ANNUAL LEGAL REVIEW 2019: KEY PRACTICE POINTS

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Seminar outline

- Part 1: Public International Law before the English courts
- Part 2: Arbitration Act 1996 cases
- Part 3: Bilateral Investment Treaty (BIT) cases

Part 1:

Public International Law before the English courts

Overview

- Public International Law issues have been a significant part of the English courts' resolution and management of matters related to foreign countries, such as Libya (e.g. *Mohamed v Breish*) and Saudi Arabia (e.g. *R (CAAT) v International Trade Secretary*)

- The application of the State Immunity Act 1978 in the context of service of proceedings for enforcement of arbitral awards has been the subject of an important pronouncement in the Court of Appeal case of *General Dynamics v Libya*

Key Cases

A. State Immunity / Service

- *General Dynamics UK Ltd v Libya* [2019] EWHC 64 (Comm) (18 January 2019)
- *Qatar National Bank v Eritrea* [2019] EWHC 1601 (Ch) (27 June 2019)
- *General Dynamics UK Ltd v Libya* [2019] EWCA Civ 1110 (3 July 2019)

B. State Immunity / Enforcement of Awards and Foreign Judgments

- *PAO Tatneft v Ukraine* [2019] 6 WLUK 226 (14 June 2019)
- *Heiser's Estate v Iran* [2019] EWHC 2074 (QB) (31 July 2019)

Key Cases

C. State Immunity / Employment Disputes

- *Webster v USA* [2019] 10 WLUK 500 (21 October 2019)

D. International Humanitarian Law

- *R (CAAT) v International Trade Secretary* [2019] EWCA Civ 1020 (20 June 2019)

E. "One voice" doctrine

- *Mohamed v Breish* [2019] EWHC 1765 (Comm) (10 July 2019)

A. State Immunity / Service (1)

- **General Dynamics UK Ltd v Libya [2019] EWHC 64 (Comm) (18 January 2019) (Males J)**
  - S.12 SIA 1978 contemplated that there always had to be some document "*required to be served*"
  - Court has no power to dispense with service
- **Qatar National Bank v Eritrea [2019] EWHC 1601 (Ch) (27 June 2019) (Master Kaye)**
  - S.12 SIA 1978 did not preclude the exercise of CPR 6.16 to dispense with service in exceptional circumstances
  - Dispensing with service meant that there was no document "*required to be served*" under S.12 SIA 1978

HOWEVER…

A. State Immunity / Service (2)

- **General Dynamics UK Ltd v Libya [2019] EWCA Civ 1110 (3 July 2019) (Sir Terence Etherton MR; Longmore LJ; Flaux LJ)**
  - The rationale for the protection of being served through diplomatic route does not apply at the enforcement stage in respect of an arbitration award
  - Order for permission to enforce was not the "*document instituting proceedings*" (so did not have to be served pursuant to S.12 SIA 1978)
  - The argument that dispensing with service meant there was no document "*required to be served*" was wrong.

B. State Immunity / Enforcement of Awards and Foreign Judgments (1)

- **PAO Tatneft v Ukraine [2019] 6 WLUK 226 (14 June 2019) (Jacobs J)**
  - Ukraine sought to resist Butcher J's order to file a further AoS on the grounds that it would be a waiver of state immunity (in respect of part of the award enforcement claim) – while its state immunity appeal to the Supreme Court was pending
  - Jacobs J refused – any risk of irreparable harm to Ukraine could be dealt with by a partial stay and undertakings not to treat Ukraine as submitting to the jurisdiction on the relevant part of the claim

B. State Immunity / Enforcement of Awards and Foreign Judgments (2)

- **Heiser's Estate v Iran [2019] EWHC 2074 (QB) (31 July 2019) (Stewart J)**
  - Alleged acts of funding from overseas insufficient to engage the exception to immunity for personal injury caused by an act or omission in the United Kingdom (S.5 SIA 1978)
  - Establishment of a charitable foundation and partnership in New York insufficient to satisfy the 'presence' requirement of S.31 CJJA 1982
  - Not construing S.31 CJJA 1982 and S.5 SIA 1978 as wide enough to cover terrorist activities was not a breach of Article 6 ECHR
  - Alleged state-sponsored terrorism was not a "*commercial transaction*" under S.3 SIA 1978

C. State Immunity / Employment Disputes

- **Webster v USA [2019] 10 WLUK 500 (21 October 2019) (Employment Judge Foxwell)**
  - USA successfully asserted immunity against Employment Tribunal claims from two former UK national employees at USAF bases in UK
  - Section 16(2) SIA 1978 provides that Part I of the SIA 1978 "*does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952*"
  - Each claimant had been engaged in performance of USA's sovereign functions
  - Alternatively, adjudication would require evaluation of specific US policies/objectives – impermissible as a matter of state immunity

D. International Humanitarian Law

- **R (CAAT) v International Trade Secretary [2019] EWCA Civ 1020 (20 June 2019) (Sir Terence Etherton MR; Irwin LJ; Singh LJ)**
  - Divisional Court: SSIT's decision of no "*clear risk*" of "*serious violations*" by Saudi Arabia in Yemen conflict was not irrational
  - However, CAAT's appeal was allowed
  - Criterion 2c of SSIT's Guidance required specific attention to the question of past violation of IHL as a relevant consideration when assessing real risk of future violation
  - SSIT could not reach a rational conclusion as to the effects of UK input or of high level Saudi assurances without an assessment of past IHL violations before granting an export licence for sales of arms and military equipment to Saudi Arabia. No assessment had been made or even attempted
  - [[CoA granted both sides permission to appeal to Supreme Court]]

E. "One voice" doctrine

- **Mohamed v Breish [2019] EWHC 1765 (Comm) (10 July 2019) (Andrew Baker J)**
  - FCO recognised Government of National Accord (GNA) as the Libyan Government
  - Respondent asserted that the GNA's Resolution 12 (appointing the Applicant as LIA Chairman) was invalid under Libyan law because GNA had not been the valid Libyan executive at the material time
  - The "one voice" doctrine extended to cases where the FCO chose to recognise a *de facto* effective government rather than the *de jure* government under local law. In that regard, the Court had recognised and declared the GNA and the Presidency Council to have been the executive authority and government of Libya since at least 19 April 2017
  - The "one voice" doctrine prohibited the Court from any consideration of whether Regulation 12 was valid and lawful
  - [[An appeal is currently scheduled to be heard in April 2020]]

PANEL QUESTIONS – Public International Law before the English courts

1. Are the strict requirements for service of proceedings upon a State (as reflected in Section 12 of the State Immunity Act 1978) unrealistic and outdated?

2. The Foreign & Commonwealth Office plays an important role in issuing certificates as "evidence of the facts stated therein" in the context of State Immunity and Diplomatic Immunity matters. Should this be changed in any way? If so, how?

3. Is the "commercial exception" to State Immunity within the State Immunity Act 1978 broad enough, or too broad?

Part 2:
Arbitration Act 1996 cases

Overview

- Approximately 55 arbitration cases before the English courts in 2019 (based on a Westlaw search) – majority of cases based on Arbitration Act 1996
- Most commonly invoked sections:
  - Section 9 (stay of legal proceedings)
  - Section 24 (power of court to remove arbitrator)
  - Section 66 (enforcement of arbitral awards)
  - Section 67 (challenging the award: substantive jurisdiction)
  - Section 68 (challenging the award: serious irregularity)
  - Section 69 (appeal on point of law)
  - Section 101-103 ((refusal of) recognition and enforcement of NYC awards)
- International institutional trends:
  - ICSID: In FY2018, 56 new cases. In FY2019 (up to 30/06/2019), 52 new cases
  - ICC: In 2018, 842 new cases. In 2019, 869 new cases
  - DIAC: In 2018, 161 new cases. In 2019, 208 new cases
  - CIETAC: In 2018, 2962 new cases. In 2019, 3333 new cases
  - SIAC: In 2018, 402. Data for 2019 not yet available
  - LCIA: In 2018, 317. Data for 2019 not yet available

Key Cases

A. Seeking arbitration documents for use in disciplinary proceedings against arbitrator

- *CIArb v B, C & D* [2019] EWHC 460 (Comm) (7 March 2019)

B. Challenges

- *BC v BG* [2019] EWFC 7 (28 January 2019)
- *State A v Party B & Party C* [2019] EWHC 799 (Comm) (29 January 2019)
- *Korea v Dayyani* [2019] EWHC 3580 (Comm) (20 December 2019)
- *BSG Resources Ltd v Vale SA* [2019] EWHC 3347 (Comm) (29 November 2019)
- *K v S* [2019] EWHC 2386 (Comm) (9 July 2019)

C. Section 69 Appeal

- *The Arctic* [2019] EWCA Civ 1161 (10 July 2019)

Key Cases

D. Anti-suit / anti-arbitration injunctive relief

- *Minister of Finance (Inc) v International Petroleum Investment Co* [2019] EWCA Civ 2080 (26 November 2019)
- *Sabbagh v Khoury & ors* [2019] EWCA Civ 1219 (12 July 2019)

E. Recognition and Enforcement

- *PAO Tatneft v Ukraine* [2019] 6 WLUK 226 (14 June 2019)
- *PAO Tatneft v Ukraine* [2019] 12 WLUK 435 (20 December 2019)

F. Interplay between Enforcement and EU Sanctions

- *Iran's MoD v International Military Services Ltd* [2019] EWHC 1994 (Comm) (24 July 2019)

A. Seeking arbitration documents for use in disciplinary proceedings against arbitrator

- **CIArb v B, C & D [2019] EWHC 460 (Comm) (7 March 2019) (Moulder J)**
  - In the interests of justice, and notwithstanding the obligation of confidentiality that would otherwise apply, CIArb was granted access under CPR 5.4C(2) to certain documents relating to the appointment of an arbitrator and an arbitration hearing concerning whether he had a conflict of interest
  - Since CIArb's disciplinary proceedings were not based upon findings by Hamblen J in subsequent court proceedings for the arbitrator's removal, it was not in the interests of justice to grant CIArb access to the skeleton arguments used in those proceedings

B. Challenges (1)

- **BC v BG [2019] EWFC 7 (28 January 2019) (Clare Ambrose)**
  - Proper framework for a challenge to an award distributing assets under the Family Law Arbitration Financial Scheme was the AA1996, not the procedure in *J v B* [2016] EWHC 324 (Fam)
- **Korea v Dayyani [2019] EWHC 3580 (Comm) (20 December 2019) (Butcher J)**
  - The Dayyanis held their investments indirectly but were still "*investors*" under the BIT. Share Purchase Agreement (prior to closing) and Contract Deposit were relevant "*investments*" under the BIT
  - S.67 challenge by Korea rejected

B. Challenges (2)

- **State A v Party B & Party C [2019] EWHC 799 (Comm) (29 January 2019) (Sir Michael Burton)**
  - An extension of time for a S.67 challenge required consideration of the factors set out in *Kalmneft* [2001] CLC 1805, including assessing the strength of the application
  - Fresh evidence could be considered in that assessment BUT the longer the delay, the more transformational / "*seismic*" the fresh evidence would need to be to justify an extension
  - Delay of 959 days – extension refused

B. Challenges (3)

- **BSG Resources Ltd v Vale SA [2019] EWHC 3347 (Comm) (29 November 2019) (Sir Michael Burton)**
  - Unsuccessful S.68 challenge that LCIA Tribunal's refusal (after the end of the LCIA arbitration) to allow the entire 2000-page transcript of the final hearing of related ICSID proceedings to be adduced, in order to show Guinean officials' evidential inconsistencies and reopen the LCIA arbitration, amounted to a serious irregularity
- **K v S [2019] EWHC 2386 (Comm) (9 July 2019) (Sir Jeremy Cooke)**
  - Unsuccessful S.68 challenge that Tribunal's exclusion of an expert's report on losses (on the basis that it referred to factors not pleaded adequately or at all), amounted to a serious irregularity

C. Section 69 Appeal

- **The Arctic [2019] EWCA Civ 1161 (10 July 2019) (Gross LJ; McCombe LJ; Leggatt LJ)**
  - Arbitrators determined that Clause 9A of an amended standard BARECON 89 Form, which imposed an obligation on Charterers to maintain the vessel in class, was not "*absolute*" but merely required the exercise of due diligence
  - Carr J reversed that decision on a S.69 appeal, but also held that the term was a condition rather than an innominate term, entitling the Owners to terminate the charterparty.
  - CoA (Gross LJ main judgment) allowed appeal against Carr J decision, and held that "*textually and contextually*" the term was not a condition. The charterparty did not make either the physical maintenance of the vessel or the maintenance of P&I club insurance cover a condition, so it was hard to see how the maintenance of the vessel in class would be a condition.

D. Anti-suit / anti-arbitration injunctive relief (1)

- **Minister of Finance (Inc) v International Petroleum Investment Co [2019] EWCA Civ 2080 (26 November 2019) (Sir Geoffrey Vos C; Newey LJ; Males LJ)**
  - Claimants had a right to challenge a consent award (alleged to have been procured by fraud), and a stay of S.67/68 challenges should only have been granted for compelling reasons
  - Judge below had exercised case management powers on incorrect legal basis and had failed to recognise that the grounds of challenge affected the authority to enter into settlement deeds and therefore undermined the arbitration agreement
  - Second arbitration threatened the appellants' right to pursue the S.67/68 challenges and was vexatious and oppressive. Anti-arbitration injunction granted.

D. Anti-suit / anti-arbitration injunctive relief (2)

- **Sabbagh v Khoury & ors [2019] EWCA Civ 1219 (12 July 2019) (David Richards LJ; Haddon-Cave LJ; Sir Timothy Lloyd)**
  - AA1996/NYC did not deprive English courts of power to restrain foreign-seated arbitrations under S.37 SCA 1981
  - The rationale behind being slow to restrain foreign proceedings did not apply to foreign arbitrations (because there was no interference with the foreign court's jurisdiction)
  - If a dispute is clearly not within a valid arbitration agreement, then an anti-arbitration injunction should be granted (but it is still an exceptional step)

E. Recognition and Enforcement

- **PAO Tatneft v Ukraine [2019] 6 WLUK 226 (14 June 2019) (Jacobs J)**
  - Ukraine refused extension of time to file AoS pending its appeal to the Supreme Court which it had sought so that it could avoid submission to the jurisdiction
  - The part of the claim related to the appeal was stayed and an undertaking given by the claimant that filing an AoS would not be treated as a submission to the jurisdiction, in order to allow the claimant to enforce the arbitral award for the other part of the claim
- **PAO Tatneft v Ukraine [2019] 12 WLUK 435 (20 December 2019) (Cockerill J)**
  - Ukraine unsuccessfully asserted that the presiding arbitrator's failure to disclose that Tatneft's solicitors had (during the arbitration which gave rise to the award in Tatneft's favour) appointed him as an arbitrator in an unrelated matter (ICSID proceedings against Peru) was grounds for refusal of recognition/enforcement under S.103(2)(e) AA1996

F. Interplay between enforcement and EU sanctions

- **Iran's MoD v International Military Services Ltd [2019] EWHC 1994 (Comm) (24 July 2019) (Phillips J)**
  - Article 38 of Regulation 267/2012 provides that a claim in connection with any contract or transaction, the performance of which had been affected wholly or partially by measures imposed by that regulation, was not to be satisfied if it was a claim made by a sanctioned entity
  - Iran's MoD could not enforce the interest component of an arbitral award insofar as it concerned the period of time for which it was itself a sanctioned entity

PANEL QUESTIONS – AA1996 cases

1. **Should Section 68 of the Arbitration Act 1996 be amended to include a permission threshold?**

2. **Is Section 24 of the Arbitration Act 1996, on its own or read together with arbitral institutional rules and the IBA Guidelines on Conflict of Interest, sufficient to address the increasing perception (whether right or wrong) that the pool of arbitrators is too cosy, cosseted and should be conflicted more often?**

3. **How is London's role as the pre-eminent seat for international arbitration being affected/likely to be affected (if at all) by "Brexit"?**

Part 3:
Bilateral Investment Treaty (BIT) cases

Overview

- Proposed amendments to ICSID Rules, including on:
  - Expedited procedure
  - Disclosure obligations for arbitrators
  - Costs
  - Third party funding
  - Tribunal-appointed experts

Key Cases

A. Corruption

- *Niko Resources (Bangladesh) v BAPEX & Petrobangla* (ICSID Case Nos.ARB/10/11 and 10/18) (Decision on Corruption Claim, 25 February 2019)
- *Lao Holdings NV v Laos* (ICSID Case No.ARB(AF)/12/6) (Award, 6 August 2019)

B. Annulment

- *Churchill Mining PLC and Planet Mining Pty Ltd v Indonesia* (ICSID Case Nos.ARB/12/40 and 12/14) (Decision on Annulment, 18 March 2019)
- *RSM Production Corporation v Saint Lucia* (ICSID Case No.ARB/12/10) (Decision on Annulment, 29 April 2019)

Key Cases

C. Quantum

- *Cube Infrastructure Fund SICAV and others v Spain* (ICSID Case No.ARB/15/20) (Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019)
- *Tethyan Copper Company v Pakistan* (ICSID Case No.ARB/12/1) (Award, 12 July 2019)

D. Disqualification

- *Vattenfall AB and others v Germany* (ICSID Case No.ARB/12/12) (Recommendation Pursuant to the Request by ICSID dated 24 January 2019 on the Respondent's Proposal to Disqualify all Members of the Arbitral Tribunal dated 12 November 2018)

A. Corruption (1)

- **Niko Resources (Bangladesh) v BAPEX & Petrobangla (ICSID Case Nos.ARB/10/11 and 10/18) (Decision on Corruption Claim, 25 February 2019) (Michael E. Schneider, President; Campbell McLachlan QC; Jan Paulsson)**
  - The numerous acts identified by the Respondents as procured by corruption were "*unsupported by the evidence, often relied on speculation or assumed links that were not shown to exist by the available evidence*"
  - Benefits afforded to a State Minister (vehicle and travel expenses) had already been the subject of a criminal sanction in Canada, but they could not be taken as having procured or contributed to the procurement of the relevant contracts as they occurred after their conclusion and had no apparent link to them
  - "*Allegations of bribes paid by Niko to the Prime Minister for her approval of the Agreements have no evidentiary support*"

A. Corruption (2)

- **Lao Holdings NV v Laos (ICSID Case No.ARB(AF)/12/6) (Award, 6 August 2019) (Ian Binnie QC, President; Bernard Hanotiau; Brigitte Stern)**
  - Claimant alleged expropriation, breach of FET standard, discrimination and less favourable treatment. Laos asserted, *inter alia*, that the claims should not be entertained at all on the basis of bribery and corruption
  - Some of the underlying transactions were deeply suspicious but there was not "*clear or convincing evidence*", although the Tribunal held that, in at least one instance, on the balance of probabilities it was more likely than not that a bribe had been paid to an unidentified Government official in an unsuccessful attempt to advance the claimants' agenda
  - The bribery/corruption allegations were dismissed BUT the Tribunal also dismissed all the alleged treaty violations

B. Annulment (1)

- **Churchill Mining PLC and Planet Mining Pty Ltd v Indonesia (ICSID Case Nos.ARB/12/40 and 12/14) (Decision on Annulment, 18 March 2019) (Judge Dominique Hascher, President; Karl-Heinz Böckstiegel; Jean Kalicki)**
  - Unsuccessful annulment application based upon:
    - serious departure from fundamental rule of procedure (alleged failure by Tribunal to allow evidence that deprived the claimants of a full opportunity to present their case on a novel legal framework that the Tribunal ultimately found decisive);
    - manifest excess of powers (alleged failure to apply Indonesian law/international law of State responsibility/international law of unjust enrichment); and
    - failure to state reasons

B. Annulment (2)

- **RSM Production Corp v Saint Lucia (ICSID Case No.ARB/12/10) (Decision on Annulment, 29 April 2019) (Donald McRae, President; Andreas Bucher; Alexis Mourre)**
  - Partially successful annulment application based upon:
    - improperly constituted tribunal (allegation that Dr. Gavan Griffith QC lacked impartiality but was not removed); and
    - manifest excess of powers (Tribunal ordered claimant to provide security for costs and then dismissed the claims "with prejudice" for non-compliance)
  - Committee rejected the arguments relating to the composition of the Tribunal on the basis of the alleged lack of impartiality of Dr. Griffith QC
  - While the Committee saw no manifest excess of power by the Tribunal in deciding to discontinue the proceedings as a result of RSM's refusal to provide security for costs, the Tribunal had manifestly exceeded its powers by dismissing the claims "with prejudice"

C. Quantum (1)

- **Cube Infrastructure Fund SICAV and others v Spain (ICSID Case No.ARB/15/20) (Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019) (Vaughan Lowe QC, President; James Spigelman; Christian Tomuschat)**
  - Three jurisdictional objections: (i) ECT did not apply to intra-EU disputes (the "*Achmea*" issue) (rejected by Tribunal); (ii) The companies which actually owned the plants (which were subsidiaries) were not the claimants in the arbitration (rejected by Tribunal); and (iii) Claims arose from taxation measures, over which Article 10 of the ECT did not generate obligations (accepted by Tribunal)
  - Tribunal decided unanimously that Spain breached the FET standard, but dismissed all other claims
  - Spain argued the most appropriate method for damages calculation was the cost of the assets plus a reasonable return. But the Tribunal, while observing that caution was required with the DCF method, agreed with the claimant that it was the most appropriate method in this case.
  - The Claimants' analysis focused on the performance of specific plants which had an operating history, even if relatively short, in a highly-regulated industry; and it addressed the specific impact of the disputed measures in terms of the loss of cash flows to those plants.
  - Damages of approximately EUR45 million awarded

C. Quantum (2)

- **Tethyan Copper Company v Pakistan (ICSID Case No.ARB/12/1) (Award, 12 July 2019) (Klaus Sachs, President; Lord Hoffmann; Dr. Stanimir Alexandrov)**
  - Pakistan ordered to pay c. US$4.08bn damages as principal amount of compensation, along with pre- and post-award interest, and to pay the costs of the arbitration, and to pay c. US$60m towards the claimant's costs
  - In considering the level of compensation to be awarded, the Tribunal analysed four issues:
    - the applicable standard of compensation;
    - the requirement of causation;
    - the applicable standard and burden of proof; and
    - the valuation method to be applied to determine Claimant's damages
  - "Modern DCF method" was determined to be the appropriate calculation method
  - Claimant's claimed damages reduced by c. US$1.84bn to account for risks regarding feasibility and/or the value of the claimant's investment, and reduced by a further c. US$2.56bn to fully account for systematic and asymmetric risks affecting the project

D. Disqualification

- ***Vattenfall AB and others v Germany* (ICSID Case No.ARB/12/12) (Recommendation Pursuant to the Request by ICSID dated 24 January 2019 on the Respondent's Proposal to Disqualify all Members of the Arbitral Tribunal dated 12 November 2018) (Secretary-General of the Permanent Court of Arbitration)**
  - Germany sought to disqualify the whole tribunal (Albert Jan van den Berg; Vaughan Lowe QC; Charles Brower) on grounds of alleged assistance by the Tribunal in the formulation of the claimants' claim and unequal treatment
  - PCA S-G held that it was not reasonable to infer that the Tribunal's request for further argument on a jurisdictional issue (even though it had already been extensively argued) was intended to aid the Claimants
  - Tribunal's efforts to complete gaps in the evidentiary record and to ascertain the parties' positions on additional points did not provide basis for speculation as to a biased motive

PANEL QUESTIONS – BIT cases

1. **Is it time for a permanent court for all BIT-based investment disputes to be adjudicated upon by full time judges?**
2. **There is a perception (right or wrong) that some form of impropriety often underpins investment agreements which give rise to BIT disputes. Why is it so difficult to prove fraud/corruption and how can this issue be more effectively address by both parties and tribunals?**
3. **Should a high value quantum claim (where a claimant claims beyond US$100 million) be the subject of consideration by a Tribunal-appointed expert more often?**
4. **Is DCF, and now "modern DCF", too much of a moving feast to provide the basis for damages evaluation without a cross-check?**