

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

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## 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

Commercial arbitration remains the preferred dispute resolution procedure for international transactions. The full implications of Brexit for arbitration in the UK are being closely monitored by practitioners and do not appear to have had any negative impact so far. This is unsurprising, given that the primary attractions of London should remain the same, namely the:

- Relative contractual certainty offered by English law.
- Reliability, neutrality and impartiality of the English judiciary.
- Support for the arbitral process offered by English courts and the Arbitration Act 1996.
- UK's position as a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

With 89% of its cases in 2019 seated in London, the London Court of International Arbitration's (LCIA) statistics are reflective of arbitration activity in London. A record number of arbitrations were referred to the LCIA (406) in 2019. The LCIA has not yet released its Annual Casework Report for 2020 but it has reported a spike in new cases in the first quarter of 2020, predicting that in the medium-term the COVID-19 crisis "will undoubtedly lead to additional cases". A significant impact of the COVID-19 pandemic has been the increased shift to virtual hearings due to restrictions on travel and in-person meetings. The LCIA Arbitration Rules 2020 (LCIA Rules 2020), which came into force on 1 October 2020, reflect this development and expressly allow remote hearings: "As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form)" (*Article 19.2, LCIA Rules 2020*). It remains to be seen whether the default position will revert to in-person hearings once the effects of the pandemic have been overcome, or whether virtual hearings become a lasting trend which could result in cost savings to the parties.

Out of the LCIA 2019 cases, 346 were referred under the LCIA Rules, with non-UK parties accounting for 81% of its users. In a quarter of those cases where the claims were quantified in the request for arbitration, the sum claimed was between USD5 million and USD100 million, with the sum claimed exceeding USD100 million in a further 4% of cases.

Trending industries continue to include banking and finance and energy and resources (accounting for 32% and 22% of disputes respectively).

An increased focus on transparency continues following the LCIA's launch of an online database of anonymised arbitrator challenge

decisions in February 2018. Arbitrator challenges were relatively infrequent in 2015-2019, corresponding to 2% of the percentage of arbitrations commenced in each year. However, two court decisions emphasised the importance of disclosure by arbitrators. A decision of the Privy Council in February 2018 noted that disclosure can serve as a sign of transparency and may prevent an objection being raised (*Wael Almazeedi v Michael Penner and Stuart Sybermsa [2018] UKPC 3*). In April 2018, the English Court of Appeal considered for the first time the scope of the duty of disclosure (*Halliburton Company v Chubb Bermuda Insurance Ltd [2018] EWCA Civ 817*) and found that it extends not only to circumstances that a fair-minded and informed observer would conclude to give rise to a real possibility of bias, but also to circumstances that merely might give rise to this conclusion. In a borderline case, where there is uncertainty whether facts would give rise to such a possibility, the court found that disclosure should be given. This sets the bar relatively low and places the test for arbitrators on a similar footing to the test applied to English judges. The Supreme Court in a judgment handed down in November 2020 (*Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48*) agreed with the Court of Appeal and confirmed that arbitrators have a legal duty to disclose matters which would, or might, lead to the conclusion that there is a real possibility that they are biased.

Under English law, successful challenges to arbitrators are relatively rare. In 2018, the Court of Appeal overturned the Commercial Court's decision to remove an arbitrator for lack of qualifications, on the grounds that he had not met the requirement of having "not less than ten years' experience of insurance and reinsurance" stipulated in the arbitration agreement. The court held that the arbitrator's experience of insurance and reinsurance law met this requirement (*Allianz Insurance Plc and another v Tonicstar Ltd [2018] EWCA Civ 434*). These decisions demonstrate the English courts' balance between imposing high standards of transparency and accountability on arbitrators, but equally not removing arbitrators lightly.

The last few years have also seen a notable increase in third-party funding activity in commercial international arbitrations seated in England. There currently is no specific obligation on a party to disclose the fact that it has a funding arrangement in place. However, potential conflicts of interest arising from potential relationships between parties, law firms, the relatively small number of funders and the small circle of arbitrators subject to repeat appointments has led to calls for greater transparency with regard to funding arrangements.

#### Advantages/disadvantages

While much depends on how arbitration clauses are drafted and what decisions are made during an arbitration, the following principal advantages of arbitration often apply:

- Greater certainty through enforcement of decisions through the New York Convention.
- Confidentiality.
- Tribunal expertise and neutrality through party-appointment of arbitrators.

- Flexibility in terms of the procedure, for example to enable expedition or limit disclosure of documents.
- Finality: usually there are only limited grounds on which an award can be challenged.

The principal disadvantages of arbitration can include the:

- Reluctance of tribunals to dispose of weak claims/defences on a summary basis.
- Reluctance of tribunals to impose rigorous case management.
- Length of time it can take from commencement of the arbitration to publication of the final award.
- 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 unless care is taken with the choice of arbitrators.

## 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 (UNCITRAL Model Law)?

Arbitrations seated in England, Wales or Northern Ireland are governed by the Arbitration Act 1996 (Arbitration Act). Although the Arbitration Act is comprehensive, it does not codify all elements of English arbitration law, some of which are found in the common law.

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

- 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 have 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?

The mandatory provisions of the Arbitration Act have effect, notwithstanding any agreement to the contrary (*section 4(1), Arbitration Act*). In contrast, the non-mandatory provisions of the Arbitration Act apply in the absence of the parties agreeing their own arrangements (*section 4(2), Arbitration Act*). The full list of mandatory provisions are set out in Schedule 1 to the Arbitration Act. These include, for example:

- Rights of parties to stay legal proceedings in respect of a matter referred to arbitration (*sections 9 to 11, Arbitration Act*).
- Power of the court to extend time limits to begin an arbitral proceeding or other dispute resolution procedures which must be exhausted before arbitration commences (*section 12, Arbitration Act*).
- Power of the court to remove an arbitrator (*section 24, Arbitration Act*).

- Immunity of an arbitrator (*section 29, Arbitration Act*).
- Rights to challenge/appeal awards on the grounds of lack of substantive jurisdiction (*section 67, Arbitration Act*) or serious irregularity (*section 68, Arbitration Act*).

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

The courts have held that the purpose of the Arbitration Act is to allow parties to agree to have disputes determined by arbitration rather than in court. Most types of commercial disputes can be arbitrated. However, case law has also determined that certain claims may be non-arbitrable (see, for example, *Fulham Football Club (1987) Ltd v J Sir David Richards and another* [2011] EWCA Civ 855; *Riverrock Securities Limited v International Bank of St Petersburg (Joint Stock Company)* [2020] EWHC 2483 (Comm)). Claims may be non-arbitrable if:

- The relief sought requires an order that only a court can make.
- The relief sought engages third-party interests in a relevant sense.
- The claim represents an attempt to delegate to the arbitrators a matter of public interest which cannot be determined within the limitations of a private contractual process.

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. Also, where elements of a dispute raise issues which are not arbitrable, that does not mean that the dispute as a whole will not be subject to the parties' arbitration agreement (*Aqaba Container Terminal (PVT) Co v Soletanche Bachy France SAS* [2019] EWHC 471 (Comm)). Nonetheless, the *Fiona Trust* principles must be applied carefully to the facts of the particular case. For example, the Court of Appeal considered an application for an anti-suit injunction restraining, among other claims, a company's claims against a "quasi-partner" in the New South Wales courts, in its capacity as assignee of the rights of certain third parties to contributions toward a monetary judgment from the quasi-partner. While the claims related to a partnership agreement, since the third parties were not parties to that agreement, the court deemed it highly unlikely that the partners had intended to include these claims within their arbitration clause. Accordingly, the assigned claims did not fall within the scope of the arbitration clause and could not be restrained (*Michael Wilson & Partners, Ltd v John Forster Emmott* [2018] EWCA Civ 57).

The English courts have taken a similar approach to arbitration agreements in investment treaties. For example, in July 2018, the High Court upheld its jurisdiction to enforce an award under the Russia-Ukraine Bilateral Investment Treaty (BIT), rejecting the state's arguments that it had not waived state immunity under the UK State Immunity Act 1978 in the BIT arbitration agreement, in respect of claims for breach of fair and equitable treatment (FET). The court held that, although the BIT did not expressly include FET protection, Ukraine had agreed to arbitrate "any dispute" in connection with investments, which logically included disputes over what protections were conferred by the BIT. The availability of a FET claim was therefore for the arbitral tribunal to decide on the merits. The court also preferred a broad interpretation of "investment" for the purposes of determining whether the state had waived immunity in respect of the investor's acquisition of shares of foreign third-party shareholders not covered by the BIT (*PAO Tatneft v Ukraine* [2018] EWHC 1797 Comm).

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

- Where an employee has statutory rights, which entitles 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 (however, insolvency claims are not automatically deemed non-arbitrable: see *Riverrock Securities Limited v International Bank of St Petersburg (Joint Stock Company)* [2020] EWHC 2483 (Comm)).
- Criminal matters.

## Limitation

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

The Limitation Act 1980, the Foreign Limitation Periods Act 1984, the Limitation (Northern Ireland) Order 1989 and the 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*). In an example of the courts' approach to this limitation period, the Commercial Court set aside an order granting an extension of 18 days to challenge a partial award on jurisdiction, finding that the claimant had made an unreasonable decision by allowing the time limit to expire, in the hope that it would win on the merits (*Telecom of Kosovo JSC (formerly PTK JSC) v Dardafon.Net LLC* [2017] EWHC 1326 (Comm)).

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 and others* [1996] IRLN 45).

## ARBITRATION INSTITUTIONS

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

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

- International Chamber of Commerce (ICC). In 2019, 114 arbitrations were seated in London, making it the most frequently elected seat and representing 17.1% of arbitrations submitted to the ICC in that year.
- London Court of International Arbitration (LCIA). In 2019, 307 arbitrations were seated in London, representing 89% of arbitrations referred to the LCIA under the LCIA Rules.

- London Maritime Arbitrators Association.

## 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

A written arbitration agreement need not be signed, nor is there a requirement for the agreement to be contained within a single document, meaning that an agreement to arbitrate can comprise an exchange of communications in writing (section 5(2), *Arbitration Act*). However, the documents must be clear enough to evidence that the parties intended to incorporate an agreement to arbitrate (*Italian Delegation on Wheat Supplies v Certain Exporting Houses* (1925) 22 LI L Rep 673). Part 1 of the *Arbitration Act* (sections 1 to 84) governs arbitration agreements that are made or evidenced in writing (section 5, *Arbitration Act*). An arbitration agreement does not, however, necessarily need to be made in writing. 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 it has 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*.

#### Separate arbitration agreement

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*).

Parties can incorporate an arbitration clause by reference to a standard form clause or to a set of trade terms. Such trade terms or standard form clause may in turn incorporate by reference external provisions requiring a dispute to be submitted to arbitration (*Wyndham Rather Ltd v Eagle Star and British Dominions Insurance Co Ltd* (1925) 21 LI L Rep 214).

See above, *Substantive/formal requirements*.

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## Unilateral or optional clauses

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

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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 Ltd (British Virgin Islands)* [2016] UKPC 1).

#### Third parties

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

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As a starting point, where an arbitration agreement is governed by English law, a non-party to that agreement cannot be made to a party to the arbitration without its 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. Where a party (the assignee) acquires rights under a contract which contains an arbitration agreement, the assignee may only bring claims in arbitration (reflecting the "conditional benefit" principle in English law). In *London Steam-Ship Owners' Mutual Insurance Association Ltd v Kingdom of Spain (the Prestige)* [2020] EWHC 1582 (Comm), the court established that where this conditional benefit principle applies, the jurisdiction of the arbitrator incorporates not only the determination of the assignee's substantive claim, but also, if the assignee failed to pursue its claim in arbitration, the determination of what relief the other party is entitled to following the assignee's failure to comply with the arbitration agreement.

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 another set of arbitral proceedings (*section 35, Arbitration Act*). 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 *Articles 22 and 22A of the LCIA Rules 2020*).

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### 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?

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See *Question 10*.

#### Separability

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

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English law does recognise the separability of arbitration agreements (*section 7, Arbitration Act*). An arbitration agreement will be regarded as separate from (and unaffected by the invalidity of) the main "host" contract unless there is clear evidence of factors which directly and independently impeach the arbitration agreement (*Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40). The Supreme Court in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 stressed that the purpose of the separability doctrine was "not to insulate the arbitration agreement from the substantive contract for all purposes" but merely to give legal effect to the parties' presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. It thus found that the separability doctrine did not give rise to a presumption that, by nominating a seat of the arbitration, the parties had impliedly also decided that the law of that seat should govern the arbitration agreement.

#### Breach of an arbitration agreement

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### 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?

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#### 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*).

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

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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)). Currently, courts of

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an EU member state may not grant anti-suit injunctions to restrain a party from continuing proceedings in another EU member state (*Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc (Case C-185/07)* and *Nori Holdings Ltd v Bank Otkritie Financial Corporation [2018] EWHC 1343 (Comm)*). It remains to be seen whether a possible consequence of the UK's departure from the EU might therefore be that English courts are now able to grant anti-suit injunctions in respect of proceedings before another EU member state court.

English courts have the power, in exceptional cases, to grant anti-arbitration injunctions to restrain an arbitration seated abroad, even where England is not the natural forum for the underlying dispute (*Sabbagh v Khoury [2019] EWCA Civ 1219*). In *Sabbagh*, the exceptional circumstances leading the court to intervene were the fact that the claimants to the foreign-seated arbitration had themselves previously submitted to the English court the question of whether the claims fell within the arbitration agreement, and had that question answered in the negative.

## ARBITRATORS

### Number and qualifications/characteristics

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#### 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?

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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 15-18, Arbitration Act*).

### Independence/impartiality

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

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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 identified potential gaps in the IBA Guidelines (*W Ltd v M SDN BHD [2016] EWHC 422 (Comm)*). The Court of Appeal (in *Halliburton Company v Chubb Bermuda Insurance Ltd [2018] EWCA Civ 817*) found 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 all the facts, conclude that there was a real possibility that the tribunal was biased?

The Arbitration Act 1996 is silent as to an arbitrator's duty of disclosure. However, the Court of Appeal determined the test for disclosure in *Halliburton v Chubb*. This case concerned a London-seated arbitration claim relating to indemnification in respect of settlements following the Deepwater Horizon explosion. The

applicant sought the removal of one of the three appointed arbitrators, on the basis that there were "justifiable doubts as to his impartiality", citing the fact that he had been appointed as an arbitrator in two other disputes arising out of the Deepwater Horizon explosion and had not disclosed the fact of those overlapping appointments. The court held that the arbitrator should have disclosed these circumstances, clarifying that an arbitrator's duty of disclosure extends not only to circumstances that a fair-minded and informed observer would conclude give rise to a real possibility of bias, but also to circumstances that merely might give rise to such a conclusion. In a borderline case, where there is uncertainty as to whether facts would give rise to such a possibility, the court found that disclosure should be given. The court nevertheless held that the arbitrator's overlapping appointments did not give rise to apparent bias, as such practice was seen as commonplace, with arbitrators being trusted to approach each case with an open mind. Further, the court gave weight to the finding that the arbitrator's non-disclosure was accidental and that he had acted appropriately when concerns were raised.

The Supreme Court in a judgment handed down in November 2020 (*Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48*) upheld the decision of the Court of Appeal and confirmed that arbitrators have a legal duty to disclose matters which would, or might, lead to the conclusion that there is a real possibility that they are biased. The Supreme Court left it open whether the duty extends only to facts "known to the arbitrator" (as suggested by the Court of Appeal) or whether there may be circumstances in which the arbitrator may be under a duty to make reasonable inquiries as to whether there are facts or circumstances which ought to be disclosed. The Supreme Court also clarified that an arbitrator's legal duty of disclosure does not override the arbitrator's concurrent duty of privacy and confidentiality under English law, with the consequence being that disclosure can only be made if the parties to whom the obligations of privacy and confidentiality are owed give their consent, expressly or impliedly.

However, this decision may still make future arbitrator challenges more likely, particularly bearing in mind the court's confirmation that an arbitrator's failure to disclose will be relevant in determining whether apparent bias exists, despite the Commercial Court's clear indication that the English courts will not impose an unreasonably rigorous standard when assessing alleged failures to disclose (*Soletanche Bachy France SAS v Aqaba Container Terminal (Pvt) Co [2019] EWHC 362 (Comm)*).

### Appointment/removal

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

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##### Appointment of arbitrators

Failing agreement by the parties, there is a default mechanism for the appointment of arbitrators (*sections 16-18, 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 written request to do so (*section 16(3), Arbitration Act*).
- 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 written request to do so, and the two so appointed must forthwith appoint a third arbitrator as chairman (*section 16(5), Arbitration Act*).

##### 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.

Some examples in which the court considered exercising its power to remove an arbitrator on the basis that justifiable doubts as to his impartiality existed include the following:

- In *Cofely Ltd v Bingham and another* [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 that there were justifiable doubts about the arbitrator's independence and impartiality.
- In *Halliburton v Chubb*, the Court of Appeal considered whether an arbitrator could, without disclosure, be appointed in multiple arbitral proceedings with overlapping subject matter. The court approved the decision in *Cofely Ltd* and acknowledged that "inside information and knowledge may be a legitimate concern" for parties. Nonetheless, the Court of Appeal ultimately held that as a starting point, "an arbitrator should be trusted to decide the case solely on the evidence or other material adduced in the proceedings in question". On the facts of the case, the court was not satisfied that the facts gave rise to justifiable doubts about the arbitrator's impartiality. The Supreme Court in a judgment handed down in November 2020 (*Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48) upheld the Court of Appeal's decision.
- In *Sierra Fishing Company and others v Farran and others* [2015] EWHC 140 (Comm), the claimants objected to the appointment of the sole arbitrator on the grounds 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.

Removal can also be sought on the basis that the arbitrator does not possess the qualifications required by the arbitration agreement. In 2018, the Court of Appeal overturned a Commercial Court decision to remove an arbitrator, on grounds that he did not meet the requirement of having "not less than ten years' experience of insurance and reinsurance". The court preferred a wider construction of the term "experience" and held that the arbitrator's experience of the law of insurance and reinsurance satisfied the requirement (*Allianz Insurance Plc and another v Tonicstar Ltd* [2018] EWCA Civ 434).

The LCIA publishes anonymised decisions on arbitrator challenges and decisions dating back to 2010 on an online database.

## 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.

The courts will however give effect to applicable institutional rules in determining whether proceedings have been validly commenced. For example, Article 1.2 of the LCIA Rules 2020 allows for the submission of composite [requests for arbitration,] which means that parties can commence a single arbitration in respect of disputes under multiple contracts. As noted in *A v B* [2017] EWHC 3417 (Comm), composite requests were previously not permitted under the LCIA Rules 2014. A defective arbitration notice may have potentially significant consequences where purported commencement takes place hard up against the date of the expiry of a statutory or contractual limitation period.

### 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).

##### Default rules

In the absence of agreement by the parties, the Arbitration Act gives the tribunal the power to decide all procedural and evidential matters (section 34, *Arbitration Act*) as well as a range of general powers. These include the power to:

- Decide where and when the proceedings will be held (section 34, *Arbitration Act*).
- Decide whether written statements of claim/defence should be used (section 34, *Arbitration Act*).
- Decide which documents or classes of documents should be disclosed (section 34, *Arbitration Act*).
- Order security for costs (section 38, *Arbitration Act*).
- Direct that a witness 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 tribunal 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 has no doubts about what to provide (*Tajik Aluminium Plant v Hydro Aluminium AS and 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 courts are reluctant to exercise such powers against third parties outside of the jurisdiction (*Benhurst Finance Ltd & Ors v Pierre Adrien Colliac [2018] EWHC 2188 (QB)*). 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)*).

## EVIDENCE

### 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?

#### Scope of disclosure

It is for the tribunal to decide all procedural and evidential matters (subject to the right of the parties to agree any matter – see below), 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.

#### Validity of parties' agreement as to rules of disclosure

The tribunal's discretion to decide all procedural and evidential matters is subject to the right of the parties "to agree any matter" (*section 34, Arbitration Act*). The parties can accordingly agree on the rules of disclosure, thereby restricting or excluding the general discretion of the tribunal.

## 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, for example, to facilitate separate disciplinary proceedings brought by the Chartered Institute of Arbitrators against an arbitrator (*The Chartered Institute of Arbitrators v B and others [2019] EWHC 460 (Comm)*).

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 prerequisite for this type of remedy that the threatened breach can cause any prejudice to the party. The English Commercial Court has previously granted an order prohibiting disclosure of an award, even though the court had held it was in the public domain by virtue of a public enforcement challenge hearing, and therefore not subject to the confidentiality obligation under Article 30 of the applicable LCIA Rules 1998 (*UMS Holding Ltd and others v Great Station Properties SA [2017] EWHC 2473 (Comm)*).

## COURTS AND ARBITRATION

### 23. Will the local courts intervene to assist arbitration proceedings seated in their 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.

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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 2020) (*Gerald Metals SA v The Trustees of the Timis Trust and others* [2016] EWHC 2327). Even then, the intervention will be designed to cause minimum interference with the progress of the arbitration.

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#### 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?

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##### Risk of court intervention

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*).

##### Delaying proceedings

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*).

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## INSOLVENCY

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

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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 1986*).

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).

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## REMEDIES

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#### 26. What interim remedies are available from the tribunal?

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##### 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 for the preservation of property, or any other order for provisional relief (*section 25, LCIA Rules 2020*).

Further, certain arbitral institutions (including the LCIA and ICC) have procedures for the appointment of emergency arbitrators so 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 and others* [2016] EWHC 2327).

In March 2020, the Court of Appeal ruled that an English court has the power to order an English resident non-party witness to be compelled in support of arbitration proceedings seated and conducted overseas (in this case, in New York: *A & B v C, D and E* [2020] EWCA Civ 409). The judgment was however limited to section 44(2) of the Arbitration Act, which addresses only the taking of witness evidence.

##### Ex parte/without notice applications

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 (for example, section 25.1 of the LCIA Rules 2020).

##### 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*).

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#### 27. What final remedies are available from the tribunal?

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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 the 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, or an additional award (*section 70(3), Arbitration Act*). The High Court has confirmed that the date of an arbitration award for the purposes of the 28-day period for appealing under the *section 70(3)* runs from the date of the original award and not the date of correction of the award, save in cases where the corrections were material to the challenge in question (*Daewoo Shipbuilding and Marine Engineering v Songa Offshore Equinox [2018] EWHC 538 (Comm)*).

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.

The court can order the applicant to provide security for the costs of the application or appeal (*section 70(6), Arbitration Act*), and can order that any money payable under the award must be brought into court or otherwise secured pending the determination of the application or appeal (*section 70(7), Arbitration Act*). However, the threshold required for applications under *section 70(7)* of the Arbitration Act is high: the court confirmed in *BSG Resources Limited v Vales and others [2019] EWHC 2456 (Comm)* that the jurisdiction conferred on it by *section 70(7)* should not be used as a means of assisting a party to enforce an award which has been made in its favour.

#### 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 and others v Farran and others [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 it will be appointing its own arbitrator does not amount to taking part because it cannot amount to invoking the jurisdiction of a tribunal that has not been constituted.

In *Glencore Agriculture BV v Conqueror Holdings Ltd [2017] EWHC 2893 (Comm)*, a party who did not take part in proceedings successfully challenged the award on the basis that the notice commencing arbitration was not properly served, having only been emailed to a junior employee of the respondent who was not authorised to accept service.

### 29. What is the limitation period applicable to actions to vacate or challenge an international arbitration award rendered inside your jurisdiction?

See *Question 28, Grounds and procedure*.

## COSTS

### 30. 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. Leading litigation funders first adopted a Code of Conduct (Code) in November 2011. The Code was amended in January 2018, and now no longer applies to arbitration, leaving third-party funding of arbitration broadly unregulated in England and Wales.

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### 31. 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?

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#### 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.
- 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 so doing (*Lewis v Haverfordwest Rural District Council [1953] 1 WLR 1486*).

## ENFORCEMENT OF AN AWARD

### Domestic awards

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

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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*). Guidance on the correct court in which enforcement proceedings should be brought is provided by Practice Direction 62.3 of the English Civil Procedure Rules.

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

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### 33. 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)?

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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).

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### 34. To what extent is a foreign arbitration award enforceable?

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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 under the New York Convention is the same as a judgment or order made by the courts of England and Wales (*sections 100-103, 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 sections 103(2) and 103(3) of the 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 (proper notice being "such as is likely to bring the relevant information to the attention of the person notified, taking account of the parties' contractual dispute resolution mechanism, including any applicable institutional arbitration rules" (*Ekran OAO v Magneco Metrel UK Ltd [2017] EWHC 2208 (Comm)*)).

- 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. In *AIC Limited v The Federal Airports Authority of Nigeria* [2019] EWHC 2212 (TCC), the Technology and Construction Court adjourned its determination of whether to enforce an arbitration award obtained in Nigeria, where the defendant had applied to the Nigerian court to set aside the award, and the outcome of that application was still pending. The court held that it was relevant to consider whether the defendant's application to set aside the award was bona fide and not a delaying tactic, whether that application had a realistic prospect of success and whether an adjournment would render enforcement more difficult and result in any prejudice to the claimant.
- The award is in respect of a matter not capable of settlement by arbitration.
- Enforcement of the award would be contrary to public policy (including for example where the award has been obtained by fraud) (*Anatolie Stati and others v The Republic of Kazakhstan* [2017] EWHC 1348 (Comm)). The Court of Appeal has however indicated a high standard for refusing enforcement on public policy grounds: *RBRG Trading (UK) v Sinocore International* [2018] EWCA Civ 838. For example, the mere fact that English law would have arrived at a different result does not of itself justify the application of English public policy and a refusal of enforcement.
- The award includes decisions on matters not submitted to the arbitration which can be separated.

The Arbitration (International Investment Disputes) Act 1966 does not contain any equivalent of the above defences for the purposes of the International Centre for Settlement of Investment Disputes (ICSID) awards, meaning that the UK courts are obliged to recognise an ICSID award as if it were a final judgment of their own courts. It had previously been considered that an exception to this would be where the enforcement of the ICSID award would give rise to a breach of any EU law that the UK courts are required to apply, further to a Court of Appeal judgment in *Viorel Micula and others v Romania and European Commission (intervenor)* [2018] EWCA Civ 1801. In this case, the European Commission had decided that Romania's implementation or execution of the award would breach EU state aid law. Pending the outcome of an appeal of that decision to the General Court of the European Union, Romania obtained a stay of enforcement proceedings commenced in the English courts. The Court of Appeal upheld the stay, ruling that the principle of *res*

*judicata* could not be relied upon in circumstances where enforcement of the award would directly contradict the European Commission's Decision. However, in February 2020 the Supreme Court overturned the Court of Appeal, holding that the UK's pre-existing obligations to the other contracting states of the ICSID Convention take priority over any existing EU law obligations (*Viorel Micula and others v Romania* [2020] UKSC 5).

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

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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*).

#### Length of enforcement proceedings

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### 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?

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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

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

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The new LCIA Arbitration Rules 2020 now provide tribunals with an express power for the early determination of claims or defences that are manifestly outside the jurisdiction of the tribunal, or are inadmissible or manifestly without merit.

Other recent suggestions for reform have included the General Council of the Bar's suggestion 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.

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