

Kluwer Arbitration Blog

The Seat of Arbitration is Important. It's That Simple.

David Hesse (Clyde & Co.) · Sunday, June 10th, 2018 · Clyde & Co.

The seat of arbitration is a vital aspect of any arbitration proceeding. The situs is not just about where an institution is based, where hearings will be held or where there may be a good pool of arbitrators. It is also about which courts have supervisory power over your arbitration and the scope of those powers. A recent decision of the Commercial Court reminds us that although the governing law of an agreement may provide for one national law, which may follow the nationality of one or both parties, it is the seat of the arbitration which is crucial to the protection of an arbitral award and its enforceability.

Atlas Power v National Transmission

In *Atlas Power v National Transmission* Mr Justice Phillips heard an application in the Commercial Court for a final anti-suit injunction to restrain the defendant from challenging a Partial Final Award made in an LCIA arbitration. In ordering the final injunction, Phillips J confirmed that the seat of the arbitration in question was London and this entitled the claimant to permanently restrain the defendant from challenging the Final Partial Award in Lahore, Pakistan or anywhere other than England & Wales. (*Atlas Power v National Transmission* [2018] EWHC 1052 (Comm))

Background

The claimants were a group of independent power producers (IPPs) generating and supplying energy solely to the defendant, National Transmission and Despatch Company Limited (NTDC), a company registered in Pakistan and owned by the government of Pakistan. The IPPs entered into nine power purchasing agreements (PPAs) with NTDC. The PPAs were subject to Pakistani law and provided, in a somewhat complex arbitration agreement, for tiered dispute resolution by mutual discussions, expert determination and arbitration. The arbitration clause provided for Lahore, Pakistan as the situs in general, but under certain circumstances, the arbitration clause provided that the arbitration would be conducted in London, England.

A dispute arose which was determined in the IPPs' favour by expert determination. NTDC challenged the determination in the Lahore court and obtained an injunction preventing any reliance by the parties on that determination. While the expert's determination had been pending, the IPPs had commenced nine LCIA arbitrations in London (which had been subsequently stayed with the agreement of the LCIA and NTDC, pending the outcome of the expert determination). Following the expert determination (and NTDC's challenge to the result), the stay on the arbitrations was lifted at the request of the IPPs.

The LCIA Court determined under LCIA Rule 16.1 that the seat of the arbitration should be London and a sole arbitrator was appointed.

NTDC subsequently applied for the arbitration to be stayed on grounds that the seat of the arbitration was Lahore, not London and that the Lahore injunction prevented the arbitration from proceeding.

Various proceedings took place in the courts in Lahore and the arbitration in London, including, a declaration from the arbitrator that the correct seat was London, following the NTDC application. The arbitrator issued a Partial Final Award finding in the IPPs favour finding that the expert's determination was final and binding. NTDC challenged the award under s68 Arbitration Act but discontinued the proceedings.

Commercial Court proceedings

The IPPs came before the Commercial Court in December 2017 (judgment handed down 4 May 2018) seeking an anti-suit injunction from the English Court restraining NTDC from challenging the Partial Final Award in Lahore or anywhere other than England & Wales.

In the Commercial Court NTDC argued (having eventually agreed that London was the seat of the arbitration) that the present case could be distinguished from the Court of Appeal decision in *C v D* on which the IPPs relied. In *C v D* the Court of Appeal held that having chosen London as the seat of arbitration, the parties must be taken to have agreed that proceedings on the award should only be those permitted by English law. NTDC submitted that as the governing law of the PPAs and the arbitration agreement was the law of Pakistan so the provisions as to the choice of seat and the intended effect of such a choice must be determined as a matter of Pakistan law. As such, that a contract between Pakistani parties governed by the law of Pakistan cannot exclude the supervisory jurisdiction of the Pakistan courts. (*C v D* [2008] 1 Lloyd's Rep 239)

The judgment

Phillips J found in the IPP's favour on the "entirely straightforward basis that the seat of the Arbitration is London" and restrained NTDC on a permanent basis from challenging the Partial Final Award in Lahore or anywhere other than England & Wales.

In reaching this decision, Phillips J considered:

- Where the seat of the arbitration is in England & Wales, Part I of the Arbitration Act 1996 apply including the provisions in s67 and s68 relating to challenging an award on the basis of jurisdiction or serious irregularity
- The seat therefore determines the curial law of the arbitration
- Numerous authorities establish that the courts of this jurisdiction, England & Wales, regard the choice of seat of an arbitration as akin to an exclusive jurisdiction clause
- The Court of Appeal in *C v D* made it clear that by choosing London as a seat the parties intended that proceedings on the award should only be those permitted by English law regardless of the governing law of the arbitration

He further noted that in *C v D*, one of the reasons Longmore J regarded the seat as necessarily giving rise to exclusive supervisory jurisdiction was that the alternative would be a highly unsatisfactory position in which multiple jurisdictions could hear challenges to an award. This

must surely be correct as the alternative leaves the potential for potentially conflicting decisions and undermines the finality of the arbitral process.

The case adds to the increasing volume of jurisprudence in England & Wales in support of and giving effect to parties' choices in respect of arbitration provisions. The choice of seat is a vital consideration when contracting and should never be relegated to 'just another detail' of a dispute resolution clause.

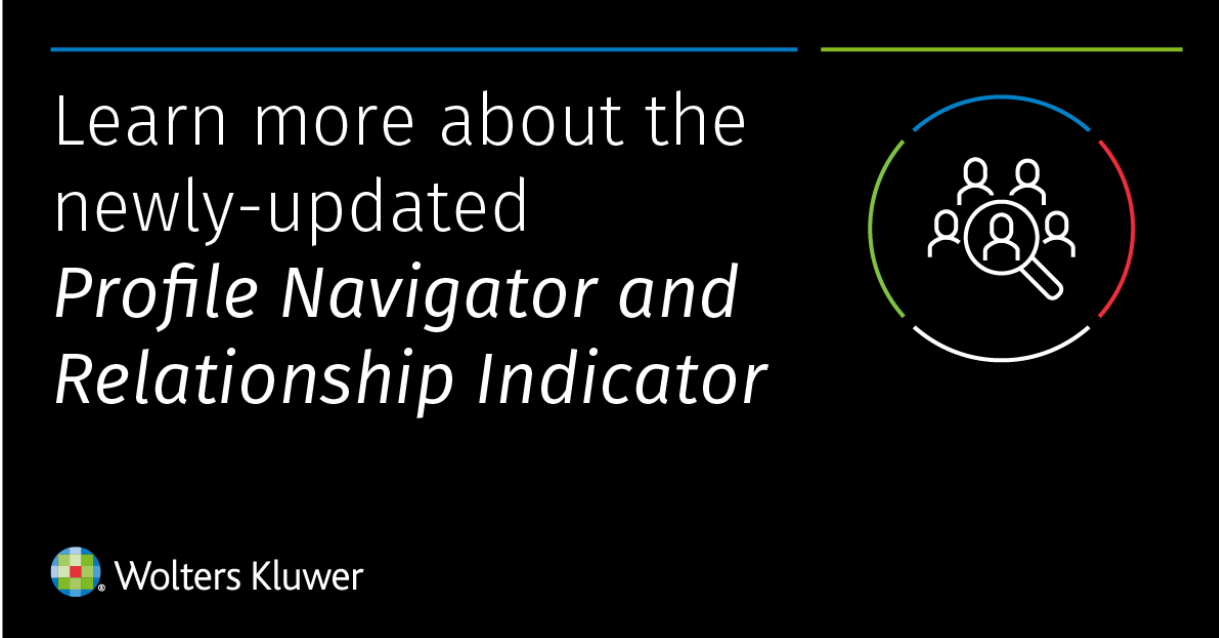
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