CHANCERY BAR

The Chancery Bar Association's SHANGHAI CONFERENCE 2018

Welcome to the Fairmont Peace Hotel
Friday 11th May 2018

#chbaconference

CHANCERY BAR

Introduction of Chancery to China… and China to Chancery

David Yu, President of the Shanghai Bar Association
Amanda Tipples QC, Chairman of the Chancery Bar Association
Duncan McCombe, former Chair of the Young Bar Council

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Fiduciary Duties in International Litigation & Arbitration

Michael Green QC, Fountain Court Chambers
Lesley Anderson QC, Kings Chambers/Hardwicke
Tom Asquith, 4 New Square
Gareth Tilley, Serle Court

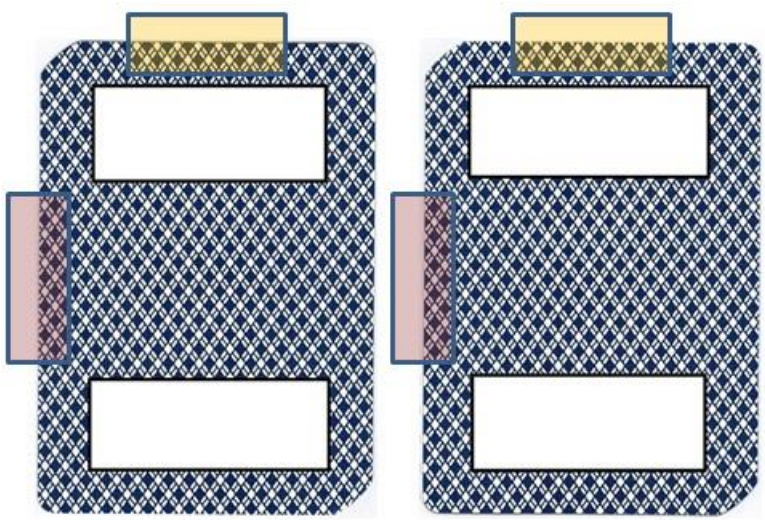
Remedies for breach of fiduciary duty against perpetrators and third parties

Remedies against perpetrators

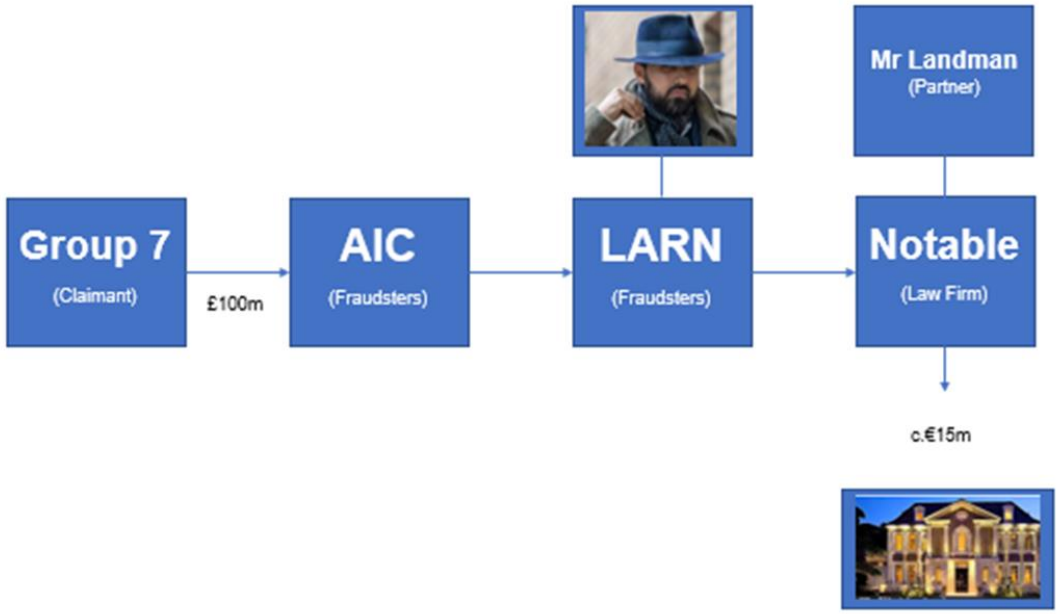
- Rescission
- Account of profits
- Proprietary constructive trusts
- Equitable compensation
- Forfeiture of fees
- Removal (i.e. injunction)

Required state of mind for recovery against third parties such as bankers, lawyers and agents

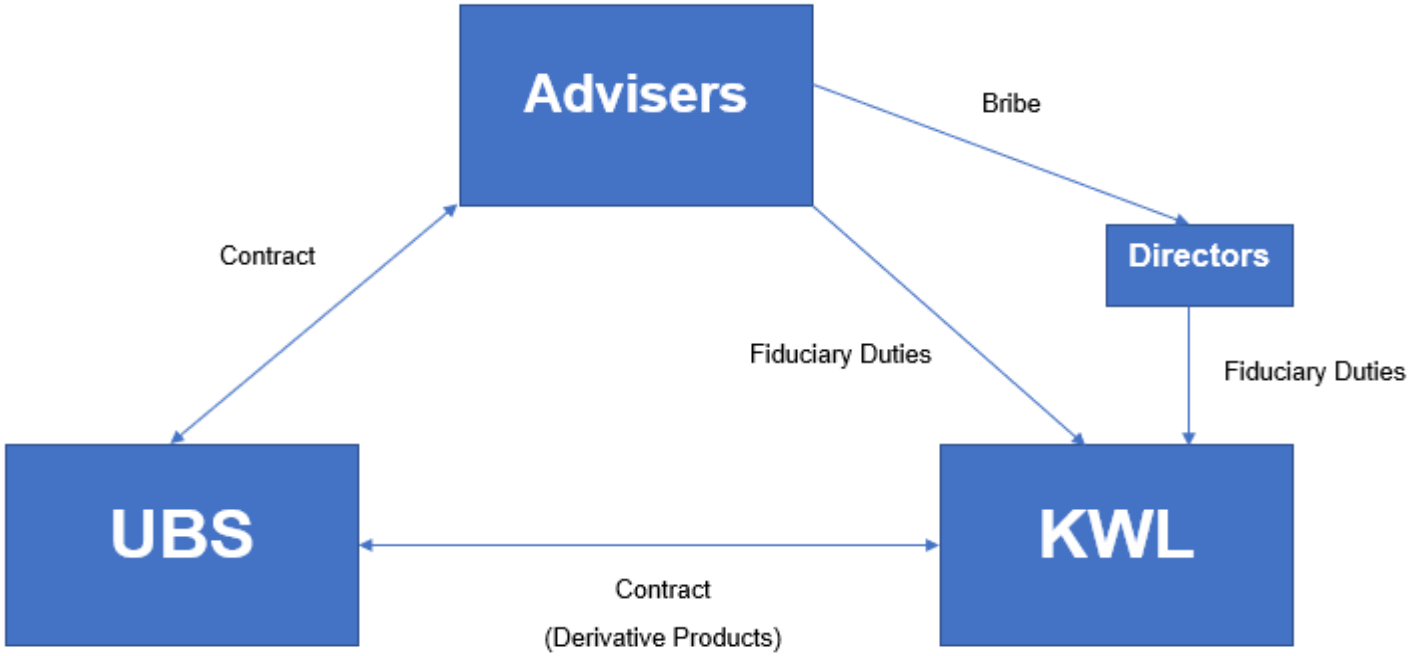
Ivey v Genting



Group Seven v Nasir [2017] EWHC 2466 (Ch)



UBS AG v Kommunale Wasserwerke Leipzig GmbH [2017] EWCA Civ 1567



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Morning Refreshment Break

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Anti-suit, freezing and other injunctions in support of Chinese proceedings

Rory Brown, 9 Stone Square

Peter de Verneuil Smith, 3 Verulam Buildings

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THE ANTI-SUIT INJUNCTION

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STRUCTURE

- What is an anti-suit injunction (ASI) and what is it not?
- Why is such a remedy available?
- Why might I want one?
- How does the court decide whether or not to grant an ASI?
- What are the procedural pitfalls?

WHAT IS AN ASI?

- Discretionary statutory jurisdiction: s37 Senior Courts Act 1981.
- Order restraining the respondent from starting or continuing proceedings in a foreign court or arbitral process (and elsewhere) where necessary in the interests of justice.
- Assessment of conduct of a person.
- Interference with right of access to justice.

WHAT IS IT NOT?

- Acts against person not court (*SNIA v Lee Kui Jak* [1987] A.C. 871, HL, at p.892 *per* Lord Goff).
- Not a decision on jurisdiction; English court not superior – distaste for 'judicial colonialism'; courts have *kompetenz-kompetenz* (*Barclays Bank plc v Homan* [1992] B.C.C. 757, at p.762 *per* Hoffmann J., and at pp.774 & 775 *per* Glidewell LJ).
- Generally, an ASI is not enforceable abroad. N.b. Fentiman, *International Commercial Litigation*, (OUP, 2015 Ed.), 16.19). Respondent and foreign court may carry on regardless.

WHY IS THIS REMEDY AVAILABLE?

- Vindication of positive right or (obversely) enforcement of duty/obligation.
- Restraint of vexatious, oppressive or unconscionable litigation.
- Protection of integrity of proceedings; judgment; national legal system (*Al Tamimi v Al Chamaa* [2017] JRC 176 (fruits and the tree)); international legal system; global economy.
- Prevention of inefficiency (e.g. *Cook v Abrahams* [2018] EWHC [tbc] (n.b. stay not an anti-suit injunction case).

WHY MIGHT I WANT AN ASI?

- Foreign court will accept juris. or powerless to decline it.
- Procedural disadvantages in foreign courts, e.g. delay in juris. challenge; juris. not debated until trial (Fentiman, at 16.02).
- Judgment sought abroad in breach of contract *(Compa. Sud-Americana v Hin-Pro Int. Logistics* [2016] 1 All ER 417).
- Two actions. Two states. Two questions. Two rolls of the dice.
- Oppression: money and multiplicity (*Al Tamimi v Al Chaama & otrs* [2017] JRC 033: Jersey, London, DIFC, ASI-settlement).
- Contempt: damages; committal; refusal of English court to enforce judgment obtained contemptuously (*Philip Alexander v Bamberger* [1997] IL Pr 73, [30]; cf. *Hin-Pro Int.,* above.)

HOW DOES THE COURT DECIDE?

- Absent agreement or special factor, a person has no right not to be sued in a particular forum.
- R amenable to jurisdiction (e.g. *Al Tamimi,* Commissioner Clyde-Smith).
- English Court interested in proceedings, i.e. has jurisdiction.

- Where exclusive jurisdiction clause, not a question of appropriate forum or comity, a question of 'honour' (*Deutsche Bank AG v Highland Crusader Offshore Partners LLP* [2009] EWCA Civ 725; [2010] 1 W.L.R. 1023, CA, at [50] *per* Toulson LJ). Strong reasons exception (*Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd's Rep. 425, [24] *per* Lord Bingham).
- Where non-exclusive, must show foreign procs are vexatious or oppressive (*Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14, [2012] 1 Lloyd's Rep. 376, [30] per Rix LJ).
- Vexatious or oppressive due to submission or invocation (e.g., *Star Reefers* – extrication from adverse consequences of English judgment, *Al Tamimi v Al Chaama* [2017] JRC 176 – material non-disclosure of DIFC procs).

PROCEDURAL PITFALLS

- Notice and urgency.
- Deep conflicts – 'anti-anti-suit injunction'; contractual choice of applicable law but English procedural power.
- Make application promptly and before proceedings are too far advanced (*Rec Wafer Norway AS v Moser Baer Photo Voltaic Ltd* [2010] EWHC 2581 (Comm); [2011] 1 Lloyd's Rep. 410 at [46] *per* Blair J., *Cook v Abrahams* [2018] EWHC [tbc])

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Freezing injunctions in support of Chinese proceedings

Peter de Verneuil Smith, 3 Verulam Buildings

Introduction

A. What is an English Freezing Injunction?

B. How an English Freezing injunction may assist Chinese proceedings.

C. Ancillary orders.

D. Practical consequences.

A.1 What is an English Freezing Injunction?

- An interim injunction which prevents a defendant from wrongfully dissipating assets pending a judgment or enforcement.
- It puts severe commercial/reputational pressure on a defendant.
- It does not provide security over assets.

A.2 The test for a Freezing Injunction

The following must be shown by a claimant to obtain a freezing injunction:

(i) A good arguable case on the merits

(ii) A real risk of dissipation; and

(iii) It is just and convenient to grant the order.

A.3 When can you seek a Freezing Injunction?

- Before proceedings are started.
- During proceeding.
- After a judgment has been obtained.

B.1 How a Freezing injunction may assist Chinese Proceedings

- Chinese company ("X") sues Swiss company ("Z") in PRC for breach of a software supply contract. X alleges Z made fraudulent representations and has discovered that Z is transferring assets to related companies to try to make itself judgment proof. Z has a branch and bank account in London.
- How can the English courts assist X?

B.2 How a Freezing injunction may assist Chinese Proceedings ?

X should seek a freezing injunction in England to support the PRC proceedings in order to:

(i) Prevent Z dissipating of assets located in England & Wales or anywhere in the world.

(ii) Discover what assets Z holds.

(iii) Identify a pool of assets readily available for enforcement.

B.3 How to obtain a freezing injunction in aid of PRC proceedings

- S25 Civil Jurisdictions and Judgment Act 1982 enables freezing injunctions to support PRC proceedings.
- PRC proceedings must have already commenced or the claimant must give an undertaking to commence them.
- The PRC proceedings must be substantive and not be (i) for the arrest of property nor (ii) for obtaining evidence.
- The English court must have jurisdiction over the defendant.

  Motorola Credit Corp v Uzan (No 2) [2003] EWCA Civ 752

B.4 The test under s.25 CJJA

It is a two stage test:

- Would the English Court grant a freezing injunction if the proceedings were in England?
- Is it inexpedient to grant the order?

B5. Inexpediency

There are five considerations as whether it is inexpedient to make the order (see Motorola):

(i) Will an order interfere with the management of the case of the primary court.

(ii) Whether the primary court has a policy as to making freezing injunctions.

(iii) Whether there is a risk of conflicting decisions with a foreign state where the defendant resides or assets are located.

(iv) Whether there is a potential conflict as to jurisdiction which makes it inappropriate to make a worldwide order.

(v) Whether the court has the ability to enforce the order.

B.6 Would X obtain the injunction?

X would probably obtain the injunction because:

(i) If the case were brought in England an injunction would probably be granted if there was strong evidence of a fraud.

(ii) It is not inexpedient to make the order because there is personal jurisdiction over the branch (and therefore the ability to enforce), at least one asset in England (the branch).

B.7 What if the PRC proceedings were arbitral?

No problem - A freezing injunction in support of foreign arbitral proceedings may be obtained under s.44 of the Arbitration Act 1996.

Euro Telecom International v Republic of Bolivia

[2008] EWCA Civ 880

C.1 Ancillary orders

In order to make the Freezing Injunctive effective a claimant may seek:

- Disclosure of the assets held by the defendant.
- Disclosure as to how the defendant's legal fees are being paid.

D.1 Practical consequences

A freezing injunction is likely to increase the likelihood of Z settling the claim because:

- Z's banking operations in England will become difficult.
- Z may experience reputational damage.
- Z will want to resolve quickly the Freezing Injunction.

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Disclosure of trust documents: Some key principles

William East (5 Stone Buildings)

Topics to be covered:

- Importance of the issue
- The general test for disclosure
- *Kam v HSBC* (Hong Kong) - using trust instrument to protect against disclosure
- Rules which apply to particular types of documents

Importance of trust disclosure

- Information is power and obtaining disclosure can be key to beneficiaries enforcing their rights.

- **Reasons can vary:**
  - From wanting to obtain core trust documents to understand rights under trust;
  - To requesting documents as a prelude to making an attack on trustees in litigation (e.g. breach of trust, attempt to set aside exercise of powers).

General test for disclosure

- Leading English decision is *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26. Decision of Privy Council, applied in Hong Kong in *Kam v HSBC* [2010] 4 HKLRD 69.

- **Principles:**
  - No beneficiary has entitlement as of right to trust documents;
  - Trustees and court may have to balance competing interests (beneficiaries, trustees, third parties, confidentiality);
  - Beneficiaries who are more likely to benefit from trust are more likely to get disclosure;

Schmidt v Rosewood principles (continued…)

- Where there are competing interests, can they be protected by limiting or redacting the material released, or by making arrangements for inspection by professionals to limit use of material?

- Some rules which previously applied to disclosure under earlier case law still relevant.

Ultimately, a matter of court's discretion as to whether or not disclosure will be ordered.

Importance of different jurisdictional rules

- Some jurisdictions have sought to restrict disclosure, e.g. Bahamas (Trustee Act 1998, s. 83), where trustees do not even have to inform beneficiary with vested interest of existence of trust, if not in their 'best interests'.

- In England - use of Data Protection Act 1998 to circumvent restrictions on trust disclosure - decision in *Dawson-Damer v Taylor Wessing LLP* [2017] EWCA Civ 74.
- *Can apply even where trust not based in England!*

Using trust instrument to protect against disclosure: *Kam v HSBC* [2010] 4 HKLRD 69

Anita Mui

- Case involving estate of Anita Mui - pop star who died in 2003;
- Left entire estate to trust called Karen Trust;
- Attempt by mother to challenge Will and validity of the trust;
- Argued that trust void owing to clause in trust seeking to restrict disclosure;

Kam v HSBC (continued…)

- Letter of wishes - wanted to leave:
  - Two properties to Eddie Lau, image and costume designer;
  - $1.7m to subsidise nephews and nieces' education;
  - $70,000 a month for benefit of mother.

- Clause 33 of trust:
  - Trustee not obliged to make known to any beneficiary that trust exists (until beneficiaries become absolutely entitled);
  - No beneficiary entitled to demand trustees disclose any information relating to the trust or exercise of trustees' powers.

- Argument: Clause 33 made whole trust void, without information beneficiaries cannot enforce the trust.

Kam v HSBC (continued…)

- Decision of Hong Kong CFA:
  - Clause itself might be void (CA ruled the other way);
  - Court always has, per *Schmidt*, supervisory jurisdiction over trusts so can intervene;
  - Mother had remedy of seeking discovery of documents in litigation (shows importance of distinction between disclosure under trust law principles and disclosure in litigation);
  - Clause did not render whole trust void.

Obtaining disclosure of particular types of documents

- Despite general discretionary test under *Schmidt*, still some documents which are more likely to be disclosed than others.

- Likely to be disclosed: 'core' documents such as trust instrument, deeds of appointment, trust accounts etc. However - see *Erceg v Erceg* [2017] NZSC 28 - disclosure refused where (1) beneficiary's interest remote and (2) concern over how information would be used.

- Also likely to be disclosed: information about state of trust, how currently invested etc, what distributions have been made.

Obtaining disclosure of particular types of documents

- Less likely to be disclosed: documents which may shed light on trustees' reasons for taking decisions (*Re Londonderry* [1965] Ch. 918). Such as:
    - Discussions between trustees as to how to exercise powers;
    - Reasons for exercising powers in particular way;
    - Material upon which such reasons were or might have been based.
- Debate re letters of wishes - core documents which ought to be disclosed, or documents which relate to inherently confidential process of deciding how to exercise powers (*Breakspear v Ackland* [2009] Ch 32)?

Obtaining disclosure of particular types of documents

- Legal advice re exercise of trustees' functions paid for out of trust fund normally disclosable, privilege no defence.
- Same applies to legal advice as to extent of trustees' powers, although not regarding any particular suggestion re how should exercise powers.
- Privilege can be used to protect against disclosure of advice taken re breach of trust claims paid for by trustees.

Conclusions

- Although there is a legacy of ‘rules’ about disclosure of trust documents from earlier case law, discretionary test in *Schmidt* means that every case is fact-sensitive and has to be approached on its merits.

- Real importance in identifying the particular jurisdictional rules which may apply given international nature of many trust disclosure cases - e.g. systems of law which set out stricter rules.

- Safe to assume nothing - not even that a beneficiary is entitled to obtain trust deed and financial statements re the trust (*Erceg).*

Thank you for listening

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The bottom line

Nicholas Davidson QC, 4 New Square

The client equation

The client equation

$$x - y = \text{happiness}$$

The client equation

x – y = happiness

?

The client equation

Recovered from opponent: *x*

The client equation

Recovered from opponent: *x*

Paid to own lawyers: *y*

The client equation

Recovered from opponent: *x*

Paid in costs: *y*

Is *(x-y)* positive or negative?

Recovered from opponent?

Recovered from opponent?

Principal sum

Recovered from opponent?

Principal sum

Interest

Recovered from opponent?

Principal sum

Interest

Interest on judgment debt

Recovered from opponent?
Costs (net)

Recovered from opponent?

Costs (net)

Interest on costs

"... legal rules which are not soundly based resemble proverbial bad pennies: they turn up again and again."

Sempra Metals Ltd v. Inland Revenue Commissioners

[2007] UKHL 34 [2008] 1 A.C. 561

"Interest … on an equitable compensation order … may be awarded on a compound basis." [Snell]

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The National Housing Trust v. Y.P. Seaton & Associates Co Ltd

[2015] UKPC 43; [2016] B.L.R. 215

Arbitration Act 1996
(England and Wales)
Arbitration (Scotland) Act 2010

The Late Payment of Commercial Debts (Interest) Act 1998

Littlewoods Ltd v HMRC

[2017] UKSC 70

[2017] 3 WLR 1401

Kazakhstan Kagazy PLC
v
Zhunus
[2018] EWHC 369 (Comm)

Carrasco v Johnson
[2018] EWCA Civ 87

Certain Underwriters at Lloyd's
v
Syrian Arab Repunblic
[2018] EWHC 385 (Comm)

Jaura v. Ahmed

[2002] EWCA Civ 210

[2002] All ER (D) 289

Kitcatt v MMS UK Holdings Ltd

[2017] EWHC 786 (Comm)

More interest?
What about enhancement?

More interest?
What about enhancement?
Part 36

More interest?
Part 36
Up to 10% above base rate

Part 36
Up to 10% above base rate
On judgment and costs

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Triple Point Technology Inc
v
PTT Public Company Ltd
[2018] EWHC 45 (TCC)

Be interested in interest from the start of the claim

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Be interested in interest from the start of the claim Beware of the costs

Nicholas Davidson QC, 4 New Square

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Lunch Break

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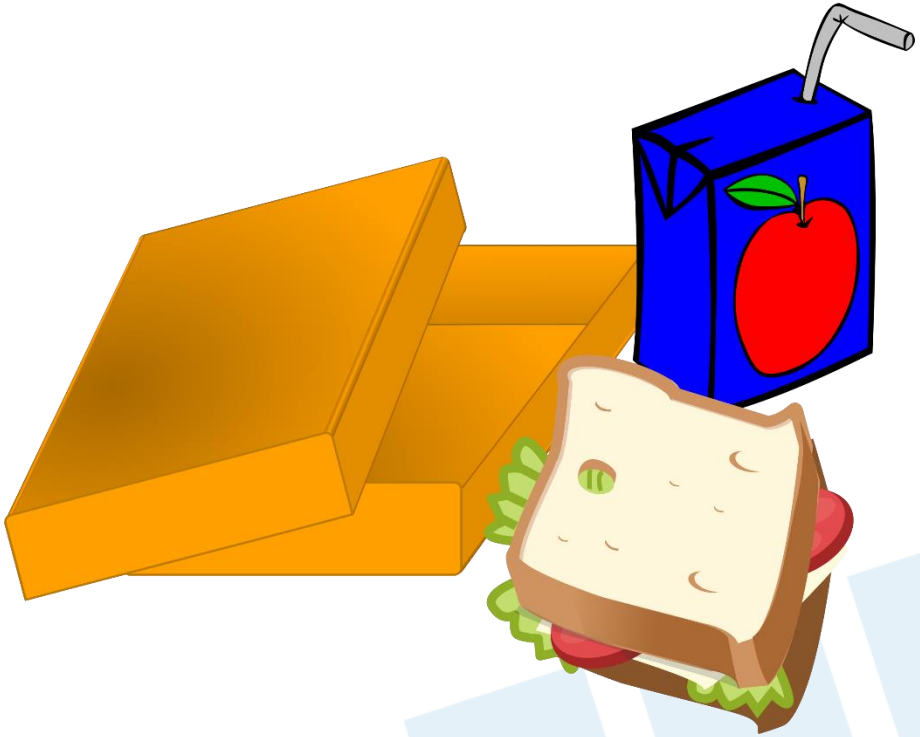

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Belt and Road: Dispute resolution and good faith in contracts

Colin Wright, Gilt Chambers (Hong Kong) & St Philips Stone (London)

Camilla Lamont, Landmark Chambers

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BELT & ROAD – PART I

DISPUTE RESOLUTION ALONG THE BELT AND ROAD

Colin Wright
St Philips Stone, London
Gilt Chambers, Hong Kong

THE BELT AND ROAD INITIATIVE ("BRI")

- The Belt and Road Initiative was announced by President Xi Jingping in October 2013
- The Silk Road Economic Belt ("the Belt") is the overland trade route which follows the path of the historic Silk Road and passes through central and west Asia to Europe
- The 21st Century Maritime Silk Road ("the Road") is the collection of sea routes that connect China and East Asia to Southeast Asia, Oceania, Indonesia, India, Africa and Europe

AIMS OF THE BELT AND ROAD INITIATIVE

- BRI has the following aims:
  - To promote economic cooperation
  - To facilitate exchanges and mutual learning
  - To promote peace and development
- Governing Principles
  - Compliance with market rules
  - Respect for the primary role of the market in resource allocation
  - Respect for the primary role of enterprises
  - Expectation that governments will perform their functions

THE SIZE OF THE BELT AND ROAD INITIATIVE

- Infrastructure projects along the Belt and Road will cost an estimated US$4-8 trillion
- In excess of 66 countries will participate in Belt and Road projects
- These countries make up over 60% of the world's population and 30% of the world's economic output

CHALLENGES OF BELT AND ROAD PROJECTS

- The sheer number of different jurisdictions involved in the BRI give rise to a wide range of challenges including:
  - Diverse range of political and legal systems
  - Risk of political instability in some countries along the Belt and Road
  - Absence of fair and impartial legal system in some countries

FACILITIES CONNECTIVITY

- “Facilities Connectivity” is a key area of the cooperation under BRI
- Focuses on the improvement of connectivity by infrastructure development
- The plan is to connect all the sub-regions of Asia and to connect Asia with Africa and Europe
- In order to implement the ambitious plan, a wide range of infrastructure projects are proposed

INFRASTRUCTURE PROJECTS ALONG THE BELT AND ROAD

- "Infrastructure" is defined by the Asian Development Bank as including
  - Transport
  - Power
  - Telecommunications
  - Water supply
  - Sanitation
- China has already invested over US$50 billion in infrastructure projects along the Belt and Road

THE NEED FOR DISPUTE RESOLUTION MECHANISMS

- Given the sheer size and number of the Belt and Road projects, disputes will inevitably arise
- The disputes could be between
  - Business v Business
  - Business v Government
  - Government v Government
- Many B2B disputes will involve a Chinese State Owned Enterprise ("SOEs")

THE NEED FOR LEGAL RISK MANAGEMENT

- Legal risk management is required at the stage of negotiating an infrastructure project and should cover:-
  - Legal due diligence covering the legal and regulatory framework of the place of investment
  - The structure of the contractual arrangement
  - The drafting of the contract
  - The dispute resolution clause, which should specify the method by which any disputes are to be resolved, the forum and the choice of law

METHODS OF DISPUTE RESOLUTION

- Potential methods of dispute resolution include
  - Court litigation
  - Arbitration
  - Mediation
- In BRI projects, the contracting parties will be able by an appropriate dispute resolution clause to select their preferred method for resolving their dispute
- The negotiation of an appropriate dispute resolution mechanism is a vital part of the legal risk management which should be undertaken on all BRI projects

COURT LITIGATION

- In the event that no alternative forum is selected, a dispute may end up being resolved in the courts of the state in which the BRI project is being undertaken
- By reason of the range of countries along the Belt and Road, there is a risk of the courts in the host country not having a developed and impartial court system
- In order to present the case before the court in the host country, it will be necessary to instruct lawyers qualified in the local jurisdiction

THE INTERNATIONAL COURTS IN BEIJING, XIAN AND SHENZHEN

- In February 2018, the establishment was announced of 3 new courts located in Beijing, Xian and Shenzhen to hear disputes arising out of Belt and Road projects
- The Xian court will hear disputes relating to the land routes of the Belt and Road
- The Shenzhen court will hear disputes relating to the sea routes of the Belt and Road

THE INTERNATIONAL COURTS IN BEIJING, XIAN AND SHENZHEN

- The International Courts may draw on the experiences of
  - The International Finance Centre Courts in Dubai
  - The International Commercial Court in Singapore
- Potential for foreign judges to sit on the Chinese International Courts
- The Courts will have the advantage that they will develop expertise in the particular
- The Courts will be able to mould their procedures to fit the requirements of Belt and Road disputes

COURTS IN OTHER JURISDICTIONS

- The Courts in other jurisdictions will be able to determine Belt and Road projects in the event that they are selected as the forum by the parties in relevant contract
- Courts in jurisdictions such as England & Wales have a good reputation for hearing highly complex commercial disputes
- The Silk Road Economic Belt and the 21st Century Maritime Silk Road converge at the United Kingdom
- England & Wales has a well-established mercantile law which has been adopted and developed by other common law jurisdictions

ARBITRATION

- Many BRI disputes are at present resolved by Arbitration
- Arbitration is favoured by the participants in infrastructure
- The advantages of Arbitration include:
  - Confidentiality
  - Informality
  - Flexibility
  - Ability to select arbitrators with relevant expertise
  - Ease of enforcement

THE NEW YORK CONVENTION

- The New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards makes arbitral awards enforceable in more than 150 foreign countries and territories
- The ability to enforce arbitral awards under the New York Convention gives arbitration a significant advantage over court litigation
- In the case of a court judgment, the ability to enforce depends on the existence of a bilateral treaty with the country in which enforcement is attempted

ARBITRATION IN HONG KONG

- By Article 2 of the Hong Kong Basic Law, China granted Hong Kong a high degree of autonomy in accordance with the One Country Two Systems constitutional principle
- Hong Kong's autonomy extends to all matters except defence and foreign affairs
- By Article 8 of the Hong Kong Basic Law, the common law and the rules of equity continue to apply in Hong Kong
- Hong Kong has a well developed arbitral system under a modern statutory framework

ARBITRATION IN HONG KONG

- As China and Hong Kong are One Country, Hong Kong arbitral awards are not enforceable in China under the New York Convention
- However, Hong Kong awards are enforceable in China and vice versa under the 1999 Arrangement on Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR
- The Supreme People's Court ("SPC") has directed that where any lower court is minded to refuse enforcement of a HK arbitral award the case must be referred to the SPC

THE CHOICE OF LAW

- The contracting parties are free to choose the law which shall govern the substantive dispute
- The parties may choose a neutral law to govern their dispute, such as the law of England & Wales, even if the dispute is heard in a different forum

MEDIATION

- Mediation is a form of alternative dispute resolution in which an independent third party assists the parties to reach a resolution
- The advantages of mediation include
  - Flexibility and informality
  - Confidentiality
  - The ability to reach creative solutions to the dispute
  - The preservation of business relationships

MULTI-LAYERED DISPUTE RESOLUTION

- Dispute resolution clauses in BRI contracts often contain provisions for multi-layered resolution, e.g. mediation followed by arbitration
- Such provisions have the potential to allow a quick resolution through the mediation process which allows the parties to continue to work together
- More adversarial methods will only be used in the event that the mediation fails to achieve a resolution

CONCLUSIONS

- The Belt and Road Initiative is an extraordinary vision which has potential to surpass other investment projects such as the post-war Marshall Plan
- The number and size of the Belt and Road infrastructure projects means that disputes will inevitably arise
- Party autonomy will be the key to the selection of the appropriate method for resolution of particular disputes
- The parties will need to exercise care to make the best choice from the range of available dispute resolution methods

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BELT & ROAD – PART II

"FAIR PLAY? THE RELEVANCE OF GOOD FAITH IN THE PERFORMANCE OF DEVELOPMENT AND JOINT VENTURE AGREEMENTS"

Camilla Lamont

Landmark Chambers

GOOD FAITH ALONG THE BELT AND ROAD

GOOD FAITH IN CHINESE CONTRACT LAW

- China has adopted a civilian code – 1999 Chinese Contract Law (CCL)
- A general duty of good faith is an integral and fundamental part of Chinese Contract law – Art. 6 CCL
- Long and lasting tradition of paternalism and collectivism
- Translates as "*honesty, trustworthiness/ creditability*"
- Outer limits of what is required by the concept of "good faith" are not clearly prescribed and potentially the overarching concept of good faith confers considerable discretion on judges

CCL – ARTICLE 6 OVERARCHING DUTY OF GOOD FAITH

- Overarching requirement in Art. 6 is qualified by specific provisions, such as those in Arts. 42(3), 60, 92, and 125, that take precedence.
- Art. 60, dealing with performance, provides that contracting parties shall observe the principle of good faith in accordance with the nature and purpose of the contract and trade practice
- Art 125 – contracts are to be interpreted in accordance with its wording, other relevant clauses, the purpose of the contract, trade practice and the principle of good faith

GOOD FAITH IN ENGLISH CONTRACT LAW

- No overriding principle of good faith and reluctance to embrace such principle
- Tradition of individualism
- Freedom of contract is central concept
- Values certainty
- Fears palm tree justice
- Preference for piecemeal development along established lines

PIECEMEAL SOLUTIONS

That is not to say good faith has no role to play, far from it:

- More exacting standards required in particular contexts, such as insurance and partnership
- Equitable rules for striking down unconscionable bargains
- Development of estoppel
- Unlawful penalties
- Legislation dealing with unfair contract terms and the rights of consumers

IMPLICATION OF DUTY TO ACT IN GOOD FAITH?

- General duty of good faith is unlikely to arise by way of necessary implication in most cases
- Supreme Court rowing back on implied terms generally: *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] and adhering to the letter of the contract: *Arnold v Britton [2015]*
- Recognition that contractual discretions must be exercised rationally and in good faith: *Braganza v BP Shipping Ltd [2015]*
- Specific terms will sometimes be implied on conventional grounds which have the practical effect of requiring parties to adhere to spirit if not letter of the contract: *Sparks v Biden* [2017]

JOINT VENTURES

- Duties of good faith are implied in certain types of commercial relationship, such as insurance contracts, agency and partnership
- May also be justified in the context of particular analogous relationships, such as joint ventures, *Ross River Ltd v Cambridge City Football Club [2008]*
- The court may even go so far as to construe the contractual arrangement as giving rise to fiduciary duties in special circumstances: *Ross River Ltd v Waveley Commercial Ltd* [2013]
- However, the court must be careful not to distort the parties' contractual bargain by the inappropriate introduction of equitable principles

GOOD FAITH CLAUSES

- Fairly common for development agreements to include express terms requiring good faith in all or part of the parties' dealings
- Courts have shown themselves willing to uphold and apply such clauses
- Meaning of "*Good faith*" has been interpreted in different ways. Precise meaning is always a question of contextual interpretation:
  - Absence of bad faith
  - Observance of reasonable commercial standards of fair dealing
  - Faithfulness to the agreed common purpose
  - Consistency with the justified expectations of the developer

REACH OF EXPRESS TERMS

- Courts have gone further than simply requiring an absence of bad faith
- Courts have shown themselves willing to use good faith obligations to address lacunas in the contract by applying notions of fair dealing according to the spirit or underlying aim of the contract.
- Courts unwilling to impose general duties of good faith that would:
  - contradict express provisions of the contract
  - deprive a party of freely negotiated advantages bedded in the contract and or
  - require a party to subordinate its own interests to those of the other party.

BERKELEY COMMUNITY VILLAGES LTD V PULLEN [2007] EWHC 1330

- Developer agreed to act on a 'no win, no fee' basis, in return for 10% of the net returns upon a sale of the land, once planning permission for residential or mixed development had been obtained.
- Developer invested considerable time, effort and expense in pursuit of the agreed objective and, as a result, the value of the land was enhanced.
- Prior to planning permission being obtained, a third party made an offer to the landowner to purchase the land. The landowner wished to sell. No express provisions of the contract preventing sale
- The developer, wishing to earn its fee, sought injunctive relief to prevent a sale.

BERKELEY V PULLEN – THE DECISION

- *"In all matters relating to this agreement the parties will act with the utmost good faith towards one another and will act reasonably and prudently at all times."*

- English Court held that this duty was breached. Such a sale did not observe reasonable commercial standards of fair dealing. It did not observe faithfulness to the agreed common purpose and it was inconsistent with the justified expectation of the developer to take the promotion of the land to a conclusion and obtain a fee based on the express terms of the agreement

AUDIENCE PARTICIPATION ….

- In absence of an express clause how might English and Chinese Courts have decided the claim for an injunction to restrain sale on the facts of *Berkeley v Pullen*?

- Would the sale be restrained in your jurisdiction?

LEARNING LESSONS

- Contracting parties from different legal jurisdictions may well have very different expectations/ understandings as to the role of good faith in the performance of a contract
- It is important that parties and their lawyers appreciate the legal and cultural differences that may exist between them
- The treatment of good faith differs not only between civil and common law systems. Some common law systems have embraced a wider principle of good faith, such as the US and Australia. There are also differences in treatment of good faith amongst civil systems

CONCLUSIONS

- Differences between English and Chinese contract law are likely to be over-stated, but the courts in each jurisdiction may well direct different outcomes on any given set of facts (or the same outcome by different routes).
- Both systems are grappling with inherent tensions between party autonomy and certainty, on the one hand, and fairness and collective good, on the other
- Implications for choice of law clauses in contracts and drafting substantive obligations
- If in doubt spell it out

CHANCERY BAR

CHANCERY BAR ASSOCIATION'S SHANGHAI CONFERENCE

Friday 11 May 2018
Shanghai, China

International Arbitration Under English Law and Enforcing Arbitration Awards In The English Courts

Cecilia Xu Lindsey & Timothy Harry

Outline

1. Choice of law and seat
2. Choice of arbitrators
3. Choice of tribunal (institution)
4. Further issues and the arbitral award
5. Challenge an international award in the English courts
6. Available appeal process
7. Possible difficulties in enforcing an award through the English courts

Choice of Law and Seat – Arbitration Act 1996

- Definition of "seat": judicial seat of the arbitration designated by the parties, the arbitral tribunal, or determined by the parties' agreement and all the relevant circumstances. (s.3 (a) (b) (c))

  Beijing Jianlong Heavy Industry Group v Golden Ocean Group and others [2013] EWHC 1063 (Comm)

- Mandatory provisions in the Act
- Non-mandatory provisions in the Act
- The Act empowers the English court: "*unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings* ***the same power*** *of making orders about the matters listed below as it has* ***for the purposes of and in relation to legal proceedings.***" (s.44(1))

Choice of Law and Seat – English Court

- Concern of intervention of state court
- Arbitrability of dispute (s.81(1)(a))
  (**NB**. Matters which are NOT arbitrable)
- Parties' autonomy
- Supportive measures of the English court
- London as seat set within the English legal infrastructure
- *2015 International Arbitration Survey*

Seat of Arbitration

- Stipulating the seat
- Relevant rules
- Ad hoc arbitrations
- London: one of the most preferred and widely used seats; prominence; English law
- *Sulamerica CIA Nacional De Seguros SA and others v Enesa Engenharia SA and others [2012] EWCA Civ 638,* per LJ Moore-Bick, "*the choice of seat of the arbitration "is to be determined by undertaking a three-stage enquiry into (i) express choice, (ii) implied choice and (iii) closest and most real connection. As a matter of principle, those three stages ought to be embarked on separately and in that order*" (Hallett LJ and Lord Neuberger MR agreed)

Choice of Arbitrators - Impartiality

***Blue Bank International & Trust (Barbados) v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20):**

- 1994 BIT;
- Request for and registration of arbitration;
- ICSID Convention and Arbitration Rules;
- The Claimant appointed Mr Jose Maria Alonso (a Spanish national) as arbitrator, who subsequently accepted the appointment;
- The Respondent's **challenge** of the Claimant's appointment of Mr Alonso for several reasons;

Choice of Arbitrators – Impartiality (con'd)

- Art. 57 of the ICSID Convention: "*A party may propose to a Commission or Tribunal the disqualification of any of its members on · account of any fact indicating a* ***manifest*** *lack of the qualities required by paragraph (1) of Article 14 …*";
- Art. 14(1) of the ICSID Convention: "*Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the field of law, commerce, industry or finance, who may be relied upon to exercise* ***independent judgment****. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators. "*

Choice of Tribunal (Institution)

2015 International Arbitration Survey: Improvements and Innovations in International Arbitration

Primary factors:

- Reputation
- Recognition
- Established formal legal infrastructure in the seat
- **ICC, LCIA,** HKIAC, SIAC, SCC

Choice of Tribunal (Institution) (con'd)

- The most important factors:

  "**a high level of administration**" (which relates to the proactiveness and responsiveness of the institution's staff) and

  "**neutrality/internationalism**".

- Characteristics in the individual rules:

  e.g.

  HIAC and SIAC – "simplified process" based on the quantum of dispute

  LCIA, ICC, and SCC – "expedited" process

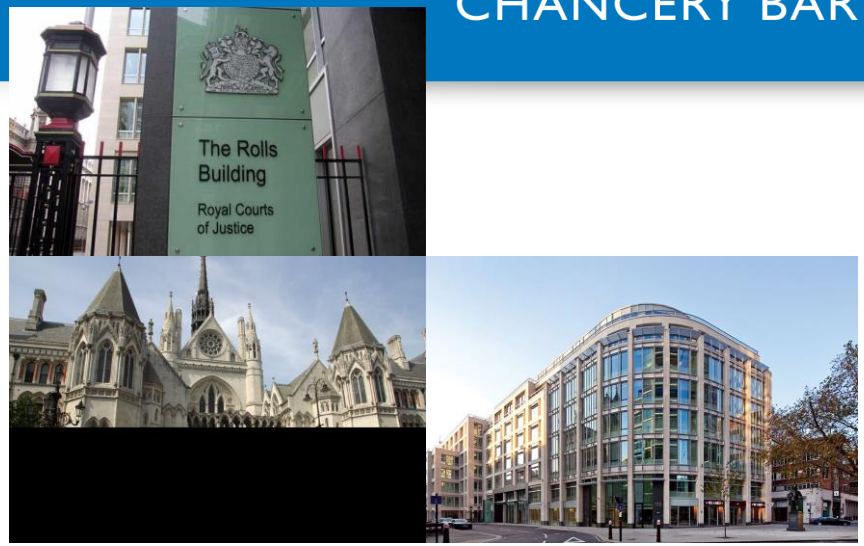
Further Issues

- Institutional rules
- UNCITRAL Model Law
- Parties choose the **law** and procedures via independent **seat** of arbitration conducted by neutral **arbitrators** of neutral and international **institutions**
- New York Convention – **signatory state?** England will give full enforcement proceedings in local courts as a court order; but will other jurisdictions?
- State laws vary
- Further issue: recognition and enforcement of the **award**

Arbitral Award

- "*Due process paranoia*"
- Scope of challenge to an award
  s.67 – substantive jurisdiction
  s.68 – serious irregularity
- Scope of judicial review of an award
  s.69 – appeal on point of law
- Refusal of recognition or enforcement s.103
  "public policy"

Challenging the Award: Serious Irregularity Section 68 of the Arbitration Act 1996



(1) A party to arbitral proceedings may ... apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award…

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-

(2) Serious irregularity … which the court considers has caused or will cause substantial injustice to the applicant-

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers;

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may-

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

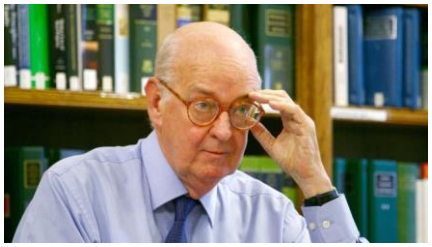
(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

(4) The leave of the court is required for any appeal from a decision of the court under this section

Generally

Lord Steyn in *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221 at [31]



"This is a mandatory provision. The policy in favour of party autonomy does not permit derogation from the provisions of section 68. **First**, intervention under section 68 is only permissible after an award has been made. **Secondly**, the requirement is a serious irregularity ... plainly a high threshold must be satisfied. **Thirdly**, it must be established that the irregularity caused or will cause substantial injustice to the applicant. This is designed to eliminate technical and unmeritorious challenges. **Fourthly**, the irregularity must fall within the closed list of categories set out in paragraphs (a) to (i)."

S68 (serious irregularity) does not permit a challenge to an award on the ground that the tribunal arrived at a wrong conclusion as a matter of law or fact. It is not like an appeal in that regard. It is concerned with cases where there has been serious irregularity affecting the tribunal, the proceedings or the award, which has caused substantial injustice.

Fraud

Mr. Justice Blair in *Double K Oil Products v Nestle Oil* [2009] EWHC 3380 (Comm)

"In accordance with the high threshold applicable to s.68 Arbitration Act 1996, it is not enough … to show that one party inadvertently misled the other, however carelessly. It will normally be necessary to satisfy the court that some form of reprehensible or unconscionable conduct has contributed in a substantial way to the obtaining of the award. A challenge to an award cannot, therefore, be made on the grounds of an innocent failure to give proper disclosure. Where, as in the present case, the allegation is fraud in the production of evidence, the onus is on the applicant to make good the allegation by cogent evidence. The applicant must show that the new evidence relied upon to demonstrate the fraud was not available at the time of the arbitration and would have had an important influence on the result. The latter point (important influence on the result) take effect within the statutory requirement that the irregularity has caused or will cause or will cause substantial injustice to the applicant".

Appeal on Point of Law
S69 of the Arbitration Act 1996

(1) An appeal shall not be brought under this section except-

- (a) With the agreement of all the other parties to the proceedings, or
- (b) With the leave of the court

(2) Leave to appeal shall be given only if the court is satisfied

- (a) That the determination of the question will substantially affect the rights of one or more of the parties
- (b) That the question is one which the tribunal was asked to determine
- (c) That, on the basis of the findings of fact in the award
  - (i) The decision of the tribunal on the question is obviously wrong, or
  - (ii) The question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
- (d) That, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in al the circumstances for the court to determine the question.

Recognition and Enforcement of Awards
S101 of the Arbitration Act 1996

(1) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

(2) Where leave is so given, judgment may be entered in terms of the award.

Refusal of Recognition or Enforcement
S103 of the Arbitration Act 1996

(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves-

(a) That a party to the arbitration agreement was (under the law applicable to him) under some incapacity;

(b) that the arbitration agreement was not valid under the law to which the parties subjected it or… under the law of the country where the award was made;

(c) That he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(d) That the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;

(e) That the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;

(f) That the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made

(3) Recognition or enforcement of the award may also be refused if … it would be contrary to public policy to recognize or enforce the award.

Public Policy

(1) An “unruly horse”.

(2) The public policy is that applicable in England and includes illegality.

(3) Sir John Donaldson in *Deutsche Schchtbau- und Tiefbohrgesellschaft mbH v. Ras Al-Khaimah National Oil Co* [1990] 1 AC 295, 316: “considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Burrough J [in 1824] remarked… “it is never [usually] argued at all, but when other points fail”…it has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised”.

Q&A

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The Chancery Bar Association's SHANGHAI CONFERENCE 2018

Afternoon Refreshment Break

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The incorporation of the English doctrine of fiduciaries into Chinese law

By John McGhee QC

Duties of fiduciaries

- Duty to act within the scope of their powers
- Duty to act in the best interests of the beneficiaries
- No conflict duty
- No profit duty
- Duty of care and skill

Trust Law article 25

The trustee shall abide by the provisions in the trust documents and handle trust business for the best interests of the beneficiary.

In administering the trust property, the trustee shall be careful in performing his duties and fulfil his obligations with honesty, good faith, prudence and efficiency.

第二十五条　受托人应当遵守信托文件的规定，为受益人的最大利益处理信托事务。

受托人管理信托财产，必须恪尽职守，履行诚实、信用、谨慎、有效管理的义务。

Trust Law article 22

Where the trustee disposes of the trust property in breach of the purposes of the trust, or causes losses to the trust property … the settlor shall have the right to apply to the People's Court for annulling such disposition and the right to ask the trustee to restore the property to its former state or make compensation.

Where a transferee of the said trust property accepts the property whilst knowing the violation of the purposes of the trust, he shall return the property or make compensation.

第二十二条　受托人违反信托目的处分信托财产或者因违背管理职责、处理信托事务不当致使信托财产受到损失的，委托人有权申请人民法院撤销该处分行为，并有权要求受托人恢复信托财产的原状或者予以赔偿；该信托财产的受让人明知是违反信托目的而接受该财产的，应当予以返还或者予以赔偿。

Trust Law article 26

Except obtaining remuneration according the provisions of this Law, the trustee may not seek interests for himself by using the trust property.

Where the trustee, in violation of the provisions of the preceding paragraph, seeks interests for himself by using the trust property, the interests gained therefrom shall be integrated into the trust property.

第二十六条　受托人除依照本法规定取得报酬外，不得利用信托财产为自己谋取利益。

受托人违反前款规定，利用信托财产为自己谋取利益的，所得利益归入信托财产。

Trust Law article 27

The trustee may not convert the trust property into his own property.

Where the trustee converts the trust property into his own property, he shall restore the trust property into its former state; where losses are caused to the trust property, he shall bear the responsibility to pay compensation.

第二十七条　受托人不得将信托财产转为其固有财产。

受托人将信托财产转为其固有财产的，必须恢复该信托财产的原状；造成信托财产损失的，应当承担赔偿责任。

Trust Law article 28

The trustee may not conduct inter transaction between his own property and trust assets or between the trust assets of different settlors, unless it is otherwise stipulated in the trust documents or is consented by the settlors or beneficiary and the inter transaction is conducted at fair market price.

Where the trustee in violation of the provisions in the preceding paragraph, causes losses to the trust property, he shall bear the responsibility to pay compensation.

第二十八条　受托人不得将其固有财产与信托财产进行交易或者将不同委托人的信托财产进行相互交易，但信托文件另有规定或者经委托人或者受益人同意，并以公平的市场价格进行交易的除外。

受托人违反前款规定，造成信托财产损失的，应当承担赔偿责任。

Company Law article 147

Directors, supervisors and senior officers shall abide by laws, administrative regulations and the articles of association of the company, and have a fiduciary obligation and obligations of diligence to the company.

Directors, supervisors and senior officers may not take advantage of their positions and powers to collect or accept bribes or other illegal income, and may not encroach upon the property of the company.

第一百四十七条 董事、监事、高级管理人员应当遵守法律、行政法规和公司章程，对公司负有忠实义务和勤勉义务。

董事、监事、高级管理人员不得利用职权收受贿赂或者其他非法收入，不得侵占公司的财产。

Company Law article 148(I) & (II)

Directors and senior officers may not have the following acts:

(I) misappropriate the funds of the company;

(II) deposit the funds of the company in an account opened in his personal name or in the name of another individual;

第一百四十八条 董事、高级管理人员不得有下列行为:

(一)挪用公司资金;

(二)将公司资金以其个人名义或者以其他个人名义开立账户存储;

Company Law article 148(III) & (IV)

(III) in violation of the articles of association of the company, lend the funds of the company to other persons or use the property of the company to provide security for other persons without the consent of the board of shareholders, general meeting or the board of directors;

(IV) enter into a contract or transaction with the company in violation of the articles of association of the company or without the consent of the board of shareholders or general meeting;

(三)违反公司章程的规定，未经股东会、股东大会或者董事会同意，将公司资金借贷给他人或者以公司财产为他人提供担保；

(四)违反公司章程的规定或者未经股东会、股东大会同意，与本公司订立合同或者进行交易；

Company Law article 148(V) & (VI)

(V) take advantage of the convenience of his position to seek for himself or other persons commercial opportunities that belong to the company or to operate by himself or for another person the same type of business as that of his company without the consent of the board or shareholders or general meeting;

(VI) accept as his own the commissions of a transaction between another person and the company;

(五)未经股东会或者股东大会同意，利用职务便利为自己或者他人谋取属于公司的商业机会，自营或者为他人经营与所任职公司同类的业务；

(六)接受他人与公司交易的佣金归为己有；

Company Law article 148(VII) & (VIII)

(VII) disclose the secrets of the company without authorisation;

(VIII) other acts that violate his fiduciary obligation to the company.

The income derived by a director or senior officers from violating the provisions of the preceding paragraph shall belong to the company.

(七)擅自披露公司秘密;

(八)违反对公司忠实义务的其他行为。

董事、高级管理人员违反前款规定所得的收入应当归公司所有。

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Company/Insolvency Panel

Michael Todd QC, Erskine Chambers
Ben Shaw, Erskine Chambers
Bhavesh Patel, Travers Thorp Alberga
Oliver Phillips, Maitland Chambers

CHANCERY BAR

The Use of Schemes for both Solvent and Insolvent Restructurings

Michael Todd QC & Ben Shaw
Erskine Chambers

The Use of Schemes for both Solvent and Insolvent Restructurings

- The ability, under English law, of companies to reorganise their relationships with their members / shareholders and their creditors has been an important feature of company law for over a century.
- It is that feature which has attracted companies established in other jurisdictions to seek assistance from the English Courts to utilise the statutory process designed to facilitate such reorganisations.

Relationship between a Company and its Members

The relationship between a company and its members, at least in relation to the membership rights and obligations between them are

- are largely governed by a contract between them
- found in the company's Articles of Association, or Bye-laws
- in the nature of a statutory contract.

Relationship between a Company and its Creditors

- Similarly, the relationship between a company and its creditors, often, but not always, is governed by a contract between them.

Variations of the Contract

- As a matter of law, a contract may only be varied with the approval of each of the parties to it.
- An overlay of both statute law and common law, at least in relation to members, regulates further those relationships.

Members

The statutory contract of membership, may be varied in accordance with the statute.

- The Companies Acts provide a mechanism for the variation of that contract.
- Under English law, by Special Resolution
  - A Special Resolution is a resolution passed by a majority of not less than 75%
  - The passing of such a Resolution is itself, however, subject to constraints imposed by the common law
- Those constraints relate, largely, as to the purposes for which such a Resolution may be passed and where members are to be treated differently

Creditors

- Contracts with creditors are rarely in the nature of a statutory contract.

The need for the Statutory Process

- Generally, a variation in the relationship between the parties to a contract requires the consent of each of them.
- The statutory process enables such a variation to be effected of the rights of a class of persons with similar rights without that unanimous consent.
- The process applies equally to creditors of a company whose claims are not based in contract.

To which Transactions with members may the Process be applied

The Process is most often used to implement

- a takeover of a company
- a demerger from a company
- the insertion of a new holding company above a company
- a group reorganisation
- a take private of a company
- the removal of minority shareholders (without conferring upon them appraisal rights)

To which Transactions with creditors may the Process be applied

The Process is most often used to implement arrangements to avoid a liquidation of a debtor company

- a moratorium, deferring the date for satisfaction of creditors
- a compromise
    - reducing the amount payable by a company to its creditors
    - varying the nature and substance of creditors' entitlements against a company
    - a determination of the claims of creditor
    - a transfer of assets of a debtor company to a new company
    - a transfer and consolidation of assets of a debtor company and consolidation of those assets with those of another company or companies

What is the feature common to all such Transactions

The feature of all such schemes is that they involve a compromise or arrangement between a company and

- its creditors
  - or class of creditors or
- its members
  - or class of members

Compromise or Arrangement

In determining whether there is a compromise or arrangement within the contemplation of the statute the court

- requires that there should be some element of give and take by the company and those persons with whom the scheme is proposed
- will have regard not only the benefits which the members or creditors will receive from the company but all those which will be received taking the transaction of which the scheme forms part as a whole

Classes of Members and Creditors

- Similar considerations apply when he court has to determine whether the persons with whom the Scheme is to be effected have rights sufficiently similar so as to enable them to form one or more classes for the purpose of voting to approve the scheme

The Requirements of the Process

In place of such unanimity, the statutory process requires:

- approval by a specified majority of the class, that is 75% of those members of the class who vote on the proposal and
- the approval of the court.

The process is court controlled from beginning to end

Jurisdiction in relation to Foreign Companies

The courts of a particular country may entitle a company not established in that jurisdiction to take the benefit of the statutory process in that jurisdiction

- The courts in England & Wales have power to sanction a scheme between a company and its creditors if those courts have jurisdiction to wind up that company
  - Such a company has to show sufficient connection with the jurisdiction
- A country's laws may permit a company to redomicile / relocate to that country so as to enable that company to take the benefit of the statutory processes and to promote a scheme between it and its members or creditors
  - By way of example, the laws of the Cayman Islands permit such redomiciliation

The Benefits of the Process

Binding nature

- If approved the scheme and its terms are binding on all members or creditors as the case maybe
    - who are members of the class(es) concerned
    - whether or not the voted on the scheme and
    - whether or not they voted to approve it

The Benefits of the Process

Certainty

- The Scheme Process through the court takes about 10 weeks
- There is no residuary litigation to be determined by the court
- There are no appraisal rights for dissenters
- There is no prospect of a dissenter obtaining more than is on offer by the company
- The court's Order sanctioning the Scheme will not be set aside in the absence of fraud

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Offshore Fair Value Petitons

Bhavesh Patel, Travers Thorp Alberga

CHANCERY BAR

Cross-Border Company Liquidations

Oliver Phillips
Maitland Chambers

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Overview

- When will courts in common law jurisdictions wind up companies incorporated in another jurisdiction?
- What recognition and assistance will courts in common law jurisdictions grant to liquidators of companies appointed in jurisdictions other than the company's seat of incorporation?
- Where we are now with the concept of 'modified universalism' in common law insolvency proceedings?

Universalism and territorialism

"Universalism aims to provide a single forum applying a single legal regime to administer the debtor's assets and liabilities on a worldwide basis.

In contrast, territorialism envisages that insolvency proceedings within a jurisdiction have effect only within that jurisdiction. In other words, local assets are meant for local creditors"

(Ramesh J (Singapore), speaking extra-judicially)

Modified universalism

> Local courts should, so far as is consistent with justice and local public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution

paraphrasing Lord Hoffmann,

In re HIH Casualty and General Insurance [2008] 1 WLR 852 (HL)

The English retreat? (1)

High point of modified universalism:

- Privy Council decision in "Cambridge Gas" [2007] 1 AC 508
- House of Lords decision, *In re HIH Casualty and General Insurance* [2008] 1 WLR 852

In HIH, Lord Hoffmann describes modified universalism as the "golden thread running through English cross-border insolvency law since the 18th century"

The English retreat (2)

But Supreme Court and Privy Council then appear to limit the extent to which modified universalism can be relied on at common law:

- *Rubin v Eurofinance SA* [2013] 1 AC 236 (SC)
- *Singularis Holdings Ltd v PriceWaterhouseCoopers* [2015] AC 1675 (PC)

Jurisdiction to wind up foreign companies

Three “core requirements”:

- Must be a “sufficient connection” with the jurisdiction—but this does not necessarily require assets within the jurisdiction
- Must be a reasonable possibility that the winding-up order will benefit those applying for it
- Court must be able to exercise jurisdiction over one or more persons in the distribution of the company’s assets

"Sufficient connection": *Yung Kee Holdings Ltd*

Re Yung Kee Holdings Ltd, Kam v Kam (2015) 18 HKCFAR 501

- What is a "sufficient connection"?
- Test is highly flexible and fact-specific
- Can be "sufficient connection" where
  - company has no assets within the jurisdiction;
  - indirectly held subsidiaries carry on business within the jurisdiction;
  - and all shareholders and directors are in the jurisdiction.

Impact of *Yung Kee* in HKSAR

Courts of HKSAR are increasingly willing to assert jurisdiction to wind up foreign companies, following *Yung Kee Holdings Ltd*

- *Re Great Choice Consultants Ltd*, 2016 (CA)
- *Re Shandong Chenming Paper Holdings Ltd*, 2017 (CFI)—where the company was incorporated in PRC
- *Re China Medical Technologies Inc.*, 2018 (CA)—court suggests that the three "core requirements" are not requirements at all!

Assisting foreign liquidators

Do common law courts have jurisdiction to assist liquidators where the liquidation is proceeding in a jurisdiction other than where the company is incorporated?

Question not directly addressed in England, but doubted by Millett J in *Re International Tin Council* [1987] Ch 419

Millett J in *Re International Tin Council*

"Although a winding up in the country of incorporation will normally be given extra-territorial effect, a winding up elsewhere has only local operation"

Assistance in Bermuda

Re Dickson Group Holdings Ltd [2008] SC (Bda) 37 Com

- Bermudan company with business in PRC and HKSAR
- Put into liquidation in HKSAR
- Court says it undoubtedly possesses a discretionary jurisdiction to recognise foreign primary insolvency proceedings re a local company, though the conditions governing the exercise of the discretion are not clear
- Company's COMI relevant to discretion

Assistance in Cayman Islands

Re Fu Ji Food and Catering Services Holdings Ltd, 2010

- Cayman holding company, with substantial PRC business, and registered in HKSAR
- Put into liquidation in HKSAR
- Court accepts that the company has a real and substantial connection to HKSAR
- Grants stay of proceedings without requiring a local liquidation

Assistance in Singapore

Re Opti-Medix Ltd [2016] SGHC 108

- BVI company with business in Japan, involving non-recourse notes governed by Singaporean law
- Put into liquidation in Japan
- Singapore said to be moving towards universalist approach
- Accepts that COMI is relevant to common law jurisdiction
- Explicitly declines to follow English decision in *Rubin*

Assistance in Cayman Islands (again)

Re China Agrotech Holdings Ltd, 2017

- Cayman company with business in HKSAR, and registered in HKSAR
- Put into liquidation in HKSAR
- Court treats Privy Council decision in *Singularis* as binding, but accepts that it should have regard to modified universalism
- Liquidators would not be recognised under private international law, but should be recognised at common law

Where are we now?

Divergence between position in England and in other common law jurisdictions:

- English courts adopting a cautious approach: extension of modified universalism is a matter for the legislature, not judges
- Other common law jurisdictions much more ready to embrace modified universalism
- But common law is flexible enough for different jurisdictions to take different approaches

A recent overview

Insolvency Lecture by the Chancellor of the English High Court (Sir Geoffrey Vos) in Singapore on 26 October 2017

- He was counsel in HIH, and appears to regret the retreat from modified universalism in *Rubin* and *Singularis*
- Uncertain what developments in the common law will be permitted over time, but will proceed incrementally: i.e. evolution, not revolution
- Emphasises importance of judicial co-operation frameworks

The Chancery Bar Association's SHANGHAI CONFERENCE 2018

Thank you for your attendance.

There will now be a rooftop reception.