ICLG

The International Comparative Legal Guide to:

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

There are no formal requirements for an arbitration agreement to be valid. However, the Arbitration Act 1996 (the "1996 Act"), which governs arbitration proceedings in England and Wales, only applies to arbitration agreements that are in writing (section 5(1)). The 1996 Act contains a number of mandatory and non-mandatory provisions intended to facilitate the arbitral process, and so it is highly recommended that arbitration agreements are recorded in writing.

An agreement is deemed to be in writing for the purposes of the 1996 Act if it is: (i) made in writing, whether or not signed by the parties (section 5(2)(a)); (ii) made by exchange of communications in writing (section 5(2)(b)); or (iii) evidenced in writing (section 5(2)(c)). The parties will satisfy the writing requirement if they orally agree to arbitrate by referring to terms that are in writing (section 5(3)). Writing includes "*being recorded by any means*" (section 5(6)).

As to the content of an arbitration agreement, the 1996 Act simply requires that the parties agree "*to submit to arbitration present or future disputes (whether they are contractual or not)*" (section 6(1)). It is possible for a contract to incorporate an arbitration agreement contained in a separate document by reference to that separate document (section 6(2)).

1.2 What other elements ought to be incorporated in an arbitration agreement?

Parties should consider making provision in their arbitration agreement for the applicable arbitral rules, governing law, arbitral seat, language of the arbitration, and number of arbitrators.

Where the arbitration agreement does not include these elements, the default provisions of the 1996 Act provide detailed procedures, designed to enable parties to use and enforce arbitration agreements in circumstances where the agreements themselves provide little practical assistance.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

The English courts have generally taken a pro-enforcement approach to arbitration agreements. This is reflected in the courts' approach to: (i) ambiguous arbitration agreements; (ii) the separability of arbitration agreements; and (iii) the scope of arbitration agreements.

English law construes arbitration clauses widely and generously. It will rarely hold that a clause of a commercial contract is void for uncertainty and will endeavour to make sense of the agreement. In *Exmek Pharmaceuticals SAC v Alkem Laboratories Ltd* [2015] EWHC 3158 (Comm), a contract inconsistently contained both an arbitration clause and an exclusive jurisdiction clause for "UK" courts. The English High Court held that the arbitration agreement was valid – with all disputes to be submitted to arbitration seated in England and Wales under the supervisory jurisdiction of the courts of England and Wales. There are, however, limits to the lengths the courts will go to save arbitration agreements. For instance, a clause might not be considered an arbitration agreement under the 1996 Act if it does not permit the arbitrator to make decisions that are binding on the parties (*Turville Heath Inc v Chartis Insurance UK Ltd* [2012] EWHC 3019 (TCC)).

Under English law, arbitration agreements are separable. This means that an arbitration agreement may be valid, even if the contract in which the arbitration agreement is contained is invalid (for example, because of misrepresentation) (*Fiona Trust Corp v Privalov & Ors* [2007] 4 All ER 951). The situation is different if the arbitration agreement itself is impugned, but this is rare and difficult to prove in practice.

In *Fiona Trust*, the House of Lords also held that parties to arbitration agreements generally intend all disputes arising out of their relationship to be determined by the same tribunal, unless language to the contrary is present. The issue is more complicated when a party asserts that an arbitration agreement in one contract extends to claims arising from a different contract between the same parties. In such cases, courts and arbitral tribunals are likely to scrutinise the contracts carefully in order to determine the scope of the arbitration agreement (as seen in *Trust Risk Group SpA v AmTrust Europe Ltd* [2015] EWCA Civ 437).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The 1996 Act governs the enforcement of arbitration proceedings in England and Wales. There have been no significant changes to this legislation in the last year.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The provisions of the 1996 Act that are in force do not distinguish between domestic and international arbitration proceedings. Sections 85 to 87 of the 1996 Act (which apply to "domestic arbitration agreements" only) are not in force.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The 1996 Act is, in large part, based on the UNCITRAL Model Law (last amended in 2006). However, the 1996 Act differs from the Model Law in a number of important respects, including the following:

- the 1996 Act applies to all forms of arbitration, whereas the Model Law only applies to international commercial arbitration;
- under the 1996 Act, a party may appeal an arbitral award on a point of law (unless agreed otherwise);
- under the 1996 Act, an English court is only able to stay its own proceedings and cannot refer a matter to arbitration;
- the default provisions of the 1996 Act for the appointment of arbitrators provide for the appointment of a sole arbitrator as opposed to three arbitrators;
- under the 1996 Act, where each party is required to appoint an arbitrator, a party may treat its party-nominated arbitrator as the sole arbitrator in the event that the other party fails to make an appointment;
- there is no time limit for a party to oppose the appointment of an arbitrator under the 1996 Act; and
- the 1996 Act does not prescribe strict rules for the exchange of pleadings.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

For arbitrations seated in England and Wales, all provisions listed in schedule 1 of the 1996 Act are mandatory. The provisions listed in Schedule 1 include (by way of example): the basic duties of tribunals and parties (sections 33 and 40); challenges to an award (sections 67 and 68); and certain powers of the court, such as the powers to stay legal proceedings (sections 9 to 11), extend agreed time limits (section 12), remove arbitrators (section 24), secure witnesses' attendance (section 43), and enforce an award (section 66).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The 1996 Act does not define or describe those matters that are "arbitrable" (i.e., capable of settlement by arbitration); it simply preserves the common law position (section 81(1)(a)).

Under English common law, a multitude of non-contractual claims (including tort, competition, intellectual property, and certain statutory claims) are capable of settlement by arbitration. There are, however, certain claims which are not capable of settlement by arbitration, including criminal matters and claims under the Employment Rights Act 1996 (*Clyde & Co LLP v Bates Van Winkelhof* [2011] EWHC 668 (QB)).

Two recent decisions have addressed the arbitrability of statutory claims. The English Court of Appeal has held that (i) statutory claims relating to minority interests in a company (unfair prejudice) are arbitrable, but (ii) arbitrators have no power to order the winding up of a company (*see Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 and *Salford Estates (No.2) Ltd. v Altomart Ltd* [2014] EWCA Civ 1575).

There is also an open question as to whether disputes involving issues of mandatory EU law can be settled by arbitration. The long-held view is that such matters – for example, EU competition claims – are generally arbitrable (*ET Plus SA v Jean-Paul Welter* [2005] EWHC 2115 (Comm) *cf. Accentuate Ltd v ASIGRA Inc.* [2009] EWHC 2655)).

A recent case decided that the foreign act of state doctrine applies in arbitration as in court litigation, with the result that a challenge to the validity of a foreign legislative act is non-arbitrable (*Reliance Industries Ltd v Union of India* [2018] EWHC 822 (Comm)).

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Unless agreed otherwise, the tribunal has the competence to rule on its own substantive jurisdiction as to:

- whether or not there is a valid arbitration agreement;
- whether or not the tribunal has been properly constituted; and
- what matters have been submitted to arbitration in accordance with the arbitration agreement (1996 Act, section 30(1)).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

A party against whom court proceedings are brought in England and Wales in apparent breach of an arbitration clause, may apply to the court for a stay of the court proceedings (1996 Act, section 9(1)). The court is required to grant the stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed (section 9(4)). This requirement applies even if the seat of the arbitration is outside of England and Wales (section 2(1)).

Once the applicant has established the existence of an arbitration clause and that the clause covers the matters in dispute, the burden of proof shifts to the party seeking to show that the arbitration agreement is null and void, inoperative, or incapable of being performed. In practice, this is a high threshold (*see Joint Stock Company "Aeroflot Russian Airlines" v Berezovsky* [2013] EWCA Civ 784).

Pursuant to section 9(3) of the 1996 Act, the right to a stay of judicial proceedings may be lost if the applicant has taken steps in the court proceeding to answer the substantive claim. It has been held that participating in a case management conference and inviting the court to make related orders constituted steps to answer the substantive claim (*Nokia Corp v HTC Corp* [2012] EWHC 3199 (Pat)).

An application under section 9 is not the only means by which a party can seek to restrain court proceedings allegedly brought in

breach of an arbitration agreement. The court is also entitled to stay court proceedings under its inherent jurisdiction where the requirements of section 9 of the 1996 Act are not satisfied – for instance, where there is a dispute whether the parties have entered into a binding arbitration agreement or whether the dispute falls within the scope of the arbitration agreement (*see Golden Ocean Group v Humpuss Intermoda Transportasi* [2013] EWHC 1240 (Comm)).

The power of the courts in England and Wales to issue an anti-suit injunction is considered below in question 7.4.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

As explained above in question 3.2, unless otherwise agreed by the parties, the arbitral tribunal may determine its own substantive jurisdiction. The court, however, also has certain powers to decide the jurisdiction and competence of the tribunal during the arbitral proceedings (1996 Act, section 32); after an award has been rendered (section 67); and where the applicant has not taken any part in the arbitral proceedings (section 72).

Section 32 of the 1996 Act grants the court a limited power to address the jurisdiction and competence of an arbitral tribunal during proceedings. A party can only apply to the court for a ruling on jurisdiction during arbitral proceedings in two circumstances:

- First, an application can be made where all parties to the arbitral proceedings agree in writing.
- Second, an application can be made where the arbitral tribunal gives permission and the court is satisfied that: (i) the determination of the question is likely to produce substantial savings in costs; (ii) the application was made without delay; and (iii) there is good reason why the matter should be decided by the court (section 32(2)). It is only in exceptional cases that a court will find these criteria to have been met (*see Toyota Tsusho Sugar Trading Ltd v Prolat SARL* [2014] EWHC 3649 (Comm) for a recent case where the criteria were met).

The arbitral proceedings may continue, and an award may be granted, at the same time that an application to the court for the determination of a preliminary point of jurisdiction is pending (section 32(4)).

Section 67 of the 1996 Act permits a party to challenge an arbitral award on grounds of lack of substantive jurisdiction. A challenge must be brought within 28 days of the date of the arbitral award determining jurisdiction. The court will review the arbitral tribunal's jurisdiction by way of complete rehearing, without being bound by the arbitral tribunal's reasoning (*Dallah Real Estate & Tourism Holding Co v Government of Pakistan* [2010] UKSC 46).

It should be noted that, under section 67, a party may also challenge the tribunal's finding that it did not have jurisdiction. There was a successful challenge in *GPF GP Sarl v Poland* [2018] EWHC 409 (Comm), which concerned an arbitration under the SCC rules arising from the Poland-Belgium-Luxembourg BIT.

Under section 72 of the 1996 Act, a party who takes no part in the arbitral proceedings can apply to the court for a declaration or injunction restraining arbitration proceedings by challenging: (i) the validity of an arbitration agreement; (ii) whether the arbitral tribunal has been properly constituted; or (iii) the matters that have been referred to arbitration. In addition, such a party may challenge an award under section 67, as discussed above.

For the sake of completeness, it should be noted that the court can also address the substantive jurisdiction of the arbitral tribunal in proceedings for the recognition and enforcement of foreign arbitral awards.

The right to object to the substantive jurisdiction of the arbitral tribunal may be lost if a party takes part or continues to take part in the arbitral proceedings without objection (section 73).

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

English law does not empower tribunals to assume jurisdiction over individuals or entities, which are not party to the arbitration agreement. Arbitration is a consensual process. While a tribunal may invite a non-party to submit testimony or produce documents willingly, it cannot itself compel that individual or entity to do so (although the court has powers to make such orders in certain circumstances).

In various jurisdictions, a number of legal theories have been advanced to seek to bind non-signatories to arbitration agreements (such as piercing the corporate veil and the group of companies doctrine). English law, however, has not embraced these legal theories. Following a recent Supreme Court decision, it will be extremely rare that the corporate veil is pierced (*VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5). Moreover, in *Peterson Farms Inc. v C & M Farming Ltd* [2004] EWHC 121 (Comm), the High Court set aside an award in which the group of companies doctrine had been recognised, stating, *inter alia*, that the doctrine "*forms no part of English law*". However, third parties may be bound to arbitration agreements through the principles of agency law.

Under English law, in certain circumstances, third parties can acquire rights under a contract (pursuant to the Contracts (Rights of Third Parties) Act 1999). Where that contract contains an arbitration clause, the third party may be required to enforce those rights through arbitration (section 8(1) and *Nisshin Shipping v Cleaves & Co* [2003] EWHC 2602 (Comm)). The third party may also have the right to insist on being sued by any parties to the contract in arbitration rather than in court. However, a party to an arbitration agreement cannot commence an arbitration against a third party without that third party's consent (*Fortress Value Recovery Fund LLP v Blue Skye Special Opportunities Fund LP* [2013] EWCA Civ 367).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Section 13 of the 1996 Act governs the imposition of limitation periods for arbitral proceedings in England and Wales. This provides that the "Limitation Acts" apply to arbitral proceedings in the same way that they apply to legal proceedings. The "Limitation Acts" are defined (in section 13(4)) as comprising the Limitation Act 1980 and the Foreign Limitation Periods Act 1984.

The former imposes a six-year limitation period for actions in both contract and tort, which constitute the majority of arbitration claims. The latter statute provides that, where a dispute is governed by

foreign law, the laws of the foreign state relating to limitation shall apply. In imposing such a rule, the Foreign Limitation Periods Act makes clear that the rules regarding foreign limitation periods are substantive.

It is not uncommon for parties to agree a contractual limitation period that is shorter than the statutory period. If they do so, section 12 of the 1996 Act provides that the court may extend that contractual limitation period if (i) the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and it would be just to extend the time, or (ii) the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Where an arbitration is seated in England and Wales, there is a mandatory stay of proceedings where one party to the arbitration is subject to a winding-up order or goes into administration. Proceedings may be continued only with the consent of the administrator or permission of the court (Insolvency Act 1986, section 130(2) and schedule B1, para. 43(6); Cross Border Insolvency Regulations 2006, schedule 1, para. 20(1)). In deciding whether to lift a stay, the courts have a wide discretion to do what is fair and just in the circumstances (*United Drug (UK) Holdings Ltd v Bilcare Singapore Pte Ltd* [2013] EWHC 4335 (Ch)).

At least for cases involving parties from EU Member States, the effect of insolvency proceedings on pending arbitration proceedings will be determined in accordance with the law of the seat of the arbitration (Recast Regulation on Insolvency Proceedings 2015/848, article 18). Thus, in *Syska (Elektrim SA) v Vivendi Universal SA* [2009] EWCA Civ 677, the Court of Appeal rejected the argument of a Polish party in administration that an arbitral tribunal in England and Wales no longer had jurisdiction over a dispute because the arbitration agreement had been annulled by Polish bankruptcy law.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Section 46 of the 1996 Act provides that the dispute shall be decided in accordance with the parties' choice of law, or, if the parties agree, in accordance with "*other considerations*". A choice of the laws of a particular state is understood to refer to the substantive laws of the foreign state, and not the foreign state's conflict of laws rules.

Where no choice or agreement is made, the tribunal is given considerable latitude, and is required to apply the law "*determined by the conflict of laws rules which it considers applicable*" (1996 Act, section 46(3)). This grants the tribunal broad power to apply a system of conflict of laws rules that it concludes is most appropriate to the case.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The 1996 Act is silent as to when mandatory laws will apply. In practice, arbitral tribunals in England and Wales may take guidance from Rome I, which stipulate when mandatory laws may prevail over an express choice of law in English court proceedings.

Rome I applies to contracts entered into after 17 December 2009, and was adopted in England and Wales in full. It provides that effect may be given to both (i) the mandatory laws of the forum, and (ii) the mandatory laws of the state where the obligations arising out of the contract have to be performed, insofar as those mandatory laws render performance of the contract unlawful (Rome I, article 9). Furthermore, where the application of a law is manifestly incompatible with the public policy of the forum, it will not be applied (Rome I, article 21).

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

In England and Wales, the question of which law is applicable to the formation, validity, and legality of the arbitration agreement is determined by the application of common law choice-of-law principles. The Rome I Regulation expressly excludes arbitration agreements from its scope (Rome I, article 1(2)(e)).

The court will look first for an express choice of law and, failing that, an implied choice of law from the other provisions of the contract. If this does not yield an answer, the court will seek to determine which law has the "*closest and most real*" connection with the arbitration agreement (*Sulamerica Cia Nacional de Seguros SA v Ensesa Engenharia S.A.* [2012] EWCA Civ 638).

In practice, there are two options: (i) the law that governs the underlying contract that contains the arbitration agreement (*Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2013] 2 All ER 1); or (ii) the law of the country of the chosen seat (*Habas Sinai Ve Tibbi Gazlar Istihsal Andustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071 (Comm)). Which will apply depends on the particular facts of the case.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

English law gives parties wide autonomy in their selection of arbitrators. The 1996 Act imposes only two mandatory rules in this area: first, the death of an arbitrator brings his or her authority to an end, and second, the court has the ability to remove arbitrators who are not performing their functions properly (section 24).

Parties are free to agree on the number of arbitrators, whether there is to be a chairman or an umpire, the arbitrators' qualifications, and the method of appointment (section 15). The arbitrators must consent to their appointment for such appointment to be valid. Unless otherwise agreed, an agreement that the number of arbitrators shall be two (or any other even number) shall be understood to be an agreement that an additional arbitrator is to be appointed to act as chairman of the tribunal (section 15(2)).

As indicated above, the court has the power to remove an arbitrator on several grounds, including: (i) justifiable doubts as to his impartiality; (ii) the fact an arbitrator does not possess the qualifications required by the parties' arbitration agreement; (iii) physical or mental incapability; or (iv) failures in conducting the proceedings (section 24(1)(a) to (d)). For a recent example of such an application, see *Allianz Insurance v Tonicstar Ltd* [2018] EWCA Civ 434.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the parties fail to agree on an appointment procedure, the 1996

Act sets out default provisions for the appointment of arbitrators. Depending on the number of arbitrators agreed by the parties, the 1996 Act has default provisions for the appointment of:

- a sole arbitrator (joint appointment by the parties within 28 days of a written request by one party: section 16(3));
- a tribunal comprised of two arbitrators (each party to appoint one arbitrator within 14 days of a written request by one party to do so: section 16(4));
- a tribunal comprised of three arbitrators (as with two, but the two party-appointed arbitrators shall forthwith appoint a chairman: section 16(5)); and
- a tribunal comprised of two arbitrators and an umpire (as with three, subject to differences as to the timing of the umpire's appointment: section 16(6)).

Where the parties have failed to even agree on the number of arbitrators, the tribunal shall consist of a sole arbitrator by default (section 15(3)).

The 1996 Act contains provisions in the event that an appointment procedure fails. If the procedure fails because one party fails to comply with the procedure, the other party may give notice that it intends to appoint its arbitrator to act as sole arbitrator, and then make such an appointment (section 17(1)). For other failures in the appointment procedure, either party may apply to the court to exercise certain powers (unless the parties have agreed to the contrary). These powers include: (i) giving directions as to the making of appointments (section 18(3)(a)); (ii) directing that the tribunal be constituted by such appointments as have been made (section 18(3)(b)); (iii) revoking any previous appointments (section 18(3)(c)); or (iv) making the necessary appointments itself (section 18(3)(d)). The court may also delegate its power to make the necessary appointment to an arbitral institution if it thinks fit (*Chalbury McCouat International Ltd v PG Foils Ltd* [2010] EWHC 2050 (TCC)).

5.3 Can a court intervene in the selection of arbitrators? If so, how?

A court may intervene in the selection of arbitrators in certain circumstances, but only on the application of one of the parties to the arbitration agreement. If one party fails to appoint an arbitrator and so a sole arbitrator is appointed under section 17 of the 1996 Act, the party in default may apply to the court to set aside that appointment (section 17(3)). In all other cases where the appointment procedure has failed, unless the parties have agreed otherwise, a party can apply to the court to exercise certain powers (as described in more detail in question 5.2). Furthermore, as discussed in question 5.1, the court has the ability to remove arbitrators in certain circumstances if an application is made under section 24.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

The impartiality of arbitrators is central to the arbitration process. The 1996 Act states that "*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal*" (section 1(a)). Section 24(1)(a) of the 1996 Act permits a party to apply to the court for the removal of an arbitrator on the basis that circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality. Furthermore, section 33(1)(a) of the 1996 Act requires the tribunal to act fairly and impartially as between the parties, and a failure by a tribunal to comply with this duty is a ground for challenging the validity of an award (section 68(2)(a)).

The question whether circumstances exist which give rise to justifiable doubts as to an arbitrator's impartiality is to be determined by applying the common law test for apparent bias (*A v B* [2011] 2 Lloyd's Rep 591). The test for apparent bias is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that an arbitrator was biased (*H v L* [2017] EWHC 137 (Comm)).

The 1996 Act does not require the disclosure of potential conflicts (it does not contain provisions equivalent to articles 12 and 13 of the Model Law). The Departmental Advisory Committee – on whose report the 1996 Act was based – preferred instead to retain the rule that the only issue is whether the arbitrator has acted impartially, and not whether they are "*independent in the full sense of that word*". Nevertheless, arbitrators would be well advised to disclose any matters which could reasonably be deemed to have a bearing on their impartiality.

Institutional rules commonly adopted by the parties in arbitration proceedings in England and Wales do contain disclosure requirements:

- Under the LCIA Rules, prospective arbitrators are required to sign a declaration before being appointed by the LCIA, stating whether "*there are any circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence*" and specifying any such circumstances in full (LCIA Rules, article 5.4).
- A similar obligation is imposed by the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members (October 2009), which provides that "*Members shall disclose any interest or relationship which is likely to affect, or may reasonably be thought likely to affect, their conduct*" (Part 1, Rule 2).
- The IBA Guidelines on Conflicts of Interest in International Arbitration (October 2014) contain detailed guidance on independence, impartiality and disclosure that is frequently referred to. It should be noted that the IBA Guidelines are just guidelines. In a recent case (*W Ltd v M SDN BHD* [2016] EWHC 422 (Comm)), the English High Court refused to annul an award on the ground of serious irregularity, even though the arbitrator had a non-waivable conflict of interest within the meaning of the IBA Guidelines.

The failure by an arbitrator to disclose repeat appointments by a party to an arbitration may result in the courts removing that arbitrator. In *Cofely Ltd v Bingham* [2016] EWHC 240 (Comm), an arbitrator was removed after failing to disclose that 18% of his appointments and 25% of his income were in some way related to one of the parties to the arbitration.

It is possible, in theory, to make an application to the court to obtain disclosure of documents that may be relevant to whether an arbitrator is impartial. However, an order for disclosure against an arbitrator will only be made in "*wholly exceptional*" circumstances (*P v Q* [2017] EWHC 148 (Comm)).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The parties are free to decide on the procedure of arbitrations seated

in England and Wales, and generally do so by reference to a set of institutional rules. If the parties do not agree a procedure, Part I of the 1996 Act contains default provisions governing arbitration proceedings in England and Wales. The default provisions give the tribunal the power to decide all procedural and evidential matters (section 34(1)).

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

There are no particular procedural steps that are required by law. Instead, the parties are free to agree how their disputes are to be resolved.

The 1996 Act does, however, impose, an overarching "general duty" on the arbitral tribunal (section 33). This general duty has two elements. First, section 33(1)(a) requires the tribunal to act fairly and impartially as between the parties, giving each a reasonable opportunity to put its case and deal with that of its opponent. Second, the tribunal is obliged by section 33(1)(b) to adopt procedures suitable to the circumstances of a particular case, avoiding unnecessary delay and expense, so as to provide a fair means for the resolution of the matters falling to be determined. The tribunal is obliged to comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence, and in the exercise of all other powers conferred upon it.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no separate rules that govern the conduct of counsel from England and Wales in arbitral proceedings sited in England and Wales. English solicitors participating in arbitrations sited in England and Wales are bound by the Solicitors Regulation Authority Code of Conduct 2011 ("SRA Code of Conduct"). English barristers are governed by the BSB Handbook 2019.

Where arbitration proceedings are sited outside of England and Wales, the following rules apply:

- Solicitors who are established and practise in England and Wales will be regulated by the SRA Code of Conduct. A solicitor who temporarily practises abroad will be subject to some but not all provisions of the SRA Code of Conduct (chapter 13A). A solicitor who practises overseas on a non-temporary basis will be subject to the SRA Overseas Rules, which are a modified version of the SRA Code of Conduct taking into account the circumstances of overseas practice.
- Barristers must comply with the rules of the local bar unless this conflicts with one of the core duties under the BSB Handbook, in which case the core duties prevail (BSB Handbook, rule C13).

There are no separate rules that govern the conduct of counsel from states and jurisdictions other than England and Wales in arbitral proceedings sited within England and Wales. The SRA and BSB Handbook are limited to solicitors and barristers of England and Wales. Furthermore, there are no separate rules that impose mandatory codes of conduct on counsel irrespective of jurisdiction. The expectation is that lawyers from other jurisdictions are regulated by the applicable rules of professional conduct from their home jurisdictions.

It is this difference in regulation – with practitioners in the same arbitration being required to comply with different rules of professional conduct – that has led to moves to harmonise the rules of professional conduct to which international arbitration practitioners are subject. In 2013, the International Bar Association published its Guidelines on Party Representation in International Arbitration, to which arbitral tribunals may make reference. More recently, the LCIA revised its arbitral rules in 2014 to grant arbitral tribunals the power to sanction legal representatives in the event that their conduct falls below the required standard.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

As mentioned in question 6.2 above, the arbitral tribunal has a general duty to act fairly and impartially, and to adopt suitable procedures (section 33). Furthermore, the tribunal has the power to withhold the award if it has not been paid (section 56(1)). With those exceptions, under the 1996 Act, the parties are free to agree on the powers exercisable by the arbitral tribunal in relation to the proceedings (section 38).

Unless otherwise agreed, the arbitral tribunal also has certain powers to sanction the parties in the event of default, including the power to: dismiss any claim where there has been inordinate and inexcusable delay (section 41(3)); continue the proceedings in the absence of a party if that party fails without sufficient cause to participate (section 41(4)); and make a peremptory order prescribing a time for compliance, if a party fails to comply with the tribunal's orders or directions (section 41(5)).

Where a party fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may dismiss the claim (section 41(6)). Where a party fails to comply with any other kind of peremptory order, the tribunal may: (i) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order; (ii) draw such adverse inferences from the act of non-compliance as the circumstances justify; (iii) proceed to an award on the basis of such materials as have been properly provided to it; or (iv) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance (section 41(7)).

There are also default provisions relating to the tribunal's power to award preliminary and interim relief, as set out below in question 7.1.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

In England and Wales, only solicitors of the Senior Courts of England and Wales and barristers called to the Bar in England and Wales can have rights of audience in English courts or rights to "conduct litigation" in proceedings issued in those courts. These restrictions are subject to certain limited exceptions.

An arbitration sited in England is not subject to these restrictions; accordingly, foreign lawyers are free to appear before an arbitral tribunal in England without restriction. Indeed, a representative need not necessarily be legally qualified in any jurisdiction; the 1996 Act provides that, unless the parties otherwise agree, each

party may be represented in the proceedings "*by a lawyer or other person chosen by him*" (section 36).

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Arbitrators acting in arbitrations sited in England and Wales have immunity for any act or omission made in the discharge of the arbitrators' functions, unless the act or omission is shown to have been in bad faith (section 29, which is mandatory). When appointing an arbitrator, the parties may agree with the arbitrator the potential consequences of the arbitrator's resignation, including agreeing that the arbitrator should incur liability (section 25(1)). An arbitrator can apply to the court for relief from liability in those circumstances (section 25(3)).

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Intervention by national courts in the arbitral process should be minimal, and the court should not intervene except as expressly provided by the 1996 Act (section 1(c)).

The Act does provide that the national courts may exercise powers with regard to some procedural issues. Specifically, the courts may deal with procedural issues relating to:

- the enforcement of peremptory orders of the tribunal (section 42);
- securing the attendance of witnesses (section 43);
- the taking and preservation of evidence, the inspection of property, the sale of goods that are subject to proceedings, interim injunctions, and the appointment of a receiver (section 44); and
- the determination of a preliminary point of law (section 45).

Only one of these provisions is mandatory (the power to secure the attendance of witnesses in section 43). The parties can therefore agree to exclude these other powers of the courts should they so wish.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Unless the parties have agreed otherwise, the tribunal may: order a claimant to provide security for costs in the arbitration (section 38(3)); give directions relating to property which is the subject matter of the proceedings or as to which any question arises in the proceedings (section 38(4)); direct a party or witness to be examined (section 38(5)); or give directions for the preservation of evidence (section 38(6)).

In addition, the parties may agree that the tribunal shall be entitled to make an order for provisional relief (section 39) (e.g., the disposition of property or provisional payment). In the absence of agreement between the parties, the tribunal shall not have such power. The tribunal is authorised to grant provisional relief without having to seek the assistance of the court to do so.

In the event that a party fails without sufficient cause to comply with an order – or a procedural direction – given by the tribunal, the tribunal may make a peremptory order, which specifies a time for compliance (section 41(5)).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Unless otherwise agreed, the courts have the same powers in arbitral proceedings as they do in court proceedings in relation to:

- the taking of evidence (section 44(2)(a));
- the preservation of evidence (section 44(2)(b));
- the inspection of property (section 44(2)(c));
- the sale of any goods that are the subject of the proceedings (section 44(2)(d)); and
- the granting of an interim injunction or the appointment of a receiver (section 44(2)(e)).

It was formerly the case that the court itself could intervene to order security for costs during an arbitration but this power was removed by the Arbitration Act 1996 (repealing section 12(6)(a)) of the Arbitration Act 1950). A court can only order security in the context of challenges to an award under sections 67, 68, or 69 (see question 7.5).

It is a condition precedent to the court having the power to act that neither the arbitral tribunal nor any arbitral or other institution has the power to act or is able for the time being to act effectively (section 44(5)). This threshold may be met where the tribunal has yet to be formed or where the applicant requires an order which will bind third parties (*Pacific Maritime (Asia) Ltd v Holystone Overseas Ltd* [2008] 1 Lloyd's Rep 371). In *Gerald Metals v Timis* [2016] EWHC 2327 (Ch), the court held that where the parties had the opportunity to use emergency procedures as laid down in the LCIA Rules, the court would not exercise its powers under section 44. Only in those cases which were so urgent that relief could not be given by these emergency procedures would the court intervene.

There are further conditions precedent to the court acting, which vary according to the urgency of the situation. If the situation is urgent, the court is only entitled to make whatever orders it thinks necessary for the purpose of preserving evidence or assets (section 44(3)). If the situation is not urgent, the court is only entitled to act (i) on the application of a party made with the permission of the arbitral tribunal, or (ii) with the agreement in writing of all of the other parties (section 44(4)).

The English courts have given guidance on the meaning of "*preserving evidence and assets*", which is generally interpreted broadly. For instance, in *Doosan Babcock Ltd v Commerializadora de Equipos y Materiales Mabe Lda* [2013] EWHC 3010 (TCC), the court granted interim relief to restrain the beneficiary of a performance guarantee bond from making a demand under that bond.

English courts are not limited to granting interim relief with respect to arbitrations seated in the jurisdiction, but interim relief will more rarely be granted in support of arbitrations seated outside of England and Wales and where there is no connection with this jurisdiction (*see Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm)).

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

In general, the courts do not intervene in arbitral proceedings in England and Wales, except within the relatively narrow confines of the 1996 Act, where it is both necessary and appropriate for them to

do so. As explained above in question 7.2, the court will not grant interim relief unless the tribunal or arbitral institution has no power to act or is unable for the time being to act effectively (section 44(5)).

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

The courts' approach to anti-suit injunctions differs depending on whether or not the actual or prospective court proceedings that the applicant wishes to restrain have been or will be brought in an EU Member State.

In *Allianz SpA v West Tankers Inc*, Case C-185/07 [2009] 1 AC 1138, the European Court of Justice held that Regulation 44/2001 (known as the Brussels I Regulation) did not permit the issuance of anti-suit injunctions by courts of a Member State to restrain proceedings commenced in another EU Member State in contravention of an arbitration agreement (see also *Nori Holdings Ltd v Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm), confirming that West Tankers is good law).

However, in *Gazprom OAO* Case C-536/13 [2015] 1 Lloyd's Rep 610, the European Court of Justice held that when an arbitral tribunal issues an anti-suit injunction, this can subsequently be enforced by the court of a Member State. This is the case even if enforcing the anti-suit injunction will have the effect of restraining proceedings before the courts of another EU Member State. This development may have the effect of making arbitration even more attractive to European parties.

The law is well-settled where EU law does not apply. English courts have continued to grant anti-suit injunctions in respect of proceedings brought outside the EU, in violation of valid and binding arbitration agreements (*see Midgulf International Ltd v Groupe Chimique Tunisien* [2010] EWCA Civ 66). The English courts will also grant injunctive relief to restrain breaches of an arbitration agreement even where the applicant has no intention of commencing arbitration (*AES-UST Kamenogorsk Hydropower Plant LLP v UST-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35). The courts may also award relief at the post-award stage to restrain proceedings that "*challenge, impugn or have as their object or effect the prevention or delay in enforcement*" of an award (*Shashoua v Sharma* [2009] EWHC 957 (Comm)).

In order to obtain an anti-suit injunction, the application must be made "*promptly and before the foreign proceedings are too far advanced*" (*The Angelic Grace* [1995] 1 Lloyd's Rep. 87). The case of *ADM Asia-Pacific Trading v PT Budi Semesta Satria* [2016] EWHC 1427 (Comm) is a recent example of refusal of an anti-suit injunction application that was not made swiftly. The applicant must also satisfy the court that there is a "*high degree of probability*" that there is a valid agreement and that bringing and continuing the court proceeding is contrary to such an agreement (*see Rochester Resources Ltd v Lebedev* [2014] EWHC 2926 (Comm)). In general, where England and Wales is not the seat of the arbitration, the court will hesitate to grant any injunction, because this is normally a matter for the supervisory court abroad (*see Amtrust Europe Limited v Trust Risk Group SpA* [2015] EWHC 1927 (Comm), which concerned an anti-arbitration injunction).

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Both the courts and the arbitral tribunal are empowered to order security for costs in certain circumstances.

Section 38(3) of the 1996 Act grants the tribunal a restricted power to order security for costs (unless agreed otherwise). The tribunal can only order security for costs against the claimant or counterclaimant. Furthermore, the tribunal is not permitted to exercise this power merely because the claimant is an individual that is ordinarily resident overseas, or because it is a corporation incorporated or formed in a country outside the UK or whose central management is located outside the UK.

As discussed above at question 7.2, the court cannot order security for costs during an arbitration. The court can, however, enforce an arbitral tribunal's order for security for costs and make its own order where a party makes an application to challenge an arbitral award under sections 67, 68, or 69. However, the restrictions imposed on the arbitral tribunal with regard to individuals or corporations based outside the United Kingdom also apply to the exercise of this power by the court (section 70(6)).

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Enforcement of preliminary relief and interim measures ordered by an arbitral tribunal in England and Wales is a two-step process. If a party fails to comply with an order of the arbitral tribunal, the tribunal must first issue a peremptory order specifying a time for compliance. (The tribunal's power to make peremptory orders is set out above in question 6.4.) Unless agreed otherwise, the court can then enforce the peremptory order on application by the tribunal, on application by a party with the permission of the tribunal, or where the parties have agreed that the enforcement powers of the court should be available (1996 Act, section 42(1) and (2)). The court will not act unless the applicant has exhausted any available arbitral process, which addresses the failure to comply with the tribunal's order (section 42(3)).

The above procedure does not apply to arbitrations seated outside of England and Wales (section 2(1)). It therefore appears that the court would not enforce preliminary relief or interim measures ordered by a tribunal seated outside of England and Wales.

Some arbitral rules allow arbitral tribunals to issue interim measures in the form of an award (for example, the ICC Rules and the SIAC Rules allow arbitral tribunals to issue interim measures in the form of an award; the LCIA Rules allow emergency arbitrators to issue decisions in the form of an award). It is possible that such decisions are capable of enforcement as awards under section 66 (as discussed in question 11.3), but there is no clear authority.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Section 34(1) of the 1996 Act provides that it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter. Section 34(2)(f) lists the procedural and evidential matters that the tribunal may decide, including: (i) whether to apply "strict" rules of evidence as to the admissibility, relevance or weight of any material sought to be tendered on matters of fact or opinion; and (ii) the time, manner, and form in which such material should be exchanged or presented.

English law contains extensive rules of evidence, which are applicable in England courts. Frequently, rather than adopting strict

English rules of evidence, arbitral tribunals will be guided by the IBA Rules on the Taking of Evidence in International Arbitration.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Unless otherwise agreed, the tribunal has the power to order a party to produce documents (1996 Act, section 34(2)(d)) and the tribunal may determine whether or not these documents are relevant and/or privileged (section 34(2)(f)). The tribunal also has the power to order that any evidence be given orally at the hearing (section 34(2)(e) and (h)).

The tribunal has no power to order the production of documents by a third party or to secure the attendance of witnesses. However, as described in more detail below in question 8.3, a court can provide assistance in such matters.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

A party to arbitral proceedings can also apply to the court under section 43 of the 1996 Act to secure the attendance of a witness (including a third-party witness) in order to produce documents or provide oral testimony.

The court cannot, however, order pre-action disclosure in circumstances where the dispute is to be decided by arbitration (*Travelers Insurance Company Ltd v Countrywide Surveyors Ltd* [2010] EWHC 2455 (TCC)).

In addition to the above, the court can make an order under section 42 requiring a party to comply with a peremptory order made by the tribunal. This could include an order requiring a party to produce documents.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Parties are free to agree whether there should be oral or written evidence in arbitral proceedings (1996 Act, section 34(1)). Otherwise, the arbitral tribunal may decide whether or not a witness or party will be required to provide oral evidence and, if so, the manner in which that should be done and the questions that should be put to, and answered by, the respective parties (section 34(2)(e)). Unless otherwise agreed, the tribunal also has power to direct that a particular witness or party may be examined on oath or affirmation, and may administer the necessary oath or affirmation (section 38(5)). There is no strict requirement that oral evidence be provided on oath or affirmation; it is a matter for the tribunal's discretion.

The 1996 Act contains further provisions with regard to expert testimony. Section 37(1) provides that, unless the parties agree otherwise, the arbitral tribunal is empowered to appoint (i) experts or legal advisors to report to it and the parties, or (ii) assessors to assist it on technical matters. The parties must, however, be given a reasonable opportunity to comment on any information, opinion or advice offered by such a person (section 37(1)(b)).

The conduct of lawyers with regard to the preparation of witness testimony is often regulated by the rules of professional conduct of the jurisdiction in which that lawyer is admitted to practise.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

When making an order for the production of documents, the tribunal may determine that a document (or class of documents) is protected from disclosure on the grounds of privilege.

English law recognises a number of privileges. The most common is legal professional privilege, which can be subdivided into legal advice privilege (communications between a lawyer and a client for the purpose of seeking legal advice) and litigation privilege (which applies to communications between parties, their lawyers and third parties for the dominant purpose of upcoming legal proceedings that were "reasonably in prospect"). English law interprets "legal advice" relatively broadly: it applies not only to a lawyer's advice on the law, but also to what could be "prudently and sensibly done in the relevant legal context" (*Three Rivers DC v Governor and Company of the Bank of England (No. 6)* [2004] UKHL 48). However, English law defines the "client" more restrictively: within a corporate organisation, the "client" is deemed to be only those individuals directly charged with communicating with the lawyers, rather than all employees of the corporation (*Three Rivers DC v Governor and Company of the Bank of England (No. 5)* [2003] EWCA Civ 474). Privilege also applies to communications with in-house counsel, so long as the communications are for the purpose of giving legal advice (*Alfred Crompton Amusement Machines Ltd v Customs & Excise Comms (No. 2)* [1972] 2 QB 102).

Privilege can be waived, both advertently and inadvertently. Importantly, a party may be taken to have waived privilege if it refers to a privileged document in its pleadings or witness statements.

English law recognises other privileges, including joint privilege, common interest privilege and without prejudice privilege. The first two are applications of the principles of legal professional privilege to multi-party situations, while the last is a rule that protects from production to the tribunal correspondence made in a genuine attempt to settle a dispute.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

The parties are free to agree on the form any award should take (1996 Act, section 52(1)). In the absence of agreement, the award shall be in writing and signed by all of the arbitrators or all those assenting to the award (section 52(3)); it shall contain the reasons for the award, unless it is an agreed award or the parties have agreed to dispense with reasons (section 52(4)); and it shall state the seat of the arbitration and the date when the award was made (section 52(5)). An award must also make a final determination of a particular issue (*Brake v Patley Wood Farm* [2014] EWHC 4192 (Ch)).

The New York Convention requires awards to be "duly authenticated" in order for contracting states to be obliged to enforce them. Therefore, an unsigned award may not be enforceable in another contracting state. (Note, however, the Court

of Appeal's recent statements regarding the enforcement of awards under section 102 (1) of the 1996 Act in *Lombard-Knight v Rainstorm Pictures Inc* [2014] EWCA Civ 356, a case discussed in detail in question 11.3 below.)

A tribunal is entitled to make a single, final award or an award relating only to part of the claims submitted to it for determination (section 47). The parties may also agree that the tribunal should have a separate power to make provisional awards, in which case it can order any relief on a provisional basis that it would have power to grant in a final award (section 39(1)).

The 1996 Act does not require the award to be rendered within a particular time, although the tribunal must avoid unnecessary delay. The parties can, however, specify in their arbitration agreement a time within which the award must be rendered.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The parties are free to agree on the powers of the tribunal to correct an award (1996 Act, section 57(1)). Parties should, however, make sure that any agreed process for correction or amendment takes place within a prescribed timeframe, otherwise there could be a dispute about whether an award is final and enforceable.

In the absence of agreement, the tribunal can:

- correct an award to remove any clerical mistake or error arising from an accidental slip or omission, or clarify or remove any ambiguity in the award (section 57(3)(a)); or
- make an additional award in respect of any claim that was presented to the tribunal but not dealt with by the tribunal (section 57(3)(b)).

A party must apply for a correction or an additional award within 28 days of the original award (section 57(4)). The tribunal can also correct an award on its own initiative within 28 days of the original award or issue an additional award within 56 days of the original award (sections 57(5) and (6)). Unless otherwise agreed by the parties, these time limits can be extended by the court under section 79(3) where the parties have exhausted all options before the tribunal and a substantial injustice would otherwise occur (*see Xstrata Coal Queensland v Benxi Iron & Steel* [2016] EWHC 2022 (Comm) for a recent example where an extension to correct mistakes was granted).

There are a number of cases addressing how far arbitrators may go in correcting clerical mistakes or errors arising from accidental slips and omissions, from which it is hard to derive clear rules. These provisions are not, however, intended to permit an arbitrator to change his or her mind (*see*, e.g., *Mutual Shipping Corp v Bayshore Shipping Co Ltd* [1985] 1 WLR 625).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

There are three bases upon which a party may apply to the court to challenge or appeal an arbitral award made in England and Wales.

First, a party may argue that the tribunal lacked substantive jurisdiction to make the award (1996 Act, section 67). A party challenging the substantive jurisdiction of the tribunal under section 67 is entitled to a complete rehearing, rather than a review of the decision reached by the tribunal (*Dallah Real Estate & Tourism Holding Co v Government of Pakistan* [2010] UKSC 46). After hearing a challenge under section 67, the court may either confirm the award, vary the award, or set aside the award in whole or in part.

Second, a party may challenge an award on the basis of a serious irregularity affecting the tribunal, the proceedings, or the award, which has the effect of causing substantial injustice to the applicant (section 68). There are two limbs to a challenge under section 68: the applicant must show both "*serious irregularity*" and that "*substantial injustice*" was caused thereby. There is a high threshold for challenges under section 68 (*Gujarat NRE Coke Ltd and Shri Anrun Kumar Jagatramaka v Coeclerici Asia Pte Ltd* [2013] EWHC 1987 (Comm)). Recently, the High Court emphasised that relief under section 68 is a "remedy of last resort" (*Ameropa SA v Lithuanian Shipping* [2015] EWHC 3847 (Comm)).

Serious irregularity can arise in nine different circumstances, namely where:

- the tribunal has failed to comply with its general duty under the 1996 Act (including its duty to act fairly and impartially) (section 68(2)(a));
- the tribunal has exceeded its powers (section 68(2)(b));
- the tribunal has failed to conduct the proceedings in accordance with the parties' agreed procedure (section 68(2)(c));
- the tribunal has failed to deal with all of the issues put to it (section 68(2)(d));
- an arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award has exceeded its powers (section 68(2)(e));
- there is uncertainty or ambiguity as to the effect of the award (section 68(2)(f));
- the award was obtained by fraud or is otherwise contrary to public policy (section 68(2)(g));
- the award does not comply with requirements as to form (section 68(2)(h)); or
- there was irregularity in the conduct of the proceedings or the award which is admitted by the arbitral tribunal or other institution or person vested by the parties with powers in relation to the proceedings or the award (section 68(2)(i)).

An "error of law" will not, without more, be sufficient to challenge an award under section 68 (*Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221).

Having shown that a serious irregularity has occurred, a party must then show that substantial injustice was caused thereby. The question of substantial injustice is approached independently of the question of serious irregularity. For example, in *CNH Global NV v PGN Logistics Limited* [2009] EWHC 977 (Comm), an arbitral tribunal committed a serious irregularity, when it purported to correct its award in order to award the claimant interest, although it had no power to do so. The court nevertheless refused to set aside the award on the basis that, since interest was due to the claimant, the party ordered to pay interest had suffered no "substantial injustice". Similarly, in *Chantiers de L'Atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383, the High Court dismissed a challenge to an award, despite making a finding that there had been fraud in the arbitration, because the claimant was unable to establish that the tribunal probably would have come to a different decision if there had been no fraud.

On a successful challenge under section 68, the court can remit the award to the tribunal for reconsideration, set aside the award, or declare the award to be of no effect either in whole or in part.

A party's right to bring a challenge under sections 67 and 68 may be lost if that party does not object to the tribunal's jurisdiction and/or procedural irregularities forthwith and continues to take part in the proceedings (section 73).

Third, an award can be appealed if the tribunal erred on a point of law (section 69). Unlike a challenge under either section 67 or 68, this appeal goes to the merits of the tribunal's reasoning.

Unless all parties agree to the appeal being brought, an appeal under section 69 can only be brought if leave is granted by the court (section 69(2)). The court will only grant leave if it finds four conditions to be satisfied: (a) the determination of the question will substantially affect the rights of one or more of the parties; (b) the question is one which the tribunal was asked to determine; (c) the decision of the tribunal was obviously wrong, or the question is one of general public importance and at least open to serious doubt; and (d) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all of the circumstances for the court to determine the question.

When an applicant seeks leave to appeal, the standard of review adopted by the court is deferential. When determining if the tribunal has reached a decision that is "obviously wrong", an error must be apparent on the face of the award itself, such that it constitutes a "*major intellectual aberration*" (see *HMV UK Ltd v Propinvest Friar Ltd Partnership* [2012] 1 Lloyd's Rep 416). Likewise, where the question is one of general public importance, the mere fact that the court might have reached a different conclusion is unlikely to render an award "open to serious doubt".

Assuming leave to appeal is granted, the court will then proceed to hear the appeal itself. It has been held that an appeal will not be allowed simply because the appeal court may have come to a different conclusion, so long as a tribunal that correctly understood the law could have reached the same conclusion as the conclusion reached by the tribunal (see *Vinava Shipping Co Ltd v Finelvet AG (The Chrysalis)* [1983] 1 Lloyd's Rep 503).

After hearing an appeal under section 69, the court may confirm the award; vary the award; remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination; or set aside the award in whole or in part.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

Sections 67 and 68 of the 1996 Act are mandatory. However, the parties may agree to exclude the right to appeal to the court on a question of law (section 69(1)).

An agreement that the tribunal does not need to give reasons for its award will be deemed an agreement between the parties to exclude this basis of appeal (section 69(1)). Moreover, many of the major institutional arbitral rules (including the LCIA and ICC rules) have the effect of excluding the application of section 69. However, a statement that the award shall be "final, conclusive and binding" will not suffice to exclude section 69 (*Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm)).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The parties can agree additional appeal procedures before a second arbitral tribunal or before an arbitral institution, but cannot expand the court's power to review an arbitral award.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

An appeal against or challenge to an arbitral award under the 1996 Act must be commenced by the issue of an arbitration claim form (in accordance with Part 62 of the English Civil Procedure Rules).

A challenge or appeal under any of sections 67 to 69 must be brought within 28 days of the date of the award (or 28 days of the notification of the decision of any applicable process of arbitral appeal or review) (section 70). As mentioned in question 9.2, unless the parties otherwise agree, these time limits can be extended by the court under section 79(3) in certain circumstances.

If the arbitral tribunal corrects its award under section 57 of the 1996 Act, the 28-day time limit will run from the date of the corrected award. However, the 28-day time limit will only be postponed in this way if the applicant seeks a "material" correction which is necessary to enable the applicant to know whether it had grounds to challenge the award (*K v S* [2015] EWHC 1945 (Comm); *Daewoo Shipbuilding & Marine Engineering Company Ltd v Songa Offshore Equinox Ltd* [2018] EWHC 538 (Comm)).

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The United Kingdom (of which England and Wales forms a part) is a party to the New York Convention, which it signed and ratified in 1975, subject to the reservation that it applies only to awards made in the territory of another contracting party.

Part III of the 1996 Act provides for the recognition and enforcement of New York Convention awards (i.e., awards made, in pursuance of an arbitration agreement, in the territory of another state which is also a party to the New York Convention). The Supreme Court has recently held that when it comes to recognition and enforcement, the 1996 Act provisions and the New York Convention should be read consistently as the Convention establishes "a common international approach" (*IPCO (Nigeria) v Nigerian National Petroleum Corp* [2017] UKSC 16).

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

The United Kingdom is also a party to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927. An arbitral award made in the territory of a contracting party to this treaty is enforceable pursuant to section 99 of the 1996 Act. Enforcement of awards under the Geneva Convention 1927 has, in practice, been all but superseded by enforcement under the subsequent New York Convention. However, there remain a limited number of countries which have not yet acceded to the New York Convention that are party to the Geneva Convention 1927.

England and Wales has not signed any other regional conventions regarding the recognition and enforcement of arbitral awards. However, the Foreign Judgments (Reciprocal Enforcement) Act 1933 provides for the reciprocal recognition and enforcement of arbitral awards (and court judgments) in former Commonwealth countries.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Generally speaking, the English courts adopt a strongly pro-enforcement approach.

The enforcement procedure prescribed by the 1996 Act distinguishes between awards made in England and Wales and foreign awards.

An arbitral award made in England may, by leave of the court, be enforced in the same manner as a judgment or order of the court (section 66). Leave will not be given where the tribunal is shown to have lacked substantive jurisdiction to make the award. Where leave is given, judgment may be entered in terms of the award.

The enforcement of foreign awards under the New York Convention is addressed by sections 100 to 104 of the 1996 Act. A New York Convention award (defined in section 100 as an arbitral award made in the territory of a foreign state that is a party to the New York Convention) may – with the leave of the court – be recognised and enforced in the courts of England and Wales in the same way as judgment or order of the court (section 101). As is the case with awards made in England and Wales, judgment may be entered in the terms of the award.

A party seeking recognition and enforcement of a New York Convention award must produce: (i) the duly authenticated original award or a duly certified copy thereof; and (ii) the original arbitration agreement or a duly certified copy thereof (section 102(1)). If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent (section 102(2)). The Court of Appeal has held that the requirements of section 102(1) should not be construed too strictly, so as to give rise to "*hollow formalism*" (*Lombard-Knight v Rainstorm Pictures Ltd* [2014] EWCA Civ 356). In that case, the Court of Appeal held that photocopies of two arbitration agreements, when accompanied by a statement of truth, could amount to "certified copies" of the original arbitration agreements, as required by section 102(1)(b).

Recognition and enforcement of New York Convention awards may only be challenged on limited grounds, namely: (i) incapacity of a party; (ii) invalidity of the arbitration agreement; (iii) lack of proper notice; (iv) lack of jurisdiction; (v) procedural irregularity in the composition of the tribunal; (vi) the fact that the award has been set aside or not become binding in the country where it was made; (vii) the non-arbitrability of the subject matter of the arbitration; and (viii) the fact that it would be contrary to public policy to enforce the award (section 103).

Under the New York Convention, the court "may" refuse recognition and enforcement on one of the above grounds. The English courts therefore retain a discretion to enforce an award even where one of these grounds exists, but this discretion is very narrowly construed (*Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs (Pakistan)* [2009] EWCA Civ 755).

It is not necessary for the court to recognise and enforce an arbitral award in its entirety. The Court of Appeal has held that the word "award" in sections 101 to 103 of the 1996 Act should be construed to mean the "award or part of it", and accordingly, that the court is permitted to enforce part of an award (*IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2008] EWCA Civ 1157).

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

In general, the English common law principles of *res judicata* and issue estoppel apply to arbitrations sited in England and Wales. A final and binding award, therefore, precludes the successful party from bringing the same claim(s) again, either in a fresh arbitration or before the national courts, and precludes both parties from contradicting the decision of the arbitral tribunal on a question of law or fact decided by the award (*Sun Life Insurance Company of Canada and others v The Lincoln National Life Insurance Company* [2006] 1 All ER (Comm) 675; *Injazat Technology Capital Ltd v Najafi* [2012] EWHC 4171 (Comm)).

The Privy Council has affirmed that a prior award may be used by one of the parties to raise a defence of issue estoppel in a new arbitration between the same parties (*Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co. of Zurich* [2003] 1 WLR 1041).

The doctrine of issue estoppel does not apply in the same way to subsequent proceedings between a party to an earlier arbitration and a non-party. However, seeking to bring claims or advance defences that were rejected in an earlier arbitration can amount to abuse of process (it has been said though that it will be a "*a rare case, and perhaps a very rare case, where court proceedings against a non-party to an arbitration can be said to be an abuse of process*" (*Michael Wilson & Partners Ltd v Sinclair* [2017] EWCA Civ 3)).

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Section 103(3) of the 1996 Act gives effect to Article V(2)(b) of the New York Convention, meaning that an English court may refuse to recognise or enforce an award on the ground that it is contrary to public policy. As noted above in question 11.3, the approach of the English courts is pro-enforcement: the Court of Appeal has held that arguments based on public policy should be approached with "*extreme caution*", as the provision "*was not intended to furnish an open-ended escape route for refusing enforcement of New York Convention awards*". (*IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2005] EWHC 726 (Comm).)

Notwithstanding the above, recognition and enforcement has been refused on grounds of public policy for the following reasons: the award was obtained by fraud (*see Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 2 Lloyd's Rep 65); the award was tainted by illegality (*Soleimany v Soleimany* [1998] 3 WLR 811); the underlying agreement was contrary to principles of EU law, in particular competition law as set out in Articles 101 and 102 of the TFEU (*Eco Swiss China Time Ltd v Benetton International NV* Case C-126/97 [1999] ECR I-3055); and the award was unclear as to the obligations imposed on the parties (*Tongyuan (USA) International Trading Group v Uni-Clan Ltd*) (2001, unreported, 26 Yearbook of Commercial Arbitration 886). In a recent case (*National Iranian Oil Company v Crescent Petroleum Company International Ltd* [2016] EWHC 1900 (Comm)), the English High Court clarified that the enforcement of a contract procured by bribery would not be contrary to public policy, but the enforcement of a contract to pay a bribe would be.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Although it is not addressed by the 1996 Act, the English courts have held that arbitral proceedings in England and Wales are confidential. The most accepted explanation is that there is an implied duty of confidentiality in all arbitration agreements, which is said to arise from the essentially private nature of arbitration (*Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184).

Both the parties and the tribunal are required to maintain the confidentiality of the hearing, the pleadings, the documents generated during the hearing, and the award. There is no clear authority on whether the existence of an arbitration and the identity of the parties to the arbitration are confidential.

There are also certain exceptions to the obligation of confidentiality described above, including: where the parties have agreed that the proceedings will not be confidential; where disclosure is reasonably necessary to establish or protect a party's legal rights; where disclosure is in the interests of justice; and where disclosure of documents is required by law (*Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184). These exceptions to the obligation of confidentiality are most often relevant with regard to the arbitral award: for example, a party may have to disclose the award to the court when bringing recognition and enforcement proceedings.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

A party to whom documents (or other information) were disclosed in arbitral proceedings is precluded by the implied duty of confidentiality from referring to or relying on that information in subsequent proceedings. However, as noted in question 12.1, there are exceptions to the duty of confidentiality.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The parties are free to agree the scope of the tribunal's power to grant remedies (1996 Act, section 48(1)). Sections 48(3) to (5) set out the powers of the tribunal in the absence of any agreement to the contrary:

- First, the tribunal may make a declaration as to any matter to be determined in the proceedings (section 48(3)).
- Second, the tribunal is permitted to order the payment of a sum of money, in any currency (section 48(4)). The tribunal does not have an unfettered discretion to decide the currency of an award. Where the proper currency cannot be discerned from the parties' contract, the damages should be calculated in the currency in which the loss was felt by the claimant or which most truly expresses his or her loss (*Milan Nigeria Ltd v Angeliki B Maritime Company* [2011] EWHC 892 (Comm)).
- Third, under section 48(5), the tribunal has the same powers as the court to order: (i) a party to do or refrain from doing anything; (ii) specific performance of a contract (other than a contract relating to land); and (iii) the rectification, setting aside or cancellation of a deed or document. For these purposes, the arbitral tribunal only has those powers that are exercisable by both the county court and the High Court. *See* 1996 Act, section 105(1). However, it is an open question whether a tribunal could make orders such as freezing orders (discussed but not decided in *Kastner v Jason* [2004] EWCA Civ 1599).

English law does not allow punitive damages (called "exemplary damages" under English law) to be awarded for breach of contract, but does rarely permit the award of exemplary damages for some tortious claims. Therefore, if the parties' agreement is governed by English law, exemplary damages can only be awarded in limited circumstances.

Some foreign laws permit punitive damages to be awarded in a wider range of circumstances – in particular, US law permits the award of triple damages for breach of anti-trust and certain other laws. It is possible that awards of multiple damages are contrary to English public policy and that an arbitral tribunal seated in England and Wales would refuse to award them on that basis. (In *Jones v Jones* [1889] LR 22 QBD, an English court refused to award multiple damages, and the Protection of Trading Interests Act 1980 prevents an English court from enforcing a judgment for multiple damages.) (*Cf. Pencil Hill Ltd. v US Citta di Palermo Spa* [2016] EWHC 71 (QB), which held that the English rule against enforcing penalty clauses in a contract was not a sufficient reason to refuse enforcement of an award under the New York Convention.)

13.2 What, if any, interest is available, and how is the rate of interest determined?

The 1996 Act provides that parties are free to agree on the powers of the tribunal to award interest (section 49(1)). In the absence of agreement by the parties, the powers set out in sections 49(3) and 49(4) apply.

Section 49(3) empowers the tribunal to award pre-award interest. Pre-award interest can be awarded on a simple or compound basis, from such dates, at such rates, and with such rests as the tribunal considers meet the justice of the case. Interest can be awarded on the whole or part of any amount awarded by the tribunal. The tribunal has a similar power with regard to amounts outstanding at the outset of the arbitral proceedings but paid before the award was made.

Section 49(4) empowers the tribunal to award post-award interest on any unpaid amount. Once again, the tribunal has full discretion to decide the rates and rests of such an award as it considers to meet the justice of the case.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The 1996 Act provides that the tribunal may make an award allocating the costs of the arbitration between the parties (section 61). These costs include: the arbitrators' fees and expenses (section 59(1)(a)); the fees and expenses of any arbitral institution (section 59(1)(b)); and the legal or other costs of the parties (section 59(1)(c)).

With one exception, the parties are entitled to reach an agreement with regard to the costs of any arbitral proceeding (section 61(1)). The exception is that the parties may not agree that one party will

pay the costs of the arbitration regardless of the outcome, unless this agreement was entered into after the dispute in question has arisen (section 60). In the event that no agreement has been reached, the arbitral tribunal shall make an award of costs on the basis that costs should "follow the event" (i.e., the successful party will be entitled to its costs), unless it considers such an award inappropriate in the circumstances of the case (section 61(2)).

In practice, a tribunal may treat interim steps or applications separately when awarding costs, potentially resulting in an unsuccessful party recovering its costs in relation to an unnecessarily expensive and onerous interim step in the proceedings taken by the successful party.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Payment of tax is a personal matter for the party to whom damages are paid. If an arbitral award relates to income, it will be subject to income tax or corporation tax along normal principles. If it relates to capital, the position is more complex. Where damages are derived from an underlying asset, they will be taxed as if the underlying asset has been sold. Where damages do not relate to an underlying asset, the first £500,000 will be tax-exempt, after which any further exemptions must be sought from HMRC (Extra Statutory Concession, D33).

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are a number of means by which third parties – including lawyers – can fund claims under the law of England and Wales. These include conditional fee arrangements, damages-based agreements (another term for contingency fee arrangements) and third-party funding.

A conditional fee arrangement ("CFA") allows a lawyer to charge on a "no win, no fee" basis. The lawyer agrees to charge the client nothing if he is unsuccessful, while obtaining an uplift on his or her usual fee (a success fee) if he or she is successful. As a consequence of recent rule changes (the so-called "Jackson reforms"), it is no longer possible for a costs award made in "proceedings" to include the payment of a success fee under a conditional fee arrangement. This restriction on the recoverability of costs appears to apply to arbitrations (see section 58(A)(4) and (6) of the Courts and Legal Services Act 1990, as amended).

Following the Jackson reforms, parties can also enter into contingency fee agreements (known in England as "damages-based agreements" or "DBAs"). A DBA allows the lawyer to recover a percentage of the client's damages if the client is successful in the case.

The use of third-party funding is permitted in England and Wales (*Arkin v Borchard Line* [2005] 1 WLR 3055), and there are a number of third-party funders active in the market. In a recent case (*Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm)), the High Court upheld an arbitrator's decision to award a party its third-party funding costs as part of an award on costs.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

The United Kingdom (which incorporates England and Wales) signed and ratified the Washington Convention on 26 May 1965 and 19 December 1966, respectively. The Washington Convention ultimately entered into force in the United Kingdom on 18 January 1967.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

The United Kingdom has entered into more than 100 BITs, of which 94 are currently in force. The United Kingdom has also been a signatory to the Energy Charter Treaty since 16 December 1997.

Since the entry into force of the Treaty of Lisbon on 1 December 2009, the European Commission has been responsible for negotiating and concluding BITs with states outside the European Union on behalf of all EU Member States. All EU Member State BITs with non-EU states signed prior to 1 December 2009 will remain in force until replaced by new treaties between the EU and the relevant state(s) (*see* EU Council Regulation 1219/2012). As discussed below in question 15.1, the United Kingdom has now begun the process of leaving the EU, after which time it may regain competence to conclude BITs.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The most recent version of the United Kingdom's model BIT was published in 2008. Key elements of United Kingdom BITs include provisions for the fair, equitable and non-discriminatory treatment of investments, compensation for expropriation, transfer of capital and returns, and access to arbitration to resolve disputes.

The main objective of the United Kingdom's model BIT is to provide legal protection for British foreign property in a rapidly developing international context. It is similar to the model BITs of other European countries. Its language emphasises investment protection rather than the liberalisation of the investment policies of developing countries.

Of particular note in the UK model BIT is Article 3 which is the "most favoured nation" article. Article 3.3 stipulates which articles of the BIT the most-favoured-nation provision applies to, and includes the dispute-settlement provision of the BIT.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Under the State Immunity Act 1978, a state is entitled to immunity of two different kinds. First, immunity from adjudication protects a state from being subject to the jurisdiction of the English courts.

Second, immunity from enforcement protects a state from having a writ of enforcement executed against it by an English court. The Act recognises a number of exceptions to immunity from adjudication, but only two exceptions to immunity from enforcement.

In the context of arbitration, the most important exception to immunity from adjudication is provided by section 9. Where a state has agreed in writing to submit disputes to arbitration, it is not entitled to immunity from adjudication with respect to proceedings in the English courts which relate to the arbitration (see *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [2006] EWCA Civ 1529). A state would therefore not be immune from the adjudicative jurisdiction of the English courts with respect to court proceedings that related to an arbitration under a bilateral investment treaty to which the state was a party. (*See PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm) for a recent discussion of these principles.)

The only exceptions to immunity from enforcement are where: (i) the state has waived its immunity from enforcement in writing (section 13(3)); and (ii) the property of the state is in use for commercial purposes (section 13(4)). A state will only waive immunity from injunctions or orders of specific performance by giving its written consent.

A mere agreement by the state to submit to the jurisdiction of a national court is not sufficient to waive immunity from execution: the language used by the state must make it clear that it has waived immunity from execution (section 13(3)). (This and other issues relating to state immunity were recently explored in *Pearl Petroleum Company Ltd. v The Kurdistan Regional Government of Iraq* [2015] EWHC 3361 (Comm).) Historically, English and international courts have been reluctant to deem state assets to be used exclusively for commercial purposes (*Alcom Ltd v Republic of Colombia and others* [1984] AC 580). *L R Avionics Technologies Ltd v Federal Republic of Nigeria* [2016] EWHC 1761 (Comm) is a recent example where such an application was unsuccessful.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

London continues to be one of the leading centres for international arbitration. A 2018 survey carried out by Queen Mary University of London found that London was the most favoured arbitral seat in the world (based on a survey of 922 respondents and 142 personal interviews). The caseload of the LCIA continues to be robust (with 303 arbitrations started in 2016), and London is frequently chosen as the seat for arbitrations under other institutional rules and for *ad hoc* arbitration.

On 29 March 2017, the United Kingdom triggered Article 50 of the Treaty on European Union, commencing a process whereby the United Kingdom will leave the EU ("Brexit"). At the time of writing, the United Kingdom is scheduled to leave the European Union on 31 October 2019 (though there remains considerable uncertainty about whether it will do so on that date).

After Brexit, there is unlikely to be any change to English arbitration law and London is likely to remain attractive as an arbitral seat for the following reasons:

- First, the United Kingdom will remain a signatory to the New York Convention and the pro-enforcement attitude of the courts will continue.
- Second, the legislation governing arbitration will remain unchanged as this is domestic rather than European.
- Third, Brexit will not materially change the substantive content and application of English contract law and commercial law as these are largely unaffected by EU law. There is therefore no reason why English law as a governing law should not remain a popular choice for parties in their international contracts.
- Fourth, Brexit may make arbitration more attractive for commercial parties as court judgments will no longer be enforceable under the Brussels I Regulation (recast), Regulation 1215/2012 after Brexit is completed.
- Fifth, Brexit may mean that English courts can issue anti-suit injunctions to restrain parties from bringing proceedings before courts of a European Member State (as is currently prohibited by *Allianz SpA v West Tankers Inc.*, Case C-185/07 [2009] 1 AC 1138, discussed in question 7.4).
- Sixth, the UK's obligations under EU law may sometimes conflict with its obligations under arbitration-related treaties (such as the Washington Convention) but this will no longer be the case (*see Micula & Ors v Romania (Rev 1)* [2018] EWCA Civ 1801).

In the Queen Mary survey referred to above, more than half of respondents agreed that Brexit would have no impact on London's attractiveness as a seat of arbitration. There was, however, a significant minority (37%) that considered that London's position would be adversely affected because of (among other things) legal uncertainty and the possibility that London's reputation as a commercial centre will diminish.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The Law Commission of England and Wales continues to consider and consult upon potential changes to the 1996 Act in order to retain London's competitive edge as a seat for arbitration. For example, the Law Commission considered whether the 1996 Act should be amended expressly to permit tribunals to determine preliminary issues of fact or law akin to the summary judgment procedures applicable in English court proceedings and to allow for the arbitration of trust disputes. However, there are no immediate proposals for change in the near future, as arbitration law was left out of the most recent programme for reform.

The LCIA's current rules apply to arbitrations commenced after 1 October 2014. These rules have introduced the following changes (among others):

- the arbitral tribunal has the right to deny a party's request to change its counsel in the event that the intended change is likely to compromise the composition of the tribunal or the finality of the award;
- there are new guidelines for the conduct of legal representatives and the tribunal has a wide discretion to impose sanctions for violations;
- the new rules contain emergency arbitrator provisions;
- as well as declaring that they are independent and impartial, prospective arbitrators are required to declare that they are ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration;
- the LCIA Court has the power to revoke an arbitrator's appointment if he or she fails to conduct the arbitration with reasonable efficiency, diligence and industry;
- the tribunal is required to render its final award as soon as reasonably practical after the final submissions by the parties, and to do so in accordance with a timetable that must be notified to the parties and the registrar; and
- the LCIA Court and tribunals have enhanced powers to consolidate arbitrations.

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