ICLG

The International Comparative Legal Guide to:

International Arbitration 2015

12th Edition

A practical cross-border insight into international arbitration work

Published by Global Legal Group, in association with CDR, with contributions from:

Advokatfirman Vinge
AEQUO
Al Busaidy, Mansoor Jamal & Co.
Ali Budiardjo, Nugroho, Reksodiputro
Anderson Mori & Tomotsune
Andreas Neocleous & Co LLC
Baker & McKenzie LLP
Boss & Young Attorneys-at-Law
Brödermann Jahn RA GmbH
Charles River Associates
Chiomenti Studio Legale
Clifford Chance CIS Limited
Clyde & Co
Cornerstone Research
Costa e Tavares Paes Advogados
Dentons Canada LLP
Dr. Colin Ong Legal Services
Figueroa, Illanes, Huidobro y Salamanca
Freshfields Bruckhaus Deringer LLP
Geni & Kebe
Hajji & Associés
Holland & Knight
Homburger
K&L Gates LLP
Kachwaha & Partners
König Rebholz Zechberger
Kubas Kos Gałkowski
Law Office "Sysouev, Bondar, Khrapoutski SBH"
Lazareff Le Bars
Lendvai Partners
Lindfors & Co Attorneys at Law
Linklaters LLP
Loyens & Loeff Luxembourg S.à.r.l.
Luke & Associates
Matheson
Medina Garrigó Abogados
Motieka & Audzevičius
Olleros Abogados, S.L.P.
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Popovici Nițu & Asociații
PUNUKA Attorneys & Solicitors
Schutte Schluep & Heide-Jørgensen
Sedgwick Chudleigh Ltd.
Sefrioui Law Firm
Sidley Austin LLP
Skadden, Arps, Slate, Meagher & Flom LLP
Tonucci & Partners
Travers Thorp Alberga
TroyGould PC
Von Wobeser y Sierra, SC
Weber & Co.
Wilmer Cutler Pickering Hale and Dorr LLP
Yulchon LLC

CDR Commercial Dispute Resolution

GLG Global Legal Group

GLG
Global Legal Group

Contributing Editors
Steven Finizio and Charlie Caher, Wilmer Cutler Pickering Hale and Dorr LLP

Head of Business Development
Dror Levy

Sales Director
Florjan Osmani

Commercial Director
Antony Dine

Account Directors
Oliver Smith, Rory Smith

Senior Account Managers
Maria Lopez

Sales Support Manager
Toni Hayward

Editor
Rachel Williams

Senior Editor
Suzie Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
July 2015

ISBN 978-1-910083-56-7
ISSN 1741-4970

Strategic Partners

MIX
Paper from responsible sources
FSC® C011748

Preface:

General Chapters:

Asia Pacific:

Central and Eastern Europe and CIS:

Western Europe:

Continued Overleaf →

GLG
Global Legal Group

England & Wales

Charlie Caher

Michael Howe

Wilmer Cutler Pickering Hale and Dorr LLP

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of England and Wales?

Arbitration proceedings in England and Wales (and Northern Ireland) are governed by the Arbitration Act 1996 (the "1996 Act").

The 1996 Act applies only to arbitration agreements that are in writing (section 5(1)). Although oral arbitration agreements are recognised at common law, the 1996 Act does not apply to wholly oral arbitration agreements (section 81(1)(b)). Such agreements will not benefit from the default procedures or various other statutory powers conferred on the tribunal under the 1996 Act. Oral arbitration agreements also fall outside the scope of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention").

An agreement is deemed to be in writing if it is: (i) made in writing (whether or not signed by the parties) (section 5(2)(a)); (ii) made by exchange of communications in writing (section 5(2)(b)); or (iii) evidenced in writing (section 5(2)(c)). An agreement is evidenced in writing pursuant to section 5(2)(c) if recorded by one of the parties or by a third party with the authority of the parties to the agreement (section 5(4)). An exchange of written submissions in arbitration proceedings in which the existence of an agreement (other than in writing) is alleged by one party, and not denied by the other party, will constitute an agreement in writing as between those parties (section 5(5)). Under the 1996 Act, parties may also orally agree to arbitrate by referring to terms that are in writing (section 5(3)). Writing includes "being recorded by any means" (section 5(6)).

As to the content of an arbitration agreement, the 1996 Act simply requires that the parties agree "to submit to arbitration present or future disputes (whether they are contractual or not)" (section 6(1)). Parties may agree the specific terms of a written arbitration agreement or, alternatively, refer to a document containing an arbitration clause. Such reference will constitute an arbitration agreement if the effect of it is to make that clause part of the agreement (section 6(2)).

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

English courts generally take a broad view as to what constitutes an "arbitration agreement" under the 1996 Act; it suffices for the parties to have recorded in writing nothing more than an intention to refer any disputes to arbitration (section 6). The various default provisions of the 1996 Act provide detailed procedures designed to enable parties to use and enforce arbitration agreements in circumstances where the clauses themselves provide little or no practical assistance.

However, the English High Court recently held that a clause providing for an arbitration procedure (to determine the loss arising out of an insurance policy) was non-compliant with the 1996 Act and therefore not a genuine arbitration clause (*Turville Heath Inc v Chartis Insurance UK Ltd* [2012] EWHC 3019 (TCC)).

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

The 1996 Act promotes party autonomy and the courts are expected to take a non-interventionist approach where parties have agreed to submit their disputes to arbitration. The English courts also take a fairly broad view as to what matters will be deemed arbitrable under an arbitration agreement, with a view to promoting international trade and comity.

In 2008, the English House of Lords held that the time had come for a "fresh start" to the approach courts ought to take to the construction and enforcement of jurisdiction and arbitration clauses in international commercial contracts, and that such clauses ought to be more liberally construed (*Fiona Trust Corp v Privalov & Ors* [2007] 4 All ER 951, 958; see also *Deutsche Bank AG v Sebastian Holdings Inc* (No 2) [2011] 2 All ER (Comm) 245 (Court of Appeal)). In *Fiona Trust*, the House of Lords held that since the arbitration agreement is severable, it does not necessarily follow that it will be invalid if the underlying agreement has been held to be invalid (for example, because of misrepresentation). Instead, the arbitration agreement can only be invalidated by virtue of independent factors. However, in *Hyundai Merchant Marine Company Limited v Americas Bulk Transport* [2013] EWHC 470 (Comm), the English High Court held (on appeal to an award under section 67 of the 1996 Act) that a lack of consensus preventing the main agreement from coming into existence also prevented the arbitration agreement coming into existence. According to the Court, the two agreements were subject to the same conditions of agreement, which were not satisfied. In a more recent decision concerning validity of arbitration agreements, the High Court refused to declare the parties' agreement unenforceable even though the remaining contractual obligations were contrary to English public policy. A letter of guarantee issued by a Chinese company had been found to breach English public policy as it formed part of a scheme designed solely with the purpose of breaking Chinese law (*Beijing Jianlong Heavy Industry Group v Golden Ocean Group*

and Others [2013] EWHC 1063 (Comm)). In a case concerning the scope (as opposed to the validity) of arbitration agreements, *Interprods Ltd v De La Rue International Ltd* [2014] EWHC 68 (Comm), the High Court reaffirmed the *Fiona Trust* principle that parties to arbitration agreements are generally understood to be rational businesspeople, intending all disputes arising out of their relationship to be determined by the same tribunal, unless language to the contrary is present. In this case, Interprods attempted to argue that a dispute fell outside the wide scope of the arbitration clause at issue, because De La Rue terminated a contract following alleged criminal conduct. The High Court rejected the argument that such a matter was not intended to be covered by the wording of the arbitration agreement.

In relation to the enforceability of an agreement to negotiate, or an agreement to settle disputes amicably, the High Court has previously held that where an ADR process was not properly defined, and the parties' commitment to the process was equivocally expressed, the relevant clause could not be held to be a valid pre-condition to the issue of proceedings. The obligation and the process in question need to be sufficiently clear and certain to be given legal effect (*Wah (Aka Alan Tang) & Another v Grant Thornton International Ltd & Others* [2012] EWHC 3198 (Ch)).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in England and Wales?

The 1996 Act (which came into force with effect from 31 January 1997) governs the enforcement of arbitration proceedings in England and Wales. The 1996 Act implements the New York Convention (signed and ratified by the United Kingdom in 1975, subject to the reservation that it applies only to awards made in the territory of another contracting party), insofar as it requires that contracting States recognise agreements in writing under which the parties undertake to submit disputes to arbitration (Article II(1) and (2)). There have been no significant changes to this legislation in the last year.

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

The provisions of the 1996 Act in force do not distinguish between domestic and international arbitration proceedings. It is important to note, however, that sections 85 to 87 of Part II of the 1996 Act (which modify Part I in the case of "domestic arbitration agreements") are not in force.

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

The 1996 Act is, in large part, based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 1985 (the "Model Law"). However, in a number of important respects, the 1996 Act does not adopt the Model Law in its entirety. Perhaps most significantly, the Model Law is intended to apply only to international commercial arbitration (Article 1(1) of the Model Law). In contrast, the 1996 Act is not as limited, applying equally to all forms of arbitration. In addition, in contrast to the Model Law, under the 1996 Act:

- the document containing the parties' arbitration agreement need not be signed (and in contrast to the pre-2006 Model Law drafting, the "writing" requirement under the 1996 Act is defined broadly ("being recorded by any means") and covers the language now contained in Option 1 of the amended version of Article 7 of the Model Law adopted in 2006);
- an English court is only able to stay its own proceedings and cannot refer a matter to arbitration;
- the default provisions for the appointment of arbitrators provide for the appointment of a sole arbitrator as opposed to three arbitrators;
- a party retains the power to treat its party-nominated arbitrator as the sole arbitrator in the event that the other party fails to make an appointment (where the parties' agreement provides that each party is required to appoint an arbitrator);
- there is no time limit on a party to oppose the appointment of an arbitrator;
- parties must expressly opt-out of most of the provisions of the 1996 Act which confer default powers on the arbitrators in relation to procedure; and
- there are no strict rules for the exchange of pleadings.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in England and Wales?

The 1996 Act makes mandatory for all arbitrations sited in England and Wales those provisions listed in Schedule 1 of the 1996 Act (section 4(1)). These provisions apply whatever the parties may have agreed. The provisions listed in Schedule 1 include (by way of example) provisions relating to: (a) the court's powers to stay legal proceedings (sections 9 to 11), extend agreed time limits (section 12), remove arbitrators (section 24), secure witnesses' attendance (section 43), and to enforce an award (section 66); (b) challenges to an award (sections 64 and 68); and (c) the basic duties of tribunals and parties (sections 33 and 40).

3 Jurisdiction

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

The 1996 Act does not define or describe those matters that are capable of settlement by arbitration (i.e., arbitrable). The 1996 Act simply preserves the common law position in respect of arbitrability (section 81(1)(a)). However, the 1996 Act expressly applies to non-contractual, as well as contractual, disputes (section 6(1)).

Under English common law, a multitude of non-contractual claims (including claims in tort, disputes involving competition law matters, disputes concerning intellectual property rights and certain statutory claims) are capable of settlement by arbitration. In two recent decisions on the question of arbitrability of statutory claims, the English Court of Appeal has held that (a) statutory claims relating to minority interests in a company (unfair prejudice) are arbitrable, but (b) that arbitrators have no power to order the winding up of a company, relief which is reserved exclusively to the court (see *Fulham Football Club (1987) Ltd v Richards* [2011] *EWCA Civ 855 and Salford Estates (No.2) Ltd. v Altomart Ltd* [2014] EWCA 1575 (Civ)).

There are, however, certain claims which are definitively not capable of settlement by arbitration. To begin with, arbitration is limited to civil proceedings: criminal matters are not capable of settlement by arbitration. Second, employment claims cannot be arbitrated. In *Clyde & Co LLP v Bates Van Winkelhof* [2011] EWHC 668 (QB), the High Court confirmed that claims under the Employment Rights Act 1996 are non-arbitrable, since the Act renders void any agreement which would prevent an employee from having its case heard before an employment tribunal. (It is notable that no such provision appears in the legislation governing unfair prejudice claims.)

Questions have also been raised as to whether disputes involving issues of mandatory EU law can be settled by arbitration. In *Accentuate Ltd v ASIGRA Inc.* [2009] EWHC 2655, the High Court suggested that an arbitration agreement will be considered "*null, void and inoperative*" to the extent that it purports to require the submission to arbitration of issues relating to mandatory EU law. There are questions as to whether this decision contradicts the long-held view that such matters – for example, EU competition claims – are indeed arbitrable (see e.g., *ET Plus SA v Jean-Paul Welter* [2005] EWHC 2115 (Comm.) (Q.B.), and *Eco Swiss China Time Ltd v Benetton International NV* [1999] (Case C-126/97)).

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

The 1996 Act (section 30(1)) confers upon the arbitral tribunal (subject to the parties agreeing otherwise) the competence to rule on its own substantive jurisdiction as to:

- whether or not there is a valid arbitration agreement;
- whether or not the tribunal has been properly constituted; and
- what matters have been submitted to arbitration in accordance with the arbitration agreement.

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

Pursuant to section 9 of the 1996 Act, a party to an arbitration agreement (against whom legal proceedings are brought in England and Wales, in apparent breach of an arbitration clause), may apply to the court for a stay of proceedings in the court. The court is required to grant the stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed (section 9(4)). This requirement applies even if the seat of the arbitration is outside of England and Wales (section 2(1)). However, pursuant to section 9(3) of the Act, the right to a stay of judicial proceedings may be lost if the applicant has taken steps in the court proceeding to answer the substantive claim. It has been held that participating in a case management conference and inviting the court to make related orders constituted steps to "answer the substantive claim" (*Nokia Corp v. HTC Corp* [2012] EWHC 3199 (Pat)).

The House of Lords' decision in *Fiona Trust & Holding Corp v. Privalov & Ors* [2007] 4 All ER 951, [2008] 1 Lloyd's Rep 254, held that arbitration clauses are to be given a broad interpretation, in accordance with the principle that parties will be taken to have intended to have all their disputes determined by the same tribunal, unless clear words exist to indicate a contrary intention (note the recent application of this principle in *Interprods Ltd v De La Rue International Ltd* [2014] EWHC 68 (Comm)). In considering whether court proceedings are in respect of a matter referred to arbitration, the court will look at the nature and substance of the claim or claims and not at how those claims have been formulated in the parties' pleadings (*Lombard North Central plc v GATX Corporation* [2012] EWHC 1067 (Comm)). In cases where facts give rise to claims under more than one contract between the same or closely related parties, the choice of arbitration under one contract may mean that claims under related contracts would also be stayed (*Deutsche Bank AG v Tongkah Harbour Public Company Ltd* [2011] EWHC 2251 (Comm)). Accordingly, the ability of parties to successfully resist a section 9 stay application has been significantly reduced.

The difficulty in parties successfully resisting section 9 stay applications has been recently emphasised in the Court of Appeal judgment of *Joint Stock Company "Aeroflot Russian Airlines" v Berezovsky and Others* [2013] EWCA Civ 784. In this case, the Court of Appeal allowed a stay of proceedings under section 9 (4) of the Act, finding that the High Court had been wrong in holding that a Swiss arbitration clause was unenforceable as a matter of Swiss law. The Court of Appeal stressed that the wording of section 9 (4) places the burden of proof on the party seeking to show that the arbitration agreement was either "null and void" or "inoperative" (once the section 9 applicant had established the existence of an arbitration clause, and that the clause covered the matters in dispute).

Under section 72 of the 1996 Act, a party who takes no part in the arbitral proceedings may challenge: (i) the validity of an arbitration agreement; (ii) whether the arbitral tribunal has been properly constituted; or (iii) the matters that have been referred to arbitration, and may seek an injunction restraining arbitration proceedings. There is the potential for inconsistency between the possibility of applying for a stay under section 9 and the chance to apply for an injunction under section 72. The Court of Appeal has held that where the court is faced with applications under both section 9 and 72, the section 9 application should be determined first (along with any related issues, such as the validity of the arbitration agreement) (*Fiona Trust & Holding Corp v. Privalov & Ors* [2007] EWCA Civ 20). The Court of Appeal also held that if there is a valid arbitration agreement, proceedings cannot be launched under section 72 at all.

An application under section 9 is not the only means by which a party can seek to restrain court proceedings allegedly brought in breach of an arbitration agreement. The court is also entitled to stay court proceedings under its inherent jurisdiction. It will tend to exercise this power where the requirements of section 9 of the Act are not satisfied. It has been held, however, that this power should only be exercised in "rare and compelling circumstances" (*Reichhold Norway ASA v Goldman Sachs International* [1999] EWCA Civ 1703; see the recent decision in *Stemcor UK Ltd v Global Steel Holdings Ltd and another* [2015] EWHC 363 (Comm) for an example of where the threshold of "rare and compelling circumstances" was met).

Historically, English courts have sought to restrain the bringing of overseas proceedings in breach of an arbitration agreement by means of an anti-suit injunction. However, following the decision of the European Court of Justice in *Allianz SpA v West Tankers Inc*, Case C-185/07 [2009] All ER (D) 82, the issuance of anti-suit injunctions to restrain proceedings commenced in another EU Member State in contravention of an arbitration clause was no longer permitted. The Court reached this decision notwithstanding the fact that the relevant instrument – Regulation 44/2001 (known more commonly as the Brussels Regulation) – expressly excluded arbitration from its ambit. On 10 January 2015, the "recast" Brussels Regulation came into effect. One of the important changes made by the recast regulation is to strengthen the arbitration exclusion (as explained in more detail in question 15.1 below). It remains to be seen whether the amendments effected by the recast regulation will allow the Court of Justice of the European Union ("CJEU") (as it is now known) to overcome its aversion to anti-suit injunctions.

Irrespective of the position with regard to anti-suit injunctions under the recast Regulation, the High Court has confirmed that no principle of EU law prevents a tribunal from entertaining a claim for damages for breach of an arbitration agreement arising out of proceedings brought before the court of another EU Member State (*West Tankers Inc v Allianz SpA* [2012] EWHC 854 (Comm)).

English courts remain willing to issue anti-suit injunctions to restrain proceedings brought in non-EU countries in breach of an arbitration agreement (see e.g., *Midgulf International Ltd v Groupe Chimique Tunisien* [2009] EWHC 963 (Comm); *Joint Stock Asset Management Company "Ingosstrakh Investments" v BNP Paribas SA* [2012] EWCA Civ 644). This is the case even where the party seeking the injunction has no intention to commence arbitral proceedings (*AES-UST Kamenogorsk Hydropower Plant LLP v UST-Kamenogorsk Hydropower Plant JSC* [2010] EWHC 772 (Comm), upheld on appeal in both the Court of Appeal and Supreme Court ([2011] EWCA Civ 647 and [2013] UKSC 35).

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

Under the 1996 Act, and unless otherwise agreed by the parties, the arbitral tribunal may determine its own substantive jurisdiction (section 30). Section 30(1) defines substantive jurisdiction as comprising:

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

There are two stages at which a party to arbitral proceedings may challenge the substantive jurisdiction of the tribunal: at the preliminary stage (under section 32); and after an award has been rendered (under section 67). A party that has not taken any part in arbitral proceedings is also entitled, pursuant to section 72, to bring proceedings at any time for a declaration or injunction regarding the substantive jurisdiction of the tribunal.

The Act restricts challenges at the preliminary stage; the clear intention being that the initial decision as to jurisdiction ought to rest with the arbitral tribunal. An application under section 32 can only be made in two circumstances. First, where all parties to the arbitral proceedings agree in writing. Second, where the arbitral tribunal gives permission in circumstances where the court is satisfied that:

- the determination of the question is likely to produce substantial savings in costs;
- the application was made without delay; and
- there is good reason why the matter should be decided by the court (section 32(2)).

It is only in exceptional cases that a court will find these criteria to have been met, and therefore allow a determination as to the tribunal's jurisdiction to be made by the court at a preliminary stage.

An application under section 32 was the focus of the recent decision in *Toyota Tsusho Sugar Trading Ltd v Prolat SARL* [2014] EWHC 3649. This case was notable for two reasons. First, it was one of the rare cases in which – after permission was granted by the arbitral tribunal – the three requirements for court involvement were met. Interestingly, the "good reason" as to why the matter ought to be decided by the court was that parallel proceedings had been commenced in Italy, in which the Claimant in those proceedings (Prolat) contended that it was not bound to arbitrate. This links to the second notable point, which was the court's approach to the application of the Brussels Regulation. (This case was decided two months before the recast Brussels Regulation came into force in January 2015.) The court held that it was not constrained by the ongoing Italian proceedings from deciding the question of the applicability of the arbitration agreement, holding that the arbitration exception found at Article 1(2)(d) of the Regulation applied. The court's decision stands in marked contrast to the famous *West Tankers* decision (discussed in more detail below), the effect of which was apparently to preclude the court of the seat of arbitration from determining the application of an arbitration clause while another court was seised of the issue. The decision was, however, consistent with the position under the recast Regulation, which was due to come into force just two months later (and which is now in force).

The arbitral proceedings may continue, and an award may be granted, at the same time that an application to the court for the determination of a preliminary point of jurisdiction is pending (section 32(4)). The right to object to the substantive jurisdiction of the court may be lost if the party takes part or continues to take part in the arbitral proceedings without objection (section 73).

An application to challenge an arbitral award on grounds of lack of substantive jurisdiction under section 67 is not subject to the same hurdles. That said, such proceedings are time-limited: they must be brought within 28 days of the date of the arbitral award being challenged. A hearing under section 67 is by way of complete rehearing (*Azov Shipping Co v Baltic Shipping Co (No 1)* [1999] 1 Lloyd's Rep 550.

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

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

English law does not afford a tribunal power to assume jurisdiction over individuals/entities not actually a party to the arbitration agreement. Arbitration is considered to be, first and foremost, a consensual process. While a tribunal may invite a non-party to submit testimony or produce documents willingly, it cannot itself compel that individual or entity to do so (although the court has powers to so order in certain circumstances in support of the arbitral process).

In various jurisdictions, a number of legal theories (e.g., agency, alter ego principles, third party rights and the group of companies doctrine) have been advanced to seek to bind non-signatories to arbitration agreements. English law, however, is circumspect in embracing these legal theories (*Adams and Others v Cape Industries Plc and Another* [1990] Ch 433; *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5), and there has been a general refusal to accept the group of companies doctrine in the absence of consent on the part of the third party or possibly an estoppel (*Bay Hotel v Cavalier* [2001] UKPC 34). In *Peterson Farms Inc. v C & M Farming Ltd* [2004] All ER (D) 50, the High Court set aside an award in which the group of companies doctrine had been recognised, stating, *inter alia*, that it "*forms no part of English law*".

Until recently, there remained some scope under English law of reaching results not dissimilar to the group of companies doctrine by concluding that the non-signatory to an arbitration agreement was claiming "*through or under*" that agreement. Moreover, it was possible to argue in favour of piercing of the corporate veil (*Roussel-Uclaf v GD Searle & Co.* [1978] 1 Lloyd's Rep. 225).

However, in November 2008, the Court of Appeal, in *City of London v Sancheti* [2008] EWCA Civ 1283; [2008] All ER (D) 204 (Nov); [2009] 1 Lloyd's Rep 117, closed the door on this possibility, determining that *Roussel-Uclaf* was wrongly decided and should not be followed. The defendant in *Sancheti* was accordingly denied a section 9 stay, because the Claimant (the Mayor and Commonality and Citizens of the City of London) was not a party to the relevant arbitration agreement (contained in the UK-India Bilateral Investment Treaty) – the relevant party was the UK Government.

English law does, however, allow non-signatories to arbitration agreements to be bound in certain circumstances. First, a party may be bound where it has, or has assumed, rights under a contract pursuant to the Contracts (Rights of Third Parties) Act: see *Nisshin Shipping Co. Ltd v Cleaves & Co. Ltd* [2004] 1 All E.R. (Comm.) 481 (Q.B.). In this case, brokers, who had rights to commission payments under a charterparty agreement to which it was nonetheless not a party, were held to be entitled to arbitrate against party to the charterparty. However, in *Fortress Value Recovery Fund LLP v Blue Skye Special Opportunities Fund LP* [2013] EWCA Civ 367, the Court of Appeal held that very clear language is required in order to take the benefit of a contractual exclusion subject to an arbitration clause in the same agreement under the Contracts (Right of Third Parties) Act 1999. This decision also held that the scope of the Contracts (Rights of Third Parties) Act 1999 is limited to third party rights; and that limitations in a contract which may give rise to a defence are not assignable. As a result, non-contracting parties seeking to assert such defences are not covered by the Act.

English law has also allowed non-signatories to be bound by an arbitration agreement in other situations: (i) where the principal is bound to a contract that has been signed by his agent; (ii) under the doctrine of ostensible or apparent authority, by which a party is bound by another's acts even where those were unauthorised; (iii) where a party has impliedly consented to an arbitration agreement through the conclusion of a related agreement; (iv) where a guarantor is bound by an arbitration clause in a guaranteed contract; and (v) other situations involving the transfer of obligations, including assignment of a contract and subrogation.

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

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

The former imposes a six-year limitation period for actions in both contract and tort. Therefore, it can be said with confidence that the limitation period for the large majority of arbitration claims would be six years. The latter enactment, meanwhile, provides that where a dispute being determined in England and Wales is governed by foreign law, the laws of the foreign state relating to limitation shall apply. In imposing such a rule, the Foreign Limitation Periods Act clearly establishes that the rules regarding foreign limitation periods are substantive.

3.7 What is the effect in England and Wales of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Where an arbitration is seated in England and Wales, there is no mandatory stay of proceedings where one party to the arbitration becomes insolvent. However, proceedings may be continued only with the consent of the administrator or permission of the court (Schedule B1, para. 43(6) Insolvency Act 1986). In this regard, in *Syska (acting as the administrator of Elektrim SA (in bankruptcy)) and another v Vivendi Universal SA and Others* [2009] EWCA Civ 677, the Court of Appeal upheld the decision of a London arbitral tribunal rejecting Elektrim's argument that they lacked jurisdiction because the arbitration agreement had been annulled by Polish bankruptcy law.

Moreover, in *United Drug (UK) Holdings Ltd v Bilcare Singapore Pte Ltd* [2013] EWHC 4335 (Ch), the English High Court recently held that a stay of proceedings against a Singaporean company could be lifted (to allow arbitration proceedings), even though insolvency proceedings were pending in Singapore. The purpose of lifting the stay was to determine the rights and obligations of the parties. In the circumstances, the High Court seems to have placed reliance on the legitimacy of the request for arbitration and the fact that lifting such a stay would not be burdensome on the defendant, as they could "piggyback" on the defence of a second defendant.

Article 15 of the Council Regulation on Insolvency Proceedings (No. 1346/2000) provides that the effects of insolvency on one party to "a lawsuit pending" (which includes an arbitration) are to be determined by the laws of the Member State in which that proceeding is sited. In this regard, the English Court of Appeal, in *Syska*, confirmed that Article 15 is not in conflict with Article 4 (which provides that the effects of a company's insolvency are to be determined by the law of the Member State in which the insolvency proceedings are opened), as Article 4(2) expressly exempts from that provision "lawsuits pending". As a result, if a party to an arbitration becomes insolvent during the course of the arbitration, the effect of that insolvency on the arbitral proceedings will be determined by the law of the seat of the arbitration.

4 Choice of Law Rules

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

Section 46 of the 1996 Act is largely similar in effect to Article 28 of the Model Law, providing that the dispute shall be decided in accordance with the parties' choice of law, or, if the parties agree, in accordance with "other considerations". Moreover, section 46 provides that a choice of the laws of a particular state is limited to the substantive laws of the foreign state, and not the foreign state's conflict of laws rules. (The law applicable to the procedure of the arbitration is governed by the 1996 Act (section 2).)

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

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

The circumstances in which mandatory laws will prevail over the law chosen by the parties will depend on the date upon which the agreement was entered into.

For contracts entered into on or before 17 December 2009, an arbitral tribunal seated in England and Wales is obliged to give effect to mandatory laws of England and Wales, but not to those of some other jurisdiction. For such contracts, the relevant instrument is the Rome Convention, which applies in England and Wales pursuant to the Contracts (Applicable Laws) Act 1990.

With regard to the application of mandatory laws of England and Wales, Article 7(2) of the Rome Convention provides that the other provisions of the Rome Convention do not restrict the application of the rules of the law of England and Wales where they are mandatory, irrespective of the law otherwise applicable to the contract. Accordingly, where a rule of law of England and Wales is truly mandatory, it must prevail over the law chosen by the parties (*Ingmar GB Ltd v Eaton Leonard Technologies Inc* (Case C-381/98) [2001] All ER (EC) 57). Examples of such mandatory rules in England and Wales include the Employment Rights Act 1996, the Unfair Contract Terms Act 1977 and the Carriage of Goods by Sea Act 1981.

With regard to the mandatory application of the laws of other jurisdictions, the UK legislature did not incorporate the relevant provision – Article 7(1) of the Rome Convention – into domestic law. Accordingly, where the contract was entered into on or before 17 December 2009, there is no scope for the mandatory laws of some other jurisdiction to prevail over the parties' choice of law.

The situation is different for contracts entered into after 17 December 2009. The Rome Convention has now been replaced by Regulation No. 593/2008 on the Law Applicable to Contractual Obligations (the "Rome I Regulation") for all contracts concluded after 17 December 2009. In contrast to its predecessor, the Rome I Regulation does not permit derogations from certain provisions. It is now the case that an arbitral tribunal seated in England and Wales must give effect to both (i) the mandatory laws of the forum (i.e. England and Wales), and (ii) the mandatory laws of the state where the obligations arising out of the contract have to be performed override the parties' choice of law.

As noted above, the English High Court has held that an "*arbitration clause would be 'null and void' and 'inoperative' within the meaning of section 9(4) of the 1996 Act, in so far as it purported to require the submission to arbitration of 'questions pertaining to' mandatory provisions of EU law*" (*Accentuate Ltd v ASIGRA Inc.* [2009] EWHC 2655). The authors submit that this case was decided incorrectly on that point.

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

The Rome Convention and Rome I Regulation expressly exclude from their scope "arbitration agreements" (Article 1(2)(d) Rome Convention; Article 1(2)(e) Rome I Regulation). Accordingly, in England and Wales, the question of which law is applicable to the formation, validity and legality of the arbitration agreement itself is determined by the application of general common law choice-of-law principles.

Applying these general common law principles, the court will look first for an express choice. Failing that, they will seek necessary implications from the provisions of the contract. If this also does not yield a definitive answer, the court will seek to determine which law has the "closest and most real" connection with the arbitration agreement (*Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm); *Compagnie Tunisienne De Navigation S.A. v Compagnie D'Armement Maritime S.A.* [1971] AC 572). When determining which jurisdiction the arbitration agreement has a close and real connection with, this will generally be the law of the seat of the arbitration rather than the law applicable to the underlying agreement (assuming that the two differ) (*C v D* [2007] EWCA Civ 1282; *Sulamerica Cia Nacional de Seguros SA v Ensesa Engenharia S.A.* [2012] EWCA Civ 638; *Abuja International Hotels Ltd v Meridien Sas* [2012] EWHC 87 (Comm)).

5 Selection of Arbitral Tribunal

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

English law gives parties wide autonomy in their selection of arbitrators. The relevant provisions of the 1996 Act operate only as a fallback provision in circumstances where express written agreement has not been reached (section 5(1)). The 1996 Act imposes only two mandatory rules in this area: first, that the death of an arbitrator brings his or her authority to an end; and second, that the court has the ability to remove arbitrators who are not performing their functions properly (section 24).

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

In the absence of the parties' agreement as to the number of arbitrators, the tribunal will be made up of a sole arbitrator (section 15(3)). As indicated above, the court has the power to remove an arbitrator on several grounds, including: (i) justifiable doubts as to his impartiality; (ii) in the event that he or she does not possess the qualifications required by the parties' arbitration agreement; (iii) physical or mental incapability; or (iv) failures in conducting the proceedings (section 24(1)(a) to (d)).

There were fears at one time that provisions of anti-discrimination legislation might limit the parties' scope to choose their own arbitrators. The decision of the Court of Appeal in *Jivraj v Hashwani* led to fears that requirements as to nationality – which are found in the arbitral rules of many leading institutions – would fall foul of the relevant UK anti-discrimination legislation. However, the UK Supreme Court subsequently overturned the Court of Appeal's decision, holding that arbitrators are not "employees", and as such fell outside the provisions of the relevant anti-discrimination legislation (*Jivraj v Hashwani* [2011] UKSC 40). English anti-discrimination legislation therefore does not limit the parties' scope to choose their own arbitrators.

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

Parties are free to agree on the procedure for appointing arbitrators (including the chairman or umpire) (section 16(1)). If the parties fail to agree on an appointment procedure, the 1996 Act sets out

detailed provisions for the appointment of: a sole arbitrator (joint appointment by the parties within 28 days of a written request by one party, section 16(3)); a tribunal comprising two arbitrators (each party to appoint one arbitrator within 14 days of a written request by one party to do so, section 16(4)); a tribunal comprising three arbitrators (as with two, but the two party-appointed arbitrators shall forthwith appoint a chairman, section 16(5)); and a tribunal comprising two arbitrators and an umpire (as with three, subject to differences as to the timing of the umpire's appointment, section 16(6)). Where the parties have failed to even agree as to the number of arbitrators, by default, the tribunal shall consist of a sole arbitrator (section 15(3)).

The Act contains provisions in the event that an appointment procedure fails. If the procedure fails because of the failure to comply by one of the parties, the 1996 Act sets out a detailed default procedure, which enables the other party to give notice that it intends to appoint its arbitrator to act as sole arbitrator, and to make such an appointment (section 17(1)). For other failures in appointment procedure, either party may apply to the court to exercise certain powers (unless the parties have agreed to the contrary). These powers include (i) giving directions as to the making of appointments (section 18(3)(a)); (ii) directing that the tribunal be constituted by such appointments (section 18(3)(b)); (iii) revoking any previous appointments (section 18(3)(c)); or (iv) making the necessary appointments itself (section 18(3)(d)). (See *Through Transport Mutual Assurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] All ER (D) 351 for confirmation of the English High Court's exercise of such powers.)

The court may also delegate its power to make the necessary appointment to an arbitral institution if it deems fit (see *Chalbury McCouat International Ltd v PG Foils Ltd* [2010] EWHC 2050).

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

A court may intervene in the selection of arbitrators in certain circumstances, but only on the application of one of the parties to the arbitration agreement. In the event that a sole arbitrator is appointed under section 17 of the 1996 Act, the party in default may apply to the court to set aside that appointment (section 17(3)). In all other cases where the appointment procedure has failed, unless the parties have agreed otherwise, a party can apply to the court to exercise certain powers (as described in more detail above).

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

The impartiality of arbitrators is central to the arbitration process. The 1996 Act states that "the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal" (section 1(a)). Section 24(1)(a) of the 1996 Act permits a party to apply to the court for the removal of an arbitrator on the basis that circumstances exist that give rise to justifiable doubts as to that arbitrator's "impartiality". Furthermore, section 33(1)(a) of the 1996 Act requires that the tribunal shall act fairly and impartially as between the parties. The application of this duty can be demonstrated by the decision of the High Court in *ED & F Man Sugar Ltd v Belmont Shipping Ltd* [2011] EWHC 2992 (Comm), where the court held that a tribunal is not obliged to alert parties to potential arguments that may support their case.

The Act does not require the disclosure of potential conflicts. It does not contain provisions equivalent to Articles 12 and 13 of the Model Law. The Departmental Advisory Committee – on whose report the 1996 Act was based – preferred instead to retain the rule that the only issue is whether the arbitrator has acted impartially, and not whether they are "independent in the full sense of that word". This is consistent with the long-standing English practice of having party-appointed arbitrators (*AT & T Corporation v Saudi Cable Co* [2000] Lloyd's Rep 127).

Under the recently-revised LCIA Rules, prospective arbitrators are required to sign a declaration before being appointed by the LCIA, stating whether "*there are any circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence*", and specifying any such circumstances in full (Article 5.4, LCIA Rules). A similar obligation is imposed by the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members (October 2009), which provides that "*Members shall disclose any interest or relationship which is likely to affect, or may reasonably be thought likely to affect, their conduct*" (Part 1, Rule 2).

The organisation of the English legal profession – split into solicitors and barristers – gives rise to interesting issues regarding independence, impartiality and disclosure of conflicts of interest. In *A and others v B and another* [2011] EWHC 2345 (Comm), the sole arbitrator (a barrister) disclosed – shortly before issuing the award – that it had been instructed by the defendant's solicitors throughout the course of the arbitration in an unrelated matter. The instructions were given by a different partner at the defendant's solicitors. The claimant sought to set aside the arbitral award for serious irregularity giving rise to substantial injustice (under section 68 of the Act), claiming that a fair-minded and informed observer would conclude that there was a real possibility of unconscious bias. The court disagreed on this point, and further held that the late disclosure of this conflict was not a serious irregularity within the meaning of section 68.

6 Procedural Rules

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

The provisions of Part I of the 1996 Act, which govern the procedure of an arbitration pursuant to an arbitration agreement, apply to arbitration proceedings that have their seat in England or Wales (section 2(1)). Under the 1996 Act, the "seat of the arbitration" is the juridical seat, which is the place where the arbitration has its formal legal seat and where the arbitration award will be made. Although it is usually the case, it is not essential that the physical hearings take place at the seat of the arbitration.

The parties are free to agree the seat of the arbitration in their arbitration agreement (section 3). If the parties fail to agree the seat of the arbitration, an arbitral (or any other) institution or person vested by the parties with powers to do so may designate the seat (section 3(b)). Alternatively, if authorised to do so by the parties, the arbitral tribunal may designate the seat (section 3(c)).

Where no arbitral seat has been designated or determined, and there is a connection with England and Wales, the court may still exercise its powers under the 1996 Act for the purpose of supporting the arbitral process (section 2(4)). The provisions relating to stay of proceedings and enforcement of arbitral awards apply regardless of the location (or even designation) of the seat (section 2(2)).

6.2 In arbitration proceedings conducted in England and Wales, are there any particular procedural steps that are required by law?

There are no particular procedural steps that are required by law. Instead, the parties are free to agree how their disputes are to be resolved. The Act does impose, however, an overarching "general duty" on the arbitral tribunal (section 33). This general duty has two elements: first, section 33(1)(a) requires the tribunal to act fairly and impartially as between the parties, giving each a reasonable opportunity to put its case and deal with that of its opponent (i.e., due process); and second, the tribunal is obliged by section 33(1)(b) to adopt procedures suitable to the circumstances of a particular case, avoiding unnecessary delay and expense, so as to provide a fair means for the resolution of the matters falling to be determined.

The tribunal is obliged to comply with the general duty discussed above in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence, and in the exercise of all other powers conferred upon it.

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

There are no separate rules that govern the conduct of counsel (legal professionals or otherwise) from England and Wales in arbitral proceedings sited in England and Wales. English solicitors participating in arbitrations sited in England and Wales are bound by the Solicitors Regulation Authority ("SRA") Code of Conduct 2011 ("SRA Code of Conduct"). English qualified barristers, moreover, are governed by the Code of Conduct of the Bar Council ("Bar Code of Conduct"), as regulated by the Bar Standards Board ("BSB").

Solicitors and barristers are generally governed by the same professional standards in arbitration proceedings sited both inside and outside of England and Wales. In the case of solicitors, the SRA Code of Conduct, Chapter 13A, provides that the SRA Code of Conduct does not apply to those practising overseas or to those engaged in "temporary practice overseas". Those regulated individuals who are established in practice overseas and those authorised bodies or recognised sole practitioners with responsibility for or control over bodies or branch offices overseas, are governed by the SRA Overseas Rules. The Overseas Principles are modified from the SRA Principles, in order to take account of the different legal, regulatory and cultural context of practice in other jurisdictions, which may require different standards of conduct to those required in England and Wales. Equally, the Bar Code of Conduct is not expressly limited to regulating the conduct of barristers participating in cases within England and Wales. Instead, the Bar Code of Conduct is clear that the Code (or at least most sections of it) apply to all regulated persons "practising" or "otherwise providing legal services". The wording of the Code is not jurisdictionally limited and hence, applies to barristers involved in international arbitration proceedings sited both inside and outside of England and Wales.

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

It is this difference in regulation – with practitioners in the same arbitration being required to comply with different rules of professional conduct – that has led to moves to harmonise the rules of professional conduct to which international arbitration practitioners are subject. In 2013, the International Bar Association adopted its Guidelines on Party Representation in International Arbitration. Although non-binding, these guidelines represent a welcome first step in attempts to harmonise the rules of professional conduct to which international arbitration practitioners the world over are subject. More recently, the LCIA took steps in this regard when publishing its revised arbitration rules, granting the power to the arbitral tribunal to sanction legal representatives in the event that their conduct fell below the required standard.

6.4 What powers and duties does the national law of England and Wales impose upon arbitrators?

Under the 1996 Act, the parties are free to agree on the powers exercisable by the arbitral tribunal in relation to the proceedings (section 38). Unless otherwise agreed by the parties, however, the tribunal may: order a claimant to provide security for the costs of the arbitration (section 38(3)); give 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 (section 38(4)); direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation (section 38(5)); or give directions to a party for the preservation, for the purposes of the proceedings, of any evidence in his custody or control (section 38(6)).

In addition, the parties are free to agree that the tribunal shall have the power: to order on a provisional basis any relief which it would have power to grant in a final award (section 39(1)); to dismiss any claim where there has been inordinate and inexcusable delay (section 41(3)); or to dismiss any claim where a party fails to comply with a peremptory order of the tribunal to provide security for costs (section 41(6)). Where a party fails to comply with any other kind of peremptory order, the tribunal may: (a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order; (b) draw such adverse inferences from the act of non-compliance as the circumstances justify; (c) proceed to an award on the basis of such materials as have been properly provided to it; or (d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance (section 41(7)).

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

In England and Wales, only solicitors of the Supreme Court of England and Wales, and barristers called to the Bar in England and Wales, holding practising certificates from the respective English bodies regulating these professions (the SRA and the Bar Council respectively), can have rights of audience in English courts, or rights to the "conduct of litigation" in proceedings issued in these courts. Appearing in court without one of these qualifications can render a

person liable to a criminal charge (section 21 Solicitors Act 1974, sections 14(1) and 181(1) Legal Services Act 2007), contempt of court (section 14(4) Legal Services Act 2007) and that person will be precluded from recovering any fees from his putative client (section 25 Solicitors Act 1974). These restrictions are subject to certain limited exceptions.

An arbitration sited in England is not covered by these various provisions; accordingly, foreign lawyers are free to appear before an arbitration tribunal in England without restriction. Indeed, a representative need not necessarily be legally qualified in any jurisdiction; the 1996 Act specifically provides that, unless the parties otherwise agree, each party may be represented in the proceedings "by a lawyer or other person chosen by him" (section 36).

6.6 To what extent are there laws or rules in England and Wales providing for arbitrator immunity?

Arbitrators acting in arbitrations sited in England and Wales have immunity for any act or omission made in the discharge of the arbitrator's functions, unless the act or omission is shown to have been in bad faith (section 29, which is mandatory). If an arbitrator resigns, the parties may reach an agreement with him or her regarding the liability to be incurred by the arbitrator as a consequence of his or her resignation (section 25(1)).

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

Section 1 of the Act sets out three general principles, which apply to the interpretation of the large majority of the Act's provisions:

- the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense (section 1(a));
- the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest (section 1(b)); and
- the court should not intervene except as expressly provided by the Act (section 1(c)).

The clear effect of the second and third principles is that intervention by national courts in the arbitral process should be minimal.

The Act does provide the national courts with jurisdiction to address certain procedural issues. Specifically, the courts may deal with procedural issues relating to: (i) the enforcement of peremptory orders of the tribunal (section 42); (ii) securing the attendance of witnesses (section 43); (iii) the taking and preservation of evidence, making orders relating to property, sale of goods, granting of interim injunctions or the appointment of a receiver (section 44); and (iv) the determination of a preliminary point of law (section 45). Importantly, however, only one of these provisions is mandatory (the power to secure the attendance of witnesses in section 43). The parties can therefore agree to exclude these other powers of the tribunal should they so wish.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitrator in England and Wales permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

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

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

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

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

The court can act in two ways in the context of providing preliminary or interim relief. First, unless otherwise agreed by the parties, the court can order a party to comply with a peremptory order made by the arbitral tribunal (section 42).

Second, and perhaps more importantly, the courts have the same power to act in relation to arbitral proceedings as they do in relation to court proceedings (section 44(1)). (Once again, this power is subject to any agreement to the contrary.) The court has power to make orders with regard to the following matters: the taking of evidence (section 44(2)(a)); the preservation of evidence (section 44(2)(b)); the making of orders relating to property relating to the proceedings (section 44(2)(c)); the sale of any goods the subject of the proceedings (section 44(2)(d)); and the granting of an interim injunction or the appointment of a receiver.

It is a condition precedent to the court having the power to act that neither the arbitral tribunal nor any arbitral or other institution has either no power or is unable for the time being to act effectively (section 44(5)). The most common circumstances in which this threshold is achieved would be where the tribunal has yet to be formed. In *Seele Middle East Fze v Drake & Scull Int Sa Co* [2013] EWHC 4350 (TCC), the court referred to the impact of emergency arbitrator provisions (specifically those found in the 2012 ICC Rules), in the context of whether an arbitral tribunal would be able to act effectively, but did not need to decide the point.

There are further conditions precedent to the court acting, depending on the urgency of the situation. If the situation is urgent, the court is entitled to make whatever orders it thinks necessary for the purpose of preserving evidence or assets (section 44(3)). If the situation is not urgent, the court is only entitled to act (i) on the application of a party made with the permission of the arbitral tribunal, or (ii) with the agreement in writing of all of the other parties (section 44(4)). The impact of these two provisions is that, unless a party can persuade all of the other parties that interim relief should be sought, pre-arbitral relief can only be obtained where the situation is urgent.

The English courts have recently given guidance on the meaning of "preserving evidence and assets" when granting urgent relief under section 44(3). In *Doosan Babcock Ltd v Commerializadora de Equipos y Materiales Mabe Lda* [2013] EWHC 3010 (TCC), the court found it had jurisdiction to grant interim relief to restrain a beneficiary of a performance guarantee bond from making a demand

under that bond. By contrast, in *Zim Integrated Shipping Services Ltd v European Container KS and European Container 11* [2013] EWHC 3581, Males J refused to order an injunction on the basis that defining the alleged contractual rights that the applicant sought to protect (their right to repayment of a loan that the respondent had refused to pay) as "assets" would stretch the meaning of that word too far.

The granting of interim relief by the court is not necessarily the end of the matter in that regard. If the court so orders, the arbitral tribunal can be granted jurisdiction to vary or set aside the order of the court (section 44(6)).

English courts are not limited to granting interim relief with respect to arbitrations seated in the jurisdiction. For interim relief in support of arbitrations held outside England and Wales, see *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm), [2008] 2 All E.R. (Comm) 1034 and *Western Bulk Shipowning III A/S v Carbofer Maritime Trading ApS, The Western Moscow* [2012] EWHC 1224 (Comm).

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

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

The object of the 1996 Act is to recognise and uphold party autonomy to choose the procedure for the resolution of disputes and to prevent unnecessary intervention by the courts. To that end, the 1996 Act confers as many powers of the court as possible onto the tribunal. Furthermore, even in those areas where the court is entitled to act, it can only do so where the tribunal or arbitral institution has no power or is unable for the time being to act effectively (section 44(5)). Therefore, if the arbitrators have already been appointed, the court is unlikely to intervene unless satisfied that any order the arbitrators might make would have little value (for example, because it cannot be enforced, or involves a third party) (*Pacific Maritime (Asia) Ltd v Holystone Overseas Ltd* [2008] 1 Lloyd's Rep 371).

The restraint exercised by the court in matters of interim relief is further demonstrated by the decision in *Euroil Ltd v Cameroon Offshore Petroleum SARL* [2014] EWHC 52 (Comm). The court held that the closer an injunction came to resolving a matter to be determined by the tribunal, the more wary a court should be in exercising its discretion to grant an injunction.

7.4 Under what circumstances will a national court of England and Wales issue an anti-suit injunction in aid of an arbitration?

As noted above, the European Court of Justice ruled under the original Brussels Regulation that intra-EU anti-suit injunctions (i.e., those to restrain proceedings first brought in the courts of EU or EFTA Member States where those proceedings are in contravention of an arbitration clause) are a violation of EU law (*Allianz SpA v West Tankers Inc*, Case C-185/07 [2009] All ER (D) 82). The consequence of this decision was that English courts were no longer able to issue an anti-suit injunction in relation to proceedings in the courts of other EU/EFTA Member States; nor were they entitled to grant declaratory relief to confirm the validity of an arbitration agreement after another EU or EFTA court has ruled that there is no valid arbitration clause (*Endesa Generación SA v. National Navigation Company ('Endesa')* [2009] EWCA Civ 1397). Nevertheless, the CJEU has recently clarified that the prohibition on intra-EU anti-suit injunctions under the original Brussels Regulation does not apply to an anti-suit award issued by a tribunal seated in the EU (*Gazprom* Case C-536/13 [2015]).

The impact of the recast Brussels regulation (which came into force on 10 January 2015) on anti-suit injunctions is still being determined. The Advocate General's Opinion in the *Gazprom* case (which was delivered in December 2014 and was based on the recast Brussels regulation) suggests that the CJEU will at some stage in the future confirm that arbitration is excluded from the Brussels Regulation, and that, contrary to the *West Tankers* decision, an EU court can grant an anti-suit injunction against court proceedings elsewhere in the EU in support of arbitration. However, the recast Regulation does appear to have reversed the position under *Endesa*, such that the courts of the seat of the arbitration will no longer be bound by the decision of a foreign court with respect to the validity of an arbitration agreement. Further analysis of the impact of the recast Regulation is found under question 15.1 below.

The approach of the English courts is markedly different where EU law does not apply. Thus, the English courts have continued to grant anti-suit injunctions in respect of proceedings brought outside the EU, in violation of valid and binding arbitration agreements (*Midgulf International Ltd v Groupe Chimique Tunisien* [2009] EWHC 963 (Comm), upheld on appeal ([2010] EWCA Civ 66); and *Transfield Shipping v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3629). The English courts will also grant such injunctive relief even where the applicant has no intention of commencing arbitration (*AES-UST Kamenogorsk Hydropower Plant LLP v UST-Kamenogorsk Hydropower Plant JSC* [2010] EWHC 772 (Comm), upheld on appeal in both the Court of Appeal and Supreme Court ([2011] EWCA Civ 647 and [2013] UKSC 35)) and at the post-award stage to restrain proceedings that "challenge, impugn or have as their object or effect the prevention or delay in enforcement" of an award (*Shashoua v Sharma* [2009] EWHC 957 (Comm)) (while leave to appeal was granted in this case, the authors are not aware of any reported decision on appeal).

In cases where the English courts have the power to grant an anti-suit injunction, the application must be made "promptly and before the foreign proceedings are too far advanced" (*The Angelic Grace* [1995] 1 Lloyd's Rep. 87 and *The Skier Star* [2008] 1 Lloyd's Rep 652). In cases where there is not yet a final decision as to whether there is a valid arbitration agreement, the applicant for an (interim) anti-suit injunction must satisfy the court that there is a "high degree of probability" that there is such an agreement and that bringing and continuing the court proceeding is contrary to such an agreement, a test which is justified because its effect is to prevent the continuation of foreign proceedings (see *Midgulf International Ltd v Groupe Chimique Tunisien* [2009] EWHC 963 (Comm), followed in *Transfield Shipping v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3629 (Comm) [2010] EWCA Civ 66; *Malhotra v Malhotra* [2012] EWHC 3020 (Comm); *Rochester Resources Ltd and others v Lebedev and another* [2014] EWHC 2926 (Comm)).

In recent years, the Court of Appeal has affirmed the grant of an anti-suit injunction restraining a third party, not itself bound by the relevant arbitration clause, from pursuing Russian court proceedings on the grounds that there was evidence of collusion between that third party and the defendant in the arbitration in bringing the Russian proceedings (*Joint Stock Asset Management Company "Ingosstrakh Investments" v BNP Paribas SA* [2011] EWHC 308 (Comm), affirmed in [2012] EWCA Civ 644). Moreover, in 2013, the English courts have made clear their continued willingness to issue anti-suit injunctions to prevent proceedings in breach of an arbitration agreement. In *Ecom Argonindustrial Corp Ltd v Mosharaf Composite Textile Mill Ltd* [2013] EWHC 1276 (Comm),

for example, the High Court granted an anti-suit injunction despite an earlier anti-suit injunction being issued in another state. In *Bannai v Erez (Trustee in Bankruptcy of Eli Reifman)* [2013] EWHC 3689, Burton J refused to set aside an injunction despite the presence of insolvency proceedings in Israel.

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

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

Section 38(3) grants the tribunal a restricted power to order security for costs. First, such an order can only be made where the parties have not agreed to the contrary. Second, the tribunal can only order security for costs against the claimant. Third, the tribunal is not permitted to exercise this power merely because the claimant is an individual that is ordinarily resident overseas, or because it is a corporation incorporated or formed in a country outside the United Kingdom or whose central management is located outside the UK.

The court is empowered to order security for costs in limited circumstances. It may do so where a party makes an application to set aside an arbitral award under sections 67 or 68, or an appeal on a point of law under section 69. However, the restrictions imposed on the arbitral tribunal with regard to individuals or corporations based outside the United Kingdom also apply to the exercise of this power by the court.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in England and Wales?

English law contains extensive rules of evidence, which were established at common law. Under the Act, however, the tribunal is not obliged to apply these strict rules of evidence unless the parties decide to the contrary. Section 34(1) provides that it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter. Section 34(2)(f) includes in this list of procedural and evidential matters the questions of: (i) whether to apply "strict" (i.e. inflexible) rules of evidence as to the admissibility, relevance or weight of any material sought to be tendered on matters of fact or opinion; and (ii) the time, manner and form in which such material should be exchanged or presented.

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure (including third party disclosure)?

The tribunal has some power to order disclosure of documents, but it is not unlimited. Unless otherwise agreed, the tribunal has power to order a party to produce documents (section 34(2)(d)) and the tribunal may determine whether or not documents are relevant and/or privileged (section 34(2)(f)).

The tribunal has no power to order production of documents by a third party. However, as described in more detail below, a party to arbitral proceedings can apply to the court under section 43 of the Act to secure the attendance of a witness (including a third party witness) in order to either produce documents or provide oral testimony.

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

There are three circumstances in which the court can play a role in matters of disclosure. First, the court has powers under section 44 (unless the parties agree to the contrary) with regard to (i) the preservation of evidence (section 44(2)(b)), and (ii) the making of orders relating to property that is subject to the proceedings (section 44(2)(c)).

Second, as noted above, a party to arbitral proceedings can apply to the court under section 43 to secure the attendance of a witness (including a third party witness) to produce documents. The court cannot, however, order pre-action disclosure (under the English Civil Procedure Rules) in circumstances where the dispute is to be decided by arbitration (*Mi-Space (UK) v Lend Lease Construction (EMEA) Ltd* [2013] EWHC 2001 (TCC)).

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

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

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

The tribunal does not have the power to force the attendance of a witness. As noted above, however, a party can apply to the court to order the attendance of a witness in order to give oral testimony (or to produce documents).

The Act contains further provisions with regard to expert testimony. Section 37(1) provides that, unless the parties agree otherwise, the arbitral tribunal is empowered to appoint: (i) experts or legal advisors to report to it and the parties; or (ii) assessors to assist it on technical matters. The parties must, however, be given a reasonable opportunity to comment on any information, opinion or advice offered by such a person (section 37(1)(b)). Any waiver of this right to comment must be express: the courts have held that where the parties have chosen a set of procedural rules that are silent as to the right to comment conferred by section 37(1)(b), they will not thereby be held to have "otherwise agreed" to waive that right.

The conduct of lawyers with regard to the preparation of witness testimony is often regulated by the rules of professional conduct of the jurisdiction in which that lawyer is admitted to practice. This has led to concerns of inequality of arms, with concerns being raised that lawyers from certain jurisdictions are entitled to act in a manner which would fall foul of the rules of professional conduct of other jurisdictions.

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

As noted above, section 34 entitles the arbitral tribunal to determine any procedural or evidential matter, unless the parties have agreed to the contrary. These powers include the power to order a party to produce documents or classes of documents (section 34(2)(d)). In making such an order, the tribunal may determine that a document (or class of documents) is protected from disclosure on the ground of legal, professional or other privilege (assuming the precondition of confidentiality exists).

In determining whether a particular document is privileged, the tribunal may be guided by generally applicable principles of English law. English law recognises a number of privileges. The most common is legal professional privilege, which can be subdivided into legal advice privilege (communications between a lawyer and a client for the purpose of seeking legal advice) and litigation privilege (which applies to communications between a lawyer and a third party for the dominant purpose of upcoming legal proceedings that were "reasonably in prospect"). English law interprets "legal advice" relatively broadly: it applies not only to a lawyer's advice as to the law, but also to what could be "prudently and sensibly done in the relevant legal context". However, English law defines the client more restrictively: within a corporate organisation, the "client" is deemed to be only those individuals directly charged with communicating with the lawyers, rather than all employees of the corporation (*Three Rivers District Council v Governor and Company of the Bank of England* (No. 5) [2003] EWCA Civ 474).

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

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

9 Making an Award

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

There is no definition of an arbitral award under English law. The parties are free to agree on the form any award should take (section 52(1)). In the absence of agreement, the award shall: be in writing and signed by all of the arbitrators or all those assenting to the award (section 52(3)); contain the reasons for the award (unless it is an agreed award or the parties have agreed to dispense with reasons) (section 52(4)); and state the seat of the arbitration and the date when the award was made (section 52(5)). The High Court recently held that an award must also make a final determination of a particular issue: given that the decision in question did not, it was held to constitute a procedural order rather than an arbitral award (*Nihal Mohammed Kamal Brake and another v Patley Wood Farm* [2014] EWHC 4192 (Ch)).

The New York Convention requires awards to be "duly authenticated" in order for contracting states to be obliged to enforce them. Therefore, an unsigned award may not be enforceable in another contracting state. (Note, however, the Court of Appeal's recent statements regarding the enforcement of awards under section 102 (1) of the Arbitration Act 1996 in *Lombard-Knight v Rainstorm Pictures Inc* [2014] EWCA Civ 356, a case discussed in detail under question 11.3 below.)

A tribunal is entitled to make a single, final award or, by virtue of section 47 of the 1996 Act, an award relating only to part of the claims submitted to it for determination. It is not uncommon for a tribunal to separate issues of liability and damages and to provide separate awards in respect of each. The tribunal also has a separate power to make provisional awards, in which it can order any relief that it would have power to grant in a final award (section 39(1)).

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

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in England and Wales?

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

First, a party may argue that the tribunal lacked substantive jurisdiction to make the award (section 67). As noted above, a tribunal will have substantive jurisdiction pursuant to section 30 where: (i) there was a valid arbitration agreement; (ii) the tribunal was properly constituted; and (iii) the tribunal ruled on matters "submitted to the arbitration in accordance with the arbitration agreement". A party challenging the substantive jurisdiction of the tribunal under section 67 is entitled to a complete rehearing, rather than a review of the decision reached by the tribunal (*Azov Shipping Co v Baltic Shipping Co* (No 1) [1999] 1 Lloyd's Rep 550 referred to with approval by the UK Supreme Court in *Dallah Real Estate & Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46; *Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH* [2013] EWHC 338 (Comm); *Hyundai Merchant Marine Company Limited v Americas Bulk Transport Limited* [2013] EWHC 470 (Comm)).

After hearing a challenge under section 67, the court may either confirm the award, vary the award or set aside the award in whole or in part.

Second, a party may challenge an award on the basis of serious irregularity affecting the tribunal, the proceedings or the award, which has the effect of causing substantial injustice to the applicant (section 68). There are two limbs to a challenge under section 68: the applicant must show both "serious irregularity" (within the meaning of section 68(2)) and that "substantial injustice" was caused thereby.

It is difficult to succeed with a challenge under section 68. As the Court of Appeal has noted, the authorities "place a high hurdle in the way of a party to an arbitration seeking to set aside an award or its remission by reference to section 68". (*Bandwidth Shipping Corp v Intaari* [2008] 1 All ER 1015.) Similarly, in *Gujarat NRE Coke Ltd and Shri Anrun Kumar Jagatramaka v Coeclerici Asia Pte Ltd* [2013] EWHC 1987 (Comm), the High Court held that it would only be in an "extreme case" that the court would interfere on the basis of serious irregularity. (Further authorities indicating the same point include *A and others v B and another* [2011] EWHC 2345 (Comm)

(discussed in more detail under question 5.4 above) and *AK Kablo v Intamex* [2011] EWHC 2970 (Comm).)

The options available to a court following a challenge under section 68 are different to those under section 67. First, the court has no express right to vary the award. Second, the court has the additional power to remit the award to the tribunal for reconsideration. Third, the power of the court to set aside the award is constrained, in that it may only do so if it considers that it would be inappropriate to remit the matter to the tribunal for reconsideration. Finally, the court has an additional power, namely to declare the award to be of no effect either in whole or in part.

Serious irregularity can arise in nine different circumstances, namely where: the tribunal has failed to comply with its general duty under the 1996 Act (including its duty to act fairly and impartially) (section 68(2)(a)); the tribunal has exceeded its powers (section 68(2)(b)); the tribunal has failed to conduct the proceedings in accordance with the parties' agreed procedure (section 68(2)(c)); the tribunal has failed to deal with all of the issues put to it (section 68(2)(d)); an arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award has exceeded its powers (section 68(2)(e); there is uncertainty or ambiguity as to the effect of the award (section 68(2)(f)); the award was obtained by fraud or otherwise contrary to public policy (section 68(2)(g)); the award does not comply with requirements as to form (section 68(2)(h)); or there was irregularity in the conduct of the proceedings, and the court considers that this has caused or will cause substantial injustice to the applicant (section 68(2)(i)). In contrast to the position in some jurisdictions, however, an "error of law" on the part of the arbitrators will not give rise to "substantial injustice", sufficient to uphold an appeal under section 68 (*Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 A.C. 221 (HL)).

Having shown that a serious irregularity has occurred, a party must then show that substantial injustice was caused thereby. It is clear that the question of substantial injustice is approached completely independently of the question of serious irregularity, which helps to explain why challenges under section 68 face such a "high hurdle". For example, in *CNH Global NV v PGN Logistics Limited* [2009] EWHC 977 (Comm), the High Court described the arbitrators' failure to award interest as a "howler", which then became a serious irregularity when the tribunal subsequently issued an addendum purporting to "correct" the award by ordering the payment of interest. The court nevertheless refused to set aside the award on the basis that the party ordered to pay interest had suffered no "substantial injustice". Similarly, in *Chantiers de L'Atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383, the High Court dismissed a challenge to an award despite making an unequivocal finding that there had been fraud in the arbitration because the claimant was unable to establish that the tribunal probably would have come to a different decision if there had been no fraud.

The third basis on which an award can be challenged is that the tribunal erred on a point of law (section 69). Unlike a challenge under either section 67 or 68, this challenge goes to the merits of the tribunal's reasoning, rather than the procedural matters relating to the circumstances in which the award was procured.

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

The standard of review adopted by the court at the review stage is deferential. When determining if the tribunal has reached a decision that is "obviously wrong", courts have tended to hold that a "permissible range of options" are open to the tribunal (see *Cosemar SA v Marimarna Shipping Co Ltd (The Mathew)* [1990] 2 Lloyd's Rep 323). An obvious error must be apparent on the face of the award itself: in the words of the Court of Appeal, it must constitute a "major intellectual aberration" (see *HMV UK Ltd v. Propinvest Friar Ltd Partnership* [2012] 1 Lloyd's Rep 416). Likewise, if determining whether the conclusion of the tribunal was "open to serious doubt" (in circumstances where the point is one of general importance), the position seems to be that the mere fact that the court might have reached a different conclusion does not render an award open to serious doubt.

Assuming leave to appeal is granted, the court will then proceed to hear the challenge itself. The approach of the court is somewhat stricter at this second stage than at the leave stage, but nonetheless still deferential. It has been held that if a tribunal that correctly understood the law could have reached the same conclusion as that in fact reached by the tribunal, it was irrelevant that the judge himself may have come to a different conclusion (see *Vinava Shipping Co Ltd v Finelvet AG (The Chrysalis)* [1983] 1 Lloyd's Rep 503).

A court that hears an appeal on a question of law has four options, some of which apply in the context of section 67, others in the context of section 68. The court may: (i) confirm the award; (ii) vary the award; (iii) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination; or (iv) set aside the award in whole or in part.

An appeal under any of sections 67-69 must be brought within 28 days of the date of the award (or 28 days of the notification of the decision of any applicable process of arbitral appeal or review) (section 70). A party's right to bring a challenge under any of these sections may be lost if that party continues to "take part" in the proceedings and the relevant objection is not made "forthwith" (section 73).

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

Parties may agree to exclude the right to appeal to the court on a question of law arising out of an award made in the course of arbitral proceedings (section 69(1)). For the purposes of section 69 of the 1996 Act, an agreement that the tribunal does not need to give reasons for its award will be deemed an agreement between the parties to exclude this basis of appeal (section 69(1)). The parties will also agree to exclude the operation of section 69 if they agree to arbitrate in England under the auspices of certain arbitral institutions (unless they opt expressly to preserve this right). For example, both the ICC Rules and the LCIA Rules expressly provide that, by agreeing to arbitrate under their rules, the parties have agreed to waive any process of appeal or review.

Outside of the circumstances set out above, the parties must use "sufficiently clear wording" in order to exclude the operation of section 69. The High Court has held that a statement that the award shall be "final and binding" or "final, conclusive and binding" will not suffice (*Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm)).

Sections 67 and 68 are mandatory provisions of the 1996 Act (as listed in Schedule 1 to the 1996 Act), whose application cannot be excluded by agreement of the parties.

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

The 1996 Act provides that an award made by the tribunal is final and binding unless otherwise agreed by the parties. Therefore, the parties are free to agree to challenge the award under any procedures set out in the arbitration agreement (or agreed otherwise), in addition to the grounds for challenge set out in the 1996 Act. Equally, the parties are free to agree that an award be disregarded entirely in order that they may re-arbitrate their dispute (in which case the first award cannot be enforced).

10.4 What is the procedure for appealing an arbitral award in England and Wales?

An appeal against an arbitral award under section 69 must be commenced by the issue of an arbitration claim form (in accordance with Part 62 of the English Civil Procedure Rules ("CPR")). If (as is usually the case) permission to appeal has to be sought before the appeal itself can be heard, then the arbitration claim form must also: (i) identify the question of law; (ii) state the grounds on which the party challenges the award; (iii) be accompanied by a skeleton argument in support of the application; and (iv) append the award.

The granting of leave to appeal should follow a summary procedure: as the High Court held in *Morris Homes (West Midlands) Ltd v Keay* [2013] EWHC 932 (TCC), "the process of determining the application for leave to appeal should be a summary one, and one in which the applicant has to establish that it is clear-cut that the criteria [under section 69(3)] are established". Unless there is a dispute as to whether the question raised by the appeal is one that the tribunal was asked to determine, the only arbitration documents that should be put before the court are: (i) the award; and (ii) any document (such as the contract or relevant parts thereof) which is referred to in the award and which the court needs to read in order to determine the question of law arising out of the award (see paragraph 12.5 of CPR, Practice Direction 62).

11 Enforcement of an Award

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

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

Part III of the 1996 Act deals with the recognition and enforcement of New York Convention awards (i.e., awards made, in pursuance of an arbitration agreement, in the territory of another state which is also a party to the New York Convention).

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

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

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

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

Generally speaking, the English courts exhibit a strong bias in favour of enforcement. For this purpose, the enforcement procedure prescribed by the 1996 Act distinguishes between awards made in England and Wales and foreign awards (as opposed to domestic and international awards).

An arbitral award made in England may, by leave of the court, be enforced in the same manner as a judgment or order of the court (section 66). Leave will not be given where the tribunal is shown to have lacked substantive jurisdiction to make the award. Where leave is given, judgment may be entered in terms of the award. The High Court has affirmed that the power to enter judgment in terms of the award includes the power to enter judgment in terms of both positive and negative declaratory awards (see *West Tankers Inc v Allianz SpA* [2012] EWCA Civ 27, affirming [2011] EWHC 829 (Comm) and *African Fertilizers and Chemicals NIG Ltd v BD Shipsnavo GmbH & Co Reederei Kg* [2011] EWHC 2452 (Comm)).

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

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

Recognition and enforcement of New York Convention awards may only be challenged on limited grounds. These grounds fall into two categories: those that have to be proved by the challenging party (found in section 103(2)); and those that can be raised by the court on its own motion (found in section 103(3)). The six grounds in section 103(2) that require proof from the party seeking to avoid recognition and enforcement are: (i) incapacity of a party; (ii) invalidity of the arbitration agreement; (iii) lack of proper notice; (iv) lack of jurisdiction; (v) procedural irregularity in the composition of the tribunal; and (vi) the fact that the award has been set aside or not become binding in the country where it was made. The two grounds in section 103(3) that can be raised by the court of its own motion are the non-arbitrability of the subject matter of the arbitration and the fact that it would be contrary to public policy to enforce the award (section 103).

Both section 103(2) and 103(3) provide that the court "may" refuse recognition and enforcement on one of these grounds. The English courts therefore retain a discretion to enforce an award even where one of these grounds exists, but this discretion is very narrowly construed (*Yukos Oil Company v Dardana Ltd* [2002] 2 Lloyd's Rep 326). Indeed, in *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs (Pakistan)* [2009] EWCA Civ 755, the Court of Appeal recognised that, although in certain circumstances a court may have discretion to enforce an award notwithstanding the existence of one of the conditions for refusal of enforcement set out in section 103, such circumstances must be limited. This was affirmed by the UK Supreme Court ([2010] UKSC 46, para. 46), where Lord Mance noted that "[a]bsent some fresh circumstance such as another agreement or an estoppel, it would be a remarkable state of affairs" if the court enforced or recognised an award which was found to have been made without jurisdiction.

It is not necessary for the court to recognise and enforce an arbitral award in its entirety. The Court of Appeal has held that the word "award" in sections 101 to 103 of the 1996 Act should be construed to mean the "award or part of it", and accordingly, that the court is permitted to enforce part of an award (*IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2008] All ER (D) 197 (Oct)).

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

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

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

The doctrine of issue estoppel does not apply in the same way to subsequent proceedings between a party to an earlier arbitration and a non-party. However, the High Court has held on more than one occasion that seeking to bring claims or advance defences that were rejected in an earlier arbitration can amount to abuse of process (*Michael Wilson & Partners Ltd v Sinclair* [2012] EWHC 2560 (Comm); *OMV Petrom SA v Glencore International AG* [2014] EWHC 242 (Comm)).

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

Section 103(3) of the 1996 Act gives effect to Article V(2)(b) of the New York Convention, meaning that an English court may refuse to recognise or enforce an award on the ground that it is contrary to public policy. As noted above, the approach of the English courts is pro-enforcement: the Court of Appeal has held that arguments based on public policy should be approached with "extreme caution" (see *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al Khaimah Nat'l Oil Co. (sub nom DST v Rakoil)* [1987] 3 WLR 1023, 1032 (English Court of Appeal), reversed on other grounds, [1988] 2 All E.R. 833 (House of Lords)).

Notwithstanding the above, recognition and enforcement has been refused on grounds of public policy for the following reasons: the award was obtained by fraud (see *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 2 Lloyd's Rep 65 (CA); and *Tamil Nadu Electricity Board v ST-CMS Electric Company Private Ltd* [2008] 1 Lloyd's Rep 93); the award is tainted by illegality (*Soleimany v Soleimany* [1998] 3 WLR 811); the underlying agreement is contrary to principles of EU law, in particular competition law as set out in Articles 101 and 102 of the TFEU (*Eco Swiss China Time Ltd v Benetton International NV* (1999) (Case C-126/97); or the award is unclear as to the obligations imposed on the parties (*Tongyuan (USA) International Trading Group v Uni-Clan Ltd* (2001, unreported, 26 Yearbook of Commercial Arbitration 886)).

When determining questions on the basis of public policy, the English court is required to reach a decision based on its own conception of public policy. This is the case even when courts of other jurisdictions have passed judgment on questions of public policy. This issue arose before the Court of Appeal in in *Yukos Capital SARL v OJSC Rosneft Oil Company* [2012] EWCA Civ 855). An arbitral tribunal seated in Russia had made four arbitral awards in favour of Yukos. These awards were set aside by a Russian court. The Dutch Court of Appeal had (i) recognised and enforced the awards, notwithstanding the fact that they had been set aside at their seat, and (ii) refused to recognise and enforce the judgment of the Russian court, holding that the Russian court's decision was "partial and dependent".

The question before the English court (on a preliminary issue) was whether the decision of the Dutch Court of Appeal created an issue estoppel, which precluded Rosneft from arguing that the decision of the Russian court was not "partial and dependent". The Court of Appeal held that it should not be bound by either the decision of the Russian court or the Dutch court, but rather than it had to make up its own mind regarding questions of public order.

12 Confidentiality

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

Arbitral proceedings in England and Wales are presumptively confidential. Both the parties and the tribunal are required to

maintain the confidentiality of the hearing, the pleadings, the documents generated during the hearing and the award. This confidentiality does not flow from the Act, but from a general principle of the common law. The most accepted explanation is that there is an implied duty of confidentiality in all arbitration agreements, which is said to arise from the essentially private nature of arbitration (*Emmott v Michael Wilson & Partners Ltd* [2008] 1 Lloyd's Rep 616).

This confidentiality obligation is not all-encompassing. Both the existence of an arbitration and the identity of the parties to the arbitration are generally not considered to be confidential, unless the parties have agreed otherwise.

There are also certain exceptions to the obligation of confidentiality described above. These include where the parties have agreed that the proceedings will not be confidential, where disclosure is reasonably necessary to establish or protect a party's legal rights, where disclosure is in the interests of justice, and where disclosure of documents is ordered by a court (*Emmott v Michael Wilson & Partners Ltd* [2008] 1 Lloyd's Rep 616). These exceptions to the obligation of confidentiality are most often relevant with regard to the arbitral award: for example, a party may have to disclose the award to the court when bringing recognition and enforcement proceedings.

When disclosure of documents submitted in arbitral proceedings is sought in subsequent proceedings "in the interests of justice", it is not necessary that the "justice" in question be sought in England and Wales. In *Emmott*, the Court of Appeal took into account the fact that a New South Wales court would be misled in the absence of the disclosure sought, holding that the international dimension of the case demanded a broader view of interests of justice.

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

A party that disclosed pre-existing documents in arbitral proceedings is entitled to do the same in subsequent proceedings. The mere fact that they have already been produced does not protect them from production on a second occasion.

The situation is very different for documents that a party received – rather than produced – in earlier arbitral proceedings. A party to whom documents (or other information) was disclosed in arbitral proceedings would be precluded by the implied duty of confidentiality from referring to, or relying on, that information in subsequent proceedings. This is unless one of the exceptions to the duty of confidentiality set out above applies.

13 Remedies / Interests / Costs

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

The parties are free to agree the scope of the tribunal's power to grant remedies (section 48(1)). Section 48(3)-(5) sets out the powers of the tribunal in the absence of any agreement to the contrary.

First, the tribunal may make a declaration as to any matter to be determined in the proceedings (section 48(3)). Second, the tribunal is permitted to order the payment of a sum of money, in any currency (section 48(4)). This latter power does not, however, give the tribunal an unfettered discretion as regards the currency of an award. Where a tribunal is unable to ascertain from the terms of the contract any intention as to which currency should be used, the damages should be calculated in the currency in which the loss was felt by the claimant or which most truly expresses his or her loss (*Milan Nigeria Ltd v Angeliki B Maritime Company* [2011] EWHC 892).

Finally, under section 48(5) the tribunal has the same powers as the court to order: (i) a party to do or refrain from doing anything; (ii) specific performance of a contract (other than a contract relating to land); and (iii) the rectification, setting aside or cancellation of a deed or document.

English law does not allow punitive damages to be awarded for breach of contract. Therefore, if the parties' agreement is governed by English law, the tribunal has no power to award punitive damages unless the parties expressly agree to the contrary. However, this is a restriction imposed by English contract law: there is nothing in the 1996 Act (or the common law relating to arbitration) to prevent an arbitral tribunal seated in England from awarding damages for breach of contract. Therefore, if the parties' agreement is governed by a foreign law, or broad enough to encompass claims under a foreign statute, and that foreign law statute provides for special damages or punitive damages (e.g., triple damages in U.S. anti-trust claims), an arbitral tribunal sited in England and Wales is fully entitled to award such damages.

There are some important restrictions on what an arbitral tribunal can do, even if the parties were to purport to confer such jurisdiction on it. The powers of an arbitral tribunal are limited to those that can be exercised (in certain areas) by the High Court or the county courts (*Kastner v Jason* [2004] 2 Lloyd's Rep 233). An arbitral tribunal cannot therefore assume sovereign powers that are reserved for other courts, such as the power to order imprisonment or the payment of fines to the state.

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

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

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

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

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

The 1996 Act provides that a party may be entitled to recover the costs of the arbitration (section 61). These costs include: the arbitrators' fees and expenses (section 59(1)(a)); the fees and expenses of any arbitral institution (section 59(1)(b)); and the legal, or other, costs of the parties (section 59(1)(c)).

As a general rule, the parties are entitled to reach an agreement with regard to the costs of any arbitral proceeding (section 61(1)).

However, English law does not allow the parties to agree that one party will pay the costs of the arbitration regardless of the outcome, unless this agreement was entered into after the dispute in question has arisen (section 60). In the event that no agreement has been reached, the arbitral tribunal is entitled to make an award of costs on the basis of the general English law principle that costs should "follow the event" (i.e., the successful party will be entitled to its costs) (section 61(2)). The arbitral tribunal has discretion to depart from the general principle if it considers it to be inappropriate in the circumstances of the case.

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

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

An arbitral award may be subject to earnings-related tax, but the payment of tax is a personal matter for the party to whom damages are paid. Essentially, damages intended to replace lost income or profit may be taxable.

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

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

A conditional fee arrangement ("CFA") allows a lawyer to charge on a "no win, no fee" basis. The lawyer agrees to charge the client nothing if he is unsuccessful, while obtaining an uplift on his or her usual fee (a success fee) if he or she is successful. As a consequence of recent rule changes, it is no longer possible for a costs award made in "proceedings" to include the payment of a success fee under a conditional fee arrangement (see section 58(A)(6) of the Courts and Legal Services Act 1990 (as amended), which prevents the recovery of success fees from the losing side in "proceedings"); this has brought into question whether parties to arbitration can claim the costs of a success fee from the losing side. It is unclear whether these provisions will fetter the discretion of arbitrators (provided by section 63 of the Act) to determine recoverable costs as they think fit.

Historically, contingency fee agreements (known in England as "damages-based agreements" ("DBAs")) were unlawful in English civil litigation (although they were permitted in the context of contentious employment matters). A DBA allows the lawyer to recover a percentage of the client's damages if the case is won, but receive nothing if the case is lost. Following the so-called "Jackson reforms" into the funding of civil litigation, DBAs became lawful in April 2013.

Until 2005, the use of third party funding in England and Wales was prohibited as being contrary to the doctrine of maintenance and champerty. These restrictions were, however, liberalised following a 2005 decision of the Court of Appeal determining that professional funding could in fact enhance access to justice for parties who would not otherwise be able to afford legal advice (*Arkin v Borchard Line* [2005] 1 WLR 3055). As a result of this decision, there are now a number of third party funders active in the market.

Third party funding in England and Wales is currently self-regulating. In November 2011, the Association of Litigation Funders of England and Wales ("ALF") published a Code of Conduct which defines the role of, and provides guidelines to, third party funders. The Code expressly refers to funding in the context of both litigation and arbitration. Among other points, the Code requires that: (i) funders maintain confidentiality in respect of all information relating to the dispute; (ii) funders not seek to influence the conduct of the dispute by the party's counsel; and (iii) the funding agreement ("LFA") state the extent of the funder's liability to the litigant to meet any adverse costs order. Members of the ALF agree to comply with the Code, although membership of ALF is voluntary.

A number of criticisms have been levelled at the Code and the ALF. For example, the Institute for Legal Reform of the US Chamber of Commerce ("ILR") and the European Justice Forum ("EJF") both advocate in favour of *binding* (as opposed to voluntary) regulation. Concerns with regard to conflicts of interest have also been raised.

Notwithstanding the decision in *Arkin*, the legitimate scope of third party funding remains unclear, including in relation to a funder's liability for costs if the litigant is unsuccessful. In *Arkin*, it was suggested that liability for costs may extend to a funder that has attempted to exercise control over the litigation. More recently, the High Court has held that liability may arise where, for example, the funder is responsible for the litigation taking place or for causing the successful litigant to incur costs that it would not otherwise have incurred (*Merchantbridge & Co Ltd and another company v Safron General Partner Ltd and other companies* [2011] EWHC 1524). It is unclear how far these decisions extend to arbitration, not least because the third party funder is unlikely to be a party to the arbitration agreement (and a tribunal will therefore generally lack jurisdiction to make an award of costs against them).

14 Investor State Arbitrations

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

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

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

In the United Kingdom, BITs are described as Investment Promotion and Protection Agreements ("IPPAs"). According to the Foreign & Commonwealth Office, the United Kingdom has concluded 127 IPPAs. The United Kingdom is also a signatory to the Energy Charter Treaty, having deposited its instruments of accession and ratification on 16 December 1997.

Since the entry into force of the Treaty of Lisbon on 1 December 2009, the European Union ("EU") has competence with regard to foreign direct investment. Consequently, the European Commission is now responsible for negotiating and concluding BITs with states outside the EU.

As a result of this extended competence, the EU has implemented Council Regulation 1219/2012 ("Regulation 1219/2012"), which entered into force on 9 January 2013. Following the implementation of Regulation 1219/2012, all EU Member State BITs with non-EU states signed prior to 1 December 2009 will remain in force until replaced by new treaties between the EU and the relevant state(s). The Regulation provides that, in the event the European Commission considers an existing EU Member State BIT (with a non-EU State) to represent a serious obstacle to the EU's negotiation of a replacement BIT, the Commission will consult with the relevant Member State in an attempt to resolve the matter.

In recent years, the EU has entered into a number of Free Trade Agreements ("FTAs") with states such as Canada and South Korea, both of which contain measures aimed at promoting foreign direct investment. At the time of writing, negotiations are ongoing for an EU-Japan FTA and the Transatlantic Trade and Investment Partnership ("TTIP") between the EU and the United States. It is unclear at the present time whether investment-protection provisions will be included in either of these instruments, although the potential investment protection provisions of TTIP have been a well-known (and controversial) element of the negotiations of that instrument thus far.

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

The United Kingdom's model BIT was published in 2005 and amended in 2006. Key elements of United Kingdom BITs include provisions for equal and non-discriminatory treatment of investors and their investments, compensation for expropriation, transfer of capital and returns and access to independent settlement of disputes.

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

Of particular note in the UK model BIT is Article 3 which is the "most favoured nation" ("MFN") article. Article 3.3 provides expressly which articles of a BIT the MFN provision would apply to, and includes the dispute settlement provision of a BIT.

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

Under the State Immunity Act 1978, a state is entitled to immunity of two different kinds. First, immunity from adjudication protects a state from being subject to the judgment of the English courts. Second, immunity from enforcement protects a state from having a writ of enforcement executed against it by an English court.

The Act recognises a number of exceptions to immunity from adjudication, but only two such exceptions to immunity from enforcement.

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

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

A mere agreement by the state to submit to the jurisdiction of a national court is not sufficient to waive immunity from execution: the language used by the state must make it clear that a waiver of immunity from execution is desired.

Historically, English and international courts historically have been reluctant to deem state assets to be used exclusively for commercial purposes (*Alcom Ltd v Republic of Colombia and others* [1984] AC 580).

15 General

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

There have been two particularly noteworthy developments with regard to arbitration in England and Wales within the last year: the coming into force of the recast Brussels Regulation; and the coming into effect of the new LCIA arbitration rules.

The recast Brussels Regulation seeks to address a number of concerns regarding the Regulation – and its interpretation by the ECJ / CJEU – since it was enacted in 2001. One important criticism of the Regulation related to the interpretation of the arbitration exception in Article 1(2)(d) of the Regulation. In the *West Tankers* decision, the European Court of Justice (as it then was) held that the courts of one Member State are precluded from issuing an anti-suit injunction to restrain proceedings in another Member State. The ECJ further held that the Italian court – before which proceedings were commenced in breach of the arbitration agreement – had jurisdiction to determine the validity of the arbitration agreement on the basis that this was an incidental question to the substantive claim before it (which was for damages). This was notwithstanding the fact that the arbitration agreement between the parties called for arbitration sited in London, rather than in Italy. The consequence of the ECJ's decision in *West Tankers* was reflected in the decision of the Court of Appeal in *Endesa Generación SA v National Navigation Company ('Endesa')* [2009] EWCA Civ 1397 (reversing the decision at first instance), which held that the judge at first instance had been wrong to grant a declaration upholding the arbitration agreement in circumstances where the Spanish court had already ruled on that issue to the contrary.

The recast Regulation does not amend the basic arbitration exclusion found at Article 1(2)(d). Instead, it sought to clarify the scope of the exception by introducing a new recital, namely recital 12. It also introduces a new provision, at Article 73(2), providing expressly that the recast Regulation would not affect the application of the New York Convention.

The most significant changes effected by the recast Regulation (with regard to arbitration) are as follows:

First, the recast Regulation does not apply the principle of *lis pendens* with regard to arbitration. Under the general rules of the original Regulation, a court that was seised second of a dispute had to stay its proceedings and wait for the court seised first to determine whether it had jurisdiction. Therefore, notwithstanding the fact that the parties might have agreed to site their arbitration in a particular jurisdiction, a party could undermine this choice by simply commencing proceedings in another jurisdiction and waiting for that court to pass judgment as to whether or not it had jurisdiction. This is no longer possible under the recast Regulation: recital 12 clarifies that nothing in the Regulation should prevent the courts of a Member State from: (i) referring the parties to arbitration; (ii) staying or dismissing proceedings; or (iii) examining whether an arbitration agreement is null and void, inoperative or incapable of being performed.

Second, and related to the first point, decisions of courts of other EU Member States regarding the validity or enforceability of an arbitration agreement are no longer entitled to recognition and enforcement. This, therefore, eliminates the difficulty experienced by the claimant in *Endesa* – where the courts of the seat of the arbitration (England) were bound by the decision of the courts of another EU country (Spain) that an arbitration agreement was unenforceable. The courts of the seat of the arbitration are therefore free to disregard the decisions of the courts of other Member States in this area.

Third, the recast Regulation reinforces the primacy of the New York Convention. It provides that, where a party has commenced court proceedings in breach of an arbitration agreement and the court has refused to give effect to the arbitration agreement, the substantive decision of the court is entitled to recognition and enforcement in accordance with the provisions of the Regulation. However, if a Member State court is asked to recognise and enforce a judgment of a Member State court and a conflicting arbitral award, the New York Convention takes precedence. Arbitral awards can therefore be granted recognition and enforcement even where there is a conflicting judgment of a Member State court.

The recast Regulation therefore mitigates the most troublesome effects of the ECJ's decision in *West Tankers*. The one point it does not directly address, however, is the point for which *West Tankers* is best known, namely the granting of anti-suit injunctions to restrain proceedings brought in breach of an arbitration agreement. As noted above at question 7.4, it is possible that the recast Regulation might permit such injunctions to be granted. Indeed, the recent decision of the CJEU in *Gazprom* (in the context of anti-suit injunctions ordered by arbitrators) suggests that such a development might even be likely. However, this question cannot be definitively answered until this specific question has been addressed by the CJEU.

The second noteworthy development relates to the introduction by the LCIA – the leading arbitral institution in England and Wales – of updated arbitration rules. These revised rules apply to all arbitrations filed after 1 October 2014. The primary intention in bringing these new rules into effect was to keep up with recent changes in international arbitration practice. This can be seen by: (i) the inclusion of an emergency arbitrator mechanism (although the LCIA is unique among major arbitral institutions in making provision for emergency arbitration concurrently with provision for expedited composition of the arbitral tribunal); and (ii) the inclusion of provisions for consolidation, in limited circumstances, of arbitral proceedings where the parties have not expressly agreed to do so. The LCIA has also sought to portray itself as a truly international arbitration institution: whereas before London was always the default seat of arbitration, Article 16.2 of the revised rules provided that London shall only be the default seat unless and until the arbitral tribunal determines that another seat is appropriate.

The most interesting elements of the new LCIA Rules, however, are those rules that have no counterpart in the rules of other major arbitral institutions. To begin with, and as described in more detail in question 15.2 below, the revised rules contain a number of provisions designed to enhance the efficiency of LCIA arbitration. The most notable provisions, however, are the new mandatory rules relating to legal representatives.

Under Article 18 of the LCIA Rules (and the new Annex thereto), the arbitral tribunal is given specific authority to regulate (i) the right of legal counsel to appear, and (ii) the conduct of those legal representatives.

As to the former, the arbitral tribunal has the right to deny a party's request to change its counsel in the event that the intended change is likely to compromise the composition of the tribunal or the finality of the award (Article 18.4). This might occur, for example, when the introduction of new counsel would give rise to issues of conflict of interest that previously did not exist.

As to the latter, Article 18.5 obliges the parties to ensure that all of its legal representatives have agreed to abide by the general guidelines set out in the Annex. In the event that a party complains about the conduct of a legal representative (or the tribunal raises the issue of its own motion), the tribunal has the right to decide whether the legal representative has violated the general guidelines (Article 18.6). The tribunal is given considerable discretion as to the sanctions imposed for such a violation.

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

The LCIA has, in its new rules, taken substantial steps to address two current issues. The first of these is the current concern with regard to regulating the conduct of legal representatives, which was discussed in more detail in the section above. The second is the steps taken to address the hot topic of time and cost.

To begin with, the LCIA requires prospective arbitrators to not only declare that they will be independent and impartial, but that they are ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration. Consistent with this, the LCIA Court has the power to revoke an arbitrator's appointment if he or she fails to conduct the arbitration with reasonable efficiency, diligence and industry.

The timetable for the award is another innovation. The LCIA now requires the tribunal to render its final award as soon as reasonably practical after the final submissions by the parties, and to do so in accordance with a timetable that must be notified to the parties and the registrar.

Charlie Caher
Wilmer Cutler Pickering Hale and Dorr LLP
49 Park Lane
London W1K 1PS
United Kingdom

Tel: +44 20 7872 1633
Fax: +44 20 7839 3537
Email: charlie.caher@wilmerhale.com
URL: www.wilmerhale.com

Charlie Caher is a counsel at Wilmer Cutler Pickering Hale and Dorr LLP in London. His practice focuses on international arbitration and dispute resolution. Mr. Caher's international arbitration practice includes representation in both institutional and *ad hoc* arbitrations (including under the ICC, LCIA, SIAC, DIS, PCA and UNCITRAL rules) sited in both common and civil law jurisdictions (including London, Bermuda, Munich, The Hague and Singapore). Mr. Caher's international commercial arbitration practice covers a wide range of industries, including construction, insurance, financial services, telecommunications, oil and gas, aerospace and energy. Mr. Caher is qualified as a Solicitor in England and Wales, with Rights of Higher Audience in the Higher Courts. Mr. Caher is a graduate of Lincoln College, Oxford University (M.A. (Oxon.), 2002).

Michael Howe
Wilmer Cutler Pickering Hale and Dorr LLP
49 Park Lane
London W1K 1PS
United Kingdom

Tel: +44 20 7872 1032
Fax: +44 20 7839 3537
Email: michael.howe@wilmerhale.com
URL: www.wilmerhale.com

Michael Howe is a senior associate at Wilmer Cutler Pickering Hale and Dorr LLP in London. His practice focuses on complex arbitration and litigation matters. He has represented clients in both institutional and *ad hoc* arbitrations under a wide variety of arbitral rules, including LCIA, ICC, ICDR, UNCITRAL and ICSID. Mr. Howe has a particular focus on international commercial arbitration, having advised clients from Europe, the United States and Asia, in disputes relating to energy and natural resources, manufacturing, financial services and telecommunications. Mr. Howe is qualified as a solicitor of England and Wales, with Rights of Higher Audience in the Higher Courts. He is also admitted to the Bar of the State of New York. Mr. Howe is a graduate of St. Catherine's College, Oxford University (B.A. (Oxon), 2006) and of New York University School of Law (LL.M., 2007).

WILMERHALE®

WILMER CUTLER PICKERING HALE AND DORR LLP®

Wilmer Cutler Pickering Hale and Dorr LLP is an international law firm with offices in London, Beijing, Berlin, Boston, Brussels, Denver, Frankfurt, Los Angeles, New York, Palo Alto and Washington, D.C. The firm offers one of the world's premier international arbitration and dispute resolution practices, covering virtually all forms of international arbitration and dispute resolution. The firm is experienced in handling disputes administered under a wide variety of institutional rules, including the ICC, AAA, LCIA, UNCITRAL, and ICSID rules. The firm also has extensive experience with more specialised forms of institutional arbitration and *ad hoc* arbitrations. Wilmer Cutler Pickering Hale and Dorr's lawyers have been involved in arbitrations sited across the world, and the group has handled disputes governed by the laws of more than 70 different legal systems. Our international arbitration group has been involved in more than 650 proceedings in recent years and we have successfully represented clients in four of the largest, most complex arbitrations in the history of the ICC and several of the most significant *ad hoc* arbitrations to arise in the past decade.

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Environment & Climate Change Law
- Franchise
- Gambling
- Insurance & Reinsurance
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks

GLG
Global Legal Group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk