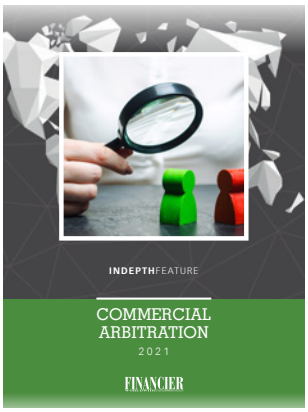

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COMMERCIAL ARBITRATION

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in commercial arbitration.

UNITED KINGDOM

RPC

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Q. Reflecting on the past 12-18 months, what key trends and developments do you believe have dominated the commercial arbitration space in the UK?

A: A combination of technological advances, significant judgments and innovative institutional rules marked 2020 out as an exceptional year. Even though there was a hesitance to move to virtual hearings at the start of the pandemic, as time went on, they became the norm and are now the default mode of arbitration. There have been a plethora of webinars, podcasts and protocols supporting the use of technology in commercial arbitration, most notably from the Chartered Institute of Arbitrators (CIArb). The winners in all of this are the environment and the clients. 'Green' arbitration is on the rise and substantial costs have been saved. The era of the glamorous air mile-clocking arbitration practitioner may be over. Those trends were reflected in the London Court of International Arbitration's (LCIA's) new set of rules, released in autumn 2020. The main changes include the refinement and expansion of the virtual hearing provisions, confirming the primacy of electronic communication and facilitation of electronically signed awards, the easier expedition of proceedings, including early dismissal determination, and the broadening of power to order consolidation and concurrent conduct of arbitrations. 2020 was also marked by the launch of a new arbitration institution – the London Chamber of Arbitration and Mediation (LCAM) – which promotes innovation, including the use of blockchain technology and virtual hearings.

Q. Have any recent commercial arbitration cases gained your attention? What can they tell us about arbitration in the UK?

A: The highlights of the last 12 months were two Supreme Court decisions that reinforce the forensic and robust approach of the English court to arbitration-related applications. The first decision, *Halliburton v. Chubb Insurance*, sets out the process for assessing whether there is a real possibility of arbitrator bias and what disclosures an arbitrator must make. The issue arose in a Bermuda form insurance arbitration, relating to insurance claims made in respect of the Deepwater Horizon disaster. The Supreme Court

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considered whether the arbitrator in the *Halliburton v. Chubb* arbitration had to disclose his subsequent appointments by the same law firm in two similar cases. The Court decided that in that instance the arbitrator's failure to disclose his multiple appointments did not justify his disqualification for apparent bias. However, the court emphasised that context was key. It is not uncommon to see the repeat appointment of certain arbitrators in arbitrations involving claims against multiple insurers arising out of the same incident. However, the court emphasised that context was key and it may reach a different decision in another industry. The second decision, *Enka v. Chubb Insurance*, sets out the approach to be adopted in ascertaining the law governing arbitration agreements. If the law governing the contract is not chosen, the arbitration agreement is governed by the law with which it is most closely connected. The majority held that the law with which the arbitration agreement is most closely connected will generally be the law of the seat, even if this differs from the law governing the parties' substantive contract.

Q. What challenges and issues exist for parties undertaking commercial arbitration in the UK?

A: 2020 was a year when Brexit caught everyone's attention. But arbitration is unaffected by Brexit, as the UK is a signatory to the New York Convention and has always been considered an arbitration-friendly jurisdiction. We expect that to continue in the years to come. One challenge, however, has been the perception that London is not necessarily a cost-effective venue for smaller-sized claims. This has prompted several London-based institutions to introduce provisions aimed at speeding up cases with a view to saving costs, especially in relation to lower value claims, such as the small claims procedures by the LMAA, early determination by the LCIA and expedited procedure by the LCAM. The digitalising trend in arbitration, such as virtual hearings and electronic documents, will undoubtedly reduce the cost of London-seated arbitrations.

Q. In your opinion, how might the processes and protocols for conducting commercial arbitration be improved to

enhance aspects such as speed, cost and efficiency for the benefit of the parties involved?

A: There has been a wave of soft law in this area, and helpful protocols have been developed, aimed at speeding up the arbitration process. The LCIA and some other institutions have also provided arbitrators with certain tools, such as the summary early dismissal of cases, that will help to speed up arbitrations and decrease overall costs. The COVID-19-era trend of virtual hearings has already proven how arbitrations can become more cost efficient. This is especially valuable for smaller value claims.

Q. How robust, would you say, is arbitral enforcement in the UK? What can parties expect when trying to compel an award through local courts?

A: London remains a stronghold of financial services and institutions. Enforcement is supported by a robust legislative framework – the Arbitration Act of 1996 – and the tools available to the English courts to support such enforcement, for instance freezing

It would be prudent for parties to stipulate the law of the arbitration agreement, especially where the substantive governing law and seat are different.

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injunctions and disclosure of assets. Also, English courts take a robust approach to challenges. The grounds for challenging a domestic arbitration award are limited to just three: no substantive jurisdiction, serious irregularity and an appeal on a point of English law. Unlike in other jurisdictions, public policy challenges almost never succeed in England. Overall, only 16.7 percent of Arbitration Act challenges succeed, which perhaps reflects the dramatic fall in such applications being made to the English courts.

Q. Would you advise companies to include arbitration provisions in their commercial agreements? What factors should they address when doing so?

A: London has traditionally been one of the most popular international dispute resolution venues. In 2018, the CIArb issued a framework for evaluating the best arbitral seats – London ranks highly on all scores. Despite the uncertainty caused by Brexit as to the enforcement of English court jurisdictional agreements in Europe, we would certainly encourage parties to provide for London-seated arbitrations in their commercial agreements, especially when one of the parties is based in the UK, to avoid any future uncertainty in enforcement. In doing so, it would be prudent for parties to stipulate the law of the arbitration agreement, especially where the substantive governing law and seat are different. Although the Supreme Court's verdict in *Enka v. Chubb Insurance* provided some clarity, there is a fair amount of divergence between various jurisdictions on this question. Undoubtedly, the absence of express choice of the law governing the arbitration agreement increases the risk of multijurisdictional litigation and consequent divergent results.

Q. How do you expect commercial arbitration to develop in the UK over the coming months and years?

A: We anticipate that there will be increased emphasis given to data protection in arbitration proceedings. The LCIA, for instance, has now issued a data privacy notice for LCIA arbitrations. While it increases the time and cost efficiency of arbitrations, not to mention being more environmentally friendly, there are those who say that assessing

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the veracity of a witness online cannot be achieved as successfully as at an in-person hearing. There have also been concerns that junior lawyers benefit less from the learning by osmosis that takes place from being present at hearings. We anticipate that there might be will to return to in-person hearings after the pandemic, even if combined with virtual hearings. Finally, it has been well over 25 years since the last major overhaul of the Arbitration Act of 1996. Is the Arbitration Act 1996 ripe for reform? ❑

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