DELOS
dispute resolution

ENGLAND & WALES

DELOS GUIDE TO ARBITRATION PLACES (GAP)

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration in England and Wales is subject to a sophisticated legal regime, supported by knowledgeable, efficient and commercially astute local courts, and practiced by experienced local practitioners.

Arbitral proceedings are governed by the English Arbitration Act 1996 (the "**1996 Act**") and are founded upon the principles of party autonomy, fairness and the non-intervention of the courts. English law recognises the confidentiality of arbitral proceedings, subject to limited exceptions.

The 1996 Act provides English courts with a wide range of powers exercisable in support of arbitral proceedings seated in England and Wales. English courts, which have a well-deserved reputation for fairness and impartiality, generally show deference to arbitral tribunals and proceedings and refrain from intervening, save in limited circumstances. English courts will enforce arbitral awards, both local awards rendered under the 1996 Act and foreign awards enforceable pursuant to the New York Convention 1958, again subject to very limited exceptions.

The 1996 Act confers wide powers on an arbitral tribunal, including as regards its powers to decide on matters relating to its jurisdiction, the conduct of arbitral proceedings, evidentiary and procedural matters and the remedies it may impose.

Key places of arbitration in the jurisdiction	London.
Civil law / Common law environment?	Common law.
Confidentiality of arbitrations?	The 1996 Act is silent on confidentiality, but English law recognises the confidentiality of arbitral proceedings subject to limited exceptions.
Requirement to retain (local) counsel?	There is no requirement to retain local counsel for arbitral proceedings, although local counsel (barristers or solicitor-advocates) must be retained to appear before the English courts for any court proceedings in support of arbitrations seated in England.[1]
Ability to present party employee witness testimony?	Not specifically, but tribunals have wide powers to decide on evidentiary matters, including the power to summon witnesses (both resident and non-resident in England and Wales) (section 34 of the 1996 Act).
Ability to hold meetings and/or hearings outside of the seat?	Yes, parties are free to decide on all procedural matters, including whether the meetings and/or hearings are to be held outside of the seat (section 34(2)(a) of the 1996 Act).
Availability of interest as a remedy?	Yes. Unless otherwise agreed by the parties, the 1996 Act confers a wide discretion on arbitral tribunals regarding interest (section 49 of the 1996 Act).
Ability to claim for reasonable costs incurred for the arbitration?	Yes. Unless the tribunal or the court determines otherwise, the successful party will be allowed to claim a "*reasonable amount in*

[1] The higher courts include the various divisions of the High Court, the Court of Appeal and the Supreme Court.

	respect of all costs reasonably incurred" (section 63(5)(a) of the 1996 Act). A pre-dispute agreement on the allocation of costs is unenforceable (section 60 of the 1996 Act).
Restrictions regarding contingency fee arrangements and/or third-party funding?	Conditional fee arrangements ("CFAs") and damages-based agreements ("DBAs") may be entered into under English law. Third party funding is also available.
Party to the New York Convention?	Yes.
Other key points to note	An unsuccessful party has the right to challenge an arbitral award to an English court for a "*serious irregularity*" affecting the award and causing it "*substantial injustice*", and, unless the parties agree otherwise, to appeal to a court on a point of English law determined in the arbitral award. However, the vast majority of such actions do not succeed and parties may agree to exclude the right to appeal on a point of law either expressly in their contract or waive it as a result of their choice of institutional rules.
WJP Civil Justice score (2017-2018)	0.81

ARBITRATION PRACTITIONER SUMMARY

The 1996 Act was drafted to align the arbitration laws of England and Wales with international practices whilst ensuring that key principles that had emerged from the common law were preserved. The 1996 Act is broadly based on the UNCITRAL Model Law (though wider in scope) and incorporates internationally recognised principles of arbitration. Party autonomy is at the centre of the 1996 Act, and accordingly, with few exceptions, most provisions may be altered or contracted out of by the parties. The English courts enjoy wide powers to support arbitral proceedings, but in line with the principle of non-intervention contained within section 1(c) of the 1996 Act, the English courts have in practice shown deference to arbitral tribunals, and have refrained from intervening.[2]

Notably, the 1996 Act allows for arbitral awards to be appealed to the English courts on a point of law, where the parties have not agreed otherwise – this is a peculiarity of the 1996 Act not reflected in the Model Law.

Date of arbitration law?	1996 (with most provisions coming into force on 31 January 1997).
UNCITRAL Model Law? If so, any key changes thereto?	The UNCITRAL Model Law was not adopted wholesale, but the 1996 Act is broadly based on it, with the scope of the 1996 Act being wider. One of the key changes in the 1996 Act is that it allows for arbitral awards to be appealed on a point of law (section 69 of the 1996 Act).
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Yes, arbitration matters are generally dealt with by suitably experienced judges in the courts which determine commercial disputes, primarily in the specialist courts of the Business and Property Court of the High Court of Justice, which includes the Commercial Court, the Admiralty Court, the Technology and Construction Court, the Circuit Commercial Court (formerly, the Mercantile Court) and the Chancery Division courts.[3]
Availability of *ex parte* pre-arbitration interim measures?	Pre-arbitration interim measures are available from the courts, and the courts will grant these *ex parte* (or without notice), where appropriate. However, these are subject to a subsequent inter partes (on notice) hearing to determine whether the interim measure should remain in place. Section 44 of the 1996 Act, which deals with the English courts' powers exercisable in support of arbitral proceedings, restricts the courts' powers to situations where the arbitral tribunal or institution holding those powers either "*has no power or is unable for the time being to act effectively*" (section 44(5) of the 1996 Act). It is not uncommon for a court to grant such interim measures.
Courts' attitude towards the	The principle of competence-competence is firmly stated in

[2] Note that there are recent cases demonstrating that the English courts are willing to grant injunctions to stop a foreign-seated arbitration (see *e.g. Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm); *Whitworths Ltd v Synergy Food Ingredients & Processing* BV [2014] EWHC 4239 (Comm)).

[3] Claims under the 1996 Act must be commenced in accordance with the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996. Details about the appropriate forum for bringing an arbitration claim are also contained within Rule 62 of the Civil Procedure Rules ("CPR") and in the corresponding Practice Direction to Part 62.

competence-competence principle?	section 30(1) of the 1996 Act and is respected by the English courts. However, there are circumstances where, either by agreement or with the permission of the arbitral tribunal, the English courts may give a preliminary ruling on the arbitral tribunal's jurisdiction (section 32 of the 1996 Act). A tribunal's decision on its own jurisdiction may be subsequently challenged before the courts (section 30(2)) and the English courts have shown that they are willing to review a tribunal's decision on its own jurisdiction.[4]
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The 1996 Act allows the courts to vacate an award, where it has been successfully appealed on a point of law arising from the tribunal's award pursuant to section 69 of the 1996 Act.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The English courts will generally abide by the decision of the tribunal at the seat of the award. The courts will not normally enforce an arbitral award that has been vacated (*i.e.*, annulled at the seat), but there are limited situations in which the English courts may depart from this approach, for example, where the foreign court's set-aside decision was "*so extreme and incorrect as not to be open to [that foreign] court acting in good faith*".[5]
Other key points to note?	ϕ

4 See *e.g.*, *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

5 *Maximov v Open Joint Stock Company "Novolipetsky Metallurgichesky Kombinat"* [2017] EWHC 1911 (Comm).

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

The 1996 Act, which applies to domestic and international arbitrations seated in England and Wales, is broadly based on the UNCITRAL Model Law. However, the Model Law was not adopted wholesale.[6] As such, there are a number of differences between the UNCITRAL Model Law and the 1996 Act, as further outlined below.

Unlike the UNCITRAL Model Law, the 1996 Act is not limited to international commercial arbitration, but also extends to domestic arbitration.

The default position under the 1996 Act is that the tribunal will consist of a sole arbitrator where the parties have not agreed otherwise (section 15(3)), whereas the default position under the UNCITRAL Model Law is a panel of three arbitrators (Article 10(2)).

Significantly, the 1996 Act allows for arbitral awards to be appealed to the English courts on a point of law under section 69 unless the parties have excluded the courts' jurisdiction under this section by agreement. The UNCITRAL Model Law does not make provision for arbitral awards to be appealed on a point of law.

The procedural grounds upon which an award can be appealed in England and Wales, contained in section 68(2) of the 1996 Act (on the grounds of serious irregularity), are more wide-ranging than the grounds for the set-aside of the award contained in Article 34(2) of the UNCITRAL Model Law. However, section 68(2) requires a higher test for an award to be set aside.

An applicant seeking a set-aside under section 68 must establish that there was a "*serious irregularity*" which has caused or will cause "*substantial injustice*" to the applicant.[7] Whilst the English courts have found that "*substantial injustice*" may occur if a party is not given an opportunity to put its case[8] or where the arbitral tribunal fails to deal with a substantial point,[9] the mere presence of these circumstances is not enough for a challenge to succeed and the applicant will have to establish that it has in fact suffered prejudice.

1.2 When was the arbitration law last revised?

The arbitration law was last formally revised in 1996 with the introduction of the 1996 Act, with few amendments made since its enactment. However, the law in this area continues to develop through ongoing advancements in case-law from the English courts. The Law Commission (established for the purpose of promoting the reform of the law) has also recognised that reforms to the 1996 Act are required, for instance, to include the power for arbitral tribunals to give summary judgments, or strike out spurious claims or defences. Despite this, it has not included the 1996 Act in its latest programme for reform.

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6 This was a result of the recommendation of the Departmental Advisory Committee on Arbitration, a committee of arbitration experts set up in 1985 and dissolved in 1997 to consider arbitration legislation in the United Kingdom from the perspective of the UNCITRAL Model Law.

7 The seminal judgment of the House of Lords (as it then was) in *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43 highlights the high threshold for a successful challenge under section 68.

8 See *e.g.*, *Kalmneft v Glencore International AG and another* [2002] 1 All ER 76.

9 See *e.g.*, *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Under English law, arbitration agreements are separable, meaning that the law of the arbitration agreement (*i.e.*, the law that applies to the contractual requirement to refer a dispute to arbitration) may be distinct from the law of the contract between the parties (*i.e.*, the law governing the commercial agreement between the parties).[10]

If the parties have not expressly or impliedly (for example, by application of choice of law rules) chosen a law to govern their arbitration agreement, the English courts will often adopt the rebuttable presumption that the law governing the parties' substantive agreement also governs their arbitration agreement. This presumption may be ousted in certain circumstances, for example, if an application of the substantive law would render the arbitration agreement ineffective.[11]

If the parties have not expressed (or implied) a choice of law for the substantive agreement, the English courts will often determine that the law of the seat shall govern the arbitration agreement.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Section 7 of the 1996 Act stipulates that, unless otherwise agreed between the parties, an arbitration agreement is distinct and separate from the underlying agreement, meaning that it will survive the underlying agreement being invalid, not coming into existence or becoming ineffective. There are limited circumstances where the arbitration agreement may be declared invalid on the same grounds as the underlying agreement (for example, bribery).

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

While both oral and written arbitration agreements are valid as a matter of English law, an arbitration agreement needs to be in writing or evidenced in writing in order to bring the arbitration within the scope of the 1996 Act (sections 5(1) and (2) of the 1996 Act). "*In writing*" is construed widely and includes *inter alia* an oral agreement to submit to arbitration by reference to "*terms which are in writing*" (section 5(3)). Evidential issues may arise in respect of oral arbitration agreements and the extent of the provisions in aid of arbitration under the English common law are much more limited compared to those available under the 1996 Act.

To the extent that the validity of the arbitration agreement is called into question at the enforcement stage, the 1996 Act stipulates that recognition or enforcement of an award may be refused where the party to the arbitration agreement was (under the law applicable to it) under some incapacity, or in circumstances where the arbitration agreement was not valid under the applicable law or, where there is no indication about this, under the law of the country where the award was rendered (section 103(2)(a) and (b)). Accordingly, when seeking to enforce an award in England and Wales regard must be had to the applicable law of the arbitration agreement.

Compliance with the requirements for a valid arbitration agreement under section 5 of the 1996 Act may not be sufficient for the enforcement of an arbitral award under the New York Convention 1958 outside of the United Kingdom. Most importantly, the New York Convention requires arbitration agreements to be signed (Article II(2)) and a foreign court may therefore require such a requirement even though this formality is not required under English law.

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10 See *e.g.*, *Sulamerica CIA Nacional de Seguros SA & ors v Enesa Engenharia SA & ors* [2012] EWHC 42 (Comm), at [7]; *C v D* [2007] EWCA Civ 1282, at [22]-[29].

11 *Sulamerica CIA de Seguros v Enesa Engenharia SA* [2012] EWCA Civ 638.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

Given that arbitration is a contractual and consensual process, arbitration agreements will typically only bind those parties who have consented to submitting their dispute to arbitration. However, English law recognises a number of exceptions, in which a third party, as a non-signatory, may nevertheless be bound by an arbitration agreement.

This occurs for example in circumstances where a party can be said to have consented to arbitration, for example in agency relationships, where the agent enters into a contract containing an arbitration agreement on behalf of the principal.

Further, as provided under the Contracts (Rights of Third Parties) Act 1999, a third party may be entitled to, or indeed bound, to submit to arbitration to enforce a right or benefit conferred to it under a contract, in circumstances where the contract contains an arbitration agreement that covers the dispute. The leading case on arbitration matters involving the Contracts (Rights of Third Parties) Act 1999 is *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm), where brokers were entitled to claim payment of commission in arbitration proceedings provided for in a charterparty.

Section 82(2) of the 1996 Act also makes it clear that a third party may be bound by an arbitration agreement if it claims under or through a party to the arbitration agreement. This may occur where the original agreement has been assigned or novated to a third party.

English law does not recognise the "*group of companies*" doctrine. Entities within the same corporate group will be treated as separate legal entities, including for the purposes of establishing whether they are a party to an arbitration agreement. The English courts have very occasionally applied the "*alter ego*" doctrine and pierced the corporate veil where there has been substantial wrongdoing such as fraud or where the corporate structure has been used to escape legal responsibilities.

2.5 Are there any restrictions to arbitrability? In the affirmative:

English law places restrictions on the arbitrability of disputes, *i.e.*, on whether the subject matter of the dispute is capable of being arbitrated (as distinct from issues concerning the scope of the arbitration agreement or the arbitral tribunal's jurisdiction). Arbitrability is not defined in law or under the 1996 Act, however, section 103(3) of the 1996 Act acknowledges that an award may not be recognised or be enforceable "*if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.*" Subject matters commonly considered "*inarbitrable*" include *inter alia* certain issues of criminal law, family law, planning, insolvency and certain matters contrary to public policy such as contracts that are void for illegality.

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

Yes, as noted above. Arbitrable issues which may have wider consequential effects will, once arbitrated, have limited scope of enforcement. For example, disputes relating to the validity of intellectual property rights are capable of being submitted to arbitration under English law, but any award subsequently rendered will only be binding on the parties to the arbitration.

2.5.2 Do these restrictions relate to specific persons (i.e. State entities, consumers etc.)?

No.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside of the jurisdiction?

Where court proceedings are commenced in breach of an arbitration agreement, the defendant(s) may make an application to the English courts for the proceedings to be stayed, pursuant to section 9 of the 1996 Act. This must be done within the relevant time period for acknowledging service of a claim under the CPR. The defendant is not required to serve a defence to the claim in the court litigation until the jurisdictional issues have been resolved. However, if the defendant does serve a defence, this will be taken as acceptance of the court's jurisdiction.

Pursuant to section 9(4) of the 1996 Act, the courts must grant the stay unless the arbitration agreement is null and void, inoperative or incapable of being performed. In addition to the powers conferred on the courts under section 9, the courts also have an inherent jurisdiction to stay proceedings before them in favour of arbitration, in circumstances where there is an issue as to whether the parties entered into a binding arbitration agreement or whether the subject matter of the action was within the scope of the arbitration.[12] This has been described as a residual jurisdiction "*principally confided to dealing with cases not contemplated by the statutory provisions*",[13] where the strict requirements of section 9 cannot been satisfied. This power is rarely exercised.[14]

3.1.2 If the place of the arbitration is outside of the jurisdiction?

In accordance with section 2(2)(a) of the 1996 Act, section 9 applies even if the seat of arbitration is outside England and Wales, or if no seat has yet been designated or determined.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

The 1996 Act does not oblige the English courts to recognise or enforce an injunction issued by an arbitral tribunal enjoining the court to stay ongoing litigation. The better course of action for a party seeking to stay ongoing litigation proceedings may be to make an application to the court under section 9 of the 1996 Act, which also applies to arbitrations seated outside England and Wales.

3.3 On what grounds can the courts intervene in arbitrations seated outside of the jurisdiction?

The English courts have the power to intervene in arbitrations seated outside of the jurisdiction in a number of ways. Under section 37 of the Senior Courts Act 1981, a party may apply to the court for an anti-suit injunction if it wishes to restrain another party from either commencing or carrying on with proceedings abroad in breach of an arbitration agreement. However, following the ruling of the European Court of Justice (as it then was) in *Allianz SpA v West Tankers Inc (Case C-185/07),* the English courts cannot grant anti-suit injunctions to prevent proceedings in the courts of other EU member states in breach of arbitration agreement, *where such proceedings fall within the scope of the original Brussels Regulation.*[15] *The position in relation to Switzerland, Iceland and Norway is likely to be similar to the position under the original Brussels Regulation on the basis that the provisions contained in the 2007 Lugano Convention are nearly identical. It is yet to be seen whether the recast Regulation*[16] *reinstates the courts' power to grant anti-suit*

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12 *A v B* [2006] EWHC 2006 (Comm).

13 *Etri Fans Ltd v NMB* (UK) Ltd [1987] 1 WLR 1110, 1114.

14 *See e.g., A v B* [2006] EWHC 2006 (Comm).

15 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It is not currently clear what the position of the English courts will be post-Brexit.

16 Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

injunctions in respect of proceedings brought in another EU member state. Anti-suit injunctions are however available in respect of proceedings brought outside the EU or the Lugano Convention states.

Under section 44(2)(e) of the 1996 Act, the court also has the power to grant interim injunctions in support of arbitration proceedings, including freezing orders (formerly known as "*Mareva orders*") to prevent a party from dissipating its assets. Such freezing orders are often issued alongside associated disclosure orders requiring the party against whom the order is made to provide details of its assets.[17]

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

Yes. There are no restrictions in the 1996 Act or the common law on the instruction of outside counsel or self-representation in arbitration proceedings.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Section 33 of the 1996 Act imposes a general duty on the arbitral tribunal to act fairly and impartially as between the parties, in its conduct of the proceedings, as regards procedural and evidentiary matters and more generally, in its exercise of all the powers it holds. While the 1996 Act requires members of an arbitral tribunal to act 'impartially' as between the parties, it does not expressly impose a separate requirement for the arbitrators to be 'independent' of the parties.

Where the circumstances give rise to justifiable doubts as to an arbitrator's impartiality and also have caused or will cause "*substantial injustice*" to a party, a party can apply to the court for the arbitrator to be removed under section 24(1) of the 1996 Act. The English courts will have regard to various sources, including English case law on judicial bias, the IBA Guidelines on Conflicts of Interest in International Arbitration and arbitral decisions relating to challenges, when rendering its decision on whether or not an arbitrator is, or appears to be, biased. The English courts will decide the matter on a case by case basis as regards the evidence, applying the test of whether the circumstances would "*lead a fair-minded and informed observer to conclude that there was a real possibility … that the [arbitrator] was biase*d".[18]

Where an arbitrator has a prior interest that may call into question his or her impartiality, it is advisable that this be disclosed at the earliest opportunity, although a failure to disclose will not, of itself, give rise to an automatic finding of partiality.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal in the case of *ad hoc* arbitration?

Where an arbitration agreement is silent on the procedure to be adopted to constitute the tribunal and the parties have not otherwise agreed on the procedure, the 1996 Act sets out a number of key provisions that the parties may rely upon to constitute the tribunal.

The default position under the 1996 Act as to the number of arbitrators is a sole arbitrator pursuant to section 15(3). Section 16 sets out the default appointment procedure to be followed both for a sole arbitrator and for a tribunal of two or more members. Section 17 provides a mechanism to constitute a tribunal if one party fails to or refuses to appoint its arbitrator, allowing the other party to appoint their nominated co-arbitrator to be the sole arbitrator in the dispute and for the sole arbitrator's award to be binding on both parties.

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17 Guidance as to the circumstances in which it will be appropriate for the court to enforce a worldwide freezing injunction is provided in *Dadourian Group Int Inc v Simms* [2006] EWCA Civ 399.

18 *Re Medicaments & Related Classes of Goods* [2001] 1 W.L.R. 700; *Porter v Magill* [2001] UKHL 67.

Where the parties have failed to constitute a tribunal, section 18 gives the courts the powers to i) give directions as to the making of any necessary appointments (section 18(3)(a)); ii) direct that the tribunal be constituted by such appointments (or any one or more of them) as have been made (section 18(3)(b)); iii) revoke any appointments already made (section 18(3)(c)); and iv) make any necessary appointments itself (section 18(3)(d)). The parties are however free to agree on the procedure to be followed in the event of a failure of the procedure for the appointment of the arbitral tribunal under section 18(1), and any such agreement would take priority over the intervention of the court.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Yes. Pursuant to section 44 of the 1996 Act, the courts have wide powers to grant interim measures in support of arbitral proceedings. However, the courts' powers may be excluded by agreement of the parties (for instance, in their arbitration agreement). In all cases, the courts may only act if the arbitral tribunal, institution, etc. has no relevant power or is otherwise unable to act effectively (section 44(5)). The inability to act will include situations such as where interim relief is required but the arbitral tribunal has not yet been constituted, or where the order has to be enforced against a third party which a tribunal would be unable to ensure.

The specific powers granted to the courts under the 1996 Act regarding interim measures are the same powers available to the courts in relation to court litigation, and include the power to summon witnesses (both resident and non-resident in England and Wales), to grant freezing orders, appoint receivers, powers for the sale of goods, and powers to require persons to produce evidence. In non-urgent cases, agreement from the other party or permission from the arbitral tribunal is required for the English courts to grant interim measures (section 44(4)). For urgent cases, these requirements are not necessary, but the English courts are limited to making such orders as the courts consider "*necessary for the purpose of preserving evidence and assets*" (section 44(3)).

4.4.1 If so, are they willing to consider ex parte requests?

Section 44(3) of the Act makes it clear that ex parte requests shall only be granted in urgent cases.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does the law provide for the confidentiality of arbitration proceedings?

Although the 1996 Act is silent on the issue of confidentiality, English law recognises the confidentiality of arbitral proceedings, which extends to documents produced or generated during the arbitration.[19] The duty of confidentiality is subject to a number of broad exceptions, including where disclosure is in the interests of justice or in the public interest,[20] it is ordered or permitted by the court, and/or it is necessary to pursue or protect a party's legal right. The parties may waive or modify the duty of confidentiality by agreement. For example, Article 30 of the London Court of International Arbitration ("LCIA") Rules 2014 expressly provides for arbitral awards and other arbitration documents produced during LCIA proceedings to remain confidential.

4.5.2 Does the law regulate the length of arbitration proceedings?

Although Article 1(a) of the 1996 Act states that "*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense*", English law does not regulate the length of arbitration proceedings.

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19 *Emmott v Michael Wilson and Partners* [2008] EWCA Civ 184.

20 *London and Leeds Estates Ltd v Paribas Ltd* [1995] 1 E.G.L.R. 102; *Ali Shipping Corp v Shipyard Trogir* [1999] 1 W.L.R. 314.

4.5.3 Does the law regulate the place where hearings and/or meetings may be held?

No. Under section 34 of the 1996 Act, the parties are free to decide on all procedural matters, including the location of any part of the proceedings, such as meetings and hearings (section 34(2)(a)). If the parties so wish, meetings and/or hearings may be held outside of England and Wales.

4.5.4 Does the law allow for arbitrators to issue interim measures?

The 1996 Act allows the parties to agree on the powers exercisable by the tribunal. Unless otherwise agreed, the 1996 Act confers the express powers on arbitrators to order security for costs (section 38(3)), to issue orders relating to the inspection or preservation of property which is the subject of arbitral proceedings (section 38(4)), to make orders directing that a party or a witness be examined on oath or affirmation (section 38(5)) and to issue orders for the preservation of evidence (section 38(6)). Furthermore, the parties may agree to grant the tribunal the power to order on a provisional basis any relief which it would have the power to order in a final award, including interim payments on account of costs of the proceedings, or provisional payments as between parties (section 39), but there are questions surrounding the enforceability of such relief and these powers are seldom used in practice.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

Unless otherwise agreed between the parties, arbitral tribunals have wide discretionary powers under section 34(1) of the 1996 Act to decide all evidential matters. Such matters include for instance the language or location of hearings, the form of submissions, whether the tribunal should take initiative in ascertaining the facts or the law, whether documents should be disclosed in the arbitration, and what rules of evidence should be applied, and whether (and the extent to which) there should be oral or written evidence or submissions.

There are no express restrictions relating to the presentation of testimony by a party employee.

4.5.6 Does the law make it mandatory to hold a hearing?

The 1996 Act does not make it mandatory to hold a hearing. Pursuant to section 34(2)(h), the tribunal has the power to decide whether or not there should be a hearing. However, where it decides to dispense with an oral hearing, the tribunal must have regard to all the circumstances, so as not to give rise to a subsequent challenge.

4.5.7 Does it prescribe principles governing the awarding of interest?

Unless otherwise agreed by the parties, the 1996 Act confers a wide discretion on the arbitral tribunal to award simple or compound interest for such periods and at such rates "as it considers meets the justice of the case" (section 49).

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

The 1996 Act allows the parties to agree between themselves the allocation of costs in the event of an arbitration, provided the agreement was entered into *after* the relevant dispute arose (section 60). Any agreement as to costs which was made before the relevant dispute arose is not valid or enforceable. The default position under the 1996 Act for the allocation of costs is that costs follow the event (*i.e.*, the losing party pays the winning party's fees), except where it is inappropriate to do so in relation to either all or part of the costs (section 61(2)).

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

Yes. Under section 29 of the 1996 Act, which is mandatory, arbitrators and their employees or agents benefit from statutory immunity to civil liability for their acts and/or omissions, except where their act or

omission can be shown to be in bad faith. "*Bad faith*" is not defined within the 1996 Act but there is some guidance in case law as to what the English courts understand this to mean. The burden of proving "*bad faith*" is on the party alleging it.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Whilst it is accepted that an arbitral tribunal does not have the power to render a criminal conviction or impose a custodial sentence, English case-law recognises that arbitral tribunals have the power to find facts which establish a criminal office (fraud being such an example) and that in certain circumstances, arbitral tribunals have jurisdiction to find that a criminal offence has been committed.[21]

5. The award

5.1 Can parties waive the requirements for an award to provide reasons?

Yes. Section 52(4) provides that the parties have the right to dispense with a requirement of reasons to be provided.

5.2 Can parties waive the right to seek the annulment of the award?

The parties may waive their right to appeal the award on a point of law under section 69. Parties cannot waive their right to challenge the tribunal's substantive jurisdiction under section 67, or to a challenge the award on the basis of a serious irregularity under section 68. Under section 73, a party may lose its right to challenge an award before a court if it failed to raise the same objection promptly before the arbitral tribunal.

Where a successful challenge is brought, this will not necessarily (although it may) result in the award being annulled, but may instead result in the award being varied, remitted to the same arbitral tribunal for consideration, or for an award to be declared to have no effect in part. The courts cannot carry out a *de novo* review of a tribunal's findings of facts, unless the facts in question are directly relevant to a challenge concerning the tribunal's jurisdiction.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at the seat of jurisdiction?

The 1996 Act does not prescribe any atypical requirement to render a valid award. The requirements as to the form of the award in section 52 of the 1996 Act (that it be in writing, signed by all the arbitrators, contains reasons, states the seat and the date of the award) may be disapplied by party agreement.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

Appeals on findings of fact are not permitted. Section 69 of the 1996 Act allows a party to appeal an award on a question of law. A question of law is defined in section 82(1) and excludes issues of foreign law.

These rights can be waived, and section 69(1) states that an agreement to dispense with reasons for the tribunal's award will be construed as an agreement to exclude the application of this section. Choosing institutional rules that preclude the parties' rights of appeal will exclude the application of this section. Permission must be sought, either from all the parties to the proceedings or from the court, in order to bring an appeal.

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21 *The London Steamship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain, The French State* [2013] EWHC 3188 (Comm); *The London Steamship Owners' Mutual Insurance Association Ltd v Spain* [2015] EWCA Civ 333, at [78] ("*It was not disputed that in the ordinary way an arbitrator has jurisdiction to find facts which constitute a criminal offence (fraud being an all too common example) or that in an appropriate case an arbitrator also has jurisdiction to find that a criminal offence has been committed. As the judge pointed out, however, it is necessary to distinguish between a finding of criminal conduct and a conviction which provides the basis for a penal sanction. It may also be important to distinguish between a claim and a dispute or difference.*"); *Interprods v De La Rue International* [2014] EWHC 68.

The requirements for obtaining permission are set out in section 69(3) and include (i) that the determination will "*substantially affect*" the rights of one or more parties;[22] (ii) that the question of law is one which has been put to the tribunal to determine;[23] (iii) that on the basis of the findings of fact in the award, either the decision of the tribunal on the question is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt,[24] and (iv) that despite the agreement of the parties to resolve the matter by arbitration, it is "*just and proper*" for the court to determine the question in all the circumstances.[25]

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Normally, domestic awards will be enforced by summary procedure (i.e., no full trial is required) pursuant to section 66 of the 1996 Act. This section extends to awards rendered outside of the jurisdiction (section 2(2)(b)) and provides for awards, with the permission of the court, to be "*enforced in the same manner as a judgment or order of the court to the same effect*" (section 66(1)). Where permission is granted, judgment may also be given in terms of the award (section 66(2)). Permission will not be granted where the tribunal lacked jurisdiction (section 66(3)), where doing so would go against public policy or, where an award is defective, vague or ambiguous.

Alternatively, an "*action on the award*" may be brought (section 66(4)), but this option is normally more costly and protracted, and would only be pursued in circumstances where the summary procedure contained in sub-section (1) and (2) is not available.

The recognition and enforcement of foreign awards is set out in Part III of the 1996 Act. This part covers the recognition and enforcement of Geneva Convention awards (section 99) as well as New York Convention awards (sections 100 to 104). The provisions relating to New York Convention awards mirror the provisions contained in the New York Convention.

Under the Limitation Act 1980, the limitation period to make an application to the court to enforce an award and to bring an action on the award is 6 years from the last moment when the award should have been satisfied (section 7) or 12 years where the arbitration agreement is under seal (section 8). Where it is not clear when this would be, the cause of action will accrue when a reasonable time to pay has passed, according to the circumstances of the specific case.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

Where an application for the setting aside or suspension of the award has been made, there is no automatic suspension of the right to enforce under English law. However, section 103(5) of the 1996 Act gives the court the power to adjourn the decision on recognition or enforcement of the arbitral award, and the court may even order the party seeking the suspension or setting aside of the award to give suitable security. The rationale behind not automatically staying proceedings is so that proceedings cannot be frustrated by a party bringing a challenge.

Where a party has appealed an award under section 67 on the basis of lack of jurisdiction, the 1996 Act expressly allows the arbitral tribunal to continue with the arbitral process (section 67(2)). This relates to situations where the arbitral proceedings continue, for example in bifurcated proceedings where the tribunal's jurisdictional finding is issued as a partial or separate award.

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22 See *e.g.*, *CMA CGM SA v Beteiligungs-KG MS "Northern Pioneer" Schiffahrtsgesellschaft* [2002] EWCA Civ 1878 (CA).

23 See *e.g.*, *Michael Wilson & Partners Ltd v John Forster Emmott* [2011] EWHC 1441 (Comm).

24 See *e.g.*, *Demco Investments & Commercial SA v SE Bankers Forsakring Holding Aktiebolag* [2005] EWHC 1398 (Comm); *HMV UK Limited v Propinvest Friar Limited Partnership* [2011] EWCA Civ 1708.

25 See *e.g.*, *HMV UK Limited v Propinvest Friar Limited Partnership* [2011] EWCA Civ 1708.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Contrary to the approach taken by the courts in other jurisdictions, the English courts normally take the approach that an award that has been vacated at the seat of arbitration, cannot be enforced in England. This is not to say that the English courts will never allow enforcement of an award that has been vacated, however, the recent High Court judgment in *Nikolay Viktorovich Maximov v Open Joint Stock Company*[26] provides a reminder that a party seeking to enforce an award in such circumstances must meet a high threshold, which it was not able to satisfy in this case.

5.8 Are foreign awards readily enforceable in practice?

Yes, foreign arbitral awards are readily enforceable in practice, in particular, where an award is rendered by a State which is a signatory to the New York Convention. The procedure is straightforward, as set out in sections 100 to 104 of the 1996 Act, and the grounds for resisting enforcement are limited.

6. Funding arrangements: are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

Conditional fee arrangements ("CFAs"), whereby a client pays a base amount for the lawyer's fees in any event plus a success fee in certain circumstances (circumstances may include an award of damages above a threshold value), are permitted in arbitration. However, the maximum amount of the success fees is limited. Damages-based agreements ("DBAs") such as "*no win, no fee*" arrangements are available so long as they comply with the required statutory requirements governing such fee arrangements. Third party funding is also generally available.

7. Is there likely to be any significant reform of the arbitration law in the near future?

At present, there are no publicised plans for a significant reform of the arbitration law. However, the current political developments surrounding Brexit will inevitably affect some aspects of the arbitral proceedings seated in England and Wales. The biggest change is likely to be brought about as a result of EU law ceasing to apply to the UK. This may have an impact on the recourse available to parties to an arbitration agreement. For instance, parties may in the future be able to seek anti-suit injunctions, where court proceedings have been commenced in another member state in breach of an arbitration agreement. A large number of areas will however remain unaffected by Brexit on the basis that EU law does not dictate in many key areas, including the law governing the enforcement of arbitral awards which is guided by the New York Convention (as incorporated into the 1996 Act) or the powers of the arbitral tribunal, which are set out in the 1996 Act.

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[26] *Nikolay Viktorovich Maximov v Open Joint Stock Company "Novolipetsky Metallurgichesky Kombinat"* [2017] EWHC 1911 (Comm).