

# ARBITRATION IN ENGLAND AND WALES

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## 1. The Arbitration Act 1996

- 1.1.1 The Arbitration Act 1996 (**English Arbitration Act**) came into force on 31 January 1997. The English Arbitration Act:
- consolidated and updated the existing legislation on arbitration;
  - codified legal rules and principles established by case law;
  - brought English law more into line with internationally recognised principles of arbitration law;
  - sought to make arbitration in England more attractive both to domestic and to international users;
  - is broadly based on the Model Law (1985),<sup>1</sup> but applies equally to domestic and to international arbitration;
  - goes beyond the scope of the Model Law (1985) and contains a near-comprehensive statement of the English law of arbitration;
  - is intended to be user-friendly, has a logical structure and is written in plain English;
  - states what the objective of arbitration is, although it does not attempt a definition;
  - increases the scope of party autonomy;
  - strengthens the powers of the arbitral tribunal; and
  - limits judicial intervention in the arbitration process while preserving the courts' powers to provide assistance where this is necessary to make arbitration a fair and efficient dispute resolution procedure.

## 2. Historical background

- 2.1.1 Before the English Arbitration Act came into force, English arbitration law was scattered over the Arbitration Acts 1950, 1975 and 1979. This legislation applied to different aspects of arbitration and was complemented by, interpreted by and built on a large body of case law.
- 2.1.2 Historically, three broad criticisms were levelled at English arbitration:
- it was slow and expensive: “litigation without wigs”;
  - the law was inaccessible to laypersons and to foreign users; and
  - the courts were too ready to intervene in the arbitral process.
- 2.1.3 As a result, arbitration became increasingly unattractive as an option for dispute resolution and London lost out to other jurisdictions as a venue for international commercial arbitrations.

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<sup>1</sup> For the full text of the Model Law (1985), see CMS Guide to Arbitration, vol II, appendix 2.1.

- 2.1.4 In the 1980s, the Department of Trade and Industry established the Departmental Advisory Committee on Arbitration Law (**DAC**) under the Chairmanship of Lord Justice Mustill (as he then was). One of the key decisions for the DAC was whether to recommend the enactment of the Model Law (1985).
- 2.1.5 Whilst the DAC decided against adopting the Model Law (1985) wholesale, it did recommend that the new Arbitration Act should, so far as possible, adopt the structure and language of the Model Law (1985) and be clear and accessible. Despite these aspirations, the first draft bill in February 1994 did little more than consolidate the existing statutes of 1950, 1975 and 1979.
- 2.1.6 Under the new chairmanship of Lord Justice Saville (as he then was), the DAC produced an entirely new draft bill by December 1995. After extensive consultation, but with relatively few changes, this became the English Arbitration Act.
- 2.1.7 Many provisions of the English Arbitration Act appear familiar at first sight, but it nevertheless implemented a number of radical reforms. The DAC also published Reports on the Arbitration Bill in February 1996 and on the English Arbitration Act in January 1997. These do not form part of the English Arbitration Act, but are authoritative guides to its provisions, may be referred to in court and are frequently relied on by arbitrators.
- 2.1.8 The procedures for arbitration applications to the courts in England and Wales are now set out in Part 62 and the Practice Direction to Part 62 of the Civil Procedure Rules.<sup>2</sup> (The courts of Scotland and of Northern Ireland follow their own procedure.)

## 3. Scope of application and general provisions of the English Arbitration Act

### 3.1 Arbitrability

- 3.1.1 Most commercial disputes are capable of being arbitrated if the parties agree on that form of dispute resolution.<sup>3</sup> Generally, the courts have not considered the circumstances in which disputes cannot be arbitrated. Where this issue is brought before the courts, however, only limited public policy considerations normally apply. As the DAC noted, “matters which are not arbitrable in England lie almost

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<sup>2</sup> Civil Procedure Rules 1998 (**CPR**).

<sup>3</sup> English Arbitration Act, s 1(b).

wholly outside the commercial field". There are a few exceptions to this rule, for example, where the courts are concerned that the arbitral process may breach one of the party's statutory rights. Recently the courts have held that where an employee has statutory rights entitling them to have their case heard before an employment tribunal, it is not possible to submit the dispute to arbitration as the sole means of deciding the dispute.<sup>4</sup>

### 3.2 Scope of application

3.2.1 The English Arbitration Act applies to all arbitrations, the legal "seat" or "place" of which is in England and Wales or Northern Ireland. Scotland has its own separate legal system and arbitration law (see Arbitration in Scotland, sections 1 and 2). The English Arbitration Act applies to institutional as well as to ad hoc arbitrations.

3.2.2 Certain provisions of the English Arbitration Act apply even if the place of the arbitration is outside England, Wales and Northern Ireland, or if no place has been designated or determined<sup>5</sup> in the arbitration agreement. These include provisions concerning the:

- stay of legal proceedings;<sup>6</sup>
- enforcement of awards;<sup>7</sup>
- securing of the attendance of witnesses;<sup>8</sup> and
- court's powers in support of arbitral proceedings.<sup>9</sup>

3.2.3 The provisions of Part I of the English Arbitration Act apply to all arbitrations conducted pursuant to an arbitration agreement. Part II of the English Arbitration Act deals with consumer arbitrations<sup>10</sup> and arbitrations conducted on a statutory basis to which Part I of the English Arbitration Act does not apply. Part III deals with the recognition and enforcement of foreign awards and Part IV contains general provisions. This chapter will focus on the provisions of Part I and Part III of the English Arbitration Act.

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<sup>4</sup> *Clyde & Co LLP v Bates Van Winkelhof* [2011] EWHC 668 (QB).

<sup>5</sup> A distinction is made between "designated" and "determined" in the English Arbitration Act, s 3. "Designated" refers to the express or implied agreement of the parties as to the seat, or the power of the arbitral institution or arbitrators to determine the seat. In the absence of any such agreement, the court may itself "determine" the seat by reference to other relevant circumstances.

<sup>6</sup> English Arbitration Act, s 9–11.

<sup>7</sup> *Ibid*, s 66.

<sup>8</sup> *Ibid*, s 43.

<sup>9</sup> *Ibid*, s 44.

<sup>10</sup> An arbitration agreement is not binding on a consumer in relation to a claim for a pecuniary remedy of not more than GBP 5,000 (see Unfair Arbitration Agreements (Specified Amount) Order 1999, SI 1999/2167).

### 3.3 General principles

3.3.1 The English Arbitration Act is founded on and is to be construed in accordance with three guiding principles: fairness, party autonomy and non-intervention by the courts.<sup>11</sup>

#### *Fairness*

3.3.2 The English Arbitration Act states that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.<sup>12</sup> This is primarily a reflection of the rules of natural justice, but there is an additional emphasis on avoiding unnecessary costs and delay. The principle is also given effect in the general duties imposed on the arbitral tribunal by Section 33 and on the parties by Section 40 (discussed in paragraphs 7.3.2 and 7.3.4 below).

#### *Party autonomy*

3.3.3 The English Arbitration Act states that the parties shall be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.<sup>13</sup>

3.3.4 These “safeguards” are provided by the mandatory provisions of Part I of the English Arbitration Act, which apply regardless of any agreement by the parties to the contrary. The English Arbitration Act is structured in such a way as to complement the mandatory provisions with two types of additional provisions: first, those which apply only if the parties expressly agree (i.e. the parties have “contracted in”); and, secondly, further provisions which apply automatically unless the parties expressly agree otherwise (i.e. the parties have “contracted out”).

#### *Non-intervention by the courts*

3.3.5 The English Arbitration Act limits the scope for court intervention in the arbitral process and provides that the courts shall not intervene except as expressly provided by the English Arbitration Act.<sup>14</sup> At the same time, the English Arbitration Act reduces the scope for obstructive parties to delay arbitral proceedings by making applications to the courts through the following provisions:

- mandatory stay of court proceedings in favour of arbitration;<sup>15</sup>
- arbitral proceedings to continue and award may be made pending a decision of the court on the arbitral tribunal’s jurisdiction;<sup>16</sup>

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<sup>11</sup> English Arbitration Act, s 1.

<sup>12</sup> *Ibid*, s 1(a).

<sup>13</sup> *Ibid*, s 1(b).

<sup>14</sup> *Ibid*, s 1(c).

<sup>15</sup> *Ibid*, s 9.

<sup>16</sup> *Ibid*, s 32(4).



- the arbitral tribunal (not the court) can order security for costs;<sup>17</sup>
- extension of an arbitral tribunal's powers in case of party default;<sup>18</sup> and
- the court may exercise such powers as it has only if the arbitral tribunal has no equivalent power.<sup>19</sup>

## 4. The arbitration agreement

### 4.1 Formal requirements

4.1.1 Section 5 of the English Arbitration Act stipulates that the arbitration agreement must be made in writing. This requirement is construed broadly so that it can be satisfied not only if there is a written agreement as such, but also if the agreement is contained in an exchange of communications in writing, or if the agreement is merely evidenced in writing or is reached otherwise than in writing but by reference to terms which are in writing (e.g. general terms and conditions). The writing requirement is also satisfied if there is an exchange of submissions in arbitral or legal proceedings in which the existence of an arbitration agreement is alleged by one party and not denied by the other. The exchange of written submissions between the parties is then taken to constitute the written arbitration agreement. Finally, an agreement is considered to be in writing, even if it is recorded by any other means.<sup>20</sup>

4.1.2 Section 6(2) of the English Arbitration Act clarifies that a reference in a main agreement to a separate written arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the main agreement. The incorporation of the arbitration agreement by reference does, however, require the use of clear and unambiguous wording.<sup>21</sup>

### 4.2 Separability

4.2.1 Pursuant to Section 7 of the English Arbitration Act, the arbitration agreement is treated as separate from the main commercial agreement into which it has been incorporated and the arbitration clause therefore survives the invalidity, non-existence or ineffectiveness of the main agreement.<sup>22</sup>

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<sup>17</sup> *Ibid*, s 38(3).

<sup>18</sup> *Ibid*, s 41.

<sup>19</sup> *Ibid*, s 44(5).

<sup>20</sup> *Ibid*, s 5(4).

<sup>21</sup> *Aughton Ltd v MF Kent Services Ltd* [1991] 57 B.L.R. 1.

<sup>22</sup> The court has upheld the principle of separability in a series of cases, see *Fiona Trust & Holding Corporation and ors v Privalov and ors* [2007] UKHL 40 and *El Nasharty v J Sainsbury PLC* [2007] EWHC 2618 (Comm).

### 4.3 Mandatory and non-mandatory provisions

4.3.1 The mandatory provisions of Part I of the English Arbitration Act are listed in Schedule 1 to the English Arbitration Act. They deal with such matters as the:

- duty of the court to stay its proceedings;<sup>23</sup>
- power of the court to extend time limits;<sup>24</sup>
- power of the court to remove an arbitrator;<sup>25</sup>
- joint and several liability of parties to arbitrators for fees and expenses;<sup>26</sup>
- immunity of arbitrators;<sup>27</sup>
- objections to the arbitral tribunal's jurisdiction;<sup>28</sup>
- general duties of the arbitral tribunal;<sup>29</sup>
- general duties of the parties;<sup>30</sup>
- enforcement of an award;<sup>31</sup>
- challenges to the award;<sup>32</sup> and
- immunity of arbitral institutions.<sup>33</sup>

4.3.2 All other provisions of Part I of the English Arbitration Act are non-mandatory and the parties are free to make their own arrangements. If the parties do not make any such arrangements, the non-mandatory provisions form a set of “model rules” which will apply in the absence of any express agreement on a point by the parties. The parties are free to deviate from such “model rules” and adopt the procedural rules laid down by an arbitral institution or other body.<sup>34</sup>

4.3.3 Where parties agree to incorporate institutional rules into their arbitration agreement, such as those published by the LCIA<sup>35</sup> or the ICC International Court of

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<sup>23</sup> English Arbitration Act, s 9.

<sup>24</sup> English Arbitration Act, s 12, which applies where an arbitration agreement provides that a claim shall be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step (a) to begin arbitral proceedings or (b) to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun.

<sup>25</sup> English Arbitration Act, s 24.

<sup>26</sup> *Ibid.*, s 28.

<sup>27</sup> *Ibid.*, s 29.

<sup>28</sup> *Ibid.*, s 31.

<sup>29</sup> *Ibid.*, s 33.

<sup>30</sup> *Ibid.*, s 40.

<sup>31</sup> *Ibid.*, s 66.

<sup>32</sup> *Ibid.*, s 67–68.

<sup>33</sup> *Ibid.*, s 74.

<sup>34</sup> *Ibid.*, s 4(3).

<sup>35</sup> For the full text of the LCIA Arbitration Rules, see CMS Guide to Arbitration, vol II, appendix 3.12.

Arbitration,<sup>36</sup> the English Arbitration Act provides that this amounts to parties making their own arrangements and displaces non-mandatory provisions in circumstances where the arbitration rules are contrary to any such provisions.<sup>37</sup>

#### 4.4 Choice of law

- 4.4.1 Regarding the law applicable to the arbitral proceedings, the courts have confirmed their willingness to recognise and enforce choices of law in parties' arbitration agreements.<sup>38</sup> If the parties choose England as the seat of the arbitration, they will be taken to have agreed that the English courts shall have exclusive jurisdiction of the arbitration and the mandatory provisions of the English Arbitration Act will apply, including those relating to the parties' ability to challenge the award under Sections 67 and 68 of the English Arbitration Act.<sup>39</sup> Specifically, the courts have confirmed that if England is chosen as the seat of an arbitration, the *lex arbitri* of any court proceedings regarding the award given by an arbitral tribunal will be English law and the proper jurisdiction of such proceedings is the English courts, even if the underlying contract is governed by the laws of a different jurisdiction.<sup>40</sup>
- 4.4.2 With respect to the law applicable to the substance of the dispute, Sections 46(1) and (3) of the English Arbitration Act provide that the arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute, or, if and to the extent that there is no such choice or agreement, it shall apply the law determined by the conflict of law rules which it considers applicable. The parties' choice of law will be taken to exclude conflict of law rules and to refer to the substantive laws of that particular country only.
- 4.4.3 By the arbitration agreement (or on some other basis) the parties can also authorise the arbitral tribunal to decide the dispute on the basis of the *lex mercatoria* or *ex aequo et bono* (also referred to as amiable composition, where arbitrators dispense with the consideration of law and consider solely what would be a fair and equitable resolution to the dispute). However, these are very rarely agreed upon in practice, given the uncertainties as to the scope of the *lex mercatoria* and the principles to be applied in making a decision *ex aequo et bono*.

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<sup>36</sup> For the full text of the ICC Arbitration Rules, see CMS Guide to Arbitration, vol II, appendix 3.7.

<sup>37</sup> English Arbitration Act, s 4(3).

<sup>38</sup> *C v D* [2007] EWCA Civ 1282.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Naviera Amazonica Peruana SA v Compania Internacional de Seguros de Peru* [1988] 1 Lloyd's Rep. 116. This applies other than, of course, to enforcement proceedings.

4.4.4 Under English conflict of law rules, the applicable law of a contract (in the absence of an agreement by the parties) will in most cases be determined in accordance with the Regulation on the Law Applicable to Contractual Obligations adopted by the European Community on 17 June 2008 (**Rome I**), which came into force on 17 December 2009. In July 2007, the European Community also adopted a new Regulation on the Law Applicable to Non-Contractual Obligations (**Rome II**), which came into force on 11 January 2009. Rome II sets out new choice of law rules for non-contractual obligations, such as torts and equitable claims and it is anticipated that the English courts will determine non-contractual conflicts of laws issues in accordance with Rome II. Where the arbitration agreement is drafted widely to include disputes that arise from non-contractual obligations, then the determination of the applicable law may also include reference to Rome II.

## 5. Composition of the arbitral tribunal

### 5.1 Constitution of the arbitral tribunal

5.1.1 The parties are free to agree on the number of arbitrators and whether there is to be a chair or umpire.<sup>41</sup> However, an agreement that determines the number of arbitrators as two or any other even number shall be understood as requiring the additional appointment of a chair, unless the parties agree otherwise. If there is no agreement as to the number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator. If the parties have agreed that there is to be a chair or umpire, they are free to agree on his or her functions. Where there is no agreement as to the function of the chair or umpire, Sections 20 and 21 of the English Arbitration Act contain default provisions. Those default provisions provide, in the case of a chair, that decisions, orders and awards shall be made by all or a majority of the arbitrators (including the chair) and that the view of the chair shall prevail in relation to a decision, order or award, in respect of which there is neither unanimity nor a majority.<sup>42</sup> For an umpire, the default position is that the umpire shall attend the arbitral proceedings and be supplied with the same documents and other materials as supplied to the other arbitrators, with decisions being made by the arbitrators unless and until they cannot agree, in which case the umpire shall replace the arbitral tribunal and make decisions, orders and awards as if he or she were sole arbitrator.<sup>43</sup>

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<sup>41</sup> English Arbitration Act, s 15(1).

<sup>42</sup> *Ibid*, s 20(3) and s 20(4).

<sup>43</sup> *Ibid*, s 21(3) and s 21(4).

- 5.1.2 The procedure for the appointment of the arbitral tribunal is determined by the arbitration agreement between the parties. Where the parties have not agreed an appointment procedure, Section 16 of the English Arbitration Act makes detailed provision for the appointment of the arbitral tribunal.
- 5.1.3 In the event that each of the two parties to an arbitration agreement is to appoint an arbitrator but one party refuses or fails to do so within the time specified, the other party, having duly appointed its arbitrator, may give notice in writing to the party in default that it proposes to appoint its arbitrator to act as sole arbitrator. If the party in default does not make the required appointment and does not notify the other party that it has done so within seven days of that notice, the other party may appoint its arbitrator as sole arbitrator and the arbitrator so appointed may proceed to make an award which is binding on both parties.<sup>44</sup>
- 5.1.4 If the agreed appointment procedure fails to constitute an arbitral tribunal, the courts have specific powers to appoint, or assist with securing the constitution of, an arbitral tribunal upon application by one of the parties.<sup>45</sup>

## 5.2 Removal of arbitrator

- 5.2.1 Pursuant to Section 23 of the English Arbitration Act, the authority of an arbitrator can be revoked by the agreement of the parties in writing or by an arbitral or other institution or person vested by the parties with powers in that regard.
- 5.2.2 The court may order the removal of an arbitrator upon application by one of the parties on any of the following grounds:
- circumstances exist which may give rise to justifiable doubts as to an arbitrator's impartiality;
  - an arbitrator does not possess the agreed qualifications;
  - an arbitrator is physically or mentally incapable of conducting the arbitral proceedings or there are justifiable doubts as to his or her capacity to do so; or
  - an arbitrator fails to conduct the arbitral proceedings properly or with reasonable speed and substantial injustice has been or will be caused to the applicant.<sup>46</sup>
- 5.2.3 The arbitral tribunal may, however, continue the arbitral proceedings in the meantime and proceed to make an award while the application to the court is pending. The challenge procedure cannot, therefore, be abused to delay the arbitral proceedings for tactical reasons.

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<sup>44</sup> *Ibid.*, s 17.

<sup>45</sup> *Ibid.*, s 18.

<sup>46</sup> *Ibid.*, s 24.

### **5.3 Appointment of substitute arbitrators**

5.3.1 Where an arbitrator ceases to hold office (whether it is due to resignation, removal or death) and the parties have not agreed whether, and if so, how the vacancy is to be filled, Section 27 of the English Arbitration Act provides that Section 16 or Section 18 procedures (discussed at paragraphs 5.1.1–5.1.4 above) apply to the filling of the vacancy as in relation to the original appointment.

### **5.4 Arbitrators' fees, expenses and immunity**

5.4.1 Section 28 of the English Arbitration Act makes express provision for the parties' liability to the arbitrators for fees and expenses. Section 29 provides that arbitrators enjoy immunity from claims unless they act in bad faith.

## **6. Jurisdiction of the arbitral tribunal**

### **6.1 Competence to rule on jurisdiction**

6.1.1 Section 30 of the English Arbitration Act gives the arbitral tribunal the power to rule on its own jurisdiction. It is up to the arbitral tribunal to decide which, if any, of the disputes referred to arbitration are within the scope of the arbitration agreement.

6.1.2 However, if agreed in writing by the parties or in certain circumstances with the permission of the arbitral tribunal, the courts may determine preliminary points of jurisdiction upon application by one of the parties.<sup>47</sup> The arbitral tribunal's decision on jurisdiction may also be subject to a full rehearing by the courts.<sup>48</sup>

6.1.3 Section 31 of the English Arbitration Act requires that any objection to the substantive jurisdiction of the arbitral tribunal that a party may have, must be raised at the earliest possible stage in the proceedings, i.e. before that party takes any steps in the proceedings to contest the merits of any matter in relation to which the arbitral tribunal may have jurisdiction.

6.1.4 The right to object to the arbitral tribunal's lack of substantive jurisdiction (and to other irregularities affecting the arbitral tribunal or proceedings) may be lost if the objection is not made at the earliest opportunity.<sup>49</sup>

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<sup>47</sup> *Ibid*, s 32.

<sup>48</sup> English Arbitration Act, s 67 and see below at paragraph 10.2.2.

<sup>49</sup> English Arbitration Act, s 73.

## 6.2 Power to order interim measures

- 6.2.1 Under Section 38(1) of the English Arbitration Act, the parties are free to agree on the powers exercisable by the arbitral tribunal. It is therefore possible for the parties to confer on the arbitral tribunal the power to order interim measures, either by incorporating the institutional rules of a major arbitral institution such as the ICC into their arbitration agreement or by express provision in the arbitration agreement.
- 6.2.2 In the absence of any agreement by the parties on the issue of interim measures, Section 38(4) of the English Arbitration Act empowers the arbitral tribunal to give directions relating to property which is the subject of the arbitral proceedings and which is owned by or is in the possession of a party to the dispute. Additionally, the arbitral tribunal may “give directions to a party for the preservation for the purposes of the proceedings of any evidence in his or her custody or control”.<sup>50</sup>
- 6.2.3 Unless otherwise agreed by the parties, the English Arbitration Act does not confer upon arbitrators the power to secure the sum in dispute by an order taking effect as an injunction, although it is possible to seek a freezing injunction from the High Court.<sup>51</sup>

## 7. Conduct of proceedings

### 7.1 Common law tradition

- 7.1.1 England and Wales is a common law jurisdiction. The legal process has traditionally emphasised the importance of procedural issues and a number of English procedural concepts. Those concepts are not part of the continental European civil law tradition, although they are familiar in other common law jurisdictions such as the United States, Canada, Australia and most Commonwealth member states. These procedural elements include the disclosure and inspection of documents, the exchange of witness statements, cross-examination of witnesses and use of party-appointed expert witnesses.
- 7.1.2 There was intended to be a significant shift in approach under the CPR (which govern the conduct of cases in the English courts) towards more proactive case management by the courts. However, English legal proceedings in essence remain adversarial in approach (i.e. party-driven with the judge adopting the position of arbiter between the opposing parties) rather than inquisitorial (i.e. more reliant on

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<sup>50</sup> *Ibid.*, s 38(6).

<sup>51</sup> English Arbitration Act, s 44(2)(e) and see below at section 9.5.

the judge taking charge of progressing a case). One of the advantages of arbitration over litigation as a means of settling international commercial disputes is that, because of its flexibility, arbitration can transcend the confines of national legal systems and the parties can tailor a procedure to suit their particular needs. English arbitral proceedings under the English Arbitration Act are not tied to English court procedure. The English Arbitration Act enables arbitrators to use wide-ranging powers (which are much more akin to the case management techniques employed under the continental European procedural system) to ensure that the arbitration progresses efficiently, proportionately and in the interests of the parties.

## **7.2 Commencing an arbitration**

7.2.1 Unless otherwise agreed by the parties, Section 14(4) of the English Arbitration Act provides that arbitral proceedings are commenced when one party serves on the other a written notice requiring it to appoint an arbitrator or to agree to the appointment of an arbitrator. The court will interpret this broadly and flexibly and an implied request to appoint an arbitrator has been found to be sufficient for the commencement of an arbitration.<sup>52</sup> However, in order to avoid any uncertainty in this respect, the written notice of arbitration should expressly call upon the other party to appoint an arbitrator.

7.2.2 Section 14 does not deal with the matters in dispute that a party wishes to refer to arbitration. A written notice should clearly specify such matters but be drafted widely enough to ensure all potential matters in dispute are referred to arbitration.

## **7.3 General procedural principles**

7.3.1 The English Arbitration Act expressly defines and imposes duties on the parties and the arbitrators.

### *General duties of the arbitral tribunal*

7.3.2 Section 33(1) is one of the key provisions in the English Arbitration Act and provides that the arbitral tribunal shall act fairly and impartially, shall give each party the right to be heard and shall adopt procedures that are suitable for a particular case to avoid unnecessary delay or expense.

7.3.3 The express duty to avoid unnecessary delay and expense was first introduced by the English Arbitration Act and is an important provision. It is intended to encourage arbitrators to impose strict timetables to ensure that the arbitral proceedings are progressed with all due expedition.

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<sup>52</sup> *Charles M Willie Co (Shipping) Ltd. v Ocean Laser Shipping Ltd, The Smaro* [1999] 1 Lloyd's Rep 225.



*General duties of the parties*

- 7.3.4 Under Section 40 of the English Arbitration Act, the parties have a general duty to do everything necessary for the proper and expeditious conduct of the arbitral proceedings and, corresponding to the duties imposed on the arbitral tribunal by Section 33, a duty to comply with the arbitral tribunal's directions without delay.

*Procedural powers of the arbitral tribunal*

- 7.3.5 Procedural and evidential matters are decided by the arbitral tribunal unless the parties agree otherwise.<sup>53</sup> Section 34(2) of the English Arbitration Act sets out a non-exhaustive list of the procedural issues to be determined by the arbitral tribunal. Those powers give arbitrators the ability to impose expedited procedures in suitable cases and to dispense with, for example:
- written submissions;<sup>54</sup>
  - disclosure;<sup>55</sup>
  - interrogatories (i.e. questions put to and answered by the parties prior to trial);<sup>56</sup>
  - oral evidence;<sup>57</sup> and
  - oral hearings.<sup>58</sup>
- 7.3.6 The arbitral tribunal may refer to Section 34 as a guideline and may dispense with procedures which are not appropriate in the circumstances of a particular case. Nevertheless, arbitrators have to exercise these powers with care so as not to deprive a party of a reasonable opportunity to put its own case or to respond to its opponent's case.<sup>59</sup> If the arbitral tribunal acts contrary to this obligation, the aggrieved party may be able to challenge any subsequent award in the courts on the grounds of "serious irregularity" under Section 68 of the English Arbitration Act.<sup>60</sup> However, the courts have generally approached this issue in favour of arbitrators actively managing their arbitrations.<sup>61</sup>

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<sup>53</sup> English Arbitration Act, s 34(1).

<sup>54</sup> *Ibid*, s 34(2)(c).

<sup>55</sup> *Ibid*, s 34(2)(d).

<sup>56</sup> *Ibid*, s 34(2)(e).

<sup>57</sup> *Ibid*, s 34(2)(f).

<sup>58</sup> *Ibid*, s 34(2)(h).

<sup>59</sup> One of the arbitral tribunal's general duties under s 33(1)(a) of the English Arbitration Act.

<sup>60</sup> See below at section 10.2.

<sup>61</sup> *Margulead Ltd v Exide Technologies* [2004] EWHC 1019 (Comm).

- 7.3.7 The English Arbitration Act provides the arbitral tribunal with further express powers, including the power to:
- appoint its own expert(s);<sup>62</sup>
  - order the claimant to provide security for costs;<sup>63</sup>
  - direct that a party or witness shall be examined on oath and, for that purpose, to administer the necessary oath;<sup>64</sup>
  - order interim payments to be made or to make other provisional awards where the parties have agreed that the arbitral tribunal should have such powers;<sup>65</sup>
  - make an award dismissing a claim for want of prosecution where there has been an inordinate and inexcusable delay on the part of the claimant in pursuing the claim and where the delay prejudices the respondent;<sup>66</sup>
  - continue the proceedings in the absence of a party who fails to attend a hearing of which proper notice was given without showing sufficient cause;<sup>67</sup>
  - make a peremptory order where a party fails to comply with an order or direction of the arbitral tribunal, which order may be enforceable by the court pursuant to Section 42 of the English Arbitration Act;<sup>68</sup>
  - make awards on different issues at different times;<sup>69</sup>
  - award compound interest;<sup>70</sup> and
  - direct that the recoverable costs of the arbitration be limited to a specified amount.<sup>71</sup>

7.3.8 Unless the parties specifically agree, the arbitral tribunal has no power to consolidate different arbitral proceedings or to order concurrent hearings.<sup>72</sup>

## 7.4 Seat, place of hearings and language of arbitration

7.4.1 Pursuant to Section 3 of the English Arbitration Act, the term “seat” of the arbitration means only its “juridical” seat. The fact that the parties have agreed that the seat of the arbitration shall be, for example, London, does not prevent

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<sup>62</sup> English Arbitration Act, s 37.

<sup>63</sup> *Ibid*, s 38(3).

<sup>64</sup> *Ibid*, s 38(5).

<sup>65</sup> *Ibid*, s 39.

<sup>66</sup> *Ibid*, s 41(3).

<sup>67</sup> *Ibid*, s 41(4).

<sup>68</sup> *Ibid*, s 41(5).

<sup>69</sup> *Ibid*, s 47.

<sup>70</sup> *Ibid*, s 49.

<sup>71</sup> *Ibid*, s 65.

<sup>72</sup> *Ibid*, s 35(2).

the parties or the arbitrators from deciding to hold any part of the arbitral proceedings elsewhere if this is more convenient.<sup>73</sup>

- 7.4.2 The language or languages to be used in the arbitral proceedings and the question of whether translations of documents are to be supplied is equally a matter for the parties to decide or, in the absence of any agreement by the parties, for the arbitral tribunal to determine.<sup>74</sup>

## 7.5 Submissions

- 7.5.1 The format and timetable for submissions will be determined by the arbitral tribunal unless agreed by the parties.<sup>75</sup> In English arbitral proceedings, the parties' submissions frequently take the form of formal statements of case, similar but not identical to those used in court proceedings and limited to identifying the issues between the parties. They may, however, take the form of more complete submissions which also deal with the relevant facts, evidence and law, similar to continental European court submissions.

## 7.6 Oral hearings and written proceedings

- 7.6.1 Before the English Arbitration Act came into force, either party could effectively require that an oral hearing be held. Under the English Arbitration Act it is now for the arbitral tribunal to decide whether there should be an oral hearing including submissions and evidence, subject to the parties' right to agree otherwise.<sup>76</sup> In suitable cases the arbitral tribunal can, therefore, make an award on the basis of written proceedings alone. However, in practice it would be rare for the arbitral tribunal to proceed on this basis unless agreed by the parties.

## 7.7 Taking of Evidence

- 7.7.1 Evidential matters will be determined by the arbitral tribunal, subject to any agreement between the parties.<sup>77</sup> These matters might include whether disclosure and inspection of documents should take place between the parties and, if so, whether the scope of disclosure should in any way be restricted to certain documents or classes of documents;<sup>78</sup> whether there should be an exchange of witness statements or expert reports; and whether strict rules of evidence should be followed as to admissibility, or the relevance of, or weight to be given to, the

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<sup>73</sup> *Ibid.*, s 34(2)(a).

<sup>74</sup> *Ibid.*, s 34(2)(b).

<sup>75</sup> *Ibid.*, s 34(2)(c).

<sup>76</sup> *Ibid.*, s 34(2)(h).

<sup>77</sup> *Ibid.*, s 34(1).

<sup>78</sup> *Ibid.*, s 34(2)(d).

evidence adduced by the parties.<sup>79</sup> The English Arbitration Act expressly authorises the arbitral tribunal to appoint experts and advisers but the parties must be given an opportunity to comment on the opinion, information or advice provided by any arbitral tribunal-appointed expert.<sup>80</sup>

## 8. Making of the award and termination of proceedings

### 8.1 Remedies

8.1.1 Subject to any agreement by the parties as to the powers which the arbitral tribunal may exercise, Section 48 of the English Arbitration Act provides that the arbitral tribunal may:

- make a declaration as to any matter to be determined in the arbitral proceedings;<sup>81</sup> or
- order the payment of a sum of money in any currency.<sup>82</sup>

8.1.2 Furthermore, the arbitral tribunal has the same powers as the courts to:

- grant a permanent injunction;<sup>83</sup>
- order specific performance of a contract;<sup>84</sup> or
- order the rectification, cancellation or setting aside of a deed or other document.<sup>85</sup>

8.1.3 The arbitral tribunal's powers to grant interim measures are discussed in section 6.2 above.

### 8.2 Interest

8.2.1 In the absence of any agreement between the parties, the arbitral tribunal has a discretionary power to award simple or compound interest, from such dates and at such rates as it considers just, on the whole or part of:

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<sup>79</sup> *Ibid*, s 34(2)(f).

<sup>80</sup> *Ibid*, s 37.

<sup>81</sup> *Ibid*, s 48(3).

<sup>82</sup> *Ibid*, s 48(4).

<sup>83</sup> English Arbitration Act, s 48(5)(a). Note that Section 48(5)(a) does not confer a power to grant an interim injunction in the form of an award, since an award must finally dispose of the issues with which it deals. The parties may, however, have agreed pursuant to Section 39 that the arbitral tribunal should have the power to make provisional awards, in which case the arbitral tribunal may issue an interim injunction in the form of a provisional award under that section.

<sup>84</sup> English Arbitration Act, s 48(5)(b).

<sup>85</sup> *Ibid*, s 48(5)(c).

- the amount awarded, in respect of any period up to the date of the award;<sup>86</sup>
- any amount claimed in the arbitration and outstanding at the date of commencement of the arbitration but paid before the award was made, in respect of any period up to the date of payment;<sup>87</sup> and/or
- the outstanding amount of any award from the date of the award until payment.<sup>88</sup>

8.2.2 The fact that the arbitral tribunal has a discretionary power to award interest does not affect the parties' rights to claim contractual interest.

### 8.3 Decision-making by the arbitral tribunal

8.3.1 Where the parties have agreed that there is to be a chair, they are free to agree the functions of the chair in relation to the making of decisions, orders and awards.<sup>89</sup> If, or to the extent that there is no such agreement, decisions, orders and awards shall be made by all or a majority of the arbitrators (including the chair)<sup>90</sup> and the view of the chair shall prevail where there is neither unanimity nor a majority.<sup>91</sup>

8.3.2 If the parties have agreed that there is to be an umpire, they are free to agree what the functions of the umpire are to be and, in particular, whether he or she is to attend the arbitral proceedings and when the umpire is to replace the other arbitrators as the arbitral tribunal with power to make decisions, orders and awards.<sup>92</sup>

8.3.3 Where the parties agree that there shall be two or more arbitrators with no chair or umpire, the default position (unless agreed between the parties) is that decisions, orders and awards shall be made by all or a majority of the arbitrators.<sup>93</sup>

### 8.4 Form, content and effect of the award

8.4.1 Pursuant to Section 58 of the English Arbitration Act, an award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the

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<sup>86</sup> *Ibid*, s 49(3)(a).

<sup>87</sup> *Ibid*, s 49(3)(b).

<sup>88</sup> *Ibid*, s 49(4).

<sup>89</sup> *Ibid*, s 20(1).

<sup>90</sup> *Ibid*, s 20(3).

<sup>91</sup> *Ibid*, s 20(4).

<sup>92</sup> *Ibid*, s 21(1).

<sup>93</sup> English Arbitration Act, s 22(2). For an explanation of the position where the parties have agreed on an even number of arbitrators, see paragraph 5.1.1. above.

parties to the arbitration, subject to the limited rights the English Arbitration Act provides for challenge or appeal to the courts.<sup>94</sup>

- 8.4.2 Section 52 of the English Arbitration Act provides that, unless otherwise agreed by the parties, an award shall:
- be in writing;
  - be signed by all the arbitrators or a majority of those arbitrators assenting to the award;
  - contain reasons (unless it is an agreed award or the parties have agreed to dispense with reasons); and
  - state the place of the arbitration and the date on which the award was made.
- 8.4.3 Once an award has been made, parties shall be notified without delay,<sup>95</sup> but the arbitral tribunal has power to withhold the award until the arbitrators' fees and expenses are paid in full.<sup>96</sup>

## 8.5 Settlement

- 8.5.1 If the parties settle their dispute during the course of the arbitration, the arbitral tribunal shall terminate the substantive proceedings and shall record the settlement in the form of an agreed award if requested to do so by the parties.<sup>97</sup>

## 8.6 Costs

- 8.6.1 Unlike the Model Law (1985), Sections 59–65 of the English Arbitration Act make express provision for the allocation of the costs of the arbitration as between the parties. The English Arbitration Act also provides that, unless the parties agree otherwise, the arbitral tribunal may make an award of costs. The costs of the arbitration include the:
- fees and expenses of the arbitrators;
  - fees and expenses of any arbitral institution concerned; and
  - legal or other costs of the parties.
- 8.6.2 Generally, an award of costs will “follow the event”,<sup>98</sup> but the arbitral tribunal has discretion to take other relevant factors into account when making its award on costs. Only reasonably incurred costs of the arbitration and fees and expenses of

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<sup>94</sup> English Arbitration Act, s 67–69. See also sections 10.2 and 10.3 below.

<sup>95</sup> English Arbitration Act, s 55(2).

<sup>96</sup> *Ibid*, s 56.

<sup>97</sup> *Ibid*, s 51(2).

<sup>98</sup> This means that the losing party pays the reasonable costs of the arbitration. If a claimant is successful only in part, the costs of the arbitration may be allocated between the parties on a pro rata basis.

arbitrators are recoverable. Pursuant to Section 60 of the English Arbitration Act, an agreement between the parties that a party is to pay the whole or part of the costs of the arbitration is only valid if it has been made after the dispute has arisen. Section 60 is a mandatory provision, the purpose of which is to prevent a party who wishes to pursue its claim finding that it is unable to do so because, whatever the result, it has agreed to bear some or all of its own costs. Section 60 does, however, permit such an agreement to be made where the decision to go to arbitration is taken after the dispute has arisen, as it is assumed that in such a case the costs agreement can be at arm's length.<sup>99</sup>

## 8.7 Correction and interpretation of the award

8.7.1 The English Arbitration Act makes provision in Section 57 for the arbitral tribunal to correct obvious errors, mistakes, omissions or ambiguities in the award, or to make an additional award in respect of claims which were presented to the arbitral tribunal but not dealt with in the award. These powers may be exercised by the arbitral tribunal either on its own initiative, or upon the application of a party, and after hearing representations from the other party.

# 9. Role of the courts

## 9.1 Jurisdiction of the courts

9.1.1 The extent to which the courts may interfere in the arbitration process is one of the most important issues for parties to international arbitral proceedings. The English Arbitration Act follows the scheme of the Model Law (1985) in this regard: the courts have no jurisdiction in matters relating to arbitration unless expressly provided by the English Arbitration Act. A distinction can be drawn between the role of the courts:

- before and during the arbitral proceedings; and
- after the award has been made.

9.1.2 The powers of the court in relation to arbitral proceedings are limited to those expressly conferred by the English Arbitration Act. Those powers include:

- the enforcement of peremptory orders made by the arbitral tribunal;<sup>100</sup>
- making preservation orders in relation to evidence and assets;<sup>101</sup> and
- the determination of preliminary points of law.<sup>102</sup>

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<sup>99</sup> *Virdee v Viridi* [2003] EWCA (Civ) 41.

<sup>100</sup> English Arbitration Act, s 42.

<sup>101</sup> *Ibid*, s 44.

<sup>102</sup> *Ibid*, s 45.

## 9.2 Stay of court proceedings

- 9.2.1 Section 9 of the English Arbitration Act provides that, upon application by a party to an arbitration agreement against whom court proceedings are brought in regard to the same matter, the court must grant a stay of the court proceedings unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. The court has established two threshold requirements for granting a stay of court proceedings under Section 9:
- there must be a concluded arbitration agreement; and
  - the issue in the court proceedings must be a matter that, under the arbitration agreement, is to be referred to arbitration.<sup>103</sup>
- 9.2.2 The court also has an inherent jurisdiction to order a stay of its proceedings in exceptional circumstances (i.e. where the court deems proceedings to be vexatious or oppressive).<sup>104</sup> The absence of jurisdiction under Section 9 of the English Arbitration Act to order a stay does not preclude the court's exercise of this inherent jurisdiction.
- 9.2.3 Although Section 9 of the English Arbitration Act is silent on the point, the court decision granting or refusing a stay of court proceedings can be appealed, provided permission to appeal is granted either by the High Court judge hearing the application for a stay or by the Court of Appeal.<sup>105</sup>
- 9.2.4 A significant number of cases on the stay of court proceedings under Section 9 have reached the courts since the English Arbitration Act came into force. The case law confirms that the courts' general approach is to enforce arbitration agreements strictly, even in circumstances where the agreement containing the arbitration clause might have been procured by bribery.<sup>106</sup> This is still the case under the new Bribery Act 2010.

## 9.3 Extension of time for commencement of arbitral proceedings

- 9.3.1 An arbitration agreement may provide that a claim shall be time barred, or that the claimant's right shall be extinguished, unless the claimant begins, within the time fixed by the agreement, either arbitral proceedings or another dispute resolution procedure which must be exhausted before arbitral proceedings may be commenced. In such cases the court may extend the time for taking these steps pursuant to Section 12 of the English Arbitration Act.

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<sup>103</sup> *Albon v Naza Motor Trading SDN BHD* [2007] EWHC 665 (Ch).

<sup>104</sup> Senior Courts Act 1981, s 49(3). See also *Reichhold Norway ASA v Goldman Sachs International* [1999] 2 Lloyd's Rep 567.

<sup>105</sup> *Inco Europe Ltd v First Choice Distribution* [2000] 1 Lloyd's Rep 467.

<sup>106</sup> *Fiona Trust and Holding Corporation & Ors v Privalov & Ors* [2007] EWCA Civ 20.



## 9.4 Preliminary rulings on points of jurisdiction and law

- 9.4.1 Under Section 32 of the English Arbitration Act, the courts have the power to determine preliminary points on the substantive jurisdiction of the arbitral tribunal upon the application of a party. Pursuant to Section 45 of the English Arbitration Act and unless the parties agree otherwise, the courts may also, on the application of a party to arbitral proceedings, determine any preliminary points of law arising in the course of the proceedings if satisfied that it substantially affects the rights of one or more of the parties.<sup>107</sup> The court will only consider such applications if they are made either with the agreement of all other parties or with the permission of the arbitral tribunal, and if the court is satisfied that the determination of the question is likely to produce substantial cost savings and that the application was made without delay. In the case of applications under Section 32, there must also be a good reason why the matter should be decided by the court.
- 9.4.2 While Section 32 of the English Arbitration Act is a mandatory provision, the parties are free to exclude the courts' jurisdiction under Section 45 of the English Arbitration Act by agreement. An agreement by the parties to dispense with the requirement that the arbitral tribunal give reasons in support of its award will be considered as an agreement also to exclude the courts' jurisdiction under Section 45.<sup>108</sup>

## 9.5 Interim protective measures

- 9.5.1 Unless otherwise agreed by the parties, the courts have the power under Section 44(2) of the English Arbitration Act to order certain defined interim measures in support of arbitral proceedings, including orders preserving evidence and interim injunctions. If the case is one of urgency, Section 44(3) of the English Arbitration Act also empowers the English court, on the application of a party or proposed party to the arbitral proceedings, to make such orders as it thinks necessary for the purpose of preserving evidence or assets. Section 44 of the English Arbitration Act is, however, a non-mandatory provision and the parties may agree that the courts shall have wider powers than those set out in Section 44. If the parties wish to agree that interim relief is to be granted free from the restrictions of Section 44, then a very clear contractual provision needs to be made to that effect.<sup>109</sup>

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<sup>107</sup> The court has, for example, been asked to consider as a preliminary legal issue the construction of documents; see *Beeegas Nominees v Decco Ltd* [2003] EWHC 1891 (Ch).

<sup>108</sup> English Arbitration Act, s 45(1).

<sup>109</sup> *SAB Miller Africa v East African Breweries Ltd* [2009] EWCA Civ 1564.

9.5.2 The interim measures which the court may order include freezing orders,<sup>110</sup> search orders<sup>111</sup> and anti-suit injunctions. Anti-suit injunctions restrain a person over whom the arbitral tribunal has jurisdiction from continuing with or commencing proceedings in a foreign court that are vexatious or oppressive or that are in breach of the arbitration agreement. Following a referral of a case by the House of Lords (as it then was), the ECJ considered whether it is consistent with Brussels I Regulation for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement. The ECJ determined that anti-suit injunctions are inconsistent with the Brussels I Regulation, thereby curtailing the courts' ability to grant anti-suit injunctions to prevent parties from continuing with or commencing proceedings before the courts of EU Member States.<sup>112</sup>

9.5.3 It is important to note that the courts only have the power to grant interim measures if, or to the extent that, the arbitral tribunal has no power or is unable at that time to act effectively. In practice, the court is most commonly called upon to exercise this power to order interim measures in circumstances where the arbitral tribunal has not yet been constituted. Section 44 of the English Arbitration Act applies to all arbitral proceedings regardless of whether the place of the arbitration is in England and Wales. The courts may, therefore, in appropriate circumstances grant interim measures in aid of foreign arbitral proceedings which would not otherwise fall within the scope of the English Arbitration Act if there is a good reason for the court to exercise its discretion and intervene.<sup>113</sup>

## 9.6 Obtaining evidence and other court assistance

9.6.1 An arbitral tribunal has no power to compel witnesses to attend before it to give evidence. Section 43 of the English Arbitration Act therefore provides that a party

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<sup>110</sup> Freezing orders are interlocutory injunctions granted by the court (normally *ex parte* and on the basis of affidavit evidence) restricting the respondent's right to dispose of or deal with its assets, requiring the respondent to disclose the nature, value and location of such assets and to provide other information to the applicant. Freezing orders can not only be made in relation to assets located in England and Wales but, in appropriate circumstances, also on a worldwide basis.

<sup>111</sup> Search orders are also interlocutory injunctions granted by the court (normally *ex parte* and on the basis of affidavit evidence) entitling the applicant to 'raid' and search the respondent's premises for certain evidence in relation to the subject matter of court proceedings. Search orders are of particular importance in cases of infringement of intellectual property rights but have a wider scope of application. Both freezing and search orders have been described as 'nuclear weapons of the law' and will only be granted in exceptional circumstances and upon various cross-undertakings by the applicant, including a cross-undertaking in damages. Service of an arbitration claim form seeking relief under Section 44 of the English Arbitration Act can be effected outside the jurisdiction and in relation to evidence outside of England and Wales, i.e. a party to an arbitration agreement which is subject to the English Arbitration Act may apply to an English court for an order assisting it with obtaining evidence which is located outside of England and Wales.

<sup>112</sup> *Allianz SpA v West Tankers Inc.* (Case C-185/07).

<sup>113</sup> See, for example, *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm) (the court set aside a freezing injunction in relation to foreign proceedings, as, *inter alia*, the applicant failed to demonstrate a sufficient connection to the English jurisdiction).

to arbitral proceedings can use the usual court procedures to secure the attendance of witnesses. Under English civil court procedure this means that the party may serve a witness summons on the witness to secure attendance before the arbitral tribunal, either for the purpose of giving oral evidence or for the purpose of producing documents or other evidence. Applications for the preservation of evidence or the taking of witness evidence may be made to the court under Section 44 of the English Arbitration Act.

## 10. Challenging and appealing the award through the courts

### 10.1 Loss of right to object to award

- 10.1.1 The right of a party to object to an award on any of the following grounds may be lost if the aggrieved party had not raised such objections at the earliest possible opportunity in the arbitral proceedings, namely that:
- the arbitral tribunal lacked substantive jurisdiction;
  - the arbitral proceedings were improperly conducted;
  - there was a failure to comply with the terms of the arbitration agreement; or
  - there was any other irregularity affecting the arbitral tribunal or the arbitral proceedings.<sup>114</sup>

### 10.2 Challenging the award

- 10.2.1 An award once made can only be challenged pursuant to:
- Section 67 of the English Arbitration Act, on the ground that the arbitral tribunal lacked substantive jurisdiction; or
  - Section 68 of the English Arbitration Act, on the ground that there was a serious irregularity affecting the arbitral tribunal, the proceedings or the award.
- 10.2.2 On applications challenging the award on the grounds that the arbitral tribunal lacked jurisdiction under Section 67 of the English Arbitration Act, the court may either confirm the award, vary the award or set the award aside in whole or in part. Section 68(2) of the English Arbitration Act sets out an exhaustive list of the circumstances which constitute a serious irregularity if they cause substantial injustice to the applicant, namely:
- breach of Section 33 of the English Arbitration Act (general duties of the arbitral tribunal);

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<sup>114</sup> English Arbitration Act, s 73.

- the arbitral tribunal exceeding its powers;
- failure to conduct the arbitral proceedings in accordance with the arbitration agreement;
- failure by the arbitrators to resolve all matters in dispute referred to them;
- uncertainty or ambiguity of the award;
- the award being obtained by fraud or in a manner contrary to public policy;
- failure to comply with formal requirements relating to the award; or
- admitted irregularity in the arbitral proceedings or the award.

10.2.3 In recent years, there have been a number of challenges to awards on the grounds of bias, on the basis that it involves a breach of Section 33 of the English Arbitration Act (which requires the arbitral tribunal to, *inter alia*, act fairly and impartially between the parties).<sup>115</sup> The court has held that actual or apparent bias of an arbitrator is a substantial injustice and can amount to a serious irregularity for the purposes of Section 68 of the English Arbitration Act.<sup>116</sup>

10.2.4 If an award is successfully challenged on grounds of serious irregularity under Section 68 of the English Arbitration Act, the court may either remit the award (in whole or in part) to the arbitral tribunal for reconsideration, set the award aside or declare it to be of no effect.

### 10.3 Appeal on point of law

10.3.1 Awards can be appealed on points of law only. An award may only be appealed after permission has been granted by the court or by the agreement of the parties. The grounds on which such permission to appeal will be granted derive from the pre-English Arbitration Act common law guidelines. Leave to appeal shall be given only if the court is satisfied that:

- the determination of the question will substantially affect the rights of one or more of the parties;
- the question is one which the arbitral tribunal was asked to determine;
- on the basis of the findings of fact in the award, the decision of the arbitral tribunal on the question is obviously wrong;
- on the basis of the findings of fact in the award, the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and
- despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.<sup>117</sup>

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<sup>115</sup> See above at paragraph 7.3.2.

<sup>116</sup> *ASM Shipping Ltd v TTMI Ltd* [2006] EWCA Civ 1341.

<sup>117</sup> English Arbitration Act, s 69(3).

- 10.3.2 On an appeal under Section 69 of the English Arbitration Act, the court may either confirm the award, vary the award, remit the award to the arbitral tribunal for reconsideration in whole or in part or set the award aside in whole or in part. The court will generally remit the matters in question to the arbitral tribunal for reconsideration unless it is satisfied that this would be inappropriate under the circumstances.
- 10.3.3 Unlike challenges under Sections 67 and 68 of the English Arbitration Act, the parties' right to appeal on points of law can be excluded by agreement between the parties, either in the arbitration agreement or at a later stage. Where the parties choose to arbitrate under the ICC Rules or the LCIA Rules, the parties' right to appeal under Section 69 of the English Arbitration Act is waived automatically.<sup>118</sup> Where the parties opt for ad hoc arbitration or institutional rules which do not contain waiver language akin to the ICC Rules and LCIA, the parties can exclude the application of Section 69 by stating so expressly in the arbitration agreement. Pursuant to Section 69(1) of the English Arbitration Act, the parties' agreement to dispense with the requirement that the arbitral tribunal give reasons for its award will be considered an agreement to exclude the right of appeal.<sup>119</sup> Sections 70–73 of the English Arbitration Act contain supplementary provisions and restrictions in relation to the challenge or appeal of awards.

## 11. Recognition and enforcement of awards

### 11.1 Domestic awards

- 11.1.1 Section 66 of the English Arbitration Act provides that domestic awards may be enforced with the permission of the court as if they were court judgments. Permission shall only be refused if the person against whom the award is to be enforced shows that the arbitral tribunal lacked substantive jurisdiction to make the award. It has recently been confirmed that this right of enforcement under Section 66 also applies to declaratory awards, where the victorious party's objective in obtaining an order for enforcement is to establish the primacy of a declaratory award over an inconsistent judgment.<sup>120</sup>

### 11.2 Foreign awards

- 11.2.1 The procedure for recognition and enforcement of foreign awards is covered in Part III of the English Arbitration Act.

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<sup>118</sup> See Article 28.6 of the ICC Rules and Article 26.9 of the LCIA Rules.

<sup>119</sup> See paragraph 9.4.2 above on the effect of such an agreement on the courts' jurisdiction under Section 45 of the English Arbitration Act.

<sup>120</sup> *West Tankers Inc v Allianz SpA and Generali Assicurazione Generali SpA* [2011] EWHC 829 (Comm).

- 11.2.2 Pursuant to Section 99 of the English Arbitration Act, the Arbitration Act 1950 continues to apply to the recognition and enforcement of awards under the 1927 Geneva Convention, which continues to apply in relation to certain awards which cannot be enforced under the New York Convention.
- 11.2.3 Most foreign awards are today enforced under the New York Convention.<sup>121</sup> This requires the award to be a “New York Convention Award”, i.e. an award made pursuant to a written arbitration agreement in a state which is a signatory to the New York Convention.
- 11.2.4 The recognition and enforcement of New York Convention awards are governed by Sections 100–104 of the English Arbitration Act and may only be refused if the party against whom it is to be enforced proves one or more of the following:<sup>122</sup>
- incapacity of a party to the arbitration agreement;
  - invalidity of the arbitration agreement;
  - lack of due notice or opportunity to present its case;
  - lack of substantive jurisdiction of the arbitral tribunal;
  - irregularity in the composition of the arbitral tribunal or conduct of the arbitral proceedings;
  - award not binding on parties, set aside or suspended;
  - the subject matter of the arbitration is not capable of settlement by arbitration;
  - or
  - recognition and enforcement of the award would be contrary to public policy.<sup>123</sup>
- 11.2.5 It is rare for the English Courts to refuse to enforce a foreign award under the New York Convention. However, the Supreme Court has recently ruled that an award given against an entity which the Supreme Court found was not a party to an agreement under which the arbitration was brought (but which the arbitral tribunal concluded was bound by the arbitration agreement) is not enforceable under English law.<sup>124</sup> The Supreme Court also determined that it was entitled to revisit the arbitral tribunal’s decision on jurisdiction for the purposes of considering enforcement under the New York Convention.

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<sup>121</sup> For the full text of the New York Convention, see CMS Guide to Arbitration, vol II, appendix 1.1.

<sup>122</sup> English Arbitration Act, s 104.

<sup>123</sup> For example, in cases where the underlying contract involved illegality. See *Soleimany v Soleimany* [1999] QB 785.

<sup>124</sup> *Dallah Real Estate & Tourism Holding Co v Pakistan* [2010] UKSC 46.

## 12. Court proceedings

12.1.1 Arbitration applications are generally dealt with by the Commercial Court or, in relation to cases where the subject matter relates to technology or construction, the Technology and Construction Court (**TCC**), both forming part of the Queen's Bench Division of the High Court of Justice. They are governed by Part 62 and the Practice Direction to Part 62 of the CPR. Appeals in arbitration matters from decisions of the Commercial Court or TCC are heard by the Court of Appeal, but permission to appeal will first be required from the first instance court i.e. either the Commercial Court or TCC. Appeals from the Court of Appeal will be made to the Supreme Court.<sup>125</sup>

## 13. Questions not addressed by the English Arbitration Act

13.1.1 A number of questions have not been addressed by the English Arbitration Act and have instead been left open to developments in the jurisprudence. These include, in particular, the following issues.

13.1.2 Multi-party disputes and consolidation of separate arbitral proceedings give rise to a number of potentially complex issues and require careful consideration on a case-by-case basis at the contract drafting stage. Parties should ensure that adequate provision is made in relation to the appointment procedure for the arbitral tribunal, the arbitral tribunal's jurisdiction and procedural matters. Some institutional arbitration rules, for example the new ICC Rules,<sup>126</sup> have been drafted to accommodate multi-party disputes and the joinder of additional parties.

13.1.3 Privacy and confidentiality of the arbitral proceedings and of the subsequent award are traditionally perceived as typical advantages of arbitration over court litigation. The English Arbitration Act does not address confidentiality. This was deliberate as the DAC took the view that the task of setting out the scope of the confidentiality obligations, and exceptions to it, was both difficult and controversial and would be better suited to case-by-case development by the courts.<sup>127</sup>

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<sup>125</sup> Permission of the "court" is required for any appeal from a decision of the court under either Sections 67(4) or 68(4) of the English Arbitration Act. At first sight, this appears to suggest that unless the judge at first instances gives leave to appeal there can be no appeal. However, two separate lines of decisions of the Court of Appeal have weakened the proposition that the first instance judge alone is competent to grant leave to appeal from his own decision: see *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618 and *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 A.C. 221.

<sup>126</sup> Which are in force since January 2012. For the full text of the ICC Rules, see CMS Guide to Arbitration, vol II, appendix 3.7.

<sup>127</sup> See para 17, February 1996 DAC Report.

- 13.1.4 Under English law, the confidentiality of arbitration is an implied term of every arbitration agreement,<sup>128</sup> despite conflicting decisions in the Commonwealth.<sup>129</sup> The court has held that the obligation includes any documents prepared for and used in the arbitration, or disclosed or produced in course of the arbitration or transcripts or notes of the evidence in the arbitration or the award.<sup>130</sup> Notwithstanding the position taken by the English courts, it is advisable for the arbitration agreement expressly to stipulate confidentiality in relation to the arbitral proceedings and the award.
- 13.1.5 There are a number of exceptions to the duty of confidentiality, namely:
- by consent of the parties;
  - by order or leave of the court;
  - where the court considers that making an exception is reasonably necessary (to establish or protect a party's rights against a third party); or
  - where the court considers that making an exception is in the interests of justice (e.g. prior inconsistent views expressed by an expert in arbitral proceedings).<sup>131</sup>

## 14. Conclusion

- 14.1.1 The English Arbitration Act has contributed significantly to revitalising English arbitration and to ensuring that London remains one of the leading centres for international commercial arbitrations.
- 14.1.2 The English Arbitration Act has made arbitration a more attractive option for dispute resolution by increasing party autonomy, as well as reducing the scope for court interference in the arbitral process. Arbitrators have been given wider procedural powers which can contribute to making arbitration more efficient. The success of these provisions depends on arbitrators exercising their powers in practice fairly and imaginatively, distinguishing the parties' choice of arbitration as their preferred method of dispute resolution from more formal and rule-bound court proceedings.

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<sup>128</sup> *Ali Shipping Corporation v Shipyard Trogir* [1998] 1 Lloyd's Rep 643.

<sup>129</sup> See, for example, *Eso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* [1995] 183 CLR 10 (in which the Australian High Court held that confidentiality is not an essential attribute of private arbitration).

<sup>130</sup> *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184.

<sup>131</sup> In *London & Leeds Estate v Paribas Ltd* [1995] 2 EG 134 Mance J permitted disclosure of an expert's reports from earlier arbitrations which were said to be inconsistent with his evidence in the current rent review arbitration. Mance J took the view that the public interest in ensuring that the expert's inconsistent views were exposed outweighed the parties' rights to confidentiality.



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