Arbitration

In association with:

crowell moring

2019

GETTING THE DEAL THROUGH

crowell moring

International Dispute Resolution Contacts

George D. Ruttinger
Partner and Co-Chair
gruttinger@crowell.com
+1.202.624.2670

Ian A. Laird
Partner and Co-Chair
ilaird@crowell.com
+1.202.624.2879

Stuart H. Newberger
Partner
snewberger@crowell.com
+1.202.624.2649

Adrian Jones
Partner
arjones@crowell.com
+44.20.7413.1352

David Baron
Partner
dbaron@crowell.com
+1.202.624.2527

Michelle J. Linderman
Partner
mlinderman@crowell.com
+44.20.7413.1353

Crowell & Moring LLP is an international law firm with more than 500 lawyers representing clients in litigation and arbitration, regulatory, and transactional matters. We have offices in Washington, D.C., New York, Los Angeles, San Francisco, Orange County, London, and Brussels. The firm is internationally recognized for its representation of Fortune 500 companies in high-stakes litigation, as well as its ongoing commitment to pro bono service and diversity.

GETTING THE DEAL THROUGH

Arbitration 2019

Contributing editors

Gerhard Wegen and Stephan Wilske

Gleiss Lutz

Reproduced with permission from Law Business Research Ltd
This article was first published in February 2019
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2006
Fourteenth edition
ISBN 978-1-912228-86-7

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Preface

Arbitration 2019

Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of *Arbitration*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia, Chile and Pakistan.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Gerhard Wegen and Stephan Wilske of Gleiss Lutz, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
January 2019

England & Wales

Adrian Jones, Gordon McAllister, Edward Norman and John Laird

Crowell & Moring LLP

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The New York Convention has been in force in the United Kingdom, of which England and Wales are a part, since 1975. This is, however, subject to the 'reciprocity reservation', meaning recognition and enforcement are limited to awards made in other contracting states. The application of the Convention was subsequently extended to the following overseas territories of the United Kingdom: Gibraltar (1975), the Isle of Man (1979), Bermuda (1979), the Cayman Islands (1980), Guernsey (1985), Jersey (2002) and most recently the British Virgin Islands (2014).

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the ICSID Convention) entered into force in the United Kingdom in 1967.

The Energy Charter Treaty 1994 has been in force since 1998.

The United Kingdom is a signatory to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, which entered into force in 2017.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

As of December 2018, the United Kingdom has entered into 105 bilateral investment treaties (BITs) with other countries, according to the list provided on the United Nations Conference on Trade and Development website. Of these, 94 are currently in force. The treaties entered into by the United Kingdom do not extend to any of its various overseas territories unless there is an exchange of notes between the contracting states explicitly extending the reach of a treaty to specific territories.

These treaties typically express an intention to encourage and promote investment from each contracting state into the other, and provide that, if certain investment protections set out in the treaty are breached, the investor can resolve its dispute with the host state by international arbitration. BITs typically provide for arbitration under institutional rules (most commonly ICSID) or for ad hoc arbitration under UNCITRAL rules.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary source of domestic arbitration law is the Arbitration Act 1996 (the Act), which governs both domestic and foreign arbitral proceedings. Under section 2, the Act applies where the seat of the arbitration is in England or Wales. With the exception of Part III of the Act, which deals with recognition and enforcement of foreign awards, the Act does not differentiate between domestic and foreign proceedings. Though sections 85–87 relate to 'domestic arbitration agreements', these sections are not in force, and are, therefore, without legal effect.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Act adopted the principles set out in the UNCITRAL Model Law of 1985, although not the Model Law itself. The Departmental Advisory Committee led by Lord Justice Saville (as he then was) considered it more appropriate to draft a new arbitration law setting out in statutory form and, in a structure similar to that of the Model Law, the existing principles of arbitration law in England.

The Act includes the majority of the key features of the 1985 Model Law, but there are a number of significant differences, including:

- the default provision under the Act provides for a tribunal to be composed of a single arbitrator, whereas the Model Law contemplates a tribunal of three arbitrators;
- under the Act, the parties are free to opt out of the provision that the arbitration agreement is separable from the substantive agreement in which it appears;
- similarly, the parties are free to opt out of the Act's provision that competence to rule on the jurisdiction of the arbitration tribunal lies with the tribunal itself; and
- the Act permits a party to challenge an arbitration award on a question of English law arising out of the award in narrowly defined circumstances.

The Act has not been amended to take account of the revisions included in the 2006 UNCITRAL Model Law.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Schedule 1 of the Act lists the mandatory provisions of Part 1 of the Act. These include the following:

- provisions relating to the stay of court proceedings where an arbitration agreement is in place (sections 9–11);
- the power of the court to extend the time limit for commencing arbitration proceedings (or other dispute resolution mechanisms that must be exhausted before recourse to arbitration) beyond that set out in the arbitration agreement (section 12);
- the application of the Limitation Acts (as defined in the Act) to arbitral proceedings (section 13);
- the power of the court to remove an arbitrator under certain circumstances (section 24);
- the effect of the death of an arbitrator (section 26(1));
- the joint and several liability of the parties to pay the arbitrators' reasonable fees and expenses (including the fees of any expert appointed by the tribunal) (sections 28 and 37(2));
- the immunity of arbitrators for acts done or omitted in the discharge or purported discharge of their functions as arbitrators, and an equivalent immunity for arbitral institutions (sections 29 and 74);

- that objections to the substantive jurisdiction of a tribunal should be made before the first step in the proceedings to contest the merits (section 31);
- the court's power to determine questions of a tribunal's substantive jurisdiction (section 32);
- general duties of the arbitral tribunal to act fairly and impartially, and to adopt procedures suitable to the circumstances of the case (section 33);
- a requirement that the parties do all things necessary for the proper and expeditious conduct of the arbitral proceedings (section 40);
- the availability of court procedures to secure the attendance of witnesses (by agreement of the parties or with the tribunal's permission) (section 43);
- the power of a tribunal to refuse to deliver an award without payment of the arbitrators' fees (section 56);
- a provision that an agreement that the costs of the arbitration are to be borne by one party is only valid if made after the dispute arose (section 60);
- that an arbitral award may be enforced in the same manner as a court judgment or order (with the court's leave) (section 66);
- provisions relating to challenging an award in the courts because the tribunal lacked substantive jurisdiction, or because there was a serious irregularity affecting the tribunal, the proceedings or the award (sections 67 and 68 (and sections 70 and 71, insofar as they relate to sections 67 and 68));
- the rights of a person alleged to be a party to arbitral proceedings but who takes no part in them (section 72);
- that a party who fails to make a timely objection to the jurisdiction of the arbitral tribunal on the manner in which the proceedings have been conducted cannot raise that objection later, unless that party can demonstrate that it did not know, and could not with reasonable diligence have known, of the grounds for objection at the time (section 73); and
- that a power to charge property recovered in relation to arbitral proceedings with the payment of solicitors' costs exists for arbitral proceedings (section 75).

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Section 46 of the Act states that a tribunal shall determine the dispute in accordance with the substantive law chosen by the parties.

Alternatively, the parties may agree that the tribunal can decide the dispute in accordance with such other considerations as the parties or the tribunal itself may determine. Such considerations may include trade uses, lex mercatoria, amiable composition and ex aequo et bono decisions.

Where no such agreement is discernible, section 46 provides that a tribunal shall apply the conflict of laws rules 'which it considers applicable'.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your jurisdiction?

The most prominent institution based in England that deals with international commercial arbitration is the London Court of International Arbitration (LCIA).

London Court of International Arbitration
International Dispute Resolution Centre
70 Fleet Street
London
EC4Y 1EU
Tel: +44 20 7936 6200
Fax: +44 20 7936 6211
lcia@lcia.org
www.lcia.org

The LCIA traces its origins back to 1883. Based in London, the LCIA's caseload is primarily international. In 2017, 285 arbitrations were referred to the LCIA, with 19 per cent of the parties being from the United Kingdom. The LCIA has also established the DIFC-LCIA Arbitration Centre in the United Arab Emirates.

Under the LCIA's International Arbitration Rules, the parties are free to choose the seat of the arbitration, but if they have failed to express a choice, the LCIA Rules default to arbitration in England. Almost all LCIA arbitrations use London as their seat. The parties are also free to nominate any arbitrators, subject to their confirmation by the LCIA Court. The secretariat administers cases submitted to the LCIA, with the LCIA Court overseeing the proper application of the LCIA Rules. The court has 35 members, all very prominent and well-respected international arbitration experts, only five of whom are English.

The LCIA most recently updated its arbitration rules with effect from 7 October 2014 (the 2014 LCIA Rules). These rules include a number of new features, including:

- LCIA arbitration tribunals are explicitly empowered to impose costs sanctions on parties who engage in 'non-cooperation resulting in undue delay';
- party representatives are deemed to have agreed to abide by principles of ethical conduct set out in the Annex to the 2014 LCIA Rules; and
- new rules were adopted for the appointment of emergency arbitrators.

LCIA fees are assessed on the basis of specified hourly rates, as opposed to being a percentage of the value of the dispute.

The Chartered Institute of Arbitrators (CIArb) also offers international arbitration services, including its own rules, acting as an appointing authority. However, it is principally renowned in the international arbitration community for its key role in the training and accreditation of arbitrators.

The Chartered Institute of Arbitrators (CIArb)
International Arbitration and Mediation Centre
12 Bloomsbury Square
London
WC1A 2LP
Tel: +44 20 7421 7444
Fax: +44 20 7900 2917
info@ciarb.org
www.ciarb.org

After maintaining the same rules in force since 2000, CIArb introduced new arbitration rules on 1 December 2015. These rules include modernisations of procedure in line with other institutional rules such as emergency relief, and in Appendix II, a list of proposed matters for consideration by the parties and the arbitral tribunal at a case management conference.

A considerable proportion of international commercial arbitration seated in London involves specialist fields with a long history of arbitration, including shipping, insurance and commodities. Specialist arbitration bodies administer many of these arbitrations, including:

London Maritime Arbitrators' Association (LMAA)
The Baltic Exchange
38 St Mary Axe
London
EC3 8BH
Tel: +44 20 7283 7701
Fax: +44 20 7283 7702
info@lmaa.org.uk
www.lmaa.org.uk

Insurance and Reinsurance Arbitration Society (ARIAS (UK))
London Underwriting Centre
3 Minster Court
Mincing Lane
London
EC3R 7DD
Tel: +44 1732 832 475
Fax: +44 1732 835 677
www.arias.org.uk

Grain and Feed Trade Association
9 Lincoln's Inn Fields
London
WC2A 3BP
Tel: +44 20 7814 9666
Fax: +44 20 7814 8383
post@gafta.com
www.gafta.com

Federation of Oils, Seeds & Fats Associations
4–6 Throgmorton Avenue
London
EC2N 2DL
Tel: +44 20 7283 5511
Fax: +44 20 7623 1310
contact@fosfa.org
www.fosfa.org

London Metal Exchange
56 Leadenhall Street
London
EC3A 2DX
Tel: +44 20 7264 5555
Fax: +44 20 7680 0505
tom.hine@lme.com
www.lme.com

In addition, many arbitrations seated in London are conducted under the international arbitration rules of institutions based elsewhere, including the International Court of Arbitration of the International Chamber of Commerce and the International Centre for Dispute Resolution, a division of the American Arbitration Association.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The Act does not exclude any specific categories from arbitration and, in general, English courts take an inclusive view of what is arbitrable. Section 1(b) of the Act provides that parties should be free to decide how their disputes will be resolved, limited only by safeguards necessary in the public interest. Section 6(1) of the Act provides that both contractual and non-contractual disputes are arbitrable, but does not go further. Criminal and certain family law matters are not considered arbitrable (although the High Court has made a consent order in the terms of an arbitral award made by a Beth Din in matrimonial proceedings (*AI v MT* [2013] EWHC 100 (Fam)). As a matter of practicality, where a state grant of a right or protection is concerned (such as a patent) the dispute will not be able to be fully resolved by recourse to an arbitral tribunal. Similarly, where a debt arises in an agreement subject to arbitration, a winding-up petition may be more appropriate than arbitration where the dispute concerns whether the debtor is capable of settling the debt (*Salford Estates (No. 2) Limited v Altomart Limited* [2014] EWCA 1575 Civ). Certain statutory employment rights are only within the jurisdiction of the Employment Tribunal, although purely contractual disputes between employer and employee may be referred to arbitration (*Clyde & Co LLP v Krista Bates van Winkelhof* [2011] EWHC 668 (QB)). Consumer disputes for sums under £5,000 are not arbitrable (Unfair Arbitration Agreements (Specified Amount) Order 1999 (SI 2167/99)).

9 Requirements

What formal and other requirements exist for an arbitration agreement?

An arbitration agreement is an agreement to submit to arbitration present or future disputes, whether contractual or not (section 6).

Oral arbitration agreements are possible at common law, but they do not receive the statutory protections of the Act. The Act applies only to arbitration agreements in writing (section 5), save for a few exceptions set out below.

Agreements in writing are defined very broadly, including:

- agreements made in writing, whether or not signed by the parties (section 5(2)(a));
- an exchange of communications in writing, or an agreement evidenced in writing (section 5(2)(b) and (c)); and
- an agreement otherwise than in writing by reference to terms that are in writing (section 5(3)).

This definition therefore includes general terms and conditions. Where one party to arbitration proceedings alleges the existence of an agreement to arbitrate, if the other party fails to deny the allegation, this also creates an arbitration agreement under the Act (section 5(5)).

The requirement for writing is excluded in some scenarios:

- termination of arbitration agreements (section 23(4));
- consumer arbitration agreements are governed by the Unfair Terms in Consumer Contracts Regulations, which is recognised at sections 89 to 91 of the Act;
- small claims arbitration in the county court (section 92);
- arbitrations involving a judge as arbitrator (section 93); and
- statutory arbitrations (sections 94 to 97).

It has been held that where parties have agreed to arbitrate disputes under one agreement, this agreement may become an implied term of subsequent agreements, such as settlement agreements (*Interserve Industrial Services Ltd v ZRE Katowice SA* [2012] EWHC 3205 (TCC)). Where parties have a contract with a third party that provides for certain rules, including arbitration (a vertical contract), an arbitration agreement may exist in an implied 'horizontal contract' between them. By way of example, agents, players and teams may be bound to resolve their disputes under the Football Association's Rules and their arbitration provisions (see *Mercato Sports (UK) Ltd & anr v The Everton Football Club Company Ltd* [2018] EWHC 1567 (Ch)).

If related contracts between parties contain inconsistent dispute resolution clauses, a 'centre of gravity' analysis may be used to determine which prevails, whether between arbitration and litigation or different arbitration provisions (*AmTrust Europe Ltd v Trust Risk Group SpA* [2015] EWCA Civ 437). This is a practical test that seeks to determine which contract is most closely connected to the matters in dispute.

An agreement providing that the parties would 'endeavour to first resolve the matter through Swiss arbitration', but failing such resolution would submit the dispute to the courts of England, was interpreted by the English court to constitute a mere agreement to attempt to agree an arbitration process rather than being a binding agreement to arbitrate (*Kruppa v Benedetti* [2014] EWHC 1887 (Comm)).

Clauses providing that parties 'may' submit a dispute to arbitration can be treated as non-exclusive, allowing litigation instead; however, if a party to such a clause insists on arbitration, it is likely the court would uphold that choice (*Anzen Limited & ors v Hermes One Limited* [2016] UKPC 1).

In instances where the parties' agreement is reflected in a single contract, an arbitration clause can be incorporated, along with other terms, simply by reference to another document. However, where the arbitration clause is found in a contract with a third party, it must be expressly referred to in order for it to be incorporated (*Barrier Limited v Redhall Marine Limited* [2016] EWHC 381 (QB)).

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

English courts approach issues of the enforceability of an arbitration agreement from a pro-arbitration perspective. Section 7 of the Act embodies the principle of separability, unless the parties agree otherwise. Consequently, even if the underlying agreement is unenforceable, the arbitration agreement will be enforceable, unless there are circumstances that impeach the arbitration agreement itself (*Fiona Trust & Holding Corporation v Yuri Privalov* [2007] EWCA Civ 20). Although section 7 is a non-mandatory provision, its operation is not displaced by a choice of law as to the merits, only by express waiver or agreement as to alternative law on the issue by the parties (*National Iranian Oil Company v Crescent Petroleum Company International Ltd & Crescent Gas Corporation Ltd* [2016] EWHC 510 (Comm)).

Under section 8 of the Act, an arbitration agreement is not discharged by the death of a party, and it may, therefore, be enforced against that party's personal representative.

One of the parties may inadvertently waive the right to arbitrate a dispute in circumstances where it takes a step in court proceedings that are inconsistent with the agreement to submit disputes to arbitration (see *Nokia Corp v HTC Corp* [2012] EWHC 3199 (Pat)).

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Under English law, on assignment of contractual rights, an assignee is usually bound by an arbitration agreement in the contract as an 'inseparable component of the transferred rights' (*West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA* [2005] EWHC 454 (Comm)). Where an arbitration is already under way, the assignee must first give notice to the other parties and the arbitrators. The arbitration may then continue, and orders or awards already made are 'reinstated' as between the other parties, the tribunal and the assignee (*Republic of Kazakhstan v Istil Group Inc* [2006] EWHC 448 (Comm)). Notice may postdate the assignment itself (*Eurosteel Ltd v Stinnes AG* [2001] 1 All ER (Comm) 964)), although delay in giving notice beyond a reasonable time may lead an English court to conclude that the arbitration has lapsed (*NBP Development Ltd & ors v Buildko and Sons Ltd* [1992] 8 Const LJ 377).

Where the lex fori or lex arbitri is English law by virtue of the arbitration agreement, the court will likely apply English law to determine the effect of an assignment of an agreement to arbitrate even where the governing law of the contract is otherwise foreign (see, for example, *Navigation Maritime Bulgare v Rustal Trading Ltd (The Ivan Zagubanksi)* [2000] EWHC 222 (Comm and *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA* [2005] EWHC 454 (Comm)).

The civil law concept of universal succession (whereby a company can cease to exist without liquidation, its rights and liabilities transferring wholesale to another company) does not exist in English law. If a foreign company is subject to such a process in another jurisdiction, English law views the succession as analogous to an assignment, which would bind the successor to any arbitration agreements of the prior entity. However, notice is required to continue an arbitration in progress at the time of succession (*Republic of Kazakhstan v Istil Group Inc* [2006] EWHC 448 (Comm)).

The administrator of an insolvent company is bound by arbitration agreements entered into by that company, because the administrator acts as an agent of the company under paragraph 69, Schedule B1 of the Insolvency Act 1986. A liquidator of a company may bring or defend legal proceedings in the name and on behalf of the company being wound up, and so would be bound by an arbitration agreement contained in a contract entered into by the company, pursuant to paragraph 4, Schedule 4 of the Insolvency Act 1986.

The Third Parties (Rights Against Insurers) Act 1930 provides that a third party with a debt claim against an insolvent debtor has a direct claim against an insurer of that debtor. However, in pursuing such a claim, the claimant is bound by any arbitration agreement between the insured and insurer (*Socony Mobil Oil v West of England Shipowners Mutual Insurance Association (London) Ltd (The Padre Island) (No. 2)* [1991] 2 AC 1)). It is not clear whether such a third party with a debt claim may replace the insured in an existing arbitration, although it is likely by analogy with assignment (*Baytur SA v Finagro Holdings SA* [1992] QB 610).

Where an insurer may enforce an insured's rights against a third party through subrogation, the insurer is generally bound by any arbitration agreement governing those rights; and if subrogation occurs when arbitration is already under way, the insurer must give notice to the parties and arbitrators (*Starlight Shipping Co & Anor v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm)).

Unless this is expressly excluded in the parties' contract, a specific statutory right under the Contracts (Rights of Third Parties) Act 1999 (the CRTP Act) allows a third party to enforce terms of contracts that purport to confer a benefit on that third party. A third party exercising such a right is bound by any agreement to arbitrate (section 8(1) CRTP Act; *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm)). In *Fortress Value Recovery Fund LLP & ors v Blue Skye Special Opportunities Fund LP (A Firm)* [2013] EWCA Civ 367, the Court of Appeal concluded that clear language was required to make the right of a third party to avail itself of an exclusion clause in a contract subject to an arbitration clause in the same agreement.

Third parties who have obtained rights governed by an arbitration agreement (by which they are themselves therefore bound) may pursue anti-suit injunctions in the same manner as the original parties (*Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakaliyat Ve Ticaret AS ('Yusuf Cepnioglu')* [2016] EWCA Civ 316). See, further, questions 21 and 29.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The primary feature of arbitration is party consent, from which it follows that a tribunal may not add or substitute a party to any proceedings without the acquiescence of the existing parties. For the same reason, under section 35 of the Act, a tribunal may not consolidate its arbitration with another unless the parties consent, even if the separate proceedings relate to similar or the same subject matter.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The group of companies doctrine does not exist in English law (*Peterson Farms Inc v C & M Farming Ltd* [2004] EWHC 121 (Comm)).

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

Multiparty arbitration agreements are often adopted in contracts governed by English law and applied in arbitrations seated in England. However, the Act itself does not deal with multiparty arbitration agreements directly, or impose any requirements for such agreements to be valid. Under sections 16(7) and 18 of the Act, if any appointment mechanism contained in a multiparty arbitration agreement should fail, any party may apply to the court for assistance with the appointment of the tribunal.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Under section 93(2) of the Act, judges of the Commercial Court of England and Wales are precluded from sitting as arbitrators without approval of the Lord Chief Justice.

In 2011, the Supreme Court confirmed in *Jivraj v Hashwani* [2011] UKSC 40, that arbitrators are not employees of the parties, and that a requirement that an arbitrator should be of a particular religion did not contravene the anti-discrimination provisions of the Employment Equality (Religion or Belief) Regulations 2002. The Supreme Court ruled that nationality and religion may validly be taken into account in the selection of arbitrators.

16 Background of arbitrators

Who regularly sit as arbitrators in your jurisdiction?

Non-lawyers occasionally sit as arbitrators, and are more likely to be found in arbitrations in specialist fields such as commodity arbitration. Barristers and solicitors sit as arbitrators, some also having counsel practices at a law firm or in chambers, or holding academic posts. In-house counsel are more rarely appointed. Many retired members of

the judiciary, including senior judges formerly of the Court of Appeal and Supreme Court, have active practices as arbitrators, usually based from one of the leading barristers' chambers.

The LCIA has signed the Equal Representation in Arbitration Pledge as a mark of its continuing commitment to diversity in international arbitration. The LCIA's commitment is demonstrated, for example, by standing practice to publish transparent data on arbitrators' gender and first-time appointments, and additional information about arbitrators' nationalities.

17 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Section 15(3) of the Act provides the default position that the tribunal shall be comprised of a sole arbitrator.

Section 16 deals with the mechanics of the appointment process, giving the parties 28 days to agree on the appointment of a sole arbitrator, or in the case of a three-member tribunal, 14 days for each party to nominate an arbitrator, the two arbitrators so nominated forthwith selecting the third, who acts as chair of the tribunal. If one party refuses to participate in the appointment process, section 17 permits the other party to declare that its selected arbitrator will act as the sole arbitrator. The defaulting party may then apply to the court under section 18 to set aside the appointment.

Article 5.8 of the 2014 LCIA Rules also provides for the appointment of a sole arbitrator unless the parties have otherwise agreed, and unless the LCIA Court determines that a three-member tribunal would be appropriate in the circumstances. The LCIA Court alone is empowered to appoint arbitrators, taking into account any written agreement between the parties (article 5.7). If the parties have agreed that each of them shall nominate one arbitrator to a three-member tribunal, they must make their nominations in the request for arbitration (article 1.1(v)) and the response (article 2.1(v)). However, the parties' nominees will not be appointed unless they certify that there are no circumstances currently known to the candidate that are likely to give rise to any justifiable doubts as to his or her impartiality or independence, and that the candidate is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration (article 5.4).

Unless otherwise agreed, any party may apply to the court under section 18 of the Act to give directions as to the making of any necessary appointments; to direct that the tribunal shall be constituted by any appointments that have already been made; to revoke any appointments already made; or to make any necessary appointments itself. A useful example of the way the court handles such applications is *Silver Dry Bulk Company Limited v Homer Hulbert Maritime Company Limited* [2017] EWHC 44 (Comm), in which the court confirmed that, to have jurisdiction to make an order under section 18, there must be a good arguable case that there is a valid arbitration agreement.

18 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Under section 24 of the Act, a party to an arbitration may apply to the court for the removal of an arbitrator on the following grounds:

- the existence of circumstances raising 'justifiable doubts' as to the arbitrator's impartiality;
- the arbitrator does not possess the qualifications required by the arbitration agreement;
- the arbitrator is physically or mentally incapable of conducting the proceedings, or there are justifiable doubts as to his or her capacity to do so; or
- the arbitrator has failed to conduct the proceedings properly or efficiently.

In all cases, the applicant must also be able to demonstrate a 'substantial injustice has been or will be caused' by the appointment (*T v V and Ors* [2017] EWHC 565 (Comm).

The arbitrator has a right under section 24 to be heard by the court. If the court decides to exercise its power of removal, it may make an order determining the fees the arbitrator should be paid, or require the arbitrator to repay fees or expenses already received.

The relevant test for section 24(1)(a) – impartiality of the arbitrator – is 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased' (*Porter v Magill* [2001] UKHL 67; *AT&T Corporation v Saudi Cable Co* [2000] EWCA Civ 154). This test is objective. A failure to disclose arbitral appointments in related matters will not automatically constitute apparent bias (*Halliburton Company v Chubb Bermuda Insurance Ltd & ors* [2018] EWCA Civ 817).

English courts have also considered the IBA Guidelines. In *A v B* [2011] EWHC 2345 (Comm) the court concluded that the IBA Guidelines are not intended to override national law, and that 'it necessarily follows that if, applying the common law test, there is no apparent or unconscious bias, the Guidelines cannot alter that conclusion', and in *W Limited v M SDN BHD* [2016] EWHC 422 (Comm) the court criticised the Guidelines for their inflexibility in providing for some non-waivable 'Red List' scenarios that would automatically indicate bias. But, on occasion, the Guidelines have been used to support a finding of apparent bias (see *Cofely Ltd v Bingham & Anor* [2016] EWHC 240 (Comm)).

It has recently been suggested that a challenge to an award for serious regularity (see question 43) should be accompanied by a section 24 application for the court to consider removal in conjunction with other remedies (*RJ & anr v HV* [2018] EWHC 2833 (Comm)).

Finally, by virtue of section 24(2), a party wishing to challenge an arbitrator should first exhaust any institutional process within the arbitration before applying to the court. Such a mechanism exists, for example, in article 10 of the LCIA Rules and articles 12 and 13 of the CIArb Rules. The LCIA Court began publishing an anonymised selection of its previous challenge rulings on its website in 2018.

19 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

The relationship between the parties and the arbitrators is contractual in nature. However, despite this, and regardless of which party appointed them, all arbitrators share an overriding obligation under section 33 of the Act to act 'fairly and impartially between the parties, giving each party a reasonable opportunity of putting his case'.

English law does not determine an arbitrator's level of remuneration or expenses. However, under section 28 of the Act, the parties are 'jointly and severally liable' to pay 'such reasonable fees and expenses (if any) as are appropriate' and it is, therefore, open to the court to review an arbitrator's remuneration. Under section 56(1), a tribunal sitting in England may refuse to deliver an award except upon full payment of the arbitrators' fees and expenses.

20 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Under section 29 of the Act, unless acting in bad faith, arbitrators have immunity for acts and omissions in the purported discharge of their duties.

Jurisdiction and competence of arbitral tribunal

21 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Section 9 of the Act provides that when a claim (or counterclaim) is commenced in the English courts against a party with respect to a 'matter'

covered by an arbitration agreement, that party can apply to stay those court proceedings. The court may be required to parse the scope of matters covered by the arbitration agreement and grant a selective stay of court proceedings over only part of the issues in dispute between the parties (see *Sodzawiczny v Ruhan & ors* [2018] EWHC 1908 (Comm)).

Such an application is to be made at the usual point in the proceedings for challenging the court's jurisdiction, namely after the proceedings have been acknowledged by the defending party (there is a place on the form acknowledging service of the proceedings to indicate whether or not jurisdiction will be contested), but before any substantive step in the proceedings is taken by that party. It has been held that an action impliedly affirming the court proceedings is such a step (eg, agreeing to a consent order after a case management conference was found to be an unequivocal step affirming proceedings in *Nokia Corp v HTC Corp* [2012] EWHC 3199 (Pat)). However, if the application is made in good order, the subsequent service of a defence will not, necessarily, constitute a step in the proceedings that undermines a section 9 challenge (*Autoridad del Canal de Panama v Sacyr SA and Ors* [2017] EWHC 2337 (Comm)).

In most cases, the acknowledgement of service form is to be submitted within 14 days following service of the claim, so the served party must react promptly.

Section 9(4) makes the granting of a stay by the court mandatory unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. An incapability of performance does not include a party's impecuniosity. A previously granted stay may be lifted on the grounds the arbitration agreement is inoperative where both parties signal to the court that they have abandoned the arbitral proceedings (for both points, see *Trunk Flooring Ltd v HSBC Asset Finance (UK) Ltd & Anor* [2015] NIQB 23). The issue can come close to a question of arbitrability (see the discussion of *Salford Estates (No. 2) Limited v Altomart Limited* [2014] EWCA 575 Civ in question 8). Parties should be aware that their acceptance of joinder in litigation proceedings may debar them from later raising section 9 to seek a stay of a related counterclaim that may otherwise have been subject to arbitration (see *Unwired Planet International Ltd v Huawai Technologies Co Ltd and Ors* [2015] EWHC 2097).

The court also has an inherent jurisdiction by section 37 of the Senior Courts Act 1981 to grant a stay of foreign litigation in favour of arbitration, but this is not mandatory as in the case of a section 9 stay (see further question 29). That inherent power can also be exercised where the litigation, whether foreign or domestic, involves different parties, if the court is persuaded that there are significant overlapping issues and potential for duplication of costs, although it is rare in this context (*Stemcor UK Ltd v Global Steel Holdings Ltd and Anor* [2015] EWHC 363 (Comm); *In the matter of Fenox (UK) Limited sub nom J & W Sanderson Limited v Fenox (UK) Limited & Ors* [2014] EWHC 4322 (Ch)).

22 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

Section 30 of the Act provides that the arbitral tribunal may rule on whether there is a valid arbitration agreement, whether the tribunal is properly constituted and what matters have been submitted to arbitration. The court also has the power to make an injunction to restrain the pursuit of arbitral proceedings (or even their commencement) under section 37 of the Senior Courts Act 1981, although it will often defer to the tribunal's own power to decide its jurisdiction under section 30 of the Act, or to a local supervisory court when the arbitral proceedings at issue are in a foreign jurisdiction (see, by way of example, *AmTrust Europe Ltd v Trust Risk Group SpA* [2015] EWHC 1927 (Comm)).

Section 31 provides that a challenge to the tribunal's jurisdiction in the arbitral proceedings must be raised no later than the time when the challenging party takes its first step in the proceedings to contest the merits of the matter over which it alleges the tribunal has no jurisdiction. Appointing an arbitrator will not prevent a party from contesting the tribunal's jurisdiction. Where a party considers that a tribunal is exceeding its jurisdiction once proceedings are under way, any objection must be made as soon as possible.

Under section 32 of the Act, an application can be made to the court to determine a preliminary point of jurisdiction only if all parties consent in writing to the application being made, or the arbitral tribunal gives permission to make the application and the application is made promptly, determination of the question is likely to produce substantial cost savings and there is a good reason why the court should decide the matter.

A party to the arbitration can challenge any award issued by the arbitral tribunal for lack of jurisdiction (section 67), provided that the challenging party has no available right of review or appeal under the arbitral process and makes the challenge within 28 days of the date of the award (as opposed to the date at which the parties have sight of the award: *S v A and B* [2016] EWHC 846 (Comm)) (or the conclusion of the appeal or review process) (section 70(2) and (3)). See question 37 for further guidance on time limits.

A party that fails to avail itself of an opportunity to challenge jurisdiction within the established period under the Act is debarred from raising the objection at a later stage, before either the arbitral tribunal or the court, unless it can show it could not with reasonable diligence have discovered the ground for objection at the time (section 73(1)).

Where a tribunal issues a partial award (see question 38) on the matter of its jurisdiction, a party's failure to challenge that award under section 67 within the time frame laid out in section 70 deprives it of the right to raise the challenge at a later time (section 73(2); see, by way of example, *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Limited* [2015] EWHC 1452 (Comm)).

The Act also makes provision for persons alleged to be a party to the arbitral proceedings, but who take no part in them, to question through the courts whether there is a valid arbitration agreement, whether the tribunal is properly constituted, and what matters have been submitted to arbitration, or to challenge an award once made for lack of jurisdiction (section 72; see, by way of example, *Hashwani v OMV Maurice Energy Ltd* [2015] EWHC 1811 (Comm)).

In circumstances of related disputes deriving from separate contracts providing for litigation and arbitration, parties should exercise caution if electing to raise claims or counterclaims before the different bodies. In *Swallowfalls Limited v Monaco Yachting & Technologies SAM and Mr Peter Landers JR* [2015] EWHC 2013 (Comm) the defendants had brought counterclaims in arbitration, which were dismissed. When the defendants subsequently sought to raise those same claims in the litigation, the court struck them as already adjudicated given the defendants' prior election to raise them in the arbitral proceedings.

Arbitral proceedings

23 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Under section 3 of the Act, in the absence of any agreement between the parties, and if so authorised by the parties, the tribunal may select the seat of the arbitration. Failing such agreement, it is for the court to determine the seat, having regard to 'all the relevant circumstances'. Unless agreed by the parties, the tribunal may determine under section 34 of the Act where the proceedings are held. English courts consider their supervisory jurisdiction over English-seated arbitrations as exclusive to any other courts (see *Atlas Power v National Transmission and Despatch Company Ltd* [2018] EWHC 1052 (Comm)).

Section 34 of the Act also deals with the language of the arbitration, which, absent agreement between the parties, is a matter for the tribunal to determine.

24 Commencement of arbitration

How are arbitral proceedings initiated?

If there is no agreement between the parties or choice of arbitration rules setting out how the arbitration is to be initiated, section 14 of the Act provides that arbitration is deemed to have commenced when one party gives notice in writing to the other party or to the appointing authority requiring that person to make an appointment, although this is interpreted flexibly (*Easybiz Investments v Sinograin & Chinatex* [2010] EWHC 2565 (Comm)). Parties may agree the mode of service of a notice of arbitration under section 76 of the Act, but such service must be to the other party directly, or to an agent expressly empowered

to accept service (*Sino Channel Asia Ltd v Dana Shipping and Trading PTE Singapore & Anor* [2016] EWHC 1118 (Comm)).

Parties may establish time limits in which to bring an arbitration claim after a dispute has arisen, separate from the principles of limitation of claims. The court may extend any agreed time limit if it deems it appropriate (section 12 of the Act; *P v Q* [2018] EWHC 1399 (Comm)).

In the case of arbitrations under the 2014 LCIA Rules, article 1.4 provides that arbitration is commenced once a request for arbitration is received by the registrar. The request for arbitration should be accompanied by the relevant filing fee. Under article 1.1(vi), if the required filing fee has not been paid, the arbitration is deemed not to have commenced.

Article 1.1 sets out the elements that must be included in the request for arbitration, being: the names and contact details of all parties and their legal representatives; a copy of the arbitration agreement and the document in which it appears; a brief statement describing the nature and circumstances of the dispute and the claims that are advanced; a statement of matters such as the seat and language of the arbitration and the appointment of the arbitrators on which the parties have agreed or on which the claimant wishes to make a proposal; and any nomination of an arbitrator that is required by the arbitration agreement.

Care should be taken in cases where claims may arise under more than one contract between the parties, even if they both designate recourse to the LCIA. The court has interpreted a 'dispute' under article 1.1 to mean a dispute under one contract and arbitration agreement (*A v B* [2017] EWHC 3417 (Comm)). In circumstances where a dispute arises involving issues under two contracts, it may be prudent to file two requests for arbitration and seek consolidation under article 22 of the LCIA Rules.

25 Hearing

Is a hearing required and what rules apply?

There is no rule requiring a hearing in English arbitration proceedings; however, it is usual practice to hold one. Under article 19.1 of the 2014 LCIA Rules, any party may insist on a hearing unless the parties have previously agreed in writing to a 'documents-only' arbitration.

26 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Section 33 of the Act requires the tribunal to act fairly and impartially, and to adopt procedures suitable to the circumstances of the case. Section 34 gives the tribunal power to decide all procedural and evidential matters, subject to any agreement between the parties, including disclosure, questioning of witnesses, what rules of evidence should apply and the manner in which the evidence should be presented.

Powers granted to a tribunal sitting in England and Wales, therefore, give the tribunal very broad discretion to determine all matters relating to evidence. It is unusual for a tribunal to adopt the strict rules of evidence that would apply in court proceedings, but tribunals do commonly use the IBA Rules of the Taking of Evidence in International Commercial Arbitration, either as the rules governing the proceedings or as a guide in the exercise of discretion.

Disclosure of documents is not uncommon, although its scope is usually more limited than would be the case in English court proceedings.

Any person may appear as a witness, including the parties themselves. Witnesses of fact usually give their direct evidence by way of witness statements, and are cross-examined on their evidence during the hearing. The parties may appoint expert witnesses who submit written reports and appear at the hearing for cross-examination and questioning by the tribunal. The tribunal may also appoint experts under section 37 of the Act, although this power is rarely exercised.

27 Court involvement

In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

The court may assist an arbitral tribunal in a number of ways. It can enforce a peremptory order if that order is not complied with in the time prescribed (or a reasonable time) and the applicant has exhausted available arbitral procedures for forcing compliance (section 42 of the Act). With the permission of the tribunal or agreement of the other parties, a party to an arbitration may seek the court's assistance to secure the attendance of a witness, or to obtain disclosure of documents or other evidence, just as in court proceedings (section 43). The court may also assist in relation to the following matters under section 44 (unless this is excluded by agreement of the parties):

- taking witness evidence;
- preserving evidence;
- making orders relating to the inspection, detention, sampling, etc, of property that is the subject of the proceedings (in *Assimina Maritime v Pakistan Shipping Corporation* [2004] EWHC 3005 (Comm) the High Court ordered a third party to produce a report for inspection);
- authorising entry to premises in possession or control of a party;
- the sale of goods that are the subject of the proceedings;
- granting an interim injunction or appointment of a receiver; and
- orders for the preservation of evidence or assets, in cases of urgency.

The court may also determine a question of law arising in the course of arbitration proceedings, by either the agreement of the parties or with the arbitral tribunal's permission on application by a party to approach the court, if the court is satisfied that determining the question will produce a substantial costs saving and the application was made without delay (section 45). This is rarely sought in practice, but an example is found in *Goodwood Investments Holdings Inc v Thyssenkrupp Industrial Solutions AG* [2018] EWHC 1056 (Comm), where the court was asked to determine whether without prejudice correspondence had established a settlement that foreclosed the arbitration.

Given the tribunal's power to decide its own jurisdiction under the Act (see question 22), the court will be reluctant to interpose its own judgement on whether an arbitration agreement is valid, except under the rules and procedures for appeal of arbitral awards (see *HC Trading Malta Ltd v Tradeland Commodities SL* [2016] EWHC 1279 (Comm), where the court declined to rule on the validity of an arbitration agreement where arbitration proceedings were contemplated by one of the parties but not yet initiated).

The courts' powers under section 44 are rarely, if ever, exercisable against third parties to the arbitration proceedings (*DTEK Trading SA v Mr Sergey Morozov and Anor* [2017] EWHC 94 (Comm).

28 Confidentiality

Is confidentiality ensured?

The Act makes no particular provision regarding confidentiality, but it is generally recognised that arbitration proceedings are private and members of the public cannot attend hearings as they can proceedings in open court. Some institutional rules include a duty of confidentiality (eg, 2014 LCIA Rules article 30), others do not. Typically, a tribunal will address the issue of confidentiality in its procedural orders. This is important as English law does not clearly define the scope of the confidentiality obligation.

English law typically treats confidentiality as an implied term of the arbitration agreement (see *Ali Shipping Corporation v Shipyard Trogir* [1997] EWCA Civ 3054, but this approach was criticised by the Privy Council as being insufficiently flexible in *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Company of Zurich (Bermuda)* [2003] UKPC 11).

The duty of confidentiality is subject to a number of recognised exceptions, including the consent or agreement of the parties to dispense with or limit obligations on confidentiality, where disclosure is required or permitted by a court (eg, by order of the court in other proceedings, *Science Research Council v Nassé* [1980] AC 1028) and where disclosure is necessary to establish or protect legal rights (eg, to claim an indemnity for its liability to the other arbitrating party, *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243; and where a principal wishes to obtain documents put before arbitral proceedings in which it has a financial interest and its agent is a party to the arbitration, *AMEC Foster Wheeler Group Limited v Morgan Sindall Professional Services Limited & Ors* [2015] EWHC 2012 (TCC)) and where it is in the interests of justice (eg, to prevent an overseas court being misled about the scope of an arbitration, *Emmott v Michael Wilson & Partners*

Ltd [2008] EWCA Civ 184). In *Westwood Shipping Lines inc & Anor v Universal Schifffahrtsgesellschaft MBH & Anor* [2012] EWHC 3837 (Comm), where an arguable claim could not otherwise be pursued in court, a party was permitted to rely on documents used in an earlier arbitration proceeding because it was considered reasonably necessary to protect the claimant's legitimate interests, and it was in the interests of justice. More recently, the court has indicated that a claimant does not need permission to bring litigation proceedings in the protection of its legitimate interests, although otherwise in violation of arbitral confidentiality, but it acts at its own risk in so doing (*Sarah Lynette Webb v Lewis Silkin LLP* [2015] EWHC 687 (Ch)).

The rules governing English court procedure (the Civil Procedure Rules (CPR)) provide that court proceedings relating to arbitration are generally heard in private, except for those relating to the determination of a preliminary point of law under section 45 or an appeal on a point of law under section 69 of the Act (CPR 62.10(3)), although the court has a general discretion to make any arbitration claim hearing private (CPR 62.10(1)). However, this is counterbalanced by a public interest in judgments of the court being public, particularly in relation to appeals under section 68 of the Act (see *Department of Economic Policy of the City of Moscow v Bankers Trust* [2004] EWCA Civ 314).

Interim measures and sanctioning powers

29 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Section 44(1) of the Act states that the court has the same powers in support of arbitration proceedings as it would in court proceedings to make orders having to do with, for example, the taking and preservation of evidence and the granting of interim injunctions, or the appointment of a receiver. The court's powers under section 44 are not mandatory and may be restricted by agreement between the parties. Furthermore, the court may only exercise its powers under section 44 where, in a case of urgency, it is necessary to preserve evidence or assets, or where the application is made with the permission of the tribunal or the agreement of the other party. In either case, section 44(5) provides that 'the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.'

In practice, the powers conferred on the court by section 44 of the Act are used with restraint (see *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618). The court will rarely make section 44 orders against third parties, and particularly not those outside the jurisdiction (*DTEK Trading SA v Mr Sergey Morozov & anr* [2017] EWHC 94 (Comm)).

The Supreme Court in *AES UST-Kamenogorsk Hydropower Plant LLP v UST-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35 examined the interplay between section 37 of the Senior Courts Act 1981 and section 44 of the Act. The Supreme Court held that, even where no arbitration had been commenced and none was intended, section 37 of the Senior Courts Act 1981 gave the court jurisdiction to grant an anti-suit injunction. This was followed in *Southport Success SA v Tsingsham Holding Group Co Ltd* [2015] EWHC 1974 (Comm). However, anti-suit injunctions must be made promptly, and a party that takes significant steps to address the merits of a dispute in court proceedings before seeking such an injunction is likely to be denied relief (*ADM Asia-Pacific Trading PTE Ltd v Toepfer International Asia PTE Ltd & Anor* [2016] EWHC 1427 (Comm)).

30 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The Act does not provide for emergency arbitrator appointments.

The 2014 LCIA Rules have added a provision for appointment of an emergency arbitrator on application in writing to the LCIA Court stating reasons for the need of emergency relief (article 9B), as well as providing for expedited formation of a tribunal also on application in writing (articles 5 and 9A). The LMAA Terms of Appointment 2012 do not make explicit provision regarding emergency arbitrators, although at clause 8(b)(iv), should a tribunal of three be in the process of formation, but the third arbitrator not yet be selected, the two presently appointed arbitrators may make decisions, orders and awards upon 'any matter' on which they are agreed. The CIArb arbitration rules established on 1 December 2015 include provisions for the appointment of an emergency arbitrator at article 26 and Appendix I.

Where emergency arbitration procedures are available, but the presiding arbitral institution has declined to activate them in response to a party's application, the court is unlikely to step in to use its powers under section 44 of the Act to offer relief instead (*Gerald Metals SA v Timis & Ors* [2016] EWHC 2327 (Ch)).

31 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Under the Act, and to the extent not otherwise agreed by the parties, the tribunal may order:

- security for costs (section 38(3) (though this may not be on the basis that the claimant is resident, or a corporation formed or substantially controlled from, outside the United Kingdom) (section 38(3)(a) and (b));
- the inspection, photographing or preservation of a party's property (section 38(4)(a)); and
- the preservation of evidence (section 38(6)).

In addition, section 39 of the Act allows the parties to agree to empower the tribunal to make any order on a provisional basis granting relief that it would have the power to grant in a final award.

32 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Section 40 of the Act is a mandatory provision imposing a general duty on the parties to arbitration to 'do all things necessary for the proper and expeditious conduct of the arbitral proceedings'. This general duty may be enforced by the tribunal under section 41, with sanctions in some specified circumstances, including a dismissal of the claim or defence of the party in breach. For example, inexcusable delay may lead to dismissal (section 41(3)), although this extreme sanction is likely to be inappropriate until the delay has extended beyond the end of the claim or counterclaim's limitation period (*Derya Commercial Estate v Derya Inc* [2018] EWHC 1673 (Comm)). If the party fails to comply with a peremptory order of the tribunal, the tribunal, or the other party with the permission of the tribunal, may apply to the court for an order under section 42. The breach of such an order of the court would be treated as contempt, which could result in fines or a term of imprisonment. The tribunal also has a further opportunity to sanction a recalcitrant party in determining its award of costs under section 61 of the Act.

The 2014 LCIA Rules include an annex entitled General Guidelines for Parties' Legal Representatives, setting out five general principles governing the conduct of party representatives. Article 18.5 empowers an LCIA arbitration tribunal to sanction party representatives for breach of these guidelines by imposing a written reprimand or caution, or adopting other measures (article 18.6). It remains to be seen how these provisions will be applied in practice.

Awards

33 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Usually, in the case of a three-member tribunal, one of the arbitrators is appointed to act as the chair of the tribunal, and in this case section 20 of the Act permits an award to be made by a majority of the arbitrators, with the view of the chair prevailing if the arbitrators cannot reach a unanimous or majority decision. Alternatively (and quite rarely), the

third arbitrator may act as an umpire under section 21 of the Act. In the event that the other arbitrators are unable to reach an agreement, the umpire can, by order of the court, replace them as the tribunal with power to make all decisions in the arbitration.

These procedures are not mandatory under the Act and may be displaced by party agreement (sections 20(1), 21(1) and 22(1)).

34 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Although dissenting opinions are allowed under English law, they are infrequent. Section 52(3) of the Act provides that a dissenting member of the tribunal need not sign the award. A dissenting opinion does not form part of the award under the Act. Consequently, a party cannot rely on a dissenting opinion to sustain a challenge for serious irregularity under section 68 (*F v M* [2009] EWHC 275 (TCC)). But a dissenting opinion might be admissible as evidence in relation to procedural matters or on an appeal on a point of law under section 69 (*B v A* [2010] EWHC 1626 (Comm)).

35 Form and content requirements

What form and content requirements exist for an award?

There is no statutory definition of an award in the Act. The parties are free to agree on the form of an award, failing which, section 52 of the Act sets out the formal requirements. The award must be in writing, signed by all of the arbitrators who assent to it, and it must state reasons unless it is an agreed award or the parties have agreed to dispense with reasons. In addition, the award must state the seat of the arbitration and the date on which the award is made.

The court gave useful guidance on the adequacy of the reasons stated for an award in *Compton Beauchamp Estates Limited v Spence* [2013] EWHC 1101.

36 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The Act does not include time limits for the tribunal to render an award, although it is always open to the parties to agree upon a particular time limit. If a time limit is imposed by agreement of the parties, unless they agree otherwise, this may be extended by the court upon the application of a party or of the tribunal under section 50 of the Act if the court considers that substantial injustice would otherwise result.

Considered in reverse, the arbitrators' duty of fairness to the parties under section 33 of the Act will generally not impinge upon their discretion to issue an award rather than await the outcome of potentially relevant but independent events (see *SCM Financial Overseas Ltd v Raga Establishment Ltd* [2018] EWHC 1008 (Comm), where the court held there had been no serious irregularity in the arbitration despite an award being rendered before the issuance of a Ukrainian court judgment, which could have been important evidence).

Under clause 20 of the LMAA Terms of Appointment 2012, the award 'should normally be available within not more than six weeks from the close of the proceedings'. The LCIA and CIArb arbitration rules make no provision for award deadlines.

37 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Any application for the correction of an award or for an additional award under section 57 of the Act must be made within 28 days of the date of the award (or any longer period agreed by the parties). Challenges to an award under sections 67 to 69 of the Act (see question 43) must also be brought within 28 days of the date of the award (or, if there has been some form of review or appeal of an award, within 28 days of the date when the applicant was notified of the result of that process) (section 70(3)). These time limits run from the date of the award rather than from the date when the award was delivered to the parties (*S v A and B* [2016] EWHC 846 (Comm)).

The court may extend this time limit under section 79, but this power will only be exercised where the court is satisfied that all other recourse has been exhausted and that a substantial injustice would otherwise be done (*Terna Bahrain Holding Co WLL v Al Shamsi* [2012] EWHC 3283 (Comm)). Moreover, applications to the tribunal for correction or clarification of the award under section 57 (see question 42) will only qualify to modify the deadline for appeals under section 70(3) if they are material to the appeal itself (*Daewoo Shipbuilding & Marine Engineering Company Ltd v Songa Offshore Equinox Ltd & anr* [2018] EWHC 538 (Comm)).

38 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

Under section 48 of the Act, the parties are free to agree which remedies the tribunal may award. In the absence of any agreement, the tribunal may make declarations, order the payment of damages, grant injunctions, order specific performance, and order the rectification, setting aside or cancellation of a document.

Under section 47 of the Act, the tribunal may make partial awards on different aspects of the dispute.

Under section 51 of the Act, the tribunal may grant consent awards.

Under section 57 of the Act, the tribunal may correct an award or make an additional award.

39 Termination of proceedings

By what other means than an award can proceedings be terminated?

If the parties reach a settlement before an award is granted, under section 51 of the Act, they may request the tribunal to terminate the proceedings and record the settlement as an agreed award. An agreed award must meet all of the formal requirements of an award, and must state that it is an award of the tribunal.

40 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Section 61(1) of the Act provides that the tribunal may make an award allocating the costs of the arbitration between the parties. This power is subject to any agreement by the parties (in either the arbitration agreement itself or in the institutional rules selected). However, an agreement that one party is to pay the whole or part of the costs of the arbitration regardless of its outcome is only valid if made after the dispute in question has arisen (section 60).

It is usual in English court proceedings that 'costs follow the event', and this position is reflected in section 61(2) of the Act (unless this is inappropriate in the circumstances). The term 'costs' includes the fees and expenses of the arbitrators, the fees and expenses of any arbitral institution, and the legal and other costs of the parties (section 59).

'Other costs' may, at least in some circumstances, include the costs of third-party dispute funding (*Essar Oilfields Services Limited v Norscot Rig Management PVT Limited* [2016] EWHC 2361 (Comm)). See question 52 for further discussion of third-party funding. Sections 62 to 65 of the Act set out additional detailed rules relating to the recovery of costs.

Prior to an award on costs, the parties must be heard on the issue as much as on the substantive matters of the dispute, applying the arbitrators' duty to act fairly between them under section 33 of the Act (*Oldham v QBE Insurance (Europe) Ltd* [2017] EWHC 3045 (Comm)).

41 Interest

May interest be awarded for principal claims and for costs, and at what rate?

Section 49 of the Act provides that the parties are free to agree on the powers of the tribunal with regard to interest and, if no such agreement is made, the tribunal may award simple or compound interest at rates it considers 'meet the justice of the case'. Therefore, absent agreement of the parties on the point, the tribunal has considerable flexibility over the award of interest under the Act.

Proceedings subsequent to issuance of award

42 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Section 57 of the Act empowers the tribunal, on its own initiative or on application by a party, to correct an error or remove an ambiguity in an award, or to issue an additional award in respect of a claim that was presented to the tribunal but not dealt with in the original award. An applicant must show that any claim it says was omitted was in fact presented to the tribunal, and the focus should be on the substance rather than the form (*Cadogan Maritime Inc v Turner Shipping Inc* [2013] EWHC 138 (Comm)). An application under section 57 must be made within 28 days of the date of the original award (which may be fewer than 28 days from the date when the award was served) and the new award must be issued within 28 days of the date of the application. The tribunal may also issue a corrected award under section 57 under its own initiative within 28 days of the date of the original award. The parties may agree an extension to the time limits under section 57.

43 Challenge of awards

How and on what grounds can awards be challenged and set aside?

After any appropriate exhaustion of arbitral appeal or correction (sections 57 and 70(2) of the Act; see also *X v Y* [2018] EWHC 741 (Comm)), an award may be set aside on the following grounds:

- The tribunal lacked substantive jurisdiction (section 67). Such a challenge must be made at the earliest possible opportunity, failing which, the right to object will be waived under section 73. Where a tribunal issues a partial award (see question 38) on the matter of its jurisdiction, a party's failure to challenge that award under section 67 within the time frame laid out in section 70 (see question 22) deprives it of the right to raise the challenge at a later time (section 73(2); see *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Limited* [2015] EWHC 1452 (Comm)). The grounds on which the appeal is made must have been considered by the tribunal (*Athletic Union of Constantinople v National Basketball Association (No. 2)* [2002] EWCA Civ 830). They usually concern the existence of a valid arbitration agreement between the parties (see *Finmoon Ltd v Baltic Reefers Management Ltd* [2012] EWHC 920 (Comm)). Generally, the court is slow to exercise its discretion (see *Integral Petroleum v Melars Groups Ltd* [2015] EWHC 1893 (Comm)), where an application for relief under section 67 was refused, even though it was found that the tribunal's ruling that it lacked jurisdiction was incorrect.
- The award was affected by a serious irregularity (section 68). It is rare for an appeal under section 68 to be successful. It is limited to those cases where justice requires the court to intervene. The grounds constituting a serious irregularity are divided into those affecting the arbitral procedure (including issues regarding apparent bias of an arbitrator (see question 18)) and those affecting the award. None of them permit the court to reconsider the merits of the award, or whether the tribunal's findings of fact or law were correct (see *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43; *Primera Maritime (Hellas) Ltd and others v Jiangsu Eastern Heavy Industry Co Ltd and another* [2013] EWHC 3066 (Comm)). Nor will the court overturn an award on the basis that the tribunal failed to give sufficient weight to particular evidence (*Schwebel v Schwebel* [2012] EWHC 3280 (TCC)) or because of delay in issuing the award (*BV Scheepswerf Damen Gorinchem v The Marine Institute* [2015] EWHC 1810 (Comm)). A tribunal's award based on the conclusion that one provision was a penalty was overturned where the party advancing the penalty argument had applied it to a different provision of the parties' agreement (*Brockton Capital LLP v Atlantic-Pacific Capital Inc* [2014] EWHC 1459 (Comm)). Parties are expected to approach the tribunal to clarify ambiguities in the award under section 57(3) of the Act if possible (see question 42) before recourse to a section 68 application to the court on the basis that the award was unclear (*Torch Offshore llc v Cable Shipping Inc* [2004] EWHC 787 (Comm)). The Commercial Court Guide clarifies that an appeal under section 68 may be dismissed without a hearing, and that a party could be sanctioned with indemnity costs if it loses an appeal under section 68 having refused to allow the appeal to proceed on the papers without a hearing.
- An appeal on a point of English law (section 69). This is a departure from the Model Law, but it is limited in scope. An appeal under section 69 may only be brought with the permission of the court or with the agreement of all other parties to the arbitration. The Court of Appeal has a threshold discretion to allow an appeal under section 69, but this will only be exercised in limited circumstances: *Kyla Shipping Company Ltd v Bunge SA* [2013] EWCA Civ 734. The point of law under appeal must substantially affect the rights of at least one of the parties. In addition, it must be one on which the conclusion of the tribunal is obviously wrong (which includes where the award does not answer at all a pertinent question of law: *Fehn Schiffahrts GmbH & Co KG v Romani SPA* [2018] EWHC 1606 (Comm)), or it must be a question of general public importance and the decision of the tribunal must be open to serious doubt. The right to appeal under section 69 may be excluded by agreement of the parties.

The language of the statute is permissive: the court 'may' rather than 'shall' make an order to confirm, vary, set aside or remit the award, as relevant under these various sections, if it is satisfied sufficient reasons are present. This is understood to allow the court, where appropriate, to make no order at all (*Integral Petroleum SA v Melars Group Limited* [2016] EWCA Civ 108).

An application to appeal on any of these grounds must be made within 28 days of the date of the award being appealed. The court may, under section 70, make orders for security for the respondent's costs of the application, and for payment into court of any sums due under the arbitration award. In *X v Y* [2013] EWHC 1104 (Comm), Teare J made an order for security for costs against X where there was a real risk that any costs order made against that party would not be enforced without considerable delay and expense. An application for costs rather than sums due under the award may be more likely to succeed (*Progas Energy Ltd & ors v The Islamic Republic of Pakistan* [2018] EWHC 209 (Comm)).

Parties should also be conscious of those decisions of a tribunal that are challengeable under these procedures, and those that are not. 'Award' is not defined in the Act, but case law has established that an award must finally dispose of an issue in an arbitration, to be contrasted with procedural orders or directions (*Brake v Patley Wood Farm LLP* [2014] EWHC 4192 (Ch)). For example, a challenge under sections 68 and 69 to a tribunal's order refusing to strike out a claim was not acted upon by the court, as such refusal was not finally determinative of a claim and could have been revisited by the tribunal (*Enterprise Insurance Co Plc v (1) U-Drive Solutions (Gibraltar) Ltd (2) James Drake QC* [2016] EWHC 1301 (QB)).

44 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

In theory, there are three potential levels of appeal. The initial application must be made to the Commercial Court – the part of the High Court that is charged with dealing with applications on arbitration matters. The application must be made within 28 days of the date of the award being challenged, and a hearing would usually take place within six to nine months of the date of the application.

Further appeals may only be made with permission. The Commercial Court may grant permission to appeal to the Court of Appeal, but the Court of Appeal may not grant permission itself to hear an appeal if the Commercial Court refuses. A further appeal is possible to the Supreme Court, again only with permission. This is rarely granted. The authors are only aware of two cases in which the Supreme Court addressed an issue under the Act dealing with an arbitration seated in the jurisdiction: *Jivraj v Hashwani* [2011] UKSC 40 and *NYK Bulkship (Atlantic) NV v Cargill International SA* [2016] UKSC 20.

Appeals at each level routinely take more than a year to reach judgment. The general rule is that costs follow the event (ie, the losing party will be ordered to pay the reasonable costs of the successful party).

45 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Section 66 of the Act provides that with leave of the court an award made by an arbitral tribunal may be enforced in the same manner as a judgment or order of the court, with judgment being entered in the terms of the award. Leave will not be given if the party against whom the award is to be enforced can demonstrate that the tribunal lacked the jurisdiction to make the award (section 66(3)).

With regard to foreign arbitration awards made in a New York Convention state, sections 100 to 103 of the Act provide for recognition and enforcement of these awards upon the production to the court of an authenticated original or certified copy of the award together with the original or certified copy of the arbitration agreement. If the award is in a foreign language, a certified translation must also be provided (section 102). With the leave of the court, these awards may be enforced in the same manner as a judgment or order of the court (section 101(2)).

The grounds under section 103 of the Act for refusing recognition and enforcement of a New York Convention award are narrow and include that:

- a party to the arbitration was under some incapacity;
- the arbitration agreement was not valid under the relevant law;
- the person against whom the award is invoked was not given proper notice of the arbitration or was otherwise unable to present its case;
- the award is beyond the scope of the matters submitted to arbitration;
- the composition of the tribunal was contrary to the parties' agreement or the relevant law;
- the award is not yet binding on the parties, or has been set aside or suspended by a competent authority under the relevant law;
- the award relates to matters that are not capable of settlement by arbitration; and
- it would be contrary to public policy to enforce the award.

Awards to which the New York Convention does not apply remain enforceable under the Arbitration Act 1950 (section 99 of the Act).

The relevant procedural rules for applying for enforcement of an award are set out at CPR 62.18.

The case of *Ecobank Transnational Inc v Tanoh* [2015] EWHC 1874 (Comm) serves as a reminder for those seeking to avoid enforcement that such an application can be defeated by delay. In that case, eight months had passed since foreign court proceedings had been commenced in breach of an arbitration agreement.

46 Time limits for enforcement of arbitral awards

Is there a limitation period for the enforcement of arbitral awards?

Claims to enforce a domestic award must be brought within six years of becoming final and payable (section 7 of the Limitation Act 1980; *National Ability SA v Tinna Oils & Chemicals Ltd* [2009] EWCA Civ 1330), unless the arbitration agreement is under seal, in which case the limitation period is 12 years (section 8, Limitation Act 1980). The New York Convention is silent with respect to limitation as a ground to reject enforcement of foreign awards. The same periods would presumably also apply, therefore, with respect to enforcement of a foreign award in England.

47 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Section 103(2) of the Act sets out the limited grounds on which recognition or enforcement of a New York Convention award may be refused. These include that 'the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made'. The mere fact that an application has been made in a foreign jurisdiction to set aside the award will usually result in a stay of enforcement proceedings; see, for example, *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v Republic of Kazakhstan* [2015] EWHC 2542 (Comm), where the High Court exercised its inherent case management powers to adjourn an application for enforcement of an Energy Charter Treaty award while annulment proceedings were under way in the Swedish courts.

In *Yukos Capital SARL v OJSC Rosneft Oil Company* [2014] EWHC 1288 (Comm), the court considered as a preliminary issue whether the enforcement of an arbitral award that had been set aside by the courts of the seat is precluded under common law. The court concluded that it was not, and if the claimant could satisfy the court that the foreign court's judgment offended against basic principles of honesty, natural justice and domestic concepts of public policy, the court would have power to enforce the award.

Although the New York Convention allows enforcement to be declined on grounds of public policy, a foreign award granting relief under principles that would not prevail under English law may nevertheless be enforced (see *Pencil Hill Ltd v US Citta di Palermo Spa* (Case BA40MA109) (unreported), where a Swiss award granting relief under a contractual penalty, which would not have been granted in English law, was enforced by the English court). More generally, fraud and illegality of conduct of a party may justify, on grounds of public policy, the refusal to enforce an award. However, where the arbitral tribunal has already scrutinised those issues, the English court will be slow to overturn the tribunal's decision-making (for an example of application, see *RBRG Trading (UK) Ltd v Sinocore International Co Ltd* [2018] EWCA Civ 838).

48 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The authors are not aware as yet of any judgments discussing enforcement of an emergency arbitrator order.

The Act refers to 'arbitrators' or the 'arbitral tribunal', but does not expressly refer to 'emergency arbitrators'. Section 41 does permit the tribunal to make 'peremptory orders', which the court may enforce pursuant to section 42. However, it is not clear whether the court will consider an emergency arbitrator to fall within the definition of 'the tribunal', whose orders would be enforceable under section 42. These provisions are not applicable to arbitrations seated outside the jurisdiction. Furthermore, section 66 only provides for the enforcement of an 'award'. 'Award' is not defined in the Act, but case law has established that an award must finally dispose of an issue in an arbitration, to be contrasted with procedural orders or directions (*Brake v Patley Wood Farm LLP* [2014] EWHC 4192 (Ch)). Accordingly, it is uncertain whether an emergency arbitrator order to which the main tribunal is not bound – which is expressly the case under some institutional rules – would fall within the English court's definition of an award.

The issue is perhaps even more uncertain with regard to decisions of an emergency arbitrator in foreign proceedings. As well as the issues just discussed, even where an award is issued, the court may not view it as sufficiently final and binding within the meaning of article V of the New York Convention to warrant enforcement.

Article 9.9 of the LCIA Rules 2014 provides that the award of an emergency arbitrator shall 'take effect as an award under article 26.8', making it 'final and binding on the parties'. Although this is perhaps designed to encourage enforcement by the court, the authors are not aware of any case law specifically on this point. In practice, institutional rules generally include an undertaking to comply with any awards or orders, which, conscious of alienating the tribunal, and the potential for adverse costs orders, parties are unlikely to breach lightly. This may explain why English courts do not appear to have addressed this issue yet.

49 Cost of enforcement

What costs are incurred in enforcing awards?

A party seeking enforcement of an arbitral award must comply with the procedure set out in CPR 62.18 and pay a court fee (currently £66). The application must be made to the court, supported by the arbitration agreement, the award, and an affidavit or witness statement and a draft order. Typically, most of the cost of enforcement will be made up of legal fees, which could rise quickly if the application is contested. However, these may be recoverable by a successful party under the

Update and trends

Various moves have been made towards transparency in international arbitration in recent years. The United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, of which the United Kingdom is an original signatory, came into force in late 2017. Arbitral institutions are also increasingly publishing material about their operations. In the United Kingdom, the LCIA began publishing arbitration costs and duration statistics in 2015, subsequently updated in October 2017, and has made some awards publicly available in anonymised form. In 2018, it launched a database of LCIA Court decisions on challenges to appointed arbitrators on its website, indicating that upheld challenges are rare but not unheard of. The LCIA also continues to publish guidance notes. Following its introduction of guidance for the involvement of tribunal secretaries in 2017, in early 2018 it offered considerations on the use of experts in arbitration.

Several judgments of the English courts considered the subjects of state sovereignty and investment treaty arbitration in 2018:

- The High Court in *GPF Gp S.à.r.l v Republic of Poland* [2018] EWHC 409 (Comm) applied the Vienna Convention on the Law of Treaties and (it appears for the first time) overturned a tribunal's finding that it lacked jurisdiction under a BIT. Such instances of domestic court scrutiny over the findings of investment tribunals are rare, not least because the most common institutional forum for such arbitration, ICSID, has an annulment procedure for appeals independent of municipal courts by virtue of the ICSID Convention. The case also demonstrates that de novo review is the typical approach of the English courts to what was a section 67 challenge. The approach is much less deferential to the original decision of the arbitral tribunal than some other jurisdictions.
- *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm) demonstrated the privileged position of sovereigns. Despite the general principle of the Act that delayed jurisdictional objections be dismissed, here the court determined, by virtue of section 9 of the State Immunity Act 1978, that it was obliged to entertain new jurisdictional objections as to the existence of an arbitration agreement with the state. The case again involved the rare analysis by an English court of BIT language with reference to the Vienna Convention and investment arbitration jurisprudence.
- By the long-standing 'act of state' doctrine, English courts will rarely adjudicate the lawfulness of sovereign acts and their effects on property situated in foreign territory. In *Reliance Industries Ltd & ors v Union of India* [2018] EWHC 822 (Comm), for the first time, the High Court decided that the doctrine should also apply to arbitrations seated in England applying English private international law principles. The Court thus confirmed the tribunal's own decision, applying the doctrine that determining the legal effect of an Indian executive act was beyond its jurisdiction.

The High Court has confirmed English jurisprudential understanding that the *West Tankers* principle remains intact under the Recast Brussels Regulation (Council Regulation 1215/2012). The principle precludes the grant of anti-suit injunctions against court proceedings in EU member states in favour of arbitration. Consequently, in *Nori Holdings Limited & ors v PJSC Bank Okritie Financial Corporation* [2018] EWHC 1343 (Comm) the court granted such an injunction against Russian proceedings, but held it could not with respect to related Cypriot proceedings. However, the United Kingdom is due to leave the European Union in March 2019. Depending on the nature of the arrangements for that exit, the Brussels Regulation, and consequently the *West Tankers* principle, could cease to operate in English law. Accordingly, determinations regarding anti-suit injunctions against EU state proceedings would revert to the English court's general power under section 37 of the Senior Courts Act 1981.

usual adverse costs principles applicable to English litigation. The applicant will also be liable for the associated costs of serving the defendant, which should be borne in mind particularly if the defendant is located abroad. Finally, identifying and seizing the defendant's assets will involve additional costs, which could also be considerable.

Other

50 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Some particular features of the English legal system and establishment likely to affect arbitration include:

- English (and other common law) arbitrators may be more likely than their civil law counterparts to make orders for extensive document disclosure;
- there is an assumption that the English rules of privilege will apply; and
- the assumption of 'loser pays' costs codified in the Act is a significant consideration for arbitration in England.

51 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

No specific framework governs the ethical conduct of counsel in international arbitration. The general ethical standards for solicitors are set out in the Solicitors Regulatory Authority's Code of Conduct. For those 'practicing overseas' on a non-temporary basis, the Solicitors Regulation Authority's Overseas Rules apply, which exclude some of the Code of Conduct rules – including those relating to advocacy – which would otherwise apply. The conduct of barristers is governed by the Code of Conduct in the Bar Standards Board's (BSB) Handbook. Both codes govern conduct of English counsel in international arbitration.

European counsel working in the European Union are subject to article 6(1) of Directive 98/5/EC, which provides that 'a lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host member state in respect of all the activities he pursues in that territory.' In theory, therefore, a European lawyer would be subject to the applicable Code of Conduct. However, it is unclear whether European lawyers practising temporarily in the jurisdiction, for example, at an arbitration seated in London, fall within the scope of the Directive. European lawyers may also be subject to the Council of Bars and Law Societies of Europe's Code of Conduct for European Lawyers.

For other foreign lawyers, no mandatory conduct rules apply. The 2014 LCIA Rules include an annex described as General Guidelines for the Parties' Legal Representatives. Absent the parties' agreement to the contrary, these guidelines apply to all arbitrations conducted under the 2014 LCIA Rules, whether or not seated in the jurisdiction.

The IBA Guidelines on Party Representation in International Arbitration likely represent best practice in England and Wales. Guidelines 18 to 24 relate to the preparation of witness evidence. Counsel are permitted to liaise with witnesses and experts, and to assist in the preparation of their evidence. Although these provisions are most likely compatible with the Solicitors' Code of Conduct, the BSB's Code arguably requires a higher standard. Rule C2.rC9.4 provides: 'You must not rehearse, practise with or coach a witness in respect of their evidence.' A similar prohibition exists under English common law (*R v Momodou* [2005] EWCA Crim 177).

52 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There are no statutory regulations specific to the contemporary practice of third-party funding in this jurisdiction. However, third-party funding is regulated by, and impacts, a variety of principles and procedures in English law-based arbitration and dispute resolution more generally.

The historic restrictions on champerty, the funding or 'maintenance' of a litigant's suit by a third party, have been diluted but not entirely eliminated. In order for a third-party funding arrangement to be deemed champertous today, the court would look to whether the arrangement appears designed to 'inflame damages' or the funder otherwise appears to have taken control of the litigation or arbitration for its own ends, beyond entering into an arrangement merely to fund a disputant in exchange for a share of proceeds (see *Arkin v Borchard*

Lines Ltd & Ors [2005] EWCA Civ 655 and *Excalibur Ventures LLC v Texas Keystone Inc & Ors* [2014] EWHC 3436).

If a funding agreement is deemed champertous, it is unenforceable by the funder. In the event of unsuccessful litigation, a funder may be liable for adverse costs up to the amount of its funding contribution in normal circumstances, and its liability in this regard may be unlimited if the agreement is champertous (*Arkin v Borchard Lines Ltd & Ors* [2005] EWCA Civ 655). However, the situation in arbitration is unclear. As a point of first principle, a funder would not normally be a party to the arbitration agreement. Accordingly, a tribunal cannot be expected to have jurisdiction to order costs against it. Nor does it appear to be the case that the English court would have such jurisdiction – costs orders against third parties not being among the powers exercisable by the court in support of arbitration under sections 42 to 44 of the Act.

'Other costs' as referred to in section 59(1) of the Act may, at least in some circumstances, include the costs to the claimant of its third-party dispute funding to be awarded as costs of the arbitration at the discretion of the tribunal (*Essar Oilfields Services Limited v Norscot Rig Management PVT Limited* [2016] EWHC 2361 (Comm)).

Third-party funding is also affected by issues of privilege and confidentiality. It appears the process of a funder receiving documents from the funded party or its legal advisers ought to be covered by common-interest privilege, although the authors are not aware that this is as yet settled law. Transmission of documents to funders and potential funders could take place under the terms of a confidentiality agreement, given that confidentiality is an essential element of privilege.

The authors are not aware of any requirement of a funded party to arbitration informing its opponent or opponents of such arrangements.

A code of conduct for third-party funders has been published by the Association of Litigation Funders (last revised in January 2018), and is a form of self-regulation of members.

53 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Overall, London is an attractive and commonly selected site for arbitration, largely because London has a high level of infrastructure and support for the procedure of arbitration. It has laws and courts that are very respectful of arbitration and are designed to allow the process to be followed largely without intervention by the court; it has a great many experienced arbitrators and counsel based there or in nearby European jurisdictions; and it also has a number of hearing centres such as the International Dispute Resolution Centre and the Chartered Institute of Arbitrators.

Foreign practitioners should be aware that visas are required for entry into the United Kingdom for citizens of many non-European countries.

crowell moring

Adrian Jones **arjones@crowell.com**
Gordon McAllister **gmcallister@crowell.com**
Edward Norman **enorman@crowell.com**
John Laird **jlaird@crowell.com**

Tower 42
25 Old Broad Street
London
EC2N 1HQ
United Kingdom

Tel: +44 207 413 0011
Fax: +44 207 413 0333
www.crowell.com

crowell moring

Delivering end-to-end advice on business and governmental disputes worldwide

Crowell & Moring represent clients from a wide range of industries and geographic regions in disputes under international and bilateral trade agreements and treaties.

Crowell & Moring IDR practice delivers end-to-end advice on the full range of business and governmental disputes worldwide. In addition to handling trade and investment issues and international arbitration, together with our affiliate firm C&M International (CMI), we help clients shape trade policy in the United States and abroad, as well as to interface with sovereigns around the globe.

CROWELL.COM

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

ISBN 978-1-912228-86-7