OUTLOOK

NEWS AND VIEWS FROM THE 39 ESSEX COMMERCIAL AND CONSTRUCTION GROUP

MAY 2020

INTRODUCTION

Welcome to the May 2020 edition of *Outlook*, a roundup of news and views from the 39 Essex Commercial and Construction Group. Readers will not be surprised to learn that the impact of the current global health emergency remains the primary focus for the C&C Group's practitioners.

Samar Abbas Kazmi and Philippe Kuhn examine the effect of COVID-19 on the work of the Business and Property Courts. Their article considers the official guidance issued by the senior judiciary and HMCTS, several COVID-19 related judgments handed down since the UK went into lockdown, and the emerging trends that can be discerned.

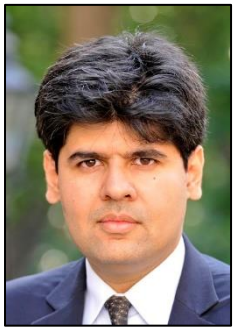
As some respite from coronavirus, Steven Lim revisits the proper law of the arbitration agreement and provides a critique of *BNA v BNB & Anor* [2019] SGCA 84 and *Kabab-Ji S.A.L v Kout Food Group* [2020] EWCA Civ 6 with a postscript on *Enka Insaat Ve Sanayi A.S. v OOO "Insurance Company Chubb" & Ors* [2020] EWCA Civ 574.

With some countries around the world beginning to move out of lockdown, minds in the construction industry are turning toward what will happen as teams return to work. Swee Im Tan provides a mind-map of the topics on which construction lawyers will be called upon to advise.

And Samar Abbas Kazmi and James Bradford analyse the response of arbitral institutions to the COVID-19 situation, consider the challenges of remote working and offer practical tips on the way forward for practitioners and their clients involved in disputes.

Contents

Editorial team: Marion Smith QC, Hannah McCarthy, David Hopkins, James Bradford, Ruth Keating, Gethin Thomas



REMOTE HEARINGS AND ADJOURNMENT APPLICATIONS IN THE BUSINESS AND PROPERTY COURTS: EMERGING TRENDS

Samar Abbas Kazmi and Philippe Kuhn

English courts have long led the way in handling complex international commercial disputes. The specialist courts which are now known as the Business and Property Courts of England and Wales have time and again demonstrated their institutional capacity and willingness to adapt to the realities of modern commerce. The ongoing crisis precipitated by COVID-19 is no different. In recent weeks, the courts have embraced innovation to meet the challenges posed by remote working and have defied the odds to keep proceeding with a number of complex matters with minimal disruption.

Case management issues have been considered in a number of recent adjournment applications. These decisions provide valuable guidance on issues of safety, technological measures, procedural fairness and open justice. Importantly, these decisions demonstrate that English courts can be expected to maintain their pragmatic and fact-sensitive approach when dealing with applications for adjournment and other ancillary matters. As such, special adjustments for witnesses and experts in other jurisdictions and the needs of international clients are likely to be accommodated in the spirit of fairness.

We set out below a few guiding principles which may be gleaned from the courts' approach to case management.

(1) PRACTICE DIRECTIONS, "REMOTE HEARING PROTOCOL" AND HMCTS GUIDANCE:

By way of background, it is to be noted that the senior judiciary and HMCTS have been active in providing a fleet of new Practice Directions, the "Remote Hearing Protocol" and other guidance. These are by now familiar, but they are general in nature. Commercial and construction litigation is complex and varied, in particular given the high proportion of foreign litigants in the English courts. This means there is necessarily room for fact-sensitive evaluations by experienced judges deciding adjournment applications and wider case management questions relating to remote hearings.

To provide a flavour of current reference materials:

1. **Practice Directions**: In late March and early April, Practice Direction 51Y[1] and Practice Direction 51Z[2] were introduced. The former deals with open justice issues. The latter provides helpful guidance on extensions of time, allowing parties to agree in writing to extensions of 56 days without the permission of the court.

2. **"Remote Hearing Protocol"**: The "Civil Justice in England and Wales Protocol regarding Remote Hearings"[3] deals with expected steps, including: (1) the main options available for remote hearings, with a non-exhaustive list of teleconference and video link services ([13]); (2) the respective roles of the courts and the parties in making alternative proposals ([16]–[17]); and (3) the conduct of remote hearings ([20]–[23]).

3. **HMCTS guidance**: HMCTS and individual courts have produced guidance in several forms. The key consolidated guidance is "HMCTS telephone and video hearings during coronavirus outbreak".[4] This deals with the full range of remote hearing questions, including the decision to use alternative arrangements, applicable court rules and PDs, open justice and listing information.

[1] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic
[2] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51za-extension-of-time-limits-and-clarification-of-practice-direction-51y-coronavirus
[3] https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-26_03_20-1-1.pdf
[4] https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak?utm_medium=email&utm_source=

(2) EMERGING PRACTICE IN THE BUSINESS AND PROPERTY COURTS:

The Business and Property Courts have provided more tailored guidance on applicable case management principles in recent adjournment applications. Given the range of factors referred to, it is most convenient to take the cases chronologically.

The first major judgment was by Teare J in *National Bank of Kazakhstan v Bank of New York Mellon* (unrep., 19 March 2020). While the decision on the adjournment application is unavailable, it was later cited and reproduced in part in *Re One Blackfriars Ltd (in liquidation)* [2020] EWHC 845 (Ch) at [33] (discussed below).

Teare J stressed that the "default position now in all jurisdictions must be that a hearing should be conducted with one, more than one, or all participants attending remotely". He used the strong language "it is incumbent on the parties to seek to arrange a remote hearing *if at all possible*" (emphasis added), despite accepting that "the geographical location of the expert witnesses" poses "particular challenges". He thus refused the adjournment application. The matter was heard within days and the trial judgment has been handed down: [2020] EWHC 916 (Comm).

Similarly, on 26 March 2020, Insolvency and Companies Court Judge Jones rejected an adjournment application in *Re Smith Technologies*. That judgment is unreported but was cited with approval in *Municipio De Mariana v BHP Group Plc* [2020] EWHC 928 (TCC) at [21]. The judge gave short shrift to arguments about: (1) the ability of the respondents to give and receive instructions because of the different locations of counsel, solicitors and clients; (2) self-isolation by one of the respondents (falling within a vulnerable category); and (3) the quality of internet connections. Commenting on technological difficulties, the court said at [8]:

> "It has been contended that the legal team for the respondents has no previous experience and there is insufficient time to learn to be able to participate fully and fairly. Bluntly, that is not good enough. Solicitors are going to have to act quickly. They need to practise Skype and put in place procedures to enable them to be effective trial lawyers. I have to observe that it is highly surprising that the technology available to a firm of solicitors is not more advanced than that available to the courts, but again I return to the fact that this is not difficult technology. Nor should it be difficult to organise an electronically presented defence."

The court also considered that: (1) "instructions can be taken without anyone hearing them during the trial, using mute on Skype and mobile phones, either directly or through apps"; (2) short-term arrangements can be made to address internet connectivity issues; and (3) there is scope for flexible timetabling to allow for family difficulties or space problems (see at [7], [12]–[13]). In addition, the need for co-operation between the parties and the willingness of the court to provide further case management directions where needed was pointed out (see at [13]).

A very comprehensive treatment of remote hearing case management issues is found in *Re One Blackfriars Ltd* [2020] EWHC 845 (Ch) (6 April 2020). John Kimbell QC (sitting as a Deputy High Court Judge) dismissed an application to adjourn the trial. He dealt with: (1) consistency with the Government's instructions pursuant to the Coronavirus Act and the Coronavirus Regulations; (2) safety concerns; (3) technological challenges; and (4) potential unfairness. The parallels to Teare J's refusal of an adjournment in *National Bank of Kazakhstan* are notable.

In summary, the court emphasised the following factors:

1. The Coronavirus legislation made "specific exemptions" for court proceedings, which sends "a very clear message that [Parliament] expects the courts to continue to function so far as they able to do safely by means of the increased use of technology to facilitate remote trials". (See at [23])

2. "A remote trial must not endanger the health of any participants or, indeed, anyone else involved in the trial behind the scenes". The particular issues raised were that some trial participants were in the vulnerable category and that two of the expert witnesses had caring responsibilities within their households. However, these concerns were considered insufficient for an adjournment. Principally on the basis that there had to be more concrete evidence of difficulties and there was a real need for co-operation between the parties, including the possibility of dispensing with certain evidence. The judge left open the possibility of revisiting that determination at a further PTR. (See at [38]–[39])

3. There was little sympathy for technological issues. A number of remote trials had taken place, including before Teare J in the Commercial Court. The experience so far was that remote trials had been successful even when the proceedings involved multiple parties and in excess of ten witnesses. The parties were ordered to "co-operate in seeking potential remote trial platforms and document handling systems". Any proposed system should be "subject to robust testing from as many of the locations from which participants are likely to be giving evidence (or making submissions)" as possible and "careful attention must be paid to the Internet bandwidth available" at all locations. Internet connection and bandwidth were considered "an absolutely essential enquiry" and, as a preliminary view, "it may well be preferable for witnesses to travel to a few locations as close as possible to their home". (See at [46], [49]–[51])

4. Unfairness was not a major issue where litigation is "between well-resourced sophisticated parties", both have "excellent teams" and there is thus "an equality of arms".[5] (See at [53])

Following the "business as usual" theme, in *Heineken Supply Chain BV v Anheuser-Busch InBev SA* [2020] EWHC 892 (Pat) (9 April 2020), Daniel Alexander QC (sitting as a Deputy High Court Judge) considered an application to extend time for service of reply evidence in a patents dispute. He allowed a short extension but, relying on the cases above, refused to allow a longer extension which would result in the trial being adjourned. Notably, at [28], he showed little sympathy for difficulties faced in preparing Belgian law expert evidence, stressing that "where it can be safely done and without risks to the integrity of the legal process, the wheels of justice should keep turning at their pre-crisis rate".

The latter comment met with criticism in *Municipio De Mariana v BHP Group Plc* [2020] EWHC 928 (TCC) (20 April 2020). HHJ Eyre QC considered an application for extending time for filing of evidence which, if granted, would result in the vacation of a 7-day jurisdiction application. Significantly, the application was granted. However, the facts were quite extreme. The applicants' Brazilian law expert was a 76-year old retired Brazilian judge with limited IT skills based in Brasilia, without access to relevant papers located in Sao Paulo (see at [36]). As to expert evidence, HHJ Eyre QC at [31] expressed doubts over the general comments in *Heineken*, in particular "the assumption that as a general rule if less time is spent on material or if there is less involvement by the lawyers the evidence will be shorter or will have more relevance or authenticity." Further, HHJ Eyre QC at [24] distilled five principles from the authorities:

> "i) Regard must be had to the importance of the continued administration of justice. Justice delayed is justice denied even when the delay results from a response to the currently prevailing circumstances.
>
> ii) There is to be a recognition of the extent to which disputes can in fact be resolved fairly by way of remote hearings.
>
> iii) The courts must be prepared to hold remote hearings in circumstances where such a move would have been inconceivable only a matter of weeks ago.
>
> iv) There is to be rigorous examination of the possibility of a remote hearing and of the ways in which such a hearing could be achieved consistent with justice before the court should accept that a just determination cannot be achieved in such a hearing.
>
> v) Inevitably the question of whether there can be a fair resolution […] by way of a remote hearing will be case-specific. A multiplicity of factors will come into play and the issue of whether and if so to what extent live evidence and cross-examination will be necessary is likely to be important in many cases. There will be cases where the court cannot be satisfied that a fair resolution can be achieved by way of a remote hearing."

[5] Another case dealing with questions of unfairness is *MillChris Developments Ltd v Waters* [2020] 4 WLUK 45 (2 April 2020). Jefford J refused to grant an injunction stopping an adjudication from proceeding. It was submitted that to allow the adjudication to continue would be a breach of natural justice because of the effects of COVID-19, but Jefford J held that only exceptionally would a court grant an injunction to stop an adjudication, and on the facts the test was not met. There was no explanation as to why papers could not be transported or scanned over. The reasons why evidence could not be obtained had nothing to do with COVID-19.

(3) EMERGING TRENDS:

The Business and Property Courts are clearly staying true to the "business as usual" mantra. They have given a firm steer to avoid disruptions and gaps in court utilisation by expecting a high level of technological sophistication. This reflects the well-represented and well-resourced nature of most parties.

High expectations for investment and training in improving technology capacity, both for lawyers and to assist witnesses, have been set. A notable example is *Re One Blackfriars Ltd*. In practice, this would seem to include experimenting and gaining familiarity with a range of video link and teleconference platforms, not limited to the current frontrunners Skype and Zoom. Intermediary firms such as Sparq and Opus 2 provide these kinds of services, and some can even help address open justice concerns by facilitating live streaming of hearings through court listing pages, including from the Rolls Building. A possible exception to the rule may be certain cross-border disputes in which a greater number of relevant participants may be affected more seriously by technological issues or other restrictions not found in the UK.

One factor that could have greater currency as a potential objection to proceeding with trials in current conditions is safety. This is reflected in part by the willingness to hold a further PTR nearer the trial date if necessary in *Re One Blackfriars Ltd*. However, this will need to be well-substantiated and there is at least some indication that parties may be expected to dispense with non-essential evidence in certain cases.

Similarly, the question of expert evidence is not as clear-cut as suggested in *Heineken*. *Municipio De Mariana* underlines the fact-sensitive nature of such case management decisions and the wide range of potentially relevant considerations. Certainly where experts (or other key witnesses) are likely to be in different time zones, issues of substantive fairness are likely to arise.

Cross-examination of key witnesses in proceedings concerning serious allegations, including alleged fraud, conspiracy and other species of dishonesty, may also raise issues in some cases. Sophisticated commercial parties are already familiar with remote evidence in such disputes, in particular in international arbitration. However, there is as yet no specific guidance on conducting entire civil fraud trials remotely. This is likely to require further judicial attention.

Another area for further reflection is the extent of the courts' willingness to depart from usual timetabling patterns for longer trials, in order to accommodate participants in different time zones. It is to be hoped that the general comment about flexibility in *Re Smith Technologies* can be extended beyond family difficulties or space problems. Trial lengths may also need to be revisited on account of such adjustments and, in general, the added time involved in giving evidence by video link rather than in person. ●

REVISITING THE PROPER LAW OF THE ARBITRATION AGREEMENT

A CRITIQUE OF *BNA V BNB & ANOR* [2019] SGCA 84 AND *KABAB-JI S.A.L V KOUT FOOD GROUP* [2020] EWCA CIV 6

WITH A POSTSCRIPT ON *ENKA INSAAT VE SANAYI A.S. V OOO "INSURANCE COMPANY CHUBB" & ORS* [2020] EWCA CIV 574

Steven Lim

Three recent decisions of the Courts of Appeal in Singapore and England provide an opportunity to revisit the common law approach to determining the proper law of the arbitration agreement. The proper law of the arbitration agreement is often overlooked in the drafting of arbitration clauses but is of primary importance where the validity of the arbitration agreement is in question.

The three decisions are:

1. *BNA v BNB & Anor* [2019] SGCA 84 ("***BNA v BNB***");
2. *Kabab-JI S.A.L v Kout Food Group* [2020] EWCA Civ 6 ("***Kabab v Kout***"); and
3. *Enka Insaat Ve Sanayi A.S. v OOO "Insurance Company Chubb" & Ors* [2020] EWCA Civ 574 ("***Enka v Chubb***").

Much has been written about *BNA v BNB* and *Kabab v Kout* already. *Enka v Chubb* was released more recently on 29 April 2020. In this re-evaluation I focus on whether the common law approach to determining the proper law of the arbitration agreement, as exemplified in these three cases and going back to the English Court of Appeal decision in *Sulamérica Cia Nacional de Seguros SA & Ors v Enesa Engelharia SA & Ors* [2012] EWCA Civ 638; [2013] 1 WLR 102 ("***Sulamérica***"), accords with the obligations in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") and the corresponding obligations in the UNCITRAL Model Law on International Commercial Arbitration ("**the Model Law**").

I also consider whether courts, even the most international arbitration friendly ones like England and Singapore, give enough attention to the multifaceted interplay of choice of law in the interpretation of international arbitration agreements.

Given the brevity of this note for the form in which it is published, I only identify points where the common law approach diverges from the New York Convention and, in my view, insufficient attention has been given to the interplay of choice of law in the interpretation of international arbitration agreements, leaving a more in-depth discussion of these issues to a less succinct paper in future.

BNA v BNB

The Court of Appeal in Singapore handed down the decision in *BNA v BNB* in December last year. The case concerned a tripartite arbitration in a takeout agreement for industrial gas. The parties were:

1. BNA – a PRC entity;
2. BNB – a South Korean entity; and
3. BNC – another PRC entity.

BNB was the original seller in the takeout agreement and BNA was the buyer. BNC, a related company to BNB, subsequently took over BNB's obligations as seller by novation. BNB however remained jointly and severally liable for BNC's failure to perform its obligations. PRC law was the governing law of the contract and therefore of the substance of the dispute.

The arbitration agreement provided for arbitration administered by the SIAC under the SIAC Rules with "arbitration in Shanghai". Under PRC law:

1. two PRC parties, i.e. BNA and BNC, cannot agree to arbitrate disputes outside of the PRC; and
2. there is a serious question whether a foreign institution, i.e. the SIAC, can administer arbitration in the PRC.

A majority of the tribunal found, applying the validation principle, that Singapore law was the proper law of the arbitration agreement. The validation principle states that an arbitration agreement should be upheld as valid if it is valid under any of the laws that may potentially be applicable to it,

even if it is not valid under other potentially applicable laws.[1] The validation principle is embedded in the pro-enforcement policy and choice of law provisions of the New York Convention (which are replicated in the Model Law).[2]

The majority award reasoned:

1. It made no commercial or logical sense for parties to intentionally select a law to govern an arbitration agreement which would invalidate it.

2. The words "arbitration in Shanghai" designated Shanghai as the venue (but not the seat or place) of the arbitration.

3. Singapore was the seat of the arbitration (presumably because of the choice of SIAC as administering institution).

4. Singapore law, as the law of the seat, was the proper law of the arbitration agreement.

The majority's finding upheld the validity of the arbitration agreement.

The dissent by the third arbitrator opined that:

1. Shanghai was the designated seat or place of the arbitration.

2. There was nothing to displace PRC law as the proper law of the arbitration agreement (PRC law being both the governing law of the substantive contract and of the seat).

3. The dispute is classified as a domestic dispute under PRC law.

4. PRC law prohibits a foreign institution from administering an arbitration of a domestic dispute.

BNA applied to set aside the majority award in the Singapore High Court. The court applied the three stage inquiry set out in *Sulamérica*, which was endorsed by the Singapore High Court in *BCY v BCZ* [2017] 3 SLR 357 ("***BCY v BCZ***"). The court found:

1. Singapore was the seat of arbitration because the parties had expressly incorporated the SIAC Rules 5th edition, 2013 (rule 18.1 of those rules specified Singapore as the default seat of the arbitration in the absence of the parties' agreement).[3]

2. Since the arbitration agreement referred to two locations – Singapore (through rule 18.1) and Shanghai – in the absence of a clear selection of the seat by the parties, the words "arbitration in Shanghai" was taken to be designation of Shanghai as the venue and not the seat.[4] Singapore was therefore the seat by default, under rule 18.1.

3. Because Singapore was the seat, Singapore law displaced PRC law as the proper law of the arbitration agreement (since the validity of the arbitration agreement was in doubt under PRC law).

Although the court upheld the majority award, which had applied the validation principle, it expressly rejected the application of the principle in Singapore law. The court found the validation principle:

1. Was impermissibly instrumental.[5]

2. Could be inconsistent with the parties' intentions.[6]

3. Was unnecessary because Singapore law already endorsed the principle in the Latin maxim *verba ita sunt intelligenda ut res magis valeat quam pereat* i.e. words are to be understood in a manner that the subject matter be preserved rather than destroyed.[7]

4. Could create problems at the enforcement stage because article V(1)(a) of the New York Convention contains choice of law provisions for determining the proper law of the arbitration agreement, the starting point of which is the parties' intentions, whereas the validation principle seeks to validate an arbitration

[1] *BNA v BNB* [2019] SGHC 142 ("***BNA HC***") at [51] citing Gary Born, "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814 at [51].

[2] As explained further below.

[3] This provision was removed in the 6th edition of the SIAC Rules, 2016. The SIAC Rules now do not specify a default seat.

[4] Arbitral tribunals are allowed to hold hearings in another location other than the seat for convenience – in arbitration parlance this is called the venue. The juridical seat does not change even if hearings are held in a different venue.

[5] *BNA HC* at [53].

[6] Ibid at [55].

[7] Ibid at [62].

agreement without "necessary regard to the parties' choice of law".[8]

With respect, it appears to me the court itself took an instrumental approach by reading "arbitration in Shanghai" as designation of venue and not seat, to arrive at the decision that the proper law of the arbitration agreement was Singapore law, to validate the arbitration agreement which would have been invalid under PRC law. In other words, the court applied *a validation approach* even though it would not endorse the validation principle.

The validation principle is not inconsistent with the parties' intentions; it gives effect to the parties' agreement to arbitrate. There is no conflict between the validation principle and article V(1)(a) (and article II) of the New York Convention as the validation principle is *derived* from the choice of law principles and pro-enforcement policy applicable to both articles II and V(1)(a).[9]

On appeal, the Court of Appeal reversed the High Court. The Court of Appeal held:

1. The natural reading of "arbitration in Shanghai" meant Shanghai was the seat selected by the parties.

2. Singapore is therefore not the competent court to decide jurisdiction.

As it was not necessary for the Court of Appeal to do so, it declined to address the application, in Singapore law, of the validation principle or the effective interpretation principle (a civil law concept which provides that where an arbitration clause can be interpreted in two different ways, the interpretation enabling the clause to be effective should be adopted in preference to that which prevents the clause from being effective).[10]

In arriving at its decision, the Court of Appeal also applied the three stage enquiry in *Sulamérica*, which stipulates that in determining the proper law of the arbitration agreement the court has to consider, in the order stated below:

1. Whether the parties had expressed a specific choice of law.

2. If not, does the arbitration agreement evince an implied choice of law (in *Sulamérica* the court held there was a rebuttable presumption that the governing law of the substantive contract is the implied choice in the absence of an express choice. This presumption could be rebutted, for example, if the arbitration agreement was invalid under the governing law of the contract, in which case the fall back implied choice was the law of the seat).

3. Failing determination of an implied choice, what law had the closest connection to the arbitration agreement.

The three stage test in *Sulamérica* applied English contract law precedent for determining the proper law of contracts generally.[11] The court did not consider whether this test accorded with the choice of law provisions in the New York Convention. The *Sulamérica* test departs from the New York Convention in one aspect. The New York Convention provides for the default selection of the law of the seat, not the law with the closest connection to the arbitration agreement, where no express or implied choice of law can be found.

Article V(1)(a) of the New York Convention contains choice of law provisions for determining the proper law of the arbitration agreement which are similar to, but as noted above, not identical with the three stage test in *Sulamérica*. Article V(1)(a) first points to:

1. "the law to which the parties have subjected it" (which includes both express and implied choices of law); and then

2. "failing any indication thereon", "the law of the country where the award was made" (i.e. the law of the seat).

Article V(1)(a) deals with recognition and enforcement of arbitration awards. Article II of the New York Convention deals with recognition and enforcement of arbitration agreements. While there is no express choice of law provision in article II, it is implied in the scheme of the New York Convention that to avoid inconsistent decisions at the stage of recognition and enforcement of arbitration

[8] Ibid at [65].

[9] Gary Born, "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814 at [27], [56] and [59]. The choice of law provisions in articles II and V(1)(a) are discussed further below.

[10] *BNA v BNB* at [95].

[11] *Sulamérica* at [9] – it appears this point was not argued before the court and it was accepted as "common ground".

agreements and awards, the choice of law provisions in Art V(1)(a) are to be applied in Art II.[12]

The Court of Appeal's approach to the determination of the proper law of the arbitration agreement did not, with respect, give sufficient consideration to the multifaceted interplay of choice of law in the interpretation of international arbitration agreements. The court did not give any apparent consideration to the law to be applied to interpretation of the arbitration agreement for *the purposes* of determining its proper law. The court applied Singapore law to construe the arbitration clause to determine the proper law. The court subsequently found the proper law was PRC law. As with as with any other contract, the arbitration agreement should be construed by its proper law, subject to the pro-arbitration policy and internationally accepted rules of construction mandated by the New York Convention.[13] This raises the question whether Singapore law was the appropriate law to apply when construing the arbitration agreement to determine its proper law.[14]

I was faced with a similar issue when sitting as an arbitrator in an ad hoc arbitration in Singapore. There was a dispute whether Singapore or India was the seat of the arbitration and hence, whether I had been properly appointed by the default appointing authority in Singapore as arbitrator. The dispute centred on whether the words "arbitration proceedings shall be held at Singapore" should be read as an express choice of Singapore as the seat, or a designation of venue.

The claimant argued it was only a designation of venue, and the arbitration was seated in India because Indian law was the governing law of the substantive contract and:

1. That express choice of law extended to the arbitration agreement.

2. Alternatively, Indian law was the implied choice of law, relying on the presumption in *Sulamérica* that the governing law of the contract was the implied choice of law for the arbitration agreement, in the absence of an express choice of law.

3. Also relying on *Sulamérica*, Indian law had the closest connection to the arbitration agreement.

As both the arbitration agreement and substantive contract were governed by Indian law, the arbitration was seated in India.

The respondent argued Singapore law was the proper law of the arbitration agreement as the express choice, or alternatively the implied choice, or the law with the closest connection with the arbitration agreement.

There was therefore a dispute as to the proper law of the arbitration agreement by which I was to determine whether the words "arbitration proceedings shall be held at Singapore" was an express choice of seat or designation of venue. The parties agreed, in response my enquiry, that the relevant principles of contractual interpretation would be the same under Singapore or Indian law. I decided it was not necessary for me to determine whether the governing law of the arbitration agreement was Indian or Singapore law at that stage and I reserved determination of the issue to a later stage should it become material. Applying the principles of contractual interpretation common to Indian and Singapore (and for that matter English) law, I found that the words "arbitration proceedings shall be held at Singapore" was an express choice of Singapore as the seat, and not just of venue:

1. The words "arbitration proceedings" encompass the entire conduct of the arbitration from the commencement of the arbitration to the final award and not just the hearing itself.

2. It would be odd for the parties to have gone to extent of specifying the location for the hearing but not where the arbitration would be seated – a concept of much greater significance.

My decision was, in effect, upheld by the Indian Supreme Court when it declined to appoint an arbitrator under section 11 of the Indian Arbitration and Conciliation Act 1996, on the assertion that the arbitration was seated in India.[15]

[12] Gary Born, "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814 at [30] and [59].

[13] *International Commercial Arbitration*, 2nd Edition, Gary Born at §9.05.

[14] Gary Born argues it is wrong to apply the law of judicial enforcement to interpretation of the arbitration agreement – *International Commercial Arbitration*, 2nd Edition, Gary Born at §9.05. The same argument would apply to the law of the seat.

[15] *Pricol Limited v Johnson Controls Enterprise Ltd. & Ors*, Arbitration Case (Civil) No. 30 of 2014, unreported.

In retrospect, and considering the issue I raise above on the appropriate law to apply when construing the words of an arbitration clause to determine its proper law, it would have been appropriate for me to apply internationally accepted principles of construction (giving as much effect as possible to the pro-arbitration policy of the New York Convention) to the construction of the relevant words, and whether the parties had made an express choice as to seat, in order to determine whether Indian or Singapore law was the proper law of the arbitration agreement.

KABAB V KOUT

Kabab v Kout concerned a franchise development agreement ("**FDA**") between Kabab and a company with the acronym AHFC. The arbitration agreement in the FDA provided for ICC arbitration in Paris. The governing law of the FDA was English law. AHFC subsequently became a subsidiary of Kout.

Kabab commenced arbitration against Kout under the arbitration agreement in the FDA. The tribunal had to consider a jurisdictional issue as to whether Kout was a party to the FDA (and the arbitration agreement). The majority of the tribunal found:

1. French law was the proper law of the arbitration agreement.

2. Whether Kout was bound by the arbitration agreement was a matter of French law (and it was).

3. Whether a transfer of substantive rights and obligations of the FDA took place was a matter of English law.

4. As a matter of English law, a novation making Kout the main franchisee could be inferred by conduct of the parties.

Kout applied to set aside the award in France. Kabab applied to enforce the award in England. In England, the High Court held:

1. There was an express choice of English law as the proper law of the arbitration agreement in article 14 of the FDA.

2. English law therefore governed whether Kout became a party to the arbitration agreement.

3. Under English law Kout did not become a party to the FDA.

On appeal, the Court of Appeal upheld the High Court decision:

1. Article 1, read with article 15 of the FDA, provided for the express choice of English law as the proper law of the arbitration agreement.

2. Article 1 made clear that "this Agreement" (capitalised) included all subsequent terms of the agreement, including the arbitration clause in section 14.

3. Article 15 expressly provided that "[t]his Agreement shall be governed and construed in accordance with the laws of England", and by article 15 all terms of the agreement, including the arbitration agreement in article 14, were governed by English law.

The court recognized that, generally, governing law clauses in the substantive contract do not apply to the arbitration agreement,[16] but it did in this case because of articles 1 and 15 taken together.

The point of particular interest for me in *Kabab v Kout* was that the court questioned, but did not decide, whether the requirement of necessity for business efficacy before a term can be implied can be satisfied under the three stage test in *Sulamérica*, or the choice of law principles in the New York Convention, where there is a fallback default choice of either the law of the country:

1. with the closest connection; or

2. where the award was made.[17]

Counsel for Kabab submitted to the court that the test of implication set out in *Sulamérica* did not depend on showing the term to be implied was necessary for business efficacy.

[16] Citing *Arsanovia v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm); [2013] 1 Lloyd's Rep 235 at [21].

[17] *Kabab v Kout* at [70].

The court queried whether this was correct in light of the Supreme Court decision in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742:

> "where the law on implication of terms was authoritatively restated by Lord Neuberger PSC at [14] to [32], that (save of course where terms are implied as matter of law) a term will only be implied into a contract if it is necessary for business efficacy."[18]

This query stems from the English common law approach (as seen in *Sulamérica*) that general English contract law precedent for determining the proper law of a contract applies to the determination of the proper law of an arbitration agreement. This ignores, as I have noted above, the express choice of law principles in the New York Convention, which signatories to the New York Convention, including England, should adhere to. By only looking to English contract law precedent for determining the proper law of a contract, the court ignores that the New York Convention mandates choice of law principles, which includes consideration of an implied choice, in the absence of an express one. In my view, the law on implication on terms in English law should not be applied to the determination of the proper law of the arbitration agreement, which should adhere to the choice of law principles in the New York Convention.

ENKA V CHUBB

This note was first conceived when *BNA v BNB* and *Kabab v Kout* had been released within short succession of each other. It would however be remiss of me not to include a postscript on *Enka v Chubb*, given its release at the time of writing this note.

Enka v Chubb concerned an anti-suit injunction for breach of an arbitration agreement (as did *Sulamérica*). The English Court of Appeal had to determine whether English or Russian law was the proper law of the arbitration agreement, as a step towards determining whether there was a valid arbitration agreement, and whether court proceedings commenced in Russia were in breach of this agreement.

The court noted English authority had not spoken "with one voice" on the relative weight to be given to the law of the seat of the arbitration and the law of the substantive contract in determining the proper law of the arbitration agreement,[19] it was time to "impose some order and clarity on this area", and "the current state of the authorities does no credit to English commercial law which seeks to serve the business community by providing certainty."[20]

The court surveyed the primary cases addressing this issue; including *Sulamérica* and *Kabab v Kout*. On *Kabab v Kout* the court said it would only be "in the minority of such cases where the language and circumstances of the case demonstrate that the main contract choice is properly to be construed as being an express choice" of the proper law of the arbitration agreement.[21] The court's view was *Kabab v Kout* did not signal a shift towards a more expansive reading of the express choice of the substantive contract law to also cover the arbitration agreement.

The court endorsed the three stage test in *Sulamérica*, but differed from *Sulamérica* on the weight to be given to the law of the substantive contract versus the seat in the implication of the proper law of the arbitration agreement. The court summarized the principles for determining the proper law of the arbitration agreement as follows:[22]

1. The proper law of the arbitration agreement is to be determined by applying the three stage test required by English common law conflict of law rules:

   (1) Is there an express choice of law?

   (2) If not, is there any implied choice of law?

   (3) If not, with what system of law does the arbitration agreement have its closest and most real connection?

2. Where there is an express choice of law in the main contract it may amount to an express choice of the proper law of the arbitration agreement. Whether it

[18] Ibid at [53]. See also [54] for the court's discussion on whether implication is possible as a matter of law (the court said that argument could "be dismissed immediately". The issue was one of contractual interpretation "and terms will not be implied into an agreement was a matter of law".)

[19] *Enka v Chubb* at [69].

[20] Ibid at [89].

[21] Ibid at [90].

[22] Ibid at [105].

does so will be a matter of construction of the whole contract, including the arbitration agreement, applying the principles of construction of the main contract law, if different from English law.

3. In all other cases there is a strong presumption that the parties have impliedly chosen the law of the seat as the proper law of the arbitration agreement. This is the general rule but may yield to another system of law governing the arbitration agreement where there are powerful countervailing factors in the relationship between the parties or the circumstances of the case.

The court gave primacy to the law of the seat, instead of the law of the substantive contract, for the following reasons:

1. The governing law of the substantive contract applies to the validity, interpretation and performance of the terms of the substantive contract, other than the terms of the separate arbitration agreement. This follows from the doctrine of separability of the arbitration agreement, which is determined by the law governing the arbitration (which is usually the law of the seat) and not the substantive law of the contract. The governing law of the substantive contract "has little if anything to say about the [choice of the proper law of the arbitration agreement] because it is directed to a different and separate agreement". The validity, existence and effectiveness of the arbitration agreement is treated (by the separability doctrine) as separate from the main contract; therefore, the governing law should also be treated as separate.[23]

2. The overlap between the law governing the arbitration and the arbitration agreement strongly suggests that they should usually be the same.[24] The connection between the law of the arbitration agreement is closer to the law governing the arbitration than the law of the substantive contract. Businessmen should not be taken to have chosen a different law to apply to two closely related aspects of the arbitration (i.e. the law of the arbitration agreement and law of the arbitration).[25]

On the first reason above, the court itself recognized there is authority[26] and commentary[27] that separability of the arbitration agreement is limited to its validity, existence or effectiveness and does not make the arbitration agreement an entirely separate contract. As cited in *Enka v Chubb*, Moore-Bick LJ said in *Sulamérica* at [26]:

> "The concept of severability itself, however, simply reflects the parties' presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. Its purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes."

Further, the Model Law and English Arbitration Act 1996 ("**English Arbitration Act**") restrict the doctrine of separability to its existence and validity:

1. The Model Law states in article 16:

   "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. **For that purpose**, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

   (Emphasis added)

2. The English Arbitration Act states in section 7:

   "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or had become

[23] Ibid at [92] and [94].

[24] Ibid at [96].

[25] Ibid at [99].

[26] *Sulamérica* at [26]; and see also *BCY v BCZ* at [60] and [61].

[27] "Choosing the Law Governing the Arbitration Agreement", Glick and Venkatesan in *Jurisdiction Admissibility and Choice of Law in International Arbitration* (2018), Kaplan and Moser, at [9.05].

> ineffective, and it shall **for that purpose** be treated as a distinct agreement."
>
> (Emphasis added)

On the second reason above, the court recognized there is no conceptual difficulty if the seat court is to apply a foreign law to the arbitration agreement if that is what the parties have selected.[28] Further, where the seat adopts the Model Law[29] the seat court is required to determine the validity of the arbitration agreement according to the law "to which the parties have subjected it or, failing any indication thereon" the law of the seat.[30] The law of the seat is only applied by default where there is no express or implied selection of choice of law. There is no assumption in the scheme of the Model Law that the proper law of the arbitration agreement will be the same as the law of the seat.[31]

The court also recognized a conceptual problem may arise where no seat is chosen, because English conflicts rules do not recognize the concept of a floating proper law; the arbitration agreement must be governed by a system of law which is identifiable at the time the agreement is made.[32]

Even though the court said it was time to "impose some order and clarity on this area", it is not clear the decision in *Enka v Chubb* achieves this. As the court noted, English authority has vacillated between giving primacy to the substantive law of the contract and the law of the seat, when implying the proper law of the arbitration agreement; with the caveat in both cases that the presumptive law may be rebutted if it invalidates the arbitration agreement.

The proper law of the arbitration agreement is most significant where it is invalid under one of the possible applicable laws. Instead of laying down a presumptive implied law, it makes more sense, and is more transparent, to apply the validation principle which expressly aims to validate the arbitration agreement. This not only gives effect to the parties' commercial intentions – to agree an effective and workable international dispute resolution mechanism – it is also required by the terms and purposes of articles II and V(1)(a) of the New York Convention and articles 8, 34 and 36 of the Model Law.

CONCLUSION

There is no space in this brief note to explore the issues I raise as to the obligations of the New York Convention, the divergence of the common law from these obligations, and also the insufficient appreciation of the interplay of choice of law issues in the interpretation of international arbitration agreements. This will have to be reserved for a format that allows a longer and more in-depth consideration of these issues. My intention in this note is to highlight the issues to spur discussion. ●

[28] *Enka v Chubb* at [99].
[29] Which applies the same choice of law principles to the proper law of the arbitration agreement as found in the New York Convention.
[30] Article 34(2)(a)(i) of the Model Law.
[31] See also *BCY v BCZ* at [64].
[32] *Enka v Chubb* at [103].

MIND-MAPPING CONSTRUCTION CLAIMS – WHAT HAPPENS WHEN WE ALL GO BACK TO WORK?

Swee Im Tan

When invited to deliver a webinar on construction law in early April 2020, we in Malaysia had just commenced our partial lock down of a fairly severe nature (Movement Control Order). We were only allowed out of our homes for food and medicine, not even for exercise. Construction sites were shut down with immediate effect and the 12 tower cranes visible from my window stood eerily quiet. So, I thought to steer away from the oft discussed subject of claims for Force Majeure and the like and turned instead to look at happier times when construction projects resume work. I started to plan for the webinar by mind mapping a few topics which construction lawyers will be called upon to advise, and ended up with the mind map you see on the following page.

❧

These thoughts can essentially be grouped into three time frames:

(1) DURING LOCKDOWN

The thoughts were that instead of sitting at home despairing, contractors ought to seriously be planning their remobilisation for immediate implementation once the call to arms is announced. As I write this, that call to arms has just been announced in Malaysia today, 1 May 2020, allowing the construction sector to get back to work on 4 May 2020. That's the weekend to get ready, so if you were not ready today, you are not going to be ready on Monday.

(2) RESUMPTION OF PHYSICAL WORK

Once back to work, there will no doubt be numerous changes that have to be contended with, from the additional protective measures necessitated by the lock down, to disruptions in work flow due to social distancing requirements and likely design and programme changes arising from supply chain disruptions. These will invariably entail variations which have time and money consequences.

Dangling over all these will be worries about liquidated damages for delayed completion and calls on on-demand performance bonds.

(3) DISPUTE RESOLUTION

Claims and disputes will be rife, but many will face a cash crunch that must be resolved immediately. Therefore, the need to focus on negotiations, settlements and mediations in the near term – and for lawyers and advisors to be facilitative rather than combative.

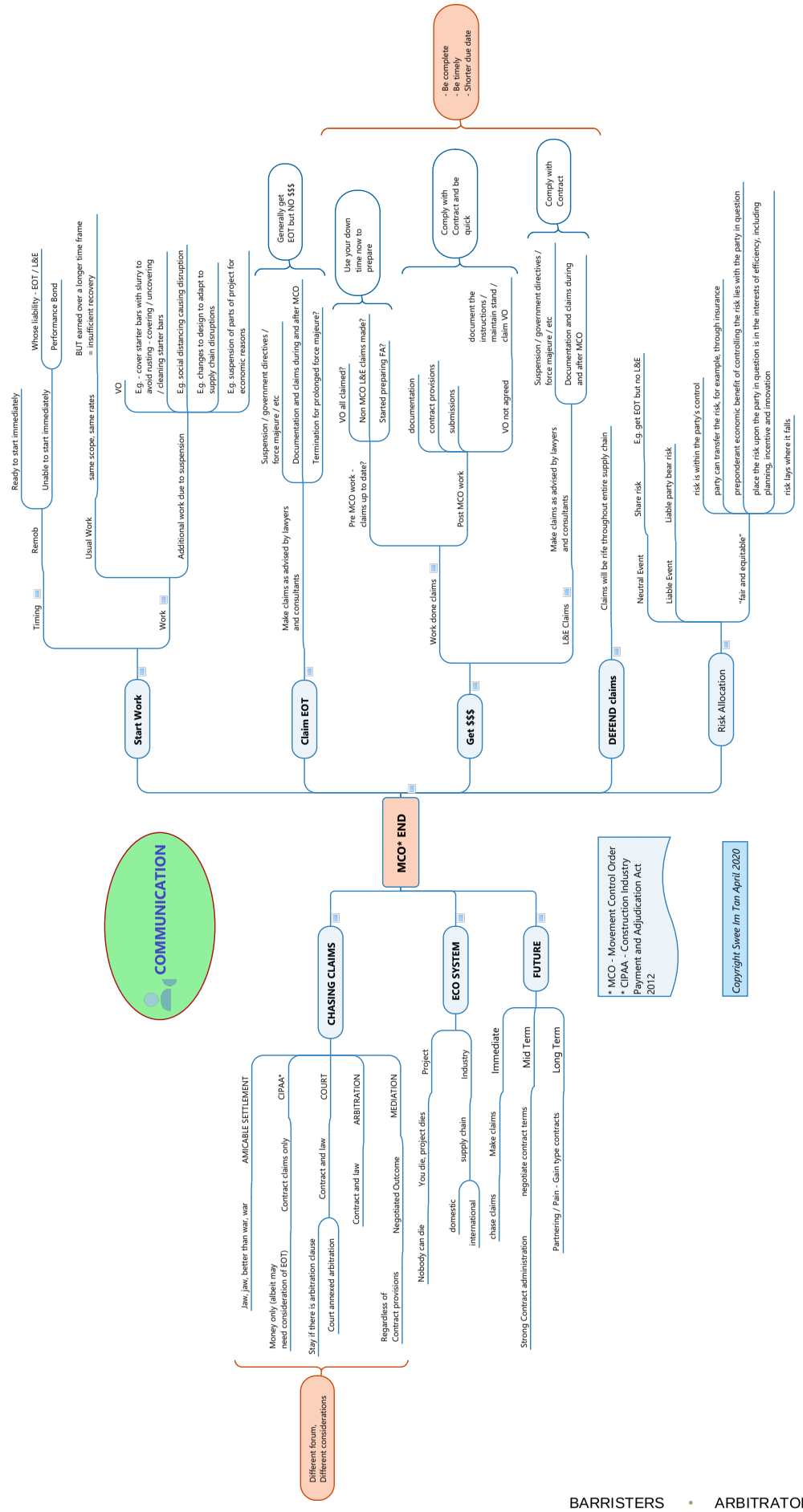
❧

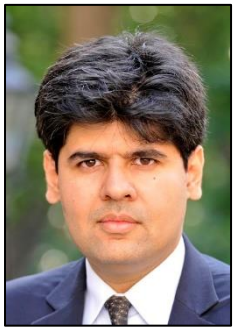
A more holistic view of the eco-system of the project, the industry and the supply chain, needs to be adopted by all to try and support the survival of many individuals. The realisation of "if you die, then I die too" can be a powerful factor in getting projects back on its feet despite immense economic difficulties.

Communication is paramount; not just within one organisation but among all the stakeholders – from developers to financiers, insurers, sub-contractors at every level and the shareholders of every organisation involved.

Ultimately more formal means of dispute resolution will still have a place, and parties need to be aware of the different considerations in each forum; it may be the same dispute but different approaches are required in statutory adjudication from arbitration to court actions.

There is much more to think about, but think, plan and act we must. ●


MCO* END
Start Work
Timing
Ready to start immediately
Unable to start immediately
Work
Remob
Usual Work
same scope, same rates
BUT earned over a longer time frame
= insufficient recovery
Additional work due to suspension
VO
E.g. - cover starter bars with slurry to avoid rusting - covering / uncovering / cleaning starter bars
E.g. social distancing causing disruption
E.g. changes to design to adapt to supply chain disruptions
E.g. suspension of parts of project for economic reasons
Whose liability - EOT / L&E
Performance Bond
Claim EOT
Make claims as advised by lawyers and consultants
Suspension / government directives / force majeure / etc
Documentation and claims during and after MCO
Termination for prolonged force majeure?
Generally get EOT but NO $$$
Use your down time now to prepare
VO all claimed?
Non MCO L&E claims made?
Started preparing FA?
Get $$$
Work done claims
Pre MCO work - claims up to date?
Post MCO work
documentation
contract provisions
submissions
VO not agreed
document the instructions / maintain stand / claim VO
Comply with Contract and be quick
- Be complete
- Be timely
- Shorter due date
DEFEND claims
L&E Claims
Make claims as advised by lawyers and consultants
Suspension / government directives / force majeure / etc
Documentation and claims during and after MCO
Comply with Contract
Claims will be rife throughout entire supply chain
Risk Allocation
Neutral Event
Liable Event
Share risk
Liable party bear risk
E.g. get EOT but no L&E
"fair and equitable"
risk is within the party's control
party can transfer the risk, for example, through insurance
preponderant economic benefit of controlling the risk lies with the party in question
place the risk upon the party in question is in the interests of efficiency, including planning, incentive and innovation
risk lays where it falls
COMMUNICATION
CHASING CLAIMS
ECO SYSTEM
FUTURE
AMICABLE SETTLEMENT
CIPAA*
COURT
ARBITRATION
MEDIATION
Contract claims only
Contract and law
Contract and law
Negotiated Outcome
Project
Industry
Immediate
Mid Term
Long Term
Jaw, jaw, better than war, war
Money only (albeit may need consideration of EOT)
Stay if there is arbitration clause
Court annexed arbitration
Regardless of Contract provisions
Nobody can die
You die, project dies
domestic
international
supply chain
Make claims
chase claims
negotiate contract terms
Strong Contract administration
Partnering / Pain - Gain type contracts
Different forum, Different considerations
* MCO - Movement Control Order
* CIPAA - Construction Industry Payment and Adjudication Act 2012
Copyright Swee Im Tan April 2020



CORONAVIRUS AND ARBITRATION: INSTITUTIONAL RESPONSES, CHALLENGES AND PRACTICAL TIPS

Samar Abbas Kazmi and James Bradford

This article was originally distributed on 20 April 2020 and posted in two parts on the 39 Essex Chambers website on 20 April and 23 April 2020.

INTRODUCTION

The ongoing global pandemic created by COVID-19 ("**coronavirus**") has led to unprecedented restrictions on how we conduct our professional lives. In a matter of weeks, businesses around the world have had to make adjustments which, under different circumstances, would have been made over years – or not at all. The dispute resolution sector is no different.[1]

In this article, we look at how the international arbitration community is responding to the challenges posed by the current crisis and how the work being done today can provide a template for the future. We consider three questions:

1. How have some of the leading international arbitration institutions responded to the present outbreak?
2. What challenges must arbitration overcome in order to fully adapt to the demands of remote working?
3. How, practically, can these challenges be met?

We argue that international arbitration is exceptionally well-suited to providing effective dispute resolution in these times and beyond: although there are challenges ahead, institutions are already pushing forward with new guidance and protocols for practitioners and the flexibility which arbitration as a process offers means that it is likely to continue to be the ideal forum for parties in these times.

(1) RESPONSE OF ARBITRAL INSTITUTIONS

In a time of unprecedented crisis, institutions have adapted quickly and proactively, facilitating a move to electronic and remote working. At the time of writing, all major international arbitration institutions are operating remotely and have taken a number of steps to make the move to remote working easier for users.[2] In broad terms, institutions have taken three broad categories of steps to support users of international arbitration:

(A) FACILITATING A MOVE TO GOING ELECTRONIC (FOR CASE MANAGEMENT AND HEARINGS)

First, various institutions have emphasised that they are fully operational, even if they have closed their physical premises and that they have made provision for remote working.

For instance, the International Chamber of Commerce (ICC) advised[3] that all offices of the Secretariat of the ICC Court and the ICC ADR Centre are operational and "Staff members are healthy and working remotely via mobile posts. Special arrangements have been put in place and will likely remain in force for the immediate future". Similar statements have been issued by the Singapore International Arbitration Centre (SIAC),[4] the Korean Commercial Arbitration Board (KCAB),[5] the Hong Kong International Arbitration Centre (HKIAC)[6] and the Arbitration Foundation of Southern Africa (AFSA)[7].

---

1 For instance in England and Wales, see the Bar Council Guidance at https://www.barcouncil.org.uk/resource/updated-guidance-on-attending-hearings.html. The Guidance has been that practitioners should not attend civil hearings in person unless the hearing is genuinely urgent and cannot be done remotely (with a note that "such a hearing will be a rare occurrence"). Equally, see the more recent guidance of HM Courts & Tribunals Service at https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak?utm_medium=email&utm_source=.

2 Additionally, there are heart-warming examples of the international arbitration community coming together on its own initiative and showing its spirit. For instance, the Willem C. Vis International Commercial Arbitration Moot was able to move its entire competition online at a very short notice through the collaborative efforts of the organisers, participants and volunteer arbitrators. See, also, the 'Arbitration Kitchen series' organised by The Russian Arbitration Association.

3 https://iccwbo.org/media-wall/news-speeches/covid-19-urgent-communication-to-drs-users-arbitrators-and-other-neutrals/

4 https://www.siac.org.sg/images/stories/press_release/2020/[ANNOUNCEMENT]%20ENHANCED%20COVID-19%20MEASURES%20AT%20SIAC.pdf

5 https://bit.ly/2z4MMNQ

6 https://www.hkiac.org/news/hkiac-service-continuity-during-covid-19

7 https://arbitration.co.za/

The Milan Chamber of Arbitration, located in the Lombardy region of Italy which has been one of the worst affected areas of Europe in the last two months, announced on 9 March 2020 that it was fully operational.[8] In an article by Alison Ross for the Global Arbitration Review first published on 7 March 2020 and re-posted by the Milan Chamber of Arbitration on 30 March 2020,[9] the director general of the centre Stefano Azzali was quoted as saying:

> "This is almost the second week of the emergency. During the first week we had to cancel almost all arbitration and mediation hearings and two training programmes. This week, the cancellations have been fewer, which indicates users of our services have got over the shock and are adjusting to the emergency situation."

Beyond these messages, institutions have facilitated remote working, by opting for virtual hearings and moving to electronic means to process new requests for arbitration and to conduct case management of existing disputes.

For instance, LCIA announced that parties were to file all requests in new cases through the online filing system or by email, that all other questions, documents and correspondence to LCIA be conducted by email only and that with respect to awards, arbitrators were to deliver them by email. Similarly, the Dubai International Arbitration Centre announced that it will only accept submissions in soft copy[10] and SIAC has emphasised that it remains their top priority to "ensure that your case management needs are promptly and efficiently attended to" and all communications with it should be done via email.[11] HKIAC has also outlined the virtual hearing services which it can offer, including cloud-based video conferencing which it says is compatible with all major video conferencing platforms.[12]

(B) PROTOCOLS AND GUIDANCE FOR VIRTUAL HEARINGS

Secondly, various institutions have taken steps to provide detailed guidance to arbitrators and practitioners for how virtual hearings could operate.

For example, KCAB announced recently a revised version of the Seoul Protocol on Video Conferencing in International Arbitration ("**Seoul Protocol**").[13] Amongst other things, the Protocol sets minimum standards for the venue at which a video conference is to be held, rules for which persons can be present in the remote venue where the witness is giving evidence as well as rules for the documents which the witness is to use during the hearing.

Equally, ICC has produced a "Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic".[14] The Note includes principles and suggestions to ensure continued effective case management (such as identifying issues which may be resolved without witness and/or expert evidence). Section III of the Note gives guidance on the organisation of virtual hearings, Annex I to the Guidance gives a checklist for a Protocol on Virtual hearings and Annex II lists suggested clauses to include within cyber protocols of procedural orders to deal with the organisation of virtual hearings.

The International Centre for Settlement of Investment Disputes ("**ICSID**") also published recently a guide to online hearings at the ICSID wherein it noted that its video-conferencing platform does not require special hardware or software, allows for hearings of any size with a virtual chat function to enable communication with specific individuals or the whole group and that a virtual stenographer will provide a real-time transcript of the proceeding visible to all participants.[15]

(C) WEBINARS & KNOWLEDGE SHARING

A number of institutions have also been running webinars to assist practitioners get to grips with the new working environment.

---

8 https://www.camera-arbitrale.it/en/news/remote-access-to-cam-services.php?id=927

9 https://www.camera-arbitrale.it/en/news/the-coronavirus-what-impact.php?id=935

10 http://www.diac.ae/idias/

11 https://www.siac.org.sg/images/stories/press_release/2020/[ANNOUNCEMENT]%20ENHANCED%20COVID-19%20MEASURES%20AT%20SIAC.pdf

12 https://www.hkiac.org/content/virtual-hearings

13 Available at: https://bit.ly/2zPjxyH

14 https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf

15 https://icsid.worldbank.org/en/Pages/News.aspx?CID=362

For instance, ICC is running the "ICC Arbitration & ADR Technical Webinar Series – Road to Digitalisation", which is aimed at sharing information and knowledge about best practice in virtual hearings whereas SIAC is offering a series looking at the future of international arbitration with a focus on strategies, case management issues, interim measures and issues arising out of COVID-19. HKIAC has converted what would ordinarily have been a seminar series looking at broad issues in international arbitration into a webinar series running in four different languages.

Further, DELOS Dispute Resolution has set up a resource page on contractual and legal issues arising from the impact of COVID-19 which contains a "selection of English language client guidance published by law firms and practitioners that may be of initial help with thinking through" some of the potential questions which parties may be considering (such as issues of impossibility or frustration); this is organised by jurisdiction and theme.[16]

(2) CHALLENGES OF REMOTE WORKING

It is clear from the above that various arbitral institutions across the globe have responded quickly to set up remote working and to facilitate support at all stages of the process, whether this is at the point of new applications, awards or the hearing itself. However, it takes time to turn around a juggernaut and there are significant challenges which need to be overcome. We set out below a few key challenges.

(A) CASE PREPARATION & PRE-HEARING STAGES

We anticipate a number of potential difficulties due to the lack of in-person contact.

First, **evidence gathering**. Given the restrictions that practitioners face with social distancing rules, individuals are going to face difficulties in meeting potential factual witnesses, having in person meetings with them to go through critical documents for potential exhibits.

Secondly, **document management**. Similar to the above, parties are going to need to think ahead (to the extent that they have or are not already doing so) about getting on top of large quantities of documents for the purposes of disclosure exercises at an early stage, particularly where physical access to such documents may or may not be restricted. As noted below, parties are already moving forward in this area.

Thirdly, **experts**. Working remotely may lead to difficulties where the dispute requires expert evidence and such experts need to physically review matters by (for instance) conducting a site visit.

(B) HEARING STAGE

Much has been said about the perceived difficulties of remote or "virtual" advocacy, in particular when it comes to cross-examination. Often, these fears are overblown: cross-examination in international arbitration is a forensic exercise, and "gotcha" moments are few and far between. However, that is not to say that transition to remote hearings will always be easy. In our experience of virtual hearings, there are a number of general, issues which parties will need to consider at an early stage.

First, ensuring the **confidentiality** of the arbitration is protected. This being one of the principal advantages for some commercial clients of the entire process, it is imperative to ensure that the software which is adopted for the hearing is appropriately secure.

Secondly, **time zones**. Given how arbitration disputes frequently involve parties across a variety of jurisdictions, sometimes at different ends of the globe, the need to think in advance of parties working across different time zones is paramount. For instance, if practitioners based in London wish to attend a hearing taking place in Hong Kong then the time difference is likely to cause problems for what would otherwise be a normal hearing timetable. This problem is relatively easily solved for shorter hearings (e.g., interlocutory hearings) where an early start in one time zone and a late finish in another might just do the trick but for longer hearings running over days (or hearings involving multiple time zones) careful advanced planning and diary management is required.

Thirdly, **languages and multiple participants**. As with the above, where individuals are based in different jurisdictions, parties will have to think ahead about the likelihood of participants speaking in different languages and requiring interpreters. Equally, where the hearing is being conducted remotely and virtually, practitioners are naturally not going to

[16] https://delosdr.org/index.php/2020/02/10/coronavirus-impact-on-business-contracts/; DELOS has also produced a checklist of 'matters to consider in deciding whether to maintain the date of the hearing, and preparing, conducting and following up on the hearing in light of COVID-19', see https://delosdr.org/index.php/2020/03/12/checklist-on-holding-hearings-in-times-of-covid-19/

have the same physical set up with the usual breakout rooms in which to discuss events in the hearing, strategize and take instructions.

Fourthly, **witnesses**. Ensuring witnesses are provided with the appropriate documents that they may need to refer to or be referred to during the hearing and that their evidence is not compromised.

(3) PRACTICAL TIPS AND THE WAY FORWARD

Whether the difficulties are at the pre-hearing stage or during the substantive hearing itself, it is our view that arbitration is likely to prove itself a flexible procedure to meet the challenges of remote working and virtual hearings during this period and beyond.

Two general points are worth making at the outset. First, that arbitration as a procedure starts from a position of providing great flexibility and it is indeed arbitration's flexibility as a dispute resolution mechanism procedure which is often a great draw for clients and practitioners. Parties have the ability work with the tribunals to mould the different procedural rules which they will ultimately be bound by. Secondly, the arbitration community has already made significant steps towards remote working in recent years even before COVID-19. For instance, the ICSID noted that in 2019, approximately 60% of the 200 hearings and sessions organised by ICSID were held by video-conference.[17] Equally, the White & Case/Queen Mary Survey for 2018 found that 17% of respondents "always" used videoconferencing in international arbitration, 43% "frequently" used it, 30% "sometimes" used videoconferencing, 5% "rarely" and 5% "never".[18] Further, 89% of respondents said that videoconferencing should be used more often in international arbitration.[19]

With these preliminary points in mind, there are various solutions to the pitfalls outlined, some of which have already been set out in the Protocols and guides of the arbitral institutions referenced above.

For instance, at the pre-hearing stages, there are a number of effective document platforms which will allow practitioners to get on top of the documents at an early stage and in a paperless way. For instance, ICC in its Guidance Note highlights a number of different document sharing platforms which it cites could be used for the purposes of electronic bundles to be used at the hearing.[20] Practitioners will need to investigate whether these online platforms can be used at an early stage for the purposes of first understanding what documents each party has and then subsequently enabling practitioners to analyse them and make strategic decisions in relation to them. Equally, parties are going to need to plan early with regards to proofing and evidence gathering and to perhaps consider video conferencing software, to ensure that factual statements can be prepared on time.

At the hearing stage (whether this is a substantive merits-based hearing or a procedural/interim matter), institutions are already getting ahead in setting up Protocols for effective virtual hearings on different online platforms.

First, regarding the confidentiality of the proceedings, parties will have to think ahead about which platform to use and what procedures to put in place. For instance, ICC in its Guidance note has provided (again without endorsement or warranty) a list of various video platforms to which it has licensed access.[21] Furthermore as noted above, the Seoul Protocol has set out some detailed guidance for the operation of videoconferencing. It sets out procedures for what it defines as the "Hearing Venue" (the site of the hearing) and the "Remote Venue" (where the remote witness, factual or expert, is located to provide his/her evidence). Article 2 set outs out minimum standards with regards to the confidentiality and security concerns, as has been highlighted elsewhere,[22] noting for instance:

> "2.1 To the extent possible, and as may be agreed to by the Parties or ordered by the Tribunal […]:
>
> c. The Venue shall be in a location that provides for fair, equal and reasonable right of access to the Parties and their related persons, as

[17] https://icsid.worldbank.org/en/Pages/News.aspx?CID=362

[18] Link to study on https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration; page 32.

[19] Link to study on https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration; page 33.

[20] https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf; [33].

[21] https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf; [32].

[22] As also flagged by http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/

> appropriate. Similarly, cross-border connections should be adequately safeguarded so as to prevent unlawful interception by third parties, for example, by IP-to-IP encryption.
>
> 2.2 The Parties shall use their best efforts to ensure the security of the participants of the video conferencing, including the Witnesses, Observers, interpreters, and experts, among others."[23]

Moreover, the Chartered Institute of Arbitrators has also released a "Guidance Note on Remote Dispute Resolution Proceedings"[24] which at section 6 deals with confidentiality and privacy concerns. For instance, details of the full names and roles of all participants to the remote proceedings should be (amongst other things) circulated in advance.[25]

Secondly, with regards to practical difficulties like time zones, ICC Guidance Note[26] has already highlighted the issues which the Tribunal will need to consider in order to ensure equality and a full opportunity to present its case during a virtual hearing, which include (amongst other things) different time zones and the number of participants and locations.[27] Careful case management in advance will be needed to ensure that practitioners are able to attend hearings in different jurisdictions to where the Tribunal is based: for instance in the Hong Kong example above, greater allowance is going to be needed for the time difference, so a one week trial may extend to being double the time.

Thirdly, in relation to language and multiple witnesses, it will clearly be a matter for the relevant institution/tribunal and parties but again the guidance notes of different institutions have already put forward some suggestions. For instance, the Seoul Protocol opts for consecutive interpretation rather than simultaneous[28] whereas Annex II of the ICC note leaves it for the parties.[29] Equally, guidance such as that issued by the Chartered Institute of Arbitrators (amongst others) has sought to cater for the move from a physical to a virtual hearing, for instance providing for a breakout room,[30] noting that "the other party should not have the ability to hear or view muted caucus proceedings as body language of participants, as well as their reaction might negate the whole idea of confidentiality of caucus meetings".

Fourthly, various measures can be envisaged for ensuring the integrity of the process and the evidence of the witnesses. For instance, the Seoul Protocol notes at Article 3.1:

> "During the course of the video conference, the only persons present in the Remote Venue shall be the Witness giving evidence (with his/her counsel, if applicable), interpreters, paralegals to assist with the documents, and representatives from each Party's legal team on a watching brief. Each Party shall provide the identities of every individual in the room to the other Party/Parties and to the Tribunal prior to the video conference and the Tribunal shall take steps to verify the identity of each individual present at the start of the video conference."[31]

CONCLUSION

Remote working and the move to virtual hearings will no doubt present challenges to all elements of the legal sector. However, arbitration and the arbitral community seems ideally well positioned to meet these challenges. It remains a flexible and adaptable mechanism which will help clients achieve practical solutions in an uncertain time and arbitral institutions have responded quickly and proactively to adapt to the demands of remote working and virtual hearings. ●

[23] Seoul Protocol, available at: https://bit.ly/2zPjxyH
[24] https://www.ciarb.org/media/9013/remote-hearings-guidance-note_final_140420.pdf
[25] Ibid, [6.2].
[26] https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf
[27] Ibid, [28].
[28] Article 7.2 of the Seoul Protocol, available at: https://bit.ly/2zPjxyH
[29] https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf
[30] https://www.ciarb.org/media/9013/remote-hearings-guidance-note_final_140420.pdf; Article 3.2.
[31] Available at: https://bit.ly/2zPjxyH

CONTRIBUTORS

SWEE IM TAN (1987)

Swee Im Tan is a Barrister-at-Law (Middle Temple), a Fellow of the Chartered Institute of Arbitrators, a Fellow of the Malaysian Institute of Arbitrators, a Fellow of the Asian Institute of Alternative Dispute Resolution, a Fellow of the Chartered Institute of Building, a Fellow of the Malaysian Society of Adjudicators, a Fellow of the Dispute Board Federation an arbitrator, adjudicator and mediator on the panel of the Asian International Arbitration Centre, a member of the SIAC Panel of Arbitrators, a member of the HKIAC Panel of Arbitrators, a qualified adjudicator, a Malaysia Construction Industry Development Board Accredited Mediator, and holds a Diploma in International Commercial Arbitration.

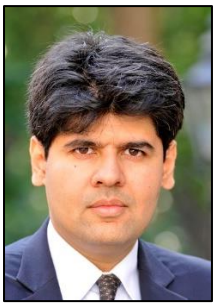
Swee is also an Advocate and Solicitor of the High Court of Malaya, and founded a legal firm in Malaysia which focuses on the construction, infrastructure and energy sectors. She was in-house counsel for a public listed company and has extensive arbitration experience. She was a key member of the drafting team on the first independent power plants in Malaysia, the Kuala Lumpur International Airport, the Malaysia-Singapore Second Crossing projects and many other major projects in Malaysia as well as internationally. Swee is one of only five lawyers in Malaysia named in Who's Who Legal for the practice area of Construction. Swee regularly sits as arbitrator and adjudicator, in addition to her many years as counsel in arbitrations and adjudications. Her appointments are institutional as well as party agreed. Swee is a regular speaker at conferences and seminars as well as practical workshops in contract administration. Full profile

STEVEN LIM (1992)

Steven is an arbitrator and advocate with more than 25 years' experience in international dispute resolution and arbitration in Asia. Steven sits as presiding, sole, co-arbitrator and emergency arbitrator. He also appears as lead counsel in international arbitrations and has appeared as lead counsel in the High Court and Court of Appeal in Singapore. Prior to practising as an independent arbitrator and barrister, Steven practised as a Singapore advocate and solicitor and as an English solicitor advocate with leading Singapore and international firms in Asia.

Steven has extensive experience with disputes involving Asia-Pacific jurisdictions including Singapore, India, China, Hong Kong, Taiwan, South Korea, Japan, Thailand, Vietnam, Cambodia, Philippines, Indonesia, Malaysia, Brunei, Nepal, US and Australia. He is a panel arbitrator with the SIAC, HKIAC, ICDR, KCAB, AIAC, THAC, CAAI and has also sat in ICC, SCMA, LMAA, UNCITRAL Rules and ad hoc cases. He is a Fellow of the Chartered Institute of Arbitrators, the Singapore Institute of Arbitrators and the Asian Institute of ADR and is a Director of the Chartered Institute of Arbitrators Singapore Branch.

Steven has received recognition as a leading individual in international dispute resolution and arbitration in Chambers and Legal 500 where he has been noted as "hugely experienced", "a respected arbitrator with extensive experience handling commercial arbitrations in the construction, infrastructure and energy sectors". Steven was included in the inaugural list of the top 100 A-List lawyers in Singapore by Asia Business Law Journal in 2018. Full profile



SAMAR ABBAS KAZMI (2011)

Samar Abbas Kazmi specialises in commercial, construction and technology disputes, with a particular emphasis on international arbitration (in relation to which he is regularly ranked in legal directories as a leading junior). He has been involved in disputes concerning parties in the Middle East, Asia-Pacific and the Caribbean, and has particular expertise in technically complex matters concerning large developments and infrastructure projects.

Before coming to the Bar, Samar graduated from Yale University where he majored in Economics and Political Science. He then spent a number of years working as a management consultant and strategy professional, and brings to the Bar extensive knowledge of the pharmaceutical, telecommunications and consumer packaged goods industries. As an advocate, he has particular experience of handling disputes arising from joint ventures, long-term commercial relationships and construction projects.

Samar has a particular interest in international work, having worked in Asia, Europe, Middle East and North America. He is also an Honorary Associate Professor at University College London. Full profile

JAMES BRADFORD (2016)

James Bradford accepts instructions across all areas of Chambers' work, with a particular interest in commercial & construction law, international arbitration, public law & human rights and European Union law.

Since being taken on as a tenant in 2018, James has already been developing an international practice with a keen focus on international arbitration work. Both during pupillage and since, James has gained experience of different international arbitration matters including, most recently, being instructed as junior counsel on a high-value international trusts arbitration (led by Elspeth Talbot-Rice QC with Andrew Holden at XXIV Old Buildings Chambers). He has a wide range of experience of appearing in different courts and hearings, including as junior counsel in the UK Supreme Court.

Prior to coming to the Bar, James worked as a Lecturer in Law at Oxford University, teaching various undergraduate subjects including Contract Law, Human Rights Law and European Union Law to students across different colleges. He is bilingual in Italian and has experience working on different research projects with leading Italian academics: in particular, he has assisted Prof. Guido Alpa (Professor of Civil Law, La Sapienza Università di Roma) and Prof. Attila Tanzi (Professor of International Law, Università di Bologna). Full profile

PHILIPPE KUHN (2017)

Philippe is building a broad practice across all areas of Chambers' specialisms. He has a particular interest in commercial matters with an international dimension (including arbitration, construction, shareholder, civil fraud, jurisdiction and choice of law disputes) and cases at the intersection of private and public law (including Human Rights Act damages and equality rights claims). This builds on his international background, growing up in Switzerland and Sri Lanka, before reading law at the LSE and Oxford and qualifying as a barrister.

He joined Chambers after completing a third six pupillage in March 2020. He was previously a Judicial Assistant at the Supreme Court of the United Kingdom (2018/19), assigned to Lord Briggs, Lord Sumption and Lord Sales. He completed his pupillage at 11 KBW (2017/18) and maintains an interest in commercial and statutory employment matters. Full profile

Chief Executive and Director of Clerking: Lindsay Scott
Senior Clerks: Alastair Davidson and Michael Kaplan
Senior Practice Managers: Niki Merison and Mark Winrow

LONDON
81 Chancery Lane
London
WC2A 1DD
DX: London/Chancery Lane 298

Tel: +44 (0)20 7832 1111

MANCHESTER
82 King Street
Manchester
M2 4WQ

Tel: +44 (0)16 1870 0333

SINGAPORE
28 Maxwell Road
#04-03 & #04-04
Maxwell Chambers Suites
Singapore 069120

Tel: +65 6320 9272

KUALA LUMPUR
#02-9, Bangunan Sulaiman
Jalan Sultan Hishamuddin
50000 Kuala Lumpur
Malaysia

Tel: +60 32 271 1085