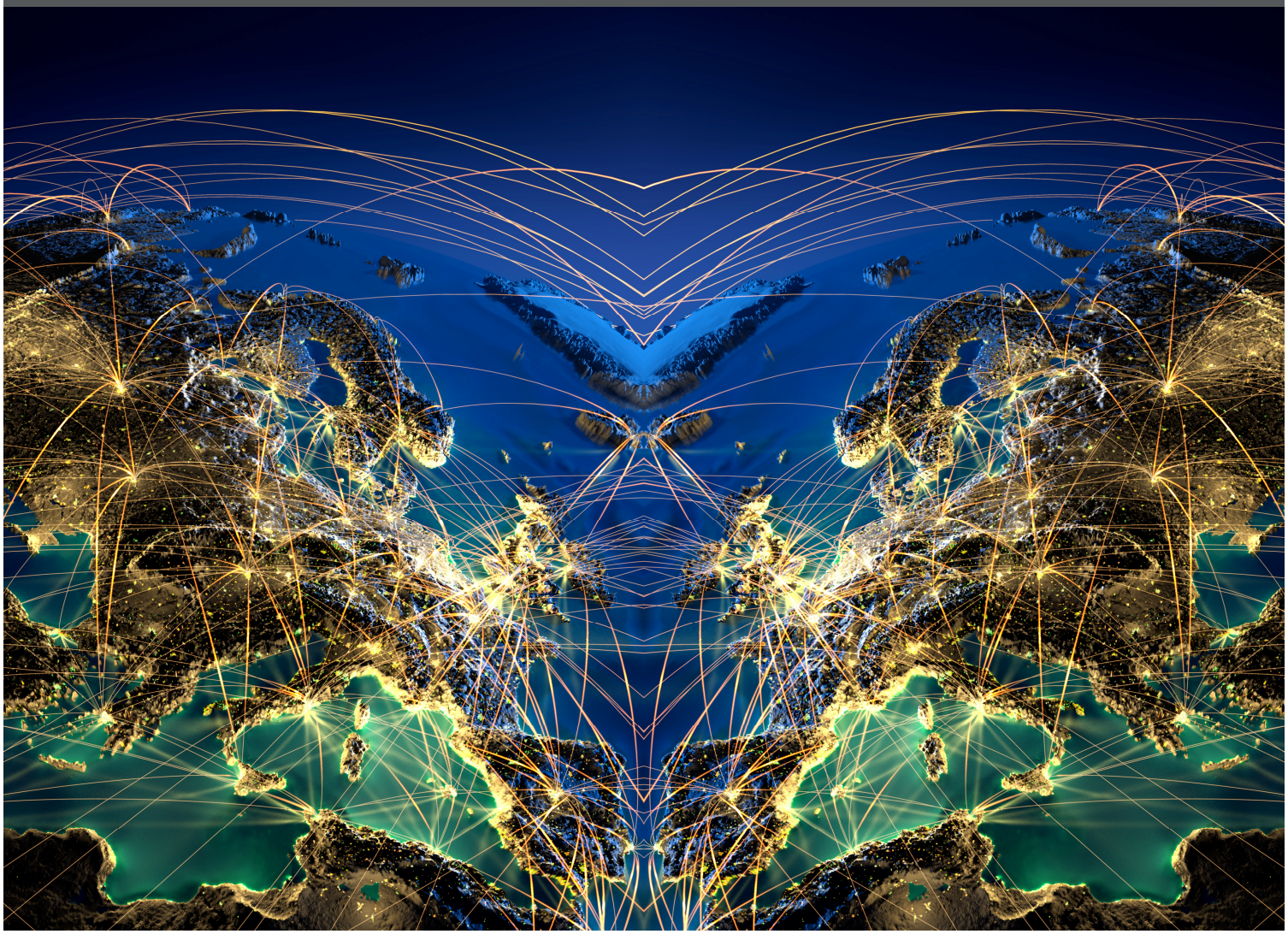
ADDLESHAW GODDARD

INTERNATIONAL ARBITRATION

Quarterly Review – April 2016



In this Issue...

Welcome to Addleshaw Goddard's International Arbitration Quarterly Review. The aim of this publication is to capture significant arbitration cases and legal developments.

If you have any thoughts and comments on this publication, please contact the editorial team.

Two Barristers, Same Chambers: Bar Council Guidance and Disclosures on Conflicts

It is not uncommon in English court proceedings to find barristers from the same chambers representing opposing parties, or appearing before a judge who was formerly a member of the same chambers.

This practice however is not the norm in many other common law and civil law legal systems. As a result, non-English lawyers are less comfortable with the potential of an arbitration comprising a barrister-arbitrator from the same chambers as a barrister representing one party or indeed two or more members of the Tribunal being based at the same chambers. Could the barrister acting as the arbitrator be biased in favour of the party who is represented by counsel from the same chamber, either for monetary or personal reasons? Is there any risk that two members of the Tribunal from the same chambers will not be impartial? What is the effect such an appointment could have on the enforcement and challenge of the award?

Given these potential concerns, the English Bar Council has issued a guidance note to explain the types of considerations and principles barristers at the self-employed Bar may wish to bear in mind when acting both as advocates in arbitration and as arbitrators and to ensure that "*any concerns that the client may have as to the arbitrator/counsel situation are met, and to ensure that the valuable protection given to clients by the availability of the independent bar is not compromised*".

This article summarises this guidance note from the English Bar Council. It also puts forward possible practical solutions open to parties engaged in international arbitration to deal with such issues.

Barristers acting as Advocates

As a matter of English law, there is no prohibition against an advocate appearing before an arbitration tribunal which includes a member of his or her chambers (*Laker Airways v FLS Aerospace et al* [1999] WL 4777389, Rix J).

The Bar Council has made several key points to explain this position:

- The "structure and culture" of the self-employed English Bar is slightly unusual. Whilst most lawyers form partnerships, in which the partners share the profits and losses of their practice, operate under a common professional name and out of the same office or group of offices, English barristers do not. They are self-employed who might share expenses but not profits and losses or income. This means that two advocates within the same chambers have no financial interest in the success of one another.

- The English Bar system is premised on the client having a freedom of choice in selecting its advocate. Rule C29 of The Bar Standards Board Handbook, for example, provides that a barrister is obliged to accept instructions on behalf of a client unless certain limited exceptions apply. The purpose of this rule is that the barrister must consider whether it is in the client's best interests that they accept such instructions and, if it is, the barrister must take the case. This rule, referred to as the "cab rank" rule, means that clients should always have access to the advocate of their choice. It also helps to avoid situations where, for example:

... As a matter of English law, there is no prohibition against an advocate appearing before an arbitration tribunal which includes a member of his or her chambers ...

... What is the effect such an appointment could have on the enforcement and challenge of the award?

- Barristers act only for one side in a particular field (such as always acting for insurance companies or always banks, never customers).

- One party to a specialist dispute can "conflict out" all barristers practising from a particular set of chamber by the simple expedient of seeking advice from one member of that set. This has a practical benefit. In specialist disputes there might only be a limited number of expert advocates in the given field. Barristers with an expertise in a specialist field also frequently practise from the same chambers. If it were possible to conflict out whole sets of chambers this way, the client's choice would be restricted.

Barristers Acting as Arbitrators

It is a general requirement in many arbitration rules that an arbitrator should be independent or impartial (or both) and should disclose any circumstances relevant to such independence and impartiality. For example:

UNCITRAL Arbitration Rules	Article 9 requires an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.
ICC Rules	Under Article 11(1) "*Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration*" and under Article 2(7) of the ICC Rules a prospective arbitrator must disclose in writing to the Secretary General of the Court any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties.
LCIA Rules	Article 3 provides that "*All arbitrators shall be and remain at all time impartial and independent of the parties; and none shall act in the arbitration as advocate for or representative of any party. No arbitrator shall advise any party on the parties' dispute or the outcome of the arbitration*".
IBA Guidelines	The IBA Guidelines on Conflicts of Interest in International Arbitration provide that: "*Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceeding has otherwise finally terminated.*"

The IBA Guidelines on Conflicts of Interest also set out a series of exemplary situations where there may be an actual or perceived conflict of interest. These situations are divided into a **Red List** (which lists situations where the conflict either cannot be waived or can only be waived expressly), an **Orange List** (situations where the conflict can be waived and will be held to be waived if, following disclosure of the relevant facts to the parties, no objection in taken within 30 days) and a **Green List** (situations where there is no actual or perceived conflict of interest). These are only guidelines (as recently highlighted in a case which is described below) but they are persuasive and often applied by courts or tribunals around the world.

Paragraph 3.3.2 of the Orange List notes that in a situation where the arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers, there ought to be disclosure of the same to the parties. Once this disclosure is made, an objection may be made to the arbitrator continuing to act within 30 days, failing which the parties will be deemed to waived any assertion that there is a conflict of interest on these facts. The arbitrator however will still have to consider whether they should continue to act, which will depend on the exact facts of each individual case.

More recently, the ICC has also issued guidance on conflict disclosures by arbitrators, which was adopted by the Bureau of the Court on 12 February 2016. This note invited arbitrators to consider certain specific situations that "*may call into question their independence of impartiality in the eyes of the parties*", including where, for example, "*The arbitrator or prospective arbitrator has a professional or close personal relationship with counsel for one of the parties or its law firm*" and "*The arbitrator or prospective arbitrator has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel for one of the parties or its law firm*". Here, again, the situation where a barrister-arbitrator and counsel for one party are from the same chambers where there might be a perceived bias.

The Bar Council has therefore emphasised that it is key for any arbitrator-barristers to make sure that steps are taken to ensure that disclosure is made as early as possible in the arbitration. The Bar Council also makes certain suggestions which the barrister-arbitrators themselves could take, including to request, at the time of appointment or during the first procedural hearing, that the parties identify their legal representative.

Practical Tips

Whilst it is clear that barristers have to consider their own disclosure obligations and potential instructions carefully, there are also certain steps which the parties and their solicitors can take themselves. These include:

- The Parties agreeing, at the outset of the arbitration, to identify their legal representatives and identify any changes to their counsel promptly. At the first procedural hearing, for example, the parties could request that an Order be made that the parties notify the arbitrator and the other party of their current legal teams, and that each party should notify the arbitrator and the other party of any change in the team within a set period.

- The parties agreeing, at the outset of the arbitration, that neither party will raise an issue as to the impartiality of the tribunal (or enforcement of the award) simply because members of the Tribunal, or counsel and arbitrator, are from the same chambers.

- Insisting that any potential counsel and barrister-arbitrator undertake an internal conflicts check process within each set of chambers before their instruction and/or appointment, so that full disclosure and any potential conflicts can be raised as early as possible.

- Where the potential barrister informs the parties that he or she has been instructed in an arbitration where one or more members of the Tribunal are barristers in the same set of chambers, the parties should then promptly disclose this to the legal representatives of the other party or consider instructing alternative counsel.

- Discussing the practical arrangements within chambers with Counsel's clerks to mitigate against the risk of leaking confidential and privileged information within the same chambers. This could include:

- Requesting that separate clerks are designated to deal with the matter on behalf of the arbitrator and on behalf of the advocate;

- Insisting on specific technological arrangements (such as Chinese Walls) to ensure that communications destined for one member to do not come into the hands of, or are seen by, the other member; and

- Ensuring that there are separate arrangements for the secure storage of paper and folders in relation to the case.

English courts finds "weaknesses" in IBA Guideline's conflict of interest provisions

In *W Limited v M SDN BHD [2016] EWHC 422 (Comm),* the Commercial Court rejected a challenge for apparent bias under section 68 of the Arbitration Act 1996 as it identified weaknesses in the 2014 IBA Guidelines on Conflicts of Interest (**Guidelines**).

Background

W Limited (**W**) made an application to challenge an arbitration award made in favour of M SDN BHD (**M**) citing serious irregularity in the form of bias pursuant to section 68(2) of the Arbitration Act 1996. It was common ground that there was no actual bias but the challenge was founded on apparent bias, as set out in the Guidelines.

The relevant facts can be summarised as follows:

- The arbitrator, David Haigh QC was a senior partner at Canadian law firm Burnet Duckworth & Palmer LLP.
- Despite his position, Mr Haigh QC had no involvement in the running of the firm, nor was he responsible for providing legal advice to the firm's clients. On the contrary, he sat almost exclusively as an international arbitrator.
- W argued that a conflict of interest had arisen on the grounds that Mr Haigh QC's firm acted for a company which had the same corporate parent (**Parent Company**) as M and had derived significant remuneration in doing so. This was the result of the acquisition by the Parent Company of the firm's client which had occurred after David Haigh QC had been appointed as an arbitrator.
- The basis of W's argument relied upon paragraph 1.4 of the Guidelines, which states that there would be a non-waivable conflict of interest (the **Non-Waivable Red List**) where the arbitrator or his or her firm regularly advises a party or its affiliate, and the arbitrator or his or her firm derives significant financial income from such advice.

Decision

The court dismissed the application on two separate grounds:

... the case at hand was a clear example that the Guidelines, and the non-waiver of conflicts provisions in particular, contained weaknesses...

- Firstly, applying the common law test for apparent bias, the court held that it was unlikely that a fair-minded and informed observer would draw a conclusion that there was bias or a real possibility of bias. Although Mr Haigh QC was a partner of a law firm, his position was used solely for the purpose of facilitating resources for his work as an arbitrator. He had also completed the necessary conflict checks, which did not alert him to the relationship between M and his firm's client, largely due to the fact that the acquisition was announced and completed after such checks were completed. The court was also satisfied that Mr Haigh QC would have made a disclosure had he been aware of the connection, which further demonstrated a lack of bias.
- Secondly, the court ruled that although the Guidelines and their objectives were commendable, they were "guidelines" and not binding. In his judgment. Judge Knowles also identified that the case at hand was a clear example that the Guidelines, and the non-waiver of conflicts provisions in particular, contained weaknesses. Its principal criticism lied in the way the Guidelines restrain the parties from considering their particular circumstances when the matter falls within the Non-Waivable Red List. The wording and purpose of the non-waiver of conflicts provisions were clearly incompatible with the facts of this case, which did not warrant inclusion in the Non-Waivable Red List.

Comment

This is an important decision for the international arbitration community given that the Guidelines are well respected and widely applied.

Arbitration practitioners should take note of the point made by the English court that whilst the Guidelines can be a useful starting point, they should not be applied rigidly.

This is a victory for common sense but it does remove some of the certainty that a strict application of the Guidelines would have provided.

Increased certainty for optional arbitration provisions

In *Anzen and Others v Hermes One Limited [2016] UKPC ,1* the Privy Council held that an option to arbitrate in a shareholders' agreement amounts to a binding agreement to submit a dispute to arbitration in the event that either party exercises their right to rely on the arbitration provision, either by making an unequivocal statement to that effect or by making an application to stay the proceedings.

The Privy Council concluded that, notwithstanding the commencement of court proceedings by a party, once the option to arbitrate is exercised by one party, the agreement to arbitrate becomes binding on both parties and the dispute between them must be referred to arbitration in accordance with the terms of the arbitration provision.

Background

Hermes One Limited (**Hermes**) and Anzen and Others (**Anzen**) were shareholders in a British Virgin Islands incorporated entity named Everbread Holdings Ltd (**Everbread**). Everbread is involved in the development of airline search software. In July 2012 the parties entered into a shareholders' agreement (**SHA**).

The SHA contained a dispute resolution provision at Clause 19.5 referring disputes between the parties to arbitration in accordance with the ICC rules. The provision provided:

"any party may submit the dispute to binding arbitration" (emphasis added).

The Dispute

Following a breakdown in relations between the parties a dispute arose concerning alleged unfairly prejudicial conduct in the management of Everbread. Hermes commenced proceedings against Anzen in the courts of the British Virgin Islands, seeking a number of remedies, including damages and/or the appointment of a liquidator over Everbread.

Shortly after the commencement of the court proceedings, Anzen applied to the BVI court for a stay. This application was made pursuant to section 6(2) of the BVI Arbitration Ordinance 1976 (**Ordinance**). This provision of the Ordinance is similar to section 9 of the English Arbitration Act 1996 and provides that a party to an arbitration agreement may apply to the court to stay court proceedings commenced against it.

Anzen's application was dismissed by the BVI court on the basis that:

- Clause 19.5 of the SHA amounted to an option to submit a dispute arising under or relating to the SHA to arbitration;

... any provision that deprives a party of the option to submit a dispute to litigation must be decisive and clear ...

- in circumstances where a party has already commenced court proceedings, the option in Clause 19.5 of the SHA could only be exercised by referring the same matter to arbitration in accordance with the arbitration provision in the SHA; and
- Anzen's failure to commence parallel ICC arbitration proceedings precluded it from relying on Section 6(2) of the Ordinance.

Anzen appealed the decision and the Court of Appeal dismissed its appeal citing similar reasons. The Privy Council has, however, allowed Anzen's appeal.

Decision

In reaching its decision the Privy Council stated that the key to the appeal lay in the construction of Clause 19.5. The Privy Council referred to three possible ways that Clause 19.5 could be analysed:

- The words "*any party may submit the dispute to binding arbitration*" means that the parties can only pursue their disputes through arbitration (**Analysis 1**); or
- The wording of Clause 19.5 is permissive, allowing the pursuit of a dispute by way of court proceedings but also allowing a party to commence arbitration proceedings by either:
  - commencing an ICC arbitration in accordance with the provisions of the arbitration provision (**Analysis 2**); or
  - making an "*unequivocal*" request that the dispute be referred to arbitration and/or by making an application to stay the court proceedings. (**Analysis 3**).

Analysis 1

The Privy Council rejected Analysis 1. It took the view that any provision that deprives a party of the option to submit a dispute to litigation must be decisive and clear. The use of the word "*may*" in Clause 19.5 leaves the option to submit the dispute to litigation open. Accordingly, the provision is not sufficiently clear and therefore cannot deprive a party of the option of submitting a dispute to litigation.

In coming to this conclusion, the Privy Council explored case law from:

- England (Lobb Partnership Ltd v Aintree Racecourse Co Ltd [2000] CLC 431);
- Canada (Canadian National Railway and Others v Lovat Tunnel Equipment Inc (1999), 174 DLR (4th) 385; and
- Singapore (WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka [2002] 3 SLR 603.

The conclusion reached from the Privy Council's review of the above cases was that the presence of the word "*may*" in an arbitration provision strongly indicates that the option to commence arbitration proceedings is open to either party and, in the event they choose to exercise this option, then the other party is bound to accept that the dispute has been referred to arbitration. The clause is therefore an option to arbitrate although it does not preclude the parties from commencing proceedings in the courts should they wish.

The frequency with which the word "*may*" is used in a commercial context when arbitration is intended as an express alternative to litigation also influenced the Privy Council's decision to reject Analysis 1.

Analysis 2

Analysis 2 was also rejected by the Privy Council. The reason for rejecting this analysis of Clause 19.5 of the SHA was that it was not consistent with business common sense. The Privy Council concluded that requiring a party, that has had court proceedings brought against it, to incur the expense of commencing arbitration proceedings to seek a declaration of non-liability from a tribunal would be a significant hurdle to parties wanting to arbitrate the dispute.

Analysis 3

The Privy Council concluded that Analysis 3 is the preferred choice. The hallmark of arbitration is consent and parties are under an obligation to cooperate in the pursuit of arbitration. Analysis 3 removes the hurdle of a party having to incur the cost of commencing arbitration proceedings and allows the party wishing for a dispute to be arbitrated either to commence arbitration itself or to insist on arbitration being commenced either by way of an application for a stay of the proceedings or by an "*unequivocal*" request.

Comment

This commercially sensible and pro-arbitration decision provides some clarity and useful guidance into how optional arbitration provisions may be interpreted and exercised. It is likely to influence decisions and serve as guidance to supervisory courts dealing with the construction of optional arbitration provisions between commercial parties.

The Pricy Council explored and drew from a number of helpful authorities from England and Wales, Canada and Singapore which highlights the increasing consistency between decisions in international arbitration. The decision serves to promote consistency and certainty for parties involved in international trade and commerce that have signed agreements containing optional arbitration provisions.

English Court enforces penalty award

In the recent judgment of *Pencil Hill Ltd v US Citta di Palermo SpA (case No. BA40MA109)*, the High Court rejected an application to set aside an order enforcing a Swiss award, which had been made on the ground that the enforcement would be contrary to public policy.

Background

In 2012 Pencil Hill Ltd sold the registration rights of footballer Paulo Dybala to Italian Football club Palermo for €6.72m. The contract provided for the €6.72m to be paid in two instalments with a further €1m becoming due under an additional agreement.

Palermo failed to pay the instalments and the matter was referred to the Court of Arbitration for Sport (the **CAS**). Pencil Hill made a claim for €6.72m for the instalments, a further €6.72m as a penalty payment and €1m for the amount due under the additional agreement.

The CAS awarded €9.4m which included the €6.72m and €1m due under the agreements. However, the CAS stated, applying Swiss law, that the penalty of €6.72m was *"disproportionate and unfair"* and reduced the sum by 75% to €1.68m.

The Swiss Supreme Court dismissed an appeal by Palermo and upheld the reduced penalty. Pencil Hill then applied to the English High Court to enforce the award.

Decision

The key issue to be decided by the English High Court was whether to refuse to enforce the €1.68m on the ground that to do so would be contrary to public policy since there is an English public policy against the enforcement of penalty clauses.

Section 103 of the Arbitration Act 1996 provides that English Courts have a duty to enforce an award under the New York Convention, but that they can refuse to recognise or enforce an award if it is *"contrary to public policy"*.

... the English public policy of refusing to enforce penalty clauses was outweighed by the policy in favour of enforcing international arbitration awards ...

The Court found that the English public policy of refusing to enforce penalty clauses was outweighed by the policy in favour of enforcing international arbitration awards. Consequently the Court found that enforcing the award for the sum of €1.68m would not be contrary to public policy.

The Court considered the following in coming to its decision:

- There is a strong presumption that the courts in England should lean towards enforcing foreign arbitration awards.
- There are only a narrow set of circumstance in which a court can refuse to enforce an award. One ground is that the award would be contrary to public policy and the bar for refusing to enforce an award on this ground is set very high. The Court was not satisfied in this case that the matter was injurious to the public good.
- The parties' choice of law should be taken into account by the Court when reaching a decision. In this case the parties had chosen Swiss law as their governing law and the award had been made by the CAS on that basis.
- The penalty sum had already been reduced by the Swiss Court because it was considered to be excessive.

Comment

The decision demonstrates once more the pro- arbitration stance of the English Courts: they implement a strong policy in favour of enforcing arbitration awards. It also confirms that the English courts will not automatically impose English public policy rules on parties who have chosen a different law to govern their contracts. All of this should be good news for parties seeking to enforce arbitration awards in England & Wales.

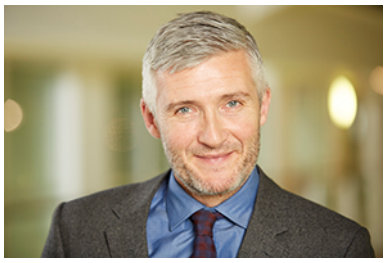
KEY CONTACTS

Contributors to this edition: Nick Ashcroft, Emily Caldwell, Gilbert Hakim and Rebecca Dennehy.

If you would like further information on any of the matters raised in this edition please contact any of the editorial team below:

Simon Kamstra
Head of International Arbitration

+44 (0)20 7788 5558
email me



Richard Wise
Managing Associate

+ 44 (0)20 7160 3255
email me

Dr Caroline Bell
Professional Support Lawyer

+ 44 (0) 20 7788 5162
email me

addleshawgoddard.com

Doha, Dubai, Hong Kong, Leeds, London, Manchester, Muscat, Singapore and Tokyo*

*a formal alliance with Hashidate Law Office