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International Arbitration News

July 2013

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Global Counsel Awards 2013

We are delighted to congratulate our client Edison SpA, on its success at the International Law Office Global Counsel Awards 2013, where it was awarded the accolade of Litigation Team of the Year. We were fortunate to be able to join representatives of Edison at the award ceremony in New York City in June this year.

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IBA introduces new Guidelines on Party Representation

On 25 May 2013, the International Bar Association adopted the IBA Guidelines on Party Representation in International Arbitration (Guidelines). The Guidelines are intended to provide a common set of standards and obligations to apply to representatives from all jurisdictions when acting in an international arbitration.

Background to the Guidelines

International arbitrations can involve practitioners from multiple jurisdictions with distinct domestic professional conduct rules and traditions, acting in matters with a different seat of arbitration, and different governing law. This can lead to confusion or conflict between the various practitioners' understanding of the standards of conduct which should be applied, for example regarding ex parte communications with arbitrators or document disclosure obligations. The risk of confusion can exist even within a party's own legal team, which may draw practitioners from different jurisdictions.

The Guidelines originate from the recommendations of a 2008 task force of experienced individuals from a variety of jurisdictions. Draft guidelines were prepared following a survey in 2010, which found support for the development of guidelines on party representation. Consultation with experienced arbitrators, practitioners and arbitral institutions occurred, and following revisions the Guidelines were adopted by the IBA Council. The central aim is to maintain the fairness and integrity of international arbitrations by providing a common standard of conduct.

When do the Guidelines apply?

The Guidelines are contractual in nature and apply where agreed by the parties (in the arbitration agreement or subsequently). The parties can apply all or a part of the Guidelines. They can also apply where the arbitral tribunal, after consultation with the parties, determines it has the authority to apply them. The Guidelines do not say when a tribunal with have the authority to determine to apply the Guidelines without express agreement by the parties. This will be a matter for the tribunal to determine, likely based on the express and implied terms of the arbitration agreement and the arbitration rules selected.

Where adopted in full, the Guidelines will apply to any person appearing and making submissions or representations on behalf of a party (including employees but excluding witnesses), regardless of whether the person is legally qualified

Importantly however, the Guidelines do not displace any mandatory, domestic, statutory or ethical obligations.

Summary of scope of Guidelines

The Guidelines deal with matters such as:

a) challenges to party representatives – in particular where the arbitral tribunal has already been constituted and the new representative has a relationship with a tribunal member which creates a conflict of interest;

b) communications with arbitrators – in particular prohibiting ex parte communications with an arbitrator, except in limited circumstances;

c) submissions to the arbitral tribunal – including prohibiting submissions of fact known to be false;

d) information exchange and disclosure – including a duty on the representative to inform the client of the need to preserve documents, advise and assist in taking reasonable steps to search for documents, and not to suppress or conceal documents requested or required to be produced;

e) witnesses and experts – including the obligation of representatives to identify themselves and the client before seeking information to ensure that statements/expert reports reflect the witnesses own evidence and opinion, and not to invite or encourage false evidence; and

f) remedies for breach of the Guidelines.

If the Guidelines are breached the arbitral tribunal may admonish the representative; draw adverse inferences when assessing evidence or legal arguments; take the misconduct into account when awarding costs; and take any other appropriate measure to preserve the fairness and integrity of the proceedings.

Additional comments

The Guidelines impose rules which are familiar to Australian practitioners, and also likely other practitioners whose domestic system and rules are based on the English common law tradition.

Where adopted by parties, the Guidelines will provide greater comfort and predictability of standards and obligations on the representatives during that international arbitration. There are, however, a number of grey areas that remain such as the degree to which US-style witness preparation will be accepted.

The Guidelines may also provide a useful reference point in challenges to the enforcement or validity of awards based on practitioner conduct.

It remains to be seen whether arbitral institutions will adopt or incorporate these Guidelines within their own rules. Unless and until this occurs, we commend parties to include these Guidelines in their arbitration agreements.

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The Arbitration/Court partnership: when anti-suit injunctions are needed

The relationship between court and arbitration proceedings has often been described as a partnership. However, as with any good relationship, the partnership between court and arbitration requires an element of give and take. Nowhere is this need for balance more acutely felt than where there is disagreement in separate jurisdictions as to the correct procedure to follow in any given case. This issue has recently come before the English Supreme Court in the case of *Ust-Kamenogorsk Hydropower Plant JSC* (the "**Appellant**") *v AES Ust-Kamenogorsk Hydropower Plant LLP* (the "**Respondent**") [2013] UKSC 35.

The Appellant was the grantee and lessee of a 25 year concession which entitled it to control an energy-producing hydroelectric plant in Kazakhstan while the Respondent was the owner and grantor of that concession. The concession agreement was governed by Kazakh law but contained an arbitration clause which required any dispute to be settled in London in accordance with the rules of the International Chamber of Commerce (the "**ICC**").

A dispute arose after the Respondent alleged that it had made a request for information regarding concession assets which the Appellant had failed to provide. As a result, the Respondent brought a claim before the Kazakh court seeking the disclosure of the information sought. The Appellant's application to stay these proceedings on the basis of the arbitration clause in the concession agreement failed; the Kazakh court ruled the clause to be invalid on the basis that (a) it concerned tariff disputes and (b) the reference to the ICC left the arbitral body unspecified. In response, the Appellant applied for, and was successful in obtaining, an interim anti-suit injunction from the English Courts which was later made final. However, the Kazakh courts proceeded to reject the Appellant's attempts to rely on the interim injunction.

The English Court of Appeal declared that the English courts were not bound by the Kazakh court's ruling as both of the grounds on which it ruled the arbitration clause to be invalid were unsustainable under English law. As such, Burton J. declared that the claim in question could only properly be pursued by arbitration. This restrained the Respondent's pursuit of the claim via the courts in Kazakhstan, or indeed, in any other forum.

The matter eventually came before the English Supreme Court, which was asked to consider whether it had the power to declare that a claim could only properly be brought in arbitration and/or to injunct the continuation or commencement of proceedings brought in any other forum outside the Brussels/Lugano regime.

In reaching its decision, the Court considered the application of section 37 of the Senior Courts Act 1981, which states that *"The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."* The Court acknowledged that the power in section 37 should be exercised sensitively and with due regard to the principles underpinning the Arbitration Act 1996, but held in the circumstances

that section 37 permitted the English courts to injunct the commencement or continuation of proceedings brought in another forum where an arbitration agreement existed. Further, the Court ruled that this power was equally exercisable where an arbitration was on foot or proposed (as in the case in hand) and that arbitral proceedings do not need to have been commenced.

In reaching its decision, the Supreme Court highlighted that it will take care before enforcing this power and acknowledged that there will be some cases where foreign proceedings are brought in breach of an arbitration clause or exclusive court agreement and the appropriate course is to leave it to the foreign court to recognise and enforce the parties' agreement on forum. However, where, as in the present case, the foreign court refuses to do so on a basis which is not sustainable under English law, there is every reason for the English Court to exercise its power to intervene under section 37.

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Squire Sanders in the News

The American Lawyer last week published its biennial Arbitration Scorecard (2011-2013).

Squire Sanders was placed within the Top 10 of Big Arbitration Awards for its role in *Edison SpA v Rasgas* and ranked three times for its involvement in the largest arbitration awards for the period 2001-2013.

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The new Saudi arbitration law: a step towards international norms

A year has passed since the enactment of Saudi Arabia's new Arbitration Law, which made significant changes to the practice of arbitration in the Kingdom, with new provisions aimed at implementing a more "arbitration friendly" regime for businesses, both local and foreign.

The new law was issued by Royal Decree No. M/34 dated 24/05/1433 H, corresponding to 16/04/2012 G (the "Arbitration Law"), and reflects terms which are mainly inspired by the international policies of UNCITRAL, with the aim to give more comfort for foreign businesses coming into the Saudi market.

The new law had significantly reshaped the old law and made a lot of amendments regarding the appointment of arbitrators, the arbitration process and procedures, and most importantly – the enforcement of arbitral awards whether local or foreign.

Under the old law, arbitrators of a Saudi arbitral tribunal were required to be Muslim and male, with experience and a good reputation. The new law no longer places a requirement that the arbitrators are male, but they must hold a university degree in either Shariah or law. However, where the arbitrators form part of a panel, this requirement extends only to the head of the panel.

An important change welcomed by foreigners doing business in Saudi, is that the new law no longer requires arbitration proceedings to be in Arabic, and the parties may choose which language for their arbitration, provided that at least one of the parties to the agreement is a foreigner. The parties are also entitled to appoint a foreign law to govern their agreement, and such provisions shall be adhered to by a Saudi arbitral tribunal. Previously, the parties could not freely choose the language or the applicable law for arbitration; it was set to be Arabic and Saudi Law respectively.

Also, if the parties have not agreed to apply a particular set of arbitration rules (such as the ICC); they may refer to the Arbitration Law which sets out a procedure similar to international rules of arbitration.

The amendments introduced by the new law have allowed arbitration in Saudi Arabia to become a more reliable source of dispute resolution. The new law makes it clear that an arbitration agreement or clause is binding if agreed to in writing, which may be satisfied by an exchange of letters or emails, or by incorporation of another agreement which includes arbitration provisions. Further, the invalidity or termination of a contract will not invalidate an arbitration agreement as long as the agreement to arbitrate is independently valid.

One major improvement from the 1983 law, relates to the enforcement of arbitral awards. Prior to the passing of the new law, any arbitral award had to be ratified by a supervising court in order to be enforceable; so the arbitral award only becomes "final" once the Saudi courts have settled any appeal against the award.

The supervising court (the Saudi Board of Grievances, which is the appropriate judicial authority in most commercial disputes) would hear any objection raised by any party including issues regarding merits of the case. In practical effect, an arbitral award that is issued after couple of years of proceedings may still be reversed by the Board of Grievances.

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Under the new law, the supervising court shall only have the authority to review the award (and not the merits of the case) to ensure compliance with Sharia law, public policy, and/or the arbitration agreement, and to ascertain that it does not contradict any previous judgments and has been properly served on the opposing party.

Moreover, it is up to the court to identify and raise any issues that would prevent enforcement - the parties have few objection rights at this stage.

With the continued dramatic growth and economic diversification in Saudi Arabia, the influx of foreign investments and the accession of Saudi Arabia to the World Trade Organization, Saudi authorities were committed to develop a more "friendly" regulatory environment.

Although the new Arbitration Law is still largely untested and remains to be assessed over time, we believe that the introduction of the new changes is a step towards achieving a more friendly, regulated environment.

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Update from Hong Kong - recent amendments to the HKIAC Rules and Arbitration Ordinance

HKIAC Rules 2013

In June 2013, the Hong Kong International Arbitration Centre (the **"HKIAC"**) published revised Administered Arbitration Rules, which will come into force on 1 November 2013 (the **"2013 Rules"**).

The original Administered Arbitration Rules took effect from 1 September 2008 (the **"2008 Rules"**) and, after 3 years of use, it was considered that the 2008 Rules generally worked well and no major overhaul was required. The 2013 Rules simply clarify the 2008 Rules and introduce certain provisions codifying current best practices. The 2013 Rules continue to provide for a light touch approach.

The 2013 Rules govern an arbitration where an arbitration agreement provides for the same to apply or provides for arbitration "administered by HKIAC" or words to similar effect and the Notice of Arbitration is submitted on or after 1 November 2013. However, this is subject to Articles 23.1, 28, 29 and Schedule 4 not applying where the arbitration agreement was concluded before 1 November 2013. Key changes include:

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Consolidation and joinder (Articles 27 to 29)

Tribunal has been given power to join a party (upon the request of an existing party provided the additional party is bound by an arbitration agreement, or upon the request of a third party). The 2008 Rules only provided for limited power to join a party with the written consent of an existing party applicant and the additional party. HKIAC may also consolidate 2 or more arbitrations (into the arbitration that commenced first) upon a party's request if a common question of law or fact arises and the rights to relief arise out of the same transaction or series of transactions, or allow claims arising out of multiple contracts to be made in a single arbitration. The 2008 Rules contained no express provision for consolidation.

Emergency relief (Article 23.1 and Schedule 4)

A party may now apply for emergency relief concurrent with or after the Notice of Arbitration, but before constitution of the tribunal. If the HKIAC accepts the emergency application, short deadlines are provided for, namely, appointment of the emergency arbitrator within 2 days and within 15 days of transmission of the file, the emergency decision must be made. Such decision is to bind the parties until the rendering of the final award or until the emergency arbitrator or tribunal so decides.

Expedited procedure (Article 41)

Circumstances in which parties may apply for their dispute to be determined on an expedited basis have been expanded. The monetary threshold has been raised to HK$25 million (equivalent to over US$3 million), albeit based on such threshold, the expedited procedure only applies if the HKIAC so decides upon the application of a party, rather than automatically under the previous threshold of US$250,000 as per the 2008 Rules. Otherwise, the HKIAC may decide that the expedited procedure applies if the parties so agree or in cases of exceptional urgency. The expedited procedure means the presumption of a sole arbitrator and documentary evidence only, as well as the award being required to be rendered within 6 months.

Capped hourly rate and standard terms of appointment (Article 10.1 and Schedules 2 and 3)

Under the 2008 Rules, parties may agree for the tribunal's fees to be calculated based on a prescribed percentage of the sum in dispute or hourly rates. Such choice remains under the 2013 Rules, but if hourly rates are opted for, a cap set by the HKIAC from time to time applies, initially at HK$6,500 per hour (equivalent of approximately US$830). Standard terms of appointment have also been introduced, which can be amended by agreement or the HKIAC. The purpose is to reduce the need for the parties to negotiate these issues.

Arbitration Amendment Bill 2013 (the "Bill")

The Bill was gazetted on 28 March 2013 and a second reading of the same in the Legislative Council (Hong Kong's parliament) took place on 24 April. It is hoped that the amended Arbitration Ordinance will come into force in August.

One main amendment is to implement the reciprocal arrangement for enforcement of awards concluded with Macau in January. This would mean awards made in Macau are enforceable in Hong Kong with leave of the court (limited grounds for refusal of enforcement are prescribed virtually

identical to those for New York Convention awards). This fills a gap since Hong Kong and Macau are not separate states, but rather special administrative regions of China, and previously a Macau award was not considered a foreign award in Hong Kong and reliance could not be placed on the New York Convention.

The Bill also provides that emergency relief granted by an emergency arbitrator (whether in or outside Hong Kong) is enforceable in the same manner as an order or direction of the court with leave of the court (applicant must show emergency relief sought to be enforced, inter alia, preserves assets, evidence and/or status quo and/or prevents prejudice to arbitral process). This supports the introduction of emergency relief provisions to the 2013 Rules, as well as the growing worldwide trend to provide for emergency relief, for example, in the ICC and the SIAC rules.

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A frustrating decision: English Court of Appeal refuses to intervene in arbitration award

In the recent case of Kyla Shipping Company Limited v. Bunge S.A. [2013] EWCA Civ 734, the applicant vessel owners sought to challenge a judge's refusal of permission to appeal from his own decision on a question of law arising from an arbitration award.

Case Background

The owners (**"Kyla"**) and the charterers (**"Bunge"**) had entered into a time charter, during which the vessel was seriously damaged following a collision whilst docked at a Brazilian port. As a result of the damage, Kyla claimed that the vessel was a constructive total loss. Kyla argued that the charterparty had been frustrated since the damage to the vessel was such that the cost of repair exceeded her market value and, as a consequence, the voyage could not be completed.

In February 2010, the parties commenced arbitration to consider issues of frustration of the charterparty, relating to the damaged vessel. The existence of an insurance provision within the charterparty effectively created a fund that was adequate to cover repairs to the vessel and, moreover, indicated that a risk of this type of damage had been contemplated by both parties at the time at which the contract was made. Despite this, the arbitrator found that the charterparty had been frustrated since the uneconomical repair position made Kyla's obligations under the charterparty commercially impractical.

Bunge sought permission to appeal the award pursuant to section 69 of the Arbitration Act 1996 (the **"Act"**). That application was determined on paper by a High Court Judge, and permission was granted on the basis that the question of law had raised a "question of general public importance".

At the hearing of the appeal, the parties presented arguments to Flaux J, who, following their submissions and a subsequent period of time to reflect on the issues, held that the doctrine of frustration should not be interpreted so as to create an uncompromising position whereby uneconomical repair costs would automatically frustrate a charterparty. Rather, it was his view that the insurance clause created a responsibility for Kyla to repair the damaged vessel up to the amount of cover. He considered that, since Kyla had taken the decision not to execute the repairs, despite the insurance cover to cater for such damage, the catalyst for the failure to complete the voyage was not the alleged frustrating event, as submitted by Kyla, but rather, the commercial decision not to repair the vessel.

Consequently, it was held that the charter could not be treated as having been frustrated and Bunge's appeal was upheld. Kyla then sought permission to appeal this decision pursuant to section 69(8) of the Act, which Flaux J refused.

The Court of Appeal's Decision

Having had their application for permission to appeal rejected, Kyla applied to the Court of Appeal for permission to appeal, or alternatively, to set aside the decision of Flaux J.

Under section 69 of the Act, a High Court decision can only be appealed with the leave of the High

Court where it considers the question to be of general importance or one which should be considered by the Court of Appeal. That being said, the Court of Appeal has a residual jurisdiction to set aside a refusal of permission to appeal, in instances where there exists some special reason to set aside.

Kyla put forward two main submissions in support of their application to set aside the decision of Flaux J. Firstly, that once it had been concluded that the question of law had raised a question of "general public importance", Flaux J had no reason to state that the case turned on its own set of facts or contractual construction. Secondly, that the arbitrator had not found that the insurance underwriters were willing and ready to repair the damaged vessel and, accordingly, Flaux J had no business to come to this conclusion when denying Kyla's permission to appeal.

In his interpretation of section 69 of the Act, Longmore LJ declared that the Court of Appeal had no jurisdiction to hear Kyla's application for permission to appeal since the High Court had held that "the case was not a case of general importance". In addition, he stated that the residual jurisdiction to set aside a refusal of permission is only exercisable in cases where that refusal stems from unfair or improper process, to the extent that "the decision to refuse cannot be categorised as a decision at all". In his judgment, he made reference to *CGU v Astra Zeneca Insurance Co Ltd*[1], in which Rix LJ had examined the scope of the court's ability to apply this residual jurisdiction following some form of unfair or improper process. In that case, it was stated that residual jurisdiction was exercisable following events where "something which has gone fundamentally wrong in the process, cannot properly be called a decision".

Unfortunately for Kyla, they were unable to point to anything which had gone "fundamentally wrong with the process" or, to a real defect in the fairness of the judicial process. Section 69(8) of the Act places a particularly high threshold upon an applicant to satisfy in this regard, a task that their counsel were unable to overcome in the absence of any applicable case law where the Court of Appeal had exercised this residual jurisdiction.

Accordingly, the Court of Appeal refused to overturn Flaux J's decision not to grant permission to appeal against his decision under section 69 of the Act. Longmore LJ did however provide some useful guidance for litigants in the future when facing a similar difficulty, stating that "if the shipowners wish to be sure that they have readier access to the expertise of this court, they should agree to the High Court resolving their disputes in the first place".

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[1] [2007] Bus L.R. 162

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Editor Profiles

George M. von Mehren leads the firm's International Dispute Resolution Practice Group, ranked by The American Lawyer's 2011 Arbitration Scorecard as a top arbitration practice globally. The 2009 edition of the publication also recognized one of George's recent arbitration victories, in which the client benefited by more than US$1 billion, as the second largest arbitration award by dollar amount in the world during the prior two years. The 2007 Arbitration Scorecard recognised another of George's victories as among the five largest arbitration awards in the prior five years. With more than 30 years of experience in complex adversarial proceedings, George spends 100 percent of his time representing clients in international arbitrations and providing strategic advice for litigation in courts outside the US. He has an established record of working effectively with counsel from around the world.

Paul Oxnard has over 20 years of experience dealing with high value commercial litigation, and international and domestic arbitration matters. He has been instrumental in developing the firm's market-leading Alternative Dispute Resolution practice in the UK. Paul has particular experience in relation to disputes in the heavy engineering, energy (particularly nuclear and gas) and telecoms sectors and white collar fraud, injunctive work (obtaining, enforcing and resisting general, freezing, and search and seizure injunctions). He also specialises in EU public procurement regulations related issues. Paul is recognised in Chambers Global 2012 within the dispute resolution category.

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Contributor Profiles

Peter Chow is deputy of the International Dispute Resolution (IDR) Practice Group, leads the IDR/Arbitration practice in Asia-Pacific. He handles disputes related to oil and gas, energy and natural resources, infrastructure and construction projects, international trade and general commerce. Peter has acted as counsel in numerous cases, appearing for parties in court, mediation and arbitration proceedings, including those involving ICC, HKIAC, CIETAC, SIAC and UNCITRAL arbitral rules. He has helped many clients to achieve expeditious resolution of disputes using alternative dispute resolution techniques. Peter also practices construction law (major projects) and advises clients on anticorruption initiatives.

Graeme Slattery represents clients in resolving a wide range of disputes. His experience includes representation in disputes over international oil fields, mining and exploration agreements, major construction projects, managed investment schemes, employment matters, directors' duties, disclosure obligations and oppression actions. His practice encompasses a variety of industry sectors including energy and resources, real estate and commercial property, financial services, technology, construction, transportation and logistics, infrastructure and government.

Rebecca Heath represents clients in a wide range of disputes. Her experience includes representation in disputes over mining and exploration agreements, construction projects, property developments, joint ventures, managed investment schemes, employment matters and directors' duties, as well as various other types of contractual and statutory rights, obligations and liabilities. She has acted for clients in a wide variety of industry sectors including energy and resources, real estate and commercial property, financial services, technology, sports, entertainment, construction, infrastructure and government.

Felicia Cheng is part of the International Dispute Resolution Practice Group in Asia. She handles general commercial disputes with particular experience in trade, construction, insolvency and employment disputes. She is an associate of the Chartered Institute of Arbitrators and Hong Kong Institute of Arbitrators.

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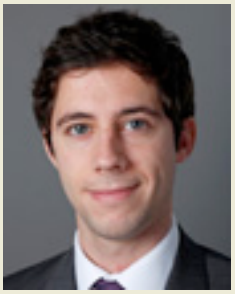
Contributor Profiles

Wissam Hachem has a wide range of experience in matters involving commercial, corporate, securities, private equity, real estate and civil law with a particular emphasis on corporate, securities and private equity. He has represented numerous European, American and Middle Eastern clients in Lebanon, Saudi Arabia, the UAE, Bahrain and throughout the Middle East. Before joining Squire Sanders, Wissam practiced in one of the leading firms in Beirut focusing mainly on corporate and banking transactions. He then joined the Riyadh local affiliate of Squire Sanders in early 2004. For the last nine years in Saudi Arabia, Wissam has worked on various matters involving clients from Saudi Arabia, the Gulf countries, Far East Asia, Europe and the United States.

Lloyd Thomas provides a range of contentious and regulatory advice to a number of leading sports clubs, individuals and National Governing Bodies on a variety of issues. As part of such advice, Lloyd regularly assists in proceedings brought before the FIFA Dispute Resolution Chamber and the Court of Arbitration for Sport. Lloyd also provides clients with advice on commercial litigation and arbitration, as well as alternative dispute resolution.



Max Rockall advises on a range of contractual and commercial disputes, including UK and international commercial litigation, arbitration, shipping litigation and alternative dispute resolution. Max has experience in handling disputes before the English High Court, the London Marine Arbitrators Association and the Court of Appeal.