

## Attendance

**By** Gabriella Bligh  
**Client** Commodity Arbitration Club  
**Subject** Note of Commodity Arbitration Club Lunch  
**Date** 24 October 2022

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Lunch at Clyde & Co 24.10.2022. 12:30 – 15:00

Chair: Edward Album.

Following introductions, it was agreed amongst the group that good wishes should go to Graham Perry who is currently unwell.

Topics:

1. **Law Commission's Consultation paper – Review of the Arbitration Act 1996** – David Barnett
2. **Jurisdiction of tribunal to enforce pre-arbitration contractual requirements** – Pavani Reddy

### **Law Commission's Consultation paper – Review of the Arbitration Act 1996**

1. The Law Commission's consultation is inviting responses by 15 December 2022.
2. The Law Commission has produced both a consultation paper and also a summary thereof (available here: [Review of the Arbitration Act 1996 | Law Commission](#)).
3. The areas discussed in the consultation paper are:
  - a. Confidentiality
  - b. Independence of arbitrators and disclosure
  - c. Discrimination
  - d. Immunity of arbitrators
  - e. Summary disposal of issues which lack merit
  - f. Interim measures ordered by the court in support of arbitral proceedings (s44 of the Act)
  - g. Jurisdictional challenges against arbitral awards (section 67)
  - h. Appeals on a point of law (section 69)
4. Initial discussion was on the **summary disposal of issues which lack merit**. There are currently two main thresholds for summarily disposing of a case, either pursuant to the phrase "manifestly without merit", as is used in some arbitral rules, or the test of "no real prospect of success" which is used in court proceedings in England and

Wales. The consultation paper requests feedback on which is the preferred approach.

5. It was proposed that summary judgement can be fair in certain circumstances, and that innovation to improve was considered welcome.
6. **Independence and disclosure.** The consultation paper confirms that the Act should not impose a duty of independence on arbitrators, but impartiality (section 33). This is on the basis that if the arbitrator is impartial then it does not matter if they are not entirely independent.
7. It was suggested to the room that often arbitrators are chosen because of their expertise, therefore independence cannot be guaranteed. However, if any interest exists then the arbitrator must disclose it.
8. The requirement for arbitrators to disclose an interest already exists in case law, however the consultation paper proposes to codify the requirement for arbitrators to disclose any interest, in order to show their impartiality.
9. With regard to **challenging the jurisdiction of the tribunal**, if a party has objected to the jurisdiction of the arbitral tribunal and then further objects under section 67, such challenge should be by an appeal, and not a rehearing.
10. **Appeals on a point of law**, it is not proposed that section 69 should be reformed, as it is considered a good compromise between the need to ensure the finality of an arbitral award and to correct errors of law.
11. A minor amendment is proposed to **section 70**. An arbitration award can be **challenged on the basis of jurisdiction**. Section 70(3) requires such a challenge to be brought within 28 days. However, section 70(2) requires available recourse to be used first under section 57, which can take longer than 28 days. The paper therefore proposes to amend section 70(3) so that time runs from the date when the arbitral party was notified of the result of their request under section 57.
12. The question was presented to the room whether commodities traders are content with the changes proposed by the law commission.
13. With regard to the independence and disclosure for arbitrators, it was said that sugar arbitrators are all from the business and therefore all know those in the industry, and as such would not be independent. Some attendees were of the opinion that the codification of case law is positive, and it would be possible to opt out of the provision, which would be useful for those in the commodity trades.
14. In opposition, it was mentioned that in *Halliburton v Chubb* [2020] the Supreme Court was of the opinion that a statutory provision was not needed, and it is therefore of concern what the motivation would be for now introducing such. Indeed, one of the issues which the Supreme Court considered was the IBA Guidelines on Party Representation in International Arbitration but found that they are not internationally recognised or adopted. It is of a concern what wording would be inserted in the Act.
15. It was suggested that the proposed wording for the Act should be shared, so that a submission can be made. As the Consultation Paper is still in the discussion phase, it was agreed that it was likely that it would be possible to have a “second bite at the cherry”. It was queried whether commodities/shipping would be considered too niche to potentially sway the chosen wording. It was suggested that institutional lobby’s will have some sway on the codification. Arguably it is possible that the codification is not

needed as it is the position in common law. However, it was questioned whether the conscience of arbitrators is robust enough to compel disclosure under the common law, as some arbitrators may risk losing work through such disclosure.

16. It was summarised that the main queries related to: (i) does the requirement for arbitrators to disclose need to be codified? (ii) what needs to be disclosed? (iii) what about trade representatives in the commodities sector?
17. The room was reminded that the deadline for opinions to be presented to the Law Commission is the 15 December.
18. Chair, Edward Album, raised the topic of the **seat of arbitration** and it is the seat that governs the arbitration. The arbitration agreement is to be treated as separate to the contract, if the contract is not valid.
19. It was mentioned that the seat of arbitration is not a big problem for the commodities market. However, for others it has been an area of conflict whether an arbitration clause should be subject to the main contract provision. The French Supreme court and the Supreme Court have come to different decisions.
20. The British Supreme Court's decision in *Kabab-Ji SAL v Kout* [2020] was overruled by the French court in September 2022, which concluded that even if a contract is governed by English law, it is the procedural rules of French arbitration law which govern the validity etc., of the arbitration clause. In practice it is not a problem for those in commodities, but it could become a problem if contracts seek to change the seat of the arbitration.

## **Jurisdiction of tribunal to enforce pre-arbitration contractual requirements**

21. English law has not typically been clear on the enforceability of pre-conditions to arbitration, such as a requirement to mediate or have discussions. In contrast, Singapore and Hong Kong have provided clarity.
22. The Commercial Court's decision last year relating to preconditions to arbitration clauses has provided some clarity (*Republic of Sierra Leone v SL Mining Ltd* [2020]). The case considered two previous judgments which agreed that parties had agreed to such contractual preconditions and therefore should comply.
23. As such, the English court says that failure to comply with a precondition to arbitration only affects the admissibility of a claim, rather than the jurisdiction of the arbitrators to hear the claim.
24. In *NWA v NWF* [2021], which contained an LCIA clause, the claimant commenced arbitration and stayed the arbitration themselves, saying that it had not done LCIA mediation. The Defendant refused. The court outlined that non-compliance with the clause does not go to the jurisdiction of the tribunal, but to admissibility of the claim.
25. Experience of a recent case was shared with the group, relating to a very poor jurisdiction clause. The claimant gave notice of mediation, the next day gave notice of arbitration and then arrested goods. The tribunal stayed the arbitration in order to mediate. The Claimant withdrew from the mediation and the arbitration award was given. Because they have agreed to GAFTA arbitration it was understood that they had jurisdiction.
26. It was discussed that it is difficult to force parties to mediate if they do not want to reach an agreement. It was agreed that in the commodities sector mediation is not popular.

27. It was queried whether you could injunct a party on the basis that they had not mediated. It was suggested that the position would be similar to default awards, as there are opportunities to participate, following which you proceed to the award.
28. Agreement that often those in commodities are driven to arbitration by price volatility.
29. As parties in commodities are often used to negotiating, it is common that mediation would not succeed because attempts to agree have already been exhausted. It was suggested that shipping disputes often have more success in mediation, as they are more expensive and often insurers are involved.
30. It was also noted that the process of mediation can be as complicated as trial, it is therefore sometimes useful in the build up to trial. The Metro litigation was mentioned, where the costs began to exceed the potential award and it therefore settled.
31. It was put to the group that the Law Commission has been looking at **discrimination**. Reference was made to the previous existence of contractual requirements for a “commercial man”. The relevant case included a contract which provided for a high holder of an Ismaili community. It was found not to be compliant with human rights under ECHR laws.
32. It was highlighted that the sugar association has recently amended their contracts to reference “they/them” to remain gender neutral.