ANNUAL LEGAL REVIEW OF 2023: KEY PRACTICE POINTS

Chaired by Lord Thomas

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Seminar Outline

- Part 1: Arbitration and International Disputes Overview
- Part 2: Arbitration Act 1996 cases
- Part 3: Investment Treaty decisions
- Part 4: Public International Law before the English Courts

Part 1: Arbitration and International Disputes Overview

- In FY2023, ICSID registered 45 new cases ("the new ICSID arbitrations").
- The 2 main bases of consent for the new ICSID arbitrations remained BITs (37%) and the ECT (13%).
- The largest proportion of the new ICSID arbitrations were brought against States from Central America & the Caribbean (22%) and Eastern Europe & Central Asia (18%).
- The largest propotion of the new ICSID arbitrations were brought in the oil/gas/mining (27%), electric power (15%) and finance (11%) sectors.
- Women accounted for 22% of ICSID arbitrator appointments in the new ICSID arbitrations. Western Europe and North America accounted for the vast majority of ICSID arbitrator appointments. Only 3 arbitrators from the MENA region were appointed.
- The ICC and LCIA appear not to have yet published statistics for 2023.

Part 2: Arbitration Act 1996 cases

Overview (1)

- Around 74 reported judgments concerning AA 1996 provisions, including c. 15 on appeals on a point of law under Section 69 AA 1996 and c. 14 on aspects of challenges under Sections 67-68 AA 1996.
- The UKSC gave an important judgment on stays of court proceedings under Section 9 AA 1996 (*Mozambique v Privinvest* [2023] UKSC 32).
- The Commercial Court and CoA gave a large number of decisions on aspects of anti-suit injunctive relief in support of arbitrations, including several in the context of sanctions:
  - *Patel v Minerva* [2023] EWCA Civ 118
  - *Nigerian Agip Exploration Ltd v GEC Petroleum Development Co* [2023] EWHC 414 (Comm)
  - *Eurochem v Tecnimont* [2023] EWCA Civ 688
  - *SQD v QYP* [2023] EWHC 2145 (Comm),
  - *G v R* [2023] EWHC 2365 (Comm)
  - *Spain v London Steamship Owners' Mutual Insurance Association Ltd* [2023] EWHC 2473 (Comm)
  - *Deutsche Bank v RusChemAlliance* [2023] EWCA Civ 1144
  - *Renaissance v Chlodwig* [2023] EWHC 2816 (Comm) and [2023] EWHC 3160 (Comm)
  - *RSM v Gaz du Cameroun* [2023] EWHC 2820 (Comm)
  - *PT Services Malta v Caliplay* [2023] EWHC 3060 (Comm)
  - *Shell v Sunlink* [2023] EWHC 3135 (Comm)
  - *Tyson v Partner Reinsurance Europe* [2023] EWHC 3243 (Comm)
  - *UK P&I Club v Venezuela* [2023] EWCA Civ 1497.

Part 2: Arbitration Act 1996 cases

Overview (2)

- The Law Commission's review of AA 1996 concluded it did not need 'root and branch reform', but made several recommendations for improvements in specific areas (all of which were accepted by HMG).
- The Arbitration Bill was introduced into the House of Lords on 21/11/2023 and contains several initiatives for substantive reform:
  - Codification of an arbitrator's duty of disclosure;
  - Strengthening of arbitrator's immunity surrounding resignations and Section 24 AA 1996 applications;
  - Introducing an arbitral power to summarily dispose of issues that have "*no real prospects of success*";
  - Revised framework for Section 67 AA 1996 challenges;
  - New rules on determining the law applicable to an arbitration agreement (following dissatisfaction with the law as stated by the UKSC in *Enka v Chubb* [2023] UKSC 38);
  - Clarification of the courts' powers in support of arbitrations and emergency arbitrations.

Part 2: Arbitration Act 1996 cases

KEY CASES

A. Challenges and the loss of the right to object

- *Radisson Hotels APS Danmark v Hayat Otel Işletmeciliği Turizm Yatırım Ve Ticaret Anonim Şirketi* [2023] EWHC 892 (Comm) (21/04/2023)
- *National Iranian Oil Co v Crescent Petroleum Company International Ltd* [2023] EWCA Civ 826 (13/07/2023)
- *Nigeria v Process & Industrial Developments Ltd* [2023] EWHC 2638 (Comm) (23/10/2023)

B. Stay of court proceedings

- *Mozambique v Privinvest Shipbuilding SAL (Holding) and ors* [2023] UKSC 32 (20/09/2023)

C. Anti-suit injunctive relief

- *Deutsche Bank AG v RusChemAlliance LLC* [2023] EWCA Civ 1144 (11/10/2023)

A. Challenges and the loss of the right to object (1)

***Radisson Hotels APS Danmark v Hayat Otel Işletmeciliği Turizm Yatırım Ve Ticaret Anonim Şirketi* [2023] EWHC 892 (Comm) (21/04/2023) (Dame Clare Moulder)**

- After a liability/causation award in favour of the defendant (D), an in-house lawyer in D's parent company informed the claimant (C) of mid-arbitration communications between D and an arbitrator.
- C subsequently engaged the in-house lawyer and obtained evidence showing the arbitrator had provided D copies of internal tribunal emails.
- C challenged under Section 68 AA 1996, and the arbitrator resigned.
- The Commercial Court rejected C's Section 68 AA 1996 challenge as being barred by Section 73 AA 1996:
  - C had had grounds for suspicion when first informed of the contact between D and the arbitrator.
  - For purposes of Section 73 AA 1996, a distinction was to be drawn between having knowledge and having evidence.
  - C had failed to show that it could not have obtained the evidence for the challenge sooner than it did.
  - Further, C had continued to participate in the quantum phase of the arbitration for nearly 2 weeks (whilst considering their strategy) rather than raise the bias issue with the full Tribunal.

A. Challenges and the loss of the right to object (2)

***National Iranian Oil Co v Crescent Petroleum Company International Ltd* [2023] EWCA Civ 826 (13/07/2023) (Males LJ; Nugee LJ; Falk LJ)**

- Crescent commenced arbitration on a contract (Iranian Law/London arbitration). NIOC brought a Section 67 AA 1996 challenge against the Tribunal's rejection of its jurisdictional objection that part of the claim concerned liability under a different contract.
- Crescent contended NIOC's objection before the Tribunal had been different (it had not included the ground on which the Section 67 AA 1996 challenge was pursued), and that NIOC had not lost its right to object under Section 73 AA 1996.
- The CoA dismissed both (i) NIOC's appeal against the summary dismissal of its Section 67 AA 1996 application, and (ii) Crescent's application for permission to cross-appeal on the decision concerning Section 73 AA 1996:
  - Cross-appeal: PTA from a Section 67 AA 1996 decision could only be granted at first instance. A decision that the right to challenge had not been lost under Section 73 AA 1996 was "*a decision of the court under [Section 67 AA 1996]*" for the purposes of Section 67(4) AA 1996.
  - Appeal: the judge's evaluation of expert Iranian Law evidence was not an impermissible "*mini-trial*". The judge had disentangled the admissible from the inadmissible, accepted the admissible, and then considered it clear that, even if NIOC succeeded in proving all the facts relied upon, it would not in under Section 67 AA 1996.

A. Challenges and the loss of the right to object (3)

***Nigeria v Process & Industrial Developments Ltd* [2023] EWHC 2638 (Comm) (23/10/2023) (Robin Knowles J)**

- Nigeria challenged US$6.6bn awards under, *inter alia*, Section 68(2)(g) AA 1996 on the grounds they were procured by fraud and/or contrary to public policy, citing (i) P&ID's bribery/corruption before, at and after contract formation, and (ii) P&ID's accessing Nigeria's confidential legal documents during the arbitration. P&ID contended Nigeria had lost its right to challenge under Section 73 AA 1996.
- The Commercial Court upheld Nigeria's challenge and set aside the awards.
  - Serious irregularity causing substantial injustice: (1) A Nigerian public official drafting the contract was bribed to assist P&ID in obtaining contractual terms adverse to Nigeria. Further bribes were paid during the arbitration to suppress that fact; (2) During the arbitration, P&ID received (and deliberately retained) Nigeria's internal legal documents, including documents that were confidential and subject to LPP; (3) P&ID main witness in the arbitration gave dishonest evidence about the contract's formation; and (4) had the Tribunal known of the bribes, it would have handled Nigeria's delays/failures to engage differently.
  - Nigeria had not lost the right to object under Section 73 AA 1996. Reasonable diligence would not have discovered the bribery/false evidence/provision of Nigeria's internal legal documents earlier.

B. Stay of proceedings

***Mozambique v Privinvest Shipbuilding SAL (Holding) and ors* [2023] UKSC 32 (20/09/2023) (main judgment: Lord Hodge)**

- Mozambique's SPVs entered into supply contracts (Swiss Law/Swiss arbitration) with members of the Privinvest group, and loan agreements secured by sovereign guarantees (English Law/English courts' jurisdiction). Mozambique alleged Privinvest conspired (including paying bribes to public officials/bank employees) to expose Mozambique to a US$2 billion liability under the guarantees. Privinvest sought a Section 9 AA 1996 stay.
- The Commercial Court held the bribery/unlawful means conspiracy/dishonest assistance claims were not "*matters*" within the scope of the arbitration agreements. That decision was reversed by the CoA.
- The UKSC allowed Mozambique's appeal:
  - Section 9 AA 1996 involved a two-stage exercise: (i) which "*matters*" had been or would be raised in the English proceedings, and (ii) did those matters fall within the arbitration agreement?
  - A "*matter*" need not encompass the entire dispute. A "*matter*" needed to be an (arbitrable) substantial issue relevant to a claim/defence. This was an evaluation of the substance and relevance of a "*matter*".
  - The bribery/unlawful means conspiracy/dishonest assistance claims required no examination of the supply contracts' validity, so a defence as to their validity would be irrelevant to any liability to account for bribes. They were not "*matters*" in respect of which the English proceedings were brought, and were not within the scope of the arbitration agreements.

C. Anti-suit injunctive relief

***Deutsche Bank AG v RusChemAlliance LLC* [2023] EWCA Civ 1144 (11/10/2023) (Nugee LJ; Snowden LJ; Falk LJ)**

- RCA made a demand under a bank guarantee (English Law/Paris-seated arbitration). DB refused to pay because of sanctions concerning Russia. RCA commenced Russian proceedings. DB commenced Paris-seated arbitration and sought an anti-suit injunction (ASI) from the English courts (because ASIs could not be obtained from the French courts). Bright J refused to grant an ASI on the basis that (i) England was not the proper forum, and (ii) ASIs were contrary to French public policy.
- The CoA allowed DB's appeal, after hearing additional evidence on French Law.
  - Bright J had only limited French Law evidence available. The fresh evidence suggested that, whilst French courts could not grant ASIs, they would recognise one from the English courts (provided it was not contrary to international public policy).
  - There was a serious issue to be tried on the merits and a good arguable case that paragraph 3.1(6)(c) of CPR PD6B was satisfied. Furthermore, applying *Spiliada* principles, England was the proper forum. The choice was not between two competing jurisdictions; it was between the claim being brought or not being brought at all.
  - Even if RCA applied to discontinue the Russian proceedings, it was possible for the Russian court to refuse. It was appropriate to restrain RCA from enforcing any judgment from the Russian court.

Part 2: Arbitration Act 1996 cases

Panel Questions

1. Are the proposed changes to the Arbitration Act 1996 necessary? Do they go far enough?

2. Is the Supreme Court's decision in *Mozambique v Privinvest and others* [2023] UKSC 32 likely to lead to more inconsistent decisions in different jurisdictions?

3. What are the main challenges to London's position as the pre-eminent dispute resolution centre concerning (a) Courts (b) arbitration?

Part 3: Investment Treaty decisions

KEY CASES

A. Jurisdictional objections

- *AsiaPhos Ltd and anor v China* (ICSID Case No. ADM/21/1) (Award) (16/02/2023)
- *Santamarta Devis v Venezuela* (PCA Case No. 2020-56) (Decision on Jurisdiction *Ratione Personae*) (26/07/2023)
- *Adria Group BV and anor v Croatia* (ICSID Case No. ARB/20/6) (Decision on Intra-EU Jurisdictional Objection) (31/10/2023)

B. Conflicts of interest

- *Pildegovics and anor v Norway* (ICSID Case No. ARB/20/11) (Procedural Order 9 – Application regarding Alleged Conflict of Interests) (23/02/2023)

C. Non-Disputing Party intervention

- *Eni International BV and ors v Nigeria* (ICSID Case No. ARB/20/41) (Procedural Order 4 – Decision on Petition under ICSID Arbitration Rule 37(2)) (07/03/2023)

A. Jurisdictional objections (1)

AsiaPhos Ltd and anor v China **(ICSID Case No. ADM/21/1) (Award) (16/02/2023) (Klaus Sachs (President); Stanimir Alexandrov; Albert Jan van den Berg)**

- Singaporean mining companies claimed under PRC-Singapore BIT 1986 alleging expropriation of phosphate mines by prohibiting mining in an area set aside as a panda nature reserve.
- China objected to jurisdiction, *inter alia*, on the basis that the dispute was not within the scope of its consent to arbitration which (under Article 13(3) BIT) was limited to disputes about the amount of compensation for expropriation.
- (By majority) the Tribunal held it had no jurisdiction:
  - Applying VCLT 1969 treaty interpretation principles, the BIT's arbitration clause was limited to disputes over the amount of compensation awarded for an (undisputed or previously established) expropriation. Disputes concerning the "*occurrence*" and "*legality*" of an expropriation could only be brought before the host State's domestic courts.
  - Absent unambiguous consent of both parties, and where a State with sovereign immunity, the BIT's MFN clause could not be used to expand the scope of the arbitration clause.
- Stanimir Alexandrov (dissenting): The arbitration clause's reference to "*a dispute involving the amount of compensation resulting from expropriation*…" did not limit the scope to disputes about quantum, rather than existence, of expropriation.

A. Jurisdictional objections (2)

Santamarta Devis v Venezuela (PCA Case No. 2020-56) (Decision on Jurisdiction _Ratione Personae_) (26/07/2023) (Claus von Wobeser (President); Marcelo Kohen; Eduardo Siqueiros Twomey)

- Dual Spanish-Venezuelan national claimed under Spain-Venezuela BIT alleging, *inter alia*, unlawful confiscation of a manufacturing plant. Venezuela objected to jurisdiction on the basis that the claimant's dual nationality took him outside the BIT's scope of "*investor*" which required an investor to possess "*the nationality of one of the contracting parties*".
- The Tribunal rejected jurisdiction:
  - The argument that "*one*" meant "*only one*" was rejected. The purpose of the definition was to prevent claims against host States by people who held solely the host State nationality.
  - Dual nationals had a special and separated status in international law. A good faith interpretation of the BIT could neither include or exclude dual nationals from the BIT's scope.
  - However, on the facts, the claimant's "*dominant*" or "*effective*" nationality was that of Venezuela. He was therefore not entitled to sue Venezuela under the BIT.

A. Jurisdictional objections (3)

Adria Group BV and anor v Croatia **(ICSID Case No. ARB/20/6) (Decision on Intra-EU Jurisdictional Objection) (31/10/2023) (Sir Christopher Greenwood KC (President); Charles Poncet; J. Christopher Thomas KC)**

- Dutch investors commenced ICSID proceedings under the Netherlands-Croatia BIT. Croatia (supported by the European Commission as a NDP) ran the "Intra-EU" objection to jurisdiction.
- The Tribunal rejected all aspects of Croatia's Intra-EU objection:
  - Conflict between the EU Treaties and the obligations of BIT parties under BITs and the ICSID Convention fell to be determined under PIL rules. ICSID tribunals sat outside the EU legal order and were not strictly bound by *Achmea* and *Komstroy*. ICSID tribunals would defer to the CJEU's interpretation of the EU Treaties, but did not have to defer to the CJEU's views on EU Law's primacy over other PIL obligations.
  - EU Law did not negate the offer to arbitrate in the BIT. The BIT was only terminated when the "Termination Treaty" (between 23 EU Member States, including Croatia and the Netherlands) entered into force on 31/03/2021.
  - The 15/01/2019 Declaration recognising the consequences of *Achmea* also had not terminated the BIT. Its language clearly envisaged that the intra-EU BITs would be terminated by future agreements.
- N.B. In *European Commission v UK* (C-516/22) (09/11/2023), Advocate-General Emiliou opined the UKSC's decision in *Micula v Romania* [2020] UKSC 5 (19/02/2020) violated its duty to refer under Article 267 TFEU and its duty of cooperation by refusing to stay proceedings until the CJEU adjudicated.

B. Conflicts of interest

Pildegovics and anor v Norway **(ICSID Case No. ARB/20/11) (Procedural Order 9 – Application regarding Alleged Conflict of Interests) (23/02/2023) (Sir Christopher Greenwood KC (President); L. Yves Fortier KC; Donald McRae)**

- Latvian investors raised concerns about conflicts of interest on the part of, *inter alia*, the law firm Wikborg Rein (WR) and KPMG as Norway's advisors in an arbitration regarding investments in the snow crab fishing sector.
- The Tribunal excluded KPMG and refused to exclude WR:
  - The Tribunal had broad powers under Article 44 ICSID Convention and ICSID Arbitration Rule 19 to regulate matters affecting procedural integrity. Applying *Fraport v Philippines*, the test was "*whether there is a real risk that a party's lawyer or other adviser may have received confidential information from the other party which may be of significance in the proceedings and might prejudice the fair trial of the case*".
  - WR had advised third parties on Norwegian criminal proceedings relating to illegal snow crabbing and was alleged to have obtained confidential information about the investors. Although the Tribunal was "*disturbed*" by the late disclosure of WR's involvement to "*assist with background work*", the Tribunal was not satisfied that there was a sufficiently close connection between the investors and the third parties to justify WR's exclusion.
  - KPMG were advising Norway, but one of its partners had previously done a preliminary damages assessment for the second claimant relating to the present dispute, thereby obtaining confidential information. That was "*a clear conflict of interest*".

C. Intervention of Non-Disputing Party

Eni International BV and ors v Nigeria **(ICSID Case No. ARB/20/41) (Procedural Order 4 – Decision on Petition under ICSID Arbitration Rule 37(2)) (07/03/2023) (Laurent Lévy (President); J. William Rowley KC; Zachary Douglas KC)**

- Dutch investors commenced ICSID arbitration under Netherlands-Nigeria BIT. Various NGOs, who had been investigating allegations of corruption on the part of the investors for more than a decade, applied under ICSID Arbitration Rule 37(2) to file submissions as a Non-Disputing Party (NDP) and to access documents from the arbitration record for that purpose.
- The Tribunal granted the NGOs' application:
  - The NGOs satisfied the criteria in ICSID Arbitration Rule 37(2).
  - The NGOs would assist the Tribunal to better understand factual aspects relating to Nigeria's allegations of corruption on the part of the investors. The NGOs were able to contribute knowledge that the parties either did not have or was likely to disclose. Furthermore, the NGOs could be said to have a significant interest in the proceedings.
  - However, the NGOs were unlikely to be able to assist the Tribunal with legal issues relating to corruption.
  - To enable them to fulfil their NDP role effectively, the NGOs were granted access to a consolidated list of factual exhibits, but refused access to other parts of the record.

Part 3: Investment Treaty decisions

Panel Questions

1. Are further measures required to address potential conflict of interest issues in respect of arbitrators - if so, what would you suggest?

2. Is the UK's position on enforcement of intra EU-BIT awards post-*Achmea* tenable irrespective of Brexit?

3. Are damages awards in BIT cases and the underlying expert formulations increasingly opaque? Should arbitrators have increasing recourse or be required to obtain input from an independent assessor in claims of high value (more than US$100 million)?

Part 4: PIL before the English Courts

Overview

- The English courts at first instance and appellate level continue to face PIL issues on a regular basis, and have rendered important decisions in 2023 in the fields of:
  - State Immunity – *BB v Al-Khayyat* [2023] EWCA Civ 253, *Zhongshan Fucheng Investment Co v Nigeria* [2023] EWCA Civ 867, *UK P&I Club v Venezuela* [2023] EWCA Civ 1497, *Shehabi v Bahrain* [2023] EWHC 89 (KB), *Mozambique v Credit Suisse* [2023] EWHC 2215 (Comm)
  - Sanctions – *PJSC National Bank Trust v Mints* [2023] EWCA Civ 1132, *Synesis v Foreign Secretary* [2023] EWHC 541 (Admin), *Shvidler v Foreign Secretary* [2023] EWHC 2121 (Admin), *R (Fridman) v HM Treasury* [2023] EWHC 2657 (Admin), *Litasco v Der Mond* [2023] EWHC 2866 (Comm)
  - Foreign Act of State Doctrine – *Law Debenture Trust Corp v Ukraine* [2023] UKSC 11, *Crane Bank Ltd v DFCU Bank Ltd* [2023] EWCA Civ 886
  - "One voice" doctrine – *Deutsche Bank v Central Bank of Venezuela* [2023] EWCA Civ 742
  - Treaty interpretation – *Infrastructure v Spain* [2023] EWHC 1226 (Comm)
  - International Humanitarian Law – *R (CAAT) v International Trade Secretary* [2023] EWHC 1343 (Admin)

Part 4: PIL before the English Courts

KEY CASES

A. Justiciability

- *R (Friends of the Earth Ltd) v Secretary of State for International Trade and ors* [2023] EWCA Civ 14 (13/01/2023)
- *The Law Debenture Trust Corporation Plc v Ukraine* [2023] UKSC 11 (15/03/2023)

B. State Immunity

- *European Union v Syria* [2023] EWHC 1116 (Comm) (21/04/2023)
- *Zhongshan Fucheng Investment Co Ltd v Nigeria* [2023] EWCA Civ 867 (20/07/2023)
- *Hulley Enterprises Ltd and ors v Russia* [2023] EWHC 2704 (Comm) (01/11/2023)

C. Sanctions

- *Dalston Projects Ltd and ors v Secretary of State for Transport* [2023] EWHC 1885 (Admin) (21/07/2023)

A. Justiciability (1)

***R (Friends of the Earth Ltd) v Secretary of State for International Trade and ors* [2023] EWCA Civ 14 (13/01/2023) (Sir Geoffrey Vos MR; Bean LJ; Sir Keith Lindblom)**

- C sought JR of HMG's approval of a US$1.5 billion investment in an LNG project alleged to be incompatible with the UK's Paris Agreement obligations. C contended, *inter alia*, there was no rational basis for HMG to conclude that there was compatibility with Article 2(1)(c) (which provided for the Paris Agreement's aim to strengthen the global response to climate change by moving finance flows towards climate-resilient developments). At first instance, the Divisional Court had been unable to reach an agreed decision and so had dismissed the claim.
- The Court of Appeal dismissed the claimant's appeal.
  - The Paris Agreement was not incorporated into domestic law and did not create domestic legal obligations. Nevertheless, the funding's compatibility with the UK's international law obligations was justiciable.
  - Whether there was an error of law depended on whether HMG had adopted a "*tenable*" (not necessarily "*correct*") view on the funding's alignment with the UK's international law obligations.
  - On the facts, HMG had adopted a "*tenable*" view. Article 2(1)(c) set out one treaty aim and purpose, but did not itself give rise to obligations to demonstrate that UK overseas funding was on a pathway towards limiting global warming below 2°C.

A. Justiciability (2)

The Law Debenture Trust Corporation Plc v Ukraine **[2023] UKSC 11 (15/03/2023) (majority: Lords Reed, Lloyd-Jones, Kitchin, Hodge)**

- LDTC obtained summary judgment after Ukraine placed a moratorium on further payments in respect of US$3bn Eurobonds.
- The UKSC (i) dismissed Ukraine's appeal against the CoA's rejection of its arguments based on capacity, authority and countermeasures, and (ii) dismissed LDTC's appeal against the setting aside of summary judgment for duress.
  - Capacity: a foreign State recognised by HMG was presumed to have full capacity under English Law.
  - Authority: the rule that a principal was bound by a contract made by an agent with ostensible authority applied where the principal was a State and the agent was a State official (even if the official was acting beyond the limit of statutory powers).
  - Countermeasures: A defence of international law countermeasures was non-justiciable (Lord Carnwath dissenting).
  - Duress: Ukraine's averments of economic pressure were not legally capable of amounting to duress (Lord Carnwath dissenting). However, Ukraine's averments that Russia threatened to use force were, and would require determination at trial. Ukraine's physical duress claim would not require questioning the validity under international law of a foreign sovereign act.

B. State immunity (1)

***European Union v Syria* [2023] EWHC 1116 (Comm) (21/04/2023) (Butcher J)**

- EU sought to recover debts owed under development loan agreements, which designated Syria's UK ambassador as its agent for service. EU contended that that method was rendered inoperable by ongoing civil unrest in Syria, and instead provided the claim documents to the FCDO for them to effect diplomatic service.
- Instead of serving hard copies (because the UK had no diplomatic presence in Syria), the FCDO effected email service on Syria's Foreign Ministry. EU applied to the English court for a declaration that that was valid service.
- The Commercial Court granted the declaration sought by EU.
  - Section 12(1) SIA 1978 did not prescribe the transmission to be used by UK diplomatic representatives carrying out service through the diplomatic route.
  - The FCDO could use its discretion in determining what was the most appropriate method in the circumstances (subject to the chosen method not being prohibited in the laws of the receiving State).
  - The *dictum* in *Heiser's Estate v Iran* [2019] EWHC 2074 (QB) that "*received*" (for the purposes of Section 12 SIA 1978) required an act of volition from the receiving State was inconsistent with modern authorities that a refusal to accept physical document did not prevent legal "*receipt*" of those documents.

B. State Immunity (2)

Zhongshan Fucheng Investment Co Ltd v Nigeria **[2023] EWCA Civ 867 (20/07/2023) (Sir Julian Flaux C; Underhill LJ)**

- ZFI obtained permission to enforce against Nigeria a US$55.6m BIT award, regarding which Nigeria had previously filed (and discontinued) a Section 67 AA 1996 challenge. Cockerill J gave Nigeria 2 months and 14 days to apply to vary the enforcement order.
- Nigeria applied out of time for variation. Cockerill J refused, rejecting the submission that the *Denton* criteria did not apply because of State Immunity, finding the breaches were serious/significant/without good reason, and that the interests of justice militated against an extension. Nigeria was refused PTA.
- The CoA dismissed Nigeria's application to reopen a refusal of PTA:
  - Cockerill J had made an assessment that there was no arguable case for State Immunity, but had nevertheless set out a timetable (taking into account that Nigeria was a State) for Nigeria to apply for variation. Nigeria had failed to comply with that timetable. The suggestion that the court should, in that situation, effectively disregard the enforcement order in order to allow Nigeria's State Immunity invocation to be determined was misconceived.
  - Cockerill J's findings on the application of the *Denton* criteria to Nigeria's breach were upheld.

B. State Immunity (3)

Hulley Enterprises Ltd and ors v Russia **[2023] EWHC 2704 (Comm) (01/11/2023) (Cockerill J)**

- In proceedings to enforce Dutch-seated US$50 billion awards, the court ordered the trial of preliminary issues as to whether the defendant's State Immunity jurisdiction challenge should be refused because of the binding effect of Dutch judgments concerning the existence of an underlying arbitration agreement.
- The Commercial Court determined the preliminary issues in favour of the claimants, and dismissed the defendant's State Immunity challenge to jurisdiction:
  - Nothing interior to the SIA 1978 indicated Issue Estoppel was unavailable against a State. Two cases (*Dallah v Pakistan* [2010] UKSC 46 and *Diag Human v Czech Republic* [2014] EWHC 1639 (Comm)) implicitly recognised such a possibility.
  - Recognition of a foreign judgment against a State required the test in Section 31 CJJA 1982 to be satisfied. However, it was unnecessary to comply with the procedural requirements of Section 31(4) CJJA 1982 absent an application for recognition and enforcement under CJJA 1982. In the circumstances, the defendant had submitted to the Dutch jurisdiction by challenging the awards.
  - The jurisdictional points raised on the State Immunity challenge had already been determined in the Dutch courts in a manner that was "*final and conclusive*".
  - There were no "*special circumstances*" rendering the application of Issue Estoppel unjust.

C. Sanctions

***Dalston Projects Ltd and ors v Transport Secretary* [2023] EWHC 1885 (Admin) (21/07/2023) (Sir Ross Cranston)**

- The Transport Secretary exercised his statutory powers to detain the claimants' superyacht on the grounds it was owned, controlled or operated by a person connected with Russia. The claimants were not themselves sanctioned. The claimants sought, *inter alia*, to set aside that decision under Section 38(2) SAMLA 2018.
- The Administrative Court refused the claimants' application:
  - The Transport Secretary had not acted for an improper purpose when ordering the detention. The detention was done for a purpose consistent with that of the sanctions regulations to encourage Russia to cease unlawful acts against Ukraine.
  - It was common ground that the detention of Russian assets in the UK pursued a legitimate aim as part of HMG's foreign policy to expand sanctions against Russia. The vessel's detention was done because the second claimant was very wealthy and connected with Russia. That provided a "*rational connection*" between the detention and the legislative aim. The lack of clarity as to what particular contribution to that aim the detention might make did not mean it was irrational.

Part 4: PIL before the English Courts

Panel Questions

1. Does the Supreme Court's decision in *Law Debenture Trust v Ukraine* [2023] UKSC 11 give rise to any significant concerns?

2. Is it time for Section 12 of the State Immunity Act 1978 to be amended to permit service by other means which must presently be undertaken through diplomatic channels in exceptional circumstances?

3. Should the common law doctrine of Issue Estoppel apply to foreign Court Judgments in respect of the question whether a State has waived immunity from the jurisdiction of England & Wales?

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