RUSSELL ON ARBITRATION

Twenty Third Edition

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FOREWORD

Russell on Arbitration is one of the classic legal reference works. It has stood the passage of time and established, and in recent editions reinvented, its own distinct persona and importance in legal literature. Few other texts have become institutions due to acceptance and reliance on by the legal fraternity, including the courts, practitioners and all those involved with arbitration in England and under English law. For many foreign lawyers representing parties in arbitrations in England *Russell* is a reference tool for them too.

Anecdotal evidence suggests there are an ever increasing number of arbitrations in England. Whilst difficult to substantiate, this may be the result of the momentum of the alternative dispute resolution movement which has resulted in decreasing numbers of cases being taken to the courts. Yet hard facts on the number of arbitrations are not available and perhaps impossible to obtain. This is due in large part to the very many different kinds of arbitration, resorted to by parties from different industries, involving arbitrators from different backgrounds and professional experience, and many involving factual issues rather than legal principles. These arbitrations are domestic (i.e. where both parties are from England and the subject matter is in England), international (involving some non-UK element), commercial (involving some business element), investment (arising out of bilateral investment treaties or investments by a party into another country), ad hoc and institutional (such as ICC, LCIA or Stockholm Institute), commodities (food and grain) and industry specific (shipping, insurance, construction).

The only evidence that exists is the annual number of known decisions arising out of, concerning or affecting arbitration in the English courts. A rough estimate suggests that in almost five years since the 22nd edition of *Russell*, there have been 70–80 such decisions a year over this period. However what is important is not the numbers but how the English courts use their power to support and give effect to the agreement of the parties to submit their differences to arbitration. The Arbitration Act 1996 greatly narrowed the opportunities for the English courts to review and interfere with the arbitration process. Happily that approach has been supported and followed in the main by the English courts.

With the passage of 10 years since its enactment, the Arbitration Act 1996 continues to be interpreted and applied with its intended purpose, i.e. giving primary place to the will of the parties and then upholding the authority of the arbitrators to conduct proceedings appropriately in the circumstances of the case. It is also noteworthy that the English courts are looking at factors and influences from outside the United Kingdom, especially the UNCITRAL Model Law of International Commercial Arbitration, the New York Convention and the decisions of other national and international courts on related commercial arbitration issues.

There are four main areas where reported decisions of the English courts have covered important areas of the 1996 Arbitration Act.

1. The courts have sought to give effect to party autonomy and to oblige parties to adhere to their commitment to arbitrate. This has meant the staying of proceedings commenced in the courts despite the existence of a valid arbitration agreement and recognising the differences that exist in the conduct of arbitrations generally. The effect may be to preclude a party from seeking to challenge an award in a country other than the place of arbitration and even, perhaps in due course, ordering a party to participate in an arbitration based on a valid arbitration agreement. A breach of the arbitration agreement could also give an entitlement to monetary damages.

2. Injunctive relief, by way of anti-suit or anti-arbitration injunctions, is a widely sought remedy in the face of an arbitration agreement and gives rise to many concerns of excessive jurisdiction being exercised by the courts. These cases have provided the opportunity for the English courts to consider the interaction between the duty of the court to recognise the autonomy of the arbitration and therefore the importance of not interfering in the process, and the need to exercise jurisdiction and make orders which give effect to the decision of the parties to submit their differences to arbitration. In practise the court's powers have been used sparingly, and only to enforce arbitration agreements and support arbitral practice. They generally are not used to interfere with arbitrations taking place in another country and under some other law.

3. The doctrine of separability, resisted for some time in England, is now well accepted in English law and given effect to in the Act. The English courts have recognised that, with few exceptions, it is for arbitrators to determine the extent of their own jurisdiction, and that the arbitration and the arbitration agreement may be subject to a different national law to that governing the underlying contract. Most significantly, the House of Lords decision in *Premium Nafta Products Ltd & Others v Fili Shipping Co Ltd & Others* (the *Fiona Trust* case) recognised that an arbitral tribunal will not be deprived of jurisdiction where the underlying contract is alleged to have been induced by bribery, or for that matter even if this allegation is upheld.

4. An area where the courts have had some involvement is with respect to the duties of arbitrators. These are stated in section 33 of the Arbitration Act 1996 in language which, whilst original and perhaps revolutionary, expresses the general expectation and understanding of the duty of arbitrators in unique terms. These obligations are to "act fairly and impartially as between the parties", "giving each party a reasonable opportunity of putting his case" and adopting procedures which "avoid unnecessary delay or expense". The meaning and application of these basic standards have still to be thoroughly considered in the English courts. They have however been tested in the English courts largely in the context of applications to challenge awards for serious irregularity under section 68. The English courts have also had the opportunity to consider the IBA Guidelines on

Conflict of Interest in International Arbitration in reviewing standards for impartiality and independence of arbitrators.

This 23rd edition of *Russell on Arbitration*, more than 150 years after the first edition, reflects the law on these and other issues up to date in 2007. It will continue to be an indispensible aid to lawyers and non-lawyers involved with arbitration or wishing to understand the principles of the law applicable to arbitration in England. The authors, distinguished and experienced practitioners in all forms of international and domestic arbitration, are to be commended for continually raising the bar in respect of this ever more valuable book.

Julian D M Lew Q.C.
October 2007

PREFACE

This book deals with the English law of arbitration as at June 30, 2007, although wherever possible an attempt has been made to incorporate subsequent developments up to the date of finalising the proofs for publication in early October 2007. For example, reference has been included to the potentially important first instance decisions in *Albon v Naza Motor Trading Sdn Bhd (No.4)*, where the court exceptionally granted an injunction to restrain a foreign arbitration, and to *Tamil Nadu Electricity Board v ST-CMS Electric Co Private Ltd*, which deals with the interplay between the law of the matrix contract and the law of the agreement to arbitrate. Both of these cases were decided in July 2007.

Even more recently, in the final days of reviewing the proofs of the book, the House of Lords handed down the important decision in *Premium Nafta Products Ltd v Fili Shipping Co Ltd*. We had given extensive treatment to the decision of the Court of Appeal in this case (there entitled *Fiona Trust & Holding Corp v Yuri Privalov*). The House of Lords decision further bolsters the principle of separability of the agreement to arbitrate contained in section 7 of the Act and lays down sensible and modern guidance on the construction of the wording of agreements to arbitrate and we have therefore sought to incorporate reference to it in so far as possible in the time available.

More than ever, the development of arbitration law is moving at a fast pace and the temptation, which we have resisted, was to postpone publication of this 23rd edition until certain important developments had crystallised, not least because in the five years since the 22nd edition almost every area of arbitration law has received judicial attention and time is now ripe for a fresh statement of the law. One evolving issue worthy of particular note is the continued ability of the courts to grant anti-suit injunctions to restrain proceedings brought in other Brussels Convention countries commenced in breach of an agreement to arbitrate is in doubt following the reference of this question to the European Court of Justice by the House of Lords in *West Tankers Inc v Ras Riuione Adriatica di Sicurata*. The ECJ is not expected to consider the reference until 2009 at the earliest. In Chapter 7, we summarise the current position pending this decision and the arguments for and against the use of anti-suit injunctions.

Finally, we should thank our colleagues at Allen & Overy LLP and elsewhere who have given us great assistance in the process of preparing this addition, in particular, Hannah Ambrose, Chris Mainwaring-Taylor and Conan Lauterpacht, colleagues in the arbitration group at Allen & Overy. We also wish to express our thanks for the tireless secretarial support provided by Maria Iannella, and for the invaluable support and guidance given by our publishers at Sweet & Maxwell.

David St John Sutton, Judith Gill, Matthew Gearing
October 2007

ABBREVIATIONS

Act
The Arbitration Act 1996.

Brussels Regulation
Council Regulation (EC) No.44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, including, if applicable, its application to Denmark as from July 1, 2007 by virtue of an agreement made on October 19, 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Brussels Convention
EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels 1968. The Brussels Convention has been largely replaced by the Brussels Regulation. With respect to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments before July 1, 2007, the Brussels Regulation is not applicable to Denmark. Nor does it apply to certain overseas territories which fall within the geographical scope of the Brussels Convention. The Brussels Convention therefore continues to have a residual application.

ADR
Alternative dispute resolution.

Arbitration PD
The *Practice Direction—Arbitration* which supplements CPR Pt 62.

Chitty
Beale and others, *Chitty on Contracts* (29th edn, Sweet & Maxwell, 2006).

CIArb
Chartered Institute of Arbitrators.

Commercial Court
The part of the Queen's Bench Division of the English High Court of Justice devoted to commercial cases, including all arbitration applications and appeals.

Convention award
An arbitration award made in a country which is party to the New York Convention. The use of the expression "Convention award" derives from a statutory

definition in the Arbitration Act 1975, s.7: that Act has been repealed. The Arbitration Act 1996, s.100(1) uses the expression "New York Convention award" for awards made outside the United Kingdom under the New York Convention; there are of course other conventions for the enforcement of awards made outside the United Kingdom. However, the expression "Convention award" in the narrower sense is likely to continue to be used.

CPR
The Civil Procedure Rules in force as at September 2007.

DAC
Departmental Advisory Committee on Arbitration Law set up by the United Kingdom's Department of Trade and Industry.

DAC Report
The DAC (see above) produced a number of reports. Where none is specified, the reference is to their report on the Arbitration Bill of February 1996. If the reference number is to another of the committee's reports, the title of that report is given in full.

Dicey & Morris
Dicey, Morris & Collins, *Conflict of Laws* (Lawrence Collins and other eds, 14th edn, Sweet & Maxwell, 2006).

Kendall
J Kendall, *Expert Determination* (3rd edn, Sweet & Maxwell, 2001).

FIDIC
Federation Internationale des Ingenieurs-Conseils.

FOSFA
Federation of Oils and Seeds and Fats Association.

GAFTA
Grain and Feed Trade Association.

Geneva Convention
Convention on the Execution of Foreign Arbitral Awards signed at Geneva on behalf of His Majesty on September 26, 1927

Handbook
Bernstein's *Handbook of Arbitration Practice* (4th edn, Sweet & Maxwell, 2003).

IBA Guidelines
IBA Guidelines on Conflicts of Interest in International Arbitration.

IBA Rules
IBA Rules on the Taking of Evidence in International Commercial Arbitration.

ICC
International Chamber of Commerce.

ICCA
International Council for Commercial Arbitration.

ICC Rules
Rules of Arbitration of the ICC.

ICE
Institution of Civil Engineers.

ICSID
International Centre for the Settlement of Investment Disputes.

ICSID Convention
The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965.

JCT
Joint Contracts Tribunal.

LCIA
London Court of International Arbitration.

LCIA Rules
LCIA Arbitration Rules.

LMAA
London Maritime Arbitration Association.

Lugano Convention
Convention of September 16, 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters. Its effects are materially the same as the Brussels Convention and it governs issues of jurisdiction and enforcement between the European Union member states and the European Free Trade Association countries other than Liechtenstein (namely Iceland, Switzerland and Norway).

Merkin
Robert Merkin, *Arbitration Law* (LLP, 1991).

Model Law
The UNCITRAL Model Law on International Commercial Arbitration.

Mustill and Boyd
Michael Mustill and Stewart Boyd, *Commercial Arbitration* (2nd edn, 1992), as supplemented by a *2001 Companion* (Butterworths, 2001).

NEMA guidelines
Guidelines, laid down by the House of Lords in *BTP Tioxide Ltd v Pioneer Shipping Ltd, "The Nema"* [1982] A.C. 724, for appeals from arbitration awards to the courts.

New York Convention
The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

Redfern & Hunter
Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, 2004).

RIBA
Royal Association of British Architects.

RICS
Royal Institution of Chartered Surveyors.

RSC
Rules of the Supreme Court of England and Wales now largely replaced by the CPR.

UNCITRAL
United Nations Commission on International Trade Law.

UNCITRAL Rules
Arbitration Rules of the United Nations Commission on International Trade Law, 1976.

WHITEBOOK
The CPR and Practice Directions, with Commentary, contained in two volumes.

TABLE OF CASES