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**ARBITRATION UPDATE**

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## **INTRODUCTION**

1. This paper will set out some of the key arbitration cases from the last 12 months that are likely to have an impact on the construction industry.
2. This paper is divided into the following headings:
  - (1) Arbitration agreements
  - (2) Arbitral proceedings and court intervention
  - (3) Human rights.

### **I. ARBITRATION AGREEMENTS**

3. An arbitration agreement is defined in **Russell**<sup>1</sup> as:

*“Section 6 of the Arbitration Act 1996 contains a definition of an arbitration agreement. It provides that an arbitration agreement is ‘an agreement to submit to arbitration present or future disputes (whether they are contractual or not)’. An arbitration agreement is therefore a contractual undertaking by two or more parties to resolve disputes by the process of arbitration, even if the disputes themselves are not based on the contractual obligations. The term ‘disputes’ includes ‘any difference’. It is important to note also:*

*(1) The Arbitration Act 1996 will only apply to an arbitration agreement if it is writing or evidenced in writing.*

*(2) Reference to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.”*

### **Fiona Trust v Privalov [2007] UKHL 40**

4. In this important decision, the House of Lords considered the modern approach that should be taken to arbitration agreements and confirmed the principles applicable to separability under the Arbitration Act 1996 (Arbitration Act).
5. The owners of eight vessels entered into a contract with the charterers. The contracts contained an arbitration clause which provided that:

*“any dispute arising under this charter shall be decided by the English courts to whose jurisdiction the parties hereby agree”.*

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<sup>1</sup> Russell on Arbitration (2008), at para 2-002.

6. Disputes arose between the parties and the owners claimed that the contracts had been procured by bribery of their senior officers by an individual who controlled or was associated with the charterers. The owners sought to rescind the contracts on the grounds that they had been procured by bribery. The charterers commenced London arbitration proceedings and asked the arbitrator to determine (amongst other things) the effectiveness of the owner's purported rescission. Before the disputes had been resolved by way of arbitration, the owners commenced court proceedings for a declaration that the contracts had been validly rescinded. The charterers applied under section 9 of the Arbitration Act for a stay of those proceedings.
7. Upholding the Court of Appeal's decision, the House of Lords held that the owner's claims for rescission should be stayed so that the disputes could be dealt with by way of arbitration, in accordance with the arbitration agreement.
8. In reaching its decision, the House of Lords held that it was time for a fresh start to the interpretation of arbitration clauses. Lord Hoffmann held at paragraph 13:

*"... the construction of an arbitration clause should start from the **assumption** that the parties, as **rational businessmen**, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."*

**Emphasis added**

9. Applying this approach, the House of Lords found that there was nothing in the arbitration clause to exclude disputes about the validity of the contract, whether on the grounds that it was procured by fraud, bribery, misrepresentation or anything else. The clause therefore applied to the parties' present dispute.
10. On the issue of separability, the House of Lords held that under the principle of separability, as enacted in section 7 of the Arbitration Act, the invalidity or rescission of the main contract did not necessarily rescind or invalidate the arbitration agreement. As the facts of this case did not involve an attack on the validity of the arbitration agreement, any findings in relation to the main contract would not impeach the arbitration agreement. Lord Hoffmann stated at paragraph 19 that section 7 of the Act:

*“... means that they must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement.”*

**C v D [2007] EWCA Civ 1282**

11. In this appeal the Court of Appeal considered a number of interesting issues on the scope of an arbitration clause.
  
12. The respondent US insurer issued a policy on a Bermuda Form to the appellant insured (US firm). The policy contained an arbitration clause which provided that any dispute arising out of the policy would be *finally and fully* determined in London, England. The policy itself was governed and construed in accordance with the law of New York. Disputes arose in relation to a claim made by the insured, and the insured referred that dispute to arbitration in London. The terms of reference stated that the law governing the arbitration was that of the Arbitration Act 1996. The arbitral tribunal made an award in favour of the insured, ruling that the insured had succeeded in full on its claim. The insurer indicated that it would challenge the award in the US courts. The insured was subsequently granted an interim anti-suit injunction against the insurer on a without notice application, which was then replaced by undertakings. Before the Commercial Court in the present proceedings, the insured then sought a final injunction and declaratory relief against the insurer, restraining the insurer from bringing any proceedings to challenge the award other than proceedings in England or Wales. The Commercial Court granted the insured the relief sought. The insurer appealed arguing that the judge had been wrong to hold that the arbitration agreement was governed by English law merely because the seat of the arbitration agreement was in London, and that the closest connection with the agreement was New York law under which a challenge was permitted.
  
13. The issues referred to the Court of Appeal were:
  - (1) Whether by choosing London as the seat of arbitration, the parties agreed that the agreement to arbitrate was governed by English law?
  - (2) Whether the arbitration clause constituted an “agreement to the contrary” for the purposes of section 58 of the Arbitration Act?

14. The Court of Appeal dismissed the appeal. It held that by choosing London as the seat of the arbitration, the parties were to be taken to have agreed that proceedings on the award should only be those permitted by English law. By choosing a seat for the arbitration, the parties had also chosen a choice of forum for remedies seeking to attack the award. It rejected the insured's argument that section 58 of the Act, which provided for finality of an arbitral award, was not a mandatory provision of the Act and that there was a 'permissible agreement to the contrary' contained in the parties' arbitration clause itself which was governed by the law of the state of New York and which permitted challenge for manifest disregard for the law. Longmore LJ held at paragraph 19:

*“The fact, however, that the 1996 Act allows parties to contract out of its mandatory provisions does not mean that the proper law of a contract to refer disputes to arbitration can constitute an ‘agreement to the contrary’ and thus import a method of challenge to the award not permitted by the seat of arbitration.”*

15. Further, the Court of Appeal drew a distinction between the law applicable to the insurance contract and that which applied to the arbitration agreement: the insurance contract was governed by the law of New York, whereas the arbitration agreement was determined by the seat of arbitration, which in this case was England.

### **BEA Hotels v Bellway LLC [2007] EWHC 1363 (Comm)**

16. This is an interesting case of the Commercial Court which considers an issue of practical importance, especially in multi-party arbitrations.
17. The parties had entered into a joint venture to purchase a company's shares in Romania. The parties, plus other companies, had joined a joint venture term sheet, which contained an arbitration agreement. Disputes arose between the parties as to the term sheet and an arbitrator was appointed by the LCIA, in accordance with the arbitration clause. The respondent subsequently commenced court proceedings in Israel, and served particulars of claim against the applicant and others for a number of different claims. The arbitrator held, in a partial award on jurisdiction, that the respondent had not repudiated the contract and that the applicant remained obliged to arbitrate. The applicant appealed the award under section 67 of the Arbitration Act. The issue for the Court was: does the issue of court proceedings amount to a repudiation of the parties' arbitration agreement and render an arbitrator devoid of jurisdiction?

18. The Court dismissed the applicant's appeal under section 67. It held that the issue of the respondent's court proceedings neither repudiated the parties' arbitration agreement nor rendered the arbitrator devoid of jurisdiction. To show that the arbitration agreement had been repudiated, the applicant needed to show a repudiation of the agreement to refer the parties' dispute to the arbitrator rather than simply a repudiation of the arbitration agreement itself. To establish a repudiatory breach of the relevant agreement, the applicant had to establish that the respondent had demonstrated an intention to no longer be bound by it. On the facts, however, no such intention was evinced.
19. It was clear from the respondent's statement of case that it was clearly stating that it was *not* using the court proceedings to pursue any claims against the applicant that were the subject of arbitration. From the facts, no reasonable person could have thought that the respondent was demonstrating an intention not to pursue claims against the applicant in the arbitration. The expressed intention of the court proceedings was to complement the arbitration by having those claims determined that could not be decided in the arbitration, essentially because the relevant party was not a party to the arbitration agreement. As the effect of the respondent's particulars of claim was to exclude arbitrable claims from the court's determination there was therefore no breach of the arbitration agreement, let alone a repudiatory breach.

## **II. ARBITRAL PROCEEDINGS AND COURT INTERVENTION**

20. The role of the court in domestic arbitral proceedings is defined in **Russell paragraph 7-001** as:

*“The general principle is stated in Pt. 1 of the Arbitration Act 1996 as follows:*

*‘In matters governed by this Part [of the Act] the court should not intervene except as provided by this Part.’*

*This statement of principle in the very first section of the Arbitration Act 1996 is clear recognition of the public policy of **party autonomy** underlying the Act and the desire **to limit and define the court's role in arbitration so as to give effect to that policy**. ... The statement of principle indicates two possibilities as to when the court can intervene in an arbitration. Under the first, the paradigm case, the court should only intervene where there is a provision in Pt 1 of the Arbitration Act 1996 that permits court intervention... In the second (and*

*exceptional) case, however, the court may also intervene to prevent substantial injustice even if there is no relevant provision in Pt. 1 of the Act.”*

**Emphasis added**

**West Tankers v Ras Riunione Adriatica Di Sicurta (The “Front Comor”) [2007] UKHL 4**

21. This is an important decision of the House of Lords, where it considered English courts’ jurisdiction to grant anti-suit injunctions, preventing a person from bringing an action in another jurisdiction in contravention of an arbitration clause.

22. Erg chartered a vessel from the applicant owner (West Tankers). The charterparty was governed by Italian law and contained an arbitration clause providing for arbitration of any disputes to be in London under English law. The vessel collided with an oil rig at Erg’s refinery. Erg recovered its insured losses, under an insurance policy governed by Italian law from its insurer, the respondent (Ras), in court proceedings. In 2003 the insurers, exercising their statutory right under Italian law, commenced proceedings against the owner in Italy to recover amounts which it had paid to Erg under the policies. In 2004, the owner commenced English proceedings claiming declarations that the dispute which was the subject of the Italian proceedings arose out of the charterparty and that the insurers claiming by right of subrogation were therefore bound by the agreement to refer it to arbitration in London. The owner also claimed an injunction to restrain the insurers from taking any further steps in relation to the dispute except by way of arbitration and requiring them to discontinue the proceedings in Italy. Colman J granted the declarations and the anti-suit injunction. The issue that came before the House of Lords (and upon which Colman J allowed a fast-track appeal to the House of Lords) was whether in light of Regulation 44/2001 EC it was open to the English courts to grant an anti-suit injunction in favour of London arbitration.

23. The House of Lords decided that this was a matter for the European Court of Justice. The House of Lords referred the following question to the European Court of Justice for a preliminary ruling:

*“Is it consistent with EC Regulation 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?”*

24. While the result of the ECJ’s preliminary ruling is eagerly await, assistance on this issue can be derived from the opinions of the law lords set out in the House of Lords judgment. In summary, the opinions of the House of Lords were:

- (1) The proceedings fell outside Regulation 44/2001 and are not inconsistent with its provisions. This is because:
  - i. The Regulation is not applicable to arbitration. The House of Lords opined that this exclusion extends to court proceedings whose subject matter is arbitration.
  - ii. By the nature of arbitration (i.e. that it is contractual and serves a commercial purpose), the jurisdiction to restrain foreign proceedings is generally regarded as an important and valuable weapon for the court exercising supervisory jurisdiction over the arbitration.
  - iii. If Member States of the European Community were not willing to offer arbitral parties such protection, there were plenty of other states with good arbitral institutions that could. There was no doctrinal necessity or practical advantage in limiting the courts of Member States in such a way.
- (2) The decision of Colman J had been right to hold that the grant of an anti-suit injunction was not inconsistent with the New York Convention, and that as a matter which fell within the English court's discretion, the court ought not to refuse to restrain proceedings brought in breach of an arbitration agreement that were taking place in another Member State.

**Albon v Naza Motor Trading Sdn Bhd [2007] EWCA Civ 1124**

25. In this case the Court of Appeal considered whether an English court could grant an anti-arbitration injunction against a party to a foreign arbitration.
26. The applicant sold cars in England. The respondent sold cars in Malaysia. The parties entered into motor vehicle distribution agreement governed by English law. The applicant commenced proceedings in England seeking recovery of sums that it claimed were due from the respondent, and he obtained permission for service on the respondent outside the jurisdiction. The respondent applied for a stay of those proceedings on the basis that the parties had entered into a Joint Venture Agreement (JVA) governed by Malaysian law under which the parties had agreed to submit all of their disputes to arbitration in Malaysia. The respondent appointed an arbitrator and gave notice of arbitration. The applicant contended that he had not entered into such an agreement and that his signature on the clause was a forgery.

27. While awaiting trial in England on the validity of the clause, the applicant obtained an injunction preventing the respondent from commencing or taking any steps in the arbitration in Malaysia. A condition of the injunction was that the applicant gave the respondent a cross undertaking in damages. Following the applicant's failure to pay the cross undertaking at the Court's request, the injunction was discharged. The applicant then made a fresh application for an injunction. The application raised two questions for the Court:

- (1) Did the Court have jurisdiction to grant such an injunction?
- (2) If so, should the court exercise its discretion to grant such an injunction?

28. Upholding the decision of Lightman J, the Court of Appeal held that the Court did have jurisdiction to grant such an injunction and that in the circumstances the Court should exercise its discretion to grant such an injunction. It held that because the applicant had a good arguable case and the English court was to be the final judge on the authenticity of the JVA, the immediate and co-extensive continuance of arbitration proceedings was unconscionable. As such, the applicant had satisfied the well know principle that a party will not be restrained from instituting or continuing proceedings unless the applicant can show that to do so would be oppressive, vexatious or unconscionable. The matter therefore came within the Court's discretion. While it was true that caution should be exercised before the grant of an anti-arbitration injunction, this was not an ordinary case as it had been agreed that the English court would determine whether the JVA had been forged. The respondent's argument that the grant of an injunction would interfere with the autonomy of the arbitration process therefore had to fail as the arbitrators' autonomy had already been undermined because they had been excluded from answering that question. Waller LJ held at paragraph 17:

*"In the ordinary case there would be much to be said for this argument. But this is not an ordinary case because of the features set out in para 13 above. It is properly arguable that the agreement to arbitrate has been forged in order to defeat proceedings properly brought in England and, in addition to this, it is at present agreed that the English court will determine that question. The autonomy of the arbitrators has thus already been undermined because they are, in any event, precluded for the present from determining that question. In these circumstances it is not right to say that the judge is attempting to case-manage the arbitration. **It would be more accurate to say that he is case-managing the application before him which will determine in England the question whether the JVA is authentic or not.**"*

**Emphasis added**

**Brown v Crosby [2008] EWHC 817 (TCC)**

29. In this case the TCC considered a number of points of practical importance, including: whether it should allow a party to rely on evidence in court proceedings which has had the credibility of that evidence questioned in previous arbitration proceedings; and the weight to be given to the relative strength or weakness of an application made under section 68(2)(g) of the Arbitration Act.
30. The respondent developer engaged the applicant main contractor to design and build a residential development under a standard JCT form with Design (1998 Edition). Following a number of adjudication decisions in favour of the applicant the parties started two arbitrations: one was commenced by the respondent to reverse the decision in the second adjudication, and the second by the applicant in which it claimed for loss and expense and variations. The first arbitration related to various alleged incentive agreements which were said to have been agreed between the parties' managing directors. Disclosure in this arbitration was ordered on the basis of co-operation and liaison between the parties. An order for disclosure in the second arbitration was given *before* the issue of the award in the first arbitration. The award in the first arbitration was then given against the applicant on the basis that there were no agreements which entitled it to the bonuses that it claimed. The applicant, as the losing party in the first arbitration, applied for leave to extend its time for service of an application under section 68(2)(g) to challenge the award on the basis of serious irregularity, claiming that the award had been obtained by fraud or the way in which it was procured was contrary to public policy. The basis of the applicant's claim arose out of his belief that some of the documents disclosed in the second arbitration should have been disclosed in the first arbitration and demonstrated that the respondent's managing director had committed perjury in the first arbitration. The issue for the Court was therefore whether it should grant the applicant an extension of time to challenge the award under section 68(2)(g).
31. The Court refused the applicant's application. Akenhead J considered the factors that the court would take into account when considering whether to grant an extension of time for an application. He found that the length of delay, its causation and the reasonableness of the parties' conduct were all primary factors, and that although the strength of the case was not a

primary factor, an intrinsically weak case would count against the application for an extension of time. The applicant in this case had made his application 66 days after the 28-day period for issuing a challenge under section 68 and on the evidence there was no good reason or excuse for the failure.

32. Akenhead J then went on to consider the possible strength of the applicant's case under section 68(2)(g). Akenhead J held that where issues of credibility arose in the arbitration and there was available material which either was actually or could be deployed before the arbitrator, the court should be very slow to allow the losing party the opportunity to rely upon the same material under section 68(2)(g). The matter of deciding whether or not a witness was lying was a matter that the parties would have left to the arbitrator. Save in exceptional circumstances, the parties' autonomy dictated that the arbitrator's decision on whether or not a witness was lying must be upheld. No exceptional circumstances existed in this case and therefore the applicant's allegations should be ignored for the purposes of the section 68(2)(g) application and the application for the extension of time. Taking all factors into account, Akenhead J concluded that the applicant's case was weak and that the application should be dismissed. In reaching his decision, Akenhead J reviewed the authorities and summarised these principles at paragraph 36 as:

*“(i) The deliberate withholding of documents which had been ordered to be disclosed in the arbitration may in certain circumstances be considered to be reprehensible conduct and thus contrary to public policy under S.68(2)(g).*

*(ii) It must, at least, be less reprehensible (if reprehensible at all) for a party to withhold disclosure where disclosure has not as such been ordered by the arbitrator. Under some agreed or standard procedures for disclosure (for instance the IBA Rules) disclosure is voluntary unless specific documents are either agreed or ordered to be disclosed.*

*(iii) On balance, I consider that the withholding or non-disclosure of documents which have not been ordered to be disclosed by the Arbitrator or have not been agreed to be disclosed, cannot be described as reprehensible or fraudulent unless such non-disclosure is clearly part of some other fraud or reprehensible conduct on the part of the non-disclosing party.*

*(iv) Lying, being not uncommon in arbitration or in civil proceedings in general, can be a basis upon which an award is obtained by fraud or in a way which is contrary to public policy but where the credibility of the witness in question was a primary feature of the arbitration or the arbitration hearing it is less likely that it will be considered to be a serious irregularity.*

*(v) If there are grounds under Section 68(2)(g) based on lying or deception on the part of the respondent to the application, it is necessary to demonstrate that the award was dependent upon or was reached as a result of the lying or deception.*

*(vi) If the grounds under Section 68(2)(g) are established, it is still necessary to show that substantial injustice would be caused to the applicant as a result thereof. That may prove not to be very difficult to establish if the grounds under Section 68(2)(g) are established.”*

**Taylor Woodrow v RMD Kwikform Ltd [2008] EWHC 825**

33. The TCC considered a number of practical points in this case on questions which related to the appointment of an arbitrator and initiation of arbitral proceedings.

34. The claimant contractor engaged the defendant sub-contractor to design, supply and erect scaffolding. Clause 26 of the agreement contained an arbitration clause which provided:

*“If any question or difference arises between the Contractor and Sub-Contractor in connection with or arising out of the Sub-Contract or the Sub-Contract Works, it shall, subject to the provisions of this clause, be referred to the arbitration and final decision of a person to be **agreed between the parties or failing such agreement** within a period of 14 days of one party giving to the other notice in writing of such dispute question or difference, a person appointed upon the application of either of the parties by the President for the time being of the Chartered Institute of Arbitrators.”*

**Emphasis added**

35. Following a collapse of the scaffolding on 13 December 2000, the contractor brought a claim against the sub-contractor who, in turn, brought a claim against the contractor for payment of the outstanding balance allegedly due under the sub-contract. On 17 January 2003, the contractor’s solicitors wrote to the sub-contractor enclosing draft particulars of claim and asking them to state whether or not they wished to rely upon the arbitration clause, or rather agree to resolve the disputes by litigation. The parties then engaged in without prejudice discussions. On 12 December 2006 the contractor commenced High Court proceedings against the sub-contractor which were then served on the sub-contractor. On 25 April 2007, following service of the High Court proceedings, the sub-contractor applied under section 9 of the Arbitration Act to stay the proceedings. On 18 May 2007 the contractor applied to the CIArb for the unilateral appointment of an arbitrator by the President. On 24 May 2007, the sub-contractor became aware of the contractor’s application. The sub-contractor asserted that there had been no valid appointment in accordance with the arbitration clause and that the employer’s letter of 17 January 2003 was insufficient notice to commence a claim under the arbitration clause. The parties then agreed to make an application under sections 32 and 45 of the Arbitration Act, for the court to determine a preliminary point of law on:

- (1) Whether the arbitrator had been properly appointed in accordance with the arbitration agreement; and
- (2) Whether, for the purposes of section 14 of the Arbitration Act, the date at which the arbitral proceedings were to be regarded as having being commenced (if at all).

36. Section 14 of the Act provides:

*“(1) The parties are **free to agree** when arbitral proceedings are to be regarded as commenced for the purposes of this Part and for the purposes of the Limitation Acts.*

*(2) If there **is no such agreement** then the **following** provision apply.*

...

*(4) Where the arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party **notice in writing** requiring him to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.”*

**Emphasis added**

37. Ramsey J found that the matter was governed by section 14(4) of the Act, rather than 14(1), and that the letter of 13 January was insufficient notice to commence arbitration proceedings. Section 14(1) applied where the parties had agreed when arbitral proceedings are regarded as commenced. The arbitration clause did not amount to such an agreement as it made no mention of when arbitration proceedings were deemed to be commenced and there was no agreement that the notice was the commencement of the proceedings. Therefore, section 14(4) applied in this case. Ramsey J held that the employer’s letter was insufficient because a notice of arbitration had to make it clear that the person giving it was intending to refer the dispute to arbitration. The employer’s letter evinced no such intention as the letter was merely requesting the contractor to commence the process of agreeing an arbitrator.

### **III. HUMAN RIGHTS**

38. It may seem unusual to have a section on human rights in an arbitration update. However, as with many other branches of the law, the principles applicable to construction arbitrations can be affected by human rights issues. In this context, human rights issues tend to arise in relation to Article 6(1) of the European Convention on Human Rights (ECHR) which provides:

*“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”*

39. On the extent to which Article 6(1) affects arbitrations, **Russell paragraph 1-039** states:

*“Although an arbitral tribunal is not a ‘tribunal’ within the meaning of Art. 6 of ECHR, an arbitrator is required to observe duties that are broadly compatible with Convention rights. Duties imposed on an arbitral tribunal by s. 33 of the Arbitration Act 1996 requires an arbitrator to ‘act fairly and impartially as between the parties, giving each party reasonable opportunity of putting his case and dealing with that of his opponent...’ A party who voluntarily agrees to arbitration is treated as having waived his right to a public hearing in the arbitration, but the waiver does not extend to the other rights guaranteed by Art 6(1) of the ECHR, including the right to a fair hearing within a reasonable time by a tribunal that is impartial and independent. Thus, although the Arbitration Act 1996 is compatible with the ECHR, it is important that the tribunal bears in mind the ECHR and its jurisprudence as well as the Arbitration Act.”*

### **Stretford v Football Association Ltd [2007] EWCA Civ 238**

40. In this case the Court of Appeal gave a detailed analysis to the relationship between Art 6 and arbitration, and in particular the circumstances in which an arbitration agreement will be deemed to have waived the parties’ right to rely upon the provisions of Article 6. The appeal was heard at the same time as two other appeals, one of which was Sumukan Ltd v The Commonwealth, discussed in more detail below.

41. The claimant was an agent who represented footballers. In 2002 the claimant applied for a licence from the defendant. He was granted a temporary licence on 11 January 2002, followed by a full licence on 9 April 2002. This licence stated that:

*“the holder of this licence agrees to abide by the rules and regulations of FIFA, THE FA Premier League and the Football League.*

42. The rules and regulations included a handbook which was issued annually. In 1989 the FA adopted an arbitration clause, which provided that any dispute or difference between two or more participants arising out of or in connection with the agreement was to be referred to arbitration. That clause added:

*“[The Clause] shall not operate to provide an appeal against the decision of a Disciplinary Commission or Appeal Board under the Rules of Association and shall operate only as the forum and procedures for a legal challenge on the grounds breach of contract to any such decision.”*

43. The FA issued disciplinary proceedings against the claimant. The claimant commenced court proceedings against the FA claiming (amongst other things) a declaration that the disciplinary proceedings did not comply with Article 6 ECHR. The FA applied for a stay of the proceedings under section 9 of the Arbitration Act, which was granted by Sir Andrew Morritt, who found that the parties’ arbitration clause was valid and binding. The claimant appealed. The issue before the Court of Appeal was whether the arbitration clause complied with Article 6.

44. The Court of Appeal upheld Sir Andrew Morritt’s decision that the arbitration clause was not contrary to Article 6. It reviewed the components of article 6, namely the need for a public fair hearing by an impartial tribunal. It found that the provisions of the Arbitration Act were important in the context of Article 6 because they provided for a fair hearing by an impartial tribunal. Further, Sir Anthony Clarke MR found at paragraph 38:

*“... the mandatory provisions [of the Arbitration Act] ensure that the High Court has power to put right any want of impartiality or procedural unfairness, so the only provisions of article 6 which could arguably be said not formally to be met by the Act are the requirements that the hearing be in public, that the members of the tribunal be independent, that the tribunal be established by law and that the judgment be pronounced publicly.”*

45. However, the Court of Appeal found that as a matter of English law the parties had waived their rights to a public hearing and that the judgment be pronounced publicly. This was because, in accordance with Strasbourg jurisprudence, where parties had voluntarily or freely entered into an arbitration agreement they were treated as waiving their rights under article 6 provided that the waiver was agreed without constraint and did not run counter to any important public interest. As none of these issues arose in this case, and the parties had voluntarily entered into agreement, the arbitration clause was valid and binding.

**Sumukan Ltd v The Commonwealth Secretariat [2007] EWCA Civ 243**

46. In this landmark decision, the Court of Appeal considered whether parties' rights to exclude an appeal against an award for error of law (section 69 of the Arbitration Act) could be ousted by a clause which was incorporated by reference into the arbitration agreement.

47. The applicant's predecessors in title and the respondent entered into a contract subject to an arbitration scheme, the effect of which was that any agreement to go to arbitration with the respondent was to be referred to arbitration under the terms of the respondent's statute. The respondent's statute contained a clause which provided:

*"The judgment of the Tribunal shall be **final and binding** on the parties and shall not be subject to appeal. The provision shall constitute an 'exclusion agreement' within the meaning of the laws of any country requiring arbitration or as those provisions may be amended or replaced."*

**Emphasis added**

48. The parties referred a dispute to arbitration and the arbitrator made an award in favour of the respondent. The applicant sought to challenge the award under section 69 of the Arbitration Act on the ground that it contained an error of law. The application was heard by Colman J who found that although the criteria for permission to appeal had been satisfied, the parties had excluded the right of appeal by incorporating as a matter of English domestic law into their contract the arbitration clause contained in the respondent's statute. Further, he found it unnecessary to construe the words "otherwise agreed" contained in section 69(1) of the Arbitration Act in any special way for the purposes of Article 6 of the ECHR. Colman J refused to give permission to appeal from his decision to the Court of Appeal. Regardless of this finding, the applicant appealed to the Court of Appeal and obtained permission to appeal in relation to the issue as to the effect of Art 6. The issues before the Court of Appeal included (amongst other things):

- (1) Whether the Court of Appeal possessed any jurisdiction to hear the appeal; and, if so,
- (2) Whether Colman J has been correct in his substantive ruling that the right to appeal against the arbitration award for error of law under section 69 had in fact been excluded from the appeal.

49. After finding that it had jurisdiction to hear the appeal, the Court of Appeal affirmed the decision of Colman J.

50. On the first issue, the Court of Appeal held that it had jurisdiction to consider the appeal. It distinguished between:

- (1) Cases where the court was assisting or overseeing the arbitration process and cases where the question was whether the jurisdiction of the court had been excluded.
- (2) In relation to section 69 of the Arbitration Act, whether it related to a decision as to whether the parties had agreed to exclude the court and (if they had not) the decision as to whether to grant or refuse permission to appeal.
- (3) Jurisdiction issues as to preliminary decisions as to whether section 69 was to be applicable at all and other decisions.

51. After making these distinctions, it held that the question whether there was an exclusion agreement was a preliminary question under section 69(1) and it followed that the Court had jurisdiction, despite Colman J's refusal of permission to appeal.

52. On the second issue, the Court of Appeal held that Article 6 of the convention did not render a clause excluding a right of appeal onerous or unusual, nor did it compel the word "agreed" in section 69(1) to be read differently. This was because the Article 6 rights waived by the agreement were of a limited nature, and it was common in a commercial context, when arbitration was agreed, to agree to limit the right of appeal. As the contract in this case was in writing and had expressly referred to the arbitration clause contained in the respondent's statute, it followed that section 69 did not need to be read differently to avoid infringement of the claimant's rights. At paragraph 59, Waller LJ found that by waiving the right to appeal to the court:

*"All that is being waived is the right to a public hearing in court (and that by the unchallenged arbitration clause), and a right to test the decision of the arbitrator in a court other than under ss 67 and 68."*

### **The Republic of Kazakhstan v Istil Group [2008] EWCA**

53. Further human rights issues arose for determination by the Court of Appeal in this case. The issues in this case, however, did not arise in relation to whether an arbitration agreement was compatible with the ECHR but rather whether the appeal process as enacted by section 67(4)

was in violation of the ECHR. After this recent trend of cases it remains to be seen whether human rights arguments will be cropping up more frequently in arbitration cases....

54. The respondent's predecessor entered into three contracts with two companies who allegedly acted as agents for Company X. The applicant then allegedly assumed responsibility for Company X's liabilities, including its debts. Disputes arose between the parties and the respondent obtained an award in its favour. The applicant challenged that award under section 67 of the Arbitration Act, on the ground that the arbitrators did not possess any jurisdiction over them. Steele J upheld the applicant's challenge which rendered the award in the respondent's favour void for want of jurisdiction. The judge refused permission to appeal from this decision. This issue before the Court of Appeal was whether it had jurisdiction to hear an appeal from that decision.
55. The respondent relied on the exception to the rule that the Court of Appeal cannot give permission to appeal if it has been refused by the trial judge. That exception is derived from the Court of Appeal's general power to give permission to appeal under the Supreme Court Act 1981, read in conjunction with Article 6 ECHR, and arises where there has been a failure by the judge to give a fair hearing in reaching his decision on permission to appeal. The respondent raised three arguments:
- (1) Section 67(4) was incompatible with the right to a fair hearing as set out in Article 6 and was to be read as implying a right to appeal to the Court of Appeal;
  - (2) The judge failed to properly engage with the respondent's arguments;
  - (3) In his oral reasons for refusing permission to appeal but not in his later written reasons, the judge had not applied the proper test of whether there was a reasonable prospect of success on appeal but had applied a stricter test.
56. The Court of Appeal rejected each of the respondent's arguments and found that the Court of Appeal had no jurisdiction to grant the application. It found (as had already been held in previous case law) that section 67(4) of the Arbitration Act was not incompatible with the ECHR, provided that it was open to the court to review the fairness of the procedure adopted in the lower court. It was legitimate for Parliament to seek to restrict further appeals and it was proportionate to restrict second appeals to those cases where the judge considered that there was a reasonable prospect of success. In the context of arbitration, where disputes had

to be resolved without delay or expense, it was proportionate that it should be the judge who knew about the case and who had decided the dispute who should be entrusted with the decision whether there was a reasonable prospect of success. However, even in light of these principles it was still open to the Court of Appeal to review the fairness of the process of the determination of the question whether leave to appeal under section 67(4) should be given. In considering the circumstances in which it might be appropriate for the Court of Appeal to review the fairness of the process, it quoted the following passage from CGU International Insurance plc v AstraZeneca Insurance Co Ltd [2007] 1 Lloyd's Rep 142:

*“What one is looking for is not merely an error of law, but such a substantial defect in the fairness of the process as to invalidate the decisions....”*

57. On the facts of the case, there had been no unfairness. The Court of Appeal rejected the respondent's arguments that the judge had failed to engage with its arguments and had applied the wrong test. The respondent's arguments therefore failed.