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Key 2024 Arbitration Trends In A Changing World

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2023 was another year of change brought by global factors, such as the Russia-Ukraine war, the rising trend of protectionism, the continued and increased disruption to supply chains, and inflation — all factors that are set to continue in 2024 and will give rise to dispute risks across different jurisdictions and sectors.

This article explores the key arbitration trends for 2024 and beyond. Key sectors, such as the global mining and commodities market, will continue to generate a number of disputes as a result of the energy transition and the race for critical raw materials. Environmental, social and governance-related disputes are likely to rise and have the opportunity to frame the future arbitration space for these issues.

On the procedural side, the amendments to the Arbitration Act 1996 and the High Court of Justice of England and Wales' findings on Oct. 23 in Federal Republic of Nigeria v. Process and Industrial Developments Ltd.[1] will both guide future arbitration proceedings and provide helpful lessons on confidentiality, disclosure and professional duty.

Global Mining and Commodities Markets

The global mining and commodities markets are still reeling from the Russia-Ukraine war and the ensuing retaliation measures. These markets were subjected to added pressure in 2023, which will likely increase in 2024, as a result of increasing demands to accelerate the energy transition and the changing regulatory landscape targeting critical raw materials supply chains. This includes the U.S. Inflation Reduction Act; the European Union Critical Raw Materials Act; the U.K. Critical Minerals Strategy, or CMS; and the Canadian Critical Minerals Strategy.

The new EU Critical Raw Materials and the U.K. Critical Minerals Strategy — both designed to protect critical raw materials supply chains and changes in regional mining laws, such as the ones in Mexico and Chile, or Canada's restrictions on investments by foreign state-owned companies in its critical minerals sector — are likely to give rise to an increase in investor-state disputes and commercial arbitration for existing and new projects.

For example, focusing on the CMS, the U.K. government is planning to review mineral rights-related barriers to exploration and extraction, and explore ways to expedite critical mineral mine development. Any changes related to the permitting of mining developments may lead to an increase in disputes

regarding permits, public consultation requirements under local and international law, and ESG risks.

The Rise of ESG Disputes

ESG continues to rise as a prominent feature of the business and regulatory landscapes. ESG obligations exist across industries and therefore have the potential to generate a wide range of disputes. Similarly, the actors promoting these actions can be individuals, groups of individuals, nongovernmental organizations, and sovereign states or their agencies and instrumentalities.

In recent years, ESG-related provisions have led to a number of commercial contract claims or investment treaty-based claims. Commercial contract claims may arise from climate change-related provisions on renewable energy and sustainability commitments, indemnity provisions covering environmental incidents, or supply chain-related provisions, such as responsible business, human rights and greenhouse gas emissions commitments.

In investment treaty cases, ESG-related provisions are used both as a sword to trigger new claims when host states fail to carefully implement new regulations, or as a shield by host states in defending investment claims when they have arisen.

Arbitration lends itself well to the resolution of ESG disputes, as it can provide a neutral and flexible forum with specialist arbitrators and with the added protection of confidentiality, particularly for investors concerned with the impact that political pressure may have on the ability to have disputes resolved fairly and with due process.

However, the use of arbitration also faces criticism, as some claim it is unsuitable for disputes between corporations and individuals because of the likely disproportionate difference in financial resources between the parties and the requirement for the consent of the parties to an arbitration agreement by third parties and stakeholders.

While ESG frequently arises in the context of arbitration, the most prominent ESG-related disputes have taken place before the English courts.

For instance, in the July High Court case JSS Investmentfonds SICAV v. Glencore PLC, Glencore's investors sought damages from the company based on allegations that the company made misleading or untrue statements in past prospectuses to cover up corruption.[2]

In another High Court case, ClientEarth v. Shell PLC, ClientEarth commenced a derivative action in February on behalf of Shell, of which it is a minority shareholder, against Shell's directors, for their alleged failure effectively to address the risks of climate change.[3]

Reform of the Arbitration Act 1996

On Sept. 6, the Law Commission of England and Wales published its final report, recommending some limited reforms to the Arbitration Act 1996.[4] The bill incorporated all the amendments to the Arbitration Act that are currently before the U.K. Parliament.

The Law Commission ultimately recommended a reasonably limited number of amendments, such as clarifications to Section 67, the codification of an arbitrator's continuing legal duty to disclose matters and the codification of arbitral tribunals' power to render awards on a summary basis. These

amendments should enhance the arbitration process, while at the same time avoiding such drastic changes as to render the process entirely unfamiliar.

One of the most welcome amendments relates to the governing law of arbitration agreements. Under English law as it currently stands, the applicable test to determine the governing law of arbitration agreements is set out in the 2020 Supreme Court case Enka v. Chubb.[5]

In that case, the Supreme Court determined that where the law of the arbitration agreement is not specified, but there is an express choice of governing law for the contract, the governing law of the contract will also apply to the arbitration agreement contained within the contract.[6]

However, in the absence of any express choice of law to govern the contract, the arbitration agreement is governed by the law with which it is most closely connected. Where parties have chosen a seat of arbitration, the governing law of the arbitration agreement will generally be the law of the seat, even if it differs from the law applicable to the parties' substantive contractual obligations.

The Law Commission's proposed amendment would simplify the law greatly as the new section of the Arbitration Act would state, "[t]he law applicable to an arbitration agreement is — (1) the law that the parties expressly agree applies to the arbitration agreement; or (2) where no such agreement is made, the law of the seat of the arbitration in question."[7]

While the amendment brings certainty, it will only apply to arbitration agreements concluded after the bill comes into force. Therefore, for a number of years to come, there will be two different approaches, with parties with arbitration agreements concluded before the bill comes into force having to face the unpredictable test in Enka v. Chubb.

Lessons Learned from Nigeria v. Process and Industrial Developments

Judge Robin Knowles' findings in Nigeria v. Process and Industrial Developments[8] serve as a cautionary tale on confidentiality, disclosure and professional duty in arbitration.

In Nigeria v. Process and Industrial Developments, the High Court upheld a challenge to the $11 billion arbitration award obtained by Process and Industrial Developments, or P&ID, against Nigeria. Judge Knowles found several instances of fraud, based on the evidence before him:

- P&ID procured Nigeria's entry into a gas supply and processing agreement through the bribery of a Nigerian official;

- That same Nigerian official continued to be bribed during the arbitration proceedings to conceal the original wrongdoing; and

- During the arbitration, P&ID and its lawyers came into possession of numerous leaked documents that they knew or ought to have known were legally privileged, which allowed P&ID to track Nigeria's strategy and its knowledge of the perpetrated fraud during proceedings.

In sum, Judge Knowles considered that P&ID had procured the award "only after and by practising the most severe abuses of the arbitral process."[9]

While the facts of the case are extreme, it raised a number of questions about the arbitrators' conduct

and the role arbitration had to play in failing to uncover the corruption. We set out below a number of lessons that can be taken.

First, while a challenge under Section 68 of the Arbitration Act rarely succeeds, the choice of London as the seat of the arbitration serves as a reminder of the importance of choosing an arbitration seat with neutral, thorough and robust courts willing to overturn awards when appropriate.

Second, Judge Knowles' approach under Section 68 of the Arbitration Act led in some instances to a broadening of the scope of Section 68. Judge Knowles' approach could be criticized as coming close to the impermissible exercise of reviewing all the evidence.

This was something that Judge Nigel Teare concluded in the December 2017 decision in UMS Holding Ltd v. Great Station Properties SA was a matter exclusively for the tribunal and not within Section 68's scope.[10] This is particularly the case for some of Judge Knowles' comments on procedure and the merits, even if these were made obiter.[11] While the approach may have seemed justified in this case, this remains an exceptional case as the finality of arbitration must be protected.

Third, Judge Knowles was implicitly critical of the arbitrators for merely witnessing the inequality between the parties, which was notable in Nigeria's unpreparedness in challenging PI&D's quantum case.[12] Arbitrators should therefore be wary of the consequences of taking too much of a noninterventionist approach. Consideration should be given as to whether broader and more prescriptive powers to control evidence in a manner that is consistent with the materiality and relevance of evidence are required.

However, the existence of these powers is dependent upon the willingness of arbitrators to exercise them. Concerns relating to due process challenges, or the potential for a disappointed party to then resist enforcement based on the perceived conduct of arbitrators, should not be sufficient justification for a defensive and noninterventionist approach.

Fourth, arbitrators and parties will also be aware of the risk that confidential arbitration could be used as a component of fraudulent schemes to produce awards that can be enforced worldwide. Judge Knowles found that there was a risk of this happening, particularly in the context of private and confidential arbitration that takes place behind closed doors and without the scrutiny of the public and press.[13]

Fifth, and finally, P&ID's lawyers, Seamus Andrew and Trevor Burke KC, stood to receive "life changing sums of money" contingent upon success for P&ID in the arbitration.[14] Undoubtedly, this potential personal gain influenced their behavior in relation to the legally privileged leaked documents. This may raise future considerations as to what extent funding and contingent fee agreements and conflicts of interest should be disclosed and reviewed in arbitration proceedings.

Conclusion

In conclusion, 2024 will likely be dominated by macroeconomic factors. The continued inflationary pressures combined with the drive toward the energy transition and the strains on global supply chains are likely to continue to cause serious difficulties for companies and states across the globe.

This should lead to a proliferation of disputes across a wide range of sectors, as companies and states restructure their policies and investments to build resilient global ties. As such, arbitration will continue

to be the preferred dispute resolution mechanism, particularly given the recent fine-tuning of the lex arbitri in England and Wales.

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[1] Federal Republic of Nigeria v. Process & Industrial Developments Limited [2023] EWHC 2638 (Comm).

[2] Leslie Hook, Jane Croft, Adrienne Klasa and Harry Dempsey, 'Glencore hit with investor lawsuit after bribery conviction', Financial Times (London 10 October 2023),https://www.ft.com/content/a7a1980e-1fe4-438e-92a5-ddc53d07ab56.; JSS Investmentfonds SICAV and others v. Glencore plc and others, filed on 26 July 2023.

[3] ClientEarth v. Shell Plc and others [2023] EWHC 1897 (Ch).

[4] Law Commission, Review of the Arbitration Act 1996, Final Report and Bill (Law Com No 413. 2023) (Final Report). The full final report is accessible at https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/.

[5] Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb [2020] UKSC 38, [2020] 1 WLR 4117 9.

[6] Ibid [170].

[7] Final Report (n 3) [12.78].

[8] Federal Republic of Nigeria v Process & Industrial Developments Limited [2023] EWHC 2638 (Comm).

[9] Ibid [516].

[10] UMS Holding Ltd & Ors v Great Station Properties SA & Anor [2017] EWHC 2398 [28].

[11] Federal Republic of Nigeria (n 7) [586]–[591].

[12] Federal Republic of Nigeria (n 7) [587]–[588].

[13] Federal Republic of Nigeria (n 7) [589].

[14] Federal Republic of Nigeria (n 7) [207].