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England & Wales: Law & Practice

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ENGLAND & WALES

Law and Practice

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Wilmer Cutler Pickering Hale and Dorr LLP offers one of the world's largest and most experienced international arbitration and dispute resolution practices. The international arbitration group has been involved in more than 650 proceedings in recent years. Lawyers have successfully represented clients in a number of the largest institutional arbitrations and several of the most significant ad hoc arbitrations to arise in the past decade. The multinational team consists of nearly 70 lawyers, all of whom principally practise international dispute resolution. In addition to representing clients as counsel, many lawyers regularly sit as arbitrators in international arbitrations. The practice covers commercial and investment arbitration under the rules of all leading arbitral institutions and ad hoc arbitrations seated in a wide range of jurisdictions. It has represented individuals, companies, states and state entities. Lawyers are practised in handling disputes under a wide range of international arbitration centres, and also have extensive experience with more specialised forms of institutional arbitration and ad hoc arbitrations.

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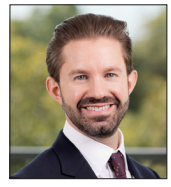

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1. General

1.1 Prevalence of Arbitration

Arbitration is often used in England and Wales as an alternative to litigation. A 2021 survey by Queen Mary University of London found that London remains the most favoured arbitral seat in the world. The London Court of International Arbitration (LCIA) has confirmed that that it had 333 referrals in 2022, with its caseload increasing by 60% in the past ten years. Non-UK parties account for around 88% of its users.

1.2 Key Industries

According to the LCIA's 2022 annual casework report, the top three industry sectors dominating the LCIA's caseload are banking and finance, energy and resources, and transport and commodities (together representing 65% of all cases). These are the most likely growth areas for international arbitration. Significantly, transport and commodities cases dominated the LCIA's caseload, with the percentage of cases in 2022 more than double the percentage in 2021.

1.3 Arbitral Institutions

The most commonly used institutions for international arbitration in England and Wales are the International Chamber of Commerce (ICC) and the LCIA (see **1.1 Prevalence of Arbitration**).

1.4 National Courts

There are no specific courts designated to hear disputes related to arbitration. Arbitration claims under the Arbitration Act 1996 (the "1996 Act") are most frequently started in the Admiralty and Commercial Courts or the Technology and Construction Court.

2. Governing Legislation

2.1 Governing Legislation

England and Wales have not adopted the UNCITRAL Model Law (the "Model Law"). Instead, international arbitration in England and Wales is governed by the 1996 Act, which applies to all domestic and international arbitrations where the seat of the arbitration is England, Wales or Northern Ireland.

Although the 1996 Act is strongly influenced by the Model Law, one important difference is that the Model Law only applies to international commercial arbitration, whereas the 1996 Act applies to all forms of arbitration.

2.2 Changes to National Law

There have not been any changes to the 1996 Act in the past year.

On 22 September 2022, the Law Commission issued its first consultation paper and considered a number of potential amendments to the 1996 Act. The Law Commission's suggestions include:

- barring challenges to arbitrator appointments and rendering parties' agreements unenforceable if they're based on protected characteristics defined in the Equality Act 2010;
- strengthening arbitrator immunity from costs for court applications;
- introducing a non-mandatory statutory summary judgment-style procedure; and
- redefining Section 67 challenges as appeals, rather than re-hearings.

The Law Commission further opined that Section 44 should allow courts to issue orders supporting arbitration against third parties, and that parties can seek court's assistance even though

they have agreed to a regime under which emergency arbitrators can be appointed.

In its second consultation paper published in March 2023, the Law Commission considered three areas of potential reforms to the 1996 Act. It advocated that the law of the arbitration agreement should be the law of the seat and highlighted the complications stemming from the decision in Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38, which held that the proper law governing an arbitration agreement should be the law of the contract. Further, having received a response to the first consultation paper, the Law Commission revised its Section 67 proposal and moved away from the "appeal" terminology. Instead, it proposed to particularise the limits to a Section 67 challenge in the rules of court, namely:

- the court should not entertain any new grounds of objection, or any new evidence, unless they could not have been presented to the tribunal with due diligence;
- evidence should not be reheard, save exceptionally in the interests of justice; and
- a Section 67 challenge should be allowed only where the tribunal's decision was wrong.

Finally, in relation to discrimination, the Law Commission opined that the simplest approach might be to prohibit discrimination generally in an arbitration context.

The Law Commission will publish its final report after considering the response to its second consultation paper.

3. The Arbitration Agreement

3.1 Enforceability

There are no formal legal requirements for an arbitration agreement to be enforced under the laws of England and Wales. However, Section 5 of the 1996 Act stipulates that Part (1) of the 1996 Act (Sections 1–84) only applies where the arbitration agreement is in writing. Given that Part (1) contains mandatory and non-mandatory provisions that facilitate the arbitration process, it is highly advisable to use a written arbitration agreement. A party that wishes to rely on an oral arbitration agreement would only be able to rely on the old common law to govern its arbitration.

The 1996 Act does not impose any strict requirements on the content of an arbitration agreement. Instead, Section 6(1) merely stipulates that the parties must agree "to submit to arbitration present or future disputes (whether they are contractual or not)".

Under Section 6(2) of the 1996 Act, it is possible for a contract to incorporate by reference an arbitration agreement that is contained in a separate document.

3.2 Arbitrability

The 1996 Act stipulates in Section 6(1) that both contractual and non-contractual disputes may be submitted to arbitration. Beyond this, it does not define nor describe the matters that are capable of settlement by arbitration. Instead, the Section 81(1)(a) of the 1996 Act provides that common law governs whether or not matters are capable of settlement by arbitration.

At common law, the English courts have placed emphasis on the importance of upholding party autonomy to agree to arbitration to resolve their disputes. Consistent with this:

- English courts have held that a wide range of non-contractual disputes (including tort, competition, intellectual property and certain statutory claims) are capable of settlement by arbitration; and
- there is a strong assumption when construing an arbitration clause under English law that the parties intended to have disputes arising out of their relationship decided in the same forum (Fiona Trust & Holding Corporation v Privalov (2007) UKHL 40).

In practice, this means that arbitration agreements are interpreted broadly to encompass non-contractual as well as contractual disputes.

There are, however, a limited number of disputes that are not arbitrable, including:

- criminal, planning and certain family law matters;
- insolvency proceedings subject to the statutory regime set out in the Insolvency Act 1986; and
- certain employment disputes, in which an employee has a statutory right to be heard in front of an employment tribunal.

Whether certain statutory claims are capable of settlement by arbitration remains open to debate. This question does not lend itself to a general answer: each specific statutory claim will address the issue differently. On one hand, the Court of Appeal has held that a shareholder's unfair prejudice claim brought under Section 994 of the Companies Act 2006 is capable of settlement by arbitration (Fulham Football Club (1987) Ltd v Richards (2011) EWCA Civ 855). On the other hand, arbitrators have no power to order the winding-up of a company (Salford Estates (No 2) Ltd v Altomart Ltd (2014) EWCA Civ 1575).

While the arbitrability of trust disputes is sanctioned by legislation in certain offshore jurisdictions (eg, Section 91A of the Trustee Amendment Act 2011 in the Bahamas), it is not clear whether such disputes would be arbitrable in England and Wales.

Finally, the High Court has found that even if elements of a dispute raise an issue that is not arbitrable, the arbitration agreement will not be invalidated and the parties' dispute as a whole will still be subject to the arbitration agreement (Aqaba Container Terminal (PVT) Co v Soletanche Bachy France SAS (2019) EWHC 471 (Comm)).

3.3 National Courts' Approach

The approach of the English courts with respect to the enforcement of arbitration agreements is broadly pro-enforcement. English law will endeavour to uphold agreements to arbitrate, where possible. This pro-arbitration stance is reflected in English law's approach to the construction of arbitration agreements.

The English courts tend to construe an arbitration clause widely and generously to the party that seeks to rely on it. Under English law, the threshold for finding that an arbitration clause in a commercial contract is void for uncertainty is a high one. In Adactive Media Inc v Ingrouille (2021) EWCA Civ 313, for instance, a contract contained both an arbitration clause and an exclusive jurisdiction clause for California courts and this appeared to be inconsistent. The court held that the arbitration agreement was enforceable by finding a way to reconcile the clauses; it held that the two clauses dealt with different aspects of jurisdiction.

This decision illustrates how English courts will strive to give an arbitration agreement meaning. The courts rarely hold that an agreement is

pathological – and, therefore, not enforceable – because it is impossible to understand what the parties' agreed. This approach has recently been endorsed by the Supreme Court (Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb (2020) UKSC 38).

Finally, as noted above, there is a strong assumption when construing an arbitration clause under English law that the parties intended to have disputes arising out of their relationship decided by the same tribunal, unless there is clear language to the contrary (Fiona Trust & Holding Corporation v Privalov (2007) UKHL 40; Helice Leasing SAS v PT Garuda Indonesia (Persero) TBK (2021) EWHC 99 (Comm)).

3.4 Validity

Pursuant to Section 7 of the 1996 Act, an arbitration agreement is separable from the main agreement into which it has been incorporated (Fiona Trust & Holding Corporation v Privalov (2007) UKHL 40). As such, an arbitration agreement generally survives the invalidity, inexistence or ineffectiveness of the main agreement. However, where the dispute revolves around the formation of the contract-concerned with offer and acceptance and intention to create legal relations it may impeach the arbitration clause (DHL Project and Chartering Ltd v Gemini Ocean Shipping Co Ltd [2022] EWCA Civ 1555).

The Supreme Court has addressed the choice of law rules that govern the validity of arbitration agreements (Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb (2020) UKSC 38). The Supreme Court held that, where the parties have not expressly or impliedly chosen the law that governs the arbitration agreement but have chosen the law applicable to the main contract, the latter choice of law will generally apply to the arbitration agreement. The Supreme Court also held that the choice of a different seat does not, of itself, displace such a presumption. In Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) (2021) UKSC 48, the Supreme Court confirmed that the principles in Enka also apply to the enforcement of an arbitration award rendered under the New York Convention.

4. The Arbitral Tribunal

4.1 Limits on Selection

The 1996 Act gives the parties broad autonomy to agree on the procedure for appointing arbitrators. The arbitration agreement allows the parties to agree on:

- the procedure to be followed for the constitution of the tribunal;
- the number of arbitrators (including whether there is an umpire or chairperson); and
- any qualifications required from the arbitrators (Section 15).

(The arbitrators must, of course, consent to their appointment before it is valid.)

Although the parties have broad autonomy to determine the process for selecting arbitrators, the court retains the power to remove arbitrators in certain circumstances – see **4.4 Challenge and Removal of Arbitrators**.

4.2 Default Procedures

The usual situation is that the parties' arbitration agreement sets out the procedure that must be followed for the constitution of the tribunal. If it does not, Sections 16–18 of the 1996 Act set out a series of default mechanisms for the appointment of arbitrators. Depending on the number of arbitrators agreed by the parties, these include the default provisions for the appointment of:

- a sole arbitrator – by joint appointment of the parties no later than 28 days after service by one of the parties of a request to do so (Section 16(3));
- a tribunal comprising two arbitrators – by each party appointing one arbitrator within 14 days of a written request by one of the parties to do so (Section 16(4));
- a tribunal comprising three arbitrators – by each party appointing one arbitrator within 14 days of a written request by one of the parties to do so, and the two party-appointed arbitrators then appointing a chairperson (Section 16(5)); and
- a tribunal comprising two arbitrators and an umpire – as with three, subject to differences with regard to the timing of the umpire's appointment (Section 16(6)).

Where the parties have not agreed on the number of arbitrators, the default position is that the tribunal will consist of a sole arbitrator (Section 15(3)).

An alternative situation is one in which the parties have included a mechanism for appointing the arbitral tribunal in their arbitration agreement, but that mechanism fails. In these circumstances, the 1996 Act provides the English courts with a number of powers that either party can apply to exercise, including:

- a power to give directions when making appointments, which includes delegating its power to make the necessary appointment to an arbitral institution if it thinks fit (Section 18(3)(a), Chalbury McCouat International Ltd v PG Foils Ltd (2010) EWHC 2050 (TCC));
- a power to direct that the tribunal be constituted by the appointments made (Section 18(3)(b));
- a power to revoke any previous appointments (Section 18(3)(c)); and
- a power to make the necessary appointments itself (Section 18(3)(d)).

Furthermore, unless the parties agree otherwise, where each of the two parties has to appoint an arbitrator and one party refuses to do so – or fails to do so within the time specified – the other party may give notice in writing to the party in default that it proposes to appoint its arbitrator to act as sole arbitrator (Section 17(1)).

4.3 Court Intervention

There are two ways in which the English courts can intervene in the selection of arbitrators.

- First, the court can exercise certain powers to appoint under the default procedure referred to in **4.2 Default Procedures**.
- Second, the court can intervene where the parties have included a mechanism for appointing the arbitral tribunal in their arbitration agreement but that mechanism fails. In these circumstances, the 1996 Act provides the English courts with a number of powers that either party can apply to the court to exercise, as described in **4.2 Default Procedures**.

4.4 Challenge and Removal of Arbitrators

The provisions governing the challenge and removal of arbitrators are found in Section 24 of the 1996 Act. Pursuant to that Section, a party may apply to the English courts to remove an arbitrator and the court has the power to remove an arbitrator on several grounds, including:

- where there are justifiable doubts about their impartiality;
- if an arbitrator does not possess the qualifications required by the parties' arbitration agreement;

- physical or mental incapability; or
- if an arbitrator fails to conduct the proceedings properly or to use all reasonable dispatch in conducting the proceedings.

While the challenge is pending, the tribunal may continue the arbitral proceedings and make an award (Section 24(3)). The 1996 Act grants arbitrators who are challenged an opportunity to be heard (Section 24(5)).

For a recent example of the application of Section 24 of the 1996 Act, see Newcastle United Football Co Ltd v Football Association Premier League Ltd (2021) EWHC 349 (Comm), in which an arbitrator was unsuccessfully challenged on grounds that they had previously advised the respondent about an issue related to the dispute.

4.5 Arbitrator Requirements

The 1996 Act contains a requirement for arbitrators to act fairly and impartially between the parties (Section 33(1)). The courts apply an objective test to the issue of impartiality. The court will ask whether a fair-minded and informed observer would conclude that there was a real possibility of bias (Koshigi Ltd v Donna Union Foundation (2019) EWHC 122 (Comm)) (Halliburton Company v Chubb Bermuda Insurance Ltd (2020) UKSC 48).

When applying this test, the English courts are not bound by the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines"). (These Guidelines are only binding if agreed upon by the parties or where the tribunal has adopted the rules in question.) However, the IBA Guidelines will be taken into account by the English courts as persuasive authority.

The 1996 Act does not contain provisions equivalent to Articles 12 and 13 of the Model Law; as such, it does not require the disclosure of potential conflicts. However, it is acknowledged best practice for arbitrators to disclose – at the earliest opportunity – any matters that could reasonably be deemed to have a bearing on their impartiality. A failure to disclose will give rise to a ground to challenge the arbitrator, either by applying to the relevant arbitral institution or to the court.

The Supreme Court recently considered when an arbitrator should make disclosure of circumstances that may cause justifiable doubts about their impartiality (Halliburton Company v Chubb Bermuda Insurance Ltd (2020) UKSC 48). In that case, the appointment of an arbitrator was challenged on the basis that the arbitrator had failed to disclose that he had been appointed as an arbitrator in two related disputes, and this failure gave rise to "justifiable doubts as to his impartiality".

The Supreme Court held that there may be circumstances where the acceptance of multiple appointments involving a common party and the same or overlapping subject matter gives rise to an appearance of bias. Whether it does so will depend on the facts of the case and, in particular, the customs and practice in the relevant field of arbitration. Based on the facts of the case, the Supreme Court concluded that the arbitrator had a legal duty to disclose the appointments in related disputes. However, the failure to disclose did not ultimately give rise to apparent bias for several reasons, including the fact that there was no prospect of the appointing party gaining any advantage by reason of overlapping references.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

As noted in **3.2 Arbitrability**, the 1996 Act provides that common law governs which matters are not capable of settlement by arbitration. At common law, a wide range of non-contractual disputes are capable of settlement by arbitration.

As also noted in **3.2 Arbitrability**, there are a limited number of disputes that are not arbitrable. There is also an open question as to the extent to which mandatory EU law questions and certain statutory claims can be settled by arbitration.

5.2 Challenges to Jurisdiction

Section 30(1) of the 1996 Act provides that, unless agreed otherwise, the tribunal has the competence to rule on its own substantive jurisdiction. This comprises the right to rule on:

- whether there is a valid arbitration agreement;
- whether the tribunal has been properly constituted; and
- what matters have been submitted to arbitration in accordance with the arbitration agreement.

5.3 Circumstances for Court Intervention

A court can address issues of jurisdiction of an arbitral tribunal in three circumstances.

First, Section 32 of the 1996 Act allows a party to apply to the court for the determination of a preliminary point of jurisdiction. Such an application can only be made:

- where all the parties to the arbitral proceedings agree in writing to refer the matter to the court; or
- where the tribunal gives permission to apply to court, and the court is satisfied that:
  (a) the application will result in a saving of costs;
  (b) the application was made without delay; and
  (c) there is good reason why the matter should be decided by the court.

These criteria will only be met in exceptional circumstances (VTB Commodities Trading Dac v JSC Antipinsky Refinery (2019) EWHC 3292 (Comm)). While the court is considering such a preliminary question of jurisdiction, the arbitration proceedings may continue and an award be granted (Section 32(4)).

Second, Section 67 of the 1996 Act allows a party to challenge an arbitral award on grounds of lack of substantive jurisdiction. The court will review de novo the tribunal's jurisdiction by way of complete rehearing and will not be bound by the tribunal's reasoning (see **11.2 Excluding/Expanding the Scope of Appeal**).

Third, under Section 72 of the 1996 Act, a party that does not take part in the proceedings can apply to the court for a declaration or injunction to restrain arbitration proceedings by challenging:

- the validity of an arbitration agreement;
- whether the arbitral tribunal has been properly constituted; or
- what matters have been referred to arbitration in accordance with the arbitration agreement.

It should be noted that the right to object to the substantive jurisdiction of the tribunal can be lost if a party takes part or continues to take part in proceedings without raising an objection (Section 73, 1996 Act). For a recent discussion on the operation of Section 73, see National Iranian Oil Company v Crescent Petroleum Company

International Ltd and anor [2022] EWHC 2641 (Comm), where the High Court held a party to be not prevented from presenting its Section 67 challenge by not raising an objection in front of the tribunal.

5.4 Timing of Challenge

A party can go to court to challenge the jurisdiction of the tribunal at any time. As noted in **5.3 Circumstances for Court Intervention**, a party can both seek a determination of a preliminary question of jurisdiction and challenge the award for lack of substantive jurisdiction (although such a challenge must be brought within 28 days of the award being rendered).

A party that does not participate in the arbitral proceedings may also challenge the jurisdiction of the tribunal at any point.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

As described in more detail in **11.1 Grounds for Appeal**, the standard of review under a Section 67 challenge to the jurisdiction of the tribunal is de novo. The court will review the tribunal's jurisdiction by way of complete rehearing, without being bound by the tribunal's reasoning (Dallah Real Estate & Tourism Holding Co v Government of Pakistan (2010) UKSC 46).

5.6 Breach of Arbitration Agreement

A party may apply for a stay of proceedings where another party commences litigation in the courts in England and Wales in breach of an arbitration agreement (Section 9(1), 1996 Act). The burden of proof is on the applicant to establish the existence of an arbitration clause and that the clause covers the subject matter of the dispute. If this is satisfied, the burden of proof shifts to the party that commenced court proceedings to show that the arbitration agreement is null and void, inoperative or incapable of being performed (Joint Stock Company "Aeroflot Russian Airlines" v Berezovsky (2013) EWCA Civ 784).

A party may also apply to an English-seated tribunal for an anti-suit injunction to restrain court proceedings brought in breach of the parties' arbitration agreement, including a mandatory injunction requiring a party to take active steps to terminate proceedings already commenced (VTB Bank v Mejlumyan (2021) EWHC 3053 (Comm)).

As noted in **2.1 Governing Law**, Section 9 only grants the court power to stay the proceedings – it does not require the court to refer the parties to arbitration.

A party must challenge the court's jurisdiction within the time limit for acknowledging service of the claim form, which is generally 14 days. The right of a stay may also be lost where a party seeking the stay has taken steps in court proceedings to answer the substantive claim. This can include participating in a case management conference and inviting the court to make related orders (Nokia Corp v HTC Corp (2012) EWHC 3199 (Pat)).

The court also has an inherent jurisdiction to stay proceedings even where Section 9 of the 1996 Act is not satisfied. The court has exercised this discretion where there is a dispute as to the validity or scope of the arbitration agreement (Golden Ocean Group v Humpuss Intermoda Transportasi (2013) EWHC 1240 (Comm)).

If a party commences litigation in another jurisdiction (other than a member state of the EU or contracting state to the Lugano Convention), the party against whom proceedings are com-

menced can apply to the English courts for an anti-suit injunction. There is no requirement that an arbitration is seated in England and Wales for the court to grant an anti-suit injunction to protect arbitration proceedings. In practice, the English courts are far more likely to grant an anti-suit injunction where the arbitration is seated in this jurisdiction because the availability of an anti-suit injunction is normally a matter for the supervisory court of the seat of the arbitration (Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb (2020) UKSC 38).

5.7 Jurisdiction Over Third Parties

English law places great emphasis on arbitration being a consensual process. Accordingly, English law does not permit a tribunal to assume jurisdiction over non-parties (Kabab-Ji SAL v Kout Food Group (2021) UKSC 48). There is nothing to prohibit a tribunal from inviting non-parties to produce documents, for example, but the tribunal does not have the power to compel a non-party to do so. Instead, the court has limited powers to make such orders.

Common ways of seeking to bind a non-signatory include agency, the group of companies doctrine, or piercing the corporate veil. In proceedings before English courts, arguments based on agency are most likely to succeed – the English courts have regularly held that a third party may be bound to an arbitration agreement through principles of agency law. One such example was Filatona Trading Ltd v Navigator Equities Ltd (2020) EWCA Civ 109, in which the court of appeal held that a disclosed principal of a signatory to an arbitration agreement was entitled to exercise rights under that agreement.

The English courts have been clear that the group of companies doctrine "forms no part of English law" (Peterson Farms Inc v C & M Farming Ltd (2004) EWHC 121 (Comm)). Further, the Supreme Court has held that the circumstances in which English law will be willing to pierce the corporate veil are extremely rare (VTB Capital Plc v Nutritek International Corp (2013) UKSC 5).

In certain circumstances, a third party will acquire rights under a contract pursuant to the Contract (Rights of Third Parties) Act 1999. If such a contract contains an arbitration agreement, a third party that has acquired these rights will have the right to insist on being sued in arbitration rather than in court (Nisshin Shipping v Cleaves & Co (2003) EWHC 2602 (Comm)). Equally, a third party that wishes to enforce its rights under such a contract would have to do so through arbitration (Section 8, Contract (Rights of Third Parties) Act 1999).

Consistent with the above, an arbitral award will not bind third parties, including parent companies of parties to an arbitration. The English Commercial Court recently rejected an argument that findings in an arbitration could be binding on the claimant (a party to the arbitration) against the parent company of another party to the arbitration (Vale SA v Steinmetz (2020) EWHC 3501 (Comm)).

6. Preliminary and Interim Relief

6.1 Types of Relief

The powers of a tribunal to grant preliminary or interim relief are set out in Sections 38 and 39 of the 1996 Act.

Section 38(1) provides that the parties are free to agree on the powers of the arbitral tribunal. Subject to contrary agreement, the arbitral tribunal has the power to:

- order a claimant to provide security for costs in the arbitration (Section 38(3));
- give directions relating to property that is the subject matter of the proceedings or about which any question arises in the proceedings (Section 38(4));
- direct a party or witness to be examined (Section 38(5)); and
- give directions for the preservation of evidence (Section 38(6)).

Section 39 provides that the parties are free to agree that the tribunal will have the power to order, on a provisional basis, any relief it would have the power to grant in a final award. For a recent discussion of Section 39, see EGF v HVF & Ors [2022] EWHC 2470 (Comm) where the High Court considered arbitrators' power to issue interim payment orders under UNCITRAL Rules. It stated that even though arbitrators may not have the power to grant interim remedies through an award under Article 34 of the UNCITRAL Rules, parties may expressly grant the tribunal such a power under Section 39.

In the absence of agreement to the contrary, an arbitral tribunal can only grant interim relief if the relief in question falls into one of the four categories set out above. However, the rules of many arbitral institutions provide for the granting of interim relief by the tribunal. By agreeing to arbitrate before one of these institutions, the parties will have agreed that the tribunal should be empowered to grant interim relief.

The 1996 Act does not, unless otherwise agreed, confer on the tribunal a power to grant an interim injunction to secure the sum in dispute. However, it is possible to seek a freezing injunction from the High Court (Section 44(2)(e)).

6.2 Role of Courts

Unless otherwise agreed by the parties, the court has the power to make orders in respect of those set out in Section 44 of the 1996 Act. The matters in which the court is empowered to grant an interim relief are:

- taking of evidence of witnesses;
- the preservation of evidence;
- orders relating to preservation, detention, inspection or sampling of the disputed matter;
- the sale of any goods; and
- the granting of an interim injunction.

Furthermore, in situations of urgency, the court is entitled (on the application of a party or proposed party to arbitral proceedings) to make such orders as it thinks necessary for the purpose of preserving evidence or assets.

However, the court's power to order provisional measures under Section 44 of the 1996 Act is limited. Once the tribunal is constituted, the court will only make interim orders with the permission of the tribunal or where the tribunal has no power or is unable to act effectively (Section 44(5)).

The powers of the court to grant interim relief do not extend to International Centre for Settlement of Investment Disputes (ICSID) arbitrations, where any relief should be sought from the tribunal (ETI Euro Telecom International NV v Republic of Bolivia & Anor (2008) EWCA Civ 880).

The Court of Appeal has recently confirmed that the English courts have the power to make orders against non-parties under Section 44, for example, by ordering the taking of evidence from a non-party witness for the purpose of aiding

foreign arbitral proceedings (A & B v C, D & E (2020) EWCA Civ 409).

6.3 Security for Costs

Unless the parties agree otherwise, the tribunal has the power to order the claimant to provide security for costs (Section 38(2–3), 1996 Act). Costs for which security can be ordered include the costs of the arbitrators and the parties' own costs (Section 39, 1996 Act).

The current position under the 1996 Act is that security for costs is only available from the tribunal, with the court only ordering security in relation to challenges to an award made under Sections 67–69 of the Act.

7. Procedure

7.1 Governing Rules

The 1996 Act gives the parties autonomy to agree their own procedural rules. This is typically done by the parties incorporating a set of institutional rules that govern the procedure of the arbitration into the agreement. In the absence of an agreement by the parties, the default provision under the 1996 Act is for the tribunal to determine all procedural and evidential matters (Section 34).

7.2 Procedural Steps

The 1996 Act does not set out any mandatory procedural steps that are required by law. Instead, as noted in **7.1 Governing Rules**, the parties are given autonomy to agree on their own procedural rules.

The Act does, however, impose certain overarching principles, which must be observed when determining which procedure is followed. Most importantly, the 1996 Act imposes a "general duty" on the tribunal to act fairly and impartially so that each party is given a reasonable opportunity to put its case and deal with that of its opponent (Section 33(1)(a)).

The tribunal is also under an obligation to adopt procedures that avoid unnecessary delay and expense – and suit the circumstances of the particular case – in order to provide a fair means for the resolution of the dispute (Section 33(1)(b)). Section 33 is mandatory; it cannot, therefore, be excluded by agreement.

Furthermore, the 1996 Act places an obligation on the parties to do all things that are necessary for the proper and expeditious conduct of the arbitral proceedings (Section 40).

7.3 Powers and Duties of Arbitrators

As noted in relation to **7.2 Procedural Steps**, arbitrators have a general duty to act fairly and impartially, adopt procedures that avoid unnecessary delay and expense, and provide a fair means of resolving the dispute that is referred to them, as per Section 33 of the 1996 Act. Arbitrators are also under a duty to render an enforceable award.

In addition to the general powers granted to a tribunal under Section 38 of the 1996 Act (discussed in **6.1 Types of Relief**), a tribunal has the power under Section 56(1) to withhold an award for non-payment of its fees.

7.4 Legal Representatives

There are no particular qualifications or other requirements for legal representatives appearing in an arbitration that is seated in England and Wales. The 1996 Act simply provides that, unless the parties agreed otherwise, a party may be represented in proceedings "by a lawyer or other person chosen by [the party]" (Section 36).

Accordingly, foreign lawyers are free to appear without restriction, as are non-lawyers that are not qualified in any jurisdiction.

8. Evidence

8.1 Collection and Submission of Evidence

The procedural and evidential matters of arbitral proceedings seated in England and Wales are governed by Section 34 of the 1996 Act, which gives the tribunal a broad power to decide all such issues, subject to the right of the parties to agree any matter. Under Section 34(2), the tribunal has the power to decide:

- whether written statements of claim and defence are used and at what stage these should be supplied;
- whether any – and, if so, which – documents or classes of documents should be disclosed between and produced by the parties and at what stage of proceedings;
- whether evidence should be given orally at a hearing;
- whether to apply strict rules of evidence, including whether a document is protected from disclosure by privilege;
- whether – and to what extent – the tribunal should take the initiative in ascertaining the facts and the law; and
- whether – and to what extent – there should be oral or written evidence or submissions.

The tribunal's powers only apply to the parties involved in the arbitration. Hence, the tribunal cannot order a non-party to produce documents, or secure the attendance of witnesses. In such cases, the tribunal and/or the parties generally request the court to assist.

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.

8.2 Rules of Evidence

As noted in **8.1 Collection and Submission of Evidence**, Section 34 of the 1996 Act empowers the tribunal to decide all evidential matters, unless the parties agree otherwise. This power includes the right to determine:

- 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
- the time, manner and form in which such material should be exchanged or presented.

It should be noted that tribunals will often follow the IBA's Rules on the Conduct of the Taking of Evidence in International Arbitration rather than adopt the strict rules of evidence that apply to English court proceedings.

8.3 Powers of Compulsion

A tribunal has the power to order disclosure of documents by the parties (Section 34(2)(d), 1996 Act). However, a tribunal does not have the power to request the attendance of witnesses or order the production of documents by a third party.

A party to arbitral proceedings can (with the agreement of all the parties or the permission of the tribunal) apply to the court under Section 43 of the 1996 Act in order to obtain third-party disclosure or secure the attendance of a witness to produce documents or obtain oral testimony.

The English courts have confirmed that court orders for pre-action disclosure are not avail-

able if there is an arbitration agreement between the parties (Travelers Insurance Company Ltd v Countrywide Surveyors Ltd (2010) EWHC 2455 (TCC)).

9. Confidentiality

9.1 Extent of Confidentiality

The 1996 Act is silent on the issue of confidentiality. However, English courts have held that all arbitral proceedings seated in England and Wales are confidential. This conclusion is based on the implied duty of confidentiality, which derives from the essentially private nature of arbitration and, as such, exists in all arbitration agreements (Emmott v Michael Wilson & Partners Ltd (2008) EWCA Civ 184).

Pursuant to this implied duty of confidentiality, all constituent parts of an arbitral proceeding – including the pleadings, the hearing, the award and all documents produced and disclosed during the proceedings – are deemed confidential. Both the parties and the tribunal are under the implied obligation to preserve this confidentiality (Ali Shipping Corporation v Shipyard Trogir (1997) EWCA Civ 3054). Furthermore, it should be noted that 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.

There are certain exceptions to the confidentiality obligation. Most notably, parties are entitled to agree that the proceedings will not be confidential. The court of appeal in Emmott v Michael Wilson & Partners Ltd (2008) EWCA Civ 184 recognised three further exceptions. These are cases where disclosure is:

- in the interests of justice;
- ordered or permitted by the court; or
- required to establish or protect a party's legal rights.

In Manchester City Football Club Ltd v Football Association Premier League Ltd (2021) EWCA Civ 1110, the Court of Appeal ordered the publication of a High Court judgment rejecting Manchester City Football Club's challenges to an award under Sections 67 and 68 of the Act. The Court of Appeal held that publication was appropriate because it would not lead to the disclosure of any significant confidential information about a dispute in which there was public interest and where the subject matter had already been widely reported.

10. The Award

10.1 Legal Requirements

The parties are entitled to agree on the formal requirements for an award to be valid (Section 52(1), 1996 Act). In the absence of such agreement, the 1996 Act contains the following set of default formalities that apply:

- the award shall be in writing and signed by all the arbitrators or all those assenting to the award (Section 52(3));
- the award shall contain reasons for the award, unless it is an agreed award or the parties have agreed to dispense with reasons (Section 52(4)); and
- the award shall state the seat of the arbitration and the date when the award was made (Section 52(5)).

At common law, an award must also make a final determination of a particular issue (Brake v Patley Wood Farm (2014) EWHC 4192 (Ch)). The

1996 Act does not prescribe a time limit within which an award must be rendered. However, the tribunal is under an obligation to avoid "unnecessary delay" and the parties can specify a time within which an award should be rendered.

The New York Convention, implemented in Part III of the 1996 Act, requires awards to be "duly authenticated" for contracting states to be obliged to enforce them. Therefore, an unsigned award may not be enforceable in another contracting state.

10.2 Types of Remedies

Under the 1996 Act, it is up to the parties to agree on the scope of the tribunal's power to grant remedies (Section 48). In the absence of such agreement, the 1996 Act provides the tribunal with the power to grant comprehensive relief. This includes the power to:

- make a declaration about any matter to be determined in the proceedings (Section 48(3));
- order the payment of a sum of money in any currency (Section 48(4));
- order (i) injunctive relief, (ii) specific performance of a contract that does not relate to land, and (iii) rectification, setting aside or cancellation of a deed or other document (Section 48(5)).

There is no express rule that addresses whether the tribunal can award punitive (or exemplary) damages. If the parties agree, the tribunal is entitled to do so. In the absence of such an agreement, punitive or exemplary damages may only be awarded in the same circumstances that such damages are provided for under the applicable law. As a matter of English law, punitive or exemplary damages are not available for a breach of contract claim but are available for a limited number of claims in tort.

It is possible that where a certain remedy is available under the governing law but not under English law, the award of such a remedy would be contrary to English public policy and should be refused on that basis by a tribunal seated in England and Wales. However, the English Court has held that the English law position that penalty clauses should not be enforced was not a sufficient reason to refuse recognition under the New York Convention (Pencil Hill Ltd v US Citta di Palermo Spa (2016) EWHC 71(QB)).

10.3 Recovering Interest and Legal Costs

Parties are entitled under the 1966 Act to pre-award interest, post-award interest and to recover legal costs.

Under Section 49, the parties can agree on the power of the tribunal to award interest (Section 49(1)). In the absence of such agreement, Section 49 contains default provisions on the award of interest. These empower the tribunal to award pre-award and post-award interest on a simple or compound basis, at such rates and with such rests as the tribunal considers meets the justice of the case. No mandatory nor customary rate of interest is applicable.

Under the 1996 Act, the parties to an arbitration are also entitled to reach an agreement regarding the costs of the proceedings (Section 61(1)). The only restriction on this autonomy is that the parties are not entitled to agree, before the dispute in question has arisen, that one party will pay the costs of the arbitration irrespective of the outcome (Section 60).

In the event that no agreement on costs is reached, the 1996 Act contains default provisions that give the tribunal the power to allocate costs of the arbitration between the parties

(Section 61). These costs include the arbitrators' fees and expenses, the fees and expenses of any arbitral institution, as well as the legal and other costs of the parties (Section 59).

As far as the allocation of costs is concerned, the 1996 Act provides that – unless agreed otherwise – costs should "follow the event" unless the tribunal considers that such an award would be inappropriate in the circumstances of the case (Section 61(2)). This means that the starting point for the allocation of costs is that the successful party is entitled to its reasonable costs.

11. Review of an Award

11.1 Grounds for Appeal

There are three limited grounds on which a challenge can be made to an award in England and Wales, namely:

- the tribunal lacked substantive jurisdiction to make the award (Section 67);
- there was a serious irregularity that has caused or will cause substantial injustice (Section 68); and
- the tribunal erred on a point of law (Section 69).

Sections 67 and 68 are mandatory provisions of the Act – ie, they cannot be excluded by agreement. In contrast, the right to appeal on a point of law under Section 69 may be excluded if the parties agree otherwise.

Challenge to the Tribunal's Substantive Jurisdiction

A challenge to the tribunal's substantive jurisdiction may be made to a final award that deals with the merits or to a preliminary award on the tribunal's jurisdiction. A challenge to jurisdiction is generally based on the existence, validity or scope of the arbitration agreement or whether the tribunal was constituted in accordance with the arbitration agreement. Where an award is challenged for lack of jurisdiction, the English courts must revisit the tribunal's decision on jurisdiction.

A challenge under Section 67 is not limited to instances where a tribunal has found that it does have jurisdiction. A party may also challenge under Section 67 a tribunal's finding that it does not have jurisdiction (GPF GP Sarl v Poland (2018) EWHC 409 (Comm)).

The English High Court has recently confirmed that non-compliance with a multi-tier dispute resolution provision does not constitute a basis to challenge the jurisdiction under Section 67 (Republic of Sierra Leone v SL Mining Ltd (2021) EWHC 286 (Comm)). The High Court concluded that whether a party has complied with a multi-tier dispute resolution provision is a procedural matter of admissibility rather than jurisdiction and, therefore, falls within the competence of the tribunal (rather than the English courts) to determine. This approach has mostly recently been confirmed by the Court of Appeal in Hong Kong in C v D [2022] HKCA 729.

A party that challenges the substantive jurisdiction of the tribunal is entitled to a complete rehearing, instead of a review of the decision by the tribunal (see Dallah Real Estate & Tourism Holding Co v Government of Pakistan (2010) UKSC 46). The Law Commission (as noted at **2.2 Changes to National Law**) has suggested that this approach should be reconsidered.

Challenge on the Grounds of Serious Irregularity

A Section 68 challenge has two limbs. The applicant must show that:

- there has been a "serious irregularity"; and
- "substantial injustice" has resulted.

The High Court has recently reiterated that there is a "high threshold" to be met under Section 68 and the courts should not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the objective of upsetting or frustrating the process of arbitration" (K v A (2019) EWHC 1118 (Comm)). In Tenke Fungurume Mining S.A v Katanga Contracting Services S.A.S [2021] EWHC 3301 (Comm), the High Court confirmed that Section 68 is designed as a longstop and is only available in extreme cases.

Section 68 contains an exhaustive list of what constitutes a "serious irregularity", citing circumstances where:

- the tribunal has failed to comply with its general duty under the 1996 Act;
- the tribunal has exceeded its powers;
- the tribunal has failed to conduct the proceedings in accordance with the parties' agreed procedure;
- the tribunal has failed to deal with all the issues put to it;
- an arbitral or other institution or person has exceeded the powers vested in it by the parties in relation to the proceedings or the award;
- there is uncertainty or ambiguity as to the effect of the award;
- the award was obtained by fraud or is otherwise contrary to public policy;
- the award does not comply with requirements as to form; or
- there was irregularity in the conduct of the proceedings or the award that is admitted by the arbitral tribunal or other institution or person vested by the parties with powers relating to the proceedings or the award.

If one of these grounds is present, the applicant must then show that "substantial injustice" has resulted from the serious irregularity. The question of substantial injustice is considered distinct from the question of serious irregularity and approached separately. To succeed on the substantial injustice test, an applicant does not need to demonstrate that the outcome would have been different, provided it can show that "the tribunal might well have reached a different conclusion in its award" (The Secretary of State for the Home Department v Raytheon Systems Limited (2015) EWHC 311 (TCC)). An applicant, however, could be barred by Section 73 and lose its right to bring a challenge on the basis of Section 68 if it did not act promptly as soon as it thought it had a reason to object and continue to take part in the proceedings. (Radisson Hotels APS Denmark v Hayat Otel Işletmeciliği Turizm Yatırım Ve Ticaret Anonim Şirketi [2023] EWHC 892 (Comm)).

Following 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 in whole or in part.

Appeal on a Point of Law

An appeal on a point of law can be brought with the agreement of all other parties to the arbitra-

tion or with the leave of the court. To be granted leave, an applicant must satisfy the court that:

- a determination of the question will substantially affect its rights;
- the question of law is one that the tribunal was asked to determine;
- based on the findings of fact, the tribunal's decision is obviously wrong or – where the question is of general public importance – at least open to serious doubt; and
- it is just and proper for the court to determine the question.

The standard of review adopted at the leave stage 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" (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".

The standard of review adopted by the court at the appeal itself, if leave is granted (or all parties have agreed to refer the point), is similarly deferential (Zermalt Holdings SA v Nu-Life Upholstery Repair Limited [1985] 275 EG 1134). It is not sufficient for an applicant to satisfy the appeal court that it may have come to a different conclusion. A Section 69 appeal will only be successful if an applicant can show that a tribunal that correctly understood the law could not have reached the same conclusion as the tribunal (Vinava Shipping Co Ltd v Finelvet AG (The Chrysalis) (1983) 1 Lloyd's Rep 503). For a rare example of a successful challenge under Section 69, see Pan Ocean Co Ltd v Daelim Corporation [2023] EWHC 391 (Comm), where the High Court held that a tribunal erred in the application of an implied term which required the charterers to carry out reinspection of the cargo holds without delay after a failed holds inspection.

If an appeal under Section 69 is successful, the court may:

- vary the award;
- remit the award to the tribunal, in whole or in part, for reconsideration in light of the court's determination; or
- set aside the award in whole or in part.

For a rare example of a successful Section 69 application, see CVLC Three Carrier Corp & Anor v Arab Maritime Petroleum Transport Company (2021) EWHC 551 (Comm), where the court found that the tribunal had been mistaken to imply a term into a guarantee.

Procedure

In terms of procedure, a challenge or appeal is started by filing an arbitration claim form under Part 62 of the Civil Procedure Rules (CPR). The claim form is required to identify the basis of the challenge by referring to the relevant section of the Arbitration Act and give an outline of the award being challenged. To apply to the court, the applicant must also show that all available recourses from the tribunal to correct, review or make an additional award were exhausted.

Any challenge or appeal must be brought within 28 days of the date of the award or of being notified of the outcome of any arbitral appeal, review, correction to the award or an additional award (Section 70(3)).

In a recent case the High Court confirmed that the date of an arbitration award for the purposes

of the 28-day period for appealing under Section 70(3) runs from the date of the original award and not the date of correction of the award, except in cases where the corrections were material to the challenge in question (Daewoo Shipbuilding and Marine Engineering v Songa Offshore Equinox (2018) EWHC 538 (Comm)). This 28-day time limit can be extended by the court under certain circumstances, unless the parties agree otherwise (Section 79(3)).

11.2 Excluding/Expanding the Scope of Appeal

As noted in **11.1 Grounds for Appeal**, Sections 67 and 68 of the 1996 Act are mandatory and cannot be excluded by agreement of the parties. Conversely, Section 69 is not mandatory and the right to appeal to the court on a question of law can be excluded if the parties agree otherwise.

The parties will be deemed to have excluded an appeal under Section 69 if they agree that the tribunal is not required to give a reasoned award. Similarly, an agreement to apply many of the major institutional rules (including the ICC and LCIA rules) will exclude the right to appeal under Section 69.

The parties can agree additional appeal procedures before a second arbitral tribunal or before an arbitral institution. However, the parties cannot expand the court's power to review an arbitral award that is set down in Sections 67 and 68, because the court's power to review an arbitral award is statutory.

11.3 Standard of Judicial Review

As noted in **11.1 Grounds for Appeal**, when a party seeks leave to appeal, the standard of judicial review of the merits of the case is deferential. In contrast, the standard of review when a party is challenging the substantive jurisdiction of the tribunal is de novo (Dallah Real Estate & Tourism v Government of Pakistan (2010) UKSC 46).

12. Enforcement of an Award

12.1 New York Convention

The UK (England, Wales, Northern Ireland and Scotland) is a party to the New York Convention, which it signed and ratified in 1975. This was subject to the reservation that the New York Convention only applied to awards made in the territory of another contracting party. Sections 100–104 of the 1996 Act provide for the recognition and enforcement of New York Convention awards ("awards made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) [that] is a party to the New York Convention").

In IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation (2017) UKSC 16 the Supreme Court held that the New York Convention constitutes "a complete code" that was intended to establish "a common international approach" to the conditions for recognition and enforcement. Therefore, it is not permissible to use English procedural rules to fetter a party's rights under the New York Convention.

The UK is also a party to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927. An arbitral award that is made in the territory of a contracting party to the Geneva Convention can be enforced under the 1996 Act (Section 99). There are a small number of countries that have not acceded to the New York Convention but are party to the Geneva Convention 1927. Apart from cases involving these countries, enforcement of awards under the Geneva Convention 1927 has been largely superseded by enforcement under the New York Convention.

England and Wales have not signed any other similar enforcement conventions. However, England and Wales have enacted the following acts.

- The Foreign Judgments (Reciprocal Enforcement) Act 1933 – this provides for the reciprocal recognition and enforcement of arbitral awards in former Commonwealth countries. Again, enforcement of awards pursuant to this statute has been largely superseded by enforcement under the New York Convention.
- The Arbitration (International Investment Disputes) Act 1966 – this provides for the recognition and enforcement of ICSID awards.

12.2 Enforcement Procedure

The procedure for enforcing an arbitral award in England and Wales is governed by the 1996 Act. Section 66 provides the following two alternative procedures for the enforcement of an award.

An arbitral award may, by leave of the court, be enforced in the same manner as a judgment or order of the court.

An award creditor may begin an action on the award, seeking the same relief from the court as is set out in the tribunal's award. The latter procedure is rarely followed in practice.

An application for leave to enforce is generally made without notice to the other party. It involves submitting an arbitration claim form and a witness statement attaching the arbitration agreement and award (CPR, Part 62). Where leave is granted, judgment may be entered in terms of the award and the same powers that are available to enforce a court judgment are available to enforce an award. Leave to enforce will be refused where – or to the extent that – the award debtor shows that the tribunal lacked substantive jurisdiction to make the award (Section 66(3), 1996 Act). This procedure governing enforcement is separate from and does not affect the recognition or enforcement of an award under the New York Convention.

To obtain recognition and enforcement of a New York Convention award, a party must produce the duly authenticated original award (or a duly certified copy thereof) and the original arbitration agreement (or a duly certified copy thereof) (Section 102(1), 1996 Act). If the award or agreement is in a foreign language, the party must also produce a translation of it certified by either an official or sworn translator or by a diplomatic or consular agent (Section 102(2)).

Recognition and enforcement of New York Convention awards in England and Wales can only be refused on limited grounds. These grounds are set out in Section 103 of the 1996 Act, which mirrors Article V of the New York Convention. Enforcement may be refused if:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement was invalid;
- a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present their case;
- the award deals with a dispute that did not fall within the terms of the arbitration, or deals with matters out of the scope of the arbitration;
- the composition of the arbitral tribunal was not in accordance with the parties' agreement or the law of the country of the arbitration;
- the award has not yet become binding on the parties;
- the award has been set aside or suspended by a competent authority of the country in which it was made;

- the award concerns a matter not capable of settlement by arbitration;
- enforcement of the award would be contrary to public policy; or
- the award contains decisions on matters not submitted to arbitration – in such case, it may only be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration that can be separated from those on matters not submitted.

Under Section 103 of the 1996 Act, enforcement "may" be refused on one of the above grounds. This means that the English courts retain their discretion to enforce an award even where one of the grounds for refusal is shown to exist. In practice, however, it would be rare for the English courts to conclude that an award should be enforced if there are grounds for refusing recognition. In Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs (Pakistan) (2009) EWCA Civ 755, the court recognised that its discretion to enforce an award – even where a ground under Section 103 exists – should be narrowly construed.

It is not necessary for the court to recognise and enforce an arbitral award in its entirety. The High Court has held that "award" in the 1996 Act should be construed broadly to mean the "award or part of it", meaning the court can enforce part of an award (IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation (2008) EWCA Civ 1157).

12.3 Approach of the Courts

The English courts have generally adopted a strongly pro-enforcement approach, which is reflected in their approach to refusing enforcement on public policy grounds.

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. However, the English courts have held that arguments for refusing recognition on public policy grounds should be approached with extreme caution and the public policy exception should be construed narrowly. This is because it "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)).

A New York Convention award, however, does not automatically deprive the English court of any jurisdiction in relation to the dispute which is the subject matter of the award (Chechetkin v Payward Ltd and others [2022] EWHC 3057 (Ch)).

13. Miscellaneous

13.1 Class Action or Group Arbitration

In England and Wales, there is no express provision for class action or group arbitration. The 1996 Act provides for the consolidation of proceedings by agreement of the parties but prevents the tribunal from consolidation in the absence of such an agreement. This means that a class action or group arbitration would only be possible if specifically provided for in the relevant arbitration agreement.

13.2 Ethical Codes

English barristers participating in arbitrations in England and Wales are bound by the Bar Standards Board's BSB Handbook 2020. Solicitors are bound by the Solicitors Regulation Authority (SRA) Standards and Regulations 2019. There are no separate rules that apply to counsel from

jurisdictions outside England and Wales participating in arbitrations in England and Wales.

Some arbitral institutions incorporate mandatory ethical standards into their arbitration rules. The 2020 LCIA Rules contain mandatory ethical standards that parties' authorised representatives must comply with and give the tribunal the power to order sanctions for non-compliance (see 2020 LCIA Rules, Articles 18.4–18.5 and General Guidelines for the Authorised Representatives of the Parties).

13.3 Third-Party Funding

A third-party funding agreement in an arbitration (and related court proceedings) is permitted in England and Wales and is not subject to a formal regulatory framework. Third-party funding is a rapidly growing market in England and Wales. Third-party funding of arbitrations seated in England and Wales continues to become more prevalent both in terms of the number of cases being funded and the number of specialist firms offering funding.

Historically, English law considered that third-party funding arrangements breached the rule against maintenance and champerty. Accordingly, third-party funding arrangements were not permissible. However, the application of those rules has now been relaxed. Currently, under English law, a third-party funding arrangement will only breach the rule against maintenance or champerty if it contains an element of impropriety by, for example, giving the third-party funder full control over the conduct of the litigation or a disproportionate share of profits.

A successful party in an arbitration may recover its funded costs. In a recent case, the High Court held that the costs of the arbitration may also include the costs of third-party funding in certain circumstances (Tenke Fungurume Mining SA v Katanga Contracting Services SAS (2021) EWHC 3301 (Comm)). Conversely, arbitral tribunals do not generally have jurisdiction to make an adverse costs order against third-party funders, as under Section 61 of the 1996 Act a tribunal may only make a cost order against a party to the arbitration.

13.4 Consolidation

Under the 1996 Act, a tribunal may only order the consolidation of arbitration proceedings with consent of the parties. Section 35(1) of the 1996 Act provides that parties are free to agree that:

- arbitral proceedings shall be consolidated; or
- that concurrent hearings shall be held.

However, the tribunal has no power to order the consolidation of proceedings or concurrent hearings absent the agreement of the parties (Section 35(2), 1996 Act). The LCIA Rules 2020 and ICC Rules 2021, however, both expand the power of the tribunal to order consolidation in certain circumstances.

The court recently confirmed in Guidant LLC v Swiss Re International SE (2016) EWHC 1201 (Comm) that, although consolidation may often be in the interest of efficiency and desirable to avoid the risk of inconsistent results, "under the 1996 Act the court has no power to order consolidation or co-ordination of arbitration proceedings nor does an arbitral tribunal have such power except with the consent of the parties".

13.5 Binding of Third Parties

See **5.7 Third Parties**.

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