ANNUAL LEGAL REVIEW OF 2024: KEY PRACTICE POINTS

Chaired by Sir Robin Jacob

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The Large Pension Room, Gray's Inn, London

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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 FY2024, ICSID registered 58 new cases ("the new ICSID arbitrations").
- The 2 main bases of consent for the new ICSID arbitrations remained BITs (53%, up from 37% in FY2023) and the ECT (14%, up from 13% in FY2023).
- The largest proportion of the new ICSID arbitrations were brought against States from Eastern Europe & Central Asia (24%, up from 18%), South America (19%, up from 13%), North America (16%, up from 13%) and Central America & the Caribbean (12%, down from 22%).
- The largest proportion of the new ICSID arbitrations were brought in oil/gas/mining (28%, up from 27%), transportation (19%, up from 9%), and electric power (17%, up from 15%).
- Women accounted for 29% of ICSID arbitrator appointments in the new ICSID arbitrations (up from 22%). Western Europe still accounted for the most ICSID arbitrator appointments (40%), but South America (20%) overtook North America (18%).
- The ICC and LCIA appear not to have yet published statistics for 2024.

Part 2: Arbitration Act 1996 cases

Overview (1)

- Around 55 reported judgments concerning AA 1996 provisions in 2024.
- The UKSC gave an important judgment on appeal under Section 69 AA1996, including *Herculito v Gunvor* [2024] UKSC 2, *Sharp v Viterra* [2024] UKSC 14 and *RTI v MUR* [2024] UKSC 18. The UKPC gave an important judgment at the intersection between arbitration and insolvency law (*Sian Participation v Halimeda International* [2024] UKPC 16)
- The English courts continued to hear a large number of cases concerning aspects of anti-suit injunctive relief in support of arbitrations, including several in the context of sanctions:
  - *Sodzawiczny v Smith* [2024] EWHC 231 (Comm)
  - *Tyson International Co Ltd v GIC Re* [2024] EWHC 236 (Comm)
  - *Euronav Shipping NV v Black Swan Petroleum DMCC* [2024] EWHC 896 (Comm)
  - *Barclays Bank Plc v VEB.RF* [2024] EWHC 1074 (Comm), [2024] EWHC 2981 (Comm) and [2024] EWHC 3088 (Comm)
  - *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30
  - *Investcom Global Ltd v PLC Investments Ltd* [2024] EWHC 2505 (Comm)
  - *Renaissance Securities (Cyprus) Ltd v ILLC Chlodwig Enterprises* [2024] EWHC 2843 (Comm)
  - *Manta Penyez Shipping Inc v Zuhoor Alsaeed Foodstuff Co* [2024] EWHC 3109 (Comm)

Part 2: Arbitration Act 1996 cases

Overview (2)

- The Arbitration Bill received its second reading in the House of Lords on 29/01/2025 (having been reintroduced by the Labour Government):
  - Suggestions for the Arbitration Bill to react to *P&ID v Nigeria* by legislating in the area of arbitral corruption have been resisted: "*We take corruption very seriously. However, we have concluded that arbitral corruption is not caused by any issue with our domestic arbitral framework. The Arbitration Act 1996 and common law already provide remedies to deal with corrupt conduct*" (Sir Nicholas Dakin, Parliamentary Under-Secretary of State for Justice, Hansard Arbitration Bill [Lords], Volume 761: debated on Wednesday 29 January 2025)).

    Note, inter-alia, draft provisions:

  - Section 6A which requires express agreement concerning the law applicable to the arbitration agreement, failing which the law of the seat applies
  - Section 23A confirming the continuing duty of disclosure upon an arbitrator
  - Section 39A power to make an award on a summary basis

Part 2: Arbitration Act 1996 cases

KEY CASES

A. Bias

- *H1 and anor v W and ors* [2024] EWHC 382 (Comm) (22/02/2024)
- *Aiteo Eastern E&P Co Ltd v Shell Western Supply & Trading Ltd and ors* [2024] EWHC 1993 (Comm) (01/08/2024)

B. Transactions defrauding an award creditor

- *Crescent Petroleum Company International Ltd and anor v Retirement, Savings & Welfare Fund of Oil Industry Workers* [2024] EWHC 835 (Comm) (15/04/2024)

C. Section 69 AA1996

- *Sharp Corp Ltd v Viterra BV* [2024] UKSC 14 (08/05/2024)
- *Eronat v CPNC International (Chad) Ltd and anor* [2024] EWHC 2880 (Comm) (18/10/2024)

D. Section 68 AA1996 – costs

- *Nigeria v Process & Industrial Developments Ltd* [2024] EWCA Civ 790 (12/07/2024)

E. Anti-suit injunctions

- *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30 (18/09/2024)

F. *Norwich Pharmacal* relief in set aside proceedings

- *Filatona Trading Ltd and anor v Quinn Emanuel Urquhart & Sullivan UK LLP* [2024] EWHC 2573 (Comm) (14/10/2024)

A. Bias (1)

***H1 and anor v W and ors* [2024] EWHC 382 (Comm) (22/02/2024) (Calver J)**

- The British Film Institute nominated an arbitrator in an insurance dispute arising out of a policy of film production insurance. The insured submitted a report from an on-set safety expert in the Swedish film industry. The arbitrator made various comments on the parties' experts, including:
  - he was "*extremely good friends*" with the insured's experts
  - conversely, he did not know the insurer's expert
  - it was unnecessary to call any expert witnesses.
  - in addition, the arbitrator commented that one of the insurer's witnesses (who had initially been retained by the insured to investigate the underlying accident) had inappropriately "*switched sides*".
- **The Commercial Court removed the arbitrator under Section 24(1) AA1996:**
  - In the context of the comments of knowing the insured's experts extremely well and not knowing the insurer's expert, the arbitrator's suggestion he did not need to hear from any expert witness was not an impartial position.
  - The fair-minded and reasonable observer would apprehend a risk that the arbitrator would be accepting the insured's experts' evidence at face value. The fact that the arbitrator did allow cross-examination of the experts did not rectify the situation.
  - However, the "*switching sides*" comment, whilst demonstrating the arbitrator's "*inexperience*", did not demonstrate animosity to the witness and did not give rise to a real possibility of bias.

A. Bias (2)

***Aiteo Eastern E&P Company Ltd v Shell Western Supply & Trading Ltd and ors* [2024] EWHC 1993 (Comm) (01/08/2024) (Jacobs J)**

- The parties were in two consolidated ICC arbitrations, in which four Partial Awards were rendered. The claimant challenged those awards under Section 68 AA1996 on grounds of the defendants' nominated arbitrator's bias. The claimant had successfully challenged the arbitrator through the ICC Court.
- The arbitrator (DEG) had 8 professional connections (comprising arbitral appointments and expert instructions) with the defendants' solicitors, only 2 of which were disclosed in her ICC Disclosure Statement. The rest only emerged after the Partial Awards.
- **The Commercial Court allowed the claimants' Section 68 AA1996 application:**
  - The cumulative effect of the arbitrator's repeat appointments/engagements by the defendants' solicitors, coupled with material non-disclosures by the arbitrator, gave rise to a real possibility of bias (applying *Halliburton v Chubb*).
  - Contrary to the claimants' arguments, the ICC Court's ruling did not have *res judicata* effect. However, it did work to resolve any possible doubt about the existence of bias.
  - The identified bias amounted to a "*serious irregularity*" in respect of all four Partial Awards. Subject to the specific facts of each case, "*substantial injustice*" may be inferred where apparent bias is found.
  - However, analysing each of the four Partial Awards, only one gave rise to "*substantial injustice*" and would be remitted for reconsideration.

B. Transactions defrauding an award creditor

***Crescent Petroleum Company International Ltd and anor v Retirement, Saving & Welfare Fund of Oil Industry Workers* [2024] EWHC 835 (Comm) (15/04/2024) (Sir Nigel Teare)**

- Crescent and NIOC had a 25-year GSA. Crescent secured a Partial Award for US$2.4 billion in damages (interest accruing at US$15m per month).
- Crescent obtained a charging order against "NIOC House" in Westminster (worth approx. GBP80-100m). When it came to register the charging order, NIOC House was no longer registered to NIOC. It had been transferred (for no monetary consideration) to an Iranian oil industry workers' pension fund (the defendant).
- **The Commercial Court ordered NIOC House be transferred under Section 423 IA 1986 as a "*transaction defrauding creditors*":**
  - The court rejected NIOC's argument that (as a matter of Iranian Law) NIOC House was merely under NIOC's custody (as distinct from ownership) before the transfer. There was an *amanat* arrangement between NIOC and the defendant, but NIOC House was not included in it.
  - As a matter of English Law, there had been no declaration of trust that NIOC had legal and beneficial ownership of NIOC House.
  - The transfer had been effected with urgency straight after NIOC was served with the court's order permitting enforcement. The evidence suggested the transfer had not been to regularise ownership of an asset, but rather to put assets out of a creditor's reach.

C. Section 69 AA1996 appeal / damages assessment

Sharp Corp Ltd v Viterra BV **[2024] UKSC 14 (08/05/2024) (Lord Reed; Lord Hodge; Lord Briggs; Lord Hamblen; Lord Leggatt)**

- Under two amended awards a five-person GAFTA Appeal Board awarded damages to sellers of two cargoes as a result of the buyers' default after delivery to Mundra port in Gujarat. Jacobs J gave the buyers leave to appeal under Section 69 AA1996 on questions of law concerning how damages were to be assessed – (a) market value of goods at discharge port on date of default, or (b) theoretical cost on date of default of buying goods FOB at original shipment port plus market freight rate for transporting goods to discharge port.
- The appeal was dismissed by Cockerill J, but allowed by the CoA.
- **The Supreme Court held:**
  - Section 69(3) AA1996 only allowed leave to appeal on questions of law the tribunal was asked to determine. The CoA had erred in deciding questions of law the GAFTA Appeal Board had not been asked to decide.
  - As to the damages assessment, if there was an available market for a substitute transaction on the same terms as the contract then that would be the appropriate market price to take. If not, and the difference in terms was of economic significance, then an appropriate adjustment had to be made to ensure the contract price and default price were comparing like-with-like.
  - The GAFTA Appeal Board had no evidence of an available market for a substitute transaction on the same terms. The goods were (on default date) situated in a warehouse in Mundra had had increased in value due to imposition of customs tariffs. It was reasonable to sell those goods ex Mundra rather than on the international market.

C. Section 69 AA1996 appeal – time limits

***Eronat v CPNC International (Chad) Ltd and anor* [2024] EWHC 2880 (Comm) (18/10/2024) (Bryan J)**

- The claimant and respondent entered into a deed of indemnity (LCIA arbitration agreement) relating to oil & gas exploration in Chad. On 16/05/2024, the claimant sought to appeal an LCIA award issued against him on 11/04/2024 – five days after the appeal deadline under Section 70(3) AA1996 had elapsed.
- **The Commercial Court granted reverse summary judgment dismissing the claimant's appeal:**
  - The claimant's argument that the time limit began to run from when the electronic notification of the award was sent out was dismissed. The AA1996 was clear that the time limit began to run from the date the award was made (Section 54 AA1996).
  - The claimant's attempt to rely on correspondence between his legal advisor and one of the arbitrators as evidence that the tribunal had agreed the award was made on 16/04/2024 was also rejected.
  - The courts have repeatedly emphasised the importance of finality to the arbitral process.

D. Section 68 AA1996 challenge – costs

***Nigeria v Process & Industrial Developments Ltd* [2024] EWCA Civ 790 (12/07/2024) (Sir Julian Flaux C; Snowden LJ; Fraser LJ)**

- After setting aside a multibillion dollar award against Nigeria, Robin Knowles J ordered P&ID to pay Nigeria's costs in GBP, rejecting P&ID's arguments that to do so would afford Nigeria a very substantial windfall due to exchange rate fluctuations.
- **The Court of Appeal upheld the judge's decision:**
  - The purposes of a costs award is to cover the winning party's liability that it incurred to its lawyers, which is not necessarily the same as its 'loss'.
  - Nigeria paid its litigation bills in GBP. Applying the indemnity principle, the order for the payment of costs should be in GBP too.
  - Whether P&ID was correct in its argument that Nigeria financed the litigation by taking naira from its central government funds (and converted the same into GBP) was of no consequence.
- N.B. The UKSC granted PTA on 28/10/2024.

E. Anti-suit injunctions / applicable law issues

***UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30 (18/09/2024) (Lord Reed; Lord Sales; Lord Leggatt; Lord Burrows; Lady Rose)**

- RCA brought Russian proceedings seeking recovery of EUR 448 million under on-demand bonds (governed by English Law, ICC arbitration seated in Paris) after the underlying contractor refused to return advance payments due to UK/EU sanctions (despite RCA not being designated under EU/UK sanctions).
- UniCredit sought ASI relief from the English courts requiring RCA to discontinue the Russian proceedings. An interim *ex parte* ASI was granted but then the High Court held it had no jurisdiction because (1) the arbitration agreements were governed by French Law, and (2) in any event England was not the proper forum. The CoA allowed UniCredit's appeal.
- **The Supreme Court dismissed RCA's appeal and maintained the final ASI:**
  - Applying *Enka v Chubb*, the choice of governing law typically encompasses any arbitration agreement contained in it. English Law governed the arbitration agreements under the bonds.
  - The *Spiliada* test was intended for situations where no contractual forum had been agreed, and thus was inappropriate for situations where the parties had agreed arbitration.
  - The power to grant an ASI was not reserved to the courts of the seat. The choice of Paris as the seat was not by itself a reason not to grant ASI relief, in circumstances where the evidence suggested the French courts were not an available forum for this claim

F. *Norwich Pharmacal* relief in set aside proceedings

***Filatona Trading Ltd and anor v Quinn Emanuel Urquhart & Sullivan UK LLP* [2024] EWHC 2573 (Comm) (14/10/2024) (Calver J)**

- In proceedings to set aside a US$95 million award, the "Chernukhin Parties" relied upon a report said to have been suppressed by the "Deripaska Parties" during the underlying arbitration. It was argued that the disclosure of the report in the arbitration would have resulted in a substantially higher award.
- As it transpired, the report was a forgery provided by a business intelligence consultancy to the defendant's law firm (which was not the Chernukhin Parties' solicitor of record but was acting in an advisory capacity).
- **The Commercial Court granted the Deripaska Parties' *Norwich Pharmacal* application:**
  - The Deripaska Parties had a good arguable case that they had been the victim of unlawful means conspiracy, lawful means conspiracy and malicious falsehood: "*all of the evidence…points to this document being a forgery designed to cause very considerable loss*".
  - The defendant had become "*mixed up in the wrongdoing*" by engaging the consultancy, sending it for translation from Russian to English, conducting further enquiries/analysis and then providing it to the Chernukhin Parties' solicitors of record.
  - There was a realistic prospect that disclosure of the consultancy's identity would assist in identifying the wrongdoer.
  - It was in the overall interests of justice to identify the wrongdoer. *Inter alia*, such an order would likely deter similar wrongdoing in the future.

Part 2: Arbitration Act 1996 cases

Panel Questions

1. Are arbitrator challenges now more frequent and hostile post *Halliburton v Chubb* [UKSC]?

2. Is the *Unicredit* decision (giving effect to *Enka v Chubb* [UKSC]) an example of the exercise of exorbitant jurisdiction? Does draft Section 6A of the Arbitration Bill reflect a more realistic approach?

3. Is London losing ground to other arbitration seats? If so, what could be the reasons for this?

Part 3: Investment Treaty decisions

KEY CASES

A. Rule 41(5) of the ICSID Arbitration Rules

- *Optima Ventures LLC and ors v United States of America* (ICSID Case No. ARB/21/11) (Decision on the Respondent's Objection under Arbitration Rule 41(5)) (19/01/2024)

B. Non-Disputing Parties

- *Glencore International AG v Colombia* (ICSID Case No. ARB/21/30) (Procedural Order 3) (10/10/2024)

C. Disqualification

- *ABH Holdings SA v Ukraine* (ICSID Case No. ARB/24/1) (Decision on the Claimant's Proposal to Disqualify Professor Sean Murphy) (15/07/2024)
- *Silver Bull Resources Inc v Mexico* (ICSID Case No. ARB/23/24 – Annulment Proceeding) (Decision on Claimant's Proposal to Disqualify Philippe Sands KC) (21/10/2024)

D. Annulment

- *Agility Public Warehousing Company KSCP v Iraq* (ICSID Case No. ARB/17/7 – Annulment Proceeding) (Decision on Annulment) (08/02/2024)

E. Preservation of Evidence

- *Sea Search-Armada LLC v Colombia* (PCA Case No. 2023-37) (Supplementary Decision and Order for an Evidence Preservation Protocol) (28/06/2024)

F. Lifting of Redactions

- *BA Desarrollos LLC v Argentina* (ICSID Case No. ARB/23/32) (Procedural Order 5 – Lifting of Redactions) (15/08/2024)

A. Rule 41(5) of the ICSID Arbitration Rules

***Optima Ventures LLC and ors v United States of America* (ICSID Case No. ARB/21/11) (Decision on the Respondent's Objection under Arbitration Rule 41(5)) (19/01/2024) (Monica Pinto (President); Jan Paulsson; David Pawlak)**

- The claimants (three Ukrainian entities controlled by Messrs. Kolomoisky and Bogolyubov) alleged that civil forfeiture actions taken by the US DoJ against real estate in Texas and Ohio breached, *inter alia*, the FET and expropriation protections in the US-Ukraine BIT.
- USA raised three objections under Rule 41(5) of the ICSID Arbitration Rules:
  - Failure to abide by the 6-month cooling-off period in Article VI of the BIT before submitting the dispute to Arbitration.
  - The claims were "*grossly premature and unripe*" because there has been no final action by the US District Court in the underlying civil forfeiture proceedings.
  - The principles of comity and prescriptive jurisdiction cannot bar the US from pursuing the measures complained of.
- **The Tribunal dismissed all of the USA's objections:**
  - Rule 41(5) allowed for the early dismissal of claims that manifestly lack legal merit.
  - All three of the USA's objections involved complex issues of legal interpretation and factual analysis that were not suitable for summary resolution through the Rule 41(5) procedure.

B. Non-Disputing Parties

Glencore International AG v Colombia **(ICSID Case No. ARB/21/30) (Procedural Order 3) (10/10/2024) (Sabina Sacco (presiding); Bernard Hanotiau; Donald McRae)**

- The underlying claims arose out of an order of the Constitutional Court of Colombia to suspend the claimants' partial modification of a water stream passing through a mining project area. The indigenous Wayuu communities of La Gran Parada and Paradero ("Communities") and the Colectivo de Abogados y Abogados Jose Alvear Restrepo ("CAJAR") petitioned to be recognised as non-disputing parties ("NDPs") under ICSID Arbitration Rule 37(2).
- **The Tribunal recognised the Communities, but not CAJAR, as NDPs:**
  - ICSID Arbitration Rule 37(2) required: (i) NDPs should possess knowledge, expertise or insight that goes beyond or differs from that of the disputing parties; (ii) NDPs' written submission should address a matter within the scope of the dispute; and (iii) NDPs should have a significant interest in the proceedings.
  - The Communities had strong social, cultural and environmental connections to water sources in the region and were best placed to advise the Tribunal of their "*world view and cultural norms*". CAJAR did not have a "*significant interest*" just because it was engaged in protecting community human rights in the region.

C. Disqualification (1)

ABH Holdings SA v Ukraine **(ICSID Case No. ARB/24/1) (Decision on the Claimant's Proposal to Disqualify Professor Sean Murphy) (15/07/2024) (Ajay Bhanga)**

- Ukraine appointed Professor Murphy as arbitrator in a dispute concerning nationalisation of a bank ultimately controlled by Russian nationals through the claimant Luxembourg holding company. The claimant challenged Professor Murphy on the grounds of: (1) his having voted in favour of a declaration of the Institut du Droit International condemning Russia's actions in Ukraine ("IDI Declaration") and having only disclosed this belatedly; (2) comments made during a webinar organised by George Washington University Law School and non-disclosure of the same; and (3) his US nationality (which Russia considers an "*unfriendly country*").
- **The ICSID Administrative Council Chairman dismissed the claimants' challenge:**
  - At the material time, no pleadings had been filed in the ICSID arbitration and thus the nature of what the "*issues in dispute*" were likely to be was unclear.
  - In those circumstances, the claimants' insistence that whether Russia's actions excused Ukraine's wrongs against the claimant and the lawfulness of sanctions imposed against Russia were going to be "*key issues*" was "*hypothetical or speculative in nature*".
  - A reasonable third party would not conclude Professor Murphy manifestly could not be relied upon to exercise independent and impartial judgment.

C. Disqualification (2)

Silver Bull Resources Inc v Mexico **(ICSID Case No. ARB/23/24 – Annulment Proceeding) (Decision on Claimant's Proposal to Disqualify Philippe Sands KC) (21/10/2024) (Ian Glick KC (president); Stephen Drymer)**

- On the basis of the contents of a "Declaration on Costs" authored by Philippe Sands KC in separate ICSID proceedings *Eco Oro v Colombia* (published on 01/08/2024), the claimant sought his disqualification in this arbitration. The claimant's position was that PSKC's comments in that Declaration demonstrated a predisposition against parties with third-party funding in investor-State arbitrations.
- **The Co-Arbitrators dismissed the claimant's challenge:**
  - PSKC's comments in *Eco Oro v Colombia* amounted to a concern that there was a risk the purpose of ISDS would be subverted if TPFs unconnected with the case of the host State were in control of arbitrations and/or that their involvement might make the proceedings more costly. The risk would be exacerbated if a funder (without liability to contribute to the other side's costs if the claim fails) stands to receive much of the damages of a successful claim. Overall, PSKC perceived a risk of delegitimising ISDS.
  - However, PSKC had not expressed the view that TPF is always unjustified, that he personally thinks worse of parties with TPF, or that funded claims were more likely to be unmeritorious.
  - A reasonable third party would not conclude PSKC's comments gave rise to justifiable doubts as to his independence and impartiality.

D. Annulment

Agility Public Warehousing Company KSCP v Iraq **(ICSID Case No. ARB/17/7 – Annulment Proceeding) (Decision on Annulment) (08/02/2024) (Ricardo Ramirez (presiding); Jacomijn van Haersolte-van Hof; Hi-Taek Shin)**

- Agility commenced ICSID arbitration against Iraq alleging that a decision by Iraq's Communications & Media Commission requiring Agility to rescind its share acquisition in a telecoms company amounted to an expropriation without compensation. KRG's Companies Registrar issued a decree which returned Agility's shares to Korek's previous Iraqi shareholders. Agility also claimed it suffered a denial of justice in the recourse it sought through the Iraqi courts.
- An ICSID Tribunal (Cavinder Bull (presiding); John Beechey; Sean Murphy) rejected all of Agility's claims on 22/01/2021.
- **The Annulment Committee granted partial annulment:**
  - (By majority) The Tribunal had not adequately assessed whether Iraq had conducted itself consistently with its BIT obligations. It had focused upon the CMC's order and not focused on the broader manner of the relevant conduct. The Tribunal had failed "*to explain why the 'proper interpretation' of a measure which was outside the scope of its jurisdiction would assist the Tribunal in determining the 'manner' i.e. a way to proceed or act, in which the relevant measure […] was implemented would be consistent with the BIT*". This amounted to a manifest excess of powers under Article 52(1)(b) ICSID Convention.
  - In addition, the Tribunal had failed to state its reasons (for the purposes of Article 52(1)(e) ICSID Convention) for why it had focused on the CMC's order rather than on reviewing Iraq's broader conduct, as it had indicated previously it would.

E. Preservation of Evidence

Sea Search-Armada LLC v Colombia **(PCA Case No. 2023-37) (Supplementary Decision and Order for an Evidence Preservation Protocol) (28/06/2024) (Stephen Drymer (President); Stephen Jagusch KC; Claus von Wobeser)**

- The case involves the future of the shipwrecked Galeón San José. The claimant sought interim measures from the Tribunal to preserve and protect evidence related to Colombia's planned salvage operations on the wreck, following media reports suggesting imminent commencement of these operations.
- Colombia maintained it had no immediate plans for extraction at the site and that necessary protective measures were being taken as per Colombian laws. Despite this, the claimant insisted on a written undertaking detailing specific activities around exploration or recovery from the wreckage site along with documentation measures.
- The claimant contended that a failure to preserve evidence could cause harm not adequately reparable by damages, justifying temporary relief pending the Tribunal's final decision. Colombia contended the claimant's application amounted to attempted document production, rather than preservation of evidence.
- By a decision dated 03/06/2024, the Tribunal declined to grant immediate temporary relief, but ordered implementation of an Evidence Preservation Protocol:
  - The Protocol sets out a series of measures Colombia "*has implemented and/or shall implement to ensure that any items identified, recovered or salvaged, or eventually identified, recovered or salvage, from the Galeón San José, as well as other Evidence…, are catalogued, preserved and protected for purposes related to the Arbitration*".
  - The Protocol made clear that the act of entering into the Protocol did not amount to an admission that Galeón San José was located at the site reported in a confidential report at the heart of the dispute.

F. Lifting of Redactions

BA Desarrollos LLC v Argentina **(ICSID Case No. ARB/23/32) (Procedural Order 5 – Lifting of Redactions) (15/08/2024) (Deva Villanua (President); Stephen Drymer; Luis Alberto Gonzalez Garcia)**

- Argentina requested that certain documents (relating to "accounts") be produced unredacted, contending that the redacted information was linked to the issue of denial of benefits under the BIT.
- Argentina further claimed that the redaction of practically the entire content of documents made it impossible to verify whether the information was comprehensive, correct and complete.
- The claimant's arguments in support of redactions were premised upon the assertion that the redacted information lacked relevance to the dispute .
- **The Tribunal rejected Argentina's request for production of unredacted versions of certain documents:**
  - Argentina had failed to explain the relevance of the redacted information to establishing control and substantial business activities for the purposes of the Tribunal determining whether or not it had jurisdiction over the dispute.
  - Whilst the Respondent might be "*slightly impeded*", it had sufficient information to be able to argue the significance of individual accounts for jurisdictional purposes.

Part 3: Investment Treaty decisions

Panel Questions

1. Are Investment Treaty Institutions and Tribunals applying a less rigorous/too nuanced approach to the requirements of "independence and impartiality" in respect of arbitrators? Do the ABH and Silver Bull decisions reflect this concern?

2. Should Tribunals have a duty to investigate corruption allegations once raised? If so, how would this duty be given effect to in practice and what limits might be applied to ensure the arbitral process is not derailed or unfair?

3. Should redactions to documents, if permitted, be reviewed by an independent Counsel appointed by the Tribunal where concerns are raised?

Part 4: PIL before the English Courts

Overview

- The English courts at appellate level and Supreme Court continue to face PIL issues on a regular basis, and have rendered important decisions in 2024 in the fields of:
  - State Immunity – *Border Timbers Limited and anor v Zimbabwe* [2024] EWHC 58 (Comm), *Operafund Eco-Invest Sicav Plc and anor v Spain* [2024] EWHC 82 (Comm), *Privinvest Shipbuilding SAL (Holding) and ors v Nyusi* [2024] EWCA Civ 184, *General Dynamics United Kingdom Limited v Libya* [2024] EWHC 472 (Comm), *Argentum Exploration Ltd v South Africa* [2024] UKSC 16, *Zhongshan Fucheng Industrial Investment Co Ltd v Nigeria* [2024] EWHC 1503 (Comm), *The British Council v Beldica* [2024] EAT 92, *Muda v Malaysia* (Case No. 2203623/2021), *Shehabi and anor v Bahrain* [2024] EWCA Civ 1158, *Infrastructure Services Luxembourg Sarl and anor v Spain; Border Timbers Limited and anor v Zimbabwe* [2024] EWCA Civ 1257
  - Sanctions – *Phillips v Secretary of State for Foreign, Commonwealth & Development Affairs* [2024] EWHC 32, *UniCredit Bank AG v RusChemAlliance LLC* [2024] EWCA Civ 64, *Khan v Secretary of State for Foreign, Commonwealth & Development Affairs* [2024] EWHC 361 (Admin), *Dalston Projects Limited and ors v Secretary of State for Transport; Shvidler v Secretary of State for Foreign, Commonwealth & Development Affairs* [2024] EWCA Civ 172, *Navigator Equities Limited and anor v Deripaska* [2024] EWCA Civ 268, *LLC Eurochem North-West 2 v Societe Generale SA and ors* [2024] EWHC 1084 (Comm), *Barclays Bank Plc v VEB.RF* [2024] EWHC 1074 (Comm), *Vneshprombank LLC v Bedzhamov* [2024] EWHC 1048 (Ch), *RTI Ltd v MUR Shipping BV* [2024] UKSC 18, *Celestial Aviation Services Ltd v UniCredit Bank GmbH* [2024] EWCA Civ 628, *Hellard and ors v OJSC Rossiysky Kredit Bank (in liquidation)* [2024] EWHC 1783 (Ch), *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30, *R (Elliott Associates LP and anor) v The London Metal Exchange and anor* [2024] EWCA Civ 1168, *R (Naasani and ors) v Secretary of State for Foreign, Commonwealth & Development Affairs* [2024] EWHC 2827 (Admin)
  - Closed material procedure – *R (L1T FM Holdings UK Limited and anor) v Secretary of State in the Cabinet Office* [2024] EWHC 386 (Admin), *Hale-Byrne v Secretary of State for Business & Trade and anor* [2024] EWHC 942 (KB)
  - Treaty obligations – *R (FDA) v Minister for the Cabinet Office and anor* [2024] EWHC 1729 (Admin)

Part 4: PIL before the English Courts

KEY CASES

A. HMG/civil service obligations to comply with International Law

- *R (FDA) v Minister for the Cabinet Office and anor* [2024] EWHC 1729 (Admin) (05/07/2024)

B. State Immunity

- *Privinvest Shipbuilding SAL (Holding) and ors v Nyusi* [2024] EWCA Civ 184 (29/02/2024)
- *Argentum Exploration Ltd v Republic of South Africa* [2024] UKSC 16 (08/05/2024)
- *Shehabi and another v Bahrain* [2024] EWCA Civ 1158 (04/10/2024)
- *Infrastructure Services Luxembourg SARL and another v Spain; Border Timbers and anor v Zimbabwe* [2024] EWCA Civ 1257 (22/10/2024)

C. Sanctions

- *Dalston Projects Ltd and ors v Transport Secretary; Shvidler v Foreign Secretary* [2024] EWCA Civ 172 (27/02/2024)

A. HMG/civil service obligations to comply with International Law

***R (FDA) v Minister for the Cabinet Office and anor* [2024] EWHC 1729 (Admin) (05/07/2024) (Chamberlain J)**

- The claimant (a civil service union) sought judicial review of Cabinet Office guidance regarding civil servants' obligations under the Civil Service Code (which formed part of their employment conditions) to "*comply with the law and uphold the administration of justice*". The Guidance informed civil servants that, if a Minister decided to remove a person from the UK to Rwanda in defiance of an interim measure from the ECtHR, a civil servant would not breach the Code by implementing the Minister's decision.
- **The Administrative Court granted permission for judicial review but dismissed the claim:**
  - The UK is obliged not to hinder the effective exercise of the right of individual petition to the ECtHR, including to take all reasonable steps to comply with an interim measure. To defy an interim measure would be a violation of international law.
  - Whilst there is a convention HMG will comply with international law, a decision not to do so is not, *ipso facto*, contrary to domestic law (applying the UK's dualist theory of international law).
  - Applying public law interpretive principles, the Code requires, in a case where domestic and international law clash, civil servants to comply with domestic law (which, as above, includes the principle that a Minister can act in breach of international law). The Code was not unlawfully unclear.

B. State Immunity (1)

***Privinvest Shipbuilding SAL (Holding) and ors v Nyusi* [2024] EWCA Civ 184 (29/02/2024) (Sir Julian Flaux C; Underhill LJ; Phillips LJ)**

- Mozambique alleged three sovereign guarantees secured by Privinvest were obtained fraudulently. A CPR Part 20 claim was brought against Mozambique's President alleging deceit. Robin Knowles J held that service on the President was ineffective and, further, that the President was immune under Section 20 SIA 1978.
- **The CoA dismissed Privinvest's appeal:**
  - Mozambique was a Commonwealth State not party to the 1965 Hague Convention on service abroad of judicial and extrajudicial documents in civil and commercial matters. Service was required to be done through Mozambique's judicial authorities. The attempt at service by leaving documents with security personnel at official residences was ineffective.
  - Applying Section 20 SIA 1978, the DPA 1964 and the VCDR 1961, the President had absolute immunity in cases not involving UK-based commercial activities.

B. State Immunity (2)

Argentum Exploration Ltd v South Africa **[2024] UKSC 16 (08/05/2024) (Lord Lloyd-Jones; Lord Briggs; Lord Hamblen; Lord Leggatt; Lord Richards)**

- The SS Tilawa was sunk in 1942 carrying 2364 silver bars owned by South Africa and intended to be used to produce coinage. Argentum brought a claim for salvage in respect of the bars in 2017. South Africa asserted State Immunity, arguing that the "*commercial purposes*" exception in Section 10(4)(a) SIA 1978 was inapplicable. Sir Nigel Teare and a majority of the CoA (Elisabeth Laing LJ dissenting) held the Tilawa and the silver were "*in use…for commercial purposes*".
- **The Supreme Court upheld South Africa's appeal:**
  - Section 10 SIA 1978 was "*a hybrid provision making specific provision concerning immunity from both adjudicative and enforcement jurisdiction in Admiralty proceedings*".
  - Cargo sitting in the hold of a ship was not being used for any purpose at all (whether commercial or sovereign) – it was just being carried. Thus, the focus needed to be on what the silver was intended to be used for.
  - The silver was intended for a sovereign (non-commercial) use – namely, minting coins.
  - Accordingly, South Africa's invocation of immunity was to be upheld.

B. State Immunity (3)

Shehabi and another v Bahrain **[2024] EWCA Civ 1158 (04/10/2024) (Lady Carr LCJ; Males LJ; Warby LJ)**

- The claimants brought harassment claims in respect of psychiatric injuries suffered as a result of Bahraini agents (operating outside the UK) allegedly hacking their computers and infecting them with spyware.
- Bahrain asserted State Immunity. The claimants relied upon exception in Section 5 SIA 1978 in respect of "*personal injury…caused by an act or omission in the United Kingdom*".
- **The CoA dismissed Bahrain's appeal:**
  - Standalone psychiatric injury claims fell within the definition of "*personal injury*" for the purposes of Section 5 SIA 1978.
  - The act of remotely (i.e. outside the UK) infecting a computer inside the UK was nevertheless an "*act…in the United Kingdom*" for the purposes of Section 5 SIA 1978.
  - Males LJ: "*if State A interferes with the territorial sovereignty of State B by doing an act in State B which is liable to cause death or personal injury to persons in State B, it takes the risk that it will be subject to civil proceedings in State B. Such proceedings are in accordance with principles of international comity*".

B. State Immunity (4)

Infrastructure Services Luxembourg SARL and another v Spain; Border Timbers and anor v Zimbabwe **[2024] EWCA Civ 1257 (22/10/2024) (Sir Julian Flaux C; Newey LJ; Phillips LJ)**

- In separate ICSID arbitrations, Spain and Zimbabwe ("States") had awards rendered against them, which the respective claimants sought to enforce in England. Both States asserted State Immunity, which were rejected by Fraser J (Spain) and Dias J (Zimbabwe). Both States appealed.
- **The CoA rejected the States' appeals:**
  - Dias J's "*novel*" analysis that Section 1(1) SIA 1978 did not apply to applications to register an ICSID award at all because the registration of an ICSID award did not involve a judicial act was "*misconceived*". Entering judgment against a foreign State involved a clear exercise of adjudicative jurisdiction.
  - The States' unequivocal agreement in Article 54 ICSID Convention to submit to domestic jurisdiction in relation to the enforcement of ICSID awards was a submission to jurisdiction for the purposes of Section 2 SIA 1978. Such a conclusion was supported by previous English case law (including *Micula v Romania* [2010] UKSC 5), as well as the ICSID Convention's object/purpose and its *travaux preparatoires*.

C. Sanctions

***Dalston Projects Ltd and ors v Transport Secretary; Shvidler v Foreign Secretary* [2024] EWCA Civ 172 (27/02/2024) (Sir Geoffrey Vos MR; Singh LJ; Whipple LJ)**

- In *Dalston*, the Transport Secretary exercised 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, and contended (unsuccessfully) that the Transport Secretary acted unlawfully on public law grounds and contrary to A1P1 ECHR.
- In *Shvidler*, the Foreign Secretary designated the claimant on the grounds that he (either himself or through his association with Roman Abramovich) was involved in obtaining a benefit from or supporting the Government of Russia. The claimant contended (unsuccessfully) that the decision was in breach of Articles 8 and A1P1 ECHR.
- **The CoA dismissed both claimants' appeals:**
  - In a first instance hearing, the court was required to consider proportionality as a matter of substance and should not limit itself to assessing rationality of decision-making.
  - *Dalston*: The overall effect of detentions made must be considered when determining whether an act is rationally connected to the legislation's aim, rather than just the efficacy of each individual detention.
  - *Shvidler*: Remaking the court's assessment on proportionality for itself, the CoA found a fair balance had been struck between the community interests and the appellant's rights: "*Sanctions often have to be severe and open-ended if they are to be effective*".
- N.B. UKSC granted PTA on 02/05/2024. Appeals were heard on 15-16/01/2025.

Part 4: PIL before the English Courts

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Panel Questions

1. Are the rules on service of English proceedings upon States/State entities too rigid in failing to reflect modern technology, practical limits upon serving in the "Home State", evidence of evasive conduct and actual notice?

2. Are commentators justified in stating that ICSID awards are afforded too much scope for registration and enforcement under domestic law, not least because the ICSID process is cumbersome, with very limited scope for review of awards by the Annulment process (Article 52 of the ICSID Convention)?

3. Are sanctions against foreign national individuals otherwise unconnected to the foreign "hostile" State and/or its emanations a legitimate or effective foreign policy tool?

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