

ARBITRATIONS AND ARBITRATION LAW

THE ARBITRATION ACT 1996

The Arbitration Act 1996 ("the 1996 Act") was introduced, after a wide-ranging consultation with industry and the judiciary, to enhance and clarify the law of arbitration as it applies in England, Wales and Northern Ireland. Its aim was not to radically reform arbitration law, which had evolved over three centuries but, rather, to fine-tune the system and reflect best-practice.

The 1996 Act replaced Pt I of the Arbitration Act 1950, the Arbitration Acts of 1975 and 1979 and the Consumer Arbitration Agreements Act 1988.

Part I of the Arbitration Act 1996 covers arbitration pursuant to an arbitration agreement (defined in ss.5(1) and 6), the general principles of which are summarised as follows:

The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

The court should not intervene except as provided by Pt I of the 1996 Act.

Part II lists other provisions relating to arbitration, covering:

Domestic arbitration agreement (ss.85-87, ss.85-86 not yet in force)

Consumer arbitration agreements (ss.89-91);

Small claims arbitration in the county court (s.92);

Appointment of judges as arbitrators (s.93); and

Statutory arbitrations (ss.94-98).

Part III governs the recognition and enforcement of certain foreign awards, covering:

Enforcement of Geneva Convention awards (s.99); and

Recognition and enforcement of New York Convention awards (ss.100-104).

Part IV consists of general provisions as to the meaning of "the court" (s.105) and representation provisions in Crown applications (s.106).

Arbitration agreement: An "arbitration agreement" is defined as meaning "an agreement to submit to arbitration present or future disputes (whether they are contractual or not)": s.6.

The provisions of Pt I of the 1996 Act apply only where the arbitration agreement is in writing: s.5.

A person alleged to be a party to arbitration proceedings but who takes no part in the proceedings may question whether there is a valid arbitration agreement by applying to the court for a declaration or injunction or other appropriate relief: s.72(1)(a).

In *Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH* [2010] EWCA Civ 1100; [2011] 2 All E.R. (Comm) 327 it was held that a person who had not taken part in arbitration proceedings leading to an interim award on jurisdiction, but had thereafter taken part in the proceedings on the merits, could not make an application under s.72(1)(a) questioning whether there was a valid arbitration agreement.

"The court" for the purposes of the 1996 Act means the High Court or a county court: s.105. With a few notable exceptions, applications under the 1996 Act must be commenced in the High Court: The High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996/3215.

Mandatory provisions of the 1996 Act: Sections 9 to 11 (stay of legal proceedings); s.12 (power of court to extend agreed time limits); s.13 (application of Limitation Acts); s.24 (power of court to remove arbitrator); s.26(1) (effect of death of arbitrator); s.28 (liability of parties for fees and expenses of arbitrators); s.29 (immunity of arbitrator); s.31 (objection to substantive jurisdiction of tribunal); s.32 (determination of preliminary point of jurisdiction); s.33 (general duty of tribunal); s.37(2) (items to be treated as expenses of arbitrators); s.40 (general duties of the parties); s.43 (securing the attendance of witnesses); s.56 (power to withhold award in case of non-payment); s.60 (effectiveness of agreement for payment of costs in any event); s.66 (enforcement of award); s.67 (challenging the award: substantive jurisdiction); s.68 (challenging the award: serious irregularity); s.70 (challenge or appeal: supplementary provisions); s.71 (challenge or appeal: effect of order of court); s.72 (saving for rights of person who takes no part in proceedings); s.73 (loss of right to object); s.74 (immunity of arbitral institutions etc.); s.75 (charge to secure payment of solicitors' costs).

Separability of arbitration agreement: Unless otherwise agreed by the parties, the arbitration agreement does not become invalid, non-existent or ineffective because the main agreement is invalid, or did not come into existence or has become ineffective: s.7.

See *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40; [2007] 4 All E.R. 951 where it was held that the principle of separability contained in s.7 meant that the invalidity or rescission of the main contract did not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration

agreement had to be treated as a distinct agreement and could be void or voidable only on grounds which related directly to it. Fiona Trust was considered in *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd* [2013] EWHC 1063 (Comm); [2013] 2 All E.R. (Comm) 436 where it was held that the concept of separability had been codified in 1996 Act s.7. However, an arbitration agreement could be rendered void or unenforceable if it was directly impeached on grounds which related to the arbitration agreement itself and were not merely a consequence of the invalidity of the underlying contract.

See also *Hyundai Merchant Marine Co Ltd v Americas Bulk Transport Ltd (The Pacific Champ)* [2013] EWHC 470 (Comm); [2013] 2 All E.R. (Comm) 649.

Seat of the arbitration

The "seat of the arbitration" means the juridical seat of the arbitration designated by the parties to the arbitration agreement or such other persons appointed with the agreement of the parties: s.3. The seat of the arbitration is the legal, rather than physical, place of the arbitration proceedings.

An arbitration has to have a juridical seat before it begins and the requirement imposed upon the court by s.3(c) to consider the "relevant circumstances" in the determination of the appropriate jurisdiction of the seat, is one which involves consideration of the pre arbitration circumstances, not those subsequently arising: *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 All E.R. (Comm) 514.

Where London is chosen as the seat of the arbitration, the parties are taken to have agreed that proceedings on the award should be only those permitted by English law. A choice of seat for the arbitration is, in effect, a choice of forum for remedies seeking to attack the award: *C v D* [2007] EWCA Civ 1282; [2008] 1 All E.R. (Comm) 1001.

See also: *Tamil Nadu Electricity Board v ST-CMS Electric Co Private Ltd* [2007] EWHC 1713 (Comm); [2007] 2 All E.R. (Comm) 701; *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638; [2013] 1 W.L.R. 102 and *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm); [2013] 1 Lloyd's Rep. 235.

Application of the Limitation Acts: The Limitation Acts (see Key Acts and Key Subordinate Legislation above) apply to arbitration as they apply to legal proceedings: s.13.

In *National Ability SA v Tinna Oils & Chemicals Ltd (The Amazon Reefer)* [2009] EWCA Civ 1330; [2010] 2 All E.R. 899 it was held that the limitation period of six years under the Limitation Act 1980 s.7 was

applicable to an application to enforce an arbitration award in the same manner as a judgment under s.66 of the 1996 Act.

THE ARBITRATION PROCESS (ENGLISH ARBITRATIONS)

Commencement of arbitration: The parties are free to agree when the arbitration is to be regarded as commenced for the purposes of the 1996 Act and the Limitation Acts: s.14(1). If there is no such agreement, different notice provisions apply depending on whether the arbitrator is named or designated in the arbitration agreement: s.14(3); whether the arbitrator or arbitrators are to be appointed by the parties: s.14(4); or whether the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings: s.14(5).

In *Bulk & Metal Transport (UK) LLP v Voc Bulk Ultra Handymax Pool LLC (The Voc Gallant)* [2009] EWHC 288 (Comm); [2009] 2 All E.R. (Comm) 377 it was held that a message which stated that if charterers did not agree to the appointment of a single arbitrator, the owners would commence arbitration and appoint their own arbitrator, in accordance with an arbitration clause, was sufficient to commence arbitration within s.14(4).

Arbitral tribunal: The parties are free to agree on the number of arbitrators to form the tribunal and whether there is to be a chairman or umpire. Where there are an even number of arbitrators there is a presumption that an additional arbitrator is required to act as chairman. If there is no agreement as to the number of arbitrators, the tribunal is made up of a sole arbitrator: s.15

See also: s.20 (Chairman); s.21 (Umpire); s.22 (Decision-making where no chairman or umpire).

The authority of an arbitrator is personal and ceases on his death. However, unless otherwise agreed by the parties, the death of the person by whom an arbitrator was appointed does not revoke the arbitrator's authority: s.26.

Where an arbitrator ceases to hold office, the parties are free to agree:

Whether and if so how the vacancy is to be filled,

Whether and if so to what extent the previous proceedings should stand, and

What effect (if any) his ceasing to hold office has on any appointment made by him (alone or jointly).

Failing agreement, the provisions of s.16 (procedure for appointment of arbitrators) and s.18 (failure of appointment procedure) apply: s.27. The parties should seek so far as possible to apply the procedure for appointing arbitrators under the arbitration agreement to the appointment of

substitute arbitrators: Federal Insurance Co v Transamerica Occidental Life Insurance Co [1999] 2 All E.R. (Comm) 138.

A person alleged to be a party to arbitration but who takes no part in the proceedings may question whether the tribunal is properly constituted by applying to the court for a declaration or injunction or other appropriate relief: s.72(1)(b).

Appointment of the arbitrator(s): The parties are free to agree on the procedure for appointing the arbitrator or arbitrators: s.16. Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party refuses or fails to do so, the party which has duly appointed his arbitrator ("the first party"), may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

The defaulting party has 7 clear days of that notice being given to appoint an arbitrator and notify the first party that he has done so. Failing that the first party may appoint his arbitrator as sole arbitrator whose award is binding on both parties as if he had been appointed by agreement. The party in default can (upon notice to the appointing party) apply to the court to set aside the appointment: s.17.

Jurisdiction of tribunal: Unless otherwise agreed by the parties, the arbitral tribunal is given express power to rule on its own substantive jurisdiction as to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. Any such ruling may be challenged: s.30.

An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings. Appointing or participating in appointing an arbitrator does not constitute as a first step: s.31(1).

An objection during the course of the proceedings that the tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised: s.31(2).

The court has power to determine a preliminary point of jurisdiction: s.32.

A person alleged to be a party to arbitration but who takes no part in the proceedings may question what matters have been submitted to arbitration in accordance with the arbitration agreement by proceedings in the court for a declaration or injunction or other appropriate relief: s.72(1)(c).

Where the arbitral tribunal rules that it has substantive jurisdiction and a party to the arbitration who could have questioned that ruling, does not do so, or does not do so within the time allowed by the

arbitration agreement or any provision of the 1996 Act, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling: s.73(2).

Loss of right to object: If a party to arbitration takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of the 1996 Act, any objection that:

The tribunal lacks substantive jurisdiction,

The proceedings have been improperly conducted,

There has been a failure to comply with the arbitration agreement or with any provision of the 1996 Act, or

There has been any other irregularity affecting the tribunal or the proceedings

he may not raise that object later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection: s.73(1).

In *Thyssen Canada Ltd v Mariana Maritime SA* [2005] EWHC 219 (Comm); [2005] 1 Lloyd's Rep. 640 it was held that where a party participated in an arbitration when it had knowledge of or could with reasonable diligence have discovered grounds for objection, a challenge to an award for serious irregularity under s.68 was barred by s.73 of the 1996 Act, no extension of time should be granted for the making of the s.68 application and the application itself was an abuse of process. See also *Nestor Maritime SA v Sea Anchor Shipping Co Ltd* [2012] EWHC 996 (Comm) and *Terna Bahrain Holding Co WLL v Al Shamsi* [2012] EWHC 3283 (Comm); [2013] 1 All E.R. (Comm) 580.

General duties of the tribunal: The tribunal must:

Act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

Adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined: s.33.

Failure by the tribunal to comply with s.33 is a substantial irregularity for the purposes of s.68. The test for apparent bias is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the arbitrator was biased. However, the fair-minded and informed observer is not unduly suspicious: see *Interprods Ltd v De La Rue International Ltd* [2014] EWHC 68 (Comm); [2014] 1 Lloyd's Rep. 540

It is for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter: s.34.

Tribunal's powers: The parties are free to agree on the powers exercisable by the tribunal for the purposes of and in relation to the proceedings. Unless otherwise agreed by the parties the tribunal has the following powers:

To appoint experts or legal advisers to report to it and the parties or to appoint assessors to assist it on technical matters, and may allow any such expert, legal adviser or assessor to attend the proceedings. The parties must be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person: s.37(1)

To order a claimant to provide security for the costs of the arbitration: s.38(3)

To give procedural directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings: s.38(4)

To direct that a party or witness be examined on oath or affirmation and may for that purpose administer any necessary oath or take any necessary affirmation: s.38(5)

To give directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or power: s.38(6).

Unless the parties agree to confer such power on the tribunal, the tribunal has no power:

to order consolidation of other arbitration or concurrent hearing: s.35(2)

to order on a provisional basis any relief which it would have power to grant in a final award: s.39(4).

Powers of tribunal in case of party's default: The parties are under a general duty to do all things necessary for the proper and expeditious conduct of the arbitration: s.40. The parties are free to agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration: s.41(1).

Unless otherwise agreed by the parties:

Where there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim, the tribunal may make an award dismissing the claim: s.41(3). "Delay" includes any delay which causes a substantial risk that it is not possible to have a fair resolution of the issues in the claim: *L'Office Cherifien des Phosphates Unitramp SA v Yamashita-Shinnihon Steamship Co Ltd (The Boucraa)* [1994] 1 A.C. 486.

Where a party fails to attend or be represented at an oral hearing of which he has been give notice, or where matters are to be dealt with in writing, fails to submit written evidence, the tribunal may continue the proceedings in the absence of that party or the written evidence and may make an award on the basis of the evidence before it: s.41(4).

If, without sufficient cause, a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same effect: s.41(5).

If a claimant fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim: s.41(6).

Stay of legal proceedings: An agreement which gives one party the option of bringing any dispute between the parties to arbitration is valid and the court will order a stay of proceedings brought in contravention of that agreement pursuant to s.9 of the 1996 Act: NB Three Shipping Ltd v Harebell Shipping Ltd [2004] EWHC 2001 (Comm); [2005] 1 All E.R. (Comm) 200.

There is a right of appeal to the Court of Appeal of a High Court decision as to the grant of a stay under s.9: Inco Europe Ltd v First Choice Distribution [2000] 1 W.L.R. 586.

A stay can only be obtained against a party to an arbitration agreement or a person claiming through or under such a party and a mere legal or commercial connection is not sufficient: City of London v Sancheti [2008] EWCA Civ 1283; [2009] Bus. L.R. 996.

See also: Deutsche Bank AG v Tongkah Harbour Public Co Ltd [2011] EWHC 2251 (QB); [2012] 1 All E.R. (Comm) 194 and Nomihold Securities Inc v Mobile Telesystems Finance SA [2012] EWHC 130 (Comm); [2012] Bus. L.R. 1289.

Service of notices and documents: The parties are free to agree on the manner of service of any notice or other document. If there is no such agreement a notice or other document may be served on a person by any effective means. If a notice or other document is addressed, pre-paid and delivered by post to the addressee's last known principal residence, last known principal business address or to the party's registered or principal office, as the case may be, it will be treated as effectively served: s.76.

Securing the attendance of witnesses: With the permission of the tribunal or the agreement of the other parties, a party to arbitration may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence. The court procedures can only be used if the witness is in the United Kingdom and the proceedings are being conducted in England, Wales or Northern Ireland: s.43.

For the procedure governing securing the attendance of witnesses, see CPR Practice Direction 62 paras (7.1 to 7.3).

Remedies: The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies: s.48.

Unless otherwise agreed by the parties, the tribunal:

May make a declaration as to any matter to be determined in the proceedings;

May order the payment of a sum of money, in any currency;

Has the same powers as the court to order a party to do or refrain from doing anything; to order specific performance of a contract (other than a contract relating to land); to order the rectification, setting aside or cancellation of a deed or other document.

The parties are free to agree on the powers of the tribunal as regards the award of interest. Unless otherwise agreed the tribunal has the power to award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case: s.49. See also: *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43; [2006] 1 A.C. 221.

THE ARBITRATION AWARD (ENGLISH ARBITRATIONS)

Unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined: s.47(1).

The parties are free to agree on the form of an award. Failing agreement, the award must be in writing signed by all the arbitrators or all those assenting to the award; contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons; and state the seat of the arbitration and the date when the award is made: s.52.

Unless otherwise agreed by the parties:

where the seat of the arbitration is in England and Wales or Northern Ireland, any award in the proceedings will be treated as made there, regardless of where it was signed, despatched or delivered to the parties: s.53

the tribunal can decide what date is to be taken as to when the award was made. Otherwise, the date of the award is taken to be the date on which it is signed by the arbitrator or, where more than one arbitrator signs the award, by the last of them: s.54

the award will be notified to the parties by service on them without delay of copies of the award: s.55.

CHALLENGING AN AWARD (ENGLISH ARBITRATIONS)

Correction of award or additional award: The parties are free to agree on the powers of the tribunal to correct an award or make an additional award. Absent such agreement, the tribunal may on its own initiative or on the application of a party:

correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or

make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award: s.57.

See further: *CNH Global NV v PGN Logistics Ltd* [2009] EWHC 977 (Comm); [2009] 1 C.L.C. 807 and *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm); [2004] 2 All E.R. (Comm) 365.

Challenging the award: Time limit: An application challenging the award or an appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the application or appellant was notified of the result of that process: s.70(3).

In *Terna Bahrain Holding Co WLL v Al Shamsi* [2012] EWHC 3283 (Comm); [2013] 1 All E.R. (Comm) 580 an extension of time under s.70(3) to challenge an award was refused where the application would in any event fail. However, even if the challenge would have been successful, time would not have been extended because there had been substantial delay as a result of a deliberate choice for perceived tactical advantage.

Challenging the award: Substantial jurisdiction: A party to arbitration may (upon notice to the other parties and to the tribunal) apply to the court: (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction: s.67(1). Where the president of an arbitral tribunal had not been appointed in accordance with the agreed procedure his participation in an arbitration was unlawful and the award a nullity. There is no room in the field of private arbitration for the common law rule which, in some circumstances, can validate the acts of an apparent and reputed judge: *Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 243; [2007] 3 All E.R. 342.

See also: *Dallah Real Estate & Tourism Holding Co v Pakistan* [2010] UKSC 46; [2011] 1 A.C. 763 and *Abuja International Hotels Ltd v Meridien SAS* [2012] EWHC 87 (Comm); [2012] 1 Lloyd's Rep. 461.

Challenging the award: Serious irregularity: A party to arbitration may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see s.73) and the right to apply is subject to the restrictions in s.70(2) and (3).

Serious irregularity means an irregularity of one or more of the kinds listed in s.68(2). In *Atkins Ltd v Secretary of State for Transport* [2013] EWHC 139 (TCC); [2013] B.L.R. 193 it was held that "serious irregularity" within the meaning of s.68 did not mean in itself an error of fact or law on the part of the arbitrator and was not to be used as a ground for challenging the factual findings or legal reasoning of an arbitrator.

For there to be a serious irregularity under s.68(2)(b) because the arbitrators had exceeded their powers, it is necessary to establish that they purported to exercise a power they did not have. The erroneous exercise of a power which the arbitrators did have involved no excess of power. In particular, s.68 is not engaged if the arbitrators merely arrived at a wrong conclusion of law or fact: *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43; [2006] 1 A.C. 221. See also *Kaneria v England and Wales Cricket Board Ltd (ECB)* [2014] EWHC 1348 (Comm); (2014) 164(7606) N.L.J. 16.

Only the failure by an arbitral tribunal to deal with an important or fundamental issue could be capable of amounting to a serious irregularity causing substantial injustice within the meaning of s.68(2)(d): *Fidelity Management SA v Myriad International Holdings BV* [2005] EWHC 1193 (Comm); [2005] 2 All E.R. (Comm) 312.

See also: *Van der Giessen-de Noord Shipbuilding Division BV v Imtech Marine & Offshore BV* [2008] EWHC 2904 (Comm); [2009] 1 Lloyd's Rep. 273 and *Nestor Maritime SA v Sea Anchor Shipping Co Ltd* [2012] EWHC 996 (Comm).

In *Compton Beauchamp Estates Ltd v Spence* [2013] EWHC 1101 (Ch); [2013] 20 E.G. 107 (C.S.) it was held that, although an arbitrator's reasoning for an award determining the rent payable by a tenant for an agricultural holding was poor, it was, save in one minor respect, just enough to explain the conclusions reached. The failure to give adequate reasons for one aspect of his decision did not give rise to substantial injustice to the landlord so as to justify setting the award aside under s.68.

Appeal on point of law: Unless otherwise agreed by the parties, a party to arbitration may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an

award made in the proceedings. There can be no appeal in circumstances where the parties have agreed to dispense with reasons for the tribunal's award: s.69.

This is a non-mandatory provision and the parties can agree to exclude it. However, very clear words are required to exclude the jurisdiction of the court to entertain an appeal. The use of the terms "final, conclusive and binding" in an arbitration clause in an agreement could not be read as excluding the jurisdiction of the court to hear an appeal: *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* (formerly *Centurion Petroleum Corp*) [2009] EWHC 2097 (Comm); [2010] 2 All E.R. (Comm) 442. See also *Dollingstown Football Club v Irish Football Association* [2011] NIQB 66.

An appeal cannot be brought except (a) with the agreement of all the other parties to the proceedings, or (b) with the leave of the court. The threshold level required to obtain permission to appeal against an arbitration award under s.69 on a question of law is a very high one. The intention behind the 1996 Act was to curtail factual challenges being disguised as legal submission: *House of Fraser Ltd v Scottish Widows Plc* [2011] EWHC 2800 (Ch); [2012] 1 E.G.L.R. 9.

Appeals on questions of fact are not allowed by s.69 and it is very doubtful that the court has any inherent jurisdiction to entertain such an appeal, even where the parties have agreed to such an appeal: *Guangzhou Dockyards Co Ltd* (formerly *Guangzhou CSSC-OCEANLINE-GSW Marine Engineering Co Ltd*) v *ENE Aegiali I* [2010] EWHC 2826 (Comm); [2011] 2 All E.R. (Comm) 595.

FEES AND COSTS

Arbitrator's fees: The parties are jointly and severally liable to pay the reasonable fees and expenses of the arbitrators: s.28 and s.64(1).

The tribunal may refuse to deliver an award to the parties except upon full payment of the fees and expenses of the arbitrators: s.56.

Costs of the arbitration: The costs of the arbitration are made up of:

the arbitrators' fees and expenses;

the fees and expenses of any arbitral institution concerned; and

the legal or other costs of the parties.

The tribunal will award costs on the general principle that costs should follow the event: s.61.

The parties are free to agree what costs of the arbitration are recoverable. In the absence of such agreement the tribunal will award the recoverable costs of the arbitration on such basis as it thinks fit: s.63.

Immunity of arbitrator: An arbitrator (or an employee or agent of an arbitrator) is not liable for anything done or omitted in the discharge or purported discharge of his function as arbitrator unless the act or omission is shown to have been in bad faith:s.29.

Any liability incurred by an arbitrator by reason of his resigning is not affected by s.29.

Immunity of arbitral institutions: An arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith. Nor is he liable, by reason of having appointed or nominated an arbitrator, for anything done or omitted by the arbitrator in the discharge or purported discharge of his functions as arbitrator. This immunity extends to an employee or agent of the arbitral institution or person: s.74.

Enforcement of the award: An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. Where leave is so given, judgment may be entered in terms of the award: s.66.

The court has power to order judgment to be entered in the terms of an arbitral award in a case where the award was in the form of a negative declaration: *West Tankers Inc v Allianz SpA (The Front Comor)* [2012] EWCA Civ 27; [2012] 2 All E.R. (Comm) 113. See also *Nakanishi Marine Co Ltd v Gora Shipping Ltd* [2012] EWHC 3383 (Comm).

RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS

Recognition and enforcement of foreign awards are governed by Pt II of the Arbitration Act 1950 and Pt III of the 1996 Act.

Court's Powers under Pt I of the 1996 Act: The parties to arbitration can, in certain circumstances and on notice to the other parties, apply to the court to exercise its powers under the 1996 Act. The procedure for making applications to the court is governed by the Civil Procedure Rules Pt 62 and Practice Direction 62.

The court has power to extend agreed time limits to commence arbitration or other dispute resolution procedures: s.12. An order under s.12 does not affect the operation of the Limitation Acts.

In *Cathship SA v Allanasons Ltd (The Catherine Helen)* [1998] 3 All E.R. 714 it was held that a court's power to permit an extension of time for commencing arbitration proceedings under s.12 was more restricted than under the Arbitration Act 1950 s.27, its predecessor. Since s.12(3) laid down a condition requiring the court to be satisfied that circumstances were such as to be "outside the reasonable contemplation of the parties" at the time of the agreement, the court was not entitled to extend time

on the basis that, on balance, it was just to do so. Further, s.12(3) had to be interpreted as requiring the court to consider not only what the parties had in mind but also what they reasonably would have had in mind, necessitating a consideration of usual practice relating to that particular type of transaction.

In certain circumstances the court has power to set aside the appointment of an arbitrator: s.17(3) - see above.

Where there has been a failure in the appointment procedure, the court has powers to (a) give directions as to the making of any necessary appointments; (b) direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made; (c) revoke any appointment already made; (d) make any necessary appointments itself: s.18

The court has power to remove an arbitrator on the grounds specified in s.24(1), namely justifiable doubts as to his impartiality, qualifications, physical or mental incapacity, or a failure to conduct the proceedings properly or timeously. For discussion of the application of s.24 see *Laker Airways Inc v FLS Aerospace Ltd* [2000] 1 W.L.R. 113. Where the court removes an arbitrator, it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.

An arbitrator who resigns his appointment may (upon notice to the parties) apply to the court (a) to grant him relief from any liability thereby incurred by him, and (b) to make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid: s.25(3).

The court may, on the application of a party to the arbitration (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal: s.32 Unless the parties otherwise agree, the court may make an order requiring a party to comply with a peremptory order made by the tribunal: s.42(1).

Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitration the same power of making orders about the matters listed in s.44(2) as it has for the purposes of and in relation to legal proceedings: s.44(1). If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitration, make such orders as it thinks necessary for the purpose of preserving evidence or assets: s.44(3) and see *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618; [2005] 1 W.L.R. 3555. See also *Euroil Ltd v Cameroon Offshore Petroleum Sarl* [2014] EWHC 12 (Comm)

Unless otherwise agreed by the parties, the court may on the application of a party to arbitration (upon notice to the other parties) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties: s.45(1).

Where the time for making an award is limited by or in pursuance of the arbitration agreement the court may by order extend that time, unless otherwise agreed by the parties: s.50 The court will only make an order if satisfied that a substantial injustice would otherwise follow.

If the tribunal does not determine the recoverable costs of the arbitration, any party to the arbitration may apply to the court (upon notice to the other parties) to determine the recoverable costs on such basis as it thinks fit or order how they should be determined: s.63(4) and see s.64(2).

On an application challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order (a) confirm the award, (b) vary the award, or (c) set aside the award in whole or in part: s.67(3).

If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may (a) remit the award to the tribunal, in whole or in part, for reconsideration, (b) set the award aside in whole or in part, or (c) declare the award to be of no effect, in whole or in part: s.68(3).

On an appeal on a point of law the court may by order (a) confirm the award, (b) vary the award, (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or (d) set aside the award in whole or in part: s.69(7).

Where service of a document in the manner agreed by the parties or pursuant to s.76 is not reasonably practicable, the court may make such order as it thinks fit for service in such manner as the court may direct, or dispense with service of the document: s.77.

INTERNATIONAL ARBITRATION

Arbitration is a voluntary process, which can be entered into only by means of an agreement between the parties to resolve their differences through this mechanism. Arbitration is widely used by commercial parties around the globe as a preferred alternative to court litigation. The reasons for this are many, as explained further below, and the increase in the numbers of disputes referred to the various arbitral institutions reflects the popularity of arbitration, with many major arbitration institutions reporting steady increases in case loads over the past few years, as further explained below.

Many jurisdictions have different sets of rules for international and domestic arbitrations. Domestic arbitrations are usually defined as arbitrations held in a particular jurisdiction which concern two or more parties from that same jurisdiction. In England and Wales, however, the Arbitration Act 1996 (the Arbitration Act) has largely removed this distinction for most purposes. Yet the distinction is still significant, even as regards England and Wales, because challenges to, and recognition and enforcement of international awards is governed by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) (and other international conventions the UK is signatory to).

The principal international arbitration institutions are: the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution (ICDR) (the international arm of the American Arbitration Association), the Stockholm Chamber of Commerce (SCC) and the Swiss Arbitration Association (SAA) in Europe; the American Arbitration Association (AAA) in the USA; the Dubai International Financial Centre (DIFC) (in a strategic partnership with the LCIA, with rules based on the LCIA rules) and the Dubai International Arbitration Centre (DIAC) in the Middle East; Hong Kong International Arbitration Centre (HKIAC), Singapore International Arbitration Centre (SIAC) and China International Economic and Trade Arbitration Commission (CIETAC) in Asia. The institution most frequently used for the resolution of investment disputes is the International Centre for Settlement of Investment Disputes (ICSID). Many ad hoc arbitrations, both commercial and state-investor, are conducted using the United Nations Commission on International Trade Law (UNCITRAL) Rules, though UNCITRAL does not administer arbitrations.

There are also a number of important "specialist" arbitration organisations for specific types of disputes based in London, for example: the London Maritime Arbitrators Association (LMAA), whose members resolve maritime disputes and the Grain and Feed Trade Association (GAFTA), which provides an arbitration services to parties using GAFTA standard contracts.

Arbitrations can be "seated" in any jurisdiction chosen by the parties. This may be the same as the "home" of the institution whose rules have been selected by the parties. London, for example, is the base of the LCIA. However, parties can agree on an alternative "seat" of their choice under almost all arbitration rules. For example, although the ICC is based in Paris, ICC arbitrations are seated in many other countries. The juridical "seat" of an arbitration is important because, as explained below, it is relevant to the degree of court involvement in the arbitration and to the permitted grounds of challenge to an award in its place of issue and to its enforcement. Some of the most popular international arbitration centres are London, Paris, Switzerland, Singapore and New York.

It is easy to understand why the global business community often views arbitration as the preferred method of resolving cross-border commercial disputes, as further explained below:

- The parties are much more likely to achieve a confidential and private dispute resolution process in arbitration than in other dispute resolution methods, including litigation, which is generally public;
- Arbitration is generally more flexible than litigation, permitting the parties to craft their own dispute resolution process if they so choose;
- Arbitration provides a neutral forum for resolving disputes, independent of the parties or national courts;
- In arbitration, parties are able to select their own tribunal, consisting of arbitrators and a chairman with the desired experience and expertise. It is, therefore, possible, for example, to have a construction dispute over a contract governed by Argentinian law resolved in London by an arbitrator experienced in both Argentinian law and construction issues;
- International arbitral awards benefit from the New York Convention, making them generally more easily enforceable worldwide than court judgments, in the countries-signatory to the Convention (currently almost 150 states);
- Arbitral awards, unlike decisions of national courts, are not, in most developed jurisdictions subject to appellate review on the facts or the law (though they are generally re-viewable on a narrow range of issues such as jurisdiction, procedural fairness and public policy);

Arbitration has traditionally been considered to be a cheaper option than litigating in national courts. Whilst this is no longer necessarily the case, particularly compared with the cost of litigation in some civil law jurisdictions, the costs of arbitration may still be dwarfed by the costs of court proceedings in some jurisdictions, such as those which mandate a wide disclosure process.

- In some cases, arbitration can be a faster method of resolving disputes, especially compared to litigating in some jurisdictions where final resolution can literally take decades (e.g., the courts in India); and
- The scope of document disclosure in arbitration is significantly more limited than in court litigation in most developed jurisdictions, which reduces costs and management time.

The main attractions of arbitration are well known and do not require an expansive analysis. Arbitration provides a system which parties can tailor to their needs, which is relatively confidential, which provides a neutral forum for resolving disputes with arbitrators of the parties' choice. Arbitration is independent of state courts (and the expense, delays and uncertainties often

involved in litigation), and may be less costly and more expedient than litigation, with an enforceable award issued at the end of the process.

While arbitration proceedings involving substantial disputes are rarely cheap, concerns about the duration of arbitral proceedings and the costs involved can be exaggerated. It is true that arbitral proceedings in the commercial context can last a number of months or even several years, but so can court cases, especially in less arbitration-friendly jurisdictions. In certain jurisdictions, litigation can and often does take years, if not decades, with the courts struggling to hear the mind boggling backlogs of unresolved cases: for example, in 2009 Indian courts had a backlog of 30 million unresolved cases (Indiatogether.org - 2009; last accessed January 2016). Even in the courts of more developed jurisdictions, instances of exorbitantly lengthy proceedings are not unheard of: in the famous BCCI case, the opening submissions for the claimant took 80 days to deliver, and those for the defendant a record 119 days (Guardian.co.uk -2005; last accessed January 2016).

Arbitration has therefore become, and remains, one of the preferred methods for resolving international commercial disputes. As recent institutional statistics show, its popularity is increasing in tandem with increased support for arbitration from national courts in most developed jurisdictions and many developing ones over the past few years.

PRELIMINARY STAGES OF ARBITRATION (INTERNATIONAL ARBITRATION)

Arbitrability: One of the preliminary issues must be considered at the outset of any arbitration is that of arbitrability, i.e. whether the dispute in question is capable of being resolved in arbitration, or whether it must be submitted to the courts. This is generally prescribed by national laws in each jurisdiction, and reflects each state's public policy considerations. For example, in many jurisdictions, criminal offences are not arbitrable, some insolvency issues may be reserved for the courts of the place of incorporation of the relevant company and some competition and antitrust issues may not be resolved through arbitration.

In England & Wales, the Arbitration Act provides that both contractual and non-contractual disputes may be resolved through arbitration (s.6(1)). Commercial disputes arising under a valid arbitration agreement are generally arbitrable. While the Arbitration Act does not provide a list of non-arbitrable matters, matters which are deemed non-arbitrable under English law include criminal and family law issues.

Jurisdiction: The principle that the tribunal can only resolve the disputes which the parties have mandated the tribunal to resolve arises from the consensual nature of arbitration, and the fact

that the authority of the arbitral tribunal is derived from the agreement entered into by the parties to an arbitration.

Challenges to an arbitral tribunal's jurisdiction by the respondent to an arbitration claim are relatively common. A party may argue that there is no valid arbitration agreement, that it is not bound by the arbitration agreement, that the dispute itself or some part of it is not arbitrable, or that the claim is time-barred.

Where challenges to jurisdiction are raised by one of the parties, it is generally accepted in international arbitration that the tribunal itself has inherent (at least initial) power to decide itself whether or not it has jurisdiction to hear the claims. Most arbitration institutions and national laws contain express provisions confirming that the tribunal can rule on its own jurisdiction - s.30 of the Arbitration Act, for example, establishes such power in English law.

However, if the tribunal exceeds its jurisdiction, the resulting award will be in danger of being set aside or refused enforcement by a competent court. Section 67 of the Arbitration Act provides for an appeal against an award on grounds of jurisdiction. In two recent cases (*Hyundai Merchant Marine Co Ltd v Americas Bulk Transport Ltd (The Pacific Champ)* [2013] EWHC 470 (Comm); *Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH* [2013] EWHC 338 (Comm)), the English High Court set aside the arbitration awards under s.67 on the grounds of the tribunals' lack of substantive jurisdiction: in *Hyundai Merchant Marine Co Ltd v Americas Bulk Transport Ltd (The Pacific Champ)* [2013] EWHC 470 (Comm), the Court found that there was no binding agreement between the parties and, accordingly, no arbitration agreement; in *Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH* [2013] EWHC 338 (Comm), the Court concluded that an arbitration clause was not incorporated into the agreement in question through a prior course of dealings between the parties.

The jurisdiction of a tribunal may be protected or challenged through the use of an anti-suit injunction. Anti-suit injunctions may be divided into two categories: as injunctions restraining arbitration proceedings, and injunctions restraining parallel court proceedings. The latter is more common in practice, since the aim is to give effect to an arbitration agreement between the parties. The relatively recent case of *Gazprom OAO (C-536/13) EU:C:2015:316*; last accessed January 2016) confirms that EU Member States are obliged to recognise anti-suit injunctions issued by arbitral tribunals, but not those issued by the courts of other Member States. This follows on from the *West Tankers* case, which established that the courts of one Member State cannot restrict the courts of another Member State from ruling on their own jurisdiction. The ECJ

ruled that restraining another Member State in this way ran against the mutual trust principle at the core of Brussels Regulation 44/2001.

Appointment of the Tribunal: The constitution of the arbitral tribunal is one of the key preliminary issues in any international commercial arbitration. The parties will usually set out the number of arbitrators on the panel in the arbitration agreement. In the absence of such a provision, most institutional rules will include a default position. For example, art.12 of the 2012 ICC Rules provides that a sole arbitrator will be appointed where the parties have not agreed upon the number of arbitrators, save where the dispute is such as to warrant the appointment of three arbitrators.

It is customary for international commercial entities to provide for a three-arbitrator panel in their commercial agreements, where each party appoints an arbitrator, and the chairman is selected by the parties' appointees (or, absent agreement between them, by the institution selected). The ability to appoint an arbitrator is one of the key attractions of international arbitration, because it allows the parties to choose an arbitrator with appropriate competence and expertise, who understands the issues in dispute.

It is inevitable, therefore, that arbitral tribunals will often consist of individuals with varied cultural, commercial and legal backgrounds. Often panels will consist of lawyers from both civil and common law jurisdictions, who may have different views on the procedural issues likely to arise in the course of the proceedings, such as document disclosure (see below).

CONDUCT OF THE ARBITRAL PROCEEDINGS (INTERNATIONAL ARBITRATION)

In general, institutional rules provide only an outline of the steps which need to be taken. This provides flexibility, which is one of the attractions of international arbitration.

While the proceedings can be conducted in different ways, there are some key issues which regularly arise during the course of arbitration proceedings:

Bifurcation of Liability and Quantum Issues: One issue that often arises is whether the questions of liability and quantum should be dealt with separately. Quantifying claims/counter-claims in many commercial disputes is often a very time consuming and costly exercise, necessitating the consideration by the tribunal of many volumes of documentation, as well as the involvement of one or more quantum experts on each side who usually produce voluminous expert reports. In such cases, it may be more efficient procedurally and economically for the tribunal to decide on liability before embarking on the issues of quantum, so that the parties avoid expending time and money on evidence which may be irrelevant once a decision on liability is reached.

Disclosure of Documents: The expectation of the scope of document production will usually vary depending on the jurisdiction and/or background of the counsel representing each party. These expectations largely derive from the applicable civil procedure rules used in litigation in national courts. For example, the scope of documents to which a party to litigation is entitled under the US Federal Rules of Civil Procedure is wider than that in most other common law and almost all civil law countries, whereas there is generally no or only a very restricted obligation on the parties in civil law countries to provide any "disclosure" or "discovery" of documents other than those on which they intend to rely. Court rules on disclosure do not apply to international arbitration. Attitudes of tribunals to disclosure issues can vary greatly, making this one of the most debated areas in arbitration. However, there is something of a consensus to the effect that some disclosure by a party of potentially unfavourable documents should occur but that disclosure in arbitration will generally be more specific rather than general and fall short of the very heavy obligations under most common law systems.

The parties and tribunals often adopt the "Rules for the Taking of Evidence in International Commercial Arbitration" produced by the International Bar Association (the "IBA Rules"), which are widely considered to be an international standard for document production in arbitration. Where disputes arise between the parties as to the relevance/materiality of the requested documentary evidence, the tribunal will, under the IBA Rules, decide whether such a request should be denied or granted, weighing the considerations of materiality against proportionality.

In recent years, several arbitral institutions including the ICC (ICC Commission Report on Techniques for Managing Electronic Document Production When it is Permitted or Required in International Arbitration, 2011), IBA (IBA Rules on the Taking of Evidence in International Arbitration, 29 May 2010), AAA/ICDR (The ICDR Guidelines for Arbitrators Concerning Exchanges of Information) and the Chartered Institute of Arbitrators ("CI Arb") (CI Arb Protocol for E-Disclosure in Arbitration, October 2008) have either investigated the issues relating to management of e-disclosure, or revised their rules or issued guidelines to address the challenges presented by such disclosure, with varying approaches, from strictly minimalist guidance (e.g., AAA/ICDR) to a "checklist" intended to guide the parties and the tribunal (CI Arb).

In England & Wales, under s.34(2)(d) of the Arbitration Act, it is for the tribunal to decide on the scope of document production, unless the parties have agreed otherwise. In English arbitrations, if a party fails to comply with the tribunal's document production order, s.41(7) of the Arbitration Act allows the tribunal to draw adverse inferences and/or make appropriate orders as to costs, or seek an order from the court under s.42(1) of the Act.

Interim Relief: It may be necessary, in the course of arbitral proceedings, for either the arbitral tribunal or a local court to issue orders binding on the parties in order to preserve the status quo awaiting the outcome of the arbitration. Such orders may include "holding" orders aimed at preserving evidence or protecting assets. In institutional arbitrations, the arbitral tribunal will usually have the express power to issue such orders under the applicable institutional rules. In certain circumstances, however, the tribunal may not have the requisite powers or its powers may not be sufficient. These include, for example, situations where the tribunal itself has not yet been established and is therefore unable to issue interim orders (although some arbitration institutions, such as the ICC, have addressed this issue by allowing a party in need of urgent interim or conservatory measures that cannot await the constitution of the tribunal to apply for such measures to an "emergency arbitrator" or a need for an order binding on a third party (as the tribunal's orders are binding only on the parties to the arbitration itself), such as a bank; or a need to make a without notice application against a party to the arbitration, e.g., for an order freezing its assets or bank accounts.

Under most developed arbitration laws, national courts have inherent powers to issue interim measures in support of arbitrations. The Arbitration Act sets out circumstances in which the English court may exercise its powers to support arbitral proceedings in s.44:

" (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

(5) In any case 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. "

As regards the nature of the interim measure sought, they may take different forms and will vary in different jurisdictions, and will usually be set out in the national arbitration legislation. As a general guide, the categories of such measures will usually include measures to secure attendance of witnesses, preserve evidence, preserve status quo and measures dealing with documentary disclosure.

Regulation of the Conduct of the Proceedings - Procedural Timetable: One of the first things an arbitral tribunal, once appointed, will do is invite the parties to agree a "procedural timetable" for

the dispute, i.e. the steps in the arbitral proceedings and the time-frames for achieving them. If the parties are unable to agree the timetable (or particular aspects of it), the tribunal will ultimately impose one. In doing so, the tribunal will strive to balance the interests of both parties, and ensure that each has an opportunity to present its case, so as to limit any potential challenges to the award ultimately rendered by the tribunal and to make such award enforceable.

Confidentiality: Confidentiality can be an important consideration when deciding which dispute resolution method to choose. Generally, the parties are more likely to achieve a confidential and private dispute resolution process in arbitration than in litigation. It is always open to the parties to include an express obligation of confidentiality in their arbitration agreement and they would generally be well advised to do so if this is important to them. This is because, while in some jurisdictions national arbitration laws provide for confidentiality in arbitration, other arbitration laws do not and the same is true of the various institutional rules.

The Arbitration Act is silent on confidentiality, although English common law recognises an implied term of the arbitration agreement that arbitration be private and that certain documents created in relation to an arbitration are confidential (subject to certain exceptions). Rule 30 of the LCIA Rules provides that, unless the parties agree otherwise, they shall keep confidential all awards in the arbitration, all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party to proceedings not otherwise in the public domain, subject to disclosure being required "by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority". As regards investment arbitration, even where arbitration is not conducted under ICSID Rules (where there is no general duty of confidentiality unless the parties agree otherwise), confidentiality of proceedings is increasingly difficult to enforce.

AFTER ISSUE OF THE FINAL AWARD (INTERNATIONAL ARBITRATION)

Enforcement of the Award: One of the most important benefits of international arbitration is the relative ease of enforcement of arbitral awards. Under the New York Convention, a global regime for recognition and enforcement of arbitral awards covering 150 countries, local courts in contracting states are required to recognise and enforce foreign awards issued in other contracting states as though they were judgments of the local courts, subject to a limited number of grounds for refusing enforcement. The New York Convention regime allows an award creditor to pursue assets located almost anywhere in the world. There is no equivalent global regime allowing recognition and enforcement of court judgments, other than the Brussels I Regulation

(recast), Lugano Convention or EU-Denmark agreement for Europe and a limited number of bilateral enforcement treaties between individual countries.

That said, while the New York Convention allows very limited grounds to refuse enforcement, in some jurisdictions the interpretation of such grounds to deny enforcement can be rather broad, particularly the interpretation of "public policy".

One such refusal occurred in October 2013, when all three of the Dubai courts, having considered the applicability of the New York Convention, refused to recognise and enforce two ICC arbitration awards on the ground that, under the UAE's procedural laws, the Dubai Court of Cassation does not have jurisdiction to hear the case (Case No. 156/2013 Civil Cassation).

Sections 101-103 of the Arbitration Act incorporate into English law the provisions for the recognition and enforcement of awards under the New York Convention. English courts have a pro-enforcement attitude to arbitration awards and will only rarely refuse to enforce them, usually on public policy grounds. For example, in the case of *Westacre Investments Inc v Jugoimport SDPR Holding Co Ltd* [2000] Q.B. 288 enforcement was ordered despite public policy considerations in respect of an alleged illegality. In *Dallah Real Estate & Tourism Holding Co v Pakistan* [2010] UKSC 46; [2011] 1 A.C. 763, however, the English Supreme Court refused enforcement of an ICC award on the grounds that the defendant was not a party to the arbitration agreement.