base its request on Article 41(5) of the FA, on the other hand, its submission mentioned Article 10 of the ICC Rules as the provision setting out the relevant criteria for consolidation.[6] In any case, the claimant's position was that any requirements for consolidation, be they the ones provided by the FA or the ICC Rules, were met.

Article 41(5) of the FA empowers the arbitral tribunal to consolidate multiple arbitrations on the condition that:

- The arbitrations were related "to several contracts concluded under this Framework Agreement";
- The subject matters were "related by common questions of law or fact";
- The arbitrations, if conducted separately, "could result in conflicting awards or obligations".

Conversely, Article 10 of the ICC Rules vests the power to consolidate in the ICC Court and not the tribunal. Moreover, Article 10 provides for slightly different criteria for consolidation.[7]

A first question is, again, whether Article 41 supersedes the arbitration agreements contained in the purchase orders. These latter agreements do not expressly provide for consolidation but merely refer to the ICC Rules.

Can parties deviate from the institutional rules they have selected?

A more interesting question is whether parties, in exercising their autonomy, can deviate from the chosen arbitral rules to transfer the power to consolidate from the ICC Court to the arbitral tribunal. Given that the act of choosing the rules is also an expression of parties' autonomy, it may be said that Article 41 contains two conflicting expressions of the Parties' will.

In Vienna, teams rarely got heated while discussing this matter. However, a few bold teams relied on a distinction between 'mandatory' and 'optional' institutional rules. According to this distinction, parties are not allowed to make arrangements contrary to the mandatory rules as this may lead the institution to refuse to administer the arbitration. The question remains, however, as to what rules fall in this category. Sometimes, the answer is provided by the rules themselves where they expressly provide that any different arrangements would be contrary to the rules.[8] Occasionally, the answer is provided by case law, such as in *Samsung v Qimonda*.[9] Here, the parties agreed on an arbitration agreement which excluded the ICC Court's power to scrutinise awards and the institution's role in confirming arbitrators. The Paris Court of First Instance validated the ICC's decision to refuse to administer the arbitration as it considered scrutiny and arbitrators' confirmation to be very central to the ICC arbitration system.

In most cases, however, the lack of criteria defining 'mandatory' rules prevents their identification. Article 10 of the ICC Rules is probably one of these cases.

The risk of having an unenforceable award

In Vienna, arbitrators are always alert to spot any contradictions in the parties' pleadings. When dealing with consolidation, a possible contradiction would be for the claimant to affirm the tribunal's jurisdiction, over both claims, on the basis of Article 41 of the FA. Then, in the attempt to cherry-pick the seemingly more convenient criteria provided by the ICC Rules, it would bring the subsidiary consolidation request under Article 10 of the ICC Rules.

Arbitrators would be quick to realise the risk in following this line of argument. If the arbitral tribunal were to ground its jurisdiction in Article 41, but then disregard Article 41 for the purpose of consolidation, that may amount to a breach of the parties' arbitration agreement. Ultimately, this would be a ground for setting aside or refusing enforcement of the award.[10]

Conclusion

The procedural issues addressed by the 2024 Vis Moot competition delved into the interplay between various ICC provisions and the terms

of several arbitration agreements. Simple research on arbitration resources may confirm that courts and arbitral tribunals have tested the ICC Rules at length on the issues of new claims and consolidation of proceedings. This has allowed the ICC to evolve and develop meticulous provisions addressing these matters. Today, such provisions are enshrined in Articles 6, 9, 10 and 23 of the 2021 edition of the ICC Rules. To grasp the evolution of the ICC Rules, one may look at Article 6 (effect of the arbitration agreement), whose wording has considerably changed from the 1998 edition to the 2012 edition.[11] Also, the 1998 edition did not even contain a provision addressing the scenario of claims arising from multiple contracts or the consolidation of arbitral proceedings, now Articles 9 and 10 respectively.

To further understand how institutions try to maintain the competitive edge in the dispute resolution market, one may focus on the ICC's meticulous work in respect to Article 10.[12] The 2021 revision of the ICC Rules expanded the scope of Article 10, which now allows for consolidation of arbitrations commenced under two identical arbitration agreements, even if said arbitrations are between different parties and are based on separate contracts (Article 10(b)). This change is particularly relevant for construction projects where it is common to have a series of back-to-back contracts between the various entities performing work (e.g. employer, contractor, subcontractors, suppliers). If, for example, a contractor wants to consolidate the arbitration against the subcontractor into the arbitration against the employer, it would need to make sure that the main construction contract and the subcontract contain identical arbitration agreements. If this is the case, Article 10(b) of the ICC Rules would automatically lead to consolidation.

As seen in Vienna, the 2021 revision also clarified that consolidation is permissible even if the arbitration agreements are not the same. This is now permitted when the pending arbitrations are between the same the parties, the disputes arise in connection with the same relationship, and the ICC Court finds the arbitration agreements to be compatible (Article 10(c)). ■

Footnotes

[1] The problem can be found on the website of the Vis Moot: *https://www.vismoot.org/31st_vis_moot/#problem*.

[2] Informal term for a participant in a moot court competition.

[3] The claimant's employee clicked on a spoofed URL in an e-mail thereby inadvertently downloading a malware.

[4] And also, that Article 41 forms the basis of the pending arbitration proceedings.

[5] Problem, page 7, para 23 (Request for Arbitration).

[6] Problem, page 47, paragraphs 8 and 9 (Claimant's request for consolidation); and page 66, paragraph 43(d) (Procedural Order no. 2).

[7] According to letter c, consolidation may be granted if "*the arbitrations are between the same parties, the disputes in the arbitration arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible*."

[8] See Article 2(4) of Appendix III to the ICC Rules: "*The arbitrator's fees and expenses shall be fixed exclusively by the Court as required by the Rules. Separate fee arrangements between the parties and the arbitrator are contrary to the Rules*."

[9] Tribunal de Grande Instance (TGI) Paris, 22 January 2010, 10/50604, in *Revue de l'arbitrage* (2010) 571.

[10] For example, under Article 34(2)(iv) of the UNCITRAL Model Law which is, for the purpose of the Vis Moot, the *lex arbitri* of the arbitration.

[11] The 2012 version of Article 6 has mostly remained untouched after the 2017 and 2021 revisions.

[12] See here the track changes made by the 2021 revision: *https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-2021-2017-arbitration-rules-compared-version.pdf*.

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