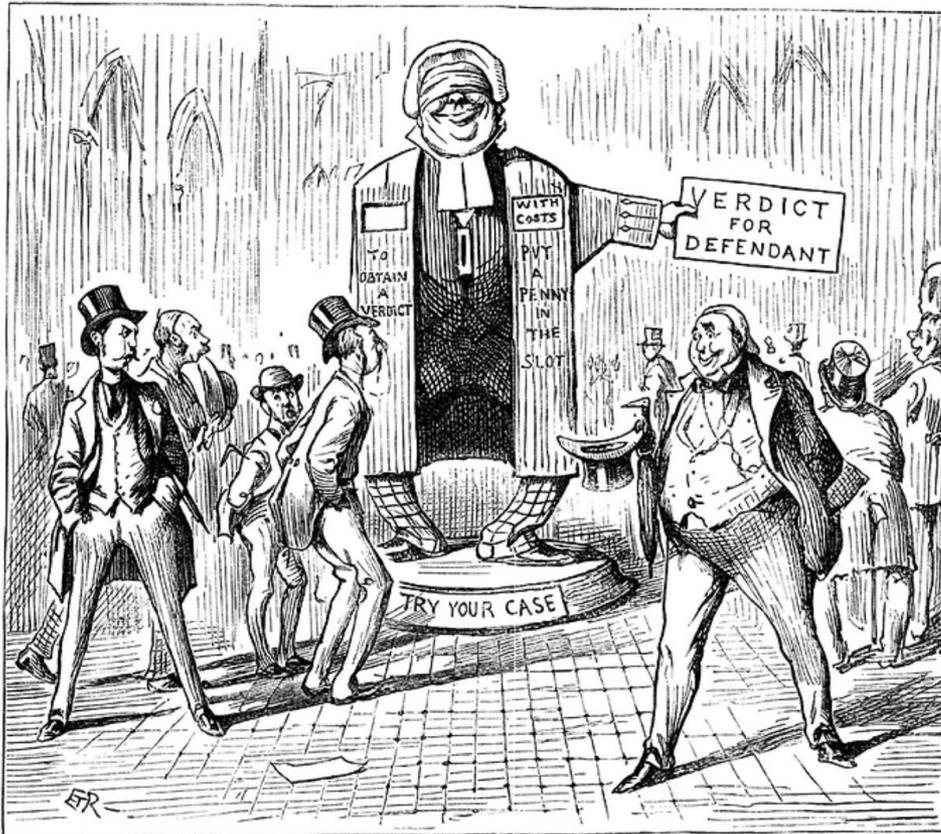


# The Courts and Arbitration: Update on Recent Developments

**Adam Constable QC**

**16 July 2020**



## **AUTOMATIC ARBITRATION.**

**NO MORE EXORBITANT FEES! NO MORE LAW! NO MORE TRIALS!**

A look at recent arbitration cases in the Courts

- Topics covered:
  1. Applicable law
    - law of the contract, law of the agreement and law of the seat....
  2. Arbitration appeals -
    - section 67 (jurisdiction)
    - section 68 (irregularity)
    - section 69 (error of law)

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# 1. Applicable Law

**Key Cases**

# Enka Insaat ve Sanayi AS v OOO Insurance Co Chubb [2020] EWCA Civ 574



- Appeal against a decision not to grant an anti-suit injunction against a party alleged to be in breach of a London arbitration clause by bringing proceedings in Russia
- Issue: how significant was the choice of London as the seat of arbitration?
- Centred on jurisdiction, and the proper law of agreement

- High court decision: Judge declined to determine the proper law of the agreement; dismissed the Appellant's claim on forum non conveniens grounds
- Court of Appeal:
  - Judge had been wrong to decline to rule on the proper law of the agreement
  - Forum non conveniens never appropriate where issue is before the court determined by the curial law (law of seat)
  - Proper law governing this agreement was English law:
    - Substantive law of contract; law of arbitration agreement; curial law.
    - Matter of construction if law of contract governs law of arbitration agreement
    - If law of contract does not govern arbitration agreement, curial law likely to

# Kabab-ji Sal (Lebanon) v Kout Food Group (Kuwait) [2020] EWCA 6



- Court of Appeal refused the enforcement and recognition of an arbitral award handed by an ICC Tribunal seated in Paris
- Two key issues
  - Was arbitration agreement governed by English law (law of substantive agreement) or French law (curial law)
  - Answer would determine whether the Respondent was a party to the agreement [NOM clause, *Rock Advertising*]

- Issue 1: agreement stated that the governing law was English Law - did the seat of arbitration being in a different country override this?
  - Held: No... the arbitration clause contained express words that the arbitration agreement should be governed by English law
- Issue 2: was the Respondent a party to the agreement?
  - Held: No and the lower judge should have made a finding to this effect
  - The Respondent only became a party through oral agreement;
  - The lower judge should have made a finding to this effect and refused to grant an adjournment



- Sting in the tail
  - Cour d'appel de Paris, Pôle 1 - chambre 1, 23 juin 2020, No. 17/22943) (23 June 2020).).
  - The substantive rules of international arbitration governed the agreement and decision enforced

## 2. Arbitration Appeals

**Key cases**



# Obrascon Huarte Lain SA (t/a OHL Internacional) v Qatar Foundation for Education, Science and Community Development [2019] EWHC 2539 (Comm)



- Challenge to an arbitration award under s68(2)(a) of the Arbitration Act 1996 (failure by the tribunal to comply with the general duty under s33)
- Contract was governed by Qatari law and the Dispute centred on Article 184 of the Qatari Civil Code
- Carr J dismissed the contractor's appeal against the award and noted that s68(2)(a) is a high threshold

# Obrascon Huarte Lain S.A. (t/a OHL Internacional) v Qatar Foundation for Education, Science and Community Development [2020] EWHC 1643 (Comm)



- The next development
- Applications made under s67 and s68 of the Arbitration Act
- Butcher J gave guidance on the scope of the power of arbitrators to correct or interpret an award under Article 35 of the 2012 ICC Rules of Arbitration



- Held that the claimant's complaint was not suited to a s67 challenge
- s68 challenge was more suitable as the claimant's complaint focused on the exercise by the tribunal of its power to correct and interpret awards
- Article 35 of the ICC Rules provides a power to correct certain errors – did the changes here fit within that category?
- HELD: They were of a “similar nature” - s68 challenge also dismissed

# Americas Bulk Transport Ltd (Liberia) v COSCO Bulk Carrier Ltd (China) m.v Grand Fortune [2020] EWHC 147 (Comm)



- Challenge to the arbitral tribunal's substantive jurisdiction under s67 of the Arbitration Act 1996
- The Defendant had taken assignment of a third party's rights
- Claimant asserted that there was no contract between itself and the third party and the tribunal therefore did not have jurisdiction
- HHJ Pelling dismissed the claim

# Nobiskrug GmbH v Valla Yachts Ltd [2019] EWHC 1219 (Comm)



- Appeal under s69 of the Arbitration Act 1996 alleging that the arbitral tribunal had made an error of law
- The claim arose out a contract under which the Defendant had engaged the claimant to build a super yacht
- Because of the complexity of the issues and the lack of clarity in the arbitral award, the matter was referred back to the tribunal

# Nobiskrug GmbH v Valla Yachts Ltd [2019] EWHC 1219 (Comm)



- Remission:



**Thank you for listening**

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