

Arbitration procedures and practice in the UK (England and Wales): overview

Justin Williams, Hamish Lal and Richard Hornshaw
Akin Gump LLP

global.practicallaw.com/4-502-1378

USE OF ARBITRATION AND RECENT TRENDS

1. How is commercial arbitration used and what are the recent trends?

Use of commercial arbitration and recent trends

The use of commercial arbitration as the preferred dispute resolution procedure for international parties is continuing to increase. This is partly due to greater certainty of enforcement through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). In 2016, the International Chamber of Commerce (ICC) reported its highest ever number of referrals with 966 requests filed.

The full implications of Brexit for arbitration in the UK are being closely monitored by the industry, but it does not appear to have had any immediate impact. For a number of reasons, London remains a very attractive venue for parties to choose as a seat for arbitration. The London Court of International Arbitration (LCIA) reported that non-UK parties accounted for more than 80% of its users in 2016. The LCIA also saw an increase in high-value claims of US\$50 million or more (now accounting for 18% of disputes), with trending industries including energy and resources (accounting for 22.5% of disputes).

The recent focus on transparency has continued, with the ICC incorporating detailed guidance on conflicts into its Note to Parties and Arbitral Tribunals on the Conduct of Arbitration, adopted on 1 March 2017.

Third party funding of arbitration claims has also generated widespread discussion, particularly following a ruling in which the Commercial Court confirmed that third party funding costs (such as success fees and uplifts) are, in principle, recoverable in arbitration (see *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm)). The Court held such costs fall under section 59(1)(c) of the Arbitration Act 1996. This is in contrast to the position in English litigation, where success fees are not recoverable under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. It seems likely that the decision will further increase interest in third-party funding of international arbitration in the UK.

In certain sectors (particularly construction and engineering) there is a desire to amend multi-step dispute resolution provisions to make the expert determination step final and binding (so the determination cannot be opened up, reviewed or revised in subsequent steps). In these circumstances, only a failure to comply with a determination could be referred to a subsequent step (such as arbitration).

Advantages/disadvantages

The principal advantages of arbitration include:

- Greater certainty about the enforcement of awards.

- Avoiding the specific legal systems/national courts of certain jurisdictions.
- Flexibility in terms of the procedure.
- Confidentiality.
- Limited grounds for challenges and appeals (which can also be a disadvantage, see below).

The principal disadvantages of arbitration include:

- Reluctance of tribunals to dispose of weak claims/defences on a summary basis.
- Reluctance of tribunals to issue sanctions for non-compliance with deadlines.
- The time it can take from commencement of the arbitration to publication of the final award.
- The limited grounds for challenges and appeals which, together with the confidential nature of the process, can create a risk of a lack of intellectual rigour in the award.

LEGISLATIVE FRAMEWORK

Applicable legislation

2. What legislation applies to arbitration? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (either with or without the amendments adopted in 2006) (UNCITRAL Model Law)?

The Arbitration Act 1996 applies where the seat of the arbitration is in England, Wales or Northern Ireland.

The following sections of the Arbitration Act may apply where the seat of the arbitration is outside England, Wales or Northern Ireland:

- Sections 9 to 11 (stay of legal proceedings).
- Section 43 (securing the attendance of witnesses).
- Section 44 (court powers exercisable in support of arbitral proceedings).
- Section 66 (enforcement of arbitral awards).

England and Wales has not adopted the UNCITRAL Model Law (either with or without the amendments adopted in 2006), although the drafting of the Arbitration Act was, in some respects, influenced by it.

MANDATORY LEGISLATIVE PROVISIONS

3. Are there any mandatory legislative provisions? What is their effect?

There are a number of mandatory provisions in the Arbitration Act covering, for example:

- Powers of the court.
- Immunity of an arbitrator.
- Rights to challenge/appeal awards.

The full list of the mandatory provisions is set out in Schedule 1 to the Arbitration Act.

4. Does the law prohibit any types of disputes from being resolved through arbitration?

The courts have held that the purpose of the Arbitration Act is to give effect to the autonomy of the parties to agree to have disputes determined by arbitration rather than in court. Most types of commercial disputes can be arbitrated (see, for example, *Fulham Football Club (1987) Limited v (1) J. Sir David Richards and (2) The Football Association Premium League Limited* [2011] EWCA Civ 855).

The courts have been prepared to interpret arbitration agreements broadly to encompass non-contractual as well as contractual disputes (*Fiona Trust & Holding Corporation v. Privalov* (2007) UKHL 40). In this case, Lord Hoffman held that construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal.

There are some very limited cases in which disputes are not arbitrable:

- Where an employee has statutory rights entitling them to have their case heard before an employment tribunal, it is not possible to submit the dispute to arbitration as the sole means of deciding the dispute (*Clyde & Co LLP v Bates van Winkelhof* [2011] EWHC 668).
 - Insolvency proceedings (which are subject to the statutory regimes set out in the Insolvency Act 1986).
 - Criminal matters.
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LIMITATION

5. Does the law of limitation apply to arbitration proceedings?

The Limitation Act 1980, the Foreign Limitation Periods Act 1984 and the Limitation (Northern Ireland) Order 1989 and Foreign Limitation Periods (Northern Ireland) Order 1985 apply to arbitral proceedings in the same way as they apply to legal proceedings (*section 13, Arbitration Act*).

An award must be challenged within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, within 28 days of the date when the applicant or appellant was notified of the result of that process (*section 70(3), Arbitration Act*).

The time period for enforcing an award is six years from the date on which the cause of action accrued (*section 7, Limitation Act 1980*). This time period increases to 12 years if the arbitration agreement is under seal (*section 8, Limitation Act 1980*).

The cause of action for enforcement of an award accrues at the time of the breach of the express or implied obligation to carry out the award, and not at the date of the arbitration agreement or the date of the award (*Agromet Motoimport Ltd v Maulden Engineering Co (Beds) Ltd* [1985] 1 WLR 762).

A period of three months has been considered reasonable for the payment of damages ordered by a tribunal (*International Bulk Shipping v Minerals & Metals Trading Corp of India & Others* [1996] IRLN 45).

ARBITRATION ORGANISATIONS

6. Which arbitration organisations are commonly used to resolve large commercial disputes?

There are a number of different institutions that are commonly used in arbitrations seated in England and Wales. These include the:

- International Chamber of Commerce.
 - London Court of International Arbitration.
 - London Maritime Arbitrators Association.
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JURISDICTIONAL ISSUES

7. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction recognise the concept of kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

Any party wishing to challenge the jurisdiction of the tribunal can do so by application either to the tribunal or to court.

The principle of *kompetenz-kompetenz* applies (*sections 30 and 31, Arbitration Act*). The tribunal can rule on its own substantive jurisdiction either by issuing an interim award or by addressing jurisdiction in the final award.

A party can also apply to court for a determination of any question on the substantive jurisdiction of the tribunal with the consent of the parties or the permission of the tribunal (*sections 32 and 73, Arbitration Act*).

ARBITRATION AGREEMENTS

Validity requirements

8. What are the requirements for an arbitration agreement to be enforceable?

Substantive/formal requirements

Part 1 of the Arbitration Act (being sections 1 to 84) only applies to an arbitration agreement made, or evidenced, in writing (*section 5, Arbitration Act*).

An agreement in writing does not need to be signed, and can comprise an exchange of communications in writing (*section 5(2), Arbitration Act*). Although arbitration agreements are typically included in the commercial contract to which they relate, it is possible for them to be set out in a separate document, and incorporated into the commercial contract by reference (*section 6(2), Arbitration Act*).

Common law rules apply when determining the effect of an oral arbitration agreement unless that oral agreement is by reference to terms that are in writing (*section 5(3), Arbitration Act*). Oral arbitration agreements can be problematic for the following reasons:

- Before an award is issued, any party can revoke the authority of an arbitrator, assuming they have not been validated by terms of reference (Lord v Lee [1868] LR 3 QB 404).
- If the authority of the arbitrator is revoked, the dispute can then be referred to court (Aughton Ltd v MF Kent Services Ltd [1991] 57 BLR 1).
- An award can only be enforced by commencing a full action in court, as opposed to the summary enforcement procedure provided under the Arbitration Act.

UNILATERAL OR OPTIONAL CLAUSES

9. Are unilateral or optional clauses, where one party has the right to choose arbitration, enforceable?

Clauses where one party has the right to choose arbitration are enforceable (*Mauritius Commercial Bank Ltd v Hestia Holdings Ltd and another* [2013] EWHC 1328 (Comm)). The courts will give effect to such clauses by, among other things, ordering a stay of proceedings issued in breach (even if an arbitration has not also been commenced under the clause) (*Anzen v Hermes One Limited (British Virgin Islands)* [2016] UKPC 1).

10. In what circumstances can a party that is not a party to an arbitration agreement be joined to the arbitration proceedings?

As a starting point, where an arbitration agreement is governed by English law, a non-party to that agreement cannot be made a party to the arbitration without his consent.

However, the application of certain principles of English law can have the effect that a party who was not a signatory to the arbitration agreement will still be treated as a party to it. These principles include:

- Agency (for example, undisclosed principal and apparent authority).
- Piercing the corporate veil (*Ashot Egiazaryan and Vitaly Gogokhiya v OJSC ODK Finance and The City of Moscow* [2015] EWHC 3532 (Comm)).
- Situations where the original agreement has been assigned or novated to a third party.

A party who seeks to enforce rights under the Contracts (Rights of Third Parties) Act 1999 must, if the contract in question contains an arbitration agreement, enforce the right through arbitration (provided that this has not been excluded) (*section 8(1), Contracts (Rights of Third Parties) Act 1999*).

In certain transactions, a non-party has a right to step into the shoes of a party, usually where there has been a breach of contract. A funder, for example, may have the right to step into the shoes of an insolvent developer on a construction project.

It is also possible for parties to agree that one set of arbitral proceedings will be consolidated with other arbitral proceedings (*section 35, Arbitration Act*) and the rules of a number of arbitral institutions expressly provide a framework for the consolidation of proceedings and joining of third parties (see, for example, *Articles 7 to 10 of the Rules of Arbitration of the International Chamber of Commerce 2017 and Article 22 of the LCIA Rules 2014*).

11. In what circumstances can a party that is not a party to an arbitration agreement compel a party to the arbitration agreement to arbitrate disputes under the arbitration agreement?

See *Question 10*.

SEPARABILITY

12. Does the applicable law recognise the separability of arbitration agreements?

English law does recognise the separability of arbitration agreements (*section 7, Arbitration Act* and *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40).

BREACH OF AN ARBITRATION AGREEMENT

13. What remedies are available where a party starts court proceedings in breach of an arbitration agreement or initiates arbitration in breach of a valid jurisdiction clause?

Court proceedings in breach of an arbitration agreement

A party can apply to court for a stay of the court proceedings (*section 9, Arbitration Act*). The court must grant the stay unless the arbitration agreement is null and void, inoperative or incapable of being performed. The court can also exercise its discretion to grant a stay of court proceedings under its inherent jurisdiction (*Lombard North Central plc and another v GATX Corporation* [2012] EWHC 1067 (Comm)).

Arbitration in breach of a valid jurisdiction clause

A party can challenge the jurisdiction of the tribunal either by application to the tribunal itself (*section 30, Arbitration Act*) or by application to court (*section 32, Arbitration Act*). In either case, the challenge should be made before substantive steps are taken in the arbitral proceedings (*sections 31 and 73, Arbitration Act*).

14. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

Courts have the power to grant anti-suit injunctions (*section 37, Senior Courts Act 1981*). The Supreme Court has held that an anti-suit injunction can be obtained even where arbitration was not yet on foot or in contemplation (*Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35).

However, anti-suit injunctions are an equitable form of relief and will not be granted in favour of an arbitration if there are strong reasons not to do so. Strong reasons include delay in applying (even if the delay has caused no detriment to the parties) (*Essar Shipping Ltd v Bank of China Ltd* [2015] EWHC 3266 (Comm)). However, if a party brings legal proceedings in the courts of another EU member state in breach of an arbitration agreement, the English courts cannot grant anti-suit injunctions to restrain those proceedings (*Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc (Case C-185/07)*).

ARBITRATORS

Number and qualifications/characteristics

15. Are there any legal requirements relating to the number, qualifications and characteristics of arbitrators? Must an

arbitrator be a national of, or licensed to practice in your jurisdiction to serve as an arbitrator there?

Other than impartiality (see *Question 16*), there are no requirements under the Arbitration Act relating to the qualifications and characteristics of arbitrators. It is not necessary for an arbitrator to be a national of, or licensed to practise in, England.

As far as the number of arbitrators is concerned, certain provisions apply in default of agreement between the parties (including where the parties have agreed on an even number of arbitrators, that an additional arbitrator will be appointed as chairman) (*sections 15 to 18, Arbitration Act*).

INDEPENDENCE/IMPARTIALITY

16. Are there any requirements relating to arbitrators' independence and/or impartiality?

There is a requirement for arbitrators to act fairly and impartially between the parties (*section 33(1), Arbitration Act*). Section 1(a) also states that "*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense*".

The IBA Guidelines on Conflicts of Interest in International Arbitration 2014 provide a non-exhaustive list of circumstances in which appointments should be declined or disclosures made in order to protect against bias. These are arranged based on a "traffic light" system from red to green based on their significance. However, the IBA Guidelines only apply where the parties have so agreed or the tribunal has adopted them. Further, the English Commercial Court has recently identified potential gaps in the IBA Guidelines and confirmed that the test to be applied by the courts (which are not bound by the IBA Guidelines) in respect of impartiality is an objective one: would a fair-minded and informed observer, having considered the facts, consider there to be a real possibility that the tribunal was biased (*W Limited v M SDN BHD [2016] EWHC 422 (Comm)*), which was a challenge to set aside an award on the grounds of bias as serious irregularity under section 68 of the Arbitration Act).

APPOINTMENT/REMOVAL

17. Does the law contain default provisions relating to the appointment and/or removal of arbitrators?

Appointment of arbitrators

There is a default mechanism for the appointment of arbitrators (*sections 16 to 18, Arbitration Act*) which includes the following:

- If the tribunal is to consist of a sole arbitrator, the parties will jointly appoint the arbitrator no later than 28 days after service by one of the parties of a request to do so.
- If the tribunal is to consist of three arbitrators, each party will appoint one arbitrator no later than 14 days after service by one of the parties of a request to do so, and the two so appointed will forthwith appoint a third arbitrator as chairman.

Removal of arbitrators

A court can remove an arbitrator on certain specified grounds, including justifiable doubts about his impartiality and a failure to properly conduct the proceedings (*section 24, Arbitration Act*). Where the arbitral institution also has power to remove an arbitrator, a court will not exercise its power until the applicant has exhausted any available recourse to that institution.

There have been two recent instances in which the court has exercised its power to remove an arbitrator on the basis that justifiable doubts as to his impartiality existed:

- In *Cofely Ltd v Bingham & Anor* [2016] EWHC 240 (Comm), Cofely Ltd, the arbitrator acted as adjudicator or arbitrator on a number of occasions over the previous three years in proceedings where Knowles (the claimant in the arbitration) was a party or provided representation. These matters generated 25% of the arbitrator's income in that period and, in 18 out of 25 of these matters, the arbitrator had found in Knowles' favour. In the circumstances, the court held there were justifiable doubts about the arbitrator's independence and impartiality.
- In *Sierra Fishing Company & Ors v Farran & Ors* [2015] EWHC 140 (Comm) the claimants objected to the appointment of the sole arbitrator on the ground that he had a social and commercial relationship with the first and second defendants and had failed to disclose that he was related to the first defendant's legal counsel. In making an order that he should be removed, the court observed that the arbitrator had made arguments on behalf of the first and second defendants that they had not advanced, and had acted as if he had "descended into the arena and taken up the battle" on behalf of the defendants, such that he had ultimately lost the necessary objectivity required to determine the merits of the claim.

PROCEDURE

Commencement of arbitral proceedings

18. Does the law provide default rules governing the commencement of arbitral proceedings?

There are default rules governing commencement of arbitral proceedings (*section 14, Arbitration Act*), including:

- Where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced when one party serves a notice requiring them to submit the matter to the person so named or designated.
- Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced when one party serves on the other party notice requiring them to appoint an arbitrator or to agree to the appointment of an arbitrator.

APPLICABLE RULES AND POWERS

19. What procedural rules are arbitrators bound by? Can the parties determine the procedural rules that apply? Does the law provide any default rules governing procedure?

Applicable procedural rules

The Arbitration Act enables parties to exercise extensive autonomy to determine the applicable procedural rules (which, in practice, is often done by reference to the rules of an arbitral institution and/or the International Bar Association).

Subject to the right of the parties to agree any matters, it is for the tribunal to decide all procedural and evidential matters (*section 34, Arbitration Act*).

Certain default rules apply in the absence of agreement to the contrary between the parties, such as the tribunal's power to order security for costs and to direct that a witness must be examined on oath (*section 38, Arbitration Act*).

EVIDENCE AND DISCLOSURE

20. If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

The arbitrator can order disclosure of documents and attendance of witnesses (*sections 34, 43 and 44, Arbitration Act*).

The tribunal has the power to order disclosure of documents by the parties (*section 34(2)(d), Arbitration Act*).

A party can (with permission from the tribunal or the agreement of the other parties) apply to court for an order requiring the attendance of a witness in the UK to give oral testimony or to produce documents (*section 43(1), Arbitration Act*).

The following principles are relevant to the production of documents:

- It is a fundamental requirement that there is clear identification of the documents required so that the recipient of a summons had no doubts about what to provide (*Tajik Aluminium Plant v Hydro Aluminium AS & Others [2006] 1 WLR 767*).
- The key consideration is whether the documents are necessary for the fair disposal of the matter or to save costs. The court should therefore consider whether the information can be obtained by some other means (*Council of the Borough of South Tyneside v Wickes Building Supplies Ltd [2004] EWHC 2428 (Comm)*).

Any application for a witness summons must comply with Civil Procedure Rule 34. In particular, it must show that the dispute cannot be disposed of adequately unless the witness attends to give evidence.

A court has the same power to make orders in support of arbitral proceedings as it has in legal proceedings in respect of certain matters, including taking evidence from witnesses outside the jurisdiction (*section 44(2)(a), Arbitration Act*). However, it appears that the court will only exercise such powers against third parties in exceptional circumstances; the powers primarily relate to parties to the arbitration. The proper approach when seeking evidence or documents from third parties outside the jurisdiction is usually to apply to the court for a letter of request addressed to the court of the jurisdiction in which the evidence will be taken (*DTEK Trading SA v Morozov [2017] EWHC 94 (Comm)*).

The court will only make such an order if or to the extent that the tribunal, and any arbitral institution, has no power or is unable for the time being to act effectively.

There may be a contractual right for one party to obtain documents from a third party who is not involved in the arbitration. These clauses are often captured in "audit" clauses or come under the remit of "access to documents" or "access to personnel" clauses (for example, *Brookfield Construction (UK) Ltd v Foster & Partners Ltd [2009] EWHC 307 (TCC)*).

21. What documents must the parties disclose to the other parties and/or the arbitrator? How, in practice, does the scope of disclosure in arbitrations compare with disclosure in domestic court litigation? Can the parties set the rules on disclosure by agreement?

It is for the tribunal to decide all procedural and evidential matters (subject to the right of the parties to agree any matter) including whether and which documents will be disclosed and at what stage (*section 34, Arbitration Act*).

The Civil Procedural Rules (which apply to English litigation) give the courts significant flexibility in determining the scope of disclosure. The "standard disclosure" order, however, requires parties to disclose documents on which they rely, as well as documents that support another party's case or adversely affect either their own or another party's case.

By contrast, the IBA Rules on the Taking of Evidence in International Arbitration, which are commonly adopted in English arbitrations, require parties to produce the documents available to them on which they rely, and allow parties to submit requests for other parties to produce specified documents.

CONFIDENTIALITY

22. Is arbitration confidential? If so, what is the scope of that confidentiality and who is subject to the obligation (parties, arbitrators, institutions and so on)?

In contrast with English litigation (where statements of case and certain other documents can be accessed by non-parties, hearings are usually public and judgments are usually published), arbitral proceedings generally have a greater degree of confidentiality. This emphasis on confidentiality is often seen as a key incentive for parties to choose arbitration.

Although the Arbitration Act is silent on the issue of confidentiality, case law imposes duties of confidentiality on the parties and the arbitrators in relation to the arbitration hearing as well as to documents disclosed or generated in the arbitration (*Emmott v Michael Wilson and Partners [2008] EWCA Civ 184*).

There are a number of exceptions to this general principle of confidentiality, including where disclosure of documents:

- Has been agreed by the parties to the arbitration.
- Has been ordered by the court.
- Is reasonably necessary for the establishment or protection of a party's legal rights.
- Is necessary in the public interest or in the interests of justice.

If there is a threatened breach of confidentiality, the tribunal (if it has been granted the required power) or the court can order injunctive relief. It is not a pre-requisite for this type of remedy that the threatened breach can cause any prejudice to the party.

COURTS AND ARBITRATION

23. Will a local court intervene to assist arbitration proceedings seated in its jurisdiction?

A court is only permitted to intervene in arbitration proceedings to the extent expressly permitted by the Arbitration Act (*section 1(c), Arbitration Act*), for example to:

- Order a party to comply with a peremptory order made by the tribunal (see *section 42, Arbitration Act*).
- Require the attendance of a witness to give testimony or to produce documents or other material evidence (see *section 43, Arbitration Act*).
- Grant an interim injunction with regard to specified matters under *section 44(2)* of the Arbitration Act, including in relation to the preservation of evidence and the sale of any goods subject of the proceedings.
- Determine a question of law arising in the course of the proceedings (see *section 45, Arbitration Act*).

The parties can agree to exclude *sections 42, 44 and 45* of the Arbitration Act but cannot agree to exclude *section 43*.

As a general principle, the court will only intervene when it is satisfied that the applicant has exhausted any available arbitral process. For example, the court will not grant interim relief in circumstances where the parties can submit such matters to an emergency arbitrator with jurisdiction to order urgent relief (which is the default position under Article 9B of the LCIA Rules 2014) (*Gerald Metals SA v The Trustees of the Timis Trust & others* [2016] EWHC 2327). Even then the intervention will be designed to cause minimum interference with the progress of the arbitration.

24. What is the risk of a local court intervening to frustrate an arbitration seated in its jurisdiction? Can a party delay proceedings by frequent court applications?

The risk of the English courts intervening to frustrate arbitral proceedings is low because they are supportive of arbitration. The court's powers to intervene are designed to support rather than displace the arbitral process and are also expressly limited by the Arbitration Act (see *Question 23*).

The Arbitration Act also limits the extent to which parties can delay arbitral proceedings by making applications to the court. A mandatory stay of court proceedings commenced in breach of an arbitration agreement will be granted in favour of arbitral proceedings unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of having effect (section 9(4), Arbitration Act) (see, for example, *Associated British Ports v Tata Steel UK Ltd* [2017] EWHC 694 (Ch)).

In certain cases, arbitral proceedings can continue, and an award can be made, pending a determination by the court (section 32(4), Arbitration Act).

INSOLVENCY

25. What is the effect on the arbitration of pending insolvency of one or more of the parties to the arbitration?

A winding up order, or the appointment of provisional liquidators, in relation to a party to arbitration results in an automatic stay of that arbitration except with leave of the court and subject to any terms that may be imposed (section 130(2), Insolvency Act 1986). The court also has the discretion to order a stay in the event of a voluntary winding up.

A stay on broadly the same terms as above is available in relation to recognised foreign insolvency proceedings (*Cross Border Insolvency Regulations 2006* (SI 2006/1030), Schedule 1, Article 20(1)). The court also has the discretion to order a stay where a foreign court has ordered a winding up.

No legal process can be continued against a company in administration without permission from the court or consent from the administrators (paragraph 43(6) of Schedule B1, Insolvency Act).

When deciding whether to exercise its discretion to lift or modify an automatic stay, the court will consider all the facts to decide what is right and fair in the circumstances, with particular focus on the interest of creditors (*Cosco Bulk Carrier Co Ltd v Armada Shipping SA, STX Pan Ocean Co Ltd* [2011] EWHC 216 (Ch)).

A stay under these provisions does not render the arbitration null or void, unless the party subject to insolvency proceedings is being dissolved as there cannot be a valid award where one of the parties has ceased to exist (*Baytur SA v Finagro Holdings SA* [1992] QB 610).

REMEDIES

26. What interim remedies are available from the tribunal?

Interim remedies

The parties are free to agree that the tribunal will have the power to order on a provisional basis any relief it would have the power to grant in a final award (section 39, Arbitration Act).

The power to grant interim remedies can also be conferred on the tribunal under the applicable arbitral rules. For example, a tribunal can order the parties to pay security for costs and make an order on preservation of property, or any other order for provisional relief (section 25, LCIA Rules 2014).

Further, certain arbitral institutions (including the LCIA and ICC) have procedures for the appointment of emergency arbitrators in order that interim remedies can be granted on an urgent basis. Unless otherwise agreed by the parties, the court (rather than the tribunal) has broad powers to make orders in respect of (section 44, Arbitration Act):

- Taking evidence from witnesses.
- Preserving evidence.
- Sale of goods.
- Granting interim injunctions.

However, the court can only intervene to the extent that the arbitral tribunal has no power or is unable for the time being to provide the same relief (*Gerald Metals SA v The Trustees of the Timis Trust & others* [2016] EWHC 2327).

Ex parte

There is no provision in the Arbitration Act specifically empowering the tribunal to grant interim relief on an ex parte basis. Some institutional arbitral rules make clear that interim relief can only be granted after all parties have been given a reasonable opportunity to respond (section 25.1, LCIA Rules 2014).

Security

Unless otherwise agreed by the parties, the tribunal has the power to order a claimant to provide security for the costs of the arbitration but does not specify the grounds on which the order can be made (section 38, Arbitration Act).

An order for security for costs cannot be made solely because the claimant resides outside the jurisdiction (but this provision can be excluded by agreement) (section 38(3), Arbitration Act).

27. What final remedies are available from the tribunal?

The parties are free to agree the powers of the tribunal with regard to remedies (section 48, Arbitration Act). Unless otherwise agreed by the parties, the tribunal has the power to order as final remedies:

- A declaration on any matter to be determined by the proceedings.
- An order to pay a sum of money.
- An order for a party to do or refrain from doing anything.
- An order for specific performance of a contract (other than a contract relating to land).
- An order rectifying, setting aside or cancelling a deed or other document.

The parties are also free to agree the powers of the tribunal with regard to the award of interest. Unless otherwise agreed by the parties, the tribunal can award simple or compound interest from any date, and at any rate, it considers appropriate (*section 49, Arbitration Act*).

APPEALS

28. Can arbitration proceedings and awards be appealed or challenged in the local courts? What are the grounds and procedure? Can parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitral clause itself)?

Rights of appeal/challenge

Challenges or appeals are available in three situations:

- On the basis of the tribunal's lack of substantive jurisdiction (*section 67, Arbitration Act*).
- On the basis of serious irregularity (*section 68, Arbitration Act*).
- On a point of law (*section 69, Arbitration Act*).

Grounds and procedure

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

A challenge or appeal is started by filing an arbitration claim form (*Rule 62, Civil Procedure Rules*). The claim form must refer to the relevant section of the Arbitration Act forming the basis of the challenge and give details of the award being challenged.

Waiving rights of appeal

The parties can agree to exclude the right to appeal on a point of law. The right to challenge for lack of jurisdiction and serious irregularity are non-excludable.

However, if a party taking part in the proceedings fails to raise an objection on the basis of the following, it can lose the right to object subsequently (*section 73, Arbitration Act*):

- That the tribunal lacks substantive jurisdiction.
- That the proceedings have been improperly conducted.
- That there has been a failure to comply with the arbitration agreement or with any provision of the Arbitration Act.
- That there has been any other irregularity affecting the tribunal or the proceedings.

Case law has clarified what it means to take part in an arbitration (*Sierra Fishing Company & Ors v Farran & Ors [2015] EWHC 140 (Comm)*), in particular:

- A request or agreement to put the arbitration process on hold does not, of itself, seek to invoke the tribunal's jurisdiction. Similarly, an agreement to revive the process does not amount to taking part. Mere silence and inactivity in the face of a revival of the process by another party is equally incapable of amounting to taking part.
- Requests or agreements to adjourn procedural hearings, of themselves, do not amount to initially taking part (although they can amount to continuing to take part where the party had already taken part by invoking the tribunal's jurisdiction). They merely seek to preserve the opportunity to participate or object at the hearing where a postponement is sought or agreed.
- The claimant's indication that they will be appointing their own arbitrator does not amount to taking part because it cannot

amount to invoking the jurisdiction of a tribunal that has not been constituted.

29. What is the limitation period applicable to actions to vacate or challenge an international arbitration award?

See *Question 28, Grounds and Procedure*.

30. What is the limitation period applicable to actions to enforce international arbitration awards rendered outside your jurisdiction?

Claims to enforce an arbitration award rendered outside England and Wales are subject to the same limitation periods as claims to enforce English-seated arbitration awards. These periods are:

- Six years from the failure by one party to honour the award (*section 7, Limitation Act 1980*).
- 12 years from failure to honour the award if the arbitration agreement is a deed (*section 8, Limitation Act 1980*).

COSTS

31. What legal fee structures can be used? Are fees fixed by law?

The amount of legal fees is not fixed by law.

Conditional fees (where lawyers are entitled to a success fee based on the fees charged) are permitted for contentious work, including arbitration, in England and Wales. The maximum amount of the success fee is limited to 100% of the fees that would otherwise be payable.

Contingency fees (where lawyers are entitled to a success fee calculated as a percentage of the damages recovered) are not permitted unless they are "no win no fee" arrangements complying with the relevant requirements (*Damages-based Agreements Regulations 2013 (SI 2013/609)*). Such agreements are permitted for all contentious work, including arbitrations.

Third party funding is also available for arbitration. While this area is not regulated by law, leading litigation funders have adopted a Code of Conduct that explicitly covers arbitration (*paragraph 2.4, Code of Conduct for Litigation Funders*, adopted in November 2016).

32. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider?

Cost allocation

The tribunal can (but is not obliged to) make an award allocating the costs of the arbitration between the parties, subject to any agreement between them (*section 61(1), Arbitration Act*). To be valid, any agreement between the parties must have been made after the dispute arose (*section 60, Arbitration Act*). "Arbitration costs" include the arbitrators' fees and expenses, the fees and expenses of any arbitral institution concerned and the costs (including legal costs) of the parties (*section 59, Arbitration Act*).

A cost award must "follow the event", meaning that the costs will fall on the unsuccessful party unless either:

- The parties have agreed otherwise.

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- It appears to the tribunal that it is not appropriate in the circumstances (section 61(2), *Arbitration Act*).

Cost calculation

Any agreement or award extends only to "recoverable costs" (section 62, *Arbitration Act*). The parties can agree which costs of the arbitration are recoverable (section 63(1) *Arbitration Act*). In the absence of an agreement, the tribunal can determine this issue. In these circumstances, the tribunal must specify the basis on which it is acting and state the items of recoverable costs and the amount referable to each (section 63(3), *Arbitration Act*). Third party funding costs (including success fees and uplifts) are, in principle, a "recoverable cost" in arbitration (*Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm)). The arbitrators' fees and expenses are also recoverable to the extent that they are reasonable (section 64(1), *Arbitration Act*).

If the tribunal declines to decide which costs are recoverable, any party to the arbitration can apply to court for a determination (section 63(4), *Arbitration Act*).

Factors considered

When deciding on costs issues, a tribunal will typically consider a wide range of factors, such as whether a party has succeeded in full or only in part and whether a party's conduct has been unreasonable. If the tribunal exercises its discretion to depart from the general rule on allocation, it must clearly set out its reasons for doing so (*Lewis v Haverfordwest Rural District Council* [1953] 1 WLR 1486).

ENFORCEMENT OF AN AWARD

Domestic awards

33. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts?

There are two principal routes available to enforce an arbitration award in England and Wales:

- By summary procedure (section 66, *Arbitration Act*).
- By action on the award for failure to comply with the award (section 66(4), *Arbitration Act*). This method is rarely used in practice.

An award can be enforced summarily in two distinct ways:

- It can be enforced "in the same manner as a judgment or order of the court" (section 66(1), *Arbitration Act*).
- It can be "converted" into a court judgment (section 66(2), *Arbitration Act*).

In either case, the enforcing party must apply to the court for permission. This is generally done without notice to the other party, and involves submitting an arbitration claim form and a witness statement attaching the arbitration agreement and award (*Civil Procedure Rule 62.18*).

When permission is granted, all the methods available to enforce a court judgment can be used to enforce the award, including injunction, award of damages and specific performance (section 66(1), *Arbitration Act*).

FOREIGN AWARDS

34. Is your jurisdiction party to international treaties relating to recognition and enforcement of foreign arbitration awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

The UK has been a party to the New York Convention since 1975. The application of the New York Convention is subject to the reservation that it will apply only to the recognition and enforcement of awards made in the territory of another contracting state.

The UK has also submitted notifications to extend the application of the New York Convention to the British Virgin Islands, Gibraltar, the Isle of Man, Bermuda, the Cayman Islands, Guernsey and Jersey. Enforcement of foreign awards from countries that are not party to the New York Convention continue to be enforced under section 37 of the *Arbitration Act 1950*.

The UK is also a party to the Geneva Convention 1927 and has enacted:

- The Foreign Judgments (Reciprocal Enforcement) Act 1933 (which provides for the enforcement of judgments and arbitral awards from specified former Commonwealth countries).
- The Arbitration (International Investment Disputes) Act 1966 (which provides for the recognition and enforcement of ICSID awards).

35. To what extent is a foreign arbitration award enforceable?

English courts recognise and enforce a foreign arbitration award rendered by a state that is party to the New York Convention, subject only to some exceptions. The enforcement procedure is the same as a judgment or order made by the courts of England and Wales (sections 100 to 103, *Arbitration Act*).

There are certain exceptions in which recognition and enforcement of an award can be refused (*Article 5, New York Convention, as enacted in English law by section 103(2) and (3), Arbitration Act*), which are as follows:

- A party to the arbitration agreement was under some incapacity.
- The arbitration agreement was not valid.
- A party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.
- The award deals with a dispute that did not fall within the terms of the arbitration, or deals with matters out of the scope of the arbitration.
- The composition of the arbitral tribunal was not in accordance with the agreement of the parties or the law of the country of the arbitration.
- The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which it was made.
- The award is in respect of a matter not capable of settlement by arbitration.
- Enforcement of the award would be contrary to public policy.
- The award includes decisions on matters not submitted to the arbitration which can be separated.

LENGTH OF ENFORCEMENT PROCEEDINGS

36. How long do enforcement proceedings in the local court take, from the date of filing the application to the date when the first instance court makes its final order? Is there an expedited procedure?

The length of time it takes to enforce an award that is not complied with voluntarily depends on the nature of any objections to enforcement that are raised. There is, however, a summary procedure available to a party seeking to enforce when there are no objections.

REFORM

37. Are any changes to the law currently under consideration or being proposed?

In 2016, the Law Commission (which is responsible for reviewing the laws of England and Wales and recommending reforms to,

among other things, modernise the law) launched a public consultation as to whether the Arbitration Act should be included in its 13th programme of reform in 2017.

The General Council of the Bar issued a response on 31 October 2016, suggesting that arbitrators be given powers to strike out unmeritorious claims and that explicit support should be given to summary judgment procedures. It was also suggested that parties to arbitration be given an explicit right to make settlement offers that would have the same effect as Part 36 offers in claims before the courts.

The Law Commission was due to submit its recommendations to the government in June 2017, but this has been delayed due to the 2017 general election.

MAIN ARBITRATION ORGANISATIONS

Chartered Institute of Arbitrators

W www.ciarb.org

The London Court of International Arbitration

W www.lcia.org/LCIA/introduction.aspx

London Maritime Arbitrators Association

W www.lmaa.london/about-us-Introduction.aspx

The International Chamber of Commerce

W www.iccwbo.org

ONLINE RESOURCES

Legislation.gov.uk

W www.legislation.gov.uk/ukpga/1996/23/contents

Description. This website contains the full text of the Arbitration Act 1996.

W

<http://webcache.googleusercontent.com/search?q=cache:VJUa8hapoloJ:www.ibanet.org/Document/Default.aspx%3FDocumentUid%3De2fe5e72-eb14-4bba-b10d-d33dafee8918+&cd=1&hl=en&ct=cnk&gl=uk>

Description. This site contains the full text of the IBA Guidelines on Conflicts of Interests in International Arbitration, adopted on 23 October 2014.

W <https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/>

Description. This is the ICC Guidance Note for the Disclosure of Conflicts by Arbitrators, adopted on 22nd February 2016.

Practical Law Contributor profiles



Justin Williams, Partner

Akin Gump LLP

T +44 20 7012 9660
F +44 20 7012 9601
E williamsj@akingump.com
W www.akingump.com

Professional qualifications. Solicitor, England and Wales

Areas of practice. International arbitration and dispute resolution; litigation; energy.

Recent matters

- Acting in international arbitrations all over the world, including in Latin America, the Caribbean, Europe, the CIS, sub-Saharan Africa, the Middle East and Asia.
- Advising on proceedings under most of the major arbitral rules.



Richard Hornshaw, Partner

Akin Gump, LLP

T +44 20 7661 5489
F +44 20 7012 9601
E richard.hornshaw@akingump.com
W www.akingump.com

Professional qualifications. England and Wales, Solicitor; Hong Kong, Solicitor

Areas of practice. International arbitration; financial services; investment funds; financial restructuring and insolvency.

Recent matters

- Acting for a range of financial institutions and corporates on high-value, complex and cross-border disputes in both arbitration and litigation.
- Conducting arbitrations under the auspices of many of the major arbitral institutions including the LCIA, UNCITRAL, ICC and LMAA, as well as pursuant to the rules of certain commodity trading associations.



Hamish Lal, Partner

Akin Gump, LLP

T +44 20 7012 9740
F +44 20 7012 9601
E hamish.lal@akingump.com
W www.akingump.com

Professional qualifications. England and Wales, Solicitor; called to the Bar by the Honourable Society of Gray's Inn; Part II Advocate (Full Rights) in Dubai International Finance Centre (DIFC) Courts

Areas of practice. International arbitration and dispute resolution; construction arbitration and litigation; global project finance; litigation; Middle East.

Recent matters

- Acting under applicable laws (common law and civil codes) including UAE law, Law of Iraq, Law of Nigeria, Qatar Civil Code, Law of Denmark, as well as English law.
- Acting under the rules of the ICC, LCIA, DIAC, DIFC-LCIA and the Stockholm Chamber of Commerce, as well as in contractual mediations, expert determinations and ad-hoc arbitrations under the UNCITRAL Rules.