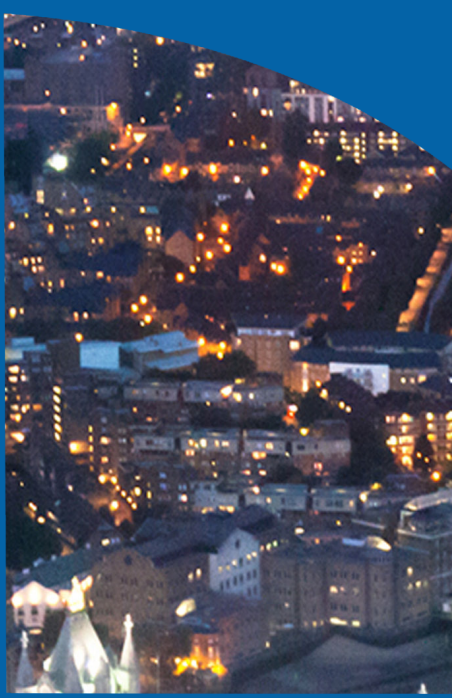
ISSUE 32

serlespeak

RAISING THE BAR IN CHANCERY & COMMERCIAL

Arbitration



The past twelve months have witnessed much debate about how arbitral processes and their court supervision can be improved, and about how they might be enhanced by complementary dispute resolution mechanisms. After two rounds of consultation, the Law Commission has issued its recommendations regarding changes to the Arbitration Act 1996, whilst several arbitral institutions have reformed or are reforming their rules. All continue to work to encourage more diversity in appointments.

Meanwhile, the courts have continued to grapple with issues of jurisdiction, enforcement, procedural irregularity and confidentiality. In this issue:

• **John Machell KC** analyses the keenly anticipated Privy Council decision in *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2023] UKPC 33 on the extent to which effect should be given to an arbitration agreement in a shareholders' agreement in the face of a petition for just and equitable winding up.

• **Wilson Leung** comments on the Hong Kong Court of Final Appeal's recent decision in *C v D* [2023] HKCFA 16 that stepped arbitration clauses go to admissibility rather than jurisdiction.

• **Ramyaa Veerabathran** considers the decision of the English court to refuse to enforce a Californian arbitration award in favour of a crypto-asset exchange on public policy grounds, *Payward Inc and Ors v Chechetkin* [2023] EWHC 1780 (Comm).

• I summarise some recent English and Singapore cases touching on the limits to the confidentiality of arbitrations.

You can find links to articles on the Law Commission's proposals for reforms to the Arbitration Act 1996, the ICC's guide on Effective Conflict Management and Report on Facilitating Settlement in International Arbitration and cases, including *Alphamix Ltd v District Council of Riviere du Rempart (Mauritius)* [2023] UKPC 20 and *Mozambique v Privinvest Shipbuilding SAL* [2023] UKSC 32 on our website and our LinkedIn page.

Jennifer Haywood FCIArb

Chambers News & Events

Legal Directories and Awards

We have obtained excellent rankings and testimonials in the Legal 500 UK Bar directory 2024, having been recommended as a set in 10 practice areas. Serle Court barristers received an impressive 150 individual recognitions this year.

In addition, Serle Court is ranked Tier 1 in The Legal 500: The English Bar Offshore, achieving 23 individual member rankings. Charlotte Beynon and Stephanie Thompson are both recognised as Rising Stars, demonstrating the quality of talent at all levels of seniority in Chambers.

In Chambers and Partners, Serle Court is branded "exceptional across the board", and ranked in 11 practice areas, and band 1 in Chancery: commercial, Chancery: traditional, Offshore and Partnership. Our barristers received 156 individual recommendations across 23 practice areas. Serle Court also received a Band 1 ranking for Chancery: Traditional in the Chambers and Partners High Net Worth Guide 2023. One client comments *"I am always impressed by their responsiveness, both in terms of speed but also the level of care and attention which is given to matters."*

Congratulations to James Weale, who won 'Chancery Junior of the Year' at the Chambers UK Bar Awards 2023 and to Zahler Bryan, who won 'Chancery Junior of the Year' at the Legal 500 UK Bar Awards 2023.

Congratulations to Richard Wilson KC and Dakis Hagen KC, who are both ranked 'Top Recommended' in the Spear's Tax and Trust Barristers Index 2023.

Three of our mediators, Elizabeth Jones KC, Beverly-Ann Rogers and Paul Johnson, were included in the Legal 500 Hall of Fame. Like our other mediators, they can be instructed directly through Serle Court.

Congratulations to Adil Mohamedbhai for winning the business crime defence award (civil fraud) category at the Lexology Client Choice Awards 2024.

6 Serle Court barristers were recognised in the Private Client Global Elite Directory 2024. Richard Wilson KC, Dakis Hagen KC, Constance McDonnell KC, Giles Richardson KC, Adil Mohamedbhai and Stephanie Thompson have all been ranked in the list of the world's elite lawyers advising UHNW clients.

Further congratulations to our BD team, who collected an award for 'Marketing Team of the Year' at The Legal 500 UK Bar Awards 2023.

Appointments

We extend our warmest congratulations to Lance Ashworth KC, who has been appointed a Deputy High Court Judge by the Lady Chief Justice under section 9(4) of the Senior Courts Act 1981 for a six-year term with effect from 27 November 2023.

We congratulate Gregor Hogan, who has been admitted to the Bar of the British Virgin Islands (BVI).

Retirements and hires

Chambers said goodbye to Serle Court's longest serving clerk, Head Clerk, Steven Whitaker, retired from duties in April 2023. His clerking career spans over 50 years, 48 of those with Serle Court. Steve will be missed by all of us at Serle Court and we all wish him a very happy retirement.

In August, after 49 years as a barristers' clerk, Paul Ballard retired. He was described as "a credit to the profession and a thoroughly decent person", and Chambers wishes him a very happy and healthy retirement.

Congratulations to Ramyaa Veerabathran, Ryan Tang, Matthew Innes and Anneliese Mondschein for successfully completing their pupillages at Serle Court.

Leading property litigation barrister Jonathan Upton joined Chambers. Jonathan's appointment demonstrates Serle Court's commitment to strengthening its property expertise and ensuring that it offers its clients counsel of the highest quality and capability across the full range of its practice.

EDI, outreach and staff recruitment

In June, Serle Court's EDI committee and Daniel Lightman KC, co-author of the acclaimed book *'Cricket Grounds from the Air',* hosted a hugely successful event at the world's oldest sporting museum - The MCC Museum, Lord's Cricket Ground. The event explored diversity in cricket and saw two Jewish Internationals tell their stories.

Chambers held a Prospective Pupillage evening in chambers on 21 November, where students were given information about what to expect during the application process, life as a pupil at Serle Court and insights into careers at the Commercial Chancery Bar. The attendees were able to meet barristers of different seniorities over refreshments and hear talks from our barristers.

In September, Senior Practice Managers Arron Snipe and Colin Bunyan joined the Practice Management team. Both Colin and Arron have significant track records in clerking and will be a tremendous support to the Practice Directors with the management and development of members' practices and the management of client relations. We hope you will have the chance to meet them both soon.

We also welcome a new Head of People & EDI, Juliette Drummond to our management and administration team, and congratulate Jim Costa on his appointment to the role of Credit Control Manager.

Chambers News & Events

Expert texts

The second edition of Commercial Litigation in Anglophone Africa, the first textbook addressing this developing area of law, was published in March 2023. The book is co-authored by Chambers' Andrew Moran KC and Anthony Kennedy and was published in March 2023.

The second edition of Contentious Trade Mark Registry Proceedings – written by Michael Edenborough KC with expert contributions from Thomas Elias, Adrian de Froment and Stephanie Wickenden – has now been published by CITMA. It deals in detail with every stage of contested trade mark matters before the UK IPO.

The 16th Edition of "Butterworths Intellectual Property Law Handbook" has now been published. Michael Edenborough KC has been the consultant editor of this work since, and including, the 13th edition. The new edition has been fully revised and updated to reflect recent key developments in this area.

Congratulations to John Eldridge on the publication of the 11th edition of Fleming's The Law of Torts, a major reference work on the law of torts. The author team comprises Carolyn Sappideen, Prue Vines, John Eldridge, Paula Giliker, Peter Handford and Barbara McDonald.

The second edition of 'Research Handbook on International Insurance Law and Regulation' has been published. Julian Burling is one of two joint editors and is the author of one of the chapters.

Serle Court's Thomas Fletcher is the editor of a key practitioners' text on trusts law, Lewin on Trusts. The [first] supplement to Lewin on Trusts 20th edition was published at the end of 2023.

In the press

Andrew Bruce has written an article for the Citywealth magazine, discussing the art market and the obstacles facing dispute resolution in this field.

Professor Suzanne Rab was interviewed on BBC's World Business Report about Ofcom's probe into practices and features that could limit competition in cloud infrastructure services. She has also recently been interviewed on BBC World Service about the EU Advocate General's comments on the Apple state aid tax challenge.

Five Serle Court members were featured in The Lawyer's 'Blockbuster trials to watch out for in October'. Daniel Lightman KC, Charlotte Beynon, and Tim Benham-Mirando were mentioned in relation to the *BHS Group* liquidation proceedings, and Jonathan Adkin KC and Zahler Bryan were mentioned in relation to the 'tuna bonds' litigation.

Serle Court barristers feature in The Lawyer's Top 20 cases for 2024. To read the article in full, view on thelawyer.com (paywalled).

Andrew Moran KC and Wilson Leung contributed an article to ICC FraudNet's Global Annual Report 2023 entitled *"Unexplained Wealth Orders in the UK"*.

Wilson Leung wrote an article for LexisNexis entitled *'Foreign arbitral award enforced despite UK consumer rights objections* (*Eternity Sky v Zhang*)'.

Amy Proferes acted for the successful respondents in *Dyer v Webb* [2023] EWHC 1917 (KB). Perhaps unusually for a neighbour dispute, the case (as noted by Dexter Dias KC in his judgment) "raises important questions about the nature, extent and limitations of certain of our fundamental freedoms under the law.'"

The Global Legal Post invited Jennifer Haywood to discuss recent challenges to arbitral awards. The article assesses a number of recent cases in which a party has sought but failed to challenge an arbitral award under section 68 of the Arbitration Act 1996, highlighting the difficulty in challenging an award on the basis of an irregularity.

Zoe O'Sullivan KC published an article titled *"Some Hot Topics in Crypto Claims"* in the ThoughtLeaders4 Disputes Magazine Issue 9.

In an article for the New Law Journal titled *"A good man always knows his limitations",* Andrew Francis has written about three very recent judgments on the limitation of claims.

In their article for The International Insolvency & Restructuring Report 2023/2024 entitled *"The light at the end of the tunnel and the last throw of the die: liquidators' claims against former directors following Sequana,"* Daniel Lightman KC and Charlotte Beynon analysed the Supreme Court's decision in *BTI 2014 LLC v Sequana SA & Ors* [2022] 3 WLR 709.

Chambers News & Events

Events

Following on from a highly successful event last year, our barristers thoroughly enjoyed welcoming clients and colleagues back for Serle Court's 6th International Trusts and Commercial Litigation Conference on 6 November. In keeping with tradition, the conference was held at the iconic Rainbow Room, Rockefeller Center, for what proved to be a stimulating and in-depth look at the key legal issues faced in the world of international trusts and commercial litigation.

Attendees provided rave reviews about the conference and described the experience as "a real pleasure", "an absorbing and engaging day", and "a testament to the collective expertise and enthusiasm present in the room."

Our barristers thoroughly enjoyed hosting an 'end-of-summer' cocktail and mocktail networking session with Charles Russell Speechlys.

Chambers hosted a half-day Insolvency and Restructuring Conference, *'Serle Speak Live: an audience with our insolvency barristers'* at The Law Society. Discussions included key issues in the *BHS litigation* and digital assets in insolvency.

Serle Court co-hosted a seminar with HFW during Dubai Arbitration Week at the Waldorf Astoria DIFC. Rupert Reed KC co-chaired the event *"Enforcement Trends in the UAE: Seizing assets and getting awards paid,"* whilst Zoe O'Sullivan KC and Gregor Hogan presented on the panel along with a panel of speakers from HFW.

Christopher Stoner KC and Andrew Francis led a workshop at this year's Annual PBA Conference titled *"Looking from the viewing gallery at Tate Modern with different legal spectacles."*

Lance Ashworth KC spoke about recent developments in investigating fraud, managing stakeholders and recovering assets in cross-border matters at the London International Investigations and Asset Recovery conference breakfast.

Wilson Leung spoke at a seminar organised by The University of Law London Alumni Network on the topic of *'UK and China cross-border dispute resolution: Practising tips and risk management'.*

Harry Martin attended and spoke at The Institute of Art & Law's event titled *"Art Law Unveiled: Navigating Modern and Contemporary Art Transactions"*, examining topics such as authenticity matters in relation to contractual disputes and artist resale rights.

Gregor Hogan was a keynote speaker at the ThoughtLeaders4 FIRE Summer School: The Ultimate Insider's Guide, which offered attendees a fantastic opportunity for networking and broadening their knowledge on all things Asset Recovery.

Barristers Lance Ashworth KC, Matthew Morrison, Jennifer Meech and Jamie Randall attended the R3 Business Lunch 2023 along with Practice Director Nick Hockney. All who attended had a brilliant time and valued the opportunity to speak with colleagues from all areas of the insolvency and restructuring community.

Seminar & webinar programme

Serle Court is committed to delivering a high-quality programme of talks and panel discussions to assist our clients in-house with knowledge development and training sessions. On request, our barristers can offer our clients and contacts thought-provoking expert seminars across all areas of commercial chancery practice.

If you would like to discuss any of the topics listed in the 2024 programme of talks and/or arrange a convenient time for our barristers to present them in-house or online, please contact our Business Development Director, Charlotte Davidson or our Marketing Manager, Shana Garioch.

For more information regarding our upcoming events and where you can see us next, please click **here**.

Company law and arbitration agreements: *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2023] UKPC 33

It is becoming increasingly common, particularly where shareholders originate from the PRC or Hong Kong, to see arbitration agreements in company articles of association and shareholder agreements. Such arbitration agreements tend to be drafted in broad terms to cover all disputes and issues arising between the shareholders. Courts in common law jurisdictions tend to take a liberal pro-arbitration approach to construction of arbitration agreements. Lord Hoffmann said in *Fiona Trust and Holding Corp v Privalov* [2007] Bus LR 1719: *"In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.""* This approach is embedded as part of the law of international commerce: see *Enka Insaat ve Sanayi AS v OOO 'Insurance Co Chubb'* [2020] 1 WLR 4117 per Lord Hamblen at [107].

That approach to construction reflects a broader pro-arbitration policy to be found in legislation such as in section 1(b) of the UK Arbitration Act 1996 which provides that parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. There is, however, a tension between the general pro-arbitration policy and the court's exclusive jurisdiction to grant some forms of relief, such as orders to wind up companies.

The pro-arbitration policy is given effect to by statutory provisions that require the court to stay court proceedings where litigants are party to an arbitration agreement, and proceedings are brought in respect of a matter which is to be referred to arbitration under the agreement: see the UNCITRAL Model law on International Commercial Arbitration Article 8 and section 9 of the UK Act.

Where a matter is within the scope of an arbitration agreement, a party to the agreement has a right to a stay of court proceedings (at least pro tanto) provided that the agreement is not null and void, inoperative or incapable of being performed.

In such cases, it is no part of the court's function to examine the merits of the claim of the party seeking a stay: an assertion of the existence of a dispute is enough: *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1 WLR 726. Where there is an arbitration agreement, the parties have agreed not only that the matters within the agreement should be arbitrated but also that they should not be decided by a court. There may be some disputes between the parties that are within the arbitration agreement and others that are not. In such a case, the stay will apply only to the former. This may lead to fragmentation of forum, but desirability of unification of process must give way to the sanctity of contract: *Tugushev v Orlov* [2021] EWHC 926 (Comm) per Sir Nigel Teare at [23]; and see *Wealands v CLC Contractors Ltd* [1999] CLC 1821 at [17]-[26] per Mance LJ.

Although the law adopts a pro-arbitration stance and there is a presumption of arbitrability, nevertheless in limited circumstances the law restricts the scope of matters that are capable of being arbitrated. It does not follow, however, from the fact that a statutory provision gives a power to the court that it would not have at common law that a dispute of the kind contemplated by the statutory provision is necessarily within the exclusive jurisdiction of the court and is not arbitrable. So, for example, a claim for unfair prejudice relief is arbitrable (at least where no relief affecting third parties is sought): *Ennio Zanotti v Interlog Finance Corp BVIHC* 2009/0394 (8 February 2010) and *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333. The issue is whether a particular statutory provision expressly or, by reference to public policy considerations, impliedly gives the court exclusive jurisdiction. So, it is well established that the court's power to order a winding-up or appoint liquidators is exclusive and not arbitrable. But merely because the court is vested with particular exclusive power does not mean that there may be no resort to arbitration in respect of the dispute. Specifically, it does not mean that disputes or differences, i.e. matters, that arise in relation to a liquidation application are not arbitrable or that the court is unwilling to stay a liquidation application to enable the parties to arbitrate such matters. So, for example, where a liquidation application is made by reference to an alleged unpaid debt, the court has power to stay the liquidation application pending an arbitration to determine the existence of the debt.

In *FamilyMart China Holding Co Ltd v Ting Chuan* (Cayman Islands) Holding Corporation [2023] UKPC 33, the Board was able to give authoritative guidance on how these principles applied to just and equitable winding up applications. FamilyMart China Holding Co Ltd ("FMCH") applied to wind up China CVS (Cayman Islands) Holding Corp ("the Company") on the just and equitable ground. FMCH alleged that the other shareholder had caused, permitted and/or procured the majority directors to act in breach of their duties to the Company, and (i) that it had lost trust and confidence in the conduct and management of the Company's affairs as a result of that lack of probity and (ii) that its relationship with the other shareholder had irretrievably broken down. The other shareholder applied to dismiss or stay the application on the basis of an arbitration

agreement in a shareholders agreement.

It was common ground between the parties that the court had exclusive jurisdiction to order the winding up of a company. The heart of the dispute was whether the winding up application raised any "matter" that was capable of being referred to arbitration such that the court should stay the winding up application to enable an arbitration to take place. In an opinion written by Lord Hodge, the Board undertook a detailed analysis of the meaning of "matter" concluding at [61]: *"... a "matter" is a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings and is susceptible to be determined by an arbitrator as a discrete dispute. If the "matter" is not an essential element of the claim or of a relevant defence, it is not a matter in respect of which the legal proceedings are brought" and recognising at [66] that treating "matter" in this way may: "involve the fragmentation of the parties' disputes with some matters being determined by an arbitral panel and other matters being resolved by the court. Such fragmentation may on occasion, be inconvenient to one or more of the parties to the court proceedings. ... But, where, on a proper interpretation of the arbitration agreement, the parties have contracted to refer to arbitration disputes which do not extend to all the matters raised in the legal proceedings, giving effect to the parties' contract will involve fragmentation of the disputes. The disadvantages caused by such fragmentation can be mitigated by effective case management by both the court and the arbitral panel."*

The Board then dealt with inoperability from [69], identifying a difference between subject matter non-arbitrability and remedial non-arbitrability. Having referred in [75] to the general consensus that an arbitration agreement cannot confer on an arbitral tribunal the power to order the winding up a company but in [76] to the consensus that there is a power to grant inter partes remedies in proceedings for unfair prejudice, the Board held in [77] that: *"in an application to wind up a company on the just and equitable ground there may be matters in dispute between the parties, such as allegations of breaches of a shareholders' agreement, which can be referred to an arbitral tribunal for a determination, which is binding on the parties, notwithstanding that only a court can make a winding up order"*; and in [78] that: *"The Board agrees as a general rule with this approach to discrete matters which involve inter partes disputes in the context of a winding up application. Matters, such as whether one party has breached its obligations under a shareholders' agreement or whether equitable rights arising out of the relationship between the parties have been flouted, are arbitrable in the context of an application to wind up a company on the just and equitable ground and the arbitration agreement is not inoperative because the arbitral tribunal cannot make a winding up order."*

As a consequence, the Board held:

(a) at [83] to [97] that issues as to whether (i) FMCH had lost trust and confidence in the other shareholder and in the conduct and management of the Company's affairs, and (ii) whether the fundamental relationship between FMCH and the other shareholder had irretrievably broken down, were "matters" that were capable of being arbitrated and in respect of which a stay of the winding up proceedings pro tanto was mandated; and

(b) at [98] to [103] that there should be a discretionary stay of the whole proceedings.

It is also worth noting that in [81], the Board held that: "A ruling by an arbitral tribunal that it was of the view that it was just and equitable that a company be wound up would be ineffective; it could not bind the parties in a hearing before the court and, given the interests of third parties in a possible winding up of the company, it could not bind the court. In deciding on the appropriate remedy under section 95 the court takes into account the interests of third parties, including the company's directors and employees, and businesses which have dealings with the company, who will be affected if a winding up order is made."

Whilst it is clearly right that a finding by an arbitrator as to whether a company should be wound up is not binding on a court in the sense of compelling a court to make or refuse to make a winding up order, it is, with respect, difficult to see why such a finding should not be treated as binding as between the parties – so as to constitute an issue estoppel – by reference to the matters that were in issue in the proceedings. In other words, whilst a respondent may be entitled to defend a winding up application in court post-arbitration by reference to matters not dealt with in the arbitration, it is difficult to understand why an arbitrator cannot determine, as between the parties on the basis of the matters debated and adjudicated upon in the arbitration, that it is just and equitable that a company is wound up, and why that finding should not be binding as between the parties. The arbitrator would not be making a winding up order and would not prevent the court from taking into account the interests of third parties in deciding whether actually to wind up the company, but there would seem no reason as a matter of principle and policy why, as between the parties to the arbitration agreement, the threshold issue should not be adjudicated by arbitration.

John Machell KC

Tiered Arbitration Clauses: Admissibility or Jurisdiction?

Introduction

In its recent judgment in *C v D* [2023] HKCFA 16, the Hong Kong Court of Final Appeal (HKCFA) made a notable contribution to the long-running debate on whether 'tiered arbitration clauses' go to an arbitral tribunal's jurisdiction or merely affect the admissibility of the dispute. The HKCFA decided that compliance with such clauses is presumptively a matter of *admissibility* rather than jurisdiction. This means that, in general, the question is left exclusively for the tribunal to decide, without further review by the courts. If a party has not complied with such a clause before commencing arbitration, the tribunal could dismiss the claim as inadmissible but also has other procedural options (such as staying the arbitration).

The HKCFA's decision continues the pro-arbitration trend seen in other jurisdictions, which also recognises the desirability of limiting the courts' intervention in the arbitration process. The decision is likely to be persuasive to the English courts, which so far have only considered the issue at first instance level.

Tiered arbitration clauses

A tiered arbitration clause (also known by various names such as a 'multi-tiered dispute resolution clause' or an 'escalation clause') is a contractual provision that outlines a specific process for resolving disputes between the parties. The parties agree, in the event of a dispute, to follow a specific sequence of steps. Typically, the clause requires the parties to attempt negotiation, mediation, conciliation (or other types of ADR) before commencing arbitration proceedings. It has become increasingly common for commercial contracts to include this type of clause (*Enka v Chubb* [2020] UKSC 38, [168]).

There has been ongoing debate, both in academia and in the courts of leading arbitration centres, about whether compliance with such tiered arbitration clauses is a matter of "jurisdiction" or "admissibility". In essence, if it is a matter of *jurisdiction*, it is a question that can be examined by the courts (whether or not the tribunal has already ruled on the issue), potentially resulting in the invalidation of the arbitral proceedings or award. On the other hand, if it is a matter of admissibility, the question is exclusively for the tribunal to adjudicate upon.

C v D: background

In *C v D*, the Hong Kong courts had to grapple with the effect of a tiered arbitration clause. The appellant and the respondent were companies which jointly operated a broadcasting satellite. The respondent alleged that the appellant had breached their contract by preventing transmission of some broadcasts.

The contract contained a tiered arbitration clause, which provided that, in the event of a dispute, the parties were required to enter into negotiations. If the negotiations failed to produce a resolution, either party could commence arbitration proceedings in Hong Kong.

The respondent's CEO wrote a letter to the appellant's board, in which he accused the appellant of committing a repudiatory breach of the contract. The letter demanded the appellant to cease its interruption of the relevant broadcasts but also suggested negotiations between the parties' management teams. However, the appellant's solicitors simply replied to the respondent's solicitors, demanding the respondent to refrain from contacting the appellant's board.

The respondent commenced arbitration proceedings in Hong Kong. The appellant retorted by arguing, inter alia, that the tribunal did not have jurisdiction to entertain the dispute because of non-compliance with the tiered arbitration clause. The tribunal decided to deal with that argument together with the substantive issue of liability (instead of dealing with it as a preliminary question).

Following a hearing, the tribunal made an award in favour of the respondent. In relation to jurisdiction, the tribunal held that the pre-arbitration requirement for negotiation had been satisfied by the respondent's CEO's letter. As to liability, the tribunal ruled that the appellant was in breach of the contract.

The appellant applied to the Hong Kong courts to set aside the award pursuant to s 81 of the Hong Kong Arbitration Ordinance (which mirrors Article 34 of the UNCITRAL Model Law), on the ground that the award was made without jurisdiction.

The first instance judge and the Court of Appeal rejected the appellant's application, holding that the appellant's objection was a matter of admissibility and not jurisdiction. Therefore, once the appellant's objection had been determined (and rejected) by the tribunal, the court had no power to review that determination. The appellant appealed to the HKCFA.

HKCFA's decision

The HKCFA ruled in favour of the respondent. 4 of the 5 judges (led by Ribeiro PJ) held that compliance with a tiered arbitration clause is a question of admissibility rather than jurisdiction unless the contract contained clear language to the contrary. Such language was absent in the contract at hand. Therefore, the Hong Kong courts had no power to review the tribunal's finding that the requisite pre-arbitration steps had been complied with.

Gummow NPJ arrived at the same result but differed from the majority's reasoning: he saw no utility in the admissibility/jurisdiction distinction and instead directly examined whether compliance with pre-arbitration conditions was within the ambit of matters which the parties had (in their arbitration clause) agreed to submit to arbitration. On a proper construction of the clause, it was; and thus the courts had no power to interfere.

Jurisdiction vs admissibility

A party may raise various types of objections to the commencement of arbitral proceedings or the consequent issuing of an arbitral award. In an effort to categorise these types of objections, some academic writers and judges have drawn a distinction between "jurisdictional" objections and "admissibility" objections.

As Ribeiro PJ explained, a jurisdictional objection is a challenge to the *tribunal*, i.e. a contention that the tribunal has no authority to conduct the arbitration because the parties have not properly consented to that process ([33]-[43]). The tribunal normally has power to rule on its own jurisdiction (competence-competence), but it is not the final arbiter of jurisdiction. The policy of the law is that the supervisory or enforcing court should have power to decide whether jurisdiction was correctly assumed by the tribunal. Thus, the court has power to rule on a question of jurisdiction, or to review a tribunal's decision on such question ([29]-[31], [40]).

By contrast, an admissibility objection is a challenge to the *claim*, in other words, an argument that the claim is procedurally defective and should not be entertained by the tribunal. The objection does not deny the parties' consent to arbitrate. An admissibility objection is to be resolved by the tribunal, whose decision is *not* reviewable by the courts ([29], [32]-[44]).

The jurisdiction/admissibility distinction has been embraced by an increasing number of academics and courts. The latter includes the English High Court, which has accepted that compliance with a tiered arbitration clause is generally a matter of admissibility and, hence, the exclusive domain of the tribunal (*Republic of Sierra Leone v SL Mining* ([2021] EWHC 286 (Comm), [8]-[21]); *NWA v NVF* [2021] EWHC 2666 (Comm), [41]-[46]). It also includes the Singapore Court of Appeal, which has held that a time bar argument is a matter of admissibility and thus not reviewable by the courts (*BBZ v BAZ* [2020] SGCA 53, [76]-[77]). Similar decisions can be seen in the United States and Australia.

Tiered arbitration clauses: admissibility not jurisdiction

Drawing on this distinction, the majority held that compliance with a tiered arbitration clause was presumptively a question of admissibility, not jurisdiction. As Ribeiro PJ explained at [47], where parties have agreed to refer a dispute to arbitration, their normal expectation would be for the whole dispute to be resolved by the tribunal: *"[The parties] have opted to submit their disputes to an arbitral tribunal rather than a court for resolution. It would be surprising to discover that they intend to have a court involved and to undergo two rounds of decision-making to determine whether a pre-arbitration condition has been met."* This echoes Lord Hoffmann's well-known observations in *Fiona Trust v Privalov* [2007] UKHL 40 at [6]-[8] that parties who have consented to arbitration generally wanted a 'one-stop shop' for their dispute.

Therefore, unless the arbitration clause contains *"unequivocally clear language"* to the contrary, pre-arbitration conditions should be regarded as non-jurisdictional ([47]-[50]). As the English High Court highlighted in *NWA v NVF* (at [54]), this presumption makes sense because even if the parties' handling of a dispute fails to comply with the pre-arbitration protocol, it typically remains the *same dispute*, the non-compliance does not affect whether it is a dispute of the kind which the parties have consented to submit to arbitration.

In the circumstances, an objection based on such non-compliance is exclusively for the tribunal to rule on and not the courts. Furthermore, as the first instance judge pointed out ([2021] 3 HKLRD 1, [49]), the tribunal has flexibility to determine the consequences of non-compliance: the tribunal could dismiss the claim outright, but may also adopt other procedural options such as staying the arbitral proceedings pending compliance with the pre-arbitration protocol.

Conclusion

In recent years, there has been a noticeable trend towards harmonisation, with more and more jurisdictions regarding compliance with tiered arbitration clauses as a matter of admissibility rather than jurisdiction. The HKCFA's judgment in *C v D* is an important illustration of that pro-arbitration trend, which is based on the premise that parties who choose to arbitrate usually wish to limit the courts' intervention in the arbitration process. As Lord Hoffmann put it in Fiona Trust at [6], such parties *"want those disputes decided by a tribunal which they have chosen...and do not want to take the risks of delay"*. The HKCFA's decision will be especially influential in other Model Law jurisdictions, but is also likely to be persuasive in non-Model Law jurisdictions (such as England) which seek to promote international arbitration and place an emphasis on party autonomy.

Wilson Leung

English High Court refuses to enforce arbitration award in crypto consumer dispute on public policy grounds

Ramyaa Veerabathran

The Commercial Court has refused to enforce a Californian arbitration award in favour of a crypto-asset exchange on public policy grounds, in a rare example of such a decision by the English courts: *Payward Inc and Ors v Chechetkin* [2023] EWHC 1780 (Comm).

The underlying dispute

The award concerned a dispute between the Payward group which operates an online crypto-asset exchange known as "Kraken" and Mr Chechetkin, a UK-based customer of the platform.

Mr Chechetkin had opened a trading account on Kraken in March 2017, thereby entering a clickwrap contract with Payward that was subject to its Terms of Service. The terms included an arbitration agreement which, so far as relevant, provided for disputes to be decided through arbitration seated in California and to be conducted under the JAMS Comprehensive Arbitration Rules & Procedure (the "JAMS Rules"). The courts of California were to have exclusive jurisdiction over any appeals from any arbitration award. The clause further provided that any dispute between the parties would be governed by the laws of California and any applicable United States law without giving effect to any conflict of laws principles that may provide for the application of the laws of another jurisdiction.

The dispute concerned the sum of approximately £608,000 which Mr Chechetkin had lost by placing trades on the platform in 2020. This gave rise to parallel proceedings in the form of an arbitration initiated by Payward in California and a claim in the English High Court commenced by Mr Chechetkin.

Before the English High Court, Mr Chechetkin alleged that Payward's activities in the UK constituted regulated activities within the meaning of sections 19(1) and 22 of the Financial Services and Markets Act 2000 (the "FSMA") such that it was in breach of the General Prohibition under section 19 on carrying on regulated activities without the necessary authorisation (the "FSMA Claim"). If he was right about that, his agreement with Payward was unenforceable pursuant to section 26, and Payward was almost certainly committing a criminal offence under section 23 of the FSMA.

Payward disputed the jurisdiction of the English court over that claim. That challenge was dismissed by Miles J in the High Court ([2022] EWHC 3057 (Ch)), with the effect that the FSMA Claim would continue unless the final award was enforced.

Mr Chechetkin also raised his arguments about the applicability of the FSMA in the arbitration at a preliminary stage and challenged the arbitrator's jurisdiction and the arbitrability of the dispute on the basis that the arbitration clause was unenforceable. That challenge was summarily rejected by the arbitrator.

The arbitration then proceeded to a final hearing, which resulted in an award in favour of Payward, including a finding that Mr Chechetkin was "enjoined from filing or prosecuting a claim against Payward in court, whether in the UK or other jurisdiction". It was this part of the award that Payward was particularly keen to have enforced in the UK.

Part 8 claim to enforce the award

Payward brought a Part 8 claim in the Commercial Court seeking recognition and enforcement of the award under the Arbitration Act 1996 (the "1996 Act"). Mr Chechetkin opposed the recognition and enforcement of the award on the basis that to do so would be contrary to public policy within the meaning of section 103(3) of the 1996 Act.

Was Mr Chechetkin a consumer?

The Judge had no doubt that Mr Chechetkin was a consumer within the meaning of the definition set out in section 2(3) of the Consumer Rights Act 2015 (the "CRA 2015"), which provides that

> *"'Consumer' means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession."*

His sole profession and full-time job was as a lawyer. He had been assessed as a customer by Payward on the basis that he had no experience of cryptocurrency trading and that he did not work in crypto or fintech. Neither the frequency and magnitude of the trades made by Mr Chechetkin nor the mere fact that his trading could be considered knowledgeable, experienced and sophisticated showed that his transactions were entered wholly, mainly or at all for purposes within his trade, business, craft or profession.

No issue estoppel in respect of the FSMA Claim

Payward raised a novel argument in support of the award's enforcement by invoking the principle of issue estoppel and, alternatively, the *Henderson v Henderson* principle of abuse of process. They contended that the arbitration award was wrong in that the arbitrator had failed to give proper effect to the JAMS Rules by proceeding on the basis that English law was irrelevant, and that the FSMA claim should therefore be treated as having been finally decided by the award.

The judge rejected that argument and concluded that, given the arbitrator's firm view that English law was irrelevant to the dispute, in reality, there had been no scope for Mr Chechetkin to bring his FSMA Claim in the arbitration. In doing so the judge relied on *Dallah Co v Ministry of Religious Affairs of Pakistan* [2011] 1 AC 763 for the proposition that an arbitral tribunal's decision on its own jurisdiction does not bind the courts of a different, non-supervisory jurisdiction when they are asked to enfore the award. In any event, the arbitrator having simply declined to consider English law at all, she had not made any findings of fact or law that were relevant to the issue before the

court. The court was therefore entitled to form its own view of the award's consistency with English public policy.

CRA and FSMA represent the UK's public policy

The judge had no difficulty with concluding that both the CRA 2015 and the FSMA 2000 were expressions of the UK's public policy.

The purpose of enacting the CRA was inter alia to give effect to the EU Directive 93/13 on Unfair Terms in Consumer Contracts. The Court of Justice of the European Union's decisions concluding that this directive represents public policy were binding on the English courts: *Lipton v BA City Flyer* [2021] EWCA Civ 454.

Similarly, the objective of the FSMA was to make provision for the regulation of the financial services market and to appoint the Financial Conduct Authority (the "FCA") as the regulatory body responsible for that sector. These were unquestionably matters of public policy.

The fact that the CRA and FSMA are UK-wide statutes underlined their general significance as expressions of the public policy of the UK as a whole.

Enforcement would be contrary to the public policy objectives of the CRA

The Judge considered that enforcement of the award would be contrary to the public policy embodied by section 74 of the CRA, namely that where a consumer contract has a close connection with the UK, any issues arising thereunder which fell within the scope of the CRA must be decided in accordance with that UK statute rather than any foreign law. The contract between Mr Chechetkin and Payward was unquestionably such a contract. The judge found that that by itself sufficed to make the award unenforceable: issues arising out of a contract with a UK consumer which should have been answered by reference to the CRA had instead been answered under the laws of California.

The judge then explored the implications of applying the CRA to the arbitration clause by considering whether it was "unfair" within the meaning of section 62 thereof. Emphasising that the mere fact that a consumer contract provides for disputes to be arbitrated does not render it unfair, the judge reminded himself that this is a question for the court to decide on the facts of each case by applying an objective test that asks whether a reasonable consumer in the position of this consumer would have agreed to the clause: *Cavendish Square Holdings BV v Makdessi* [2016] AC 1172.

The judge concluded that whilst a reasonable consumer in Mr Chechetkin's position might have agreed to arbitration in the UK subject to the 1996 Act, they would not have agreed to arbitrate in California under the JAMS Rules for a number of reasons, including the following:

- A US arbitrator acting within the context of a US arbitration system was not an appropriate tribunal for the issues that had been raised in this particular case because the arbitrator had no experience of English law and was not receptive to submissions on the English regulation of the financial services sector;
- The disadvantages to the consumer arising as a result of the English courts not having supervisory jurisdiction over the arbitration, such as the lack of a right to appeal on grounds of an error of law; and
- Practical disadvantages such as the significant expense, stress and inconvenience to a UK-based consumer as a result of having to instruct US attorneys in order to participate in the Californian arbitration.

Enforcement would be contrary to the public policy of the FSMA

The judge considered that Mr Chechetkin had at least a prima facie claim under the FSMA, which would be stopped in its tracks if the award were enforced. That in itself was a further reason why the arbitration clause was unfair within the meaning of the CRA and therefore contrary to English public policy. It would also be contrary to the public policy objectives of the FSMA, including that contracts falling foul of the general prohibition in section 19 should be unenforceable. Further, from the perspective of broader public interest and the FCA's ability to pursue its statutory objectives, it was no less important that claims like Mr Chechetkin's FSMA claim were pursued in the UK courts or at least in arbitration proceedings in the UK rather than in confidential arbitration proceedings overseas, or not at all.

Conclusion and comment

The judge accordingly declined to enforce the final award on the basis that it would be contrary to public policy within the meaning of section 103(3) of the 1996 Act.

It is still very much the case that the English courts will generally seek to give effect to arbitration awards as required under the New York Convention. However, this case serves as a useful reminder of the English court's power to refuse to enforce an award where it conflicts with public policy and as an illustration of the court's approach to that analysis under the 1996 Act. It is also clear from Bright J's reasoning that where the dispute raises issues that engage matters of public policy, the court will not simply gloss over the practical exigencies that may manifest within the different arbitration systems when considering the suitability and competence of the tribunal to decide the dispute in a manner that is consistent with English public policy. In this case, the judge noted that the professed priorities of the JAMS arbitration system were to "save time and money" and promote "efficiency, speed and results", which he considered may well have meant that the arbitrator had favoured the short and simple route to disposing of the claim over one that would require the investigation of foreign laws.

Having said that, there were a number of particular aspects of this case which ultimately led to the court's refusal to enforce, as discussed above. The conclusion was not that disputes with UK consumers can never be arbitrated, nor that they can never be arbitrated outside of the UK: it will very much depend on the nature of issues raised and the characteristics of the arbitration system in question, including the tribunal's ability and willingness to deal with issues of UK law where necessary.

More generally, the case demonstrates the potential pitfalls of taking a 'one-size-fits-all' approach to dispute resolution clauses without regard to the jurisdiction in which the counterparty may be based, particularly when dealing with consumers in regulated market sectors.

Confidentiality in arbitration – some recent cases on exceptions

Confidentiality

Confidentiality is considered an important aspect of arbitration by many users but perhaps surprisingly to many, the Arbitration Act 1996 does not expressly address confidentiality. The basis for confidentiality in the common law was perhaps best described by Lawrence Collins LJ in *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 at [84]: "a rule of substantive law masquerading as an implied term".

Confidentiality is not absolute, and the exceptions have been developed by the courts on a case by case basis. Three recent cases here and in Singapore have touched on different aspects of confidentiality and its limits.

Arbitration claims and the public interest in open justice

Confidentiality does not necessarily extend to arbitration claims. The court weighs the public interest in open justice against the desirability of maintaining confidentiality in the arbitration, particularly, but not exclusively, if there is an appeal on a point of law.

Radisson Hotels ApS Danmark ("Radisson") brought a challenge under section 68 of the Arbitration Act 1996 to an arbitration award obtained against it by Hayat Otel Isletmeciligi Turizm Yatirim ve Ticaret Anonim Sirketi ("Hayat"). The parties had agreed that all materials and information submitted in the arbitration should remain confidential, but Radisson additionally sought anonymisation and redaction of names in the judgment to protect the confidentiality of the underlying arbitration. ([2023] EWHC 1223 (Comm))

Hayat was content for the judgment to be published and submitted that the fact of the arbitration had been referred to in Radisson's accounts. Given those facts, the judge held that the expectation of privacy did not outweigh the public interest in making the judgment accessible and easy to follow, so the judgment should not be anonymised. [2023] EWHC 1223 (Comm).

Arbitrator deliberations

The plaintiff in *CZT v CZU* SGHC(I) 11 applied to the Singapore International Commercial Court to set aside an award issued by a majority in a Singapore seated ICC arbitration, on the grounds that the majority had decided a key liability issue on grounds or for reasons not contained in the award and that the majority had attempted to conceal the true reasons behind the award. The minority had issued a dissenting opinion in which he had made serious allegations of impropriety against the majority. The plaintiff applied for orders that the three members of the tribunal produce their records of deliberations.

It was common ground that there are implied obligations of confidentiality concerning arbitrator deliberations; such confidentiality is necessary to enable frank discussion between arbitrators and protect from outside influence.

However, as with other obligations of confidentiality, there are exceptions, and the issue was the scope of the exceptions. The plaintiff argued that due process, the interests of justice and the public policy of preserving the integrity and reputation of Singapore as a seat could all give rise to an exception.

The court found that this formulation of the exceptions was too wide.

The court distinguished between matters of essential process and substantive deliberations, suggesting that, for example, the protection of confidentiality would not apply if the complaint were that one member of the tribunal had been excluded from deliberations. The policy reasons for protecting confidentiality would not apply in such a situation because it did not touch on the tribunal thought processes.

The court acknowledged that in some instances it might be in the interests of justice to lift the lid on arbitrator deliberations, but emphasised that such instances would be extremely rare. Impartiality might be an exception, but a mere assertion of impartiality would not be sufficient. Some evidence supporting a real prospect of succeeding would be necessary. The court dismissed the application because the minority's allegations were merely bare allegations. It remains to be seen what level of factual particularity could trigger disclosure.

Loss of confidentiality

Finally, confidentiality can of course be lost. When Deutsche Telecom AG ("DT") sought to enforce an award it had obtained against the Republic of India ("India"), India applied for orders that proceedings in Singapore be held in private, that documents and case files be sealed and that any related court-publicised in formation and the judgment be anonymised or redacted. However, interim awards and the final award were already publicly available and had indeed been much publicised. India's own lawyers had published a LinkedIn post with a link to a GAR article on the case. Information about enforcement in other jurisdictions had also entered the public domain.

Unsurprisingly, the Singapore Court of Appeal decided that the confidentiality of the arbitration had been substantially lost, and there was no compelling interest in keeping the enforcement proceedings in Singapore confidential. ([2023] SGCA(I) 4).

Conclusion

Many other jurisdictions do address confidentiality in their legislation but these cases illustrate how fact sensitive the exceptions may be and why the Law Commission decided to leave the development of the law of confidentiality to the courts.

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