ISSUE 29

serlespeak

RAISING THE BAR IN CHANCERY & COMMERCIAL

International Arbitration

"the quintessential modern commercial chancery set."

Chambers and Partners, 2022

I am delighted to introduce this edition of Serlespeak dedicated to arbitration. Over the past decade there have been many significant developments serving to illustrate the importance of arbitration for resolving commercial and international investment disputes.

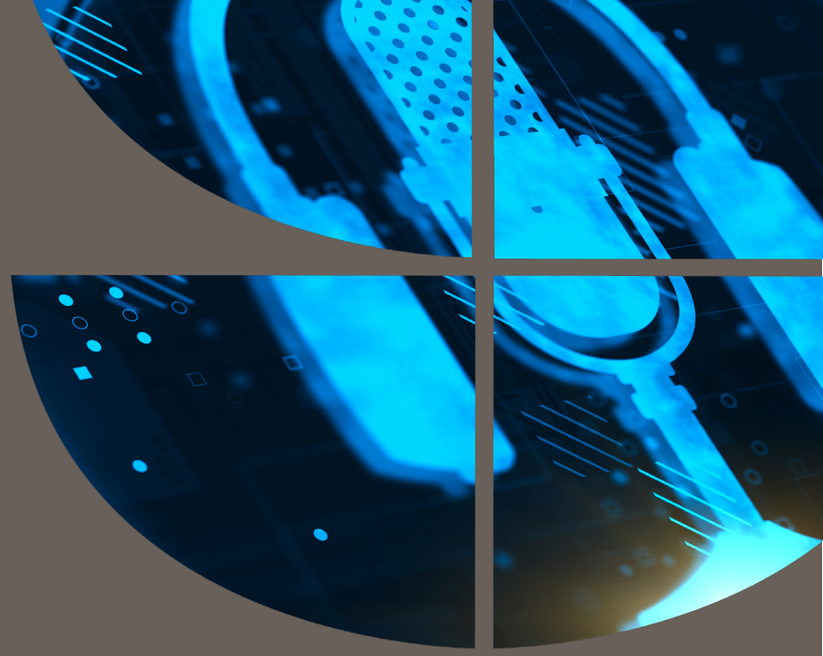
The proliferation of regional arbitral centres and their increasing caseloads, amendments of domestic laws to more closely mirror the UNCITRAL Model Law, greater scrutiny and criticism of decisions of local courts in the context of the arbitral process all reflect a clear trend in favour of arbitration.

Nevertheless, arbitral institutions are coming under more pressure to address the perception that the arbitral process needs to be more cost effective and expeditious, as well as to widen the pool of arbitrators, not least in terms of gender, nationality and age.

In this issue, Michael Edenborough QC explains how IP disputes could be effectively dealt with by arbitration and Zoe O'Sullivan QC provides an overview of the institutional rules which enable arbitral tribunals to dispose of claims/issues in a summary manner. The recent and sudden announcement to consolidate arbitral institutions in Dubai and its potential ramifications are outlined by Jamie Randall. In my article I summarise three recent decisions of the Privy Council and the UK Supreme Court, statistics from key arbitral institutions and data identifying the main provisions of the Arbitration Act 1996 featuring in English Court decisions.

Khawar Qureshi QC

Chambers News & Events



People

On October 1st, following successful completion of their pupillage's, Serle Court welcomed three new tenants to chambers; John Eldridge, Andrew Gurr and George Vare. John, Andrew and George have worked on a wide range of commercial chancery cases throughout their pupillage and look forward to meeting and working with chambers' clients.

We would like to congratulate Conor Quigley QC on his reappointment to the Shanghai International Arbitration Center as arbitrator, effective from 1 August 2021 to August 2026. Conor is an expert in EU law generally, including, in particular State Aid and subsidies, competition law and international trade law.

We are delighted that Associate member of chambers Brigitte Lindner has been called to the bar of England and Wales by Lincoln's Inn as a transferring Registered European Lawyer. Brigitte remains a member of the bar of Berlin/Germany and as a dual-qualified lawyer, she will continue to advise in international, European and comparative copyright law.

On October 18th members and staff took part in the London Legal Walk to raise funds for free legal services and support in London and the South East. Serle Court raised a total of £5,242 in support of the London Legal Support Trust and we thank members, staff, colleagues and clients for their donations.

Publications

The 15th Edition of *'Butterworths Intellectual Property Law Handbook'* went to publication in October. Edited by Michael Edenborough QC, the new edition has been fully revised and updated to reflect recent key developments in this area, including the UK's exit from the European Union. On review, Butterworths commented that *"This book provides an invaluable single source collection of UK primary and secondary legislation relating to intellectual property law in one manageable volume."*

Congratulations to John Eldridge on his new book *'Economic Torts and Economic Wrongs'*, co-edited with Michael Douglas of the University of Western Australia and Claudia Carr of Clifford Chance, published by Bloomsbury. The text features chapters by leading jurists from across the common law world, and explores contemporary issues in respect of causes of action which serve to protect a claimant's economic interests.

Remote events programme and Virtual Hub

Members of Serle Court continue to present online webinars and conferences as part of a bespoke events programme across all of chambers' practice areas. In 2021 members presented 95 remote webinars to clients. Our Business Development team and clerks continue to organise a combination of online or in-person events on a wide range of commercial chancery topics.

Serle Court launched a 'Virtual Conference Hub' in May 2021 to host its online events. You can access the Virtual Hub via Serle Court's website, by clicking the 'Virtual Hub' icon in the top right of the webpage and by completing a short registration form. The Hub's purpose is to ensure that all content relating to our online events and digital media is readily available to clients and followers.

Due to popular demand Prof. Jonathan Harris QC (Hon.) delivered a webinar on *'Cross-border Jurisdiction and Judgments after the EU Withdrawal Transition Period'* in July and October. 350 clients joined the online presentation where Jonathan used a variety of *case study examples* to consider the implications for the effectiveness of English jurisdiction clauses, the commencement of proceedings in English courts, the practical differences made by the application of common law principles to EU domiciled parties and the enforcement of English judgments in the EU.

Our property barristers have been delivering a series of online webinars titled 'Commercial Property & Real Estate Litigation: The Future'. These practical sessions explore topical issues and developments in chancery and property litigation enabling our clients to select the talks which relate most closely to their practices and knowledge development programmes.

For more information of the current talks on offer from our barristers please visit the events page of our website.

ThoughtLeaders4

Serle Court is a proud partner of the ThoughtLeaders4 Disputes and HNW Divorce communities. The Disputes Community is a specialist disputes platform connecting private practice lawyers, in-house counsel, barristers, and industry experts involved in complex, cross-border commercial litigation and international arbitration. Jonathan McDonagh spoke at the Shareholders Disputes and Class Actions conference on *'Environmental claims and collective redress'"* On 6th October, Khawar Qureshi QC spoke at ThoughtLeaders4 Disputes *'Fault Lines in India's Arbitration Landscape'* virtual event.

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This session discussed recent developments in arbitration in India and what this means for the future of arbitration in India.

On 24th November, Richard Wilson QC and Giles Richardson spoke at the HNW Divorce Litigation Flagship Conference at Merchant Taylors Hall. Richard was on a panel to discuss *'Wealth Planning Hints and Tips for Safeguarding against Divorce'*. Giles took part in a panel discussion on *'Attacking and Defending Trusts in Divorce: Is the Family Court Position on Trusts Correct?'*

Serle Court sponsored the ThoughtLeaders4 FIRE Middle East conference 2021. The event took place from 14th to 16th November 2021 at the Shangri-La Hotel in Dubai. Zoe O'Sullivan QC spoke on 15th November on Non-Performing Loans alongside James Fox (DWF, Dubai) and Richard Clarke (Kroll Dubai).

On 1st October, Constance McDonnell QC led a TL4 HNWD online panel discussion with Robert Linden Laird Craig and Michael Armstrong (both Forsters) on *'Predatory Marriage: Protecting Vulnerable Clients, and Hopes for Reform'*.

External Events

On 4th November Lance Ashworth QC spoke at ICC FraudNet's Barcelona Conference 2021 *'Fraud and Asset Recovery – Cases and Strategies'*. Lance discussed *'Why insolvency is one of the most powerful weapons in fraud cases.'* Serle Court is the only chambers which is a strategic partner of ICC Fraudnet, an international network of independent lawyers who are the leading civil asset recovery specialists in each country.

On 7th October, Serle Court sponsored the drinks reception at the Informa Connect and ConTrA Trusts in Litigation Conference. Giles Richardson spoke on *'Estate Planning/ Succession: Quirks and curiosities in 1975 Act claims'* and Kathryn Purkis spoke on a panel session discussing *'Management through change.'*

Professor Suzanne Rab was a guest speaker at Sharpe Pritchard's Mediation seminar *'Mediation: Myths and Realities'* on 5th October. Suzanne spoke alongside Senior Partner Justin Mendelle, Partners Catherine Newman and David Owens, and Legal Director Simon Kiely of Sharpe Pritchard.

International and Offshore events

As a result of the Covid-related travel restrictions between the United Kingdom and United States earlier this year, Serle Court's 5th International Trusts & Commercial Litigation Conference in November 2021 was postponed. We are pleased to confirm that the next International Trusts & Commercial Litigation Conference will take place on Monday, 14 November 2022 at the Rainbow Room, Rockefeller Centre. We are very much looking forward to reconnecting with our clients in New York this year.

In November a team of barristers, including Rupert Reed QC, Zoe O'Sullivan QC, James Weale and Gregor Hogan, accompanied by Senior Clerk Daniel Wheeler attended a number of events in Dubai during Dubai Arbitration Week 2021. Serle Court proudly sponsored the opening cocktail reception for Dubai Arbitration Week at the Jumeirah Emirates Towers on 14th November. On 15th November, Zoe O'Sullivan QC spoke at the Chartered Institute of Arbitrators (CIArb) YMG Annual Conference *'Arbitration in a Changing World'* in a debate on whether *'Virtual hearings should be the default mode of hearings in the post-pandemic world.'* On 16th November Rupert Reed QC spoke at DIAC event 'MEGASTRUCTURES Dubai: DIAC 2.0' on a panel discussion *'Power accumulation: A step forward into stronger ADR landscaping in Dubai and the region.'*

Serle Court has teamed up with lawyers from Maples Group to present the Cross Border Private Client & Trusts Series. The second panel on 'Anti-Bartlett Clauses' launched as an on-demand session in November and is available to download on the Serle Court Virtual Hub and website. The session is chaired by Ray Davern (Partner at Maples Group, London), and co-presented with Richard Wilson QC, Matthew Morrison and Alex Way (Of Counsel at Maples Group, London).

In July the editors of DIFC Courts Practice, Rupert Reed QC (Serle Court) and Tom Montagu-Smith (3VB) were joined by contributors, James Weale (Serle Court), Gregor Hogan (Serle Court) and Matthew Watson (3VB) to present a webinar *'DIFC Courts Practice – A Year On'* discussing developments in DIFC law since the book's publication in May 2020.

All the above initiatives are supported by our Business Development team and Clerks who organise and deliver these sessions. The success of this programme has been such that webinars will continue to be part of the business development programme into 2022.

Awards and Directories

In October, Serle Court won the 'UK Set of the Year' award at the Chambers High Net Worth Awards 2021. The awards reflect achievements over the past 12 months, including outstanding work, impressive strategic growth and excellence in client service.

In the Chambers UK Bar directory 2022 Serle Court is ranked in 11 practice areas; 5 of those rankings are band 1 rankings in chambers' core practice areas including Chancery: Commercial, Chancery: Traditional, Fraud, Offshore and Partnership. Our barristers have received 130 individual recommendations across 21 practice areas. 45 members of chambers have received individual rankings in at least one practice area.

We would like to congratulate John Machell QC (Partnership), Dakis Hagen QC (Family: Matrimonial Trust/Tax Experts) and Will Henderson (Chancery: Traditional & Charities) who have been recognised as 'Star Individuals'. We also congratulate Zahler Bryan and Stephanie Wickenden who have been recognised as 'Up and Coming' in Chancery: Traditional and Intellectual Property respectively.

Serle Court received Tier 1

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rankings in 5 of its core practice areas in the Legal 500 2022 directory. These areas include Civil Fraud, Offshore, Private Client: Trusts & Probate, Partnership & LLP and Mediation. Members of Serle Court are pleased to received rankings across 20 practice areas in the directory. A total of 21 silks and 26 juniors were recommended across the various practice areas. Congratulations to all.

We are delighted that Richard Wilson QC and Dakis Hagen QC have been included in Spears Magazine's selection of the best Contentious Trust and Tax Lawyers for *high-net-worth individuals*. Richard Wilson QC is featured as a 'Top Recommended' Contentious Trust Lawyer and Dakis Hagen QC features in 'The best tax and trust barristers for high-net-worth individuals' list as a 'Top Recommended Barrister'. Congratulations to both silks.

Serle Court has been recognised as 'Highly Commended' in the Best Contentious Wills and Probate Team category at the British Wills and Probate Awards 2021. It has been a fantastic year for our wills & probate specialists who were all delighted to receive this commendation.

SerleShare

SerleShare delivers valuable, expert thought leadership direct from Serle Court's barristers, arbitrators and mediators to colleagues and clients both in the UK and internationally. Content focusses on all commercial chancery areas of expertise, case updates, landmark court judgments and expert analysis. The initiative aligns chambers' marketing strategy with the current working environment and the evolving demand for quality and informative digital legal content. Since its launch, SerleShare has published 47 articles and has generated over 40k views. Please visit the SerleShare page of our website and follow #SerleShare on LinkedIn to stay up to date with our latest cases and updates.

Social Media

We have six designated discussion groups on LinkedIn to enable Serle Court members and clients to discuss topical issues. These groups are Contentious Trusts and Probate, Fraud and Asset Tracing, Intellectual Property, Middle East and Arab Law, Competition Law, and Partnership and LLP Law. Please join us.

Please follow us on Twitter @ Serle_Court.

SerleSpeak is edited by Sophie Holcombe.

Key cases and institutional developments.

(i). SIAC continues to surge ahead

In March 2021, SIAC published its 2020 annual report – 1080 new case filings (up from 479 in 2019), total amount in dispute US$8.49bn, parties from 60 jurisdictions chose to arbitrate at SIAC (India, US and China are the top foreign users).

In June 2021, LCIA published its 2020 Casework Report – 444 references to arbitration (up from 395 in 2019), 86% of parties from outside the UK (up from 81.4% in 2019).

In August 2021, ICC published its 2020 statistics – record 946 new cases (up from 869 in 2019), arbitrations seated in 113 cities in 65 countries, average amount in dispute US$145m, 38% of newly registered cases are within the US$3m threshold for ICC expedited procedure.

(ii). Section 68 AA 96 challenges continue to dominate (and mostly fail)

	Number of Challenges	
Section of the Arbitration Act 1996	**2020**	**2021 (up to September)**
9 (stay of proceedings)	11	9
24 (power of court to remove arbitrator)	4	4
44 (court powers in support of arbitrations)	10	5
67 (no substantive jurisdiction)	10	11
68 (serious irregularity)	17	12
101 (recognition & enforcement of NYC awards)	6	4
103 (refusal of recognition & enforcement of NYC awards)	7	3

(Source: BAILII / Westlaw)

(iii). The Privy Council pronounces on the scope of "public policy" and "serious irregularity"

Betamax Ltd v State Trading Corporation [2021] UKPC 14 (14 June 2021) (Lord Hodge; Lady Arden; Lord Leggatt; Lord Burrows; Lord Thomas)

1. The Mauritian Supreme Court (MSC) had set aside an arbitration award in favour of a Mauritian company on the ground that the contract (for affreightment with a State trading entity) was entered into in breach of the national public procurement regime and was contrary to public policy within Section 39(2)(b)(ii) of Mauritius' International Arbitration Act 2008 (IAA 2008). The Privy Council held that the company was entitled to enforce the award, inter-alia, on the grounds that the MSC had erroneously held that it had a responsibility not only to determine what constituted public policy, but whether the contract was illegal (a question of law that had been considered and determined by the arbitrator with no recourse to appeal), whereas the effect of Section 39(2)(b)(ii) IAA 2008 was to reserve to that court a limited supervisory role in relation to public policy while respecting the finality of the award.

RAV Bahamas Ltd & anor v Therapy Beach Club Inc [2021] UKPC 8 (19 April 2021) (Lord Hodge; Lord Hamblen; Lord Leggatt; Lord Burrows; Lord Stephens)

2. The Privy Council provided a valuable reminder as to the limited scope to challenge an arbitral award on the grounds of "serious irregularity", having considered Section 90 of The Bahamas' Arbitration Act 2009, which governed challenges to arbitration awards on the ground of serious irregularity and was in substantially the same terms as Section 68 of the Arbitration Act 1996 (AA 1996). The Privy Council held that it was not essential for there to be a separate and express allegation and finding of substantial injustice for a serious irregularity to be established. However, it was good practice for an applicant to set out in its pleading the irregularity relied on, identify the grounds for contending that there had been such an irregularity, and to demonstrate that it had caused or would cause substantial injustice.

(iv). The UK Supreme Court confirms the mandatory nature of service requirements upon a State

General Dynamics United Kingdom Ltd v Libya [2021] UKSC 22 (25 June 2021) (Lord Lloyd-Jones; Lady Arden; Lord Burrows; Lord Briggs; Lord Stephens)

3. The Supreme Court re-affirmed the importance of adhering to strict statutory requirements for service of proceedings on States, concluding that the procedure for service under Section 12 of the State Immunity Act 1978 (SIA 1978) had to be followed in all cases where proceedings were commenced against a defendant State, including proceedings to enforce a New York Convention award pursuant to Section 101 AA 1996 and CPR 62.18. The State had to be given notice of the proceedings, and a document giving such notice was a document required to be served for instituting proceedings under Section 12(1) SIA 1978. That document would be the arbitration claim form if that was required to be served; otherwise it would be the order granting permission to enforce the award.

(v). Corruption allegations must be raised as early as possible

Balochistan v Tethyan Copper Company Pty Ltd [2021] EWHC 1884 (Comm) (6 July 2021) (Robin Knowles J)

4. The Province of Balochistan was precluded by Section 73(1) AA 1996 from arguing that an ICC tribunal lacked jurisdiction when it made a partial award because the contract containing the arbitration agreement was tainted by corruption. Balochistan had failed to raise the corruption allegation before the tribunal as a challenge to its jurisdiction and it could have taken steps to discover the corruption earlier than it did. In addition to being precluded by Section 73(1) AA 1996, Balochistan was barred from raising the allegation by the doctrine of waiver by election.

Concluding Observations

The statistics from major arbitral institutions vividly illustrate the increasing popularity of arbitration as well as the growth of regional arbitration centres. Whilst the role of the Privy Council as the final appellate body for many commonwealth jurisdictions has diminished in recent years, the two cases cited above demonstrate its continued importance.

Khawar Qureshi QC

Arbitration of Intellectual Property disputes

Intellectual property (IP) disputes are not often settled in arbitration. Why is that the case? There are both good and bad reasons for this situation. However, in the right case, there can be no better solution than to resolve an IP dispute in arbitration. To discern which is an appropriate case, it is necessary first to consider the IP regime and to understand what can and cannot be done in an arbitration and how that differs from what can and cannot be done before a court.

Most, but not all, IP rights are local in nature, or at least have a degree of regionality. For example, in the United Kingdom, one may secure a national UK registered trade mark that has effect only in the UK, or a European trade mark that has effect throughout the EU27. Further, one may secure various national registrations in the various Member States of the EU27, or further afield in other important markets, such as Japan or China. There is no such thing as a "World Trade Mark". In contrast, if one wished to secure protection for a brand world-wide, then that would involve seeking registrations in every country or region of the world. Even the largest companies usually only have registrations in about 50% of the world's jurisdictions, and only a handful of companies have registrations that cover nearly every country in the world – none have protection everywhere.

A consequence of this local or regional nature of IP rights is that typically a multi-jurisdictional dispute will involve bringing separate court proceedings in each country to resolve any issue of infringement. This issue of multiplicity of proceedings is a driving force behind the creation of regional rights, such as the EU trade mark or the Unitary patent (that extends to most, but not all, of the EU27), because the infringement of such regional rights in several of countries of the region may be resolved in one set of proceedings before a single court that can grant pan-regional relief. The departure of the UK from the EU has accordingly adversely affected the reach of the UK courts in trade mark matters. Similarly, the non-participation of the UK in the UPC has had the same effect in patent matters.

A further consequence of this local or regional nature is that if it be contemplated to question the validity of a registered IP right (and that commonly happens in infringement actions as part of the defensive strategy), then a challenge may only be brought before the relevant local or regional court, as other courts do not have jurisdiction to consider the validity of a right registered in another country. Furthermore, only a local or regional court has the jurisdiction to act upon the successful outcome of any invalidity challenge and then cancel a local or regional registered right. This latter point is the most important reason for bringing IP disputes before a local or regional court. While an arbitral tribunal can consider the validity of a registered right, it cannot cancel the registration if found invalid. It can order that the proprietor undertakes to surrender, or allow to lapse, the relevant right. However, typically, the right will then cease as of the date of surrender or lapse; in contrast, a court ordered cancellation will take effect ab initio (save in the case of revocations for trade marks, but even then – in certain circumstances – it can have retrospective effect). Therefore, the relief is not coterminus with respect to the effective date of the cessation of the right. This has important consequences upon such matters as extant licence agreements and acting as a barrier to subsequent applications made while the earlier right remains in effect.

While an arbitral tribunal has the power to grant a final injunction pursuant to the Arbitration Act 1996 s.48(5), it has limited powers to grant interim injunctive relief pursuant to s.38, and these powers do not extend to enjoining a party from committing further or threatened acts of alleged infringement. However, a court may exercise such a power in arbitration proceedings (pursuant to s.44(2)(e)), but again these powers are tightly prescribed if the arbitration is already afoot. Thus, if any such interim relief is necessary, court proceedings will need to be instigated in any event.

A court may only exercise its powers if it has jurisdiction over the parties. That may arise if the IP right is registered in that jurisdiction, or if the court has personal jurisdiction over the parties. This latter route may be used to include foreign based parties if they have some material link to a party based, or an act occurring, within the jurisdiction. Absence any such relationship, a court cannot act.

In contrast, in arbitration proceedings, these jurisdictional issues are overcome by agreement between the parties. This is one of the main advantageous of arbitration, namely the power to deal with multi-jurisdictional issues in one set of proceedings, even if there is no underlying regional IP right, or other reason, that would otherwise allow the matters to be consider in one judicial forum.

A second major advantage of arbitration proceedings is that they are confidential in nature, while nearly all court proceedings are open to the public (at least for the majority of the proceedings, even if certain parts of the evidence might be heard in camera or otherwise kept confidential if trade secrets are involved).

Therefore, arbitration proceedings are favoured if there are multi-jurisdictional acts or parties involved, and confidentiality is required (which in certain circumstances might even extend to the very existence of the proceedings themselves – even though the outcome cannot be kept confidential if there is any public aspect to it, such as an IP right no longer existing). In contrast, court proceedings are favoured if it necessary for a party to avail itself of specific legal remedies such as interim injunctions, or cancellation ab initio or retrospectively of registered IP rights.

Thus, in the right case, arbitration should be considered for the resolution of IP disputes.

Michael Edenborough QC

Early Determination in International Arbitration

Historically, arbitral institutional rules have not conferred powers of summary determination on arbitral tribunals, out of a concern to avoid procedural challenges by a dissatisfied party claiming that it has not had a proper opportunity to put its case. However, the attraction of giving the tribunal the power to dismiss unmeritorious claims or defences at an early stage has led all the major arbitral institutions to introduce such powers in recent years.

First off the blocks was ICSID, which in its 2006 Arbitration Rules introduced Article 41(5):

> Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is **manifestly without legal merit...**

This power is limited to claims, the application must be made promptly, and the only ground is that the claim is manifestly without legal merit (and thus is not suitable for fact-dependent objections). In *Brandes Investment Partners LLP v Venezuela* (ICSID Case No. Arb/08/3), the Tribunal confirmed that the power under Article 41(5) can also be exercised on the grounds that the tribunal manifestly lacks jurisdiction over the claim.

The words "manifestly without legal merit" show that the threshold is intended to be a high one, because the claimant is being deprived of the full opportunity to develop and present its case afforded by the Rules. In the first published award to consider Article 41(5), *Trans-Global Petroleum v Jordan,* ICSID Case No ARB/07/25 (Decision dated 12 May 2008), the Tribunal said "the ordinary meaning of the word requires the respondent to establish its objection clearly and obviously, with relative ease and despatch. The standard is thus set high..." (para 88) and "....as a basic principle of procedural fairness, an award under Rule 41(5) can only apply to a clear and obvious case" (para 93). More recent cases such as *Lotus Holding A/S v Turkmenistan* ICSID Case No ARB/17/30 Award dated 6 April 2020 have continued to make clear that the power must be used only to strike out claims which are fundamentally flawed in law.

ICSID's lead has been followed, by rules which preserve the "manifestly without merit/manifest lack of jurisdiction" wording:

(1) In Singapore, by the SIAC Arbitration Rules 2016, Article 29(1):
(2) In Hong Kong, by the HKIAC Arbitration Rules 2018, Article 43(1):
(3) In Sweden, by SCC Arbitration Rules 2017 Article 39:
(4) By the ICC, in its 2017 clarification to its Note to the Parties, paragraph 110:
(5) By the LCIA in its 2020 Arbitration Rules, Article 22.1(viii) and 14.6.

Taking Article 22.1(viii) of the 2020 LCIA Rules as an example, the power of Early Determination can be exercised on three grounds:

"that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit..."

Manifest lack of jurisdiction

An application under this head might be made, for example, where it is apparent that either a claimant or a respondent is not a party to the arbitration agreement, provided that this is a question of law (such as whether a party has succeeded to the rights under the arbitration agreement by succession or novation) and not a fact dependent question. However, since all tribunals already had the power to determine jurisdiction as a preliminary issue, it is not clear what the express power of early determination adds to its armoury.

Inadmissible

Admissibility has received quite a lot of attention in recent cases: see *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm), *C v D* [2021] HKCFI 1474 and *BTN v BTP* [2020] SGCA 105. Lack of admissibility is to be distinguished from lack of jurisdiction: "Jurisdiction is commonly defined to refer to the power of the tribunal to hear a case, whereas admissibility refers to whether it is appropriate for the tribunal to hear it": *BBA v BAZ* [2020] 2 SLR 453, Singapore Court of Appeal, at [74]. The classic instance is where the parties have not yet fully exhausted all the stages of a mandatory dispute resolution clause prior to commencing arbitration.

"Manifestly without merit"

This is the power which most closely resembles the common law courts' power to grant summary judgment. It is likely to be the most useful and also the most controversial aspect of the Early Determination power. The wording of the institutional rules, focusing on manifest lack of merit, is conspicuously different from the power under CPR 24, requiring that the claim or defence be shown to have no real prospect of success: arguably, the arbitration threshold is higher. Nonetheless, the decided authorities on summary judgment are likely to provide a useful mine of pronouncements as to the circumstances when it is appropriate for the tribunal to dismiss the claim or defence without a full hearing.

There is as yet relatively little authority on the enforceability of awards rendered by way of Early Determination. Grounds for resisting enforcement under the New York Convention include where "the arbitral procedure was not in accordance with the agreement of the parties" (Article V(1)(d)). This is unlikely to avail a party which has expressly agreed to the incorporation of a set of institutional rules which include a power of early determination. Losing parties are more likely to seek to rely on Article V(1)(b): *"the party against whom the award is invoked was...unable to present his case."*

The ICSID caselaw is the most highly developed and likely to be referred to by tribunals as affording helpful guidance. What remains to be seen is the extent to which tribunals will make use of such powers (and whether they will be supported by the supervisory court), or whether they will be deterred by "due process paranoia". A party considering whether to make an Early Determination application would be well advised to consider the likely attitude of the courts of the seat to summary determination.

Zoe O'Sullivan QC

Adios to the LCIA: Arbitration Adjusted in Dubai and DIFC

Decree No.34 of 2021 issued by Sheikh Mohammed bin Rashid Al Maktoum, the Ruler of Dubai, turned a few heads. It was perhaps not as big a shock as Emma Raducanu's victory at the US Open (nor did it garner quite the same media coverage) but, issued just a few days later, it certainly took those in the "Middle East and North Africa ("MENA")" dispute resolution community by surprise.

Effective from 20 September 2021, the Decree abolishes the DIFC-LCIA Arbitration Centre, the joint venture between the DIFC's Arbitration Institute (DAI) and the London Court of International Arbitration (LCIA), as well as the Emirates Maritime Arbitration Centre.

The DIFC-LCIA Arbitration Centre was established in 2015 and adopted rules which were an adaptation of, and very similar to, the LCIA rules. The venture has been a popular option for dispute resolution in the MENA region because of the confluence of an up-to-date set of arbitral rules and the oversight of a major arbitral institution and has been growing year-on-year. It had reportedly more than 170 active cases in 2021, more than double the number it had in 2019. Perhaps unsurprisingly, the choice of DIFC-LCIA rules often coincided with the parties choosing the DIFC, rather than Dubai, as the seat of the arbitration. The DIFC's common law-based system and arbitration law based on the UNCITRAL Model Law makes it a much more appealing choice for international parties than onshore Dubai.

In place of the DIFC-LCIA Arbitration Centre and the Emirates Maritime Arbitration Centre will stand the Dubai International Arbitration Centre (DIAC). This has previously been based in onshore Dubai, although the Decree provides for a new DIFC branch to be established.

There is significant uncertainty in the wake of the announcement, not least for the abolished centres' staff and arbitrators. Under article 5 of the Decree, all of the assets of the abolished centres, as well as their lists of arbitrators and select personnel will be transferred to the DIAC. The LCIA itself has said that it was neither consulted nor given notice of the reforms and the practical workability of the necessary transfers remains to be seen. In addition, article 6 states that pre-existing arbitration agreements providing for arbitration under the DIFC-LCIA rules shall remain valid and effective but that they shall be administered by the DIAC unless the parties agree otherwise. It also provides that arbitral tribunals which have already been formed will continue under the applicable rules and procedure but under the supervision of the DIAC. Again the implications of these changes remain to be seen.

Whilst the Decree has come as a surprise to many, some argue that it is a natural step in the evolution of Dubai as a centre for international dispute resolution. They point to the fact that there have been changes in recent years to make Dubai a more user-friendly jurisdiction. These have included the courts of the UAE adopting a pro-enforcement attitude towards arbitration proceedings and the issuance of UAE Federal Arbitration Law No. 6 of 2018 which aligns with international standards. On the back of these changes, Dubai had risen to become one of the top ten locations for arbitration worldwide, according to the 12th International Arbitration Survey. Perhaps, however, it was hoped that Dubai's ascent would be even swifter and that a united arbitral body was required for Dubai to challenge those above it.

It is presumably hoped that the DIAC will now be a one-stop shop for all Dubai arbitration needs, whether onshore or offshore, and that this will bring clarity to the administration of arbitration in Dubai. The Decree provides for both onshore and offshore arbitration by specifying that, if Dubai is chosen as the seat of the arbitration, the UAE Federal Arbitration Law shall be the governing law and the Dubai courts shall have oversight and that, if the DIFC is chosen as the seat of the arbitration, the DIFC Arbitration Law shall apply and the DIFC courts shall have oversight. This distinction will no doubt be of importance to international users.

Ultimately the move may well be a sensible one and no doubt Dubai will continue to be a centre for dispute resolution in the region, with its enticing offering of parallel legal systems onshore and offshore. It is after all not the first occasion in recent times when a jurisdiction has parted ways with the LCIA: Mauritius did the same in 2018. There will, however, be some uncertainty over the coming months as the handover is carried out and it can't be denied that it is a rather inauspicious start for a body which should be aiming to project certainty and surefootedness. Whatever the end result, it all rather begs the question whether it would not have been better to have informed the parties and announced the move in advance rather than blindsiding everyone, Raducanu-style, by issuing the Decree and bringing into effect immediately.

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