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Common Pitfalls in International Arbitration

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Seat – do you have a choice?

- Stipulated by host nation or National Captive Company (NOC)
- Follows the agreement with the host nation
- Captured by local content laws – eg Nigeria where all energy arbitrations are brought onshore
- Decided by other advisors
- Did not read the DRP

Seat – factors if there is a choice

- Geopolitical realities
  - Who are the likely parties to the arbitration and who controls them
  - Are there any political issues around enforcement
    - See eg Russia – survey of enforcement by the RAA 2009 – 17 showed:
      - overall enforcement rate was 80 – 97%; but
      - for ICC the rate was 61% and for LCIA it was 47% and fell to 34% in disputes over €10m
      - V low rate indeed for any disputes relating to the Ukraine
  - Neutrality versus home player advantage
  - Sanctions/Corruption/FATCPA/Bribery Act

- Wrinkles in the applicable law
  - Confidentiality
  - Is the underlying instrument enforceable at all – see eg certain forms of financial security in the UAE, Japan and certain US States
  - Are there any oddities about where hearings have to be held (eg Dubai where all hearings have to be in Dubai)

- Practical considerations

  - Expertise of local arbitral institutions and arbitrators
  - Is your arbitrator willing to sit there?
  - Security
  - Cost
  - Immigration – can your arbitrator and witnesses get into the country?

Multi-Contract Disputes - what is the issue?

- Energy and construction projects split into multiple contracts
- No single arbitration agreement
- Multiple arbitrations increase cost and risk of inconsistent decisions

Multi-Contract Disputes - arbitration statutes

Arbitration Act 1996

35 Consolidation of proceedings and concurrent hearings

(1)The parties are free to agree—

(a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or

(b) that concurrent hearings shall be held, on such terms as may be agreed.

(2)Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.

Multi-Contract Disputes - arbitration statutes

Dutch Code of Civil Procedure

Article 1046

(1) In respect of arbitral proceedings pending in the Netherlands, a party may request that a third person designated to that end by the parties order consolidation with other arbitral proceedings pending within or outside the Netherlands, unless the parties have agreed otherwise. In the absence of a third person designated to that end by the parties, the provisional relief judge of the district court of Amsterdam may be requested to order consolidation of arbitral proceedings pending in the Netherlands with other arbitral proceedings pending in the Netherlands, unless the parties have agreed otherwise.

Multi-Contract Disputes - arbitral rules

ICC Rules

10 Consolidation of Arbitrations

The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:

a) *the parties have agreed to consolidation; or*

b) *all of the claims in the arbitrations are made under the same arbitration agreement; or*

c) *where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible ...*

Multi-Contract Disputes - arbitral rules

HKIAC Rules

"28.1 HKIAC shall have the power, at the request of a party and after consulting with the parties and any confirmed or appointed arbitrators, to consolidate two or more arbitrations pending under these Rules where:

(a) the parties agree to consolidate; or

(b) all of the claims in the arbitrations are made under the same arbitration agreement; or

(c) the claims are made under more than one arbitration agreement, a common question of law or fact arises in all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions and the arbitration agreements are compatible …

Multi-Contract Disputes
- law of the arbitration agreement

Centre of gravity of the dispute

- *C v D1* [2015] EWHC 2126 (Comm)
- *cf Trust Risk Group SpA v AmTrust Europe Ltd* [2015] EWCA Civ 437

Composite transaction

- *Ameet Lalchand Shah v Rishabh Enterprises,* 2018 SCC OnLine SC 487 (Indian Supreme Court)

Multi-Contract Disputes - other solutions

Same tribunal / common tribunal member

- *Guidant LLC v Swiss Re International SE* [2016] EWHC 1201 (Comm)

Multi-Contract Disputes - practical guidance

Before contract is executed

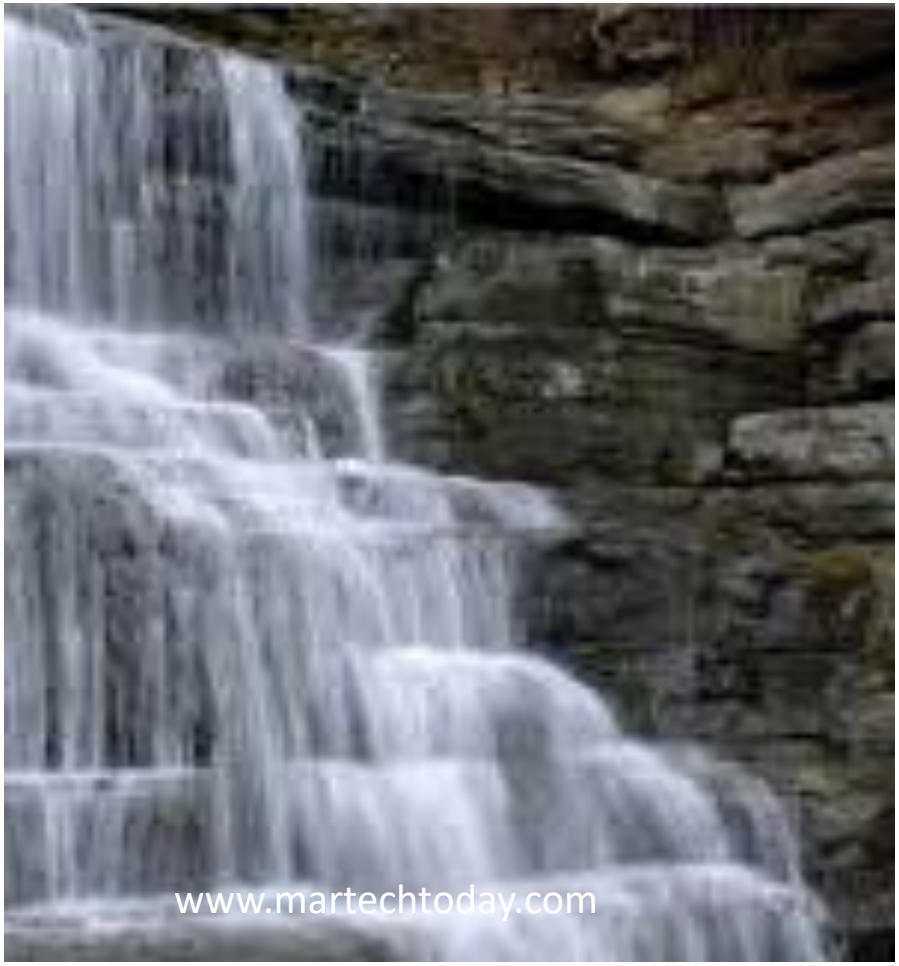
- Single arbitration agreement?
- Express consolidation clause? (But note drafting issues, e.g. *Lafarge Redland Aggregates Ltd v Shephard Hill Civil Engineering Ltd* [2000] 1 W.L.R. 1621)
- Court jurisdiction?

After dispute arises

- Consider options before Tribunal constituted

Multiple arbitrations are better than a wasted arbitration

Dispute Escalation Clauses
Introduction



- What are they?
- Typical Clause
- Perceived pros and cons

Potential Pitfalls:

- Enforcement

Ohpen Operations v Invesco [2019] EWHC 2246 (TCC),

"(i) The agreement must create an enforceable obligation requiring the parties to engage in alternative dispute resolution.

(ii) The obligation must be expressed clearly as a condition precedent to court proceedings or arbitration.

(iii) The dispute resolution process to be followed does not have to be formal but must be sufficiently clear and certain by reference to objective criteria, including machinery to appoint a mediator or determine any other necessary step in the proceedings without the requirement for any further agreement by the parties.

(iv) The court has a discretion to stay proceedings commenced in breach of an enforceable dispute resolution agreement. In exercising its discretion, the court will have regard to the public policy interest in assisting the parties to resolve their disputes."

- Which steps are binding?
- Jurisdiction

Hearings and Cross-Examination

Queen Mary / White & Case survey (2012)

"31% of civil lawyers said the average duration of their hearings was 1-2 days, compared to only 9% of common lawyers. Similarly, 34% of common lawyers, compared to only 12% of civil lawyers, said the average duration was 6-10 days."

Hearings and Cross-Examination

" … a party should be given a proper opportunity to conduct cross-examination … In a large case … proper cross-examination for a significant witness (expert or fact) may require days (or even weeks) rather than minutes or hours. Modern arbitration is therefore moving away from the old continental model."

Peter Leaver QC and Henry Forbes Smith, "The British Perspective and Practice of Advocacy", in Bishop and Kehoe (ed), *The Art of Advocacy in International Arbitration* (2010) 496

Hearings and Cross-Examination

"I recently posited at an LCIA Symposium that virtually every case can be tried in two weeks or less. I was pleased to receive almost universal agreement on that point."

David Rivkin, *Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited* (2008) 24 Arb. Int'l 375, 377

Hearings and Cross-Examination

"Given the right to cross examine that exists under most regimes, arbitration practice is much closer to the common law tradition on this issue. It is therefore reasonable to expect that if a witness' evidence is to be challenged in a substantial way – even if the challenge does not involve fraud or dishonesty – the witness should be given an opportunity to respond during cross-examination."

David Williams QC and Anna Kirk, "Fair and Equitable Treatment of Witnesses in International Arbitration" in Caron *et al* (ed) *Practising Virtue: Inside International Arbitration* (2015) Section V

Hearings and Cross-Examination

"The modern flexibility of arbitral procedure is a result of a lengthy process of emancipation from domestic rules. Cross-examination, with its long common law history, its emotive appeal to common lawyers, its underpinning in often obscure evidential rules, and its dynamic of partisanization of witnesses is a step backwards epitomising the type of procedural innovation that international arbitration must avoid."

Bernardo Cremades and David Cairns, "Cross-Examination in International Arbitration: Is It Worthwhile?", in Newman and Sheppard (eds), *Take the Witness: Cross-Examination in International Arbitration* (2010) 242

Getting more out of your expert evidence

Outline:

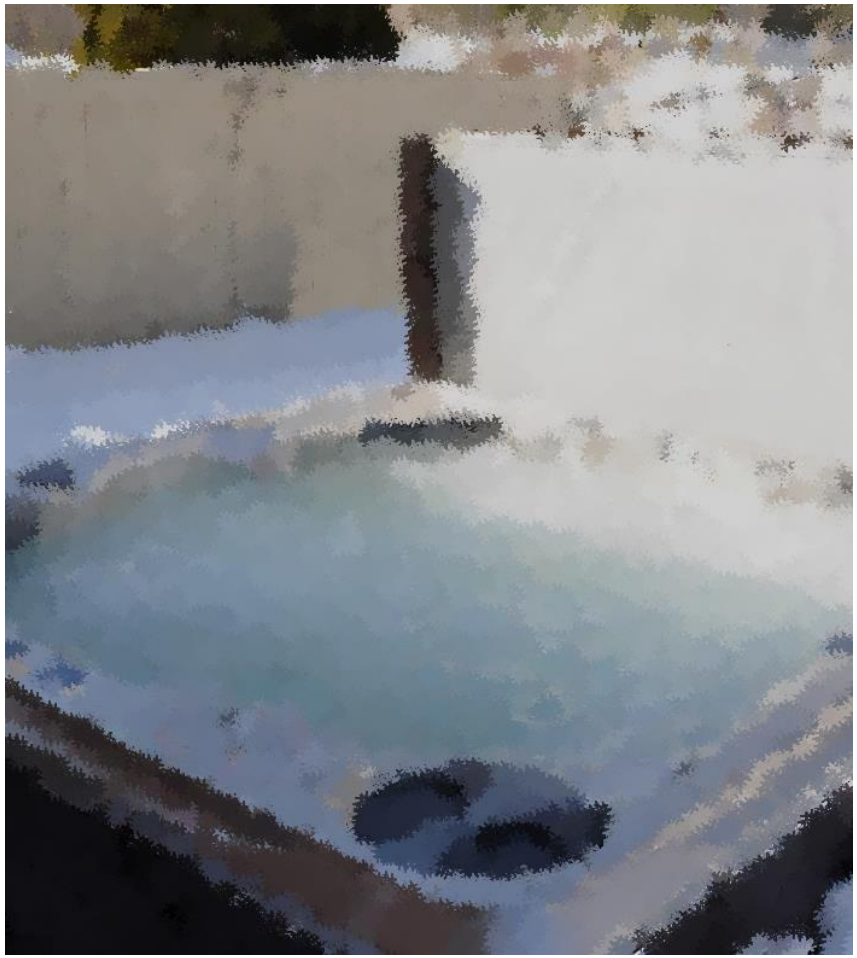
- Expert presentations
- Witness conferencing
- Tying down the issues

Expert presentations:

- What are they?
  - Short oral presentation, prior to cross-examination
  - Not new material
- Pros – roadmap for the Tribunal
- Cons – potential for expert to go off point
- Practical tip(s): agree approach in good time, consider whether it is suitable for your expert

Witness Conferencing:

- What is witness conferencing?
  - Simultaneous taking of evidence from experts of similar disciplines
  - See, for example, IBA Rules Article 8(3)(f).
- Industry generally sees as positive
- Different approaches:
  - Counsel led
  - Tribunal led



- Pros: generally very effective
- Cons: scope for unnecessary concessions
- Practical tip(s): consider whether your expert is ready and formulate a plan for how the session will unfold

Tying down the issues:

- Using a List of Issues as an agenda for the witness conferencing

Enforcement

- Energy arbitrations raise particular practical problems for enforcement
  - Do you need cooperation from the NOC?
  - It is likely that there will significant infrastructure in country – how will that be impacted?
  - Will enforcement trigger resource nationalism?
  - Is there a time value of money and of extraction issue (the diminishing nature of an oil field requires speedy enforcement)?
  - The sheer amount of the award can bankrupt the host country
  - Recovery against local partners can be difficult

- Particular legal problems
  - Sovereign immunity
    - Has the State waived immunity for the purposes of arbitration *and* enforcement (these are separate under some systems – see eg s 13(3) of the State Immunity Act 1978)
    - Are the assets State assets
    - If so, you can only enforce if they are used for a commercial purpose generally (England & Wales) or that transaction
    - Are they used for a diplomatic purpose – query whether diplomatic immunity applies

- Has the arbitration intruded into public policy issues
  - Tariff setting
  - Taxation/rent extraction
  - Licensing
- Expropriation/resource nationalism
  - Simple refusal to recognise the award
  - Retaliatory removal of licence/permissions
- Is there a BIT or an FTA – and what protection does it offer

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Thank you for listening

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