A Candid(e) View on English Case Law in Times of Brexit

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In one of Voltaire's most famous tales, two characters continuously dispute their visions of the world, and whilst Pangloss is always looking for a cause for all small events fitting into a broader system, Candide, optimistic, prefers to look at how he himself can change the world not by pursuing its meaning, but with his everyday actions. That is why, at the very end, after Pangloss spends quite some time explaining his theories about the world, Candide just replies with his famous quote: "*Excellently observed,"… "but let us cultivate our garden*."

Voltaire offers a good metaphor as to how those involved with international arbitration view their world and the cases before them. Sometimes, judges and arbitrators can be more Pangloss, trying to make their decisions fit a theoretical perspective on international arbitration and sometimes more Candide, concerned with the immediate and pragmatic challenge of a dispute and not the concatenation of all events in "*the best of all worlds*".

Of course, as Candide as they can be, it is unreasonable to expect judges and arbitrators to operate in a vacuum. They are well aware of the extraordinary historical moments affecting our society and Brexit – and the attractiveness of London as a seat for international arbitration – is certainly not an exception. Curiously, a line of recent decisions handed down by the High Court and Court of Appeal in these last couple of months reveals a very interesting balance between Pangloss and Candide in favour of international arbitration.

Starting chronologically, *Halliburton* ([2018] EWCA Civ 817), in April 2018, shows the application of pro-international standards of disclosure to be provided by arbitrators aimed at protecting an award under an objective approach to the duty to disclose. Indeed, a certain pragmatism, particularly attractive in international arbitration, is put forward as the Court of Appeal contends that non-disclosure of a potential issue conflict in a case of overlapping appointments is not, *per se,* a ground for justifiable doubt as to an arbitrator's impartiality. Instead, not only must specific circumstances be present to challenge the impartiality and independence of the arbitrator, but the duty to disclose must be determined by the arbitrator on the basis of present facts and knowledge, and not with the benefit of hindsight.

This pragmatic and contextual view of English courts, looking at each concrete situation without the concern of deductively applying general standards, is allied to the commercial and business-oriented focus of English judges in international arbitration cases, as we can see in *Dreymoor* ([2018] EWHC 909 (Comm)).

In *Dreymoor* the High Court demonstrated this perspective in relation to the extension of an arbitration clause in a group of contracts. In his decision, which considered a group of contracts which contained both ICC and LCIA clauses, expressing that the arbitration shall be seated in London, Butcher J. looked at the centre of gravity of the group of contracts and discussed how reasonable business-orientated people negotiating these commercial agreements would have decided to protect the arbitration in a sensible way: the commercial approach is balanced with flexibility and efficiency.

This is illustrated further in the *Perkins* decision ([2018] EWHC 1500) (Comm), handed down in June 2018 where Bryan J. construed the meaning of an obscure arbitration clause – providing for arbitration only if there was "*no reciprocal enforcement procedures*" between the UK and the country of the Distributor Agreement (Lebanon) – in accordance with the principles identified by Lord Hoffmann in the *Fiona Trust* case, ascertaining the *"rational commercial purpose"* or *"reasonable commercial expectation"* of *"rational businessmen*" (quoted by Bryan J at §82). It means that the interpretation of the clause must result in giving the "certainty, speed and simplicity" (at §105), three international arbitration cornerstones. In *Perkins,* the outcome was that the English Commercial Court granted an anti-suit injunction in respect of the Lebanese proceedings commenced by the Distributor in support of English arbitration.

Less than one month after *Dreymoor, Raga* ([2018] EWHC 1008 (Comm)), in May 2018, revealed another very strong pro-arbitration stance in a challenge under s.68 of the Arbitration Act 1996 ("the 1996 Act") (serious irregularity). As the ground for serious irregularity in this LCIA case was an alleged breach of the Tribunal's general duty under s.33 of the 1996 Act by the arbitrators' failure to stay the arbitration until the outcome of parallel Ukrainian court procedures, this decision also represents an interesting indication as to how the English courts could react to foreign jurisdictions during Brexit. The Court made eight observations in respect of challenges to awards based on an alleged breach of a tribunal's general duty under s. 33 of the 1996 Act, including the fact that the tribunal's conduct must be assessed as at the time of the award and not with reference to what transpired subsequently. The case also serves as a useful reinforcement of the high threshold imposed by the English court under s.68 of the 1996 Act, protecting awards from frivolous challenges.

One day after *Raga,* the English court faced another very important issue of international arbitrations. In *Atlas Power* ([2018] EWHC 1052 (Comm)), the High Court considered an anti-suit injunction to restrain one party from challenging a partial final London-seated award before the courts of Pakistan on the grounds that the Pakistani courts had jurisdiction over the arbitration.

Although the English court was faced with a very obscure dispute resolution clause, *Atlas Power* shows how English courts are still firmly wedded to the fact that a choice of London as the seat of the arbitration necessarily meant that the parties intended that proceedings on the award should be only those permitted by English law, following the reasoning in *C v D* ([2008] 1 Lloyd's Rep. 239). Even if the laws of Pakistan expressly governed the contracts in dispute, the High Court was keen to distinguish the curial law from the governing law, as the former is the only one applicable to the supporting procedures of an international arbitration.

It could be argued that *Atlas Power* is the only decision in the series of decisions discussed recently before the English courts that reinforces the supervisory power of English courts for international arbitrations seated in London, as opposed to any other choice of law; however, if it is considered from an optimistic (*rectius,* Candide) perspective, it is also the decision that not only follows a quite coherent jurisprudence, but also allows international arbitrators in London to apply any foreign law to the dispute without the risk of having any of the parties trying to create a fictitious link between that same law and its respective jurisdiction.

A further injunction request was also at the centre in the case of *Sana Hassib Sabbagh* ([2018] EWHC

1330 (Comm)), but this time requiring the respondent not to commence an arbitration in Lebanon. If *Atlas Power* shows how English courts react to foreign challenges of a London-based arbitration, in this case we can see how the English courts react to an English challenge of a foreign arbitration. Although the High Court was satisfied with the claimant's argument as to it not being bound by the articles of association containing the arbitration clause and being discussed in the Lebanese procedure, interestingly this case also shows how cautious and mindful the High Court is in granting the requested anti-arbitration injunction.

Robin Knowles J. reinforced that anti-arbitration injunctions should only be granted under exceptional circumstances and where the seat of the arbitration offers appropriate supervisory jurisdiction. The English court must be comfortable in its role of protecting parties from foreign arbitration procedures that they are not bound by and, more importantly, comfortable in doing this under foreign law: "*What matters is not which court decided them but that they are correct conclusions of Lebanese law*" (at 31). This is reassuring for party autonomy in the choice of applicable law.

The ease of the English courts in dealing with complex international disputes is reinforced in *Nori Holdings* ([2018] EWHC 1343 (Comm)) when the High Court ruled on a further case concerning anti-suit injunctions and restraining court proceedings in both Russia and Cyprus. If *Raga* and *Atlas Power* show us the reasoning of the courts concerning foreign jurisdictions, *Nori Holding* goes a step further as it considers a foreign EU jurisdiction and the Recast Regulation. In anticipation of Brexit, this is thought provoking.

It is interesting to note that the High Court remains very cautious to avoid disrespecting other jurisdictions and sticking to the *West Tankers* jurisprudence (ECJ Case C-185/07 [2009] AC 1138). What is more revealing still is that the High Court could have used the *Gazprom* (ECJ Case C-536/13) and Advocate General Wathelet's opinion – and in light of Brexit – as a safety valve to start questioning the Recast Regulation. Nevertheless, Males J., even acknowledging that possibility, preferred to give full meaning to *West Tankers* (which remains "*good law"*) and to the Brussels Regulation. The anti-suit injunction restraining the Cypriot court proceedings was then dismissed with the anti-suit restraining the Russian proceeding being granted.

Mutual respect and comity are at the centre of this judgment and, more importantly, do not seem to depend on the sole wording of the Recast Regulation or of the ECJ case law. In a scenario where the EU agreements and the ECJ jurisdiction are questioned, it is very positive that their philosophy can be applied as rule of law.

This seems to be the exact sense of *Vijay* (*[2018] EWHC* 1539 (Comm)), decided on 20 June 2018. After an ICC sole arbitrator rendered an award in Paris ordering damages against the respondent for its failures in executing a construction contract, both the claimant and respondent started a series of actions either to enforce the award in Seychelles, where the respondents' assets were, or to challenge it, respectively. It is important to note that different provisional and interim attachment measures were requested in Seychelles by the claimant, with the undertaking given being ultimately lifted in favour of the respondent.

In parallel, the claimant also requested the enforcement of the award in the UK, and a worldwide freezing order against the defendant. Although the enforcement procedure is still to be decided by the English courts later in 2018, the Mareva injunction was dismissed by Butcher J. The grounds for the decision seem to illustrate the concern of the High Court not only to identify which is the closest jurisdiction to support an international arbitration, but, more importantly, not to contradict its decision. Butcher J. saw a very limited link between the arbitration and the UK, as both parties were Seychelloises, their contract related to the construction of a hotel in Seychelles and was governed by Seychellois law. Paris was the seat of the arbitration and the assets of the respondent in the UK are

minor compared to the assets in Seychelles.

Along with the protection of the most appropriate enforcement jurisdiction, the High Court, *inter alia,* also considered that any worldwide freezing order would be contrary to the decisions already rendered by the Seychellois courts, inconsistent and "*disarharmonious*" (at 43(4)). The pursuit of "harmony" and the respect of the primary jurisdiction concerned with the enforcement of the international award show how the English courts are attentive to offer an equally harmonious arbitration seat for its cases.

In conclusion, could we say that these eight decisions supporting the international arbitration regime in a little more than two months are a coincidence? Or are they just the result of a very long tradition of international arbitration case law evolving into a very supportive jurisdiction? In one way or another, this very business-oriented, pragmatic, international and harmonious perspective in all eight cases in only two months are too much opposite to the recent political movements to be just thrown together as insignificant as a whole. Like Voltaire's Candide, I would prefer to see London as a beautiful garden for international arbitration and decisions that have been cultivating it for the best of all possible worlds.