The fragmentation of commercial disputes: the challenges for the courts and arbitration

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David Foxton (Judge of the Commercial Court)

1. Good morning. It is a great privilege and pleasure to give the opening speech at this IBA Arbitration Day conference. I am conscious that speeches by judges and ex-judges on such occasions can involve the courts telling the international arbitration how much it is doing for them.[1] Or, sometimes, the international arbitration community telling the courts how much it has to learn from them. In discharge of my own s.33 duty of fairness and impartiality, my subject over the next 20 minutes is a challenge which both commercial courts and the international arbitration communities face, and which I hope we can tackle together. That challenge arises from the attempts to accommodate increasingly complex commercial disputes in an essentially bilateral model of forum choice.

2. While there remain some commercial disputes which are a straightforward battle between A and B about the performance of a single contract, we more often encounter disputes which must be mapped on a complex nodal diagram rather than by drawing a straight line. We may have a chain of transactions, with allegations about the same goods or services being passed up and down the chain. Or a commercial party may want to bring a claim under a contract, but if it fails, sue an adviser who acted for them in entering into the transaction on the basis that the contract does not do what it was meant to do. A complex project may involve multiple contracts between the same parties – for instance contracts for supply, installation, maintenance and guarantee – which make different provision for dispute determination. Or those contracts may be between different corporate persons in the same economic units. For example. where vertically integrated enterprises are conducted by corporate groups – or, in ICC terms, a "groups of companies"[2] – in which companies within the same group contract with each other, and this becomes relevant to who has ended up out of pocket when a contract goes wrong.

3. Now, if I may be forgiven a brief moment of reflected pride, in broad terms courts generally deal well with the implications of complex commercial disputes. We have a broad range of grounds for joining parties into cases, most obviously the "necessary or proper party" gateway, and allied gateways for crossclaims and related claims.[3] I am conscious that these can be abused, when a rather shallowly rooted anchor

[1] E.g. Speech by Mr Justice Foxton: Arbitration and the Rule of Law - the Role of the Court - Courts and Tribunals Judiciary

[2] After *Dow Chemical France v. Isover Saint Gobain* ICC Case No. 4131, Interim Award of 23 September 1982. Published in 110 Journal du Droit International (Clunet) 1983, pp. 899/905, with note Y.Derains, pp. 905/907 (Arbitrators: Professor Pieter Sanders (President), Professor Berthold Goldman and Professor Michael Vasseur) See also, ICC Cases No's. 4972, 5730, 5721 and 6519. For "my part in [its] downfall" see *Peterson Farms Inc v C&M Farming Limited* [2002] EWHC 121 (Comm).

[3] Practice Direction 6B paras. 3.1(3)-(4A).

defendant is used to halt and turn the course of a large litigation vessel. But there are tools to address this concern, particularly when the anchor defendant is willing to undertake to join in proceedings elsewhere – as for example the Supreme Court decision in *Vedanta v Lungowe*.[4] We have not simply the various estoppel doctrines to prevent re-litigation, but the ability and through the concept of privies in interest and abuse of process to extend the reach of determinations beyond the immediate parties to them.[5] And we have well developed *lis alibi pendens* and case management stay jurisdictions[6] to manage the interaction of proceedings before different courts.

4. Where courts run into difficulty is where individual pairs of parties in a wider dispute have agreed that some disputes between them will be resolved in a particular way, and it is not possible for all the disputes between all the parties to be resolved in the same way. Where the agreement is for the dispute to be determined by a particular court, the English court has some flexibility. Even when the court in question is the English court, the English court will not invariably specifically enforce the agreement, sometimes leaving the disappointed party to its remedy in damages. The House of Lords famously did this in *Donohue v Armco Inc*, [7] although it is fair to say that in the contest of Latin maxims, *pacta sunt servanda* has tended to out-box *forum non conveniens* of late. Where the agreement in question is for the jurisdiction of a foreign court, and the English court has refused to stay proceedings which have been brought in breach of an exclusive jurisdiction clause, it has even left over the question of whether a claim for damages for breach of the agreement can be brought.[8]

5. One of the English court's most useful mechanisms for addressing complex claims between the same parties is the broad principle of construction of forum selection clauses, or of "one stop adjudication".[9] Even where there is more than one agreement between the parties in relation to the same commercial transaction, there can be scope for reading a forum selection agreement in one contract as extending to disputes arising under another contract which is silent on this issue.[10] Where, however, there are different forum selection clauses in different contracts, this benevolent principle of construction is not available.[11]

6. The courts have traditionally had the most limited manoeuvring room in trying to avoid the fragmentation of a complex and interconnected dispute when two of the parties have agreed that part of the dispute will be arbitrated. The obligation to stay under Article II(3) of the New York Convention 1958 and s.9 of the Arbitration Act 1996 is compulsory, not discretionary, and appears to offer limited scope for a holistic

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[4] *Vedante v Lungowe* [2019] UKSC 20.
[5] For a general survey see *PJSC National Bank Trust v Mints* [2022] EWHC 871 (Comm).
[6] See e.g. *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173.
[7] *Donohue v Armco Inc* [2001] UKHL 64.
[8] *Banco* de Honduras v East West Insurance Co [1996] 1 LRLR 74, 84-85*; Svendborg v Wansa* [1996] 2 Lloyd's Rep 559, 574.
[9] *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] Bus LR 1719.
[10] See the summary of the principles applicable to the so-called "extended *Fiona Trust*" principle in *Mustill & Boyd: Commercial and Investor State Arbitration* (3rd), [3.13.8].
[11] *BNP Paribas SA v Trattamentio Rifiuti Metropolitani SpA* [2019] EWCA Civ 768, [2019] 2 Lloyd's Rep 1, [68].

approach to dispute management. However, there has been significant developments in this respect in two decisions of the Privy Council and the Supreme Court handed down on the same day: *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Co*[12] and *Mozambique Privinvest Shipbuilding SAL (Holding)*.[13]

7. The first involves the interpretation of "a matter in respect of which the parties have made" an arbitration agreement (for the purposes of Article II of the New York Convention). The court is to apply a two-stage test of determining (i) the matters which the parties have raised or foreseeably will raise in court proceedings, and (ii) whether they fall within the scope of the arbitration agreement. The court will focus upon "the substance of the dispute", and the "matter" must be "a substantial issue" which is "legally relevant to a claim or defence, or foreseeable defence" and is susceptible to determination "as a discrete dispute". It must be an essential element of the claim or defence, and not simply a "mere issue or question" that might fall for decision. Identification of a "matter" requires judgement and common sense, and must be considered in "the context in which the matter arises in the legal proceedings". This interpretative approach considerably reduces attempts to fragment proceedings which only incidentally or collaterally raise an issue impacting on a contract containing an arbitration agreement.

8. The second is much more controversial – the suggestion that court should consider a party's motive in seeking a s.9 stay, and refuse a stay where there is no "real or proper purpose" in seeking it. While there was a tentative suggestion to this effect in a prior first instance judgment,[14] the existence of such a principle is difficult to reconcile with the terms of Article II(3) of s.9. In *Sodzawiczny v Smith*,[15] I observed:

> "This represents a significant and, it is respectfully suggested, controversial development in English arbitration law. The courts have yet to have the opportunity to explore its full ramifications, including the legal basis for such a principle (whether a rule of court process, an implied term of the arbitration agreement or some other basis) and the precise circumstances in which it can avail a court claimant".

9. The concern in these cases was the idea of a subsidiary arbitration running alongside the main court proceedings between the same parties, with the response to that concern taking the form of holding that there is no entitlement to a s.9 stay. However, there are many cases in which there are substantial issues between the same or different parties, some subject to arbitration agreements, and some not. Here, the response to the problems of multi-party litigation can be halting the court proceedings, through the courts power to order a stay under its inherent jurisdiction. In the

[12] *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corp* [2023] UKPC 33.
[13] *Mozambique Privinvest Shipbuilding SAL (Holding)* [2023] UKSC 32. On both decisions see Paul S Davies and David Foxton, "Arbitration Matters in the Privy Council and the Supreme Court" (2024] LQR 337.
[14] *Lombard North Central Plc v GATX Corp* [2012] EWHC 1067 (Comm).
[15] *Sodzawiczny v Smith* [2024] EWHC 231 (Comm), [61].

Singapore Court of Appeal decision in *Tomolugen Holdings Ltd v Silica Investors Ltd,*[16] Menon CJ held that:[17]

> "The court must in every case aim to strike a balance between three higher-order concerns that may pull in different considerations: first, a plaintiffs right to choose whom he wants to sue and where; second, the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and third, the court's inherent power to manage its process to prevent an abuse of process and ensure the efficient and fair resolution of disputes. The balance that is struck must ultimately serve the ends of justice."

10. The English courts have been somewhat cautious about stays under the inherent jurisdiction, there being authority suggesting that a stay of proceedings should only be granted in "rare and compelling circumstances".[18] However, more recently in *Athena Capital Fund SICAV-FIS SCA v Secretariat of State for the Holy See*,[19] the Court of Appeal stated that while it is likely to be "only in rare and compelling cases that it will be in the interests of justice to grant a stay on case management grounds in order to await the outcome of proceedings abroad", given that "the usual function of a court is to decide cases and not to decline to do so", the single test is whether in the particular circumstances it is in the interests of justice for a case management stay to be granted.

11. In *FamilyMart*, Lord Hodge also expressly cast doubt on earlier pronouncements to the effect that the inherent jurisdiction would only be used in "rare and compelling circumstances".[20]

12. Unlike the s.9 stay, the inherent jurisdiction stay can be granted on terms. These might include terms requiring a party seeking the stay to undertake the pursue the arbitration expeditiously, or even to offer to include another party from the litigation within the arbitration, either on the basis of an institutional rule allowing for some form of forced joinder, or as an "ad hoc" offer. Or the court might ask the party seeking to stay to undertake not to re-litigate a point it if lost in the arbitration against a non-arbitrating party, even if the doctrine of issue estoppel or abuse of process would not otherwise be engaged. It is possible to find cases treating the presence or absence of such an offer as relevant when considering whether or not to grant a stay under the inherent jurisdiction[21] albeit some decisions do not accord it much weight.[22] In *Tomolugen,* the Singapore Court of Appeal went so far as to suggest that if a defendant who obtains a

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[16] *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57
[17] Ibid, [188],
[18] *Reichhold Norway ASA v Goldman Sachs Internationa*l [2000] 1 WLR 173, 186*; Konkola Copper Mines plc v Coromin* [2006] EWCA Civ 5, [2006] 1 All ER (Comm) 437, [63].
[19] *Athena Capital Fund SICAV-FIS SCA v Secretariat of State for the Holy See* [2022] EWCA Civ 1051, [2022] 4 WLR 4570, 59].
[20] *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corp* [2023] UKPC 33, [102].
[21] *Stemcor UK Ltd v Global Steel Holdings Ltd* [2015] EWHC 363 (Comm), [2015]1 Lloyd's Rep. 580, [46]; *Alfred McAlpine Construction Ltd v Unex Corp* (1994) 70 BLR 26; *Roche Products Ltd v. Freeman Process Systems Ltd* (1996) 80 Build LR 102.
[22] *Classic Maritime Inc v Lion Diversified Holdings Bhd* [2009] EWHC 1142 (Comm), [2010] 1 Lloyd's Rep 59, [24]; *Deutsche Bank AG v Tongkah Harbour Public Company Limited* [2011] EWHC 2251 (Comm), [2012] 1 All E.R. (Comm) 194, [30].

case management stay is offered the opportunity to join in the arbitration but does not do so, they may be precluded from challenging any findings made in the arbitration when the court proceedings resume.[23]

13. So how can the arbitration community help? There are a number of measures it might take.

14. First, more extensive powers of consolidation of disputes in separate arbitrations, and a greater readiness to exercise them. Consolidation provisions have become more common and extensive in sets of arbitration rules.[24] As you know, in England and Wales, there is no court power to order consolidation or concurrent hearings.[25] The DAC rejected the suggestion that the court should be given such a power, or that it should be made a default power of the arbitral tribunal, on the basis that it would "amount to a negation of the principle of party autonomy" and that the problem was "best solved by obtaining the agreement of the parties."[26] Such a power is frequently conferred on tribunals by particular sets of arbitration rules: for example. Article 22A of the LCIA Rules; Article 10 of the ICC Rules and the powers of consolidation of the SIAC Court and the arbitral tribunal under Article 8 of the SIAC Rules.

15. However, none of these rules confer a power of forced "cross-institutional" consolidation or concurrency. There are many complex disputes where the parties may have agreed to arbitrations on the rules of different institutions, as between different parties or as between different types of claims. The SIAC have proposed a protocol for cross-institutional consolidation. This remains a work in progress, but it would be very good to see the major arbitration institutions rise to the challenge.

16. A major stumbling block on intra-institutional and inter-institutional consolidation in arbitration is one of the sacred cows of international arbitration, the idea that arbitrating parties have a legitimate entitlement to choose some or all of the members of their tribunal. The proposal that the major arbitration institutions should remove the right of party-appointment altogether has a number of notable proponents, including Chief Justice Menon,[27] Tony Landau KC[28] and Professor Jan Paulsson,[29] and, of rather less import, me.[30]

17. Second, there is the possibility of the arbitration agreement, or institutional rules, allowing so-called forced joinder of a stranger to the arbitration agreement, without the consent of all parties. The argument that a particular arbitration agreement confers a power of "forced joinder" on the tribunal was rejected by the Privy Council in *Bay*

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[23] *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57, [2016] 1 SLR 373, [190(d)].
[24] For discussion of this issue see Bernard Hanotiau, "Complex-Multicontract-Multiparty-Arbitrations" (1998) 14 Arbitration International 369.
[25] *Elektrim SA v Vivendi Universal SA (No 2)* [2007] EWHC 571 (Comm), [2005] 2 Lloyd's Rep 37, [72]; s.35 of the Arbitration Act 1996.
[26] The DAC Report of February 1996, [180]-[181].
[27] Sundaresh Menon, "Arbitration's Blade: International Arbitration and the Rule of Law" (2021) 38(1) Journal of International Arbitration 1, [34]-[38], speech to the SIAC Virtual Congress, 2 September 2020.
[28] An insightful perspective: Interview with Toby Landau QC - Lexology
[29] Jan Paulsson, *The Idea of Arbitration* (2013), 156
[30] Note 1.

Hotel and Resort Ltd v Cavalier Construction Co Ltd,[31] but the Board noted that "such a rule of an arbitral institution may of course, by incorporation, amount to express or implied consent to extension of the arbitrators' jurisdiction by their own order." The LCIA has just such a rule, in Article 22.1(x). A jurisdictional challenge to an award which was in part premised on "forced joinder" under what was then Article 22.1(h) of the LCIA Rules, in which an award was made in favour of the joined party, was rejected in *C v D1*.[32] But many view "forced joinder" provisions as a significant derogation from the principle of party autonomy and consent. In *PT First Media TBK v Astro Nusantara International BV*[33] the Singapore Court of Appeal construed a provision in a version of the SIAC Rules as limited to the joinder of other parties to the arbitration agreement. Once again, joinder provisions of this kind are not attractive to those who attach particular importance to party choice of arbitrators.

18. Third, it is easy to forget that arbitral tribunals, like courts, can stay the proceedings before them pending a determination elsewhere.[34] The concept of a contractual tribunal appointed to decide a dispute deciding not, for the time being, to do so is not a natural one, and it might be said that the s.33 duty requires the tribunal to have regard to the efficient resolution of the particular dispute before them, not some wider dispute of which the dispute referred to arbitration forms but part. Nor do arbitral tribunals have the same tools available to them as courts if a party pursues two sets of proceedings simultaneously,[35] or a party who has lost in proceedings to which the arbitral tribunal gave priority decides to have a second bite. There are well-known attempts to capture best practice in this area,[36] one of which notes that arbitral tribunals have a broad case management power to stay some or all of the issues before them pending a decision in related proceedings, but that such powers should be exercised "very sparingly".

19. The issue of an arbitral stay arises frequently ain the context of investor-state arbitrations, for example because the investment vehicle has claims against the local operating entity under the investment agreement (either in a state court or in international commercial arbitration), and the investors under an investment treaty against the host state in respect of the same events.[37] There is a greater track record of stays being ordered by one arbitral tribunal pending proceedings before another arbitral tribunal in this context. Arbitral tribunals staying proceedings pending a court determination appears to be a rarer event. The different starting points of courts and arbitral tribunals is tangible in *SCM Financial Overseas Ltd v Raga Establishment Ltd*,[38] in which an arbitral tribunal had failed to defer publication of its award pending the outcome of Ukrainian court proceedings, the outcome of which was highly

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[31] *Bay Hotel and Resort Ltd v Cavalier Construction Co Ltd* [2001] UKPC 34, [46].
[32] *C v D1* [2015] EWHC 2126.
[33] *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, [2014] 1 SLR 372, [188].
[34] Bernardo M Cremandes and Ignacio Madalena, "Parallel Proceedings in International Arbitration" 24 Arbitration International 507.
[35] *Elektrim SA v Vivendi Universal SA* [2007] EWHC 571, [2007] 1 CLC 27, [59]-[60].
[36] See Professor Filip de Ly and Audley Sheppard, "ILA Report on *Lis Pendens* and Arbitration" (2009) 25 Arbitration International 3.
[37] See Robin F Hansen, "Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties" (2010) 73 MLR 523.
[38] *SCM Financial Overseas Ltd v Raga Establishment Ltd* [2018] EWHC 1008 (Comm), [2018] Bus LR 1391, [82]-[83].

material to the issues in the arbitration. Males J rejected the challenge to the award, but his judgment contains indications that, before a court at least, a different decision might have been reached.

20. By way of concluding remarks, I wanted to say that both the courts and the international arbitration community have a responsibility to try and ensure complex multi-party disputes are resolved as efficiently as possible. So far as the international arbitration community is concerned, it is the major arbitral institutions who must lead the way, giving arbitral tribunals the power, and the confidence, to make decisions which reflect the demands of both party autonomy and efficient dispute resolution. The institutions and the arbitral tribunals can rest assured that the Commercial Court will do its best to support them in these efforts.